Passage of the

Criminal Justice (Scotland) Bill 2013

SPPB 223
Passage of the
Criminal Justice (Scotland) Bill 2013

SP Bill 35 (Session 4), subsequently 2016 asp 1

SPPB 223

EDINBURGH: APS GROUP SCOTLAND
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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. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

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 free of charge on the Parliament’s website (www.parliament.scot).

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 followed the standard 3 stage process described above.

The oral and written evidence received by the Justice Committee at Stage 1 was originally published on the web only. That material is included in this volume after the Stage 1 Report.

The Justice Committee’s Stage 1 Report included only web-links to the material relating to the Finance Committee’s consideration of the Financial Memorandum and the Delegated Powers and Law Reform Committee’s consideration of the delegated powers provisions in the Bill. The reports by those committees, along with written evidence and extracts from the minutes and the Official Reports of the relevant meetings, are included in this volume.

The Cabinet Secretary for Justice wrote to the Justice Committee on 4 February 2014, providing information on the Scottish Government’s intention to set up a reference group to consider further changes to criminal law in light of proposed corroboration reform. The Cabinet Secretary for Justice subsequently announced at
the meeting of the Parliament on 23 April 2014 that Stage 2 consideration of the Bill would not commence until after the reference group, chaired by Lord Bonomy, had reported. The report was published on 21 April 2015. Several pieces of correspondence relating to the review, its report and the Scottish Government’s subsequent proposals are included in this volume.

At its meeting on 1 September 2015, the Justice Committee agreed to a motion by the Convener to consider the Bill at Stage 2 in an order that departed from the usual default order. This followed a request from the Cabinet Secretary for Justice (in a letter dated 25 August 2015, included in this volume) that the Committee take into account in scheduling Stage 2 that the Scottish Government planned to lodge amendments relating to police powers of stop and search once an advisory group on the issue had reported at the end of August. An extract from the minutes of the committee meeting of 1 September 2015 is included in this volume. (The normal default order, under Standing Orders Rule 9.7.4, is that the sections are taken in the order in which they arise in the Bill, with each schedule taken immediately after the section which introduces it. The long title is taken last.)

The Scottish Government originally informed the Committee that it intended proposals to end the system of automatic early release for certain categories of prisoners to be brought forward by way of amendment to the Criminal Justice (Scotland) Bill. Following announcement of a delay in Stage 2 of the Bill, the Cabinet Secretary for Justice wrote to the Committee on 27 May 2014 advising that the provisions relating to automatic early release would be brought forward as a separate piece of legislation. That correspondence is included in this volume. The separate legislation was brought forward as the Prisoners (Control of Release) (Scotland) Bill, introduced in the Parliament on 14 August 2014. Further information is available on the Prisoners (Control of Release) (Scotland) Bill page.

The Delegated Powers and Law Reform Committee considered the delegated powers in the Bill after Stage 2, and agreed its report without debate. No extracts from the minutes or the Official Report of the relevant meeting of the Committee are, therefore, included in this volume. The report includes, as an annexe, correspondence from the Cabinet Secretary for Justice regarding proposed Stage 3 amendments that would give the Scottish Ministers new delegated powers.

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1 The report of the review group can be found at: http://www.gov.scot/Resource/0047/00475400.pdf
2 The report of the advisory group can be found at: http://www.gov.scot/Resource/0048/00484527.pdf
Criminal Justice (Scotland) Bill
[AS INTRODUCED]

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Criminal Justice (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about criminal justice including as to police powers and rights of suspects and as to criminal evidence, procedure and sentencing; to establish the Police Negotiating Board for Scotland; and for connected purposes.

PART 1

ARREST AND CUSTODY

CHAPTER 1

ARREST BY POLICE

Arrest without warrant

1 Power of a constable

10 (1) A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person has committed or is committing an offence.

(2) In relation to an offence not punishable by imprisonment, a constable may arrest a person under subsection (1) only if the constable is satisfied that it would not be in the interests of justice to delay the arrest in order to seek a warrant for the person’s arrest.

15 (3) Without prejudice to the generality of subsection (2), it would not be in the interests of justice to delay an arrest in order to seek a warrant if the constable reasonably believes that unless the person is arrested without delay the person will—

(a) seek to avoid arrest,
(b) continue committing the offence,
(c) interfere with witnesses or evidence, or otherwise obstruct the course of justice.

2 Exercise of the power

20 (1) A person may be arrested under section 1 more than once in respect of the same offence.

(2) A person may not be arrested under section 1 in respect of an offence if the person has been officially accused of committing the offence or an offence arising from the same circumstances as the offence.
Procedure following arrest

3 Information to be given on arrest

When a constable arrests a person (or as soon afterwards as is reasonably practicable), a constable must inform the person—

(a) that the person is under arrest,

(b) of the general nature of the offence in respect of which the person is arrested,

(c) of the reason for the arrest,

(d) that the person is under no obligation to say anything, other than to give the information specified in section 26(3).

4 Arrested person to be taken to police station

Where a person is arrested by a constable outwith a police station, a constable must take the person as quickly as is reasonably practicable to a police station.

5 Information to be given at police station

(1) Subsections (2) and (3) apply when—

(a) a person is in police custody having been arrested at a police station, or

(b) a person is in police custody and has been taken to a police station in accordance with section 4.

(2) The person must be informed as soon as reasonably practicable—

(a) that the person is under no obligation to say anything, other than to give the information specified in section 26(3),

(b) of any right the person has to have intimation sent and to have access to certain persons under—

(i) section 30,

(ii) section 32,

(iii) section 35,

(iv) section 36.

(3) The person must be provided as soon as reasonably practicable with such information (verbally or in writing) as is necessary to satisfy the requirements of Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings.

6 Information to be recorded by police

(1) There must be recorded in relation to any arrest—

(a) the time and place of arrest,

(b) the general nature of the offence in respect of which the person is arrested,

(c) if the person is taken from one place to another while in police custody (including to a police station in accordance with section 4)—
(i) the place from which, and time at which, the person is taken, and
(ii) the place to which the person is taken and the time at which the person arrives there,

(d) the time at which, and the identity of the constable by whom, the person is informed of the matters mentioned in section 3,

(e) the time at which, and the identity of the person by whom, the person is—
   (i) informed of the matters mentioned in subsection (2) of section 5, and
   (ii) provided with information in accordance with subsection (3) of that section,

(f) the time at which the person requests that intimation be sent under—
   (i) section 30,
   (ii) section 35,

(g) the time at which intimation is sent under—
   (i) section 30,
   (ii) section 33,
   (iii) section 35,

(h) the time at which the person—
   (i) is released from custody, or
   (ii) is taken from a police station or other place in order to be brought before a court or (as the case may be) appears before a court by means of a live television link.

(2) Where a person is in police custody and not officially accused of committing an offence, there must be recorded the time, place and outcome of any decision under section 7.

(3) Where a person is held in police custody by virtue of authorisation given under section 7 there must be recorded—

   (a) the time at which the person is informed of the matters mentioned in section 8,
   (b) the time, place and outcome of any review under section 9,
   (c) the time at which any interview in the circumstances described in section 13(6) begins and the time at which it ends.

(4) If a person is released from police custody on conditions under section 14, there must be recorded—

   (a) details of the conditions imposed, and
   (b) the identity of the constable who imposed them.

(5) If a person is charged with an offence by a constable while in police custody, there must be recorded the time at which the person is charged.
CHAPTER 2
CUSTODY: PERSON NOT OFFICIALLY ACCUSED

Keeping person in custody

7 Authorisation for keeping in custody

(1) Subsection (2) applies where—
   (a) a person is in police custody having been arrested without a warrant, and
   (b) since being arrested, the person has not been charged with an offence by a constable.

(2) Authorisation to keep the person in custody must be sought as soon as reasonably practicable after the person—
   (a) is arrested at a police station, or
   (b) arrives at a police station, having been taken there in accordance with section 4.

(3) Authorisation may be given only by a constable who has not been involved in the investigation in connection with which the person is in police custody.

(4) Authorisation may be given only if that constable is satisfied that the test in section 10 is met.

(5) If authorisation is refused, the person may continue to be held in police custody only if a constable charges the person with an offence.

8 Information to be given on authorisation

At the time when authorisation to keep a person in custody is given under section 7, the person must be informed of—
   (a) the reason the person is being kept in custody, and
   (b) the 12 hour limit arising by virtue of section 11.

9 Review after 6 hours

(1) Subsection (2) applies when a person—
   (a) has been held in police custody for a continuous period of 6 hours, beginning with the time at which authorisation was given under section 7, and
   (b) during that time the person has not been charged with an offence by a constable.

(2) As soon as reasonably practicable a constable must consider whether the test in section 10 is met.

(3) The constable mentioned in subsection (2) must be a constable who—
   (a) is of the rank of inspector or above, and
   (b) has not been involved in the investigation in connection with which the person is in police custody.

(4) If the constable is not satisfied that the test in section 10 is met, the person may continue to be held in police custody only if a constable charges the person with an offence.
10 Test for sections 7 and 9

(1) For the purposes of sections 7(4) and 9(2), the test is that—

(a) there are reasonable grounds for suspecting that the person has committed an offence, and
(b) keeping the person in custody is necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with the person in accordance with the law.

(2) Without prejudice to the generality of subsection (1)(b), in considering what is necessary and proportionate for the purpose mentioned in that subsection regard may be had to—

(a) whether the person’s presence is reasonably required to enable the offence to be investigated,
(b) whether the person (if liberated) would be likely to interfere with witnesses or evidence, or otherwise obstruct the course of justice,
(c) the nature and seriousness of the offence.

11 12 hour limit: general rule

(1) Subsection (2) applies when a person—

(a) has been held in police custody for a continuous period of 12 hours, beginning with the time at which authorisation was given under section 7, and
(b) during that time the person has not been charged with an offence by a constable.

(2) The person may continue to be held in police custody only if a constable charges the person with an offence.

12 12 hour limit: previous period

(1) Subsection (2) applies where—

(a) a person is being held in police custody by virtue of authorisation given under section 7,
(b) authorisation has been given under that section to hold the person in police custody on a previous occasion, and
(c) the offence in connection with which the authorisation mentioned in paragraph (a) has been given is the same offence or arises from the same circumstances as the offence in connection with which the authorisation mentioned in paragraph (b) was given.

(2) The 12 hour period mentioned in section 11 is reduced by the length of the period during which the person was held in police custody by virtue of the authorisation mentioned in subsection (1)(b).

(3) Subsections (5) and (6) of section 13 apply for the purpose of calculating the length of the period during which the person was held in police custody by virtue of the authorisation mentioned in subsection (1)(b).
Medical treatment

(1) Subsection (2) applies when—

(a) a person is in police custody having been arrested without a warrant,  
(b) since being arrested, the person has not been charged with an offence by a constable, and  
(c) the person is at a hospital for the purpose of receiving medical treatment.

(2) If authorisation to keep the person in custody has not been given under section 7, that section has effect as if—

(a) each reference in subsection (2) of that section to a police station were a reference to the hospital, and  
(b) the words after the reference to a police station in paragraph (b) of that subsection were omitted.

(3) Where authorisation is given under section 7 when a person is at a hospital, authorisation under that section need not be sought again if, while still in custody, the person is taken to a police station in accordance with section 4.

(4) Subsections (5) and (6) apply for the purpose of calculating the 12 hours mentioned in section 11.

(5) Except as provided for in subsection (6), no account is to be taken of any time during which a person is—

(a) at a hospital for the purpose of receiving medical treatment, or  
(b) being taken to a hospital for that purpose.

(6) Account is to be taken of any time during which a person is both—

(a) at a hospital, or being taken to one, and  
(b) being interviewed by a constable in relation to an offence which the constable has reasonable grounds to suspect the person of committing.

Investigative liberation

Release on conditions

(1) Subsection (2) applies where—

(a) a person is being held in police custody by virtue of authorisation given under section 7,  
(b) a constable has reasonable grounds for suspecting that the person has committed a relevant offence, and  
(c) the period of 28 days described in subsection (4) has not expired.

(2) If releasing the person from custody, a constable may impose any condition that an appropriate constable considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence.

(3) A condition imposed under subsection (2) is a liberation condition for the purposes of Chapter 7.

(4) For the purpose of subsection (1)(c)—
(a) the period of 28 days is to be calculated by counting as a day of the period any day on which the person is subject to a condition imposed under subsection (2) in connection with a relevant offence,

(b) a person is to be treated as being subject to a condition imposed under subsection (2) on a day if the person is subject to a condition under that subsection for any part of the day.

(5) In subsection (2), “an appropriate constable” means a constable of the rank of inspector or above.

(6) In this section, “a relevant offence” means—

(a) the offence in connection with which the authorisation under section 7 has been given, or

(b) an offence arising from the same circumstances as that offence.

15 Conditions ceasing to apply

(1) A condition imposed on a person under section 14(2) ceases to apply—

(a) at the end of the last day of the 28 day period described in section 14(4), or

(b) before then, if—

(i) the condition is removed by a notice under section 16,

(ii) the person is arrested in connection with a relevant offence,

(iii) the person is officially accused of committing a relevant offence, or

(iv) the condition is removed by the sheriff under section 17.

(2) In subsection (1), “a relevant offence” means—

(a) the offence in connection with which the condition was imposed, or

(b) an offence arising from the same circumstances as that offence.

16 Modification or removal of conditions

(1) A constable may by notice modify or remove a condition imposed under section 14(2).

(2) A notice under subsection (1)—

(a) is to be given in writing to the person who is subject to the condition,

(b) must specify the time from which the condition is modified or removed.

(3) A constable of the rank of inspector or above must keep under review whether or not—

(a) there are reasonable grounds for suspecting that a person who is subject to a condition imposed under section 14(2) has committed a relevant offence, and

(b) the condition imposed remains necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence.

(4) Where the constable referred to in subsection (3) is no longer satisfied as to the matter mentioned in paragraph (a) of that subsection, a constable must give notice to the person removing any condition imposed in connection with a relevant offence.
(5) Where the constable referred to in subsection (3) is no longer satisfied as to the matter mentioned in paragraph (b) of that subsection, a constable must give notice to the person—
(a) modifying the condition in question, or
(b) removing it.

(6) Where a duty to give notice to a person arises under subsection (4) or (5), the notice—
(a) is to be given in writing to the person as soon as practicable, and
(b) must specify, as the time from which the condition is modified or removed, the time at which the duty to give the notice arose.

(7) The modification or removal of a condition under subsection (1), (4) or (5) requires the authority of a constable of the rank of inspector or above.

(8) In this section, “a relevant offence” means—
(a) the offence in connection with which the condition was imposed, or
(b) an offence arising from the same circumstances as that offence.

### Chapter 3

#### Custody: person officially accused

**Person to be brought before court**

(1) Subsection (2) applies to a person when—
(a) the person is in police custody having been arrested under a warrant (other than a warrant granted under section 29(1)), or
(b) the person—
   (i) is in police custody having been arrested without a warrant, and
   (ii) since being arrested, the person has been charged with an offence by a constable.
(2) Wherever practicable the person must be brought before a court competent to deal with the case not later than the end of the court’s first sitting day after the day on which this subsection began to apply to the person (unless the person is released from custody under section 19).

(3) A person is deemed to be brought before a court in accordance with subsection (2) if the person appears before it by means of a live television link.

**Police liberation**

19  **Liberation by police**

(1) Subsection (2) applies when—

(a) a person is in police custody having been arrested under a warrant (other than a warrant granted under section 29(1)), or

(b) a person—

(i) is in police custody having been arrested without a warrant, and

(ii) since being arrested, the person has been charged with an offence by a constable.

(2) A constable may—

(a) if the person gives an undertaking in accordance with section 20, release the person from custody,

(b) release the person from custody without such an undertaking,

(c) refuse to release the person from custody.

(3) A constable is not to be subject to any claim whatsoever by reason of having refused to release a person from custody under subsection (2)(c).

20  **Release on undertaking**

(1) A person may be released from police custody on an undertaking given under section 19(2)(a) only if the person signs the undertaking.

(2) The terms of an undertaking are that the person undertakes to—

(a) appear at a specified court at a specified time, and

(b) comply with any conditions imposed under subsection (3).

(3) The conditions which may be imposed under this subsection are—

(a) that the person does not commit an offence while subject to the undertaking,

(b) any condition that an appropriate constable considers necessary and proportionate for the purpose of ensuring that the person does not obstruct the course of justice in relation to the offence in connection with which the person is in police custody.

(4) Conditions which may be imposed under subsection (3)(b) include a curfew.

(5) In subsection (3)(b), “an appropriate constable” means a constable of the rank of inspector or above.

(6) The requirements imposed by an undertaking to attend at a court and comply with conditions are liberation conditions for the purposes of Chapter 7.
21 Modification of undertaking

(1) The procurator fiscal may by notice modify the terms of an undertaking given under section 19(2)(a) by—

(a) changing the court specified as the court at which the person is to appear,

(b) changing the time specified as the time at which the person is to appear at the court,

(c) removing or altering any condition imposed under section 20(3).

(2) A condition may not be altered under subsection (1)(c) so as to forbid or require something not forbidden or required by the terms of the condition when the person gave the undertaking.

(3) The procurator fiscal may by notice rescind an undertaking given under section 19(2)(a) (whether or not the person who gave it is to be prosecuted).

(4) An undertaking given under section 19(2)(a) expires at the end of the day on which the person who gave the undertaking is required by its terms to appear at a court, except that—

(a) if before then the procurator fiscal sends notice to the person under subsection (3), it expires at the end of the day on which the notice is sent, or

(b) if the person fails to appear at a court as required by the terms of the undertaking and a warrant is granted on account of that failure, it expires at the end of the day on which the person is brought before a court having been arrested under the warrant.

(5) Notice under subsection (1) or (3) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.

22 Review of undertaking

(1) A person who is subject to an undertaking containing a condition imposed under section 20(3)(b) may apply to the sheriff to have the condition reviewed.

(2) Before disposing of an application under this section, the sheriff must give the procurator fiscal an opportunity to make representations.

(3) If the sheriff is not satisfied that the condition is necessary and proportionate for the purpose for which it was imposed, the sheriff may modify the terms of the undertaking by—

(a) removing the condition, or

(b) imposing an alternative condition that the sheriff considers to be necessary and proportionate for that purpose.
CHAPTER 4

POLICE INTERVIEW

Rights of suspects

23 Information to be given before interview

(1) Subsection (2) applies to a person who—
   (a) is in police custody, or
   (b) is attending at a police station or other place voluntarily for the purpose of being
       interviewed by a constable.

(2) Not more than one hour before a constable interviews the person about an offence which
    the constable has reasonable grounds to suspect the person of committing, the person
    must be informed—
    (a) that the person is under no obligation to say anything other than to give the
        information specified in section 26(3),
    (b) about the right under section 24 to have a solicitor present during the interview,
        and
    (c) if the person is in police custody, about any right which the person has under
        Chapter 5.

(3) A person need not be informed under subsection (2)(c) about a right to have intimation
    sent under either of the following sections if the person has exercised the right already—
    (a) section 30,
    (b) section 35.

(4) For the purpose of subsection (2), a constable is not to be regarded as interviewing a
    person about an offence merely by asking the person for the information specified in
    section 26(3).

24 Right to have solicitor present

(1) Subsections (2) and (3) apply to a person who—
    (a) is in police custody, or
    (b) is attending at a police station or other place voluntarily for the purpose of being
        interviewed by a constable.

(2) The person has the right to have a solicitor present while being interviewed by a
    constable about an offence which the constable has reasonable grounds to suspect the
    person of committing.

(3) Accordingly—
    (a) unless the person consents to being interviewed without having a solicitor present,
        a constable must not begin to interview the person about the offence until the
        person’s solicitor is present, and
    (b) the person’s solicitor must not be denied access to the person at any time while a
        constable is interviewing the person about the offence.
(4) Despite subsection (3)(a) a constable may, in exceptional circumstances, proceed to interview the person without a solicitor being present if the constable is satisfied that it is necessary to interview the person without delay in the interests of—
   (a) the investigation or the prevention of crime, or
   (b) the apprehension of offenders.

(5) For the purposes of subsections (2) and (3), a constable is not to be regarded as interviewing a person about an offence merely by asking the person for the information specified in section 26(3).

(6) Where a person consents to being interviewed without having a solicitor present, there must be recorded—
   (a) the time at which the person consented, and
   (b) any reason given by the person at that time for waiving the right to have a solicitor present.

25 Consent to interview without solicitor

(1) Subsections (2) and (3) apply for the purpose of section 24(3)(a).

(2) A person may not consent to being interviewed without having a solicitor present if—
   (a) the person is under 16 years of age, or
   (b) the person is 16 years of age or over and, owing to mental disorder, appears to a constable to be unable to—
      (i) understand sufficiently what is happening, or
      (ii) communicate effectively with the police.

(3) A person to whom this subsection applies (referred to in subsection (5) as “person A”) may consent to being interviewed without having a solicitor present only with the agreement of a relevant person.

(4) Subsection (3) applies to a person who is—
   (a) 16 or 17 years of age, and
   (b) not precluded by subsection (2)(b) from consenting to being interviewed without having a solicitor present.

(5) For the purpose of subsection (3), “a relevant person” means—
   (a) if person A is in police custody, any person who is entitled to access to person A by virtue of section 32(2),
   (b) if person A is not in police custody, a person who is—
      (i) at least 18 years of age, and
      (ii) reasonably named by person A.

(6) In subsection (2)(b)—
   (a) “mental disorder” has the meaning given in section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003,
   (b) the reference to the police is to any—
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(i) constable, or

(ii) person appointed as a member of police staff under section 26(1) of the Police and Fire Reform (Scotland) Act 2012.

Person not officially accused

26 Questioning following arrest

(1) Subsections (2) and (3) apply where—

(a) a person is in police custody in relation to an offence, and

(b) the person has not been officially accused of committing the offence or an offence arising from the same circumstances as the offence.

(2) A constable may put questions to the person in relation to the offence.

(3) The person is under no obligation to answer any question, other than to give the following information—

(a) the person’s name,

(b) the person’s address,

(c) the person’s date of birth,

(d) the person’s place of birth (in such detail as a constable considers necessary or expedient for the purpose of establishing the person’s identity), and

(e) the person’s nationality.

(4) Subsection (2) is without prejudice to any rule of law as regards the admissibility in evidence of any answer given.

Person officially accused

27 Authorisation for questioning

(1) The court may authorise a constable to question a person about an offence after the person has been officially accused of committing the offence.

(2) The court may grant authorisation only if it is satisfied that allowing the person to be questioned about the offence is necessary in the interests of justice.

(3) In deciding whether to grant authorisation, the court must take into account—

(a) the seriousness of the offence,

(b) the extent to which the person could have been questioned earlier in relation to the information which the applicant believes may be elicited by the proposed questioning,

(c) where the person could have been questioned earlier in relation to that information, whether it could reasonably have been foreseen at that time that the information might be important to proving or disproving that the person has committed an offence.

(4) Where subsection (5) applies, the court must give the person an opportunity to make representations before deciding whether to grant authorisation.

(5) This subsection applies where—
(a) a warrant has been granted to arrest the person in respect of the offence, or
(b) the person has appeared before a court in relation to the offence.

(6) Where granting authorisation, the court—
(a) must specify the period for which questioning is authorised, and
(b) may specify such other conditions as the court considers necessary to ensure that allowing the proposed questioning is not unfair to the person.

(7) A decision of the court—
(a) to grant or refuse authorisation, or
(b) to specify, or not to specify, conditions under subsection (6)(b),
is final.

(8) In this section, “the court” means—
(a) where an indictment has been served on the person in respect of the High Court, a single judge of that court,
(b) in any other case, the sheriff.

28 Authorisation: further provision

(1) An application for authorisation may be made—
(a) where section 27(5) applies, by the prosecutor, or
(b) in any other case, by a constable.

(2) In subsection (1)(a), “the prosecutor” means—
(a) where an indictment has been served on the person in respect of the High Court, Crown Counsel, or
(b) in any other case, the procurator fiscal.

(3) Where an application for authorisation is made in writing (rather than orally) it must—
(a) be made in such form as may be prescribed by act of adjournal (or as nearly as may be in such form), and
(b) state whether another application has been made for authorisation to question the person about the offence or an offence arising from the same circumstances as the offence.

(4) Authorisation ceases to apply as soon as either—
(a) the period specified under section 27(6)(a) expires, or
(b) the person’s trial in respect of the offence, or an offence arising from the same circumstances as the offence, begins.

(5) For the purpose of subsection (4)(b), a trial begins—
(a) in proceedings on indictment, when the jury is sworn,
(b) in summary proceedings, when the first witness for the prosecution is sworn.

(6) In this section—
“authorisation” means authorisation under section 27,
“the offence” means the offence referred to in section 27(1).

29 Arrest to facilitate questioning

(1) On granting authorisation under section 27, the court may also grant a warrant for the person’s arrest if it seems to the court expedient to do so.

(2) The court must specify in a warrant granted under subsection (1) the maximum period for which the person may be detained under it.

(3) The person’s detention under a warrant granted under subsection (1) must end as soon as—

(a) the period of the person’s detention under the warrant becomes equal to the maximum period specified under subsection (2),

(b) the authorisation ceases to apply (see section 28(4)), or

(c) in the opinion of the constable responsible for the investigation into the offence referred to in section 27(1), there are no longer reasonable grounds for suspecting that the person has committed—

(i) that offence, or

(ii) an offence arising from the same circumstances as that offence.

(4) For the purpose of subsection (3)(a), the period of the person’s detention under the warrant begins when the person—

(a) is arrested at a police station, or

(b) arrives at a police station, having been taken there in accordance with section 4.

(5) For the avoidance of doubt—

(a) if the person is on bail when a warrant under subsection (1) is granted, the order admitting the person to bail is not impliedly recalled by the granting of the warrant,

(b) if the person is on bail when arrested under a warrant granted under subsection (1)—

(i) despite being in custody by virtue of the warrant the person remains on bail for the purpose of section 24(5)(b) of the 1995 Act,

(ii) when the person’s detention under the warrant ends, the bail order continues to apply as it did immediately before the person’s arrest,

(c) if the person is subject to an undertaking given under section 19(2)(a), the person remains subject to the undertaking despite—

(i) the granting of a warrant under subsection (1),

(ii) the person’s arrest and detention under it.
CHAPTER 5

RIGHTS OF SUSPECTS IN POLICE CUSTODY

Intimation and access to another person

30  Right to have intimation sent to other person

(1) A person in police custody has the right to have intimation sent to another person of—
   (a) the fact that the person is in custody,
   (b) the place where the person is in custody.

(2) Intimation under subsection (1) must be sent—
   (a) where a constable believes that the person in custody is under 16 years of age, regardless of whether the person requests that it be sent,
   (b) in any other case, if the person requests that it be sent.

(3) The person to whom intimation is to be sent under subsection (1) is—
   (a) where a constable believes that the person in custody is under 16 years of age, a parent of the person,
   (b) in any other case, an adult reasonably named by the person in custody.

(4) Intimation under subsection (1) must be sent—
   (a) as soon as reasonably practicable, or
   (b) if subsection (5) applies, with no more delay than is necessary.

(5) This subsection applies where a constable considers some delay to be necessary in the interests of—
   (a) the investigation or prevention of crime, or
   (b) the apprehension of offenders.

(6) In this section and section 31—
   “adult” means person who is at least 18 years of age,
   “parent” includes guardian and any person who has the care of a person.

31  Right to have intimation sent: under 18s

(1) This section applies where a constable believes that a person in police custody is under 18 years of age.

(2) At the time of sending intimation to a person under section 30(1), that person must be asked to attend at the police station or other place where the person in custody is being held.

(3) Subsection (4) applies where—
   (a) it is not practicable or possible to contact, within a reasonable time, the person to whom intimation is to be sent by virtue of section 30(3), or
   (b) that person will not attend, within a reasonable time, at the police station or other place where the person in custody is being held.

(4) Attempts to send intimation under section 30(1) must continue to be made until—
(a) an appropriate person is contacted and agrees to attend, within a reasonable time, at the police station or other place where the person in custody is being held, or

(b) if a constable believes that the person in custody is 16 or 17 years of age, the person requests that (for the time being) no further attempt to send intimation is made.

5

(5) In subsection (4)(a), “an appropriate person” means—

(a) if a constable believes that the person in custody is under 16 years of age, a person the constable considers appropriate having regard to the views of the person in custody,

(b) if a constable believes that the person in custody is 16 or 17 years of age, an adult who is named by the person in custody and to whom a constable is willing to send intimation without a delay by virtue of section 30(4)(b).

6

(6) The reference in subsection (3)(a) to its not being possible to contact a person within a reasonable time includes the case where, by virtue of section 30(4)(b), a constable delays sending intimation to the person.

32 Right of under 18s to have access to other person

(1) Access to a person in police custody who a constable believes is under 16 years of age must be permitted to—

(a) a parent of the person,

(b) where a parent is not available, at least one person sent intimation under section 30 in respect of the person in custody who is able to attend within a reasonable time.

20

(2) Access to a person in police custody who a constable believes is 16 or 17 years of age must be permitted to at least one person sent intimation under section 30 in respect of the person in custody where—

(a) the person sent intimation is able to attend within a reasonable time, and

(b) the person in custody wishes to have access to the person sent intimation.

(3) In exceptional circumstances, access under subsection (1) or (2) may be refused or restricted so far as the refusal or restriction is necessary—

(a) in the interests of—

(i) the investigation or prevention of crime, or

(ii) the apprehension of offenders, or

(b) for the well-being of the person in custody.

30

(4) In this section, “parent” includes guardian and any person who has the care of a person.

33 Support for vulnerable persons

(1) Subsection (2) applies where—

(a) a person is in police custody,
(b) a constable believes that the person is 18 years of age or over, and
(c) owing to mental disorder, the person appears to the constable to be unable to understand sufficiently what is happening or to communicate effectively with the police.

(2) With a view to facilitating the provision of support of the sort mentioned in subsection (3) to the person as soon as reasonably practicable, the constable must ensure that intimation of the matters mentioned in subsection (4) is sent to a person who the constable considers is suitable to provide the support.

(3) That is, support to—

(a) help the person in custody to understand what is happening, and
(b) facilitate effective communication between the person and the police.

(4) Those matters are—

(a) the place where the person is in custody, and
(b) that support of the sort mentioned in subsection (3) is, in the view of the constable, required by the person.

(5) In this section—

(a) “mental disorder” has the meaning given by section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003,
(b) the references to the police are to any—

(i) constable, or
(ii) person appointed as a member of police staff under section 26(1) of the Police and Fire Reform (Scotland) Act 2012.

34 Power to make further provision

(1) The Scottish Ministers may by regulations amend—

(a) subsection (1)(c) of section 33,
(b) subsection (3) of that section.

(2) The Scottish Ministers may by regulations specify descriptions of persons who may for the purposes of subsection (2) of section 33 be considered suitable to provide support of the sort mentioned in subsection (3) of that section (including as to training, qualifications and experience).

(3) Regulations under subsection (1) or (2) are subject to the affirmative procedure.

Intimation and access to a solicitor

35 Right to have intimation sent to solicitor

(1) A person who is in police custody has the right to have intimation sent to a solicitor of any or all of the following—

(a) the fact that the person is in custody,
(b) the place where the person is in custody,
(c) that the solicitor’s professional assistance is required by the person,

(d) if the person has been officially accused of an offence—

(i) whether the person is to be released from custody, and

(ii) where the person is not to be released, the court before which the person is to be brought in accordance with section 18(2) and the date on which the person is to be brought before that court.

(2) Where the person requests that intimation be sent under subsection (1), the intimation must be sent as soon as reasonably practicable.

36 Right to consultation with solicitor

10 (1) A person who is in police custody has the right to have a private consultation with a solicitor at any time.

(2) In exceptional circumstances, a constable may delay the person’s exercise of the right under subsection (1) so far as it is necessary in the interests of—

(a) the investigation or the prevention of crime, or

(b) the apprehension of offenders.

(3) In subsection (1), “consultation” means consultation by such means as may be appropriate in the circumstances and includes (for example) consultation by means of telephone.

CHAPTER 6

POLICE POWERS AND DUTIES

Powers of police

37 Use of reasonable force

A constable may use reasonable force—

(a) to effect an arrest,

(b) when taking a person who is in police custody to any place.

38 Common law power of entry

Nothing in this Part affects any rule of law concerning the powers of a constable to enter any premises for any purpose.

39 Common law power of search etc.

(1) Nothing in this Part affects any rule of law by virtue of which a constable may exercise a power of the type described in subsection (2).

(2) The type of power is a power that a constable may exercise in relation to a person by reason of the person’s having been arrested and charged with an offence by a constable.

(3) Powers of the type described in subsection (2) include the power to—

(a) search the person,
(b) seize any item in the person’s possession,
(c) place the person in an identification parade.

40 Power of search etc. on arrest

(1) A constable may exercise in relation to a person to whom subsection (2) applies any power of the type described in section 39(2) which the constable would be able to exercise by virtue of a rule of law if the person had been charged with the relevant offence by a constable.

(2) This subsection applies to a person who—
(a) is in police custody having been arrested without a warrant, and
(b) has not, since being arrested, been charged with an offence by a constable.

(3) In subsection (1), “the relevant offence” means the offence in connection with which the person is in police custody.

Duties of police

41 Duty not to detain unnecessarily

A constable must take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody.

42 Duty to consider child’s best interests

(1) Subsection (2) applies when a constable is deciding whether to—
(a) arrest a child,
(b) hold a child in police custody,
(c) interview a child about an offence which the constable has reasonable grounds to suspect the child of committing, or
(d) charge a child with committing an offence.

(2) In taking the decision, the constable must treat the need to safeguard and promote the well-being of the child as a primary consideration.

(3) For the purposes of this section, a child is a person who is under 18 years of age.

CHAPTER 7

BREACH OF LIBERATION CONDITION

43 Offence where condition breached

(1) A person commits an offence if, without reasonable excuse, the person breaches a liberation condition by reason of—
(a) failing to comply with an investigative liberation condition,
(b) failing to appear at court as required by the terms of an undertaking, or
(c) failing to comply with the terms of an undertaking, other than the requirement to appear at court.
(2) Subsection (1) does not apply where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (in which case see section 45).

(3) It is competent to amend a complaint to include an additional charge of an offence under subsection (1) at any time before the trial of a person in summary proceedings for—

(a) the original offence, or

(b) an offence arising from the same circumstances as the original offence.

(4) In subsection (3), “the original offence” is the offence in connection with which—

(a) an investigative liberation condition was imposed, or

(b) an undertaking was given.

44 Sentencing for section 43 offence

(1) A person who commits an offence under section 43(1) is liable on summary conviction to—

(a) a fine not exceeding level 3 on the standard scale, or

(b) imprisonment for a period—

(i) where conviction is in the justice of the peace court, not exceeding 60 days,

(ii) where conviction is in the sheriff court, not exceeding 12 months.

(2) A penalty under subsection (1) may be imposed in addition to any other penalty which it is competent for the court to impose, even if the total of penalties imposed exceeds the maximum penalty which it is competent to impose in respect of the original offence.

(3) The reference in subsection (2) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—

(a) where the sentences are imposed at the same time (whether or not in relation to the same complaint), framing the sentences so that they have effect consecutively,

(b) where the sentences are imposed at different times, framing the sentence imposed later so that (if the earlier sentence has not been served) the later sentence has effect consecutive to the earlier sentence.

(4) Subsection (3)(b) is subject to section 204A (restriction on consecutive sentences for released prisoners) of the 1995 Act.

(5) Subsection (6) applies where—

(a) a court finds a person guilty of an offence under section 43(1), or

(b) a person pleads guilty to an offence under that section.

(6) The court may remit the person for sentence in respect of the offence under section 43(1) to any court which is considering the original offence.

(7) In subsections (2) and (6), “the original offence” is the offence in connection with which—

(a) the investigative liberation condition was imposed, or

(b) the undertaking was given.
45 Breach by committing offence

(1) This section applies—

(a) where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (“offence O”), but

(b) only if the fact that offence O was committed while the person was subject to the liberation condition is specified in the complaint or indictment.

(2) In determining the penalty for offence O, the court must have regard—

(a) to the fact that offence O was committed in breach of a liberation condition,

(b) if the breach is by reason of the person’s failure to comply with the terms of an investigative liberation condition, to the matters mentioned in section 46(1),

(c) if the breach is by reason of the person’s failure to comply with the terms of an undertaking other than the requirement to appear at court, to the matters mentioned in section 47(1).

(3) Where the maximum penalty in respect of offence O is specified by (or by virtue of) an enactment, the maximum penalty is increased—

(a) where it is a fine, by the amount equivalent to level 3 on the standard scale,

(b) where it is a period of imprisonment—

(i) as respects conviction in the justice of the peace court, by 60 days,

(ii) as respects conviction in the sheriff court or the High Court, by 6 months.

(4) The maximum penalty is increased by subsection (3) even if the penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(5) In imposing a penalty in respect of offence O, the court must state—

(a) where the penalty is different from that which the court would have imposed had subsection (2) not applied, the extent of and the reasons for that difference,

(b) otherwise, the reasons for there being no such difference.

46 Matters for section 45(2)(b)

(1) For the purpose of section 45(2)(b), the matters are—

(a) the number of offences in connection with which the person was subject to investigative liberation conditions when offence O was committed,

(b) any previous conviction the person has for an offence under section 43(1)(a),

(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of section 45(2), from that which the court would have imposed but for that section.

(2) In subsection (1)—

(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a Member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under section 43(1)(a),
(b) in paragraph (c), the references to section 45(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this subsection, as references to any provision that is equivalent to section 45(2).

(3) Any issue of equivalence arising under paragraph (a) or (b) of subsection (2) is for the court to determine.

47  Matters for section 45(2)(c)

(1) For the purpose of section 45(2)(c), the matters are—

(a) the number of undertakings to which the person was subject when offence O was committed,

(b) any previous conviction the person has for an offence under section 43(1)(c),

(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of section 45(2), from that which the court would have imposed but for that section.

(2) In subsection (1)—

(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a Member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under section 43(1)(c),

(b) in paragraph (c), the references to section 45(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this subsection, as references to any provision that is equivalent to section 45(2).

(3) Any issue of equivalence arising under paragraph (a) or (b) of subsection (2) is for the court to determine.

48  Evidential presumptions

(1) In any proceedings in relation to an offence under section 43(1), the facts mentioned in subsection (2) are to be held as admitted unless challenged by preliminary objection before the person’s plea is recorded.

(2) The facts are—

(a) that the person breached an undertaking by reason of failing to appear at court as required by the terms of the undertaking,

(b) that the person was subject to a particular—

(i) investigative liberation condition, or

(ii) condition under the terms of an undertaking.

(3) In proceedings to which subsection (4) applies—

(a) something in writing, purporting to impose investigative liberation conditions and bearing to be signed by a constable, is sufficient evidence of the terms of the investigative liberation conditions imposed under section 14(2),

(b) something in writing, purporting to be an undertaking and bearing to be signed by the person said to have given it, is sufficient evidence of the terms of the undertaking at the time that it was given,
(c) a document purporting to be a notice (or a copy of a notice) under section 16 or 21, is sufficient evidence of the terms of the notice.

(4) This subsection applies to proceedings—
(a) in relation to an offence under section 43(1), or
(b) in which the fact mentioned in section 45(1)(b) is specified in the complaint or indictment.

(5) In proceedings in which the fact mentioned in section 45(1)(b) is specified in the complaint or indictment, that fact is to be held as admitted unless challenged—
(a) in summary proceedings, by preliminary objection before the person’s plea is recorded, or
(b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the 1995 Act.

49 Interpretation of Chapter

In this Chapter—
(a) references to an investigative liberation condition are to a condition imposed under section 14(2) or 17(3)(b) and subject to any modification by a notice under subsection (1) or (5)(a) of section 16,
(b) references to an undertaking are to an undertaking given under section 19(2)(a),
(c) references to the terms of an undertaking are to the terms of an undertaking subject to any modification by—
(i) notice under section 21(1), or
(ii) the sheriff under section 22(3)(b).

Chapter 8

General

Common law and enactments

50 Abolition of pre-enactment powers of arrest

A constable has no power to arrest a person without a warrant in relation to an offence that has been or is being committed other than—
(a) the power of arrest conferred by section 1,
(b) the power of arrest conferred by section 41(1) of the Terrorism Act 2000.

51 Abolition of requirement for constable to charge

Any rule of law that requires a constable to charge a person with an offence in particular circumstances is abolished.

52 Consequential modification

Schedule 1 contains repeals and other provisions consequential on this Part.
Disapplication of Part

53 Disapplication to terrorism offences
Nothing in this Part applies in relation to a person who is arrested under section 41(1) of the Terrorism Act 2000.

Interpretation of Part

54 Meaning of constable
In this Part, “constable” has the meaning given by section 99 of the Police and Fire Reform (Scotland) Act 2012.

55 Meaning of officially accused
For the purposes of this Part, a person is officially accused of committing an offence if—
(a) a constable charges the person with the offence, or
(b) the prosecutor initiates proceedings against the person in respect of the offence.

56 Meaning of police custody
For the purposes of this Part, a person is in police custody if the person has been arrested by a constable and has not subsequently been—
(a) released from custody, or
(b) brought before a court in accordance with section 18(2).

Part 2
Corroboration and statements

Abolition of corroboration rule

57 Corroboration not required
(1) This section—
(a) relates to any criminal proceedings,
(b) is subject to sections 58 and 59.
(2) If satisfied that a fact has been established by evidence in the proceedings, the judge or (as the case may be) the jury is entitled to find the fact proved by the evidence although the evidence is not corroborated.

58 Effect of other enactments
Section 57 does not affect the operation of any enactment which provides in relation to the proceedings for an offence that a fact can be proved only by corroborated evidence.
59 Relevant day for application

(1) Section 57 applies in relation to the proceedings for an offence only if the specified condition is met.

(2) The specified condition is that the offence is committed on or after the relevant day.

(3) In this section and section 60, “the relevant day” means the day on which section 57 comes into force.

60 Deeming as regards offence

(1) Subsection (2) is for the purpose of section 59(2).

(2) Where the period of time during which a continuous offence is committed includes the relevant day, the specified condition is deemed to be met in relation to the offence as a whole.

61 Transitional and consequential

(1) Schedule 2 contains transitional and consequential provisions in connection with section 57.

(2) But the effect of the modifications in Part 2 of that schedule is subject to subsection (3).

(3) For the purpose of any proceedings in relation to which section 57 does not apply, the enactments modified by that Part of that schedule continue to have effect as they would but for that Part of that schedule.

Statements by accused

62 Statements by accused

(1) After section 261 of the 1995 Act there is inserted—

“261ZA Statements by accused

(1) Evidence of a statement to which this subsection applies is not inadmissible as evidence of any fact contained in the statement on account of the evidence’s being hearsay.

(2) Subsection (1) applies to a statement made by the accused in the course of the accused’s being questioned (whether as a suspect or not) by a constable, or another official, investigating an offence.

(3) Subsection (1) does not affect the issue of whether evidence of a statement made by one accused is admissible as evidence in relation to another accused.”.

(2) The title of section 261 of the 1995 Act becomes “Statements by co-accused”.

PART 3

SOLEMN PROCEDURE

63 Proceedings on petition

(1) In section 35 (judicial examination) of the 1995 Act, after subsection (6) there is inserted—
(6A) In proceedings before the sheriff in examination or further examination, the accused is not to be given an opportunity to make a declaration in respect of any charge.”.

(2) The following provisions of the 1995 Act are repealed:

(a) in section 35, subsections (3), (4) and (5),
(b) sections 36, 37 and 38,
(c) in section 68, subsection (1),
(d) in section 79, paragraph (b)(iii) of subsection (2),
(e) section 278.

64 Citation of jurors

In subsection (4) of section 85 (citation of jurors) of the 1995 Act, the words “by registered post or recorded delivery” are repealed.

65 Pre-trial time limits

(1) The 1995 Act is amended as follows.

(2) In section 65 (prevention of delay in trials)—

(a) in subsection (1), after paragraph (a) there is inserted—

“(aa) where an indictment has been served on the accused in respect of the sheriff court, a first diet is commenced within the period of 11 months;”,

(b) in subsection (1A), after the word “applies)” there is inserted “, the first diet (where subsection (1)(aa) above applies),”,

(c) in subsection (4)(b), for the words “110 days” there is substituted—

“(i) 110 days, unless a first diet in respect of the case is commenced within that period, which failing he shall be entitled to be admitted to bail; or

(ii) 140 days”,

(d) in subsection (9)—

(i) the word “and” immediately following paragraph (b) is repealed,

(ii) after paragraph (b) there is inserted—

“(ba) a first diet shall be taken to commence when it is called;”.

(3) In section 66 (service and lodging of indictment, etc.), for sub-paragraphs (i) and (ii) of paragraph (a) of subsection (6) there is substituted “at a first diet not less than 29 clear days after the service of the indictment,“.

(4) In section 72C (procedure where preliminary hearing does not proceed), for paragraph (b) of subsection (4) there is substituted—

“(b) where the charge is one that can lawfully be tried in the sheriff court, at a first diet in that court not less than 29 clear days after the service of the notice.”.
66 Duty of parties to communicate

(1) The 1995 Act is amended as follows.

(2) In section 71 (first diet), after subsection (1) there is inserted—

“(1ZA) If a written record has been lodged in accordance with section 71C, the court must have regard to the written record when ascertaining the state of preparation of the parties.”.

(3) Before section 72 there is inserted—

“71C Written record of state of preparation: sheriff court

(1) Subsection (2) applies where—

(a) the accused is indicted to the sheriff court, and

(b) a solicitor—

(i) has notified the court under section 72F(1) that the solicitor has been engaged by the accused for the purposes of conducting the accused’s defence, and

(ii) has not subsequently been dismissed by the accused or withdrawn.

(2) The prosecutor and the accused’s legal representative must, within the period described in subsection (3), communicate with each other and jointly prepare a written record of their state of preparation with respect to their cases (referred to in this section as “the written record”).

(3) The period referred to in subsection (2) begins on the day the accused is served with an indictment and expires at the end of the day falling 14 days later.

(4) The prosecutor must lodge the written record with the sheriff clerk not less than two days before the first diet.

(5) The court may, on cause shown, allow the written record to be lodged after the time referred to in subsection (4).

(6) The written record must—

(a) be in such form, or as nearly as may be in such form,

(b) contain such information, and

(c) be lodged in such manner,

as may be prescribed by act of adjournal.

(7) The written record must state the manner in which the communication required by subsection (2) was conducted (for example, by telephone, email or a meeting in person).

(8) In subsection (2), “the accused’s legal representative” means—

(a) the solicitor referred to in subsection (1), or

(b) where the solicitor has instructed counsel for the purposes of the conduct of the accused’s case, either the solicitor or that counsel, or both of them.

(9) In subsection (8)(b), “counsel” includes a solicitor who has a right of audience in the High Court of Justiciary under section 25A of the Solicitors (Scotland) Act 1980.”.
(4) In section 75 (computation of certain periods), after the words “67(3),” there is inserted “71C(3)”.  

67 First diets  

(1) The 1995 Act is amended as follows.  

(2) In section 66 (service and lodging of indictment, etc.)—  

(a) after subsection (6AA) there is inserted—

“(6AB) A notice affixed under subsection (4)(b) or served under subsection (6), where the indictment is in respect of the sheriff court, must contain intimation to the accused that the first diet may proceed and a trial diet may be appointed in the accused’s absence.”,  

(b) in subsection (6B), for the words “or (6AA)” there is substituted “, (6AA) or (6AB)”.  

(3) In section 71 (first diet)—  

(a) in subsection (1), the words from “whether” to “particular” are repealed,  

(b) in subsection (5), after the word “proceed” there is inserted “, and a trial diet may be appointed,”,  

(c) in subsection (6), for the words from the beginning to “required” there is substituted “Where the accused appears at the first diet, the accused is to be required at that diet”,  

(d) subsection (7) is repealed,  

(e) in subsection (9), after the word “section” there is inserted “and section 71B”.  

(4) After section 71 there is inserted—

“71B First diet: appointment of trial diet  

(1) At a first diet, unless a plea of guilty is tendered and accepted, the court must—  

(a) after complying with section 71, and  

(b) subject to subsections (3) to (7),  

appoint a trial diet.  

(2) Where a trial diet is appointed at a first diet, the accused must appear at the trial diet and answer the indictment.  

(3) In appointing a trial diet under subsection (1), in any case in which the 12 month period applies (whether or not the 140 day period also applies in the case)—  

(a) if the court considers that the case would be likely to be ready to proceed to trial within that period, it must, subject to subsections (5) to (7), appoint a trial diet for a date within that period, or  

(b) if the court considers that the case would not be likely to be so ready, it must give the prosecutor an opportunity to make an application to the court under section 65(3) for an extension of the 12 month period.  

(4) Where paragraph (b) of subsection (3) applies—
(a) if such an application as is mentioned in that paragraph is made and
granted, the court must, subject to subsections (5) to (7), appoint a trial
diet for a date within the 12 month period as extended, or

(b) if no such application is made or if one is made but is refused by the
court—

   (i) the court may desert the first diet simpliciter or pro loco et
tempore, and

   (ii) where the accused is committed until liberated in due course of
law, the accused must be liberated forthwith.

(5) Subsection (6) applies in any case in which—

   (a) the 140 day period as well as the 12 month period applies, and

   (b) the court is required, by virtue of subsection (3)(a) or (4)(a) to appoint a
trial diet within the 12 month period.

(6) In such a case—

   (a) if the court considers that the case would be likely to be ready to proceed
within the 140 day period, it must appoint a trial diet for a date
within that period as well as within the 12 month period, or

   (b) if the court considers that the case would not be likely to be so ready, it
must give the prosecutor an opportunity to make an application under
section 65(5) for an extension of the 140 day period.

(7) Where paragraph (b) of subsection (6) applies—

   (a) if such an application as is mentioned in that paragraph is made and
granted, the court must appoint a trial diet for a date within the 140 day
period as extended as well as within the 12 month period,

   (b) if no such application is made or if one is made but is refused by the
court—

      (i) the court must proceed under subsection (3)(a) or (as the case may
be) (4)(a) to appoint a trial diet for a date within the 12 month
period, and

      (ii) the accused is then entitled to be admitted to bail.

(8) Where an accused is, by virtue of subsection (7)(b)(ii), entitled to be admitted
to bail, the court must, before admitting the accused to bail, give the prosecutor
an opportunity to be heard.

(9) On appointing a trial diet under this section in a case where the accused has
been admitted to bail (otherwise than by virtue of subsection (7)(b)(ii)), the
court, after giving the parties an opportunity to be heard—

   (a) must review the conditions imposed on the accused’s bail, and

   (b) having done so, may, if it considers it appropriate to do so, fix bail on
different conditions.

(10) In this section—

    “the 12 month period” means the period specified in subsection (1)(b) of
section 65 and, in any case in which that period has been extended under
subsection (3) of that section, includes that period as so extended,
“the 140 day period” means the period specified in subsection (4)(b)(ii) of section 65 and, in any case in which that period has been extended under subsection (5) of that section, includes that period as so extended.”.

(5) In subsection (3) of section 76 (procedure where accused desires to plead guilty), for the words from “or, where” to “Court,” there is substituted “; the first diet or (as the case may be)”.

(6) After section 83A there is inserted—

“83B  Continuation of trial diet in the sheriff court

(1) In the sheriff court a trial diet and, if it is adjourned, the adjourned diet, may, without having been commenced, be continued from sitting day to sitting day—

(a) by minute, in such form as may be prescribed by act of adjournal, signed by the sheriff clerk,

(b) up to such maximum number of sitting days after the day originally appointed for the trial diet as may be so prescribed.

(2) The indictment falls if a trial diet, or adjourned diet, is not commenced by the end of the last sitting day to which it may be continued by virtue of subsection (1).

(3) For the purposes of this section, a trial diet or adjourned trial diet is to be taken to commence when it is called.

(4) In this section, “sitting day” means any day on which the court is sitting but does not include any Saturday or Sunday or any day which is a court holiday.”.

(7) The italic cross-heading immediately preceding section 83A becomes “Continuation of trial diet”.

68  Preliminary hearings

In section 72A (preliminary hearing: appointment of trial diet) of the 1995 Act—

(a) in subsection (1), for the words from the beginning to “section” there is substituted “In any case in which subsection (6) of section 72”,

(b) subsection (1A) is repealed.

69  Plea of guilty

In the 1995 Act—

(a) in section 70 (proceedings against organisations), subsection (7) is repealed,

(b) in subsection (1) of section 77 (plea of guilty), the words from “and, subject” to the end are repealed.

70  Guilty verdict

(1) In section 90 (death or illness of jurors) of the 1995 Act—

(a) in subsection (1), the words “, subject to subsection (2) below,” are repealed,

(b) subsection (2) is repealed.
(2) After section 90 of the 1995 Act there is inserted—

"90ZA Guilty verdict by jury

(1) A jury of 15 members may return a verdict of guilty only if at least 10 of them are in favour of that verdict.

(2) Where by virtue of section 90(1) a jury has fewer that 15 members, it may return a verdict of guilty only if—

(a) in the case of 14 members, at least 10 of them are in favour of that verdict,

(b) in the case of 13 members, at least 9 of them are in favour of that verdict,

(c) in the case of 12 members, at least 8 of them are in favour of that verdict.

(3) A jury of any number is to be regarded as having returned a verdict of not guilty if it informs the court that—

(a) it will not return a verdict of guilty in accordance with subsection (1) or (as the case may be) (2), and

(b) there is no majority among its members in favour of one of the other verdicts available to it.”.

PART 4
SENTENCING

Maximum term for weapons offences

20 71 Maximum term for weapons offences

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.

(2) In subsection (1)(b) of section 47 (prohibition of the carrying of offensive weapons), for the word “four” there is substituted “5”.

(3) In subsection (1)(b) of section 49 (offence of having in public place article with blade or point), for the word “four” there is substituted “5”.

(4) In subsection (5) of section 49A (offence of having article with blade or point (or offensive weapon) on school premises)—

(a) in paragraph (a)(ii), for the word “four” there is substituted “5”;

(b) in paragraph (b)(ii), for the word “four” there is substituted “5”.

(5) In subsection (6)(b) of section 49C (offence of having offensive weapon etc. in prison), for the word “4” there is substituted “5”.

Prisoners on early release

72 Sentencing under the 1995 Act

After section 200 of the 1995 Act there is inserted—
“200A Sentencing prisoners on early release

(1) Before sentencing or otherwise dealing with a person who has been found by the court to have committed an offence punishable with imprisonment (other than an offence in respect of which life imprisonment is mandatory), the court must so far as is reasonably practicable ascertain whether the person was on early release at the time the offence was committed.

(2) Where the court ascertains that the person was on early release at the time the offence was committed, the court must consider making an order, or as the case may be a reference, under section 16(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

(3) For the purposes of this section a person is on early release if, by virtue of one of the following enactments, the person is not in custody—

(a) Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993,
(b) Part II of the Criminal Justice Act 1991, or
(c) Part 12 of the Criminal Justice Act 2003.”.

73 Sentencing under the 1993 Act

(1) Section 16 (commission of offence by released prisoner) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is amended as follows.

(2) In subsection (1), for the words “or Part II of the Criminal Justice Act 1991” there is substituted “, Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003”.

(3) In subsection (2)—

(a) in paragraph (a), for the words from “other” to “below” there is substituted “to which subsection (2A) does not apply”,
(b) in paragraph (b), for the words from “where” to “subsection (1)(a)” there is substituted “to which subsection (2A) applies”.

(4) After subsection (2) there is inserted—

“(2A) This subsection applies to a case if—

(a) the court mentioned in subsection (1)(b) is inferior to the court which imposed the original sentence, and
(b) the whole of the period described in subsection (2)(a) exceeds—

(i) if the court mentioned in subsection (1)(b) is a justice of the peace court not constituted by a stipendiary magistrate, 60 days,
(ii) if the court is a justice of the peace court constituted by a stipendiary magistrate or the sheriff sitting summarily, 12 months,
(iii) if the court is the sheriff sitting as a court of solemn jurisdiction, 5 years.”.”
PART 5

APPEALS AND SCCRC

Appeals

74 Preliminary pleas in summary cases

(1) Section 174 (appeals relating to preliminary pleas) of the 1995 Act is amended as follows.

(2) In subsection (1)—
   (a) the words from “with the leave” to “and” are repealed,
   (b) for the words “this subsection” there is substituted “subsection (1A)(b)”.

(3) After subsection (1) there is inserted—
   “(1A) An appeal under subsection (1) may be taken—
   (a) in the case of a decision to dismiss the complaint or any part of it, by the prosecutor without the leave of the court,
   (b) in any other case, only with the leave of the court of first instance (granted on the motion of a party or ex proprio motu).”.

(4) After subsection (2) there is inserted—
   “(2A) Subsection (3) applies where—
   (a) the court grants leave to appeal under subsection (1), or
   (b) the prosecutor—
   (i) indicates an intention to appeal under subsection (1), and
   (ii) by virtue of subsection (1A)(a), does not require the leave of the court.”.

(5) In subsection (3), for the words from the beginning to “it” there is substituted “Where this subsection applies, the court of first instance”.

75 Preliminary diets in solemn cases

In section 74 (appeals in connection with preliminary diets) of the 1995 Act—

(a) in subsection (1), for the words from “to—” to “motu)” there is substituted “to any right of appeal under section 106 or 108 a party may,”,

(b) after subsection (2) there is inserted—
   “(2A) An appeal under subsection (1) may be taken—
   (a) in the case of a decision to dismiss the indictment or any part of it, by the prosecutor without the leave of the court,
   (b) in any other case, only with the leave of the court of first instance (granted on the motion of a party or ex proprio motu).”.

76 Extending certain time limits: summary

(1) Section 181 (stated case: directions by High Court) of the 1995 Act is amended as follows.
(2) After subsection (1) there is inserted—

“(1A) Where an application for a direction under subsection (1)—

(a) is made by the person convicted, and

(b) relates to the requirements of section 176(1),

the High Court may make a direction only if it is satisfied that doing so is justified by exceptional circumstances.

(1B) In considering whether there are exceptional circumstances for the purpose of subsection (1A), the High Court must have regard to—

(a) the length of time that has elapsed between the expiry of the period mentioned in section 176(1)(a) and the making of the application,

(b) the reasons stated in accordance with subsection (2A)(a)(i),

(c) the proposed grounds of appeal.”.

(3) Subsection (2C) is repealed.

(4) In paragraph (a) of subsection (3), the words from “(unless” to the end are repealed.

(5) At the end of the section there is inserted—

“(5) If the High Court makes a direction under subsection (1) it must—

(a) give reasons for the decision in writing, and

(b) give the reasons in ordinary language.”.

77 Extending certain time limits: solemn

(1) In section 105 (appeal against refusal of application) of the 1995 Act, after subsection (3) there is inserted—

“(3A) Subsection (3) does not entitle an applicant to be present at the hearing and determination of an application under section 111(2) unless the High Court has made a direction under section 111(4)(b).”.

(2) Section 111 (provisions supplementary to sections 109 and 110) of the 1995 Act is amended as follows.

(3) After subsection (2) there is inserted—

“(2ZA) Where an application under subsection (2) is received after the period to which it relates has expired, the High Court may extend the period only if it is satisfied that doing so is justified by exceptional circumstances.

(2ZB) In considering whether there are exceptional circumstances for the purpose of subsection (2ZA), the High Court must have regard to—

(a) the length of time that has elapsed between the expiry of the period and the making of the application,

(b) the reasons stated in accordance with subsection (2A)(a)(i),

(c) the proposed grounds of appeal.”.

(4) In subsection (2A)—

(a) the words “seeking extension of the period mentioned in section 109(1) of this Act” are repealed,
(b) in paragraph (a)(i) —
   (i) after “failed” there is inserted “, or expects to fail,”,
   (ii) the words “in section 109(1)” are repealed.

(5) Subsection (2C) is repealed.

(6) At the end of the section there is inserted —
   “(4) An application under subsection (2) is to be dealt with by the High Court—
   (a) in chambers, and
   (b) unless the Court directs otherwise, without the parties being present.

(5) If the High Court extends a period under subsection (2) it must—
   (a) give reasons for the decision in writing, and
   (b) give the reasons in ordinary language.”.

78 Certain lateness not excusable
In section 300A (power of court to excuse procedural irregularities) of the 1995 Act, after subsection (7) there is inserted —
   “(7A) Subsection (1) does not authorise a court to excuse a failure to do any of the following things timeously—
   (a) lodge written intimation of intention to appeal in accordance with section 109(1),
   (b) lodge a note of appeal in accordance with section 110(1)(a),
   (c) make an application for a stated case under section 176(1),
   (d) lodge a note of appeal in accordance with section 186(2)(a).”.

79 Advocation in solemn proceedings
After section 130 of the 1995 Act there is inserted —
   “130A Bill of advocation not competent in respect of certain decisions
   It is not competent to bring under review of the High Court by way of bill of advocation a decision taken at a first diet or a preliminary hearing.”.

80 Advocation in summary proceedings
After section 191A of the 1995 Act there is inserted —
   “191B Bill of advocation not competent in respect of certain decisions
   It is not competent to bring under review of the High Court by way of bill of advocation a decision of the court of first instance that relates to such objection or denial as is mentioned in section 144(4).”.

81 Finality of appeal proceedings
(1) In subsection (2) of section 124 (finality of proceedings) of the 1995 Act—
   (a) for the words “sections 288ZB and 288AA” there is substituted “section 288AA”,

(b) the words “a reference under section 288ZB or” are repealed.

(2) After section 194 of the 1995 Act there is inserted—

“194ZA Finality of proceedings

(1) Every interlocutor and sentence (including disposal or order) pronounced by the High Court when disposing of an appeal relating to summary proceedings is final and conclusive and not subject to review by any court whatsoever.

(2) Subsection (1) is subject to—

(a) Part XA and section 288AA of this Act, and

(b) paragraph 13(a) of Schedule 6 to the Scotland Act 1998.

(3) It is incompetent to stay or suspend any execution or diligence issuing from the High Court under this Part, except for the purposes of an appeal under—

(a) section 288AA of this Act, or

(b) paragraph 13(a) of Schedule 6 to the Scotland Act 1998.”.

SCCRC

15 References by SCCRC

(1) The 1995 Act is amended as follows.

(2) In section 194B—

(a) in subsection (1), for “section 194DA of this Act” there is substituted “subsection (1A)”.

(b) after subsection (1) there is inserted—

“(1A) Where the Commission has referred a case to the High Court under subsection (1), the High Court may not quash a conviction or sentence unless the Court considers that it is in the interests of justice to do so.

(1B) In determining whether or not it is in the interests of justice that any case is disposed of as mentioned in subsection (1A), the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings.”.

(3) The title of section 194B becomes “References by the Commission”.

(4) Section 194DA is repealed.

PART 6
MISCELLANEOUS
CHAPTER 1
PROCEDURAL MATTERS

Aggravation as to people trafficking

83 General aggravation of offence

(1) This subsection applies where it is—
(a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with people trafficking activity, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by a connection with people trafficking activity if the offender is motivated (wholly or partly) by the objective of committing or conspiring to commit a people trafficking offence.

(3) It is immaterial whether or not in committing an offence the offender in fact enables the offender or another person to commit a people trafficking offence.

(4) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by a connection with people trafficking activity,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

84 Aggravation involving public official

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that a people trafficking offence is aggravated by an abuse of a public position, and

(b) proved that the offence is so aggravated.

(2) A people trafficking offence is aggravated by an abuse of a public position if the offender is, at the time of committing the offence—

(a) a public official, and

(b) acting or purporting to act in the course of official duties.

(3) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by an abuse of a public position,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.
Expressions in sections 83 and 84

(1) In sections 83 and 84, “a people trafficking offence” means—
   (a) an offence under section 22 of the Criminal Justice (Scotland) Act 2003, or
   (b) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

(2) In section 84, “a public official” means an individual who (whether in Scotland or elsewhere)—
   (a) holds a legislative or judicial position of any kind,
   (b) exercises a public function in an administrative or other capacity, or
   (c) is an official or agent of an international organisation.

(3) For the purpose of subsection (2)(c), “an international organisation” means an organisation whose members are—
   (a) countries or territories,
   (b) governments of countries or territories,
   (c) other international organisations, or
   (d) a mixture of any of the above.

(4) The Scottish Ministers may by regulations modify subsections (1) to (3).

(5) Regulations under subsection (4) are subject to the negative procedure.

Use of live television link

(1) After section 288G of the 1995 Act there is inserted—

   “Use of live television link

288H Participation through live television link

(1) Where the court so determines, a detained person is to participate in a specified hearing by means of a live television link.

(2) The court—
   (a) must give the parties in the case an opportunity to make representations before making a determination under subsection (1),
   (b) may make such a determination only if it considers that to do so is not contrary to the interests of justice.

(3) The court may require a detained person to participate by means of a live television link in an ad hoc hearing held for the sole purpose of considering whether to make a determination under subsection (1) with respect to a specified hearing.

(4) Where a detained person participates in a specified hearing or such an ad hoc hearing by means of a live television link—
   (a) a place of detention is, for the purposes of the hearing, deemed to be part of the court-room, and
(b) accordingly, the hearing is deemed to take place in the presence of the 
detained person.

(5) In this section—

“court-room” includes chambers,

“live television link” means live television link between a place of 
detention and the court-room in which a specified hearing is or (as the 
case may be) is to be held.

288I Evidence and personal appearance

(1) No evidence as to a charge may be led or presented at a specified hearing in 
respect of which there is a determination under section 288H(1).

(2) The court—

(a) may, at any time before or at a specified hearing, revoke a determination 
under section 288H(1),

(b) must do so in relation to a detained person if it considers that it is in the 
interests of justice for the detained person to appear in person.

(3) Where this subsection applies—

(a) the court may postpone a specified hearing to the next day which is not a 
Saturday, Sunday or a court holiday, and

(b) the period of any such postponement is not to count towards any time 
limit applying in respect of the case.

(4) Subsection (3) applies where, on the day on which a specified hearing takes 
place or is due to take place—

(a) the court decides not to make a determination under section 288H(1) 
with respect to the hearing, or

(b) the court revokes such a determination under subsection (2).

(5) But subsection (3) does not apply where a specified hearing is one at which the 
detained person is, or is to be, brought before the court in accordance with 
section 18(2) of the Criminal Justice (Scotland) Act 2014.

288J Specified hearings

(1) The Lord Justice General may by directions specify types of hearing at the 
High Court, sheriff court and JP court in which a detained person may 
participate in accordance with section 288H(1).

(2) Directions under subsection (1) may specify types of hearing by reference to—

(a) the venues at which they take place,

(b) particular places of detention,

(c) categories of cases or proceedings to which they relate.

(3) Directions under subsection (1) may—

(a) vary or revoke earlier such directions,
(b) make different provision for different purposes.

(4) The validity of any proceedings is not affected by the participation of a detained person by means of a live television link in a hearing that is not a specified hearing.

(5) In this section, “hearing” includes any diet or hearing in criminal proceedings which may be held in the presence of an accused, a convicted person or an appellant in the proceedings.

288K Defined terms

For the purpose of sections 288H to 288J—

“detained person” means person who is—

(a) an accused, a convicted person or an appellant in the case to which a specified hearing relates, and

(b) imprisoned or otherwise lawfully detained (whether or not in connection with an offence) at any place in Scotland,

“place of detention” means place in which a detained person is imprisoned or detained,

“specified hearing” means hearing of a type specified in directions having effect for the time being under section 288J.”.

(2) In addition—

(a) in section 117 (presence of appellant or applicant at hearing) of the 1995 Act—

(i) subsection (6) is repealed,

(ii) in subsection (7), for the word “(6)” there is substituted “(5),”

(b) section 80 of the Criminal Justice (Scotland) Act 2003 is repealed.

CHAPTER 2

POLICE NEGOTIATING BOARD FOR SCOTLAND

87 Establishment and functions

(1) After section 55 of the Police and Fire Reform (Scotland) Act 2012 there is inserted—

“CHAPTER 8A

POLICE NEGOTIATING BOARD FOR SCOTLAND

55A Establishment of the PNBS

(1) There is established a body to be known as the Police Negotiating Board for Scotland.

(2) Schedule 2A makes further provision about the Police Negotiating Board for Scotland.

(3) In this Chapter, the references to the PNBS are to the Police Negotiating Board for Scotland.
55B Representations about pay etc.

(1) The PNBS may make representations to the Scottish Ministers about—
   (a) any draft regulations shared with it under section 54(1)(a),
   (b) any draft determination of a kind mentioned in subsection (2),
   (c) the matters mentioned in subsection (4) generally.

(2) The draft determination referred to in subsection (1)(b) is a draft of a determination to be made by the Scottish Ministers—
   (a) in relation to a matter mentioned in subsection (4), and
   (b) by virtue of regulations made under section 48.

(3) The Scottish Ministers may, after consulting the chairperson of the PNBS—
   (a) require the PNBS to make representations under subsection (1),
   (b) set a time period within which it must do so.

(4) The matters referred to in subsections (1)(c) and (2)(a) are the following matters in relation to constables (other than special constables) and police cadets—
   (a) pay, allowances and expenses,
   (b) public holidays and leave,
   (c) the issue, use and return of police clothing and equipment,
   (d) hours of duty.

55C Representations on other matters

(1) The PNBS may make representations to the Scottish Ministers about—
   (a) any draft regulations shared with it under section 54(2),
   (b) the matters mentioned in subsection (2) generally.

(2) The matters referred to in subsection (1)(b) are matters relating to the governance, administration and conditions of service of constables (other than special constables) and police cadets.

(3) But those matters do not include the matters mentioned in section 55B(4).

55D Reporting by the PNBS

(1) The PNBS must, as soon as practicable after the end of each reporting year, prepare a report on how it has carried out its functions during that year.

(2) The PNBS must—
   (a) give a copy of each report to the Scottish Ministers,
   (b) publish each report in such manner as it considers appropriate.

(3) In subsection (1), “reporting year” means yearly period ending on 31 March.”.

(2) In section 54 (consultation on regulations) of the Police and Fire Reform (Scotland) Act 2012, in subsection (1)—
(a) for the words from “61(1)” to “pensions)” there is substituted “55B(4)”,
(b) in paragraph (a), for the words “the United Kingdom” there is substituted “Scotland”.

3 After schedule 2 to the Police and Fire Reform (Scotland) Act 2012 there is inserted (as schedule 2A to that Act) the schedule set out in schedule 3.

**PART 7**

**Final provisions**

**Ancillary and definition**

88 **Ancillary regulations**

(1) The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) Regulations under this section—

(a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act (including this Act),

(b) otherwise, are subject to the negative procedure.

89 **Meaning of “the 1995 Act”**

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

**Commencement and short title**

90 **Commencement**

(1) This Part comes into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

91 **Short title**

The short title of this Act is the Criminal Justice (Scotland) Act 2014.
MODIFICATIONS IN CONNECTION WITH PART 1

PART 1

PROVISIONS AS TO ARREST

Criminal Procedure (Scotland) Act 1995

1 The 1995 Act is amended as follows.

2 These provisions are repealed—
   (a) in section 13, subsection (7),
   (b) section 21.

3 In section 28—
   (a) in subsection (1), for the words “has broken, is breaking, or is likely to break” there is substituted “is likely to breach”,
   (b) in subsection (1A), for the words “has breached, or is likely to breach,” there is substituted “is likely to breach”.

4 (1) In section 234A, subsections (4A) and (4B) are repealed.
    (2) In subsection (11) of section 234AA, for the words from the beginning to “those sections apply” there is substituted “Section 9 (breach of orders) of the Antisocial Behaviour etc. (Scotland) Act 2004 applies in relation to antisocial behaviour orders made under this section as that section applies”.

Miscellaneous enactments

5 In section 4 of the Trespass (Scotland) Act 1865, for the words from the beginning to “every” in the last place where it occurs there is substituted “A”.

6 In subsection (3) of section 1 of the Public Meeting Act 1908, the words from “, and if he refuses” to the end are repealed.

7 In the Firearms Act 1968, section 50 is repealed.

8 In the Civic Government (Scotland) Act 1982—
   (a) in section 59, subsections (1), (2) and (5) are repealed,
   (b) in section 65, subsections (4) and (5) are repealed,
   (c) in subsection (1) of section 80, for the words from “and taken” to the end there is substituted “by a constable”.

9 In the Child Abduction Act 1984, section 7 is repealed.

10 In section 11 of the Protection of Badgers Act 1992, paragraph (c) of subsection (1) is repealed.

11 In the Criminal Justice and Public Order Act 1994, section 60B is repealed.
12 In section 8B of the Olympic Symbol etc. (Protection) Act 1995, subsections (2) and (3) are repealed.

13 In the Criminal Law (Consolidation) (Scotland) Act 1995—
   (a) in section 7, subsection (4) is repealed,
   (b) in section 47, subsection (3) is repealed,
   (c) in section 48, subsection (3) is repealed,
   (d) in section 50, subsections (3) and (5) are repealed.

14 In the Deer (Scotland) Act 1996, section 28 is repealed.

15 In section 61 of the Crime and Punishment (Scotland) Act 1997, subsection (5) is repealed.

16 In the Protection of Wild Mammals (Scotland) Act 2002, paragraph (a) of subsection (1) is repealed.

17 In the Fireworks Act 2003—
   (a) in section 11A, subsection (6) is repealed,
   (b) section 11B is repealed.

18 In section 307 of the Criminal Justice Act 2003, subsection (4) is repealed.

19 In the Antisocial Behaviour etc. (Scotland) Act 2004—
   (a) section 11 is repealed,
   (b) in section 22, subsections (3) and (4) are repealed,
   (c) section 38 is repealed.

20 In section 130 of the Serious Organised Crime and Police Act 2005, subsection (3) is repealed.

21 In the Animal Health and Welfare (Scotland) Act 2006, in schedule 1—
   (a) paragraph 16 is repealed,
   (b) in paragraph 18(b)(i), the words “except paragraph 16” are repealed.

22 In the Prostitution (Public Places) (Scotland) Act 2007, section 2 is repealed.

23 In section 32 of the Glasgow Commonwealth Games Act 2008, subsections (3) and (4) are repealed.

24 In section 7 of the Tobacco and Primary Medical Services (Scotland) Act 2010, subsection (4) is repealed.

25 In section 9 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, subsections (2) and (3) are repealed.

**PART 2**

**FURTHER MODIFICATIONS**

26 The 1995 Act is amended as follows.
27 These provisions are repealed—
   (a) sections 14 to 15A,
   (b) section 17,
   (c) sections 22 to 22ZB (together with the italic cross-heading immediately preceding
        section 22),
   (d) in section 135, subsection (3).

28 In section 74, after paragraph (a) of subsection (2) there is inserted—
   “(aza)may not be taken against a decision taken by virtue of section 27 of the
   Criminal Justice (Scotland) Act 2014;”.

29 In section 79—
   (a) for subsection (2)(b)(ii) there is substituted—
       “(ii) a preliminary objection under any of the provisions listed in
        subsection (3A);”,
   (b) after subsection (3) there is inserted—
       “(3A) For the purpose of subsection (2)(b)(ii), the provisions are—
          (a) section 27(4A)(a) or (4B), 90C(2A), 255 or 255A of this Act,
          (b) section 9(6) of the Antisocial Behaviour etc. (Scotland) Act 2004 or that
              section as applied by section 234AA(11) of this Act,
          (c) section 48(5)(b) of the Criminal Justice (Scotland) Act 2014.”.

30 Before section 261A there is inserted—
   “Statements made after charge

261ZB Exception to rule on inadmissibility

Evidence of a statement made by a person in response to questioning carried out in accordance with authorisation granted under section 27 of the Criminal
Justice (Scotland) Act 2014 is not inadmissible on account of the statement’s
being made after the person has been charged with an offence.”.

Other enactments

31 In subsection (2)(a) of section 8A of the Legal Aid (Scotland) Act 1986, for the words
   “section 15A of the Criminal Procedure (Scotland) Act 1995 (right of suspects to have
   access to a solicitor)” there is substituted “section 24 (right to have solicitor present) of
   the Criminal Justice (Scotland) Act 2014”.

32 In the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act
   2010, sections 1, 3 and 4 are repealed.

33 In section 20 of the Police and Fire Reform (Scotland) Act 2012, subsections (2) and (3)
   are repealed.
SCHEDULE 2  
(introduced by section 61)

MODIFICATIONS IN CONNECTION WITH PART 2

PART 1

TRANSITIONAL PROVISIONS

People trafficking aggravations

1  (1) Evidence from a single source is sufficient to prove that an offence is aggravated as described in section 83.

(2) Evidence from a single source is sufficient to prove that an offence is aggravated as described in section 84.

2  Paragraph 1 has effect only for the purpose of any proceedings in relation to which section 57 does not apply.

Children (Scotland) Act 1995

3  (1) Sub-paragraph (2) has effect for as long as the relevant section of the Children (Scotland) Act 1995 continues to apply to any proceedings under Part II of that Act (despite the repeal of that section by the Children’s Hearings (Scotland) Act 2011).

(2) Section 57 applies—

(a) in relation to the ground for a referral for which the relevant section makes provision, and

(b) as if any such proceedings with respect to the ground were criminal proceedings.

4  For the purpose of paragraph 3, the relevant section of the Children (Scotland) Act 1995 is section 68(3) of that Act.

PART 2

CONSEQUENTIAL PROVISIONS

Companies, land and rail

5  In section 149 of the Companies Clauses Consolidation (Scotland) Act 1845, the words from “, either” to “more,“ are repealed.

6  In section 130 of the Lands Clauses Consolidation (Scotland) Act 1845, the words from “, either” to “more,” are repealed.

7  In section 137 of the Railways Clauses Consolidation (Scotland) Act 1845, the words from “, either” to “more,” are repealed.

Fisheries and wildlife

8  (1) In the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951, sections 7(3) and 7A(3) (so far as they are not already repealed) are repealed.

(2) In section 10C of the Salmon Act 1986, the following provisions (so far as they are not already repealed) are repealed—
(a) in subsection (2), the words “7(3) (evidence),”;
(b) subsection (3)(a).

(3) In the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003—
(a) sections 9(3), 10(2), 13(5), 14(3), 15(4), 16(4), 17(5), 17A(5), 17B(6), 18(3), 19(4) and 20(4) are repealed,
(b) in section 23(7), the words from “may” to “and” are repealed,
(c) sections 31(8), 33A(6), 38(8) and 51A(9) are repealed.

(4) In the Scotland Act 1998 (River Tweed) Order 2006 (S.I. 2006/2913)—
(a) articles 30(3), 32(3), 35(5), 37(4), 38(3), 39(4), 41(4), 42(4) and 43(4) are revoked,
(b) in article 46(7), the words from “may” to “and” are revoked,
(c) articles 52(8) and 54(8) are revoked.

9 Section 19A of the Wildlife and Countryside Act 1981 is repealed.
10 Section 23(5) of the Deer (Scotland) Act 1996 is repealed.
15 In the schedule to the Aquaculture and Fisheries (Scotland) Act 2007, paragraph 6(2) is repealed.
12 Section 12 of the Wildlife and Natural Environment (Scotland) Act 2011 is repealed.

Environmental matters

13 Section 87(7) of the Environmental Protection Act 1990 is repealed.
14 Section 1(4) of the Dog Fouling (Scotland) Act 2003 is repealed.

Road traffic law

15 (1) Section 21 of the Road Traffic Offenders Act 1988 is repealed.
(2) In Schedule 4 to the Road Traffic Act 1991, paragraph 89 is repealed.
16 Section 54 of the Vehicle Excise and Registration Act 1994 is repealed.

25 Offences against persons

17 (1) In section 96(2) of the Crime and Disorder Act 1998, the words from “and evidence” to the end are repealed.
(2) Section 74(5) of the Criminal Justice (Scotland) Act 2003 is repealed.
(3) Sections 1(4) and 2(4) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 are repealed.
(4) Section 29(4) of the Criminal Justice and Licensing (Scotland) Act 2010 is repealed.
18 Sections 4(6) and 5(5) of the Emergency Workers (Scotland) Act 2005 are repealed.
Breach of court orders

19 Section 18(3) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is repealed.

20 (1) Sections 227ZD(1), 234G(3) and 245F(2A) of the Criminal Procedure (Scotland) Act 1995 are repealed.

(2) Section 58 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 is repealed.

Proof at children’s hearings

21 In section 102 of the Children’s Hearings (Scotland) Act 2011, after subsection (3) there is inserted—

“(3A) Section 57 (corroboration not required) of the Criminal Justice (Scotland) Act 2014 applies in relation to the ground as if the proceedings with respect to the ground were criminal proceedings.”.

Miscellaneous UK legislation

22 In Schedule 5 to the Finance Act 2002, paragraph 15 is repealed.

23 In the Extradition Act 2003—

(a) in section 7—

(i) paragraph (b) of subsection (7) is repealed,

(ii) the word “but” immediately preceding that paragraph is repealed,

(b) in section 77—

(i) paragraph (b) of subsection (2) is repealed,

(ii) the word “but” immediately preceding that paragraph is repealed,

(c) in section 86(8), the words “(except that for this purpose evidence from a single source shall be sufficient)” are repealed.

24 Section 31(4) of the Counter-Terrorism Act 2008 is repealed.

SCHEDULE 3
(introduced by section 87)

POLICE NEGOTIATING BOARD FOR SCOTLAND

“SCHEDULE 2A
(introduced by section 55A)

POLICE NEGOTIATING BOARD FOR SCOTLAND

Status of the PNBS

1 (1) The PNBS—

(a) is not a servant or agent of the Crown, and

(b) has no status, immunity or privilege of the Crown.
(2) The property of the PNBS is not property of, or property held on behalf of, the Crown.

**Chairing and membership**

2 (1) The PNBS is to consist of—

(a) a chairperson,

(b) a deputy chairperson,

(c) other persons representing the interests of each of—

(i) the Authority,

(ii) the chief constable,

(iii) constables (other than special constables) and police cadets,

(iv) the Scottish Ministers.

(2) It is for the Scottish Ministers to appoint the chairperson and deputy chairperson.

(3) Other members are to be appointed in accordance with the constitution prepared under paragraph 4.

(4) A member of the PNBS holds and vacates office in accordance with the terms of the member’s appointment.

(5) The chairperson or deputy chairperson may—

(a) resign from office by giving notice in writing to the Scottish Ministers,

(b) be removed from office if, in the opinion of the Scottish Ministers, the person is unable, unfit or unwilling to perform the functions of the office.

**Disqualification from chairing**

3 A person is disqualified from appointment, and from holding office, as chairperson or deputy chairperson of the PNBS if the person is or becomes—

(a) a member of the House of Commons,

(b) a member of the Scottish Parliament,

(c) a member of the European Parliament,

(d) a Minister of the Crown,

(e) a member of the Scottish Government,

(f) a civil servant.

**Constitution and procedure etc.**

4 (1) It is for the Scottish Ministers to prepare the constitution for the PNBS.

(2) The constitution—

(a) must regulate the procedure for the PNBS to reach agreement on representations to be made under section 55B(1),
(b) may require such agreement to be reached by arbitration in such circumstances as are described in the constitution.

(3) The constitution may contain provision about—

(a) membership (including number of members to represent each of the interests mentioned in paragraph 2(1)(c)),

(b) internal organisation (for example, committees and office-holders),

(c) procedures to be followed (including conduct of meetings),

(d) the content of a report required by section 55D,

(e) such other matters as the Scottish Ministers consider appropriate.

(4) The Scottish Ministers—

(a) must keep the constitution under review,

(b) may revise it from time to time.

(5) Before preparing or revising the constitution, the Scottish Ministers must consult—

(a) the Authority,

(b) the chief constable, and

(c) persons representing the interests of constables (other than special constables) and police cadets.

Remuneration and expenses

(1) The Scottish Ministers may pay—

(a) such remuneration to the chairperson and deputy chairperson of the PNBS as they think fit,

(b) such expenses of the members of the PNBS as they think fit.

(2) The Scottish Ministers must pay such expenses as they consider are reasonably required to be incurred to enable the PNBS to carry out its functions.”.
Criminal Justice (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about criminal justice including as to police powers and rights of suspects and as to criminal evidence, procedure and sentencing; to establish the Police Negotiating Board for Scotland; and for connected purposes.

Introduced by: Kenny MacAskill
On: 20 June 2013
Bill type: Government Bill
CRIMINAL JUSTICE (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Criminal Justice (Scotland) Bill introduced in the Scottish Parliament on 20 June 2013:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 35–PM.
EXPLANATORY NOTES

INTRODUCTION

1. 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. Any examples provided are purely illustrative and do not imply that provisions do not apply in other circumstances.

2. 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.

OVERVIEW OF THE BILL

3. The Bill seeks to support the aims set out in the Policy Memorandum by introducing reforms to modernise and enhance the efficiency of the Scottish criminal justice system. The provisions in the Bill take forward a range of the Scottish Government’s key justice priorities. Some of these provisions have been developed from the recommendations of two independent reviews: Lord Carloway’s review of criminal law and practice\(^1\) and Sheriff Principal Bowen’s review of sheriff and jury procedure\(^2\). The Scottish Government sought views on Lord Carloway’s\(^3\) and Sheriff Principal Bowen’s\(^4\) recommendations in two separate consultations. A further consultation was also carried out on whether additional safeguards\(^5\) may be required if the requirement for corroboration is removed. Further information on these consultations can be found in the Policy Memorandum.

4. The Bill is in seven Parts.

5. Part 1 (Arrest and custody) includes provisions on the powers of the police to arrest, hold in custody and question a person who is suspected of committing an offence. This part also provides for the rights of such persons in custody and makes specific provision for vulnerable adults and children.

6. Part 2 (Corroboration and statements) provides for the abolition of the corroboration rule in criminal proceedings as well as the admissibility of mixed and exculpatory statements.

7. Part 3 (Solemn procedure) makes a number of amendments to the solemn procedure set out in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). These include imposing a duty on parties in criminal proceedings to communicate, increasing the length of time for which an accused person can be remanded before having to be brought to trial from 110 to 140 days, and increasing the jury majority required for a guilty verdict.

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\(^1\) http://www.scotland.gov.uk/About/Review/CarlowayReview
\(^2\) http://www.scotland.gov.uk/Publications/2010/06/10093251/0
\(^3\) http://www.scotland.gov.uk/Publications/2012/07/4794
\(^4\) http://www.scotland.gov.uk/Publications/2012/12/8141/0
\(^5\) http://www.scotland.gov.uk/Publications/2012/12/4628
8. Part 4 (Sentencing) increases the maximum sentence for handling offensive weapons offences, places a specific duty on the court to consider whether it is appropriate to punish an offender for committing an offence while on early release, and increases the flexibility for different levels of court to consider imposing a punishment on such offenders.

9. Part 5 (Appeals and SCCRC) amends the 1995 Act to make changes to appeal procedures in the High Court and adjusts how the Appeal Court will consider Scottish Criminal Case Review Commission referrals.

10. Part 6 (Miscellaneous) creates a statutory aggravation of people trafficking which will apply in cases where an accused commits an offence connected with people trafficking. This Part also makes provision to enable the use of TV links by courts and establishes and sets out the functions for a Police Negotiating Board for Scotland.

11. Part 7 contains general and ancillary provisions.

COMMENTARY ON SECTIONS

Part 1 – Arrest and custody

Chapter 1 – Arrest by police

Arrest without warrant

Section 1 – Power of a constable

12. Section 1 sets out new powers of a police constable to arrest, without a warrant, a person suspected of having committed or to be committing an offence in Scotland. (Note, however, that the arrest regime under the Terrorism Act 2000 is unaffected by the Bill (see sections 50(b) and 53)).

13. Section 1(1) provides that a constable (defined in section 54) who has reasonable grounds to suspect that a person has committed or is committing an offence may arrest that person without a warrant.

14. Section 1(2) qualifies the power of a constable to arrest a person without warrant for having committed an offence which is not punishable by imprisonment. Not only must a constable have reasonable grounds for suspecting the person, the constable must also be satisfied that the “interests of justice” would not be met if the person was not immediately arrested for the offence. Section 1(3) sets out factors that may be relevant in applying the “interests of justice” test referred to in section 1(2).

Section 2 – Exercise of the power

15. Section 2 sets out how the power of arrest set out in section 1 can be exercised.
16. Section 2(1) provides that a person may be arrested under section 1 multiple times for the same offence (e.g. a person may be arrested, questioned and released and subsequently arrested again if, for example, further evidence comes to light).

17. Section 2(2) clarifies that the power to arrest again does not apply to persons who have been “officially accused” (defined in section 55) of having committed the offence or an offence arising from the same circumstances. For example, the police cannot use the power of arrest to arrest a person without a warrant if they have a warrant to arrest the person.

Procedure following arrest

Section 3 – Information to be given on arrest

18. Section 3 specifies the information which must be provided by a constable, as soon as is reasonably practicable, to an arrested person. The information will normally be provided immediately upon arrest.

Section 4 – Arrested person to be taken to police station

19. Section 4 sets out the requirement on a constable to take an arrested person to a police station as soon as is reasonably practicable after arrest (if not arrested there). By virtue of section 37 a constable may use reasonable force when doing so.

Section 5 – Information to be given at police station

20. Section 5 sets out the information that must be provided to a person taken to a police station under arrest and to those arrested whilst at a police station.

21. In particular, section 5(2) and (3) set out various matters that the arrested person must be informed of, as soon as reasonably practicable, e.g. their right not to say anything other than to provide information relating to their name, address etc.; their rights to have intimation sent, and to have access, to solicitors and, where appropriate, persons such as parents or other persons capable of giving support; and their rights under Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council, including, for example, a letter of rights which contains basic information to assist persons in understanding their rights.

Section 6 – Information to be recorded by police

22. Section 6 details the information which must be recorded by the police when a person is arrested under section 1.

23. Section 6(1) provides a list of the information to be recorded in respect of all arrests.

24. Section 6(2) to (5) specifies the information that must be recorded in relation to a person arrested and held in police custody (defined in section 56) but not officially charged with an offence e.g. the timing and outcome of a police decision on whether to authorise their continued custody; the time and outcome of any review of continued custody; the time a person is released from custody on conditions or charged.
Chapter 2 – Custody: person not officially accused

Keeping person in custody

Section 7 – Authorisation for keeping in custody

25. Section 7(1) sets out the procedure for keeping a person in custody where the person has been not been arrested under a warrant or charged with an offence by a constable.

26. Section 7(2) provides that authorisation to keep the person in custody must be sought as soon as reasonably practicable after the person is arrested at a police station or arrives at a police station following arrest.

27. Section 7(3) and (4) provide that authorisation to keep a person in custody may only be given by a constable who has not been involved in the investigation in connection with which the person is in custody and if the test set out in section 10 is met. Section 7(5) provides that if authorisation is refused then the person can continue to be held in custody only if charged with an offence.

Section 8 – Information to be given on authorisation

28. Section 8 provides that at the time when authorisation is given to keep a person in custody under section 7, the person must be informed of the reason they are being kept in custody and that they may only be kept in custody without charge for a maximum of 12 hours.

Section 9 – Review after 6 hours

29. Section 9(1) and (2) provide that where a person has been held in police custody for a continuous period of six hours and has not been charged with an offence, a decision must be made on whether to continue to keep that person in custody. That decision must be made as soon as reasonably practicable after the expiry of the period of six hours which started when the authorisation under section 7 was given. In making that decision, the test set out in section 10 is applied (referred to below). Under section 9(3) the decision must be made by a constable of the rank of inspector or above, who has not been involved in the investigation in connection with which the person is in custody. If the test set out in section 10 is not met, the person may continue to be held in custody only if they are charged with an offence.

Section 10 – Test for sections 7 and 9

30. Section 10 sets out the test for keeping a person in custody under section 7(4) and reviewing continuation of that period of custody after six hours under section 9(2).

31. Section 10(1) provides that the test is that there are reasonable grounds for suspecting that the person has committed an offence and keeping the person in custody is necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with the person under the law. In considering what is “necessary and proportionate” regard may be had to (among others) the factors detailed in section 10(2).
Section 11 – 12 hour limit: general rule

32. Section 11 provides that a person may not continue to be held in custody after a continuous period of 12 hours unless that person is then charged with an offence by a constable. The period of 12 hours begins at the point when authorisation to keep a person in custody is given by a constable in accordance with section 7. After the expiry of 12 hours if the person is not charged, they must be released, perhaps conditionally, if appropriate (see section 14).

Section 12 – 12 hour limit: previous period

33. Where a person is held in custody on more than one occasion for the same or a related offence, section 12 provides that the 12 hour maximum period of custody (set out in section 11) is reduced by any earlier period during which the person was held in custody for that offence.

Section 13 – Medical treatment

34. Section 13(1) and (2) apply to a person who is taken into police custody having been arrested without a warrant, has not been charged with an offence and is at a hospital for the purpose of receiving medical treatment. They provide that authority to keep a person in custody may be given as though section 7 applies in the hospital as it does in a police station. For the purpose of calculating the 12 hour maximum period of custody set out in section 11, account will be taken of any time during which a person is at a hospital or travelling to one and is being questioned by a constable (section 13(4) to (6)). The same rules apply in calculating any previous period of custody (section 12(3)).

Investigative liberation

Section 14 – Release on conditions

35. Section 14 applies where a person is in police custody by virtue of the authorisation under section 7 (that is, where a person has been arrested without warrant and not charged, including a case where authorisation has been reviewed and continued under section 9) where a constable has reasonable grounds to suspect that the person has committed a relevant offence and the period of 28 days calculated in accordance with subsection (4) has not expired. As explained further below, the effect of section 14 is to enable the police to release such persons from police custody on conditions which may be applied for a maximum period of 28 days. It follows, that a person could not be released again on investigative liberation if arrested again after those 28 days have expired. The meaning of “relevant offence” is given in subsection (6).

36. Subsection (2) provides that a constable of the rank of inspector or above (subsection (5)) may authorise the release of a person from custody on any condition which is necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence. The meaning of “relevant offence” is given in subsection (6).

37. Section 14(3) ensures that any condition imposed is treated as a liberation condition for the purposes of Chapter 7. This means that a breach of any condition may be penalised by a fine or a prison sentence as outlined in Chapter 7 and, a breach which would be an offence were the person not subject to liberation conditions may be taken into account in sentencing for that offence.
Section 15 – Conditions ceasing to apply

38. Section 15 provides when conditions imposed on a person under section 14(2) cease to apply: namely, (under section 16) if the condition is removed by the police by notice, if the person is arrested in connection with a relevant offence (“relevant offence” as defined by section 15(2)), if the person is officially accused of committing a relevant offence, at the end of the 28 day period (described in section 14(4)) or (under section 17) if the condition is removed as a result of an application for review made to a sheriff against the conditions.

Section 16 – Modification or removal of conditions

39. Section 16 enables a constable, by notice, to modify or remove any condition imposed by the police under section 14(2). A modified condition may be more or less onerous than the condition originally set. Under section 16(2) a notice about the modification or removal of a condition must be given in writing to the person who is subject to it and must specify the time from which the condition is modified or removed. Any modification or removal of a condition requires to be approved by a constable of the rank of an inspector or above. This power gives the police the flexibility to adjust conditions in light of changed circumstances.

40. Section 16(3) provides that a constable of the rank of inspector or above must keep under review whether or not there are reasonable grounds for suspecting that a person who is subject to a condition imposed under section 14(2) has committed a relevant offence (as defined in section 16(8)), and whether the condition imposed remains necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence. If the inspector is no longer satisfied that there are reasonable grounds for suspecting that a person who is subject to a condition has committed a relevant offence, the person must be given notice of the removal of the condition. If no longer satisfied that a condition is necessary and proportionate, again the person must be given notice that the condition is being modified or removed.

41. Section 16(6) provides that any such notice must be given in writing to the person as soon as practicable and it must specify as the time from which the condition is modified or removed, the time at which the duty to give the notice arose i.e. the time at which the decision is made by an appropriate constable, to remove or modify the condition.

Section 17 – Review of conditions

42. Section 17(1) provides that a person who is subject to a condition imposed under section 14(2) may make an application for review to a sheriff.

43. Section 17(2) requires the sheriff to give the procurator fiscal an opportunity to make representations before the review is determined.

44. Section 17(3) provides that where the sheriff is not satisfied that the condition imposed is necessary and proportionate, the sheriff may remove it or impose an alternative condition which the sheriff considers to be necessary and proportionate for that purpose.

45. Section 17(4) provides that a condition imposed on review by the sheriff under section 17(3) is to be regarded as having been imposed by a constable under section 14(2). This
provides that in effect, the conditions set by the sheriff have the same effect and are to be taken as having taken effect when set by the police, i.e. the 28 day period is calculated from the date on which the police conditions were set. Conditions imposed by the sheriff can be modified or removed under section 16(1) in the same manner as police conditions.

Chapter 3 – Custody: person officially accused

Person to be brought before court

Section 18 – Person to be brought before court

46. Section 18(1) and (2) provide that, wherever practicable, persons kept in custody after being arrested under a warrant or arrested without a warrant and subsequently charged with an offence by a constable, must be brought before a court by the end of the next court day. For example, a person arrested at 11pm on a Tuesday and charged with an offence at 2am on the Wednesday would be due in court not later than the end of the court’s sitting on the Thursday.

47. Section 18(3) provides for persons to be considered to be brought before a court if appearing by television link.

Police liberation

Section 19 – Liberation by police

48. Section 19(1) and (2) provide that where a person is in custody having been charged with an offence, the police may: release that person on an undertaking under section 20, release the person without an undertaking or refuse to release. (Note the provisions do not apply where a person is in custody by virtue of a warrant granted under section 29(1)). It is also relevant to note that under section 41 a constable must take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody.

49. Section 19(3) provides that a constable will not be liable to any claim because of a refusal to release a person from custody.

Section 20 – Release on undertaking

50. Again, in considering whether to release a person on an undertaking the police will be mindful of their obligations under section 41 of the Bill (duty not to detain unnecessarily). Section 20(1) provides for a person to be released from police custody on an undertaking given under section 19(2)(a) only if they sign that undertaking.

51. Section 20(2) specifies the terms of an undertaking and section 20(3) and (4) set out the conditions that an appropriate constable (defined in section 20(5) as a constable of the rank of inspector or above) may impose.
Section 20(6) provides that the requirement imposed by an undertaking to attend at court and comply with conditions are to be taken to be liberation conditions for the purposes of Chapter 7 on breach of liberation conditions. This means that a breach of any condition may be penalised by a fine or a prison sentence as outlined in Chapter 7 and a breach which would be an offence were the person not subject to liberation conditions may be taken into account in sentencing for that offence.

Section 21 – Modification of undertaking

53. Section 21(1) enables the procurator fiscal by notice (effected as set out in section 21(5)) to modify an undertaking given under section 19(2)(a), either by changing the time or place of the court hearing or removing or altering a condition in the undertaking. The manner of citation may be effected, for example, by delivering the notice personally or leaving it at the person’s home.

54. Section 21(2) provides that any alteration to a condition in an undertaking should not make a condition more onerous on the person.

55. Section 21(3) provides for the procurator fiscal to rescind an undertaking. This would be appropriate, for example, if a decision is made not to prosecute. Section 21(4) provides for the circumstances in which an undertaking will expire.

Section 22 – Review of undertaking

56. Section 22(1) enables a person subject to an undertaking to apply to the sheriff for review.

57. Section 22(2) provides that the sheriff must provide the procurator fiscal with an opportunity to make representations with regard to the review. Section 22(3) provides that the sheriff may either remove a condition or impose any alternative condition that the sheriff considers to be necessary and proportionate.

Chapter 4 – Police interview

Rights of suspects

Section 23 – Information to be given before interview

58. Section 23 applies to a person who is either in police custody (defined in section 56) or has voluntarily attended a police station, or other place, for the purpose of being interviewed by the police.

59. It requires a constable to inform a person suspected of committing an offence of their rights at the most one hour before any interview commences. These rights are:

- the right not to say anything other than to provide the person’s name, address, date of birth, place of birth and nationality;
- the right to have a solicitor present during any interview; and
• if the person is being held in police custody, the rights detailed in Chapter 5, namely: the right to have another person informed that the person is in custody, the right to have a solicitor informed that the person is in custody and the person’s right of access to a solicitor whilst in custody.

60. Subsection (3) provides that if a person has already exercised their right to have another person or solicitor informed of their custody, then the police are not required to inform the person of these rights a second time.

61. For the purpose of this section, a constable is not to be regarded as interviewing a person about an offence merely by asking for the person’s name, address, date of birth, place of birth and nationality. As such, a constable does not have to inform the person of their rights, as detailed at subsection (2), before asking the person for these details.

Section 24 – Right to have solicitor present

62. This section provides for the right of a person reasonably suspected of committing an offence to have a solicitor present during police interview. It applies to a person who is either in police custody or has voluntarily attended a police station, or other place, for the purpose of being interviewed by a constable.

63. Section 24(3) provides that unless a person has consented to be interviewed without a solicitor present, a constable must not start to interview the person about the alleged offence until a solicitor is present and must not deny the solicitor access to the person at any time during interview.

64. Under subsection (4), a constable may start to interview the person without a solicitor present if satisfied it is necessary to interview the person without delay in the interests of the investigation or prevention of crime, or the apprehension of offenders. This is a high test. If a solicitor becomes available during such time as the police are interviewing a person, the solicitor must be allowed access to that person.

65. For the purpose of this section, a constable is not to be regarded as interviewing a person about an offence merely by asking for the person’s name, address, date of birth, place of birth and nationality. As such, a constable does not have to wait for a solicitor to be present before asking a person for these details.

66. Subsection (6)(a) and (b) provides for a record to be made of the time at which a person consents to be interviewed without a solicitor present and any reason the person gives for waiving the right to have a solicitor present. A person may revoke their consent at any time and in such a case the police must record the time at which a person requests that intimation is sent to a solicitor and the time that intimation is sent (section 6(1)(f) and (g)).

Section 25 – Consent to interview without solicitor

67. Subsection (2)(a) provides that a person under 16 years of age may not consent to be interviewed without a solicitor present.
68. Subsection (2)(b) provides that a person aged 16 years and over and, owing to a mental disorder (as defined in subsection (6)(a)), is considered by a constable to be unable to understand sufficiently what is happening or to communicate effectively with the police, may not consent to be interviewed without a solicitor present.

69. Subsections (3), (4) and (5) provide that a person who is 16 or 17 years of age and not suffering from a mental disorder may consent to be interviewed without a solicitor present with the agreement of a “relevant person”. If the person aged 16 or 17 years is in police custody, a “relevant person” means any person who could by virtue of section 32(2) visit the person. If the person aged 16 or 17 is not in police custody, a “relevant person” means a person who is at least 18 years of age and is reasonably named by the 16 or 17 year old.

Person not officially accused

Section 26 – Questioning following arrest

70. Section 26 enables a constable to question a person following arrest provided the person has not been officially accused of the offence (i.e. charged with the offence by the police or where a prosecutor has started proceedings in relation to the offence), or an offence arising from the same circumstances. The person has the right, however, not to answer any questions but must provide the police with their name, address, date of birth, place of birth and nationality.

71. Under subsection (3), the use, in evidence, of any answers given by a person during questioning is subject to the laws on admissibility. In general terms, this means that any questioning must be fair.

Person officially accused

Section 27 – Authorisation for questioning

72. Section 27 introduces a regime to allow the court to authorise a constable to question an accused person after the person has been officially accused of an offence or offences.

73. Subsection (1) confirms that the court may authorise a constable to carry out questioning once this stage has been reached. There is no provision for any other person, such as a prosecutor, to be so authorised.

74. Subsections (2) and (3) set out the circumstances in which the court can allow this questioning to take place. These provisions are designed to ensure that this power is exercised proportionately, having regard both to the rights of the accused person and to the public interest in gathering evidence in respect of an alleged criminal offence.

75. Thus subsection (2) provides that the court needs to be satisfied that the proposed questioning is in the interests of justice.

76. Subsection (3) sets out further factors which the court must take into account when deciding whether or not to authorise an application for questioning.
77. Subsection (5) applies where a court has granted an application to authorise questioning after the case has called in court, either having been commenced by means of a warrant, or where the accused has appeared in court. In those circumstances, subsection (4) gives the accused person the right to be heard by the court before any decision on the application is made. The person can be represented by a solicitor for these purposes, if the person wishes. It follows that the person has no similar right to be heard in respect of an application about a case which has not yet called in court.

78. Subsection (6) applies where the court has decided to grant the application and authorise questioning. In that event, subsection (6)(a) provides that the court must specify the length of time during which a constable may question the accused person. Subsection (6)(b) allows, but does not require, a court to place other conditions on the questioning to ensure that it is not unfair to the accused person. This might, for example, mean a restriction on the subject matter about which the accused person can properly be questioned.

79. Subsection (7) provides that there is no right of appeal against the decision of a court either to grant or refuse authorisation, or against any conditions imposed by the court under subsection (6)(b).

80. Subsection (8) defines the word “court” for the purposes of this section.

Section 28 – Authorisation: further provision

81. Section 28 makes further provision in respect of questioning after a person has been officially accused of an offence.

82. Subsection (1) sets out who may make an application for authorisation. Where the case against the accused person has called in court in terms of section 27(5), subsection (1)(a) provides that the application must be made by a prosecutor; otherwise the application should be made by a constable (subsection (1)(b)). In the former case, though, even if the application is granted, the questioning will be carried out by a constable, in terms of section 27(1); the prosecutor’s limited right to question an accused person at the inception of solemn proceedings only (generally known as “judicial examination”) is abolished by section 63 of this Bill.

83. Subsection (2) defines “prosecutor” for the purposes of subsection (1).

84. Subsection (3)(a) gives the High Court of Justiciary the power to prescribe, in an Act of Adjournal, the form in which a written application seeking authorisation must be made; and a written application should closely follow that form. Subsection (3)(b), by requiring an applicant to include details of any previous applications for authorisation to question the accused person, either about the same offence, or about another offence arising out of the same circumstances, will ensure that the court has information about any such previous applications.

85. Subsection (4) sets out when authorisation to question the accused person comes to an end: either when the period stipulated by the court under section 27(6)(a) expires; or, when the trial of the accused person starts. Subsection (5) defines when a trial is deemed to have started for this section.
86. Subsection (6) defines “authorisation” and “offence” for the purposes of this section.

Section 29 – Arrest to facilitate questioning

87. Where the police wish to question someone who has been officially accused of an offence, but is at liberty, section 29 provides that it will be open to the court to grant a warrant for the arrest of the accused person so the person can be detained for the purposes of questioning.

88. Subsection (1) provides that, when granting authorisation for questioning, a court can grant a warrant for the accused person’s arrest if it is expedient to do so.

89. Subsection (2) protects the accused person from indefinite detention, by requiring that if the court grants an application for a warrant it must put a time limit on the period for which the person can be detained to be questioned. Subsection (3) makes provision as to when the accused person’s detention, under a warrant granted in terms of this section, must come to an end.

90. Subsection (4) clarifies when an accused person’s detention under a warrant granted in terms of this section starts, making it possible to determine when the period specified in section 29(3)(a) has expired.

91. Subsections (5)(a) and (b) put it beyond doubt that a warrant under this section does not operate to recall or affect the operation of any bail order that the accused person might be on, whether in the same proceedings or not. While the accused person is in custody, having been detained and arrested on the warrant, subsection 24(5)(b) of the Criminal Procedure (Scotland) Act 1995, which makes it a condition of bail that the accused does not commit an offence while on bail, remains in force. This means that if the person commits an offence while detained in custody under a warrant granted in terms of this section, it would be a breach of that condition of bail. Once the accused person’s detention ends, the bail order applies in full, including any conditions attached to that order.

92. Similarly, subsection (5)(c) makes it clear that, where an accused person has been liberated on an undertaking in terms of section 19 of this Bill, the terms and conditions of the undertaking remain in force where a warrant is granted for the accused person, and continue in force after arrest and detention on that warrant.

Chapter 5 – Rights of suspects in police custody

Intimation and access to another person

Section 30 – Right to have intimation sent to other person

93. Section 30 affords a person in police custody the right to have someone else informed that the person is in police custody and where they are being held in custody.

94. This intimation must be sent as soon as reasonably practicable after the person arrives at a police station unless a delay is considered necessary in the interests of the investigation or prevention of crime, or the apprehension of offenders (subsection (5)). Where such a delay is required, it should be for no longer than necessary (subsection (4)(b)).
95. If a constable believes that the person in police custody is under 16 years of age, under subsections (2)(a) and (3)(a), a parent must be informed, regardless of whether the person requests that intimation be sent. The definition of a parent for this section and section 31 includes a guardian and any other person who has the care of the person (subsection (6)).

Section 31 – Right to have intimation sent: under 18s

96. Under this section, if a constable believes that a person in police custody is under 18 years of age, the person sent intimation under section 30 must be asked to attend at the police station or other place where the person is being held (subsection (2)). For those under 16 years this means a parent of the person and for those aged 16 and 17 years, an adult named by them (section 30(3)).

97. If a constable believes that a person in police custody is under 18 years of age and finds that the person to whom intimation is to be sent is not contactable within a reasonable time, or is unable or unwilling to attend in a reasonable time, then intimation must be sent to another appropriate person. An “appropriate person” for these purposes might be a parent or guardian or carer or as a final resort, a duty social worker from the local authority.

98. Where the person in police custody is believed to be under 16, attempts to send intimation must continue until an “appropriate person” is contacted and agrees to attend at the police station or other place the person is being held within a reasonable time. For these purposes, an “appropriate person” means a person the police consider appropriate having regard to the views of the person in police custody.

99. Where the person in police custody is believed to be 16 or 17 years of age, attempts to send intimation must continue until attempts to send intimation must continue until an “appropriate person” is contacted and agrees to attend at the police station or other place the person is being held within a reasonable time or the person in custody requests that, for the time being, no further attempts be made. For these purposes an “appropriate person” means an adult who is named by the person in custody and to whom a constable is willing to send intimation without delay.

100. Subsection (6) provides that, where the police delay sending intimation by virtue of section 30(4)(b) (which allows the police to delay sending intimation where the person to be contacted is someone the police fear will compromise the investigation or the apprehension of offenders), they must endeavour to contact another appropriate person in accordance with subsection (4)).

Section 32 – Right of under 18s to have access to other person

101. Section 32 provides for children under 18 years of age in police custody to have access to another person.

102. Under subsection (1) all children under 16 years of age in police custody must have access, in the first instance, to any parent (defined in subsection (4) to include guardians and carers) to provide support. Subsection (1)(b) ensures that where a parent is not available (that is, where they cannot be reached or are unable to attend within a reasonable time), the child has
access to another appropriate adult sent intimation under section 30, subject to the caveats in section 32(3).

103. Subsection (2) provides similar rights of access for those aged 16 or 17 years. However, in this case the adult granted access to the 16 or 17 year old does not have to be their parent (in line with section 30, which allows this age group to request that intimation be sent under that section to an adult other than their parent). As explained in section 31, intimation may be sent to more than one person. Access must be provided to at least one person (or more, if it is considered appropriate and in the best interests of the child), subject to the caveats in section 32(3).

104. In both subsection (1) and (2) the reference to reasonable time ensures that the police can provide access to another person where the parent (children aged under 16 years) or the initially and reasonably named person (children aged 16 or 17 years) cannot attend within a reasonable time.

**Vulnerable persons**

*Section 33 – Support for vulnerable persons*

105. Section 33 makes provision to identify vulnerable adults in police custody and to provide them with support to assist communication between them and the police. In practice, this support is provided by an Appropriate Adult though this term is not used in the Bill.

106. To ensure support is provided as soon as is reasonably practicable, subsections (1), (2) and (4) provide that, where a police constable (who may have been advised that a person is vulnerable following an initial assessment by the police custody and security officer, who is a uniformed non-warranted officer, whose duties include attending to the wellbeing of a person in their custody) considers that a person in police custody is age 18 or over and is unable, because of a mental disorder, to understand what is happening or to communicate effectively, they must make sure that an Appropriate Adult is told where the person is being held (this is not always at the police station and could be, for example, at a hospital) and that they require the support of an Appropriate Adult.

107. Subsection (3) provides that the role of the Appropriate Adult is to assist a vulnerable person to understand what is happening and to facilitate effective communication between the vulnerable person and the police.

108. Subsection (5) explains that “mental disorder” is as defined in section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (i.e. “any mental illness, personality disorder, learning disability however caused or manifested”). It also explains that references to the police are to constables or members of police staff as provided for in section 99 of the Police and Fire Reform (Scotland) Act 2012. This ensures that a constable can delegate certain tasks, such as intimation to an Appropriate Adult, to a civilian member of police staff.
Section 34 – Power to make further provision

109. Section 34 gives the Scottish Ministers regulation making powers to amend the category of person entitled to support from an Appropriate Adult, and what that support should consist of. It also allows the Scottish Ministers to specify who may be considered a suitable person to provide support to a vulnerable person and what training, qualifications or experience are necessary to undertake this role.

Intimation and access to a solicitor

Section 35 – Right to have intimation sent to solicitor

110. Section 35 affords a person in police custody the right to have a solicitor informed, as soon as reasonably practicable after a request is made by the person in police custody, that the person is being held in police custody, where they are being held and that the professional assistance of a solicitor is required. If the person has been officially accused of an offence (i.e. charged with the offence by the police or where a prosecutor has started proceedings in relation to the offence), the person has the right to have a solicitor informed whether they are to be released from custody or, if not, of the court before which the person is to be brought and the day on which the person will be brought before court.

Section 36 – Right to consultation with solicitor

111. Section 36 provides for the right of a person in police custody to have a private consultation with a solicitor at any time. For the purposes of this section, a consultation is defined by subsection (3) as a consultation by such means as considered appropriate, for example, by telephone.

112. Under subsection (2) the police can delay the exercise of this right only so far as necessary in the interest of the investigation or prevention of crime, or the apprehension of offenders.

Chapter 6 – Police powers and duties

Powers of police

Section 37 – Use of reasonable force

113. Section 37 enables a constable to use reasonable force to effect an arrest and when taking a person in custody to any place.

Section 38 – Common law power of entry

114. Section 38 makes clear that any existing powers of a constable to enter any premises for any purposes are not affected by this Bill. Those powers remain.

Section 39 – Common law power of search etc.

115. Section 39(1) similarly preserves any existing powers of a constable in relation to a person arrested and charged, for example, to search them, seize items in their possession and place them in an identification parade (this list is not exhaustive).
Section 40 – Power of search etc. on arrest

116. Section 40 makes clear that the powers described in section 39(2) which can be exercised by a constable in relation to a person after arrest and charge can also be exercised between a person’s arrest and the person being charged.

Duties of police

Section 41 – Duty not to detain unnecessarily

117. Section 41 provides that a constable must ensure that a person is not unreasonably or unnecessarily held in police custody.

Section 42 – Duty to consider child’s best interests

118. Section 42 states that in making decisions to arrest a child (defined for this section in subsection (3) as a person under 18 years of age), hold a child in police custody, interview a child about an offence which the child is suspected of committing, or charge a child with an offence, a constable must treat the need to safeguard and promote the well-being of the child as a primary consideration. This does not mean that the interests of the child are the only consideration or that they are, in all cases, the most important consideration. For example, the need to protect others may prevail.

Chapter 7 – Breach of liberation condition

Section 43 – Offence where condition breached

119. Section 43(1) sets out the circumstances in which a person breaches a liberation condition and thereby commits an offence. A “liberation condition” includes investigative liberation conditions imposed before charge under section 14(2) or requirements imposed by an undertaking given after charge under section 19(2). Section 43(2) provides that section 43(1) does not apply when a person breaches a liberation condition by reason of committing an offence. Such breaches are dealt with in accordance with section 45. An example of a breach of condition which may, of itself, not constitute a separate offence is a condition not to enter a particular street. If the person subject to the condition is subsequently found in that street, then a breach of liberation has occurred, but not a separate offence. If the condition was that the person was not to approach a particular witness in the case and the person does contact the witness then not only has a breach of condition occurred, but a more serious offence (attempting to defeat the ends of justice) may have taken place.

120. Section 43(3) provides that a complaint may be amended to add an additional charge of an offence of breaching a liberation condition at any time before the trial of an accused for either the original offence (see section 43(4)) or an offence arising from the same circumstances as that offence.

Section 44 – Sentencing for section 43 offence

121. Section 44(1) sets out the penalties applicable to a person convicted of an offence of breaching a liberation condition under section 43. Sections 44(2) to (3) provide that such a penalty may be imposed in addition to any other penalty that may be imposed, even if the total
exceeds the maximum penalty for the original offence. The penalties should run consecutively, subject to section 204A of the Criminal Procedure (Scotland) Act 1995 Act which concerns restriction on consecutive sentences for released prisoners. The provisions put beyond doubt that the penalty imposed for breach of the condition can be imposed on top of the penalty for original offence, even where the penalty imposed for the original offence represents the maximum penalty applicable in the circumstances.

122. Subsections (5) and (6) provide that where a court finds a person guilty of breaching a liberation condition, or the person pleads guilty to that offence, the person may be sent for sentence at any court which is considering the original offence (as defined in subsection (7).

Section 45 – Breach by committing offence

123. Section 45 applies where a person breaches a liberation condition by committing an offence and the fact that the offence was committed whilst the person was subject to a liberation condition is specified in the complaint or indictment. This is distinct from failing to comply with a condition and applies where the person is being prosecuted for the offence committed while on liberation conditions.

124. Section 45(2) requires the court, in determining the penalty for the offence, which constituted the breach of condition, to have regard to the matters specified.

125. Section 45(3) and (4) enable the court to increase the maximum penalty otherwise specified for the offence. This provision effectively displaces the maximum penalty, allowing the court to add to the penalty to take account of the fact that a breach of conditions has occurred as a consequence of the commission of an offence.

126. Section 45(5) requires the court to explain the reasons for the penalty imposed for the offence, whether it imposes an increased penalty or not.

Section 46 – Matters for section 45(2)(b)

127. Where a person breaches an investigative liberation condition, as defined in section 49(a), by committing an offence, the court must have regard to the matters specified in section 46 in determining the penalty.

Section 47 – Matters for section 45(2)(c)

128. Where a person breaches the terms of an undertaking, as defined in section 49(c), (other than the requirement to appear to court) by committing an offence, the court must have regard to the matters specified in section 47 in determining the penalty.

Section 48 – Evidential presumptions

129. In proceedings relating to an offence under section 43(breach of liberation conditions), the evidential presumptions sets out in section 48 apply.
Chapter 8 – General

Common law and enactments

Section 50 – Abolition of pre-enactment powers of arrest
130. Section 50 provides that the only power of arrest which the police have to bring a person into police custody comes from Section 1 of this Bill and Section 41(1) of the Terrorism Act 2000.

Section 51 – Abolition of requirement for constable to charge
131. Section 51 provides that a constable does not have to charge a suspect with a crime at any time and abolishes any rule of law that requires such a charge to be made.

Section 52 – Consequential modification
132. Section 52 provides that schedule 1 to the Bill contains details of changes to existing legislation as a consequence of Part 1. Paragraph 242 provides further detail in regard to schedule 1.

Disapplication of Part

Section 53 – Disapplication to terrorism offences
133. Section 53 provides that Part 1 of the Bill, dealing with arrest and custody, does not apply to persons arrested under the Terrorism Act 2000.

Interpretation of Part

Section 54 – Meaning of constable
134. Section 54 defines the meaning of constable for the purposes of this Part.

Section 55 – Meaning of officially accused
135. Section 55 defines the meaning of the term “officially accused” for the purposes of this Part.

Section 56 – Meaning of police custody
136. Section 56 defines the meaning of police custody for the purposes of this Part.

Part 2 – Corroboration and statements

Abolition of corroboration rule

Section 57 – Corroboration not required
137. Section 57 provides that, subject to the conditions set out in sections 58 and 59, where a fact has been established by evidence in any criminal proceedings, the judge or jury is entitled to find the fact proved by the evidence although the evidence is not corroborated.
138. The effect of this provision is to abolish the requirement in Scots common law that the essential facts of a case must be proven by corroborated evidence, which is to say evidence from two separate sources.

Section 58 – Effect of other enactments

139. Section 58 provides that the removal of the requirement for corroboration does not apply where an enactment specifically provides that, in relation to proceedings for an offence, a fact requires to be proven by corroborated evidence (for example, section 89(2) of the Road Traffic Regulation Act 1984, which provides that a person cannot be convicted for speeding on the uncorroborated evidence of one witness that the person was breaking the speed limit).

Section 59 – Relevant day for application

140. Section 59 provides that section 57 only applies in relation to proceedings for an offence committed on or after the date on which section 57 comes into force. The date on which section 57 comes into force will be specified by the Scottish Ministers in an order under section 90(2).

Section 60 – Deeming as regards offence

141. Section 60 provides that where an offence is committed over a period of time which includes the date on which section 57 comes into force, the requirement for corroborative evidence does not apply to the offence as a whole; meaning that corroborative evidence is not needed to prove those parts of the offence which took place before the date on which section 57 comes into force.

Section 61 – Transitional and consequential

142. Section 61 introduces schedule 2, which contains transitional and consequential provision relating to the removal of the requirement for corroboration. Schedule 2 is explained in paragraphs 243 to 247 of these Notes.

143. Section 61(3) provides that the consequential modifications provided for in Part 2 of schedule 2 only have effect in relation to criminal proceedings to which section 57, removing the requirement for corroboration, applies.

Statements by accused

Section 62 – Statements by accused

144. Section 62 inserts new section 261ZA into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). New section 261ZA will modify the common-law rule on the admissibility of hearsay evidence in criminal proceedings, as it applies to certain types of statement made by an accused.

145. Section 261ZA(1) and (2) provide that evidence of a statement made by an accused in certain circumstances is not inadmissible as evidence of a fact contained in the statement on account of the evidence being hearsay. The provision applies to a statement made by the accused in the course of being questioned (whether as a suspect or not) by a constable or another official investigating an offence.
146. The provision modifies the law relating to hearsay. As explained by the High Court of Justiciary in *Morrison v HM Advocate* 1991 SLT 57, “The general rule is that hearsay, that is evidence of what another person has said, is inadmissible as evidence of the facts contained in the statement”. That general rule is subject to exceptions. The existing common-law exceptions (discussed in *McCutheon v HM Advocate* 2002 SLT 27) allow for a statement made by the accused to be admitted as evidence of a fact contained in the statement if it is inculpatory of the accused (e.g. a confession) or “mixed” (e.g. a statement in which the accused puts himself or herself at the locus at the time the offence was committed, but does so in the context of proffering an innocent explanation for why the accused was there). The common-law does not, however, allow evidence of a statement made by the accused to be admitted as evidence of a fact asserted in the statement if the statement is purely exculpatory of the accused.

147. Subject to subsection (3), section 261ZA extends the exceptions by dispensing with the distinctions between inculpatory, exculpatory and mixed statements. The effect is that any statement made by an accused person to a constable or another official investigating an offence is excepted from the general rule that hearsay evidence is not admissible as evidence of a fact contained in the statement, regardless of whether it is inculpatory, exculpatory or “mixed”.

148. By virtue of subsection (3), section 261ZA does not affect the admissibility of evidence of a statement made by an accused as evidence in relation to a co-accused. Section 261 of the 1995 Act lays down special rules which apply before hearsay evidence of a statement by one accused can be admitted in evidence in relation to another accused. Those rules will continue to apply before evidence of a statement made by accused A can be treated as evidence of fact in the case for or against accused B.

149. New section 261ZA is restricted in its effect to superseding objections to the admissibility of evidence based on its hearsay quality. The provision does not override any other objections to the admissibility of evidence of a statement, such as objections to its admissibility based on the fairness of the circumstances in which the statement was made, or based on the content of the statement (for example, section 274 of the 1995 Act, which concerns the admissibility of evidence relating to the sexual history or character of a complainer in a sexual offence case, will still apply).

**Part 3 – Solemn procedure**

*Section 63 – Proceedings on petition*

150. Section 63 changes the procedure to be followed at what are usually the first court appearances of a person being prosecuted under solemn procedure, when the person appears on petition.

151. The purpose of these provisions is to abolish the procedure, commonly known as judicial examination, whereby the prosecutor can, at the commencement of a case being prosecuted under solemn procedure, question the accused in the presence of the sheriff. In addition, the section 63 removes the rarely-used option for the accused to make a declaration – broadly, a statement of his or her position in respect of the charge or charges on the petition – at that stage in proceedings.
152. Subsection (1) inserts a provision into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which removes the accused’s common-law right to be given the opportunity to make a declaration at the commencement of a case being prosecuted under solemn procedure.

153. Subsection (2) both removes from statute various provisions which relate to declarations, and abolishes the procedure known as judicial examination.

154. Subsection (2)(a) removes, from the 1995 Act, provisions which govern the making of declarations, and the right of the prosecutor to question the accused on extra-judicial confessions.

155. Subsection (2)(b) removes from the 1995 Act three sections which enable and regulate procedure at judicial examinations. By so doing, it abolishes the procedure.

156. Subsections (2)(c), (2)(d), and (2)(e) remove from the 1995 Act various provisions in respect of any records made of a judicial examination. These changes are consequential to the abolition of the judicial examination procedure by subsection (2)(b).

Section 64 – Citation of jurors

157. Section 64 removes from section 85(4) of the Criminal Procedure (Scotland) Act 1995 the requirement to cite potential jurors by registered post or recorded delivery. It thereby allows potential jurors to be cited by any means the sheriff clerk thinks appropriate, which may include electronic means.

Section 65 – Pre-trial time limits

158. Sections 65 to 67 make changes to the procedure followed in proceedings on indictment in the sheriff court.

159. Section 66 introduces a requirement on the prosecution and the defence to communicate and to lodge a written record of their state of preparation in advance of the first diet.

160. Section 67 provides that the arrangement by which a sheriff court indictment assigns dates for both the first diet and the trial ceases to have effect. Instead the court will appoint a trial diet at the first diet, or at a continuation of it, having ascertained the parties’ state of preparation.

161. Section 65 makes changes to the time limits prescribed in section 65 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which are intended to allow time for the procedure set out in section 66. In particular the period during which the accused can be remanded in custody pending a first diet and trial are brought in line with the corresponding High Court limits to reflect the altered pre-trial procedure.

162. Subsection (2) amends section 65 of the 1995 Act to set out revised time limits for various procedural steps in proceedings on indictment in the sheriff court.

163. The amendments made by subsection (2)(a) and (b) prevent the accused being tried on indictment in the sheriff court where the first diet is not commenced within 11 months of the first
appearance on petition. That period can be extended by the court under section 65(3) of the 1995 Act. The 12-month period within which the trial must be commenced, as specified in section 65(1)(b) of the 1995 Act is unaffected. The amended provisions mirror the equivalent arrangements for proceedings in the High Court.

164. Subsection (2)(c) amends the provisions in section 65(4) of the 1995 Act concerning the periods during which the accused person who is committed until liberated in due course of law (i.e. imprisoned to await the outcome of a trial) can be detained by virtue of that committal where an indictment has been served in respect of the sheriff court. The effect of the amendment is that the accused person must be liberated after 110 days, if no first diet has been held, and 140 days if such a diet has been held, unless the trial begins within that period. These periods can be extended by the court under section 65(5) of the 1995 Act. Again, the amended provisions mirror High Court procedure. To assist in the calculation of the time period, subsection (2)(d) amends section 65(9) of the 1995 Act to provide that the first diet in the sheriff and jury court shall be taken to commence when it is called.

165. Subsection (3) amends section 66(6) of the 1995 Act to replace the arrangements whereby an accused person is to be tried on indictment in the sheriff court is given notice of the first diet and trial diet at the same time as being served with the indictment. Instead, the accused will be given notice only of the first diet and the date of the trial diet will be fixed at the first diet. The period within which the first diet must take place will be increased from 15 clear days from the service of the indictment to 29 clear days; this change makes the sheriff court practice consistent with High Court practice.

166. Subsection (4) amends section 72C(4) of the 1995 Act for consistency with the amendment made by subsection (3). Section 72C(4) is a provision in similar terms to section 66(6), it deals with the situation where a fresh indictment has to be served on an accused because a preliminary hearing before the High Court either did not take place when it was supposed to, or was deserted for the time being without another hearing being appointed.

Section 66 – Duty of parties to communicate

167. Section 66 amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to impose a duty on the prosecution and the defence, in cases indicted to the sheriff court, to communicate and to prepare a written record of their state of preparation.

168. Subsection (2) amends section 71 of the 1995 Act by inserting a new subsection (1ZA) which requires the court to have regard to the written record when ascertaining the parties’ state of preparation at the first diet.

169. Subsection (3) inserts a new section 71C into the 1995 Act. Subsection (2) of this new section requires the prosecutor and the accused’s legal representative (as defined in subsections (8) and (9)) to communicate and jointly to prepare a written record of the state of preparation of their respective cases. The requirement arises where the accused is indicted to the sheriff court and is represented by a solicitor (new section 71C(1)).
170. Subsection (3) of the new section 71C provides that the period within which the communication must take place, and within which the written record of the state of preparation must be prepared is the period beginning with the service of the indictment and ending 14 days later. Subsection (4) provides that the written record thus established must be lodged with the sheriff clerk at least two days before the first diet, though the court may, on cause shown, extend this deadline (subsection (5)).

171. Subsection (6) of the new section 71C provides for the form, content, and arrangements for lodging of the written record, to be prescribed under an Act of Adjournal. Subsection (7) provides that the record must include a statement of how the communication required by this new section took place. Subsection (7) gives examples of the means by which the communication may take place, but the examples are not exhaustive of the means that might be employed.

172. Section 66(4) of the Bill amends section 75 of the 1995 Act to include a reference to the period mentioned in section 71C. This ensures that, where the 14 day period referred to in section 71C(3) ends on a weekend or on a court holiday, it is extended to include the next day that is not a Saturday, Sunday or court holiday.

Section 67 – First diets

173. Section 67 deals with the procedure at first diets in proceedings on indictment in the sheriff court.

174. Subsection (2) amends section 66 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Subsection (2)(a) requires the notice served on the accused with the indictment to include a warning to the accused that the first diet may proceed in his or her absence and that a trial diet may be fixed in his or her absence. This is distinct from the intimation that requires to be given by virtue of section 66(6AA) where the accused is a body corporate. However, even if the notice does not contain this warning, the amendment to section 66(6B) of the 1995 Act made by subsection (2)(b) ensures that the validity of the notice, and other procedure against the accused, is not invalidated by the omission.

175. Subsection (3) amends section 71 of the 1995 Act. The amendments provided for in subsection (3)(a), (b) and (d) are consequential on the new arrangements whereby the trial diet is appointed at the first diet (see discussion below of new section 71B). Subsection (3)(c) ensures that the requirement in section 71(6) that the accused should be called upon to plead at the first diet does not prevent the first diet proceeding in the absence of the accused. Subsection (3)(e) extends to the new section 71B discussed below the definition of the word “court” in section 71 of the 1995 Act, so that in the new section 71B references to the court will be understood as references to the sheriff court only.

176. Subsection (4) inserts a new section 71B into the 1995 Act, to deal with appointment of a trial diet at the first diet.

177. Subsection (1) of the new section 71B provides that, having taken the steps and examined the issues required at the first diet, the court only then goes on to appoint a trial. The appointing
of a trial has to be in accordance with subsections (3) to (7), which are discussed below. Subsection (2) requires the accused to appear at the trial diet.

178. Subsections (3) and (4) of the new section 71B apply when a case is subject to the requirement that the trial must commence within 12 months of the accused’s first appearance on petition. If the court considers that the case would be likely to be ready to proceed to trial within the 12 months (which may not be 12 months from the petition appearance, because the period can be extended under section 65(3) of the 1995 Act) the court must, subject to subsections (5) to (7) appoint a trial within the 12 month period. If the court does not think the case will be ready to proceed within the 12 months, the prosecutor must be given an opportunity to seek an extension of the 12 month period. If an extension is granted the court must, again subject to subsections (5) to (7), appoint a trial within the 12 month period as extended. If the period is not extended the court may desert the first diet (either permanently or for the time being only) and if the accused is being held in custody pending trial, the accused must be liberated.

179. Subsections (5) to (7) of the new section 71B apply where, in addition to the court being required to appoint a trial diet within the 12 month period under subsection (3) or (4), the accused has been committed until liberated in due course of law (i.e. imprisoned to await the outcome of a trial) and cannot be detained by reason of that committal for more than 140 days without being put on trial. In that event, as well as appointing a trial diet within the 12 month period, the court must appoint a trial within the 140 day period if it is satisfied that the case will be ready to go to trial within that period. If the court is not satisfied about that, the prosecutor must be given an opportunity to apply for an extension of the 140 day period. If an extension is granted the court must appoint a trial for a date within the 140 day period as extended (as well as within the 12 month period). If the period is not extended the accused is entitled to be admitted to bail. In that event, subsection (8) requires the court to give the prosecutor an opportunity to be heard before admitting the accused to bail.

180. Where the court has appointed a trial diet for an accused on bail (other than in the circumstances where the accused has been bailed as described in the previous paragraph) subsection (9) of the new section 71B requires that the court must review the accused’s bail conditions and empowers it, if it considers it appropriate, to set different conditions.

181. Subsection (10) of the new section 71B defines the 12 month and 140 day time limits with reference to the applicable provisions of section 65 of the 1995 Act.

182. Subsection (5) of section 67 amends section 76(3) the 1995 Act which makes provision for the situation where a diet fixed as a result of an intimation given by the accused under section 76(1) (that he intends to plead guilty) does not result in pleas being accepted in respect of all charges. The amendment allows the court to postpone a first diet where a case has been indicted to the sheriff court on the same basis as the power to postpone a preliminary hearing where the case has been indicted to the High Court. 

183. Subsection (6) inserts a new section 83B into the 1995 Act applying to jury trials in the sheriff court. The section allows trials that have not yet been commenced to be continued from sitting day to sitting day, up to a maximum number of sitting days after the day originally appointed for the trial, the maximum being set by Act of Adjournal. Failure to commence the
trial by the end of the last sitting day permitted results in the indictment falling and proceedings against the accused coming to an end.

Section 68 – Preliminary hearings

184. Section 68 reverses the effect of amendments to section 72A of the Criminal Procedure (Scotland) Act 1995 effected by section 7(3) of the Vulnerable Witnesses (Scotland) Act 2004. The amendments, which relate to proceedings in the High Court, were mistakenly applied after the section to which they related was repealed by the Criminal Procedure (Amendment) (Scotland) Act 2004, and replaced with another section with the same number.

Section 69 – Plea of guilty

185. Section 69 repeals that part of section 77(1) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which requires that the accused pleading guilty to an indictment should sign a copy of the plea. Section 70(7) of the 1995 Act, which provides for an exception to the signing requirement where the accused pleading guilty is an organisation, is thereby rendered obsolete and is also repealed.

Section 70 – Guilty verdict

186. Section 70 amends the law concerning the size of the majority required for a jury to return a verdict of guilty, in both the High Court and the sheriff court.

187. Subsection (1) repeals section 90(2) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which prescribes conditions for the returning of a verdict of guilty where the size of the jury in a criminal trial falls below 15.

188. Subsection (2) inserts new section 90ZA into the 1995 Act. Section 90ZA(1) provides that a jury of 15 members may return a verdict of guilty only if at least 10 of them are in favour of that verdict.

189. Section 90ZA(2) sets out the number of jurors required to return a verdict of guilty where the jury size falls below 15. In each case, a majority of at least two thirds of the jurors is required.

190. Section 90ZA(3) provides that a jury is to be regarded to have returned a verdict of “not guilty” if it does not return a verdict of “guilty” in accordance with subsection (1) or (2) and there is no majority in favour of either a “not guilty” or “not proven” verdict.

Part 4 – Sentencing

Maximum term for weapons offences

Section 71 – Maximum term for weapons offences

191. The Criminal Law (Consolidation) (Scotland) Act 1995 creates the following offences:

- carrying an offensive weapon in a public place (section 47);
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

• possessing an article with a blade or point in a public place (section 49);
• possessing an article with a blade or point (or weapons) on school premises (section 49A);
• having an offensive weapon etc. in prison (section 49C).

192. Section 71 of the Bill increases the maximum penalty for each of those offences from 4 to 5 years.

Prisoners on early release

Section 72 – Sentencing under the 1995 Act

193. Section 72 of the Bill inserts a new section 200A into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). New section 200A(1) of the 1995 Act provides that when the court is dealing with a person who has been found to have committed an offence that is capable of being punishable with imprisonment (except where the offence is such that the court is required to impose a life sentence), the court must so far as is reasonably practicable ascertain whether the person was on early release from a previous sentence at the time the offence was committed.

194. Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”), Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003 provide for the operation of release from custody of a prisoner prior to the end of a prisoner’s sentence. The operation of these provisions is commonly known as “early release” arrangements. For the purposes of new section 200A, new section 200A(3) provides that a person is on early release if they are not in custody as a result of the operation of Part I of the 1993 Act, Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003.

195. Section 16 of the 1993 Act provides the court with a power to be able to punish a person who commits an offence while on early release. This power is separate and additional to the normal powers of the court to sentence the person for having committed the offence. These powers are commonly known as section 16 orders and can be seen as a punishment on a person for having abused the trust placed in them by committing an offence while on early release.

196. New section 200A(2) provides that where the court has determined under new section 200A(1) that a person was on early release at the time the offence was committed, the court must consider making a section 16 order.

197. New section 200A(2) also provides that in the case where the court dealing with the offence is inferior to the court which imposed the previous sentence from which the person was released early, an inferior court must consider making a reference to the court which imposed the previous sentence so that they can consider making a section 16 order. This is subject to the new powers being given to inferior courts to make section 16 orders contained in section 73(4) of the Bill.
Section 73 – Sentencing under the 1993 Act

198. Where an offence ("the new offence") has been committed while a person was on early release, section 16(2) of the 1993 Act provides that a Scottish court may, instead of or in addition to imposing a sentence for plea or finding of guilt, order that a person may be returned to prison for a period of time. This period can be up to a maximum length equal to the period of time between the date on which the new offence was committed and the date of the expiry of their previous sentence. Section 16(2)(b) of the 1993 Act provides that where the court dealing with the new offence is inferior to the court which imposed the sentence from which the person was released early, the inferior court cannot directly impose a section 16 order and can only refer the case to the higher court for consideration to be given as to whether a section 16 order should be imposed.

199. Section 73(2) of the Bill adjusts section 16(1) of the 1993 Act so that prisoners released early under Part 12 of the Criminal Justice Act 2003 can have section 16 orders imposed upon them.

200. Section 73(4) of the Bill inserts new section 16(2A) into the 1993 Act. New section 16(2A) provides new discretion for courts dealing with persons who have committed offences while on early release from a previous sentence imposed by a higher court. The effect of the new discretion is that inferior courts will be able to consider making a section 16 order in such cases.

201. The powers of inferior courts to impose section 16 orders are restricted to those cases where the maximum length of a section 16 order does not exceed the sentencing powers of the court in respect of common law offences. Section 7(6) of the 1995 Act provides that a Justice of the Peace court can impose a custodial sentence for common law offences of up to 60 days. Section 5(2) of the 1995 Act provides a sheriff’s summary court, including when constituted by a stipendiary magistrate (by virtue of section 7(5) of the 1995 Act), can impose a custodial sentence for a common law offence of up to 12 months. Section 3(3) of the 1995 Act provides a sheriff solemn court can impose a custodial sentence for a common law offence of up to 5 years.

202. New section 16(2A)(b)(i) provides that a Justice of the Peace court, except when constituted by a stipendiary magistrate, will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 60 days.

203. New section 16(2A)(b)(ii) provides that a Justice of the Peace court constituted by a stipendiary magistrate or a sheriff sitting summarily (i.e. without a jury) will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 12 months.

204. New section 16(2A)(b)(iii) provides that a sheriff sitting as a court of solemn jurisdiction (i.e. with a jury) will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 5 years.

205. Section 73(3) makes consequential changes to section 16(2) reflecting the insertion of new section 16(2A) into the 1993 Act.
Part 5 – Appeals and SCCRC

Appeals

Section 74 – Preliminary pleas in summary cases

206. Section 174 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") allows for decisions disposing of certain objections and denials in summary proceedings, including objections to the competency and relevancy of the complaint, to be appealed to the High Court where the first instance court gives permission for the appeal. Section 74 of the Bill amends section 174 of the 1995 Act by removing the requirement to obtain permission for an appeal by the prosecutor against a decision that has resulted in the dismissal of the complaint, or any part of it.

Section 75 – Preliminary diets in solemn cases

207. Section 74 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act) allows for decisions taken at first diets and preliminary hearings to be appealed to the High Court where the first instance court gives permission for the appeal. Section 75 of the Bill amends section 74 of the 1995 Act by removing the requirement to obtain permission for an appeal by the prosecutor against a decision that has resulted in the dismissal of the indictment, or any part of it.

Section 76 – Extending certain time limits: summary

208. Section 76 amends section 181 of the Criminal Procedure (Scotland) Act 1995 Act ("the 1995 Act") so as to make further provision concerning applications to extend certain time limits that apply in relation to appeals from summary proceedings.

209. Subsection (2) inserts provisions prescribing the test to be applied by the High Court when determining an application to extend the period within which a convicted person may apply for a stated case. Subsections (3) and (4) omit the provisions under which the respondent in relation to an application under section 181(1) of the 1995 Act may insist on a hearing. Subsection (5) inserts section 181(5) which requires the court to give reasons in writing for a decision to extend a period on an application under section 181(1).

210. By virtue of section 186(8) of the 1995 Act, the amendments effected by section 76 of the Bill also have effect in relation to certain applications to extend the period allowed for the lodging of a note of appeal under section 186.

Section 77 – Extending certain time limits: solemn

211. Section 77 makes provision concerning applications to the High Court under section 111(2) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") applications to extend the period within which a convicted person may lodge intimation of intention to appeal, or a note of appeal.

212. Subsections (3) to (6) amend section 111. Subsection (3) inserts provisions prescribing the test to be applied by the High Court when determining an application under section 111(2) when it is received after the expiry of the period to which it relates. Subsection (4) amends...
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

section 111(2A) so as to extend to every application under section 111(2) the requirement on the applicant to state reasons for the failure to comply with the applicable time limit and to state the proposed grounds of appeal. Subsection (6) inserts section 111(4) which provides that applications under section 111(2) are to be dealt with in chambers and, unless the court otherwise directs, without parties being present. Subsections (1) and (5) contain amendments that are consequential on this change. Subsection (6) also inserts section 111(5) which requires the court to give reasons in writing for a decision to extend a period.

Section 78 – Certain lateness not excusable

213. Section 78 amends section 300A of the Criminal Procedure (Scotland) Act 1995 by inserting a new subsection (7A). Section 300A gives courts a general power to excuse failures to comply with procedural requirements. The amendment precludes a failure to timeously lodge certain documents from being excused under section 300A. The documents in question are those which the High Court can permit being lodged late by applying the tests that are to be amended by sections 76 and 77 of the Bill (i.e. documents used to initiate appeals from, respectively, summary and solemn proceedings).

Section 79 – Advocation in solemn proceedings

214. Section 79 inserts section 130A into the Criminal Procedure (Scotland) Act 1995, which provides that it is not competent for a decision taken at a first diet or preliminary hearing to be appealed to the High Court by bill of advocation. The provision excludes bill of advocation as a competent method of appealing a decision that could be appealed under the procedure provided for in section 74 of the 1995 Act.

Section 80 – Advocation in summary proceedings

215. Section 80 inserts section 191B into the Criminal Procedure (Scotland) Act 1995. The new section applies to decisions disposing of certain objections and denials which require to be stated before a plea is tendered in summary proceedings, including objections to the competency or relevancy of a complaint. Such decisions can be appealed to the High Court under the procedure provided for in section 174 of the 1995 Act. The new section provides that such decisions cannot also be competently appealed by way of bill of advocation.

Section 81 – Finality of appeal proceedings

216. Section 81(1) amends section 124(2) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) (as amended by section 36(11) of the Scotland Act 2012) by removing references to section 288ZB of the 1995 Act.

217. Section 81(2) inserts a new section 194ZA into the 1995 Act. Subject to the exceptions specified, the new section provides that decisions of the High Court when disposing of an appeal related to summary proceedings are final and conclusive and not subject to review by any court whatsoever. The new section is in similar terms to the corresponding provision in section 124(2) of the 1995 Act, which relates to decisions of the High Court when disposing of appeals from solemn proceedings.
SCCRC

Section 82 – References by SCCRC

218. Section 82 of the Bill amends the Criminal Procedure (Scotland) Act 1995 to adjust how the High Court considers cases referred to it by the Scottish Criminal Cases Review Commission (“the SCCRC”).

219. Section 82(2) of the Bill inserts new subsection (1A) into section 194B of the 1995 Act and provides that the High Court can only quash a conviction or sentence if it is satisfied that it is in the interests of justice to do so. New subsection (1B) provides that when the High Court is considering the interests of justice, they must have regard to the requirement for finality and certainty in the determination of criminal proceedings.

220. Section 82(4) of the Bill repeals section 194DA of the 1995 Act so that the High Court will no longer have the power to reject a SCCRC reference without hearing the appeal.

221. The overall effect of section 82 is that the High Court will apply the interests of justice test alongside hearing an appeal based on a SCCRC reference, rather than applying the interests of justice in order to decide whether to allow an appeal based on a SCCRC reference to be heard.

Part 6 – Miscellaneous

Chapter 1 – Procedural matters

Aggravation as to people trafficking

Section 83 – General aggravation of offence

222. Section 83 makes provision for a statutory aggravation which applies in cases where an accused commits an offence connected with people trafficking. Subsection (1) applies where an indictment or complaint libels or specifies that an offence is aggravated by a connection with people trafficking activity and it is subsequently proved that the offence is aggravated in that way.

223. Subsection (2) sets out the circumstances in which an offence can be regarded to have been aggravated by a connection with people trafficking. This relies on proof that the accused was motivated, in whole or in part, by the objective of committing or conspiring to commit a people trafficking offence. In terms of subsection (3), it is not material to establishing the aggravation whether or not a people trafficking offence (as defined in section 85(1)) was committed at any time or by the offender or another specific person.

224. Subsection (4) sets out the steps the court must take when it is libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with people trafficking and proved that the offence is so aggravated. In addition to a number of formal matters, the court must take the aggravation into account in determining the appropriate sentence.
Section 84 – Aggravation involving public official

225. Section 84 makes similar provision about a statutory aggravation which applies in cases where a public official, acting or purporting to act in the course of official duties, commits a people trafficking offence.

Section 85 – Expressions in sections 83 and 84

226. Section 85(1) defines people trafficking offences for the purpose of sections 83 and 84. Subsection (2) defines those to be considered as a public official for the purposes of section 84 while subsection (3) defines the term “an international organisation”.

227. Subsection (4) enables the Scottish Ministers to modify by regulations the offences considered to be people trafficking offences, the definition of who is a public official and the definition of an international organisation.

Use of live television link

Section 86 – Use of live television link

228. Subsection (1) of section 86 inserts sections 288H to 288K into the Criminal Procedure (Scotland) Act 1995. The new sections (discussed in greater detail in the following paragraphs) make provision for the participation of detained persons in hearings by means of live television link from the place of detention.

229. Subsection (2) repeals enactments in consequence of the new sections of the 1995 Act inserted by subsection (1). Specifically, paragraph (a) repeals section 117(6) of the 1995 Act, which requires an appellant in an appeal from solemn proceedings to appear before the court in ordinary civilian clothes. Paragraph (b) repeals section 80 of the Criminal Justice (Scotland) Act 2003, which allowed certain court appearances to be conducted by means of live television link and is rendered obsolete by the wider reaching new sections inserted by section 86 of the Bill.

Inserted section 288H – Participation through live television link

230. Subsection (1) requires a detained person to participate in a “specified hearing” (defined by inserted section 288J) by means of live TV link where the court has determined that the hearing should proceed in that manner. Before so determining, subsection (2) requires the court to give the parties an opportunity to make representations on the use of the TV link in the hearing. The court can only allow the hearing to proceed by TV link if satisfied that it is not contrary to the interests of justice to do so.

231. Subsection (3) gives the court the power to require a detained person to appear by TV link from the place where the person is in custody at an ad hoc hearing for the sole purpose of considering whether to make a determination on the use of TV links.

232. Where a detained person participates in a hearing by means of a TV link, the effect of subsection (4) is that the place of detention is deemed part of the court room, so that the hearing is deemed to take place in the presence of the detained person.
Inserted section 288I – Evidence and personal appearance

233. Subsection (1) precludes evidence as to the charge against the detained person being led at a hearing in which the detained person is participating by means of a TV link. It would therefore not be possible for a trial to proceed with the accused participating by TV link.

234. Subsection (2) gives the court the power to revoke, before or during a hearing, a determination (under section 288H(1)) that the accused is to participate at the hearing by TV link. Subsection (2)(b) requires that the court exercise the power to revoke the determination if it considers that it is in the interests of justice for the detained person to appear in person. For example, a problem with the technology arises unexpectedly and the court is not satisfied that it can clearly see or hear the detained person.

235. Subsection (3), read in conjunction with subsection (4), allows the court to postpone a hearing to the next day which is not a Saturday, Sunday or court holiday, if it decides either to revoke a determination under section 288H(1) or not to make a determination on the day a specified hearing takes place or is due to take place. Such a postponement does not count towards any statutory time limits applicable in the case, such as the time limits for detaining a person in custody pending a first diet or preliminary hearing. However, by virtue of subsection (5), the power cannot be used to postpone a hearing in which a person makes their first appearance from police custody.

Inserted section 288J – Specified hearings

236. Subsection (1) confers on the Lord Justice General the function of specifying the categories of hearings, such as the first appearance, at which a detained person may participate by live television link. Hearings may be specified by reference to the venues at which hearings take place (subsection (2)(a)), particular places of detention (subsection (2)(b)), or the types of cases or proceedings in which TV links can be used (subsection (2)(c)). Under subsection (3)(a) the Lord Justice General can vary or revoke any earlier directions and make different provision for different purposes (subsection (3)(b)).

Inserted section 288K – Defined terms

237. This section defines certain terms used within sections 288H to 288J. The expression “detained person” is defined so that the person imprisoned or lawfully detained at a location in Scotland. The concept of lawful detention is a broad one, it includes detention at a police station pending first appearance at court, detention in hospital by virtue of an assessment order or a treatment order imposed under the 1995 Act, detention in hospital under the Mental Health (Care and Treatment) (Scotland) Act 2003, or a young person’s detention in local authority secure accommodation.

Chapter 2 – Police Negotiating Board for Scotland

Section 87 – Establishment and functions

238. Section 87 inserts a new Chapter 8A into the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”) to provide for a Police Negotiating Board for Scotland (PNBS). New section 55A provides for the Board to be established, and introduces a new schedule 2A to make further
provision about it. New schedule 2A is set out in schedule 3 to the Bill (see paragraphs 248 and 249 for further discussion).

239. New section 55B provides that the PNBS may make representations to the Scottish Ministers about pay, allowances and expenses, public holidays and leave, the issue, use and return of police clothing and equipment, and hours of duty, in relation to constables (other than special constables) and cadets. Such representations may be made about draft regulations or determinations on these issues, or generally. The Scottish Ministers may, after consultation with the chairperson, require the PNBS to make representations about these matters within a set time period.

240. New section 55C provides that the PNBS may also make representations to the Scottish Ministers about other matters relating to the governance, administration and conditions of service of constables (other than special constables) and police cadets including draft regulations on such matters. New section 55D requires the PNBS to produce an annual report on how it has carried out its functions. The annual report is to be given to the Scottish Ministers and published.

241. Subsection (2) amends section 54 of the 2012 Act to require the Scottish Ministers to consult the PNBS before making regulations about the matters mentioned in new section 55B(4).

Schedule 1 – Modifications in connection with Part 1

242. Schedule 1 makes amendments to existing legislation as a consequence of specific elements of the Bill. Part 1 makes provision for the repeal of various enactments conferring a power to arrest without warrant, which are affected by the new power of arrest for the police set out in section 1 of the Bill. Part 2 makes provision for the repeal of enactments affected by the new arrangements for police custody and access to legal advice set out in Part 1 of the Bill.

Schedule 2 – Modifications in connection with Part 2

243. Schedule 2 makes transitional and consequential provision arising from section 57, which abolishes the requirement for corroboration.

244. Paragraphs 1 and 2 make transitional provision in respect of the people trafficking aggravations provided for in sections 83 and 84. The effect is that even before section 57 comes into force and abolishes the requirement for corroborative evidence at large, corroborative evidence will not be required to prove an aggravation under either section.

245. Paragraphs 3 and 4 provide that the removal of the requirement for corroboration in criminal proceedings by section 57, will also apply to sheriff court proceedings under section 68(3) of the Children (Scotland) Act 1995, to determine whether offence grounds for a referral to a children’s hearing have been established. This is a transitional provision. The Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”) will repeal section 68(3) but some proceedings under the section may continue as part of the transitional arrangements for the 2011 Act. Once all proceedings under section 68(3) are concluded, paragraphs 3 and 4 of the schedule will cease to apply.
246. Paragraph 21 inserts a new subsection into section 102 of the Children’s Hearings (Scotland) Act 2011 providing that section 57, which abolishes the requirement for corroborative evidence in criminal proceedings, applies where an application is made to a sheriff to determine whether offence grounds for referral to a children’s hearing under section 67(2)(j) of the 2011 Act are established.

247. Paragraphs 5 to 20 and 22 to 24 make provision in consequence of section 57. Certain statutory exceptions to the requirement for corroborative evidence presently exist. Once section 57 abolishes the requirement for corroborative evidence in criminal proceedings generally, the specific exceptions will be redundant. Part 2 of the schedule therefore removes from the statute book the existing exceptions to the general requirement for corroborative evidence.

Schedule 3 – Police Negotiating Board for Scotland

248. Schedule 3 inserts schedule 2A into the Police and Fire Reform (Scotland) Act 2012. Paragraph 1 establishes that the PNBS is not a Crown servant and has no Crown status, immunity or privilege. Paragraph 2 sets out the membership of the PNBS. It is to consist of a chair and deputy chair appointed by the Scottish Ministers, and other persons representing the Scottish Ministers, the Scottish Police Authority, the chief constable, constables (other than special constables) and police cadets. Under paragraph 3, MPs, MSPs, MEPs, government Ministers and civil servants will be disqualified from being the chair or deputy chair of the PNBS to ensure that the chair and deputy chair are independent.

249. Paragraph 4 provides that the Scottish Ministers are to prepare the constitution for the PNBS, after consulting the other persons to be represented on it. They must keep the constitution under review and may from time to time revise it. This paragraph also sets out what the constitution may include. It must regulate the procedure by which the PNBS reaches agreement on representations to the Scottish Ministers under new section 55B(1), and may require agreement to be reached by arbitration in specified circumstances. Paragraph 5 provides that the Scottish Ministers may pay remuneration to the chair and deputy chair of the PNBS, and expenses to its members. They must also pay such expenses as are necessary to enable the PNBS to carry out its functions.
INTRODUCTION

1. This document relates to the Criminal Justice (Scotland) Bill introduced in the Scottish Parliament on 20 June 2013. 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.

2. The Policy Memorandum, which is published separately, explains in detail the background to the Criminal Justice (Scotland) Bill and the policy intention behind the Bill. The purpose of this Financial Memorandum is to set out the costs associated with the measures introduced by the Bill, and as such it should be read in conjunction with the Bill and the other accompanying documents.

3. The Bill has been developed around three elements:
   - Implementation of the recommendations of Lord Carloway’s review of the criminal justice system as a package of reforms⁶;
   - Implementation of the recommendations of Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure⁷; and
   - A number of miscellaneous provisions.

4. This Financial Memorandum is structured around these three elements, but this does not translate directly to the structure of the Bill’s provisions. Table 1 below sets out the grouping of provisions used in the Financial Memorandum and how that relates to the sections of the Bill. The table also provides an index to where the provisions are covered in this Memorandum.

Table 1: cross-references to Bill sections and index to paragraph numbers

<table>
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<tr>
<th>Provisions as described in Financial Memorandum</th>
<th>Relevant sections of Bill</th>
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<td>1-13, 18, 37-41, 50-55</td>
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<td>14-17, 19-22, 43-49</td>
<td>22-23 (general), 55-76 (SPA), 138-141 (COPFS), 168-170 (SCS), 198-201 (SLAB)</td>
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<td>24-26 (general), 77-94 (SPA), 202-214 (SLAB)</td>
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⁶http://www.scotland.gov.uk/About/Review/CarlowayReview
⁷http://www.scotland.gov.uk/Publications/2010/06/10093251/0
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<td>28-30 (general), 129-131 (SPA), 222-224 (SLAB), 227-230 (local authorities)</td>
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<td>Finality and certainty</td>
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<td>Video links</td>
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<td>315-318</td>
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5. Tables 2-5, providing an overall summary of the financial impact of the Bill, can be found after paragraph 11.

6. The estimates of costs contained in this memorandum are compiled from information provided by those bodies affected by the Bill. The figures and projections provided are the best estimates available for the costs and income that will be generated as a result of the provisions of this Bill. All costs have been rounded to the nearest £1,000. Figures may not sum due to rounding.

7. This financial memorandum assumes that the Bill provisions will take effect in the financial year 2015-16.
OVERVIEW

8. The Bill will have financial implications for a number of bodies. It will primarily affect the Scottish Police Authority (“SPA”), the Crown Office and Procurator Fiscal Service (“COPFS”), the Scottish Legal Aid Board (“SLAB”), the Scottish Court Service (“SCS”), and the Scottish Prison Service (“SPS”).

9. The measures which will have the greatest financial implications are connected with the Carloway provisions, particularly:
   - The removal of the requirement for corroboration; and
   - The provisions on access to legal advice.

10. The Bowen and miscellaneous provisions on the whole have lower financial costs.

11. The tables below summarise the costs of the Bill, differentiating between financial and opportunity costs. Many of the impacts of the Bill take the form of administrative burdens resulting from increased volumes of procedures currently undertaken and the introduction of additional procedures to meet the requirements of the Bill. Where a cost has been established based on additional staff time required to perform a particular new task, or to deal with an increase in case numbers, the Scottish Government anticipates that that this will likely be dealt with through measures such as full use of existing resources, prioritisation of functions, and increased operational efficiency. These are classified as opportunity costs. Only where a specific need for additional staff has been identified, has the cost been identified as an additional financial cost. There are also some one-off capital costs associated with the Bill, for example around the police custody estate.

### Table 2: total financial costs by organisation

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These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

Table 3: total opportunity costs by organisation

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These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

Table 4: total financial costs by Bill provision

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<tr>
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<td>0</td>
<td>87</td>
<td>0</td>
<td>87</td>
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</tr>
<tr>
<td>Maximum term for weapons offences</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
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<td>(169)</td>
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<td>(169)</td>
<td>0</td>
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<td>0</td>
<td>(169)</td>
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<td>Video links</td>
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<td>0</td>
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<tr>
<td>People trafficking</td>
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<td>0</td>
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<td>0</td>
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<td>0</td>
<td>0</td>
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<tr>
<td>Total</td>
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<td>2,703</td>
<td>6,587</td>
<td>1,648</td>
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<td>6,587</td>
<td>6,587</td>
<td>6,587</td>
<td>6,587</td>
</tr>
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</table>

Although there are costs associated with establishing a Police Negotiating Board for Scotland, these are balanced by equivalent savings from discontinuing contributions to the existing Police Negotiating Board.
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

Table 5: total opportunity costs by Bill provision

<table>
<thead>
<tr>
<th></th>
<th>2015-16</th>
<th>2016-17</th>
<th>2017-18</th>
<th>2018-19</th>
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<tbody>
<tr>
<td></td>
<td>Recurring costs £'000</td>
<td>Non-recurring costs £'000</td>
<td>Recurring costs £'000</td>
<td>Non-recurring costs £'000</td>
</tr>
<tr>
<td>Arrest &amp; detention, period of custody</td>
<td>99</td>
<td>0</td>
<td>99</td>
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<tr>
<td>Liberation from police custody</td>
<td>1,127</td>
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<tr>
<td>Legal advice</td>
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<td>406</td>
<td>0</td>
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<tr>
<td>Questioning</td>
<td>167</td>
<td>0</td>
<td>167</td>
<td>0</td>
</tr>
<tr>
<td>Child suspects</td>
<td>84</td>
<td>0</td>
<td>84</td>
<td>0</td>
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<tr>
<td>Corroboration</td>
<td>14,974</td>
<td>0</td>
<td>22,724</td>
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<tr>
<td>Appeals</td>
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<td>0</td>
</tr>
<tr>
<td>Vulnerable adult suspects</td>
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<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Exculpatory and mixed statements</td>
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<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Finality and certainty</td>
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<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Carloway general</td>
<td>0</td>
<td>11,116</td>
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<td>87</td>
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<tr>
<td>Bowen provisions</td>
<td>228</td>
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<td>228</td>
<td>0</td>
</tr>
<tr>
<td>Maximum term for weapons offences</td>
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<td>Method of juror citation</td>
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<td>Video links</td>
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<td>People trafficking</td>
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<tr>
<td>Police Negotiating Board⁹</td>
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<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>18,848</td>
<td>11,116</td>
<td>26,598</td>
<td>87</td>
</tr>
<tr>
<td>Total opportunity cost</td>
<td>29,964</td>
<td>26,685</td>
<td>30,735</td>
<td>34,748</td>
</tr>
</tbody>
</table>

**IMPACT**

12. Any rise in the overall running costs of relevant organisations will be reviewed as part of the overall planning of the Justice budget.

⁹ Although there are costs associated with establishing a Police Negotiating Board for Scotland, these are balanced by equivalent savings from discontinuing contributions to the existing Police Negotiating Board.
13. The opportunity costs associated with the Bill will be for the affected organisation to manage through measures such as full use of existing resources, prioritisation of functions, and increased operational efficiency.

14. A total of £5,549,000 has been identified as recurring opportunity costs for SPA. This is as a result of new processes including investigative liberation and post-charge questioning, as well as increases in case numbers from the removal of the requirement for corroboration.

15. There is also a large one-off opportunity cost of £9,848,000 for SPA. This comprises staff time to attend training on the revised procedures provided for in the Bill. The impact of this should be minimised by ensuring the Bill’s provisions are implemented in 2015, when the Commonwealth Games and other major events of 2014 are over, and the normal police training regime resumes.

16. A total of £3,842,000 has been identified as recurring opportunity costs for COPFS. Some of this is from the new processes around challenging of special conditions for liberation from police custody, but the greater part is from the projected increase in cases as a result of the removal of the requirement for corroboration.

17. A total of £1,363,000 has been identified as recurring opportunity costs for SCS, as a result of additional court time for new processes and volume increases. It is anticipated that these will be managed within the available court time. Expected savings in court time from the Bowen provisions have already been applied to this figure.

18. A total of £22,750,000 has been identified as recurring opportunity costs for SPS, as a result of increased prison places, primarily from the removal of the requirement for corroboration. This increase will not take full effect immediately, but will gradually increase up to this level over four to five years. SPS has indicated that additional prison places can be accommodated within existing capacity, but that long term increases may accelerate the rate that the flexibility in the system is used up. This will be kept under review.

19. A total of £1,244,000 has been identified as recurring opportunity costs for local authorities, as a result of increases in community sentences, and provision of social worker support to a minority of 16 and 17 year old suspects. It is anticipated that this will be managed within existing resources.

PART A – CARLOWAY PROVISIONS

OUTLINE OF MEASURES

Measures with cost implications

20. Those measures which will have definite financial or opportunity cost implications are outlined below.
Arrest and detention, period of custody

21. The changes in the Bill to periods of custody include the requirement for a police review at or about six hours after detention and that this review should be carried out by an officer of at least the rank of inspector not directly involved in the investigation. This will have implications for the police in terms of staff time.

Liberation from police custody

22. The Bill introduces a new process of investigative liberation from police custody. This will have resource implications for the police in terms of staff time to consider and authorise liberations where conditions are applied, as well as increased numbers of returning prisoners, and increases to persons breaching conditions of undertakings.

23. There are also potential cost implications for COPFS, SLAB and SCS from the application of special conditions to bail, and associated court hearings for challenges to these conditions. This includes additional IT costs for SCS.

Legal advice

24. The Bill extends the right to legal advice to suspects detained by the police, regardless of whether questioning takes place. This will likely lead to an increase in requests for legal advice, and this will have cost implications for SLAB, as well as for the police in administering access to solicitors.

25. In addition, Police Scotland has identified a need for modifications to the custody estate. These are in line with what was identified at the point of the Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Act 2010. These costs will be phased over two years.

26. There will also be minor one-off costs for police in the production of aide memoire cards for the revised common law caution and for the production of a letter of rights for suspects.

Questioning

27. The Bill provides for the possibility of police questioning after charge, following police or Crown application to a sheriff for permission. COPFS advise that post-charge questioning is likely to be a rare occurrence. Where it occurs, it will have cost implications for SPA, COPFS, SLAB and SCS.

Child suspects

28. In giving effect to Carloway’s recommendations on child suspects, the Bill makes provision for a number of changes to the manner in which children and young people are treated in the criminal justice system with regard to the arrest, detention, interview and being charged. For the most part these changes are part of wider changes to criminal procedure which will require operational change, but of particular relevance are Carloway’s recommendations that:

- For the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years. This means that the current provisions concerning notification
to an adult reasonably named by the person and these persons having access to a child suspect should be extended to all persons under 18 years of age; and

- All children should have the right of access to an adult reasonably named by the child if detained and, in any event, in advance of and during any interview, provided that access can be achieved within a reasonable time.

29. The Scottish Government anticipates that there will be an impact for the police by way of additional time spent finding, waiting for and accommodating parental or similar support and/or legal support for 16 and 17 year olds wishing it. However, Police Scotland has indicated that this can be achieved through the Whole System Approach already underway, and that no significant additional costs are anticipated.

30. The Bill’s provisions on child suspects could bring new costs for local authorities, as a result of increased provision of social worker support for 16 and 17 year old suspects, in cases where this is not provided by a parent, family member or friend.

Corroboration and sufficiency of evidence

31. The Bill removes the current requirement for corroboration in criminal cases. Lord Carloway commented in evidence to the Justice Committee on 29 November 2011\(^\text{10}\) that he did not think that the total number of prosecutions would necessarily increase as a result of this change.

32. However, shadow reporting and shadow marking exercises carried out by Police Scotland and COPFS suggest that there are likely to be increases in the number of cases reported by the Police to COPFS, and in the number of cases prosecuted by COPFS. The potential scale of increase is as follows:

- Police – increase in police reports to COPFS in the range 1.5%-2.2%, with a most likely estimate of 1.5%.
- COPFS – change in summary prosecutions in the range of a 1% decrease to a 4% increase, with a best estimate of a 1% increase; and increase in solemn prosecutions in the range of 2-10% increase, with a best estimate of a 6% increase.

33. Taken together, and assuming that the effects are cumulative (i.e. an increase in police reports feeds directly into additional prosecutions, with changed marking procedures within COPFS applying on top of this impact), suggests potential increases in the number of prosecutions as per the table below. Relatively small sample sizes were used in analysis of the potential impact of removing the requirement for corroboration. This means that the confidence interval between which the impacts could lie – presented as low and high estimates in the table – is very large. However it is extremely unlikely that impacts at the high end of the scale would be seen.

Table 6: potential % increase in the number of prosecutions

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary prosecutions</td>
<td>0.5%</td>
<td>2.5%</td>
<td>6.3%</td>
</tr>
<tr>
<td>Solemn prosecutions</td>
<td>3.5%</td>
<td>7.6%</td>
<td>12.4%</td>
</tr>
</tbody>
</table>

34. An increase in prosecutions would have potential cost implications for SPA, COPFS, SLAB and SCS in terms of increased workload. An increase in prosecutions will also have impacts on the SPS and local authorities on the basis that additional prosecutions are likely to lead to additional convictions and additional custodial and community sentences. The number of criminal reports received by COPFS, and of summary and solemn prosecutions, vary significantly between years. In recent years there has been a significant downward trend in recorded crime, reports to COPFS and both summary and solemn court disposals (see Figures 1 and 2 below). This Financial Memorandum includes estimated costs associated with the increases indicated by the shadow marking exercises from a current baseline. However, the context for these increases is the overall scale in the reduction in criminal prosecutions over recent years.


Source: [http://www.copfs.gov.uk/About/corporate-info/Caseproclast5](http://www.copfs.gov.uk/About/corporate-info/Caseproclast5)
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

Figure 2: Court Disposals 2007-12

Source: [http://www.copfs.gov.uk/About/corporate-info/Caseproclast5](http://www.copfs.gov.uk/About/corporate-info/Caseproclast5)

35. With regard to the removal of the requirement for corroboration in relation to Children’s Hearings court proceedings, the Scottish Government anticipates no significant financial implications for the Scottish Government, Scottish Children’s Reporter Administration (“SCRA”), COPFS, SCS, local authorities or others.

**Carloway provisions in general**

36. In addition to the costs identified above, there will be one-off costs for police and COPFS to provide training for the changes in the Bill relating to Lord Carloway’s recommendations. Additional IT requirements for the police will be implemented as part of the wider IT police programme.

37. COPFS anticipate a short-term increase in the number of appeals during the three years following the commencement of the Bill.

**Measures with no or marginal costs**

**Appeal procedures**

38. The Bill makes changes to appeal procedures to encourage more timeous progression of appeals and to eliminate duplication of procedures. The intention is to avoid unnecessary delay, in accordance with the requirements of the European Convention on Human Rights. Reduced numbers of late appeals would lead to a slight saving for SLAB.

**Vulnerable adult suspects**

39. The provisions in the Bill relating to vulnerable adult suspects will not entail additional costs to local authorities and police as Appropriate Adult Services are provided at present on a non-statutory basis.
Exculpatory and mixed statements

40. The Bill amends the restrictions relating to admissibility of statements made by an accused person. The provisions relating to exculpatory and mixed statements are not anticipated to have any cost implications.

Finality and certainty

41. The Scottish Government does not anticipate there will be any additional costs associated with the provision that adjusts how the Appeal Court considers cases referred by the Scottish Criminal Cases Review Commission (“the SCCRC”).

Jury majorities

42. The Bill’s provisions relating to jury majorities required for conviction are not expected to have any additional costs.

COSTS ON THE SCOTTISH ADMINISTRATION

43. Costs on the Scottish Administration will fall on the Scottish Government, SPA, COPFS, SCS, SPS and the Legal Aid Fund. These are set out separately below. Total non-recurring financial costs on the Scottish Administration will be around £4,352,000 over two years, and there will be total recurring financial savings of £6,530,000 per year.

COSTS ON THE SCOTTISH GOVERNMENT

44. The Scottish Government does not expect any of the Bill’s provisions to have cost implications for the Scottish Government.

SCOTTISH POLICE AUTHORITY

45. The police will be affected by a number of measures in the Bill, set out below. This is based on estimates provided by Police Scotland.

46. This financial memorandum has been developed during the transition to the new police body Police Scotland. Throughout this document there are references to SPA as the body with financial authority. All police costs identified in this document are attributed to SPA. The development of these estimates has been undertaken using information provided by Police Scotland. There are also references to the Association of Chief Police Officers in Scotland (“ACPOS”), primarily relating to historic research.

Measures with cost implications

Period of custody: statutory review of police detentions

47. The Bill provides for police review of any period of detention before charge at or about six hours after detention and that such a review should be carried out by an officer of at least the rank of inspector who has not been directly involved in the investigation.
Due to the limitations of the prisoner management information technology systems being used by forces at present, it is not possible to provide accurate contemporary statistics for suspect detention rates; the basis for assessing the financial impact of this measure therefore is previous research with figures amended to account for recent, more general prisoner holding trends.

In establishing an estimate, Police Scotland has looked at the number of suspects detained by way of section 14 of the Criminal Procedure (Scotland) Act 1995, on the basis that these are the detainees currently subject to time limits for detention. Previously published ACPOS research, the Solicitor Access Data Report 2011, suggests that suspects detained by way of section 14 accounted for 79.3% of the 20% of the prisoner population who had the right to solicitor access. This suggests that approximately 15.9% of the prisoner population is detained under section 14. During 2011-12 forces dealt with a total of 204,400 prisoners. If the ratios found during the research are applied to this figure, the number of suspects coming into police premises who would be detained for investigative purposes may be assumed to be in the region of 32,400 per annum or around 90 per day.

The findings of this research indicated that only 16.5% of detentions exceeded six hours. Police Scotland has indicated that in order to complete a review at or around six hours it is likely that the review process will often commence earlier than the six hour point. As such, it has assessed that custody reviews may occur in around 20% of all (detention) cases, 6,480 occasions per annum.

The introduction of Investigative Liberation may lead to a reduction in the number of persons detained for 6 hours or more. This is considered in more detail at paragraphs 57-59. The Scottish Government anticipates that 10% of detainees would be considered for investigative liberations, so the number of reviews is reduced to 5,830. See table below for summary.

Table 7: estimated numbers of prisoners relevant for six hour review

<table>
<thead>
<tr>
<th>Total prisoners</th>
<th>204,400</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prisoners with a right to solicitor access</td>
<td>20% of 204,400</td>
</tr>
<tr>
<td>Prisoners detained under section 14 with a right to solicitor access</td>
<td>79.3% of 40,880</td>
</tr>
<tr>
<td>Prisoners detained under section 14 with a right to solicitor access still detained at six hour point</td>
<td>20% of 32,400</td>
</tr>
<tr>
<td>Prisoners detained under section 14 with a right to solicitor access still detained at six hour point not eligible for new investigative liberation procedures</td>
<td>90% of 6,480</td>
</tr>
</tbody>
</table>
52. There are a number of variables that could impact on the length of time needed to carry out a custody review, including the ready availability of information, enquiry officer(s) and the custody review officer. Police Scotland suggest an average transaction time of 30 minutes per review, giving notional costs of £99,000.

\[
5,832 \text{ inspector reviews} \times 30 \text{ minutes} \times £33.86 \text{ per hour} = £99,000
\]

53. These figures are based on the premise that an inspector need not be physically present to carry out a review.

54. This estimate is based on the hourly costs associated with an inspector’s time. This does not translate directly into additional financial cost, but will become part of inspectors’ general workloads. This £99,000 is therefore classed as an opportunity cost.

**Liberation from police custody – investigative liberation**

55. The Bill will give the police the express power to liberate a suspect from detention, prior to charge/report, subject to any appropriate conditions necessary for carrying out further investigations.

56. Around 80% of persons coming in to police custody do so on the basis of there being a sufficiency of evidence to arrest without questioning. The number of persons eligible for investigative liberation is anticipated to be broadly similar to the numbers currently being dealt with in terms of section 14 of the Criminal Procedure (Scotland) Act 1995. As explained in paragraph 49, the number of prisoners detained under section 14 and with a right to solicitor access is estimated at 32,400 per annum or around 90 per day.

57. Previous ACPOS research\(^\text{11}\) suggests that the average detention time is just under four hours and almost 84% of detentions are concluded at six hours or less. Less than one per cent exceeded twelve hours.

58. A significant proportion of detainees can be under the influence of drink and/or drugs and therefore not fit for interview, or have additional welfare needs that require medical assessment or attention. These factors impact on the police’s ability to interview suspects but also impact on the appropriateness of such individuals being quickly liberated from custody to return at a later date for questioning. There will also be cases where the nature of the crime(s) under investigation and the threat the suspect would pose to victims, witnesses or the community in general is such that they could not be liberated prior to the conclusion of the investigation.

59. Police Scotland therefore estimates the proportion of detainees that would be considered for investigative liberation at around 10%. This would equate to around 3,240 persons per annum being released on investigative liberation.

60. The police would then have the option of whether or not to place conditions on the suspect. Police Scotland estimates that around 16% of individuals released from police custody on undertakings are subject to special bail conditions. However, given the circumstances likely

\(^{11}\)http://www.acpos.co.uk/Documents/News%20Releases/SolicitorAccessDataReport.pdf [Link no longer operates]
to be prevailing at the investigative liberation stage, where the threat to the criminal justice process is arguably greater, Police Scotland suggest that the proportion of suspects that will be placed on conditions would greatly exceed the levels seen at undertaking: possibly around half of the estimated 3,240 cases that will occur over a twelve month period.

61. Application of conditions is likely to be done at the inspector level. Police Scotland estimate that the process would take somewhere in the region of 30 minutes per case:

62. Application of special conditions to investigative liberations:

\[1620 \text{ suspects} \times 30 \text{ minutes} \times £33.86 \text{ per hour} = £27,000\]

63. Such decisions would be appealable on application to a sheriff. Given the likely role of Procurator Fiscal in that appeals process, there would be a requirement for the police to provide COPFS with a report in these cases. COPFS has estimated 425 cases per annum. It may be possible that the ‘decision log’ used by the officer imposing the conditions could be used as the basis for this report, in which case there would be little additional demands on the police. Otherwise an officer would need to formulate a report.

64. There will be a number of suspects who will not comply with their conditions bringing increased workload and cost to the police in terms of crime recording, investigation, arrest/report and potential appearance from custody. There is also the likelihood that on some occasions details of the investigative liberation may need to be altered to accommodate unforeseen circumstances, either on the part of the investigating officers or suspect. This will inevitably involve officer/staff time. The impact of this should be low given the small numbers.

65. It is likely that there will be an additional increase in prisoner throughput due to those released on investigative liberation being re-arrested as a result of them having committed offences. It is not possible to accurately estimate what the level of offending will be but if it were to be 20%, this would translate to an additional 324 prisoners of whom a proportion would be kept in custody (particularly where the offence related to threats or attacks upon victims or witnesses in the original case under investigation). Given the likely spread of further detention times from a few hours to more than a day (weekend detentions), even if only the minimum additional cost of £180 is applied to each of these prisoners this would result in a further increase in costs:

\[324 \text{ person breaching conditions of undertaking} \times £180 \text{ per detention} = £58,000\]

66. To ensure the rights and welfare needs of the suspect are recognised and met there will be a need to formally ‘process’ suspects when they return. This will involve the usual search and risk assessment in order to draft a suitable care plan. It will also include a formal offer and/or reminder of legal rights. A proportion of returning suspects are likely to require the services of an interpreter or appropriate adult or in some cases a consultation with a medical practitioner to establish whether or not they are fit for interview. Police Scotland has given an average processing cost of £180 per arrival.

\[3,240 \text{ prisoners} \times £180 \text{ per detention} = £583,000\]
67. The table below summarises the potential costs identified by Police Scotland associated with investigative liberation.

Table 8 – Potential police costs associated with investigative liberation

<table>
<thead>
<tr>
<th>Cost Description</th>
<th>Cost £</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inspector level authorisation of investigative liberations and application of conditions</td>
<td>27,000</td>
</tr>
<tr>
<td>Additional work associated with people breaching conditions of investigative liberation</td>
<td>58,000</td>
</tr>
<tr>
<td>Processing of prisoners returning from investigative liberation</td>
<td>583,000</td>
</tr>
<tr>
<td>Total</td>
<td>669,000</td>
</tr>
</tbody>
</table>

68. These projections do not consider any costs associated with the notification of amendments to or cancellation of liberation dates. This will likely be achieved via telephone or e-mail and supported by a formal written notice. The Scottish Government anticipates that these costs would be marginal.

69. This estimate is based on the hourly costs associated with an inspector’s time. This does not translate directly into additional financial cost, but will be part of inspectors’ general workloads. This £669,000 is therefore classed as an opportunity cost.

Liberation from police custody – presumption to liberty

70. The Bill provides that when the police do not intend to recommend opposition to bail at a court hearing, the suspect should be released, either unconditionally or on an undertaking, to appear at court on a specified future date.

71. During the year 2011-12 Scottish police forces dealt with over 204,000 prisoners. SCS advise that during that same year 54,036 persons appeared in court on a new charge. It is only this group that will be impacted upon by the presumption to liberty and an expanded regime of undertaking.

72. Police Scotland estimates that the Bill’s provisions on presumption to liberty may result in a decrease of between 10% and 20% in the numbers of prisoners appearing from custody – between 5,400 and 10,800 prisoners.

73. Police Scotland advises that, given the nature of how costs are accrued in this area, the savings to the police from this reduction would be insignificant – detainees would have already been received in custody, may have required medical assessment and been given blankets,
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

bedding, food, etc. It is likely that all of these releases would entail the application of special conditions, which requires the authority of an inspector, taking an average of 30 minutes per case.

\[
\begin{align*}
5,420 \text{ prisoner releases} \times 30 \text{ minutes} \times 1 \text{ inspector} @ £33.86 \text{ per hour} &= £92,000 \\
10,840 \text{ prisoner releases} \times 30 \text{ minutes} \times 1 \text{ inspector} @ £33.86 \text{ per hour} &= £184,000
\end{align*}
\]

74. A mid-range estimate for this activity would be **£138,000**.

75. None of these projections includes any contingency in relation to ‘bail’ monitoring activity, whether as an additional role for frontline officers to undertake or, given potential the numbers involved through the creation of ‘Bail Managers’ as there are in some forces in England and Wales.

76. This estimate is based on the hourly costs associated with an inspector’s time. This does not translate directly into additional financial cost, but will be part of inspectors’ general workloads. This £138,000 is therefore classed as an opportunity cost.

**Legal advice – facilitating access**

77. The Bill implements Lord Carloway’s recommendation that legal access should be made available to all suspects, “regardless of questioning, as soon as practicable after… the detention of the arrested suspect at the police station”. Police Scotland has indicated that about 20% of those in police custody are currently offered access to legal advice.

78. During 2011-12 forces received a total of 204,200 prisoners. Using the 20% figure provided by Police Scotland suggests 40,840 of these would have been eligible for legal advice, leaving around 163,360 people who go through police stations and are not currently offered access to a solicitor, who will now have a right to this access.

79. Information provided by SLAB currently places the numbers of persons accessing legal advice in Scotland as being in the region of 60 per day or 21,900 per annum; this equates to a current acceptance rate of 53.6%.

80. In discussion with SLAB and other stakeholders the Scottish Government has concluded that the take-up rate for this group will likely be lower than for those who are questioned, on the basis that detainees being released without being questioned are less likely to seek legal advice. A likely range of 20% to 53.6% take-up rates for solicitor access for this non-interviewed group has been modelled, with a best estimate at 35% (see table 9 below). It should be noted that Police Scotland feels that take-up rates may be higher than this.

81. The format for legal advice will be a mix of telephone and in person. Currently around 15% of advice provided by SLAB is in person at the police station; the rest is provided through the Solicitor Contact Line. In England and Wales the ratio is markedly different – around 70% of those requesting legal advice see a legal advisor in person at a police station. However, as Lord
Carloway points out in his report\textsuperscript{12}, the system in England and Wales is not directly comparable because private communication with a solicitor is interpreted to include an accredited representative of a solicitor (i.e. a paralegal), and the introduction of fixed fees has had an impact on the type of advice offered. A proportion of 30\% of advice offered in person, with 70\% by telephone, has been modelled based on discussions with SLAB and other stakeholders.

82. Additional access to solicitors will have implications for the police in terms of staff time to facilitate this, in terms of making contact with the solicitor, making arrangements for consultation, and escorting the detained person. Police Scotland has estimated that facilitating a solicitor visit would involve 30 minutes of staff time, while facilitating a telephone consultation would involve 15 minutes of staff time. Using a 30:70 split gives an average figure of 19.5 minutes, or 0.325 hours.

Table 9: costs for police from additional legal advice

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Number of additional cases where legal advice provided</th>
<th>Impact on police</th>
</tr>
</thead>
<tbody>
<tr>
<td>20% take-up for non-interviews</td>
<td>32,672</td>
<td>$32,672 \times 0.325 \times £21.86 = £232,000</td>
</tr>
<tr>
<td>35% take-up for non-interviews</td>
<td>57,176</td>
<td>$57,176 \times 0.325 \times £21.86 = £406,000</td>
</tr>
<tr>
<td>53.6% take-up for non-interviews</td>
<td>87,561</td>
<td>$87,561 \times 0.325 \times £21.86 = £622,000</td>
</tr>
</tbody>
</table>

83. This gives a best estimate of £\textbf{406,000} of additional police staff time involved in facilitating access to legal advice. This does not translate directly into additional financial cost, but will be part of inspectors’ general workloads. This has therefore been classed as an opportunity cost.

Legal advice – modifications to custody estate

84. There are currently limited facilities in existence to permit solicitors to consult confidentially with clients at police stations. Police Scotland anticipates 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. Of the police premises in Scotland with custody holding facilities there are 42 which are identified as primary facilities and a further 55 are identified as secondary facilities. Primary facilities are resourced by designated staff from Custody Division and are where prisoners are kept prior to appearing at court. These are open on a 24/7 basis. Secondary facilities are opened on an ‘as and when necessary’ basis and are staffed by trained resources from Local Policing.

\textsuperscript{12}Carloway Review Report and Recommendations paragraph 6.1.6
85. There is an ongoing process of rationalisation of the custody estate, and Police Scotland has considered the prospect of further redesignation of custody estate centres.

86. Police Scotland anticipates that in order to accommodate the volume of legal access interviews a total of 160 consultation rooms may be required.

87. The cost of providing interview facilities varies substantially between locations. In some instances additional interview room facilities 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 costs may be £35,000 or higher, per room. An average cost per room of £20,000 has been assumed. This gives total financial costs of £3,200,000. It should be noted that this is a capital cost.

\[ 160 \text{ interview rooms} \times £20,000 \text{ average cost} = £3,200,000 \]

88. Given the wide variety in individual costs per room, it is anticipated that this total capital cost could vary within a range of between £1,600,000 and £4,800,000.

89. 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. Police Scotland advise that the cost per room will be in the order of £600.

Telephony associated with 160 interview rooms @ £600 per room = £96,000

90. The costs for modifications to the custody estate are in line with what was identified at the point of the Criminal Procedure (Legal Assistance, Detention and Appeals (Scotland) Act 2010. Due to the scale of this work, it is assumed that it would be undertaken over a period of two years, with total capital costs of £1,648,000 per year. SPA is currently developing an estates strategy, and there is some financing carried over to SPA to implement upgrades to the custody estate.

Legal advice – letter of rights

91. The Bill states that every arrested and detained suspect should be provided with a copy of a “letter of rights” unless there are particular reasons not to do so.

92. Anticipated cost for the production of English language version of the Letter of Rights is £6,000 per annum for 200,000 copies of double sided A4 with two columns of print per page.

93. The costs for the development of non-English language versions will, primarily, be associated with the cost of translation services. Provisional estimates place the cost for translation into the ten most popular non-English languages at £2,000, as a one-off cost. Additional costs for desktop, ad hoc printing are unlikely to exceed £1,000 per annum.

94. Total estimated SPA costs for the letter of rights are therefore £7,000 per annum and £2,000 initial costs.
Questioning

95. The Bill will enable the police to seek judicial authority to question a suspect further after the point of charge or intimation of a report being sent to the Procurator Fiscal, but prior to the individual’s first appearance at court. Such a process could be used when new evidence emerges or other material becomes known, or where for good reason it was not possible to question the suspect properly prior to charge. The requirement to seek permission from the court to ask further questions provides an independent safeguard to this provision. The envisaged process would be akin to obtaining a warrant from a sheriff.

96. The Crown will also be entitled to make an application to the court for the police to be allowed to question an accused after his/her first appearance in court. Such an application can be made until the trial against the accused has commenced. This will also have implications for the police.

97. Lord Carloway does not recommend that this process should be restricted to solemn procedure only although he suggests that (at para 6.2.55), “no doubt a sheriff would be reluctant to grant permission in a summary case”. Accordingly, while an application in a summary case will be competent, it is assumed that the majority of applications will be in cases which are likely to be, or are being, prosecuted under solemn procedure. COPFS report in their annual case reporting analysis that, in 2011-2012, out of 101,606 cases disposed of in court, only 5% (5,132 cases) were by way of solemn proceedings.

98. There is the possibility that once an accused has appeared in court the police (via the procurator fiscal) or the Crown itself (seeking to allow a police officer to enquire on its behalf) will make requests to interview accused people, who may either be on bail or remanded in custody, about matters relating to DNA analysis results or associated with the examination of telephones or computers. Previously this type of questioning could only be conducted at court, in the course of a trial, with no opportunity to carry out investigations as a result of any answers. It is probable that all of these interviews would be carried out at police premises under tape recorded conditions. Persons would require to be given the right to consult with solicitors. There would also be the usual requirements regarding the assessment of prisoner welfare, etc.

99. This is a new procedure without precedent in Scotland, so it is difficult to establish concrete estimates for the frequency with which post-charge questioning will be used. COPFS and Police Scotland have provided estimates, based predominantly on professional judgement, and these vary significantly. Since COPFS will act as gatekeepers in the process, deciding which requests for post-charge questioning go forward to a Sheriff, the Scottish Government has used the COPFS estimates in its calculations.

100. COPFS has estimated that a total of around 200 instances of post-charge questioning might take place each year, of which 50 could be cases where the suspect is in custody before appearing in court the next day, 100 could be cases where the suspect has been released on undertaking or report, and 50 could be cases where the suspect has already appeared in court.

101. The cost of a suspect returning to police premises for questioning has been estimated by Police Scotland at £180, covering standard processing – details noted, checks and risk
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

assessment carried out, solicitor advice offered and arranged, with the potential for medical assessment/assistance, interpreters, etc.

200 persons detained for questioned after charge @ £180 per person =£36,000

102. Police Scotland has estimated the staff costs associated with a police interview at £580. This covers officer time for the application process, interview preparation, interview, and post interview procedures including the compilation of a report (including tape transcription) to the Procurator Fiscal.

200 persons interviewed @ £580 per interview=£116,000

103. These calculations exclude any costs associated with the pre-request / pre-interview analysis of the newly available evidence or its reporting to Crown as this work would already be undertaken in the normal course of a developing investigation.

Table 10: summary of projected police costs – questioning persons after charge

<table>
<thead>
<tr>
<th>Cost Description</th>
<th>Cost</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prisoner processing</td>
<td>36,000</td>
<td>200 persons</td>
</tr>
<tr>
<td>Interview related</td>
<td>116,000</td>
<td>200 persons</td>
</tr>
<tr>
<td>Total</td>
<td>£152,000</td>
<td>200 persons</td>
</tr>
</tbody>
</table>

104. This estimate is based primarily on hourly staff costs. This does not translate directly into additional financial cost, but will be part of inspectors’ general workloads. This £152,000 has therefore been classed as an opportunity cost.

Corroboration and sufficiency of evidence

105. In order to inform his Review, Lord Carloway commissioned COPFS to carry out an analysis of data already within its possession. This suggested that there was potential for 458 additional prosecutions per year.13 Lord Carloway outlined a number of caveats to these results and subsequently commented in his evidence to the Justice Committee on 29 November 201114 that he did not expect the total number of prosecutions to increase.

106. However, analysis carried out by Police Scotland and COPFS suggests that there are likely to be increases in the number of cases reported by the Police to COPFS, and in the number of cases prosecuted by COPFS. This analysis was based on shadow marking exercises, i.e.

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13 This comprised 268 cases which had been put on petition but later marked “No Further Proceedings due to Insufficient Evidence”, and 190 cases received by the COPFS National Sexual Crimes Unit but had not resulted in an accused being placed on petition. In relation to the latter, the Carloway Review referred to 95 cases, but this was on the basis of a 6 month sample, thus implying 190 cases over a year.


56
re-evaluating a sample of previous cases to identify how many might have progressed differently under the new system.

107. COPFS provided Police Scotland with draft new guidance on the reporting of cases without corroboration. Police Scotland then conducted a shadow reporting exercise in consultation with COPFS. The focus was on ensuring, wherever possible, that there was supporting evidence in each case. The results of the exercise demonstrated that the range of increased number of cases would be between 1.5 and 2.2%, and most likely to be at the 1.5% level.

108. National case reporting indicates that in 2011-12, 242,404 Standard Prosecution Reports (“SPRs”) were completed, indicating a case referred from the police to COPFS. A 1.5% increase would equate to an additional 3,636 cases reported nationally over a twelve month period.

109. The costs of investigating and reporting a case to Crown Office vary depending upon the nature of the crime under investigation, complexity of the investigation, number of officers involved and ready availability of evidence. However, Police Scotland estimate that the cost of submitting a basic SPR is £59.86.

\[
\text{Additional 3,636 case reported annually @ £59.86 per SPR=} \text{£218,000}
\]

110. This assumes that there will be no requirement to significantly change the format for reporting cases from the police to COPFS.

111. This calculation shows the estimated cost of an increase of 1.5% in police reporting. However, levels of reported crime have been falling for several years and are now at a near forty year low. See paragraph 34 for more detail. An increase of 1.5% is within natural annual variation.

112. This estimate is based on the staff time in completing an SPR. This does not translate directly into additional financial cost, but will be part of general staff workloads. This £218,000 has therefore been classed as an opportunity cost.

113. The removal of the requirement of corroboration is likely to result in additional cases being brought to court. Police Scotland has used the figures from police and COPFS shadow marking exercises (see paragraphs 150-153 for more detail on the COPFS exercise) to extrapolate an overall increase of 3.03% in the number of court proceedings to which the police would need to provide support.

114. Police Scotland has provided an estimate of the impact of this increase on overtime payments. Only those costs borne by Strathclyde Police were available in producing this estimate. In the last financial year, Strathclyde Police spent £2,323,000 on police witnesses attendance at court. It was previously reported that Strathclyde submitted 53.5% of SPRs across Scotland. Using the proportion of case reporting as a guide, this extrapolates to £4,343,000 nationally.
115. Given the above estimated increase in proceedings Police Scotland suggest that increases in cases proceeding to trial diet, and therefore witness costs, would be of a similar order. Therefore, court overtime payments could be anticipated to rise 3.03%, an increase of £132,000 to £4,474,000. Since this relates to overtime payments, this has been counted as a financial cost.

116. These costs do not recognise additional witness provision and associated costs where no direct court overtime is attributed.

117. Police Scotland also anticipates an increase in workloads associated with a COPFS marking decision to proceed. While it is possible to make an estimation of increased costs due to direct attendance at court using existing empirical evidence, it is much more difficult to make a definitive evaluation of the costs of additional work generated by COPFS making a marking decision to initiate criminal proceedings.

118. Routinely, the majority of additional work associated with summary cases prior to citation would tend to be the submission of witness statements. Average cases would use two to five witnesses. The time taken for submission would depend on original format and other factors, but Police Scotland has provided a broad estimate that for four witness statements, two officer hours would be required on average. If proceedings increased by 2,836 cases (based on the 1% increase indicated by the COPFS shadow marking exercise) that could see a potential increase in costs of £136,000 per annum.

\[
2,836 \times 2 \text{ hours} \times £23.91 \text{ per hour} = £136,000
\]

119. This estimate is based on the staff time involved. This does not translate directly into additional financial cost, but will be part of general staff workloads. This £136,000 has therefore been classed as an opportunity cost.

120. It is the increase in solemn work that has the potential to have a greater impact across the police service, but this is very difficult to quantify due to its diverse nature. On marking a solemn case, there will most likely be a further instruction to the reporting officer by COPFS to: submit essential statements immediately and the rest thereafter, proceed with forensic analysis, conduct identity parades, continue to trace witnesses, and obtain defence statements.

121. This list is far from exhaustive but demonstrates the nature of enquiries relating to solemn proceedings. Further, COPFS regularly tasks Precognition work to the police, a significant burden on investigation teams which has not been previously costed. In addition, any further enquiry work has a knock-on impact on other areas of business, for example case management and word processing.

122. Police Scotland has modelled typical staff costs directly associated with a solemn marking decision, which suggests an average cost of £3,789 per case.

123. Using the percentage increase indicated by the COPFS shadow marking exercise suggests an additional 953 cases, suggesting total police staff costs of £3,611,000 per annum.

\[
953 \times £3,789 = £3,611,000
\]
124. This estimate is based on the staff time involved. This does not translate directly into additional financial cost, but will be part of general staff workloads. This £3,611,000 has therefore been classed as an opportunity cost.

**Carloway provisions in general – police training**

125. Commencement and implementation of the Bill’s provisions relating to Lord Carloway’s recommendations will require training to be undertaken to ensure that relevant police personnel have a professional knowledge and understanding of the legislation and its associated impact on their day to day duties.

126. Police Scotland has estimated the requirement at two hours of e-learning followed by 16 hours of classroom learning for each officer. This can be achieved through reallocation of the officer from normal duties in most cases without the need for overtime payments, so staff time for attending training is treated as an opportunity cost.

127. The financial costs associated with the training for the remainder of the Bill’s provisions are estimated at **£860,000**, comprising:

- Development of e-learning package = £45,000
- Total travel, accommodation and refreshments costs for all training = £815,000.

128. The opportunity costs associated with the training for the remainder of the Bill’s provisions are estimated at **£9,848,000**, comprising:

- Total staff time for attending 18 hours of trainings = £8,437,000
- Course and briefing preparation by training sergeants = £10,000
- Staff costs for 3-hour briefing for senior staff = £60,000
- Training staff time for delivering training = £1,209,000
- ‘Train the trainers’ – development = £35,000
- ‘Train the trainers’ – delivery = £35,000
- Additional training resource in Edinburgh and Glasgow = £64,000.

**Measures with no or marginal costs**

**Child Suspects**

129. The Bill’s provisions for child suspects will have an impact for the police by way of additional time spent finding, waiting for and accommodating parental or similar support and/or legal support for 16 and 17 year olds wishing it. In preparing the Bill the Scottish Government worked closely with Police Scotland on the provisions relating to child suspects and as part of that Police Scotland performed a scoping exercise to identify the number of 16 and 17 year olds attending police offices across Scotland during financial year 2011-12.
Table 11: numbers of 16 and 17 year olds attending police offices

<table>
<thead>
<tr>
<th>Force Area</th>
<th>Aged 16 &amp; 17</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern</td>
<td>757</td>
</tr>
<tr>
<td>Tayside</td>
<td>267</td>
</tr>
<tr>
<td>Fife</td>
<td>828</td>
</tr>
<tr>
<td>Central Scotland</td>
<td>177</td>
</tr>
<tr>
<td>Dumfries and Galloway</td>
<td>94</td>
</tr>
<tr>
<td>Lothian and Borders</td>
<td>1443</td>
</tr>
<tr>
<td>Grampian</td>
<td>402</td>
</tr>
<tr>
<td>Total</td>
<td>3968</td>
</tr>
</tbody>
</table>

130. Strathclyde were unable to provide numbers for this research but if they were taken to represent approximately the same again (based on the fact that approximately 50% of recorded crimes and offences in Scotland are recorded within the Strathclyde Police area) then a figure of 8,000 16 and 17 year olds attending police offices would be a reasonable total.

131. ACPOS, and now Police Scotland, have long been key partners in the roll-out of early and effective intervention (EEI) and the whole system approach to youth justice. The ethos of this approach promotes the diversion of young people away from formal measures and custody and in recent years. Nationally, since 2006-7 offence referrals to the children’s reporter have fallen by 66%, from 16,490 to 5,604 in 2011-12, with a 31% reduction from 2010-11 to 2011-12. Since 2008-9 the Policing Performance Framework has collected data on youth crime: the number of recorded crimes and offences committed by children and young people (8-17 year olds) decreased by 32% between 2008-09 and 2011-12. The number of children and young people (8-17) who committed crimes and offences decreased by 9% between 2010-11 and 2011-12 and fell 29% from 2008-9 to 2011-12. While the provisions in this Bill are not integral to the whole system approach they are consistent with a young-person-centred approach to youth justice which has seen substantial falls in the numbers of young people coming to the notice of police, requiring to be the subject of SPRs, and being taken to formal measures generally. As such, separating the savings associated with likely future falls in the number of young people being taken to police stations and interviewed from the costs of training, developing IT systems and additional waiting time from more general developments in policing practice would not be possible. Discussions with the Police suggest they would see these costs as intrinsic to the wider development of policing in Scotland and not attributable to this Bill.

Vulnerable adult suspects

132. The Bill provides a definition of a “vulnerable suspect” and puts in place special measures to ensure their rights are protected. Currently, when police are dealing with a vulnerable suspect or an individual about whom there is doubt about their capacity, then the services of an appropriate adult are sought. This should occur as soon as practicable and before interview.

133. Crown Office instructions on vulnerable suspects already provide that:
“Any cases involving suspects of any age who require the support of an appropriate adult must be provided with access to a solicitor prior to interview. They should not be allowed to waive this right.”

134. As the Bill’s provisions for vulnerable adults align with this Crown Office instruction, the Bill will not have a financial impact for the police.

Carloway provisions in general – police ICT

135. The Bill’s provisions will entail a significant level of change in the areas associated with custody systems, case reporting/management systems, and the Criminal History System.

136. The SPA is currently considering a major programme to redesign ICT processes and systems. If the programme is taken forward, any changes required for this Bill’s provisions should be achievable as part of this wider redesign without substantial additional costs.

Other provisions

137. The other Carloway provisions not mentioned in the previous section are anticipated to have no substantial costs for the SPA.

CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Measures with cost implications

Liberation from police custody

138. COPFS has identified two scenarios where the Bill’s provisions for liberation from police custody could have resource implications for them.

139. COPFS has developed a process model for cases where a suspect has been released by the police, HMRC or UKBA on investigative bail and wishes to challenge his bail conditions. This model sets out the work required at an administrative and professional level, and shows overall staff costs for COPFS of £64.42 per case. With an estimated 425 cases per year that leads to £27,000 per annum in staff costs.

140. COPFS has also developed a process model for cases where a suspect has been released by the police, HMRC or UKBA on undertaking and wishes to challenge his bail conditions. This also shows anticipated staff costs of £64.42 per case. With an estimated 2,950 cases per year that leads to £190,000 per annum in staff costs.

141. In total, COPFS identifies £217,000 per annum in additional staff costs as a result of the Bill’s provisions for liberation from police custody. This does not translate directly into additional financial cost, but will be part of general staff workloads. This has therefore been classed as an opportunity cost.
Questioning

142. COPFS has identified three scenarios where the Bill’s provisions for police questioning after charge could have resource implications for them. COPFS has provided process models for the three different scenarios, setting out work required at an administrative and professional level. See paragraphs 99-100 for more information on police and COPFS estimates of the prevalence of post-charge questioning.

143. For cases where the suspect has been advised he is to be reported to the Procurator Fiscal, is being kept in custody, and police/HMRC/UKBA wish to further question the suspect before he appears in court the next day, COPFS anticipate costs for them of £25.43 per case. With an estimated 50 cases per year, this leads to £1,000 per annum in staff costs.

144. For cases where the suspect has been advised he is to be reported to the Procurator Fiscal, has been released on undertaking or report, and the police/HMRC/UKBA wish to further question the suspect before he appears in court, COPFS anticipate costs for them of £43.38 per case. With an estimated 100 cases per year, this leads to £4,000 per annum in staff costs.

145. For cases where the suspect has appeared in court and police/HMRC/UKBA wish to further question the suspect, COPFS anticipate costs for them of £86.77 per case. With an estimated 50 cases per year, this leads to £4,000 per annum in staff costs.

146. In total, COPFS identify £10,000 per annum in additional staff costs as a result of the Bill’s provisions for police questioning after charge. This does not translate directly into additional financial cost, but will be part of general staff workloads. This has therefore been classed as an opportunity cost.

Corroboration and sufficiency of evidence

147. It is in relation to the provisions for the removal of the requirement for corroboration that COPFS has identified the most substantial cost implications. This relates to a possible increase in the number of reports received from the police, and in the number of prosecutions at solemn and summary court.

148. Detail of the Police Scotland shadow reporting exercise is provided in paragraphs 106-107. The results of the exercise showed a likely increase in the number of SPRs of between 1.5 and 2.2%, and most likely to be at the 1.5% level.

149. The increase in cases received from the police will result in increased costs for initial case preparation. This process is applied to all case received.
Table 12: additional COPFS costs for initial case preparation

<table>
<thead>
<tr>
<th>Process</th>
<th>Current Cost £</th>
<th>Increased cost £ (Low estimate)</th>
<th>Increased cost £ (Best estimate)</th>
<th>Increased cost £ (High estimate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial case preparation</td>
<td>4,702,000</td>
<td>71,000</td>
<td>71,000</td>
<td>103,000</td>
</tr>
</tbody>
</table>

150. A further shadow marking exercise was conducted by COPFS to consider the potential impact on the number of prosecutions. A draft new qualitative prosecutorial test was applied by six Procurator Fiscal Deputes (PFDs) with a range of experience. The deputes' assessment was made on the basis of the information contained in the SPR submitted by the police. The deputes conducting the shadow marking exercise did not know the original marking decision.

151. The results of the COPFS shadow marking exercise demonstrated that an anticipated increase of the following was likely:

- Summary Prosecutions 1% (due to the statistical sample the range could be from -1% to 4%)
- Solemn Prosecutions 6% (due to the statistical sample the range could be from 2% to 10%).

152. The combined impact of the two exercises is summarised in the following table.

Table 13: Potential % increase in the number of prosecutions (to nearest 0.1%)

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary prosecutions</td>
<td>0.5%</td>
<td>2.5%</td>
<td>6.3%</td>
</tr>
<tr>
<td>Solemn prosecutions</td>
<td>3.5%</td>
<td>7.6%</td>
<td>12.4%</td>
</tr>
</tbody>
</table>

153. A relatively small sample size was used in analysis of the potential impact of removing the requirement for corroboration. This means that the confidence interval between which the impacts could lie – presented as low and high estimates in the table – is very large. However it is extremely unlikely that impacts at the high end of the scale would be seen.

154. The increases in summary and solemn prosecutions will result in additional costs for COPFS, as set out in the following table.
Table 14: additional COPFS costs for summary and solemn prosecutions

<table>
<thead>
<tr>
<th>Process</th>
<th>Current Cost £</th>
<th>Increased cost £ (Low estimate)</th>
<th>Increased cost £ (Best estimate)</th>
<th>Increased cost £ (High estimate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary courts</td>
<td>20,365,000</td>
<td>102,000</td>
<td>509,000</td>
<td>1,283,000</td>
</tr>
<tr>
<td>Solemn courts</td>
<td>35,131,000</td>
<td>1,240,000</td>
<td>2,670,000</td>
<td>4,360,000</td>
</tr>
</tbody>
</table>

155. This gives a total estimated cost implication of £3,250,000 from increases in case volumes following the removal of the requirement for corroboration. These costs should be considered in the context of reductions in case volumes in recent years, as described at paragraph 34.

156. This estimate is based on staff costs. This does not translate directly into additional financial cost, but will be part of general staff workloads. This £3,250,000 has therefore been classed as an opportunity cost.

Carloway provisions in general – increase in appeals

157. While the level of appeals within Scotland is relatively stable, experience suggests that a change in law or a Supreme Court judgment normally leads to a short-term increase in the number of defence appeals lodged. COPFS therefore anticipate that the significant changes to the Scottish Criminal Justice System made by this Bill will give rise to legal challenges related to those changes.

158. Based on the number of appeals following the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, COPFS anticipate that for the first three years after implementation of the Bill there is likely to be a 10% increase in the Appeals Unit case load. Due to the additional work involved, this would result in an increase in costs of £87,000 per annum for three years. This estimate is based on staff time costs, and so does not translate directly into additional financial cost, but will be part of general staff workloads. This has therefore been classed as an opportunity cost.

Carloway provisions in general – COPFS training

159. The removal of the requirement of corroboration will require COPFS to apply a new prosecutorial test. This is a significant change and applying a new prosecutorial test will therefore require training for all legal staff within COPFS. COPFS staff will also require to be trained on the new arrest/detention/investigative bail and appeal provisions and any miscellaneous items that may be lodged throughout the passage of the bill. This training will be one-off and not recurring.

160. The implementation of ECHR into Scots law in 1999 was also a significant change in the legal approach that was required to be taken by prosecutors and COPFS assess that the training
needs for this Bill will be broadly similar to those undertaken at that time, which was three days training for legal staff.

161. The training requirement is assumed to extend to all 580 legal staff with an average of 20 trainees on each 3 day training event, and 815 operational admin staff with an average of 16 trainees on each one day training event.

162. Nothing has been included for the potential cost of updating existing training materials and events, which is assumed to be manageable within the normal workload of the Training Department, as this training will be prioritised over other more routine training.

163. COPFS has estimated total staff costs at £920,000, including trainer time to develop the course, trainer time to deliver events, and delegate time to attend training. COPFS training staff are already in place, and it is not anticipated that additional staff would be taken on to develop or deliver the training. This would be achieved within existing staff workload. In the great majority of cases, staff attendance at training would be by reallocation from their regular work, rather than as overtime. The above stated costs are therefore treated as an opportunity cost rather than a concrete financial cost.

Measures with no or marginal costs

164. The Bill provisions not mentioned in the previous section are anticipated to have no substantial costs for COPFS.

Carloway provisions in general – COPFS communication costs

165. It is anticipated that new documentation for COPFS will require to be produced in a number of areas. It is anticipated that in line with carbon management policies and becoming a more “green” organisation this documentation will likely be internet focused and as such, COPFS consider that any additional communication costs can be managed within the existing budget.

SCOTTISH COURT SERVICE

166. Costs on SCS will arise primarily from the increase in cases following the removal of the requirement for corroboration and the proposals in respect of new applications to the sheriff.

167. Whilst the Bill’s provisions relating to the Bowen recommendations are likely to make savings in court time, they are unlikely to make actual cash savings for the SCS. Any time freed up by the implementation of the provisions will be used to allocate court cases more quickly and use court time more effectively at both High court and local court level, but it appears that they are not of a scale that will result in the reduction of numbers of either judiciary or staff at any particular court. However some of the anticipated costs noted may be balanced by some of the estimated court time savings.
Measures with cost implications

Liberation from police custody

168. The Bill’s provisions for liberation from police custody will result in new applications to the sheriff for review of special conditions. This will require a fundamental change to the IT system to record information of police cases prior to the commencement of court proceedings. SCS has provided early estimates for this as one-off cost of £40,000, within a possible range of £30,000 to £50,000. This is capital expenditure.

169. There will also be an increase in costs in relation to the processing of the new type of applications, which may be opposed by the Crown. The current estimation of expected volumes is around 3,375 pa. If 50% of these are opposed by the Crown that would result in an additional 1,687 cases heard in court. SCS estimate around 15 minutes for such a hearing, suggesting costs of £84,000 per annum, and with unopposed chambers applications using a simplified procedure costing around £19,000 this would bring it to a total of cost around £103,000 per annum.

170. There is a finite amount of court time available under the current arrangements. The Scottish Government anticipates that these additional requirements will be managed within current resources. This £103,000 has therefore been classed as an opportunity cost.

Questioning

171. The Bill’s provisions for questioning of suspects after charge will require applications to the sheriff. In assessing costs for SCS, it is important to differentiate between applications made prior to the person’s first appearance in court, and those made following first appearance.

172. In the first case, SCS suggest that applications will be dealt with out of court by the sheriff (in a way similar to the police seeking a warrant), that there will be no opportunity for the applications to be opposed and if necessary the police may also seek a warrant for the accused to attend for questioning at the same time. It is anticipated that such applications will be cost neutral for SCS.

173. In the second scenario, where the application is made at or following first court appearance, a court diet will be fixed for the sheriff to consider the application made by the Crown and to hear any opposition to the application. There will be an increase in costs in relation to the processing of this new type of court application, which will require a court hearing.

174. COPFS has estimated that there would be around 50 cases per year of applications for post-charge questioning following first appearance at court. See paragraph 100 for more detail.

175. SCS estimates that each case, which will require to be called in court to allow for opposition, will take about 30 minutes of court time, giving a total estimated cost of £5,000 per annum.

176. There is a finite amount of court time available under the current arrangements. The Scottish Government anticipates that the additional requirements will be managed within current resources. This £5,000 has therefore been classed as an opportunity cost.
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

Corroboration and sufficiency of evidence

177. The removal of the requirement of corroboration is likely to result in additional cases being brought to court. The figures from police and COPFS for the numbers obtained in their relative shadow marking exercises suggested that increases will be in the following ranges. However, it is considered very unlikely that increases of the extent suggested in the high estimate will be seen (see paragraphs 106-107 and 150-153 for more detail).

Table 15: potential % increase in the number of prosecutions (to nearest 0.1%)

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary prosecutions</td>
<td>0.5%</td>
<td>2.5%</td>
<td>6.3%</td>
</tr>
<tr>
<td>Solemn prosecutions</td>
<td>3.5%</td>
<td>7.6%</td>
<td>12.4%</td>
</tr>
</tbody>
</table>

178. The SCS annual report for 2011/12\(^{15}\) states that there were 6,564 cases in the solemn courts. In relation to summary proceedings, there were 74,080 cases in the Sheriff Courts and 57,633 in the Justice of the Peace courts. Applying the percentage increases in table 15 above would result in the following number of additional prosecutions. This assumes that 20% of solemn cases would be prosecuted in the High Court, with the remainder in the Sheriff Courts.

Table 16: additional prosecutions

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Court</td>
<td>46</td>
<td>100</td>
<td>163</td>
</tr>
<tr>
<td>Sheriff Court solemn</td>
<td>184</td>
<td>399</td>
<td>651</td>
</tr>
<tr>
<td>Sheriff Court summary (includes Stipendiary cases)</td>
<td>370</td>
<td>1,852</td>
<td>4,667</td>
</tr>
<tr>
<td>Justice of the Peace courts</td>
<td>288</td>
<td>1,441</td>
<td>3,631</td>
</tr>
</tbody>
</table>

179. Combining this with the average costs per case of providing Legal Aid in each court in 2012-13 allows estimation of the costs resulting from additional prosecutions. This gives a total estimated cost implication of £2,500,000.

Table 17: costs resulting from additional prosecutions

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Court</td>
<td>£410,000</td>
<td>£900,000</td>
<td>£1,460,000</td>
</tr>
<tr>
<td>Sheriff Court solemn</td>
<td>£340,000</td>
<td>£740,000</td>
<td>£1,210,000</td>
</tr>
<tr>
<td>Sheriff Court summary (includes Stipendiary cases)</td>
<td>£120,000</td>
<td>£620,000</td>
<td>£1,560,000</td>
</tr>
<tr>
<td>Justice of the Peace courts</td>
<td>£50,000</td>
<td>£240,000</td>
<td>£610,000</td>
</tr>
<tr>
<td>Total</td>
<td>£930,000</td>
<td>£2,500,000</td>
<td>£4,840,000</td>
</tr>
</tbody>
</table>

180. However the cost of a High court case is significantly higher if it proceeds to trial, with the average plea costing less than 1.5% of the average case going to trial. The types of case making up the increase going to the High Court following removal of the requirement for corroboration is currently unknown, but if the cases coming to the High Court as part of the increase in business are more likely than average to test the Crown’s position on evidence and go to trial, the costs will increase accordingly.

181. These costs should be considered in the context of reductions in case volumes in recent years, as described at paragraph 34.

182. The costs from additional court time from the removal of the requirement for corroboration are to some extent balanced by the savings in court time associated with the Bowen elements of this Bill. See paragraphs 256-259 for more detail. There is a finite amount of court time available under the current arrangements. The Scottish Government anticipates that these additional requirements will be managed within current resources. This £2,500,000 has therefore been classed as an opportunity cost.

## Measures with no or marginal costs

183. The Carloway provisions not mentioned in the previous section are anticipated to have no substantial costs for SCS.

### SCOTTISH PRISON SERVICE

## Measures with cost implications

### Removal of requirement for corroboration

184. It is anticipated that the removal of the requirement for corroboration in criminal cases is likely to result in an increase in the number of prosecutions, which will impact on the SPS on the basis that additional prosecutions are likely to lead to additional convictions and additional custodial sentences. Based on the analysis by Police Scotland and COPFS (see paragraphs 106-107 and 150-153 for more detail), the potential scale of increases in prosecutions is as per the table below.

**Table 18: potential % increase in the number of prosecutions (to nearest 0.1%)**

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary prosecutions</td>
<td>0.5%</td>
<td>2.5%</td>
<td>6.3%</td>
</tr>
<tr>
<td>Solemn prosecutions</td>
<td>3.5%</td>
<td>7.6%</td>
<td>12.4%</td>
</tr>
</tbody>
</table>

185. Figures from Criminal Proceedings in Scotland 2011-12 show that 118,590 individuals were proceeded against in the solemn courts, with the equivalent figure for solemn proceedings standing at 6,146. The increase in prosecutions could therefore be as follows:
Table 19: absolute increase in the number of prosecutions (to nearest 10)

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary prosecutions</td>
<td>580</td>
<td>2,980</td>
<td>7,460</td>
</tr>
<tr>
<td>Solemn prosecutions</td>
<td>220</td>
<td>470</td>
<td>760</td>
</tr>
</tbody>
</table>

186. A relatively small sample size was used in analysis of the potential impact of removing the requirement for corroboration. This means that the confidence interval between which the impacts could lie – presented as low and high estimates in the table – is very large. However COPFS are of the view that the best estimate is expected to be an accurate forecast of the increased number of prosecutions.

187. Modelling of the potential impact of these additional prosecutions on the number of prison places required has been carried out on the following assumptions:
   - The distribution of crimes to which prosecutions will relate are as per the COPFS research done for the Carloway Review (recent shadow marking and reporting exercises identified only the overall impact at summary and solemn court level).
   - Additional prosecutions will follow the same pattern as those which have previously gone through the criminal justice system – that is, the same proportion will result in a successful conviction, the same proportion will result in a custodial sentence, and the average sentence length will be the same.

188. The costs of keeping accused people on remand has also been taken into account – there would only be additional costs where an accused person kept on remand did not receive a custodial sentence (for those who did get a custodial sentence, time on remand would be offset from the sentence served, thus meaning there were no additional costs).

189. SPS must take those offenders sentenced by the courts irrespective of the numbers in their custody at any one time. Through the years as the numbers of those in custody has increased SPS has shown that it is adaptable and has been able to react and accommodate these increases.

190. The table below sets out the number of additional prison places which could potentially be required from 2015-16 when the new provisions will come into force, and the associated costs of providing those extra prisoner places. It is anticipated that the full effect on prisoner places would not be seen immediately but would increase over a period of around 4-5 years. The figure of £37,302 used is the average annual cost of one prison place. This is calculated by dividing SPS’s overall running costs, including depreciation, by the design capacity of the prison estate in 2011-12.
Table 20: additional costs for SPS over time

<table>
<thead>
<tr>
<th></th>
<th>2015-16</th>
<th>2016-17</th>
<th>2017-18</th>
<th>2018-19</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of impact</td>
<td>20%</td>
<td>60%</td>
<td>80%</td>
<td>100%</td>
</tr>
<tr>
<td><strong>Prison places</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Low estimate</td>
<td>50</td>
<td>140</td>
<td>180</td>
<td>230</td>
</tr>
<tr>
<td><strong>Best estimate</strong></td>
<td>110</td>
<td>320</td>
<td>430</td>
<td>540</td>
</tr>
<tr>
<td>High estimate</td>
<td>190</td>
<td>570</td>
<td>760</td>
<td>950</td>
</tr>
<tr>
<td><strong>Costs based on £37,302 per additional place per annum</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Low estimate</td>
<td>£1,850,000</td>
<td>£5,200,000</td>
<td>£6,700,000</td>
<td>£8,500,000</td>
</tr>
<tr>
<td><strong>Best estimate</strong></td>
<td>£4,100,000</td>
<td>£11,850,000</td>
<td>£15,900,000</td>
<td>£20,000,000</td>
</tr>
<tr>
<td>High estimate</td>
<td>£7,000,000</td>
<td>£21,100,000</td>
<td>£28,100,000</td>
<td>£35,200,000</td>
</tr>
</tbody>
</table>

191. Current Scottish Government projections\(^{16}\) anticipate prison population growth of around 200 per annum over the period in question, suggesting that the prison population may reach around 9,000 by 2017-18, against a current capacity of 8,100. The changes made by this Bill were not specifically considered in establishing these figures, but the projections do implicitly take into account likely legislative and other policy changes.

192. In the short term, SPS considers that it can accommodate the current forecast population within its existing capacity and existing budget. If the recent drop in short term and remand populations continues this will also help to absorb the potential impact of any offenders sent to custody as a result of the changes in the law on corroboration. Similarly the SPS considers it could operate safely at these levels with a comparatively moderate capital and running cost investment without the need to commission a new prison.

193. These possible increases in prisoner numbers should also be considered in the context of the introduction of the Community Payback Order as a more robust and flexible community sentence, the presumption against imposing short prison sentences of three months or less, and a range of policy initiatives designed to reduce reoffending such as the Reducing Reoffending

These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

Change Fund. This wider work is likely to have a positive impact on the prison population, and the capacity to absorb any increases from other sources.

194. SPS has indicated that the increases in prisoner population set out as best estimates above can be accommodated within the flexibility that exists in the provision of prison places. There are limits to this flexibility, and long term increases may accelerate the rate that this flexibility is used up. However, on the assumption of a steady level of resources being available to SPS, the additional costs set out above can be considered opportunity costs.

195. Prison population projections for 2017-18 range from 7,900 (low variant) to 10,500 (high variant). Given the wide range of uncertainty in the projections, at this stage it is not possible to say whether or not this proposal would trigger the need for additional capacity, nor the precise timing of any additional capacity requirements. Following implementation, the actual increase in the number of summary and solemn cases will therefore need to be monitored closely to see whether it is likely to have any implications for prison estate planning.

Measures with no or marginal costs

196. The Carloway provisions not mentioned in the previous section are anticipated to have no substantial costs for SPS.

LEGAL AID FUND

197. Estimated costs in this section are based on current legal aid fee structures which may be subject to change in future.

Measures with cost implications

Liberation from police custody

198. The Bill provides for suspects being liberated from police custody to return at a later stage for resumption of questioning. Special conditions can be attached to this, with the ability to challenge these special conditions in a court hearing before a sheriff. If representation is to be made available at these hearings, then Assistance by Way of Representation (ABWOR) would be the only way to do this, as criminal legal aid cannot be made available before the suspect is charged. SLAB estimate that the costs of such challenges would be in the region of £83,000, on the following basis:

- Police Scotland estimates for persons released on special conditions – 1,620 (see paragraphs 59-60)
- It is estimated that 25% of these people might challenge these special conditions – 405
- A figure of £200 has been used for the purposes of estimating the cost of the average cost of ABWOR for these hearings
- 405 x £200 = £81,000.
199. The new Bill also provides for suspects who are liberated from police custody to appear in court at a later date to also have special conditions attached, with the ability to challenge these special conditions in a court hearing before a sheriff. If representation is to be made available at these hearings, then ABWOR would be the only way to do this, as criminal legal aid cannot be made available before the suspect is charged. SLAB estimate that the cost of these challenges would be in the region of £585,000 on the following basis:

- 54,000 suspects currently released in this way.
- Police estimate that between 10% and 20% of these people could have special conditions attached (5,400 to 10,800, with a mid-range estimate of 8,100)
- When added to the current figure of 3,601 people released on undertakings with special conditions, this gives a total of 11,701
- It is estimated that 25% of these people might challenge these special conditions – 2,925
- A figure of £200 has been used for the purposes of estimating the cost of the average cost of ABWOR for these hearings
- 2,925 x £200 = £585,000.

200. It is anticipated that any increase in police or procurator fiscal liberation undertaking cases could also result in an increase in the number of breach proceedings which are raised when clients fail to attend at the police station or court after giving an undertaking to appear. Legal aid can be made available for these breach proceedings. In 2011-12, there were 2,301 grants of ABWOR, summary and solemn criminal legal aid for these proceedings. In total, £1,970,000 was spent for these types of cases during the year. If there is a 10% increase in these proceedings, then this would cost an extra £197,000.

201. In total, therefore, SLAB estimate additional costs of £863,000 per annum.

Legal advice

202. The Board currently runs the Solicitor Contact Line as part of the wider Police Station Duty Scheme. This provides a telephone solicitor contact point which operates 24 hours a day, seven days a week. Where a suspect being questioned at a police station requires legal advice, the police call the Contact Line who will either then contact the named solicitor for the client, or be available to provide telephone advice direct to the client. The contact line also makes arrangements for local duty solicitors to attend personally at police stations where this is required or requested by the suspect; or, if the duty solicitor is unavailable, to attend themselves. At present, the cost of paying Board solicitors and associated staff for this service is around £650,000 per year.

203. The Bill provides for accused people who are detained but not questioned to have the right to consult with a solicitor. It is anticipated that this would increase the calls to the solicitor contact line, and the number of instances where Board solicitors are required to advise suspects at police stations. At present, SLAB deals with around 60 suspects per day who are requesting legal advice. In a third of these cases, the suspects do not have a named solicitor, so solicitors on the Contact Line provide them with legal advice. In the other two thirds of these cases, the
suspects do have a named solicitor who is then contacted to advise them that their clients are seeking legal advice from them.

204. As described in paragraph 78, the Bill is estimated to result in an additional 163,360 people being eligible to access legal advice in the police station.

205. In discussion with SLAB, Police Scotland and other stakeholders the Scottish Government has concluded that the take-up rate for this group will likely be lower than for those who are questioned, on the basis that detainees being released without being questioned are less likely to seek legal advice. A likely range of 20% to 53.6% take-up rates for solicitor access for this non-interviewed group has been modelled, with a most likely estimate at 35% (see table below). It is anticipated that the take-up rate for suspects who are interviewed would stay the same.

Table 21: total numbers of people seeking legal advice

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Total people seeking legal advice</th>
</tr>
</thead>
<tbody>
<tr>
<td>53.6% take-up for interviews; 20% take-up for non-interviews</td>
<td>22,224 + 32,672 = 54,896</td>
</tr>
<tr>
<td>53.6% take-up for interviews; 35% take-up for non-interviews</td>
<td>22,224 + 57,176 = 79,400</td>
</tr>
<tr>
<td>53.6% take-up for interviews; 53.6% take-up for non-interviews</td>
<td>22,224 + 87,561 = 109,785</td>
</tr>
</tbody>
</table>

206. At 20%, an additional 32,672 people could be looking for legal advice, giving a total of about 54,896, compared to the 22,224 SLAB are dealing with at the moment, an increase in the region of 2.5 times.

207. Taking a most likely estimated increase of 35% would mean an additional 57,176 people looking for legal advice, giving a total of about 79,400, compared to the 22,224 SLAB are dealing with at the moment, an increase in the region of 3.5 times.

208. Currently, the Solicitor Contact Line operates with two solicitors on shift at any one time 24 hours a day, seven days a week. SLAB has modelled staffing requirements on the contact line based on these potential percentage increases. Because of the 24/7 nature of this service, the costs of providing an additional solicitor for each day is roughly five whole time equivalents at about £59,000 per annum each (including shift allowances, attendance payments and employers’ costs). Therefore, the cost of providing an additional solicitor for each day would be about £295,000 per year.
209. The costs of these possible scenarios are summarised in the following table. As indicated above, it is anticipated that the 35% figure to be the one that is most likely.

### Table 22: financial impact on the Solicitor Contact Line

<table>
<thead>
<tr>
<th>Scenario</th>
<th>People seeking legal advice</th>
<th>Impact on SLAB Solicitor Contact Line</th>
<th>Additional cost to SLAB</th>
</tr>
</thead>
<tbody>
<tr>
<td>53.6% take up for interviews 20% take up for non-interviews (lower limit)</td>
<td>54,896</td>
<td>2 additional solicitors per shift</td>
<td>£590,000</td>
</tr>
<tr>
<td>53.6% take up for interviews 35% take up for non-interviews (best estimate)</td>
<td>79,400</td>
<td>2 additional solicitors per shift 2 additional admin worker per shift</td>
<td>£890,000</td>
</tr>
<tr>
<td>53.6% take up for interviews 53.6% take up for non-interviews (upper limit)</td>
<td>109,785</td>
<td>4 additional solicitors per shift 4 additional admin workers per shift</td>
<td>£1,780,000</td>
</tr>
</tbody>
</table>

210. A number of steps might be taken with the aim of ensuring that legal advice is provided in the most effective and efficient manner. These could include locating solicitors at the busiest police stations, email intimation from the Police to the Board, and wider use of video links.

211. It is anticipated that the great majority of additional advice as a result of the Bill would be offered by telephone. This is discussed at paragraph 81. There would likely be some increase in the number of personal attendances by solicitors, which could increase the average advice and assistance cost.

212. If the number of grants of advice and assistance by private and PDSO solicitors also increases 3.5 times as a result legal advice being available to everyone in a police station, then this would result in a total of around 12,600 grants of advice and assistance every year, an increase of 9,000.

213. SLAB has advised that, under the existing fee structure, the average cost of these cases would be likely to increase from £60 to somewhere in the range £90-£120, due to more personal attendances, as well as the following additional factors:

- The support required for vulnerable adults could well extend the time taken by solicitors at police stations
- The 6 hour review periods could also lead to increased advice
- Refusal of Police bail could also extend legal advice
- Questioning after charge, and questioning after police bail could also mean further legal advice.
214. This would result in an estimated increase in costs for advice and assistance by private and PDSO solicitors of between £810,000 and £1,080,000, with a mid-range estimate at £945,000.

Corroboration and sufficiency of evidence

215. It is anticipated that the removal of the requirement of corroboration would result in additional cases being brought to court. The figures from police and COPFS for the numbers obtained in their relative shadowing exercises suggested that increases will be in the following ranges. However, it is considered very unlikely that increases of the extent suggested in the high estimate will be seen (see paragraphs 106-107 and 150-153 for more detail).

Table 23: potential % increase in the number of prosecutions (to nearest 0.1%)

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<td>6.3%</td>
</tr>
<tr>
<td>Solemn prosecutions</td>
<td>3.5%</td>
<td>7.6%</td>
<td>12.4%</td>
</tr>
</tbody>
</table>

216. During 2011/2012, there were proceedings against 6,146 people in the solemn courts and 118,590 in the summary courts. Applying the percentage increases in the table above would result in the following number of additional prosecutions. This assumes that 20% of solemn cases would be prosecuted in the High Court, with the remainder in the Sheriff Courts, and 64% of summary cases prosecuted in the Sheriff Courts with the remainder in Justice of the Peace courts.

Table 24: additional prosecutions

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Court</td>
<td>43</td>
<td>93</td>
<td>153</td>
</tr>
<tr>
<td>Sheriff Court solemn</td>
<td>174</td>
<td>373</td>
<td>611</td>
</tr>
<tr>
<td>Sheriff Court summary (includes Stipendiary cases)</td>
<td>368</td>
<td>1909</td>
<td>4772</td>
</tr>
<tr>
<td>Justice of the Peace courts</td>
<td>207</td>
<td>1074</td>
<td>2684</td>
</tr>
</tbody>
</table>
217. Combining this with the average costs per case of providing Legal Aid in each court in 2012-13 allows estimation of the costs resulting from additional prosecutions. This gives a total estimated cost implication of £3,900,000 using the best estimate of case volumes. These costs should be considered in the context of reductions in case volumes in recent years, as described at paragraph 34.

Table 25: costs for SLAB resulting from additional prosecutions

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Court</td>
<td>£730,000</td>
<td>£1,580,000</td>
<td>£2,580,000</td>
</tr>
<tr>
<td>Sheriff Court solemn</td>
<td>£330,000</td>
<td>£700,000</td>
<td>£1,150,000</td>
</tr>
<tr>
<td>Sheriff Court summary (includes Stipendiary cases)</td>
<td>£230,000</td>
<td>£1,220,000</td>
<td>£3,040,000</td>
</tr>
<tr>
<td>Justice of the Peace courts</td>
<td>£80,000</td>
<td>£410,000</td>
<td>£1,030,000</td>
</tr>
<tr>
<td>Total</td>
<td>£1,370,000</td>
<td>£3,900,000</td>
<td>£7,790,000</td>
</tr>
</tbody>
</table>

**Appeal procedures**

218. SLAB has indicated that any impact of hearings in chambers on late leave to appeal compared to oral hearings would be cost neutral. Solicitors and counsel are entitled to the same fees for appearing in chambers as they would be at more formal court hearings.

219. SLAB does not consider that there would be savings accruing from more cases proceedings by way of note of appeal as opposed to stated case. The current feeing structure means that counsel are paid slightly more for notes of appeal as opposed to stated cases, with solicitors being paid slightly more for stated cases.

220. SLAB has estimated that 33% of criminal appeal cases include work involved in submitting a late appeal. In addition, the average extra expense of work involved in these late appeals, notably presenting reasons why appeals should be heard late, is about £208 per case. SLAB therefore estimates that the additional cost of dealing with late appeals is around £137,000 per year. If the new measures reduce this by 50% then this could bring savings of around £68,500 per year.

221. In 2011-12, criminal legal aid was granted for 17 Bill of Suspension cases and 6 Bill of Advocation cases. If these cases proceeded by leave to appeal, with a sift system, then the costs of these could be reduced marginally.
Measures with no or marginal costs

Child suspects

222. SLAB figures show that 6.9% of suspects who are referred to the Contact Line are under 18, with 1.2% of suspects under 16.

223. The Bill states that all children under the age of 16 should have legal advice, and not have the facility to waive that right, and that suspects who are 16 or 17 should only be able to waive that right if there is agreement of any adult reasonably named by the person.

224. Police Scotland has indicated they do not consider that these measures will have a major impact on the numbers of young people seeking legal advice in police stations (as described at paragraph 131). Through other measures such as the Children and Young People’s Bill and the police’s own strategic reviews, they are looking to reduce the numbers of young people taken through police stations and the criminal justice system. Therefore, the Scottish Government has assumed that there will not be any specific increase in the number of cases where legal advice is requested as a result of these particular measures.

Other provisions

225. The other Carloway provisions not mentioned in the previous section are anticipated to have no substantial costs for SLAB.

SCOTTISH CHILDREN’S REPORTER ADMINISTRATION

226. No additional costs have been identified for SCRA. The removal of the requirement for corroboration in children’s hearings proceedings is not anticipated to impact on the number of children and young people referred to the Reporter nor on the role of Reporters in determining whether a case should be taken to a children’s hearing. The number of children’s hearings cases that are remitted to the court will continue to depend on whether the child or young person accepts the grounds on which they have been referred to the hearing.

COSTS ON LOCAL AUTHORITIES

Measures with cost implications

Child suspects

227. The provisions relating to child suspects will potentially bring new costs to local authorities. 16 and 17 year olds can seek support from any person they name – from parent to relative to friend. In the great majority of cases such support is likely to be sought from people known to the suspect but where such support cannot be found local authority provision is the backstop. As Carloway notes in his review, that is the current practice for under 16s and works well.

228. Consultation with representatives of Police Scotland, Association of Directors of Social Work (“ADSW”) and Convention Of Scottish Local Authorities (“COSLA”) confirmed the Scottish Government’s initial view that only a small proportion of 16 and 17 year olds would
want to seek support from a social worker. For the most part a young person seeking support is likely to do so from a parent, family member or friend. Where moral support is wanted, and where no such familiar provision can be found, existing practice for under 16s would be the provision of a social worker. In the context of 16 and 17 year olds this is new provision and there is therefore no solid basis beyond the experience of professionals for determining how often this would occur. Costs have been modelled based on such support being sought in 5%, 10% and, as an upper limit, 20% of cases. This is based on an assumption that the nature of the role and existing provision is such that it would most likely be best provided by social work services. This uses an hourly rate for social work support of £21 plus 25% on-costs giving a total of £26.25 and an average time commitment of four hours (the midpoint of a range of two to six hours allowing for variations in rurality and complexity). Further detail on the numbers of 16 and 17 year olds can be found at paragraph 129. Table 26 below sets out the cost implications.

Table 26: additional costs per year for local authorities

<table>
<thead>
<tr>
<th>Assumption</th>
<th>Cases</th>
<th>Costs</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lower – 5%</td>
<td>400</td>
<td>£26.25 x 4 x 400</td>
<td>£42,000</td>
</tr>
<tr>
<td>Mid – 10%</td>
<td>800</td>
<td>£26.25 x 4 x 800</td>
<td>£84,000</td>
</tr>
<tr>
<td>Upper – 20%</td>
<td>1600</td>
<td>£26.25 x 4 x 1600</td>
<td>£168,000</td>
</tr>
</tbody>
</table>

229. 10% has been used as the most likely estimate. These costs would fall nationally across local authorities, distributed at the rates at which they bring young people to police offices.

230. This estimate is based on the hourly costs associated with a social worker’s time. This does not translate directly into additional financial cost, but would be part of the general social workers’ workloads. This £84,000 has therefore been classed as an opportunity cost.

**Corroboration and sufficiency of evidence**

231. Removal of the requirement for corroboration in criminal cases is likely to result in an increase in the number of prosecutions, which will impact on local authorities on the basis that additional prosecutions are likely to lead to additional community sentences. Based on the analysis by Police Scotland and the COPFS (see paragraphs 106-107 and 150-153 for more detail), the potential scale of increases in prosecutions is as per the table below.

Table 27: potential % increase in the number of prosecutions (to nearest 0.1%)

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary prosecutions</td>
<td>0.5%</td>
<td>2.5%</td>
<td>6.3%</td>
</tr>
<tr>
<td>Solemn prosecutions</td>
<td>3.5%</td>
<td>7.6%</td>
<td>12.4%</td>
</tr>
</tbody>
</table>

232. Figures from Criminal Proceedings in Scotland 2011-12\(^{17}\) show that 118,590 individuals were proceeded against in the summary courts, with the equivalent figure for solemn proceedings standing at 6,146. The increase in prosecutions would therefore be as follows:

\(^{17}\)http://www.scotland.gov.uk/Publications/2012/11/5336
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

Table 28: absolute increase in the number of prosecutions (to nearest 10)

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary prosecutions</td>
<td>580</td>
<td>2,980</td>
<td>7,460</td>
</tr>
<tr>
<td>Solemn prosecutions</td>
<td>220</td>
<td>470</td>
<td>760</td>
</tr>
</tbody>
</table>

233. Modelling of the potential impact of these additional prosecutions on the number of community sentences has been carried out on the following assumptions:

- The distribution of crimes to which prosecutions will relate are as per the COPFS research done for the Carloway Review (recent shadow marking and reporting exercises identified only the overall impact at summary and solemn court level).
- Additional prosecutions will follow the same pattern as those which have previously gone through the criminal justice system – that is, the same proportion will result in a successful conviction, and the same proportion will result in a community sentence.

234. The table below sets out the number of community sentences which could potentially be required, as well as the associated costs. Costs have been calculated on the basis of an assumed cost per community sentence of £2,400.

Table 29: additional costs for local authorities per year

<table>
<thead>
<tr>
<th></th>
<th>Low estimate</th>
<th>Best estimate</th>
<th>High estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Additional community sentences</td>
<td>120</td>
<td>480</td>
<td>1,140</td>
</tr>
<tr>
<td>Additional costs</td>
<td>£280,000</td>
<td><strong>£1,160,000</strong></td>
<td>£2,730,000</td>
</tr>
</tbody>
</table>

235. The costs associated with community sentences are primarily for staff time. This does not translate directly into additional financial cost, but will need to be considered by local authorities as an additional demand in managing staff workloads. This £1,160,000 has therefore been classed as an opportunity cost.

Measures with no or marginal costs

236. The provisions in the Bill in relation to vulnerable adult suspects will be of interest to local authorities but will not entail additional costs as Appropriate Adult Services are provided at present on a non-statutory basis.

237. The other Carloway provisions not mentioned in the previous section are anticipated to have no substantial costs for local authorities.
COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

238. No additional costs have been identified for other bodies, individuals or businesses.

ADDITIONAL INCOME

239. No additional income has been identified from the Bill, though there will be efficiency savings, as set out in the sections on the Bowen provisions and miscellaneous items, which will offset some of the additional costs. Savings in court time from the introduction of a compulsory business meeting (see paragraph 256-259) will reduce some of the costs from additional court time as a result of the removal of the requirement for corroboration (see paragraph 177-182).

PART B – BOWEN PROVISIONS

OUTLINE OF MEASURES

Measures with cost implications

Pre-trial time limits

240. This provision increases the time limit during which a person on remand must be brought to trial from 110 days to 140 days. This has a number of cost implications, as it will increase the prisoner population. This increase has been modelled at 40 extra places at any time.

First diets

241. This section provides that accused persons will be cited to a first diet, at which the trial diet will be set. The trial diet will be set according to the sheriff’s view of the state of preparedness of the parties. This will reduce the problem of citing parties and witnesses to diets which do not proceed, and thus create savings for the police, courts and legal aid budget as well as freeing up court time and reducing inconvenience to those involved.

Duty of prosecution and defence to communicate

242. This provides that prosecution and defence must meet in advance of the first diet to discuss their state of preparedness. Sheriff Principal Bowen described this as a Compulsory Business Meeting (“CBM”). A record will be kept of the meeting and the court must have regard to this record at the first diet. While the cost of preparing this record will fall on the COPFS the process of engagement will reduce the number of diets continued owing to unpreparedness, and indeed reduce the number of cases going to trial, as they are more likely to be resolved by early pleas. This will generate savings.

Plea of guilty

243. This removes the need to sign a plea of guilty. This will generate savings by allowing persons to plead guilty remotely.

Measures with no or marginal costs

244. The other Bowen provisions are anticipated to have no substantial costs.
COSTS ON THE SCOTTISH GOVERNMENT

245. The Bowen provisions are anticipated to have no substantial costs for the Scottish Government.

SCOTTISH POLICE AUTHORITY

246. The SPA will benefit from savings arising from fewer witness citations as a result of more efficient case management and early guilty pleas. Police officers will therefore be required to attend court less often. Over the financial years 2009-12, 56% of all witnesses first cited to sheriff and jury courts were police officers. The requirement on a police officer to attend court as a witness takes an average of 2.43 hours, not including travel time. This average reflects a time requirement that can last from one to six hours.

247. The Review found that, based on the volume of business in 2008-09, if three fewer witnesses were cited per case, there would be about 7,000 fewer witnesses cited overall. If seven fewer witnesses were cited, there would be about 17,000 fewer witnesses cited overall. (The volume of cases is, broadly, 2,400). Applying the average of 56% to these figures, the changes may save approximately 4,000 to 9,500 police witnesses. Again, applying the average time saved of 2.43 hours this would result in estimates of time saved at between 9,700 and 23,000 hours. There will also be savings in witness time arising from the increase in guilty pleas likely to result from engagement between the parties prior to the commencement of proceedings. Using a mid-range estimate of 16,350 gives annual savings of £391,000.

\[16,350 \text{ hours saved } \times \£23.91 \text{ hourly cost of a constable } = \£391,000\]

248. These savings will consist of police time spared for other activities, rather than money, as the strength of the police establishment will not be reduced. It does, however, balance some of the other demands on police time elsewhere in the Bill, and is recorded here as an opportunity cost saving.

CROWN OFFICE AND PROCURATOR FISCAL SERVICE

249. The Bill will result in savings for COPFS by ensuring that witnesses will only be cited to trial diets which are likely to go ahead thereby reducing citation costs, as well as reimbursement costs.

250. The cost of reimbursing a witness for loss of earnings, expenses etc. falls on COPFS. The amount of expenses witnesses can claim will depend on a range of factors. It is also not known how many fewer witnesses will need to be cited as a result of the changes. This is dependent on the volume of business and the complexity of cases as well as the success of the provisions in reducing the number of witness citations. Applying the range of witnesses saved described in paragraph 247 (7,000-17,000) to its current reimbursement costs, COPFS estimates a saving of approximately £75,000 to £181,000 a year. A mid-range estimate gives financial savings of around £128,000 per annum.
251. COPFS is also responsible for citing witnesses, so it would make savings by the mere fact of citing fewer witnesses. These arise from less time for a Solemn Legal Manager to decide which witnesses to call, and less time for the administrative member of staff actually to cite them. COPFS estimates citation costs at £580 per 1,000 witnesses. On the range shown above, of 7,000-17,000 witnesses saved, this would result in a saving of between £4,000 and £10,000. A mid-range estimate is a saving of £6,000 per annum. For comparison purposes, the numbers of witnesses first cited in sheriff and jury trials in each of the financial years 2009-12 was between 50,000 and 60,000. This saving relates to staff time and is therefore an opportunity cost saving, to be balanced against other opportunity costs for COPFS.

252. COPFS would, however, also have to carry some costs. These costs would arise from the requirement to attend the CBMs, and from preparing a record of these and lodging with the court in advance of the first diet. The work involved, including preparation, is estimated at half a day. The cost would depend on the seniority of the personnel undertaking this work. COPFS believes this would either be a Senior Procurator Fiscal Depute or a Solemn Legal Manager, at a half day’s cost of £178 and £150 respectively. This, however, is based on all CBMs being held by means of a face-to-face meeting. It thus represents a theoretical maximum. In many cases, no such face-to-face meeting will be held and the costs would accordingly be less.

253. CBMs will not need to be held where there is an early guilty plea under the procedure outlined in section 76 of the 1995 Act. However, such a meeting would be held where a plea of guilty is obtained at or around the first diet, or at any rate before the trial. Consequently the number of cases affected is higher than the 2,400 shown above, and has been estimated at about 3,350. This figure multiplied by the staff costs above gives a range of £503,000 to £596,000.

254. This figure is likely, however, to be reduced by a greater incidence of section 76 pleas through the new arrangements. A 5% increase, for example, would result in 118 fewer cases. This would save preparation time of one day overall per case – 118 days’ work. That work is shared among staff whose daily cost ranges from £150 to £357. The savings to offset against the costs of the CBM would therefore fall in a range of £18,000 - £42,000. The Scottish Government anticipates that a 10% increase is more likely, which would result in 236 fewer cases, and savings of between £35,000 and £84,000. A mid-range estimate gives a saving of £60,000.

255. Applying this reduction, and savings from a proportion of CBMs not requiring face-to-face meetings, the Scottish Government estimates additional costs of £370,000 per annum. These additional costs relate to additional demands on staff time. This does not translate directly into additional financial cost, but will be part of general staff workloads. This has therefore been classed as an opportunity cost.

SCOTTISH COURT SERVICE

256. It is anticipated that the proposal to introduce CBMs prior to indictment should result in savings to the courts through an increase in early pleas (because the parties will have engaged before trial) and thus avoidance of the costs of a full trial where evidence is led. It is difficult to predict how many cases will be affected, but SCS has provided estimated savings based on a 5% decrease and a 10% decrease.
257. In 2011-12, a total of 1,128 indictment cases went to trial, according to the SCS Annual Report\textsuperscript{18}. A 5% reduction in cases would be 56 fewer cases, and a 10% reduction would be 113 fewer cases. SCS costs of an individual case are estimated at £11,225 on average. The average cost for SCS of administering a plea is estimated at £187. The cost differential for each early plea is therefore a saving of £11,038. This suggests the following possible savings.

\textbf{Table 30: SCS savings from early pleas}

<table>
<thead>
<tr>
<th></th>
<th>5% reduction</th>
<th>10% reduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Savings from early pleas</td>
<td>56 x £11,038 = £623,000</td>
<td>113 x £11,038 = £1,245,000</td>
</tr>
</tbody>
</table>

258. Following discussion with SCS, it is anticipated that an increase of 10% would be more likely, and this suggests savings of £1,245,000.

259. These savings would not be an actual cost saving, as cuts in staffing levels are unlikely to arise directly through implementation of these provisions. However, these savings will counteract some of the other costs in the Bill, particularly from the removal of the requirement for corroboration. This has therefore been recorded as an opportunity cost saving.

**SCOTTISH PRISON SERVICE**

260. It is anticipated that costs will arise from the provision which increases the time-limit for the period for which an accused person may be remanded before his or her trial commences from 110 to 140 days. In some cases those imprisoned for this longer period on remand will, as a result, spend a correspondingly shorter period in prison after conviction. While the 100 day limit is currently not infrequently extended, this proposal has nevertheless been modelled as requiring 40 extra remand places even after the increase in cases where an early guilty plea is accepted. This figure would include the part-place in secure accommodation referred to under “Costs of Local Authorities”.

261. The prison service estimates that the annual cost of a prisoner place in 2011-12 was £37,302, so this proposal would result in an increased cost for the SPS of approximately £1,500,000.

262. SPS has indicated that this increase in prisoner can be accommodated within the flexibility that exists in the provision of prison places. There are limits to this flexibility, and long term increases may accelerate the rate that this flexibility is used up. However, on the basis of a steady level of resources being available to SPS, the additional costs set out above are considered opportunity costs.

LEGAL AID FUND

263. The main area which the Scottish Government anticipates will have a financial impact on the Board will be the proposed introduction of CBMs. The current legal aid payment structure is already sufficiently flexible to accommodate the proposed changes. Payment for the work involved in the CBM would be allowable on a time and line basis. Similarly, if counsel is to be involved in these meetings, counsel’s Table of Fees would ideally be revised to accommodate their attendance at CBMs although in the absence of any such changes the Table does, at present, make provision for consultations with COPFS.

264. As with SCS, it is anticipated that the provision which introduces a compulsory business meeting would result in some savings to SLAB through early pleas reducing the need to hold full trials. In the case of SLAB, the savings arising from an increase of 5% in the number of cases currently going to full trial being resolved instead by an early plea, would amount to some £167,000. An increase of 10% would lead to savings of around £334,000. This is not a cost saving, but can be offset against the additional costs for SLAB elsewhere in the Bill.

265. Balanced against this are the anticipated additional costs for SLAB from attendance at CBMs. This is estimated at £658,000 per year, based on the current payment regime and on 9,916 sheriff and jury cases paid in 2011-12. It is expected that a CBM will take place in each case, and last an average of one hour:

- Solicitors’ fees - £603,000
- Counsel’s fees £55,000 (based on a sanction for counsel granted in 2.5% of sheriff and jury cases)
- Total - £658,000.

266. However, these figures represent a theoretical maximum where CBMs are all held face to face. SLAB advise that the costs could be significantly lower if these “meetings” took place in other formats, using video/telephone conferencing or by emails. These are permitted by the Bill, so the costs will be lower. In addition, it is anticipated that the CBM process will avoid adjournments and may lead to earlier settlement being achieved. This would lead to further savings. A 25% reduction in SLAB costs is anticipated as a result of these factors. A revised cost estimate is therefore £493,000 per annum.

COSTS ON LOCAL AUTHORITIES

267. The proposal to increase the time-limit for the period for which an accused person may be remanded before his or her trial commences from 110 to 140 days will increase the number of persons held on remand (see paragraph 240).

268. In particular it could result in the occupation of a place in secure accommodation being occupied 25% of the time. At present there is capacity in the secure estate for further residents, so in the short term there is no anticipated additional cost. However, in the longer term an additional secure accommodation place could be required at the cost of around £225,000 per annum. For the purposes of this financial memorandum, the impact has been estimated at £56,000 per annum (0.25 x £225,000). This is classed as a financial cost as it is anticipated that...
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

the place would use private provision. In the case of remand residents, this is borne by local authorities, and this cost would have to be spread among the local authorities sending individuals to that place.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

269. The requirement to attend CBMs in advance of first diets will create a cost for legal representatives. However, Sheriff Principal Bowen noted that this early engagement was already good practice taking place in some areas of the country. He also observed that the views of all parties were that meaningful engagement prior to first diet removed churn, and that defence agents stated they were willing to engage in early discussion.

270. Accordingly it would appear that many defence agents are willing to undertake this cost, even where they do not undertake it already (though, as noted below, there would be reimbursement on a “time-and-line” basis from the Legal Aid Fund). This willingness to accept CBMs may be explained by the reduction in inconvenience, and cost savings, for defence agents, created by greater efficiency in the disposal of court business.

271. Costs are therefore balanced by savings. In any case they will depend on variables such as distance of meetings from agents’ offices, duration, time spent in preparation etc. They are likely to be marginal, particularly given the Bills flexibility on the manner of holding the CBM.

272. Businesses are likely to experience savings arising from the calling of fewer of their employees as witnesses and (where trials are avoided by early pleas) jurors. Similar savings will arise for the individuals concerned. However, these are marginal and are not quantified.

ADDITIONAL INCOME

273. The Bowen provisions are anticipated to have no additional income beyond the efficiency savings identified above.

PART C – MISCELLANEOUS PROVISIONS

Measures with cost implications

Maximum term for weapons offences

274. Separate offences concerning possession of an article with a blade or point are contained in sections 47, 49, 49A and 49C of the Criminal Law (Consolidation) (Scotland) Act 1995.

275. The Bill increases the maximum penalties available for each of these offences from four years imprisonment to five years imprisonment. For the purpose of this Financial Memorandum, the term ‘handling offensive weapon offences’ is used to cover all the separate offences contained within sections 47, 49, 49A and 49C of the 1995 Act.

276. The increase in the maximum penalties available for these offences does not mean that the court must impose the new maximum penalties. The court will continue to have absolute
discretion in deciding what an appropriate sentence should be for each individual case within the overall legal framework and within each court’s sentencing powers.

277. It is therefore difficult to estimate with certainty what the impact will be of increasing the maximum penalties for these offences. The information provided below is a best estimate of the financial impact of the increase in the maximum penalties but should be treated with caution given the difficulties in accurately assessing the impact of how courts will decide to use higher maximum penalties in individual cases, if at all.

Scottish Prison Service

278. The Scottish Government anticipates that an increase in the maximum penalty for these offences is likely to have an impact on the sentencing behaviour of Scottish courts.

279. Sentencing data for 2011-12\(^1\) shows that:

- the number of people convicted of these offences was 2,276;
- the number of these people who received a custodial sentence for these offences was 805;
- the percentage of those people who received a custodial sentence was 35%; and
- the average custodial sentence length for these offences was 311 days\(^2\).

280. There are relatively few people who currently receive sentences of over two years for these offences (42 in 2011-12). Whilst the impact of an increase in the maximum penalties may be limited to those who currently receive sentences relatively close to the current maximum of four years, a general increase in average sentence levels might occur.

281. The table below provides figures which demonstrate the effect of a 5% increase in average sentence lengths (the low estimate), a 10% increase in average sentence length (the mid estimate), and a 15% increase in average sentence length (the high estimate). These figures are provided on an illustrative basis to help demonstrate the potential impact of the increase in maximum penalties for these offences. The calculation uses 2011-12 sentencing data as the base values and assumes that the increase in average sentence length occurs in year one.

282. The average annual cost of one prison place is £37,302. This represents the overall cost of running the Scottish Prison Service divided by the design capacity of the prison estate in 2011-12.

283. Under the current statutory early release rules, the additional time spent in prison will be half of the additional period of time by which a sentence has increased. For example, a person

\(^{1}\text{http://www.scotland.gov.uk/Publications/2012/11/5336/0}\)

\(^{2}\text{The figures given for offences also include a very small number of offences under section 141 and 141A of the Criminal Justice Act 1988. These offences relate to restriction of sale of offensive weapons and account for less than 1% of the figures given. The provisions in this Bill do not affect the maximum penalties for section 141 and 141A offences in the Criminal Justice Act 1988.}\)
receiving an additional ten days onto their sentence as a result of an increase in the overall maximum penalties for an offence will generally spend an additional five days in prison and the figures included within the table below are calculated on that basis.

284. Where an additional period is added to a custodial sentence by a court as a result of increasing the maximum penalties for these offences which then leads to a sentence above four years being imposed (which will now be possible as a result of these provisions), different early release rules operate and the offender is classed as a long term prisoner. A long term prisoner is able to be considered for parole by the Parole Board at the halfway point of their sentence and must be released on non-parole licence at the two-thirds point of their sentence. However, very few offenders currently receive sentences close to the current maximum of four years and the Scottish Government considers it is reasonable to assume that only a handful of offenders, at most, will in the future receive sentences of more than four years and thus trigger the different arrangements for early release.

Table 31: handling offensive weapons offenses

<table>
<thead>
<tr>
<th></th>
<th>Low estimate (5% increase)</th>
<th>Mid estimate (10% increase)</th>
<th>High estimate (15% increase)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average custodial sentence</td>
<td>326.5 days</td>
<td>342 days</td>
<td>357.6 days</td>
</tr>
<tr>
<td>Increase in prison places</td>
<td>17</td>
<td>34</td>
<td>51</td>
</tr>
<tr>
<td>Additional recurring costs</td>
<td>£600,000</td>
<td>£1,250,000</td>
<td>£1,900,000</td>
</tr>
</tbody>
</table>

285. Costs for SPS arising from the increase in length of prison sentences for handling offensive weapons offenses are anticipated to be around £1,250,000 per year.

286. SPS has indicated that this increase can be accommodated within the flexibility that exists in the provision of prison places. There are limits to this flexibility, and long term increases may accelerate the rate that this flexibility is used up. However, on the assumption of a steady level of resources being available to SPS, the additional costs set out above can be considered opportunity costs.

287. No significant additional costs are anticipated to fall on other parts of the Scottish Administration. The increase in the maximum penalties available for handling an offensive weapon offences will not increase the number of prosecutions taken forward each year and so there should be no new costs failing on either COPFS or SCS.

288. It is anticipated that the increase in maximum penalties will help further act as a deterrent to the carrying of offensive weapons and it is therefore possible that savings will accrue in the future in respect of fewer offences being committed, fewer prosecutions being required and therefore fewer court cases being undertaken. Estimates are not provided, however, as it would be difficult to distinguish the direct impact of the increases in maximum penalties leading to fewer offensive weapon offences separate from other policy efforts being undertaken to reduce offensive weapon possession e.g. education campaigns such as ‘No Knives, Better Lives’

21 http://www.noknivesbetterlives.com/
TV links

289. The measures in the Bill will allow the use of TV links for first callings from police custody.

290. The initial impact of the Bill can only be estimated at this time as there remains the need to develop the details of any implementation and use of TV links through testing and pilots, which can only be enabled by the provisions in the Bill.

291. The financial implications of the proposals are complex for three reasons. They allow tests to determine the benefits of allowing first callings through the use of TV links. However, until these tests have been run, these benefits cannot be fully assessed. As a result the costings are both estimated and provisional at this stage.

292. Additionally, the costs of the equipment and services needed to run a first calling by video will be-off set by the opportunities to share the equipment for other purposes that will bring additional benefits and efficiency gains, so the costs and benefits will, in any final roll-out, be shared by this joint use. Furthermore, the demands of a modern organisation are such that the use of TV links is integral to successful communication and therefore some related costs would be incurred anyway as part of the routine update of IT equipment.

293. Finally, other activities to improve the efficiency of the criminal justice system will impact upon the issues addressed in the Bill; the number of first callings may be reduced by the additional use of liberation by undertaking by police, for example. Within these parameters, the initial estimates are that the provisions in the Bill, will, if implemented to the fullest extent and at the currently highest estimate, cost £1,332,000 in capital terms. (These costs would cover all existing court rooms in Scotland used for both criminal and civil cases). The management of first callings would also potentially add an estimated £612,000 to the costs across the Criminal Justice Partners. However, it is highly unlikely that these levels will be reached within the first five years of the introduction of the provisions. During the pilot stages, the optimum deployment of TV links for first callings and the opportunities for cost savings will be fully explored. For example, it is likely that there will be additional savings of £67,000 per annum through agents using the equipment to speak to their clients.

294. In the initial stages, it is anticipated that the technology would be installed in 17 courts and eight Primary Custody Suites. The total costs for this are estimated at £124,000 capital costs and staffing costs of £512,000. The pilot phase will allow for a fuller assessment of the appropriate level and configuration of the equipment.

Costs on the Scottish Government

295. There are no direct cost or savings implications for Scottish Government from the changes in the Bill. However, the Scottish Government funds the key justice partners and it is through them that any additional expenditure and savings would be realised.
These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

**Scottish Police Authority**

296. It is anticipated that costs would arise for SPA as a result of the use of TV links for first callings.

297. The number or units equipped will depend on the pilots. It is anticipated that in the early stages, around eight Primary Custody suites would have TV link technology installed. Capital costs for equipment installation have been estimated at between £4,000 and £10,000 per site. The Scottish Government therefore anticipates capital costs of between £32,000 and £80,000 for SPA. Other uses of the equipment, for example with the NHS in delivering tele-medicine to custody units, and reducing defence agents’ travel to prisons to visit their clients, may be possible.

298. It is anticipated that the use of TV links for first callings will give rise to an increase in management and support costs for dealing with people in custody for a longer period if they are not being brought to court. Police Scotland estimate costs associated with providing detainees with basic requirements in police custody at £180 per day, most of which arises in the first four to six hours of the detention. Additional detention would not give rise to significant additional costs in terms of provisions for the detainee.

299. There has been some work suggesting that the additional cost of management and support for those in detention will be in the order of one to two additional member(s) of staff per site. Based on an estimated eight sites in the initial stages, this would involve up to 16 additional members of staff members, at a cost in the order of £512,000 per annum. These figures will be tested in the initial pilots: again, it is possible that these initial estimates are high.

300. Under these assumptions it is estimated that the cost to Police Scotland will be £80,000 capital and £512,000 staff costs per annum.

**Crown Office and Procurator Fiscal Service**

301. The proposals will not result in any costs or benefits for COPFS. However, in the longer term, the use of TV links could open the possibility of COPFS being represented remotely thereby saving travel and time costs.

**Scottish Court Service**

302. The other area where costs will be incurred initially is for SCS. There will be a need to upgrade some existing video equipment and in the longer term replace or install equipment in other court rooms.

303. There are currently 49 Sheriff Court buildings and 5 standalone JP courts. Of these, 45 Sheriff Courts have some TV equipment, whilst none of the standalone JP courts have equipment. Six of the courts (Edinburgh, Glasgow, Kilmarnock, Hamilton, Aberdeen and Dundee) have more than one room fitted with equipment; the rest have one court room. The Supreme Courts have four rooms with existing equipment. To upgrade this equipment would cost in the region of £1,500 per room: a total of £86,000.
304. It is unlikely that there will be a need to install the equipment in all court rooms as part of this programme. Over 50% of first callings from custody are held in 17 courts. Of the 17 busiest sites six already have multiple links. Therefore, in the initial stages of the pilot work, it is unlikely that significant new equipment will be needed in courts. It is anticipated that a further 11 court rooms will need to be equipped at a capital cost of £44,000.

305. Hearings to make determinations on the use of TV links in individual cases may have a small impact on court time. It is anticipated that this will be managed within existing resources.

Scottish Prison Service

306. It is anticipated that in the initial stages there will be a need to install TV link equipment in three prisons. At an estimated cost of between £5,000 and £10,000 per site, this suggests initial capital costs for SPS of between £15,000 and £30,000.

Individuals and businesses

307. The proposals in the Bill do not directly affect defence agents.

308. There will be contracts let to supply, install and run TV equipment as part of the pilots and in the longer term the roll out of the programme. These companies will benefit from this business.

Costs on local authorities

309. Although measures in the Bill will also allow first callings to occur via TV link for children appearing from a place of secure accommodation these would be very small in number. In the initial stages of the proposed pilot work, attention will not focus on children, while fuller costs and benefits can be established.

Costs on other bodies, individuals and businesses

310. There are no cost implications for the legal community from the changes in the Bill. As part of the wider TV links programme, they will be encouraged to visit their clients by such links when in police or prison custody and the equipment installed in the Police Custody Units will facilitate this.

Method of juror citation

311. Among the miscellaneous items in the Bill is a measure to enable SCS to choose the method of citation of jurors. In particular, this is intended to permit jurors to be cited by ordinary post, rather than by recorded delivery.

Costs on Scottish Court Service

312. In November 2012 SCS established that the then difference in unit costs of citation between first class post and recorded delivery (95p) entailed an additional running cost of £169,000 per annum. Up to this amount will therefore be saved by enacting the proposed change.
Measures with no or marginal costs

Sentencing prisoners on early release
313. No significant financial impact is anticipated associated with the provisions relating to sentencing on early release.

People trafficking
314. The introduction of a statutory aggravation for people trafficking is not anticipated to have any substantial financial implications for public, private or third sector bodies, or for individuals.

Police Negotiating Board
315. The final costs of a Police Negotiating Board (PNB) for Scotland will depend on detailed arrangements which have yet to be agreed with stakeholders. However, the Scottish Government expects it to be based on the structure of the current UK PNB. The annual costs of the UK PNB are around £500,000, of which the Scottish Government contributes 10%. A large part of this cost is for travel and overnight accommodation for members.

316. The PNB consists of a Staff Side, representing the Police Federations and staff associations, and an Official Side representing police authorities, police senior management and Ministers. UK PNB has 44 members in total. Each Side has a Side Secretary, an experienced negotiator to represent their interests. The Independent Chair and Deputy Chair provide a neutral voice to assist in bringing the parties to agreement, including informal mediation and conciliation if necessary. An independent secretariat is also provided to support the Chair and Deputy Chair, arrange meetings, circulate papers etc.

317. Based on the current Scottish Standing Committee of the UK PNB, PNB Scotland is expected to have 12 members. Travel and accommodation costs will be very much less than for the UK PNB, as a result of having fewer members and less distance to travel; meetings are likely to be held in the central belt where the majority of members will probably also be based. There are expected to be fewer meetings than UK PNB, because only one Police Service is involved; UK PNB often deals with agreeing a standard approach to issues across different police forces and authorities. This will reduce the cost of daily fees for the Independent Chair, Deputy Chair and Side Secretaries, as well as for travel, accommodation, meeting rooms and catering.

318. On the basis of these assumptions, it is estimated that costs for PNB Scotland will be under £50,000, and in line with the current Scottish Government contribution to UK PNB. There are therefore no additional costs associated with this provision.
SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

On 20 June 2013, the Cabinet secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Criminal Justice (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 20 June 2013, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Criminal Justice (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
This document relates to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

CRIMINAL JUSTICE (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Justice (Scotland) Bill introduced in the Scottish Parliament on 20 June 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 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 35–EN.

POLICY OBJECTIVES OF THE BILL

2. Scotland’s justice system demonstrates how Scotland can deliver distinctive solutions in complex areas. In 2011 the Scottish Government launched the Making Justice Work programme which aims to deliver efficiency and improvement by creating justice system structures and processes that are fit for the 21st century and enable access to justice. The Scottish Government is committed to a challenging modernising agenda to ensure our justice system is as efficient and effective as possible in meeting the needs of a modern and progressive country and to ensure that Scottish criminal law and practice is compliant with the European Convention on Human Rights (“the ECHR”) and able to withstand challenges on Convention grounds.

3. The Criminal Justice (Scotland) Bill is the legislative vehicle to take forward the next stage of essential reforms to the Scottish criminal justice system to enhance efficiency and bring the appropriate balance to the justice system so that rights are protected whilst ensuring effective access to justice for victims of crime. The Bill achieves these policy objectives by taking forward and further developing the majority of the recommendations of two independent reviews of key aspects of the criminal justice system. The Bill also includes a number of other key provisions which the Scottish Government considers also assist in meeting its overall objectives of ensuring a Safer and Stronger Scotland in which public services are high quality, continually improving, effective and responsive to local people’s needs.

4. The Bill comprises three elements:
   - Provisions which have been developed from the recommendations of Lord Carloway’s Review of Scottish Criminal Law and Practice1;
   - Provisions which have been developed from the recommendations of Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure2; and

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1 http://www.scotland.gov.uk/About/Review/CarlowayReview

SP Bill 35–PM  1  Session 4 (2013)
A number of additional relevant provisions which take forward a range of key justice priorities.

5. The additional provisions which are being taken forward by the Bill are intended to complement the reforms which are based on Lord Carloway and Sheriff Principal Bowen’s recommendations by implementing a key range of justice priorities or efficiency measures. These provisions are:

- Raising the maximum custodial sentences available to courts for handling offensive weapons offences, including knife possession, from four to five years;
- Making clearer the law on court powers to impose sentences on offenders who commit offences while on early release;
- Introducing a people trafficking criminal aggravation when sentencing for other crimes with a connection to people trafficking;
- Enabling increased use of live TV links;
- Changing the method of juror citation; and
- Retaining a collective bargaining mechanism in Scotland for the negotiation of police officer pay, following the Home Secretary’s decision to abolish the UK Police Negotiating Board.

BACKGROUND

Lord Carloway’s Review of Scottish Criminal Law and Practice

6. On 26 October 2010, Lord Carloway was asked to lead an independent review of criminal law and practice following the case of Cadder v HMA\(^3\) in which the United Kingdom Supreme Court decided that the ECHR requires that a person who has been detained by the police has the right to have access to a solicitor prior to being interviewed, unless in the particular circumstances of the case there are compelling reasons to restrict that right. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (“the 2010 Act”) was introduced to deal with the immediate impact of that decision. However, the Scottish Government considered there was a further need not only to ensure the Scottish justice system continues to be fit for purpose, but that it also meets the appropriate balance of protecting the rights of accused persons with victims of crime.

7. The terms of reference for the review, which were agreed between Lord Carloway and Kenny MacAskill, the Cabinet Secretary for Justice, were as follows:
   a) To review the law and practice of questioning suspects in a criminal investigation in Scotland in light of recent decisions by the UK Supreme Court and the European Court of Human Rights, and with reference to law and practice in other jurisdictions;

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\(^2\) [http://www.scotland.gov.uk/Publications/2010/06/10093251/0](http://www.scotland.gov.uk/Publications/2010/06/10093251/0)

b) To consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime;

c) To consider the criminal law of evidence, insofar as there are implications arising from (b) above, in particular the requirement for corroboration and the suspect’s right to silence;

d) To consider the extent to which issues raised during the passage of the 2010 Act may need further consideration, and the extent to which the provisions of the Act may need amendment or replacement; and

e) To make recommendations for further changes to the law and to identify where further guidance is needed, recognising the rights of the suspect, the rights of victims and witnesses and the wider interests of justice while maintaining an efficient and effective system for the investigation and prosecution of crime.

8. Lord Carloway carried out his independent review with the support of a specialist team seconded from justice organisations. The review team operated independently of their parent organisations, answering only to Lord Carloway. Lord Carloway also made extensive use of an independent reference group made up of representatives from justice organisations, legal practitioners, the judiciary and academics.

9. The review process consisted of a range of evidence gathering, research, analysis and consultation. The consultation process ran from 8 April 2011 until 3 June 2011 and received a total of 51 responses.

10. The Carloway Report was published on 17 November 2011. A copy of the Report and associated materials from the consultation process are available at the review’s website[^4].

11. The Bill takes forward and develops as a package the majority of Lord Carloway’s recommendations which require primary legislation. This comprises provisions in the following broad areas:

- Arrest
- Period of custody
- Investigative liberation
- Legal advice
- Questioning
- Child suspects
- Vulnerable adult suspects
- Corroboration and sufficiency of evidence
- Exculpatory and mixed statements

This document relates to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

- Appeal procedures
- Finality and certainty.

12. The Bill also makes provision to increase the majority to two thirds to return a guilty verdict. This is not a recommendation of Lord Carloway’s review, however, the Scottish Government considers this is necessary light of the removal of the requirement for corroboration.

**Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure**

13. In April 2009 Kenny MacAskill, the Cabinet Secretary for Justice, commissioned Sheriff Principal Bowen QC “to examine the arrangements for sheriff and jury business, including the procedures and practices of the Sheriff Court and the rules of criminal procedure as they apply to solemn business in the Sheriff Court; and to make recommendations for the more efficient and cost effective operation of sheriff and jury business in promoting the interests of justice and reducing inconvenience and stress to the victims and witnesses involved in cases”\(^5\).

14. Sheriff Principal Bowen carried out his independent review with the support of a review team seconded from justice organisations. The review team also made use of an independent reference group made up of representatives from justice organisations, legal practitioners, the judiciary and academics.

15. The review process consisted of a range of evidence gathering, research, analysis and observation and monitoring of court proceedings.

16. Sheriff Principal Bowen published his Independent Review of Sheriff and Jury Procedure on 11 June 2010.\(^6\) The Scottish Government’s commitment to implement Sheriff Principal Bowen’s recommendations was supported by the Scottish Parliament with motion S3M-6636 of 24 June 2010.\(^7\)

17. The Bill takes forward and develops as a package those of Sheriff Principal Bowen’s recommendations which require primary legislation. This comprises provisions in the following areas:

- A requirement for the prosecutor and the defence to engage in advance of the first hearing;
- A case will be indicted to a first diet and will only proceed to trial when a sheriff is satisfied that it is ready;
- Increasing the time period in which an accused person can be remanded before having been brought to trial from 110 days to 140 days; and
- Removal of the requirement for an accused person to sign a guilty plea.

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\(^6\) [http://www.scotland.gov.uk/Publications/2010/06/10093251/0](http://www.scotland.gov.uk/Publications/2010/06/10093251/0)

This document relates to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

SCOTTISH GOVERNMENT CONSULTATION (GENERAL)

18. Formal consultations were carried out by the Scottish Government with regard to the recommendations of Lord Carloway and Sheriff Principal Bowen’s reviews. Details of those consultations are outlined below.

Lord Carloway’s Review of Scottish Criminal Law and Practice

19. Lord Carloway’s report was based on a year-long process of consultation and research, including the involvement of a reference group and an extensive series of meetings, roadshows and observational visits. This is catalogued in Annexes D\(^8\) and E\(^9\) of the Carloway Report.

20. The Scottish Government listened closely to the comments and discussion following the publication of the Carloway Report. This included evidence sessions\(^10\) held by the Justice Committee in November and December 2011 and a Parliamentary Debate in the Scottish Parliament on 25 September 2012\(^11\). Many of Lord Carloway’s recommendations were widely accepted, in principle at least, and the main focus of debate centred on the recommendation to remove the requirement for corroboration and links between that recommendation and wider aspects of Scots law.

21. On 3 July 2012, the Scottish Government published a consultation paper Reforming Scots Criminal Law and Practice: The Carloway Report\(^12\). The consultation sought views on the Carloway Report and ran until 5 October 2012, posing 41 questions relating to Lord Carloway’s recommendations. The consultation document stated that the Scottish Government’s broad approach was to recognise Lord Carloway’s Report as a substantial and authoritative piece of work and to accept the broad reasoning as set out in the report. It also stated that the Scottish Government does not intend to revisit the review and that the consultation document was designed to promote public discussion of Lord Carloway’s recommendations to assist the Scottish Government in translating into legislation the package of reforms he proposed.

22. A total of 56 consultation responses were received, of which 21 were from individuals and 35 from organisations.

23. On 19 December 2012 the Scottish Government published the non-confidential consultation responses\(^13\) along with an independent analysis\(^14\). The analysis showed majority support for almost all of Lord Carloway’s recommendations. The exception to this was the recommendation to remove the requirement for corroboration, which attracted the largest number of responses, of which a majority, including some organisations representing the legal profession, favoured its retention. Some third sector organisations were in favour of the

\(^{10}\) [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/45421.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/45421.aspx)
\(^{12}\) [http://www.scotland.gov.uk/Publications/2012/07/4794](http://www.scotland.gov.uk/Publications/2012/07/4794)
\(^{13}\) [http://www.scotland.gov.uk/Publications/2012/12/4338/0](http://www.scotland.gov.uk/Publications/2012/12/4338/0)
A large majority of respondents felt that safeguards should be put in place if the requirement for corroboration was abolished.

24. In light of the consultation responses a further consultation, Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration\(^\text{15}\) was launched on 19 December 2012, and ran until 15 March 2013. This consultation document sought views on two proposals for additional safeguards: increasing the jury majority required to return a verdict and widening the trial judge’s power to rule that there is no case to answer. Views were also sought on whether the “not proven” verdict should be retained.

25. A total of 32 consultation responses were received of which 18 were from individuals and 14 from organisations. The analysis showed that there was majority support for the two additional safeguards proposals contained in the consultation document and that concerns were raised about the proposal to widen the trial judge’s power to rule that there is no case to answer. Whilst the majority of respondents supported the abolition of the ‘not proven’ verdict, some expressed concern about the consequences of doing so.

Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure

26. On 19 December 2012 the Scottish Government also launched a public consultation, Reforming Scots Criminal Law and Practice: Reform of Sheriff and Jury Procedure\(^\text{16}\), which ran until 15 March 2013.

27. The consultation document stated the Scottish Government accepted all of Sheriff Principal Bowen’s recommendations for the reasons set out in his report. It set out the proposal to require a compulsory business meeting between the prosecutor and the defence in order to ensure effective engagement and discussion about the case at an early stage. While the principle of the compulsory business meeting attracted wide support some concerns were expressed as to the proposed timing and format of the meeting. In particular, the Crown Office and Procurator Fiscal Service (“COPFS”), which will be a participant in all compulsory business meetings, and on whom the duty of preparing the note of such meetings will fall, favoured holding the meeting after the indictment without prescriptions on the method by which it should be held. On other issues, the balance of views was in favour of extending the current time bar from 110 days. However there were mixed views on whether the increase should be from 110 to 140 days.

28. There was support for the proposal to indict an accused person to a first diet and then proceeding with the trial diet only when the sheriff is satisfied it will go ahead. There was less support for the proposals to introduce sanctions, for making statements at petition stage requiring an accused person to engage with their solicitor, or for written narrations on the facts of a case in the event of an early plea. These may be delivered, if felt desirable, by methods other than primary legislation. Accordingly the Scottish Government has not pursued these issues.

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\(^{15}\) [http://www.scotland.gov.uk/Publications/2012/12/4628/0](http://www.scotland.gov.uk/Publications/2012/12/4628/0)

\(^{16}\) [http://www.scotland.gov.uk/Publications/2012/12/8141](http://www.scotland.gov.uk/Publications/2012/12/8141)
ALTERNATIVE APPROACHES

29. An alternative approach would have been to retain the status quo and not implement the recommendations contained in Lord Carloway and Sheriff Principal Bowen’s reviews. However, such an approach would not be without risks. Lord Carloway’s review was conducted in light of recent court decisions regarding, for example, a person’s right to legal advice prior to police questioning. Such decisions necessitate a need to ensure that the rights of accused persons and victims of crime remain appropriately balanced. Furthermore, the UK Supreme Court’s decision in the Cadder case illustrates the importance of ensuring that Scottish criminal law and practice remains compliant with the rights set out in the ECHR.

30. Some of Lord Carloway’s recommendations, for example those concerning the procedure for arrest and detention, were by their nature general and high level, and further policy development work has been required to be undertaken by the Scottish Government in consultation with its justice partners. An alternative approach would have been to ask an independent body, for example the Scottish Law Commission, to further consider how the recommendations contained in Lord Carloway and Sheriff Principal Bowen’s reviews could most appropriately be implemented. However, the Scottish Government considered that, in light of the issues identified in these reviews, any benefits of doing so are outweighed by the risks of delaying these important reforms. The Scottish Government has also undertaken its own consultations on these reviews, which has helped to inform development of policy in these areas and enabled the refinement of the recommendations.

31. With the exception of the proposal to abolish the requirement for corroborative evidence, Lord Carloway’s recommendations were all supported by a majority of consultation respondents. An alternative approach could, therefore, have been to accept Lord Carloway’s recommendations with the exception of the proposal to remove the requirement for corroboration. However, Lord Carloway intended his recommendations to be implemented as a package, which was carefully constructed to ensure that the rights of suspects, the rights of victims and witnesses, and the wider interests of justice are appropriately balanced. The Scottish Government considers that implementing the report’s recommendations on a piecemeal, ad-hoc basis would risk undermining this objective. The Scottish Government was persuaded of the benefits of implementing the recommendations as a package, with any changes, or the way in which the recommendations could be taken forward, being considered in light of the consultation responses. The Scottish Government took the view, in particular, that the abolition of the requirement for corroboration is a necessary step towards a system which is able to take account of all fairly obtained evidence, respecting not only the accused but also victims and their families. This policy memorandum sets out in more detail how the Scottish Government proposes to specifically implement the recommendations and any alternative approaches considered.
PART 1 OF THE BILL

ARREST (CHAPTER 1, SECTIONS 1 TO 6)

Policy objectives

32. The policy objective is to simplify the process of arrest and detention of persons suspected of having committed a crime. The provisions in the Bill simplify and introduce greater clarity to the process whilst also equipping the police with the necessary powers to carry out their role of investigating and detecting crime.

Key information

33. The 2010 Act addressed the issues raised in the Cadder case by providing for a statutory right for persons to have access to a solicitor and extending the time the police could detain a person in order to perform their functions from 6 to 12 hours. In exceptional circumstances, a senior police officer could authorise an extension of the period for a further 12 hours allowing for a period of detention of 24 hours.

34. However, the Carloway review concluded that the distinction between arrest and detention had been eroded to such an extent that there was little purpose in continuing with the two different states. Lord Carloway recommended that it would be simpler, and more clearly in tune with ECHR, to have a single period of custody (detention), once a person has been arrested on suspicion of having committed an offence. He recommended that the powers currently conferred through section 14 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) (to detain and question a suspect at a police station) are changed to a single power to arrest a person on the ground of “reasonable suspicion”. The Scottish Government was persuaded of the logic of having a single state of custody, which simplifies and clarifies rights and procedures for police and arrested persons alike.

35. The effect of the provisions in the Bill is to abolish detention under section 14 of the 1995 Act so that the only general power to take a person into custody is the power of arrest contained in the Bill. The test for the police arresting a person without a warrant is whether they have reasonable grounds for suspecting the person has committed, or is committing, an offence punishable by imprisonment. A warrant will be required for non-imprisonable offences unless obtaining one is not in the interests of justice.

36. The Bill provides that a constable must inform the person that the person is under arrest, of the general nature of the suspected offence and reason for arrest, and must caution the person. The person must also be advised of their right to legal advice and their right to remain silent.

37. The existing requirement that the police must charge a person upon arrest and prior to reporting the person to the procurator fiscal is removed. However, there remains a period at which police investigations come to a conclusion and the person has a right to be informed of the next steps. If a report is to be submitted to the procurator fiscal for an offence, then the person must be informed of that intention. This, in effect, has the same outcome as the current ‘charge’ in that it signifies a change in the person’s status and ends the period in which police can
question a person. Any further questioning of the person which the police may wish to pursue will have to be authorised by judicial sanction (this is covered at paragraphs 83 to 101).

Consultation

38. Questions on Lord Carloway’s recommendations relating to arrest and detention were contained in the Scottish Government’s main consultation exercise.

39. The responses indicated general approval for the move to a power of arrest on the grounds of reasonable suspicion and respondents commented that this simplification will be better understood by the public. Some respondents remarked there will be a need for guidance on the term “reasonable suspicion”.

40. The majority of respondents who answered the question agreed with Lord Carloway’s recommendation that statutory rights for a person who has neither been detained nor arrested are unnecessary and the Scottish Government agrees with this.

41. Some respondents commented that the power to detain a person for a non-imprisonable offence seemed contrary to the ECHR. However, the Scottish Government recognises the police concerns about the potential difficulties of removing common law powers of arrest, particularly where offences are not punishable by imprisonment. The provisions in the Bill therefore retain the flexibility of police powers by enabling individuals to be arrested for non-imprisonable offences in particular cases where the police consider this to be proportionate and in the interests of justice and public safety.

42. Respondents also generally agreed with Lord Carloway’s recommendation that the police should no longer be required to charge a person with a crime prior to reporting the case to the procurator fiscal. However, some respondents commented that there should be a clear and transparent process to ensure the person is aware that they have been reported to the procurator fiscal, of the allegations against them, and that they should be informed of the outcome of a decision not to prosecute.

Alternative approaches

43. The Scottish Government reviewed the current powers of arrest which exist in statute and how these will operate once Lord Carloway’s recommendation has been implemented. It considered leaving all the current powers of arrest which exist in statute as they are. However, this left a great number of differing powers of arrest which the police would need to remember in practice. The Scottish Government considers that in order to ensure consistency and a process which is easily understood, the only power of arrest, with a few exceptions, should be through the power of arrest recommended by Lord Carloway.
CUSTODY (CHAPTER 2, SECTIONS 7 TO 13)

Policy objectives

44. The policy objective is to ensure that a person is not unnecessarily or disproportionately held in police custody.

Key information

45. The key principles underpinning the provisions in the Bill are that a person should not be held unnecessarily or disproportionately in custody and that the police must, when considering custody, take account of whether it is fair, in the interests of justice, and necessary to protect the public or to prevent crime.

46. The police currently detain persons using powers contained in the 1995 Act. These powers were amended by the 2010 Act to extend the period that the police had to interview a person from 6 hours to 12 hours with the potential to extend that period for a further 12 hours on the authority of a senior police officer (i.e. 24 hours in total). The Carloway review noted the low number of cases in which extensions to the existing 12 hour initial maximum has been required since the passing of the 2010 Act and concluded that the detention period should be a maximum of 12 hours with no provision for extension. In recommending this Lord Carloway was mindful of the need to ensure that investigations are not carried out in such a manner that it infringes a person’s right to a fair trial or ceases to be effective because of excessive time restraints.

47. The Scottish Government agrees with Lord Carloway’s conclusion and the Bill provides that the maximum time that a person should be detained in police custody without charge on the same ground, or grounds, arising from the same circumstances, is 12 hours cumulatively. When a person requires urgent medical treatment and is taken to a hospital, the time taken travelling to or from the hospital, and the time the person is in hospital and not subject to police questioning, is not included in the 12 hour period.

48. Where a person is kept in custody without charge for 6 consecutive hours (at any time) a constable of the rank of Inspector or above, not directly involved in the investigation, must review, as soon as reasonably practicable, the person’s continued detention taking into consideration whether the arrested person remains a suspect and the person’s presence is reasonably required. The police will be required to keep a record of all such decisions made.

49. Lord Carloway’s review also highlighted that current law and practice has the potential to allow a person to be held, in certain circumstances, for a period of 4, and perhaps 5, days in police custody prior to appearance in court. The Scottish Government agrees with Lord Carloway that such lengthy periods are unacceptable. The Bill provides that, wherever practicable, a person is to be brought before a court to deal with the case not later than the end of the court’s first sitting day after the day on which the person was arrested (unless the person was released on an undertaking).

50. The Scottish Government considers that the provisions will provide the police with sufficient time to investigate offences thoroughly whilst also defining a period of time in which a
person can be held in custody during investigation. The Bill also seeks to safeguard a person’s right to liberty by providing timescales within which a person should be brought before a court whenever practicable. The Scottish Government considers these proposals are proportionate and fair.

**Consultation**

51. Questions on Lord Carloway’s recommendations in relation to period of custody were contained in the Scottish Government’s main consultation exercise.

52. There was broad agreement with the recommendation that a person should be detained only if it is necessary and proportionate having regard to the nature and seriousness of the crime and probable disposal if convicted. However, some respondents expressed concern about the risk to the safety and security of victims and witnesses if a person was liberated.

53. The majority of respondents (14) agreed with Lord Carloway’s recommendation that the maximum time a person can be held in detention (prior to charge or report to the procurator fiscal) should be 12 hours, in order to minimise the intrusion into the liberty of a person and based on the evidence that most detentions are dealt with within 6 hours, even after the introduction of the 2010 Act allowing the police 12 hours.

54. However, respondents representing enforcement agencies commented on the need for a longer period in exceptional circumstances, with the main reasons including the need to ensure the safety and security of the victim (not simply related to the seriousness of the crime), to take account of the fitness of the arrested person (e.g. wellbeing, state of intoxication), or to secure third party assistance (e.g. an appropriate adult or an interpreter), to allow investigators to secure vital evidence (e.g. through medical examinations).

55. There was overriding support for the proposal that the 12 hour period of detention should be reviewed after 6 hours by a senior police officer. Some respondents commented on the criteria that would be applied in determining whether detention should continue and on the most appropriate person to make this decision.

**Alternative approaches**

56. There was broad agreement that a person should be detained only if it is necessary and proportionate. However, the Scottish Government recognises that a decision to liberate a person must be balanced against the need to safeguard the rights of victims and witnesses and the Bill provides the police with powers to impose conditions on a person’s liberation, such as not to approach or contact a victim.
INVESTIGATIVE LIBERATION (CHAPTER 2, SECTIONS 14 TO 17)

Policy objectives

57. The policy objective is to ensure the police have the flexibility to manage a criminal investigation in a manner that balances the needs of the enquiry and public safety against the fundamental rights of a person suspected of having committed a crime.

Key information

58. The provisions in the Bill implement Lord Carloway’s recommendations by providing the police with powers to liberate a person from custody for a set period of time whilst they carry out further investigations into a suspected crime (referred to as “investigative liberation”). These powers are most likely to be of use in the investigation of serious crimes which often involve complex and technical examinations of telephones, computers etc.

59. In order to balance the interests of justice and protect the public the police will have power to set certain conditions on such liberation, similar to bail conditions: for example to refrain from certain actions such as approaching witnesses etc. The procurator fiscal will have powers to review any conditions set by the police.

60. The person’s rights are safeguarded in that investigative liberation will be limited to 28 days (with no power to extend this period) and the person can apply to a sheriff to have any conditions amended and/or terminated.

Consultation

61. Questions on Lord Carloway’s recommendations on liberation from police custody were included in the Scottish Government’s main consultation exercise.

62. Significantly more respondents (20), particularly enforcement organisations, agreed with the recommendation that the police should be able to liberate a person from custody on conditions.

63. Twice as many respondents (13) agreed than disagreed that a limit of 28 days is sufficient in all cases. Respondents cited a range of factors as necessitating this period including the detailed forensic analysis of evidence, cross-border jurisdictional enquiries, or a need to examine large volumes of documentary evidence.

Alternative approaches

64. The Scottish Government considered whether the police should only be able to liberate a person on investigative liberation during their initial period of custody and not unconditionally. In other words, a person could only be liberated for a period of 28 days, after which they had to be charged or released and could not be arrested for the same crime again. However, further consideration of this alternative approach tended to highlight that it would hamper police enquiries and provided little flexibility for the police when dealing with crimes. It was also not
in keeping with Lord Carloway’s view as to how liberation from custody was to operate, in that the 28 days of liberation was only intended for those persons liberated on conditions, not a person liberated unconditionally. Therefore this alternative approach was not pursued.

RIGHTS OF SUSPECTS - LEGAL ADVICE (CHAPTER 4, SECTIONS 23, 24 AND CHAPTER 5, SECTIONS 35 AND 36)

Policy objectives

65. The policy objective is to set out clearly in legislation when a person’s right to access a solicitor arises, how this is communicated to the person and the circumstances in which these rights can be waived.

Key information

66. In response to the Cadder case, the 2010 Act amended the 1995 Act giving a person the right of access to a solicitor prior to and during interview by the police. Subsequently, Lord Carloway recommended that a person should have the right to legal advice from when the person is initially held in police custody, regardless of whether the person will be interviewed.

67. In his review, Lord Carloway recommended that there is no need to require the police to secure access by a person to a solicitor outwith a police station and no legislation is required in that regard. He also recommended that part of the standard caution prior to the interviewing of a person outwith a police station should include the information that a person has a right of access to a solicitor if that person wishes.

68. Under the new procedure for arrest, information on the right of access to a solicitor will be incorporated into the caution given to a person on arrest. The precise wording of the caution will remain non-statutory.

69. The Scottish Government considers that, in the majority of cases, the best place to facilitate access to a solicitor is at the police station, due to practical considerations and to ensure a private, safe and secure environment for individuals, legal professionals and the police. Accordingly, the person will be informed again of their rights and afforded access to legal advice as soon as practicable after arrival at the police station. The provisions in the Bill do not affect the existing right of a person to have intimation of the person’s detention sent to a solicitor and to a third person.

70. Those attending the police station voluntarily for interview will also have the right to have access to a solicitor prior to and during interview.

71. The right to access a solicitor does not extend to provision of assistance from a solicitor of the person’s choice, as this may not be achievable in all situations. The police currently try to accommodate such requests and it is anticipated that this practice will continue. Where a nominated solicitor cannot be contacted or is unable or unwilling to attend, the person will be offered the services of an alternative solicitor.
72. In accordance with Lord Carloway’s recommendation to introduce a Letter of Rights without delay, the Scottish Government will introduce a non-statutory letter in 2013. The provisions in the Bill will provide for a person’s right when held in police custody, to receive information on the person’s arrest, verbally or in a Letter of Rights, in accordance with Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings.

73. The Scottish Government has given extensive consideration to the appropriate means by which access to a solicitor should be provided to a person whilst at the police station, to enable advice and assistance to be delivered in an efficient and effective way. Lord Carloway recommended that “subject to what can reasonably be funded by the Scottish Legal Aid Board or the suspect himself/herself, it is ultimately for the suspect to decide whether the advice from the solicitor should be provided by telephone or in person”. Furthermore, Lord Carloway explained that, initially, the person will be expected to speak to a solicitor in private over the telephone, which will enable the solicitor to give immediate initial advice and to discuss whether the solicitor’s attendance at the police station is necessary or desirable. The Scottish Government decided in favour of provisions designed to allow flexibility as to the most appropriate means of communication, to allow for the means to be tailored to the needs of the individual. Whilst a telephone consultation may be appropriate for some individuals and in some circumstances, it is acknowledged that it may not be suitable for all.

74. The 2010 Act provided for a person to have a right to a private consultation with a solicitor before and at any time during questioning. Whilst it is understood that it is common practice by the police to allow a solicitor to be present during questioning, this is not explicit in the legislation. The Scottish Government considers that this right should be enshrined in legislation and the Bill includes provisions to this effect.

75. In relation to non-vulnerable persons waiving the right to legal advice, the opinion of Lord Hope in the UK Supreme Court case of McGowan v B17 made clear that European Court of Human Rights (“the ECtHR”) jurisprudence does not provide any support for the argument that, as a rule, a decision on whether to waive the right of access to a solicitor needs to be informed by legal advice. The provisions do require the waiver to be voluntary, unequivocal and informed. To demonstrate that a person’s decision to waive the right is made with an understanding of the right itself, the person’s waiver must be recorded and the reason for the person’s decision noted. Adults, other than vulnerable adults, will be able to waive their right to legal advice and so too, subject to special rules, will young people aged 16 to 17 (see paragraphs 102 to 129 for the special rules that apply to vulnerable adults and under 18s). But the waiver of the right to legal advice is not permanent; having allowed an interview to begin without having a solicitor present a person can stop the interview and insist on access to a lawyer”.

76. The right of the police to delay or withhold legal advice in exceptional circumstances is not affected by these provisions.

77. The provisions on the right to legal advice are also applicable to post-charge questioning.

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17 2011 UKSC 54, para 46
Consultation

78. Questions regarding the implementation of Lord Carloway’s recommendations on legal advice were included in the Scottish Government’s main consultation exercise.

79. Respondents to the consultation agreed that access to a solicitor should begin as soon as practicable after the detention of an arrested person, regardless of questioning.

80. In relation to the best way of providing legal advice, respondents commented on the status quo and on a mix of methods including face-to-face, telephone and video technology, as appropriate. Significantly more respondents (21) agreed than disagreed (3), however, that the decision on the means by which legal advice is delivered should sit with the person.

81. There was all-round agreement that the right to waive access to legal advice, and the expression and recording of this, should be set in legislation.

Alternative approaches

82. There is no alternative approach that would achieve the Scottish Government’s policy objective of clearly setting out in legislation a person’s rights to legal advice.

QUESTIONING (CHAPTER 4, SECTIONS 27 TO 29)

Policy objectives

83. The policy objective is to provide the police with powers to question a person after the person has been charged with, or officially accused of, an offence and to ensure that such powers are used proportionately and in a manner that is consistent with the person’s right to a fair trial.

Key information

84. Lord Carloway noted in his review that in the course of investigating a crime, the police would normally question three broad categories of person: witnesses, suspects, and accused. The lines separating these categories may not always be clear. A person may move from one category to another during the course of an investigation, and indeed during questioning. The position in Scots law has been that although it is proper for the police to question a person, including one detained under section 14 of the 1995 Act, once the police are in a position to charge the person with the offence(s) under investigation, questioning should cease. Generally, once that point has been reached, it is proper for the police to charge the person with the offence and to conclude any questioning. Thereafter, although the person is entitled to make a voluntary statement to the police, there should be no further questioning at the initiative of the police. Evidence of admissions made by a person after charge has long been regarded as inadmissible or unreliable if the evidence was not thought to have been fairly obtained.

85. The exception to the general rule about post-charge questioning is found in the procedure commonly known as judicial examination, in which the prosecutor can, at the inception of a case being prosecuted under solemn procedure, question a person about the charge(s) on the petition,
with a view to eliciting information about any line of defence on which they intend to rely at any forthcoming trial.

86. The Scottish Government agrees with Lord Carloway’s conclusion that in a human rights based system there is no particular reason why there should be a prohibition on the questioning of a person who has been, or ought to have been, charged with an offence, provided that the person’s rights continue to be adequately and effectively protected. Post-charge questioning might take place, for example, where the person could not be questioned for medical or other good reasons, such as a legitimate delay in obtaining access to a solicitor. Another example might be where, after a person has been charged, further evidence has come to light which the person might be able to comment upon. Developments in science, information technology, and investigative methods mean that modern police investigations can take longer and be more thorough. It is envisaged that this power will not be used regularly.

87. Accordingly, the Bill provides that a court will have the power, on application, to allow the police to question a person after the person has been charged with an offence. The Bill also provides that, once a case has called in court, the Crown can apply to a court at any time prior to the trial, for permission for the police to question the person, provided that the person’s trial has not commenced.

88. In considering an application, the court must be satisfied that it is in the interests of justice to allow the questioning. Moreover, the court must have regard to the seriousness of the offence with which the person has been charged, and the extent to which the person could have been questioned earlier about the matter. The purpose behind these provisions is to ensure that the power is exercised proportionately and appropriately.

89. The Bill also provides, as a further protection of the rights of the person, that where an application is granted the court must specify the maximum period for which the person can be questioned, and can make any further conditions it wishes; it could, for example, limit the scope of questioning if it thought it appropriate.

90. This power will apply to persons who are being held in custody pending a court appearance, and those who have been released by the police, whether on undertaking or for citation in due course. It will also apply to persons who have appeared in court, although in that case the application can only be made before the start of the person’s trial. And where the application relates to a case which has already called in court, the person is entitled to make representations, through a solicitor if the person wishes, before permission can be granted.

91. The Bill provides that, on granting an application, a court has a further power, if it thinks it expedient, to grant a warrant for the apprehension of the person in order that the questioning can take place.

92. Given this extension of the power of the police to question a person, and the fact that the person can make a voluntary statement to police if the person wishes, Lord Carloway concluded that the procedure known as judicial examination was no longer necessary. Accordingly, the Bill provides that this procedure is abolished. It further provides that the person will no longer have
the seldom-used opportunity to make a declaration – in essence, a statement of their position – at the early stage of a case being prosecuted under solemn procedure.

93. The right of access to a solicitor will apply to post charge questioning. And when a person is taken into custody to be questioned after charge, the person will have the same rights under Chapter 5 of the Bill as a person who has not been charged (including the right to have intimation of the person’s arrest sent to another person, in the case of vulnerable suspects the right of access to an Appropriate Adult and in the case of under 18 year olds the right of access to a parent, carer or responsible person).

Consultation

94. Questions regarding Lord Carloway’s recommendations on post-charge questioning were included in the Scottish Government’s main consultation exercise.

95. A significant majority of respondents (15) agreed with the proposal that the police should be able to question a person after charge.

96. Some respondents to the consultation suggested that the power to question a person after charge was unnecessary, and that given the length of time the police can detain a person for, and the proposed introduction in the Bill of the investigative liberation option for the police, there is no need to allow for post-charge questioning, as the police will have had sufficient time to question the person. The Scottish Government, however, is of the view that putting on the face of this Bill the requirement that the court must grant an application before post-charge questioning can take place, together with the court’s power to limit the scope of the questioning or impose other conditions if it thinks it appropriate, adequately balances a person’s rights and the interests of society in the full and proper investigation of crime.

Alternative approaches

97. One approach suggested by some respondents to the consultation was that the police should themselves have the power to embark on post-charge questioning, provided that the questioning was endorsed by a senior police officer. The Scottish Government, however, has taken the view that the best way of ensuring a proportionate approach, and that a person’s rights are fully protected, is to place the decision in the hands of the court.

98. It was also suggested that it would be appropriate for the defence to be allowed to make representations before an application to question a person is granted. The Scottish Government has taken the view that once a case has called in court it is appropriate that the person should be able to make representations. The Carloway review did not think that such a provision is necessary before the case has called in court, and the provisions in the Bill reflect this approach as most likely to allow for the proper investigation of crime.

99. Some respondents wondered whether the abolition of judicial examination and declarations was necessary, noted that they can still be beneficial in certain circumstances, and suggested that they might benefit from amendment; alternatively, that post-charge questioning should be carried out by a procurator fiscal rather than the police.
100. The Scottish Government has considered this issue carefully. It has arrived at the view that, given that post-charge questioning will be regulated by the court, there is no longer any particular role for judicial examination, and that the police are the right organisation to carry out the questioning in the discharge of their investigatory functions. It further noted that the right to emit a declaration is almost never exercised by accused persons, who can in any event make a voluntary post-charge statement to the police should they wish to do so.

101. The Carloway review suggested that a test drawn from Article 6 (right to a fair trial) of the ECHR should be put on the face of legislation as the test for the admissibility of evidence in the course of a trial, and that consideration should be given to the abolition of existing common law tests of fairness and admissibility. Respondents to the consultation were divided on this and the Scottish Government has concluded that this recommendation should not be included at this time.

CHILD SUSPECTS (CHAPTER 5, SECTIONS 31 AND 32)

Policy objectives

102. The policy objective is to make provision to ensure that the highest standard of protection is offered to children who are involved in the formal criminal justice process.

Key information

103. The Bill enhances existing safeguards in the Scottish criminal justice system by making a number of changes to the way in which children and young people are treated in regard to arrest, custody, interview and charge, in a manner that reflects the fact that children of different ages have different levels of maturity and capacity. A key principle enshrined in the Bill is that in taking any decision regarding the arrest, detention, interview and charging of a child by the police, the best interests of the child shall be a primary consideration.

104. Lord Carloway emphasised the importance of workability, practicality and the flexibility of any measures as they relate to children. Similarly, he recognised the value in maintaining the flexibility of judgement and informality of some contacts between young people and the police in less serious cases.

105. The provisions in the Bill importantly define a child as being under the age of 18 years for the purposes of arrest, detention and questioning. This means that the current provisions concerning notification to a parent, carer, or other responsible person and these persons having access to a child suspect will be extended to all persons under the age of 18 years.

106. The provisions in the Bill create a set of protections which are mandatory for those aged under 16 years to ensure their rights are protected in all criminal investigations. The role of the parent, carer or responsible person is to provide any moral support and parental care and guidance to the child and to promote the child’s understanding of any communications between a child and the child’s solicitor. A child under 16 has the right to access a responsible person if detained and, in any event, prior to and during interview, provided that access can be achieved within a reasonable time. The police will be able to delay or suspend that right in exceptional
The Scottish Government recognises the important role of a parent (or someone acting on behalf of the child in the role of a carer or responsible person) in protecting a child’s rights and providing moral support during investigation. Equally they recognise the importance of ensuring that a child under 16 years has access to legal advice. Therefore the provisions state that a child suspect under 16 years must be provided with access to a parent, carer or responsible person and a child cannot waive that right. Furthermore, when being interviewed as a suspect a child under the age of 16 years must be provided with access to legal advice and cannot waive that right; nor can a parent, carer or responsible person do so on the child’s behalf.

There is, however, a balance sought for children aged 16 and 17 years in order to provide a greater emphasis on their ability to make decisions for themselves and ensure their voice is heard in all parts of the process. The Bill provides that they have the right of access to any adult reasonably named by the person, and to a solicitor, in recognition of the need for support and guidance where a child wishes such support.

Lord Carloway noted that where no other support can be found for those under 16 years of age, current practice is for local authorities to provide it. In the case of 16 and 17 year olds unable to name any source of such support, the expectation is that guidance will make clear that, where it is so requested, the local authority will provide it.

However, where a 16 or 17 year old child wishes to waive the right of access to an adult named by them, then they must have advice from a solicitor. A 16 or 17 year old can only waive the right of access to a solicitor under section 24 with the agreement of an adult named by them. They are, however, entitled to have access to both such an adult and a solicitor should they wish to do so. The Bill also provides that if the 16 or 17 year old is considered vulnerable (i.e. they have a mental disorder and cannot communicate effectively or understand what is happening to them) then they will not be able to waive their right to legal advice.

**Consultation**

Questions regarding Lord Carloway’s recommendations on child suspects were contained in the Scottish Government’s main consultation exercise.

Of respondents expressing a view, the great majority were in favour of most of Lord Carloway’s recommendations with the exception of the right of 16 and 17 year olds to waive access to a lawyer.

Consultation has continued with representatives of the main national bodies, including the Convention of Scottish Local Authorities (“COSLA”), the Scottish Children’s Reporter Administration (“SCRA”), the Association of Directors of Social Work (“ADSW”) and Police Scotland. This work seeks to ensure the appropriate balance is struck between legislation and guidance.

**Alternative approaches**

The status quo was not considered as an option following the Cadder case. It was for this very reason that the Scottish Government commissioned Lord Carloway’s review.
This policy seeks to achieve the workability and flexibility which Lord Carloway favoured and which the Scottish Government sought to secure by commissioning the review in the first place.

115. The Scottish Government considered making the provision of legal advice mandatory to all under 18s. However, it recognised that it is important to distinguish between the different needs, stages of development and potential circumstances of older and younger children. Thus, while it might appear attractive to treat all individuals under 18 years consistently, the age-based laws which allow for seventeen year olds to be living independently and married reflect the quite different contexts and degrees of self-determination that can exist between a 10 and a 17 year old. The Scottish Government preferred an approach which would allow children aged 16 and 17 years to make their own decisions with safeguards in place to support them in this.

VULNERABLE PERSONS (CHAPTER 5, SECTIONS 33 AND 34)

Policy objectives

116. The policy objective is to make provision to ensure that vulnerable adult suspects are not disadvantaged, in comparison to their non-vulnerable counterparts, during police procedures.

Key information

117. Lord Carloway’s review considered the position in relation to individuals who have permanent or semi-permanent vulnerabilities which affect their fitness to be interviewed when arrested and detained as a suspect by the police.

118. The current non-statutory role of an Appropriate Adult is to facilitate communication during police procedures between the police and vulnerable suspects, accused, victims, and witnesses (aged 16 or over) who have a mental disorder or learning disability. Appropriate Adults are specifically recruited for their experience (professional or otherwise) in working in the field of mental health and their communication skills. They are often social workers or health professionals (although they do not fulfil the Appropriate Adult role in that professional capacity). Appropriate Adults are expected to successfully complete nationally recognised training and follow the Scottish Appropriate Adult Network National (“SAAN”) Guidance.

119. Appropriate Adults are independent of the police and are not usually known to the person being interviewed. An Appropriate Adult monitors the police interview to ensure that the person is not unduly distressed, understands, and continues to understand their rights and why they are being interviewed, understands the implications of their answers or lack of them, and is not disadvantaged by their disorder. The Appropriate Adult can advise the interviewing officer of concerns and can prompt a suspension of the interview to discuss them. An Appropriate Adult can be present during every stage of the investigation, including searches, interviews, medical examinations, the taking of forensic samples (e.g. DNA), fingerprinting, photographing, and identification parades.

120. The Bill defines a vulnerable person for the purpose of police arrest, detention and questioning as a person aged 18 or over (as, for these purposes, a child suspect is to be defined as
a person under the age of 18) who is assessed as vulnerable due to a mental disorder as defined in section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (i.e. “any mental illness, personality disorder, learning disability however caused or manifested”).

121. As it is at present, and as suggested by Lord Carloway, it will be for the police to assess whether the person is vulnerable. Where a person is assessed as vulnerable, the police will endeavour to secure the attendance of an Appropriate Adult as soon as reasonably practicable after detention and prior to questioning. As is current practice, the Scottish Government would expect the police, in deciding whether a person is vulnerable: to be guided by comments from carers and others who know the person, to seek medical advice if necessary, and to keep the matter under review in case vulnerability becomes apparent at a later stage.

122. The role of an Appropriate Adult is to assist a vulnerable person to understand what is going on and to facilitate effective communication between the vulnerable person and the police.

123. In relation to training, the Bill will give the Scottish Ministers regulation-making powers so that they can detail who may provide Appropriate Adult services and what training, qualifications or experience are necessary to become an Appropriate Adult.

124. The Scottish Government does not intend the legislation to interfere with the existing non-statutory role of an Appropriate Adult and expects that the police will still be able request the support of an Appropriate Adult for vulnerable suspects, and accused persons aged 16 and 17 years old, and also for victims and witnesses aged 16 and over, through the current non-statutory route. However, the Scottish Ministers can, if it becomes necessary in the future, make alternative arrangements to ensure that Appropriate Adult services continue to be provided as at present.

Consultation

125. Questions regarding the implementation of Lord Carloway’s recommendations on vulnerable adult suspects were included in the Scottish Government’s main consultation exercise.

126. The majority (24) of those who responded to the questions posed in relation to vulnerable adult suspects agreed that there should be a statutory definition of ‘vulnerable suspect’\(^\text{18}\). Whilst most agreed with the proposed definition some respondents suggested linking this to definitions contained in other legislation or proposed alternatives. The Scottish Government decided to accept Lord Carloway’s proposed definition as it sits with the existing non-statutory definition of those who require support from an Appropriate Adult.

127. A large majority (20) of those who responded agreed that the role of an Appropriate Adult should be defined in statute and with Lord Carloway’s proposed definition. There was

\(^{18}\) Section 33(1) of the Bill. Support for a vulnerable person applies where (a) a person is in police custody, (b) a constable believes that the person is 18 years of age or over, and (c) owing to mental disorder, the person appears to the constable to be unable to understand sufficiently what is happening or to communicate effectively with the police.
also agreement that statutory provision should be made to allow Scottish Ministers to define the qualifications necessary to become an Appropriate Adult. All respondents to the questions agreed that a vulnerable person must be provided with the services of an Appropriate Adult as soon as practicable after detention and prior to any questioning. However, concerns were raised in relation to a vulnerable person being allowed to waive the right of access to a solicitor with the agreement of an Appropriate Adult. The Scottish Government noted these concerns, and the instruction issued by the Lord Advocate to Chief Constables, that from 1 October 2012 a vulnerable suspect should not be allowed to waive their right of access to a solicitor (in response to cases where vulnerable suspects had done so, not fully understanding the caution or terms of interview, and the subsequent concerns about the admissibility of statements made during interview). The Scottish Government is content with the current position as set out in the Lord Advocate’s guidance.

128. Further consultation also took place with the SAAN, COSLA and ADSW to seek their views on the Scottish Government’s proposals. SAAN’s main concern was in relation to expanding the role of an Appropriate Adult so that a vulnerable person can only waive the right of access to a solicitor if the Appropriate Adult agrees to this, whilst COSLA and ADSW wished to be reassured that the legislation would not put a duty on local authorities to provide Appropriate Adult services. The Scottish Government has taken account of these views in developing the provisions.

Alternative approaches

129. The Scottish Government considered extending the provisions in the Bill include a statutory definition of (for the purpose of arrest, custody and questioning) vulnerable victims and witnesses and to specify the role of the Appropriate Adult in supporting them. Currently Appropriate Adult support is provided to vulnerable victims and witnesses on a non-statutory basis. However, the delivery of Appropriate Adult services to vulnerable suspects, accused, victims and witnesses appears to be working well in practice (and seems to go beyond that required by Lord Carloway’s recommendations). The Scottish Government does not intend at present to make any particular body statutorily responsible for the delivery of Appropriate Adult services, and so they decided to take a light-touch approach in confining the Bill provisions to the implementation of Lord Carloway’s recommendations, with the expectation that the non-statutory service will continue to run alongside these statutory provisions.

PART 2 OF THE BILL – CORROBORATION AND STATEMENTS

CORROBORATION (SECTIONS 57 TO 61)

Policy objectives

130. The policy objective is to remove the requirement for corroboration in criminal cases to enable decisions on the prosecution of criminal cases to be based on an assessment of the quality of the evidence against an accused person.
Key information

131. The requirement for corroborative evidence is a longstanding feature of Scots law. In general terms, the requirement for corroborative evidence can best be thought of as the requirement that there must first be at least one source of evidence that points to the guilt of the accused as the perpetrator of the crime and that, secondly, each “essential” or “crucial” fact requiring to be proved must be corroborated by other direct or circumstantial evidence. Generally, there are two “crucial facts” requiring proof in every crime: (1) that a crime was committed; and (2) that the accused committed it.

132. The Carloway review’s terms of reference (see paragraph 7) expressly set out that the current requirement in Scots law for corroborative evidence was an area that required to be examined in light of recent decisions of the appeal court, in particular concerning the right to access legal advice prior to and during police questioning. The question that Lord Carloway’s review considered was whether the requirement for corroboration continues to serve a useful purpose or whether “it is an artificial construct that actually contributes to miscarriages of justice in the broad, rather than appellate sense.” Lord Carloway concluded that the current requirement for corroboration in criminal cases should be abolished and that “in solemn prosecutions where there is no corroboration of testimony, there should be no requirement on the judge to warn the jury of any dangers perceived purely as a consequence of the absence of such corroboration”.

133. The rule requiring corroborative evidence is seen by some as a protection against miscarriages of justice in that it ensures that no person can be convicted of an offence solely on the basis of the testimony of a single witness. In his report, Lord Carloway stated that it is his view that the principal argument for abolishing the requirement for corroboration is that he could find no evidence that it serves its stated purpose of preventing miscarriages of justice. He observed that “The real protection against miscarriages of justice at first instance is the standard of proof required; that the judge or jury must not convict unless convinced of guilt beyond reasonable doubt.”

134. The second argument Lord Carloway made for removing the requirement for corroboration is that doing so may prevent miscarriages of justice occurring, in the broader sense of ensuring that in cases where there is evidence from a single witness to an offence, that witness is credible and reliable, and the judge or jury is satisfied beyond reasonable doubt of the accused’s guilt, a conviction would follow. Lord Carloway stated in his report that “in principle, judges or juries ought to be regarded as capable of deciding for themselves what weight to attribute to a witness’s evidence.” The fact that the evidence of a witness may be uncorroborated would be something the judge or jury would take account of in assessing what weight should be given to that witness’s evidence. Corroboration is concerned merely with the quantity, and not the quality, of the evidence against an accused person. It is not clear why, on the one hand, a case where there is a single independent and impartial eye-witness to an offence could not be prosecuted, while one involving a number of witnesses who may be unreliable (e.g. rival gang members in a street fight or feuding neighbours in a dispute) should be subject to this artificial restriction.

135. It has been suggested that the requirement for corroboration provides a degree of objectivity and consistency in assessing the evidence against an accused person. However, Lord Carloway found in the course of his review that different judges have different views on what
constitutes corroboration in a particular case and he was not persuaded that the requirement provides any more consistency than an alternative approach, based on quality of evidence, would bring.

136. Corroboration is more likely to exist in relation to some offences than others. Where crimes are usually committed in private, the only potential evidence may be from the testimony of a complainer, and this can be a particular barrier to obtaining corroboration for sexual crime and for domestic violence as there may be nothing else, or very little, in the absence of statements made by suspects at interview. The practical effect of the requirement for corroboration can be to deny access to justice for victims of these types of crime. Equally, with certain less serious crimes, for example minor assaults or thefts, there may also be little evidence other than that of the complainer but that evidence may be of itself compelling.

137. Lord Carloway considered it worth noting the impact that the existence of the requirement for corroboration has in the advice given by solicitors to suspects. Lord Carloway noted that, in Scotland, it plays a major part in the solicitor’s decision to advise the client to say nothing for fear of the client inadvertently corroborating other evidence and thereby creating a sufficiency, which would otherwise not exist. As a result, whether a person is prosecuted for and convicted of an offence conviction which would be inevitable in other jurisdictions can depend entirely on whether the person elects to respond to questioning by the police. Such advice can place a person in a difficult position. It may be felt that a judge or jury would be more likely to accept the person’s account as credible if it were raised at the earliest opportunity. Yet, the person would almost always be well advised not to speak, at least in situations where there was no obvious sufficiency of evidence.

138. Lord Carloway’s review considered a number of cases that were dropped after the Cadder ruling because the police interview was not Cadder-compliant. Without the requirement for corroboration, a significant number of these cases may very well still have had a sufficient quality of evidence to have justified continued proceedings, even though evidence of the police interview would be inadmissible. Although this number may be perceived as small when compared to the totality of prosecutions in Scotland, it is still numerically significant. On one view it means that, in the broad sense, miscarriages of justice may have occurred in a number of these cases because of the requirement for corroboration. With no prosecution, evidence suggesting that a crime had been committed was not tested and witnesses, including victims, may have been left seeing the person, whom they regarded as perpetrating a significant crime, go free.

139. For the reasons outlined above, the Scottish Government is persuaded by the conclusion of Lord Carloway’s review that “the requirement for corroboration should be abolished for all categories of crime.” His review concluded that “it is an archaic rule that has no place in a modern legal system where judges and juries should be free to consider all relevant evidence and to answer the single question of whether they are satisfied beyond reasonable doubt that the accused person committed the offence libelled. Removing the requirement for corroboration will help to ensure access to justice for victims of crimes, such as domestic violence and sexual crime, which are typically committed in private, and where corroborative evidence can be difficult to obtain.” The Bill provides that in any criminal proceedings the judge, or as the case may be the jury, if satisfied that any fact has been established by evidence in the proceedings, is entitled to find that fact proved by the evidence despite the evidence not being corroborated. The
removal of the requirement for corroborative evidence will apply in respect of all offences committed on or after the date on which the provision comes into force.

140. The requirement for corroborated evidence in relation to offence grounds in children’s hearings referrals to the sheriff court is also abolished.

141. A children’s hearing does not have a role in establishing the facts of a case; its role is to act in the best interests of the child and to determine what measures are required to address the needs of the child. If the grounds for referral at a children’s hearing are not accepted or not understood by either the child or the relevant person, the case is referred to the sheriff to determine whether the grounds are established. If the ground for referral is that the child has committed an offence, in determining whether the grounds are established, the standard of proof which applies is that which applies in criminal proceedings, beyond reasonable doubt, and there is currently a requirement for corroboration. If the sheriff finds that the ground is established the case will be referred back to a children’s hearing for it to determine whether compulsory measures of supervision are needed to support and protect that child.

142. The removal of the requirement for corroboration in children's hearings proceedings is not likely to have any significant impact and will not formally alter Reporter practice or decision making in relation to whether to refer a child to a children's hearing. The existing conditions for making these referrals (the referral ground applies and compulsion is needed) will still apply regardless of the court procedure. Reporters will have to consider whether there is a sufficiency of evidence upon which they could establish the grounds to the necessary standard of evidence.

Consultation

143. Questions regarding the implementation of Lord Carloway’s recommendations on the removal of the requirement for corroboration were included in the Scottish Government’s main consultation exercise. There were mixed views with regard to the recommendation that the requirement for corroboration should be removed. While the majority of respondents representing the legal profession were opposed, often citing concerns that the removal of the requirement could lead to an increased risk of miscarriages of justice, groups representing the victims of crime supported the recommendation as they took the view that the existing requirement for corroboration can present an artificial and unnecessary barrier to prosecution. What emerged clearly from the consultation is that, irrespective of their views on whether the requirement for corroboration should be removed, the majority of respondents considered that additional safeguards would be required to be built into the justice system if the requirement for corroboration is to be abolished. In light of this, the Scottish Government undertook a further consultation between December 2012 and March 2013, as a result of which it has been decided to make provision to increase the jury majority required for a conviction from 8 of 15 jurors to 10 (see paragraphs 171 to 182).

Alternative approaches

144. An alternative approach would have been to reject Lord Carloway’s recommendation and retain the requirement for corroboration. However, the Scottish Government considers that Lord Carloway’s review made a compelling case for its abolition, and while it is aware that some in the legal profession are concerned that removing the requirement for corroboration could
increase the risk of miscarriages of justice, only very limited evidence has been put forward in support of the potential risks that have been identified and there is no other jurisdiction in the western world in which this requirement exists. Moreover, the Scottish Government considers that Lord Carloway’s recommendations are intended to be implemented as a coherent package, and by failing to implement a significant aspect of the recommendations contained in his report, there is a very real risk of undermining Lord Carloway’s stated aim of ensuring the justice system is appropriately balanced.

145. Some consultation respondents suggested an alternative approach whereby the requirement for corroboration was selectively abolished for specific offences which often occur in circumstances where corroborative evidence is likely to be difficult to obtain (e.g. domestic violence and sexual assaults). However, the Scottish Government considers that such an approach would be unnecessarily complex, with different rules concerning sufficiency of evidence applying in respect of different offences. This would be particularly problematic where an accused was charged with multiple offences on the same indictment, e.g. a rape and an assault forming part of a single course of conduct, and corroboration would be required in respect of one of the charges and not others. Moreover, the Scottish Government see no principled reason for retaining the requirement for corroboration for some offences and not others.

146. Some have argued that the removal of the requirement for corroboratory evidence should be retrospective, in that it should apply to all criminal proceedings after the provision comes into force, irrespective of the date on which the offence was committed. Supporters of this approach consider that this would enable COPFS to re-open historic cases which could not be prosecuted at the time owing to a lack of corroborative evidence. The Scottish Government considers that such an approach risks creating uncertainty about cases which had been discontinued many years, or even decades, previously and that, in practice, given the passage of time, it is likely that few such historic cases would have been capable of prosecution. Removing the requirement for corroboration for offences committed after the provision comes into force provides greater clarity and certainty.

EXCULPATORY AND MIXED STATEMENTS (SECTION 62)

Policy objectives

147. The policy objective is to provide that an exculpatory or mixed statement made by a person to a constable, or other person investigating an offence, is not inadmissible as evidence on account of being hearsay evidence.

Key information

148. Lord Carloway noted in his review that at the core of the Cadder case was the issue of the admissibility of statements made by a person to the police without the advantage of prior legal advice. Generally speaking, statements made by a person to the police would constitute hearsay evidence (and so not be admissible in court). However, confessions made in the course of police interviews are generally regarded as an exception to the rule against the admissibility of hearsay evidence because, as they are “statements against interest”, it is reasoned in law that they are more likely to be true than not. On the other hand, exculpatory statements (i.e. statements in
which the person denies having committed an offence) made by a person in the course of a police interview would not be admissible as proof of fact.

149. Lord Carloway’s review did not seek to revisit the entire law of hearsay but did examine the treatment of statements made by a person in the course of a police interview which do not amount to a full confession and are either “mixed statements” which are partly incriminating and partly exculpatory (e.g. where a person admits to a lesser offence while denying the having committed a more serious offence) or wholly exculpatory. He concluded that “the distinction between incriminatory, exculpatory and mixed statements should be clarified so that, so far as statements made to the police or other officials in the course of an investigation are concerned, no distinction is drawn between them in terms of admissibility. All statements made by accused persons to such persons in that context should be admissible in evidence for all generally competent purposes, including proof of fact, in the case against that accused except where the content of a statement would otherwise be objectionable.”

150. It is important first to consider the reasons why hearsay evidence is not generally admissible in court. There is perceived to be a problem in an accused person being able to lead evidence at his trial of exculpatory statements as a substitute for giving evidence, not least because it might otherwise be expedient for an accused person to provide a carefully prepared narrative to a credible person shortly before the trial rather than giving evidence in person at court, so potentially avoiding cross-examination by the prosecution.

151. The law on the admissibility of exculpatory and mixed statements is complex and may not be easily understood by juries. It is not the case that exculpatory statements made by an accused person are currently not admissible at all. However, they are only admissible as evidence that an accused person’s story is consistent, where the accused has given evidence and his credibility or reliability is challenged and not as proof of fact.

152. In relation to proof of fact, a ‘mixed statement’ is admissible at the instance of the Crown and not at the instance of the defence. However, where such a statement is led by the Crown, both the incriminatory and exculpatory elements of the statement would be admissible as proof of fact. Lord Carloway expressed doubt as to whether a jury can be expected to understand and to apply the distinction between using a statement to test credibility and reliability and using it as evidence of proof of fact. Furthermore, there is a reasonable argument that the legitimate concerns about the use of hearsay evidence outlined in paragraph 150 do not apply in the same way where the accused person’s statement was made to officers charged with investigating the commission of an offence, who can be expected to challenge the accused person’s version of events in the course of the interview.

153. The Scottish Government agrees with Lord Carloway’s conclusion that “the current law on the admissibility of mixed and exculpatory statements made by a person during a police interview is not based on a rational and balanced approach to the relevance of statements. It is highly complex and potentially confusing to juries and others in the criminal justice system. It is at odds with the principle of the free assessment of evidence unencumbered by restrictive rules; and it fails to take account of the role of the police interview as part of the trial process.”
154. The Bill implements Lord Carloway’s recommendation by providing that, where a statement is made by an accused person to a constable or other person investigating an offence, it is not inadmissible as evidence on account of being hearsay. Other restrictions on the admissibility of evidence, such as those at section 275 of the 1995 Act concerning the admissibility of sexual history and character evidence, will continue to apply.

Consultation

155. Questions on Lord Carloway’s recommendations relating to exculpatory and mixed statements were included in the Scottish Government’s main consultation exercise.

156. Many more respondents agreed (20) than disagreed (3) that the rules distinguishing treatment of incriminatory, exculpatory and mixed statements should be simplified allowing the courts to assess them more freely. The consultation analysis found that “there was agreement that only statements made to the police or other officials should be allowed as this provides a safeguard against the use in evidence of statements made by the accused to friends or associates”.

Alternative approaches

157. In light of the strong support from consultation respondents for Lord Carloway’s recommendation, the Scottish Government considers that doing nothing is not a viable option. Lord Carloway indicated in his review that there might be a case for going further and providing that all relevant statements by an accused person should be admissible as evidence, irrespective of who to whom these statements were made. However, Lord Carloway acknowledged that “that may be a step too far at present. Furthermore, it could not be justified on the same basis as statements at interview since those outwith that context would not be being made as potentially part of the trial, as defined by the Convention jurisprudence.”

158. Respondents to the consultation on Lord Carloway’s Report expressed concern that allowing all relevant statements made by an accused person to be admissible as evidence, as opposed to only those made to the police, could result in accused persons using carefully prepared statements to friends or associates as a means of avoiding having to give evidence in court and face the possibility of cross-examination. More fundamentally, the effect of the Cadder case is that the police interview forms a part of the trial process, and so it is legitimate to consider hearsay statements made in such circumstances as an exception to the more general prohibition on the admissibility of hearsay evidence. Taking these viewpoints into consideration, the Scottish Government considered that only making such statements made to police admissible provided an adequate balance between the general policy of allowing judges and juries to test all available fairly-obtained evidence, and the possibility of abuse.
PART 3 OF THE BILL – SOLEMN PROCEDURE

METHOD OF JUROR CITATION (SECTION 64)

Policy objectives

159. The policy objective is to remove the current restriction on how the Scottish Court Service (“SCS”) cites persons for juries in order to permit a choice of methods.

Key information

160. Section 85(4) of the 1995 Act restricts methods of jury citation to registered post or recorded delivery. Removing this requirement will allow the SCS a choice among methods, as well as allowing for the possible use of developing technology, such as various forms of electronic communication.

Consultation

161. The main interested party in the citation of jurors is the SCS, by which it is carried out. The provision in the Bill was arrived at in consultation with the SCS, which took the view that citation by ordinary first-class post, for example, would not only save money, but might also result in improved communication with potential jurors (given some people’s reluctance to sign for delivery of post they had not been expecting). SCS also pointed out that in England and Wales citation is by means of first-class post.

Alternative approaches

162. The Scottish Government considered adding “first-class post” or similar wording to the list of permitted means of citation in Section 85(4). However, this would not provide the same flexibility as the chosen approach of avoiding specifying the method of citation at all.

SOLEMN PROCEDURE – IMPLEMENTATION OF SHERIFF PRINCIPAL BOWEN’S RECOMMENDATIONS (SECTION 63 AND SECTIONS 65 TO 69)

Policy objectives

163. The policy objective is to make provision to enable and promote the efficient and effective management of sheriff and jury cases.

Key information

164. The vast majority of cases heard before a jury in Scotland are heard in the sheriff court and include serious crimes such as violent assault, knife crime and supplying controlled drugs. In his Independent Review of Sheriff and Jury Procedure, Sheriff Principal Bowen made a number of recommendations for the more efficient and cost effective management of cases which he considered would have the additional benefit of reducing inconvenience and stress to the victims, witnesses and jurors involved.
165. The Bill requires early communication between the defence and prosecution, described by Sheriff Principal Bowen as a “compulsory business meeting”, after an indictment is served. The Bill does not prescribe the format of the communication. The intention is that prompt engagement between the prosecutor and defence will assist in the early identification of issues and, in some cases, earlier pleas of guilty. It should also help to ensure that cases proceed to trial in an orderly fashion with such matters as can be agreed in advance having been agreed. Parties will be required to keep a written record of this meeting which the Sheriff will consider. The time period between the service of the indictment and the first diet will be extended to 29 clear days to allow parties to communicate as required.

166. In order to accommodate this meeting the Bill increases the length of time for which an accused person can be remanded before having to be brought to trial from 110 days to 140 days. The Scottish Government is satisfied that this is proportionate and it is in accordance with the limit required in the High Court.

Consultation

167. Draft provisions in the Bill were subject to consultation between 19 December 2012 and 15 March 2013, as described at paragraph 26. The consultation led to some changes in the approach to the timing and manner of holding of the compulsory business meeting, in particular, given the views of the Crown, on whom the working of the proposed system depends. It also led to the Scottish Government’s decision not to proceed with sanctions, statements to the accused or written narrations.

Alternative approaches

168. While implementing the recommendation in broad measure the proposed approach departs from Sheriff Principal Bowen’s recommendations in some matters of detail, taking account of arguments expressed in response to consultation.

169. Sheriff Principal Bowen recommended that the compulsory business meeting take place before the indictment, to allow for engagement as early as possible, and that it should be by a face to face meeting wherever practicable. The Scottish Government considered this approach, and consulted on doing precisely this.

170. However, responses to the consultation suggested that parties would become clear on what matters they had to discuss only after the indictment is served. Some respondents to the consultation considered a requirement to hold face-to-face meetings would be practically difficult, be expensive and resource dependent. Since the Sheriff Principal reported, one of the objections to e-mail communication – that it was insecure – had been alleviated by the provision of new, secure systems. The Scottish Government was persuaded that delaying the compulsory business meeting until after the indictment, and allowing it to be held by electronic communication, would allow informed discussion in a way which promoted efficiency of time and money.
INCREASE TO JURY MAJORITY REQUIRED FOR CONVICTION (SECTION 70)

Policy objectives

171. The policy objective is to introduce an additional safeguard into the Scottish criminal justice system by providing that two thirds of jurors must return a guilty verdict in order for an accused person to be convicted.

Key information

172. At present, a simple majority of jurors is required for a guilty verdict to be returned. As juries are comprised of 15 people, at least 8 jurors need to vote for a guilty verdict for an accused person to be convicted. If jurors are excused during the trial, the trial can continue with a minimum of 12 jurors, but the support of 8 jurors is still needed for a guilty verdict; anything less is treated as an acquittal.

173. Scotland is the only common law jurisdiction where an accused person can be convicted on a simple majority verdict. Other systems which are based on a simple majority verdict generally have additional protections. For example, Italy allows conviction on a simple majority, but the two judges sit alongside six lay jurors. In Belgium, jurors can convict on a simple majority but a unanimous panel of judges can overturn ‘erroneous’ verdicts. More information on the rules on jury majorities in different jurisdictions can be found at http://www.scotland.gov.uk/Publications/2012/12/4628/8.

174. The Bill makes provision that a majority of two thirds of jurors is required to return a conviction. Where there is a full complement of 15 jurors, this means that 10 jurors must return a guilty verdict. Under Scots law, a trial can continue providing the number of jurors does not fall below 12. As is the case in a number of other jury systems, provision is made that the number of jurors required to return a verdict is lowered where jurors are excused during the course of a trial. Provision is made that at least two thirds of jurors must return a guilty verdict for a conviction to result and as such, a jury of 14 requires a majority of 10, a jury of 13 requires a majority of 9 and a jury of 12 requires a majority of 8 jurors.

175. Provision is made that, where the required majority is not reached for a guilty verdict and there is no majority in favour of either of the other two available verdicts (‘not guilty’ and ‘not proven’), the jury is deemed to have returned a verdict of “not guilty”. Therefore, it will remain the case that under Scots law, it will not be possible for a hung jury to result in the accused person being subject to a fresh trial.

Consultation

176. The consultation on additional safeguards sought views on the proposals to increase the jury majority required to return a conviction from 8 to either 9 or 10 of 15 jurors following removal of the requirement for corroboration.

19 [http://www.scotland.gov.uk/Publications/2012/12/4628/0]
177. A clear majority of consultation respondents supported moving to a system in which a qualified majority rather than a simple majority of jurors is required in order to return a verdict of ‘guilty’. A majority of 10 jurors was favoured by many more respondents than a majority of 9 jurors.

178. Respondents were fairly evenly split on the question of whether it should be open for COPFS to be able to bring a fresh prosecution against a person in the event that the jury is unable to reach the required majority for any verdict. Generally speaking, respondents from a legal background were opposed to any changes which could result in hung juries and proposed that where the jury fail to agree a guilty verdict by the required majority, the accused should be acquitted, as is currently the case. Conversely, victims’ groups and enforcement agencies were supportive of requiring the same majority for any verdict to be returned and COPFS having a power to re-try the accused where the original trial end with the jury being unable to agree a verdict.

Alternative approaches

179. An alternative approach would have been to retain the status quo whereby a simple majority of 8 of 15 jurors is required for a conviction to result. However, in light of the overwhelming support for raising the jury majority required for a conviction from those who responded to the consultation, the Scottish Government does not consider that it would be justifiable for Scotland to remain the only common law jurisdiction in which an accused person can be convicted on the basis that 8 of 15 jurors considered that the case had been proven beyond reasonable doubt. Respondents to the earlier consultation on Lord Carloway’s review had expressed concern that without a change to the jury majority required for a conviction, a person could be convicted because a bare majority of jurors found the accused to be guilty on the basis of a single, uncorroborated source of evidence.

180. In some other jurisdictions, the same jury majority is required for the return of any verdict and where a jury fail to agree on any verdict (a so-called hung jury) it is open for the prosecution to bring a fresh trial. This is in contrast with Scotland where, at present, anything short of the required majority for a conviction is treated as an acquittal. Hung juries are not currently a feature of the Scottish criminal justice system and it is considered that, on balance, where the evidence led in a trial has failed to persuade at least one third of the jurors that the case against the person has been proven, it would not be in the public interest to allow a fresh trial to take place. It is worth noting that jurisdictions such as England and Wales, which do allow for re-trials to take place where a jury fails to reach a verdict, require a higher proportion of jurors to agree on a guilty verdict for an accused person to be convicted.

181. The Scottish Government consultation exercise also sought views on whether the ‘not proven’ verdict remains appropriate in light of Lord Carloway’s recommendation that the requirement for corroboration should be abolished. Analysis of consultation responses showed that a majority of respondents were in favour of moving to a two verdict system. However a significant minority of respondents were concerned that time should be given to allow the impact of implementing Lord Carloway’s recommendations to be assessed before making changes to the three verdict system. The Scottish Government has therefore determined that the ‘not proven’ verdict should be retained for the time being and further consideration given to whether it remains appropriate in light of the implementation of the other changes proposed following the
Carloway review. The consultation document also sought views on whether the trial judge’s power to rule that there is no case to answer should be widened to include circumstances in which the judge considers that, while there is a technical sufficiency of evidence, no reasonable jury could consider the case to have been proven beyond reasonable doubt on the basis of the evidence led. The majority of consultation respondents supported this recommendation. However, the Senators of the College of Justice, who would be responsible for making decisions on whether to remove a case from the jury in High Court trials, were opposed. In their view, “…the system is…based on the jury being the judges of the facts and we would not be in favour of trial judges having power to take some cases away from the jury on the basis that there is a sufficiency of evidence but that a judgment is made on quality. Such a system usurps the function of the jury”. Some victims groups also expressed concern that such a power would be used by the defence to delay the outcome of proceedings and cause additional uncertainty.

182. This issue had previously been considered when the common law submission of ‘no case to answer’ was placed on a statutory footing by the Criminal Justice and Licensing (Scotland) Act 2010, following the recommendation of the Scottish Law Commission. At that time, the Scottish Government’s position was that, given that successful appeals on the grounds that no reasonable jury could convict were very rare, and taking account of concerns about the impact of such a provision on court time, the ‘no case to answer’ submission should not be extended in this way. In view of the concerns expressed by the judiciary and victims’ groups, the Scottish Government has concluded that it would not be appropriate to legislate to extend the trial judge’s power to rule that there is no case to answer.

PART 4 OF THE BILL – SENTENCING

INCREASE IN MAXIMUM SENTENCES FOR HANDLING OFFENSIVE WEAPONS OFFENCES (SECTION 71)

Policy objectives

183. The policy objective is to ensure that courts have appropriate powers to sentence persons who commit knife possession and other offensive weapon possession offences effectively.

Key information

184. Tackling knife crime is a key priority of the Scottish Government. The policy approach adopted by the Scottish Government is a combination of tough enforcement of the law coupled with initiatives to try and change the culture by educating and diverting people from carrying knives in the first place. This strategy operates in partnership with, amongst others, the police, other law enforcement agencies, the Violence Reduction Unit and youth work organisations, to help reduce the numbers of those who carry and use knives.

185. In terms of enforcement, Scottish police are carrying out a considerable number of stop and searches and the courts impose the toughest knife possession sentences in the UK. The table below shows that a person in Scotland is already 50 per cent more likely to be sent to prison than in England and Wales for knife possession and, for those who do receive a custodial sentence, a person’s sentence is likely to be nearly 70 per cent longer.
This document relates to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

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<thead>
<tr>
<th>Offence</th>
<th>% given immediate custody</th>
<th>Average sentence length (days)</th>
</tr>
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<tbody>
<tr>
<td>Possession of a sharp instrument/blade</td>
<td>29%</td>
<td>44%</td>
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186. COPFS adopt a stringent approach to the prosecution of knife possession offences and they have made recent changes to strengthen their prosecutorial policy in this respect. For example, in April 2012 the Lord Advocate announced[^21] that anyone who is arrested with a knife in Scotland’s town and city centres will be prosecuted before a sheriff and jury. The effect of this prosecutorial policy is that the maximum prison term available upon conviction increased from one year to four years. The policy intention for the provisions in the Bill is to ensure that maximum sentences are available for such offences committed in town and city centres. More recently, the Lord Advocate reported[^22] in March 2013 the initial results of a zero tolerance approach to the prosecution of knife possession offences carried out between 1 December 2012 to 4 January 2013. COPFS are committed to operating a knife crime prosecutorial policy that helps reduce offending, and re-offending, and which provides an effective deterrent.

187. Alongside effective enforcement of the criminal law, the Scottish Government is investing in a number of programmes which aim to educate young people on the dangers and consequences of carrying a knife and support them to make positive choices. This includes the No Knives Better Lives[^23] (NKBL) initiative which is now in place in 11 areas across Scotland, supported by over £2m investment from Scottish Government since 2009. This youth engagement initiative is aimed at educating young people about the dangers of carrying a knife and the devastating personal consequences it can have on their future. NKBL also helps to shape positive attitudes and influence positive life choices by promoting opportunities for young people. The Scottish Government is also supporting Medics Against Violence, a charity which uses the experience and volunteered time of over 140 senior medical professionals to give young people an understanding of the consequences of violence and knife crime and how to avoid it.

[^23]: http://www.noknivesbetterlives.com/
This document relates to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

188. Since 2006/07, there has been a significant fall in the number of people who have been convicted of handling offensive weapon offences. In 2006/07, 3,550 people were convicted of these offences. In 2011/12, 2,276 people were convicted of these offences. This represents a fall of 36% between 2006/07 and 2011/12.

189. Since 2006/07, there has been a significant increase in the proportion of people receiving a custodial sentence for these offences and a significant increase in the average length of the custodial sentences imposed for these offences.

190. In 2006/07, 1,065 people received a custodial sentence for these offences which represented 30% of all those convicted in that year. In 2011/12, 805 people received a custodial sentence for these offences which represented 35% of all those convicted in that year.

191. In 2006/07, the average sentence length for handling offensive weapon offences was 161 days. In 2011/12, the average sentence length for these offences was 311 days. This represents an increase of 93% in average sentence length between 2006/07 and 2011/12.

192. Within this wider context, the Scottish Government wants to ensure that courts are fully and appropriately empowered to be able to effectively sentence those convicted of knife possession and offensive weapon possession. While sentencing in individual cases is appropriately a matter for the court within the individual circumstances of each case and within the overall legal framework the court operates in, the Scottish Government considers that increasing the maximum penalties for these offences to five years, as proposed in section 70 of the Bill, will reinforce the message to those who might consider carrying knives and offensive weapons that the consequences if caught will be severe. This should help in further deterring the carrying of knives and other offensive weapons as well ensuring that courts do have sufficiently effective sentencing powers to deal with individual cases where the court considers a severe sentence is required.

Consultation

193. The Cabinet Secretary for Justice announced the Scottish Government’s intention to increase the maximum penalties for knife possession and other offensive weapon possession offences in November 2012. This forms part of longstanding Scottish Government policy on knife crime to ensure there is tough enforcement available under the criminal law coupled with education and diversion activity. There has been no formal consultation on the proposal.

Alternative approaches

194. Increasing the maximum penalties for knife possession and other offensive weapon offences can only be done through primary legislation. The Scottish Government could leave the current penalties unchanged, but consider that the proposed increases will help further assist

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24 The figures given for offences also include a very small number of offences under section 141 and 141A of the Criminal Justice Act 1988. These offences relate to restriction of sale of offensive weapons and account for less than 1% of the figures given. The provisions in this Bill do not affect the maximum penalties for section 141 and 141A offences in the Criminal Justice Act 1988.
efforts to reduce the number of people who carry knives and other offensive weapons which will, in turn, reduce the number of violent incidents involving these weapons.

SENTENCING PRISONERS ON EARLY RELEASE (SECTIONS 72 AND 73)

Policy objectives

195. The policy objective is to ensure that the courts always consider whether it is appropriate to punish a person for committing an offence while on early release from a previous sentence and to improve the flexibility of the powers of different levels of court to be able to impose punishments in such circumstances.

Key information

196. The courts have long-established powers to punish a person for committing a new offence while on early release from a custodial sentence given for a previous offence. These powers are contained in section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”). These powers are commonly known as ‘section 16 Orders’ and are treated as a new sentence.

197. These powers exist to give discretion to the courts to punish a person who abuses the trust placed in them after being released prior to the end of their custodial sentence, by committing a new offence.

198. The powers contained in section 16 of the 1993 Act operate whether a person has been released early from a short term sentence (4 years or less) or released early from a long term sentence (more than 4 years). They are distinct from the powers contained in section 17 of the 1993 Act which allows persons released early from a sentence on licence to be recalled to prison for breaching their licence conditions. These section 17 powers therefore only generally relate to long term prisoners (i.e. serving sentences of more than 4 years) and are available to ensure protection of the public.  

199. Where a person is released early from a long term sentence and they commit a further offence for which they are convicted, the person can be recalled to prison by the Scottish Ministers and the Parole Board for breaching their licence conditions under section 17 of the 1993 Act and separately receive a section 16 Order from the court at the point they are being sentenced for the new offence.

200. If the court decides it is appropriate to punish a person for committing an offence while on early release, the court has discretion to decide whether the section 16 Order should run concurrently with, or consecutive to, the sentence for the new offence.

201. The maximum length of a section 16 Order is the period of time equal to the date the new offence was committed and the date when the person’s original sentence ends. For example, a

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25 There are some exceptions. For example, offenders committing certain sexual offences can receive licence conditions on early release for sentences of 6 months and more even though sentences between 6 months and 4 years generally do not contain licence conditions.
person who was serving a 12 month prison sentence will be released automatically after 6 months as this is the half-way point of their sentence. If the person commits a new offence on the day they are released, then the maximum length of a section 16 Order that a court could decide to impose would be 6 months – this being the period of time between the date of the offence committed on early release (6 months) and the end of the person’s original sentence (12 months).

202. In the previous example, where a person received a sentence of 3 months for the new offence they committed on the day of early release, and assuming the court decided to use its discretion to impose a section 16 Order and that the section 16 Order should be the maximum permitted of 6 months, the court then has to decide whether the section 16 Order of 6 months should run concurrently to the sentence of 3 months, or consecutively to the sentence of 3 months.

203. If the court decides the section 16 Order should run consecutively to the original sentence, both sentences would be combined (or ‘single-termed’) to become one overall sentence of 9 months. If the court decides the section 16 Order should run concurrently to the original sentence, both sentences operate alongside each other i.e. the 3 month sentence and the 6 month sentence run at the same time.

204. As noted above, the powers of the courts to punish a person for committing an offence while on early release are contained within section 16 of the 1993 Act. There is a provision contained in section 204A of the 1995 Act which has the effect of prohibiting a court from imposing a new sentence to run consecutive to any existing sentence where a person has been released early. As can be seen from the above, this does not mean that the courts cannot punish a person for abusing the trust placed in them by committing an offence on early release but it does mean the courts must use a section 16 Order to do so rather than stating a sentence for a new offence should run consecutive to an existing sentence from which the person has been released early.

205. This area of sentencing law is intricate and not necessarily easily and widely understood. Courts do regularly use the powers under section 16 of the 1993 Act as statistics, as at September 2012, demonstrate:

- Section 16 Orders in custody – 543
- Prisoners in custody with both a section 17 Recall and a section 16 Order – 104.

206. The Scottish Government wishes to ensure that the discretionary powers of the court to punish persons for abusing the trust placed in them by committing an offence while on early release are widely understood by all those who operate in, and come into contact with, this part of the justice system. That is why in cases where the court is dealing with a person who committed an offence on early release, section 72 of the Bill places a new specific duty on the court to always consider whether it is appropriate for an additional punishment to be imposed on a person over and above punishment for the new offence.

207. The proposals do not change the substantive powers of the courts in this area and it will continue to be the case, as at present, that it is for a court to decide whether it is appropriate to
impose a section 16 Order. The Scottish Government considers this is the correct approach as the court hears all the facts and circumstances of each case and is best placed to decide on how to deal with offenders within the overall legal framework. While it is clear from the statistics that the courts regularly make use of their section 16 Order powers, the Scottish Government considers there will be a general benefit through requiring courts always to consider in every relevant case whether a section 16 Order is appropriate.

208. Section 72 of the Bill also adds new flexibility to how different levels of court can impose section 16 Orders. Currently, a court which is sentencing a person for a new offence committed while the person was on early release from a previous sentence can impose a section 16 Order only where the previous sentence was imposed by the same level of court or a lower level of court. For example, a sheriff summary court sentencing a person for a new offence can only impose a section 16 Order as a punishment for committing the new offence while on early release if the previous sentence had been imposed by a sheriff summary court or a justice of the peace court.

209. Currently if the previous sentence was imposed by a higher level of court, it is only the higher court that can impose a section 16 Order. For example, a sheriff summary court sentencing a person for a new offence cannot impose a section 16 Order as a punishment for committing an offence while on early release if the previous sentence had been imposed by a sheriff solemn court or the High Court. In such a situation, the sheriff summary court can refer the case to the higher court for consideration as to whether a section 16 Order should be imposed.

210. The Bill will give new flexibility for lower levels of court to impose section 16 Orders when the previous sentence had been imposed by a higher level of court. The provisions will empower lower levels of court to impose Section 16 Orders when dealing with a person serving a previous sentence imposed by a higher court where the maximum potential length of a section 16 Order does not exceed the common law sentencing powers of the court.

211. The 1995 Act contains the relevant sentencing limits for common law offences for different levels of court. Section 3(3) of the 1995 Act provides that the sheriff solemn court cannot impose a sentence exceeding 5 years. Section 5(2)(d) of the 1995 Act provides that the sheriff summary court cannot impose a sentence exceeding 12 months. Section 7(6)(a) provides that a Justice of the Peace (“JP”) court cannot impose a sentence exceeding 60 days.

212. The new flexibility will mean that where, for example, a sheriff summary court is sentencing for a new offence committed while on early release from a previous sentence imposed by a sheriff solemn court (or by the High Court), the sheriff summary court will be empowered to impose a section 16 Order as a punishment for the person having committed the new offence while on early release if the maximum length of the section 16 Order does not exceed 12 months. Where a JP court is sentencing for a new offence committed while on early release from a previous sentence imposed by a sheriff summary court (or by a sheriff solemn court or by the High Court), the JP court will be empowered to impose a section 16 Order if the maximum length of the section 16 Order does not exceed 60 days.
213. In cases where a higher court had imposed the previous sentence and the maximum length of a section 16 Order exceeds the general sentencing power of the lower court (i.e. a section 16 Order exceeds 60 days for a JP court, exceeds 12 months for the sheriff summary court and exceeds 5 years for the sheriff solemn court), it will continue to be the case that the lower court can refer the case to the higher court for consideration of whether a section 16 Order should be imposed.

214. In line with general sentencing limits, the Scottish Government considers this new flexibility contained in section 72 of the Bill will empower different levels of court to consider imposing section 16 Orders in relevant cases which will help improve the efficiency and operation of the courts by meaning fewer cases need to be referred from lower courts to higher courts for consideration of the imposition of a section 16 Order.

Consultation

215. While the provisions in the Bill adjust the powers of the different levels of court and require the court to always consider whether to impose a section 16 Order, they do not substantively change the overall powers of our courts in this area. The Scottish Government has therefore not undertaken any formal consultation, though they have informally consulted the judiciary about the terms of the provision.

Alternative approaches

216. The Scottish Government could have decided not to place a statutory duty on the court and continued with the current legislative provision. It is clear that courts regularly make use of their section 16 Order powers and there is no reason to consider that would not continue to be the case. However, the Scottish Government considers it is preferable to place a specific duty on the court in this way so that a court must always consider whether to impose a section 16 Order in relevant cases. Placing a specific duty on the court through this Bill will help raise general awareness of the existence of these important powers for the courts.

217. Legislation is required to adjust the powers of lower courts to consider imposing section 16 Orders where the previous sentence had been imposed by a higher court and therefore there is no alternative approach that could achieve the policy aim.

PART 5 OF THE BILL – APPEALS AND SCCRC

APPEALS (SECTIONS 74 TO 81)

Policy objectives

218. The policy objective is to make provision to enable the efficient and timely management of appeals by addressing, as far as legislation requires, some of the sources of delay.

Key information

219. The Carloway review concluded that “the reputation of the [Scottish legal] system has been tarnished by the length of time it has taken to progress some appeals”. Lord Carloway’s
views were given further point by the fact his terms of reference were to review the law in the light of recent decisions by the ECtHR. In this context, as he points out, the requirement in Article 6 (right to a fair trial) of the ECHR that persons are entitled to a fair trial within a reasonable time, applies to appeals.

220. Lord Carloway recognised that progressing appeals timeously is to a great extent dependent on those who conduct court business, and stressed that they are under a duty to ensure that cases are progressed efficiently. However, he made a number of recommendations relating to sanctions to encourage the timeous progression of appeals, the lodging of Notices of Intention to Appeal and Notes of Appeal, the rationalisation of procedures by which appeals may be heard, and the giving of reasons for allowing late appeals in plain language for victims or the next of kin.

221. The Scottish Government proposes to adopt an approach to Lord Carloway’s recommendations which observes their spirit, and in many cases their letter, while taking account of arguments for a different approach in particular cases, as set out below. The proposed approach is to ensure that there are changes to the law which support case management by the courts, promotes the progression of cases and address some of the difficult practices which have led to delay in the past.

Consultation

222. Questions on Lord Carloway’s recommendations in relation to appeals were included in the Scottish Government’s main consultation exercise.

223. While the recommendations on appeals attracted relatively little comment in the Scottish Government’s consultation on the conclusions of the Carloway review, the majority of those expressing a view supported the principles Lord Carloway had set out. The Scottish Government decided to take the approach set out below having considered with justice partners how the proposals would work in practice.

Alternative approaches

224. A possible approach would be for a more detailed application of Lord Carloway’s recommendations on sanctions, including specifying sanctions for breach of time limits and procedural requirements in legislation, or at least the granting of a specific power to make such sanctions by Act of Adjournal. However, the Scottish Government considered that stating sanctions in statute would be excessively rigid, recognising the general right of the courts to regulate their own activities. A power to make Acts of Adjournal already exists in the form of section 305 of the 1995 Act. Setting out a separate sanctions-making power could be felt to detract from the generality of this provision, so no specific powers to set sanctions in this respect are set out in the Bill.

225. However, Lord Carloway explicitly recommended amendments to discourage the late lodging of Notices of Intention to Appeal, or Notes of Appeal, and the Scottish Government

http://www.scotland.gov.uk/Publications/2012/07/4794
accepts that this is a major source of delay which should properly be addressed. One such sanction would have been to abandon an appeal for which a Notice, or Note, was not lodged timeously. The Scottish Government has not taken this approach as technically no appeal exists until leave has been granted.

226. The Scottish Government considered giving effect to the sanction of requiring special cause to be shown, and likelihood of success to be demonstrated, in a two-step process. When seeking to lodge late, an applicant would have to show good reason for doing so. Having negotiated this stage, at leave to appeal stage an applicant who had been allowed to lodge late would have to demonstrate the likelihood of the appeal to succeed. Following consultation the Scottish Government chose to make applicants satisfy the “likely to succeed” test at lodging stage. While this might have the disadvantage of an application being considered on the basis of possibly incomplete documentation, it would have the advantage of allowing the full range of issues to be considered at an early stage. It would appear also to give legislative sanction to the current practice of the courts.

227. In implementing Lord Carloway’s recommendations on limiting the available procedures, the Scottish Government considered the maximalist approach he advocated of abolishing Bills of Suspension and Advocation entirely. However, given the difficulty of establishing all the circumstances in which such Bills might be used – and thus the effects of abolition – the Scottish Government has chosen essentially to abolish their use only where alternative statutory modes of appeal are provided by sections 74 and 174 of the 1995 Act. The key consideration here has been to avoid leaving open an appeal procedure to which no requirement of leave attaches, where the procedures of section 74 and 174 require it. In the case of Bills of Suspension, these are already not competent where the procedures of sections 74 and 174 are available.

FINALITY AND CERTAINTY – REFERENCES BY SCCRC (SECTION 82)

Policy objectives

228. The policy objective is to ensure the Appeal Court is appropriately empowered to consider interests of justice as part of how they consider Scottish Criminal Cases Review Commission referred cases.

Key information

229. The Scottish Criminal Cases Review Commission (“the Commission”) was established in 1999 to investigate potential miscarriages of justice. Where the Commission investigate a case and consider that a miscarriage of justice may have occurred, they can refer the case back to the Appeal Court if the Commission think it is in the interests of justice to do so. This is a special power that only the independent Commission has to allow a case that may have exhausted the normal appeal process to be re-opened and considered afresh by the Appeal Court.

230. In considering a case based on a Commission referral, the Appeal Court considers these types of appeals on the basis of whether a miscarriage of justice occurred during the original proceedings. If a miscarriage of justice has occurred in the mind of the Appeal Court, they will overturn the conviction on that basis.
231. However, as part of the legislative response to the Cadder case, provision was included in the 2010 Act which gave a new power to the Appeal Court to reject a Commission reference, without having heard the appeal, if the Appeal Court considered that it was in the interests of justice to do so.

232. Lord Carloway’s recommendations, which are being implemented in the Bill seek to adjust the power of the Appeal Court given in the 2010 Act so that the Appeal Court retains an “interests of justice” test, but the point at which interests of justice are considered by the Appeal Court is adjusted. The provisions in the Bill will mean that the “interests of justice” test will operate as a part of how the Appeal Court considers an appeal based on a Commission reference rather than at the outset of a case being referred by the Commission i.e. the Appeal Court would no longer be able to reject a Commission reference on interests of justice grounds without having heard the appeal.

233. In his review, Lord Carloway indicated that he considered that appeal cases based on Commission referrals can on occasion raise wider issues in reaching a decision than first instance appeals and they can therefore include wider considerations than simply whether a miscarriage of justice had occurred. Both in his review and when he gave evidence to the Justice Committee on his report, Lord Carloway explained why he considered there was a need to ensure the Appeal Court had an explicit power so that they would consider appeals based on Commission referrals on the basis of whether a miscarriage of justice had occurred, and that it was in the interests of justice for the conviction to be quashed. On 29 November 2011 at the Justice Committee, Lord Carloway stated27:

“… The problem arises in this way. At the moment, if a case is referred by the SCCRC to the High Court it becomes an appeal—that is what it is. The appeal process can determine only whether there has been a miscarriage of justice in the original proceeding.

“If the court decides to allow the appeal because there has been a miscarriage of justice in the appeal process, and it has the same powers as it would have on appeal, which will include, for example, the power to order a retrial, it must either acquit the accused, because the appeal has been successful, or order a retrial.

“… When one talks about miscarriage of justice in this context it is important to remember that one is talking about a very limited point, which is whether something went wrong in the trial process.

“I will give one of the more obvious examples that we used. If the SCCRC refers a case, the appeal court has to decide whether there has been a miscarriage of justice but, in between those two stages, or perhaps even before the SCCRC has referred the case, the convicted person may have confessed to the crime. Either because the SCCRC did not know that or because it happened after the reference, that cannot be taken into account by the High Court in determining the outcome of the appeal. There would still have been a

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miscarriage of justice, but the person would have been proved to have confessed to the crime”.

234. Lord Carloway further explained that:

“…One situation in which we think the interests of justice test could be applied is when someone has deliberately not appealed in the first place. The SCCRC goes into that matter, but the question is ultimately this: should not it be the court that decides the interests of justice test in that setting? In other words, should not it lay down guidelines about when someone who has deliberately not appealed in the first place would be allowed to proceed by way of a reference from the SCCRC? It is an overriding interests of justice test that the SCCRC applies. I am recommending that, ultimately, the court should apply the same test in deciding the appeal.”

235. The Scottish Government considers that Lord Carloway’s recommendations on finality and certainty represent an appropriate development of the law to allow the Appeal Court to consider interests of justice as part of their consideration as to whether a miscarriage of justice has occurred in specific Commission referred cases. It accepts the examples above as showing that an “interests of justice” test needs to be applied by the court when hearing a referral from the SCCRC.

Consultation

236. Questions on Lord Carloway’s recommendations on finality and certainty were included as part of the Scottish Government’s main consultation exercise. Of those who responded to the consultation and offered a view on these recommendations, a majority were in favour.

Alternative approaches

237. Adjusting how the Appeal Court considers Commission referred cases requires primary legislative change and so there is no alternative approach available that would achieve the policy objective. Abolishing the “interests of justice” test altogether would not meet the policy objective.

PART 6 OF THE BILL - MISCELLANEOUS

AGGRAVATION AS TO PEOPLE TRAFFICKING (CHAPTER 1, SECTIONS 83 TO 85)

Policy objectives

238. The policy objectives are to require the courts to take into account any link between an offence and people-trafficking activity, and when dealing with a people trafficking offence, to take into account the fact that the person who committed it did so by abusing his or her position as a public official.
Key information

239. The underlying purpose, or motivation of committing, or conspiring to commit, any offence should be considered to be more serious when it takes place against a people trafficking background. The Scottish Government proposes a statutory aggravation to any criminal offence where it can be proved the offence had a connection with a people trafficking background.

240. Offences in connection with people trafficking are set out in:
   - Section 22 of the Criminal Justice (Scotland) Act 2003 (as amended by section 46 of the Criminal Justice and Licensing (Scotland) Act 2010).
   - Section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as amended by section 46 of the Criminal Justice and Licensing (Scotland) Act 2010.

241. There may be, however, other cases where, although the principal offence may concern for example tax fraud, benefit fraud, producing false documents, immigration offences, brothel keeping, and drugs offences etc., there is evidence that the offence has been committed against a background of people trafficking.

242. At present, there is no mechanism for recording where people trafficking forms the backdrop to the principal offence in a particular case. Where there is insufficient evidence to raise proceedings for a specific people trafficking offence (either in relation to section 22 of the 2003 Act or section 4 of the 2004 Act), there is no way of leading evidence to demonstrate to the court that the principal offence was committed against a background of people trafficking.

243. To meet obligations under Article 4.3 of the EU Directive on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA (2011/36/EU) the Scottish Government proposes to apply a statutory aggravation where a people trafficking offence has been committed by a public official while acting, or purporting to act, in the course of the official’s duties.

Consultation

244. The Equality and Human Rights Commission (“EHRC”) published the report of its Inquiry into Human Trafficking in Scotland in November 2011. Among other recommendations the EHRC recommended that a people trafficking background should be made a statutory aggravation in the sentencing of those convicted of related criminal offences. The EHRC’s recommendations were arrived at following a consultation process with organisations with an interest in tackling trafficking or supporting victims. The Scottish Government has considered this recommendation, and agrees with it.


Alternative approaches

245. There are no alternative approaches that would achieve the Scottish Government’s policy objective.

USE OF LIVE TELEVISION LINKS (CHAPTER 1, SECTION 86)

Policy objectives

246. The policy objective is to enable the use of live TV links for all diets in criminal proceedings with the exception of any diet where evidence is led as to the charge.

Key information

247. The policy objective is to enable the use of live TV links for all diets in criminal proceedings with the exception of any diet where evidence is led as to the charge.

248. The values of the Video Conferencing Project have been echoed by Lord Carloway and Sheriff Principal Bowen in their recent reviews. Both called upon the Scottish Government to examine expansion of the links between courts and those in custody.

249. In progressing its work, the Video Conferencing Project is currently unable to begin pilot work in the key area of first appearances in criminal cases being conducted via live TV link as this is currently prohibited by the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”).

250. Additionally, the Bill will also remove the current requirement upon the prosecutor to apply to the court for the use of TV links relating to a person’s first appearance from custody, and permit the prescription of which courts within a sheriffdom may use TV links.

251. A court will first have to determine, at an ad hoc hearing, whether TV links will be used in a case before a substantive hearing takes place and invite parties to make representations on this. In making a determination the court must consider whether the use of TV links is compatible with the interests of justice.

252. The court will have powers to decide, before or at a substantive hearing, whether it is in the interests of justice that the detained person is to appear in person and to postpone the hearing until the next day for their personal appearance. However, the court cannot postpone a hearing where the person makes their first appearance from police custody in order to prevent a person being unnecessarily or disproportionately detained.

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30 See paragraph 1.0.19 of Lord Carloway’s Review on Scottish Criminal Law and Practice and paragraph 9.5 of Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure.
253. The Bill expressly provides that TV links cannot be used for a hearing where evidence will be led as to the charge.

254. In expanding the existing provisions from the 2003 Act to include first appearances, the Bill will allow the Video Conferencing Project to make progress in this key area. First appearances currently account for a significant part of prisoner movement to courts. The key benefits of holding first appearances via a TV link will be to reduce the number of physical movements of detained persons, potentially reduce the time it takes for them to have their first court appearance, as well as a significant reduction in costs. This will be of particular benefit to women prisoners and young prisoners who are often transported across the country to court.

255. It should be noted that the extension of provisions from the 2003 Act to include first appearances does not mean these will be widely used immediately upon enactment. The Scottish Government is fully aware that the move to a wider use of TV links is a cultural change and that great care needs to be taken to ensure that any changes do not in any way jeopardise the efficient disposal of court business or, most importantly, the effective participation of a person in any hearing before the court.

256. That being the case, any use of these expanded provisions will be extensively piloted as part of the Video Conferencing Project. These pilot programmes will be developed in conjunction with all criminal justice partners including the Judiciary and the Law Society. Only once pilots have been successfully concluded will the use of TV links for first appearances become more widely used.

257. The Scottish Government is also keen to provide a safeguard to the expansion of use of TV links and is doing so by introducing a provision which allows the Lord Justice General to prescribe which courts can use this technology and for what diets. This will allow the Lord Justice General to control the roll-out of the use of TV links only allowing expansion when content that it is in the interests of justice to do so.

Consultation

258. The main criminal justice partners and legal bodies have been involved in discussion and development of the wider use of video technology within the justice system via interaction with the Video Conferencing Project. In relation to specific provisions within this Bill, the Scottish Government has worked closely with criminal justice partners in developing these provisions. No public consultation on the provisions has taken place.

Alternative approaches

259. There is no alternative approach to primary legislation that would achieve the Scottish Government’s policy objectives in this area.

260. It would be entirely possible to take no action and to leave the law as it stands. This, however, would prevent the use of TV links for first appearances in criminal proceedings even to be piloted and would defeat the aims of the Video Conferencing Project.
POLICE NEGOTIATING BOARD (CHAPTER 2, SECTION 87)

Policy objectives

261. The policy objective is to establish a new mechanism for negotiating the pay and conditions of service of constables of the Police Service of Scotland.

Key information

262. The Police Negotiating Board (PNB) was established by statute in 1980 to negotiate the hours of duty; leave; pay and allowances; the issue, use and return of police clothing, personal equipment and accoutrements; and pensions of United Kingdom police officers. It makes recommendations on these matters to the Home Secretary, Secretary of State for Northern Ireland, and Scottish Ministers, who are responsible for setting out the pay and conditions of service of police officers through Regulations. The PNB also issues guidance on the interpretation of Regulations.

263. The PNB comprises an Official Side, representing police authorities, chief officers of police and Ministers, and a Staff Side representing police officers through their various rank-based staff associations. It has an independent Chair and Deputy Chair, appointed by the Prime Minister, who bring a neutral, independent voice to the negotiations and assist in bringing the parties to agreement, through support, informal mediation and conciliation. If the parties fail to agree on an issue, the matter can be referred to arbitration under the auspices of the Advisory, Conciliation and Arbitration Service. More information is available at http://www.ome.uk.com/Police_Negotiating_Board.aspx together with the current Constitution. The current Scottish members of the PNB represent the Scottish Police Authority, the chief constable of the Police Service of Scotland, Scottish Ministers, the Scottish Police Federation, Association of Scottish Police Superintendents and Scottish Chief Police Officer’s Staff Association.

264. On 1 October 2010, the Home Secretary launched the Independent Review of Police Officer and Staff Remuneration and Conditions, led by Tom Winsor. Its second report, published on 15 March 2012, recommended that the PNB should be abolished and replaced by an independent police officer pay review body by late 2014. The Senior Salaries Review Body would take responsibility for setting the pay of chief constables, deputy chief constables and assistant chief constables. This approach is now being taken forward in the UK Government’s Antisocial Behaviour, Crime and Policing Bill.

265. A pay review body is an independent body which gathers evidence from Government and organisations representing its review group, carries out independent research, and makes recommendations to Government on this basis.

266. The changes proposed by the UK Government to the UK-wide PNB require the Scottish Government to consider the future mechanism for determining police pay and conditions of service in Scotland. Following initial consultation with the Scottish bodies represented on the PNB, provisions are included in this Bill to establish a Police Negotiating Board for Scotland (“PNBS”). This will provide a collective bargaining mechanism for constables of the Police Service of Scotland in relation to the issues currently considered by the PNB.
267. The PNB is established under sections 61 and 62 of the Police Act 1996. Those provisions set out a broad framework for the Board and enable the Secretary of State to draw up its Constitution after consultation with the bodies to be represented. The provisions in the Bill follow a similar model. In particular, this approach allows the membership of the Board to be determined in the Constitution, which will be prepared by Scottish Ministers, so that the staff associations which are not established in statute have equal status with the Official Side and Scottish Police Federation.

268. The Bill inserts provisions establishing the PNBS into the Police and Fire Reform (Scotland) Act 2012, and uses the terminology of that Act in setting out the issues on which the PNBS may make representations to Scottish Ministers. The requirement for Ministers to consult the PNBS before making Regulations is established by an amendment to section 54 of that Act. Ministers may require the PNBS to make representations about these issues within a set time period. The PNBS will also, if it wishes, be able to make representations about other matters relating to police governance, administration and conditions of service.

**Consultation**

269. In light of the proposal by the UK Government to abolish the PNB, the views of the members of the Scotland Standing Committee were sought on whether they wished to join an independent pay review body or retain a collective bargaining mechanism. All the members indicated that they preferred a collective bargaining approach. There will be further consultation with those members on the detailed arrangements for the PNBS, which will be set out in its Constitution.

**Alternative approaches**

270. The two options for obtaining recommendations on the pay and conditions of service of police officers are a collective bargaining mechanism or a pay review body. As noted above, all stakeholders in Scotland are in favour of retaining collective bargaining therefore no consideration has been given to the option of a pay review body.

271. It would be possible to take a different approach to the legislation, either by setting out more detailed arrangements in the Bill or by providing for this to be done in secondary legislation. However for the level of detail required, it is considered that a non-statutory Constitution is the best approach.

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

**Equal opportunities**

272. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website at [http://www.scotland.gov.uk/Publications/Recent](http://www.scotland.gov.uk/Publications/Recent).

273. The Bill will make significant changes to the law and practice of the Scottish criminal justice system. Consequently, the provisions in the Bill will, to varying degrees, affect all those
who come into contact with the criminal justice system, from the accused, victims and witnesses to the police, COPFS and the SCS.

274. At every stage in the development of the policy underpinning the provisions in the Bill, there has been research and consultation with criminal justice partners, key stakeholders and the wider public. From Lord Carloway and Sheriff Principal Bowen’s expert reviews and the public consultations published by the Scottish Government to informal discussions with third sector organisations, policy officials have created an evidence base from which to develop and assess provisions against the equality duty and human rights legislation. Accordingly, the Bill’s provisions do not discriminate on the basis of age, disability, sex (including pregnancy and maternity), gender reassignment, sexual orientation, race or religion and belief.

275. Scottish Government Justice Analytical Services provided analytical expertise to facilitate a framing workshop for the EQIA process. This exercise enabled policy officials to identify relevant data and establish an accurate and informed context within which the reforms to the criminal justice system will operate and against which equality matters can be assessed.

276. The EQIA identified some potential impacts against the protected characteristics, both positive and negative. Where potential negative impacts were identified, measures were taken, or planned, to mitigate possible issues. None of the impacts identified were considered to pose significant issues for the legislation.

277. Investigative liberation may have a negative impact for victims of domestic violence, of whom 82% are female. However, the Bill provides the police with additional powers to attach special conditions when releasing a person from police custody on an undertaking or on investigative liberation, such as not to approach or contact a victim, and power to arrest a person who breaches such conditions.

278. The abolition of the requirement for corroboration will remove a potential barrier to the prosecution of domestic violence and sexual offences.

279. Consideration must be given to means of communication to prevent negative impacts for people with a mental disorder, both in terms of the passive presentation of information and of the active participation of an individual in proceedings at the police station. The service offered by Appropriate Adults is essential in supporting those with a mental illness, personality disorder or learning disability and provisions in the Bill on vulnerable persons seek to establish this important role in statute.

280. The provisions on child suspects will enhance safeguards in the criminal justice system to protect the rights of children and young people, whilst recognising the differing levels of support and autonomy required according to maturity.

281. Overall, the Scottish Government considers that the Bill will provide for a more efficient and effective criminal justice system whilst ensuring that additional support is available for those who need it and can be tailored to the specific needs of individuals.
Island communities

282. The provisions of the Bill apply equally to all communities in Scotland.

283. The reduction in the maximum period of detention from 24 hours to 12 hours may impact on the ability of the police to secure access to legal advice, or to an Appropriate Adult, in island communities within that period. In his Report, Lord Carloway noted that, according to the Solicitor Access Data Report published by the Association of Chief Police Officers in Scotland (June 2011), people were more likely to waive their right of access to a solicitor at police stations in rural areas than in urban areas. Further research is required to determine the cause of this discrepancy; however, Lord Carloway recognised the role the internet may play in delivering access to a solicitor in the future, though only where it proves a suitable medium for the individual requiring advice. The Scottish Government consider that the introduction of a Letter of Rights will raise awareness of a person’s rights in custody, regardless of the person’s location. The Bill does not provide how legal advice must be provided which means that a decision can be made on the most practical and effective way in individual cases. The Scottish Government will continue to work with justice partners on methods of delivering access to legal advice.

284. Experience has shown that under the current arrangements the vast majority of vulnerable suspects have access to an Appropriate Adult in a reasonable timescale. In general, an Appropriate Adult is normally able to attend an interview within 90 minutes of receiving the call out. Whilst this may not always be the case in rural areas, the Scottish Government is not aware of significant difficulties in relation to the provision of the Appropriate Adult service in island communities. Following implementation of the Bill the Scottish Government will continue to work with key stakeholders including the SAAN (who collect and collate date on Appropriate Adults) to monitor progress and, if necessary, to identify any areas requiring additional work.

285. The provisions on the use of live TV link may have a positive impact on island communities. A detained person will be able to appear by live TV link in any hearing except where evidence will be led or presented, from a local destination at the place where the person is being detained. One of the main benefits envisaged is that prisoners may be able to appear in court sooner and that the costs and practical difficulties associated with transportation between an island and the court will be avoided.

Local government

286. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. Any impact on the business of local authorities has been captured in the Financial Memorandum. COSLA and ADSW were consulted in relation to the provisions on child and vulnerable adult suspects.

287. Currently, child suspects under 16 years have the right to support from a parent, guardian or carer. A social worker will provide assistance where such a person cannot be found or the child does not wish such persons to be involved. The Bill extends this right to 16 and 17 year olds. Consultation with representatives of Police Scotland, ADSW and COSLA confirmed the Scottish Government’s view that in most cases a child is likely to seek support from a parent, family member or friend. However, there may be a requirement for increased support from social services as a consequence of the extension of the right to 16 and 17 year olds.
288. There are currently nineteen Appropriate Adult Services which operate on a non-statutory basis. Local authorities currently provide fourteen of these services from existing social work resources. They do not have separate budgets or dedicated local authority funding but subsume the role within the social work function as a discrete task. Four services receive dedicated funding from the local authorities in their catchment area and one service, which receives a small annual grant from the local authority, uses three volunteer Appropriate Adults who receive expenses only. The Scottish Government does not intend the provisions (which set out in statute the definition of a vulnerable person and the role of an appropriate adult in relation to arrest, custody and questioning of a vulnerable person) to interfere with the current service provision. It is expected that the services will continue to operate as at present (providing communication support to vulnerable suspects, accused, victims and witnesses aged 16 and over) and that there will be no additional costs to local authorities as a result of implementing the provisions. The Scottish Government does not intend to make any organisation statutorily responsible for providing the Appropriate Adult service at this time.

289. The removal of the requirement for corroboration is likely to result in an increase in the number of prosecutions, which will impact on local authorities on the basis that additional prosecutions are likely to lead to additional community sentences. This will have an impact on the staff resource required to supervise and support community sentences.

290. The proposal to increase the time-limit for the period in which a person can be remanded in custody before a sheriff and jury trial from 110 days to 140 days will increase the number of persons held on remand. This could result in the occupation of places in secure accommodation.

Sustainable development and environmental issues

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

292. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

Human rights

293. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights, and are within the Parliament’s legislative competence. In particular, Lord Carloway’s Review sets out that it “sought to explore the law and practice in a number of other jurisdictions and the resulting jurisprudence flowing from the applicability of the European Convention.”

Arrest and custody (Part 1 of the Bill)

294. The Scottish Government acknowledges that the provisions on arrest and custody will engage a person’s rights under Article 5 of the ECHR. Detaining a person for questioning to further a criminal investigation is compatible with Article 5(1)(c) of the ECHR provided there are reasonable grounds for the suspicion and section 1 of the Bill reflects this. “Arrest” under the Bill is the mechanism by which a person is deprived of liberty and taken to a police station,
where a decision will be made under section 7 on whether or not the person should continue to be held. Arrest is thus generally expected to amount to a temporary and relatively short deprivation of liberty. The Bill further safeguards Article 5 rights by providing (section 2(2)) that a person cannot be arrested in connection with an offence where the person has been charged, either by the police or prosecutor, in relation to that offence or another offence arising from the same circumstances.

295. Sections 11 and 12 of the Bill reduce the maximum time for which a person who has been arrested can be held in custody, from 24 hours to 12 hours. At the end of the 12 hour period a person must either be released from custody or charged with an offence. The Scottish Government considers that the procedure set out in the Bill for allowing an extension of the period from 6 to 12 hours meets the standard of “lawfulness” set by the ECHR. The provisions set out a procedure which describes the circumstances in which detention may be extended to 12 hours. The constable who authorises an extension must not have had any involvement with the investigation (thereby ensuring an objective view is given on whether an extension is justified) and must be of the rank of inspector or above.

296. Once charged, the police must consider whether the person’s continued detention is necessary and proportionate (section 10(2)). Article 5(3) of the ECHR provides that everyone arrested or detained in accordance with Article 5(1)(c) shall be brought promptly before a judge or other judicial officer. The maximum period for detention of 12 hours meets the “promptness” test that has been set down by the ECtHR. The Scottish Government has carefully considered the implications under Article 5 where a person is detained on a Friday afternoon and is not able to appear at court until the following Monday, or even a Tuesday if it is a court holiday. While this does not mean that the extension of the period of detention is itself a breach of Article 5, its operation in particular circumstances may lead to an individual’s Article 5 right to be brought before a court promptly being breached. However, Police Scotland, COPFS and the SCS are aware of the potential for incompatibility in particular cases depending on how the provisions are implemented. It is notable that the police are a public authority in terms of section 6 of the Human Rights Act 1998 and must exercise the power to detain in a manner which is compatible with the ECHR. A duty is created in section 41 of the Bill which requires constables to take every precaution to ensure that a person is not detained unnecessarily. Article 5 rights will be safeguarded by these provisions.

Liberation from custody (Part 1 of the Bill)

297. A person should be released when it is not necessary to detain them whilst an investigation into the crime is on-going and the provisions in the Bill are aimed at securing the liberty of the individual where possible. The Bill makes provision (section 14) for conditions to be applied which will mitigate the risk of the person interfering with the proper conduct of the investigation and allow them to be released, rather than held in continued detention.

298. The Bill incorporates safeguards to ensure that any condition which is applied is necessary and proportionate to safeguard the proper conduct of the investigation (section 14(2)) and to prevent arbitrary decisions being made. The system provides for accountability for the imposition of conditions and a mechanism of review. Conditions must have a connection to the offence under investigation (section 14(2)) and they must be set by a constable of the rank of inspector (section 14(5)). Changes to conditions (whether adding, amending, or revoking them)
must be authorised by an inspector who will have to be satisfied that the conditions are necessary and proportionate (section 16(7)). Conditions are subject to a maximum limit of 28 days (section 14(4)) however they must be kept under review during the investigation to ensure that they do not remain in place longer than necessary (section 16(3)). A person who has been released on conditions can apply to the court to assess the appropriateness of the conditions and this will be done in line with Convention rights (section 17). The court must satisfy itself that any conditions which have been set are in fact necessary and proportionate for the purpose for which it was imposed, and may remove any conditions which fail to meet the test or impose alternative conditions it considers are necessary and proportionate in the circumstances (section 17(3)).

Rights of suspects (Part 1 of the Bill)

299. The Bill strengthens existing protections by expressly setting out what information must be given to a person before interview, including a person’s right to access a solicitor, regardless of whether the person will be questioned by the police. The right applies to persons in police custody and to persons voluntarily attending a police station or other place for the purpose of police questioning. However, the right to a solicitor does not arise in all situations where a person is being questioned by the police. Police custody or its equivalent creates a need for protection against abusive coercion; the same is not the case for questioning at the locus or in a person’s home where the person remains at liberty. The Bill therefore provides for a right to access legal advice when person is taken into police custody or a person’s freedom of action has been significantly curtailed.

300. The ‘exceptional circumstances’ in which access to a solicitor during interview can be delayed mirror current law and are consistent with domestic and ECtHR jurisprudence.

301. In order for a right of access to a solicitor to be effective, a person (whether an adult or a child) must be capable of understanding the right and the consequences of waiver. For their own protection, the policy is that children aged under 16 years and (as per Lord Advocate Guidelines currently in place) vulnerable persons cannot waive a solicitor’s attendance during questioning. The position is more flexible for children who are 16 or 17 years old. The basic position is that they will have the right to support from a responsible adult and access to legal advice.

Post-charge questioning (Part 1 of the Bill)

302. The Scottish Government agrees with Lord Carloway’s view that Article 6 does not represent a barrier to the continuation of questioning after a person has been charged, or even after the accused has appeared in court. The provisions in the Bill contain safeguards to ensure that, where an application for post charge questioning is made, the rights of the person will be properly balanced against the wishes of the police to continue their investigation. The person’s rights will be protected by the factors the court requires to take into account in assessing the application (section 27(3)); by the right of representation; by the rights which will be afforded to the accused if an application is allowed, including legal advice (section 24(2)); and the limitations which can be placed on the duration and extent of any detention and questioning which takes place pursuant to a successful application (sections 27(6)(a) and 29(2)). The Convention rights are placed at the centre of the process and must be respected and considered throughout.
Corroboration and statements (Part 2 of the Bill)

303. Corroboration is not required by Article 6 of the ECHR. The fairness of the proceedings as a whole continues to be guaranteed under the Bill by a series of safeguards, foremost amongst which is the requirement that guilt should be established beyond reasonable doubt. The Bill further enhances the safeguards available by increasing the number of jurors that require to be in favour of a guilty verdict.

304. The Bill provides that previous statements made by an accused person in the course of questioning will no longer be inadmissible as evidence of a fact contained in the statement by reason of being hearsay. The purpose of the provision is to supersede the common law distinction in the application of the rule against hearsay as between incriminatory statements and exculpatory statements, so as to allow an accused to rely on their own previous exculpatory statements. However, the provision does not supersede any other objection to the admissibility of a previous statement. Accordingly there is no effect on rules regarding the admissibility of, for example, unfairly obtained statements. The Scottish Government do not consider that the provisions impact on a person’s rights under Article 6.

Solemn procedure (Part 3 of the Bill)

Pre-trial time limits (section 65)

305. Although the Bill increases the maximum length of time that a person can be remanded in custody pending a trial on indictment in the sheriff court from 110 days to 140 days, the Scottish Government does not consider that the increase is incompatible with the right guaranteed by Article 5(3) to a trial within a reasonable time. The increase is necessary to accommodate two significant changes that are designed to improve the efficiency of proceedings on indictment in the sheriff court. The first is an increase from 15 days to 29 days in the period that must elapse between the service of the indictment and the first diet. This allows sufficient time for the prosecution and defence to communicate and to draw up a joint record of their state of preparation. The second is a change in the procedure for fixing trial diets, which will henceforth only be fixed by the court at the first diet. This is designed to reduce the number of adjournments of trials and the inconvenience and disruption consequent on such adjournments. The increase brings the time limit for sheriff and jury proceedings in to line with that already applying in the High Court.

Duty to communicate (section 66)

306. The Scottish Government does not consider that such disclosure of information as is necessary to meet the requirement to communicate and draw up the written record of the parties’ state of preparation in proceedings on indictment in the sheriff court involves any incompatibility with the right of the accused to a fair trial. The information that requires to be disclosed for this purpose does not become available as evidence against the person, and is in any event the same information about the state of preparation that the sheriff is required to call for at first diet in terms of section 71(1)(a).
Appeals and Scottish Criminal Cases Review Commission (SCCRC) (Part 5 of the Bill)

Extending certain time limits (sections 76 and 77)

307. The Scottish Government does not consider that the prescribing of the test to be applied by the High Court on an application to extend the time allowed for appealing against conviction or sentence involves any incompatibility with the Article 6 rights of prospective appellants. The provisions in question have no effect on the conditions of admissibility of appeals only the grounds on which certain conditions involving time limits may be relaxed. The aim (which is in accordance with the ‘reasonable time’ requirement in Article 6) is to reduce the number of late appeals, while recognising that there may be exceptional circumstances that justify allowing an appeal to proceed late. Any prospective appellant in solemn proceedings continues to be entitled to have a decision to refuse an extension reconsidered by the court, and the refusal of an extension does not prevent a subsequent application to the SCCRC.

308. The Scottish Government considers that it is compatible with the Article 6 rights of prospective appellants that applications to extend the time allowed for appealing against conviction or sentence should be dealt with in chambers, and that they should generally be dealt with without parties being heard. Such arrangements are compatible with the requirements of Article 6 as it is applied in relation to appeal proceedings, particularly since such applications only arise when the prescribed time limit has been missed, since the court does not hear the prosecutor in opposition to the application, and since the court has available to it both a statement of reasons for the lateness of the appeal, and a statement of the proposed grounds of appeal.

References by the SCCRC (section 82)

309. The Scottish Government does not consider that the provisions requiring the High Court not to quash a conviction or a sentence on a SCCRC reference unless it considers that it is in the interest of justice, is incompatible with a person’s rights under Article 6. The provision reflects the fact that a SCCRC reference is an extraordinary process, involving an exception to the principle of finality in criminal proceedings, and that it is appropriate that wider considerations should be applied than in an ordinary appeal. The High Court will be required to act compatibly with the ECHR in its assessment of where the interests of justice lie.

Miscellaneous (Part 6 of the Bill)

Use of live television link (section 86)

310. The Scottish Government considers that the limitations and conditions the provisions place on the use of live TV links are sufficient to guarantee compatibility with the rights of accused persons under both Article 5(3) and Article 6 of the ECHR. The use of TV links will be restricted to categories of hearing that have been specified for that purpose by the Lord Justice-General, and it will continue to be the case that an accused cannot be required to participate in a trial by means of a TV link. The provisions do not detract from the right of the person to consult in private with his or her legal representative. No substantive hearing can take place with the person required to participate by TV link unless the court has given a direction to that effect. Such a direction can only be made if the parties have been given an opportunity to make representations, and if the court is satisfied that the use of a TV links is not contrary to the interests of justice. Likewise, a court will be required to terminate the use of a TV link if at any point it considers that it is in the interests of justice for the accused to appear in person. The
Scottish Government considers that the ‘interests of justice’ test will require the court to be satisfied that the use of a TV link is compatible with the rights of the accused under Article 5(3) and Article 6.
CRIMINAL JUSTICE (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 Justice (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. 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 Bill seeks to support the aims set out in the Policy Memorandum by introducing reforms to modernise and enhance the efficiency of the Scottish criminal justice system. The provisions in the Bill take forward a range of the Scottish Government’s key justice priorities. Some of these provisions have been developed from the recommendations of two independent reviews: Lord Carloway’s review of criminal law and practice and Sheriff Principal Bowen’s review of sheriff and jury procedure. The Scottish Government sought views on these recommendations in two separate consultations. A further consultation was also carried out on whether additional safeguards may be required if the requirement for corroboration is removed.

4. The Bill is in seven parts:

- Part 1 (Arrest and Custody) includes provisions on the powers of the police to arrest, hold in custody and question a person who is suspected of committing an offence. This part also provides for the rights of such persons in custody and makes specific provision for vulnerable persons and children.

- Part 2 (Corroboration and Statements) provides for the abolition of the corroboration rule in criminal proceedings as well as the admissibility of mixed and exculpatory statements.

http://www.scotland.gov.uk/Publications/2012/07/4794
http://www.scotland.gov.uk/Publications/2010/06/10993251/0
http://www.scotland.gov.uk/Publications/2012/07/4794
http://www.scotland.gov.uk/Publications/2012/12/4628
Part 3 (Solemn Procedure) makes a number of amendments to the solemn procedure set out in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) such as imposing a duty on parties in criminal proceedings to communicate, increasing the length of time for which an accused person can be remanded before having to be brought to trial from 110 to 140 days, and increasing the jury majority required for a guilty verdict.

Part 4 (Sentencing) increases the maximum sentence for handling offensive weapons offences, places a specific duty on the court to consider whether it is appropriate to punish an offender for committing an offence while on early release, and increases the flexibility for different levels of court to consider imposing a punishment on such offenders.

Part 5 (Appeals and SCCRC) amends the 1995 Act to make changes to appeal procedures in the High Court and adjusts how the Appeal Court will consider Scottish Criminal Case Review Commission referrals.

Part 6 (Miscellaneous) creates a statutory aggravation of people trafficking which will apply in cases where an accused commits an offence connected with people trafficking. This part also makes provision to enable the use of TV links by courts and establishes and sets out the functions for a Police Negotiating Board for Scotland.

Part 7 (Final Provisions) contains general and ancillary provisions.

Rationale for subordinate legislation

5. The Bill contains a number of new delegated powers provisions which are explained in more detail below.

6. The delegated powers conferred by the Bill are either of a procedural or technical nature or relate to matters which, because of their nature, require a flexible procedure and thus it is felt appropriate that they be dealt with by subordinate legislation.

7. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has carefully considered the importance of each matter against the need to:

- Strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances with the benefit of experience, without the need for primary legislation;

- Anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation;

- Make proper use of valuable Parliamentary time;

- Ensure sufficient flexibility to respond to changing circumstances and to make changes; and
This document relates to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

- Allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation.

Delegated Powers

QUESTIONING A PERSON WHO HAS BEEN OFFICIALLY ACCUSED

Section 28(3)(a) – Power to prescribe the form to be used for an application to the court for permission to question a person officially accused of committing an offence.

Power conferred on: The High Court of Justiciary  
Power exercisable by: Act of Adjournal  
Parliamentary procedure: Laid only

Provision

8. Generally, once a person has been officially accused of an offence (i.e. charged with it by a constable or accused of it in a complaint, petition or indictment) anything that the person may say to the police about the offence in response to questioning will be inadmissible as evidence. Section 27 will allow the police or prosecutor to apply to the appropriate court for authorisation to question a person about an offence after the person has been officially accused of committing it and anything the person says in response to questioning so authorised will be admissible evidence (unless the statement is inadmissible for a reason other than its having been made after the person was officially accused).

9. Section 28(3)(a) provides that the form to be used when making a written application under section 27 is to be in any form that may be prescribed by Act of Adjournal.

Reason for taking this power

10. Being able to specify the form for an application gives the courts a way of specifying what information they will require when considering a section 27 application and how they would like to see that information set out. It is typical for court forms to be prescribed by Act of Adjournal. It would be inappropriate to prescribe the form by primary legislation, not least because it would be a poor use of Parliament’s time to deal with this level of administrative detail. In any case, the courts are better placed than the Parliament to decide what information will be required for the assessment of a section 27 application.

Choice of procedure

11. Acts of Adjournal are subject to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The contents and layout of court forms is not something that the Parliament needs to scrutinise closely.
12. Section 28(3)(a) provides that the form to be used the police are to use when making a written application under section 27 is to be any form that may be prescribed by Act of Adjournal.

VULNERABLE PERSONS

Section 34(1)(a) and (b) and section 34(2) – Power to make further provision, by regulation, in relation to who is to be considered a vulnerable person; the type of support they are to receive; who may provide that support; and what training, qualifications or experience are required.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulation
Parliamentary procedure: Affirmative procedure

Provision

13. Section 33 of the Bill provides that where a constable (who may be advised by a police custody and security officer) assesses a person in police custody, who is age 18 or over, as vulnerable due to a mental disorder, they must notify an Appropriate Adult (AA) (though this term is not used in the Bill it is commonly understood in practice) that the vulnerable person requires assistance, as soon as reasonably practicable, to understand what is going on and to facilitate effective communication between them and the police.

14. Paragraphs (a) and (b) of section 34(1) give the Scottish Ministers powers to amend by regulation: the category of person to be considered vulnerable who will require support to assist them to communicate effectively with the police; and the type of support that is to be provided (as set out in section 33(1)(c) and (3)). These powers would involve a change to primary legislation.

15. Subsection (2) allows the Scottish Ministers to specify by regulation who may be considered a suitable person to provide the support detailed in section 33(3) and what training, qualifications or experience is necessary to undertake this support role.

Reason for taking this power

16. There is no immediate intention to use the powers described above in relation to section 34(1)(a) and (b), which are designed to allow for the identification of new conditions which mean that a person requires assistance to facilitate effective communication, or the identification of other appropriate support measures for vulnerable persons. However, these powers will provide the flexibility to allow the Scottish Ministers to do so if it is found to be necessary in the future, without enacting primary legislation.

17. In relation to section 34(2), the Scottish Government does not intend the legislation to interfere with the role of an AA and expect that the police will continue to be able to request AA support for vulnerable persons and children aged 16 and 17 years, and also for victims, and witnesses aged 16 and over, through the current non-statutory route. There is therefore no immediate intention to prescribe who may be an AA or what training, qualifications or experience they should have. However, this power will provide the flexibility to allow the Scottish Ministers to
do so, if it is found to be necessary in the future to address any failings or gaps in service provision, without enacting primary legislation.

**Choice of procedure**

18. These powers are subject to the affirmative procedure. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to the detail of any changes to primary legislation.

**SOLEMN PROCEDURE**

Section 66 (new section 71C(6) of the 1995 Act) – Power to prescribe the form, content and manner of lodging of the written record of the compulsory business meeting, to be set out in an Act of Adjournal.

- **Power conferred on:** The High Court of Justiciary
- **Power exercisable by:** Act of Adjournal
- **Parliamentary procedure:** Laid only

**Provision**

19. The Bill establishes a requirement on the prosecution and defence to communicate before the first diet and to jointly prepare a written record of their state of preparation. A written record of this meeting must be prepared and lodged with the court prior to the first diet so that the sheriff may have regard to it. The new section 71C(6) gives a power to prescribe by Act of Adjournal (a) the form of the written record; (b) its content; and (c) the manner of its lodging.

**Reason for taking this power**

20. A prescribed set of requirements for the written record will be of assistance in providing guidance to the prosecution and defence agents who have to work together to prepare them, and to the sheriffs who will be using them to establish the efforts parties have made to achieve a proper state of preparedness. There are thousands of sheriff and jury trials every year; it would be very undesirable for the written record to take excessively diverse forms – though the provision does allow a degree of flexibility.

**Choice of procedure**

21. Detailed matters relating to court procedure are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see section 305 of the 1995 Act, which makes provision about Acts of Adjournal generally). The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.
Section 67 (new section 83B(1)(a) of the 1995 Act) – Power to provide that the form of the minute continuing a trial diet or adjourned diet from sitting day to sitting day is to be set out in an Act of Adjournal

Power conferred on:  The High Court of Justiciary  
Power exercisable by:  Act of Adjournal  
Parliamentary procedure:  Laid only

Provision

22. The new section 83B(1) provides that a trial diet or, if it is adjourned, the adjourned diet, may be continued from sitting day to sitting day without it actually having been commenced. Under the new section 83B(1)(a) it may be continued in such a way by means of a minute to be signed by the sheriff clerk; the form of the minute may be prescribed by Act of Adjournal. The new section 83B(1)(b) provides that it may be thus continued up to a maximum number of sitting days as the minute may have prescribed.

Reason for taking this power

23. The new section 83B(1) allows for administrative efficiency in arranging when a diet may be held. To allow this administrative efficiency there must be a recognised form of minute by which diets may be continued. The power allows this recognised form of minute to be prescribed.

Choice of procedure

24. Detailed matters relating to court procedure are not considered appropriate to be included in primary legislation. Such administrative matters can appropriately be dealt with by the High Court by Act of Adjournal rather than being subject to any Parliamentary procedure (see section 305 of the 1995 Act, which makes provision about Acts of Adjournal generally). The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

AGgravATION BY PEOPLE TRAFFICKING

Section 85 Meaning of expressions used – Power to modify subsections (1) to (3) of that section, to modify the meaning of the expressions “people trafficking offence”, the “public official” and “international organisation”.

Power conferred on:  The Scottish Ministers  
Power exercisable by:  Regulation  
Parliamentary procedure:  Negative procedure

Provision

25. Section 83 of the Bill makes provision about a statutory aggravation which applies in cases where an accused commits an offence connected with people trafficking and sets out the circumstances in which an offence can be regarded to have been aggravated by a connection with people trafficking. Section 84 makes similar provision about a statutory aggravation which applies in cases where a public official, acting or purporting to act in the course of his duties commits a people trafficking offence. Section 85 defines the terms “people trafficking offences”, “public
official” and “international organisation” for the purposes of sections 83 and 84, and enables Scottish ministers to modify the meaning of these expressions.

Reason for taking this power

26. The power is intended to ensure that the statutory aggravation by people trafficking can be taken into account in respect of any new people trafficking offences created by other legislation, or if the current people trafficking offences are modified. The power also allows for the definition of “public official” and “international organisation” to be modified if it is considered appropriate to do so, for example, in light of experience of the statutory aggravation operating in the courts.

Choice of procedure

27. It is anticipated that any changes to these sections would in general be a consequence of changes in other legislation and the negative procedure would be appropriate.

ANCILLARY

Section 88 – Power to make ancillary regulations

Power conferred on: The Scottish Ministers
Power exercisable by: Regulation
Parliamentary procedure: Affirmative if amends primary legislation, otherwise negative

Provision

28. Section 88(1) of the Bill enables the Scottish Ministers to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in consequence of, or for giving full effect to, any provision made by or under the Bill.

Reason for taking this power

29. This power is necessary to allow flexibility as provisions in the Bill are brought into force. The power is limited to the extent that it can only be used if Scottish Ministers consider it necessary or expedient in connection with the coming into force of any provision of the Bill.

Choice of procedure

30. Regulations made under this section which contain a provision which adds to, omits or replaces any part of an Act are subject to affirmative procedure. Otherwise, Regulations made under this section are subject to negative procedure. This approach is normal for ancillary powers of this type.
Section 90 – Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Laid only

Provision

31. Section 90(2) enables the Scottish Ministers to appoint days on which the provisions in the Bill come into force (other than sections contained in Part 7 of the Bill which come into force on the day after Royal Assent). An order may include such transitional, transitory or saving provision as the Scottish Ministers consider necessary or expedient in connection with the coming into force of the provisions.

Reason for taking power

32. The power is necessary to enable Scottish Ministers to appropriately commence the provisions in the Bill.

Choice of procedure

33. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. This is typical for commencement orders.
Justice Committee

3rd Report, 2014 (Session 4)

Stage 1 Report on the Criminal Justice (Scotland) Bill

Published by the Scottish Parliament on 6 February 2014
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Justice Committee

Remit and membership

Remit:

To consider and report on:
a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Christian Allard
Roderick Campbell
John Finnie
Christine Grahame (Convener)
Alison McInnes
Margaret Mitchell
Elaine Murray (Deputy Convener)
John Pentland
Sandra White

Committee Clerking Team:

Irene Fleming
Joanne Clinton
Ned Sharratt
Christine Lambourne
SUMMARY OF RECOMMENDATIONS

1. The Committee accepts that there might be some benefit in simplifying the powers of arrest along the lines proposed in Part 1 of the Bill. However, we do have concerns regarding the possible consequences of this change and we therefore make a number of recommendations aimed at improving the provisions in Part 1 of the Bill under the relevant sections below.

2. The Committee has concerns that use of the term ‘arrested’ in relation to a suspect who has been taken into police custody for questioning but has not been charged may, amongst members of the public, be more suggestive of guilt than is currently the case for a suspect who is ‘detained’ for questioning. We consider the terminology in the Bill concerning arrest to be somewhat confusing and are not convinced that members of the public, the accused or the media will be able to distinguish between a ‘person officially accused’ and a ‘person not officially accused’. We also have similar concerns relating to the proposal to allow the police to ‘de-arrest’ a person when the grounds for arrest no longer exist (see paragraph 120 of this report).

3. While we accept assurances from the police that, as with the current position, they do not intend to release a suspect’s name to the media until they have been formally charged with an offence, i.e. ‘officially accused’, we consider that every effort should be made to ensure that the reputation of the accused is not detrimentally affected by these provisions. The Committee considers that the issue of suspects’ anonymity is problematic, but merits further and careful consideration.

4. The Committee is concerned that police officer training and adaptations to the new i6 programme required to effectively implement the provisions in Part 1 of the Bill may place a significant burden on an already stretched police service and individual officers. While we accept the Cabinet Secretary’s assurances that sufficient time will be given to Police Scotland to implement a training programme and to update the new ICT system before
giving effect to the Bill, we ask the Scottish Government to ensure that adequate resources are made available to Police Scotland to carry out these tasks without further strain on its shrinking budget.

5. The Committee notes that the Bill does not give effect to Lord Carloway’s recommendation that ‘arrest’ be defined in the Bill. We further note that there was no consensus from witnesses as to whether arrest should be defined and, if so, whether this legislation was the best vehicle to do so. On balance, the Committee is not content with the Scottish Government’s decision to exclude such a definition in the Bill.

6. The Committee notes the Scottish Government’s position that the power of arrest contained in the Bill combined with common law rules would be sufficient in allowing the police to arrest a person attempting or conspiring to commit an offence. However, we heard from the police that they were not yet convinced by the reassurances given, and from the SHRC that it would have serious concerns if the police were able to arrest a person “who has done nothing contrary to the criminal law”\(^1\). We therefore call on the Scottish Government to further engage with both the police and the SHRC with a view to providing adequate reassurances on this matter.

7. The Committee notes the Scottish Government’s intention to bring forward an amendment to allow a person to be quickly released from arrest (‘de-arrested’) when the grounds for arrest no longer exist. While we recognise that there may be situations where de-arrest could be a reasonable option, we have concerns that this should not lead to a situation where people are arrested without a proper assessment by police officers as to whether such action is appropriate. We would therefore welcome further details of the types of situation and expected frequency in which de-arrest would be used. The Committee also has concerns regarding use of the term ‘de-arrest’ and consider the words ‘released’ or ‘liberated’ to be more appropriate.

8. The Committee welcomes the recent introduction of a ‘Letter of Rights’ for those in custody, in accordance with the EU Directive on the Right of Information in Criminal Proceedings. We ask the Scottish Government to respond to the suggestion of some witnesses that information to be given to suspects at a police station should be provided both verbally and in writing with a view to ensuring that they clearly understand their rights.

9. The Committee heard a divergence in views amongst witnesses regarding the appropriate maximum detention limit. However, we note the statistics provided by Police Scotland relating to the period of 4 June to 1 July 2013 which show that, although the majority of persons (80.4%) were detained for up to six hours, a not unsubstantial number (19.2%) were detained for between six and 12 hours. Given these statistics, there are mixed views on the Committee as to whether detention beyond six hours is necessary.

10. We note the Cabinet Secretary’s commitment to consider whether the detention limit should be extended in exceptional circumstances. While we recognise that there may be situations, particularly in relation to complex and serious crimes, where it may be necessary to consider extending the detention limit, we remain to be convinced whether this is really necessary, particularly when, under the Bill, the police would have the option of releasing a person on investigative liberation. We therefore seek further information on the types of ‘exceptional circumstances’ in which the Scottish Government envisages that an extension to the detention limit would be granted, how often they are likely to be applied for, who would approve any extension, and how the Scottish Government intends to ensure that such extensions do not become commonplace over time.

11. The Committee seeks assurances that investigative liberation will not have an unnecessary impact on the suspect’s private life, whilst allowing the police to conduct complex investigations which could not be completed while the person is initially detained. We note that a person may apply to the courts to have any conditions imposed either removed or altered, which we believe is a welcome protection against disproportionate conditions being applied.

12. The Committee also notes suggestions from victims’ groups that the Bill should include a specific requirement for complainers to be notified of a suspect’s release on investigative liberation and of any conditions attached, however, we are unsure as to whether such a requirement needs to be placed on the face of the Bill. We ask the Scottish Government to work with the COPFS to ensure that, where they may be at risk, complainers are always informed timeously of the suspect’s release and of any relevant conditions applied.

13. The Committee notes that there are likely to be resource implications relating to investigative liberation.

14. Like many witnesses, the Committee is concerned that suspects are sometimes held in custody for unacceptably long periods before their first appearance in court. We believe that court sitting times must be extended to reduce such lengthy periods in custody and the backlog of cases. We also recognise that there are implications for police time and resources in holding people in custody.

15. We are not however convinced that specifying time-limits for periods in custody in legislation is necessary at this stage, particularly when a working group is actively considering options for Saturday courts. We recommend that this work be completed in a timeous manner to allow any recommendations of the working group to be implemented as quickly as possible. The Committee welcomes the Cabinet Secretary’s assurances that he will “take a keen interest in the issue” and requests details of the timescale for meetings and completion of the work of the group.

16. The Committee is content that sufficient safeguards are provided in the Bill regarding liberation of those officially accused from custody, in
particular the right to apply to the sheriff to have any conditions imposed by the police reviewed.

17. The Committee notes the different experiences of witnesses from the legal profession in relation to when the caution is given to suspects by the police under current arrangements. We therefore ask the Scottish Government to respond to the specific suggestion made by the Faculty of Advocates that the Bill should specify that the caution, which must take place not more than one hour before any interview, should also be repeated at the commencement of the interview.

18. The Committee welcomes the extension of the right of access to a solicitor to all suspects held in police custody, regardless of whether the police intend to question the suspect, and that suspects are entitled to face-to-face contact with a solicitor. We recognise that there would be difficulties in specifying in the Bill that a suspect should be entitled to receive assistance from a solicitor of their choice, particularly in the more remote areas of Scotland, and we therefore agree with the Scottish Government on this matter.

19. The Committee is content with the procedure specified in the Bill allowing a constable to question a person not officially accused following arrest.

20. The Committee is persuaded that post-charge questioning may be required in certain complex and lengthy investigations. We also note that the majority of witnesses were content that the requirement on the police to apply to the court for approval for post-charge questioning provides sufficient judicial oversight to minimise the risk of miscarriages of justice.

21. However, post-charge questioning should only be used when absolutely necessary. To this end, we ask the Scottish Government to maintain a record of the circumstances and frequency in which post-charge questioning is used, including details of the applications that are refused by the courts. We further seek confirmation from the Scottish Government that existing rules providing that no adverse inference may be drawn from a suspect’s refusal to answer police questions would apply equally to post-charge questioning.

22. The Committee notes that the Victims and Witnesses (Scotland) Bill defines a child as a person up to the age of 18. The Committee asks the Scottish Government to explain why there is inconsistency between the protections for under-18s in this Bill compared with this recent legislation.

23. The Committee has concerns regarding the lack of consistency in use of the terms “welfare”, “best interests” and “well-being” of the child in this and other legislation. While we make no comment on which is the most appropriate term, we ask the Scottish Government to ensure consistency in the language used in section 42 of the Bill.
24. The Committee welcomes the Cabinet Secretary’s undertaking to give consideration to raising the age of criminal responsibility and would welcome regular updates on this work.

25. The Committee has concerns that the definition of vulnerable person in the Bill may not capture all individuals needing additional support when in custody. We also note comments from the police that there are difficulties in identifying vulnerable persons. We therefore ask the Scottish Government to give further consideration to the definition of vulnerable persons in the Bill and to reflect on whether this is consistent with the definition in the Victims and Witnesses (Scotland) Act 2014. We also ask that the Scottish Government ensures that sufficient resources are provided to the police to undergo training in this important area.

26. The Committee asks the Scottish Government to respond to concerns raised by witnesses that its decision not to place the provision of appropriate adult services in the Bill could lead to a lack of funding by local authorities already facing significant financial challenges.

27. The majority of Committee Members are of the view that the case has not been made for abolishing the general requirement for corroboration and recommend that the Scottish Government consider removing the provisions from the Bill.

28. The Committee is convinced that, if the general requirement for corroboration continues to be considered, this should only occur following an independent review of what other reforms may be needed to ensure that the criminal justice system as a whole contains appropriate checks and balances.

29. The majority of Committee Members do not believe, in the event that the requirement for corroboration is abolished, that concerns relating to the need for further reform can be adequately explored during the passage of the Bill. The Cabinet Secretary’s proposal that the commencement of the provisions abolishing the requirement for corroboration be subject to a parliamentary procedure requires further explanation and consideration, which the Committee requires before Stage 2.

30. The Cabinet Secretary’s letter dated 4 February 2014 came in the late stages of consideration of this report, and therefore cannot form part of this report. The Committee calls on the Scottish Government to provide, prior to the Stage 1 debate, further information on any review of additional safeguards (including the proposed remit, who might be involved, likely timescales and options for implementing recommendations).

31. The Committee calls on the Scottish Government to provide more information on how any requirement for supporting evidence would differ from the current need for corroboration.

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2 Margaret Mitchell, Alison McInnes and John Finnie believe that this review should be undertaken by a Royal Commission or the Scottish Law Commission.
32. The Committee also notes the Cabinet Secretary’s willingness to consider placing a revised ‘prosecutorial test’ on the face of legislation. The Committee accepts that such a step might form part of new checks and balances in response to the proposed abolition of the requirement for corroboration, but recommends that the matter should be included for full consideration in any review process.

33. The Committee is fully aware of continuing concerns relating to how the justice system responds to cases of rape, domestic abuse and other offences which often happen in private. Members note ongoing efforts to improve the situation for victims of such offences and agree that further steps need to be taken, including measures aimed at addressing low prosecution and conviction rates.

34. The Committee calls on the Scottish Government to actively review all evidence relating to how improvements with regard to offences such as rape and domestic abuse may be achieved. This should include consideration of public attitudes as well as the justice system. In relation to the latter, all stages must be included, from initial contact with the police to the giving of evidence in court (e.g. whether victims of such offences should have access to legal advice and support where their personal or medical details may be revealed in court).

35. The Committee agrees that, if the requirement for corroboration is abolished, it should not apply retrospectively.

36. On balance, the Committee considers that there is a case for a review of the role of hearsay evidence in the criminal justice system but that this should be included in any wider review of the law of evidence.

37. On balance, the Committee accepts the need to extend the pre-trial time limits as proposed in the Bill. However, we do have some reservations as to whether the proposal to extend the current 110 day limit within which the trial of an accused person held in custody must commence to 140 days is proportionate. We are therefore pleased that the Scottish Government plans to monitor the implementation of this proposal, in particular to ensure that trials are started as soon as possible and that any extensions to the 140 day limit are rare. We seek updates from the Scottish Government on any findings and outcomes arising from its monitoring of implementation of this pre-trial limit.

38. While the Committee considers that achieving effective communication must, at least in part, be dependent upon the availability of adequate resources (discussed further below), we are persuaded of the potential benefits of this measure, in particular, in reducing the possibility of victims and witnesses having to attend court when their cases are not ready to proceed.

39. The Committee supports the proposals in the Bill for statutory communication between the prosecution and defence to take place after the
indictment is served and for there to be flexibility in the method of communication to be used.

40. The Committee calls on the Scottish Government to work with the COPFS and the Law Society of Scotland in seeking to resolve current difficulties in rolling out the secure email system to all defence solicitors, with a view to resolving such difficulties by the time the Bill comes into force.

41. The Committee welcomes the Cabinet Secretary’s commitment to review whether the Bill could usefully be amended to allow individual written records on the state of preparedness of cases to be submitted by the defence and prosecution.

42. The Committee agrees with witnesses that both the prosecution and defence solicitors must be adequately resourced for the duty to communicate to work effectively as planned. We note that the Scottish Government has worked with criminal justice partners to anticipate the costs and savings that may arise from this proposal, but we recommend that the Scottish Government closely monitors the resource implications during implementation to ensure that resources are in place where and when needed.

43. The Committee notes that the Bill does not impose any sanctions if the written record is not submitted timeously.

44. The Committee agrees that the proposal in the Bill for a trial only to be scheduled once the sheriff dealing with the first diet is satisfied that the case is ready to proceed will reduce inconvenience to witnesses, and give certainty to both the prosecution and defence regarding the date of the trial.

45. The Committee welcomes the Scottish Government’s continued focus on knife crime and its efforts to change the culture of carrying knives. The Committee is content with the increase in maximum sentences for offences relating to the possession of a knife or offensive weapon from four to five years.

46. The Committee welcomes the provisions in sections 72 and 73 on sentencing offenders on early release.

47. The Committee welcomes the policy objective to speed up appeals and understands that there are practical reasons why appeals ought to be lodged timeously. We note the concerns that, in applying a higher test for allowing late appeals, cases with merit may not be heard unless they meet an exceptional circumstances test. We ask the Scottish Government to consider the Law Society of Scotland’s recommendation that sections 76 and 77 be redrafted with an emphasis on the interests of justice. The Committee also notes that Lord Carloway made other recommendations in relation to the speeding up of appeals.
48. The Committee welcomes the removal of the gate-keeping role of the High Court when dealing with referrals from the Scottish Criminal Cases Review Commission (SCCRC).

49. However, we are concerned that the Bill retains the High Court’s interests of justice test, albeit during the determination of an appeal resulting from a referral from the SCCRC. Given that, according to Lord Carloway, despite the occasional lapse, the SCCRC has been a “conspicuous success in discharging its duties conscientiously and responsibly”, we are not convinced that the arguments for the High Court replicating the duties of the SCCRC in this respect have been made. Consequently, we recommend that the High Court should only be able to rule on whether there has been a miscarriage of justice in these cases, and if there has been, the appeal should be allowed.

50. The Committee welcomes the two aggravations with regard to people trafficking proposed in the Bill. The Committee requests that the Scottish Government keeps it updated on progress with the Modern Slavery Bill and its extension to cover Scotland.

51. The Committee welcomes the establishment of a separate Police Negotiating Board for Scotland which will include participation from all ranks of police officers.

52. The Committee supports the general principles of the Bill. However, this is with the exception of proposals regarding the corroboration provisions. Our recommendations on this issue are set out in the main body of this report.

INTRODUCTION

53. The Criminal Justice (Scotland) Bill\(^4\) was introduced in the Scottish Parliament on 20 June 2013 by the Cabinet Secretary for Justice, Kenny MacAskill MSP. The Parliamentary Bureau designated the Justice Committee as lead committee in consideration of the Bill at Stage 1.

54. The Committee considered its approach to the Bill at its meeting on 25 June. It issued a call for written evidence on 26 June and received 54 responses and 11 supplementary submissions. It took evidence on the Bill over 11 meetings between 24 September and 8 October and between 19 November and 14 January from a range of criminal justice bodies, victims’ groups, legal and human rights experts, as well as from Lord Carloway, Sheriff Principal Bowen and from the Cabinet Secretary for Justice.

55. The Finance Committee also issued a call for written evidence on the Financial Memorandum on the Bill. It took oral evidence from the Scottish Government Bill Team on the costs associated with the Bill at its meeting on 20

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3 Carloway Review, page 367.
4 Criminal Justice (Scotland) Bill, as introduced (SP Bill 35, Session 4 (2013)). Available at: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx
November. The Finance Committee reported\(^5\) to the Justice Committee on the Bill on 13 December. The Delegated Powers and Law Reform Committee published its report\(^6\) on the Delegated Powers Memorandum on the Bill on 30 October.

**BACKGROUND TO THE BILL**

**Cadder vs HM Advocate**

56. On 26 October 2010, the UK Supreme Court’s judgement in the case of Cadder vs HM Advocate\(^7\) held that rules under which the police in Scotland could detain and question a suspect without the suspect having a right of access to legal advice breached the right to a fair trial (including the implied privilege against self-incrimination) recognised in Article 6 of the European Convention on Human Rights (ECHR).\(^8\)

57. In response to this ruling, the Scottish Government introduced legislation which was passed by the Scottish Parliament under emergency bill procedure on 27 October 2010. The resulting Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010\(^9\) (“the 2010 Act”) made a number of changes affecting:

- access to legal advice by suspects - enshrining a right of access to a solicitor, both before and during police questioning, and providing for related changes to state funded criminal legal assistance;

- police powers of detention - extending the maximum period during which the police are able to hold a suspect in custody for the purposes of investigation, prior to arrest, from six hours to 12 hours, with the possibility of extension to 24 hours; and

- possible appeals - seeking to restrict any impact which court rulings, such as that in Cadder, may have on already concluded prosecutions (eg providing that the Scottish Criminal Cases Review Commission (SCCRC) must have regard to the need for finality and certainty when considering if it is in the interests of justice to refer a case to the High Court).\(^10\)

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\(^7\) Cadder vs HM Advocate. Available at: [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0022_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0022_Judgment.pdf)

\(^8\) European Convention on Human Rights. Available at: [http://www.echr.coe.int/Documents/Convention_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)


Lord Carloway’s Review of Scottish Criminal Law and Practice

58. Following the case of *Cadder v HMA*, Lord Carloway (a High Court judge) was asked by the Cabinet Secretary for Justice to lead an independent review of criminal law and practice.

59. The Scottish Government considered that such a review was necessary in order to ensure that the Scottish justice system continued to be fit for purpose and that it also met the appropriate balance of protecting the rights of accused persons with victims of crime in light of the changes brought about by the Cadder judgement.\(^\text{11}\)

60. The following terms of reference of the review were agreed between Lord Carloway and the Cabinet Secretary for Justice:

(a) to review the law and practice of questioning suspects in a criminal investigation in Scotland in light of recent decisions by the UK Supreme Court and the European Court of Human Rights, and with reference to law and practice in other jurisdictions;

(b) to consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime;

(c) to consider the criminal law of evidence, insofar as there are implications arising from (b) above, in particular the requirement for corroboration and the suspect’s right to silence;

(d) to consider the extent to which issues raised during the passage of the 2010 Act may need further consideration, and the extent to which the provisions of the Act may need amendment or replacement; and

(e) to make recommendations for further changes to the law and to identify where further guidance is needed, recognising the rights of the suspect, the rights of victims and witnesses and the wider interests of justice while maintaining an efficient and effective system for the investigation and prosecution of crime.\(^\text{12}\)

61. A review team was set up in December 2010 which was supported by an expert reference group\(^\text{13}\) consisting of leading practitioners and representatives in relevant fields. The review process involved a range of evidence gathering, research, analysis and consultation. The consultation process ran from 8 April to

\(^{11}\) Criminal Justice (Scotland) Bill. Policy Memorandum (SP Bill 35-PM, Session 4 (2013)), paragraph 6. Available at: http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd-pm.pdf

\(^{12}\) Policy Memorandum, paragraph 7.

\(^{13}\) A list of members of the reference group is available at: http://www.scotland.gov.uk/About/Review/CarlowayReview/referencegroup/members
3 June 2011 and 51 responses were received. The report of the review was published on 17 November 2011.\textsuperscript{14}

62. In his report, Lord Carloway set out 76 recommendations in relation to the following areas:

- arrest and detention of suspects - a new system of arrest and detention in police custody; including proposals aimed at avoiding unnecessary or disproportionate detention and police powers to liberate suspects subject to conditions for the purpose of carrying out further investigations;

- legal advice and police questioning of suspects - proposals on suspects’ rights of access to a lawyer and the nature and scope of police questioning, including additional safeguards for children (under 18) and vulnerable adult suspects;

- rules of criminal evidence - including a proposal to abolish the requirement for corroboration in criminal cases, but rejecting any change to current rules preventing adverse inference being drawn at trial from an accused’s failure to answer questions during the police investigation; and

- appeal procedures - proposals to rationalise the current system of criminal appeals, and to achieve a balance between upholding the finality of criminal cases and allowing potential miscarriages of justice to be challenged; including a stricter test for allowing late appeals to proceed and changes to the interests of justice test applied by the High Court in relation to references from the Scottish Criminal Cases Review Commission.\textsuperscript{15}

\textbf{Justice Committee consideration}

63. Following publication of the report, the Justice Committee took evidence from a range of interested professionals, academics and stakeholders to obtain a snapshot of initial reactions to Lord Carloway’s recommendations. At the conclusion of this process, the Committee sent a letter to the Cabinet Secretary for Justice in January 2012 setting out its observations on the main issues highlighted in the evidence.\textsuperscript{16}

\textbf{Scottish Government consultation}

64. On 3 July 2012, the Scottish Government published a consultation paper\textsuperscript{17} which sought views on the recommendations made by Lord Carloway in his report. The consultation ran until 5 October 2012 and posed 41 questions relating to Lord Carloway’s recommendations.

\textsuperscript{14} Review of Scottish Criminal Law and Practice (The Carloway Review). Available at: http://www.scotland.gov.uk/About/Review/CarlowayReview
\textsuperscript{15} SPICe briefing, page 6.
\textsuperscript{17} Reforming Scots Criminal Law and Practice: The Carloway Report. Available at: http://www.scotland.gov.uk/Publications/2012/07/4794
65. The consultation document stated that the Scottish Government’s broad approach was to recognise Lord Carloway’s Report as a substantial and authoritative piece of work and to accept the broad reasoning as set out in the report. It also stated that the purpose of the consultation was not to revisit the review but instead that it was designed to promote public discussion of the recommendations to assist the Scottish Government in translating the package of reforms proposed into legislation.18

66. The Scottish Government received 56 responses to the consultation. It published the non-confidential responses 19 along with an independent analysis of these responses 20 on 19 December 2012. There was a majority in support of almost all of Lord Carloway’s recommendations. The exception to this was the proposal to remove the requirement for corroboration, which attracted the largest number of responses. Although some third sector organisations were in favour of the recommendation, a majority, including some organisations representing the legal profession, favoured its retention. In addition, a large majority of respondents felt that safeguards should be put in place if the requirement for corroboration was abolished.21

67. In light of these responses, the Scottish Government launched a further consultation 22 on 19 December 2012 which sought views on the need for safeguards following the removal of the requirement for corroboration. In particular, it sought views on two proposals for additional safeguards: increasing the jury majority to return a guilty verdict and widening the trial judge’s power to rule that there is no case to answer. Views were also sought on whether the ‘not proven’ verdict should be retained.

68. The consultation ran until 15 March 2013 and 32 responses were received. The Scottish Government published the responses received 23 on 21 June 2013. While many of the respondents still disagreed with the proposal to abolish the requirement for corroboration 24, there was majority support for the additional two safeguards proposed 25.

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18 Reforming Scots Criminal Law and Practice: The Carloway Report, paragraph 1.8.
21 Policy Memorandum, paragraph 23.
22 Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration. Available at: http://www.scotland.gov.uk/Publications/2012/12/4628/0
23 Additional Safeguards Following the Removal of the Requirement for Corroboration: Consultation Responses. Available at: http://www.scotland.gov.uk/Publications/2013/06/7066
Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure

69. In April 2009, the Cabinet Secretary for Justice commissioned Sheriff Principal Bowen QC to conduct an independent review of the practices and procedures relating to solemn sheriff court cases (sheriff and jury cases).

70. The remit of the review was:

“To examine the arrangements for sheriff and jury business, including the procedures and practices of sheriff court and the rules of criminal procedure as they apply to solemn business in the sheriff court; and to make recommendations for the more efficient and cost-effective operation of sheriff and jury business in promoting the interests of justice and reducing inconvenience and stress to the victims and witnesses involved in cases.”

71. Sheriff Principal Bowen carried out his review with the support of a review team seconded from justice organisations. An independent reference group comprising representatives from justice organisations, legal practitioners, the judiciary and academics also supported the review process, which consisted of a range of evidence gathering, research, analysis and observation and monitoring of court proceedings.

72. The report of the review was published on 11 June 2010. It set out 34 recommendations for sheriff and jury cases, not all of which would require legislation. It included proposals in the following areas:

- communication between prosecution and defence - improving out of court discussion between the two parties by establishing compulsory business meetings;
- management of cases - improving the effectiveness of first diets (existing pre-trial court hearings) and the scheduling of trials; including the recommendation that a trial sitting is not allocated until the sheriff dealing with the relevant first diet is satisfied that all outstanding issues have been resolved;
- time limits - providing the parties with more time to prepare cases by bringing time limits more into line with High Court cases; including an extension to the deadline for bringing custody cases to trial; and
- monitoring and evaluation of reforms.

73. In putting forward these proposals, Sheriff Principal Bowen indicated that the success of the proposed reforms would be dependent upon a legal aid structure.

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26 Policy Memorandum, paragraph 13.
27 A list of members of the reference group is available at page 10 of the review document: http://www.scotland.gov.uk/Resource/Doc/314393/0099893.pdf
28 Policy Memorandum, paragraphs 14 and 15.
which is supportive of early resolution, sentence discounting in appropriate cases and effective judicial management. He also noted that—

“This Review has been conducted in the full knowledge of the stringencies likely to be imposed on public sector spending in the foreseeable future. I have made no recommendation which is likely to result in significant public expense; to the contrary I believe that the recommendations of this report, if implemented, will help make better use of resources and result in demonstrable savings in the long term.”

Scottish Government consultation

75. The Scottish Government indicated its broad support for Sheriff Principal Bowen’s recommendations, stating in the consultation document that—

“The new system model will … be one where the attention of all parties is directed to timeous engagement and early resolution of any issues that are susceptible to agreement. In the new system, actual court time will be dedicated to hearing issues which are genuinely still in dispute. This will result in savings of time and money and spare victims and witnesses inconvenience and distress. The system model will be supported by incentives to parties to play positive roles, and Sheriff Principal Bowen also places a strong emphasis on judicial management.”

76. It published the responses to the consultation along with an analysis of these responses on 21 June 2013.

Provisions in the Bill

77. The Bill comprises provisions which have been developed from recommendations of Lord Carloway’s Review of Scottish Criminal Law and Practice, and from the recommendations of Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure, as well as a number of additional relevant matters which take forward a range of Scottish Government justice priorities.

78. In terms of Lord Carloway’s recommendations, the Bill includes provision in the following broad areas: arrest, period of custody, investigative liberation, legal...
advice, questioning, child suspects, vulnerable adult witnesses, corroboration and sufficiency of evidence, exculpatory and mixed statements, appeal procedures, finality and certainty.

79. Although not a recommendation of Lord Carloway, the Bill also makes provision to increase the jury majority to two thirds to return a guilty verdict. The Scottish Government considered this necessary in light of the removal of the requirement for corroboration in criminal cases.38

80. In terms of Sheriff Principal Bowen’s recommendations, the Bill’s provisions include:

- a requirement for the prosecutor and the defence to engage in advance of the hearing;
- a case will be indicted to a first diet and will only proceed to trial when a sheriff is satisfied that it is ready;
- increasing the time period in which an accused person can be remanded before having been brought to trial from 110 days to 140 days; and
- removal of the requirement for an accused person to sign a guilty plea.39

81. In addition, the Bill makes provision for matters relating to the sentencing of offenders, people trafficking, the Police Negotiating Board for Scotland (PNBS), the use of live TV links which, according to the Policy Memorandum, are intended to complement the reforms based on the two reviews.40

82. The main provisions of the Bill are set out in six parts:

- Part 1 (arrest and custody) which deals with police powers to arrest, hold in custody and question suspects as well as protective rights of suspects (restating a number of existing rights and powers as well as providing for a number of important reforms);
- Part 2 (corroboration and statements) which abolishes the current general requirement for corroboration in criminal cases and makes changes to ‘hearsay’ rules in so far as they affect the admissibility in evidence of certain statements made by an accused person;
- Part 3 (solemn procedure) which makes provisions aimed at facilitating the better preparation of sheriff and jury cases, and changing the rules on jury majorities in all solemn procedure cases;
- Part 4 (sentencing) which makes provision for sentencing for possession of a knife or offensive weapon and for people who commit an offence during a period of early release from a custodial sentence;

38 Policy Memorandum, paragraphs 11 and 12.
39 Policy Memorandum, paragraph 17.
40 Policy Memorandum, paragraph 5.
Part 5 (appeals and the SCCRC) which makes provisions seeking to address delays in determining appeals and makes changes to the way in which the High Court deals with references from the SCCRC; and

Part 6 (miscellaneous) which makes provisions seeking to create a statutory aggravation relating to people trafficking, allowing for greater use of live television links between prisons (or other places of detention) and the courts, and establishing a Police Negotiating Board for Scotland.  

PART 1: ARREST AND CUSTODY

Arrest by police

Powers of arrest: overview

83. Police officers are currently able to take suspects into custody, and hold them for the purposes of investigation or appearance in court, on the basis of:

- common law and statutory powers of arrest; and
- powers of detention under section 14 of the Criminal Procedure (Scotland) Act 1995.

84. Common law powers allow a police officer to arrest a suspect without a warrant where this is necessary for the purposes of preventing the suspect from escaping, committing further offences, or hindering the course of justice. This power may be exercised where the officer has a reasonable suspicion that the suspect has committed an offence. In addition, the common law allows an accused to be arrested and held in custody, on the basis of a warrant granted by the court, where necessary to secure the person’s attendance at court.

85. Statutory powers of arrest are attached to a wide range of statutory offences and are generally applicable on the basis of reasonable suspicion that a person has committed an offence.

86. Powers of detention set out in section 14 of the 1995 Act, may be exercised where a police officer has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment.

87. In his report, Lord Carloway stated that “the distinction [between detention and arrest] has been eroded to such an extent that there is little purpose in continuing with two different states of custody”, therefore “it would be simpler, and more clearly in tune with the ECHR, if there were a single period of custody, once a suspect has been arrested on suspicion”. He added that “the existence of two distinct means of taking a person into custody … is a peculiar, if not unique, feature of modern Scots criminal procedure” and he therefore recommended

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41 SPICe briefing, page 5.
42 SPICe briefing on the Bill, page 10.
43 SPICe briefing on the Bill, page 10.
44 SPICe briefing on the Bill, page 10.
45 Carloway Review, paragraph 5.0.4.
46 Carloway Review, paragraph 5.1.4.
that the common law and statutory rules on arrest and detention be replaced with a general power of arrest on ‘reasonable suspicion’.  

88. The Bill generally gives effect to Lord Carloway’s recommendations in relation to arrest and custody. The Policy Memorandum on the Bill states that the Scottish Government was “persuaded by the logic of having a single state of custody which simplifies and clarifies the rights and procedures for police and arrested persons alike”. It confirms that “the effect of the provisions is to abolish detention under section 14 of the 1995 Act so that the only general power to take a person into custody is the power of arrest contained in the Bill”. The Policy Memorandum also explains that “the test for the police arresting a person without a warrant is whether they have reasonable grounds for suspecting the person has committed, or is committing, an offence punishable by imprisonment”. A warrant would still be required for non-imprisonable offences “unless obtaining one is not in the interests of justice”.

89. At present, the arrest of a person on suspicion of having committed an offence is followed by the police charging the suspect. The Bill seeks to remove the necessity for the police to charge a person upon arrest and prior to reporting to the procurator fiscal for prosecution. The Policy Memorandum indicates that, where a suspect is to be reported to the procurator fiscal without being charged, the police must still advise the suspect of this intention. It goes on to state that: “this, in effect, has the same outcome as the current ‘charge’ in that it signifies a change in the person’s status and ends the period in which police can question a person”. The Bill provides that any further questioning must be authorised by judicial sanction, an area which is explored later in this report.

90. In providing for police powers and rights of suspects, the Bill distinguishes between people who are ‘officially accused’ and those who are ‘not officially accused’ of committing an offence. In many cases this would be the distinction between a suspect who has or has not been charged with an offence. However, given that a suspect may be reported for prosecution without charge, the category of persons who are ‘officially accused’ includes suspects who have not been charged but in relation to whom the prosecutor has initiated proceedings. Procedures relating to these two groups are discussed later in the report.

Powers of arrest: simplification or needless change?
91. A large number of witnesses and respondents to the Committee’s call for written evidence supported the provisions in the Bill in relation to arrest and detention. In its written submission, the Crown Office and Procurator Fiscal Service (COPFS) described the proposal “as a welcome simplification of the often complex rules regarding powers of arrest”; while Assistant Chief Constable Malcolm Graham told the Committee that Police Scotland believes that the case

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47 Carloway Review, paragraph 4.0.8.
48 Policy Memorandum, paragraph 34.
49 Policy Memorandum, paragraph 35.
50 Policy Memorandum, paragraph 35.
51 Policy Memorandum, paragraph 37.
52 Criminal Justice (Scotland) Bill, section 55.
has been well made and that the changes are required. He explained that “the current terminology persistently causes confusion because the term ‘detention’ is used for somebody who is remaining in custody prior to court, rather than for a means of temporary arrest”. Professor James Chalmers of the University of Glasgow said that he did not see any difficulty merging the two concepts, suggesting in fact, that “doing so will give us a much more rational and sensible system than the one that we have”. Professor Fiona Leverick, also from the University of Glasgow, agreed that the provisions in the Bill around arrest and detention were “a vast improvement” in simplifying a particularly confusing system.

92. The Faculty of Advocates also welcomed “the simplification, clarification and modernisation of the law of arrest and detention”. Murdo Macleod QC, representing the Faculty, told the Committee that “the distinction between detention and arrest is almost academic anyway, because people are now entitled to have their solicitor present with them during detention as well as afterwards”.

93. However, the Law Society of Scotland was less convinced, arguing that “the current system is working well and there is no requirement to move to a system of arrest on the basis that a constable has reasonable grounds for suspecting that the person has committed or is committing an offence”. In oral evidence, Grazia Robertson of the Law Society added that “the system, as changed in light of Cadder, seems to have bedded in … and to be working well”.

94. Calum Steele of the Scottish Police Federation (SPF) also said he was “not entirely convinced” that the need for change had been demonstrated or that the proposed wording would be more easily understood. He suggested that “it seems to be unnecessary to create a new set of statutory provisions that are almost identical to an old set of statutory provisions, with just a change in terminology”. David O’Connor of the Association of Scottish Police Superintendents (ASPS) told the Committee that he tended to agree with this position.

95. The Cabinet Secretary for Justice told the Committee that, “at present, detention and arrest blur into each other” and that “the provisions will improve the law and will be easier for the police to apply than those under the current system”. He went on to argue that “it will bring the Scottish system more into line with the European Convention on Human Rights, which refers to … detention as the period of police custody following arrest”.

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58 Faculty of Advocates. Written submission, page 1.
60 Law Society of Scotland. Written submission, page 2.
96. The Committee accepts that there might be some benefit in simplifying the powers of arrest along the lines proposed in Part 1 of the Bill. However, we do have concerns regarding the possible consequences of this change and we therefore make a number of recommendations aimed at improving the provisions in Part 1 of the Bill under the relevant sections below.

Powers of arrest: public perception
97. When asked to comment on whether the public perception of a person who is under arrest differs from that of a person who is being detained, ACC Graham accepted that “the term ‘arrest’ has a different feel for the public from ‘detention’”. However, he suggested that “people largely understand that in Scotland … your guilt or innocence is decided at the point when you go to court, not because the police have either detained or arrested you”. He went on to argue that “there would not be any release of information until somebody was arrested and could be charged under the current system, so I do not see that that would change because we had moved to a position of arrest under suspicion”. He added that “I do not think that would come into the public domain in the way you have described, and it would not change the public perception”. Professor Chalmers said, in any case, that he was “not sure that the distinction between arrest and detention is well understood by the general public; they both involve largely the same thing, which is somebody being taken into custody”.

98. The Cabinet Secretary told the Committee that “although somebody may be arrested by the police, they are presumed innocent until a court case conclusively proves otherwise” and that “everyone in Scotland recognises that point, although, sadly, it sometimes does not appear to be portrayed in that way in the media”. He added that “ordinary citizens in Scotland find it pretty hard to explain the difference between arrest and detention and why some people are arrested straight by the police and others are detained”.

99. The Cabinet Secretary was asked whether he would consider giving suspects in certain sensitive cases anonymity to protect the reputation of those who have been arrested but are not officially accused. He responded that “these are matters on which we do not have a formal policy” but said “we are happy to consider them and engage with the committee, the legal profession and, doubtless, the media and those involved in social media”. He added that this was “a legitimate and understandable point” but that, “as always, the devil is in the detail, especially in relation to social media”.

100. The Committee has concerns that use of the term ‘arrested’ in relation to a suspect who has been taken into police custody for questioning but has

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not been charged may, amongst members of the public, be more suggestive of guilt than is currently the case for a suspect who is ‘detained’ for questioning. We consider the terminology in the Bill concerning arrest to be somewhat confusing and are not convinced that members of the public, the accused or the media will be able to distinguish between a ‘person officially accused’ and a ‘person not officially accused’. We also have similar concerns relating to the proposal to allow the police to ‘de-arrest’ a person when the grounds for arrest no longer exist (see paragraph 120 of this report).

101. While we accept assurances from the police that, as with the current position, they do not intend to release a suspect’s name to the media until they have been formally charged with an offence, i.e. ‘officially accused’, we consider that every effort should be made to ensure that the reputation of the accused is not detrimentally affected by these provisions. The Committee considers that the issue of suspects’ anonymity is problematic, but merits further and careful consideration.

Power of arrest: resource implications

102. While noting that the provisions in relation to the general power of arrest in the Bill appeared to be “relatively straightforward”, the SPF suggested that there could be cost implications arising from the provisions, particularly regarding training for police officers and adapting ICT systems “at a time when the service budget is under extreme pressure”. 76 Chief Superintendent David O’Connor of ASPS agreed that “the change appears, on the surface, to be relatively simple”, but “there will be significant training issues for Police Scotland in ensuring that everyone fully understands what the change from ‘detention’ to ‘arrest on suspicion’ means”. 77 He later added that, although this “is a big ask, it is doable”. 78

103. John Gillies of Police Scotland accepted that “the training and re-education of the service in relation to these provisions would be considerable” and said that it was “difficult to put a cost on such training, but it is fair to say that it would be quite a distraction to the service”. 79

104. Stevie Diamond of Unison suggested that the i6 ICT programme, 80 which is due to come into operation in 2015, could need “rejigging … before it starts, to accommodate the provisions in the Bill”. 81 ACC Graham explained that work was “on-going to ensure that the i6 programme can be designed … to encompass as many of the proposals in the Bill as possible”, however, “we cannot design in those proposals with any degree of certainty until the Bill becomes an Act”. 82

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76 Scottish Police Federation. Written submission, page 1.
80 i6 is the new ICT programme for Police Scotland which is currently under development. It covers six broad areas: crime, criminal justice, custody, missing persons, vulnerable persons and productions/lost and found property.
105. The Cabinet Secretary told the Committee that “Police Scotland is content and understands the obligations that go with any new legislation”. He later added that the Scottish Government has had discussions with the police and advised that “they will take time to ensure that training is given—some of it will be on the job, some of it will be online and some of it might take place at Tulliallan.” The Financial Memorandum assumes that the Bill provisions will take effect in the financial year 2015-16, which the Cabinet Secretary told the Committee would allow time for the police to undergo the necessary training.

106. The Committee is concerned that police officer training and adaptations to the new i6 programme required to effectively implement the provisions in Part 1 of the Bill may place a significant burden on an already stretched police service and individual officers. While we accept the Cabinet Secretary’s assurances that sufficient time will be given to Police Scotland to implement a training programme and to update the new ICT system before giving effect to the Bill, we ask the Scottish Government to ensure that adequate resources are made available to Police Scotland to carry out these tasks without further strain on its shrinking budget.

Definition of arrest
107. In his report, Lord Carloway stated that “there would be benefit in stipulating exactly what ‘arrest’ is in statute”. He therefore recommended that, “in line with the concepts expressed in Article 5 of the Convention, arrest should be defined as meaning the restraining of the person and when necessary, taking him or her to a police station”. The Bill does not however include a definition of ‘arrest’.

108. ACC Graham told the Committee that “it would be helpful if ‘arrest’ was defined in the Bill in the way that Lord Carloway set out [as] we have great concerns about the absolute requirement in the Bill to take a person to a police station when they have been arrested, and we agree with Lord Carloway that the inclusion of ‘when necessary’ will help to ensure that a person’s liberty is not taken from them unnecessarily.”

109. Mr O’Connor of ASPS said that his “understanding of arrest is that the person is no longer free to go about their lawful business, or has not been advised that they are free to do so” and that this definition is “common throughout the services”. Mr Steele of the SPF agreed that this definition was “well understood and well applied” and that “it did not appear to cause any confusion”.

110. The Committee also heard from Professor Chalmers that “one of the difficulties with defining ‘arrest’ was that existing law is quite unclear on it”. He argued that, as “the Bill does not provide a comprehensive scheme for regulating arrest but simply sets out the circumstances in which that power might be
exercised, I am not sure that the Bill is the place to define arrest comprehensively or that the Carloway review gives us a good basis for doing that".\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 8 October 2013, Col 3351.}

111. \textbf{The Committee notes that the Bill does not give effect to Lord Carloway’s recommendation that ‘arrest’ be defined in the Bill.} We further note that there was no consensus from witnesses as to whether arrest should be defined and, if so, whether this legislation was the best vehicle to do so. On balance, the Committee is not content with the Scottish Government’s decision to exclude such a definition in the Bill.

\textit{Police powers: arrest to prevent crime}  
112. In its written submission, ASPS argued that “the proposed powers of arrest should be clear that an arrest can be made to prevent an attempt to commit a crime”\footnote{Association of Scottish Police Superintendents. \textit{Written submission}, page 1.}. Mr O’Connor of ASPS explained that there may be circumstances where an arrest is necessary to take a person who may be a threat to him or herself and to the public to the police station to access the services and care they need.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 1 October 2013, Col 3291.} These concerns were shared by Police Scotland. ACC Graham told the Committee that reassurances had been given by Scottish Government officials that common law powers covering such situations would be retained, although he said that this “does not give us huge comfort at the moment”.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 1 October 2013, Col 3291.}

113. However, Shelagh McCall told the Committee that the Scottish Human Rights Commission (SHRC) "would be extremely concerned about the idea that the police could arrest someone who had done nothing contrary to the criminal law".\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 8 October 2013, Col 3369.} Professor Chalmers agreed that “the idea … is quite disturbing”, adding that “it is not clear why that would be necessary”.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 8 October 2013, Col 3369.} Ms McCall and Mr Macleod QC concluded that section 1 of the Bill was probably adequate in enabling the police to arrest a person if he or she had committed or was committing an offence.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 1 October 2013, Col 3326.}

114. When asked whether he was satisfied that the new statutory power of arrest would allow an arrest to be made to prevent a crime, the Cabinet Secretary said that “the difficulty arises when people are thinking about offending”.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 7 January 2014, Col 4056.} Aileen Bearhop of the Scottish Government confirmed that the common-law offence of attempting to commit a crime and conspiracy would remain.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 7 January 2014, Col 4056.}

115. \textbf{The Committee notes the Scottish Government’s position that the power of arrest contained in the Bill combined with common law rules would be sufficient in allowing the police to arrest a person attempting or conspiring to commit an offence.} However, we heard from the police that they were not yet convinced by the reassurances given, and from the SHRC that it would have serious concerns if the police were able to arrest a person
“who has done nothing contrary to the criminal law”\textsuperscript{99}. We therefore call on the Scottish Government to further engage with both the police and the SHRC with a view to providing adequate reassurances on this matter.

Procedure following arrest

\textit{Arrested person to be taken to police station}

116. Section 4 of the Bill provides that a person arrested outwith a police station must be taken as quickly as is reasonably practicable to a police station.

117. In relation to this requirement, ACC Graham told the Committee that this “absolute requirement ... does not retain sufficient flexibility in the system for circumstances in which we might wish, in effect, to de-arrest somebody”.\textsuperscript{100} David Harvie of the COPFS suggested that “in circumstances in which, for example, evidence comes to light prior to getting to the police station that the person in custody may be the wrong individual, the strict terms of the Bill as drafted might mean that the person has to be taken to a police station even though at that stage they are no longer under suspicion”.\textsuperscript{101}

118. The Cabinet Secretary for Justice told the Committee that he had listened to the evidence received on this matter and agreed “to make provision for the release of a person from arrest when the grounds for that arrest cease to exist”, which “has been referred to in evidence as ‘de-arrest’”.\textsuperscript{102} Aileen Bearhop of the Scottish Government added that “it is recognised that there will be cases in which the grounds for arrest no longer apply and the person should no longer be under arrest, so we will change the Bill to ensure that the arrest can be stopped and the person can be released straight from the street without having first to be taken to a police station only to be sent home”.\textsuperscript{103}

119. The Committee notes the Scottish Government's intention to bring forward an amendment to allow a person to be quickly released from arrest (‘de-arrested’) when the grounds for arrest no longer exist. While we recognise that there may be situations where de-arrest could be a reasonable option, we have concerns that this should not lead to a situation where people are arrested without a proper assessment by police officers as to whether such action is appropriate. We would therefore welcome further details of the types of situation and expected frequency in which de-arrest would be used. The Committee also has concerns regarding use of the term ‘de-arrest’ and consider the words ‘released’ or ‘liberated’ to be more appropriate.

\textit{Information to be given at police station}

120. Section 5 of the Bill specifies the information to be given to suspects at a police station. This includes: (a) that the person is under no obligation to say

anything, other than to give the information specified in section 26(3)\textsuperscript{104} of the Bill; and (b) of any right the person has to have intimation sent and to have access to certain persons under other sections of the Bill. For example, under section 30, children under 16 have the right to have intimation sent to a parent; under section 36, a person in police custody has the right to consultation with a solicitor; and under section 33, vulnerable persons have the right to assistance from an appropriate person.

121. Lord Carloway recommended in his report that suspects held in custody should be provided with a ‘Letter of Rights’\textsuperscript{105}, clearly setting out all of their rights, including access to a solicitor.

122. The UK opted into an EU Directive on the Right of Information in Criminal Proceedings in 2012, requiring Member States to ensure that a Letter of Rights be provided to those held in custody.\textsuperscript{106} In July 2013, the Scottish Government introduced a non-statutory Letter of Rights for those in custody. Section 5(3) of the Bill specifies that a suspect must be provided as soon as reasonably practicable with information (verbally or in writing) as is necessary to satisfy the requirements of the EU Directive.

123. Mr Macleod QC of the Faculty noted that this information could be provided verbally or in writing, and was keen to “state strongly that that information should be given both verbally and in writing”, given that “many arrestees or people who are brought into custody have literacy problems”.\textsuperscript{107} Ann Ritchie of the Glasgow Bar Association (GBA) agreed with this position, arguing that “studies show that information given verbally and in writing is more easily understood”.\textsuperscript{108}

124. Ms Ritchie also had concerns that section 5 of the Bill was “incredibly and unnecessarily complex” for an accused person to follow and suggested that the section needed to be rephrased and set out in clear terms\textsuperscript{109}. However, Mr Macleod QC said he was “not sure that an accused person would be pouring over section 5 in any event”, suggesting that he or she would be able to obtain the information that they need through the Letter of Rights.\textsuperscript{110} Mr Harvie of COPFS argued that this section “is one of the key foundations that make the Bill Convention compliant” and that it should therefore remain in the Bill.\textsuperscript{111}

125. The Committee welcomes the recent introduction of a ‘Letter of Rights’ for those in custody, in accordance with the EU Directive on the Right of Information in Criminal Proceedings. We ask the Scottish Government to respond to the suggestion of some witnesses that information to be given to suspects at a police station should be provided both verbally and in writing with a view to ensuring that they clearly understand their rights.

\textsuperscript{104} Section 26(3) of the Bill specifies that a person under arrest must give their name, address, date of birth, place of birth (where required), and nationality.

\textsuperscript{105} Carloway Review, paragraph 6.1.24.

\textsuperscript{106} SPICe briefing, page 20.


Custody: person not officially accused

Keeping person in custody

126. Until quite recently, section 14 of the Criminal Procedure (Scotland) Act 1995 provided a maximum period of six hours during which a suspect could be held in custody and questioned by the police. Such a suspect could be questioned without being allowed access to legal advice.

127. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which was enacted in response to the UK Supreme Court’s judgment in *Cadder v HM Advocate*, extended the maximum period in which a suspect could be detained for questioning from six to 12 hours, with the possibility of an extension to 24 hours. It also provided a right of access to a solicitor for detained suspects, before and during police questioning. The Policy Memorandum accompanying the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill stated that it was considered necessary to set out access to a solicitor as a specific statutory right “to ensure certainty in the law, and of course, provide a specific and identifiable protection for suspected persons”. It also explained that, “with the introduction of a system based on solicitor access during detention, six hours is not considered by COPFS, the Scottish Police Services Authority or the Association of Chief Police Officers in Scotland to be an adequate maximum period”.

128. In his report, Lord Carloway accepted that “there is … little, if any, doubt that a six-hour maximum is unrealistic in many, albeit not most, cases” and said that “there will continue to be a significant proportion of cases for which six hours will be too restrictive a period to allow proper and effective investigation”. He argued that “it is important to maintain the central principle that persons suspected of an offence are not unnecessarily or disproportionately kept in custody”, and therefore suggested that “a period of 12 hours is reasonable” (with no power of extension).

129. He also recommended that the police should be required to undertake a formal review of a suspect’s detention at or around six hours from the time that he or she is brought into custody, suggesting that this “would not be an unreasonable burden on the police”. The purpose of this review, he argued, would be “to ensure that the continued detention of the suspect is justified, that any causes for continued detention, such as the suspect’s fitness for interview or delays in contacting a solicitor, were being properly addressed and that their welfare is being taken into account”.

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112 SPICe briefing, pages 10-11.
113 Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill. Policy Memorandum, paragraph 16.
114 Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill. Policy Memorandum, paragraph 19.
115 Carloway Review, paragraph 5.2.20.
116 Carloway Review, paragraph 5.2.23.
117 Carloway Review, paragraph 5.2.23.
118 Carloway Review, paragraph 5.2.33.
119 Carloway Review, paragraph 5.2.34.
120 Carloway Review, paragraph 5.2.36.
130. The Bill’s Policy Memorandum states that the Scottish Government agrees with the 12-hour maximum detention period and six-hour review proposed by Lord Carloway, arguing that it would provide the police with sufficient time to investigate offences thoroughly, while also safeguarding a person’s right to liberty. Section 11 of the Bill seeks to give effect to these recommendations.

131. In a supplementary written submission to the Committee, Police Scotland provided figures for persons detained under section 14 of the Criminal Procedure (Scotland) Act 1995 during the period between 4 June to 1 July 2013:

- 2693 persons detained for up to a maximum of six hours (80.4%);
- 643 persons detained for between six and 12 hours (19.2%); and
- 13 persons detained beyond 12 hours.

132. The proposal in the Bill for a 12-hour maximum period in which a person could be held in custody was supported by a number of witnesses, including Murdo Macleod QC of the Faculty of Advocates and Professor Leverick.

133. ACC Graham said that Police Scotland supported a 12-hour normal limit, but argued that the Bill should also provide for an extension of up to 24 hours in exceptional circumstances to ensure sufficient time to complete serious and complex investigations. He said that “the number of cases for which we would need to go for an extension beyond 12 hours is very small, but they are the most critical cases—rapes, murders and other complex cases in which … not having that additional time would hamper our ability to keep people safe and could hamper the ends of justice being met.” Mr Harvie of COPFS agreed that there may be a need to extend the period of custody beyond 12 hours “in the most serious cases involving the most complex investigations.”

134. Other witnesses suggested that a return to a six-hour limit may be more appropriate. For example, Grazia Robertson told the Committee that the Law Society considered that “six hours is a sufficient and proportionate time for the police to carry out their tasks”, however, it “acknowledges the arguments in favour of 12 hours”. Ms McCall said that “there is no evidence that a 12-hour period is necessary” and therefore the SHRC would support reintroduction of the six-hour limit with an extension beyond six hours in exceptional circumstances. ACC Graham told the Committee however that the previous six-hour limit was “woefully inadequate … even in basic cases at times”.

135. Ms McCall had particular concerns surrounding the holding of child and vulnerable adult suspects in police custody for any length of time. She suggested

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121 Policy Memorandum, paragraph 50.
122 Police Scotland. Supplementary written submission, page 1.
that “the Parliament should think carefully about whether it is ever appropriate to hold a child or vulnerable adult for more than six hours”. The SHRC therefore recommended in its written submission that “the Bill should state that taking a child into custody is a measure of last resort because it really ought not to happen unless it is absolutely necessary”.  

136. On a related issue, Police Scotland said that it was not persuaded of the need to include in the Bill the requirement for a review of a person’s detention after six hours as it could “create an additional unnecessary layer of management intervention and associated demand on the service”.  

137. However, the Faculty of Advocates argued that the Bill should include a requirement to maintain a record of the review of detention after six hours to ensure that suspects are not being detained for longer than is necessary and proportionate.  

138. The Cabinet Secretary told the Committee that—

“I am … aware of police concerns about the 12-hour limit for keeping persons in custody and the need to consider provisions to allow an extension in exceptional circumstances. I continue to listen to all the arguments for potential extension in exceptional circumstances.”  

139. The Committee heard a divergence in views amongst witnesses regarding the appropriate maximum detention limit. However, we note the statistics provided by Police Scotland relating to the period of 4 June to 1 July 2013 which show that, although the majority of persons (80.4%) were detained for up to six hours, a not unsubstantial number (19.2%) were detained for between six and 12 hours. Given these statistics, there are mixed views on the Committee as to whether detention beyond six hours is necessary.  

140. We note the Cabinet Secretary’s commitment to consider whether the detention limit should be extended in exceptional circumstances. While we recognise that there may be situations, particularly in relation to complex and serious crimes, where it may be necessary to consider extending the detention limit, we remain to be convinced whether this is really necessary, particularly when, under the Bill, the police would have the option of releasing a person on investigative liberation. We therefore seek further information on the types of ‘exceptional circumstances’ in which the Scottish Government envisages that an extension to the detention limit would be granted, how often they are likely to be applied for, who would approve any extension, and how the Scottish Government intends to ensure that such extensions do not become commonplace over time.
Investigative liberation

141. Lord Carloway noted in his report that, “in the modern era, there are a number of steps in a police investigation which can take a considerable time” and so “it may not be practicable for them to be completed within the proposed 12-hour maximum period”. However, he recognised that “it may be neither necessary nor proportionate for a suspect to be detained whilst these steps are being undertaken” and therefore concluded that “liberation, subject to conditions for a limited period whilst the police investigation is completed would seem a sensible alternative to prolonged detention in some cases.”

142. Lord Carloway therefore recommended a new system of investigative liberation under which the police could release an arrested suspect, who had not been charged but was still under investigation, on conditions and with the possibility of further questioning on return to police custody (following re-arrest). The period of custody, prior to charge, would still be limited to a total of 12 hours, whether or not the person was released and then rearrested and returned to police custody. Lord Carloway also proposed that the conditions under which a suspect would be released could include any special conditions as necessary, such as prohibiting the suspect from visiting a particular area, but that the suspect could apply to a sheriff for the review of the release conditions.

143. Lord Carloway recommended that the period during which a suspect could be subject to investigative liberation should not exceed 28 days as “the longer the liberation period, the greater the potential detrimental impact to the suspect” and that “it would seem prudent, therefore, to constrain any period of liberation without charge”. He added that “a balance needs to be struck”.

144. The Bill gives effect to these recommendations. Section 14 allows the police to release suspects from police custody on conditions which may be applied for a maximum of 28 days while they carry out further investigations into a suspected crime. Section 17 provides that the person who is subject to conditions imposed may apply for a review to a sheriff, who may remove them or impose alternative conditions.

145. The Policy Memorandum on the Bill states that “these powers are most likely to be of use in the investigation of serious crimes which often involve complex and technical examination of telephones, computers, etc”. It goes on to suggest that “a person’s rights are safeguarded in that investigative liberation will be limited to

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136 Carloway Review, paragraph 5.3.5
137 Carloway Review, paragraph 5.3.5
138 Carloway Review, paragraph 5.3.5
139 SPICe briefing, page 18.
140 SPICe briefing, page 18.
141 SPICe briefing, page 18.
142 Carloway Review, paragraph 5.3.12.
144 Explanatory Notes, paragraph 44.
145 Policy Memorandum, paragraph 58.
28 days (with no power to extend this period) and the person can apply to a sheriff to have any conditions amended and/or terminated.\(^{146}\)

146. ACC Graham told the Committee that Police Scotland “welcomes the step to introduce investigative liberation although ... 28 days would potentially be restrictive as an absolute time limit” particularly for longer-running more complex cases.\(^ {147}\) Mr Steele said that “the practice of investigative liberation is a good thing in its own right ... however, significant resources are required to make it happen smoothly”.\(^ {148}\) Mr O’Connor agreed that technology would be required to support investigative liberation and track all suspects who were subject to conditions under the process.\(^ {149}\)

147. Ms McCall of the SHRC argued that a suspect released on investigative liberation should have a right to anonymity given that, at that stage, he or she would not have been officially accused of committing a crime to “ensure proper respect for their rights to private life under Article 8 of ECHR, which include right to reputation”.\(^ {150}\) She went on to suggest that, where a person is “released on the condition that, for example, they need to come back to the police station at a particular time ... that time may not be convenient for them due to their caring commitments or important work commitments or, indeed, their solicitor’s commitments, so there may be some issues there”. She went on to argue that “the Bill does not build in enough limitations around the reasons why people might be released under such conditions, what the limits of those would be and when those would be appropriate”.\(^ {151}\)

148. Both Victim Support Scotland and Scottish Women’s Aid argued that there should be a specific requirement in the Bill for the complainer to be notified of the suspect’s release on investigative liberation and of any conditions attached.\(^ {152}\) ACC Graham told the Committee that he “would be happy if that were the case”,\(^ {153}\) while Mr Steele said that he had “little hesitation supporting the view that [the complainer] should be made aware when certain conditions apply or cease to apply”.\(^ {154}\)

149. In response to suggestions that the police should be able to apply for a longer period of investigative liberation, the Cabinet Secretary told the Committee that “in the main, 28 days should be enough”. He also dispelled claims that the 28-day period would have significant resource implications for the police, stating “I cannot for the life of me see why it should ... after all, no matter whether the person was remanded or detained; the police would probably be doing the same work anyway”.\(^ {155}\)

\(^{146}\) Policy Memorandum, paragraph 60.
\(^{152}\) Scottish Women’s Aid. Written submission, page 3.
150. The Cabinet Secretary also said that he would be happy to consider any suggestions made by the Committee of further checks and balances to protect the rights of the accused released under investigative liberation and with conditions imposed. However, he highlighted that it would be for the courts to consider the acceptability of the period and conditions imposed in each individual case.\textsuperscript{156}

151. The Committee seeks assurances that investigative liberation will not have an unnecessary impact on the suspect’s private life, whilst allowing the police to conduct complex investigations which could not be completed while the person is initially detained. We note that a person may apply to the courts to have any conditions imposed either removed or altered, which we believe is a welcome protection against disproportionate conditions being applied.

152. The Committee also notes suggestions from victims’ groups that the Bill should include a specific requirement for complainers to be notified of a suspect’s release on investigative liberation and of any conditions attached, however, we are unsure as to whether such a requirement needs to be placed on the face of the Bill. We ask the Scottish Government to work with the COPFS to ensure that, where they may be at risk, complainers are always informed timeously of the suspect’s release and of any relevant conditions applied.

153. The Committee notes that there are likely to be resource implications relating to investigative liberation.

Custody: person officially accused

*Person to be brought before court*

154. Lord Carloway’s review examined the length of time that suspects may be held in police custody before their first appearance in court and found that “the current law and practice has the potential to allow a person to be held, in certain circumstances, for a period of four, and perhaps five, days in police custody prior to appearance in court”.\textsuperscript{157} He argued that “the criminal justice system cannot operate on a part-time basis” and that “in a human rights based system, it cannot simply close down in part over periods of days whilst suspects languish in temporary cells awaiting decisions on their continued detention or liberty”.\textsuperscript{158}

155. He therefore suggested that “greater practical steps must be taken to ensure that those suspects who are to be reported in custody appear in court with greater promptness than is currently achieved in some sheriffdoms”.\textsuperscript{159} He recommended that a suspect being held in police custody should appear in court on the first day after charge and that “unless there is some extraordinary feature preventing it, a person should be appearing in court, at the very latest, within thirty six hours of arrest whatever day of the week that arrest occurs upon”.\textsuperscript{160}


\textsuperscript{157} Carloway Review, paragraph 5.2.24.

\textsuperscript{158} Carloway Review, paragraph 5.2.26.

\textsuperscript{159} Carloway Review, paragraph 5.2.26.

\textsuperscript{160} Carloway Review, paragraph 5.2.32.
156. Section 18(2) of the Bill provides that, wherever practicable, the suspect must be brought before a court not later than the end of the court’s first sitting day after the day on which they are taken into police custody. The Policy Memorandum states that “the Bill seeks to safeguard a person’s right to liberty by providing timescales within which a person should be brought before a court whenever practicable”.

157. There was broad agreement amongst witnesses that court sitting times needed to change with a view to minimising the time that suspects are held in custody prior to their appearance in court. For example, Professor Leverick suggested that “we probably need to make some provision for weekend and perhaps holiday court sittings”, although she was unsure as to whether this would need to be addressed through legislation. Ms McCall argued however that the need to extend court sittings beyond the working week had been recognised for a number of years, yet working practices had not changed and therefore legislative intervention was necessary. She added that “Lord Carloway’s original recommendation would be an appropriate way in which to solve the problem”.

158. The Cabinet Secretary told the Committee that a working group, led by Police Scotland and involving the COPFS and the SCS, had been established to consider options for Saturday courts “because I am aware of the pressures on courts, and on those who do the detaining as well as those who are being detained”. He gave his assurances that he would “take a keen interest in the issue” and committed to providing feedback on how the work progresses.

159. Like many witnesses, the Committee is concerned that suspects are sometimes held in custody for unacceptably long periods before their first appearance in court. We believe that court sitting times must be extended to reduce such lengthy periods in custody and the backlog of cases. We also recognise that there are implications for police time and resources in holding people in custody.

160. We are not however convinced that specifying time-limits for periods in custody in legislation is necessary at this stage, particularly when a working group is actively considering options for Saturday courts. We recommend that this work be completed in a timeous manner to allow any recommendations of the working group to be implemented as quickly as possible. The Committee welcomes the Cabinet Secretary’s assurances that he will “take a keen interest in the issue” and request details of the timescale for meetings and completion of the work of the group.

Police liberation

161. The Carloway report notes that “the presumption must be in favour of liberation in all cases and the main reasons for which a suspect will continue to be held in police custody legitimately must … be confined to situations in which

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161 Section 18 of the Bill.
162 Policy Memorandum, paragraph 50.
he/she poses some risk, either to an individual, the public or the interests of justice, if at liberty”.

162. In order to facilitate liberation from custody in as many cases as possible, he recommended, in cases where a suspect has been charged, that the police should be given the power to impose special conditions when releasing the suspect on an undertaking to appear in court on a specified date. Lord Carloway also suggested that the COPFS should have a power to review police decisions on liberation and on any standard or special conditions imposed, and that a suspect may apply to a sheriff for a review of liberation conditions.

163. The Bill would give effect to these recommendations. Section 19(1) and (2) provide that where a person is in custody having been charged with an offence, the police may: release that person on an undertaking under section 20; release the person without an undertaking; or refuse to release. The terms of an undertaking are that the person agrees to appear at a specified court at a specified time and to comply with any conditions imposed. A person may only be released from police custody on an undertaking if he or she signs its terms.

164. Under section 21 of the Bill, the procurator fiscal may modify the terms of an undertaking by changing the court or time specified, or rescind the undertaking altogether. Section 22 provides that a person subject to an undertaking containing conditions may also apply to the sheriff to have the conditions reviewed and the sheriff may remove or alter these conditions.

165. The Committee is content that sufficient safeguards are provided in the Bill regarding liberation of those officially accused from custody, in particular the right to apply to the sheriff to have any conditions imposed by the police reviewed.

Questioning

Rights of suspects

166. Under section 23 of the Bill, the police must inform a person suspected of committing an offence of their rights one hour (at the most) before any interview commences. These rights are:

- the right not to say anything other than to provide the person’s name, address, date of birth, place of birth and nationality;
- the right to have a solicitor present during any interview; and
- if the person is being held in custody, the right to have another person and a solicitor informed that they are in custody, and the right of access to a solicitor while in custody.

167. As referred to earlier in this report, the Scottish Government has introduced a ‘Letter of Rights’ to be given to every suspect being held in police custody.

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166 Carloway Review, paragraph 5.3.1
167 Explanatory Notes, paragraph 59.
168. Mr Macleod QC argued that the Bill should be amended to specify that the caution, which must take place not more than one hour before, should also be repeated at the commencement of the interview.\textsuperscript{168} While Ms Robertson of the Law Society highlighted that the current approach was working well in practice “for the protection of everyone, including the police officers”.\textsuperscript{169} Ms Ritchie told the Committee that the “practice varies with different police officers”, and therefore it may be helpful to be enshrined in the Bill.\textsuperscript{170}

169. The Committee notes the different experiences of witnesses from the legal profession in relation to when the caution is given to suspects by the police under current arrangements. We therefore ask the Scottish Government to respond to the specific suggestion made by the Faculty of Advocates that the Bill should specify that the caution, which must take place not more than one hour before any interview, should also be repeated at the commencement of the interview.

Right to have a solicitor present

170. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which followed the UK Supreme Court’s ruling in Cadder v HM Advocate (2010), significantly extended the rights of suspects to obtain legal advice. Under this Act, suspects detained, arrested or attending voluntarily at a police station have a statutory right to a private consultation with a solicitor before questioning. This may be conducted by telephone or in person.

171. In his report, Lord Carloway recommended that the right of access to a solicitor should be extended to all suspects held in police custody, regardless of whether the police intend to question the suspect.\textsuperscript{171} He stated that “it is estimated that over two-thirds of suspects requesting legal advice name a preferred solicitor, although that does not mean that he/she will have had previous dealings with that solicitor.”\textsuperscript{172} He noted, however, that it may not be possible to make contact with the nominated solicitor or the solicitor may not be willing or available to provide advice within a reasonable time.\textsuperscript{173} He therefore recommended that “the right of access to a lawyer does not extend to the provision of assistance from a solicitor of the suspect’s choice”, however, “in accordance with current practice, efforts should be made to secure the attendance of that lawyer within reasonable time”.\textsuperscript{174}

172. Section 36 of the Bill seeks to give effect to Lord Carloway’s recommendations on the right of access to a solicitor, including where a suspect being questioned is under investigative liberation. The Policy Memorandum confirms that this right does not extend to the provision of assistance from a solicitor of the suspect’s choice, as this may not be achievable in all situations.\textsuperscript{175} It also states that “the Scottish Government decided in favour of provisions designed to allow flexibility as the most appropriate means of communication, to allow for

\textsuperscript{171} Carloway Review, paragraph 6.1.5.
\textsuperscript{172} Carloway Review, paragraph 6.1.30.
\textsuperscript{173} Carloway Review, paragraph 6.1.30.
\textsuperscript{174} Carloway Review, page 168.
\textsuperscript{175} Policy Memorandum, paragraph 71.
the means to be tailored to the needs of the individual”, therefore allowing telephone consultation where appropriate.\(^{176}\)

173. Ms McCall of the SHRC told the Committee that, “under Article 6 of the ECHR, the state ought to respect an individual’s choice of legal representative in so far as possible”, but she acknowledged that this may not always be possible, particularly in rural areas where lengthy travel may be required.\(^{177}\) Ms McCall further stated that “the purpose of legal assistance is two-fold: first, it is to protect the right against self-incrimination; and, secondly, it is to provide a check on conditions of detention and to ensure against ill treatment”. She added that, “in that second respect, it is difficult to assess over the telephone someone’s vulnerability when they are in custody”.\(^{178}\)

174. When asked to clarify whether the Bill makes it clear to individuals in custody that they have the right to face-to-face contact from a solicitor and not just advice over the telephone, Lesley Bagha, a Scottish Government official, said that “the suspect would be told that they have a right to speak to a lawyer … they would discuss the matter with their lawyer, and their lawyer might choose to come down [to the police station]”. She went on to explain that “the aim is just to keep some flexibility”, adding that “if the suspect is being questioned, there is a right for the solicitor to be present, which is an enhancement from the current position” but “it may be that in many cases a telephone call is sufficient”.\(^{179}\)

175. The Committee welcomes the extension of the right of access to a solicitor to all suspects held in police custody, regardless of whether the police intend to question the suspect, and that suspects are entitled to face-to-face contact with a solicitor. We recognise that there would be difficulties in specifying in the Bill that a suspect should be entitled to receive assistance from a solicitor of their choice, particularly in the more remote areas of Scotland, and we therefore agree with the Scottish Government on this matter.

Person not officially accused: questioning following arrest

176. The Bill enables a constable to question a person following arrest provided the person has not been officially accused of the offence (i.e. charged or where a prosecutor has started proceedings), or an offence arising from the same circumstances. The person has the right, however, not to answer any questions other than providing the police with their name, address, date of birth, place of birth and nationality.\(^{180}\)

177. The Committee is content with the procedure specified in the Bill allowing a constable to question a person not officially accused following arrest.

\(^{176}\) Policy Memorandum, paragraph 73.


\(^{180}\) Explanatory Notes, paragraph 70.
Person officially accused: authorisation for questioning

178. The Policy Memorandum notes that “the position in Scots law has been that, although it is proper for the police to question a person, including one detained under section 14 of the 1995 Act, once the police are in a position to charge the person with the offence(s) under investigation, questioning should cease”. It goes on to state that, “generally, once that point has been reached, it is proper for the police to charge the person with the offence and conclude any questioning” and thereafter “there should be no further questioning at the initiative of the police”.\(^{181}\)

179. Lord Carloway recommended that this prohibition on police questioning of a suspect after they have been charged with an offence should be relaxed.\(^{182}\) He stated that “there should be a process whereby the police, if they feel there is good reason to question a suspect after he/she has been charged or reported to the procurator fiscal but before he/she has appeared in court, can apply to the sheriff for permission to do so”.\(^{183}\)

180. In the Policy Memorandum, the Scottish Government states that it agrees with this recommendation and provides examples of when post-charge questioning might be appropriate, such as a legitimate delay in obtaining access to a solicitor, or where further scientific evidence comes to light.\(^{184}\) The Bill therefore provides that a court will have the power, on application, to allow the police to question a person after they have been charged with an offence, however, the court must be satisfied that it is in the interests of justice to allow the questioning.\(^{185}\) The Policy Memorandum states that, where an application is granted the court must specify the maximum period for which the person can be questioned and can set any further conditions it considers to be appropriate (for example, limiting the scope of questioning).\(^{186}\) The right of access to a solicitor will also apply to post-charge questioning.\(^{187}\)

181. A number of witnesses said that they were content with the measures proposed. For example, Murdo Macleod QC stated that the Faculty was “relatively relaxed” about the provision to allow post-charge questioning.\(^{188}\) He went on to suggest that it was “unlikely that there would be any great scope for miscarriages of justice” as safeguards had been built into the Bill, including a requirement to apply to the court for approval for post-charge questioning and that a solicitor must be present during that questioning.\(^{189}\) Professors Chalmers and Leverick agreed with Mr Macleod that the safeguards in place, in particular the requirement for an application to be made to the court before post-charge questioning takes place, were sufficient.\(^{190}\) Mr Macleod did however suggest that the Bill should set a maximum period for post-charge questioning rather than timings being specified by the court. His preference was for a further six hours (in addition to the original

\(^{181}\) Policy Memorandum, paragraph 84.
\(^{182}\) SPICe briefing, page 22.
\(^{183}\) Carloway Review, pages 193-194.
\(^{184}\) Policy Memorandum, paragraph 86.
\(^{185}\) Policy Memorandum, paragraphs 87-88
\(^{186}\) Policy Memorandum, paragraph 88-89.
\(^{187}\) Policy Memorandum, paragraph 93.
12-hour limit), to facilitate the questioning to take place, for example, travel time, etc.\textsuperscript{191}

182. Mr Harvie of the COPFS said that, “in modern investigations, flexibility is needed to allow us to go back and say ‘We’ve uncovered this information. Do you have anything to say about it?’”.\textsuperscript{192} ACC Graham told the Committee that there had been occasions where Police Scotland had wanted to undertake such questioning “particularly in serious and complex long-running cases in which the point of charge comes at a stage in the investigation when there is still a large amount of investigative work to do”.\textsuperscript{193} He gave assurances that post-charge questioning would be used sparingly and in consultation with the Crown.\textsuperscript{194}

183. Others had concerns regarding the proposals. For example, Justice Scotland said that it “considers that the perceived value of post-charge questioning is overstated and is unsure of what value it will add in the Scottish context”. It further stated that “any expansion of post-charge questioning must be accompanied by a legal framework providing safeguards in line with the recommendations of the Joint Committee on Human Rights”.\textsuperscript{195}

184. Ms McCall of the SHRC suggested that, although there was no difficulty with the principle, she was “not sure that the protections of judicial oversight are sufficiently robust”.\textsuperscript{196} In its written submission, SHRC also stated that the Bill should explicitly state that no adverse inference should be taken from silence during post-charge questioning.\textsuperscript{197}

185. Ms Ritchie from the GBA said that she saw “no need for the provision at all” and could not see how it assists either the prosecution or defence.\textsuperscript{198} Ms Robertson advised that the Law Society was also opposed to post-charge questioning on a practical level, suggesting that “what is envisaged is cumbersome, will make things somewhat bureaucratic and will result in our being back in a police office with our clients, presumably in a large majority of cases advising them to make no comment”.\textsuperscript{199}

186. Lesley Bagha, a Scottish Government official, told the Committee that “the position on post-charge questioning is very much the same as the position on pre-charge questioning, which takes place before somebody is officially accused, in

\textsuperscript{195} The Joint Committee on Human Rights recommendations include that: post-charge questioning deals with evidence which has come to light after charges were brought; the total period of post-charge questioning lasts for no more than 5 days in aggregate; the presence of the accused’s lawyer is necessary during any questioning; review of the transcripts from questioning after it has occurred by the same judge who authorised the post-charge questioning to ensure it remained within the prescribed scope of questioning.
\textsuperscript{196} Justice Scotland. Written submission, paragraph 19.
\textsuperscript{198} Scottish Human Rights Commission. Written submission.
that there is a right to silence and the person does not have to say anything”.\textsuperscript{201} She went on to state that, “rather than the legislation saying that no adverse inference should be made, it is assumed that there is a right to silence”.\textsuperscript{202}

187. The Committee is persuaded that post-charge questioning may be required in certain complex and lengthy investigations. We also note that the majority of witnesses were content that the requirement on the police to apply to the court for approval for post-charge questioning provides sufficient judicial oversight to minimise the risk of miscarriages of justice.

188. However, post-charge questioning should only be used when absolutely necessary. To this end, we ask the Scottish Government to maintain a record of the circumstances and frequency in which post-charge questioning is used, including details of the applications that are refused by the courts. We further seek confirmation from the Scottish Government that existing rules providing that no adverse inference may be drawn from a suspect’s refusal to answer police questions would apply equally to post-charge questioning.

Child and vulnerable suspects

Child suspects: overview

189. In his report, Lord Carloway argued that, for the purpose of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years, and noted that child suspects require extra protection. He therefore recommended that:

- there should be a general statutory provision that the best interests of the child shall be a primary consideration in taking any decision regarding the arrest, custody, interview and charging of a child;
- all children should have a right of access to a parent or other responsible person if detained by the police and only those children aged 16 or 17 should be able to waive that right; and
- children under the age of 16 should not be able to waive their right of access to a solicitor, but children aged 16 or 17 should be able to waive the right with the agreement of a parent or other responsible person.\textsuperscript{203}

190. The Bill seeks to give effect to Lord Carloway’s recommendations on child suspects. The Scottish Government states in the Policy Memorandum that it considered making the provision of legal advice mandatory to all under-18s, however, it concluded that “there is a balance sought for children aged 16 and 17 years in order to provide a greater emphasis on their ability to make decisions for themselves and ensure their voice is heard in all parts of the process”. Its

\textsuperscript{203} SPICe briefing, page 24.
preferred approach therefore is to “allow children aged 16 and 17 years to make their own decisions with safeguards in place to support them in this”. 204

191. There was general support for the measures proposed in the Bill; however, some witnesses had concerns regarding the ability of 16 and 17 year olds to waive their right of access to a solicitor. Ms Robertson of the Law Society told the Committee that those under 18 should not be allowed to waive this right 205 and Mr Macleod QC said he agreed with the Law Society’s position 206.

192. Ms Driscoll of the Child Law Centre noted that young people often waive their right to a solicitor because they do not understand the situation they are in, or they assume that having a lawyer may suggest that they are guilty. However, she went on to confirm that she was “not suggesting that there should be no discretion at the ages of 16 and 17, but we need to be satisfied that a young person understands the right that they are waiving”. 207

193. Mr Harvie of the COPFS explained that, as a result of recent case law, the Lord Advocate had issued guidance indicating that there is to be a strong presumption that 16 and 17 year olds should not be able to waive their right of access to legal advice. He went on to state that “the guidance sets out various requirements that the interviewing officer must take into account” and “as it currently stands, the guidance offers perhaps a greater level of comfort than might be foreseen from the bare terms of the legislation”. 208

194. Professor Leverick said that the Bill “has got it about right”. She suggested that “imposing legal assistance on all 16 and 17-year olds even if they are adamant that they do not want it and are capable of understanding the implications of that decision may well be disproportionate in respect of the costs involved”. 209 Mr Baillie, Scotland’s Commissioner for Children and Young People, agreed that the Bill “strikes just about the right balance”. 210

195. The Cabinet Secretary told the Committee that he believed that the Bill strikes the correct balance in allowing 16 and 17 year olds to waive their right to access to a solicitor on the advice of an appropriate person. 211 He explained that “those under 16 clearly are protected but … we recognise that 16 and 17 year olds are in a different position”, adding that “they still have to be protected, but they can marry, pay taxes or join the army”. He further stated that the Bill provides sufficient protection in ensuring that the right cannot be waived without advice from an appropriate person. 212

196. The Committee notes that the Victims and Witnesses (Scotland) Bill defines a child as a person up to the age of 18. The Committee asks the
Scottish Government to explain why there is inconsistency between the protections for under-18s in this Bill compared with this recent legislation.

Best interests of the child

197. The Policy Memorandum states that “a key principle enshrined in the Bill is that, in taking any decision regarding the arrest, detention, interview and charging of a child by the police, the best interests of the child shall be a primary consideration”. The section title in section 42 of the Bill refers to the term ‘child’s best interests’, however, in the text of section 42(2) the phrase ‘well-being of the child’ is used.

198. Mr Baillie argued that the Bill should be consistent in referring to the ‘child’s best interests’.

199. Mr Baillie told the Committee that case law existed for both ‘best interests of the child’ and ‘welfare’, which he advised was also “well understood”. He also highlighted that the Children and Young People (Scotland) Bill refers to the ‘well-being of children and young people’, while the Children (Scotland) Act 1995 refers to ‘best interests’. He argued that, in light of this confusion “we need to bring some consistency to the application of the phrases that are used” in legislation.

200. The Committee has concerns regarding the lack of consistency in use of the terms “welfare”, “best interests” and “well-being” of the child in this and other legislation. While we make no comment on which is the most appropriate term, we ask the Scottish Government to ensure consistency in the language used in section 42 of the Bill.

Age of criminal responsibility

201. In its Do the Right Thing Progress Report 2012, the Scottish Government stated that “following the raising of the age of criminal prosecution in the Criminal Justice and Licensing (Scotland) Act 2010, we will give fresh consideration to raising the age of criminal responsibility from 8 to 12 with a view to bringing forward any legislative change in the lifetime of the Parliament”.

202. A number of witnesses told the Committee that the Bill should have included provisions to raise the age of criminal responsibility in line with the Scottish Government’s commitment in the Progress Report 2012. For example, Ms McCall

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214 Children in Scotland. Written submission, page 1.
215 Barnardo’s Scotland. Written submission, page 1.
217 Do the Right Thing is the Scottish Government’s response to the 2008 concluding observations from the UN Committee on the Rights of the Child.
told the Committee that this was “a missed opportunity”, while Ms Driscoll said that “it is not a major change, but a leftover change [and] it would stop us having the youngest age of criminal responsibility in Europe, which is something to be ashamed of”.

203. Scotland’s Commissioner for Children and Young People agreed that an opportunity had been missed to address this issue in the Bill. He said that, “in the absence of any indication that there will be another criminal justice bill, the matter must at least be raised to get some clarity on how the Scottish Government will give effect to its commitment to raise the age of criminal responsibility, which I welcome”. Mr Ballard of Barnardo’s Scotland told the Committee that “it would seem entirely appropriate for the Scottish Government to do it in the Bill”. Aberlour Child Care Trust stated in written evidence that, “given that this Bill represents an entirely appropriate legislative vehicle for such a change, we were dismayed that no such provision has been made in the Bill, particularly when sections 31-33 deal directly with protecting the rights of child suspects”.

204. However, Professor Leverick said she was “not sure that the issue needs to be revisited at all [and] if it does, the Bill is possibly not the right place to do that, given that there is already an awful lot in it”.

205. The Cabinet Secretary said that “we are aware of the calls for the minimum age of criminal responsibility to increase” and added “we are happy to see what we can do within the lifetime of this session of Parliament, but I do not think that it would be practical to raise the age in the Bill, especially given that consultation will have to take place and that there are disputes about what that age should be”. He added that “not everything can be included in the Bill” and “there are understandable concerns about the age of criminal responsibility, and we are happy to give an undertaking to work on that”.

206. The Committee welcomes the Cabinet Secretary’s undertaking to give consideration to raising the age of criminal responsibility and would welcome regular updates on this work.

Vulnerable adult suspects: overview

207. Lord Carloway recommended a number of additional safeguards for vulnerable adult suspects in police custody. He argued that there should be a statutory definition of a ‘vulnerable suspect’ and that these suspects should be given the right of access to an appropriate adult as soon as possible after they are taken into custody and prior to any questioning. He further recommended that the role of the appropriate adult should be defined and that vulnerable suspects

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223 Aberlour Child Care Trust. Written submission, page 1.
227 Carloway Review, paragraph 6.0.7.
should be able to waive their right of access to a lawyer only if the appropriate adult agrees.228

208. The Bill broadly gives effect to these recommendations, including providing a statutory definition of a ‘vulnerable suspect’ and that they should have a right of access to an appropriate adult as soon as possible after they are taken into custody.

209. However, it does not allow vulnerable adults a right to waive their right of access to a solicitor with the agreement of the appropriate adult. The Policy Memorandum on the Bill states that “concerns were raised in relation to a vulnerable person being allowed to waive the right of access to a solicitor with the agreement of an appropriate adult”.229 It went on to state that “the Scottish Government noted these concerns and the instruction issued by the Lord Advocate to Chief Constables, that from 1 October 2012, vulnerable suspects should not be allowed to waive their right of access to a solicitor (in response to cases where vulnerable persons had done so, not fully understanding the caution or terms of interview, and the subsequent concerns about the admissibility of statements made during interview)”.230 The Scottish Government therefore said that it was “content with the current position as set out in the Lord Advocate’s guidance”.231

210. The Bill defines a vulnerable person, for the purpose of police arrest, detention and questioning, as “a person aged 18 or over who is assessed as vulnerable due to a mental disorder as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003, (i.e. any mental illness, personality disorder, learning disability however caused or manifested)”.232 As at present (and recommended by Lord Carloway), it will be for the police to assess whether the person is vulnerable, and for them to try to secure the attendance of an appropriate adult as soon as reasonably practicable after detention and prior to questioning.233

211. The Policy Memorandum states that the current non-statutory role of an appropriate adult is to facilitate communication during police procedures between the police and vulnerable suspects, accused, victims and witnesses (aged 16 or over) who have a mental disorder or learning disability.234 It goes on to explain that appropriate adults are independent of the police and are not usually known to the person being interviewed.235 They are often social workers or health professionals and are expected to complete national recognised training and follow the Scottish Appropriate Adult Network National Guidance.236

228 Carloway Review, paragraph 6.0.7.
229 Policy Memorandum, paragraph 127.
230 Policy Memorandum, paragraph 127.
231 Policy Memorandum, paragraph 127.
232 Policy Memorandum, paragraph 127.
233 Policy Memorandum, paragraph 127.
234 Policy Memorandum, paragraph 127.
235 Policy Memorandum, paragraph 127.
236 Policy Memorandum, paragraph 127.
212. The Bill will give the Scottish Ministers regulation-making powers so that they can specify who may provide appropriate adult services and what training, qualifications and experience are necessary to become an appropriate adult. \(^{237}\)

213. The Policy Memorandum states that “the Scottish Government does not intend to make any particular body statutorily responsible for the delivery of appropriate adult services”, following concerns expressed by COSLA and the Association of Directors of Social Work that this responsibility would fall on local authorities. \(^{238}\)

**Vulnerable adult suspects: definition and training**

214. A number of witnesses expressed concern that the definition of a vulnerable adult was too narrow. For example, Mr Macleod QC argued that the term ‘owing to a mental disorder’ should be removed from the Bill, leaving the definition in sections 25 and 33 as “the person appears to the constable to be unable to understand sufficiently what is happening or to communicate effectively with the police”. He suggested that it would be difficult for a police officer to assess whether a person is suffering from a mental disorder, whereas it would be clearer that they were unable to understand what is happening or unable to communicate effectively with the police. \(^{239}\)

215. Professor Leverick shared these concerns and suggested that “we do not have to follow slavishly what happens in England and Wales, but the equivalent terminology used in the legislation in England and Wales refers to mentally vulnerable suspects, which does not necessitate any mental disorder as such”. \(^{240}\)

Mark Ballard of Barnardo’s Scotland argued that “the reliance on mental disorder as the determinant of vulnerability is unhelpful, because there are many more reasons why adults … can be vulnerable and require support specifically to deal with that vulnerability”. \(^{241}\)

216. However, Rachel Stewart of the Scottish Association for Mental Health (SAMH) argued that the “mental disorder definition … encompasses quite a wide range of mental health problems, learning disabilities, personality disorders and autistic spectrum disorders”. She suggested that each of these conditions require different responses and therefore “the police need support and training to be able to support people who are in that situation”. \(^{242}\)

217. Ms McCall agreed that there was “a real challenge in identifying vulnerable people and the police must be properly trained to do so”. \(^{243}\) ACC Graham also acknowledged that there were difficulties in identifying vulnerable people in custody, however, he said that “we have never had more checks and balances at the point when somebody is questioned and detained, to ensure that we do

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\(^{237}\) Policy Memorandum, paragraph 123.

\(^{238}\) Policy Memorandum, paragraph 128.


everything that we can to identify whether we need to call on the services of somebody to offer support and independent advice."  

218. When asked to respond to concerns raised by witnesses regarding the definition of vulnerable persons specified in section 33 of the Bill, the Cabinet Secretary told the Committee that “I tend to think that the term ‘mental disorder’ is perfectly understandable.” He explained that “a mental disorder is defined as a ‘mental illness’, ‘personality disorder’ or ‘learning disability’, and there is tried and tested practice according to which the police have been assessing the vulnerability of suspects, accused, victims and witnesses for many years.” He added that “we are not asking police officers to act as psychiatrists; we are asking them simply to make an assessment of somebody’s ability”, which “has been routine custom and practice and has worked well.”

219. The Committee has concerns that the definition of vulnerable person in the Bill may not capture all individuals needing additional support when in custody. We also note comments from the police that there are difficulties in identifying vulnerable persons. We therefore ask the Scottish Government to give further consideration to the definition of vulnerable persons in the Bill and to reflect on whether this is consistent with the definition in the Victims and Witnesses (Scotland) Act 2014. We also ask that the Scottish Government ensures that sufficient resources are provided to the police to undergo training in this important area.

Vulnerable adult suspects: appropriate adults

220. Witnesses, including the SHRC, welcomed the view that vulnerable persons should not be able to waive their right to legal assistance without an appropriate adult being present, as “there must be someone present who is capable of advising properly on decisions made.”

221. The right of access to an appropriate adult as soon as possible after they are taken into custody was broadly welcomed by witnesses. However, concerns were raised surrounding the funding of appropriate adults. For example, Ms McCall argued that “the state has an obligation to put in place a proper system, so there must be a conversation and a decision about how appropriate adults are going to be paid for” and that training for appropriate adults, which is to be provided for in regulations would be “critical.”

222. Mr Ballard said he had concerns that the Bill only provides for appropriate adults on a statutory basis for those aged over 18 who are considered to have a mental disorder and therefore local authorities under financial pressures may not be able to support the provision of appropriate adults for 16 and 17-year-old suspects. He went on to argue that “it is not clear that support will be guaranteed unless provision is made statutory in the Bill.” Aberdeen City Council shared

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these concerns. In its written submission, Police Scotland also agreed that “provision of appropriate adult services has not been placed on a statutory basis within the Bill [and] there is therefore some concern based on limited reporting, that funding may not be secured or maintained within the constraints facing the public sector as a whole”.

223. The Committee asks the Scottish Government to respond to concerns raised by witnesses that its decision not to place the provision of appropriate adult services in the Bill could lead to a lack of funding by local authorities already facing significant financial challenges.

PART 2: (CORROBORATION AND STATEMENTS) AND SECTION 70 (GUILTY VERDICT)

Introduction

224. Part 2 of the Bill seeks to abolish the general requirement for corroboration in criminal cases. It also seeks to make changes to ‘hearsay’ rules in so far as they affect the admissibility in evidence of certain statements made by an accused person. Section 70 on jury majority is included in this part of the report as it was considered by the Committee in connection with the proposed abolition of corroboration.

Lord Carloway’s Review of Scottish Criminal Law and Practice

Background

225. The proposal to abolish the requirement for corroboration in criminal cases arose from recommendations made by Lord Carloway in his Review of Scottish Criminal Law and Practice. As part of the remit of the review, Lord Carloway was asked to consider “the criminal law of evidence … in particular the requirement for corroboration and the suspect’s right to silence.” The perceived need for review in this area arose following recent decisions of the appeal court concerning, in particular, the right to access legal advice prior to and during police questioning. The decisions followed the judgement by the UK Supreme Court in Cadder v HM Advocate.

226. In response to this ruling, the Scottish Government introduced legislation which was passed by the Scottish Parliament under the emergency bill procedure on 27 October 2010. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, amongst other things, provided for access to legal advice by suspects. As a consequence of this legislation, it was argued that greater access to legal advice would result in fewer confessions, which in turn could lead to greater difficulties in acquiring corroborative evidence. Lord Carloway was therefore asked to include in his review the requirement for corroboration in criminal cases.

251 Aberdeen City Council. Written submission.
252 Police Scotland. Written submission, paragraph 6.5.
253 Carloway Review, paragraph 7.0.1.
227. In light of this remit, Lord Carloway considered whether the requirement for corroboration continued to serve a useful purpose or whether “it is an artificial construct that actually contributes to miscarriages of justice in the broad, rather than appellate sense”. He rejected any change to the current rules preventing adverse inference being drawn at trial from an accused’s failure to answer questions during the police investigation. The Bill therefore does not seek to change the law in this area.

The requirement for corroboration

228. According to the Policy Memorandum, the requirement for corroboration requires: (a) that there be at least one source of evidence that points to the guilt of the accused as the perpetrator of the crime; plus (b) corroboration of each “essential” or “crucial” fact by other direct or circumstantial evidence. Generally, the “crucial facts” requiring proof are that a crime was committed and that the accused committed it.

229. Following consideration of the relevant issues during his review, Lord Carloway recommended that the requirement for corroboration in criminal cases should be abolished. He reached this conclusion for a number of reasons.

230. Firstly, he addressed the argument that the current requirement for corroboration is a protection against miscarriages of justice (in the sense of preventing wrongful conviction) as no person can be convicted of an offence solely on the basis of testimony of one witness. His principal argument was that he could find no evidence that the requirement served this purpose. Instead he concluded that “the real protection against miscarriages of justice at first instance is the standard of proof required; that the judge or jury must not convict unless convinced of guilt beyond reasonable doubt.”

231. Secondly, he stated that the requirement for corroboration could actually cause miscarriages of justice (in the sense of preventing the prosecution of strong cases). He argued that it should be possible to convict on the basis of evidence from a single credible and reliable witness if the judge or jury is satisfied beyond reasonable doubt of the accused’s guilt. He said that he believed that, “in principle, judges or juries ought to be regarded as capable of deciding for themselves what weight to attribute to a witness’s evidence” and the fact that evidence was uncorroborated would be something that the judge or jury could take into account in assessing what weight should be given to a witness’s evidence.

232. His third argument was that the requirement for corroboration was frequently misunderstood by everyone, “not least judges”. He considered it to be an “artificial bar” to prosecution and conviction as the system was skewed by “prioritising quantity over quality” and that “elaborate legal theories, unique to Scotland, would become unnecessary.”

254 Carloway Review, paragraph 7.2.5.
255 Policy Memorandum, paragraph 131.
256 Carloway Review, paragraph 7.2.41.
257 Carloway Review, paragraph 7.2.42.
258 Carloway Review, paragraph 7.2.44.
have been devised over recent years in an attempt to fit an archaic requirement into today’s reality”. 259

233. He also observed that corroboration was “more likely to exist in relation to some offences than others”, 260 with particular difficulties arising in relation to crimes which tend to be committed in private. This could be a particular barrier to obtaining corroboration for sexual crimes and for domestic abuse, as there could be little evidence in the absence of statements made by suspects at interview. The practical effect of this therefore was that the requirement for corroboration could “deny access to justice for victims of these types of crime”. This could also be the case with certain less serious crimes, such as minor assaults and thefts, where “there may also be little evidence other than that of the complainer but that evidence may be of itself compelling”. 261

234. Finally, Lord Carloway highlighted the impact that the requirement for corroboration has on advice given by solicitors to suspects. He concluded that there is “little doubt that in Scotland it plays a major part in the solicitor’s decision to advise his/her client to say nothing for fear of his/her inadvertently corroborating other evidence and thereby creating a sufficiency, which would otherwise not exist”. 262 Therefore, whether a person is prosecuted for and convicted of an offence “can depend entirely on whether the person elects to respond to questioning by the police”. This in practice could put the person in a difficult position as “it may be felt that a judge or jury would be more likely to accept the person’s account as credible if it were raised at the earliest opportunity” but that the person would “almost always be well advised not to speak, at least in situations where there was no obvious sufficiency of evidence”. 263

235. He concluded that the requirement for corroboration is “an archaic rule that has no place in a modern legal system where judges and juries should be free to consider all relevant evidence and to answer the single question of whether they are satisfied beyond reasonable doubt that the accused person committed the offence libelled”. 264 He therefore recommended that the requirement for corroboration in criminal cases should be abolished.

The provisions in the Bill

236. The Scottish Government accepted Lord Carloway’s arguments for removing the requirement for corroboration. In the Policy Memorandum, the Scottish Government stated that it sees Lord Carloway’s recommendations as a “coherent package” and therefore, failing to implement a significant aspect of the recommendations, ran the risk of “undermining Lord Carloway’s stated aim of ensuring the justice system is appropriately balanced”. 265

259 Carloway Review, paragraph 7.2.45.
260 Carloway Review, paragraph 7.2.49.
261 Carloway Review, paragraph 7.2.50.
262 Carloway Review, paragraph 7.2.50.
263 Policy Memorandum, paragraph 136.
264 Policy Memorandum, paragraph 137.
265 Policy Memorandum, paragraph 144.
Sections 57 to 61: Abolition of corroboration rule

237. Sections 57 to 61 of the Bill provide for the abolition of the requirement for corroboration in criminal cases. According to the Explanatory Notes, section 57 provides that (subject to the conditions set out in subsequent sections) where a fact has been established by evidence in any criminal proceedings, the judge and the jury is entitled to find the fact proved by the evidence although the evidence is not corroborated. In effect the section abolishes the requirement in Scots common law that the essential facts of a case be proven by evidence from two different sources (“corroborated evidence”). This proposal applies to almost all criminal cases, not just those crimes often committed in private, such as sexual offences.

238. The Bill excepts from this provision enactments which provide that, in relation to proceedings for a specific offence, a fact requires to be proven by corroborated evidence (the Explanatory Notes cite the example of section 89(2) of the Road Traffic Regulation Act 1984 which provides that a person cannot be convicted of speeding on uncorroborated evidence).

239. Section 59 provides that the abolition of the requirement for corroboration only applies in relation to proceedings for an offence committed on or after the date on which section 57 comes into force.

240. Section 60 provides for the circumstances where an offence is committed over a period of time which includes the date section 57 comes into force. Section 61 makes transitional and consequential provisions.

Section 70: Guilty verdict

241. Section 70 of the Bill seeks to amend the law concerning the size of the majority required for a jury to return a verdict of guilty, in both the High Court and the sheriff court. It provides that a jury of 15 members may return a verdict of guilty only if at least 10 of them are in favour. It also sets out the number of jurors required to return a verdict of guilty where the jury size falls below 15. In each case, a majority of at least two thirds of the jurors is required. Finally, the section provides that a jury is to be regarded as having returned a verdict of “not guilty” if it does not return a verdict of “guilty” and there is no majority in favour of either a “not guilty” or “not proven” verdict.

242. This provision was included in the Bill as an additional safeguard in light of the proposed removal of the requirement for corroboration. However, the change to jury majorities was not proposed by Lord Carloway, who did not envisage the need for any additional safeguards. Instead it arose from the Scottish Government’s consultation on Lord Carloway’s recommendations where a significant number of respondents highlighted the need for safeguards to be put in place should the requirement for corroboration be removed. In its subsequent consultation on safeguards, the Scottish Government sought views on three possible additional safeguards; this is the only one taken forward in the Bill.

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266 Explanatory Notes, paragraphs 137-143.
267 Explanatory Notes, paragraph 139.
268 Explanatory Notes, paragraphs 186-190.
269 A majority of respondents to that consultation said that corroboration should be retained.
General summary of evidence received

243. There were witnesses who supported Lord Carloway’s position that abolishing the requirement for corroboration would achieve access to justice for more victims of crime, in particular, cases which are generally committed in private such as rape, sexual abuse and domestic abuse. It was considered that removing the requirement would improve the ability of prosecutors to bring credible cases to court where currently the absence of corroborative evidence prevents them from doing so.

244. The proposal was welcomed mainly by organisations which support victims of crimes\(^{270}\), such as Rape Crisis Scotland and Victim Support Scotland, as well as by Police Scotland, Scottish Police Federation, Association of Scottish Police Superintendents, and the Crown Office and Procurator Fiscal Service. In its submission to the Committee, Rape Crisis Scotland said that “what we do know is that the requirement for corroboration disproportionately affects complainers in sexual offence crimes, the vast majority of which are committed in secrecy and without witnesses”.\(^{271}\) The Committee noted that, during the course of evidence, the Scottish Police Federation changed their position on this issue.

245. The Committee also received evidence in strong opposition to the proposal from a significant number of witnesses, including the Lord President, on behalf of the Senators of the College of Justice (bar one), the Faculty of Advocates, the Law Society of Scotland, Justice Scotland, and the Scottish Human Rights Commission. The main grounds of opposition were that corroboration provides a vital safeguard against wrongful conviction and therefore the requirement for it in criminal cases could not be abolished without further consideration being given to the consequences of doing so.

246. Lord Gill, the Lord President of the Court of Session, considered the proposal to be a matter of constitutional importance, asserting that corroboration was “one of the great legal safeguards in our criminal justice system”.\(^{272}\)

247. The Committee also heard from a number of academics who specialise in criminal law. Although they disagreed as to whether the requirement for corroboration should be abolished, they were all in agreement that, given the potential impact of the changes proposed, the process would benefit from a more holistic review of the checks and balances present within the Scottish criminal justice system.

248. In particular, in considering how this point had been reached, Professor Pamela Ferguson from the University of Dundee described the process as “piecemeal reform” and expressed concern that “no one is stepping back and

\(^{270}\) The Scottish Parliament’s Cross Party Group on Adult Survivors of Childhood Sexual Abuse did not support the proposal but instead recommended that consideration be given to better application of the law on corroboration.

\(^{271}\) Rape Crisis Scotland. Written submission, page 1.

taking a broad view of the criminal process, looking at the checks and balances and doing a proper comparative study with other jurisdictions”.  

**The case for reconsidering corroboration post-Cadder**

249. The Committee explored with witnesses the perceived requirement to rebalance the criminal justice system as a consequence of the UK Supreme Court ruling in the Cadder v HM Advocate 2010.

250. The Cadder case led to detained suspects being given the right to legal advice where facing police questioning. The Lord Advocate highlighted the impact that this change had in prosecuting rape cases. He stated that it was, prior to the Cadder case, common for a suspect to admit under police questioning that sexual intercourse had taken place, whilst arguing that it was consensual. However, greater access to legal advice post-Cadder had led to fewer admissions of this type and thus increased difficulties in corroborating this element of a rape case. He did not criticise the outcome but noted that “it is just a fact that, in many such cases, we do not have that source of evidence now‖.  

251. The Lord Advocate acknowledged that every criminal justice system is about checks and balances “to ensure that the guilty are convicted and the innocent acquitted”. However, he argued that the right of the accused to have access to a solicitor as a result of the Cadder case had had an impact and that “the system’s delicate balance was disturbed and a rebalancing exercise needed to be carried out”.  

252. Sandie Barton from Rape Crisis Scotland confirmed her view that the change was required as a result of the Cadder ruling and that the rights of the accused “have continued to increase without any commensurate increase in the rights and protections afforded to victims”.  

253. ACC Malcolm Graham from Police Scotland agreed that the Cadder decision had shifted the balance in the legal considerations of those cases and that it was therefore right that Lord Carloway should make recommendations “to ensure that there is an equal focus on the rights of everyone who is involved in the justice system”. However, he was not completely convinced that the proposal was made directly as a response to Cadder as “the issues that I am describing were present in police investigations, and had subsequent consequences in the justice system, before the Cadder decision was made”.  

254. Mark Harrower from the Edinburgh Bar Association acknowledged the change of “landscape” as a result of the Cadder case but was not convinced that the removal of the requirement for corroboration was the right place to look in order to redress this balance. He noted that “if fewer people confess, there will be corroboration in fewer cases from that source, but that does not mean that there will not be corroboration from other sources”. He further noted that advances in

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science meant that methods of sourcing DNA evidence were always improving, and that "we are able to get evidence from other sources in many more cases that we possibly could not have got in days gone by." 279

255. Shelagh McCall of the Scottish Human Rights Commission (SHRC) told the Committee that—

“One of the misunderstandings of the Cadder decision, as the Commission sees it, was the notion that it gave suspects some added advantage and that, therefore, there required to be some recalibration of the system in favour of victims and witnesses. In fact, Cadder brought Scotland into line with the minimum measures that were necessary to comply with article 6 of the European Convention on Human Rights, on the right to legal assistance". 280

256. On a related issue, the Policy Memorandum states that it would not be appropriate to remove the provisions in the Bill dealing with corroboration, whilst approving other provisions flowing from the Carloway Report, since the report’s recommendations should be treated as a single coherent package of measures. 281 It further states that, “by failing to implement a significant aspect of the recommendations contained in [Lord Carloway’s] report, there is a very real risk of undermining Lord Carloway’s stated aim of ensuring the justice system is properly balanced”. 282 Witnesses were therefore invited to respond to this in the context of the proposal that the provisions relating to corroboration should be removed from the Bill and referred for further consideration.

257. Professor Peter Duff from the University of Aberdeen argued that reform of corroboration could be considered separately from the current Bill. He noted that the main thrust of the Carloway report and of the Bill was to “cope with Cadder, new arrest procedures, new representation at police station procedures and so on”. He therefore concluded that removing corroboration from the Bill “would make no difference to the rest of the Bill in my view”. 283

258. Professor James Chalmers from the University of Glasgow also pointed out that the Scottish Government had not taken forward all of the evidential recommendations in the Carloway review. He cited the example of Lord Carloway’s recommendations that there should be a new statutory test for the admissibility of evidence, which is not included in the Bill. He therefore concluded that “the suggestion that the corroboration requirement cannot be taken out because it is all or nothing is not one that the committee should be persuaded by”. 284

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281 Policy Memorandum, paragraph 144.
282 Policy Memorandum, paragraph 144.
Investigation, prosecution and quality of evidence

Investigation and prosecution

259. As already noted, a principal argument put forward by supporters for abolishing the requirement for corroboration was that doing so would improve access to justice for victims of certain crimes. Lord Carloway concluded that the requirement for corroboration creates “miscarriages of justice in the broader sense, because perfectly legitimate cases that would result in a conviction are not being prosecuted because of the corroboration rule.”

260. This was generally highlighted in relation to crimes which are committed in private, where the testimony of a complainer may be the only source of evidence. This could be “a particular barrier to obtaining corroboration for sexual crimes and for domestic violence as there may be nothing else, or very little, in the absence of statements made by suspects at interview”. The practical effect of the requirement for corroboration could therefore be “to deny access to justice for victims of these types of crimes”.

261. The Lord Advocate said that he supports the proposed abolition, noting that “prosecutors and I see the acute effect of the rule of corroboration in certain areas of criminal offending—particularly sexual offending, including rape, and domestic abuse. As women and children are very much in the majority of victims in those areas of criminality, the effect of the corroboration rule is disproportionate on them.” He noted that, in 2012-13, 2,803 domestic abuse charges were not taken up because there was insufficient admissible evidence. His concern, therefore, was that “we are not providing the possibility of access to justice for a sizeable proportion of victims in those charges”.

262. ACC Graham considered the existence of the rule as an “unfair bar to justice”, in particular, “in the commission of the very offences that perhaps we would most seek to address, there is an intention on the part of the perpetrator to exploit some of the technical rules that prevent proceedings from taking place.”

263. Lily Greenan from Scottish Women’s Aid also welcomed the proposal as it would “provide the opportunity for the kinds of discussions that happen in backrooms at the moment to be heard in court”.

264. Alan McCloskey from Victim Support Scotland indicated that in his view it was also about victims, witnesses and the public having more confidence in the system. He noted that if removing the requirement would allow “more cases to be
considered and potentially taken forward on the basis of a reasonable prospect of conviction … that will allow confidence in the system”.\textsuperscript{292}

265. However, not all witnesses were convinced whether ‘access to justice’ would be served by taking such an approach. Indeed, there was a variety of views on exactly what ‘access to justice’ means. A supplementary written submission from the COPFS stated that “it is important to be clear at the outset that the abolition of the requirement for corroboration is not about improving detection or conviction rates … it is about improving access to justice for victims”.\textsuperscript{293} However, Lord Gill responded to this point by stating that “I think that that is a rather simplistic statement from the Crown”. He went on to state that “if your case is unlikely to succeed, I am not convinced that you are doing the complainer any favours by bringing it; after all, it is an ordeal for them”.\textsuperscript{294}

266. Lord Gill said that that he was also concerned that the removal of the requirement for corroboration would have a deleterious impact on the quality of justice in Scotland. He agreed that there was a concern to ensure that sexual crime and domestic abuse are properly and effectively prosecuted. However, he was concerned that abolishing the requirement for corroboration would result in weak cases with uncorroborated evidence being brought forward. He therefore questioned whether juries would convict on the word of one person with nothing else to support it.\textsuperscript{295}

267. Mr Harrower from the Edinburgh Bar Association considered the removal of the requirement for corroboration to be “a massive step simply to get at crimes that are committed in private”. He said he believed that other options should also be explored, suggesting that “we need to be more imaginative if we want to assist the Crown in finding ways to support complainers’ evidence rather than removing corroboration across the board”.\textsuperscript{296}

268. There was also a general expectation that abolishing the requirement for corroboration would increase the number of cases prosecuted, particularly in the case of sexual abuse, rape and domestic violence.

269. In his review, Lord Carloway referred to research which the Crown Office and Procurator Fiscal Service (COPFS) had been commissioned to carry out to examine the impact that removal of the requirement for corroboration would have on the number of cases brought forward for prosecution. In his report, he highlighted the result of this research, noting that the results suggested that “a substantial proportion of cases, which are currently not prosecuted because they fail the corroboration test, could be prosecuted with the reasonable prospect of securing a conviction”.\textsuperscript{297} The quality of this research was challenged during evidence.

\textsuperscript{292} Scottish Parliament Justice Committee. \textit{Official Report, 10 December 2013 Col 3901.}
\textsuperscript{293} Crown Office and Procurator Fiscal Service. Supplementary written submission, paragraph 4.
\textsuperscript{297} \textit{The Carloway Review}, paragraph 7.2.34.
270. The COPFS stated in its written evidence that, in preparing for this Bill, it had, with the police, conducted further research into the impact of the abolition of the requirement on the number of cases that could be brought forward. It reported that the result of the exercises suggested “a 1.5% increase in the number of cases which will be reported to the COPFS by the police; a 1% increase in COPFS summary business; and a 6% increase in COPFS solemn business.” Further details of this exercise are set out in the Financial Memorandum which accompanied the Bill. Again, these projections were challenged during evidence.

271. Raymond McMenamin from the Law Society of Scotland warned that it was “easy for some people to be swayed by the numbers game” and therefore emphasised that the issue should not be approached on this basis, noting the need to “look at each case individually and decide whether it is appropriate to bring a prosecution and whether it is in the public interest”.

272. Professor Duff warned against removing the requirement for corroboration simply to enable more cases to be prosecuted. In his view, this could actually result in an increase in acquittals and therefore more unhappiness on the part of the victims. He therefore concluded that “rather than resolving the problem with a quick fix, the Government would have succeeded in making the problem worse”.

273. Professor Ferguson shared this view, cautioning against taking forward the proposal just to get more people access to court. She acknowledged that, for some, it was about getting the accused into court, however, the vast majority were looking for a conviction. She therefore noted the danger that “expectations will be raised and people will go to the police and say, ‘I know it’s just my word against his, but that’s good enough now because there’s no corroboration requirement’, but it will not be good enough because juries will not convict.”

274. All witnesses shared the view that the conviction rate for cases of sexual offences and domestic abuse was unsatisfactory. However, there were differing views on whether removing the requirement for corroboration would significantly address this.

275. The Lord Advocate told the Committee that “it has been said that the abolition of corroboration is intended to increase the conviction rate for rape or other sexual offending [but] I have never seen that as the purpose and I have never ever said that it was all about increasing the conviction rate”.

276. While Professor John Blackie from the University of Strathclyde agreed that the low conviction rate for sexual offences was of serious concern, he also agreed that abolishing the corroboration requirement would not necessarily change that. He considered the rate of sexual offences to be a concern which required more

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298 Crown Office and Procurator Fiscal Service, Written submission, paragraph 35
299 Financial Memorandum, paragraph 32
serious consideration and was worried “if abolition of corroboration was being seen as a quick fix … to a serious social and justice problem”.  

277. James Wolffe QC from the Faculty of Advocates considered there to be uncertainty as to the practical effect of the provisions. He noted that—

“At first flush one might expect the rate of conviction for sexual crimes to decrease, because one is prosecuting crimes with a lesser evidential basis [however] there might be an increase in the conviction rate, not in sexual cases but across the board. Whether that will be so, and what the implications for the system and its resourcing will be, are anyone’s guess.”

278. Ms Barton of Rape Crisis Scotland agreed that removing the requirement for corroboration would not of itself make a difference in improving the conviction rates for offences committed in private but that, although the numbers involved may be small, the cases are significant to the people involved”. She also regarded the proposal “as an important step forward” and that “alongside other important measures, it could make the difference”.

279. Professor Duff said that he shared the view that abolishing the requirement for corroboration would not necessarily increase the conviction rate. In addressing this point, he suggested, as a different approach to cases of rape and other sexual assaults, reform that would allow the appointment of a lawyer to safeguard the complainer’s interest during the trial.

280. In response to these points, the Lord Advocate indicated that he did not consider the justice system to be about conviction rates; instead it was about delivering justice. He reiterated his view that enabling greater access to justice was the main objective in bringing forward this change, noting that, in his experience, “people have wished for the opportunity for their version of events and account to be heard in a court of law with the possibility that the jury, with the burden of proof and all the protections, would reach a verdict on that”.

281. The Cabinet Secretary for Justice confirmed his view that corroboration must be abolished “because it is denying access to justice for not tens or hundreds but thousands of people each year”. In terms of the number of convictions, he acknowledged that decisions on guilt and innocence rest with the judiciary and the jury, however, he considered that, by not providing access to justice, “we are not giving victims the opportunity to have closure.”

282. The Cabinet Secretary could not confirm or guarantee that any particular offence prosecuted as a result of abolishing the rule would result in a conviction.

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308 Professor Duff. Written evidence, paragraph 5.
However, he accepted that this was a matter of speculation; nevertheless, he said he believed that “it is likely that increased access to justice will lead to more convictions”.

Quality of evidence

283. Some witnesses had concerns regarding the perceived artificial nature of the requirement for corroboration. In particular, it was argued that the requirement for corroboration resulted in a focus on the quantity of evidence, as it needed to come from two separate sources, rather than the quality of evidence. Lord Carloway highlighted this as one of his arguments in favour of abolition.

284. ACC Graham, agreeing with this position, said that, “in some cases, an assessment of the quality and sufficiency of the evidence as a whole is prevented because of a technical barrier in one of the facts of the charge not being corroborated technically in the way that the law is constructed”.

285. Ms Greenan from Scottish Women’s Aid echoed this view and identified issues in the current application of the requirement which meant that there could be a temptation for investigators and prosecutors to say “we’ve ticked the two boxes—we can put that one forward”. She emphasised that this was not a criticism of how the fiscal service operates as a rule but that it was “just a recognition that, when people are pressured, they do the minimum that they need to do to move on to the next thing on their list.”

286. However, some witnesses were concerned that the abolition of the rule would have a detrimental impact on the quality of evidence being presented. In particular, it was suggested that there may be a temptation to try to bring more cases forward with less chance of conviction as the bar set by corroboration would no longer apply.

287. Mr Harrower from the Edinburgh Bar Association highlighted the need for good quality evidence, noting that “juries find it difficult to assess cases involving crimes, particularly of a sexual nature, that are committed in private” and that “the case very often boils down to one person’s word against another’s”. He was therefore concerned that this would become more difficult without the requirement for corroboration, noting that—

“Currently the cases that go to court have that element of additional evidence. What is proposed is that we put cases into court where that additional element is absent. How can we expect juries to be more sure where that evidence is not there?”

Police and Crown investigations

288. Some witnesses had concerns that, without the legal requirement for corroboration, police officers and prosecutors might come under pressure to do

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the minimum required, not always looking for corroborative evidence even if it might be expected to be available.

289. Lord Gill was concerned that, as corroboration was costly in terms of police time and resources, the prosecution might not look for corroboration when it was not required. In particular, at a time when resources were scarce he said he believes that it would be unfortunate if “economies were to be made in that direction”.318

290. Mr Wolfe QC echoed this concern, noting that “significant additional costs” had been identified for criminal justice bodies as a result of provisions of the Bill.319 However, the expectation set out in the Financial Memorandum was that these new costs would be absorbed without any increase in funding. He acknowledged that, if the removal of the requirement was the right thing to do, the means to resource this would have to be found. However, his main concern was that “a system that one might already regard as stretched will become overstretched” and that “any investigation that does not have to be carried out might not be”.320

291. The COPFS emphasised that it was the requirement for corroboration that was being abolished, not the concept of corroboration itself. It confirmed therefore that—

“In many cases corroborative evidence as we currently understand it will be available. In all cases the police and the COPFS will look for evidence which supports the credibility of the allegation of the commission of a crime as it is this supporting evidence which will often be a check and balance against possible injustice.”321

292. The COPFS also indicated that, irrespective of the proposed changes, the standard of proof remained that a charge must be proved beyond reasonable doubt, which was the main safeguard against miscarriages of justice.322

293. The Lord Advocate confirmed that the police and prosecutors are under a number of obligations to properly investigate cases. Police are under a common law duty to investigate a case fully. Under the ECHR, prosecutors and the police are under a duty to “properly and fully investigate cases and bring forward all relevant evidence”.323 Police and prosecutors are also under a duty in their disclosure obligations to ensure that cases are properly investigated and that any evidence in favour of or adverse to an accused person is properly disclosed. Finally, prosecutors are under duties to ensure that trials are conducted fairly.324

294. ACC Graham also refuted the notion that the proposal was resource driven, highlighting that “it is absolutely not the case that our support for the proposed

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322 Crown Office and Procurator Fiscal Service. Written submission, paragraph 34.
323 Article 6 of the ECHR seeks to protect the right to a fair trial.
changes to the law on corroboration is driven in any sense by financial pressures”. 325 He offered further reassurance, stating that—

“With neither hesitation nor qualification, I can say that the standard of investigation across the board would not change, were this law to be brought in as proposed. There is an absolute requirement on the police to undertake investigations, with diligence and rigour, to an evidential standard that is established through case law, which would not change as result of any of the bill’s proposals.” 326

295. This position was supported by Chief Superintendent O’Connor of the Association of Scottish Police Superintendents who noted that “in terms of policing nothing will change, because police officers will continue to go out there and conduct very comprehensive investigations and gather all the evidence” and that “full, detailed and comprehensive investigations will continue in the police service”. He added that he had “absolute confidence that the police service will continue to seek corroboration from whatever source; thereafter, it is a matter for the Crown to look at the veracity, sufficiency and competency of the different strands of evidence”. 327

296. The Cabinet Secretary said that he had no concerns in this area, noting the view of the Lord Advocate that “the police would always look for additional evidence”. He also highlighted concern at the current draw on resources resulting from application of the rule, which often required duplication of effort by police officers in a number of areas. 328 The Committee however, has concerns that there may be resource implications elsewhere.

New prosecutorial test

297. The Lord Advocate highlighted a proposed new prosecutorial test which would be in different terms to the current test (which he characterised as being largely based on an assessment of the quantity of evidence). As part of the new test, the prosecutor would have to make the following assessments—

(a) a quantitative assessment - is there sufficient evidence of the essential facts that a crime took place and the accused was the perpetrator?

(b) a qualitative assessment - is the available evidence admissible, credible and reliable?

(c) on the basis of the evidence, is there a reasonable prospect of conviction in that it is more likely than not that the court would find the case proved beyond reasonable doubt? 329

298. The COPFS stated that reform of the evidential part of the prosecutorial test would shift focus onto the credibility of the allegation and the quality of evidence which supports the allegation. It confirmed that only if a case meets the new

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evidential part of the test would the prosecutor consider what, if any, action to take
in the public interest (this aspect would not change with public interest
considerations remaining as at present). 330

299. Application of the test would “allow proceedings to be raised in a number of
cases where at present the Crown cannot proceed due to a technical lack of
corroboration for what are credible allegations where there is compelling
supportive evidence”. 331 Finally, the COPFS confirmed that the test would be
published as part of the Prosecution Code and that further guidance would be
provided on the way this test would be applied. 332

300. The Lord Advocate indicated that, in applying the reasonable prospect of
conviction test, it would be “necessary to look at the principal allegation, so the
complainant’s version or account is considered” and whether the complainant’s
account is “credible and reliable”. He also confirmed that a view would be reached
on the “totality of the evidence” and that factors to be assessed would include
“whether there is supporting evidence for the complainant’s account, whether it is
circumstantial and what evidence there is against that account”. 333 He added that
“I would not – and prosecutors would not – take up a case without any supporting
evidence”. 334

301. Mr Wolffe QC had some reservations that this was not sufficient to allay fears
about prosecutorial decisions should the requirement for corroboration be
abolished. He argued that this was a constitutional issue as “the Parliament is
looking at the statutory structures within which a trial will take place and the
safeguards in that regard” but that the test would not be “enshrined in statute” and
so far had been “the subject of relatively little debate”. 335

302. In particular, Mr Wolffe QC noted that “Lord Advocates come and go and
may change their guidance” and therefore the application of the test and the
guidance informing prosecutorial decisions was also subject to change. In
particular, he highlighted the example of certain classes of individual identified in
the COPFS written submission where it was confirmed that proceedings would not
be taken without strong supporting evidence. His concern was that this
demonstrated the test would be applied “in different ways to different classes of
case” in ways that are “unclear and unknown”. His concerns therefore remain that
the prosecutorial test is “not a legislative safeguard, and precisely how the test will
be applied remains to be seen”. 336

303. Professor Chalmers echoed this concern, noting that “it would be wrong to
suggest that [the new prosecutorial test] offered additional safeguards. All it does
is ask the question that the prosecution would have to ask in the absence of the requirement for corroboration.”

304. Questions were also raised as to how any requirement for supporting evidence would work in practice. Professor Chalmers highlighted what he saw as the incoherence of a position where there would be no legal requirement for supporting evidence although “without it prosecutions will not go ahead”. 338 Professor Duff concurred with this view, questioning what the requirement for supporting evidence would mean in practice—

“If we do not need corroboration but need supporting evidence, one has to ask what that supporting evidence is. Actually, it is simply corroboration by another name, which is the position in most other jurisdictions”. 339

305. The Cabinet Secretary reiterated the Lord Advocate’s assertion that cases would not be brought forward without supporting evidence. He cited the situation in the Netherlands where to secure a conviction there had to be “additional evidence beyond the principal matter” which is a position he believes the Lord Advocate wishes to move towards in Scotland. In terms of ensuring that such an approach was secured in the future, he indicated that he would be happy to place the new prosecutorial test on the face of legislation and “enshrine what has to be proven before there can be a conviction”. 340

Dilution and complexity of the corroboration rule

306. Lord Carloway argued that the requirement for corroboration is a complex concept which is often misunderstood and misinterpreted. In his report, he stated that the complexities of the current requirement mean that there is difficulty in the rule being understood by people outside the world of criminal practice. He continued this argument further in oral evidence to the Committee where he said that “I do not think that the concept is particularly well understood by many of the legal profession [and this can be seen] by the decisions that continue to come out from the courts from time to time”. 341

307. Professor Duff agreed that the law on corroboration is very complex, noting that “judges have, on occasion, tried to find a way around it so that they can open the way to conviction for those who they think are guilty” and that “the problem is that the law has become so complicated that nobody really understands it properly.” 342

308. ACC Graham noted that the complexity of the rule had developed over time in order to “fit in with developments in society, legal process and evidential availability, and the original concept in very simple terms has perhaps been overtaken by all those changes and developments”. 343 The Lord Advocate

followed up this point, noting that it is not only complex but that the interpretation of corroboration has changed over the years and that “prosecutors have been pretty creative in legal arguments to try to place cases before the court”.

309. Professor Chalmers accepted that it may well be the case that the rule is complex, however, he argued that any replacement would likely be equally as complex—

“We ought to remember that systems that do not have corroboration will safeguard against wrongful conviction through a wide range of different measures that are designed to prevent it. In the aggregate, those measures might turn out to be as complicated and confusing as corroboration itself. It is not clear that a system without corroboration is necessarily simpler.”

310. Professor Duff emphasised this point, noting that—

“I would not say that corroboration should be abolished because it is complicated; it is complicated, but all evidentiary doctrines are complicated. I am not sure that one can really address it in an atomistic way ... without looking at the overall context.”

311. The Cabinet Secretary considered that these difficulties helped to justify the need to abolish the corroboration requirement as, in his experience, “we do not know what corroboration is”. He said that, when “two of our most senior academics” were asked to provide a synopsis of the law of corroboration, they admitted that they could not reach one on which they could agree.

312. His view was that “in the main laws should be understandable not just to lawyers but to the general public” and that “one lawyer will disagree with what another views as corroboration”. He therefore concluded that “when we cannot get the academics or the judiciary to agree on the law of corroboration ... we are leaving it to individuals to make a decision ... about access to justice, and there is something fundamentally wrong with that.”

Attitudes to sexual offences and domestic abuse

313. A more general issue raised during evidence related to the role public attitudes in general, and jury attitudes in particular, play in the low conviction rate for certain types of case, including rape. The Committee noted evidence that, whilst the law restricts research into the basis upon which juries come to decisions, prosecutors face significant difficulties in, for example, explaining why a rape victim may offer little physical resistance to an assailant.

314. Tony Kelly from Justice Scotland concurred that the conviction rate for incidents of violence against women is an issue. He stated that at the root of poor
conviction rates were “prejudices and attitudes” and that “further consideration and work will be needed before we get anywhere near addressing that”. 350

315. Ms Barton from Rape Crisis Scotland noted that the Scottish Government had commissioned research which highlighted that “a quarter of people still believe that a woman is partly responsible [for any assault] if she has been drinking or if she has been wearing revealing clothing”. 351

316. The Lord Advocate was similarly concerned that public perceptions are an issue in relation to offences, such as rape, for example “that a woman who wears a short skirt is asking for it”. He also highlighted research conducted throughout the world into “jury myths”, including issues such as “delayed reporting, a lack of physical resistance, or the way that a woman is dressed” and how this affected how jurors viewed cases. 352 He noted that it was important to counter such attitudes in the presentation of cases 353 and that “through the national sexual crimes unit, we have been using expert evidence on many of what I call the rape myths to educate the jury as part of the trial process, and that work will continue”. 354

317. Ms Greenan from Scottish Woman’s Aid argued that “attitudes, assumptions and prejudice”, rather than evidence, could be the decisive factors in relation to successfully prosecuting some offences. She added that “the notion that removing the requirement for corroboration will in any way change that situation is false”. 355 She also claimed, however, that it would provide “a greater opportunity to have the discussions and probe the issues in the courtroom” and that “removing the requirement for corroboration would provide the opportunity for the kinds of discussions that happen in backrooms at the moment to be heard in the court”. To her, the important point was that “we will open up discussions about the evidence that really exists about violence against women by having them in the courtroom”. 356

318. Ms Barton agreed with this point. She also noted that this was part of a long-term picture that included access to judicial training, wider prevention work on changing values and attitudes and the introduction of female forensic examiners. This would all contribute towards “changing the culture of the courtroom and affording rights to complainers”. 357

319. When invited to respond to the suggestion that taking forward prosecutions which are more reliant on the evidence of the complainer alone would result in such complainers being subjected to more vigorous questioning in court, Lily Greenan responded that the “court cannot be any harder for victims in rape or sexual violence cases, who get grilled and ripped to shreds in court”. She added that—

“For victims of interpersonal crimes such as domestic abuse, rape and sexual assault, I do not see how it could be worse or how we could get a worse conviction—or failure—rate. I therefore do not accept those arguments as a reason not to consider abolishing the requirement for corroboration.”

320. Ms McCall from the SHRC acknowledged that corroboration is an impediment to certain types of cases getting to court, however she noted that this is not the only issue; “we need a much wider strategy to try to shift those cultural norms, if they are norms”. She indicated that, in terms of changing social attitudes, the SHRC had highlighted the need for “a comprehensive strategy for tackling violence against women, as well as an action plan for how to put that strategy into place”.

321. Professor Fiona Raitt from the University of Dundee highlighted a model she had been working on whereby a complainer in a rape or sexual assault case would receive legal advice during the hearing of their case. She noted that it was generally agreed that women who are aware of their rights relating to access to their medical and sensitive records were in a much stronger position in relation to the evidence they are able to give under cross-examination. She added that such complainers could not always rely on the judge or the Crown to protect their position in court and that this may be even more of an issue if the requirement for corroboration is abolished.

322. Professor Duff suggested that consideration should be given to introducing broader court procedures in considering how to address poor conviction rates in rape and sexual abuse trials. He considered that comparative research could be carried out to examine how such cases are conducted in other jurisdictions.

323. The Cabinet Secretary acknowledged that there are “various factors that we do not know in why juries come to decisions”. However, he said that he believed that the proposed changes would bring about greater confidence in the system which, in turn, would lead to more victims coming forward. His view was that, “if victims believe that the law provides support for them, they are more likely to report crimes and go through all the stages that can be traumatic for them”.

International comparisons

324. During his evidence session with the Committee, Lord Carloway indicated that, in having legal requirement for corroboration, Scotland was out of step with other countries. He noted that it is “the only country in the world that has the rule” and that in this regard “it was different from that in any other country in the civilised western world or the Commonwealth.”

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325. Mr McMenamin took a different view, noting that Scotland is not the only jurisdiction that has a requirement for corroboration. He acknowledged that it was true that “our application of corroboration is more widespread and we rely on it more than any other country, but other countries also apply it”. He noted that the United States of America used corroboration a lot and that “research will show that other jurisdictions think that corroboration must be considered in many cases”. He added that in England “the system contains certain safeguards whereby judges in certain cases can caution juries regarding corroboration and prosecutions based on single-source evidence”.

326. Ms McCall emphasised the difficulty in making such comparisons, noting that “other systems have other safeguards to ensure the quality of evidence” and that “the difficulty with looking at other systems and saying that they do just fine without corroboration is that you are comparing apples and pears”.

327. Professor Ferguson also countered Lord Carloway’s argument, noting that colleagues from different jurisdictions had confirmed that, despite stating that they had no official requirement for corroboration, it did operate unofficially in other jurisdictions. She noted that “when we probed a bit more deeply, they all said ‘No prosecutor would go ahead without what you call corroboration or two pieces of evidence’ and that judges would not find someone guilty beyond reasonable doubt just on the witness of one complainer”.

328. Lord Gill argued that “we should be proud of the fact that we have something that other jurisdictions do not have. It is one of the great hallmarks of Scottish criminal law.”

Retrospective application of abolition of requirement for corroboration

329. Section 59 of the Bill provides that abolition of the requirement for corroboration would not apply retrospectively. Thus, corroborated evidence would be required for the prosecution of offences committed before the date of abolition.

330. Petition 1436 in the name of Collette Barrie calls for retrospective application. The Committee agreed to consider the petition alongside its consideration of the Bill on 24 September 2013.

331. Ms Barrie argued that making abolition retrospective would ensure full access to justice for victims of crime and noted that, by doing so, “perpetrators of the most heinous acts [would be] held to account for their actions and prevented from harming others”.

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369 Collette Barrie. Written submission, page 5.
332. In its written evidence, Rape Crisis Scotland concluded that to not make this change to the legislation retrospective would in effect mean that “survivors of historic child sexual abuse or rape will continue to face this barrier to justice.”

333. In terms of the appropriateness of the provisions applying retrospectively, Ms Barrie drew a parallel with the Double Jeopardy (Scotland) Act 2011 which allows for retrospective application of its provisions. She noted that, during the passage of that Bill, it was argued that “it is immaterial whether the conviction or, as the case may be, the acquittal was before or after the coming into force of the Act.”

334. However, a number of witnesses argued strongly against retrospective application when questioned on the point during oral evidence. It was described as “unworkable and inappropriate” and “fundamentally unconstitutional” by Mr McMenamin and Mr Wolfe QC. Robin White of the Scottish Justice’s Association said that “there are almost never any justifications for any retrospective criminal legislation”.

335. The Cabinet Secretary said that, although he had sympathy for those who seek to bring in the provision retrospectively, he did not consider such an approach to be possible. He argued that any attempt to remove the need for corroboration in relation to offences committed before commencement of the relevant provisions could cause confusion and “great difficulties for prosecution”.

Requirement for corroboration as a safeguard

336. A principal argument put forward for retaining the requirement for corroboration was its central importance within the Scottish criminal justice system and its importance as a check against miscarriages of justice (in the sense of wrongful convictions).

337. Lord Gill stated that the requirement for corroboration is an important protection that has reduced the number of miscarriages of justice. He therefore emphasised his fear that “there would be many more [miscarriages of justice] if corroboration were to be abolished”.

338. Mr Harrower echoed this position, indicating that the relatively low number of miscarriages of justice in Scotland could be attributed to the high bar set by the requirement for corroboration. He also said he was concerned that miscarriages of justice would increase if the requirement was abolished as “it stands to reason that, if we lower the standards that are required, we will convict more innocent people”. He argued that juries are currently assisted by existence of the

370 Rape Crisis Scotland. Written submission, paragraph 2.2.
371 Collette Barrie. Written submission, page 5.
corroboration requirement when trying to establish the truth of matter and that it was regarded as "an independent check" for both juries and sheriffs. 376

339. Professor Duff highlighted the pressure on prosecutors in sexual assault and domestic violence cases, noting that "they are under great political pressure to prosecute every case". His concern was that, without the protection of the requirement for corroboration, cases which are reliant on the evidence of a single individual would be prosecuted, thus increasing "the danger of miscarriages of justice". 377

340. Mr Wolffe QC stated that, given the significance of the requirement for corroboration in the overall context of the Scottish criminal justice system, "one must look very hard at what one is putting in its place, and one must ask whether one is getting the right balance between safeguards against miscarriages of justice on the one hand, and a reasonable system for prosecuting crime on the other". 378

341. Mr Kelly of Justice Scotland cautioned that without corroboration and with nothing added to safeguard against wrongful conviction, Scotland may be in breach of article 6 of the European Convention on Human Rights (right to a fair trial). He said that if the requirement for corroboration was taken away, "it is difficult to see what the argument would be when Scotland goes to the European Court of Human Rights to respond to an accused person’s complaint that he has not had a fair trial". 379

342. Lord Carloway acknowledged the perception that corroboration is central to the criminal justice system, stating that "more than any other feature of the criminal justice system, it is seen by many as a defining and distinctive characteristic of the Scots law of evidence in criminal cases". 380

343. He also acknowledged that "the necessity of having corroborated evidence has ... lain at the heart of the criminal justice system since time immemorial and has been, and still is, regarded by many as an "invaluable safeguard' against the occurrence of miscarriages of justice". However, he said that he could find no evidence that the requirement served this purpose, instead concluding that "the real protection against miscarriages of justice at first instance is the standard of proof required; that the judge or jury must not convict unless convinced of guilt beyond reasonable doubt". 381 He backed up this assertion with evidence from his review, confirming that during that process "we were given no material to suggest that there is a difference and that the rule in relation to corroboration reduces the likelihood or incidence of miscarriage of justice in our jurisdiction". 382

344. In the broader sense, Lord Carloway said that the requirement was actually creating miscarriages of justice "because perfectly legitimate cases that would

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380 *Carloway Review*, paragraph 7.2.1.
381 *Carloway Review*, paragraph 7.2.41
result in a conviction are not being prosecuted because of the corroboration rule.\textsuperscript{383}

345. ACC Graham advised the Committee that he had not heard any credible evidence to support the view that there would be an increase in miscarriages of justice. He was also reassured that sufficient provisions were in place to avoid this happening. In particular, he noted that “the burden of proof, the test of sufficiency of evidence put before the court and all the other measures for carrying out a qualitative assessment of the inadmissibility and so on of the evidence are in place”.\textsuperscript{384} The Lord Advocate echoed this point, noting that the standard of proof remained the same and that it was “a matter for the jury whether, having tested the evidence, they find the case to be proven beyond reasonable doubt”.\textsuperscript{385}

346. Mr McCloskey from Victim Support Scotland stated that—

“There would still need to be a reasonable prospect of conviction, and the jury or the judge will have to consider that the matter is proved beyond reasonable doubt. Those absolute cornerstones of our system will still be there, and they should remain.”\textsuperscript{386}

**Sufficiency of protection after abolition**

347. Mr Wolffe QC expressed serious concerns about the proposed abolition of the corroboration requirement without having proper safeguards in place to address any change to the balance of justice. He noted that there is a need to examine the issue—

“In the context of the other things that have been done by way of adjusting and compensating in a system that has until now—in ways that cannot be overemphasised—been fundamentally based on that doctrine being at the heart of our criminal justice system”.\textsuperscript{387}

348. Mr Harrower was similarly concerned, noting that—

“Miscarriage of justice cases are very costly for the system in terms of both money and public confidence. Until now, we have managed to avoid them for a reason and, to me, corroboration is the main reason.”\textsuperscript{388}

349. Ms McCall also urged caution in relation to abolishing the corroboration requirement without considering what other measures should be introduced in its place. She noted that access to justice for an accused person includes there being the proper means by which to challenge the quality of evidence against him—

“At present, corroboration serves that function as a means of quality control. If we abolish it without reassessing the system and seeing what other safeguards might be needed, there will be nothing, apart from the ability to
cross-examine, to provide the proper means to challenge the reliability of evidence.”

350. Ms McCall cited examples of types of evidence where there would be difficulties if the requirement for corroboration were abolished. These included dock identification which the Judicial Committee of the Privy Council had determined was acceptable in conjunction with the requirement for corroboration. The European Court of Human Rights had also expressed concerns about evidence from anonymous witnesses and undercover witnesses “due to the difficulty for the defence to challenge its quality and ensure its integrity”. Ms McCall said she was therefore of the view that examples of this type highlighted “the breadth of the implications of abolishing corroboration across the system” and that time therefore needed to be taken “to examine the matter properly.”

351. In terms of the possibility of miscarriages of justice, the Cabinet Secretary’s view was that—

“We should recognise that the requirement for corroboration has not avoided miscarriages of justice here, and equally that the lack of corroboration has not resulted in them elsewhere. They occur for a variety of reasons. The fact that we are one of the few countries that have a commission to review criminal cases is a tribute and testimony to the serious view that we take of the matter. That is the position.”

352. With regard to ECHR compliance, the Cabinet Secretary confirmed that “a victim might choose eventually to go to Europe to challenge the system because they are not getting access to justice” as a result of the barrier presented by the current corroboration requirement.

353. In terms of further review, he accepted that issues highlighted, such as dock identification, needed to be examined further in terms of the impact of the abolition of the requirement would have on using such evidence. He also said that he was open to further suggestions of areas that would require review, acknowledging that “we cannot go from the old regime to the new regime without ensuring that we have it right”. He indicated that the Scottish Government was happy to take the time to get it right.

354. The Cabinet Secretary confirmed that, although there was urgency to implement the changes as quickly as possible, it had always been the Scottish Government’s intention that the changeover to the new system would not be
triggered until 2015. This would allow time for the necessary training for “not just police officers but the judiciary and prosecutors”.

Retention of corroboration in certain cases

355. An alternative proposal was to remove the requirement for corroboration only in respect of certain types of cases, such as rape, sexual abuse and domestic abuse.

356. In its submission, the Scottish Parliament’s Cross Party Group on Adult Survivors of Childhood Sexual Abuse suggested that wider definitions of corroboration should be permitted in private cases as it would seem disproportionate “to do away with corroboration for all crimes when it only impedes justice in some cases”.

357. However, Lord Gill did not consider that retaining corroboration only in relation to certain cases to be “a wise approach”, noting that “if you legislated specifically for one type of offence and relaxed the evidential requirements in respect of it, you could create, in a sense, a privileged class of complainers for that type of crime”. He therefore concluded that “the legislation must apply across the board”.

358. Ms Greenan agreed with Lord Gill’s point, stating that “the justice system should be for everyone on an equal basis”. She also highlighted the importance of not complicating matters in solemn cases noting that “technical directions to juries are problematic in terms of what counts and what does not count” and therefore that “anything that makes the process more complicated is going to be harder”.

359. Mr Harrower also noted that cases very often came to court with a number of different charges and so there was potential for confusion, particularly for juries—

“If a complainer has alleged a number of different types of crime against the same person, how do we explain to a jury that charges 1 and 2 do not require corroboration but charges 3 and 4 do? Juries have to absorb a lot of directions in a short space of time, it is sometimes difficult for them to get their heads around them but they do their best. It will make things very complicated if we create certain classes of case in which corroboration is not required.”

360. The Cabinet Secretary confirmed that such an approach had been considered but concluded that the law of evidence “should be, in the main, clear

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across the board” and that taking such a step would “cause great difficulties for those who operate the system”.403

Additional safeguards

361. Lord Carloway, in his review, did not anticipate the need for additional safeguards in the event that the requirement for corroboration was abolished. He said that he did not think the system needed to be rebalanced as he did not accept the argument that the corroboration requirement is a protection against miscarriages of justice.

362. However, a significant number of responses to the Scottish Government’s consultation on Lord Carloway’s recommendations404 reached a different conclusion, highlighting the need for additional safeguards to be introduced should the requirement for corroboration be abolished. Given the central role that the requirement for corroboration plays, there was a strong view that additional provisions needed to be in put in place to protect against wrongful convictions.

363. Lord Gill stated that—

“If there is a good solid case for abolishing corroboration, there should be no need for any safeguards. The moment that we say that there have to be safeguards, we are conceding that the change creates a risk of miscarriage of justice, which in my view, it will”.405

364. In response to concerns such as these, the Scottish Government launched a second consultation, with a view to providing additional safeguards, seeking views on three additional areas of possible reform: (a) changes to the current system under which a guilty verdict only requires the support of eight out of 15 jurors; (b) giving the judge in a jury trial the power to acquit the accused, without referring the matter to the jury; and (c) removing the ‘not proven’ verdict as an option in criminal cases.

365. While reform in all three areas was generally welcomed, some reservations were expressed at introducing (b) and (c) as safeguards. Therefore, the only additional safeguard included in the Bill relates to the jury majority required in order to reach a guilty verdict (requiring a two-thirds majority of jurors in order to establish guilt).

Guilty verdict

366. The proposed reform to the rules on jury majorities (within the context of the planned abolition of the requirement for corroboration) was not one of the main issues highlighted in evidence to the Committee. It was, however, argued that reform in this area alone would not provide a sufficient additional safeguard, although it might be desirable.

367. Professor Duff suggested that this provisions in the Bill appeared to be “rather plucked out of thin air” and that there was “no evidence to support whether that would make any difference and no detailed consideration of it”. 406

368. Mr McMenamin had similar concerns, querying how the figure of 10 out of 15 had been reached and noting that “no research has been carried out on the matter”. In terms of the adequacy of the provision as a safeguard, he compared it to the English system, where corroboration is not used in such a widespread fashion, but—

“Juries are in the first instance, directed to return unanimous verdicts. Only on the judge’s direction can there be a 10 out of 12 majority verdict for a conviction, which is still a substantially higher standard than 10 out of 15.” 407

369. Mr Kelly was also not convinced that the change would provide the necessary safeguards. He noted Justice Scotland’s position that there was nothing “particularly significant or scientific about plucking a magic figure out—pushing the majority figure up and then tweaking it in the event of jury members falling out”. He added that there was no reason that this would ensure “proof beyond reasonable doubt” and “in the absence of any research or further work, we thought that that was quite a blunt way to deal with the removal of corroboration”. 408

370. Ms Barton was not convinced of the need for the safeguard, observing that “it feels as if it is being suggested in response to popular opposition to the removal of corroboration”. Rape Crisis Scotland is, she said, opposed to an increase in the jury majority “because of what we know about prejudicial views, particularly in cases of sexual violence”. 409

371. However, there was a general view that changing the jury majority requirement in returning a guilty verdict was a positive step in improving confidence in the criminal justice system, even irrespective of the corroboration debate.

372. Michael McMahon MSP gave evidence to the Committee on this Bill in the context of his own Criminal Verdicts (Scotland) Bill, which makes almost identical provision in relation to the majority required for a jury to return a guilty verdict. The proposal to reform the majority rules was advanced as a balance to the proposal to remove the ‘not proven’ verdict, which his Bill also seeks to achieve.

373. In terms of the general need for reform in this area, Mr McMahon highlighted the need for public confidence “that a jury has considered the evidence and found … beyond reasonable doubt”. He also highlighted that there was a general view expressed in response to his consultation that “the fact that very serious cases can be concluded one way or another on a straight majority needs to be looked at”. 410

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374. Lord Carloway acknowledged that “the increase in the numbers necessary for a verdict of guilty from eight to 10 may result in greater confidence in the criminal justice system at solemn level”. However, he argued that there needed to be greater consideration given to how the majority operated in the context of other systems.\textsuperscript{411}

375. The Cabinet Secretary noted that the provision had been made in response to the consultation as it provides an additional safeguard following the removal of the requirement for corroboration, which he considered to be “a reasonable position to be in”.\textsuperscript{412}

\textit{Power of judge and reasonable jury}

376. As part of its consultation on safeguards, the Scottish Government also sought views on the option of giving the judge in a jury trial the power to acquit an accused on the basis that no reasonable jury could consider the case to have been proved beyond reasonable doubt on the basis of the evidence led.

377. This option is not included in the Bill as introduced. This is on the basis that, despite the majority of respondents supporting the proposal, the majority of the Senators of the College of Justice, who would be responsible for making decisions on whether to remove a case from the jury in High Court trials, were opposed to it. The senators’ response argued that the system was based on the jury being the judges of fact and that such a reform would usurp the function of the jury.\textsuperscript{413}

378. Mr Wolffe QC noted that such a power existed in the appeal process and so “logically, that implies that we recognise that, on occasion, juries bring in verdicts that are unreasonable”. He was therefore of the view that it seemed “odd” that the judge, who was independent and impartial, highly trained and had heard the evidence, should not have the power to withdraw the case from the jury.\textsuperscript{414}

379. Ms McCall noted that, in terms of the Lord Advocate’s intention that cases should not come to court without supporting evidence, there may be circumstances where the supporting evidence brought by the Crown “does not pass muster”. In those circumstances, the judge would have “absolutely no power to do what the prosecutor would have done had he known the situation before the case came to court”.\textsuperscript{415}

380. Ms Greenan was of the view that giving such powers to judges and sheriffs would have to be accompanied by shrivial and judicial education.\textsuperscript{416} Ms Barton suggested that perhaps it should be left up to the jury to decide. She noted that the bar of no reasonable doubt would have to be reached “which is fairly high bar to reach”.\textsuperscript{417}

\textsuperscript{413} Policy Memorandum, paragraph 181.
381. The Cabinet Secretary acknowledged that he could “see some good reasons why it should be within the power of the judge to take a matter away from the jury if he or she believes that there is an insufficient case to go forward with”.

‘Not proven’ verdict

382. The Committee also received evidence on the third proposed safeguard consulted on by the Scottish Government, i.e. the abolition of the ‘not proven’ verdict.

383. Lord Carloway, in his review, suggested that “if the issue of majority verdicts were to be examined, a review of the three-verdict system would have to follow”. In addition, all of the academic experts on criminal law who gave oral evidence to the Committee did not see any problem with the ‘not proven’ verdict being reviewed.

384. As already noted, Michael McMahon MSP’s Criminal Verdicts (Scotland) Bill seeks to remove the option of the ‘not proven’ verdict. When giving evidence to the Committee, he suggested that the reform is necessary in order to maintain confidence in the judicial system as this second verdict of acquittal currently causes confusion.

385. The majority of respondents to the Scottish Government’s consultation favoured moving to a two-verdict system. However, a significant minority were concerned that time should be given to allow the impact of Lord Carloway’s recommendations to be assessed before making changes to the three-verdict system. The Scottish Government therefore concluded that the ‘not proven’ verdict should be retained for the time being until further consideration could be given to the appropriateness of possible reform in light of the other changes brought about by the Carloway review.

Summary cases

386. In terms of additional safeguards, it was noted that the change to the jury majority requirement would have no impact on summary cases where the sheriff or justice of the peace would determine guilt. In fact, the Committee received evidence that summary procedure accounts for over 90% of all cases that come to court, yet there are no additional safeguards proposed for summary cases.

387. However, some witnesses did not see the absence of any proposal for additional safeguards in relation to summary cases as a particular problem. Professor Ferguson argued that concerns relating to the requirement for corroboration being abolished were not as great in relation to summary cases. She noted that, “although [summary cases] form the bulk of the work of courts, the stakes are not as high as under solemn procedure”. Professor Duff agreed with this suggestion, stating that “decisions about guilt or innocence in [summary]
cases would be made by sheriffs, who are experienced lawyers and who will … be well able to see the failures in witness testimony". 424

388. In relation to trials presided over by justices of the peace, Professor Blackie suggested that consideration could be given to whether it would be better to have three justices, instead of one, if the requirement for corroboration were abolished.425

389. However, Professor Chalmers urged some caution citing anecdotal evidence of sheriffs hearing cases where the evidence of a prosecution witness had been persuasive but was then shown to be unreliable by the evidence of witness cited to provide corroboration.426

390. Mr Kelly said that he had particular concerns about the safeguards available to the accused in summary cases should the requirement for corroboration be removed. He said that if “we do not have that, and in a summary case, we have nothing else, the irresistible conclusion would seem to be that there will be an unfair trial”.427

391. The Cabinet Secretary said that he considered the issue of safeguards in summary cases to be about “how the system operates in the new landscape” and that some of it would be down to judicial training through the Judicial Institute for Scotland.428

The need for further safeguards

392. A number of witnesses argued that it was not possible to identify a coherent package of checks and balances without more detailed analysis of how a system without the need for corroboration should operate. It was argued that such a review could not take place within the context of scrutinising the Bill. For this reason, witnesses were reluctant to offer more than examples of possible additional safeguards when questioned by the Committee.

393. Lord Gill described the existing system as “quite coherent and logical”, consisting of “a series of checks and balances that attempt to achieve not just fairness to the defence, but fairness to the prosecution as well”. He did not think that “you could take one brick out of the wall” without considering the consequences of doing so and therefore considered that the proposed changes had to be examined holistically, considering “all the various safeguards in the criminal system in the round”.

394. Mr McMenamin from the Law Society questioned the adequacy of the provisions, noting that “if the Bill passes into law in its present form we will be in danger of having a system of justice in which the safeguards against wrongful conviction are so minimal as to be capable of being described as basic”.429 Mr Wolfe QC echoed this point, advising that the proposal to abolish the requirement

for corroboration “with the very limited adjustment to the jury majority and no additional safeguards in summary cases is not one that the faculty can support”.  

395. Professor Chalmers suggested that the question of safeguards could not be dealt with adequately during the passage of the Bill as the question was “very complex and would require extensive comparative research”. He therefore did not consider that it could be dealt with by way of amendment to the Bill.

396. Mr Wolffe QC agreed with this view, suggesting that it was important not to look at corroboration in isolation but to look “in the round at all the structures and rules of our criminal justice system”. He noted that, “over the years, a variety of options that form part of the suite of safeguards in other jurisdictions have been looked at in Scotland” but had been rejected on the basis of the “protection of corroboration”. He therefore concluded that, if the requirement for corroboration were abolished, “we have to look again at a variety of the rules that we apply routinely in our courts”.

397. Lord Gill suggested that the sorts of issues that would need to be examined as part of this process include: reconsideration of the admissibility of certain statements; re-examination of the use that can be made of confessions; re-examination of the right of the accused not to testify; and examination of the right of the accused to withhold his defence at the earliest stage of a prosecution.

398. The Cabinet Secretary said that he was not opposed to further work being carried out to consider what further safeguards would be required. He indicated that, although the Scottish Government remained “committed to the removal of the requirement for corroboration, [there was a need to] get the landscape right and we must balance the scales of justice”. He confirmed that the Scottish Government was “open to any suggestions for additional safeguards”.

399. When asked to confirm whether it was his intention that the Bill would contain provision to the effect that the abolition of the requirement for corroboration would not occur until a committee or some other vehicle had proposed safeguards with which the Justice Committee was satisfied, he confirmed, “yes, we are perfectly comfortable with that direction of travel.”

The case for further consideration

400. A general theme running through the evidence received was the need for holistic consideration to be given to the criminal justice system in light of the proposed changes. In addition to consideration being given to the need for further safeguards, some witnesses argued that a holistic review needed to be carried out of the consequences of the abolition of the rule, given its core function within the criminal justice system.

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401. In oral evidence, Lord Gill emphasised that “the rule is not simply a technical rule of the law of evidence that can be changed as part of a discussion of evidence, it is part of the constitution of this country and one of the great legal safeguards in our criminal justice system”. He therefore argued that “a change of such profound importance ... should be made as part of a much wider consideration of criminal evidence and not simply as an ad hoc response to one particular decision of the United Kingdom Supreme Court, which is the situation in which we find ourselves”.  

402. A number of witnesses concurred with this point. Mr Wolffe QC suggested that the issue should be examined by “looking at the whole criminal justice system in the round”. He asserted that “we need to look at the system at large and all its elements so that we can secure a system that strikes the right balance between prosecuting crimes effectively, including those sexual crimes and crimes of domestic abuse that rightly raise public concern, and avoiding miscarriages of justice”.

403. Mr McMenamin questioned the extent to which the provisions in the Bill had been properly consulted on and noted that the Law Society’s view was that these matters should have been “subject to consideration on a wider scale than has been the case”.

404. Mr Harrower also warned against removing the requirement for corroboration without giving proper consideration to the consequences of doing so. He cautioned that “we have to make sure that we do not make rash decisions, because once we get rid of corroboration, it will be gone. In my submission, that would be to the detriment of our system unless we have properly thought out checks and balances in its place.”

405. Mr Kelly from Justice Scotland agreed with these points, noting that “we just do not know what the consequences will be”. He suggested that areas of concern could be highlighted, however, “we do not know what effect removal will have on the overall fairness of trials in relation, not just to victims of sexual crimes, but to victims in general and accused persons in Scotland”.

406. Professor Duff said that he had been a member of the Carloway reference group which advised the review process. He indicated that the vast majority of experts in the group had wanted the issue of corroboration referred to the Scottish Law Commission. He noted that a range of views were held amongst the experts on corroboration but that they all thought that “if we are to remove corroboration, we have to have a very good think about it and about what all the other safeguards are”.

407. However, some opposition was expressed to this proposal. ACC Graham argued that Lord Carloway had had sufficient time to consider the issues and

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report to the Scottish Government. He also suggested that the time since the report had been published had allowed everyone to consider the matter carefully. Mr O’Connor from the ASPS and Mr Ross from SPF both concurred with this view, indicating that the police service “will do the same as we are doing now irrespective of whether the bill is passed as it is or not”. 443

408. The Lord Advocate regarded Lord Carloway’s review as “an extensive piece of work”, noting that “it took a year, there was a review group and a reference group, there were four or five roadshows, there were visits down south and to the continent, the review group spoke to experts and visited the Scottish Criminal Cases Review Commission and Glasgow sheriff court and there were various other matters, all of which are in Lord Carloway’s report”. 444

409. Lord Gill suggested that further consideration of the issue could be taken forward as part of the work of the Scottish Law Commission or by a Royal Commission. He noted that “the Government has appointed royal commissions, departmental commissions … to examine such issues” and suggested that such an exercise “would not necessarily take a lot of time or cause a great deal of delay”. 445

410. The Cabinet Secretary said that he remained convinced that the case for abolishing the requirement for corroboration had been made. However, he reiterated his position that he was happy for further consideration to be given to the need for additional safeguards. In doing so he acknowledged the need to take steps to ensure that “we do not remove a manifest injustice for those on one side of the equation and replace it with a manifest injustice for those on the other side”. 446

Committee’s conclusions

411. The proposal to abolish the requirement for corroboration is seen as a controversial reform which has divided opinion on the Committee.

412. The majority of Committee Members are of the view that the case has not been made for abolishing the general requirement for corroboration and recommend that the Scottish Government consider removing the provisions from the Bill. They are concerned that the case for abolition has paid insufficient regard to the importance of this requirement within the Scottish criminal justice system, in ensuring that the system as a whole is properly balanced and gives due weight to the interests of those facing criminal allegations, complainers and society. In addition, they are not convinced that abolition would improve ‘access to justice’ in a meaningful way for victims of crimes, such as rape and domestic abuse, which are often difficult to successfully prosecute. Improving the situation for such victims must involve a lot more than prosecuting more cases without a realistic expectation of a significant increase in convictions.

413. Some Members of the Committee believe that the case for removing the requirement for corroboration has been made. They consider that access to justice will be improved by such a reform, in particular, for victims of crimes which often occur in private.

414. The Committee is convinced that, if the general requirement for corroboration continues to be considered, this should only occur following an independent review\(^{447}\) of what other reforms may be needed to ensure that the criminal justice system as a whole contains appropriate checks and balances. Any such review should consider the system in a holistic manner, looking at relevant procedures and safeguards during both investigation and prosecution of criminal allegations.

415. The majority of Committee Members do not believe, in the event that the requirement for corroboration is abolished, that concerns relating to the need for further reform can be adequately explored during the passage of the Bill. The Cabinet Secretary's proposal that the commencement of the provisions abolishing the requirement for corroboration be subject to a parliamentary procedure requires further explanation and consideration, which the Committee requires before Stage 2.

416. The Committee acknowledges that, in proposing a review of additional safeguards, the Cabinet Secretary for Justice has, in part, taken into account the concerns of witnesses. However, even at this late point in the Stage 1 process, the Committee has not received clarification from the Scottish Government regarding the timing and nature of any such review. The Cabinet Secretary’s letter dated 4 February 2014 came in the late stages of consideration of this report, and therefore cannot form part of this report. The Committee calls on the Scottish Government to provide, prior to the Stage 1 debate, further information on any review of additional safeguards (including the proposed remit, who might be involved, likely timescales and options for implementing recommendations).

417. The Committee notes evidence from the Cabinet Secretary and Lord Advocate relating to a possible requirement for ‘supporting evidence’ in cases where corroboration is not available. Members of the Committee have, however, received only limited evidence on how this might operate in practice. The Committee calls on the Scottish Government to provide more information on how any requirement for supporting evidence would differ from the current need for corroboration.

418. The Committee also notes the Cabinet Secretary’s willingness to consider placing a revised ‘prosecutorial test’ on the face of legislation. The Committee accepts that such a step might form part of new checks and balances in response to the proposed abolition of the requirement for corroboration, but recommends that the matter should be included for full consideration in any review process.

\(^{447}\) Margaret Mitchell, Alison McInnes and John Finnie believe that this review should be undertaken by a Royal Commission or the Scottish Law Commission.
419. The Committee is fully aware of continuing concerns relating to how the justice system responds to cases of rape, domestic abuse and other offences which often happen in private. Members note ongoing efforts to improve the situation for victims of such offences and agree that further steps need to be taken, including measures aimed at addressing low prosecution and conviction rates.

420. The Committee calls on the Scottish Government to actively review all evidence relating to how improvements with regard to offences such as rape and domestic abuse may be achieved. This should include consideration of public attitudes as well as the justice system. In relation to the latter, all stages must be included, from initial contact with the police to the giving of evidence in court (e.g. whether victims of such offences should have access to legal advice and support where their personal or medical details may be revealed in court).

421. The Committee agrees that, if the requirement for corroboration is abolished, it should not apply retrospectively.

Section 62 - Statements by accused

422. Section 62 seeks to modify rules on the admissibility of hearsay evidence in criminal proceedings as they apply to both exculpatory and mixed statements made by an accused.

423. The section provides that evidence of such statements would no longer be held inadmissible, as evidence of any fact contained therein, on account of the evidence being hearsay. The section only applies to statements made by an accused in the course of being questioned (whether as a suspect or not) by the police or another official investigating an offence.448

Hearsay evidence

424. The law of evidence includes various rules restricting the use of hearsay evidence in criminal cases. In a 1995 report on the use of hearsay evidence in criminal proceedings, the Scottish Law Commission noted that:

“The rule against hearsay has been formulated as follows: ‘Any assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted.’

The term ‘hearsay’ is misleading since the rule applies not only to statements made orally but also to statements made in documents and to statements made by means of conduct such as signs or gestures: all are inadmissible as evidence of the truth of the matters stated, unless an exception to the rule applies.”450

448 Explanatory Notes, paragraph 144
449 ‘Hearsay evidence’ is an out-of-court statement offered to prove the truth of the matter asserted.
425. According to the Policy Memorandum, hearsay evidence is not generally admissible in court as—

“There is perceived to be a problem in an accused person being able to lead evidence at his trial of exculpatory statements as a substitute for giving evidence, not least because it might otherwise be expedient for an accused person to provide a carefully prepared narrative to a credible person shortly before the trial rather than giving evidence in person at court, so potentially avoiding cross-examination by the prosecution”.\(^{452}\)

426. A number of exceptions rendering hearsay evidence admissible already exist. Exculpatory statements can be admitted as evidence that an accused person’s story is consistent, “where the accused has given evidence and his credibility or reliability is challenged and not as proof of fact.”\(^{453}\)

427. A ‘mixed statement’ (ie one which is partly incriminatory and partly exculpatory) is admissible at the instance of the Crown in relation to proof of fact. However, where such a statement is led by the Crown, “both the incriminatory and exculpatory elements of the statement could be admissible as proof of fact.”\(^{454}\)

428. A confession made by an accused person is also covered by an exception to the general rule against hearsay evidence and is admissible as evidence of the truth of the things said. This exception has been justified on the basis that a person has less interest in lying where a statement is purely incriminatory.\(^{455}\)

429. Lord Carloway noted “a perception that there is a problem in an accused being able to lead evidence at his/her trial of exculpatory statements, or even partly exculpatory statements, as a substitute for giving evidence”.\(^{456}\) However, he argued that it was difficult to justify the exclusion of exculpatory answers given during a police investigation where, in relation to the right to a fair trial under ECHR, a police interview may be regarded as part of the trial process.

430. He further argued that the current rules relating to the admissibility of exculpatory and mixed statements are contrary to the principle of the free assessment of evidence unencumbered by restrictive rules, as well as being unnecessarily complex and confusing.\(^{457}\)

431. He therefore concluded in his review that—

“The current law on the admissibility of mixed and exculpatory statements made by a person during a police interview is not based on a rational and balanced approach to the relevance of statements. It is highly complex and potentially confusing to juries and others in the criminal justice system. It is at

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\(^{451}\) Exculpatory evidence’ is evidence favourable to the defendant in a criminal trial that exonerates the defendant of guilt.

\(^{452}\) Policy Memorandum, paragraph 150.

\(^{453}\) Policy Memorandum, paragraph 151.

\(^{454}\) Policy Memorandum, paragraph 152.

\(^{455}\) SPICe briefing, page 31.

\(^{456}\) Carloway Review, paragraph 7.4.3.

\(^{457}\) Carloway Review, paragraph 7.0.8.
odds with the principle of the free assessment of evidence unencumbered by restrictive rules; and it fails to take account of the role of the police interview as part of the trial process.  

432. The Scottish Government agreed with this conclusion and the Bill therefore implements Lord Carloway’s recommendations in this area by providing that, where a statement is made by an accused person to a constable or other person investigating an offence, it is not inadmissible as evidence on account of being hearsay.

Committee consideration

433. The evidence received by the Committee was generally supportive of the provision. For example, the Sheriff’s Association said that the current rules are “far too complex and unlikely to be understood by juries however carefully framed the directions given to them are”. It did conclude, however, that the provisions must be “subject to the right of any party, and the judge, to make comment on them as regards the circumstances in which the statements were made, their content and what inferences could legitimately be drawn from the statement”.  

434. On the other hand, the Law Society of Scotland noted that the existing rule was designed to prevent an accused from avoiding giving evidence on oath and being subject to cross-examination. The new provision would, therefore, “allow an accused alleged to have committed a sexual assault to have his position of consent considered without going into the witness box”.

435. On balance, the Committee considers that there is a case for a review of the role of hearsay evidence in the criminal justice system but that this should be included in any wider review of the law of evidence.

PART 3: SOLEMN PROCEDURE

Management of sheriff and jury cases: background

436. Under current rules, the main stages of a sheriff and jury case (sheriff court cases dealt with under solemn procedure) are:

- initial decision to prosecute under solemn procedure;
- appearance of accused on petition;  
- indictment;  
- appearance of accused at first diet; and

458 Carloway Review, paragraph 7.4.19.
459 Policy Memorandum, paragraph 154.
460 Sheriff’s Association. Written submission, page 13
462 The first two stages are common to solemn procedure cases which are ultimately dealt with in both the sheriff courts and the High Court.
463 Following further consideration (including possible discussion with the defence) the COPFS may decide that it is appropriate to proceed with a prosecution under solemn procedure with a view to holding a sheriff and jury trial; where this is the case, the COPFS prepares a document known as the indictment setting out the final charges and notifying the accused of the dates for the first diet and trial sitting.
437. Current time limits for sheriff and jury cases are as follows:

- 80 day rule (custody cases) – an accused who has been remanded in custody at the petition stage is entitled to be released on bail if not served with an indictment within 80 days of the warrant committing the accused for trial (the time limit can be extended by the court);
- 110 day rule (custody cases) – an accused who has been detained for more than 110 days without the trial commencing is entitled to be released on bail (the time limit can also be extended by the court); and
- 12 month rule (applicable where accused released on bail) – the trial must commence within 12 months of the accused’s first appearance on petition (the time limit can be extended by the court), with failure resulting in the case falling and the accused no longer facing prosecution.

438. The Independent Review of Sheriff and Jury Procedure led by Sheriff Principal Bowen, which reported in 2010, made a number of recommendations aimed at achieving “more efficient and cost effective management of cases which he considered would have the additional benefit of reducing inconvenience and stress to the victims, witnesses and jurors involved”. The review report noted a range of concerns in relation to how sheriff and jury procedures work in practice, including:

- the need for improved communication between prosecution and defence;
- too many cases in which the parties have not reached the appropriate stage of preparation by the time of the first diet;
- a need for greater consistency in the management of cases by sheriffs;
- problems arising from trial sittings being overloaded with cases on the assumption that most trials will not proceed; and
- evidence of relatively inexperienced prosecutors having to manage a significant administrative burden of trial sittings with large numbers of cases whilst, at the same time, starting a trial.

Replicating High Court reform
439. The proposals in the Bill generally replicate the Bonomy reforms in the High Court. Sheriff Principal Bowen told the Committee that “aspects of the High
Court model are acknowledged to be a considerable improvement—particularly the fact that trial sittings now proceed”. 471

440. There was some concern amongst witnesses as to whether measures that work effectively in the High Court would also work in relation to the much greater numbers of cases dealt with in the sheriff courts. For example, the Faculty of Advocates stated that “the volume of cases in the sheriff court and the pressure on COPFS, particularly in Glasgow and Edinburgh will make it a difficult task to transpose, in effect, High Court procedure into the sheriff court”. 472

441. However, the Cabinet Secretary told the Committee that “the change has worked remarkably well [in the High Court] and that, given the nature of the High Court, it should work reasonably well in sheriff and jury cases”. 473 He did acknowledge that “the challenge is that there are more cases in the sheriff and jury system”, but went on to say that “the principles, such as taking an early focus, minimising what has to be discussed and debated and ensuring that we inconvenience people as little as possible if they do not have to be cited or called, are the same”. 474

442. Those proposals in Sheriff Principal Bowen’s review requiring legislative reform are, in broad terms, taken forward through this Bill and are discussed in turn below.

**Pre-trial time limits**

443. Sheriff Principal Bowen recommended changes to the statutory time limits in sheriff and jury cases aimed at allowing more time for the better preparation of cases and reducing some of the pressures caused by higher levels of business. His report stated that “a high volume of cases, each compressed into a short timescale, results in late pleas and adjournments through lack of time to prepare; it is this which leads to substantial inconvenience to the public and professionals who are drawn into the criminal process”. He added that “it is not possible to resolve these issues without changing the system”. 475 The report therefore recommended that—

- all cases — the minimum period between service of the indictment and holding of the first diet should be extended from 15 to 29 days;
- custody cases — the current 110 day time limit for commencing the trial should be extended to 140 days, with the first diet taking place within 110 days (bringing both into line with High Court time limits);
- bail cases — in addition to the current rule that the trial must commence within 12 months of the accused’s first appearance on petition, statute

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472 Faculty of Advocates. Written submission, paragraph 59.
should require that the first diet must commence within 11 months of that
date (again mirroring High Court procedure); and

- monitoring – court sanctioned extensions to the proposed 140 day time
  limit should be properly recorded and monitored.

444. Section 65 of the Bill seeks to make these changes to time limits. The Policy
Memorandum states that “in order to accommodate [early communication between
the prosecution and defence] the Bill increases the length of time for which an
accused person can be remanded before having to be brought to trial from 110
days to 140 days”, adding that “the Scottish Government is satisfied that this is
proportionate and it is in accordance with the limit required in the High Court”.

445. In evidence to the Committee, Sheriff Principal Bowen stressed that the
“provisions [on time limits] are, in the main, consequential on [the statutory
requirement for communication between the prosecution and defence discussed
later in this section of the report] — in particular, the proposed removal of the 110
day rule and its alteration to 140 days, which might give rise to some issues”. He
went on to argue that “in the current climate, in which cases are far more
complex because of things such as DNA analysis, mobile telephone analysis and
closed-circuit television, it is difficult to see how our timescales could be any
shorter”, adding that if the 110-day limit was retained, “we would have to reduce
the 80-day limit [in which to serve an indictment to a person in custody], which I do
not think is possible”.

446. Some concerns were raised by witnesses regarding the proposed extension
from 110 days to 140 days. In its written submission, Justice Scotland said that it
“does not support the proposal to increase the 110-day time limit to 140 days
wholesale”, as “the justification for such an increase has not been made”. It went
on to argue that, “whilst there has been a rise in the complexity of some cases
indicted even in the Sheriff Court, very many are comparatively straightforward
and a longer period before the case must be brought to trial may prove counter-
productive to the aim of ensuring parties prepare their cases at as early a stage as
possible”. It added that “of most significance is the period of time victims must wait
for justice to be served and accused persons to be tried, particularly those
remanded in custody.”

447. The Cabinet Secretary for Justice responded to these concerns, stating
that “the requirement of someone on remand to have their indictment
served within 80 days … remains sacrosanct and the extension of the time-limit from 110 to 140
days puts solemn procedure in the sheriff and jury system in line with that in the
High Court”. He added that “the change simply takes into account the complexities
of many cases as a result of forensics and other aspects”. He also restated the
Scottish Government’s commitment made in its response to Sheriff Principal

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476 SPICe briefing, page 41.
478 Policy Memorandum, paragraph 166.
481 Justice Scotland. Written submission, paragraph 42.
Bowen’s review that it intends to monitor implementation of the proposals, highlighting that “with the change to 140 days, the situation will have to be monitored to ensure that any extension is granted only with good cause”.\(^{483}\)

448. **On balance, the Committee accepts the need to extend the pre-trial time limits as proposed in the Bill. However, we do have some reservations as to whether the proposal to extend the current 110 day limit within which the trial of an accused person held in custody must commence to 140 days is proportionate. We are therefore pleased that the Scottish Government plans to monitor the implementation of this proposal, in particular to ensure that trials are started as soon as possible and that any extensions to the 140 day limit are rare. We seek updates from the Scottish Government on any findings and outcomes arising from its monitoring of implementation of this pre-trial limit.**

**Duty of parties to communicate**

449. Sheriff Principal Bowen recommended the establishment of compulsory business meetings between the prosecution and defence in sheriff and jury cases to take place early in the case preparation process. He stated that this recommendation “mirrors many aspects of best practice already followed in some areas of the country and reflects the views of all parties be it the Crown, defence, sheriffs or clerks that meaningful engagement prior to First Diet removes churn”.\(^{484}\) He added that “currently both the Crown and defence state they are willing to engage in early discussion but this often does not occur or is ineffective” and that “the purpose of making the meeting compulsory is [therefore] to establish as routine a process of effective engagement and discussion”.\(^{485}\)

450. Section 66 of the Bill generally seeks to give effect to this recommendation on early communication. The Policy Memorandum states that “the intention is that prompt engagement between the prosecutor and defence will assist in the early identification of issues and, in some cases, earlier pleas of guilty”.\(^{486}\) It further suggests that this provision “should also help to ensure that cases proceed to trial in an orderly fashion with such matters as can be agreed in advance having been agreed”.\(^{487}\)

451. Sheriff Principal Bowen said that he had heard from both defence solicitors and procurators fiscal regarding the difficulties in “getting a hold of each other”, particularly as they can often be away from their desks in court or with clients. Therefore, “the clearest possible way forward was to place a statutory duty on both parties to communicate”.\(^{488}\) While he accepted the view that “the volume [of cases in the sheriff court] means that a lot of time will have to be spent at first diets and


\(^{486}\) Policy Memorandum paragraph 165.

\(^{487}\) Policy Memorandum paragraph 165.

that will have to be managed, but … it will save a lot of time further down the line". 489

452. Victim Support Scotland said that it supports this measure as “resolution at an early stage relieves witnesses from having to attend a trial, protecting them from the potentially stressful and traumatic experience of giving evidence”. 490 In addition, Grazia Robertson of the Law Society stated that “the suggestion of meeting and attempting to resolve resolvable cases would help the defence solicitors to know which cases to prepare for by way of a trial and give them some knowledge of when that trial might take place”. 491

453. While the Committee considers that achieving effective communication must, at least in part, be dependent upon the availability of adequate resources (discussed further below), we are persuaded of the potential benefits of this measure, in particular, in reducing the possibility of victims and witnesses having to attend court when their cases are not ready to proceed.

Timing and method of communication

454. While acknowledging that “the timing of the compulsory business meeting has been a matter of considerable debate and reflection on my part”, Sheriff Principal Bowen recommended that the meetings should generally be held prior to the indictment being served as this would ensure early disposal of as many cases as possible. 492 He further recommended that, wherever practicable, compulsory business meetings should involve face-to-face meetings, which he described as “an example of best practice and necessary to satisfy the requirements of the meeting”. 493

455. However, the Bill provides that the meeting should take place after an indictment is served and does not prescribe the format of the communication. Responses to the Scottish Government’s consultation “suggested that parties would become clear on what matters they had to discuss only after the indictment is served” and that “a requirement to hold face-to-face meetings would be practically difficult, expensive and resource dependent”. 494

456. The Scottish Government states in the Policy Memorandum that it “was persuaded that delaying the compulsory business meeting until after the indictment, and allowing it to be held by electronic communication, would allow informed discussion in a way which promoted efficiency of time and money”. 495 Furthermore, the Policy Memorandum states that “since Sheriff Principal Bowen

490 Victim Support Scotland. Written submission, paragraph 59.
494 Policy Memorandum, paragraph 170.
495 Policy Memorandum, paragraph 170.
reported, one of the objections to email communication—that it was insecure—had
been alleviated by the provision of new, secure systems”. 496

457. In oral evidence, Sheriff Principal Bowen told the Committee that he
understood the reasoning behind this and was content with the Scottish
Government’s decision not to reflect his exact recommendations in terms of the
timing and method of communication between prosecution and defence. 497

458. The COPFS said that it supports the approach contained within the Bill
requiring communication to take place after the indictment is served but prior to
the first diet, as “this is the point at which some form of resolution is most likely to
occur”. 498 John Dunn of the COPFS told the Committee during oral evidence
that, “as a member of the reference group, I always held the view that the best
time for the meeting was after the case had been indicted”. The Law Society also
considers the timing suggested in the Bill to be appropriate. 499

459. The COPFS also agreed with the flexibility provided for in the Bill regarding
the method of communication used, stating that “the advent of secure email and
secure online disclosure allows for more effective means of communication
between the Crown and the defence which in turns allows space to be created
for those difficult cases which would benefit from a face-to-face discussion”. 500
However, in oral evidence, John Dunn indicated that roll-out of the criminal justice
secure email system to defence solicitors had met with some difficulties including
a low take-up rate. 501

460. The Cabinet Secretary for Justice advised the Committee that “the defence
and prosecution both preferred the meeting to be held post service of the
indictment because it would give them the opportunity to focus on the matter”,
adding that “I understand that when Sheriff Principal Bowen gave evidence to the
Committee he indicated that he was happy and content with such an approach”. 502
He further noted that “we face challenges with the IT system at present”, but said
he was “confident that Crown prosecutors and everyone else will be able to
resolve the issues”. 503

461. The Committee supports the proposals in the Bill for statutory
communication between the prosecution and defence to take place after the
indictment is served and for there to be flexibility in the method of
communication to be used.

462. The Committee calls on the Scottish Government to work with the
COPFS and the Law Society of Scotland in seeking to resolve current
difficulties in rolling out the secure email system to all defence solicitors,

496 Policy Memorandum, paragraph 170.
500 Crown Office and Procurator Fiscal Service. Written submission, paragraph 43.
with a view to resolving such difficulties by the time the Bill comes into force.

**Written record**

463. Sheriff Principal Bowen recommended that a written record reflecting issues covered during the compulsory communication between prosecution and defence should be lodged with the court prior to the first diet. This record would capture discussions held and any issues remaining to be resolved in order to ensure that the court is fully informed when a case calls for a first diet.\(^{504}\)

464. The Bill specifies that details on the form of the written record, the information it should contain and how it must be lodged will be prescribed by act of adjournal. Michael Meehan of the Faculty of Advocates told the Committee that there were advantages to this approach, including that “it can … be amended as people become used to how it works in practice and find out what works, what does not work, what could be improved, what could be left out and so on”.\(^{505}\)

465. The Bill also appears to require the submission of a single record covering the state of preparation of both the prosecution and defence. In written evidence, the Law Society highlighted that “in High Court cases the practice which has developed is for each party to individually prepare and email to the court an electronic record of that party’s preparation” and that “an electronic copy of the record is also emailed to the other parties in the case”.\(^{506}\)

466. During oral evidence, witnesses from COPFS and the Law Society argued that the Bill should (if necessary) be amended so that the requirement to prepare a written record is satisfied by the submission of separate reports by prosecution and defence.\(^{507}\) Michael Meehan of the Faculty of Advocates agreed with this position, suggesting that “there could be practical difficulties involved in getting everybody together to put in one document and, if you cannot get everybody together, no one can move forward”. He added that “it would be easier if the prosecution could prepare its document, submit it to the court and copy other people in, and then each defence party did likewise”.\(^{508}\)

467. In its written submission, Justice Scotland stated that “placing the obligation on the procurator fiscal to lodge the complete written record seems unnecessarily burdensome”, highlighting that “current High Court practice, where parties e-mail their own part of the written record to the clerk, seems preferable”.\(^{509}\)

468. The Cabinet Secretary told the Committee that the Scottish Government was aware of the concerns surrounding joint submission of the written record and was “happy to review the issue and see how we can resolve it”.\(^{510}\) Kathleen McInulty, a Scottish Government official, added that “the issue needs to be


\(^{506}\) Law Society of Scotland. Written submission, page 6.


\(^{509}\) Justice Scotland. Written submission, paragraph 43.

considered and given further thought because if there are separate schedules it is likely to take sheriffs longer to assimilate the information”. 511

469. The Committee welcomes the Cabinet Secretary’s commitment to review whether the Bill could usefully be amended to allow individual written records on the state of preparedness of cases to be submitted by the defence and prosecution.

Resource implications

470. Several witnesses had concerns about the resource implications of the measures in the Bill regarding communication between prosecution and defence. Justice Scotland, for example, argued that, “if the aims of the reforms are to be achieved, it is crucial that adequate resources are made available to the COPFS and Scottish courts” and that defence solicitors receive adequate funding “in relation to the additional (and earlier) work required of them as a result of the proposed reforms”. 512

471. The Law Society said that it “remains concerned regarding the resource implications for both Crown and Defence”. 513 Grazia Robertson of the Law Society told the Committee that, “if this is not properly resourced, there could be further delay in the system”. 514 Mr Dunn acknowledged that the COPFS is facing financial pressures, but stated that “we have dragooned ourselves in such a way that we can try to accommodate that pressure”. 515 He added that it was “now organised along lines of federations, or larger groupings of what used to be 11 areas [and] within the federations, we are organised along functional lines so that we do a proportion of business that allows for some specialisation”. 516

472. The Cabinet Secretary agreed that “there will be increased costs through legal aid that we will have to address, but there will also be savings in the systems as a result—it is hoped—of having fewer citations not just for witnesses and jurors but for specialist witnesses”. 517 He told the Committee that anticipated costs are set out in the Financial Memorandum on the Bill, adding that “we know that there are issues to be addressed, but we have quantified the costs and worked with relevant agencies and we believe that we can manage them”. 518

473. The Committee agrees with witnesses that both the prosecution and defence solicitors must be adequately resourced for the duty to communicate to work effectively as planned. We note that the Scottish Government has worked with criminal justice partners to anticipate the costs and savings that may arise from this proposal, but we recommend that the Scottish Government closely monitors the resource implications during implementation to ensure that resources are in place where and when needed.

512 Justice Scotland. Written submission, paragraph 41.
Sanctions

474. Sheriff Principal Bowen told the Committee that “we agonised long and hard over the question of sanctions, both for defence and the fiscal, if the [written record] was not lodged, and we came to the conclusion that it was virtually impossible to come up with an appropriate sanction”. ⁵¹⁹ He added that “it is very much a matter for sheriffs to take a strong line, making it clear that, if it is not done, not only the court but the public will be inconvenienced”. ⁵²⁰

475. On the absence of sanctions where the written record was not submitted in time, Mr Dunn of the COPFS highlighted that “the 2005 practice note says that the High Court judge would regard that state of affairs as ‘unacceptable’ … however, the reality is that those provisions have been in place for some eight years now and I am not conscious of there being any occasion when a written record has not been submitted”. ⁵²¹

476. The Committee notes that the Bill does not impose any sanctions if the written record is not submitted timeously.

First diets

477. Section 67 of the Bill seeks to give effect to Sheriff Bowen’s recommendation that a trial should only be scheduled and witnesses cited once the sheriff dealing with the first diet is satisfied that outstanding issues have been resolved. His report stated that “implementation of this recommendation will help to ensure that a trial sitting is centred on trials which are proceeding, and not on juggling a number of cases with the prospect of few actually resulting in the leading of evidence”, adding that “this should reduce the administrative burden on the Scottish Court Service and fiscals who are due to conduct trials, and ought to lead to more certainty for defence agents”. ⁵²²

478. The Law Society stated that, “as indicting cases to the first diet will happen every day in Sheriff and Jury courts in both Glasgow and Edinburgh, consideration must be given to the impact that this proposal will have on ‘hub’ jury courts in rural areas and how this will work in practical terms.” ⁵²³ The COPFS however supports the proposal which it expects to “reduce the inconvenience to witnesses” in particular. ⁵²⁴

479. The Committee agrees that the proposal in the Bill for a trial only to be scheduled once the sheriff dealing with the first diet is satisfied that the case is ready to proceed will reduce inconvenience to witnesses, and give certainty to both the prosecution and defence regarding the date of the trial.

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Sentencing (weapons offences)

480. Section 71 of the Bill increases the maximum sentence from four to five years for a number of statutory offences relating to the possession of a knife or offensive weapon in a public place, school premises or a prison.  

481. The change forms part of the Scottish Government’s policy in respect to knife crime of “tough enforcement” alongside supporting education and diversion projects. The Scottish Government believes that the increase in maximum sentences for knife crime will reinforce the message that carrying knives is a serious offence and will deter people from doing so.

482. South Lanarkshire Council welcomed the proposals and agreed with the Scottish Government that these changes would reinforce the gravity of the offences in the minds of the public and those who commit knife crime.

483. Murray Macara QC of the Law Society of Scotland sympathised with the desire to address the problem of knife crime. However, he was unsure whether increasing the maximum sentence would have much of an effect. He suggested that “the answer lies in culture rather than penalty” and that “deterrent sentences can address that culture only so far”. Mr Macara also noted that it was likely that the maximum sentences would be used only when someone had a significant record of carrying knives or other violent behaviour.

484. In his evidence to the Committee, the Cabinet Secretary noted that there has been a marked decrease in the offence of handling a weapon. He added that the “situation is getting better, but we would be remiss if we were complacent.”

485. The Cabinet Secretary stated his belief that the judiciary should be afforded the flexibility to sentence those convicted of carrying a knife to up to five years. He also made clear his view that sentences are a matter for the judiciary who will do so “on the basis of clear facts and circumstances”.

486. The Committee welcomes the Scottish Government’s continued focus on knife crime and its efforts to change the culture of carrying knives. The Committee is content with the increase in maximum sentences for offences relating to the possession of a knife or offensive weapon from four to five years.

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525 SPICe briefing, page 42.
526 Policy Memorandum, paragraph 193.
527 Policy Memorandum, paragraph 192.
528 South Lanarkshire Council. Written submission, 23 August 2013.
Sentencing (offenders on early release)

487. Under section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, courts are able to order a person who has committed an offence during a period of early release from a custodial sentence to serve part or all of their outstanding sentence. These orders are known as “section 16 orders” and are separate and additional to the normal powers of the court to sentence the offender for the new offence.

488. Sections 72 and 73 seek to ensure that courts consider using section 16 orders in appropriate cases and provide the lower courts with greater flexibility to impose such orders without referring the case to a higher court. The Scottish Government has, however, stated that the proposed reforms “do not substantively change the overall powers of our courts in this area”.

489. The Committee received little evidence on this issue. During oral evidence, both the Crown Office and Procurator Fiscal Service (COPFS) and the Law Society of Scotland did not raise any concerns and agreed that the proposed reforms did not represent a substantial change.

490. The Committee welcomes the provisions in sections 72 and 73 on sentencing offenders on early release.

Appeals

491. Sections 74 to 81 of the Bill make a number of amendments to procedures and rules for appeals. They are:

- the removal of the requirement for prosecutors to gain the leave of the court of first instance when making appeals relating to preliminary pleas or diets;
- the prescription of the test applied by the High Court when considering an application to extend the time limits for lodging an appeal and providing the grounds for the appeal;
- removal of the right for a hearing when the High Court considers applications to extend the time limits for lodging an appeal and providing the grounds for the appeal;
- removal of the possibility of using a bill of advocation to appeal decisions which could be appealed using sections 74 or 174 of the Criminal Procedure (Scotland) Act 1995; and
- ensuring that appeals, arising from summary proceedings, heard by the High Court are final and conclusive.

492. These provisions stem from recommendations in the Carloway Review and aim to improve the efficient and timely management of appeals. The

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533 Policy Memorandum, paragraph 215.
535 Explanatory Notes, paragraphs 206 to 217.
Carloway Review noted that Article 6 of the European Convention on Human Rights, which entitles persons to a fair trial within a reasonable period of time, applies to appeals.\(^{538}\)

493. The Bill does not seek to take forward all of the recommendations of the Carloway Review in this area. Notably the following recommendations are not provided for in the Bill:

- giving the High Court statutory powers to impose sanctions to enforce time limits and its own procedural decisions; and
- abolishing appeals by means of bills of suspension and advocation.

494. In regard to the first of these, the Scottish Government decided not to set out the High Court’s powers in legislation because “stating the sanctions in statute would be excessively rigid, recognising the general right of the courts to regulate their own activities”.\(^{539}\)

495. In relation to the second, the Scottish Government noted the difficulty in identifying all of the circumstances in which bills of suspension and advocation are used, and therefore the effects of the complete abolition of these routes of appeal. However, it stated that proscribing the use of a bill of advocation to appeal decisions which could be appealed using sections 74 or 174 of the Criminal Procedure (Scotland) Act 1995 would prevent the circumvention of the requirement for leave to appeal from the first instance court under the statutory routes of appeal.\(^{540}\)

496. In its written evidence, Justice Scotland noted that the “primary mischief identified by the Carloway Review related principally to the overall length of time taken to deal with appeals, not the need for appeals to be started on a more timely basis”.\(^{541}\) Justice Scotland questioned whether there is any evidence that the current tests for allowing late appeals are too lax and stated that “the discretion to extend time, although already closely guarded, may be key to ensuring justice in an individual case”.\(^{542}\) It also argued that the strength of the grounds for an appeal may not be readily identifiable from examining papers in chambers and that the right to a hearing should be retained, before permission to appeal is refused due to lateness.\(^{543}\)

497. However, the COPFS welcomed the provisions relating to appeals as an “across-the-board tightening of procedures [which] will improve the efficiency and effectiveness of the appeals process generally”.\(^{544}\)

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\(^{536}\) Carloway Review, pages 352-353.
\(^{537}\) Policy Memorandum, paragraph 218.
\(^{538}\) Policy Memorandum, paragraph 219.
\(^{539}\) Policy Memorandum, paragraph 224.
\(^{540}\) Policy Memorandum, paragraph 227.
\(^{541}\) Justice Scotland. Written submission, 16 September 2013.
\(^{542}\) Justice Scotland. Written submission, 16 September 2013.
\(^{543}\) Justice Scotland. Written submission, 16 September 2013.
\(^{544}\) Crown and Procurator Fiscal Service. Written submission, 12 September 2013.
498. During oral evidence, the Committee heard that appeals in Scotland are, on the whole, dealt with efficiently and timeously. Some types of appeals are more likely to take a long time, for example, Scottish Criminal Cases Review Commission (SCCRC) referrals, appeals on the grounds of defective representation and where new evidence is led. Murray Macara QC from the Law Society of Scotland noted that “we have a system that is capable of delivering appeals to a conclusion very quickly [and] what must be remembered are the causes for delay.”

499. Fraser Gibson from the COPFS explained that, for example, delay can “be down to appellants seeking to add new grounds of appeal [or] recover other documents which [can spin] out the legal process to the extent that it takes a number of years”. Michael Walker of the SCCRC noted that “sometimes the appellant changes solicitors or legal teams and, each time they do that, the team comes to the case anew”.

500. James Wolffe QC from the Faculty of Advocates pointed out that sections 76 and 77 relate to the late notes and grounds of appeal and not the subsequent progress of the appeal. This progress “is left to the courts’ case management”. Speaking as a council member for Justice Scotland, Mr Wolffe expressed concerns that “narrowing the access to the appeal court … would restrict access to justice” and could result in those rejected appeals being taken to the SCCRC. Mr Macara shared these concerns and argued that it may not be in the interests of justice “that an appellant should be denied the opportunity to appeal simply because of an excessively rigid and fixed timetable”. Mr Macara argued that sections 76 and 77 should be toned down, for example with the words “justified by exceptional circumstances” replaced with “in the interests of justice”.

501. Mr Gibson from the COPFS laid out the Crown’s position that there should be a strict test to justify a late appeal. He stressed the importance of appeals being made quickly to prevent the courts continually revisiting old cases to the detriment of current cases and because evidence and papers cannot be kept forever. Evidence, such as forensics or witnesses’ recollections, can also degrade. Mr Gibson summarised by stating that time-limits “are there for a reason”.

502. Mr Gibson also argued that the Bill would allow the court flexibility and explained that, when deciding on whether the exceptional circumstances test is met, the court will balance the length of the delay, the reasons for the delay and the merits of the appeal. In doing so, the court will “arrive at an accommodation that serves the interests of justice”.

503. The Committee explored with witnesses whether more could be done during appeals to speed up the process, such as taking up Lord Carloway’s
recommendation that the High Court be given power to impose sanctions to enforce time-limits and procedural orders. The Faculty of Advocates had concerns with this proposal. Mr Wolffe explained that, under these proposals, a lawyer could be in a position where they could be penalised for fulfilling their professional responsibility in acting in the best interests of their client (e.g. by advancing a new and late ground for appeal). Furthermore, while the court may be able to exercise discretion in applying a sanction, it would have to make additional and separate inquiries to discover the circumstances around any breach of its orders to do so. 553

504. The Committee also asked witnesses whether the Bill should have included Lord Carloway’s recommendation to completely abolish bills of suspension and advocation. Mr Gibson agreed with the Scottish Government’s position that it would be difficult to put in place statutory provisions to ensure that there is a mode of redress for all the circumstances where bills of suspension and advocation are used. 554

505. The Cabinet Secretary said that there should be clarity for both those seeking to appeal and other people who are affected by the process, such as victims. He continued—

“What we are doing here is giving the accused clear intimation of what the timescales are for marking an appeal against sentence or conviction or both. That also makes it clear to victims that if an appeal is not in by a specific time, it will not come in—barring exceptional circumstances.” 555

506. The Cabinet Secretary said that he did not believe that the proposed ‘exceptional circumstances’ test would be too restrictive. He added that the appeal court would be able to work with the test and that solicitors would be able to “clearly understand” that “exceptional circumstances are beyond something that just did not fit into someone’s schedule”. 556

507. The Cabinet Secretary reiterated the Scottish Government’s view that case management is a matter for the judiciary. 557

508. The Committee welcomes the policy objective to speed up appeals and understands that there are practical reasons why appeals ought to be lodged timeously. We note the concerns that, in applying a higher test for allowing late appeals, cases with merit may not be heard unless they meet an exceptional circumstances test. We ask the Scottish Government to consider the Law Society of Scotland’s recommendation that sections 76 and 77 be redrafted with an emphasis on the interests of justice. The Committee also notes that Lord Carloway made other recommendations in relation to the speeding up of appeals.


Scottish Criminal Cases Review Commission

509. The Scottish Criminal Cases Review Commission (SCCRC) is an independent body which reviews cases where it is alleged that a miscarriage of justice may have occurred. Should the SCCRC consider that a case may be a miscarriage of justice and that it is in the interests of justice to do so, the SCCRC can refer the case to the High Court. In most respects, the High Court then deals with the case as if it were a normal appeal.\(^{558}\)

510. Following the Cadder judgement, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (“the 2010 Act”) explicitly provided that the SCCRC must consider the needs of finality and certainty when applying its interests of justice test. The 2010 Act also provided that the High Court can decide not to hear an appeal if it determines that it is not in the interests of justice to do so. The rationale for these changes was a concern that the Cadder judgment would result in a large number of applications to the SCCRC.

511. The Carloway Review recommended that the High Court should not have the power to reject a referral on the ground of the interests of justice before hearing the appeal (a ‘gate-keeping’ role). It did however recommend that, when deciding an appeal, the High Court should consider both whether there has been a miscarriage of justice and whether it is in the interests of justice for the appeal to be allowed. Lord Carloway also recommended that the requirement of the SCCRC to consider finality and certainty when reviewing a case be retained.\(^{559}\) The Scottish Government agreed with Lord Carloway and section 82 of the Bill reflects his recommendations.

512. Michael Walker from the SCCRC noted that finality and certainty had, in practice, always formed part of the SCCRC’s decision-making in relation to the interests of justice. The 2010 Act simply stated this element expressly.\(^{560}\)

513. Lord Carloway argued that, allowing the High Court to consider the interests of justice during the determination of an appeal resulting from an SCCRC referral would ensure that, if new evidence confirming the guilt of the convicted person came to light between the time the SCCRC decides on the referral and the court decides on the appeal, the High Court could take this into account. He stated that a “retrial is almost never going to be an option in an SCCRC reference, because of the timescales.”\(^{561}\)

514. Academics from the University of Glasgow School of Law argued that the example given by Lord Carloway is unlikely and, in any case, the Bill would be inadequate in dealing with this as it “creates no power for the court to hear evidence of the alleged confession and so take it into account”.\(^{562}\)

515. Fraser Gibson explained that the COPFS supports the Bill as it is currently drafted for two reasons, “first, it future proofs the system against things like the

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\(^{558}\) SPICe briefing, page 46.

\(^{559}\) Carloway Review, page 369.


\(^{562}\) Chalmers, Farmer and Leverick. Written submission, 28 August 2013.
Cadder case happening again and, secondly, it guards against the possibility of error”.\(^{563}\) The SCCRC rejected these arguments on the basis that its track-record suggests that it is capable of dealing with cases that redefine the interpretation of law and that there is no evidence of the SCCRC making errors.\(^{564}\)

516. Mr Walker stated that the SCCRC’s position is “that there should be no veto of a commission reference by the appeal court in the interests of justice at either stage of the appeal”.\(^{565}\)

517. The SCCRC made the case that it applies its own tests consistently to a high standard: 67% of referrals to the High Court have led to successful appeals (which contrasts with around 1% of ordinary appeals being successful); since the 2010 Act came into force, 20 of its 21 referrals have proceeded to a full appeal;\(^{566}\) and since the SCCRC was established there have been 29 occasions where the SCCRC has not referred a case to the High Court solely because it would not be in the interests of justice to do so.\(^{567}\)

518. Both the Faculty of Advocates and the Law Society of Scotland put forward the view that it cannot be in the interests of justice to allow a conviction which the High Court has found to be a miscarriage of justice to stand.\(^{568,569}\) Murray Macara argued that the SCCRC and the High Court have distinct roles, saying that “the commission should be trusted to continue [applying its own tests prior to referral] and that the High Court, as the appeal court, should concern itself with whether it has been established that there has been a miscarriage of justice”.\(^{570}\)

519. Mr Walker also suggested that the “public would have some difficulty coming to terms with a court at the end of the process finding that there had been a miscarriage of justice but saying, for another reason, that it was not in the interests of justice to allow the appeal”.\(^{571}\) Furthermore, the SCCRC argued that such an outcome “would seriously undermine both the independence of the Commission and its role in strengthening public confidence in the ability of the criminal justice system to address miscarriages of justice”.\(^{572}\)

520. Mr Walker recalled that the report of the Sutherland Committee, which recommended and led to the establishment of the SCCRC, was clear that the gatekeeping role of determining whether an appeal should be heard should not be given to the High Court, but is the role of the SCCRC. He added, “that is why the commission exists”.\(^{573}\)

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\(^{568}\) Faculty of Advocates. Written submission, 6 September 2013.

\(^{569}\) Law Society of Scotland. Written submission, 6 September 2013.


\(^{572}\) Scottish Criminal Cases Review Commission. Written submission, 2 September 2013.

521. The Cabinet Secretary said that he believes that the Bill strikes the right balance and, while he values the role of the SCCRC, he said that “it is important that the High Court should consider and take cognisance of whether there has been a miscarriage of justice and … the interests of justice.” The Cabinet Secretary added that he believed that the provisions would be “used or considered sparingly.”

522. He echoed Lord Carloway’s view that, by considering the interests of justice, the High Court would be able to reject appeals where the original trial was not dealt with appropriately but further evidence had come to light since confirming the guilt of the appellant. The Committee noted that when a case is appealed to the High Court under the normal route, the court only determines whether there has been a miscarriage of justice. The Cabinet Secretary argued that having the additional test for appeals arising from SCCRC referrals is justified because those cases “tend to be a lot more historic.”

523. The Committee welcomes the removal of the gate-keeping role of the High Court when dealing with referrals from the Scottish Criminal Cases Review Commission (SCCRC).

524. However, we are concerned that the Bill retains the High Court’s interests of justice test, albeit during the determination of an appeal resulting from a referral from the SCCRC. Given that, according to Lord Carloway, despite the occasional lapse, the SCCRC has been a “conspicuous success in discharging its duties conscientiously and responsibly”, we are not convinced that the arguments for the High Court replicating the duties of the SCCRC in this respect have been made. Consequently, we recommend that the High Court should only be able to rule on whether there has been a miscarriage of justice in these cases, and if there has been, the appeal should be allowed.

People trafficking

525. Sections 83 and 84 of the Bill create two statutory aggravations relating to people trafficking. Section 83 provides that any offence may be aggravated if motivated by the objective of committing or conspiring to commit a people trafficking offence. Section 84 provides for an aggravation of a people trafficking offence where the offender has abused a public position in committing the offence.

526. Section 85 of the Bill defines “a people trafficking offence” as:

- an offence under section 22 of the Criminal Justice (Scotland) Act 2003;
- an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

527. The Equality and Human Rights Commission’s (EHRC) report on an Inquiry into Human Trafficking in Scotland recommended the creation of an aggravation of

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people trafficking. Respondents to the Committee’s call for evidence were supportive of this measure.\(^{577}\)

528. The Scottish Government stated that the aggravation of a public official committing the offence of people trafficking meets its obligations under Article 4.3 of the EU Directive on preventing and combating trafficking human beings and protecting its victims.\(^ {578}\)

529. The Committee heard evidence from Alison Di Rollo from the COPFS that she welcomed the aggravation as set out in section 83. She stated that the aggravation would be “another element in the toolkit for prosecutors” and would be used where there is not enough evidence to libel a substantive case of people trafficking but nonetheless enough to present “the court and sentencer a context or background of trafficking that would aggravate the offence and so lead to a more extensive sentence”.\(^ {579}\) She also argued that courts recording offences aggravated by people trafficking will “shine a light on that activity so that statistics are more robust”.\(^ {580}\)

530. Ms Di Rollo made it clear that the COPFS will, if there is enough evidence, always prosecute a substantive charge of people trafficking rather than simply relying on an aggravation of some other offence. She added that “aggravation will not be used as an easy option or a shortcut”.\(^ {581}\)

531. Bronagh Andrew from Community Safety Glasgow (TARA Project) also welcomed the proposals as another tool to combat people trafficking. She noted that victims of human trafficking can be “extremely traumatised and have little information about the human traffickers, so it can be difficult for investigations to progress”.\(^ {582}\)

532. Ms Andrew suggested that it would be helpful for a shared definition of human trafficking to be set out in statute. She noted that Jenny Marra MSP has lodged a consultation on proposed legislation, which defines human trafficking.\(^ {583}\)

533. The Cabinet Secretary said that he recognises that there is a problem with people trafficking in Scotland. He said that the Government believes “that the first necessary step is to bring in a general aggravation, because we are conscious that that will help to raise awareness and allow evidence to be led”.\(^ {584}\)

534. The Cabinet Secretary agreed that more work is required in this area, including possibly a broader legal definition of human trafficking. He said that the


\(^{578}\) Policy Memorandum, paragraph 243.


Scottish Government is in talks with the UK Government about whether provisions in the forthcoming Modern Slavery Bill can be extended to Scotland.\textsuperscript{585}

535. The Committee welcomes the two aggravations with regard to people trafficking proposed in the Bill. The Committee requests that the Scottish Government keeps it updated on progress with the Modern Slavery Bill and its extension to cover Scotland.

**Police Negotiating Board for Scotland**

536. The Police Negotiating Board (PNB) established in 1980 provides a forum for negotiating hours of duty; leave; pay and allowances; the issue, use and return of police clothing; personal equipment; and pensions of police officers in the UK.\textsuperscript{586} It makes recommendations on these matters to the Home Secretary, Secretary of State for Northern Ireland, and Scottish Ministers, who are responsible for setting out the pay and conditions of police officers through Regulations. The PNB also issues guidance on the interpretation of Regulations.

537. The Policy Memorandum on the Bill explains that “the PNB comprises an Official Side, representing police authorities, chief officers of police and Ministers, and a Staff Side representing police officers through their staff associations”.\textsuperscript{587} If the parties disagree on an issue, the matter can be referred to arbitration under the Advisory Conciliation and Arbitration Service.

538. The Independent Review of Police Officer and Staff Remuneration and Conditions, led by Tom Winsor, recommended in its second report of 15 March 2012 that the PNB should be abolished and replaced by a new independent pay review body. In relation to other parts of the UK, this approach is being taken forward in the UK Anti-social Behaviour, Crime and Policing Bill which includes provisions seeking to abolish the PNB and create a pay review body – the Police Remuneration Review Body. The new body would consider the pay and conditions of most police officers in England, Wales and Northern Ireland. In relation to senior police officers, that role would be performed by the existing Senior Salaries Review Body.

539. Although the new pay review body would not make recommendations in relation to areas of policing which have been devolved to Scotland, the proposed abolition of the PNB is one of a number of proposals which gave rise to the need for the legislative consent of the Scottish Parliament. On 8 October 2013, the Scottish Parliament agreed to a Legislative Consent Motion granting the abolition of the PNB, as it affects Scotland.

540. In the Policy Memorandum on this Bill, the Scottish Government indicates that, as a result of initial consultation with Scottish police bodies, it will seek to establish a Police Negotiating Board for Scotland (PNBS) to continue the current collective bargaining approach to police pay and conditions rather than adopting the approach favoured by the UK Government.\textsuperscript{588} Section 87 of the Bill provides a


\textsuperscript{586} Policy Memorandum, paragraph 262.

\textsuperscript{587} Policy Memorandum, paragraph 263.

\textsuperscript{588} Policy Memorandum, paragraph 266.
framework for establishing a PNBS. It is intended that further detail will be set out in a constitution prepared by the Scottish Ministers. The Scottish Government published a consultation paper seeking views on this approach and the detailed operation of a PNBS which closed on 27 September 2013.

541. There was broad support amongst police bodies for the proposal to establish a PNBS. John Gillies said that Police Scotland welcomes this proposal, noting that “the PNB operates informally in Scotland, so it is just a case of taking that forward”. Calum Steele said that the Scottish Police Federation also welcomed the proposal, however, he indicated that “it remains unclear whether the Scottish Chief Police Officers Staff Association will take the view that it should fall within the ambit of the Review Body on Senior Salaries” rather than the PNBS. He warned that “if we lose very senior officers’ buy-in to the view that the negotiating mechanism is the right way of dealing with pay and conditions across the service, we lose a fundamental link in ensuring that there is a common, negotiated and fair approach to terms and conditions”.

542. In evidence to the Committee, the Cabinet Secretary confirmed that the Scottish Chief Police Officers Staff Association had indicated its willingness to participate in the new PNBS, adding that “all police officers, from the newest constable to the chief constable, will therefore be dealt with by the board”.

543. The Committee welcomes the establishment of a separate Police Negotiating Board for Scotland which will include participation from all ranks of police officers.

POLICY AND FINANCIAL MEMORANDUMS

544. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the Policy Memorandum which accompanies the Bill. The Committee considers that more detail would have been helpful.

545. The same rule also requires the lead committee to report on the Financial Memorandum. The Committee notes that the Finance Committee received a number of written submissions and took evidence from the Scottish Government Bill Team. However, we have made a number of observations relating to the resource implications arising from the Bill and have asked the Scottish Government to monitor costs during implementation.

SPICe briefing, page 49.
GENERAL PRINCIPLES OF THE BILL

547. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill.

548. The Committee supports the general principles of the Bill. However, this is with the exception of proposals regarding the corroboration provisions. Our recommendations on this issue are set out in the main body of this report.
The Committee reports to the Justice Committee as follows—

INTRODUCTION

1. The Criminal Justice (Scotland) Bill (the Bill) was introduced by the Scottish Government (the Government) on 20 June 2013.

2. The Policy Memorandum states that the Bill—

   “is the legislative vehicle to take forward the next stage of essential reforms to the Scottish criminal justice system to enhance efficiency and bring the appropriate balance to the justice system so that rights are protected whilst ensuring effective access to justice for victims of crime.”

3. Under Standing Orders Rule 9.6, the lead committee at Stage 1 is required, among other things, to consider and report on the Bill’s Financial Memorandum (FM). In doing so, it is required to consider any views submitted to it by the Finance Committee (“the Committee”).

4. In July 2013, the Committee agreed to invite a range of organisations potentially affected by the Bill to submit written evidence.

5. A total of 16 pieces of written evidence along with a further two supplementary submissions were received. All written submissions can be accessed via the Committee’s website at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/65990.aspx.

6. The Committee also received a letter from the Cabinet Secretary for Justice (dated 18 November 2013) drawing its attention to planned increases in funding relating to certain provisions within the Bill which had not been reflected in the FM.

7. At its meeting on 20 November 2013 the Committee took evidence on the FM from the Government Bill Team.


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1 Criminal Justice (Scotland) Bill. Policy Memorandum, paragraph 3
9. Following the evidence session, the Committee received a letter from the Bill Team dated 3 December, providing further information on the FM.

THE FINANCIAL MEMORANDUM

10. The FM states that the Bill has been developed around three elements—

- Implementation of the recommendations of Lord Carloway’s review of the criminal justice system as a package of reforms;
- Implementation of the recommendations of Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure; and
- A number of miscellaneous provisions.

11. The FM states that the Bill’s financial implications will “primarily affect the Scottish Police Authority (SPA), the Crown Office and Procurator Fiscal Service (COPFS) the Scottish Legal Aid Board (SLAB) the Scottish Court Service (SCS) and the Scottish Prison Service (SPS). It goes on to state that “the measures which will have the greatest financial implications are connected with the Carloway provisions, particularly the removal of the requirement for corroboration and the provisions on access to legal advice...the Bowen and miscellaneous provisions on the whole have lower financial costs.”

Total financial costs

12. A table summarising the “total financial costs by organisation” (Table 2) is provided after paragraph 11. Table 4 then breaks down the “total financial costs by Bill provision” and suggests that between 2015-16 and 2018-19 the Bill will result in total recurring costs of £6.587 million per annum, and in non-recurring costs of £2.703 million and £1.648 million in 2015-16 and 2016-17 respectively.

13. When asked in oral evidence whether it envisaged any further non-recurring costs after 2016-17, the Bill Team explained that these costs were “primarily police capital costs for additional interview rooms” which had been “based on what the police told us.”

Total opportunity costs

14. The FM provides a table after paragraph 11 summarising “total opportunity costs by organisation” (Table 3). Table 5 then breaks down the “total opportunity costs by Bill provision” and suggests that such opportunity costs are expected to amount to between £26.685 million and £34.748 million in each of the years between 2015-16 and 2018-19.

Opportunity Costs

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2 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 10
3 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 11
5 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 11
6 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 11
15. During the Committee’s scrutiny of the FM it became apparent that a key, overarching theme was the FM’s use of opportunity costs. Whilst certain opportunity costs could be specifically attributed to either the Carloway or Bowen provisions (and where appropriate, are considered under these respective headings below), a significant part of the oral evidence session focussed on a more general discussion relating to the Bill Team’s definition and usage of the term.

16. The Bill Team explained that the FM differentiated between financial costs and opportunity costs, stating—

“We consider opportunity costs to be the impacts on staff time and other existing resources that can be managed through measures such as prioritisation of functions and increased operational efficiency.”

17. It further explained that—

“Where a new process has been identified or an increase in volumes of cases has been predicted, and where the impact of that has been spread throughout Scotland in such a way that it is manageable within existing resources, that is classified as an opportunity cost.”

18. The Bill Team stated that “a lot of what is in the Bill is business as usual for many bodies”, but that business might need to be reorganised to absorb the changes. It pointed out that the new processes being introduced “are not being layered on top of old processes; they are replacing what is in place already.”

19. In summary, the Bill Team stated—

“I suspect that that is a more cogent explanation of opportunity cost - it is what we expect to be done in the normal course of business as usual, even though we are facing a significant change management exercise.”

20. In response to the suggestion that this appeared to differ from the standard definition of an opportunity cost and that the FM seemed “to be using the term almost as a code for efficiency savings” the Bill Team stated—

“although everyone in central or local government is being asked to look for efficiency savings, that is not the core of the opportunity costs as we use the term in the financial memorandum. The general expectation on bodies is that they will make efficiencies, but we are not necessarily offsetting new costs

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against efficiencies. A lot of these costs are not new; instead, they are resources that are being used for something different.”

21. When asked whether certain activities might therefore not be able to be undertaken as a result of changes stemming from the Bill, the Bill Team gave the example of police training costs totalling around £9.8 million (as noted in paragraph 128 of the FM). It explained that, had the training been carried out in 2014-15 as originally planned, it would have resulted in real costs relating to the requirement for backfilling and overtime. However, it stated that, as a result of changing the implementation date to allow the training to take place in 2015-16—

“the police have indicated that they will be able to spread the training across the year in a way that ensures that it can be accommodated in normal police time and will not require any backfilling or overtime.”

22. Noting that the FM estimated a recurring opportunity cost to the SPS of £22.75 million per annum by 2018-19, the Bill Team explained that it had used an average figure of £37,000 per prisoner but that this did not mean that the cost of incarcerating one additional prisoner would amount to the same sum. It explained that—

“The cost of putting an extra 200 or 300 people in prison per year will not be £37,000 each; it will be the amount that it costs to feed those extra prisoners and the various direct costs that are attributable to their being in prison.”

23. The Bill Team further explained that—

“The indication that we have had from prisons is that the costs of an extra 200-odd prisoners are already largely included in what have been put forward as the annual prison running costs. The prison running costs include some flexibility for prisoner numbers going up or down on an annual basis. That is why, in previous years, prisons have had underspends during the year. Running costs have been slightly lower than had been anticipated because prisoner numbers have been slightly lower.”

24. When it was suggested to the Bill Team that it might be possible to disguise costs in any FM by arguing that they could all be absorbed, it agreed “that that could lead to our trying to badge everything as an opportunity cost, which would be misleading.”

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25. However, the Bill Team explained that this was the reason why it had “been careful to agree the opportunity costs with our partners”, noting that “when they have felt that there would be an additional financial cost, our partners have been vocal.”

26. The Bill Team further stated that “had we called many of those costs financial costs that would not have been transparent, either. We are not spending £10 million on training police officers specifically for the bill. That training will form part of their normal in-year training.”

27. When asked whether it had identified what training, tasks or normal duties would not be undertaken to enable police officers to attend training courses required as a result of the Bill, the Bill Team stated that, whilst “it would be for the individual agencies to comment in detail on what they would and would not do”, it had discussed detailed implementation plans with them. It stated that this process was continuing but pointed out that “We are talking about the financial year 2015-16, which is quite far ahead to be thinking about training and workload issues.”

28. Responding to suggestions that such issues would have had to be considered in order to inform the long-term cost implications provided in the FM, the Bill Team agreed that this was the case and that the training had been modelled but that “we might not have to look at the exact detail of which training courses police officers will or will not go on.”

29. In response to questions relating to the apparent upwards trajectory of predicted opportunity costs for the SPS as provided in table 3 of the FM (rising from £6.85 million in in 2015-16 to £14.6 million and £18.65 million in 2016-17 and 2017-18 respectively, and to £22.75 million in 2018-19) and whether these opportunity costs must, at some point, become real financial costs, the Bill Team replied—

“I can see how the table is slightly misleading. The figure for 2018-19 is for the Bill’s full impact, and we expect the figure to be at that level from then onwards. The figures are staggered in that way because they are modelling prison sentences that might be several years long. In the first year there would be additional sentences, whereas in the second year there would be additional sentences but also people continuing to serve the sentences that were brought in in the first year. That is why the figures ramp up to a particular level, which we expect to be the long-term level.”

30. When asked how this assumption might be affected by prison sentences of longer than three years, the Bill Team acknowledged that this was “not an exact science”, but stated—

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“I think that the figure was reached using an average prison sentence of eight years; therefore, it will take four years to reach the average level. After four years, people will start to leave prison who went into it as a result of the Bill, and our analysts suggested that that is where the figures will start to level out.”

31. West Dunbartonshire Council stated that the FM’s estimate of an additional cost of £1.244 million in additional demand for social workers appeared to be “the result of a series of informed guesses” and that the assumption that it would result in opportunity costs—

“appears to have been arrived at on the basis of no evidence whatsoever; including, very importantly, the capacity of local authorities to make decisions regarding the allocation of staff time to accommodate new work arising as a result of the consequences of legislation and over which we have little or no control. This would bear an interpretation of additional costs, joining a lengthening list of unfunded additional demands on the local authority.”

32. West Dunbartonshire Council went on to state that the additional financial burdens arising from the Bill “should be funded in full by the Scottish Government through an additional funding allocation.”

33. Fife Council stated “we recognise that opportunity costs could become actual costs and would need to revisit these issues should demand increase to such an extent that would detract from the aim of the Bill to modernise and enhance efficiency.”

34. The Association of Scottish Police Superintendents (ASPS) stated in written evidence that “much of the costs are classed as opportunity costs and I would advise close scrutiny of these in the wider context of police reform.” It further stated—

“It is my understanding that the Police Service of Scotland must subsequently achieve year on year real financial savings due to the annually reducing budget and that therefore the opportunity to use resources “freed up” by efficiency savings is questionable. It is a more likely scenario that resources “freed up” have to be offered Early Retirement (ER), Voluntary Retirement (VR) or redeployed to fill gaps arising from ER and VR wherever possible.”

35. When asked directly if the Government was prepared to give a commitment to reviewing costs in the future “in the light of experience so that any marked increase could be funded” by it, as suggested by Falkirk Council, the Bill Team stated—

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23 West Dunbartonshire Council. Written submission, paragraph 5
24 West Dunbartonshire Council. Written submission, paragraph 7
25 Fife Council. Written submission, paragraph 10
26 The Association of Scottish Police Superintendents. Written submission, paragraph 16
“Yes. We will certainly be monitoring the bill’s impact and maintaining communication with the key bodies.”

36. The Bill Team reiterated this undertaking in its letter of 3 December stating that it was “in the process of developing detailed implementation plans with key partners, and will maintain close communication with these bodies up to and beyond the Bill’s provisions coming into effect.”

37. The Committee is concerned about the lack of clarity regarding the usage of the term “opportunity costs” within the FM.

38. The Committee notes the view of some witnesses that these opportunity costs could become actual costs and recommends that the lead committee asks the Cabinet Secretary for Justice to confirm that these costs will be fully funded.

39. The Committee recommends that the Government publishes periodic updates on the costs of the Bill, including the “opportunity costs.”

Part A – Carloway Provisions

Costs on the Scottish Administration (paragraphs 43 - 226)

40. The FM states that “costs on the Scottish Administration will fall on the Scottish Government, SPA, COPFS, SCS, SPS and the Legal Aid Fund….Total non-recurring financial costs on the Scottish Administration will be around £4,352,000 over two years, and there will be total recurring financial savings of £6,530,000 per year.”

Removal of requirement for corroboration

41. The Bill removes the current requirement for corroboration in criminal cases. The FM states that Police Scotland and COPFS conducted “shadow reporting and shadow marking exercises” which suggested this would be likely to result in increases in the number of cases reported by the police to COPFS and in the number of cases prosecuted by COPFS.

42. The FM states that “an increase in prosecutions would have potential cost implications for SPA, COPFS, SLAB and SCS in terms of increased workload.” As additional prosecutions are likely to lead to additional convictions and therefore to additional custodial and community sentences, the FM states that this would also impact on the SPS and on local authorities.

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28 Scottish Government Bill team letter
29 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 43
30 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 32
31 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 34
43. On the basis of the shadow exercises, the FM predicts that the increase in police reports to COPFS would be likely to be in the range of 1.5 – 2.2% with a “most likely estimate of 1.5%.”

44. The FM also predicts that the resultant change in the number of summary prosecutions would be in the range of a 1% decrease to a 4% increase, “with a best estimate of a 1% increase.” Solemn prosecutions are predicted to increase by between 2% and 10%, “with a best estimate of a 6% increase.”

45. Taken cumulatively, the FM’s “best estimate” is that there would be a 2.5% increase in summary prosecutions and a 7.6% increase in solemn ones.

46. The Faculty of Advocates (“The Faculty”) stated that the FM did “not provide sufficient information on these exercises to allow for meaningful comment” and that “even if the results of the shadow exercises…are to be regarded as reliable, there are reasons…to believe that the analysis in the FM understates the resources implications.” The Faculty also suggested that it was unrealistic to treat additional costs as opportunity costs.

47. The Faculty stated that the predicted increase in the numbers of prosecutions was “surprisingly small”. It also suggested that—

“the cohort of “additional” cases is likely to contain a significantly higher proportion of sexual offences than the current caseload, and, in particular, to include a higher proportion of cases in which the case will essentially turn on an assessment of the complainer’s evidence against an assessment of the accused’s evidence. Such cases are significantly more likely to go to trial rather than to be resolved by a plea, yet it would appear (para. 180) that no allowance for this has been made in the assessment of the additional costs.”

48. The Faculty went on to state that, as noted in the FM, “the average plea costs 1.5% of the average case going to trial” and pointed out that an increase in prosecutions for rape would impact disproportionately on the High Court.

49. The Faculty’s submission further noted that increases in the numbers of prosecutions (over and above those predicted in the FM) would have a resultant impact on those organisations listed above. It stated that “the Legal Aid Board does not appear to have included any estimate for costs attributable to additional appeals generated by the change in the law. This contrasts with COPFS, which has made an allowance for this in the first three years of the new regime.”

50. When questioned on this point by the Committee, the Bill Team stated that this was due to the fact that COPFS had specifically raised this point (and had been able
to provide evidence) but “the issue was not raised with us by any of the other agencies, so we felt that it would be specific to the work of that team and we have not looked at it in other areas.” It further stated, however, that “It would not be standard for the financial memorandum to say that there will be more appeals because we are changing the law.”

51. **The Committee invites the lead committee to seek clarification of the reason why it would not be standard for a projected increase in the number of appeals resulting of the Bill to be included in the FM.**

52. When it was suggested that a potential increase in the number of appeals must have some financial implication for organisations other than COPFS, the Bill Team stated that it “did not have sufficiently robust evidence to suggest that there would be an increase in the number of appeals across the board.”

It gave an undertaking, however, to “have conversations with other agencies” and to “get back” to the Committee on this point.

53. In its letter of 3 December, the Bill Team stated—

“If there is an overall increase in appeals, that will impact on the legal aid fund, as pointed out by the Faculty of Advocates. The legal aid fund is a demand-led fund, and the Scottish Government has undertaken to meet all associated demand-led costs. We will monitor the impact of the Bill on the legal aid fund, and funding will be available to cover any increases as a result of this Bill.”

54. The letter further stated that the potential for a related impact on the SCS had also been considered and that the Government and the SCS had agreed that any short-term increase in appeals could be managed within existing resources.

55. **The Committee welcomes the Government’s commitment to monitoring the impact of the Bill on the legal aid fund and making additional funding available if required.**

56. In their joint submission, Police Scotland and the SPA provided greater details on the basis for their shadow marking exercises. Having concluded these exercises, their submission stated that two points had become apparent in relation to the volume of reports to COPFS—

- “There is no great volume of unreported matters, where a named suspect is known to the police, which would be likely to ’swamp’ the justice system should the rules on evidence be amended as indicated; and
- In almost all matters where there is any degree of supporting evidence, the police will tend to report under the current regime, particularly in serious allegations.”

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41 Scottish Government Bill team letter
42 Police Scotland and the Scottish Police Authority. Written submission, paragraph 31
57. In written evidence, COPFS stated that it was “content that the estimated costs and savings set out in the Financial Memorandum (as they apply to COPFS) are reasonable and are as accurate as possible in respect of the time periods considered.” It also subsequently provided greater detail of the basis for its shadow marking exercise in supplementary written evidence before offering to provide further details to the Committee should it so require.

58. In oral evidence, the Bill Team acknowledged the “reasonable point” that the published FM had not provided “a huge amount of detail” on COPFS’ shadow exercise, but pointed out that further detail had subsequently been provided in its supplementary written evidence. Noting that the Faculty had “also stated that, overall, the Financial Memorandum is a reasonable summary of costs”, the Bill Team confirmed that, in its view, the shadow exercise was “quite a robust way of evidencing the estimates. We feel that the estimates are strong and reliable.”

59. Later in the meeting it expanded on this point stating—

“The exercise that was undertaken was absolutely robust and thorough. Perhaps the description of it in the financial memorandum was not as detailed as it might have been, but the additional information that the Crown Office has now presented gives a good picture of the thorough investigation that occurred.”

60. The Bill Team also highlighted that it had “conducted a detailed exercise on the back of the shadow marking exercise” and had undertaken “an analytical exercise based on existing models for predicting impacts.”

61. The Committee notes that a more detailed description of the basis for the shadow marking exercise was provided in supplementary written evidence. However, it asks why this was not originally included in the FM in order to facilitate proper scrutiny of the estimated costs.

62. The Bill Team further explained that the FM’s estimates were “in most instances, a range of possible outcomes within which we have indicated a best estimate” and that, unless otherwise indicated, these best estimates had been based on “the professional experience and judgment of the various bodies involved.” It confirmed that his was the methodology which informed the Government’s planned timetable for implementation and stated that “a full plan will be prepared once the final terms of the Bill are known.”

63. The Bill Team later stated that it had “identified where there are additional costs for which we need to provide extra funding”, but that it expected “the police and
courts to be able to deal with the business that arises from the changes, by and large, as normal.” Expanding on this point, it stated—

“We are talking about increased volumes of between 1 and 6 per cent at the serious end, so we do not expect an overwhelming amount of additional casework as a result of the Bill. The Crown Office has confirmed that in its evidence.”

64. In response to questions regarding whether any increase in rape convictions might result in future savings by reducing the crime rate over time, the Bill Team agreed that this was a policy objective but that any such future savings had not been quantified in the FM as the period which it covered was “too short to take account of that kind of effect.”

65. When asked whether, conversely, it was possible that removal of the requirement for corroboration might result in fewer convictions and therefore, in savings, the Bill Team acknowledged that “arguments can be made about the impact on the conviction rate. Some argue that the rate might be lower and some argue that it might be higher.”

66. The Bill Team explained that the FM’s calculations had been based on existing conviction rates “simply because that is the best evidence that we have available”, “because we felt that anything else would be speculation”. However, it also stated that it had “worked in other factors” including Lord Carloway’s analysis of the types of cases that would go forward, and it “built that into the model of the additional cases that will proceed.”

67. When questioned specifically about the Bill’s potential impact on the SPS, the Bill Team explained that, whilst a number of factors could be expected to impact on the size of the prison population, the SPS had stated that “in the short term, the estimates set out in the Financial Memorandum are manageable within capacity.”

Forensic Services

68. The SPA/Police Scotland submission stated that—

“The impact of the Bill will compel the Police Service to change and introduce new working practices that will impact on Forensic Services. This will affect the number of cases forensic services are required to examine which would be over and above our current demand as well as the impact on us having to examine more cases in a shorter timeframe.”

69. It provided a table estimating that a 2% increase in its forensic services workload would result in increased costs to Police Scotland of £529,000 per annum

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54 Police Scotland and the Scottish Police Authority. Written submission, paragraph 9
whilst a 4% increase would result in increased costs of £1,056,000. In the Cabinet Secretary's letter of 18 November, he explained that these potential increased costs had not been raised during the FM’s development but that following discussions between his officials and Forensic Services, "it has been agreed that the most likely impact is a 2% increase, at a cost of £529,000 per year."  

70. The Committee welcomes the provision of this additional funding but questions why this requirement was not highlighted during the original consultation.

71. Both ASPS and the SPA/Police Scotland submissions made the point that the police will need to invest in new ways of working as a result of the Bill. ASPS stated that, whilst it appreciated that police ICT costs to support the changes were incorporated in the wider police ICT investment programme, "some reference should be made (in the FM) to the ICT cost that is attributable to this Bill, in order that this is captured and understood for the future, without wishing to raise a risk of "double counting.""

72. With regard to opportunity costs, the Faculty stated—

"In characterizing the additional costs to the Court Service as "opportunity costs" the FM relies on savings in court time which it is anticipated will be achieved by the Bowen proposals. Since those proposals relate to solemn cases prosecuted in the sheriff court, it is difficult to see how they could be relevant to the High Court. While a trial is running the court staff and other court facilities cannot be otherwise used and it is, for that reason, open to question whether the additional costs to the Court Service should be characterized as "opportunity costs", which can be absorbed through efficiency savings."  

73. In response to questioning on this point, the Bill Team confirmed that the proposals would impact on sheriff courts but stated that it had "developed the estimates in close co-working with the Scottish Court Service, which has indicated to us that it is able to accommodate those within existing resources." It further pointed out that the SCS had indicated this to be the case in its written submission.

Costs on local authorities (paragraphs 227 - 237)  
74. The FM states that "the provisions relating to child suspects will potentially bring new costs to local authorities," whilst "removal of the requirement for corroboration in criminal cases is likely to result in an increase in the number of prosecutions, which will impact on local authorities on the basis that additional prosecutions are likely to lead to additional community sentences."  

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55 Cabinet Secretary for Justice letter  
56 Association of Scottish Police Superintendents, Written submission, paragraph 13  
57 The Faculty of Advocates, Written submission, paragraph 31  
58 Scottish Parliament Finance Committee, Official Report, 20 November 2013, Col 3339  
59 Criminal Justice (Scotland) Bill, Financial Memorandum, paragraph 227  
60 Criminal Justice (Scotland) Bill, Financial Memorandum, paragraph 231
75. The FM estimates that these provisions will result in total recurring opportunity costs of £1.244 million for local authorities and provides a more detailed description of the basis for this estimate in paragraphs 227 to 237.

76. The FM’s “best estimate” is that the Bill would result in 480 additional community sentences per year at a total cost of £1,160,000. However, it states that, as costs associated with these would primarily relate to staff time, “this does not translate directly into additional financial cost, but will need to be considered by local authorities as an additional demand in managing staff workloads. This £1,160,000 has therefore been classed as an opportunity cost.”

77. Falkirk Council suggested that the removal of the requirement for corroboration would be likely to result in an increased number of community sentences and that this would have implications for “already overstretched criminal justice social workers.” It stated that it believed the Government’s estimates “to be flawed in relation to an expectation that this extra work can be subsumed within existing resources” and that the Bill would result in increased staffing costs for local authorities.

78. West Dunbartonshire Council stated that “the potential increase for Community Payback Orders is also likely to increase demand on criminal justice staff – with no financial contribution provided.”

79. Renfrewshire Council also stated that it would find it “very difficult to absorb this additional workload without additional resources,” pointing out that it was already absorbing significant increases in supervision and unpaid work orders subsequent to the introduction of Community Payback Orders without any additional funding.

80. A number of local authorities also drew attention to the potential for an increased number of social work reports arising from the removal of the requirement for corroboration. Dundee City Council, for example, stated—

“We do not believe that all the potential additional costs have been accurately reflected in the FM. No consideration has been given to the potential increased volume of Social Work reports as a result of an increase in the number of prosecutions and associated requests for Social Work court reports. The FM assumes that the costs of supporting additional community sentences will not translate directly into additional financial cost but will be an additional demand in managing workloads.”

81. Similarly, Fife Council stated—

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61 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 54
62 Falkirk Council. Written submission, paragraph 9
63 Falkirk Council. Written submission, paragraph 11
64 West Dunbartonshire Council. Written submission, paragraph 10
65 Renfrewshire Council. Written submission, paragraph 4
66 Dundee Council. Written submission, paragraph 4
“We note the potential increase in workload from increased Community Sentencing and would anticipate additional costs could be attached to Local Authorities in the preparation of Criminal Justice and other associated reports as well as placing an increased demand on services providing community based statutory supervision.”

82. In response to questioning from the Committee relating to the FM’s “best estimate” of an additional 480 additional community sentences per year, the Bill Team explained that this figure would amount to an increase of around 2.8% which could be considered to result in opportunity costs which “are manageable because the workloads of social workers and other relevant agencies can be repositioned.”

83. When asked what percentage increase in community sentences might be needed before it would result in additional financial costs for local authorities, such as the need to recruit additional staff, the Bill Team stated that it did not have the calculations to hand, but—

“In the discussions that were had, the feeling was that the potential increase was not anywhere near enough for there to be a cost. Even when we looked at the figures at the high end of the range and divided the cases across all the various authorities in Scotland, the numbers did not come out high enough for there to be an absolute need to recruit additional staff. It was felt that the potential additional cases could be managed by current staff levels.”

84. The Committee invites the lead committee to seek clarification from the Cabinet Secretary for Justice as to what percentage increase in community sentences would be required in order to result in financial costs according to Government calculations.

85. The Bill Team also explained that it had developed the FM’s estimates “through consultation with COSLA and ADSW” and not through discussions with individual local authorities. It stated that it was “therefore understandable that a small number of local authorities might not completely hold the same views as those bodies” and further noted that local authority submissions to the Committee were “not unanimous in the positions that they present.”

86. The Convener suggested that, whilst he understood that COSLA had been consulted as the umbrella body, it appeared that some local authorities felt that their concerns had not been addressed. However, the Bill Team stated that these concerns had not been raised during the production of the FM and that it stood by the FM’s estimates with regard to opportunity costs. It further stated that it had “calculated the costs on a Scotland-wide basis” and that its information “strongly

67 Fife Council. Written submission, paragraph 9
suggests that there will be no great impact on any particular local authority and that, therefore, the proposals can be absorbed within current allocations of staff.”

87. Nevertheless, the Bill Team undertook to respond to the Committee “by letter on the various issues that local authorities have highlighted so that we can reassure you on each and every one.”

88. In this letter, the Bill Team explained that “these costs would arise in the context of substantial decreases in crime rates in Scotland in recent years, as well as a range of policy initiatives designed to reduce reoffending.” It further pointed out that the Government “had protected the overall community justice budget, including funding within that for community sentences” before stating that the 2014-15 draft budget contained an increase of £500,000 in cash terms (it is not clear from the letter whether this increase relates specifically to funding for community sentences or to the wider community justice budget).

89. The letter also stated that the Government had provided additional flexibility to local authorities and that it was for them to allocate funding on the basis of local need. As any additional costs would be “spread across the country and represent a small percentage increase,” the letter states “that in the context of reducing crime rates and the additional funding commitment, this work can be managed within existing resources.”

90. Similarly, when specifically asked why some local authorities felt that increased volumes of social work reports did not appear to have been considered in the FM, the Bill Team stated that it had consulted in good faith and that “the concern about social work reports was not raised with us when we produced the memorandum, so it is not reflected in it.” It also confirmed that “the submissions have not caused us to move away from what has been said already” and that it understood the FM’s position to be correct.

91. Expanding on this point in writing, the Bill Team noted that social work reports were not mandatory in all cases. Again it pointed towards “substantial decreases in crime rates” and stated that, in this context, a small increase in the number of social work reports spread across the country “would be manageable within existing resources.”

92. On a separate point, with regard to the concerns of certain local authorities, the Bill Team suggested that—

73 Scottish Government Bill team letter
74 Scottish Government Bill team letter
76 Scottish Government Bill team letter
“Some of the local authority submissions assume that certain things will happen under the Bill that are not necessarily provided for in it and that are not intended to be provided for in it.”

93. When asked to elaborate on this suggestion, the Bill Team offered to do so in writing. However, when the subject of the provision of appropriate adults arose later in the evidence session (see paragraphs 95 to 98 below), it became clear that this was the topic to which the Bill Team had referred and that further information in writing on this point would no longer be required.

94. The Committee invites the lead committee to ask whether both COSLA and individual local authorities were invited to respond to the consultation or whether COSLA was simply invited to respond on behalf of all local authorities in Scotland. If all local authorities were not invited to respond, the Committee invites the lead committee to ask why they were not invited to do so.

**Vulnerable adult and child suspects**

95. Where the police assess an individual as being “vulnerable”, the Bill would require them to secure the attendance of an Appropriate Adult as soon as reasonably practicable after detention and prior to questioning. The FM states that these provisions “will not entail additional costs as Appropriate Adult Services are provided at present on a non-statutory basis.”

96. However, a number of local authorities questioned this assumption. Aberdeenshire Council, for example, stated that at present, social workers undertake the role on a voluntary basis and that training costs for volunteers total £5,000 per annum. In the event that the provision of appropriate adults became a statutory duty for local authorities, it suggested that the requirement to ensure they are available 24 hours a day would mean that social work backfill and additional funding for training would be necessary. It stated that—

> “The likely cost of backfill would be 1 x peripatetic social worker post and likely cost of increased coordination would be 1/2 post coordinator to Coordination referrals, appropriate adult training and awareness. So overall cost approx £65k per year.”

97. In oral evidence, the Bill Team confirmed that the Government had “no intention of making that provision statutory”, and stated that, as the Bill as introduced did not make the provision of appropriate adults a statutory requirement, no related costings had been included in the FM. It further stated that it had an agreement with COSLA that practices regarding the provision of appropriate adults would not alter as a result of the Bill and, therefore, no additional costs relating to this provision were expected. It did undertake however, to “carefully monitor how the Bill is implemented” and would “react if there are, in fact, changes.”

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78 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 236
79 Aberdeenshire Council. Written submission, paragraph 5
98. The Bill Team provided further clarification in its letter of 3 December, confirming that “the Bill does not introduce a new appropriate adult scheme, and it does not change the role of either the police or the appropriate adult.” Therefore, it suggested that “the concern raised by Aberdeenshire Council in particular seems to come from a misunderstanding of the effect of the Bill.”

99. The letter did confirm, however, that the Government had “made a specific commitment to COSLA to review the impact of the Bill in relation to vulnerable adults after implementation.”

100. The Committee welcomes this commitment to reviewing the impact of the Bill in relation to vulnerable adults after implementation.

101. Currently children aged 16 or under who are detained have the right to access to an adult named by them in advance of and during an interview. The Bill extends this right to those aged 18 or under. The FM predicts that “in the great majority of cases such support is likely to be sought from people known to the suspect” (such as friends or family members) but that there will be cases where support is sought from a social worker instead.

102. The FM suggests that the most likely proportion of cases where the services of a social worker would be requested would be 10% of cases (around 800 cases per year). It estimates that this would result in additional annual costs per year for local authorities of £84,000 but that this would be an opportunity cost as it would form part of a social worker’s general workload.

103. Falkirk Council, however, stated that “it is difficult to understand what formula the Scottish Government has used to base their calculation on that 10% of young people will need this.” It stated that it knows “anecdotally” “that many young people (particularly those who have been previously looked after) seek this support from social workers” and that the potential impact on its resources was therefore “very difficult to quantify or predict” at this stage.

104. The Bill Team addressed this subject in its letter of 3 December, stating that consultation with ACPO, ADSW and COSLA had resulted in the assumption that “only a small proportion of 16 and 17 year olds would want to seek support from a social worker.”

105. The letter reiterated the basis for the FM’s “best estimate” of additional costs totalling £84,000 per year across Scotland and stated that, in the context of falling rates of youth crime, this increase “would be manageable within existing resources.”

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81 Scottish Government Bill team letter
82 Scottish Government Bill team letter
83 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 163
84 Falkirk Council. Written submission, paragraph 8
85 Scottish Government Bill team letter
86 Scottish Government Bill team letter
Legal Advice

106. With regard to Grants of Advice and Assistance, the Law Society stated that “the existing funding arrangements for solicitors carrying out police station work are inadequate and need to be reviewed” and that “funding mechanisms for this work are not structured appropriately and the rates are unduly limited.”

107. Noting that SLAB had confirmed that the Government intended to review the payment mechanism as part of its work on the Bill, the Law Society stated that it would encourage this review to take place as soon as possible and that it would be keen to engage with it.

108. The Law Society also noted that the Bill would provide for police questioning after charge and that there would be a right of access to a solicitor for such questioning. It pointed out that on the basis of the FM, it appeared that all additional work relating to this would go unpaid and that, in its view, it was not appropriate for the Government to expect such work to go unremunerated.

109. In his letter of 18 November, the Cabinet Secretary stated that whilst SLAB had provided estimates in relation to this point, they had “unfortunately” been overlooked during the drafting of the FM and that this would now be remedied. The additional anticipated cost of this was stated as being £34,000 per year. (KM letter)

Part B – Bowen Provisions

110. Following Sheriff Bowen’s Independent Review of Sheriff and Jury Procedure, the Bill makes provision for a number of changes to the operation of sheriff and jury business, including increasing the period on which a person may be held on remand from 110 to 140 days.

Costs on the Scottish Administration (paragraphs 245 – 266)

111. The FM provides a description of the estimated cost implications of the Bowen provisions on a number of organisations as follows—

- SPA (paragraphs 246 – 248) - £391,000 per annum in savings.
- COPFS (paragraphs 249 – 255) - £370,000 per annum in additional costs.
- SCS (paragraphs 256 – 259) - £1.245 million per annum in savings.
- SPS (paragraphs 260 – 262) - £1.5 million per annum in additional costs.
- SLAB (paragraphs 263 – 266) - £493,000 per annum in additional costs.

Costs on local authorities (paragraphs 267 – 268)

112. The FM states that the “proposal to increase the time-limit for the period for which an accused person may be remanded before his or her trial commences from 110 to 140 days will increase the number of persons held on remand.” The FM then estimates that this increase “could result in the occupation of a place in secure

87 The Law Society of Scotland. Written submission, paragraph 25
88 Cabinet Secretary for Justice letter
89 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 267
accommodation being occupied 25% of the time” which, it states, would result in increased (shared) costs to local authorities of £56,000 per annum.

113. A number of local authorities questioned this estimate in written evidence. Renfrewshire Council, for example, stated that the weekly cost of a placement was currently £5,412, meaning that the additional annual cost of a 30 day increase to it alone would amount to £69,583. It further stated that the FM’s assertion that the additional cost would be shared amongst local authorities was flawed as—

“local authorities adhere to a financial framework where service requirements are purchased by spot placements on a needs required basis and not block placements and individual local authorities bear the costs. Therefore authorities will not have spare capacity to accommodate and will not be able to spread the costs among authorities.”

114. West Dunbartonshire Council also queried the FM’s estimate stating—

“How this translates into the stated additional need for a single additional secure accommodation place is not clear at all, and especially as the FM then states at Para 268 that this place is anticipated to be required only 25% of the time. This logic seems to contradict Para 230 which talks about 40 extra remand places at any time. The logic seems to suggest that at any point in time that 39.75 of these places will be within the SPS provision (or elsewhere).”

115. Whilst Falkirk Council stated—

“We believe the impact of this cannot be estimated but has the potential for very large costs for local authorities. There is the possibility that the courts may view secure care as the first option for 16/17 year olds, rather than a remand to a Young Offenders Institution. If this position was taken, costs could be magnified given there are currently 60 16/17 year olds in Polmont Young Offenders Institution on remand or sentenced.”

116. Dundee City Council estimated its potential increase in expenditure relating to young people in secure care on remand to be around £45,000. It further pointed out that it would also incur additional costs relating to secure transport costs to courts, children’s hearings or medical appointments at an average cost of £610 per journey.

117. In its letter of 3 December, the Bill Team acknowledged that “the section covering this in the FM does not go into detail on the process of obtaining estimates” before setting out further details on its modelling exercise which were intended to address the issues raised by local authorities. On the basis of the predicted “very small impact in financial terms” and in the context of a “substantial reduction” in the use of secure remand places, it concluded “that the small

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90 Criminal Justice (Scotland) Bill. Financial Memorandum, paragraph 268
91 Renfrewshire Council. Written submission, paragraph 4
92 West Dunbartonshire Council. Written submission, paragraph 5
93 Falkirk Council. Written submission, paragraph 14
94 Scottish Government Bill team letter
percentage increase estimated for in the Bill would be manageable within existing resources.”

118. The Committee notes that this more detailed explanation was provided in response to points made in written evidence. However, it asks why this was not originally included in the FM in order to facilitate proper scrutiny of the estimates it contained.

CONCLUSION

119. The lead committee is invited to consider this report as part of its scrutiny of the Criminal Justice (Scotland) Bill’s FM.
Present:

Gavin Brown
Kenneth Gibson (Convener)
John Mason (Deputy Convener)
Jean Urquhart
Malcolm Chisholm
Jamie Hepburn
Michael McMahon

Also present: Bruce Crawford and John Swinney, Cabinet Secretary for Finance, Employment and Sustainable Growth

**Criminal Justice (Scotland) Bill:** The Committee took evidence on the Financial Memorandum from—

Elspeth MacDonald, Deputy Director, Criminal Justice Division, Peter Hope-Jones, Policy Officer, Criminal Justice Bill Team, and Kerry Twyman, Finance Business Partner, Justice, Scottish Government.
On resuming—

Criminal Justice (Scotland) Bill: Financial Memorandum

The Convener: Our second item of business is to take evidence from the Scottish Government bill team as part of our scrutiny of the Criminal Justice (Scotland) Bill's financial memorandum. I welcome Elspeth MacDonald, Peter Hope-Jones and Kerry Twyman. I understand that a member of the bill team would like to make a brief opening statement.

Elspeth MacDonald (Scottish Government): Thank you, convener—I will make an opening statement.

The Criminal Justice (Scotland) Bill is a wide-ranging and forward-thinking reform that will modernise and strengthen the Scottish criminal justice system. Most of its provisions have been developed from the recommendations of two independent reviews: Lord Carloway’s review of criminal law and practice and Sheriff Principal Bowen’s review of sheriff and jury procedure.

Lord Carloway’s review was prompted by the Cadder case, which had a significant and immediate effect on the criminal justice system and resulted in the abandonment of hundreds of prosecutions, including some for very serious crimes. The provisions of the bill that implement the recommendations of Lord Carloway’s review are intended to create a criminal justice system that is able to meet the requirements of modern society and provide as much resilience as possible against any unexpected future developments in European Court of Human Rights jurisprudence.

The costs that are associated with the bill are of course set out in detail in the financial memorandum. The Cabinet Secretary for Justice and the Cabinet Secretary for Finance, Employment and Sustainable Growth have made it clear that the costs are reasonable in the context of reforms that will put Scotland at the forefront of human rights protections and introduce efficiencies to the criminal justice system.

The financial memorandum was developed through close consultation and discussion with key partners, including Police Scotland, the Crown Office and Procurator Fiscal Service, the Scottish Prison Service, the Scottish Court Service, the Scottish Legal Aid Board, the Convention of Scottish Local Authorities and the Association of Directors of Social Work. The costs are based on the information that was provided by those various bodies—including the shadow marking exercise—and on their professional experience and judgment. We consider what we have set out to be
the best possible estimate of the costs that are associated with the bill as introduced.

I can give more detail on the process, if the committee would find it useful. However, that might come out in questioning.

**The Convener:** I am happy to see whether it comes out in questioning. I might even ask something along those lines myself.

As usual, I will start off the questions and then open out the session to committee colleagues. My first question is in regard to written evidence from the Faculty of Advocates, which states:

“In characterising the additional costs to the Court Service as ‘opportunity costs’ the financial memorandum “relies on savings in court time which it is anticipated will be achieved by the Bowen proposals. Since those proposals relate to solemn cases prosecuted in the sheriff court, it is difficult to see how they could be relevant to the High Court.”

Can you comment on that, please?

**Peter Hope-Jones (Scottish Government):** The faculty is correct to point out that the specific savings that are identified in the sections on sheriff and jury reforms will impact on sheriff and jury courts. However, we developed the estimates in close co-working with the Scottish Court Service, which has indicated to us that it is able to accommodate those within existing resources. That is also indicated in the written submission to the committee.

**The Convener:** Okay. You will have seen some of the responses that we received from local authorities on the financial memorandum’s estimate of the provisions’ total recurring opportunity costs. West Dunbartonshire Council stated that the figure appears to be the result of a series of informed guesses”. The council also stated that the assumption that it would result in opportunity costs “appears to have been arrived at on the basis of no evidence whatsoever”.

**Peter Hope-Jones:** The first thing to say with regard to the responses from local authorities is that the estimates in the financial memorandum were developed, as we have said, through consultation with COSLA and the ADSW. We reached agreements with those bodies as representatives of local authorities more widely. We did not talk with individual local authorities. It is therefore understandable that a small number of local authorities might not completely hold the same view as those bodies. It is worth noting, too, that the local authorities’ responses to the committee are not unanimous in the positions that they present.

We went through a detailed process to estimate the impacts on local authorities. There are two major ones to consider. One relates to corroboration, on which there was a detailed exercise on the back of the shadow marking exercise, about which I can talk more if members are interested in it. The second concerns the proposals on the sheriff and jury procedure. Again, we undertook an analytical exercise based on existing models for predicting impacts and I can provide more details on that if it would be helpful.

10:15

**The Convener:** Some of the local authorities are quite critical. West Dunbartonshire Council said that no consideration had been given to “the allocation of staff time to accommodate new work arising”.

It also said:

“the potential increase for Community Payback Orders is also likely to increase demand on criminal justice staff—with no financial contribution provided.”

I am concerned that some of the local authorities feel that their concerns have not been addressed at all. I understand what you say about COSLA as the umbrella organisation, but the local authorities seem to feel that their direct concerns have not been considered.

**Peter Hope-Jones:** The concerns that have come out were not raised with us when we were producing the financial memorandum. As I said, we discussed the impacts, so we stand by the estimates in the memorandum as part of the opportunity costs that have been presented more generally.

**Elspeth MacDonald:** I propose that the difference is that we dealt with COSLA and the Association of Directors of Social Work and calculated the costs on a Scotland-wide basis. The information that we have strongly suggests that there will be no great impact on any particular local authority and that, therefore, the proposals can be absorbed within current allocations of staff. If that were not to be the case, we would want to know that, but that is the best information that we have.

Some of the local authority submissions assume that certain things will happen under the bill that are not necessarily provided for in it and that are not intended to be provided for in it.

**The Convener:** Will you elaborate on some of those?

**Elspeth MacDonald:** Could I elaborate on that in writing? It is something that I have just come across.

**The Convener:** Thank you for that.
You talked about social work directors being consulted, but Dundee City Council says:

“No consideration has been given to the potential increased volume of Social Work reports as a result of an increase in the number of prosecutions and associated requests for Social Work court reports.”

If social work directors were consulted, I am confused as to why the council thought that no consideration had been given to that.

**Elspeth MacDonald:** Somewhat unhelpfully, I am also confused, because we consulted in good faith, if you know what I mean. We understand the position to be as we set it out. It is robustly set out in the financial memorandum and we understand what we say to be correct. The submissions have not caused us to move from what has been said already.

**Peter Hope-Jones:** In the financial memorandum, we have tried to drill down quite deeply into the impacts of the abolition of corroboration. Quite a lot of detail is set out on that. However, the concern about social work reports was not raised with us when we produced the memorandum, so it is not reflected in it.

**The Convener:** Opportunity costs have already been raised. You have an explanation in the financial memorandum of what they are, but I ask you to talk us through that for the public record and so that everybody knows what we are talking about.

**Elspeth MacDonald:** The financial memorandum differentiates between financial costs and opportunity costs. We consider opportunity costs to be the impacts on staff time and other existing resources that can be managed through measures such as prioritisation of functions and increased operational efficiency.

That approach was agreed with our key partners as we moved forward. We discussed it in detail, and over some time, with all the bodies that we have mentioned. Where a specific need has been identified for additional staff as a result of the bill, that has been included as a financial cost. Where a new process has been identified or an increase in volumes of cases has been predicted, and where the impact of that has been spread throughout Scotland in such a way that it is manageable within existing resources, that is classified as an opportunity cost. That is the approach that we took with local authorities.

There may be savings, but an example of opportunity costs would be around training. Initially, Police Scotland anticipated a substantial requirement for the backfilling of posts and overtime payments in order to achieve implementation of the bill in 2014. Notably, the Commonwealth games and other major events will be a real drain on police resources. We responded to those concerns, and we have set out a timetable for implementation, which allows training to be completed without the need for widespread backfilling and overtime payments. That works through staff schedules and cover arrangements, which means that the staff costs that are associated with training can be considered as opportunity costs rather than a financial cost.

That is about reorganising the business to absorb the changes. A lot of what is in the bill is business as usual for many bodies. Court cases are business as usual for the courts and investigating crime is business as usual for the police. However, there are new ways of doing that business that people will need to be trained up for, and then those new ways of doing business will become business as usual, too.

We should not lose sight of the fact that the new processes that are being introduced are not being layered on top of old processes; they are replacing what is in place already. For example, the new process for arrest and detention replaces what is there already. The new process for looking after suspects of crime is different, but the police look after suspects of crime as a matter of course now.

I suspect that that is a more cogent explanation of opportunity cost—it is what we expect to be done in the normal course of business as usual, even though we are facing a significant change management exercise. Organisations throughout Scotland should be able to deal with that, and that is the way in which we have looked at it. That is also the way in which our key partners have accepted it.

**The Convener:** I will touch on one specific area before opening up the discussion to colleagues round the table: that of vulnerable adult and child suspects. When the police assess an individual as being vulnerable, the bill requires them to secure the attendance of an appropriate adult as soon as reasonably practicable. The financial memorandum states that that

“will not entail additional costs ... as Appropriate Adult Services are provided at present on a non-statutory basis.”

Local authorities are questioning that assumption. Aberdeenshire Council has said that social workers undertake the role on a voluntary basis and that training costs are £5,000 per volunteer. If that provision becomes statutory, it would mean that those individuals would have to be available 24 hours a day, and there would be backfilling costs that have not been considered. Could you talk us through that aspect of the FM?

**Elspeth MacDonald:** That is the example that I was thinking about of a local authority making an assumption that something will become statutory that is not statutory now. We have no intention of making that provision statutory although, if the
Parliament makes it statutory, we would have to reconsider the matter. The bill as introduced did not make a statutory requirement for appropriate adults to be provided. Therefore, that is not included in the costings of the bill.

The Convener: You are saying that there is no inevitability or likelihood that that will take place.

Elspeth MacDonald: It is certainly not the Government’s policy that it should take place, although obviously the bill is now in the hands of the Parliament.

Peter Hope-Jones: At the core of the estimates on vulnerable adults is an agreement with COSLA that the practice around providing appropriate adults will not change as a result of the bill. They will continue to be offered in the way that they are now, and therefore the costs will be the same. We have also agreed with COSLA that we will carefully monitor how the bill is implemented. We will continue to liaise with COSLA and react if there are, in fact, changes.

The Convener: Thank you for that. I open up the discussion to colleagues round the table.

John Mason: The convener raised the question of opportunity costs. Will you say a bit more about that? I understand from your explanation to the convener that you are suggesting that opportunity costs exist where something is going to stop and something else is going to start, so the amount of work just carries on. My understanding was that it is hoped that the legislation will lead to more rape convictions. Does that mean that there will be more people going through the courts and more people in prison?

Elspeth MacDonald: The stop and start is part of the explanation, and the rest is that we expect this to become business as usual. We expect the police and the courts to be able to deal with the business that arises from the changes, by and large, as normal. We have identified where there are additional costs for which we need to provide extra funding.

John Mason: You said that it will become business as usual. My understanding is that less serious cases never go to court because the courts are so full. If you bring in more rape cases, will that mean that other cases will fall out of the system?

Elspeth MacDonald: Sorry, but I do not agree with your original proposition that less serious cases would not proceed.

John Mason: Do you agree that that is what happens at the moment?

Elspeth MacDonald: I am saying that I do not agree that that is what happens. It is not for me to answer that, but that is not my understanding of what happens at the moment. We would expect the most serious cases to proceed. We are talking about increased volumes of between 1 and 6 per cent at the serious end, so we do not expect an overwhelming amount of additional casework as a result of the bill. The Crown Office has confirmed that in its evidence.

John Mason: On the Scottish Prison Service, paragraph 192 on page 70 of the financial memorandum states:

“In the short term, SPS considers that it can accommodate the current forecast population within its existing capacity and existing budget.”

Is there spare capacity in the prisons at the moment?

Peter Hope-Jones: Yes. The Scottish Prison Service has indicated to us that there is capacity in the prison system to accommodate the increase that we have indicated in the short term. The SPS and the Scottish Government undertake regular prison population projections and plan the estate provision on that basis, and we will continue to do so in order to monitor the actual impacts of the bill.

John Mason: I had understood that at least some prisons are overcrowded and are at more than their expected capacity. Is that not the case? If it is the case, they could not have spare capacity.

Peter Hope-Jones: It would be for the Scottish Prison Service to comment on that in detail, but my understanding is that, if more people are convicted, that should reduce the crime rate over time and therefore there should be a saving. Has that been built in, or is it too long term?

Peter Hope-Jones: That has not been reflected directly. It is something that we discussed and obviously it is a policy objective, but it is hard to quantify a specific impact in individual years.

10:30

Elspeth MacDonald: The period of the financial memorandum is too short to take account of that kind of effect although, as Peter Hope-Jones says, it is one of the objectives that we are aiming for.
John Mason: If I have read the media correctly, some people have questioned whether there will be more convictions, because there will be other hoops to go through instead of corroboration, such as stricter jury numbers. One school of thought is that there will be fewer convictions and therefore that there will be savings. Has there been a risk analysis or probability assessment of that?

Peter Hope-Jones: In our calculations in the financial memorandum, we used existing conviction rates, simply because that is the best evidence that we have available. However, we worked in other factors. For example, for Lord Carloway’s review, he did some analysis of the types of cases that would go forward for prosecution, and we built that into the model of the additional cases that will proceed.

Arguments can be made about the impact on the conviction rate. Some argue that the rate might be lower and some argue that it might be higher. For the purposes of our calculations, we went with the current figure, because we felt that anything else would be speculation and would involve trying to add or take away a certain percentage, which would not be particularly constructive.

Jamie Hepburn: On the shadow exercises that have been undertaken, the Faculty of Advocates set out that the financial memorandum “does not provide sufficient information on those exercises to allow for meaningful comment.”

How would you respond to that suggestion?

Peter Hope-Jones: The shadow marking exercise was set up by the Crown Office and the police so it would be for them to answer on the detail of exactly what they underwent. However, it should be noted that the Crown Office has provided supplementary written evidence to the committee that provides more detail of exactly what went into that exercise. Since then, it has also set out, in evidence to the Justice Committee, the new prosecution test, which reflects broadly what was done in the shadow marking exercise.

Jamie Hepburn: You would refute the suggestion that there is not enough information about those exercises.

Peter Hope-Jones: In the financial memorandum as published there is not a huge amount of detail. That is a reasonable point. However, what the Crown Office has put out since gives a decent picture of what was undertaken.

Jamie Hepburn: So the information is there.

The Faculty of Advocates also stated that the predicted increase in the number of prosecutions is “surprisingly small”, the implication being that the figure given might underestimate the cost of prosecuting cases through the courts. However, I noted that the Crown Office and Procurator Fiscal Service has set out that it is content that the estimated costs and savings set out in the financial memorandum, as it applied to the COPFS, “are reasonable and are as accurate as possible”.

How would you respond to the faculty’s suggestion that the predicted increase in the number of prosecutions was surprisingly small?

Peter Hope-Jones: I noticed that in the submission from the Faculty of Advocates. The first thing that I would point out is that the faculty also stated that, overall, the financial memorandum is a reasonable summary of costs. Secondly, it did not give much evidence for why it feels the way you describe. The estimates for corroboration in the financial memorandum were as the result of those detailed shadow marking exercises, which reproduce the process of decision making in actual cases. It was quite a robust way of evidencing the estimates. We feel that the estimates are strong and reliable.

Elspeth MacDonald: It might be useful at this point for me to provide the detail that I referred to earlier on the process that we went through in reaching what we have in the financial memorandum. We undertook detailed discussions with partners about the implications of the bill for their services. That included looking at what would happen if impacts were at the higher end of ranges and the likelihood of that happening.

Our financial estimates are, in most instances, a range of possible outcomes within which we have indicated a best estimate. Where we have used a range, it is because it is best statistical practice to do so. We have then based best estimates—unless we have specifically indicated our own workings on the point—on the professional experience and judgment of the various bodies involved. We have used that methodology with the various bodies that we have referred to, so we consider that the result has been a thorough consideration of the implications of the bill, including the need for training and changes in processes and methodology. That is informing our planned timetable for implementation, and a full plan will be prepared once the final terms of the bill are known.

I hope that that provides some sort of background to the process, which has been pretty robust, I have to say, and has taken some time.

Jamie Hepburn: That is helpful. The faculty also suggested—the deputy convener made this point, too—that “the incidence of convictions may change” as a result of the bill and that, if so,
“an assessment which simply applies the existing proportion of cases in which a conviction is secured to the ‘additional’ cases prosecuted would underestimate the costs to SPS and local authorities.”

How do you respond to that?

**Peter Hope-Jones:** That is an illustration of exactly what I was talking about earlier. The Faculty of Advocates submission argues that the conviction rate may be higher, and that would impact on the number of convictions and therefore on prisons. However, as we heard, there is an argument that the conviction rate may in fact be lower because a bar is being removed to certain cases going forward, which potentially increases the number of cases. We felt that there was no sufficiently robust evidence either way on which to base a calculation, and that is why we have used the existing figure.

**Jamie Hepburn:** I appreciate that it is pretty difficult to know what the conviction rate may be in future. The deputy convener also referred to the Scottish Prison Service position in response to the financial memorandum. For absolute clarity, can you confirm that it is not expressing any concerns about capacity issues in prisons or about the costs involved in the bill and that such concerns have not been presented to you?

**Peter Hope-Jones:** There are wider conversations about prison capacity. Prison numbers are projected to increase by about 200 places per year in any case. That does not specifically incorporate the predictions in the financial memorandum, but it does reflect an expectation that there will be legal changes and that those changes are liable to lean more towards stronger prison sentences. It is also worth noting that we should consider the increases in prisoner numbers in the wider context of such things as community payback orders as a more robust and flexible community sentence, the presumption against imposing short prison sentences of three months or less, and the range of policy initiatives designed to reduce reoffending, such as the reduce reoffending change fund. There is a wider picture about prisoner numbers, obviously, and the bill feeds into that wider conversation.

**Jamie Hepburn:** I suppose the point is that the Scottish Prison Service is not knocking the Government’s door down saying that there is a financial problem as a result of the bill.

**Peter Hope-Jones:** Not as a result of the bill. It has said that, in the short term, the estimates set out in the financial memorandum are manageable within capacity.

**Jamie Hepburn:** Thank you.

**Gavin Brown:** Is the average cost of a community sentence £2,400?

**Peter Hope-Jones:** I believe that that is the figure that we use in our calculations. Let me just check that—it is set out in the financial memorandum. If you repeat the question, I will confirm the figure.

**Gavin Brown:** Is the average cost of a community sentence £2,400?

**Peter Hope-Jones:** We have used the figure of £225,000.

**Gavin Brown:** Sorry?

**Peter Hope-Jones:** We have used the figure of £225,000.

**Gavin Brown:** For a community sentence?

**Peter Hope-Jones:** Oh no—I am sorry—the figure that I cited was for secure accommodation.

**The Convener:** Perhaps you could get back to the committee with that information.

**Peter Hope-Jones:** Yes. We will get back to you on that.

**Gavin Brown:** Let us assume that the cost is of that magnitude. You assume that there will be an increase in the number of community sentences. You have a low estimate of 120, a best estimate of 480 and a high estimate of 1,140. If we work to your best estimate of 480 additional community sentences a year, on what basis do you assume that there will be no additional costs on local authorities with that number of additional cases?

**Peter Hope-Jones:** The costs associated with community sentences are different from those associated with prisons in that they are mostly about the staff time involved in the supervision of the sentences. It is worth noting that the 480 additional cases modelled in the financial memorandum are, at around 2.8 per cent of the total figure of 16,916, a relatively small percentage increase.

The position is set out as part of the opportunity costs model that we have explained in some detail. They are manageable because the workloads of social workers and other relevant agencies can be repositioned.

**Gavin Brown:** What percentage increase in community sentences would be needed for there to be an additional cost to local authorities?

**Peter Hope-Jones:** I am not sure that I can answer that specifically. However, aside from the bill, there is increasing emphasis on community sentences in the justice system.

**Kerry Twyman (Scottish Government):** We do not have the calculations to hand. On staff time, we were talking about an extra couple of hours a week, the expectation would be that current staff could absorb that; were we talking about a large
enough increase in cases to require additional staff to be recruited, there would be a financial cost. In the discussions with COSLA on the issue, it was not considered that there would be a high enough impact, based on these numbers, to require the recruitment of additional staff members.

Gavin Brown: In that case, what percentage increase is needed before new staff are required? You are saying that you have not done those calculations.

Kerry Twyman: In the discussions that were had, the feeling was that the potential increase was not anywhere near enough for there to be a cost. Even when we looked at the figures at the high end of the range and divided the cases across all the various authorities in Scotland, the numbers did not come out high enough for there to be an absolute need to recruit additional staff. It was felt that the potential additional cases could be managed by current staff levels.

Gavin Brown: In evidence presented to the committee, West Dunbartonshire Council, which the convener mentioned, has said that there would be additional costs; Falkirk Council has said that there would be increased staffing costs; Fife Council has questioned your assumptions; and Renfrewshire Council has said that it would be very difficult to absorb the costs. The message that we are getting from local authorities is that there will be increased costs, but you are saying that there will not. I am simply trying to work out the percentage increase in sentences before additional costs are incurred. We are getting a very different message from what you have presented to us.

10:45

Peter Hope-Jones: Only a minority of local authorities have written in on this issue and it should be noted that, although they have picked up a number of small issues, Fife and South Lanarkshire said in their submissions that, overall, the financial memorandum gives a reasonable estimation of the costs and they broadly accept it. As I have said, the agreement was made with COSLA as the representative body.

Elspeth MacDonald: It might be helpful if we respond by letter on the various issues that local authorities have highlighted so that we can reassure you on each and every one.

The Convener: That is going to be a big letter, right enough.

Elspeth MacDonald: Yes, but my point is that, in some cases, assumptions have been made that do not apply and, in others, we can provide the committee with specific answers. We would look to do that rather than not answer your question now.

Gavin Brown: I accept the point that not every increase in cases will lead to additional costs, but I find it very difficult to accept that there will be no additional costs whatever. No doubt some of the costs can be absorbed, but the evidence that we have received is that not all of them can be, and I merely ask you to reflect on how you have reached your conclusion that none of the additional cases will lead to additional costs. I find that surprising, but I will leave the matter there.

Elspeth MacDonald: I am happy to respond and clarify the position for you.

Gavin Brown: Thank you.

The Convener: You do not need to respond on the assumed costs of community sentencing, because the figures can be found in table 29 of the financial memorandum.

Michael McMahon: I have only a short question. We have seen evidence of the disparities in the figures that are being cited and read the concerns of local authorities. In its submission, Falkirk Council has stated that, because of the concern about what might be described as the wide margin of error between the financial memorandum and the local authorities’ assessments of the impact of the legislation,

“It would be preferable if the ... Government gave an undertaking to review costs in the light of experience so that any marked increase could be funded”.

Can you give that commitment?

Peter Hope-Jones: Yes. We will certainly be monitoring the bill’s impact and maintaining communication with the key bodies.

Malcolm Chisholm: I find this financial memorandum interesting for two reasons. First, many of the debates on costings are inextricably bound up with the bill’s fundamentally controversial aspects, a good example of which is corroboration. There is an inherent uncertainty about all of this, but I suspect that people have reached their particular conclusions because of their position on the policy rather than anything else. I will certainly follow the matter with great interest.

That was merely a comment. My question is more about the second aspect of the financial memorandum that I have found intriguing: opportunity costs. I must admit that, all this time, I have been struggling to see why you have used the term. As I understand it, the opportunity cost of a policy is all the things that you cannot do because you are implementing that policy. However, you seem to be using the term almost as a code for efficiency savings, which I have to
say puzzles me. If it is fundamentally related to efficiency savings, such a move has been questioned by the Association of Scottish Police Superintendents, which is saying—and I will not read out the quote—“Look, we’re already making lots of efficiency savings to free up resources for early and voluntary retirement.” Some people might have the suspicion that some of the big sums of money attached to opportunity costs are slightly misleading and that they really should be called financial costs. After all, you cannot have unending efficiency savings and simply badge up all the additional costs to be dealt with through efficiencies.

Elspeth MacDonald: I have already explained what opportunity costs are. There is an element of efficiency saving but, as far as the police are concerned, the fact is that, if the bill is passed, 17,234 police officers who are doing their job one way just now will have to do their job differently and the main costs of that will fall on the front-line officers.

In some instances, the bill’s provisions—the Bowen provisions, for example—will provide efficiencies themselves. However, although everyone in central or local government is being asked to look for efficiency savings, that is not the core of the opportunity costs as we use the term in the financial memorandum. The general expectation on bodies is that they will make efficiencies, but we are not necessarily offsetting new costs against efficiencies. A lot of these costs are not new; instead, they are resources that are being used for something different.

Malcolm Chisholm: That might be closer to the normal meaning of opportunity cost, but it raises the question of what will not be done that is currently being done. Central to the concept of an opportunity cost is the idea that you cannot do certain good activity because you are now doing something else. However, that does not seem to have been acknowledged in the narrative around opportunity costs in the financial memorandum. Indeed, you seem to be almost redefining language in a way that I find slightly puzzling.

Kerry Twyman: The police costs form one of the largest opportunity costs in the bill; as paragraph 128 of the financial memorandum makes clear, the figure for that is £9.8 million, the bulk of which relates entirely to training. In that case, the term “opportunity costs” might, as you suggest, not mean substituting something for something else; instead, because we have moved the implementation date from 2014-15—a year in which, according to the police, the additional training would have required backfilling and overtime, with all the real financial costs that that would have carried—to 2015-16, the police have indicated that they will be able to spread the training across the year in a way that ensures that it can be accommodated in normal police time and will not require any backfilling or overtime. It would therefore have been very misleading to have classed that as a financial cost; the training, the figure for which is £8 million, will be carried out during normal police time.

As for the £1.2 million for training staff time for delivering training, we are talking about staff who are currently in post delivering training. The discussion, again, was about whether, if we moved the implementation date to 2015-16, it could be worked into the normal training for police without the need to take on additional training staff, which again would carry a real financial cost. Arguably, that could not be classed as a real financial cost as it was effectively being absorbed by moving the implementation date and not carrying any additional cost.

As we have discussed, a similar argument can be made about the prisons cost. At the moment, prisons have flexibility in managing their portfolio and estate and can move prisoners around and they indicated to us that no direct financial cost arose from the bill’s provisions.

I do not know whether that helps.

Malcolm Chisholm: The prisons example is probably the best one because it has the highest cost—I think that the figure is £22 million as a result of increased prison places. It is hard to imagine how we can have a lot more prisoners at no real cost.

Kerry Twyman: It comes down to the use of the average figure of £37,000 per year for a prisoner place. This is where the opportunity cost concept comes into its own, because putting one more prisoner into the prison estate will not necessarily cost £37,000. That figure takes into account the costs of and depreciation in the estate, and putting in one more prisoner will not require the building of a whole new prison. We have used the figure of £37,000, but that is the average cost of a prisoner across the estate. The cost of putting an extra 200 or 300 people in prison per year will not be £37,000 each; it will be the amount that it costs to feed those extra prisoners and the various direct costs that are attributable to their being in prison.

Malcolm Chisholm: Even those are financial costs rather than opportunity costs. You might assume that staffing levels are related to the number of prisoners in some way, too.

Kerry Twyman: The indication that we have had from prisons is that the costs of an extra 200-odd prisoners are already largely included in what have been put forward as the annual prison running costs. The prison running costs include some flexibility for prisoner numbers going up or down on an annual basis. That is why, in previous
years, prisons have had underspends during the year. Running costs have been slightly lower than had been anticipated because prisoner numbers have been slightly lower. That happened last year, in 2012-13.

Malcolm Chisholm: I may not have looked at enough financial memorandums to know, but that seems an interesting concept to introduce into the world of financial memorandums. It could be used in any financial memorandum to disguise financial costs. I am not accusing you of doing that—I would have to look into the issue more—but it could always be argued that the costs involved are not real costs because they can all be absorbed. Do you know what I mean?

Kerry Twyman: Yes. That is why we have been careful to agree the opportunity costs with our partners. When they have felt that there would be an additional financial cost, our partners have been vocal. As I outlined, there are specific areas in which the police have said that the bill will result in additional financial costs, and those have been captured in the financial memorandum. The same goes for the Scottish Legal Aid Board.

We would not have called the costs in question opportunity costs if that had not been agreed with the partners concerned. You are absolutely right that that could lead to our trying to badge everything as an opportunity cost, which would be misleading. However, had we called many of those costs financial costs that would not have been transparent, either. We are not spending £10 million on training police officers specifically for the bill. That training will form part of their normal in-year training.

John Mason: I have a supplementary question on the issue that has just been asked about. Mention has been made of paragraph 128, which refers to “staff time for attending 18 hours of training”.

I do not know whether that applies to every officer. Paragraph 126 says:

“This can be achieved through reallocation of the officer from normal duties in most cases without the need for overtime payments”.

Therefore, the extra time that Mr Chisholm was talking about will be included in officers’ total normal hours. That means that they will go to less training on things such as first aid and equal opportunities or that they will spend less time on the beat. I do not see the police in my area sitting around or having long tea breaks.

Have you done any digging on what normal duties will be cut out to enable that extra work to be done?

Peter Hope-Jones: It would be for the individual agencies to comment in detail on what they would and would not do, but we have had conversations about detailed implementation plans. That process is continuing, but the outcome will depend slightly on the final form of the bill and other factors. We are talking about the financial year 2015-16, which is quite far ahead to be thinking about training and workload issues.

The Convener: I do not know that it is. Is all that not included in the forward financial projections in the financial memorandum?

Peter Hope-Jones: What precisely are you referring to?

The Convener: You said that 2015-16 was quite far ahead. Surely we have to think about such things when we look at the long-term cost implications in the financial memorandum.

Peter Hope-Jones: Absolutely, but we might not have to look at the exact detail of which training courses police officers will or will not go on.

The Convener: Surely you have to do that as part of the process of looking at the overall costs. When it comes to the financial memorandum and the bill, you must know what you will be paying for.

Peter Hope-Jones: I am sorry—I do not mean to suggest that we have not modelled what training will be required for the bill. That is set out as an opportunity cost, and it will need to be balanced against other training priorities.

11:00
The Convener: I want to go back to some things that have not been covered during the session. The total recurring costs are a very precise £6.587 million per annum, but I note that non-recurring costs are £2.703 million and £1.648 million in 2015-16 and 2016-17, respectively. Do you envisage any further non-recurring costs, or will it all be resolved within two years, after which the costs will, in effect, be zero?

Peter Hope-Jones: The non-recurring costs to which you refer are primarily police capital costs for additional interview rooms. Those costs are modelled on the basis of what was put to us as the plan for meeting the requirements of the bill. The position around police premises is slightly more complicated now that we have a single police force, and all sorts of rationalisation is being done around that. Those figures are based on what the police told us.

Within the change that is going on at the moment, there is reasonable capacity because of costs being freed up through the rationalisation of the estate. Apart from what is being modelled here, work is being done in the police on capital fund management and the building of new
facilities. Those costs are therefore potentially manageable within the other work that is going on.

The Convener: Thank you for that.

In its submission, the Faculty of Advocates has said that no “estimate for costs attributable to additional appeals generated by the change in the law” seems to have been considered.

Peter Hope-Jones: Yes. A cost is quoted for the Crown Office. It raised that with us as a specific issue for its team that deals with appeals, which saw an increase in workload as a result of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. It anticipates that there will be another increase in workload for that team. However, the issue was not raised with us by any of the other agencies, so we felt that it would be specific to the work of that team and we have not looked at it in other areas.

The Convener: You do not think that there should be any costs in the financial memorandum to reflect that.

Peter Hope-Jones: It would not be standard for the financial memorandum to say that there will be more appeals because we are changing the law. That does not apply to all financial memoranda of this type. However, we felt that it was worth reflecting that in the financial memorandum simply because the Crown Office raised a specific issue about that particular team and was able to provide evidence.

The Convener: Gavin Brown wants to come in.

Gavin Brown: My question is on a separate point.

The Convener: That is okay. You have the floor.

Gavin Brown: Table 3 of the financial memorandum, which is on page 39 of the document that I have in front of me, has a heading that refers to opportunity costs. For the SPS, the opportunity costs for 2015-16 are £6.85 million, becoming £14.6 million for 2016-17 and then going up to £18.65 million and £22.75 million. Do the opportunity costs for the SPS continue along that trajectory over time? I take on board the fact that there is not a direct cost every time that there is an extra prisoner. However, if the opportunity costs are on that trajectory, they must, at some point, become real financial costs and they cannot then be classed as opportunity costs.

Peter Hope-Jones: I can see how the table is slightly misleading. The figure for 2018-19 is for the bill’s full impact, and we expect the figure to be at that level from then onwards. The figures are staggered in that way because they are modelling prison sentences that might be several years long. In the first year there would be additional sentences, whereas in the second year there would be additional sentences but also people continuing to serve the sentences that were brought in in the first year. That is why the figures ramp up to a particular level, which we expect to be the long-term level.

Gavin Brown: Would there be no prison sentences of longer than three years? You say that the figure will get to £22.75 million and never go higher than that, but what if some prison sentences were considerably longer than three years? Surely the figure would then go up.

Peter Hope-Jones: I think that the figure was reached using an average prison sentence of eight years; therefore, it will take four years to reach the average level. After four years, people will start to leave prison who went into it as a result of the bill, and our analysts suggested that that is where the figures will start to level out. It is not an exact science, so there might be some variation, but that is the picture that our analysts developed.

The Convener: Okay. That was a digression from what we were talking about—I apologise for that.

Let me take you back to appeals. You were talking about the financial memorandum. Surely, if there is an additional cost from appeals under the legislation, that should at least be touched on in the financial memorandum. That cost must be funded somehow, must it not? If additional appeals are generated by a change in the law, there must be a financial implication.

Peter Hope-Jones: We did not have sufficiently robust evidence to suggest that there would be an increase in the number of appeals across the board. The team in the Crown Office raised a particular issue about its workload and that is what we reflected.

The Convener: Should that be looked at a wee bit further?

Peter Hope-Jones: We can have conversations with other agencies and get back to you, if that would be helpful.

The Convener: Thank you very much.

The financial memorandum states that Police Scotland and the COPFS conducted shadow reporting and shadow marking exercises. That was touched on earlier in Jamie Hepburn’s questioning. The Faculty of Advocates has stated:

“The FM does not provide sufficient information on those exercises to allow for meaningful comment.”

Earlier, you talked about the process being thorough and robust, but the Faculty of Advocates has said that it cannot even comment meaningfully
on the exercises because the process has not been robust and thorough. How can we get an accurate reflection of what the bill will impact on financially if that is the case?

Peter Hope-Jones: The exercise that was undertaken was absolutely robust and thorough. Perhaps the description of it in the financial memorandum was not as detailed as it might have been, but the additional information that the Crown Office has now presented gives a good picture of the thorough investigation that occurred.

The Convener: Okay. Thank you.

Would the bill team like to make any further points before we wind up?

Elspeth MacDonald: I thank the committee for its thorough scrutiny. We will provide the other information that was asked for that we could not provide off the cuff.

The financial memorandum represents a great deal of hard work with all the main bodies concerned, all of which have signed it off. It is, therefore, an agreed position with the main bodies that are affected by the bill. Despite the financial memorandum’s novel aspects, we intended at all times to reveal to the committee as much relevant information as we could, together with our thinking behind the conclusions that we reached.

The Convener: Thank you very much for responding to our questions. We look forward to receiving further information in writing.
Written evidence to the Finance Committee

Aberdeenshire Council
Association of Scottish Police Superintendents
Crown Office and Procurator Fiscal Service
Dundee City Council
Faculty of Advocates
Falkirk Council
Fife Council
Joint Submission from Scottish Police Authority and Police Scotland
Renfrewshire Council
Scottish Court Service
Scottish Legal Aid Board
Scottish Prison Service
South Lanarkshire Council
The Law Society of Scotland
West Dunbartonshire Council
West Lothian Council

Supplementary evidence

Crown Office and Procurator Fiscal Service
The Law Society of Scotland
Letter from Scottish Government Bill team to Convener, 3 December 2013

Correspondence

Letter from Cabinet Secretary for Justice to Convener, 18 November 2013
1. Currently the appropriate adult’s scheme is run on a voluntary basis in that social workers volunteer to train as appropriate adults and undertake this if an appropriate adult requested.

2. If it is made a right that people have access to an appropriate adult this will mean that financial assistance is required to ensure availability of appropriate adults on a 24 hour basis.

3. In terms of current costing, the current appropriate adult scheme is run on £5k per year. The £5k covers training costs and social workers do this on a voluntary basis. However, what this means is that a full service is not provided.

4. However, if it were to be a duty upon local authorities to provide appropriate adults then we would need social work backfill to ensure we could deliver this service and funding for training more social workers.

5. The likely cost of backfill would be 1 x peripatetic social worker post and likely cost of increased coordination would be 1/2 post coordinator to Coordination referrals, appropriate adult training and awareness. So overall cost approx £65k per year.
Consultation

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

1. I provided a joint response with the Scottish Police Federation. Our comments reflected our joint view that while we supported much of the policy intention and many of the measures proposed we were not wholly convinced in relation to the case for the wholesale abolition of the requirement for corroboration. Our comments did not focus on the financial aspects other than we would welcome detailed evidence of the benefits and cost of change.

2. We also welcomed any opportunity to streamline processes, reduce time and costs associated with current processes and procedures. Elements of the Bill may eventually enable some efficiency to be achieved in policing but there is a risk of increased pressure on the Criminal Justice System downstream from policing. I accept that an assessment has been undertaken to identify the potential increase in reporting of cases and prosecutions that might follow but remain concerned.

3. We also supported the removal of the requirement for corroboration in certain aspects of legal procedure such as the need to corroborate the service of certain legal documents. However our general stance was and remains that we are not wholly convinced of the case that corroboration is not required.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?

4. We did not offer any detailed consideration on the financial assumptions.

Did you have sufficient time to contribute to the consultation exercise?

5. Yes.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?

6. Our members are the senior operational leaders of the police service. They provide operational leadership and direction as Divisional and Departmental Commanders carrying Strategic and Tactical responsibility for high risk policing operations with direct personal and professional legal accountability for their decisions. This includes Firearms and all other major policing operations as well as the day to day operations including decisions whether to retain an arrested person in
custody or release them into the community, where the lives and personal safety of members of the public depend upon the decisions made.

7. While there are no direct implications for ASPS as a Staff Association for much of the Bill, there may be implications for my members who will have to work within the legislation and apply it in practice. There may also well be indirect implications for my members arising from future legal challenges to this new legislation as new Case Law is generated.

8. An area of direct relevance to us as a Staff Association is Chapter 2, Section 87, Police Negotiating Board Scotland. We welcome this development as necessary and proportionate given the wider developments across UK policing negotiating arrangements. I note the FM provides no detail on the anticipated costs and that the Scottish Government are to “pay such expenses as are necessary to enable PNBS to carry out its functions”\(^1\). I will respond in more detail to the separate Scottish Government consultations on PNB.

9. Support for the work of the UK PNB, which is in the process of being wound up, has included specialist support from the Office of Manpower and Economics and I hope that this has been taken into account in terms of funding as such support will still be required.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

10. I was unable to locate reference to the projection of costs “over 15 years” in the FM. I am however aware of the 15 year projection of estimated costs and savings for police reform. The projected costs and savings in the FM for the Criminal Justice (Scotland) Bill for the policing elements are based on the best estimate of Police Scotland. Much of the costs are classed as opportunity costs and I would advise close scrutiny of these in the wider context of police reform.

11. The challenge to achieve the required savings arises as a consequence of the Outline Business Case (OBC) for police reform. ASPS were not afforded the opportunity to comment on the financial aspects of the OBC and Police Scotland is struggling to find the savings that were offered in the OBC. There are elements of the FM that highlight financial costs as opposed to opportunity costs required to achieve the policy objectives. These relate to practical aspects such as estate and making custody facilities meet the requirements of the legislation. However, it remains difficult to comment constructively on the accuracy and reasonableness of the FM, as I believe the Bill still requires some additional work and have made a submission to the Justice Committee to this effect.

12. The Bill is driven from a Human Rights perspective, which I fully support. It is therefore important that the processes and procedures put in place by Police Scotland focus on safeguarding Human Rights. It is a particularly challenging task for policing in the context of achieving significant financial savings year on year.

\(^1\) Criminal Justice (Scotland) Bill, Paragraph 249
The information was however presented over 4 years (2015/16, 2016/17, 2017/18, and 2018/19) in tables throughout the FM. I note that the Bill seeks to “modernise and enhance the efficiency of the Scottish Government criminal justice system”\(^2\). There is no doubt that the Bill will modernise Scottish Criminal Justice System (SCJS) by the measures proposed, to a significant degree. However, I believe an opportunity to further modernise and streamline police powers relating to powers of search which has been missed which I believe would improve justice and reduce costs.

13. I appreciate that the costs of Police ICT to enable this change are incorporated in the wider police ICT investment\(^3\) programme but some reference should be made to the ICT cost that is attributable to this Bill, in order that this is captured and understood for the future, without wishing to raise a risk of “double counting”.

14. I note that the costs in the FM are assessed as “financial” if it relates to a specific need for additional staff to perform a new function or one-off capital costs associated with the Bill. Other costs are assessed as “opportunity costs” which can be defined as “the best alternative uses that the goods or services could be put to”\(^4\). These opportunity costs in terms of policing must be viewed in the context of the budget set by the SPA for 2013/14 and the reducing budget for policing leading up to and during the period of the new Bill’s implementation.

15. In relation to policing, on 28 March 2013 the Scottish Police Authority set the 2013/14 budget\(^5\) for the Police Service of Scotland at the available funding level of £1,062,449,000 against expenditure budgets of £1,126,343,000 resulting in a requirement to achieve spending reductions of £63,894,000 in the financial year 2013/14.

16. It is my understanding that the Police Service of Scotland must subsequently achieve year on year real financial savings due to the annually reducing budget and that therefore the opportunity to use resources “freed up” by efficiency savings is questionable. It is a more likely scenario that resources “freed up” have to be offered Early Retirement (ER), Voluntary Retirement (VR) or redeployed to fill gaps arising from ER and VR wherever possible.

17. The majority of costs in policing relate to people costs. The main way in which costs will be reduced will be by reducing the head count providing the service. This means primarily police staff posts being reduced. The business change required by policing arising from this Criminal Justice Bill is significant and is outlined in the FM. This change will need to be managed in the context of a period of significant budget

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\(^2\) Criminal Justice (Scotland) Bill, Paragraph 3

\(^3\) [http://www.spa.police.uk/assets/126884/175734/item-13-i6-business-case](http://www.spa.police.uk/assets/126884/175734/item-13-i6-business-case)


\(^5\) [http://www.spa.police.uk/assets/126884/147077/Item02-budget-final](http://www.spa.police.uk/assets/126884/147077/Item02-budget-final)
reduction, reducing numbers of police staff and a major operational challenge in the form of the Commonwealth Games. It is important to note the context and acknowledge the scale of the likely challenge.

18. Much of the opportunity cost relates to using resources differently to deliver the business change required: removing out of date training and guidance material, designing and delivering new training material and associated training, abstraction for attending training courses and so on. An assessment also appears in relation to the time required for new work in relation to reviewing detention by Inspecting ranks, considering and applying bail conditions and case managing “investigative bail” and so on.

19. Intuitively these assessments do not appear unreasonable but would welcome understanding to what extent any adjustment has been made for “optimism bias” in not only the assessments for policing (SPA) but right across the SCJS organisations impacted by this Bill. In addition, it I would welcome clarity if an allowance has been made for increase in costs over the period associated with inflation and other relevant on costs associated with staff costs.

20. Much of the detail has been worked through and detailed modelling carried out in relation to how Police Scotland would configure itself to meet the new requirements arising from the Bill. For example, work is already underway to reduce the supervisory ratios across Police Scotland to ensure necessary cost savings are achieved under a policy of management delayering.

21. ASPS understand and accept the need for management delayering but would encourage the Justice Committee to seek assurance that there is a clearly defined model with sufficient Inspectors to meet the new requirements under the Bill. There can be a temptation to just “add in” the new requirements and responsibilities to the roles and responsibilities of Inspectors. I do not think this would be in keeping with the spirit or intention of the Bill which seeks to protect the rights of detained persons and protect the public.

22. In addition the Chief Constable will be held to account by the Scottish Police Authority for performance across an extensive range of indicators which includes the overall detection rate along with targets for submission times to the Procurator Fiscal Service. This will undoubtedly create a pressure to increase the number of reports that the SCJS as a whole may have to deal with. I would also encourage clarity over the potential impact that achieving all of the performance indicators might have on the rest of the Criminal Justice System.

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8 [http://www.spa.police.uk/assets/126884/140136/item62-performanceframework](http://www.spa.police.uk/assets/126884/140136/item62-performanceframework)
If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

23. At this moment in time I do not see direct financial costs for ASPS, but seek assurance that PNB Scotland related costs (specialist support) will be met.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

24. It is difficult to comment on the uncertainty of the estimates but would hope that a sufficient allowance has been made for optimum bias as well as for inflation and pay rises. The FM also "wraps up" the costs associated with ICT to enable this change in the wider police ICT programme. This change will require ICT to make it work and the costs associated with this need to be robustly scrutinised and monitored given the history of public sector ICT programmes.

Wider Issues

Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

25. There are areas of the Bill which in my view need further work and therefore it is difficult to assert that all the costs are reasonably captured. I have made a submission to the Justice Committee in relation to the areas I believe need further work.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

26. The Bill introduces major change. It changes what until now has been a mixture of Common Law and Statute Law police powers into precise statutory legislation. It is probable that detailed legal debate may follow on the precise meaning of any particle wording in the legislation and therefore additional guidance or indeed a Code of Practice may become necessary to ensure police apply their powers in accordance with the intention of Parliament.
FINANCE COMMITTEE CALL FOR EVIDENCE
CRIMINAL JUSTICE (SCOTLAND) BILL: FINANCIAL MEMORANDUM
SUBMISSION FROM CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. Yes - COPFS were aware of both consultation exercises and submitted a response to the initial public consultation on Lord Carloway's proposals which took place between 3 July and 5 October 2012. In this response COPFS supported the broad principles contained in the consultation paper but, at that time, did not comment on any financial assumptions made. COPFS did not provide a response to the second public consultation on additional safeguards required following the removal of the requirement for corroboration.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
2. Yes - COPFS contributed to the preparation of the Financial Memorandum and our submissions have been accurately recorded in that document.

Did you have sufficient time to contribute to the consultation exercise?
3. Yes.

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.
4. Yes - Policy officials from COPFS provided a written submission to the Scottish Government in relation to the Financial Memorandum. This focused on the areas which were likely to directly impact on the work of COPFS and included the following:

- Corroboration - the removal of the requirement for corroboration will have an impact on the numbers and types of cases that will be prosecuted in future.
- Training - the removal of the requirement for corroboration will require COPFS to apply a new prosecutorial test which will be a substantial change and require a significant amount of training for all legal staff within COPFS.
- Appeals – although the level of appeals within Scotland is relatively stable, it has been proven that a change in law normally increases the number of defence appeals lodged.
Communications Costs - new documentation for COPFS will require to be produced in a number of areas although this documentation will likely be internet focused.

Information systems costs – work is ongoing and these are still to be finalised.

Challenges to conditions of Investigative Liberation/Undertakings and Post-charge questioning – a number of different processes have been identified and their resultant costs have been estimated.

Solemn Procedure - details of the proposed overall costs and savings of Sheriff Principal Bowen’s recommendations which form Part 3 of the Bill have been assessed.

5. COPFS is content that the financial implications referred to above are accurately reflected in the Financial Memorandum.

Do you consider that the estimated costs and savings set out in the Financial Memorandum and projected over 15 years for each service are reasonable and accurate?

6. COPFS is content that the estimated costs and savings set out in the Financial Memorandum (as they apply to COPFS) are reasonable and are as accurate as possible in respect of the time periods considered.

7. It was not possible to provide exact figures in relation to some of the information and certain assumptions required to be made. For example, the regimes of post charge questioning introduced by s27-29 of the Bill and investigative liberation introduced by s14 to 17 are entirely new processes in the Scottish criminal justice system and it is difficult to estimate the frequency with which they will be used and challenged. However, COPFS is satisfied that the information provided is as reasonable and accurate as possible in the circumstances.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

8. The Financial Memorandum sets out the total estimated costs to COPFS. However, COPFS is content that these costs can be met from within the organisation, following an internal review of processes and procedures.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

9. Yes. As stated in the response to question 5 above, certain assumptions were made in relation to the information provided for the Financial Memorandum. These assumptions and associated estimates have been accurately covered in the Memorandum.
Wider Issues

*Do you believe that the Financial Memorandum reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?*

10. COPFS believes that the Financial Memorandum reasonably captures the costs associated with the Bill, but can only comment in respect of COPFS.

*Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?*

11. It is not anticipated that there will be future costs associated with the Bill that would impact on COPFS.
FINANCE COMMITTEE CALL FOR EVIDENCE

CRIMINAL JUSTICE (SCOTLAND) BILL: FINANCIAL MEMORANDUM

SUBMISSION FROM DUNDEE CITY COUNCIL

Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. No

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. N/A

Did you have sufficient time to contribute to the consultation exercise?
3. N/A

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. We do not believe that all the potential additional costs have been accurately reflected in the FM. No consideration has been given to the potential increased volume of Social Work reports as a result of an increase in the number of prosecutions and associated requests for Social Work court reports. The FM assumes that the costs of supporting additional community sentences will not translate directly into additional financial cost but will be an additional demand in managing workloads. However locally we are already facing a sustained increase in the number of community based sentences (up 30%) within a context of reduced Criminal Justice Grant funding leading to funding pressures and the proposals in the Bill will exacerbate this problem should no additional funding be provided. In addition, should the Change Fund be successful in achieving its objectives, there is a presumption in the fund criteria that these services are funded from mainstream CJS funding in the longer term should there be a local commitment for them to continue. This would further reduce resources available to fund an increasing number of community based sentences.

5. In relation to the proposal to increase the time limit for the period of remand from 110 to 140 days we consider the potential financial implications to be underestimated based on our recent experience. Taking the whole system approach which encourages young people to stay under supervision for longer periods of time, any serious offending will potentially involve remand in secure provision paid for by the local authority. Through comparing the cost of 2 Dundee young people recently placed in secure care on remand before and after the proposed changes we estimate the potential increase in expenditure would be around £45k under the new proposals. In addition, the local authority incurred expenditure of over £12k on
secure transport costs relating to court/Children’s Hearing appearances/ medical appointments etc over the remand period for the 2 individuals, an average of around £610 per journey. It is therefore unreasonable to expect that this cost nationally would be around £56k per annum and that the costs would be met by local authorities.

6. The assumptions made around funding support to child suspects appear to be reasonable.

**Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?**

7. See comments at 4 above.

**If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?**

8. See comments at 4 above.

**Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?**

9. See comments at 4 above.

**Wider Issues**

**Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?**

10. There could potentially be an impact on agencies supporting victims of crime through increased numbers of prosecutions.

**Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?**

11. None considered
Introduction

1. The Faculty of Advocates is the independent bar in Scotland. Collectively, its members have unrivalled experience of advocacy before the Scottish courts and include acknowledged experts in many fields of law. The Faculty makes available to the people of Scotland a pool of skilled and well-trained advocates who are available for instruction in any court in the land. The work of the Faculty and of its members is integral to the maintenance of the rule of law in Scotland.

2. The Criminal Justice (Scotland) Bill proposes wide-ranging reforms of the criminal justice system. The Faculty’s response to the provisions of the Bill are elaborated fully in its response to the Justice Committee’s Call for Evidence. As will be evident from that response, the Faculty actively supports those parts of the Bill which it considers to be in the public interest. However, there are features of the Bill which the Faculty cannot support. In particular, it does not support the proposal, as it appears in this Bill, to abolish the requirement of corroboration.

3. The Faculty wishes to comment on the information in the Financial Memorandum (“the FM”) in relation to the proposal to abolish corroboration. The Faculty confines its comments to the Finance Committee to this aspect of the Bill. The key point which the Faculty wishes to make in relation to the abolition of corroboration is this. The requirement of corroboration is central to the practical operation of the criminal justice system in Scotland at every stage. Yet there is no clarity as to what will be put in its place. Without such clarity, the effects of the proposal cannot meaningfully be assessed. In particular, it is effectively impossible to make any reliable estimate of the resource implications of the proposal.

4. The analysis in the FM depends critically on two “shadow” exercises which have been undertaken, one by the police and the other by COPFS. The FM does not provide sufficient information on those exercises to allow for meaningful comment. The Faculty has asked for further information about them, but this has not, as yet, been forthcoming.

5. Even if the results of the “shadow” exercises on which the analysis is based are to be regarded as reliable, there are reasons, which are set out more fully below, to believe that the analysis in the FM understates the resource implications. Further, it seems to the Faculty to be unrealistic to treat additional costs which have been identified as “opportunity costs” which can be absorbed without a real increase in resources to key parts of the system.
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if you did, did you comment on the financial assumptions made?

6. The Faculty responded in detail to both consultation exercises. Neither consultation addressed the resource implications of the proposals. In particular, the first consultation, Reforming Scots Criminal Law and Practice: the Carloway Report did not address the resource implications of the abolition of corroboration. The Faculty pointed this out in its response to that consultation (a copy of which is attached): see paragraphs 61 to 65.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?

7. The issues which the Faculty identified in paragraphs 61 to 65 of its response in relation to the abolition of corroboration are addressed in the FM. For the reasons set out below, the Faculty does not consider that this analysis adequately addresses the likely resource implications of this part of the Bill.

Did you have sufficient time to contribute to the consultation exercise?

8. Yes

If the Bill has any financial implications for your organization, do you believe that these have been accurately reflected in the FM? If not, please provide details.

9. The proposal to abolish corroboration might, insofar as it increases the number of prosecutions, generate a financial benefit for advocates and therefore, indirectly, for the Faculty of Advocates. The scale of any such benefit is speculative. In any event, the Faculty does not consider any possible financial benefits to individual advocates or to the Faculty arising from this measure to be material considerations in assessing the merits or otherwise, in the public interest, of the proposal.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

10. No. Specifically, the Faculty does not believe that the estimated costs set out in the FM in relation to the proposal to abolish corroboration are reasonable or accurate.

11. The requirement for corroboration is, currently, central to the practical operation of the criminal justice system at all stages. It informs the investigations undertaken by the police and is fundamental both to the consideration of the case by the prosecutor and the conduct of the trial, as well as often being relevant if the case is appealed.

12. In particular, under the current law, a prosecution should not be initiated unless there is sufficient evidence in law – i.e. there must be evidence from more than one source to support the propositions: (i) that a crime has been committed; and (ii) that it was the accused who committed the crime. This is not a technicality. The existence of corroborated evidence provides some reasonable assurance that there are sufficient prospects of securing a conviction to justify initiating a
prosecution and, if necessary, putting the accused to trial. Further, the requirement to look for corroboration, if it exists, helps to secure that cases are fully investigated and that evidence which may help to secure a conviction (or, indeed, which may be exculpatory) will be identified.

13. The Bill proposes to remove the requirement of corroboration, without putting in its place any new evidential standard or test to be applied by prosecutors and trial judges. It would follow that uncorroborated evidence from a single source would suffice in law to establish: (i) that a crime has been committed; and (ii) that the accused committed the crime. This might, for example, be the evidence of a single witness who alleges that the accused committed a crime against him or her.

14. In practice, it does not appear to be the intention that every case in which there is uncorroborated evidence from a single source will be reported by the police to the COPFS, or that every such case will be prosecuted. It appears to be assumed that police and prosecutors will apply an additional test or tests in deciding (in the case of the police) whether or not to report a case to the COPFS and (in the case of the prosecutor) in deciding whether or not to prosecute. The practical operation of these alternative tests is critical to any assessment of the resource implications of the proposal. The Crown Agent has recently intimated that the proposed test will be: “Is there a reasonable prospect of conviction in that it is more likely that not that the court would find the case proved beyond reasonable doubt?” In order to assess the impact of the change, it would be necessary to have an understanding of how it is intended that the test will, in practice, be applied.

15. The FM relies, critically, on the outcome of two “shadow” exercises, one undertaken by the police and one by prosecutors: see para. 106. The FM does not, however, provide material details of the basis upon which these exercises were undertaken: cf paras. 107, 150. This effectively disables witnesses to the Committee, or the Committee itself, from scrutinizing the analysis in the FM. The Faculty has requested additional information about these exercises, but this has not been forthcoming. The FM does disclose that these “shadow” exercises each involved re-evaluating “a sample of previous cases”: para. 106; para. 150. The Faculty offers the following general observations:

- The size of the sample(s) is/are not disclosed, although the FM does state that the exercise undertaken by COPFS was “relatively small”, with consequent, rather significant, implications for the statistical reliability of the conclusions: para. 153.

- The basis of selection of the sample(s) is not disclosed. It is, accordingly, impossible to assess whether or not the sample(s) were representative of the caseload of the police and/or the COPFS as a whole. This may be important, because the effect of the change in the law may vary with different types of case, such that, if the sample(s) was/were not in fact representative of the caseload, the results would not provide a sound basis for drawing conclusions.
It is not clear whether the two exercises were linked – i.e. whether the exercise undertaken by prosecutors involved “shadow” marking of the cases “reported” under the shadow exercise undertaken by the police, or of some other sample (and, if the latter, how that sample was identified).

It appears to have been assumed that a case investigated under the new regime would look in all respects identical to the same case investigated under the old regime. It is open to question whether this is a reliable assumption: there is a real concern that, in the absence of a legal requirement of corroboration, cases may be investigated by the police in a different way. It would follow, if that is correct, that “shadow” exercises undertaken on a sample of cases investigated under the current law would not provide useful information about cases which would be investigated under the new regime.

Each stage (the stage of reporting by the police and the stage of marking for prosecution), requires an exercise of judgment. The Faculty questions the assumption that the way that judgment would be exercised by the police or by the prosecutor would be the same in a real case as in a “shadow” exercise. In particular, the requirement, in a real case, to explain to the complainer a decision not to report the case or not to prosecute may affect the way that judgment will be exercised in circumstances where there is room for more than one view.

It would appear that the outcome of these exercises only identified the overall impact: para. 187. In particular, the work done did not, apparently, disclose whether the distribution of types of offence reported/prosecuted would be the same as under the current law: ibid. Yet, for reasons which we explain further below, the distribution of types of offence within the cohort of “additional” cases is likely to bear significantly on the resource implications of the proposal.

**Additional cases reported by the police to the procurator fiscal**

16. The FM reports that the “shadow” exercise undertaken by the police “demonstrated” that the range of increase in the number of cases reported to the procurator fiscal would be between 1.5% and 2.2%, but would “most likely” be at the 1.5% level. Having regard to the nature of the change in the law, these numbers are surprisingly small. In order to understand why that might be, it is necessary to see the instructions which were given to the police. The reason for concluding that the true increase will “most likely” be at the lower end of the range is not stated.

17. The additional cost to the police attributed to the reporting of cases (para. 109) is calculated relying on: (i) the lowest percentage for additional reports to the procurator fiscal; and (ii) the cost of a “basic” SPR (even though the FM acknowledges that cases vary enormously in their complexity). This figure would accordingly appear to be based on the assumptions which would generate the lowest possible cost.
18. The Faculty does not know whether it is realistic to characterize additional staff time requirements for the police as an “opportunity cost” (i.e. as capable of being absorbed within existing resources by efficiency savings, reorganization of work, etc). This is something which the Committee may wish to take up with the police.

**Consideration by the procurator fiscal**

19. The additional processing costs to COPFS identified as a result of an increase in the number of cases reported by the police (para. 149) is critically dependent on the reliability of the “shadow” exercise carried out by the police: we have commented on this above.

20. No assessment is reported of the additional time taken to assess cases under the new regime as compared with the old regime – unless this is included in the estimate at para. 149 of additional costs for “initial case preparation”. The application of a qualitative test is likely to be more time-consuming than the marking of cases under the current law and practice.

**Additional cases prosecuted**

21. By reason of the small sample size, there is a very large range between the lowest and highest estimates for additional prosecutions: para. 153. The FM nevertheless states that it is “extremely unlikely” that impacts at the high end of the scale would be seen: ibid. The basis for this assertion is not stated. It is said (para. 187) that COPFS is of the opinion that the “best estimate” stated is expected to be an “accurate forecast” of the number of additional prosecutions. The basis for this expectation is not stated. In particular, it is not clear whether it is based on professional statistical advice as to the conclusions which may properly, given the size of the sample, be drawn from the data.

22. The FM is internally inconsistent as to the absolute number of additional prosecutions. Table 16 and Table 24 contain different figures. It may be that the explanation is that the former is based on the actual number of cases in court, whereas the latter is based on the number of cases in which the defence was funded by the Scottish Legal Aid Board, but this is not clear.

23. An increase in the number of prosecutions will, as the FM identifies, impose additional costs on the police (paras. 113-124), on COPFS (paras. 147-163), on the Scottish Court Service (paras. 177-182) and on the Scottish Legal Aid Board (paras. 215-217). The “shadow” exercises only disclosed the overall impact, and not the distribution of types of offence: para. 187. The FM discloses, in relation to the additional prison costs, the nature of the additional cases which it is thought would be prosecuted under the new regime has (by reference to the different exercise undertaken for Lord Carloway’s review) been taken into account (para. 187), but does not suggest that the distribution of “additional” cases has otherwise been taken into account. Indeed para. 180 would suggest that this distribution has not otherwise been taken into account.
24. The failure to take into account the nature of the “additional” cases may be significant for the resource implications of the proposal. It may be, for example, that the cohort of “additional” cases is likely to contain a significantly higher proportion of sexual offences than the current caseload, and, in particular, to include a higher proportion cases in which the case will essentially turn on an assessment of the complainer’s evidence against an assessment of the accused’s evidence. Such cases are significantly more likely to go to trial rather than to be resolved by a plea, yet it would appear (para. 180) that no allowance for this has been made in the assessment of the additional costs. To put the financial implications of this in context, it is reported that the average plea costs 1.5% of the average case going to trial: para. 180. Further, if there were to be a significantly higher proportion of prosecutions for rape, the additional caseload would bear disproportionately on the High Court (since rape prosecutions must be brought in the High Court), and it is unclear whether the assumption as to the number of additional cases which would be prosecuted in the High Court (para. 178) has taken that into account.

25. **Additional police costs attributable to an increase in the number of prosecutions.** The FM identifies additional police costs attributable to an increase in the number of cases being prosecuted and going to trial: (i) direct costs by way of police overtime; (ii) opportunity costs by way of additional work required in the investigation and preparation of cases. The reliability of these estimates is critically dependent on the reliability of the estimated increase in the number of cases being prosecuted and going to trial. The FM rightly recognizes that the additional costs to the police involved in a solemn case are extremely difficult to estimate and vary significantly depending on the nature of the case. An average cost has been identified (para. 122) but this is based on an undisclosed piece of work. It is not clear, for example, whether the sample used to determine that average is, in fact, representative of the caseload which would be prosecuted under the new regime. If it is based on the current caseload, it may not be reliable for the new regime, where the profile of the caseload may be different, and where the incidence of solemn cases proceeding to trial may well be greater.

26. **Additional COPFS costs attributable to increase in the number of prosecutions.** The FM identifies additional COPFS costs by reference to the increase in the number of prosecutions, and is critically dependent on the reliability of those estimates. It may be inferred from the comment at para. 180 (albeit that comment is made in relation to SCS costs) that no allowance has been made for the likelihood that the “additional” cases are more likely to proceed to trial.

27. The FM characterizes the additional costs identified as “opportunity costs” – in other words, as costs which can and will be absorbed without any additional resources being provided. This seems to the Faculty to be unrealistic. It does not take into account the nature of some of the additional work involved. The conduct of a trial requires the attendance of a prosecutor in court. A prosecutor who is in court simply cannot be anywhere else. If there is a significant increase in the number of cases going to trial, an explanation is required as to how this could be absorbed by way of efficiency savings or otherwise without a real increase in resources.
28. The work of the COPFS is central to the public interest in the prosecution of crime and the Service must be adequately resourced to do its job effectively. Publicly available information suggests that the Crown Office and Procurator Fiscal Service is under pressure. In August 2012, the Prosecution Inspectorate reported that overloading of the system (especially in the numbers of intermediate and trial diets) hindered proper preparation of summary cases\(^1\). In January 2013, it was reported that 20% of COPFS staff surveyed wanted to leave as soon as possible or within the next year. Only 30% stated that they would recommend COPFS as a good place to work (17% below the civil service average)\(^2\). In June 2013 a survey by the FDA reported that 23% of prosecutors said that insufficient time to prepare cases was a serious cause of stress\(^3\). To expect an already overstretched service to absorb the proposed additional workload (even assuming that the assumptions made and the results reported in the FM were otherwise to be correct) without additional resources would, in the Faculty’s view, be unrealistic.

29. **Additional court costs attributable to increase in the number of prosecutions.** The figures are critically dependent on the reliability of the estimate of the number of additional prosecutions. The costs attributed to the increase do not take into account the prospect that a relatively high proportion of the “additional” cases will proceed to trial: para. 180. Further, the FM assumes that 20% of the additional solemn cases would be prosecuted in the High Court: para. 178. The basis for this assumption is not clear. If it is based on the proportion of solemn cases currently prosecuted in the High Court, it may not be a reliable assumption. Rape may only be prosecuted in the High Court and if, for example, one consequence of the change in the law were to be an increase in the number of prosecutions for rape, that increase would, in its entirety, be borne by the High Court.

30. The additional cost to SCS appears to have been derived from the additional costs of providing legal aid in each court: para. 179. If this is a correct understanding of the FM, the costs identified would not, in fact, be the costs to the Court Service of the additional cases (whether direct costs or opportunity costs); rather they would be the costs to the Legal Aid Fund of providing legal representation to the accused. The latter is of course a real cost, but is not the same thing as the additional costs to the Court Service.

31. In characterizing the additional costs to the Court Service as “opportunity costs” the FM relies on savings in court time which it is anticipated will be achieved by the Bowen proposals: paras. 167, 180. Since those proposals relate to solemn cases prosecuted in the sheriff court, it is difficult to see how they could be relevant to the High Court: cf para. 167. While a trial is running the court staff and other court

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facilities cannot be otherwise used and it is, for that reason, open to question
whether the additional costs to the Court Service should be characterized as
“opportunity costs”, which can be absorbed through efficiency savings.

32. **Additional costs to the Scottish Legal Aid Board attributable to increase in the number of prosecutions.** SLAB has assessed the additional costs by
applying the average cost of providing legal aid in each court in 2012-2013: para.
217. The estimate is critically dependent on the reliability of the estimate of the
additional number of prosecutions. If it is correct that a significantly higher proportion
of the “additional” cases is liable to run to trial, an average cost derived from the
current cohort of cases would materially underestimate the costs to SLAB resulting
from the proposal.

33. The Legal Aid Board does not appear to have included any estimate for costs
attributable to additional appeals generated by the change in the law. This contrasts
with COPFS, which has made an allowance for this in the first three years of the new
regime: paras. 157-158.

**Additional convictions**

34. If the proposal results in additional convictions this will result, as the FM
recognizes, in additional costs to the Scottish Prison Service ( paras. 184-195) and to
local authorities responsible for supervising community disposals ( paras. 231-235).

35. The assessment of these additional costs depends critically on the reliability
of the estimated number of “additional” prosecutions. The estimate of the additional
cost to the prison service has sought to take into account the likely distribution of
crimes to which the “additional” prosecutions will relate: paras. 187, 233. Because
the “shadow” marking exercises only disclosed the absolute increases, reliance has
been placed in that regard on work done by the COPFS for Lord Carloway’s Review.
The statistical reliability of that exercise has been criticized. It is unclear whether
professional statistical advice has been taken on the appropriateness of combining
the absolute increases in summary and solemn prosecutions derived from one
exercise with the likely distribution of crimes from another exercise.

36. Perhaps more significantly, the FM proceeds on the assumption that the
proportion of “additional” prosecutions which result in a conviction will reflect current
experience and that the pattern of disposals will be the same: paras. 187, 233. The
former assumption is open to question. Under the new regime, cases in which there
is no corroboration will no longer be withdrawn from juries. Likewise, juries will no
longer be directed that they can only convict if they find the essential facts proved by
corroborated evidence. In these circumstances, the incidence of convictions may
change – and may change across the board. If that is correct, an assessment which
simply applies the existing proportion of cases in which a conviction is secured to the
“additional” cases prosecuted would underestimate the costs to SPS and local
authorities. The extent of the underestimate is unknown but it may be significant.

37. The figures used by SPS give a “low estimate”, “best estimate” and “high
estimate”. The “best estimate” derives from the COPFS “best estimate” of the
additional number of prosecutions: we have commented on this above. SPS is reported as expressing the view that it could accommodate the “best estimates” within existing flexibility (while commenting on the limits of that flexibility): para. 194. At the same time, SPS makes clear that the wide range of potential effects means that it is not possible to say whether the proposal would trigger a need for additional prison places (i.e. capital spending on prisons): para. 195.

38. If the proposal were to result in a higher number of convictions for sexual offences, it would follow that there would be an increase in the number of individuals with convictions on the Sex Offenders Register. It is unclear whether or not this has been taken into account when assessing the additional costs to local authorities.

39. The Faculty does not know whether it is realistic to characterize the additional staff time required of local authorities as an “opportunity cost”: para. 235. The Committee may wish to explore this with the Prison Service and local authorities.

If relevant, are you content that your organization can meet the financial costs associated with the Bill which your organization will incur? If not, how do you think these costs should be met?

40. Not relevant to the Faculty of Advocates.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

41. No. Specifically, the FM does not accurately reflect the margins of uncertainty associated with the estimated costs associated with the proposed abolition of corroboration. The reasons for this are set out above.

Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

42. The Faculty does not believe that the FM reasonably captures costs associated with the Bill, specifically the costs associated with the abolition of corroboration. The reasons for this are set out above.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify those costs?

43. The Faculty offers no additional comment in response to this Question.
FACULTY OF ADVOCATES

RESPONSE

by

FACULTY OF ADVOCATES

to

THE SCOTTISH GOVERNMENT

on

REFORMING SCOTTS CRIMINAL LAW AND PRACTICE:

THE CARLOWAY REPORT

GENERAL RESPONSE TO THE CONSULTATION

1. The matters raised in this Consultation Paper are of fundamental importance to the administration of justice in Scotland. They should be the subject of full consideration by a Royal Commission on the criminal justice system in Scotland or other similar inquiry with the widest possible remit. In particular, if the requirement of corroboration is to be reviewed, this should be done as part of a review of the Scottish criminal justice system as a whole.

2. The requirement of corroboration is central to the current operation of the criminal justice system in Scotland. If that requirement were to be abolished, an accused person could be convicted of the most serious crime on the uncorroborated evidence of a single witness whom seven out of fifteen jurors do not believe. The proposition only has to be stated to be seen to be unacceptable in any modern system of criminal justice.

3. The proposal to abolish corroboration requires a number of questions, which are identified in the body of the response, to be addressed. A central question is the alternative criterion which is to be applied by prosecutors when they are deciding whether or not to prosecute cases. Corroboration cannot be abolished without dealing with this issue. This criterion is of such public
importance that it should be the subject of informed public
debate and be articulated in statute.

4. In addition to the present Consultation Paper, the Scottish Law
Commission has recently made recommendations for major
reform of the law on similar fact evidence and Michael McMahon
MSP is currently consulting on a proposal for a bill on Criminal
Verdicts. The implementation of any one of these proposals
would have significant consequences for the criminal justice
system. The Faculty does not accept that our criminal justice
system is so defective that it needs radical change on all these
fronts. But if there really is a case for wholesale reform, the
system should be reviewed as a whole by a body with the widest
rmit to consider all these issues together.

5. The Faculty’s responses to the particular questions asked in this
Consultation should be read subject to and in light of this general
response.

ARREST AND DETENTION

Question 1

6. The Faculty would support the simplification, clarification and
modernisation of the law of arrest and detention in light of the
European Convention.

7. The key requirements of any simplification and clarification of
the law are these:-

(i) that individuals should not have their liberty restricted without
good reason, sufficient to justify the restriction of liberty;

(ii) that an individual who has been taken into detention or custody,
should be released at the earliest possible opportunity unless
there is good and sufficient reason for continued detention or
custody;

(iii) that there should be appropriate safeguards: (a) to ensure that any
detention is lawful; (b) to ensure that persons in custody are
treated appropriately while in custody; and (c) to ensure that
detention or custody continues no longer than is justified; and

(iv) that any exercise directed to the gathering of evidence (including
the questioning of the suspect) should respect the suspect’s Article
6 rights.
8. There are two fundamental rights in play here: the right to liberty, articulated in Article 5 of the Convention; and the right to a fair trial, articulated in Article 6. Both must be fully respected by any reform of the law.

9. The Faculty agrees with Lord Carloway’s recommendation that the police should have a power of arrest on reasonable suspicion that the arrested person has committed a crime. It does so, though, in the context of agreeing also with Lord Carloway’s recommendation that a suspect should not be detained unless his or her detention is necessary and proportionate. The mere fact that the police have reasonable suspicion that a person has committed a crime, on its own, is not and should not be sufficient reason to deprive that person of liberty beyond the formal step of arrest.

10. As Lord Carloway recommends, a person should be advised of the reason for his or her arrest. As with the current law on detention, a written record should be made and kept of the time of arrest, the reason for the arrest, and confirming that the suspect has been told that reason.

Question 2

11. The Faculty agrees with this recommendation. In practice, the police do not always charge a suspect prior to reporting a case to the Procurator Fiscal and the charges ultimately brought are often different from those levelled by the police. However, it is, in the Faculty’s view, essential that the suspect is told: (a) that the case is being reported to the Procurator Fiscal; and (b) the reason why the case is being reported to the Procurator Fiscal. Again, a written record should be made and kept of these matters. Lord Carloway’s proposal envisages that after charge the suspect may be subject to further interview only on the authority of the Court. This should also be the case where the suspect is not the subject of charge but of report to the fiscal. One could otherwise envisage the police choosing not to charge, but reporting to the fiscal, with a view to continuing or repeating interviews.

Question 3

12. No. The Article 6 rights of the suspect must be respected whether or not he has been detained or arrested. If, for example, the police were to decide to interview a suspect without arresting or detaining him, they should first give him an
opportunity to take legal advice. In Ambrose v. Harris the UK Supreme Court held that it is not contrary to Article 6 for the police to ask certain limited questions of a suspect who has not been arrested or detained even though the suspect has not had access to a lawyer. But Ambrose should be not be taken to justify any type or degree of questioning of a suspect who has not been arrested or detained without giving the suspect the opportunity to consult a lawyer. The issue is one on which there is limited authority as yet from the European Court of Human Rights.

Question 4

13. The question mis-states Lord Carloway’s recommendation. Lord Carloway recommended that a suspect should not be detained unless it is necessary and proportionate to do so, and in particular that the suspect: (a) is liable to escape; (b) will not appear at an appointed court diet; (c) is likely to commit further crimes; or (d) may destroy evidence, interfere with witnesses or otherwise obstruct the course of justice. He further recommended that in determining whether a suspect’s detention or continued detention is necessary and proportionate the nature (including the level of seriousness) of the crime and the probable disposal if convicted must be taken into account. Only in exceptional circumstances should a person be detained where the charge does not involve an imprisonable offence.

14. The Faculty understands the phrase “is liable to escape” to refer to flight risk generally and not just to escape from custody. The recommendation as formulated suggests, for reasons which are not evident, different degrees of likelihood or risk in respect of the various heads - “will not appear”, “is likely to commit” or “may destroy” – and this will require attention.

15. Subject to these observations of detail, the Faculty agrees with Lord Carloway’s recommendation, taken as a whole. The nature and seriousness of the crime and the probable disposal are plainly relevant to the question of whether detention is justified. But the mere fact that the charge involves an imprisonable offence should not be sufficient on its own to justify continued detention. Potentially imprisonable offences are regularly dealt with by alternatives to prosecution such as fiscal fine. Lord Carloway has identified the particular circumstances which may, depending on the circumstances, justify continued detention.

16. If, following arrest, the police decide to detain a suspect, a written record should be made and kept to that effect, including a short statement of the reason or reasons why it was considered necessary to detain the suspect. As we state below, early access
to a lawyer is an essential safeguard to ensure that suspects are not detained unnecessarily or inappropriately.

CUSTODY

Question 5

17. The Faculty agrees with Lord Carloway's recommendation. The maximum period of detention should be no greater than the period within which it would be reasonable to expect the police to decide whether or not to charge the suspect or to refer the case to the procurator fiscal. If a longer period were to be allowed, there would be a risk that individuals would be routinely held up to the maximum. Although it is suggested that there is a small number of cases in which the 12 hour period would not suffice, it might be reasonable to anticipate that these are cases where the police would be justified in reporting the case to the fiscal at an early stage and where there would be a basis for seeking authorization for continued detention of the suspect pending appearance in court.

Question 6

18. If any extension of the 12 hour period is to be contemplated, this should be permitted only on a judicial warrant.

Question 7

19. The Faculty agrees with this proposal. Further, a record should be made and kept of the fact of the review and of the reasons for any continued detention of the suspect. This is an important safeguard against individuals being detained for longer than is truly necessary and proportionate.

Question 8

20. This question raises essentially practical issues upon which the Faculty is not best placed to comment. The period of detention in custody before appearance in court should be as short as practicable.
Question 9

21. The Faculty agrees that the police should be able to report a case to the fiscal without first charging the suspect, and that a formal charge should not be necessary at that stage in order to justify continuing to hold the suspect for first appearance in court (assuming the suspect’s detention to be otherwise justified as necessary and proportionate and assuming an appropriately short period before first appearance). However, the suspect should be advised of the reasons why he is to be detained at that time – and be told both: (i) the reason why the case is being reported to the fiscal; and (ii) the reason why it is considered necessary and proportionate to continue to continue to hold him in custody for first appearance. A written record should be made and kept recording those reasons and that the suspect has been advised of them.

LIBERATION FROM POLICE CUSTODY

Question 10

22. The Faculty agrees that the police should have the power to liberate a suspect from custody on condition that he attend for interview at a subsequent date. The Faculty considers that this is the only condition which the police should be permitted to impose on liberation. The Faculty would not support giving the police – as opposed to a judge - power to impose other conditions on the liberty of the citizen.

23. So far as the power to require the suspect to return for interview is concerned, the Faculty would regard this as an improvement on the current position, in which a suspect may be taken into custody at any hour of the day or night, and may, once he has been given access to a lawyer, be interviewed at that time. It would often be fairer that the suspect be given advance notice of the basis of suspicion, and advance notice of the interview. The suspect can then take legal advice and absorb that advice in advance of the interview. It is more likely that the suspect’s solicitor will be able to attend an interview of which advance notice has been given. At the same time, the police are able to take their inquiries forward, and prepare for the interview on that basis.

24. Legislation on this subject should address the question of disclosure by the police to the suspect’s lawyer. Without proper
disclosure of the case against the suspect, the lawyer's ability to give informed advice and the suspect's ability to take an informed decision will be hampered.

Question 11

25. The Faculty agrees that a limit of 28 days should be set on the power to require the suspect to return for interview. There should be a time limit and 28 days seems reasonable.

Question 12

26. This question raises a practical issue upon which the Faculty is not best placed to comment other than to observe that, if the police are to be given the power to require a suspect to attend for interview, the suspect is entitled to be given fair notice of the date and time of interview, not least so that he can arrange to take advice, and, indeed, so that he can make representations if the time is inconvenient.

LEGAL ADVICE

27. The Faculty agrees that a person who has been detained by the police should have a right of access to a lawyer as soon as practicable after his detention.

(i) Any citizen has a right to consult a lawyer at any time. The real questions are: (a) whether or not the police may (or in what circumstances they may) refuse a citizen that basic right; (b) whether or not (or in what circumstances) the police should be required positively to remind the citizen that he has a right to consult a lawyer; and (c) whether or not legal aid should be made available.

(ii) The deprivation of liberty is a circumstance in which the opportunity to take legal advice is of particular importance. If the police deprive someone of liberty, they should be required to advise him at that time of his right to consult a lawyer. The police should not be permitted to refuse the lawyer access to his client in such circumstances. The state should make legal aid available to cover the cost of a consultation with a lawyer.

(iii) The purposes of access to a lawyer even though questioning is not anticipated are these: (a) to ensure that any deprivation of liberty is lawful and proportionate; (b) to secure the release of the
suspect as soon as there ceases to be sufficient reason for continued detention; and (c) to minimise the risk of mistreatment during custody. If, of course, the police intend to question the suspect, access to a lawyer is also required in order to secure the suspect's fair trial rights.

28. The question of how legal advice may best be provided in a practicable way is a matter best addressed by solicitors who are involved in giving such advice. As a matter of principle, as Lord Carlway recommends, it is for the suspect or accused, who has been detained, to decide on the way legal advice is recorded. If the suspect wishes to have a face to face meeting with his lawyer, or, indeed, if the lawyer wished to have access to his client in detention, on what basis of principle could the police refuse to allow this?

Question 14

29. The Faculty does not foresee difficulties with this recommendation. The suspect, like any citizen, has a right to consult his solicitor. He is also not obliged to speak to the police if he does not wish to do so. If the suspect is to be interviewed by the police he should be reminded of his right to consult a lawyer, and given an opportunity to consult his lawyer before he speaks to the police.

30. The wording of the caution requires careful consideration. The phraseology used in the question is, in the Faculty's view, inappropriate. The suspect should be advised that he may have access to a solicitor as a right (and not simply if he wishes).

Question 15

31. The Faculty agrees with Lord Carlway's approach.

Question 16

32. The Faculty agrees that the right to waive access to legal advice and the requirement that an appropriate record of any waiver should be made and kept (as of other matters) should be set out in legislation.

33. It goes without saying that the right of access to legal advice can be waived only by someone who has been fully informed of that right. Indeed, the suspect should also be advised of the basis of
the suspicion against him and the reasons for his detention if he is being detained. If the suspect is not fully informed, any waiver will not be effective.

Question 17

34. The Faculty agrees with Lord Carloway’s recommendation. What is under consideration is the position of a suspect who is: (a) suffering a deprivation of liberty; and/or (b) facing a criminal investigation. The issues at stake are significant. Sound advice will require not only legal knowledge and understanding, but may require the exercise of sound judgment with an eye to a future possible trial process. It is essential that any person giving such advice: (i) be properly qualified to do so; and (ii) be accountable professionally for the advice given.

QUESTIONING

Question 18

35. The Faculty does not oppose this proposal, on the basis that the suspect will have proper access to informed legal advice before and during any interview, and also that no adverse inference would fall to be drawn from a decision on the suspect’s part not to answer questions. Any questioning after charge or intimation that the case is being reported to the procurator fiscal should be under the control of the Court. An application to the Court in that regard should be made by the prosecutor (and not by the police). The defence should have an opportunity to make submissions to the Court as to whether any application should be granted.

Question 19

36. The Faculty agrees that the procedure of Judicial Examination should be abolished. It is little used. The accused should remain entitled to give a Judicial Declaration.

Question 20

37. The Faculty does not agree with this proposal. Application of the common law rules on fairness can result in the exclusion of evidence which has been improperly or unfairly obtained in
advance of, or at, trial. If these rules were to be replaced with the general Article 6 test, trial judges would exclude such evidence only if they could decide at the stage of considering the question (which in proceedings on indictment would often be at a preliminary hearing), that a fair trial could not take place if the evidence were to be admitted. Often the outcome will be to admit the evidence on the basis that for aught yet seen doing so will not result in an unfair trial – indeed on the basis that the question of whether or not there has in fact been an unfair trial will only be capable of being properly assessed once the trial has been concluded.

38. The difficulty with this approach is that where, at the end of the trial, it has become apparent that the admission of the evidence had resulted in a breach of Article 6, the trial judge would have no option but to desert the case – or, if he did not take that step, the conviction would be quashed on appeal. The consequence would either be wasteful retrials or, indeed, the risk that individuals who should be convicted would escape justice. It would be far better to retain exclusionary rules of evidence which are capable of having practical purchase in advance of trial and which may be expected to secure that trials are conducted in a manner which will ultimately be held to be compatible with Article 6.

CHILD SUSPECTS

Question 21

39. The Faculty agrees with this proposal. As the Consultation Paper recognizes, both domestic and international law treat persons as children for at least certain purposes up to the age of 18.

Question 22

40. The Faculty agrees with this recommendation. The requirement to take into account the best interests of the child as a primary consideration – though not necessarily the over-riding or paramount consideration – is expressed in the International Convention on the Rights of the Child which, though not part of domestic law, is binding on the United Kingdom in international law. The ICRC may be taken into account when assessing whether or not there has been an interference with Convention rights.
Question 23

41. The Faculty does not agree that there should be any statutory articulation of the role of the parent, carer or responsible person. The purpose of giving a right of access to such a person is, speaking generally, a recognition of the vulnerability of the child and his or her dependence on his or her parent, as well as the parent’s interest in the care and guidance of the child. But it would be quite wrong, in the Faculty’s view, to articulate the parent’s role in statute. In particular, it is not and should not be the role of the parent in such a situation to promote or facilitate communication between the police and the child. To articulate such a responsibility in statute suggests that the parent is present to provide assistance to the police, rather than to provide moral support to and protection of the child.

Question 24

42. The Faculty agrees with this proposal.

Question 25

43. The Faculty agrees with this proposal.

Question 26

44. The Faculty agrees with this proposal.

VULNERABLE ADULT SUSPECTS

Question 27

45. The Faculty agrees that there should be a definition of a ‘vulnerable suspect’. The Faculty does not agree that the definition should be framed by reference solely to the subjective view of the police officer authorizing detention. If a suspect is in fact vulnerable (and can be proved to be so), then he or she should be entitled to protection whether or not that vulnerability has been recognised by the police.
Question 28

46. The Faculty has no comment on this question.

Question 29

47. The Faculty agrees that a vulnerable suspect should be provided with the services of an appropriate adult as soon as practicable after detention and prior to any questioning.

48. The Faculty does not agree that the appropriate adult should have power to agree to the waiver by the vulnerable suspect of his right of access to a lawyer. In the Faculty’s view, a vulnerable suspect, like a child, should not be able to waive the right of access to a solicitor. The right of someone who has been detained by the police to have access to a lawyer is a basic right. It would be objectionable for the appropriate adult, in effect, to have power to consent to its waiver.

Question 30

49. Appropriate adults should have training and qualifications such as to enable them to fulfill their role.

CORROBORATION

Question 31

50. The Faculty does not agree that this conclusion can properly be addressed "setting aside any question about whether this would require other changes to be made". The requirement for corroboration is not a rule which can be considered in isolation. It is at the heart of the day-to-day operation of the criminal justice system in Scotland.

51. To set the Faculty’s response on this issue in context, it is necessary to describe at least in summary the way the requirement for corroboration comes to bear under the current law at different points in the criminal justice system. We set out below the position in solemn procedure. The same general position applies with appropriate adjustment in summary procedure.

(1) The police, in the investigation of crime, the police require to be mindful of the requirement of corroboration. That requirement will
inform not only the course of the investigation, the scope of the investigation and determination of when it may be complete, but also decisions as to whether or not to report a case to the procurator fiscal.

(2) The prosecutor.

(a) **Marking decisions.** Prosecutors currently make marking decisions (decisions as to whether or not to prosecute) on the basis of two essential criteria: (i) is there sufficient evidence in law? and (ii) is a prosecution in the public interest? Generally speaking, in relation to serious crimes, where diversion from prosecution is not a realistic option, and there is corroborated evidence, the public interest will favour prosecution. If there is corroborated evidence this generally supports the view that there is a realistic prospect of conviction. In most cases the question of whether or not there is corroborated evidence is easily answered. Marking decisions can accordingly in many cases be taken relatively quickly essentially by reference to whether there is a sufficiency of evidence. This is the context in which, as the Faculty understands it, COPFS has moved away in recent years from routine precognition of cases.

(b) **At trial.** At trial the prosecutor will seek to elicit evidence which would, if accepted by the jury (or, in summary procedure, the judge), be sufficient in law. If, in relation to any charge on the indictment or complaint, the evidence as it emerges at trial would not, taken at its highest, be sufficient in law, the prosecutor should withdraw that charge (and if the prosecutor does not do so, a no case to answer submission will be sustained by the judge).

(3) The trial judge

(a) **Submission of no case to answer at close of prosecution case.** If the prosecution has not led sufficient evidence in law to justify the accused being convicted of the offence charged or of any related offence of which he could be convicted under that charge (e.g., person charged with attempted murder could be convicted of the lesser charge of assault), the defence may make a submission at the close of the Crown case that there is no case to answer. This type of submission is made immediately after the close of evidence for the prosecution. The trial judge will require to rule on that submission and, if the judge sustains the submission, the charge in question will be withdrawn from the jury. The trial judge has no power to withdraw a case from the jury on the basis that he is not satisfied with the quality (as opposed to the sufficiency) of the evidence. The question for the judge is whether there is evidence which, if it were to be accepted by the jury, would be sufficient in law.
(b) Submission as to sufficiency after the close of all the evidence. The defence may make submissions that: (i) there is insufficient evidence in law to justify the accused being convicted of an indicted offence or any other related offence of which he could be convicted under that charge; (ii) there is no evidence to support some part of the circumstances set out in the indictment (e.g. an aggravation such as permanent impairment). If the trial judge is satisfied that there is sufficient evidence in law to justify the accused being convicted of the indicted offence or any other offence then the judge must reject the submission and the trial proceeds as if no submission had been made. If the trial judge is satisfied that the evidence is insufficient in law to justify the accused being convicted of the indicted offence or of any other offence, the judge must acquit the accused of that charge. If the trial judge is satisfied that the evidence is only sufficient to justify the accused being convicted of another related offence, then the indictment will be amended accordingly. This type of submission is made after the close of all the evidence either before or after the prosecutor has addressed the jury on the evidence.

(c) The judge’s charge. The judge will, in any event, require to consider whether or not there is evidence which, if accepted by the jury, would be sufficient in law for a conviction. Judges routinely advise juries to that effect. The judge will also direct the jury on the requirement of corroboration.

(4) The jury. It is for the jury to decide whether or not it accepts any particular item of evidence and then to consider whether or not, on that basis, there is corroborated evidence of the essential facts. One consequence of the direction that there must be corroboration of the essential facts is that juries should not reach their decision based on one piece of evidence (say, a plausible witness, or a confession) without addressing the acceptability and effect of other evidence which is available to them.

(5) Appeal. On appeal, the conviction will be quashed if, in fact, there was not evidence which, taken at its highest, satisfied the requirement for corroboration. Quite separately, the appeal court has the power to quash a conviction on the basis that no reasonable jury would have convicted the accused. This latter ground of appeal rarely succeeds: even if the appeal court has a transcript of the evidence, it recognise that the jury had the advantage of seeing and hearing the witnesses and of assessing their demeanour, and was in a position to assess the credibility and reliability of the witnesses in a way that the appeal court cannot do on the papers.

52. The requirement of corroboration accordingly permeates the criminal justice system at every stage. The abolition of the
requirement would, if no other changes were made, create a system which would look quite different at every stage.

(1) The police would presumably report cases to the fiscal on the basis that there was a single piece of evidence supporting each of the essential facts, namely: (a) that a crime had been committed; and (b) that the accused was guilty of the crime.

(2) Assuming a single piece of evidence to support: (i) the fact that a crime had been committed; and (ii) that the accused was guilty of the crime, the only question for the prosecutor in deciding whether or not to prosecute the case, would (if no other change was made to the criterion to be applied by prosecutors in marking cases for prosecution) be whether the public interest favoured prosecution.

(3) On the assumption that there is at least a single piece of evidence supporting each of the essential facts, there would be no basis upon which the trial judge could withdraw a charge from the jury no matter how unsatisfactory the evidence.

(4) Juries would be directed that they could convict on the basis of a single piece of evidence acceptable to them: (a) that the crime had been committed; and (b) that the accused was guilty of the crime.

(5) An accused could be convicted on the uncorroborated testimony of a single witness (or some other item of uncorroborated evidence), even if seven out of the fifteen jurors disbelieve the witness.

(6) On appeal, again assuming a single piece of evidence supporting each of those essential facts, the only basis upon which the appeal court could review the case by reference to the quality or sufficiency of the evidence would be the “no reasonable jury” test.

53. The proposal to abolish the requirement of corroboration accordingly invites at least the following questions, the answers to which would be relevant to any decision as to whether it is a wise or appropriate step:-

(1) What safeguards or guarantees are there to be that the police will not short-circuit the investigation of cases?

(2) What criterion are prosecutors to apply when deciding whether or not to prosecute cases?

(3) On the assumption that prosecutors are to be required to apply some criterion in deciding whether or not to prosecute, should the trial judge not have power to withdraw the case from the jury if, in fact, the evidence at trial does not meet that criterion?
(4) Separately, should trial judges be given the power – or indeed the duty in all or certain classes of case – to warn the jury of the dangers of convicting on the basis of uncorroborated evidence.

(5) Is it acceptable that an accused could be convicted on the basis of one uncorroborated item of evidence even if seven out of the fifteen jurors do not accept that evidence or do not find it a sufficient basis for conviction?

Investigation of crime

54. There is a legitimate concern that if corroboration is not required then, even where it is potentially available, the police will not carry out exhaustive enquiries to discover it and the Crown, in certain circumstances, will simply not lead it. In the current climate where there are significant pressures on resources and pressure by way of time and cost there is a real possibility that only the bare minimum will be done. This could easily have the effect of causing, rather than preventing, miscarriages of justice for complainers as well as for accused persons. Often, it is the apparently minor piece of corroborative evidence that makes rather than breaks a case. For example, a complainer in an allegation of sexual assault through nerves, vulnerability or for some other reason presents to the jury as an unsatisfactory witness and on his, or her, testimony alone the jury would not be satisfied beyond a reasonable doubt. However the skilled prosecutor, at present, may be able to point to another piece of evidence, which not only provides the technical corroboration but also bolsters the credibility of the complainer and satisfies the jury to the required standard and a conviction follows. In the world without corroboration would the police be allowed the time and resources to establish if any such evidence existed or in order to meet targets and other demands would the unsupported evidence of the complainer be considered sufficient?

Decisions to prosecute

55. If corroboration were to be abolished without substituting any other criterion upon which prosecutors are to proceed when marking cases for prosecution, there would be great pressure on COPFS to prosecute any case where some evidence exists regardless of the quality of that evidence. Cases would be pursued and complainers subjected to the trial process where there was, in fact, no realistic prospect of conviction. Such a situation would be unfair both to complainers and to accused person and would involve a waste of public resources.
56. It seems to be accepted or acknowledged that, if corroboration were to be abolished, prosecutorial marking decisions would not simply be based on a test of sufficiency (plus public interest), but would be based on some qualitative assessment of the evidence as a whole. The comparative exercise carried out as part of Lord Carloway's review used a "reasonable prospect of conviction" test. The application of a qualitative test of this sort would depend significantly on individual judgment. Slightly different formulations of the test could, at least in theory, have a significant effect on the type and number of cases which would be prosecuted. Are prosecutors, for example, to prosecute any case where there is some evidence unless there is no reasonable prospect of conviction? Or are they to prosecute a case only if there is a reasonable prospect of conviction?

57. In the Faculty's view, the question of what test should be applied by prosecutors in the event of the abolition of corroboration is a question which cannot be avoided if corroboration is indeed abolished – indeed is intrinsic to the question of whether or not corroboration should be abolished. That question is one of great public interest. It should be the subject of explicit, informed and public debate, and any test should be prescribed by law.

The role of the trial judge

58. If prosecutors are to apply a "reasonable prospect of conviction" test, or indeed, some other qualitative test, in deciding whether or not to mark a case for prosecution, what is to happen if the evidence as it in fact emerges at trial is not of a quality which should properly have been held to meet the test? Surely the prosecutor should then be obliged to withdraw the case from the jury. And if the prosecutor were not do so, the trial judge should have the power to withdraw the case from the jury. It would surely not be acceptable to have a system in which, if the evidence does not come up to the standard which would have justified a prosecution in the first place, the defence could not make a submission to that effect, and the trial judge could not, withdraw the case from the jury.

59. In any event, if the requirement of corroboration were to be abolished, the question of how the judge should charge the jury would have to be addressed. Judges would presumably, at least, have to direct juries that there must be at least one piece of evidence which the jury accepts and which supports each of the following facts: (i) that a crime has been committed; and (ii) that the accused is guilty of the crime. But should the judge be required to direct the jury on the need to consider all the evidence that they have heard and to consider whether there is
evidence which supports, or on the other hand, undermines, the Crown case? If (as our system has hitherto assumed) there are dangers in convicting on the basis of uncorroborated evidence, judges should have the power, if they consider it appropriate to do so, to give juries a warning to that effect.

Jury verdicts

60. To remove the requirement of corroboration without addressing the majority verdict would, in the Faculty’s view, result in the unacceptable position that a person could be convicted on uncorroborated evidence of a single witness when seven of the jurors are not satisfied that the evidence is of a quality which would support a conviction (or, indeed, where seven members of the jury believed that the accused was innocent). The Faculty considers that there is a case for reforming the majority verdict in any event. Changing the majority verdict would, however, raise further issues, some of which are addressed in Mr. McMahon’s consultation. The Faculty refers to its response dated October 2012 to Mr. McMahon’s consultation, a copy of which is attached.

Resource implications

61. Quite apart from these issues of principle, it seems to the Faculty that the resource implications of the proposal require to be addressed. In order to assess the potential impact of the proposal on the resources required by the criminal justice system, it would be necessary to consider at least the following:

(1) What is the likely impact on the number of cases reported to the procurator fiscal?

(2) What is the likely impact on the resources required by COPFS in the precognition and marking of cases?

(3) What is the likely impact on the number of cases which are prosecuted?

(4) What is the likely impact on the incidence of convictions?

62. In particular, it appears to the Faculty that there would be likely to be significant implications for the organization, staffing and resourcing of the prosecution service. If there were to be a material increase in the number of cases reported by the police, this would add to the work of the prosecution service. In any
event, a qualitative assessment of the evidence as a whole, if it is to be done properly, is likely to be a more complex, anxious and time-consuming task than an exercise focused principally through questions of technical sufficiency. It is hard to see how the exercise could be done properly without a reversal of the trend away from precognition. Otherwise, in reality, the first time that a prosecutor would be in a position to assess the strengths, weaknesses and coherence of the evidence would be when the evidence is led at trial.

63. Conflicting views appear to have been expressed as to the effect of the abolition of corroboration on the likely number of prosecutions. The consultation paper reports (at para. 9.5) the exercise undertaken for the purposes of Lord Carlway’s review, which suggested that around 450 additional serious cases would have been prosecuted in court in 2010 applying a “reasonable prospects of conviction” test without a requirement for corroboration. The effect in relation to less serious cases is not discussed. The potential impact on the prosecution service of any increase in the number of less serious cases reported to the Crown would have to be considered in light of the recent report of the HM Inspectorate of Prosecutions on Summary Case Preparation, which identified that overloading of the COPFS already hinders proper case preparation. The consultation paper also states (para. 9.10) that Lord Carlway observed in his evidence to the Justice Committee that he would not expect the total number of prosecutions to increase. Lord Carlway stated that some cases which are currently prosecuted might not be, if assessed on a qualitative test. Depending on the actual effect on the number of prosecutions, there could be very significant consequences for the resourcing of both prosecutors and the courts. If there were indeed to be an additional 450 “serious cases” (a proportion of which, including serious sexual cases, would be prosecuted in the High Court), each of these cases would require resources to be devoted to their prosecution.

64. Each of these cases would require the expenditure of legal aid on the defence and each of them would take up time and resource in the court system. If, on the basis of a considered analysis, it were to be thought right that these additional cases be prosecuted, then it would be right that the resources should be found, but it would, in the Faculty’s view, be rash to embark on a reform which would impose additional demands on prosecutors and courts without a detailed analysis of the practical implications, and without ensuring that the necessary resources would in fact be available.

65. If the change in the law were to increase the number of convictions (as the Consultation Paper suggests), additional
resources would be required for the professional assessment, supervision and/or incarceration of persons convicted of serious offences.

**Conclusion**

66. The Faculty does not support the present proposal to abolish the requirement of corroboration. The Faculty adheres to its view that the reform of corroboration cannot be addressed without considering other structural features of the criminal justice system as a whole. In any event, the resource implications of the proposal have not, so far as the Faculty is aware, been adequately addressed.

**Question 31**

67. If the requirement for corroboration were to be removed, it would be necessary to address a number of features of the system. The criminal justice system requires to be one which, structurally, secures a fair trial within a reasonable time, and which secures that only guilty individuals are convicted. The Faculty rejects the proposition that this is something which depends on or can be established by evidence. There is, for obvious reasons, no evidence as to how our system (with all its particular features) would operate without the requirement of corroboration in place.

68. The Faculty has identified above a number of issues which would require to be addressed in order to assess the proposal that corroboration be abolished.

**OTHER CRIMINAL EVIDENCE ISSUES**

**Question 33**

69. The test for sufficiency of evidence at trial and on appeal is currently the requirement that there must be corroborated evidence of the essential facts. For the reasons already stated, the Faculty considers that, in the absence of a review of the issue which addresses the various questions which the Faculty has identified in this response, this requirement should not be changed.

70. The Faculty understands, though, that the question is directed to the question of sufficiency in the absence of a requirement of
corroboration. In that event, the test for sufficiency would presumably be that there would require to be one source of evidence of each of the essential facts – namely: (i) that a crime has been committed; and (ii) that the accused was guilty of the crime.

71. As has been observed above, the removal of the requirement of corroboration will necessarily involve the substitution of a different criterion for the prosecution of crime, based, presumably, on qualitative factors. It seems to the Faculty that once such a criterion has been articulated, it should be applied consistently throughout the system and the trial judge should have the power to withdraw a case which does not meet that standard from the jury.

Question 34

72. The Faculty agrees with this proposal.

Question 35

73. The Faculty agrees that the current rule should not change.

APPEAL PROCEDURES

Question 36

74. The Faculty takes issue with the way in which this question is framed. The law provides for time limits in a variety of contexts both in civil and in criminal procedure, and in criminal cases both at first instance and on appeal. It goes without saying that such time limits should, as a general rule, be observed. But the law also, generally, recognises that the strict enforcement of time limits, in various contexts, could work injustice, and permits the court to vary such time limits, or to excuse non-compliance, in appropriate circumstances. There is no good reason not to apply the same approach to time limits in relation to criminal appeals. Indeed, the context – an accused’s last chance (apart from the SCCRC) to correct a miscarriage of justice in relation to a conviction or sentence - would suggest that, if anything, the interests of justice may justify a departure from the strict adherence to time limits more readily in this context than in some others.

75. The ordinary sanction where an application is made late, and the court is not satisfied that it should exercise any dispensing
power, would be to refuse the application. The Faculty does not accept that there is a case for permitting the Court to order that particular steps should not be paid for out of public funds in this particular context. The practical effect of such a sanction would be that the lawyers involved would not be paid for the work which they had done in the representation of their client. It is not to be assumed that lateness or delay is necessarily attributable to or involves fault on the part of the lawyers instructed by the appellant. Lawyers who are at fault may, rightly, be sanctioned through complaints and professional disciplinary procedures. In practice, late applications may occur after a change of agency. The new agents may take the view that an application, though late, is in the appellant's best interests. If counsel is asked to advise as to whether or not grounds of appeal are arguable, he or she must give advice, whether or not the application would be timeous or not. Counsel instructed to make the application is under well-recognised professional obligations in that regard. The risk of incurring a sanction of refusal to pay for late applications would deter agents from acting in such cases and would be unfair to counsel.

76. In no other area of criminal legal aid work is the Court entitled to take the view that agents and counsel should not be paid for work legitimately undertaken. The Scottish Legal Aid Board ensures that it only pays for work reasonably done with regard to economy. The imposition of such a sanction would be likely to generate satellite litigation. Fairness would require that the lawyers involved should be entitled to appeal against any such sanction. And one could envisage that challenges to such orders would be made on behalf of appellants who were thereby disabled from advancing their appeals.

Question 37

77. The Faculty would support the simplification of the provisions for appeals. However it would be essential to ensure comprehensive coverage. For example, bills of suspension are available to challenge warrants. It is not clear that the proposal would bring warrants within the statutory appeal. The Faculty would also observe that leave to appeal is currently not required for bills of suspension and advocation: if leave is required in relation to such cases, this would imply an additional limitation on access to the Court.
Question 38

78. The Faculty wishes to comment on two matters: (a) the proposed amendments to the 1995 Act in respect of applications to lodge a Notice of Intention to Appeal late or to lodge a Note of Appeal late; and (b) the suggestion that further consideration should be given to whether the practice of trial counsel not appearing in appeal proceedings constitutes a problem, and, if so, what steps should be taken to solve that problem.

Amendments to appeal provisions

79. An appeal is the last opportunity – short of an application to the SCCRC – for challenging an alleged miscarriage of justice. The criteria for access to the Court should be articulated with that in mind. The proposed amendments would set a very high test for applications to lodge a Notice of Intention to Appeal late or to lodge a Note of Appeal late and this is liable significantly to limit access to the Court for appellants who have not lodged the relevant document in time. It would not be enough to show cause for allowing the late Notice or Note, but it would have to be "special cause". It is difficult to see how, in practice, the requirement that the grounds of appeal disclose that the appeal would "probably succeed on the grounds stated" could be applied in circumstances where there will have been no report from the Sheriff or Judge. By contrast, the test for timeous grounds is arguability. One consequence of setting the bar higher in this regard may be additional applications to the SCCRC.

Practice of trial counsel not appearing in appeal proceedings

80. The Faculty would be willing to engage with any other bodies which are considering this issue, but would offer some general observations. Firstly, the Faculty does not accept that there is a problem which requires to be addressed. There is a fundamental constitutional point at stake here – namely, that an accused person or appellant is entitled to instruct the counsel of his or her choice. While any counsel or solicitor advocate with rights of audience in the High Court should be competent to conduct any trial or criminal appeal, in practice, trials and appeals draw on different skills. It is not unreasonable for solicitors to advise their clients to instruct different counsel for these different tasks. Secondly, it is not self-evident that it is necessarily in the interests of justice that trial counsel also conduct any appeal. It may well be in the client's interest, and indeed in the interests of justice, that a fresh mind should be applied to the case. Sometimes, indeed, an appeal point may relate to the way that the case has been conducted at trial. Thirdly, many appeals
involve questions of law arising from the judge’s charge or otherwise. Such appeals do not necessarily require any reference to the evidence at trial. Even those cases that do require reference to the evidence can normally be dealt with on the basis of the Sheriff’s or Judge’s Report. Fourthly, there would be serious practical and logistical issues both for counsel and for the court if trial counsel were routinely required to deal with any appeal. Would trial counsel in such a position be required to withdraw from another trial commitment if it clashed with the appeal diet? Is this really in the interests of justice if, say, the trial is a complex case running over several weeks or months and counsel has been engaged from the outset?

FINALITY AND CERTAINTY

Question 39

81. The Faculty agrees with this proposal.

Question 40

82. The Faculty agrees with Lord Carloway’s recommendation

Question 41

83. The Faculty agrees with these recommendations.
Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. Falkirk Council has not responded to the Call for Evidence on the Bill itself or any previous consultation.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. Falkirk Council has not provided previous comments but does have concerns regarding the financial assumptions reflected in the FM.
3. The Bill has been subject to an equality impact assessment and the Scottish Government itself foresees little impact on local authorities and has stated this quite clearly. If the provisions are considered, not individually but holistically, alongside the recent Children’s Hearing Act and the implications of the Children & Young People Bill, as well as the GIRFEC agenda and the principles behind the Whole Systems Approach and Early & Effective Intervention, then we have some concerns about the potential implications, and the possible financial issues, raised by this Bill.

Did you have sufficient time to contribute to the consultation exercise?
4. Yes.

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details.
5. No, we continue to have concerns as follows:

Scottish Government itself raises the following possible implications:

- A potential for increased requests for support from Social Work in relation to young people aged 16/17 who are either in the process of being “charged”/in Court/or imprisoned.

6. The assumption which is being made is that the majority of young people will seek this support from family members or friends. However, we already know anecdotally that many young people (particularly those who have been previously looked after) seek this “support” from Social Workers.

7. We are therefore concerned about the potential impact on local authority resources and it is very difficult to quantify or predict the impact at this stage.
8. In relation to the section on Appropriate Adults, our concerns are around:

- If Police Scotland are required to make the initial assessment in relation to “vulnerability” then, initially, this is likely to result in increased requests for Appropriate Adults to be present as they are likely to err on the side of caution.

- If the definition of the identity of an Appropriate Adult, training, qualifications and experience are to be made more explicit in regulations then consideration has to be given to the implication that this may be assumed to become the role of the “registered” Social Worker in statute, without any funding to support this. There may well be increased resource implications for local authorities and also out of hours services.

- It is difficult to understand what formula Scottish Government has used to base their calculation on that 10% of young people will need this.

9. In relation to the “removal of the requirement for corroboration” being likely to result in an increase in the number of prosecutions and the likely increase in additional Community Sentences being given, we have various anxieties:

- The number of Community Sentences has already risen considerably. Again, if we consider the holistic overall proposals included in the Bill, it is clear that the principles are focused on keeping young people up to the age of 18 outwith the Court and prison service whenever possible. Whilst we would agree that this would clearly be in the best interests of the young person, there is no doubt that this has implications for already overstretched Criminal Justice Social Workers attempting to supervise the already increased number of Community Sentences.

10. We know that currently our numbers have increased. In 2012/13, 651 individuals were made subject to community payback orders in Falkirk. We estimate that number to be closer to 800 if trends continue as they have for the past 5 quarters.

11. We believe the Government estimates to be flawed in relation to an expectation that this extra work can be subsumed within existing resources.

**Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?**

12. No, we consider that the proposals within the Bill will lead to increased staffing costs for local authorities.

13. Scottish Government acknowledges its belief that the proposal to increase the time limit for the period for which an accused person may be remanded before
their trial commences from 110 to 140 days will increase the number of people held on remand. In particular, Scottish Government expects there to be an increase in the use of secure placements and expects local authorities to fund this from within existing resources.

14. We believe the impact of this cannot be estimated but has the potential for very large costs for local authorities. There is the possibility that the courts may view secure care as the first option for 16/17 year olds, rather than a remand to a Young Offenders Institution. If this position was taken, costs could be magnified given there are currently 60 16/17 year olds in Polmont Young Offenders Institution on remand or sentenced. This has particular implications for Children & Families budgets and raises a debate in relation to where the Whole Systems Approach sits – whether this is with core Children & Families Services; Youth Justice or Criminal Justice.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

15. No. Please refer to responses to questions 4 and 5. Falkirk Council believes that Scottish Government should provide additional funding to local authorities or through the Criminal Justice Authority to meet the potential staffing costs in relation to increased numbers of community sentences and also in relation to the use of secure placements for young people on remand. Alternatively, funding for these secure placements could be met directly by Scottish Government.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

16. Falkirk Council has concerns about the margins of uncertainty being considerable. It would be preferable if the Scottish Government gave an undertaking to review costs in the light of experience so that any marked increase could be funded by the Scottish Government.

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

17. No.

18. In relation to the proposal to reinforce recall to custody measures

• As of itself, this may not impact greatly on numbers. However, when taken cumulatively with other measures in the Bill, this is likely to increase the numbers of assessments prior to recall. It may impact on housing service costs when accommodation has been sourced then given up and then sourced again; and interrupt supervision/support plans, especially for those serving short recall periods.
Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

19. Yes, particularly in relation to the Appropriate Adult proposals, where training and qualification requirements are to be defined in guidance. It is not possible to quantify these costs.

20. Whilst some of the proposals in the Bill may not appear, on the face of it, to have an immediate financial impact on local authorities, we are concerned with the cumulative effect of the Bill when also considered alongside legislative changes already being implemented in other areas.
FINANCE COMMITTEE CALL FOR EVIDENCE
CRIMINAL JUSTICE (SCOTLAND) BILL: FINANCIAL MEMORANDUM
SUBMISSION FROM FIFE COUNCIL

1. There were 3 cost implications identified in the consultation – one financial cost and two opportunity costs.

<table>
<thead>
<tr>
<th>Proposal to increase time-limit for remand – will increase numbers held on remand – possibly more use of secure accommodation</th>
<th>Financial Cost</th>
<th>£56k across Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child suspects – 16-17 year olds have the right to a responsible person. In majority of cases it will be someone they know, but local authority Social Work is the backstop.</td>
<td>Opportunity Cost</td>
<td>£84k across Scotland</td>
</tr>
<tr>
<td>Removal of the need for corroboration of evidence – likely to result in increase in prosecutions, therefore increase in the potential number of community sentences</td>
<td>Opportunity Cost</td>
<td>£1,160k across Scotland</td>
</tr>
</tbody>
</table>

Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
2. YES

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
3. YES
Did you have sufficient time to contribute to the consultation exercise?
4. YES

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? In not, please provide details?
5. YES

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
6. YES

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
7. YES

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
8. YES

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?
9. We note the potential increase in workload from increased Community Sentencing and would anticipate additional costs could be attached to Local Authorities in the preparation of Criminal Justice and other associated reports as well as placing an increased demand on services providing community based statutory supervision.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?
10. We recognise that opportunity costs could become actual costs and would need to revisit these issues should demand increase to such an extent that would detract from the aim of the Bill to modernise and enhance efficiency.
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

1. The Scottish Police Authority (SPA) and Police Scotland have not made a written submission to the Scottish Parliament Finance Committee. Police Scotland provided financial data of the estimated costs of the implementation of the Bill within our written submission to the Justice Committee.

2. The financial memorandum accompanying the Bill has been correctly attributed to the Scottish Police Authority, recognising their statutory role in financial governance. The costs provided represent our estimate of the probable costs from introducing new business practices as a direct consequence of the Bill.

3. Whilst we have been robust in the process used to estimate the financial costs of the Bill, it is not possible to precisely predict all the consequences of the Bill. Therefore, we expect that the actual costs of the Bill will differ.

4. Police Scotland participated in a consultation exercise which preceded the Bill and offered comment on the assumptions made.

Financial Impact on Police Scotland

5. The financial memorandum has used the cost data provided by Police Scotland.

6. Police Scotland is determined to ensure that the challenges of implementing the proposed legislation are embraced to deliver the maximum benefits to the people who live, work, visit and invest in Scotland, further reduce crime and anti-social behaviour and keep them safe.

7. Police Scotland welcomes and supports many of the provisions within the Bill. The business case for Police Reform requires Police Scotland to operate with significant budgetary constraints. The Bill will compel the Service to invest significant resource to introduce and maintain what are unquestionably new working practises. This will take many forms, however, the deployment of new technology, infrastructure and personnel will feature prominently.

8. A number of the practises introduced by the Bill have a real and enduring impact on Police Scotland’s resources. We anticipate providing further detail in this regard and would welcome the opportunity to discuss these with members of the Committee.
Financial Impact on Forensic Services

<table>
<thead>
<tr>
<th>Additional staff required</th>
<th>2% increase in workload £000</th>
<th>4% increase in workload £000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Staff Costs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Salary and On Costs</td>
<td>417</td>
<td>834</td>
</tr>
<tr>
<td>Training Costs</td>
<td>25</td>
<td>50</td>
</tr>
<tr>
<td>Non Staff Costs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property Costs</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Supplies &amp; Services</td>
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<tr>
<td>Transport Costs</td>
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<td>11</td>
</tr>
<tr>
<td>Administration Costs</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Payment to Other Bodies</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Total Costs</td>
<td>529</td>
<td>1,056</td>
</tr>
</tbody>
</table>

9. SPA Forensic Services welcomes and supports many of the provisions within the Bill. In common with other public bodies, it is also compelled to operate within established budgetary constraints. The impact of the Bill will compel the Police Service to change and introduce new working practices that will impact on Forensic Services. This will affect the number of cases forensic services are required to examine which would be over and above our current demand as well as the impact on us having to examine more cases in a shorter timeframe.

10. The removal of corroboration will have a positive impact as we will no longer need to corroborate our casework. However, we will still be required to check our work and therefore the impact is not expected to be significant compared to the anticipated increase in our workload.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?

11. Recognition requires to be made that the information provided by Police Scotland was derived from an analysis, extrapolation and projection of existing work elements.

12. In order to inform the Bill debate generally and submission of the Financial Memorandum in particular, it was agreed in January 2013 that a comprehensive shadow-marking exercise was required. This would serve to indicate what, if any, increased submission of Standard Prosecution Reports (SPR) would likely be were the rules on Corroboration to be amended as proposed.
13. The basic format of the exercise was to review Crime Reports (CRs) raised by the police where:
   - a named suspect was known;
   - no SPR had been submitted to COPFS in relation to the matter; and
   - enquiries had been meantime completed.

14. This exercise followed an earlier, although much smaller, exercise conducted by the ACPOS Solicitor Access Implementation Team (SAIT) in January 2012. An overview of both exercises is included below.

15. Available timeframes and IT limitations were factors in the parameters of both exercises. Both exercises were commenced on the presumption that any matter currently reported would continue to be reported under any new evidential rules.

1. SAIT Exercise – January 2012

16. One police division was selected for analysis purposes as representative of the national construction of police areas.

17. Over the preceding nine month period (April 2011 – December 2012), it was recorded that 10,676 SPRs had been submitted. Within the same period, a further 2,199 Crime Reports (CRs) had also been raised where a suspect had been named, but not subject of a SPR.

18. A quantity was then discounted for analysis purposes, reasons including: suspect eliminated from enquiry; SPR submitted in relation to another named person within the report; age of suspect. (NB. Perhaps crucially, given the necessary recency of the date range examined, ‘open’ enquiries were not discounted at this time).

19. This left a record of 1,479 CRs over the nine month period which satisfied the identified criteria. Due to the onerous nature of re-examining this type of volume (only one individual participant was available at this time), the nominated sample was reduced to a single month within the date range. August 2011 was selected and produced 161 CRs (with 184 named suspects) where no SPR had been submitted.

20. Every CR in this range was re-read in conjunction with the known recommendations of Lord Carloway and consideration given to a SPR, should the requirement for corroboration be removed.

21. Primary criteria adopted in the exercise were that:
   - where substantial evidence from a single source against the suspect existed; and
   - no exculpatory or contradictory evidence was recorded, then the matter would be reported.
22. This exercise concluded that, out of the 161 CRs identified, 63 persons would be subject of a SPR under a new regime. Extrapolated over the 9 month period, this translated to an increase of 509 cases. Compared to the 10,676 already submitted, this suggested a potential increase in reporting of 4.77%.

2. Carloway Review Project Team – January 2013

23. A further, large scale, exercise was arranged in parallel to, but separate from, a Crown Office and Procurator Fiscal Service (COPFS) marking exercise. The Police exercise was based within the legacy Strathclyde Police force area due to I.T. restraints and reporting timelines. For comparison, in the Financial Year 2011-12, Scottish Police submitted 242,404 SPRs, of which Strathclyde submitted 129,782 (53.5%).

24. The exercise was based on the most recent 12 month period figures available to the participants (December 2011 – November 2012). Over that period, 133,027 SPRs had been submitted by Strathclyde. Analysis of Crime Recording systems showed that a further 13,221 CRs had been raised, where there was a named suspect but no associated SPR. At a base level, this indicated that an absolute maximum increase in SPRs was 9.9%. This, of course, was before any qualitative analysis.

25. Quantitative Social Science Research tools suggested that, for a core ‘population’ of 13,221 then a sample of 1,377 reports would provide a degree of confidence of 95% (+/- 2.5%) that the sample was truly representative. A bulk sample was initially provided. However, it became apparent that, given the close proximity in time, a number of these ‘unreported’ cases had actually since been subject to a SPR or some form of enquiry was on-going. As such, and although the others were indicative of the core population, only those enquiries that had been concluded without SPR were considered for analysis.

26. Using a team of 5 police officers with relevant background and experience, 1409 CRs were subsequently reviewed. Direct guidance and support was given by COPFS (not available to the SAIT exercise the previous year). Of the 1,409 CRs, police participants identified 141 occasions where, under a new evidential regime, a SPR would be submitted where none had been before (10.0% of unreported CRs).

27. Compared to the total already submitted (133,027) this would suggest an increase in reporting of 1,322, a percentage increase of: 0.99%.

28. Further to police analysis, there was an additional qualitative review whereby COPFS staff reviewed a proportion of those CRs where the police had concluded no SPR would be submitted. Out of 286 CRs, a further 32 were identified as being of potential interest to the PF (11.2% of those re-assessed). Extrapolated across the core sample and applied to the annual return, this led to an upward adjustment of the likely percentage increase in SPRs to between 1.5% - 2.2%.

29. The range in the findings was as a result of recognising the different treatment of certain crime types in the criminal justice process.
30. It is recognised that the reporting and prosecution of incidents can be a very subjective exercise, both to the circumstances of the matter being investigated and the professional experience of the individual concerned.

31. However, from the two exercises carried out by the police, there are two points that became apparent in relation to the volume of reports to COPFS:

- There is no great volume of unreported matters, where a named suspect is known to the police, which would be likely to ‘swamp’ the justice system should the rules on evidence be amended as indicated; and
- In almost all matters where there is any degree of supporting evidence, the police will tend to report under the current regime, particularly in serious allegations.

32. Nothing in discussions with partner agencies or around the contents of the Criminal Justice (S) Bill suggests a significant change to that position.

**Did you have sufficient time to contribute to the consultation exercise?**

33. Due to technical issues SPA / Police Scotland did not receive a formal request to submit written evidence to the Finance Committee and as such could not comply with the original submission deadlines. We are grateful that this has been recognised and that we have been afforded an opportunity to contribute.

**Costs**

*If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?*

34. Please see question one.

*Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?*

35. Please see question one.

*If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?*

36. Please see question one.

*Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?*

37. Please see question one.

**Wider Issues**

*Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?*

38. Please see question one.
Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

39. Whilst we have been robust in the process used to estimate the financial costs of the Bill, it is not possible to precisely predict all the consequences of the Bill or subordinate legislation. We expect that actual costs will differ.
FINANCE COMMITTEE CALL FOR EVIDENCE
CRIMINAL JUSTICE (SCOTLAND) BILL: FINANCIAL MEMORANDUM
SUBMISSION FROM RENFREWSHIRE COUNCIL

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. Not individually, however comments were provided to wider ADSW committees for inclusion within ADSW responses.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. No

Did you have sufficient time to contribute to the consultation exercise?
3. As the report impacts on a range of social work services it takes time to gain information as to the potential impact.

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. The bill does have a financial implication for Renfrewshire Council which we feel has not been accurately reflected in the FM. The 2 areas of concern are:

(i) The financial impact from increasing the Pre-trial time remand limits from 110 to 140 days as set out in paragraph 240 of the FM.

- The FM states in paragraph 268 that the financial impact on all authorities is estimated at £56k per annum. However this value appears under estimated as Renfrewshire Council would suffer a financial cost of £70k alone within the first 3 months of this financial year. Currently Renfrewshire budget for 3 placements at 110 days. The weekly cost of a placement is currently £5,412 per week, the Bill introduces an increase of 30 days resulting in an additional £69,583 in placement costs per annum. This is demonstrated in table 1 below:
<table>
<thead>
<tr>
<th>No of residential Placements</th>
<th>Increase in Remand days from 110 to 140 days</th>
<th>Total No of additional days required</th>
<th>Additional Number of Weeks required</th>
<th>Weekly Residential Costs</th>
<th>Cost of additional Remand days</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>30 days</td>
<td>90 days</td>
<td>12.86 weeks</td>
<td>£5,412</td>
<td>£69,583</td>
</tr>
</tbody>
</table>

- The Bill suggests addition service requirements “will be classed as a financial cost as it is anticipated that the place would use a private provision. In the case of remand residents, this is borne by the local authorities, and this cost would have to be spread among the local authorities sending individuals to that place.” This option will not apply many Local authorities, including Renfrewshire Council, as local authorities adhere to a financial framework where service requirements are purchased by spot placements on a needs required basis and not block placements and individual local authorities bear the costs. Therefore authorities will not have spare capacity to accommodate and will not be able to spread the costs among authorities.

- The residential schools budget has incurred several budget pressure over the past few years due to increased demand for placements, therefore any further service requirements could not be funding within exiting budgets.

(ii) The financial impact of the anticipated Additional Community Sentences orders due to the removal of the requirement for corroboration in criminal cases, as set out on paragraph 234 table 29 of the FM.

- Table 29 highlights that the best estimate anticipates 480 additional community sentences for local authorities. Renfrewshire Council currently incur around 3% of all community sentence orders across Scotland which would result in an additional 14 orders per annum for Renfrewshire. As paragraph 234 states “costs have been calculated on the basis of an assumed cost per community sentence of £2,400” therefore estimated additional costs for Renfrewshire Council are £33,600.

- Paragraph 235 states that this cost will be “classed and an opportunity cost” and “will need to be considered by local authorities as an additional demand in managing staff workloads”. Renfrewshire council would find it very difficult to absorb this additional workload without additional resources as the Council
is already currently absorbing an increase of 17% in supervision orders, and 78% increase in unpaid work orders since the introduction of Community Payback orders without any additional funding. Furthermore criminal justice contact levels are defined by risk and needs analysis which then provides a level of intensity which defines contact levels under National Outcomes and Standards for Social Work Services in the Criminal Justice System (Scottish Government 2010), thus the capacity to manage workloads by efficiency is limited.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

5. No we do not feel that all the estimated costs set out in the FM are reasonable or accurate due to our concerns highlighted in response to question 4 above. Costs are based on an assumption that some costs are opportunity costs and can thus be met within increasing efficiency and workload management, which is not realistic.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

6. As above we are not content that these costs can be met within existing budgets due to increasing demands on remand within secure care and criminal justice community orders.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

7. Reasonably - these are low/medium and high estimates, with costs estimated from the medium levels, it is clear there are uncertainties.

Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

8. No other costs identified.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

9. It is not possible to identify specific costs, the cost pressures related to proposals for appropriate adults for 16 and 17 years olds i.e. secure remand, are unknown, given national policy where young people where at all possible are dealt with in the childcare system to address needs appropriately.
Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. The Scottish Court Service (“the SCS”) did not participate in the consultation exercises. However, the SCS has liaised with Scottish Government throughout the development of the Bill and on the financial implications arising from the Bill.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. Our views on the potential costs arising from the Bill are reflected in the Financial Memorandum.

Did you have sufficient time to contribute to the consultation exercise?
3. Yes

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. The FM accurately reflects the financial implications for the SCS.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
5. We have no reason to doubt the projections made in the FM.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. We are content that SCS can meet the costs in the terms set out by the Financial memorandum.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
7. The figures in the Financial Memorandum represent an informed estimate of the costs which will vary depending on the volume of applications.

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?
8. Yes
Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

9. No
Introduction

1. The Scottish Legal Aid Board (the Board) assisted the Scottish Government in the development of the Financial Memorandum to the Bill and all the figures contained therein in relation to legal aid were provided by the Board.

2. The Law Society of Scotland recently sent us a copy of their response on the estimated financial implications of the Criminal Justice (Scotland) Bill. We did not see a draft of this before it was submitted to the Committee, and although their response has now been published, we must clarify and correct some of the statements and assumptions made in that response. Their response relates to the impact of the Bill on legal aid costs, and in particular refers to the estimate of the cost implications of the Bill on legal aid, as set out in the Bill’s Financial Memorandum. We note that the Law Society believe that the legal aid costs associated with the Bill “have been reasonably captured within the Financial Memorandum” to the Bill, but that in their response they take issue with the estimated legal aid costs associated with the right to legal advice for suspects.

3. We are concerned that some of the comments made in the response from the Law Society in relation to the likely legal aid costs in connection with the right to legal advice to suspects are incorrect and may mislead. Unfortunately they show very little understanding of the current arrangements and costs associated with the operation of the Board’s Solicitor Contact Line and the Police Station Duty Scheme on which the likely future costs were based.

Operation of the Solicitor Contact Line and the Police Station Duty Scheme

4. The Board employs around 12 solicitors to provide a 24/7 service for suspects who are being questioned at police stations, and who require legal advice. We normally have two solicitors on shift at any one time. The service is staffed by solicitors 24 hours a day, 7 days a week. Our solicitors have a range of experience from criminal private practice and the prosecution service.

5. Where a suspect is being questioned in a police station and requests legal advice, the police telephone the Board’s solicitor contact line. Where a suspect requests advice from a named solicitor, Board solicitors will contact that named solicitor straight away. If the Board are unable to speak directly to the named solicitor, a message is left to inform them that a suspect is seeking advice. If no return call is received, a Board employed solicitor will provide telephone advice where this is requested. If there is no named solicitor, or the named solicitor cannot provide advice, Board employed solicitors can provide telephone advice. If an attendance at a police station is requested, those solicitors who are part of the police
station duty scheme can be asked to attend the police station. In addition, where a
duty solicitor cannot attend, a Board employed solicitor can attend if required.

6. This service was set up in the aftermath of the Cadder decision by the
Supreme Court and the following emergency legislation passed by the Scottish
Parliament to give suspects the right to legal advice when being questioned at police
stations. The service commenced on 4 July 2011, when regulations came into force
placing a statutory duty on the Board to make solicitors available for this purpose.
We fulfil this obligation by having Board solicitors available to provide telephone
advice to suspects, and a series of local duty rotas where personal attendances can
also be provided by private and PDSO solicitors where the suspect requests this.

7. The service ensures that suspects can get access to legal advice in a timely
manner and indeed has gained a positive reputation amongst the legal profession
and other partners in the justice system, including the Association of Chief Police
Officers in Scotland.

Comments in relation to the Law Society’s response

Costs of the SLAB Contact Line
8. On pages 4 and 5 of the Law Society’s Response, various comments were
made about the costs of the SLAB Contact Line and the amounts paid to private
solicitors under the advice and assistance scheme.

9. The conclusion drawn here about the average costs of providing advice to
suspects by the SLAB Contact Line solicitors and private solicitors as shown on
page 5, are at best incorrect and misleading.

10. These figures compare the two thirds/one third split of the 21,900 suspects
seeking advice at police stations in a year between private named solicitors and
SLAB Contact Line solicitors. Their response then goes on to use these figures to
obtain an average case cost between the payments made to private solicitors and
the total costs of running the SLAB Contact Line. The average quoted in the two
bullet points at the top of page 5 are misleading and inaccurate and do not provide
an accurate average of the costs associated with providing advice to suspects in
police stations.

11. To obtain the SLAB Contact Line average, the Law Society use the total costs
of the service (around £650,000 per annum) and divide these by the one third of
suspects who received advice from the SLAB Solicitor Contact Line (approximately
7,300 suspects) to give an average cost of £89.04 per person advised. However,
this average does not reflect the workloads of the solicitor contact line who also deal
with the two thirds of suspects who request a named solicitor as part of their role in
ensuring that suspects obtain a solicitor when they request one. The duties of the
SLAB Contact Line solicitors are to contact and chase up private solicitors where
these are requested by the suspect. The average cost of advice given by the Board
contact line solicitors is actually substantially lower than the incorrect figure
calculated by the Law Society.
12. In relation to the average costs of private solicitors advising suspects, a completely incorrect figure of £15.61 is noted. This came from information which the Law Society requested from us earlier this year when they asked us how many advice and assistance accounts were submitted and what was the total expenditure on police station work during 2011/12. On 22 April 2013 we advised them that there were 1,464 cases paid at a total cost of £228,000 including VAT. This effectively gives an average payment of £155.73.

13. However, the Law Society’s response has used the figure of £228,000, and divided it by 14,600 which is two thirds of the estimated total suspects requesting legal advice (21,900) who were referred to private solicitors. This then gives a completely misleading figure of £15.61 per case.

14. Using the financial year of 2011/12 for any comparisons does not take into account the circumstances at the time. The Solicitor Contact Line and Police Station Duty scheme did not become operational until 4 July 2011, and in the three months which followed, many solicitors refused to participate in the scheme, which meant that they could not claim payment for any advice given to their clients. For a more valid comparison, we have recently looked at the advice and assistance costs paid to private solicitors for providing advice at police stations during 2012. As at September 2013, 8,087 grants of advice and assistance were made to suspects for the year 1 January 2012 to 31 December 2012. Of these cases 2408 accounts have now been paid at a total of £322,625, giving an average payment of £134.00 (as compared to the £15.61 calculated by the Law Society).

15. As such we are confident that the costs associated with running the Solicitor Contact Line provide value for money to the taxpayer, as well as safeguarding the rights of suspects to receive legal advice in police stations as timeously as is possible, when this is requested.
Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. The Scottish Prison Service (SPS) as an Agency of the Scottish Government (SG) did not take part in either of the SG consultation exercises which preceded the Bill. SPS were however fully involved in agreeing with SG policy colleagues the financial assumptions and narrative within the Financial Memorandum in so far as they related to SPS.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. Yes.

Did you have sufficient time to contribute to the consultation exercise?
3. N/A.

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. Yes.

Do you consider that the estimated costs and savings set out in the FM and projected over the period highlighted in the FM for each service are reasonable and accurate?
5. Yes

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. Please refer to the SPS sections in the financial memorandum in particular 190-195. The wording in these sections were agreed with SPS.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
7. Yes
**Wider Issues**

*Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?*

8. Yes.

*Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?*

9. No.
Consultation

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

South Lanarkshire Social Work Resources did take part in the Scottish Government consultation exercises which preceded the Bill but did not comment on the financial assumptions made.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?

N/A

Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?

Section 39 states that the provision in the Bill relating to vulnerable adult suspects will not entail additional costs for local authorities and police as Appropriate Adult Services are provided at present. This causes some concern as the Bill will probably result in an increase in the demand for this service which will have a budgetary impact for local authorities.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

Yes

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

There is a genuine concern that there will be an increase in the request for Appropriate Adult Services, although this will not be confirmed until the Bill is embedded. As part of an interim phasing –in of the Bill I would recommend that additional funds are made available to the local authority to meet this projected cost. Apart from being involved for several hours in police interviews and processes, there has been a significant increase in the levels of citations by the Procurator Fiscal for Appropriate Adults to attend Court.
Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
I would not disagree with it at this time.

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill?
If not, which other costs might be incurred and by whom?
Yes it reasonably captures the costs associated to the Bill.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?
I feel at this time that any future cost would be conjecture and hence would prefer not to comment. However, if this is a concern, perhaps this matter could be followed up with local authorities via a review of the implementation of the Bill, after a period of 12 months.
FINANCE COMMITTEE CALL FOR EVIDENCE

CRIMINAL JUSTICE (SCOTLAND) BILL: FINANCIAL MEMORANDUM

SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

Introduction

1. The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession.

2. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

3. To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

4. We welcome the opportunity to comment upon the estimated financial implications of the Criminal Justice (Scotland) Bill (“the Bill”).

General Comments

5. Our comments relate to the impact of the Bill on legal aid costs. We believe that the legal aid costs associated with the Bill have been reasonably captured within the Financial Memorandum to the Bill. However, we wish to comment upon the legal aid costs in relation to:

   • Right to Legal Advice to Suspects

   • Duty of Prosecution and Defence to Communicate

IMPLEMENTATION OF THE RECOMMENDATIONS OF LORD CARLOWAY’S REVIEW OF SCOTTISH CRIMINAL LAW AND PRACTICE

Right to Legal Advice to Suspects

6. We welcome the provisions of the Bill in relation to the right to legal advice to suspects.¹

7. There is a European Convention on Human Rights (“ECHR”) dimension to these provisions. Lord Carloway’s review was conducted in light of the Cadder v HMA² judgement of the UK Supreme Court on the ECHR requirements of a person’s

¹ For detailed comment on the provisions we refer to our response on the Bill itself - http://www.lawscot.org.uk/media/659951/crim_written_evidence_criminal_justice_(scotland)_bill%20_final_2013.pdf

² [2010] UKSC 43
right to legal advice prior to police questioning. The Cadder case illustrates the importance of ensuring that Scottish criminal law and practice remains compliant with the rights set out in ECHR.

8. There are unavoidable costs associated with ensuring that this area of law and practice is compliant with ECHR and able to withstand challenges on Convention grounds.

**Paragraphs 24, 77 – 82 and 197 – 214 of the Financial Memorandum**

**Paragraph 24**

*Legal Advice – Cost Implications Generally*

9. Paragraph 24 of the Financial Memorandum explains that the Bill extends the right to legal advice to suspects detained by the police, regardless of whether questioning takes place. The paragraph states that this will likely lead to an increase in requests for legal advice and that this will have cost implications for the Scottish Legal Aid Board ("SLAB") and the police.

10. This paragraph requires a minor clarification. The cost implications are actually for the legal aid fund rather than for SLAB itself. The SLAB administers the legal aid fund but the organisation’s running costs are part of a separate budget.

**Paragraphs 77 – 82**

*Increase of Persons Requesting Legal Advice*

11. Paragraphs 77 to 82 of the Financial Memorandum to the Bill outline the number of additional people likely to be requesting solicitor advice as a result of extending the right to legal advice to suspects detained by the police to situations where questioning does not take place.

12. Paragraph 81 states "The format for legal advice will be a mix of telephone and in person. Currently around 15% of advice provided by SLAB is in person at the police station; the rest is provided through the Solicitor Contact Line. In England and Wales the ratio is markedly different".

13. We question the basis of the comparison. Other than where advice is provided by the SLAB Contact Line or the Public Defence Solicitors' Office ("PDSO"), the advice is provided by private solicitors. The percentage split between telephone advice and personal attendance advice provided by private solicitors might be different from the percentage split for telephone advice and personal attendance.

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3 In the case of Cadder v HMA [2010] UKSC 43 the UK Supreme Court held that ECHR requires that a person who has been detained by the police has the right to have access to a solicitor prior to being interviewed unless in the particular circumstances of the case there are compelling reasons to restrict that right.

4 The Cadder case sought to apply to a Scottish case the principles set out in the judgment of the Grand Chamber of the European Court of Human Rights in Salduz v Turkey [2008] 49 EHRR 19.
advice provided by SLAB. If the difference is significant that might undermine the assumptions around numbers of additional telephone and personal attendance advice required.

**Paragraphs 197 – 201**

*Liberation from Police Custody*

14. We agree with the comments in paragraphs 197 to 201. We believe the figures are accurate and reasonably capture the costs associated with this part of the Bill. We note that Assistance By Way of Representation (“ABWOR”) would be the only way to make representation available at these hearings, as criminal legal aid cannot be made available before the suspect is charged. We welcome clarification on how ABWOR is to be made available for these hearings.

**Paragraphs 201 – 211**

*SLAB Contact Line*

15. Paragraphs 201 – 209 outline the financial impact on the SLAB Solicitor Contact Line.

16. Solicitors at the SLAB Contact Line provide advice in a third of police station advice cases (either by telephone or, in person, where the duty solicitor is unavailable). In the remaining two thirds of cases, the advice is provided by “named solicitors” or duty solicitors – in other words, solicitors who are not employed as SLAB Contact Line Solicitors.

17. The cost to the legal aid fund of solicitors employed by the SLAB Contact Line providing advice to approximately one third of suspects overall and associated staff costs to administer the system is around £650,000 per annum. This is a significant cost.

18. Where the advice is not provided by the SLAB Contact Line or the PDSO, the advice is provided by private solicitors either by telephone or personal attendance. This is funded through the Advice and Assistance regulations. The Financial Memorandum does not provide a total cost for these cases. However, on 22 April 2013 we received an email from SLAB which stated that the total cost of police station Advice and Assistance cases for 2011-2012 was £228,000.

19. Paragraph 79 states that the number of persons accessing legal advice in Scotland is in the region of 21,900. As far as it is possible to make a like for like

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5 Paragraphs 202 and 203 of the Financial Memorandum
6 Paragraph 203 of the Financial Memorandum
7 Paragraph 202 of the Financial Memorandum
8 We are aware that a significant amount of police station advice being provided by private solicitors goes unpaid and that one of the reasons for this is that Advice and Assistance fees are not always claimed. These issues are likely to be resolved if contributions are removed from police station work and if the payment arrangements are revised (as suggested elsewhere in this response).
comparison and on the basis of two thirds of advice being provided by named solicitors and one third of advice being provided by SLAB Contact Line Solicitors the per person costs are as follows:

20. SLAB Contact Line costs the legal aid fund approximately £89.04 per advised person per annum and
Private solicitors cost the legal aid fund approximately £15.61 per advised person per annum.

21. It is difficult to make a direct comparison between the two sets of providers so this is a very broad calculation and the figures will be inexact. However, on any view, the SLAB Solicitor Contact Line seems disproportionately expensive when set against the total cost of advice provided overall.

22. The estimated additional cost of the SLAB Contact Line as a result of the changes brought about by the Bill is £890,000 which would mean a total cost to the legal aid fund of £1,540,000 per annum (£650,000 + £890,000).

23. These are direct costs to the legal aid fund. Given the pressure on public finance we suggest that the costs of the SLAB Contact Line are reviewed.

**Paragraphs 212 – 213**

*Grants of Advice and Assistance*

24. Paragraph 212 outlines the anticipated increase in the numbers of grants of Advice and Assistance. Paragraph 213 provides information on the increase to the average cost of these cases under the existing fee structure.

25. In our view, the existing funding arrangements for solicitors carrying out police station work are inadequate and need to be reviewed.

26. Commenting on legal aid in his Report, Lord Carloway states: “The detail of the nature and extent of the provision of legal aid is broadly outside the scope of this Review. This is something for the Scottish Government and the Scottish Legal Aid Board to consider. But the manner in which the right of access to a lawyer is made “practical and effective” will depend very much on that provision.”

27. For solicitors that are not employed by SLAB, funding for advice provided to suspects at a police station is covered by the Advice and Assistance payment

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9 A proportion of the two thirds of cases will be dealt with by PDSO solicitors, for example.
10 Paragraph 209 of the Financial Memorandum – this is the best estimate. Par. 209 makes clear the upper limit is an increase of £1,780,000 which would lead to a total cost of £2,430,000.
arrangements under the Police Station Duty Scheme. This was established as an “interim scheme”.13

28. The Advice and Assistance payment arrangements, which were incorporated into the police station duty scheme on an interim basis, were not designed solely for police station advice. As a result, funding mechanisms for this work are not structured appropriately and the rates are unduly limited. Also, we believe that there should be no contributions for work carried out at a police station.

29. On 6 August 2013, SLAB issued an update to solicitors which stated: “At present, police station advice is paid for under Advice and Assistance. The Scottish Government’s intention was always to review the payment mechanism as part of the work on the Criminal Justice (Scotland) Bill 2013.”14

30. We welcome this review and would encourage it to take place as soon as possible so that existing payment arrangements can be improved. We would be keen to engage with the Scottish Government and SLAB on this issue.

Simplified Payment Arrangements Required

31. Police station advice work is chargeable on a time and line basis. This method of remuneration is not efficient or effective for this type of work. We believe that the structure of fee arrangements should be simplified and that a system of block payments should be introduced to replace the existing Advice and Assistance arrangements.

Increased Payment Rates Required

32. In his report, Lord Carloway states: “returning to the general theme of when and where the trial takes place, the Convention jurisprudence dictates that the trial no longer starts at the door of the court but at least by the time the suspect is in some form of custody. It is that, perhaps relatively new, feature of the criminal justice system that augments the role of the solicitor at this early stage of the proceedings.”15

33. We believe it is therefore appropriate that the solicitor, who is providing advice at the police station part of the process, is paid at a similar rate to that which he or she would be paid if appearing at trial.

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12 SLAB set up this interim scheme in accordance with its duty established under the Criminal Legal Assistance (Duty Solicitors)(Scotland)Regulations 2011, to arrange for solicitors to be available for the purpose of providing Advice and Assistance to suspects
13 SLAB 2011 Guidelines on Police Station Duty Scheme
14 SLAB website update, 6 August 2013 -
http://www.slab.org.uk/providers/mailshots/newsfeed/Police_Station_Duty_solicitorsx_attendance_at_police_stations
15 Lord Carloway Report at paragraph 6.1.38 -
34. The limited payment rates that are currently available for this work must be seen in the context of recent cuts in criminal legal aid and the decline in expenditure in criminal legal assistance in recent years. Andrew Otterburn and John Pollock, authors of the Society’s annual “Cost of Time” survey, have reported in an article in the Journal of the Law Society of Scotland that “life has continued to be extremely difficult for smaller firms and in particular those that undertake legal aid”.

Paragraph 213 - Police Questioning After Charge

35. The Bill provides for the possibility of police questioning after charge. The right of access to a solicitor will apply to post charge questioning.

36. Paragraph 213 of the Financial Memorandum takes the impact of this change into account in calculating the increase to the average cost of cases. However, there seems to have been little consideration given as to how solicitors will actually be paid for this work.

37. In solemn cases it has not been made clear that this work will form part of a separate chargeable payment “block” under existing legal aid regulations, nor has it been made clear that the work would be classified as preparation which remains on a time and line payment basis.

38. If the questioning takes place after the Legal Aid Granting it is not possible to revert back to Advice and Assistance to seek cover for the work carried out. The same general restriction applies in summary work, i.e. a solicitor is not able to claim for Advice and Assistance cover after legal aid is granted. Therefore as summary work is paid by a fixed fee, as things stand, if the questioning was after the Legal Aid Granting, it would be subsumed into the fixed fee.

39. In other words, in both solemn and summary cases, all the additional work, perhaps even travelling to a police station out of hours would go unpaid. We believe that it is not appropriate for the Scottish Government to expect the solicitor profession to provide advice to suspects in cases without proper remuneration.

Paragraph 214

The Cost of Increased Personal Attendances

40. Paragraph 214 states that there will be an “estimated increase in costs for Advice and Assistance by private and PDSO solicitors of between £810,000 and £1,080,000 with a mid-range estimate at £945,000.” These figures are not transparent enough.

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18 Section 27 of the Bill
19 Paragraph 93 of the Policy Memorandum
41. The reference to PDSO solicitors is incorrect. There will be no increase in Advice and Assistance costs for PDSO solicitors. PDSO solicitors submit legal aid accounts but do not claim fees from the fund (PDSO solicitors receive salaries). The increased cost of provision through Advice and Assistance funding will be separate to any increased cost of the PDSO and the two costs should be reflected in the Financial Memorandum separately.

Longer Term Costs

42. The estimated increases to Advice and Assistance costs in paragraph 214 might not reflect the longer term position if the payment structures are revised. This is noted generally at paragraph 197 of the Financial Memorandum.

Removal of Criminal Contributions from Police Station Interviews

43. The Financial Memorandum, including the figures in paragraph 214, does not take into account the removal of contributions from police station interviews.

44. Criminal contributions apply to Advice and Assistance feeing arrangements and consequently, at the moment, are applicable in funding for police station interviews. However, we understand that Section 17 of the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013 will be utilised contemporaneously with the regulations introducing the contributions system under that Act. This will remove contributions from grants of Advice and Assistance for police station interviews. Given eligibility criteria have been removed from these matters previously, this development would ensure that every member of the public who needs the services of a solicitor whilst questioned in a police station gets free automatic legal aid, thereby increasing access to justice significantly.

45. We have been advised by the Scottish Government that the intention is for contributions regulations to be in force from November 2013. The removal of contributions for police station interviews is unlikely to have a significant impact on costs. However, given the anticipated timescales for removal, it is surprising the changes are not reflected in the cost analysis of this part of the Financial Memorandum.

Contributions in Police Station “Non-Interviews”

46. We understand that no decisions have been taken on whether the removal of contributions will extend to all Advice and Assistance cases in police stations (i.e. to include situations where the suspect is not questioned).

47. We believe that contributions should be removed for all police station advice cases.

48. Financial contributions are not practical for this work. A suspect is not able to confirm his or her income and capital, presenting the solicitor with substantial difficulty in calculating the suspect’s contribution level with any accuracy. This has
the potential to complicate and delay the process of arrest and detention, which is contrary to the policy objectives of the Bill. Also, in the event that a suspect does not pay the contribution assessed the solicitor will have little option other than to raise an action in the small claims court.

IMPLEMENTATION OF THE RECOMMENDATIONS OF SHERIFF BOWEN’S INDEPENDENT REVIEW OF SHERIFF AND JURY PROCEDURE

Duty of Prosecution and Defence to Communicate

Paragraphs 242 and 263 - 266

49. Section 66 of the Bill introduces a requirement on the prosecution and the defence to communicate and to lodge a written record of their state of preparation in advance of the first diet.

50. Paragraph 242 of the Financial Memorandum states: “While the cost of preparing this record will fall on the COPFS the process of engagement will reduce the number of diets continued owing to unpreparedness, and indeed reduce the number of cases going to trial, as they are more likely to be resolved by early pleas. This will generate savings.”

51. Paragraph 263 of the Financial Memorandum states: “Payment for the work involved in the CBM would be allowable on a time and line basis.”

52. It is clear that the rationale for the introduction of this engagement is to encourage the early resolution of cases where possible.

53. In order to ensure that this policy objective is fully achieved we believe that criminal legal assistance funding should correspond with the work being carried out.

54. Solicitors will be required to attend managed meetings with prosecutors and assist in the preparation of written records. In order to support investigation and preparation of cases to facilitate their resolution at the earliest possible stage, fees should be structured so that the solicitor receives an early resolution fee for achieving a resolution by way of a section 76 hearing or at the first calling on indictment. An early resolution fee would support the cost effectiveness and efficiency of the wider criminal justice system.

55. The summary justice reforms introduced an early resolution fee for summary matters. These reforms generated significant savings in criminal legal assistance and dealt with other problems in the wider justice system such as reducing court delays.

56. We would welcome an early resolution fee for solemn matters and believe this is necessary in order to give practical effect to this policy intention of the Bill.

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20 Policy Objective as outlined at paragraphs 32 and 44 of the Policy Memorandum
Conclusion

57. The costs to the legal aid fund associated with the Bill have been reasonably captured within the Financial Memorandum. However, in relation to the provisions on the right to legal advice to suspects and the duty of prosecution and defence to communicate, some of the longer term impact needs to be considered carefully. In addition, certain changes are required to the funding structures to ensure that these provisions are both practical and effective.
Consultation

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

1. No

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?

2. N/A

Did you have sufficient time to contribute to the consultation exercise?

3. N/A

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?

4. No

5. The Bill identifies areas where there is an anticipated increase in demand for Local Authority services, as follows:

   i) Carloway Provisions – identifies a mid-risk estimated cost of £1.244m, which according to the FM, as this is additional demand for Social Worker time means that it is an opportunity cost. The opportunity cost premise assumes that the demand on existing Social Worker time can be re-prioritised to allow this work to take place and therefore there is no real new cost to local authorities. This assumption appears to have been arrived at on the basis of no evidence whatsoever; including, very importantly, the capacity of local authorities to make decisions regarding the allocation of staff time to accommodate new work arising as a result of the consequences of legislation and over which we have little or no control. This would bear an interpretation of additional costs, joining a lengthening list of unfunded additional demands on the local authority.

   There is concern that the estimated cost represents a best estimate and that the estimate of potential additional demand for CPOs is itself based on best estimates of prosecutions and convictions; in other words it is the result of a series of informed guesses.

   There is also concern that it is not clear whether or not costs of additional CJSW Reports are included in the estimate of opportunity costs arising
from additional demand for CPOs (Para. 234 and 235 of FM), there is no mention of this in the financial memorandum.

ii) The Bowen Provisions – advises that an additional cost across Scotland for local authorities will be £56,000 per year. How this has been calculated is unclear. Para 240 of the FM advises: “This has a number of cost implications, as it will increase the prisoner population. This increase has been modelled at 40 extra places at any time.”

How this translates into the stated additional need for a single additional secure accommodation place is not clear at all, and especially as the FM then states at Para 268 that this place is anticipated to be required only 25% of the time. This logic seems to contradict Para 230 which talks about 40 extra remand places at any time. The logic seems to suggest that at any point in time that 39.75 of these places will be within the SPS provision (or elsewhere).

Para 268 also suggests that as there is currently capacity in the secure estate at present then there is no short term cost, this assumes that if a place is used that the unit charge for all secure places is reduced in proportion to the increased use of secure places. It is not clear that this would operate this way in practice as secure charges do not tend to vary based on uptake during a year.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

6. No – as above

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

7. No – as identified above. In relation to the “opportunity costs” this becomes difficult as increasing demand is placed on Social Work services with only finite resources and will tend to require local authorities to consider whether their existing resource (i.e. number of Social Workers) is sufficient to meet demand, thereby likely to place financial burden on local authorities. This should be funded in full by the Scottish Government through an additional funding allocation.

8. In relation to the response at 5 ii) above it is very unclear as to how the £56k p.a. has been generated and there is a real risk that this is therefore underestimated. A transparent FM would advise how these costs are estimated.

9. Due to the way that the FM proposes to distribute the £56k (across 32 local authorities) it is very likely that those authorities who do experience the actual cost due to a secure placement will not be funded sufficiently.

10. The FM’s view on opportunity cost is interesting when viewed that the Social Workers involved in some of the additional work may work for Criminal Justice Partnerships – where it is understood the ring-fenced Scottish Government funding
is being frozen for the next 2 financial years. The increase in service demand here could have unexpected consequences for other aspects of Criminal Justice activity. In addition the potential increase for CPO’s (Para. 234 and 235 of FM) is also likely to increase demand on Criminal Justice staff – with no financial contribution provided.

**Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?**

11. The FM identifies low, medium and high levels of potential demand and therefore cost, however many of these are based on best estimates of demand increases.

**Wider Issues**

*Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?*

12. Other than what is identified above, not clear what other implications may be at this stage.

*Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?*

13. Not known at this stage.
Consultation
Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?
1. No

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?
2. Not applicable

Did you have sufficient time to contribute to the consultation exercise?
3. Not applicable

Costs
If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?
4. It is unclear whether the Bill will impact on remand in secure accommodation for young people, if this is the case there would be an impact on our expenditure on secure accommodation. We do not believe that the Bill will have any other financial implications for West Lothian Council.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?
5. If remand in secure accommodation for young people is included then this needs to be accurately reflected.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?
6. If remand in secure accommodation for young people is included additional budget would require to be allocate to reflect the additional cost.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
7. It is difficult to comment given that there is very little impact on the council.

Wider Issues
Do you believe that the FM reasonably captures costs associated with the Bill?
If not, which other costs might be incurred and by whom?
8. It is difficult to comment given that there is very little impact on the council.
Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

9. We are not aware of any additional future costs associated with the Bill.
1. I refer to my letter of 20 September 2013 in relation to the financial implications of the Criminal Justice (Scotland) Bill. I thought it might be helpful to provide some additional information in relation to the shadow marking exercise carried out by COPFS to assess the possible impact of the abolition of the requirement for corroboration on the numbers of cases which might be taken up if this proposal was introduced.

2. A statistically relevant and random selection of cases was identified in the region of 950 cases. This sample size was chosen with the aim of obtaining estimates that had an accuracy of around +/-5% with 95% confidence. These cases had previously been marked by prosecutors in October or November 2012 and were then re-marked applying the proposed new test for prosecution and guidance. The cases covered all types of offending. The shadow marking decisions were then compared with the initial marking to assess the changes in marking due to the application of the new test.

3. Six shadow markers were picked to represent a cross section of COPFS staff and to reflect the differing experience levels of those engaged in case marking within our organisation. A Principal Procurator Fiscal Depute oversaw the marking and acted as case reviewer.

4. The cases were selected from cases marked for Solemn proceedings, Summary proceedings and those marked No Action.

5. Only some categories of cases marked for No Action are likely to be affected by the change in prosecution test and the sample only therefore included those which are most likely to be affected namely cases marked for No Action where there was insufficient admissible evidence; where there were mitigating circumstances; and in a more widely ranging “other” reasons category.

6. The sample size gave results on a service wide basis for COPFS but was not specific for geographical Federations.

7. In addition, the sample gave figures for Solemn proceedings generally but did not differentiate between High Court and Sheriff & Jury proceedings.

8. The six markers marked about 160 cases each. To avoid any contamination of the decision making process, the shadow markers were only given access to the Standard Prosecution Report (SPR) and they were not aware of the initial marking. The full range of marking decisions was available to them.
9. The exercise was intended to demonstrate the impact of the change in prosecutorial test on the numbers of cases where application of the new test changed the decision to proceed to court, that is those cases where at present we do not take action but would do so using the new test; and those cases where at present we do take action but where in future we would not.

10. It should be noted that the new prosecutorial test will not have an impact on the forum where the cases should be prosecuted i.e. it will not affect whether a case is prosecuted in the JP court, Sheriff Court or High Court but the impact is simply whether the case is prosecuted or not.

**Statistical analysis of results**

11. The results of the shadow marking exercise had to be weighted having regard to the relative numbers of cases for each category that are processed by COPFS each year. For example there are significantly more summary prosecutions than solemn prosecutions therefore an appropriate weighting had to be applied to the results to “multiply” them up to get a service wide perspective. In addition, marking is done at individual subject level – assumptions had to be made on the average number of subjects per case to convert the figures to case level. A best estimate of the change in the number of cases that can be expected, with an associated confidence interval with a range of values was calculated with the following results:-

- **Solemn** – 1.06 - resulting in an increase of 6% in Solemn cases. This is calculated with a margin of error/confidence interval of between 1.02 to 1.10 i.e. a range of potential increase of between 2% and 10%

- **Summary** – 1.01 – resulting in an increase of 1% in Summary cases with a range of between 0.99 and 1.04 i.e. a range of 1% reduction to 4% increase in Summary business
1. We submitted evidence to the Finance Committee on the Financial Memorandum to the Criminal Justice (Scotland) Bill and, in particular, around the costs of providing advice to suspects at a police station. We have subsequently seen the written evidence provided by the Scottish Legal Aid Board, which discusses our analysis of the costs of this provision. We thought that it may be useful to the Committee’s deliberations to clarify our approach.

2. We calculated the average cost of advice per person on the basis of the number of people who have received advice at a police station, rather than the amount of accounts submitted to the SLAB or the number of accounts paid by the SLAB. We think that looking at average costs of advice using either of these other two perspectives is also valid, albeit limited, with the large number of accounts that have not been paid. Accordingly, we think that considering the cost of advice on a per person basis is a reasonable indicator, particularly as the data for the number of people receiving advice is robust.

3. From the latest update on advice provided at a police station, the SLAB details the number of people that have received advice:
   - Between 4 July 2011 and 30 June 2012, 22227 requests for advice (comprising 7518 instances of telephone advice from the SLAB’s Solicitor Contact Line and 14709 by named solicitors);
   - Between 1 July 2012 and 30 June 2013, 22632 requests for advice (comprising 8021 instances of telephone advice from the SLAB’s Solicitor Contact Line and 14611 by named solicitors);
   - And in the three months from 1 July 2013 to 30 September 2013, 6508 requests for advice (comprising 2484 instances of telephone advice from the SLAB’s Solicitor Contact Line and 4024 by named solicitors).

4. As the SLAB notes in its written evidence to the committee, at September 2013, for the 2012 calendar year, 8,087 grants of advice and assistance were made to suspects and 2408 had been paid at a total cost of £322,625. The SLAB suggests an average case cost of £134.00 on this basis: we think this is a valid, though limited, perspective. According to the SLAB’s own data, the number of cases paid is, for instance, less than a third of the number of grants made and indeed around a sixth of the number of instances of advice provided by named solicitors. Considering the average cost of provision on a per person basis does recognise the overwhelming majority of instances of advice that have either yet to be paid or will not see accounts submitted for payment.

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1 Police Station duty scheme update – Solicitor Contact Line, Scottish Legal Aid Board, 11 October 2013
5. The SLAB also notes that the average costs stated for advice by its Solicitor Contact Line do not reflect the costs incurred in the two thirds of cases where a named solicitor is requested. As the SLAB’s written evidence states, “The duties of the SLAB Contact Line solicitors are to contact and chase up private solicitors where these are requested by the suspect.” We see from the Financial Memorandum to the Criminal Justice (Scotland) Bill that the cost per solicitor for the contact line is £295,000 per annum (5 full-time equivalent staff at £59,000 each). We do recognise, as the SLAB’s written response states, that relaying requests for advice to private practitioners constitutes a significant part of that cost.

6. We hope this information clarifies our written evidence to the Committee and is helpful in deliberations. If we can assist further, we would be happy to do so.
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Criminal Justice Division

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Kenneth Gibson MSP
Convener
Finance Committee
The Scottish Parliament
Edinburgh
EH99 1SP

3 December 2013

Dear Mr Gibson

Thank you for the opportunity on 20 November to give evidence on the Criminal Justice (Scotland) Bill Financial Memorandum (FM). At that session I undertook to write to the Committee with further information on the issues raised by local authorities in their submission, and on appeals.

As I indicated during the evidence session, the discussions that contributed to the development of financial estimates were undertaken with the Convention of Scottish Local Authorities (COSLA) and the Association of Directors of Social Work (ADSW), rather than with individual local authorities. The eight local authorities which have provided submissions to the Committee raise five key issues. I address these below.

Removal of requirement for corroboration: community sentences

Dundee, Falkirk, Renfrewshire and West Dunbartonshire question the costs in the FM relating to management of community sentences for the anticipated increase in cases going to court.

The FM gives an explanation of how these figures were calculated, and the Crown Office has provided supplementary written evidence on the shadow marking exercises which informed these calculations. Using these figures, we estimated 480 additional community sentences – which is 2.8% of the total figure of 16,916, reported in SG statistical publication Criminal Proceedings in Scotland 2011-12.

These costs would arise in the context of substantial decreases in crime rates in Scotland in recent years, as well as a range of policy initiatives designed to reduce reoffending, such as the Reducing Reoffending Change Fund. In addition, as outlined in the draft 2014-15 budget, the Scottish Government has protected the
overall community justice budget, including funding within that for community sentences. In fact for 2014-15 there has been an increase of £500,000 in cash terms. We have also provided additional flexibility, as recommended by Audit Scotland, for Community Justice Authorities: It is for these authorities to allocate funding on the basis of local needs and demands and they were provided with the additional flexibility to do so from 2013-14 onwards.

The costs associated with community sentences as a result of the Bill’s provisions on corroboration will be in the form of demands on staff time. They will be spread across the country and represent a small percentage increase. We therefore concluded that in the context of reducing crime rates and the additional funding commitment, this work can be managed within existing resources.

Removal of requirement for corroboration: social work reports

Dundee City Council have suggested a potential increase in the volume of social work court reports as a result of the removal of the requirement for corroboration. As social work reports are not mandatory in all cases, the increase in reports is likely to be less than the number of additional cases as a result of the Bill’s changes.

This should also be considered in the context of substantial decreases in crime rates in Scotland in recent years, as well as a range of policy initiatives designed to reduce reoffending. These costs will be in the form of demands on staff time. As with community sentences, they will be spread across the country and represent a small percentage increase overall. We therefore concluded that in the context of reducing crime rates, these would be manageable within existing resources.

Vulnerable adults

Aberdeenshire, Falkirk and South Lanarkshire Councils have expressed concerns about the section on costs for provision of Appropriate Adults (AAs). The concern raised by Aberdeenshire Council in particular seems to comes from a misunderstanding of the effect of the Bill.

The provisions in the Bill are not placing a duty on either the police or local authorities to provide AA services. What the Bill does is define vulnerable person and the role of the person who is to support them, and provides that where a police constable considers that a person in police custody is age 18 or over and is unable, because of a mental disorder, to understand what is happening or to communicate effectively, they must notify a person who they consider suitable to provide the support required. This is in line with existing practice.

The Bill does not introduce a new Appropriate Adult scheme, and it does not change the role of either the police or an AA. We anticipate that provision of AAs will continue to operate as at present. It is on this basis that we have agreed with COSLA that there are likely to be no additional costs for local authorities as a result of the Bill.

We have made a specific commitment to COSLA to review the impact of the Bill in relation to vulnerable adults after implementation. We will examine data collected
by the Scottish Appropriate Adult Network and the police, and continue to liaise with key stakeholders like COSLA and Police Scotland, in order to identify any financial impact.

Provision of social worker support to 16/17 year old suspects

Falkirk Council questions the FM’s assumptions around the provision of social worker support to 16 and 17 year old suspects. However, the submission from Dundee City Council specifically states its view that “the assumptions made around funding support to child suspects appear to be reasonable.”

The Bill’s provisions in this area state that for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years. This means that the current provisions concerning notification to an adult reasonably named by the person and these persons having access to a child suspect should be extended to all persons under 18 years of age.

Consultation with representatives of Association of Chief Police Officers in Scotland (ACPOS), ADSW and COSLA took place between January and April 2013 and confirmed that in their view only a small proportion of 16 and 17 year olds would want to seek support from a social worker. For the most part a young person seeking support is likely to do so from a parent, family member or friend. Where moral support is wanted, and where no such provision can be found, existing practice for under 16s would be the provision of a social worker.

In the context of 16 and 17 year olds this is new provision. The FM models costs assuming such support was sought in 5%, 10% and, as an upper limit, 20% of cases. This gives a best estimate of £84,000 per year. These costs would fall nationally across local authorities, distributed at the rates at which they bring young people to police offices.

There is clear evidence that youth crime is falling in Scotland: the number of detected crimes committed by children and young people in 2012-13 fell by 22% compared to the previous year, to a level half that seen in 2008-09. In this context, we concluded that the anticipated increase is manageable within existing resources. We have already indicated that we would be content to revisit this with COSLA following implementation.

Pre-trial time limits for sheriff and jury cases

Dundee, Falkirk, West Dunbartonshire and West Lothian Councils comment in their written submissions on costs associated with providing secure accommodation as a result of the increase in pre-trial time limits for sheriff and jury cases from 110 to 140 days.

The section covering this in the FM does not go into detail on the process of obtaining estimates. I set out here some further information, which should address the issues raised by local authorities.
The Scottish Government undertook a modelling exercise to estimate the impact of the Bill's Sheriff and Jury provisions on the prison population and community sentences. This exercise made use of an existing model for projecting the Scottish prison population, which was adapted to focus specifically on the remand population for cases being heard in the Sheriff and Jury courts. In order to get the most accurate estimate possible, the analysis excluded individuals who are subsequently given an immediate custodial sentence, on the basis that any increase in remand time for this group would result in an equivalent reduction in time spent in custody post-sentencing.

The conclusion of this modelling exercise was that 40 additional prison places would be occupied at any time. It is worth emphasising that the impact of this change is relatively small because only a small minority of cases are expected to extend beyond 110 days, which is the current limit.

In order to estimate the impact on secure accommodation provision, officials applied the existing proportion of suspects requiring secure accommodation to this expected increase. There was no clear evidence for this proportion differing for the additional demand, so this should give a reasonable estimate. This suggested an additional one quarter of a place in secure accommodation across the whole of Scotland at any one time.

There is capacity within the existing system to absorb this increase at present. It may lead to a small increase in use of private provision, and so a financial cost of £56,000 per annum is stated in the FM. This constitutes 0.25 x £225,000 (the annual cost of a secure accommodation place). This cost will be spread across all 32 local authorities, so is a very small impact in financial terms.

The specific concern raised by Falkirk Council is that “courts may view secure care as the first option for 16/17 year olds.” This would require a change in judicial practice, and there appears to be no reason to think that would happen as a result of the Bill.

The Scottish Government are supporting Local Authorities to implement the Whole System Approach which aims to ensure that alternatives to remand are in place. Since the launch of the approach there has been a considerable reduction in the use of place of safety and remand in secure care. The most recent figures demonstrate a reduction of over 40% with figures falling from 77 between 1 August 2010 and 31 July 2011 to 45 between 1 August 2011 and 31 July 2012. In the context of this substantial reduction, we concluded that the small percentage increase estimated for the Bill would be manageable within existing resources.

**Appeals**

You also asked us to consider further the likely impact of the Bill on appeals, in relation to a query from the Faculty of Advocates as to why a cost was anticipated for Crown Office but not for the legal aid fund.

The FM suggests an opportunity cost of £87,000 for the Crown Office Appeals Unit, which Crown Office agreed was manageable within existing budgets. This was as a
result of a specific observation from Crown Office that the workload of its Appeals Unit can increase following changes to the law or a Supreme Court judgment. Crown Office made specific reference to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

The potential impact on appeals levels was discussed with stakeholders and it was agreed that the specific issue raised by Crown Office would be included in the FM, but that it would be designated an opportunity cost on the basis that it is manageable within existing resources.

If there is an overall increase in appeals, that will impact on the legal aid fund, as pointed out by the Faculty of Advocates. The legal aid fund is a demand-led fund, and the Scottish Government has undertaken to meet all associated demand-led costs. We will monitor the impact of the Bill on the legal aid fund, and funding will be available to cover any increases as a result of this Bill.

Baseline funding for the legal aid fund has already been increased by £4 million for 2015/16, and there is also a programme of savings underway within SLAB, the benefits of which have yet to be realised.

We also considered potential impact on the Scottish Court Service (SCS), and agreed with SCS that any short-term increase in appeals can be managed within existing resources.

Monitoring of impact

The process of developing financial estimates for the impact of the Bill was rigorous and extensive. It involved close consultation and discussion with key delivery partners, making use of research activity, statistical analysis, and the professional judgement and experience of stakeholders. It is as accurate an estimate as we can make at this time.

We have already committed to monitor the actual impact of the Bill in specific areas as set out above. We will also look at the wider impact of the Bill, particularly in those areas raised out by local authorities, as part of our ongoing management of implementation of the Bill. We are in the process of developing detailed implementation plans with key partners, and will maintain close communication with these bodies up to and beyond the Bill’s provisions coming into effect.

Thank you again for the opportunity to provide clarification on the Bill’s Financial Memorandum, both in person at Committee, and in this letter. I hope the above information is helpful in the Committee’s considerations.

Yours sincerely

Elspeth MacDonald
Deputy Director, Criminal Justice Division
November 2013

Dear Kenneth,

I am writing in relation to the Finance Committee’s scrutiny of the Financial Memorandum for the Criminal Justice Bill. There are two issues that have emerged from the written evidence submitted to the Committee by stakeholders which are likely to constitute financial impacts of the Bill, and which are not reflected in the Financial Memorandum.

Police forensic costs

The joint submission from the Scottish Police Authority raises the impact on SPA Forensic Services of an increase in the number of cases as a result of the Bill’s provisions on corroboration. The submission sets out estimated staff requirements, and therefore the anticipated financial impact, for a 2% and a 4% increase in workload.

These costs were not raised with the Scottish Government during development of the Financial Memorandum, but my officials have now discussed this with Forensic Services. It has been agreed that the most likely impact is a 2% increase, at a cost of £529,000 per year.

The basis for this 2% is as follows. The bulk of the Forensic Services' workload comes from police requests for analysis, but in a minority of cases they can also be asked by Crown Office to undertake investigation. Therefore it is reasonable to expect a 1.5% increase in the police cases, as suggested by the police shadow marking exercise, as well as a small further increase from Crown Office cases – estimated at 0.5% in agreement with Forensic Services. Paragraphs 105-107 of the Financial Memorandum give further information on the police shadow marking exercise.
SLAB costs for post-charge questioning

The submission from the Law Society of Scotland suggests that the Financial Memorandum should include anticipated costs for the Bill’s provisions for police questioning after charge. This was discussed with the Scottish Legal Aid Board during the development of the Financial Memorandum, and they provided cost estimates. Unfortunately it was overlooked in pulling together the Financial Memorandum, and I would like to remedy that omission now.

The total cost anticipated for this is **£34,000 per year**. The Financial Memorandum sets out and explains estimates for anticipated frequency of post-charge questioning (paragraphs 171-176). We have used estimates provided by Crown Office: 200 instances of post-charge questioning per year, of which 50 would be after the first Court appearance.

The £34,000 total has two elements. The cost of a solicitor providing advice before and during further questioning will be applicable in all 200 anticipated cases, with an average cost (provided by SLAB) of £120, giving a total estimate of £24,000. There will be additional legal costs around requests for post charge questioning which are challenged in court. This would only to apply to those 50 cases where questioning is anticipated after the first appearance at court, again with an average cost of £200 per case (provided by SLAB), giving a total of £10,000. For the purpose of the Financial Memorandum we have assumed that every request is challenged, which provides a maximum potential additional cost.

I hope that this is clear. My officials will be happy to provide any further clarification on this during the evidence session planned for 20 November.

Kenny MacAskill
Delegated Powers and Law Reform Committee

53rd Report, 2013 (Session 4)

Criminal Justice (Scotland) Bill

Published by the Scottish Parliament on 30 October 2013
Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   (ii) [deleted]
   (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
   (c) general questions relating to powers to make subordinate legislation;
   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
   (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
   (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Christian Allard
Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
John Scott
Stewart Stevenson (Deputy Convener)
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
The Committee reports to the Parliament as follows—

1. At its meetings on 24 September and 29 October 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Criminal Justice (Scotland) Bill at stage 1 (“the Bill”)\(^1\). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)\(^2\).

**OVERVIEW OF BILL**

3. This Bill was introduced by the Scottish Government on 20 June 2013. The Justice Committee is the lead Committee.


**DELEGATED POWERS PROVISIONS**

5. The Committee considered each of the delegated powers in the Bill.

6. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

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\(^1\) Criminal Justice (Scotland) Bill [as introduced] available here: [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20Bill/b35s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20Bill/b35s4-introd.pdf)

\(^2\) Criminal Justice (Scotland) Bill Delegated Powers Memorandum available here: [http://www.scottish.parliament.uk/S4_Bills/Criminal_Justice_Bill_-_DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal_Justice_Bill_-_DPM.pdf)
Section 28(3)(a) – Power to prescribe the form of an application for authorisation for the police to question a person about an offence

Section 66 (new section 71C(6) of the 1995 Act) – Power to prescribe the form, content and manner of lodging the written record of the compulsory business meeting

Section 67 (new section 83B(1)(a) of the 1995 Act) – Power to provide the form of the minute continuing a trial diet or adjourned diet from sitting day to sitting day

Section 88 – Power to make ancillary regulations

Section 90 – Commencement

7. At its meeting of 24 September the Committee agreed to write to Scottish Government officials to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the Annex.

8. In light of the written responses received by the Committee, it agreed that it did not need to draw the Parliament’s attention to the following delegated power:

Paragraph 4(1) of the new schedule 2A to the Police and Fire Reform (Scotland) Act 2012 (as inserted by section 87 and schedule 3 to the Bill)

9. The Committee’s comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

Section 34(1)(a) and section 34(2) – Power to make further provision in relation to support for vulnerable persons

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>affirmative procedure</td>
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10. Section 33 of the Bill makes provision for vulnerable persons who are held in police custody. Section 33(5)(a) of the Bill defines the term “mental disorder” for the purposes of section 33 by reference to section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”). While the Scottish Ministers have power under section 34(1)(a) of the Bill to amend section 33(1)(c), there is no power to amend the specific definition of the term “mental disorder”.

11. The Committee accordingly wrote to the Scottish Government to ask whether Ministers considered it necessary to take a power to amend the definition of the term “mental disorder” should it become necessary to do so in the future. The Committee considered that circumstances might arise that could render the definition of that term unworkable in the context in which it is used, for example, where the definition of the term in the 2003 Act is itself amended.

12. In its response, the Scottish Government explained that it did not consider that the definition of the term mental disorder would require to be amended in the
near future. It also explained, however, that it was recognised that circumstances could arise which might render it necessary to amend that definition. The Scottish Government accordingly agreed to consider bringing forward an amendment at Stage 2 in order to take a power to enable Ministers to amend the definition in future.

13. The Committee welcomes the Scottish Government’s commitment to consider bringing forward an amendment to the Bill at Stage 2 in order to allow for the definition of the term “mental disorder” to be amended.

Section 85(4) – Power to modify subsections (1) to (3) of that section

<table>
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<tr>
<th>Power conferred on:</th>
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</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>negative procedure</td>
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14. Sections 83 and 84 of the Bill provide respectively for the general aggravation of an offence by its having a connection with people trafficking activity and the aggravation of a specific people trafficking offence where there has been an abuse of a public position. Section 85(1) to (3) of the Bill define the terms “a people trafficking offence”, “a public official” and “an international organisation” respectively for the purposes of the Bill. Section 85(4) grants power to the Scottish Ministers to modify sections 85(1) to (3) by regulations. Section 85(5) provides that those regulations are to be subject to the negative procedure.

15. The Committee wrote to the Scottish Government to seek an explanation as to why the power in section 85(4) of the Bill was drawn in such wide terms given that it conferred authority upon Ministers to “modify” the definitions in section 85(1) to (3) without further specification as to how the power would be exercised. The Committee also asked the Scottish Government why it was considered appropriate for the exercise of a power to make textual amendments to primary legislation to be subject to the negative procedure.

16. In its response to the first part of the Committee’s question, the Scottish Government explained that the power in section 85(1) to (3) is limited to allowing for the relevant definitions to be amended if necessary. The power would not be used for any other purpose. Taking the Scottish Government’s response into account, the Committee considers that while the power could in theory be drawn more narrowly, its scope is acceptable. The Committee agrees that the power will require to be exercised in the context of sections 83 and 84 of the Bill. Any exercise of the power for a purpose other than modifying the specified definitions would not be permissible. The Committee is accordingly content with the scope of the power in section 85(4).

17. In relation to the second part of the Committee’s question, the Scottish Government has agreed to bring forward an amendment at Stage 2 to make the exercise of the power in section 85(4) subject to the affirmative procedure. The Committee welcomes this commitment by the Scottish Government, and considers that affirmative procedure affords the Parliament a more appropriate level of scrutiny over the exercise of the power, given that it enables textual amendments to be made to primary legislation.
18. The Committee is content with the scope of the power in section 85(4) of the Bill.

19. The Committee welcomes the Scottish Government’s commitment to bring forward an amendment at Stage 2 of the Bill to make the exercise of the power in section 85(4) subject to the affirmative procedure.

Section 86 – Use of live television link

<table>
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<tr>
<th>Power conferred on:</th>
<th>the Lord Justice General</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>direction</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>none</td>
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20. Section 86(1) of the Bill inserts new sections 288H – 288K into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The new provisions allow the court to determine that a detained person is to participate in a specified court hearing by use of a live television link. In making such a determination, the court is to have regard to any representations made by the parties as well as the interests of justice.

21. The new section 288(J)(1) of the 1995 Act, as inserted by section 86(1) of the Bill, provides that the Lord Justice General may, by directions, specify types of hearing in which a detained person may participate by live television link. Under section 288(J)(2), such directions may specify types of hearing by reference to the venues at which they take place, particular places of detention or categories of cases or proceedings to which they relate.

22. The power to make directions under the new section 288J of the 1995 Act was not addressed in the DPM. The Committee therefore wrote to the Scottish Government to seek an explanation as to why the power was to be exercisable by direction - which would not be subject to parliamentary procedure or scrutiny - as opposed to by subordinate legislation, which would at the least be laid before the Parliament. The Committee also asked the Scottish Government whether it was intended that directions made in the exercise of this power would be published.

23. In its response, the Scottish Government considers that the function of specifying types of hearing is essentially operational in nature and is consistent with the Lord Justice General’s overarching duty to make and maintain arrangements for securing the efficient disposal of court business in terms of section 2 of the Judiciary and Courts (Scotland) Act 2008. The Scottish Government also explains that decisions on specifying hearings, or revoking or varying previous directions, will require to be made on the basis of a variety of considerations which may change over time and that on some occasions, a direction specifying a type of hearing may require to be made at short notice.

24. While the Committee accepts that the function of specifying hearings is properly one to be exercised by the courts as opposed to the Scottish Government, it does not share the Scottish Government’s view that this function is purely operational in nature for two reasons. Firstly, a court will only be empowered to make a determination as to whether a hearing should be conducted
by live television link once directions are made by the Lord Justice General. That is because a determination under the new section 288H can only be made in relation to a “specified hearing”. A specified hearing is defined in the new section 288K of the 1995 Act (as inserted by the Bill) as a hearing of a type specified in directions having effect for the time being under the new section 288J.

25. The scheme of appearance by television link is therefore predicated upon the exercise of the direction-making power in section 288J. For that reason, the Committee considers that this function is a significant legal function, as opposed to a purely operational one, as the relevant provisions of the Bill cannot take effect in a practical sense until directions are made.

26. Secondly, the Committee considers that participation in a court hearing via a live television link alters the character of that hearing in a manner which has the potential to impinge upon the convention rights of those involved, unless there are sufficient safeguards in place to protect those rights. The Committee therefore considers that the Parliament has an interest in having an overview of the arrangements which are being made. In particular, the Committee considers it important that all parties are afforded fair notice of a specification of a particular type of hearing under the new section 288J. If, as the Scottish Government has indicated may happen, a direction specifying a type of hearing is made at short notice, parties may be denied that fair notice, which could mean that they have insufficient opportunity to prepare representations to present to the court when it makes a determination under section 288H. The Committee considers that this would be unacceptable, and of potential detriment to the rights of those involved, including the rights of the detained person.

27. The Committee further considers that information as to the types of hearing that are specified for the purposes of the new section 288H ought to be available publicly in advance of the specification taking effect, and that the current practice of publishing court directions after they are made is insufficient to meet this requirement. The Committee considers that the making of subordinate legislation, which would require at the least to be laid before the Parliament before it could come into force, would better achieve the requirement of publicity which the Committee considers to be an essential protection for the rights of persons who may be affected where the court determines that a hearing is to be conducted using a live television link.

28. The Committee therefore accepts the principle that the specification of hearings in which an accused person may be required to participate by live television link is a matter which should be regulated by the Lord Justice General as head of the Scottish court service. However, the Committee considers that the Parliament retains a separate interest in the exercise of this particular function. It is not persuaded that the function should be exercised without affording notice to the Parliament and the public in advance. Accordingly the Committee draws the power in section 288J(1) of the Bill to the attention of the Parliament and recommends that the Scottish Government consider bringing forward an amendment at Stage 2 to make the power to specify types of hearings which may be conducted by live television link exercisable by way of subordinate legislation to which section
30 of the Interpretation and Legislative Reform (Scotland) Act 2010 would apply.
Correspondence with the Scottish Government

On 24 September 2013, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

Section 34(1)(a) and (b) and Section 34(2) – Power to make further provision in relation to support for vulnerable persons

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

1. Section 33(5)(a) of the Bill defines the term “mental disorder” by reference to section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003. While the Scottish Ministers will have power under section 34(1)(a) of the Bill to amend section 33(1)(c), there is no power to modify the definition of “mental disorder” in section 33(5)(a). The Committee considers that it could become necessary to alter that definition in the future, for example in the event of changes to the Mental Health (Care and Treatment) (Scotland) Act 2003 definition by reference to which the term is defined in the Bill.

2. The Committee therefore asks the Scottish Government whether it considers it necessary to take a power to amend the definition of the term “mental disorder” in section 33(5)(a) of the Bill and, if not, how the Scottish Government would propose to amend that definition in the future, should it become necessary to do so (for example when exercising the power to amend section 33(1)(c))?  

Section 85 – Power to modify subsections (1) to (3) of that section

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: negative procedure

3. Sections 83 and 84 of the Bill provide respectively for the general aggravation of an offence by its having a connection with people trafficking activity and the aggravation of a specific people trafficking offence by the abuse of a public position. In both cases, the court must take the aggravation into account in determining the appropriate sentence and, where the sentence imposed is different from that which would have been imposed had the offence not been aggravated, stating the extent of, and the reasons for, that difference.

4. Sections 85(1) to (3) of the Bill define the terms “a people trafficking offence”, “a public official” and “an international organisation” respectively for the purposes of sections 83 and 84. Section 85(4) grants power to the Scottish Ministers to
modify sections 85(1) to (3) by regulations. Section 85(5) provides that those regulations are to be subject to the negative procedure.

5. The Committee asks the Scottish Government:

- Why the power in section 85(4) of the Bill is drawn in such wide terms? In particular, the Committee seeks an explanation as to why the power does not include greater specification as to the manner in which the provisions in primary legislation to which it refers may be modified.

- Whether it considers that the affirmative procedure may afford the Parliament a more appropriate level of scrutiny over the exercise of this power, considering that it enables the Scottish Ministers to make textual amendments to primary legislation?

Section 86 – Use of live television link

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6. Section 86(1) of the Bill inserts new sections 288H – 288K into the Criminal Procedure (Scotland) Act 1995. The new provisions allow the court to determine that a detained person is to participate in specified court hearings by use of a live television link.

7. The new section 288J(1), as inserted by section 86(1) of the Bill provides that the Lord Justice General may, by directions, specify types of hearing in which a detained person may participate by live television link. Such directions may specify types of hearing by reference to the venues at which they take place, particular places of detention or categories of cases or proceedings to which they relate.

8. The Committee asks the Scottish Government:

- Why it is considered appropriate for the power in section 86(1) of the Bill to be exercisable by directions which will not be subject to any level of parliamentary scrutiny?

- Whether it is considering publishing the directions to be issued by the Lord Justice General?

Power to prepare the constitution of the new Police Negotiating Board for Scotland

9. Part 6 of the Bill establishes the Police Negotiating Board for Scotland (“the PNBS”). The PNBS makes representations to the UK and Scottish Governments in respect of police hours of duty, leave, pay and allowances, pensions and uniforms.
10. Paragraph 4(1) of the new schedule 2A to the Police and Fire Reform (Scotland) Act 2012 provides that it is for the Scottish Ministers to prepare the constitution for the PNBS. Under paragraph 4(2), the constitution must regulate the procedure for the PNBS to reach agreement on representations it makes to the Scottish Ministers. Paragraph 4(3) lists a number of matters which the constitution of the PNBS as prepared by the Scottish Ministers may refer to, including membership, internal organisation and procedures.

11. The Committee asks the Scottish Government:

- Why is it considered appropriate that the power to prepare the constitution of the PNBS is not to be exercisable through the making of subordinate legislation, and therefore subject to parliamentary scrutiny?

- How is it intended that this power be exercised, i.e. what matters in addition to those already prescribed in the new schedule 2A to the Police and Fire Reform (Scotland) Act 2012 are to be addressed in the constitution of the PNBS?

On 3 October 2013, the Scottish Government responded as follows:

1. The Committee asks the Scottish Government whether it considers it necessary to take a power to amend the definition of the term “mental disorder” in section 33(5)(a) of the Bill and, if not, how the Scottish Government would propose to amend that definition in the future, should it become necessary to do so (for example when exercising the power to amend section 33(1)(c))?  

The Scottish Government thanks the Committee for raising this question. Although it is not considered likely that the definition in section 33(5)(a) of the Bill will require to be amended in the near future, the Scottish Government recognises that circumstances may arise which render the definition of “mental disorder” inapposite in the context of the Bill. We will therefore consider further whether to bring forward an amendment at Stage 2 conferring a power to amend.

It should be noted that a similar power may be required in section 25(2)(b) as the same definition of “mental disorder” is used in that section. If the definition is changed in section 33, section 25 should also be amended to mirror this.

2. The Committee asks the Scottish Government:

- Why the power in section 85(4) of the Bill is drawn in such wide terms? In particular, the Committee seeks an explanation as to why the power does not include greater specification as to the manner in which the provisions in primary legislation to which it refers may be modified.
The Government does not share the Committee’s view that the power in Section 85(4) is drawn in wide terms. The power simply allows for the modification of definitions relevant to sections 83 and 84. Those are the operative sections, the power is limited to defining what is meant in those sections by the expressions “people trafficking offence” and “public official”.

- Whether it considers that the affirmative procedure may afford the Parliament a more appropriate level of scrutiny over the exercise of this power, considering that it enables the Scottish Ministers to make textual amendments to primary legislation?

The Government is grateful to the Committee for raising the question of appropriate procedure and given all the circumstances has reflected on this. The Government recognises that whilst it is intended that this power shall be primarily used where other legislation has amended the definitions and inadvertently failed to correspondingly update section 85, it is accepted that it may also be used to amend the definitions where court practice and procedure in such cases dictate this is necessary. Accordingly in the former example, Parliament will probably have been given greater scrutiny of the amendment elsewhere. However, it is recognised that in cases of the latter example, the Government will be seeking to redefine the circumstances in which the people trafficking aggravations apply (albeit in a limited way) and this could amount to a significant change to the terms of the legislation which Parliament agreed to. On this basis, having further considered, the Government is content to confirm that in response to the Committee’s concern, it will bring forward a Stage 2 amendment to make section 85(4) power subject to affirmative procedure.

3. The Committee asks the Scottish Government:

- Why it is considered appropriate for the power in section 86(1) of the Bill to be exercisable by directions which will not be subject to any level of parliamentary scrutiny?

The function to be conferred on the Lord Justice-General is essentially operational in nature, and is therefore considered to be consistent with the Lord Justice-General’s overarching responsibility for making and maintaining arrangements for securing the efficient disposal of business in terms of section 2 of the Judiciary and Courts (Scotland) Act 2008. Decisions specifying hearings, or revoking or varying previous directions, will require to be made on the basis of a variety of considerations. These include the relevant features of different types of hearing, the availability of television link facilities at various courts and places of detention, and the facilities available to allow for confidential communications between persons appearing and their legal representatives. Operational experience gained from the developing use of television links will also have to be considered and acted upon. It is considered that the Lord Justice-General is best placed to assess these matters and to discharge the function in a manner consistent with the interests of justice.

In view of the number of criminal courts, the number of places of detention and the variety of types of hearing that might potentially be conducted by television
link, directions may require to be made fairly frequently as the use made of the technology develops. On occasions a direction may also have to be made at short notice. In both respects it is considered that the function would not be well suited to the procedure and timescales associated with the promulgation of Acts of Adjournal.

- **Whether it is considering publishing the directions to be issued by the Lord Justice General?**

There is a standard procedure for publishing directions. Once made, the directions are forwarded to the Scottish Court Service for publication on its website. They are also intimated in the offices of court, circulated to legal publications (including Greens etc.), to the Law Society, Faculty of Advocates and Judicial Institute. The Government did not consider it was necessary to include provision about publication as directions made under these provisions will be published according to this procedure.

**4. The Committee asks the Scottish Government:**

- **Why is it considered appropriate that the power to prepare the constitution of the PNBS is not to be exercisable through the making of subordinate legislation, and therefore subject to parliamentary scrutiny?**

The constitution of the current PNB deals with the procedural minutiae of day to day internal administration and process. It is not subordinate legislation in the Westminster Parliament. The Scottish Government regards that as proportionate and sensibly reflects the nature of the procedural detail with which the constitution typically deals. Our starting point is therefore that the PNBS constitution, dealing with the same order of detail, is not something that ought automatically to be made a statutory instrument simply because it can be; a balance has to be struck and, for the reason below, we think that balance rests on the side of the PNBS constitution being made by Ministers after discussion with those who will make up its members.

The PNBS is intended to continue the work the PNB does in Scotland at present with as few changes as practicable to reflect that it is intended to continue the status quo ante for Scotland. The constitution will be set out by Scottish Ministers following consultation with the organisations represented on the Board. This allows it to be flexible and to adapt quickly to changes in the policing landscape. The same approach is used for the current PNB, which allowed for the Scottish Standing Committee to be established and for changes to be made to take account of the introduction of the Scottish Police Authority and the Police and Crime Commissioners in England and Wales. It is the intention of all members of the PNB Scotland Standing Committee that the PNBS be more collaborative than the current PNB. We therefore need the processes and procedures set out in the constitution to be flexible, allowing changes to be made to ensure that we have the correct formal structures in place to allow agreements to be made between the two sides of PNB but which do not impede agreement through open discussion.
• How is it intended that this power be exercised, i.e. what matters in addition to those already prescribed in the new schedule 2A to the Police and Fire Reform (Scotland) Act 2012 are to be addressed in the constitution of the PNBS?

The provisions set out in schedule 2A cover the principal areas to allow for the organisation of the PNBS. They also give flexibility for the specific processes and procedures to be set out by Scottish Ministers following consultation with the organisations represented on the Board. An example of the processes that could be agreed under paragraph 4(3) of schedule 2A would be the formation and organisation of sub-groups or technical working groups, such as are set out within the current PNB constitution. An examination of the current constitution of the PNB gives a clear picture of what the PNBS constitution is likely to include and paragraph 4 of schedule 2A has been drafted deliberately to give further specification of the content of the constitution than the Police Act 1996 prescribes for the PNB constitution at present.
Criminal Justice (Scotland) Bill: The Committee considered the delegated powers provisions in this Bill at Stage 1 and agreed to seek further information from the Scottish Government.
Criminal Justice (Scotland) Bill: Stage 1

11:35
The Convener: Under agenda item 6 we consider the delegated powers in the Criminal Justice (Scotland) Bill at stage 1.

The committee is invited to agree the questions that it wishes to raise with the Scottish Government on the delegated powers in the bill. It is suggested that those questions are raised in written correspondence. The responses that are received will help to inform a draft report on the bill, which the committee will consider at a later date.

Section 33(5)(a) of the bill defines the term “mental disorder” by reference to section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003. Although the Scottish ministers will—under section 34(1)(a) of the bill—have the power to amend section 33(1)(c), there is no power to modify the definition of “mental disorder” in section 33(5)(a). “Mental disorder” is a defined term that appears only in section 33(1)(c). The committee may consider that it could become necessary to alter that definition in the future—for example, in the event that changes are made to the Mental Health (Care and Treatment) (Scotland) Act 2003 definition, by reference to which the term is defined in the bill.

Does the committee therefore agree to ask the Scottish Government whether it considers it necessary to take a power to amend the definition of the term “mental disorder” in section 33(5)(a), there is no power to modify the definition of “mental disorder” in section 33(5)(a). “Mental disorder” is a defined term that appears only in section 33(1)(c). The committee may consider that it could become necessary to alter that definition in the future—for example, in the event that changes are made to the Mental Health (Care and Treatment) (Scotland) Act 2003 definition, by reference to which the term is defined in the bill.

Members indicated agreement.

The Convener: Sections 83 and 84 of the bill provide, respectively, for the general aggravation of an offence by its having a connection with people trafficking activity and the aggravation of a specific people trafficking offence by the abuse of a public position. In both cases, the court must take the aggravation into account in determining the appropriate sentence and, in circumstances in which the sentence that is imposed is different from the one that would have been imposed had the offence not been aggravated, it must state the extent of, and the reasons for, that difference.

Subsections (1) to (3) of section 85 of the bill respectively define the terms “a people trafficking offence”, “a public official” and “an international organisation” for the purposes of sections 83 and 84. Section 85(4) grants power to the Scottish ministers to modify subsections (1) to (3) of section 85 by regulations. Section 85(5) provides that those regulations are to be subject to the negative procedure.

Does the committee agree to ask the Scottish Government why the power in section 85(4) of the bill is drawn in such wide terms? In particular, the committee may wish to seek an explanation of why the power does not include greater specification of the manner in which the provisions in primary legislation to which it refers may be modified.

Members indicated agreement.

The Convener: Does the committee also agree to ask the Scottish Government whether it considers that the affirmative procedure may afford the Parliament a more appropriate level of scrutiny over the exercise of the power, considering that it enables the Scottish ministers to make textual amendments to primary legislation?

Members indicated agreement.

The Convener: Section 86(1) of the bill inserts new sections 288H to 288K into the Criminal Procedure (Scotland) Act 1995. The new provisions allow the court to determine that a detained person is to participate in specified court hearings by use of a live television link. In making such a determination, the court is to have regard to any representations that the parties have made on the issue of participation via television link, as well as the interests of justice.

New section 288J(1), as inserted by section 86(1) of the bill, provides that the Lord Justice General may, by directions, specify types of hearing in which a detained person may participate by live television link. Such directions may specify types of hearing by reference to the venues at which they take place, particular places of detention or categories of cases or proceedings to which they relate. Does the committee agree to ask the Scottish Government why it is considered appropriate for the power in section 86(1) of the bill to be exercisable by directions that will not be subject to any level of parliamentary scrutiny?

Members indicated agreement.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): I am certainly content to ask the Government that question. However, we should also ask the Government whether, if it concludes that there should be no parliamentary process—we are, after all, talking about rules of court—it should consider some provision to ensure that the directions are at the very least published and available for scrutiny.

The Convener: Is the committee content with that suggestion?
The Convener: Part 6 of the bill establishes the Police Negotiating Board for Scotland. It is being set up in response to the UK Government’s forthcoming abolition of the Police Negotiating Board, which operates on a UK-wide basis and makes representations to the UK and Scottish Governments in respect of police hours of duty, leave, pay and allowances, pensions and uniforms.

Section 87 of the bill inserts a new schedule 2A into the Police and Fire Reform (Scotland) Act 2012 to make provision for the new PNBS’s status, chairing and membership, disqualification and remuneration and expenses. Under paragraph 4(1) of new schedule 2A, it will be for the Scottish ministers to prepare the PNBS’s constitution and, under paragraph 4(2), the constitution must regulate the procedure for the PNBS to reach agreement on its representations to the Scottish ministers. Paragraph 4(3) lists a number of matters to which the PNBS’s constitution, as prepared by the Scottish ministers, may refer, including membership, internal organisation and procedures. As the power to prescribe the PNBS’s constitution is not to be exercisable through the making of subordinate legislation, the constitution, once prepared, will not be subject to parliamentary scrutiny of any kind. Does the committee agree to ask the Scottish Government why it is considered appropriate that the power to prepare the PNBS’s constitution is not to be exercisable through the making of subordinate legislation and therefore subject to parliamentary scrutiny?

Members indicated agreement.

The Convener: Does the committee also agree to ask the Scottish Government how it intends that power to be exercised and what matters, in addition to those already prescribed in new schedule 2A to the Police and Fire Reform (Scotland) Act 2012, are to be addressed in the PNBS’s constitution?

Members indicated agreement.
ANNEXE B: EXTRACTS FROM THE MINUTES

21st Meeting, 2013 (Session 4) Tuesday 25 June 2013

Criminal Justice (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed: (a) to issue a call for written evidence; (b) proposed witnesses; (c) to delegate to the Convener authority to approve the final composition of witness panels where necessary; and (d) not to appoint an adviser.

25th Meeting, 2013 (Session 4) Tuesday 24 September 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Rt Hon Lord Carloway, Lord Justice Clerk.

Roderick Campbell indicated that he is a member of the Faculty of Advocates. Alison McInnes indicated that she is a council member of Justice Scotland and a member of the Cross-Party Group on Adult Survivors of Childhood Sexual Abuse. Margaret Mitchell indicated that she is the Convener of the Cross-Party Group on Adult Survivors of Childhood Sexual Abuse.

Criminal Justice (Scotland) Bill (in private): The Committee agreed to defer further consideration of its approach to the scrutiny of the Bill at Stage 1 to its next meeting.

26th Meeting, 2013 (Session 4) Tuesday 1 October 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Assistant Chief Constable Malcolm Graham, and John Gillies, Director HR, Police Scotland;
Chief Superintendent David O'Connor, President, Association of Scottish Police Superintendents;
Calum Steele, General Secretary, Scottish Police Federation;
Stevie Diamond, Police Staff Scotland Branch, Unison;
David Harvie, Director of Serious Casework, Crown Office and Procurator Fiscal Service;
Grazia Robertson, Member of the Law Society Criminal Law Committee, Law Society of Scotland;
Ann Ritchie, President, Glasgow Bar Association;
Murdo Macleod QC, Faculty of Advocates.

Roderick Campbell indicated that he is a member of the Faculty of Advocates. Alison McInnes indicated that she is a member of Justice Scotland.

Criminal Justice (Scotland) Bill (in private): The Committee further considered its approach to the scrutiny of the Bill at Stage 1.

27th Meeting, 2013 (Session 4) Tuesday 8 October 2013
Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Shelagh McCall, Commissioner, Scottish Human Rights Commission;
Professor James Chalmers, and Professor Fiona Leverick, University of Glasgow;
Tam Baillie, Commissioner, Scotland’s Commissioner for Children and Young People;
Mark Ballard, Head of Policy, Barnardo’s Scotland;
Rachel Stewart, Policy and Campaigns Manager, Scottish Association for Mental Health;
Morag Driscoll, Director, Scottish Child Law Centre.

Criminal Justice (Scotland) Bill (in private): The Committee deferred its review of the evidence received to date on the Bill at Stage 1 to a future meeting.

Work programme (in private): The Committee considered its work programme and agreed: (a) the timetable and witnesses for its further scrutiny of the Criminal Justice (Scotland) Bill; [. . . ]

28th Meeting, 2013 (Session 4) Tuesday 29 October 2013

Criminal Justice (Scotland) Bill (in private): The Committee reviewed the evidence received to date on the Bill at Stage 1.

32nd Meeting, 2013 (Session 4) Tuesday 19 November 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Murray Macara QC, Law Society of Scotland;
James Wolffe QC, Vice-Dean, Faculty of Advocates;
Michael Walker, Senior Policy Officer, Scottish Criminal Cases Review Commission;
Fraser Gibson, Head of Appeals Unit, Crown Office and Procurator Fiscal Service;
Alison Di Rollo, Head of National Sexual Crimes Unit, Crown Office and Procurator Fiscal Service;
Bronagh Andrew, Assistant Operations Manager, the TARA Project, Community Safety Glasgow.

33rd Meeting, 2013 (Session 4) Tuesday 20 November 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Rt Hon Lord Gill, Lord President of the Court of Session;
Rt Hon Frank Mulholland QC, Lord Advocate;
Catriona Dalrymple, Head of Policy Division, Crown Office and Procurator Fiscal Service.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.
34th Meeting, 2013 (Session 4) Tuesday 26 November 2013

**Criminal Justice (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—
Robin White, Vice-Chair, Scottish Justices Association; Raymond McMenamin, Solicitor Advocate, member of the Criminal Law Committee, Law Society of Scotland; James Wolffe QC, Vice-Dean, Faculty of Advocates; Mark Harrower, President, Edinburgh Bar Association.

Roderick Campbell indicated that he is a member of the Faculty of Advocates. Alison McInnes indicated that she is a member of the JUSTICE Scotland Council.

35th Meeting, 2013 (Session 4) Tuesday 3 December 2013

**Criminal Justice (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—
Assistant Chief Constable Malcolm Graham, Police Scotland; Chief Superintendent David O'Connor, President, Association of Scottish Police Superintendents; David Ross, Vice Chairman, Scottish Police Federation; Shelagh McCall, Commissioner, Scottish Human Rights Commission; Tony Kelly, Chair, Justice Scotland; Alan McCloskey, Acting Deputy Chief Executive, Victim Support Scotland; Sandie Barton, Helpline Manager and National Co-ordinator, Rape Crisis Scotland; Lily Greenan, Manager, Scottish Women's Aid.

Roderick Campbell indicated that he is a member of the Faculty of Advocates. Alison McInnes indicated that she is a member of the Justice Scotland Council.

36th Meeting, 2013 (Session 4) Tuesday 10 December 2013

**Criminal Justice (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—
Professor Peter Duff, University of Aberdeen; Professor Pamela Ferguson, and Professor Fiona Raitt, University of Dundee; Professor James Chalmers, University of Glasgow; Professor John Blackie, University of Strathclyde; Michael McMahon MSP.

37th Meeting, 2013 (Session 4) Tuesday 17 December 2013

**Criminal Justice (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—
Sheriff Principal Edward Bowen, and Gerry Bonnar, Secretary, Review of Sheriff and Jury Procedure;
John Dunn, Procurator Fiscal, West of Scotland, Crown Office and Procurator Fiscal Service;
Grazia Robertson, Member of the Law Society Criminal Law Committee, Law Society of Scotland;
Michael Meehan, Faculty of Advocates;
Cliff Binning, Executive Director Field Services, Scottish Court Service.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

1st Meeting, 2014 (Session 4) Tuesday 7 January 2014

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Kenny MacAskill, Cabinet Secretary for Justice, Lesley Bagha, Criminal Justice Bill Team Leader, Aileen Bearhop, Head of Police Powers Team, Jim Devoy, Policy Officer, Youth Justice Team, and Philip Lamont, Head of Criminal Law and Licensing Team, Scottish Government.

2nd Meeting, 2014 (Session 4) Tuesday 14 January 2014

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Kenny MacAskill, Cabinet Secretary for Justice, Kathleen McInulty, Policy Manager, Criminal Justice Bill Team, Scottish Government.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

3rd Meeting, 2014 (Session 4) Tuesday 21 January 2014

Criminal Justice (Scotland) Bill (in private): The Committee considered its draft Stage 1 report. Various changes were agreed to and the Committee agreed to continue considering the report at its next meeting.

4th Meeting, 2014 (Session 4) Tuesday 28 January 2014

Criminal Justice (Scotland) Bill (in private): The Committee continued considering a draft Stage 1 report. Various changes were agreed to and the Committee agreed to continue considering the draft report at its next meeting.

5th Meeting, 2014 (Session 4) Tuesday 4 February 2014

Criminal Justice (Scotland) Bill (in private): The Committee considered a revised draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.
ANNEXE C: INDEX OF ORAL EVIDENCE

25th Meeting, 2013 (Session 4) Tuesday 24 September 2013

Rt Hon Lord Carloway, Lord Justice Clerk

26th Meeting, 2013 (Session 4) Tuesday 1 October 2013

Assistant Chief Constable Malcolm Graham, and John Gillies, Director HR, Police Scotland
Chief Superintendent David O'Connor, President, Association of Scottish Police Superintendents
Calum Steele, General Secretary, Scottish Police Federation
Stevie Diamond, Police Staff Scotland Branch, Unison
David Harvie, Director of Serious Casework, Crown Office and Procurator Fiscal Service
Grazia Robertson, Member of the Law Society Criminal Law Committee, Law Society of Scotland
Ann Ritchie, President, Glasgow Bar Association
Murdo Macleod QC, Faculty of Advocates

27th Meeting, 2013 (Session 4) Tuesday 8 October 2013

Shelagh McCall, Commissioner, Scottish Human Rights Commission
Professor James Chalmers, and Professor Fiona Leverick, University of Glasgow
Tam Baillie, Commissioner, Scotland's Commissioner for Children and Young People
Mark Ballard, Head of Policy, Barnardo's Scotland
Rachel Stewart, Policy and Campaigns Manager, Scottish Association for Mental Health
Morag Driscoll, Director, Scottish Child Law Centre

32nd Meeting, 2013 (Session 4) Tuesday 19 November 2013

Murray Macara QC, Law Society of Scotland
James Wolfe QC, Vice-Dean, Faculty of Advocates
Michael Walker, Senior Policy Officer, Scottish Criminal Cases Review Commission
Fraser Gibson, Head of Appeals Unit, Crown Office and Procurator Fiscal Service
Alison Di Rollo, Head of National Sexual Crimes Unit, Crown Office and Procurator Fiscal Service
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Michael Meehan, Faculty of Advocates
Cliff Binning, Executive Director Field Services, Scottish Court Service

1st Meeting, 2014 (Session 4) Tuesday 7 January 2014

Kenny MacAskill, Cabinet Secretary for Justice, Lesley Bagha, Criminal Justice Bill Team Leader, Aileen Bearhop, Head of Police Powers Team, Jim Devoy, Policy Officer, Youth Justice Team, and Philip Lamont, Head of Criminal Law and Licensing Team, Scottish Government.
2nd Meeting, 2014 (Session 4) Tuesday 14 January 2014

Kenny MacAskill, Cabinet Secretary for Justice, Kathleen McInulty, Policy Manager, Criminal Justice Bill Team, Scottish Government.
On resuming—

Criminal Justice (Scotland) Bill: Stage 1

The Convener: Agenda item 4 is our first evidence session on the Criminal Justice (Scotland) Bill. I welcome the Rt Hon Lord Carloway, the Lord Justice Clerk; Elise Traynor, deputy legal secretary to the Lord President; and Jacqueline Fordyce, law clerk to the Lord Justice Clerk.

Alison McInnes (North East Scotland) (LD): Before we start, convener, I draw members’ attention to my entry in the register of interests. I am a council member of Justice Scotland and a member of the cross-party group in the Scottish Parliament on adult survivors of childhood sexual abuse. Both those groups have submitted written evidence, although I have not been involved in drafting it.

The Convener: Thank you. Does anybody else have anything to declare that is relevant?

Margaret Mitchell: I am the convener of the cross-party group on adult survivors of childhood sexual abuse.

Roderick Campbell: I refer to my entry in the register of interests, which states that I am a member of the Faculty of Advocates.

The Convener: I wish that I had something to declare, so that I could feel important, but I do not—so far—so there we are.

We move to questions from members.

Colin Keir (Edinburgh Western) (SNP): My question relates to your report, Lord Carloway. In paragraph 7.2.56, on page 285, you mention that there are “a series of rules which, realistically, are not capable of being understood by many outside the world of criminal legal practice.”

Will you explain further the current difficulties in understanding the rule?

Rt Hon Lord Carloway (Lord Justice Clerk): So far as corroboration is concerned—which is the issue that is being addressed here—it is reasonable to say, as I said in the report, that corroboration and how it operates is not widely understood by the public. Further, I do not think that the concept is particularly well understood by many of the legal profession, and there are continuing difficulties with what it means among the judiciary, at both the High Court and sheriff court levels. That can be seen by the decisions
that continue to come out from the courts from time to time.

Do you want a specific example?

Colin Keir: Yes. Obviously, that is quite a sweeping statement and it would be handy to have some examples.

Lord Carloway: Would you like an example in relation to public misconception?

Colin Keir: Yes.

Lord Carloway: An example that I think that I gave the last time that I was at the committee was the misunderstanding about what corroboration means in relation to, for example, a finding of a DNA specimen or a fingerprint. If one were to find a fingerprint or DNA of someone, say on a windowsill in a house that had been the subject of a housebreaking, the finding of that fingerprint or DNA sample is in itself—and without more—sufficient for guilt. I get the impression, however, that some people think that there requires to be another piece of evidence against the person in order to bring in a verdict of guilty, but that is not the case.

Corroboration comes into play in that particular situation in that, in Scotland, two forensic scientists would be required to speak to the finding of the DNA sample, two forensic scientists—they could be the same or different—would be required to speak to the taking of the sample from the suspect, and two forensic scientists would be needed to speak to the comparison between the sample that was found and the sample that was taken from the suspect. One gets the impression that, in the public’s mind, corroboration is about different pieces of evidence, but it is not—it is about having different witnesses speaking to particular things.

Colin Keir: Can I continue, convener?

The Convener: Yes. I have not stopped you.

Colin Keir: I have been given the first chance to ask questions, which does not happen very often under this convener, I can tell you.

The Convener: No, then—you are not getting another question. [Laughter.]

Colin Keir: Lord Carloway, your report highlights that

"there is no evidence ... to support the idea that the formal requirement for corroboration reduces miscarriages of justice."

Will you elaborate on that?

Lord Carloway: During the review, we consulted widely with a range of people, including the legal profession in particular and others outwith it, and at no point did anyone come up with any material to suggest that the incidence of miscarriage of justice in Scotland, which is the only country in the world that has the rule, is different from that in any other country in the civilised western world or the Commonwealth. We were given no material to suggest that there is a difference and that the rule in relation to corroboration reduces the likelihood or incidence of miscarriage of justice in our jurisdiction—that is essentially what was meant.

11:15

The Convener: Can I just ask you about your use of the plural “we”? I recall that you made it plain at the previous session that we had with you that this is your review or report.

Lord Carloway: Yes, that is correct.

The Convener: You have referred to a review team and a reference group. Who were those people?

Lord Carloway: Those who were in the reference group ought to be detailed in the report. I will find that information in a moment. I apologise if I have used the word “we” when referring to the review team, but the report is certainly mine. The assistance that I had consisted of a full-time secretary to the review and two full-time members of staff. We also co-opted a member of the police on a part-time basis to give us views on police procedure.

Now, if the information on the membership of the reference group is not there—

The Convener: It is—it is annex D of your report. I am looking for your members, but I do not see any names here. It is annex—

Lord Carloway: Annex E?

The Convener: I have found the names now in annex D. It states that the members of the review team were Tim Barraclough, Ian McFarlane—this information is on page 394 of your report.

Lord Carloway: Is it not page 387?

The Convener: I have page 393.

Lord Carloway: That is probably because—

The Convener: It is a different copy.

Lord Carloway: The report was not produced in hard copy; it was produced electronically only.

The Convener: Right. You used the term “we”, although you made it clear that it was your report. Who in the group disagreed with your finding or line on corroboration? That is the contentious one—let us be honest about it. Who among all the people outlined in annex D disagreed with that line?
Lord Carloway: Now, there’s a question. The table in annex D on the reference group shows that it included Ian Bryce, a member of the Law Society of Scotland, a review team. My recollection is that—you do not hold me to this if my recollection is entirely wrong—the Law Society representative was in favour of retaining the rule on corroboration. I think that the Scottish Human Rights Commission was in favour of retaining it, and I suspect that John Scott was in favour of retaining it. Those are the main ones who come to mind as expressing views seeking to retain the rule, rather along the lines of the consultation materials that were produced by their representative bodies.

The Convener: It would be very useful for the committee to know who in the reference group and the review team agreed with the finding that corroboration should be abolished.

Lord Carloway: I cannot answer that question positively, because of the way in which the reference group operated. It operated during the course of the report’s preparation; it was not that we put the report to the reference group for approval—that was not the way in which it was done. We had a series of meetings with the reference group at which its members could express their views, but we did not have a system whereby the final report was put to the reference group and we noted who was in favour of one part of the report and who was in favour of the other.

The Convener: I just wanted to nail this bit about whose report this is, because you used the term “we”. The committee has read a paper from The Modern Law Review that makes a fairly serious allegation. At page 840, it says:

“The review process may have given the views of a single individual a momentum which will be difficult to counter.”

The inference seems to be that it was you and you alone who suggested that the law of corroboration should be abolished.

I give you the opportunity to say that you are not a man alone, saying in your review that you alone want the change.

Lord Carloway: You are asking me to recall who exactly said what at meetings a year or two ago. My recollection is that those who were in favour are those who expressed supporting views after the report was produced. For example, the Crown Office and the Association of Chief Police Officers in Scotland were in favour. I do not wish to answer for people who might or might not have changed their views after seeing the report.

The Convener: As I understand it, you did not all sit down to discuss this major issue, with minutes in which people asked for their position for or against the proposal to be noted.

Lord Carloway: The minutes of all our meetings are on our website. We sat down and had sessions on corroboration—yes, we did.

The Convener: I hear that, but this is big—it is huge. I am trying to get at how this major proposal was included, because you used the term “we”, but you previously used “I” and said that it was your report.

Lord Carloway: It is my report—I accept that. I am not suggesting that anyone on the reference group was asked to endorse the report, and I think that I made that clear when I previously appeared before the committee. The cabinet secretary asked me to produce a report, and it is my report. I do not seek in any way to detract from that.

The Convener: So you refute the line in the article by James Chalmers and Fiona Leverick that “sweeping changes to the Scottish criminal justice system may now stem from the recommendations of a single individual.”

Lord Carloway: I do not refute that in the sense that it is my report and therefore they are my recommendations—that is correct.

The Convener: I just thought that, when you introduced the word “we”, we had to clarify that.

Elaine Murray: I will go further on corroboration issues that arise from the bill rather than your report. I am interested in your reaction to the bill and to some of the submissions that we have received on it. I think that 12 organisations are in favour of abolishing the requirement for corroboration and 15 oppose that, so views are conflicting.

The view has been expressed that the value of the empirical research for the review was overstated and that it was not appropriate to make a direct comparison with European models of justice, which do not make the presumption of innocence and which take an inquisitorial rather than adversarial approach—a direct translation cannot be made between the Scottish criminal justice system and other European systems.

Lord Carloway: As far as I am aware, the system in every European country that has signed up to the European convention on human rights has the presumption of innocence.

In reaching my views on corroboration, I did not concentrate solely on European systems, particularly as there are clear procedural differences between us and Europe, as you said. The fundamental reason why I recommended the change in relation to corroboration is that Scotland is the only country in the civilised world—I include in that the whole of western Europe and all the Commonwealth countries—that has a rule that requires corroboration.
My view is that the corroboration rule in this country is not reducing the incidence of miscarriages of justice in a narrow sense but creating miscarriages of justice in the broader sense, because perfectly legitimate cases that would result in a conviction are not being prosecuted because of the corroboration rule. We looked at other countries, and that was a main driver for the recommendation that Scotland must change, to bring itself into line with modern thinking on criminal justice.

As for the research, in the course of producing the report, we had an opportunity to test how the system operates in Scotland. We took all the petition cases—that is, all serious cases—that were considered in Scotland in 2010 and examined every one that had been what the prosecutors would call no pro-ed—in other words, marked for no prosecution. We had more than 450 cases that had been marked no prosecution—numerically, that is a large number of cases. We then tried to apply the type of rule that other countries would apply to those cases. By “other countries”, I do not mean only England and Wales or Ireland—south or north—but countries with a similar approach to us, such as Canada, Australia and New Zealand. Something like 268 of those 458 cases—serious cases that we had not prosecuted in Scotland—would have been prosecuted in those other countries with a realistic prospect of success.

That is why we used that cohort as illustrative of the problem that exists in this country as a result of the operation of corroboration. Serious cases are not being prosecuted when, in other countries, they would be and the people involved would be found guilty. Moreover, those cases are not classified as resulting in miscarriages of justice in those other countries.

Elaine Murray: The argument has been made that, in countries that do not have corroboration, there are a number of safeguards against unsafe conviction. The bill goes with one—an increase from a simple majority to a two-thirds majority for a guilty verdict. It does not consider, for example, the abolition of the not proven verdict or other safeguards that may exist in other countries. Does the bill contain sufficient safeguards if corroboration is abolished?

Lord Carloway: I do not consider that the abolition of the requirement for corroboration requires any rebalancing of the system by the introduction of further safeguards. I made that relatively clear in my report. Because of the fundamental view that it would not cause miscarriages of justice of the type that we are discussing in the narrow sense of appellate jurisdiction—that is, something going wrong in the trial process—I did not consider that it was necessary to introduce any safeguards.

The Government proposed certain safeguards following upon my review. I can comment on those if you wish me to do that, but I do not consider any of them to be directly relevant to the question of the abolition of corroboration.

Elaine Murray: I would be interested in your views on the safeguards that the Government suggested, including those that were not taken forward.

Lord Carloway: The increase in the numbers necessary for a verdict of guilty from eight to 10 may result in greater confidence in the criminal justice system at solemn level. If we know that there are at least 10 in the majority rather than eight, it may introduce more confidence in the system. I have no problem with that proposed reform. However, as I think I have said previously, when one compares that with other systems, one must be extremely careful to understand how the majority verdict system operates in other countries. Again, there are public misunderstandings, but a large number of people in the legal profession—including on the criminal side of things—also misunderstand how the systems operate in England and Wales and what one would call Anglo-American common-law jurisdictions.

Our system is straightforward. We require a majority of eight for a verdict of guilty but there is no requirement for a majority to return either of the acquittal verdicts. That is not the way in which the systems abroad operate—I appreciate that I am saying things that some of you already know—with some countries retaining the necessity for unanimity for the verdict. Such a system operates by requiring a majority of 10 to two or unanimity for either of the two verdicts that can be returned.

11:30

The practical import of that is straightforward. Some people think that having an eight to seven majority requirement makes our system weaker with regard to guilty verdicts, but that is not necessarily the case. In Scotland, if eight jurors are in favour of a not guilty verdict, the defendant will be acquitted. In other jurisdictions, if eight out of 12 jurors are in favour of a not guilty verdict, the defendant will not be acquitted, because those countries require a majority or unanimity for both guilty and not guilty verdicts.

One can analyse that and work out how it would operate in practice. The problem that other jurisdictions have is the so-called hung jury. It is important that the committee understands, as I am sure most—if not all—of you will, that there is a huge difference between simply having a majority
system for the verdict of guilty, and requiring a majority verdict for guilty and not guilty verdicts, as happens in other systems.

That takes me on to the second element of Elaine Murray’s question, which I think was probably about the not proven verdict. Contrary to various comments in the press, I have not expressed any view on whether the not proven verdict ought to be abolished. If you are considering its abolition—which I know is proposed in another bill—you must be very careful, given what I have said about the difference between the way in which our system operates in relation to majorities and the way in which other systems operate in that regard. You would have to consider the issue very carefully in order to decide what you think the effect of a change of that nature would be.

To put it another way, if you are dropping the not proven verdict, you have to consider whether you wish to introduce the same system as other countries have, and require a majority of 10 out of 15 for any verdict that the jury is to return, which would be the equivalent of what happens abroad.

The Convener: Alison McInnes has a supplementary.

Roderick Campbell: I have one, too.

The Convener: Will either of you pick up on the issue of the cases that were re-examined—

Alison McInnes: That is the subject of my supplementary.

The Convener: Thank you. Alison McInnes will ask that question—if she does not, I will.

Alison McInnes: Lord Carloway, you mentioned that you had reviewed those 458 cases—

Lord Carloway: Well, I did not do that personally, but it was done.

Alison McInnes: Yes—that was done in the review. How long did it take to analyse those cases? Who carried out that review? It has been criticised as a cursory desk-top study that was undertaken in a one-sided way, and involved simply asking whether a case would have proceeded to court if corroboration was not required. No one from the defence side of the cases was involved in discussing how a case would have played out in court.

Lord Carloway: Absolutely—there was no one from the defence side, because that was not the question that we were asking. The question was being asked of prosecutors. We had the materials available for review, and two procurators fiscal were asked the question. We had the data on the 458 cases that were discontinued because of lack of evidence, but that does not necessarily mean lack of corroboration. Lack of corroboration would be a principal factor, but the case would have been no pro-ed on the basis of insufficient evidence.

The question that we were asking, therefore—which we asked of prosecutors—was, "Would you have prosecuted this case if the requirement for corroboration was abolished?" We asked prosecutors to apply the standard for prosecution that one would expect to see in other countries—namely, would there be a realistic prospect of conviction in the case?

If your question is, "Would all the 268 cases that would have been prosecuted have resulted in a guilty verdict?", the answer is absolutely not; we are not suggesting that that would have been the case. In a proportion of those cases, the jury would have acquitted—we did not have any difficulty with that. The significant point is that a lot of the cases would have resulted in convictions.

Alison McInnes: You assert that, but it is very difficult for you to evidence it in any way whatsoever, because you have not been able to factor in how the juries would have handled these things.

Lord Carloway: It is an estimate—

Alison McInnes: Upon which hinges an immensely profound change. The review is nothing more than a desk-top survey.

Lord Carloway: It is absolutely a desk-top survey. I agree entirely. That is what it was always intended to be.

Alison McInnes: I have substantive questions, but I will come back to them later.

The Convener: I have a question on the same point. The Modern Law Review article picks up on this issue, which is not just about prosecuting. The question that was asked was, "Would there have been a reasonable prospect of conviction?", which you have alluded to. The article states:

"On the basis of this evidence, the Review concluded that corroboration is in fact an 'impediment to justice', and in fact even a cause of miscarriages of justice, which the Review takes as including both wrongful acquittal and wrongful conviction. The research design is at best curious and at worst badly flawed."

It states that the review appeared to be unaware of research carried out by the Royal Commission on Criminal Justice in the early 1990s, which dealt with these matters. It goes on to say:

"On that basis the Royal Commission concluded that 'a supporting evidence requirement would affect only a very small percentage of cases'. This research suggests that, in practice, the abolition of the corroboration requirement would not lead to a significantly greater number of prosecutions or convictions."

That is pretty tough stuff.
My colleague Alison McInnes alluded to the fact that the review was a desk-top survey by two prosecutors. There are people out there in certain fields who think that if corroboration is abolished, perhaps in sexual assault and rape cases, there will be a greater prospect of convictions and so on. However, nothing that I am reading in your evidence supports that. You are the very man who sits and tells us about the quality of evidence, but I have to say that the quality of evidence on which the assertions were made is pretty thin.

Lord Carloway: I did not make a recommendation to abolish the requirement for corroboration based solely on that research. As I think I have explained, the critical feature that I ask the committee to bear in mind is that Scotland is the only country in the civilised world that retains this archaic rule of medieval jurisprudence. It is holding back the criminal justice system.

The Convener: I will let committee members in. I do not think that the committee takes the view that there is not a case for the abolition of corroboration, but we are asking whether this is the right way to make that argument.

Roderick Campbell: I have a supplemental question, Lord Carloway. I want to touch on the question of majority verdicts. When you gave evidence on 29 November 2011, you said that you did not think that the issue of majority verdicts was directly connected with the work that you were doing. You went on to say:

“I think I said that if we go down the route of examining majority verdicts we must examine the not proven verdict.”—[Official Report, Justice Committee, 29 November 2011; c 544.]

The Government is proposing not to proceed with any immediate work in relation to the not proven verdict. Do you have any comments on that? Do you think that the two can be disentangled or should they be considered together?

Lord Carloway: I do not think that they should be considered together. For the reasons that I gave earlier, I think that they are entirely separate issues. If you are analysing the question of the not proven verdict, you have to analyse the question of majorities for either a verdict of not guilty or a verdict of guilty and to try to get to grips with what effect you think that would have on conviction rates and, of course, the potential for miscarriages of justice. I regard the two issues as quite separate. I agree with the Government’s view that if one is looking at the question of abolition of the not proven verdict, further work requires to be done in that regard.

Roderick Campbell: Okay. May I move on to something slightly different?

The Convener: I will move on if your question is on something different. I have John Finnie, Margaret Mitchell, Sandra White and Alison McInnes to bring in, then I will let you back in again. John, is your question on corroboration?

John Finnie: No, it is on something completely different. I beg your pardon.

The Convener: Can we finish off with corroboration, interlocking juries and not proven verdicts? I will come back to you, John.

Margaret Mitchell: Good morning, Lord Carloway. I want to ascertain whether the fact that no other jurisdiction has the requirement for corroboration is a reason in itself to abolish it.

Lord Carloway: That fact is an extremely good indicator that Scotland is on its own in the western civilised world in relation to justice systems, and that is a very good pointer to one having something anachronistic in one’s system. In the perhaps slightly more academic aspects of the report, I have traced the reason why we still have the rule, and it is because of historical anachronism. Over time, everyone else abolished it for good reason.

Margaret Mitchell: But the fact that everyone else happens not to have the requirement is not in itself a sufficient reason to abolish it.

Lord Carloway: It is not an absolute reason, no. However, if one realises how isolated Scotland is on this and what other countries think about our having such a rule, I think that that is an extremely persuasive reason why the rule must go. The same happened previously in relation to civil cases, in which we had exactly the same arguments.

Margaret Mitchell: Does any other member of the judiciary agree with your view that the requirement for corroboration should be abolished?

Lord Carloway: Do you mean at the High Court level?

Margaret Mitchell: I mean anywhere, at any level.

Lord Carloway: I think that you have received responses from at least two sheriffs who agree with my recommendation.

Margaret Mitchell: Among all the judiciary in Scotland, two sheriffs agree with your recommendation. Does that not give you pause for thought about whether you have got this right?

Lord Carloway: I conducted a year-long review into the matter, on which we consulted widely. As you will see from the terms of my report, I had no doubt whatsoever when compiling my recommendations that the recommendation to abolish the requirement for corroboration would be met with extreme resistance among the Scottish
Margaret Mitchell: Why is that the case, Lord Carloway?

Lord Carloway: Because it is ingrained into the minds of the lawyers in this country that the requirement for corroboration is an important factor that prevents the occurrence of miscarriages of justice. I spent a long time analysing the matter, and I came to the conclusion that they were in error because there is no evidence to support that proposition.

Margaret Mitchell: But that is just your conclusion. Given the magnitude of this decision and the weight of opinion from all sections of the criminal justice system, surely the proposal should be put to the test—rather than put in a bill—by being made the subject of a wider review. If you are confident, as you certainly seem to be, you would not mind that additional scrutiny. Such a review should include the option to retain the requirement for corroboration and to try to improve it.

Lord Carloway: I was asked to carry out a review by the Cabinet Secretary for Justice. I had specific terms of reference, which included looking at the question of corroboration. That was the task that I was asked to do, and that is the task that I carried out. I was not asked to consider whether there would be better or longer ways of carrying out that task. I carried out that task to the best of my ability and I looked at as much material as I thought was necessary in order to reach a reasoned conclusion.

Margaret Mitchell: Why did you not suggest that one option would be to look at how corroboration could be improved?

Lord Carloway: I do not think that the concept of a requirement for corroboration is something that we should have in our criminal justice system.

Margaret Mitchell: With respect, that is only your view.

Lord Carloway: It is not only my view. There are plenty people who agree with me, as we saw during the consultation process. You have material from the Crown Office, from ACPOS and from certain sheriffs and others who support the idea that the requirement for corroboration should be abolished. You have views to the contrary that are primarily from members of the Scottish legal profession, who are opposed to change. That is not a particularly unusual set of circumstances.

Margaret Mitchell: You have asserted that abolishing the requirement for corroboration will not lead to miscarriages of justice in the future, but that is merely an assertion. Is it not?

Lord Carloway: It is not an assertion. It is based on a detailed review that I carried out on the operation of the rule in Scotland. As I said, there is no evidence whatsoever that Scotland’s incidence of miscarriages of justice is any lower than that of any other country in the civilised world.

11:45

Margaret Mitchell: What opportunity do people who hold the contrary view have to debate the issue properly? The measure is being steamrollered through. If the cabinet secretary agrees with it, we have a majority Government and—

The Convener: Allow that some of us have different views will you, please?

Margaret Mitchell: It will potentially go through on your say-so, Lord Carloway. Forgive me, but when you are speaking, an old Scottish phrase comes to my mind: “We are all out of step but oor Jock”. The criminal legal system is not having its view widely debated, and that is a travesty.

Lord Carloway: During the course of my review, everyone was offered the opportunity to give their views on the subject. They are all contained on the website of the review process, in so far as the contributors consented to that.

It is not for me to decide whether the law should be changed. That is for Parliament. I am not attempting to steamroller anyone into doing anything. I was asked to conduct a review of the matter. I have produced my recommendations, which I am convinced are correct on this topic. Everyone had the chance of consulting and, as I recall, we produced a consultation document at the tail end of 2010 and received responses to that. I produced my report and there have been responses to that. There is now a bill and there have been responses to that. Obviously, it is this committee’s job to decide whether the recommendation is correct or wrong. If you disagree with my views and you consider that corroboration should be retained, that is entirely a matter for Parliament, and I respect that view, and of course, I enforce the law of corroboration in the courts every day.

Margaret Mitchell: For the avoidance of doubt, the consultation was done on the presumption that corroboration would be abolished and it considered what would need to be done, if anything, to guard against miscarriages of justice. In other words, the option to retain and improve corroboration was not considered. It seems to me that you have a real hostility towards considering that and recommending it, as you could have done within the remit that you were given by the Scottish Government.
Lord Carloway: I am sorry, but I cannot understand that.

The Convener: In fairness to Lord Carloway, he carried out the review under the Government’s remit. He could not just change the remit himself. That is one of the problems that we face.

Margaret Mitchell: The option of corroboration could have been left open. Why not look at retaining corroboration but improving it?

The Convener: That is a question for the cabinet secretary about the nature of the remit of the review. By no means do I want to stop robust questioning, but the review remit was a matter for the cabinet secretary; we will deal with him when he comes before the committee.

Margaret Mitchell: I thought that the remit was to look at corroboration. Could I have some clarification on what the remit was? If the remit was to look at corroboration, the review could have looked at all aspects of it and considered retaining it as well as abolishing it.

Lord Carloway: I was asked to look at that and that is exactly what I did. That is what we consulted on.

Margaret Mitchell: And improving it? The middle road was not suggested.

Lord Carloway: I am not quite sure what you mean by improving corroboration.

Margaret Mitchell: I mean retaining corroboration and looking at other sources of evidence, such as the timescales involved with the Moorov doctrine, which means looking at cases that are so similar that, even though the time between them is longer, they can be used as evidence. There is also the training of the judiciary. There is a host of ways, it seems to me, that are so similar that, even though the time between them is longer, they can be used as corroborative evidence. That is also something that we will have to determine over time.

John Pentland: We heard earlier that 458 cases have been reviewed and some 268 of them could have gone to court for judgment. Will the courts be tooled up to deal with the increasing number of cases that may be referred?

Lord Carloway: Whether an increasing number of cases will be referred is a difficult question to answer because it depends on the standard that is applied by the Lord Advocate and also, I presume, on the level of resources that the Lord Advocate has.

The Convener: Can I stop you there, Lord Carloway? I thought that we were still on corroboration, John. Your question was a supplementary on the issue of corroboration.

John Pentland: I just thought that the number of cases will be one of the practical challenges that—

The Convener: I agree. I will let Lord Carloway continue with his answer, but I will then bring in other members, because I have others waiting. Please excuse me, Lord Carloway; do continue with your answer about the pressure on courts.

Lord Carloway: The Lord Advocate will no doubt set the standard of prosecution, which will depend on a number of practical matters and not just the realistic prospects of prosecution. Presumably, he can only prosecute so many cases and the courts can only cope with so many cases per year. The number of cases will be determined by those practical factors.

I am not persuaded that there will necessarily be a significant increase in the number of cases that are prosecuted. There may be an increase in the
number of cases that might be prosecuted, but it will be for the Lord Advocate to set the appropriate standard, and I imagine that he will set a higher qualitative standard than is currently applied in practice.

The Convener: Thank you.

Sorry about that, John. It is just that I am trying to keep us on corroboration, the impact on juries and so on.

Roderick Campbell: Can I ask a supplementary question?

The Convener: On?

Roderick Campbell: On what Lord Carloway has just said.

The Convener: The pressure on courts?

Roderick Campbell: No. It is on the test for the Lord Advocate. It follows on from what Lord Carloway has just said.

The Convener: All right. I will then bring in Sandra White.

Roderick Campbell: Lord Carloway, do you agree that the new test that the Lord Advocate and others will need to put together will have to focus on the credibility of the allegations and the quality of the evidence that supports them, requiring prosecutors to assess all the available evidence with regard to admissibility, credibility and reliability?

Lord Carloway: The short answer is yes. I think that there will be much more focus on the part of the prosecutors on the quality of material that is in front of them.

The reality at present is that, if you are sitting looking at a series of statements and there is corroborative evidence to support the proof of the crime, there is a temptation to mark the case for prosecution. Once that is taken away and you have to apply a different test, which involves really looking at the quality of evidence, I think that there will be a much more careful analysis of the evidence before the case goes to court, because there will not be a formal corroboration requirement.

Roderick Campbell: Following on from that, it is not necessarily the case that there will be more prosecutions.

Lord Carloway: Absolutely. You put it better than I did in my previous answer.

The Convener: I am sorry to jump in before Sandra White, but The Modern Law Review article states that the assertion about quality versus quantity

"is misconceived and is not developed beyond the single paragraph in which it appears. The structure of a Scottish trial is in fact such as to separate out questions of quantity and quality with reasonable effectiveness. The quantitative requirement created by the corroboration rule is a matter of law for the judge, normally to be determined at the point of a submission of no case to answer."

The article suggests that the idea that getting rid of corroboration means that prosecutors—and, indeed, the defence—will focus more on quality rather than quantity is a false argument, because that happens in any event.

Lord Carloway: It happens to a degree, because there is always a residual power with the prosecutor not to prosecute something in the public interest for whatever reason he thinks fit.

The Convener: That is surely a separate matter from quality and quantity.

Lord Carloway: It is the same thing. If you do not think that you have sufficient quality of evidence, you will not prosecute because it is not in the public interest to do so.

The Convener: I would have thought that sometimes cases are not pursued in the public interest because it is such a narrow matter that it would not be appropriate to prosecute. Is it not correct that there are other issues that are not prosecuted in the public interest?

Lord Carloway: I am not sure about that.

I am saying that, at present, if there is a legal sufficiency of evidence, there is a temptation to prosecute, because if you do not do so in the face of a sufficiency of evidence, your decision may be open to criticism. If you do not have that barrier—the limitation produced by the requirement for corroboration—you are in a much more free-thinking, free-flowing world, in which you have to look at the quality of the evidence and decide: is it in the public interest to prosecute the case? The decision depends on the quality of the evidence that is available.

The Convener: Can I put that a different way? When it comes to the credibility of a witness in a rape or sexual assault case, if the Crown is of the view that the witness will not stand up to scrutiny—perhaps because of their lifestyle or something—will the prosecutors say to that person, “I’m not going to prosecute this because, if I put you in the witness box, I think that we will not be successful because they will not believe you”? On the other hand, will they say, “There is no need for corroboration now; I will put you up anyway, whether or not your credibility withstands it.”

In my view, the protection for the person who alleges the offence against them is corroboration, no matter how slight it is. If it comes down to credibility alone, you take away that protection in such cases.
Lord Carloway: It is obviously for the Lord Advocate to determine exactly what procedures he will follow in deciding whether to prosecute a case, whether it is a rape case or another sexual offence case. The reality of the situation is that many single-witness cases are currently not being prosecuted because of the absence of corroboration, but its absence can be a matter of pure chance.

The Convener: I appreciate all that, but will you answer my question? What will the Crown say to somebody whose credibility prosecutors think will not stand up, even if the Crown believes them?

Lord Carloway: I can give you a view on that, if you wish, but I cannot answer for the Lord Advocate—

The Convener: Of course not.

Lord Carloway: I cannot answer for the Lord Advocate as to what he or she will tell complainers in sexual cases, but I know that this is done daily throughout the rest of the civilised world. Decisions are made about whether to prosecute sexual offences not on the basis of chance that there happens to be an admixture of distress or other evidence, but on the basis of whether the prosecutor, looking at the evidence as a whole, considers that there is a realistic prospect of the jury convicting.

The Convener: So prosecutors may say to somebody, “I would like to take you to court so that you can give evidence against this party, but I do not think you will be believed, so I will not prosecute.”

Lord Carloway: As I understand it at the moment, in such cases, although there is a minimum requirement of corroboration, it is still for the prosecutor to determine whether the case should be proceeded with in the public interest, so the situation that you describe will happen now.

The Convener: I agree, but at least there would be something else to support the Crown bringing the case forward. There would be something other than the credibility of the party.

My concern is that, in the recent case in England, for example, in which a chap in some soap opera was—rightly—found not guilty, the only evidence was that of the accuser. There was no corroboration, and that evidence was not believed. Are we going to import that into Scotland?

12:00

Lord Carloway: I am not entirely sure what the question is, convener.

The Convener: The question is: does that make it harder in some circumstances? Many people have certain beliefs about rape and sexual offences. The corroboration requirement does not apply to all cases in all courts, but those in which it does are more likely to result in successful prosecutions.

I put it to you that there may be circumstances in which it will be harder on the person who alleges that they have been sexually assaulted or raped because, if the case proceeds only on their evidence, they will have only their credibility to put before the court. That results in a difficult choice for the prosecuting Crown Office between putting that person in the witness box, after which they will perhaps find that they have not been believed, or not putting them in the witness box because that would be tough on them and they would not be believed.

Lord Carloway: I agree entirely with what you say about the difficulty of making a decision on whether or not to prosecute. I am recommending that, instead of just proceeding with a case because there happens to be a piece of corroborative material, one proceeds on the basis of having properly analysed the quality of the evidence. I suggest to the committee that that is a better system than the one that we have now.

With regard to the complainers in sexual offences cases, the reality at present—I have views on the subject that cover a different topic—is that, in almost all such cases, it is clear that the question of the credibility and reliability of the complainer will be a central feature. Whether or not you decide to recommend the abolition of the requirement for corroboration, that will not be changed.

The Convener: I agree.

Lord Carloway: It will not change either way.

The Convener: Sometimes the Crown may have to turn round and say to a woman or a man who alleges such an offence, “We’re not going to prosecute because we don’t think you will be believed”, because that is all the evidence that it has. The complainer may be saying, “Well, you don’t need corroboration any more”, and people outside will say the same and expect the case to be prosecuted. Someone is perhaps going to have to tell them, after assessing the quality of evidence, “We are not prosecuting this case”, notwithstanding that corroboration is no longer required. That is tough—that is all that I am saying about that.

Roderick Campbell: I have a supplementary, convener—

Sandra White: Convener?

The Convener: I beg your pardon, Sandra—I got carried away.
Sandra White: I understand, convener. A lot of us have been very patient in waiting to come in.

Good afternoon, Lord Carloway—it is afternoon now.

I am not a lawyer, but I am a member of the Justice Committee, and I want to put forward the view of the people on corroboration. You mentioned that, in civil law, corroboration is no longer taken on board, and that certain people in the judiciary look on the requirement for it as ancient or archaic. It is up to them whether they view it in that way, but I am interested in how it affects people out there.

The convener and others have mentioned rape cases, domestic violence and so on. Written evidence from Sheriff Maciver in 2013 made it clear, as well as raising the issues of rape and domestic violence, that the removal of corroboration will, in general, enable the public to have better protection in court. If an elderly person is mugged in their home, for example, there is no corroboration or other witness present, so the change would be effective for them.

We have to get away from the idea that the requirement for corroboration affects only domestic abuse and rape cases. There are other areas in which crimes against individuals do not have any element of corroboration.

I was interested in what you said in your opening remarks, Lord Carloway, about corroboration not being widely understood. When I first came to the Justice Committee, I did not have much of an idea of what corroboration meant, but I have been out—as most of the committee members have—to speak to various people. I have spoken to Scottish Women’s Aid, Rape Crisis Scotland and others, and the fact is that the requirement for corroboration, or for another witness to have been present, is preventing justice from being done in what is a very horrendous crime.

Can you give us an example of how, for crimes such as rape or domestic abuse where the case involves one person’s word against another’s, abolishing the requirement for corroboration would benefit the person who the crime was committed against?

Lord Carloway: It is difficult to say that there would be a benefit to the complainer in any form of crime in that sense.

The important feature is that, if the requirement for corroboration is abolished, the prosecuting system and the courts will be able to secure convictions in cases where there is by definition no corroboration. There are many such cases. They are particularly prevalent in the domestic setting, but they are by no means exclusive to that setting.

There are many cases in which the undoubted victim of the crime will know who did it—there may be no real issue of identification because, for example, the person involved is a relative—and what was done. Currently, when the victim of the crime goes to the authorities and explains what has happened, the case is simply not prosecuted. To my mind, that is an injustice in our criminal system, and that injustice exists nowhere else in the world. Other countries regard the fact that we have such a rule as disturbing.

You asked for examples, and one can give many. In a simple robbery case, you—being a perfectly respectable citizen—may be standing at the bus stop with a bag when somebody whom you know comes along, snatches your bag and runs away. Let us make no mistake: some of our criminal fraternity know about the law of corroboration and they know how to adapt their practices in accordance with it.

If you, being a member of the Justice Committee, are robbed in that way at the bus stop and you know the person because you have lived all your life in the same close or whatever, when you go to the police, the police will tell you, “Well, that is just too bad, because there is no corroboration.” The other person will not even be prosecuted, never mind acquitted. If, on the other hand, it so chances that a friend of yours wanders round the corner and sees the person snatching your bag, the person will be prosecuted and convicted. Whether or not justice is done depends on whether someone wanders round a corner.

The Convener: In fairness, Lord Carloway, as you have said, there does not have to be another person. There could be other evidence to corroborate.

Lord Carloway: But in the situation that I have described, there is unlikely to be other evidence.

The Convener: Possession of the stolen goods might constitute other evidence.

Lord Carloway: Yes, that is an option.

Sandra White: I have a small follow-up question, as I want to get the issue correct in my mind.

As we have talked about, for people who have suffered horrific crimes such as domestic violence, rape or abuse, the experience of prosecution can sometimes be very difficult. My understanding is that the proposal to abolish the requirement for corroboration is part of a more holistic approach to criminal justice, under which the Lord Advocate will, for example, put forward specific details on the circumstances in which a case will be prosecuted and may use special measures to allow witnesses to give evidence by videolink. Would that type of approach be beneficial?
Actually, I know or believe that such an approach would be helpful, but I want to ask for your thoughts on that. Obviously, Women’s Aid and others are worried about what defence lawyers might say, but, as part of a holistic approach to the criminal justice system that includes the use of special measures such as video-links, would it be beneficial for victims of sexual crimes if there was no longer a requirement for corroboration?

Lord Carloway: Are you asking about the introduction of special measures in court and matters of that sort?

Sandra White: Yes.

Lord Carloway: The short answer to your question is, in my view, yes.

In relation to video-links, I have written papers that are probably available on the internet about where I consider we should be going in relation to evidence. In many cases, especially summary cases, the idea that we should require all the witnesses to come into court to give evidence in a courtroom is something from the past. We are in an age of technology that allows people to give evidence by a number of means. I do not wish to go into the issue in detail, because I suspect that it is a completely different area—

The Convener: Yes—it is not part of the bill.

Sandra White: I just wanted to clarify that point.

The Convener: Yes.

The next question is from Alison McInnes.

Alison McInnes: Lord Carloway, I was going to ask whether you had had pause for thought over the past year, given the significant concerns of many of your peers and colleagues, but you have been fairly robust this morning. You have been surprisingly dismissive and almost disdainful of some of your colleagues and the significant concerns that they have raised about the recommendation on corroboration. I want to go back to the discussions that you had with the cabinet secretary in the early days, before you agreed to take on the role of carrying out a review. Can you recall those discussions?

Lord Carloway: I remember being asked to enter a room by the Lord President—the Lord Justice General—who said that the Government was anxious to have someone of sufficient knowledge and experience in the field to conduct a review. In that sense, if I remember rightly, I was not selected by the cabinet secretary—I was selected by the Lord Justice General. I suspect that I then had a brief meeting with the cabinet secretary. I certainly had some form of exchange, perhaps through email, on the terms of reference, as might be expected.

Alison McInnes: At the heart of the review was the aim of future proofing our criminal justice system against ECHR challenge following the Cadder ruling. At what point did the consideration of corroboration and its removal come into the discussions on the remit? Did you posit that, or did the cabinet secretary put it into the remit? Is it something that you have always had a bee in your bonnet about?

Lord Carloway: No. If I had been asked, before I sat down and started reviewing the matter, whether the rule on corroboration ought to have been abolished, I would probably have come up with exactly the same reasons as the rest of the legal profession has done. It was the conduct of the review that persuaded me that we are wrong.

Alison McInnes: Can you recall whether the cabinet secretary specifically put that in the remit?

Lord Carloway: Do not hold me to this—I am almost certain, but I do not wish to be absolutely positive because I would need to look at the email exchanges—but my recollection is that the question of corroboration was already in the draft terms of reference before I agreed to them. The reason for that is relatively straightforward. You might recall that the case of Cadder had, in effect, reviewed by a rather strange method the case of McLean, which had said that we do not need the particular safeguard of a solicitor being present at interview because we have a whole lot of other safeguards, central to which is corroboration. The United Kingdom Supreme Court said that corroboration is not a safeguard in that context. As I understand it, that is why corroboration, among other things, was put into the remit. As soon as one started to look at the Cadder-type situation, one then had to look at the safeguards.

I apologise if I seem disrespectful of my colleagues, as that is not my intention and I respect their views, as I always have. I had no doubt what their views would be because they were expressed to me during the course of the review, some of them forcefully and some not.

Alison McInnes: Indeed, but on at least a couple of occasions this morning, you have said that other people misunderstand corroboration.

Lord Carloway: Absolutely.

Alison McInnes: Paragraph 35 in the submission from Justice Scotland states:

“We are not satisfied that any sufficient safeguards are proposed on the face of the Bill and we remain gravely concerned about the future of Scottish criminal law in the absence of corroboration. We consider that, without significant change, successful challenges to convictions under Article 6 ECHR as miscarriages of justice and incompatible with the right to a fair hearing are inevitable, whether before the Appeal Court, the UK Supreme Court or the European Court of Human Rights.”
You were asked to future proof the system against challenges, and here we have a central challenge being put forward. How do you respond to that?

Lord Carloway: I am not sure that I was asked to future proof the whole Scottish criminal legal system; I was asked to look at specific matters. The committee has asked about my terms of reference, but I am not sure that I was asked to provide a guarantee. For the reasons that I have given, I disagree with Justice Scotland’s view on this. I am not sure that I can expand on that without repeating what I have said.

12:15

Alison McInnes: Justice Scotland identifies three obvious areas: identification evidence, disputed expert testimony, and the admissibility of and weight to be afforded to confessions. Are you going to address these issues?

Lord Carloway: All those issues have been discussed in other countries that do not have the rule of corroboration. The first area that you mentioned was identification evidence. We already have the pronouncements of the UK Supreme Court on the issue of identification and how it should be dealt with. We give juries warnings in cases that have only eyewitness identification evidence. South of the border, of course, they rely on single eyewitness evidence to convict people and there is no suggestion that the incidence of miscarriages of justice in England is greater than it is here.

Alison McInnes: As I recall, England does not have dock identification.

Lord Carloway: England does not have dock identification, because it is prohibited. In England, there is a series of other methods by which an accused person can be identified. The UK Supreme Court has told us that dock identification is convention compliant, provided that certain safeguards are put in place, which they are. Again, I do not wish to bore the committee with the details but, as you would expect, they include whether the witness has had the opportunity of identifying the accused before court at an identity parade as they now exist. The absence of dock identification has, as I understand it, already been ruled on.

Alison McInnes: I have a final question. When you were speaking in response to Mr Pentland, you suggested that there is a real need to give victims the chance to take their case to court even without corroboration. I thought that we always prosecuted in the public interest, but it is beginning to sound as if we are moving towards prosecuting in the victim’s interest. Is that fair?

Lord Carloway: I am not suggesting that there should be private prosecution in Scotland. The system here is that the Lord Advocate intervenes and he makes the decision about whether a prosecution should go ahead. I am not suggesting any change to that system.

The point that you are making has, I think, been touched on, possibly by the Crown Office, and it has certainly been mentioned by previous Lord Advocates. There are certain rights under the ECHR to have adequate remedies to protect the citizen. For example, there is the right to security of person, and so on. Basically, people have a general right of that sort. The legal system under which an individual operates must provide a proper remedy, including the remedy that people are properly prosecuted and punished for crimes. As I think someone has said in the past, at some stage someone might decide to take a challenge to the European Court saying, “I don’t have a remedy because the man didn’t come round the corner and see what happened.” We might have to address such a situation in due course.

I hope that the changes to our system will not be forced on us from outwith but that they can be duly considered by our own Parliament.

The Convener: I have Roderick Campbell followed by John Finnie, Elaine Murray and Margaret Mitchell. I will try to get everyone in. I know that I am guilty of asking too many questions myself.

Roderick Campbell: I would like to start with a supplementary question to something that was raised a little while ago. It was about sexual history. Do you have a view on reviewing sexual history applications under sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 in the context of corroboration if corroboration were to go?

Lord Carloway: In the context of corroboration? I am not quite sure what the link is.

Roderick Campbell: Some people have suggested in their submissions that the committee ought to consider that but, if you do not have a view, I will not press the question.

Lord Carloway: I think that I am on record as speaking on several occasions about the need for greater protection for the complainer in sexual offences cases and for what one might call a more robust enforcement of certain provisions in that regard. I can say that with confidence having had protective measures that I suggested in relation to lines of questioning overruled by the appeal court some years ago. I have strong views on that, but I am not sure that there is a direct link with corroboration.
Roderick Campbell: I just wanted to raise the point.

On the complainer’s credibility being more in focus in the system if we have no corroboration, should consideration be given to the defence having greater freedom to challenge the complainer’s credibility, as some have suggested in their submissions?

Lord Carloway: I consider that, as a generality, the ability to challenge the complainer’s credibility in sexual offences cases is quite adequate to secure a fair trial at present and might be strengthened.

The Convener: Sorry, do you think that the protection for the complainer should be strengthened?

Lord Carloway: Yes.

The Convener: Even though there might be nothing else. Everybody wants successful, just prosecutions for sexual offences, but my concern is that that might not be the case. The defence might rightly argue that, if it is the accused’s word against the complainer’s word and the complainer has a bit of a history, it is going to open it up and start questioning the complainer’s credibility and sexual history. The bill might make the complainer more vulnerable to that and some of the protections might be eroded.

Lord Carloway: The level of protection that should be afforded to rape complainers has been considered widely in the Commonwealth, notably in Australia and Canada, which—as you will know—have very strict rape shield laws. No doubt it differs from state to state but, as I understand it, not only do they have relatively robust rape shield laws—which are to do with the protection of the witness’s dignity—and a system in which there is no corroboration, they have prohibitions on judges cautioning juries about the absence of corroboration in that category of case because it is not thought to be fair when one is balancing the interests of the accused and those of the victim.

The Convener: I am sorry, but that is not the question that I was asking. I was asking whether taking corroboration out of the picture and pursuing cases of that nature without it would leave female or male victims open to tougher questioning about their sexual histories if it is in the defence’s interests to do that. The protection for certain individuals, such as an element of corroboration, assists them and is not a problem, but abolishing corroboration might open things up. I thought that that was where Roddy Campbell was going with his questioning—that the protections that, rightly, exist now might be eroded in some way over time.

Lord Carloway: I can see no reason why they should be. It would be contrary to the way that criminal justice is going generally in the world, to return to the wider picture. The tendency is towards greater rape shield protections.

The Convener: I accept your point.

Roddy, do you have another question?

Roderick Campbell: I have not really embarked on the major question that I want to ask you, Lord Carloway, which largely concerns procedural safeguards.

When you gave evidence in November, you suggested that you saw no need for alternative safeguards. You reiterated that this morning. Notwithstanding that, the Government embarked on a second consultation in relation to additional safeguards.

We have dealt with majority verdicts and the not proven verdict, but we have not really touched on direction to the jury. Do you remain of the view, which you expressed in November, that the judge and the jury should have the freedom to assess quality? A number of the senators of the College of Justice—a minority—said that they see a direction to the jury as part of the evidence and not as a factual matter for the jury. That is also the view of a number of other people including the Scottish Human Rights Commission, which has also raised concerns in relation to article 6 of the ECHR.

Since you prepared your report and gave evidence, a couple of European Court decisions have touched on the importance of procedural safeguards. Will you expand on whether you remain of the view that the additional safeguards are not required?

Lord Carloway: In talking about procedural safeguards, are you focusing particularly on jury directions?

Roderick Campbell: Yes. I am interested not only in the direction that no reasonable jury could convict but in the jury’s discretion to exclude evidence and in whether, as the Scottish Human Rights Commission suggests, there should be a statutory discretion on the face of the bill, following section 78 of the English legislation—the Police and Criminal Evidence Act 1984.

Sorry—I am wrapping up too many things in one question. It is the general topic of procedural safeguards that I would like you to comment on.

Lord Carloway: There is a suggestion that the judge or sheriff in a jury trial should be able to withdraw the case from the jury if he or she thinks that no reasonable jury could convict. I can address that—
Roderick Campbell: Perhaps you could deal with that one first.

Lord Carloway: I do not think that that reform should be encouraged. The reason for that is primarily procedural. Let us imagine that a jury trial is coming to an end, all the evidence has been heard and somebody makes a submission that there is no case to answer. If that goes in favour of the Crown and the jury subsequently convicts, the case can be subject to an appeal in the normal way, so that does not create a problem.

On the other hand, if there is a submission that there is no case to answer, the judge’s decision is that no reasonable jury could convict and he or she acquits the accused, that will, in effect, terminate the jury trial unless an appeal court can be convened extremely rapidly. If that is not done, the trial will be wasted if the decision is wrong, because it cannot be appealed without having a new trial. That is one reason why, as far as safeguards for the accused are concerned, he has a right of appeal if he is convicted. It is much more difficult, if the decision is wrong, for the prosecutor to appeal effectively without forcing people to go through the whole process again.

The other reason why I am against the reform is that it would give a single judge power in relation to what he thinks a reasonable jury should do with the evidence, and we should guard against that. It is different to have a ground for appeal that is based on reasonable verdict. There is much less scope for idiosyncratic decision making in that case, because three judges make the decision. Experience dictates that there have been decisions that have led to acquittals that cannot then be changed in circumstances where they are demonstrated to be wrong.

That is my answer on that suggestion.

Roderick Campbell: You would accept that a number of your colleagues take a different view.

Lord Carloway: I do not think that many of them take a different view on that issue.

Roderick Campbell: It is not possible to determine that from the submission as it refers only to minorities and majorities, so we do not know the numbers. However, a minority of the senators seem to believe that it is a matter that the judge should deal with.

Lord Carloway: That is correct. There was a minority view, but the majority said that the reform should not be introduced, broadly for the reasons that I have given. That is the position.

Roderick Campbell: One of the principal points that you seem to be making is that an appeal court of three judges is more likely to get it right than a single idiosyncratic judge.

Lord Carloway: That is the way in which the legislation is framed at the moment. The question of what a reasonable jury would or would not do is determined in retrospect by the appeal court. However, if there is an insufficiency of evidence—in the sense that there is just no evidence that the person committed the crime—then even if the requirement for corroboration is abolished, it will still be possible to make a submission, which the judge can sustain, that there is no evidence. That would continue to be the case.

Again, I looked at this matter in the context of the review and I looked at the way in which they did those things south of the border. I spoke to someone who was, in effect—I cannot remember his precise title—the appeal court administrative judge in the Court of Appeal in England. I also spoke to various people in other systems. I think that they are all generally of the view that if there is enough evidence on which a jury could convict, then that is really a matter that ought to be left to the jury. If it turns out that the decision is wrong, the appeal court can sort that out.

Roderick Campbell: You are confident that that does not leave a line of exposure for an article 6 claim in the European Court.

Lord Carloway: Yes, I am reasonably confident on that, but it is sometimes a difficult matter to be confident on.

Roderick Campbell: Indeed. Moving on to the general concept of statutory guidelines such as section 78, I detected in the submissions a general view that such matters are best left to the discretion of the judge rather than having statutory discretion in the bill. Do you adhere to that view?

Lord Carloway: Sorry, this is section 78 of—

Roderick Campbell: The suggestion was made by the Scottish Human Rights Commission, among others, that we should have something on the face of the bill resembling section 78 of the Police and Criminal Evidence Act 1984 in England.

Lord Carloway: I cannot remember precisely what section 78 states.

Roderick Campbell: It is about the direction to exclude unfair evidence.

Lord Carloway: Oh, right. I beg your pardon. If evidence is unfairly obtained, that discretion is already there in Scotland, so I am not sure that—

Roderick Campbell: The question is whether to have something statutory rather than leaving discretion to judges. I think that your colleagues’ view is that the discretion is best left to judges, rather than it being statutory.
**Lord Carloway:** I think that the judge’s discretion is sufficient at the moment, without any additional powers. That probably answers the question.

**Roderick Campbell:** I will let other members in, as I am conscious of the time.

**The Convener:** I am conscious of the time, too, but I hope that you can stay a little bit longer, Lord Carloway, as this is our only opportunity to go through this matter. I hope that we can go on for another 20 minutes to half an hour—I think that we will manage to exhaust all our questions by then. Thank you very much for staying, as I appreciate that it is a long session. John Finnie has the next question.

**John Finnie:** Thank you, convener, and Lord Gill. I would like to touch on some of the practical applications of your report.

**The Convener:** I think it is Lord Carloway we have with us and not Lord Gill, but if you want to cause judicial ructions—

**John Finnie:** I am sorry, Lord Carloway. I do beg your pardon for that, and for my voice. I am a bit heady today, I am afraid.

I am interested in practical applications of your report in areas such as arrests and custody. Your remit was very clear and included a review of developments since 1980 in relation to arrest and detention and the effective investigation and prosecution of crime. On arrest without warrant for offences that are not punishable by imprisonment, will you say why you thought that the course of action that you suggested is appropriate?

**Lord Carloway:** Yes. Again, it is basically a question of being able to process the particular person. For many relatively minor offences, it would be sufficient for the prosecuting authorities to serve a complaint on the person in due course. However, to do that, you have to find out, for example, who he is and where he lives. If you do not have a power of arrest whereby you can detain and, in effect, restrain the person for the purposes of finding out those things, then you will not be able to prosecute him at all. So, you need a very limited power of arrest in order to carry out the essentials if you have a disruptive individual whom you are trying to process.

**John Finnie:** So, if the individual is co-operative—

**Lord Carloway:** There ought to be no requirement to arrest someone for an offence that is not imprisonable, if you are dealing with someone who tells you properly what their name and address is. Of course, you might suspect that although they are apparently being co-operative, they are not giving you the right information. That is what my recommendation concerns.

**John Finnie:** Would you see a benefit, as others do, in having a statutory definition for the reason for arrest and subsequent detention?

**Lord Carloway:** I cannot remember exactly how it is phrased at the moment. Is there not a qualification in relation to non-imprisonable offences, which means that that would be done only in certain circumstances?

**John Finnie:** I am looking at section 1, which deals with the power of a constable.

**Lord Carloway:** Yes, I would hope that those three subsections cover the issue.

**John Finnie:** It is a long time since I had cause to enforce this, but would the part that refers to a belief that the person will “obstruct the course of justice” be similar to the common-law power of arrest for various reasons?

**Lord Carloway:** That provision deals with the kind of activity that I have mentioned. The notion of obstructing the course of justice would cover a situation in which someone said that their name was M Mouse and you had reason to suppose that it was not. You would have to arrest him and take him to a police station so that you could process him properly.

The issues are relatively well defined for a situation in which you encounter someone in the street who is committing a non-imprisonable offence and who is, in one way or another, not cooperating. The definitions in section 1 are clear. Seeking to avoid arrest basically means someone avoiding giving their name and address by running away. Similarly, if someone continued to commit a breach of the peace or whatever the offence was, they could be arrested for that, as they could be arrested for interfering with witnesses or evidence in some way.

**John Finnie:** Your view is that that is comprehensive enough.

**Lord Carloway:** I think that it is, yes.

**John Finnie:** I want to move on to deal with the information that is to be given on arrest and the information that is to be given at the police station. The Scottish Human Rights Commission was concerned about the possibility that sections 3 and 5 of the bill do not provide sufficient information to fully protect the right of silence, under article 6 of the ECHR.

**Lord Carloway:** As far as I am aware, the sections are convention-compliant at the moment. Under the sections, the constable informs the person of the reason for the arrest and tells them that they do not have to say anything, and then takes the person to the police station, where he is...
placed under some form of restraint and is given the additional information in relation to his right to legal representation.

John Finnie: Is that the appropriate time to talk about legal representation, rather than at the point of arrest?

Lord Carloway: As long as you are not engaged in questioning the person at that point, it should not be a practical problem. However, as you rightly identified, it is at the point at which a person’s movement has been curtailed that he is entitled to be advised of his rights to have legal assistance.

John Finnie: Is it robust enough to prevent spontaneous admissions en route to the police station?

Lord Carloway: The person is told that he does not have to say anything. There is not much else that anyone can do. Advising him that he has a right to legal assistance earlier will not assist him, as you cannot give him legal assistance before he gets to the police station. At least, I think that that is the reasoning.

John Finnie: One hears of innovative situations in other jurisdictions in which police officers have, for instance, facilitated the person under arrest gaining legal advice over the phone, prior to being taken to a police station, by giving them a mobile phone. Would that be a positive?

Lord Carloway: I am not sure. If the person was behaving in an appropriate way I cannot see why one would necessarily stop them doing that. You would do it anyway before you indulge in any form of— as they put it in Europe—interrogation of the person.

John Finnie: Okey-doke. Can I ask about investigative—

The Convener: Was that an okey-doke?

John Finnie: Did I say okey-doke?

The Convener: I think you said okey-doke, but that is fine.

John Finnie: Surely it has been in the Official Report before now.

I want to move on to investigative liberation and to the concerns expressed about the range of questions and the period that an investigation can go on for, and about the unintended consequences of that investigation. For instance, there is the potential for someone to face suspension from their job on the basis that an investigation has gone ahead.

Lord Carloway: That is why the 28-day limit was put in—to stop it going on, as we heard it did in England, where people were effectively under investigation for a prolonged period. That was why I recommended that there be a time limit put on the investigation.

John Finnie: Should subsequent investigative periods have regard to a suspect’s work and family commitments and, indeed, access to a solicitor during them?

Lord Carloway: Could you maybe expand a little on that? I am not quite sure—

John Finnie: You acknowledge that there can be implications for an individual’s family and work circumstances if further investigations go on. Should the police have regard to the family and work circumstances and, indeed, to the availability of the individual’s solicitor, prior to engaging in that further investigation?

Lord Carloway: Do you mean prior to releasing the person on investigative bail?

John Finnie: No. I mean prior to the continued investigation.

Lord Carloway: I am not sure that I quite grasp the situation that you envisage. Do you mean that, rather than release the person, the police should simply process him through the courts, depending on his family circumstances?

John Finnie: No. I mean a person who has been dealt with and released, and at a future point is subject to further questioning by the police.

Lord Carloway: Oh, right.

John Finnie: I mean the regard that the police officer should have to the individual’s domestic and work-related circumstances, and the availability of a solicitor to facilitate their being legally represented when it takes place.

Lord Carloway: If he is re questioned, he will again be entitled to legal representation, as I understand it.

John Finnie: As things stand, would there be anything to preclude someone from being repeatedly rearrested after the 28 days?

Lord Carloway: The time limit of 12 hours for questioning applies throughout. In other words, if you are rearrested, the time that you have already spent in custody counts. That will in itself limit arrest, at least for the purposes of questioning. If you repeatedly arrest someone for the same offence, that would be oppressive conduct and I suspect that the courts would take a very dim view of that if it resulted in any unfairness. However, I am not sure that we had any evidence—or I had any evidence—that this was something in which the police indulged.

John Finnie: Can I move on, Lord Carloway, to information to be given before an interview? The
Scottish Human Rights Commission is of the opinion that the suspect and his solicitor should be informed prior to the interview of the content of the “reasonable grounds for suspicion”.

12:45

Lord Carloway: The person should already have been told why he is being arrested. He should be aware of the general reason why arrest is being carried out because that ought to be given at the point of arrest and, I think, also at the police station, and that is recorded.

The person may not be given the information that has led to the reasonable suspicion, and I suspect that the reason why it is not thought appropriate to give that information is that it may disclose, for example, who is providing the evidence against him at a very early stage, which might have repercussions.

I do not think that it is a requirement, certainly in human rights terms, to tell the person of the nature of the evidence against him as distinct from the allegation that is being made against him. If he gets a solicitor, the solicitor can advise him not to answer any questions until such time as the source of evidence is apparent. If he gets legal advice, that ought to deal with that type of situation.

John Finnie: Another concern voiced is that an individual might be arrested but not taken to a police station. Of course, it is arrival at the police station that triggers some of these things.

Lord Carloway: Is it not in the bill that the person has to be taken to a police station as soon as practicable?

John Finnie: You take that to mean taken directly to a police station.

Lord Carloway: Within reason, yes. We did not have any evidence in relation to detention—

The Convener: I think that the words used in the bill are “reasonably practicable”, which is an expression that we understand. Obviously it would depend on location, rurality and so on.

Lord Carloway: The police would be able to tell you about this a lot better than I can, but there are certain operational reasons why you would not take someone to a particular police station. You might have to take them to a high-security facility or suchlike.

We did not have any evidence that when someone was detained and was supposed to be taken to a police station, the police were doing anything significantly different by way of transporting them around the country or other such things that we hear about in films.

The Convener: We will move on. Alison McInnes, are your questions on this tack?

Alison McInnes: They are still about police custody, but post charge.

Lord Carloway, your report went into some detail about the length of time for which suspects may be held in police custody prior to their first appearance in court. You expressed some concern about that. You concluded:

“a significant proportion of suspects are held for periods which are at least at the outer limits of what may be regarded as acceptable even under the Convention. More important than that, suspects are being held for periods that are longer than ought to be regarded as acceptable in Scottish human rights terms.”

That was a welcome conclusion.

I am really interested to know whether you think that the bill has gone far enough in addressing that problem. As far as I can see, the bill provides that wherever practicable the suspect must be brought before the court not later than the end of the next court sitting day. There is no suggestion that we should be moving to weekend courts or anything like that. Would you have liked the bill to go further?

Lord Carloway: I think not at the moment. My view was that this is something that has to be kept under review. Here is a new regime, which may not be radically different from that under the emergency legislation or which existed before it, whereby a person is supposed to appear in court on the next court day. That sounds good, but when you examine how it is operating in practice, you see that it is a problem. It is a practical problem that is primarily for the Crown authorities to resolve. They have the power to resolve it, along with the Scottish Court Service, by ensuring that there is a court sitting day in some kind of proximity to the point when the person is charged. What I was saying was, “Here is a new regime. Let’s see how it operates but somebody should be keeping it under review to make sure that people are not being kept in custody for longer than three days, or 36 hours.”

Alison McInnes: It might be worth while to read you the Sheriffs Association’s response, which says:

“We believe that the establishment of regular Saturday Courts ... would impose an unacceptable degree of extra strain and excessive extra costs on an already overburdened criminal justice system”

and would be unnecessary in the light of increased liberation powers. Is that a fair way of responding?

Lord Carloway: It is a fair way of responding, but I do not necessarily agree with it.

The Convener: Alison McInnes might want to rephrase her question.
Alison McInnes: Yes.

Lord Carloway: The approach does not involve more work being done; it just means doing the work at a different time.

Alison McInnes: You suggest that we should not worry about the bill not being specific on the number of hours for which someone can be in custody, but I read out the reaction of the people who can fix that.

Lord Carloway: The committee should be worried in practical terms about the amount of time for which people are kept in custody. Exactly how to fix that is a much more difficult question. I was loath just to recommend the introduction of Saturday courts—weekends are the problem that we are talking about—if the problem could be solved in a practical way.

Part of the problem is that, when people are processed into a court’s cells on a Monday morning, little has been done on their cases. They languish in a cell and, at that point, nobody is in a position to decide whether they should be put through the court, released unconditionally or released conditionally. If we got to a system in which decisions were taken over the weekend—which would not require legislation, because it does not require a court to sit—people could be processed much more quickly on a Monday, whether or not it was a holiday. Custody courts would also not go on well into the afternoon, which I said in the report should not happen, especially given the conditions in which people are kept.

Margaret Mitchell: I will return to your review’s terms of reference. The section that is relevant to corroboration is paragraph (c), which says:

“To consider the criminal law of evidence, insofar as there are implications arising from (b) above”,

which is

“To consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime”—

Lord Carloway: I am sorry; I am not with you.

Margaret Mitchell: I was just quoting paragraph (b), which is not really relevant but is mentioned in paragraph (c). The relevant words are:

“in particular the requirement for corroboration and the suspect’s right to silence”.

Nothing in your terms of reference stopped you looking at retaining and improving corroboration, did it?

Lord Carloway: I did look at retaining corroboration. That is what I was asked to do and I did it.

Margaret Mitchell: You looked at retaining or abolishing the rule; the review did not consider how to improve it.

Lord Carloway: I am sorry, but no one as far as I can recall suggested some form of intermediate step.

Margaret Mitchell: In that case, was the review not fundamentally flawed? In view of that, there should be a full review. Plus, the weight of opinion against abolition was that something of this magnitude should be fully reviewed and not passed in a bill that has many other provisions—it is too important.

Lord Carloway: I did not determine the method by which the situation was reviewed. I was asked to carry out a review and I did that.

Margaret Mitchell: There was nothing to stop you looking at improving corroboration.

Lord Carloway: I say with due respect that I do not think that the requirement for corroboration can be improved.

Margaret Mitchell: That is your view.

Lord Carloway: Yes.

The Convener: We have an answer.

I will briefly, because it has not been touched on, mention section 82, which deals with the SCCRC. This is a little hobby-horse of mine. You will recall that, following Cadder, we got in—under the wire—a double test for the SCCRC, which was that it had to consider not only whether there had been a possible miscarriage of justice, but whether it was in the interests of finality and certainty to make a referral to the High Court. In the same emergency legislation, we introduced the ability of the High Court to reject a referral. You have asked for that second part to be changed, which would get rid of the gatekeeping role of the High Court. I would have liked something else to have been done for the SCCRC, but that is just my view.

It is a complete mystery to me why you still support the idea that, even if the High Court considers that there has been a miscarriage of justice, it can determine that upholding an appeal is not in the interests of finality and certainty. I am a simple person. If there has been a miscarriage of justice, there has been a miscarriage of justice. If a person has been wrongly convicted and their appeal has been successful, the appeal should be granted. I do not understand the interests of finality and certainty provision. I think that it erodes the integrity of the High Court as the court of appeal.

Lord Carloway: There are basically two points to pick up on. I have suggested that the gatekeeping role be ended, but I have also suggested that, in addition to there having been a
miscarriage of justice, it should be in the interests of justice that the appeal be allowed. The issue is to do with the definition of “miscarriage of justice”. In looking at this provision, we are not talking about a miscarriage of justice in a general sense; we are talking about a miscarriage of justice in the sense of something having gone wrong in the trial process.

I will give a straightforward example of the first area where that would be something that the court would look at. Let us say that someone comes before the court with an appeal of this nature—we should remember that that normally happens at a stage that is well remote from the trial process—but that, in the interim, new evidence against the person emerges or the person confesses. I am suggesting that, in a reference—as distinct from a straightforward appeal—the court should be able to take into account those wider considerations, which the Crown may or may not wish to put forward, as to whether, in the interests of justice, it is appropriate for that conviction to be quashed. Retrial is almost never going to be an option in an SCCRC reference, because of the timescales.

The Convener: You posited that highly unlikely example the last time you appeared before the committee. Your argument is very narrow because, as you quite rightly say, if that happened, the appeal could be granted and a new trial could be held on the new evidence; the two aspects could be separated.

The provision does not apply only to cases in which new evidence appears; it gives the High Court wide discretion. That is why I am concerned. Even if the SCCRC has already looked at finality and certainty and, notwithstanding that, has referred the case to the High Court, that test will have to be gone through again.

Lord Carloway: Yes.

The other example that I was going to give relates to the situation—which does arise—in which the SCCRC is not given, and does not have, complete information. In that situation, the court should be able effectively to review the matter. The situation that I envisage—we have had such cases in the past—is one in which a person who has lodged an appeal after his conviction and has taken a conscious decision to abandon that appeal, or has taken a conscious decision not to appeal within the time limits, comes along several years later and says, “I now want to appeal.”

We, as the court, would look at the merits of the case and consider his grounds for appeal, but in such a situation we would often say, “Well, I’m sorry, but you didn’t appeal within the time limits, and you haven’t given us a proper explanation as to why. We don’t think your grounds for appeal are bound to succeed”—or something of that nature—“and we are therefore refusing you leave to appeal late.”

13:00

It would be very odd to have a situation in which a court said, in the interests of finality and certainty—particularly in relation to victims and any other people involved—“We are not allowing you to appeal because you are too late.” If such a case comes back to us from the SCCRC several years later, we have to take a decision irrespective of the previous decision.

The Convener: As you and I know, however, the SCCRC does not say willy-nilly that there may have been a miscarriage of justice. I do not have the stats in front of me, but referrals are relatively successful. There was a change in the law in 2010, which I think was made because everyone thought that, after the Cadder case, people would be rushing to the SCCRC. Emergency legislation usually turns out to be bad.

My concern is that the SCCRC will have fully considered whether there has been a miscarriage of justice, and will even have applied the test of finality and certainty, which did not exist before. At least you are recommending that we get rid of the High Court’s ability to say, “We don’t care about that case and we’re not going to take it”, so that it will take the case in any event. However, it still has the test: it can still say that there has been a miscarriage of justice, but that it will not, in the interests of finality and certainty, grant an appeal.

You have given specific examples, but those are special cases, and that is not what the legislation says. Indeed, the executive of the SCCRC said in evidence to the committee that the legislation proposes

“not to remove the gatekeeping role of the High Court at all, but instead to dismantle the gates at the bottom of the driveway and reassemble them at the entrance to the front door.”—[Official Report, Justice Committee, 13 December 2011; c 651.]

The bill is, in effect, saying, “Right, we’re taking away the ability to say that we don’t want to accept a referral from the SCCRC and we’re taking the gates down, but we’re putting them back up at the top of the hill. We have heard the case and, yes, there has been a miscarriage of justice, but in the interests of finality and certainty, it’s just tough, but we’re not granting the appeal.”

I have heard your examples, which are clear, but very unusual. There are remedies available—a case can be retried, or whatever—but my concern is that the proposed change does not give confidence to people who have taken their case through the SCCRC system and gone through all the tests that it applies, who have had the case referred to the High Court and had their appeal
heard, and have heard that there has been a
miscarriage of justice, but then not got their
appeal. Where is the security in the system in that
respect? Do you have faith in the High Court?

Lord Carloway: I had such considerations in
mind when I made the recommendation. You have
expressed very articulately why there should not
be a gatekeeping role in that sense, as the court
must hear the merits of the appeal. However, the
test for a referral by the SCCRC concerns not only
whether a miscarriage of justice has occurred in
the narrow appellate sense, but the question of the
interests of justice.

The Convener: Yes, and it has done that.

Lord Carloway: What I am saying is that the
question whether it is in the interests of justice for
an appeal to be allowed outwith the normal course
of criminal appeals should be capable of being
reviewed by the courts, which are, after all,
supposed to be the experts in that field.

The Convener: If the test was not there before,
why is it there now?

Lord Carloway: I am trying to explain that. The
interests of justice test has always been there in
relation to the SCCRC’s recommendation: the
SCCRC must take into account not only whether a
miscarriage of justice has occurred but whether it
is, nevertheless, in the interests of justice to make
a recommendation.

The Convener: Why was the finality and
certainty test for the High Court not there before?
That is what I am getting at. That is new.

Lord Carloway: I cannot answer that because I
was not involved with the emergency legislation. I
think that you have explained that already by
saying that a Cadder floodgates-type situation was
expected—

The Convener: Yes—and it did not happen.

Lord Carloway: That did not happen, but, for
reasons that I have gone into in the review, there
have been situations in which we, in the courts,
have had referrals for cases in which a person had
decided not to pursue his appeal in the first place.

There is no doubt that each case must be dealt
with on its own facts and circumstances, but it is
difficult to argue that it is in the interests of justice
to allow someone who has deliberately decided
not to carry on with an appeal to go to the SCCRC
and come back to the court years later.

The Convener: Well, in the interests of finality
and certainty in this meeting, we will just have to
disagree on that. I have no doubt that some of us
will disagree on many matters.

I thank you very much, Lord Carloway—I
appreciate that it has been a long meeting for you,
The Convener: Item 2 is our second evidence-taking session on the Criminal Justice (Scotland) Bill at stage 1. We have two panels of witnesses today and we will consider part 1 of the bill, on arrest and custody, with both panels. In addition, we will explore the establishment of a police negotiating board for Scotland with the first panel. That is in part 6 of the bill.

I welcome our first panel—some more people who have season tickets for the committee. I will not call them the usual suspects, although that might be appropriate in the circumstances. With us are Assistant Chief Constable Malcolm Graham; John Gillies, who is director of human resources at Police Scotland; Chief Superintendent David O’Connor, who is president of the Association of Scottish Police Superintendents; Calum Steele, who is general secretary of the Scottish Police Federation; and Stevie Diamond from the police staff Scotland branch of Unison.

Thank you all for your written submissions. We move straight to questions.

Alison McInnes (North East Scotland) (LD): Before we start, I draw members’ attention to my entry in the register of interests. I am a council member of Justice Scotland.

The Convener: Thank you. Do you want to ask a question?
Alison McInnes: No. [Laughter.]

The Convener: Not yet, anyway.
Alison McInnes: That’s right.

The Convener: You should have qualified that. I call John Finnie, to be followed by Margaret Mitchell, Roderick Campbell and Elaine Murray. We are off to a flying start. Look how alert they are—they must have had their porridge.

John Finnie (Highlands and Islands) (Ind): I will start with a question about an operational matter. The Law Society of Scotland and the Scottish Human Rights Commission have questioned whether the need for the change from “detention” to “arrest on suspicion” has been demonstrated. Will the panel express their views on that, please?

Calum Steele (Scottish Police Federation): I am not entirely convinced that that need has been demonstrated. It seems to me that, beyond the statement that it will be more easily understood by the general public, there is no real reason why we should move from the current provisions of “detention” to “arrest on suspicion”. It seems to be
unnecessary to create a new set of statutory provisions that are almost identical to an old set of statutory provisions, with just a change in terminology.

**Assistant Chief Constable Malcolm Graham (Police Scotland):** We believe that the case has been well made and that the changes are required. As members will be aware, the previous arrangements were designed in the late 1970s, when the justice system was entirely different and society was a different place.

The case that Lord Carloway laid out in his report for why the changes need to take place—and why the recodification should be made as one complete set of circumstances as opposed to changes being made piecemeal—is overwhelming. The move to consistent terminology around arrest as opposed to arrest and detention is welcome. The current terminology persistently causes confusion because the term “detention” is used for somebody who is remaining in custody prior to court, rather than for a means of temporary arrest.

**Chief Superintendent David O’Connor (Association of Scottish Police Superintendents):** Bringing the concepts of detention and arrest together may simplify the process in some respects. I tend to agree with what Malcolm Graham and Calum Steele said.

I add that although the change appears, on the surface, to be relatively simple, there will be significant training issues for Police Scotland in ensuring that everyone fully understands what the change from “detention” to “arrest on suspicion” means.

**The Convener:** I saw heads nodding when training issues were mentioned. Does anybody want to come in on that? John Gillies was nodding and so was Calum Steele.

**John Gillies (Police Scotland):** The need for training and re-education of the service in relation to the provisions would be considerable. We would have to take a view on that being done alongside the current change within Police Scotland and reform towards the new organisation. It is difficult to say now what impact such an abstraction would have across the board. We would have to give due consideration to how the training would be rolled out.

It is difficult to put a cost on such training, but it is fair to say that it would be quite a distraction to the service. If the provision is to be implemented, we will need to take a view on when it should be implemented, based on the on-going changes to the service.

**Calum Steele:** There is also the reality that you cannot not know what you know, and police officers, whether they joined in the 1970s or whenever, know detention and know the process of detention from beginning to end. Unlearning that and learning something else, as with any type of human behaviour, will result in inadvertent misapplication of the wrong pieces of legislation and recording of the wrong pieces of information in notebooks and so on. I have yet to hear a cogent argument for why it makes something better to change terminology largely without changing content, and I fear that the consequence of the wrong information being recorded because officers are dealing with a new set of processes, even if the general principles of fairness are applied, could lead to cases being thrown out of court.

**John Finnie:** I would like to follow up with Mr Graham. We have evidence from the Scottish Human Rights Commission, which says of evidence supporting the change:

> “Unless such evidence is produced, the greater interference with individual’s private lives involved in longer detention periods may not be justified.”

That follows from the statement:

> “The Commission is unaware of any evidence which suggested that prior to October 2010 the police were systematically hampered in their efforts to investigate crime by the limits of the 6 hour detention period.”

Is that incorrect?

**Assistant Chief Constable Graham:** I would say that that is very incorrect. We have produced evidence in the past and in our written submission on why the six-hour period was woefully inadequate. That had become clear to operational officers, even in basic cases at times.

Members will also be aware that we previously made a written submission about proportionate and judicious use of the extensions that have come in since 2010. We were very clear at the time that we needed a system that could be expanded and was flexible. In most cases detentions could be dealt with in six hours, and the vast majority are still dealt with in under 12 hours. In the small proportion of cases for which we have sought extensions from 12 to 24 hours, that extension has absolutely been required. We have provided evidence of such cases in the appendices to our written submissions, and I argue strongly that without those extensions the ends of justice might well not have been served, because we would not have been able to gather evidence in those serious crime cases.

**The Convener:** I would like you to clarify that, because the Police Scotland submission states that

> “0.4% of all persons detained require to be extended beyond 12 hours”. 
but we do not have a percentage for the extension beyond six hours. Can you give us that?

**Assistant Chief Constable Graham:** I apologise if the data are not in there. We have data and I will ensure that they are submitted. Of course, there is no extension from six to 12 hours in the current system, but we have data showing the times for which people have been kept, and that the vast majority of cases are still dealt with in under six hours. Of course, the vast majority of cases are less serious cases, so I am keen to get across the point about scalability. The number of cases for which we would need to go for an extension beyond 12 hours is very small, but they are the most critical cases—rapes, murders and other complex cases in which the criticality of not having that additional time would hamper our ability to keep people safe and could hamper the ends of justice being met.

**Chief Superintendent O’Connor:** In addition to what has been said, we can track the matter back to 1979, when the Thomson committee first looked at powers of detention and timescales for detention. The options at that time were six hours, 12 hours or 24 hours, and the service certainly had a view back in 1979—as many people round the table will remember—that the 12-hour detention period would be the most appropriate.

The world has moved on considerably, and the six-hour detention period is not suitable in some instances, particularly for complex and difficult investigations.

**The Convener:** Are you disputing that, Calum?

**Calum Steele:** I am disputing the idea that I have that recollection of 1979. I was six years old.

**The Convener:** Now you are just showing off. I am not bothering about that.

It is important for us to know the figures, because if we are asking about the bill’s provision for detention for up to 12 hours, we need to know whether the limit needs to be fixed. One of the arguments is about whether it needs to be changed from six hours, so evidence on that would be very helpful.

**John Finnie:** I am slightly changing the subject, but I would like to ask about custody.

**The Convener:** Before we move on, does anybody have a supplementary question on the issue that we have been discussing?

**Margaret Mitchell (Central Scotland) (Con):** My question is on arrest.

**Roderick Campbell (North East Fife) (SNP):** My question is also on arrest.

**The Convener:** Is it on the terminology? I would like a question on that.

**John Finnie:** My question is connected with the power of arrest and detention in custody.

**The Convener:** Given your previous on this, I will let you proceed.

**John Finnie:** In the context of the discussion around moving away from the notion that arrest is a form of punishment that is administered by the police, Lord Carloway refers to the purpose of arrest. There has been an altered police response to detaining people in custody for domestic abuse and drink-driving. How does present practice in that regard square with Lord Carloway’s proposals? Perhaps Mr O’Connor might respond to that.

**Chief Superintendent O’Connor:** While the bill is being discussed, we would be looking for guidelines from the Lord Advocate on interpreting the bill’s provisions and how they should be applied by the police in a variety of circumstances. We will need a set of guidelines that the police service can draw on.

**John Finnie:** Do any other members of the panel have a comment on that?

**Calum Steele:** I do not disagree with what Chief Superintendent O’Connor said.

**John Finnie:** What do you see the purpose of the Lord Advocate’s guidelines being? There are Lord Advocate’s guidelines at the moment on detaining people in custody.

**Chief Superintendent O’Connor:** There are. A number of different parts are laid out in the Lord Advocate’s guidance. I suppose that a key part is that the officers in charge of the station might decide to detain a person in custody and that that would not subject an officer to any claim whatever. I think that we should discuss that as part of the discussion on the bill.

**The Convener:** I will let John Finnie back in afterwards, but I want to let other members in at this point.

**Margaret Mitchell:** Good morning, panel. I wonder whether you can comment on the written submission from the ASPS. Perhaps Mr O’Connor could do so first. The submission states that the powers of arrest in the bill “lack an explicit power to arrest to prevent a crime”, which is set out in the “general duties of a constable defined in the Police and Fire Reform (Scotland) Act 2012”.

**Chief Superintendent O’Connor:** We were looking for clarification in relation to that because there will be circumstances in which the police come across somebody who is a threat to themselves and to the public. An arrest might be necessary in order to take that person to a police
station to get them access to the services that they need. We posed the question in our submission for clarification that that power will still exist.

**Margaret Mitchell:** That is an important point. It would be a huge concern if the bill was to mean that the police could not deter and prevent crime. Would the other panel members like to comment? Perhaps the representative of Police Scotland could do so.

**Assistant Chief Constable Graham:** I agree with David O'Connor. We had concerns about that issue at an early stage of drafting. We made representations on it and sought reassurance that the common-law powers that David O'Connor described would be retained. That aspect is not included in the bill in a statutory sense; all that we have at the moment is what is described as a "letter of comfort" from those who are drafting the bill. To be frank, it does not give us huge comfort, at the moment.

There are other issues around arrest. For example, at the moment there is a power to arrest when a crime has not been committed but there is a breach of a civil order that has a power of arrest attached to it. We must ensure that that power is included for things such as matrimonial homes interdicts, which we would routinely deal with. We also have a concern around the absolute requirement to take a person to a police station when they have been arrested, which we argue does not retain sufficient flexibility in the system for circumstances in which we might wish, in effect, to de-arrest somebody. Lord Carloway's recommendation was less rigorous than that; he recommended that people should be taken to a police station when necessary.

**Margaret Mitchell:** I want to go on to that as soon as is practicably possible. However, would your preference be that the bill include an explicit power to arrest in order to prevent a crime?

**Assistant Chief Constable Graham:** I think that that would be very helpful.

10:15

**Margaret Mitchell:** Could I have the view of the other panellists?

**The Convener:** I am glad you are taking over from me, Margaret. I want an easy day—I locked myself out of the house. I am thrilled to be here. [Laughter.]

**Margaret Mitchell:** You asked me to ask the questions, convener. What can I do?

**The Convener:** Go for it, Margaret.

Witnesses should indicate when they want to come in, but do not feel obliged if you have nothing to add. I am sure that Calum Steele has something to add.

**Calum Steele:** The only thing that I have to add is that I have nothing to add.

**Margaret Mitchell:** Do you agree that the bill should include such a power?

**Calum Steele:** I agree.

**Margaret Mitchell:** Does Unison have a view?

**Stevie Diamond (Unison):** We do not have a view on that, I am afraid.

**Margaret Mitchell:** I like to give everyone a shot, convener.

**The Convener:** I know, but I am feeling peeved. Do not make me peeved. I am feeling very vulnerable today.

**Margaret Mitchell:** Do you want me to leave "as soon as practically possible"?

**The Convener:** Certainly not. I do not want to exercise an arrest on a person who is not officially accused.

One thing has not yet been addressed, although I had hoped that John Finnie would have covered it. On detention and arrest, to say "arrested and under suspicion" to the public makes them think that the person has done it. Are you telling me that the understanding of the public will be clearer? To me, that is not the case because the wording is unclear. If a person is detained and it is reported in the newspaper that that man or woman "has been detained" for something, that is one thing, but if it is reported that they have been arrested, people will not notice the words "not officially accused"? Could you comment on the language—which I had thought John Finnie was going on to discuss?

**Calum Steele:** That gets to the very nub of the matter. I have yet to see anywhere evidence that the wording is more easily understood. I look at some of the recent examples south of the border. I know that there is civil litigation on-going on this, so I will be mindful about how I phrase this. In the Jo Yeates murder inquiry, the landlord of the building in which she was murdered, who happened to be quite an eccentric-looking gentleman, Christopher Jefferies, was arrested, and it was reported that he had been arrested. I cannot speak for what the general public across the whole United Kingdom thought about it, but my sense from the subsequent furore was that they thought that the man was guilty, because of the terminology that was applied—that he had "been arrested". I do not sense that, when individuals are detained in Scotland and it is then reported that they were subsequently arrested, there is a difficulty in understanding the difference between the two. That is just an observation, however.
Assistant Chief Constable Graham: I have a contrary view. I do not think that the cases from England and Wales bear comparison, because we are in a different system; there, there is a power to detain for up to 72 hours. In the case that was mentioned, that extension was granted—albeit using a judicial submission in relation to that extension. We have a far more limited form of arrest. An arrest on suspicion, as is proposed, would still be for a maximum of 24 hours.

With due respect, convener, in relation to—

The Convener: With respect, on the perception, what you have said is true technically—I think that the case that you mention is not sub judice any more—but the concern that the committee shares is about innocent people being found guilty by the tabloid press, or even by the broadsheets.

Roderick Campbell: “Arrest” is not defined in the bill. In his report, Lord Carloway recommended that

“arrest should be defined as meaning the restraining of the person and, when necessary, taking him/her to a police station”.

I am interested in the panel’s thoughts on whether there should be a definition of arrest, and on what Lord Carloway recommended.

Chief Superintendent O’Connor: My understanding of arrest is that the person is no longer free to go about their lawful business, or has not been advised that they are free to do so. That is the sort of definition that we have worked with, and it is a definition that is common throughout the service. That arrest puts controls on the arrested person and allows the police to do a number of things to control the person. I do not have Lord Carloway’s definition in front of me; I understand the first part of it, but am not sure about the second. That takes us back to what Malcolm Graham said and the ability to de-arrest in certain circumstances. There will be occasions when it is necessary to arrest somebody at the locus, or some other area in a public place in order to confirm their identity and so on. Once that has been done, the grounds for arrest potentially no longer exist.

Assistant Chief Constable Graham: The very fact that we are discussing terminology and the definition of arrest takes us back to my previous point. The situation that David O’Connor described and Lord Carloway’s definition are similar to the current definition of detention, which is that the person is not at liberty to go about their business. I strongly contend that the public notion of that is not influenced by communication or public information from the police, because we do not release information about individuals until they are arrested.

There is less likely to be a distinction in people’s thinking between what happens in Scotland and what happens in England and Wales, given that people are probably influenced by United Kingdom media sources, as Calum Steele said. People are less likely to differentiate between the systems in such a way.

It would be helpful if “arrest” were defined in the bill in the way that Lord Carloway set out. As I said, we have great concerns about the absolute requirement in the bill to take a person to a police station when they have been arrested, and we agree with Lord Carloway that the inclusion of “when necessary” will help to ensure that a person’s liberty is not taken from them unnecessarily and that they are not detained for any longer than is necessary.

The process of taking someone to a police station and going through their rights must, quite properly, be done thoroughly, so it takes some time. In the appendices to our submission, we set out scenarios in which we think it would be in the interests of justice and of the suspect if we could de-arrest a suspect before they were taken to a police station.

The Convener: I have a funny feeling that “de-arrest” does not have a sexy ring to it. I do not see the banner headline, “That man who was arrested and not accused has now been de-arrested.”

Assistant Chief Constable Graham: New legislation inevitably brings up new terms. If I have just made up a word, I apologise.

The Convener: It is in the public domain now.

Calum Steele: I agree almost entirely with David O’Connor. The definition of arrest that the police service uses is well understood and well applied, and I do not think that it causes confusion—unlike the approach that we are about to introduce.

The Convener: We have heard and noted your view. A lot of committee members want to come in on this point. I will bring in Sandra White and take her out of my list.

Sandra White (Glasgow Kelvin) (SNP): We are discussing criminal justice and I am being taken out—that sounds good, at this time of the morning.

Public perception, which the witnesses talked about, is important and should maybe be discussed more. The perception is that if someone is arrested, as opposed to being detained, they are suspected of being guilty of a crime. There is no getting away from that, whether we are talking about the tabloids here, down south or wherever.

I want to look a wee bit beyond that. If someone is detained at their place of employment, their
employer might understand that, but if they are arrested and not charged with a crime, and they have to say to their employer, "Under this new legislation I have been arrested," how will that work for them?

I have a lot of concern about the definition of the terms “detention” and “arrest”. I understand that six hours might not be long enough for someone to get a lawyer and so on. However, we need a definition in the bill, so that people completely understand what is meant. The police understand what is meant, but the public take a different view of what “arrested” means. How will that work for someone who is in employment?

Assistant Chief Constable Graham: I take the point. Perhaps what we need in whatever is passed into legislation is a fairly sophisticated piece of communication that will inform people about the changes that have been made. I have worked extensively with some of the legislation in England and Wales and I am not aware that the perception is vastly different there, or that people there have a wider perception that being arrested on suspicion makes them guilty of a crime. People largely understand that one of the key tenets of the justice system across the UK, and particularly in Scotland, is that you are innocent until proven guilty and that, whether you are detained or arrested, your guilt or innocence is decided at the point when you go to court, not because the police have either detained or arrested you.

I have not seen or heard any evidence of a difference in perception in England and Wales, where they do not have the concept of detention. Indeed, I now find the terminology confusing, as Lord Carloway throughout his report uses the term “detention” to mean when somebody is to be kept in police custody after arrest, and that is fundamentally confusing now.

Chief Superintendent O’Connor: The key part concerns detention as arrest. We currently have detention on suspicion and we are moving to arrest on suspicion. The key words are “on suspicion”. That is the part that we need to focus on.

The Convener: I am afraid that I think that the key word for the public will be “arrest”. That is the issue. As politicians, we know that perception is a huge part of anything and, although I can see the technical arguments, I remain unconvinced at the moment that changing that terminology is helpful. The issues raised by Sandra White about the perception—whether or not employers do anything about it—among other employees if someone is arrested on suspicion are pertinent. It is very hard to shake that mud off you if it has been thrown in such cases. You said that you did not think that people in England had taken that view, but your argument is undermined by the Yeates case, where they did. That man was convicted, hung, drawn and quartered because he looked odd and the press ran the story, and he was arrested. My take on it is that that very case undermines your argument, but I shall ask other committee members for their views.

John Finnie: I would like to read an extract from Lord Carloway’s report, which says:

“The Review considers that the opportunity should be taken to simplify, modernise and clarify the circumstances in which, where an individual is under suspicion of having committed a crime, the lawful deprivation of his/her liberty can take place.”

Perception is important and the committee has an obligation to provide good law for the Police Service to follow.

I would like to press Mr Graham on the difference between arrest and detention. I share my colleagues’ concern that the public will take the view that arrest is something more definitive. As you have said, the trigger point for publicity is when someone has been arrested, and I wonder whether one of the unintended consequences of that may be people’s unwillingness thereafter to come forward with information: they will think that the police have all the information that they need to arrest a person, and a person is in custody, so they will not bother to go along with their snippet of information. Of course, the police rely on public engagement at that level.

Assistant Chief Constable Graham: To clarify, do you mean the point at which somebody would currently be detained prior to them being arrested?

John Finnie: You are saying that someone being arrested would be the trigger for information to be released. If Joe Bloggs is now in custody, a member of the public might say, “Well, they’ve obviously got the wherewithal to have that person there, so I don’t need to come forward with this bit of information that may or may not be helpful,” even though their information could be crucial.

Assistant Chief Constable Graham: When I used that as an example, I meant that, when somebody is arrested under the current scheme, that is the likely trigger for us to release information to the public, but that information would not include the details of an individual until they appeared at court. It appears sensible for that to remain under the proposed legislation. There would not be any release of information until somebody was arrested and could be charged under the current system, so I do not see that that would change because we had moved to a position of arrest under suspicion. I do not think that that would come into the public domain in the way that you have described, and it would not change the public perception.
I take the point that the term “arrest” has a different feel for the public from “detention”. Therefore, we should focus on the idea of arrest under suspicion. However, it is not my understanding that there is currently a huge amount of information around when people are detained in that short period prior to being released or, in many cases, arrested. I do not have the figures to hand, but perhaps it would be helpful if we produced some information—assuming that it is available—about the number of people who are detained and subsequently released where grounds no longer exist, as opposed to the number of people who are arrested and charged. That might give you a sense of the situation.

The Convener: Data is always helpful.

Calum Steele: I do not doubt that, in general, the position narrated by Mr Graham is correct. When press releases are put out, they will come on the back of the police arresting a person and reporting to the procurator fiscal. That is not true in all cases, however. I hesitate to give any just now, but I can say with some degree of certainty that there are examples, usually in the higher-profile cases and where there is awareness and a significant media interest, where the police will notify the press that individuals have been detained and are helping the police with their inquiries. As a general provision, the notion that that is done only when the police make an arrest and charging takes place is not 100 per cent accurate. There are other examples, usually in the higher-profile cases, where, in a bid to provide some information to those who are interested, a notification of detention is given.

Chief Superintendent O’Connor: I pose a question, which the Justice Committee may wish to consider. We have been talking about arrest and detention and the potential impact on the arrested persons, but perhaps the question should be asked how victims or complainers would feel about the matter. Groups and organisations representing victims may well have a particular view on the issue, and we cannot lose sight of that. What is their perception of it?

The Convener: The question should be what is just. The perception is that such a notification may be unjust to someone who has been taken in under detention.

Elaine Murray (Dumfriesshire) (Lab): I wish to ask about investigative liberation. There is a suggestion that a person should be released on conditions, which may be applied for a period of up to 28 days. The Faculty of Advocates and the Law Society of Scotland believe that the courts should be able to review the period. Police Scotland and the SPF suggest that 28 days is too short a maximum period for that. Scottish Women’s Aid believes that there should be a requirement that the “complainer be notified of the suspect’s release” and, presumably, of the conditions of their release.

What are your views on who should be reviewing the period, on whether 28 days is sufficient, on whether the complainer should be notified of the release and on the conditions under which a suspect is released?

Assistant Chief Constable Graham: Investigative liberation is one of the areas that Lord Carloway considered following a number of visits to England and Wales to consider the PACE act—the Police and Criminal Evidence Act 1984—which has now been in place for some 30 years and which has worked well, as we understand it, albeit in a slightly different way from what is now proposed. We welcome the step to introduce investigative liberation although, as has already been said, 28 days would potentially be restrictive as an absolute time limit. On occasion, it may not be sufficient and proportionate in circumstances where we could justify an extension.

We do not make any proposal on what that extension process should be, nor on whether there would be a recourse to the court, a judicial process and reviews within the 28-day period. We have suggested that we would be happy to consider that as an internal process. As with all other custody processes and so on, we normally have guidelines for review that are not necessarily laid out in statute, and we have not made any distinct proposals that they should be in statute.

Calum Steele: My understanding is that the time period relates to the time in which the conditions are applied to the investigation. It does not necessarily mean that the investigation ceases in its own right after 28 days. Indeed, it would be entirely right and proper for investigations to continue, irrespective of whether conditions on interim liberation apply or otherwise.

I wish to move on to some of the additional issues associated with interim liberation, as well as addressing the question whether victims and witnesses should be made aware. The SPF gave a fairly comprehensive response on the matter in relation to the Victims and Witnesses (Scotland) Bill and, even without that in front of me, I am content to note that our view was that as much information as possible should be given to victims and witnesses at key stages of the investigation and inquiry. I have little hesitation supporting the view that they should be made aware when certain conditions apply or cease to apply.
When it comes to the notion of the 28 days and interim liberation, or even interim liberation in its own right, the proposal is probably sensible. However, we have to consider the mechanics of how such things happen. We must consider the availability of solicitors, of police officers and of the suspects. I am mindful about how day-to-day policing takes place, and the fact is that traffic can prevent someone from being at a place at the particular time when they were meant to be there. I fear that there is significant potential for police officers, solicitors and those suspected of offences to miss each other. An interim liberation might be set for a particular place and time, such as midday. The police officer might get there at midday, the solicitor might have got there at 10 to midday, but the suspect might not turn up until a quarter past, by which time the police officer has concluded that they are not going to show up, and they go off to deal with something else. Then, the suspect turns up, but we find ourselves talking about whether or not we are going to arrest the person for breaching their bail conditions.

There is potential to complicate the criminal justice landscape with sets of circumstances that could, in their own right, be explained away by timing. Because of the dynamic nature of police work, the suspect could well be there at the appointed time, date and place but, as a consequence of being held up dealing with an incident, which they might have attended in good faith with the reasonable expectation of being clear of it in a proper timeframe, the police officer might be unable to get back to the police station. Furthermore, someone has to be standing at the appointed place with a stopwatch—metaphorically—switching it on and off to ensure that the overall time has not been exceeded.

That means having an awful lot of administration, or using a lot of information technology. Whichever it is, it means a lot of expense. At a time when police budgets, and indeed budgets across the whole public sector, are under massive pressures, I am not necessarily convinced that proper consideration has been made of the expense that will be associated with the administration of the process, however right and proper it is—and I do think that it is right and proper to have the ability to continue an investigation after the formal period of arrest or detention, or whatever it will be called, comes to an end.

Chief Superintendent O’Connor: I am a little bit confused as to whether we are talking about investigative liberation or interim liberation. Investigative liberation is where somebody is suspected of a crime, the 28-day period applies and various conditions can be applied; interim liberation, as I understand it, is where somebody has been charged and conditions can be imposed on the accused until they appear in court. Interim liberation is perhaps worthy of further discussion.

The Convener: Now—at this moment? Yes, please.

Chief Superintendent O’Connor: If that is okay.

The Convener: Yes, otherwise it will be left hanging in the air.

Chief Superintendent O’Connor: Currently, police officers have the power to grant an unconditional undertaking or undertaking with standard conditions when releasing accused persons from custody. Those can include not committing a crime, not interfering with witnesses, not behaving in a manner that causes or is likely to cause alarm, and complying with any other special conditions.

Under the bill, the thresholds that are associated with the application of the conditions to a written undertaking have been revised. Police officers continue to be allowed to grant unconditional undertakings to appear in court. Beyond that, an inspector or an officer of the rank of inspector can apply an additional condition where it is necessary and proportionate only for the purpose of ensuring that the accused does not obstruct the course of justice in relation to the offence for which he is being investigated. That moves on from the police powers that we currently have to prevent further crimes being committed. We can apply the standard and additional conditions, but the bill proposes having an inspector applying a condition only in relation to the charge that is under investigation.

The Convener: I understand—you are talking about investigative liberation as opposed to interim liberation.

Chief Superintendent O’Connor: I am talking about interim liberation.

The Convener: Okay, but investigative liberation can spread its tentacles further.

Chief Superintendent O’Connor: Yes, it can. It is very confusing.

The Convener: Yes, I have just been confused.

Assistant Chief Constable Graham: With your permission, I will try my best—as the whole bill is trying to do—to simplify things. I am grateful to David O’Connor for moving us on.

The Convener: I will give you points out of 10.

Assistant Chief Constable Graham: I think that release on undertaking is the term that is used for interim liberation—that is certainly the term that we would use.
With your leave, convener, I will come back to the point that was made about investigative liberation. We welcome the proposal and support the intent behind it, which is to minimise the time that people should be kept in custody, whether they are detained, arrested on suspicion or arrested subsequently. However, I agree with Calum Steele about its complexity and the systems that will have to be put in place. We have outlined the complexity and the detail of some of the costs of the systems. Like many provisions in the bill, it would require an information and communication technology system upgrade. There is complexity in managing that—complexity for people and a complexity of systems that will undoubtedly come with a cost—but we welcome the intent.

The Convener: What happens if, when investigative liberation has been granted in relation to a specific offence, you turn something else up that leads you to think that a different crime is also being committed?

Assistant Chief Constable Graham: That is not an unlikely scenario. Currently, when we are dealing with people for one crime, we may encounter another.

The Convener: What happens in those circumstances?

Assistant Chief Constable Graham: If the circumstances were connected with the crime that we were investigating, we would have to take it as a whole. In other words—

The Convener: Let us say that it was not; let us say that it was completely different.

Assistant Chief Constable Graham: We would deal with it separately and it may be that we would deal with it at that time within the constraints. We would not be able to add another 28 days on, as it were, and say, "We will take 56 days, because we have found another crime." That would clearly not be in the interests of justice or fairness, if that is the point that you were making.

Currently, if we have six hours and we uncover another crime, either we would deal with it later—we would come back and detain somebody at a separate time—or we would need to deal with it within the constraints of the other matter that we were already dealing with. In the same way, if we find a gun when we are out searching a house under a warrant that has been issued on suspicion of drugs, we might go and get a warrant to search further for firearms, because we now have that suspicion, so we would carry on and do that.

The Convener: But you cannot have a fishing warrant.

Assistant Chief Constable Graham: Absolutely. I imagine that it would be the same in these circumstances. I do not think that there is any detail of how such situations would be dealt with as a concurrent process under investigative liberation.

The Convener: My deputy convener does not understand this either, so she might make me not feel so foolish.

Elaine Murray: Under investigative liberation, what happens when we come to the end of the 28 days? Is it the case that the conditions are lifted but you can continue investigating? Or do you have to drop the case?

Assistant Chief Constable Graham: My understanding is that the conditions would fall but the investigation could continue. The period of 28 days has no doubt been chosen based on a judgment about proportionality. However, our concern is that, although that period is absolutely fine for a large number of cases, it would not be fine for a number of longer-running more complex cases. We have laid out the details of some of those cases in an appendix to our written submission. We would therefore contend that to put in place a system whereby we can extend the 28 days would mean that the conditions could be extended. Otherwise, it becomes a cliff edge that you fall off. The investigation continues but the—

Elaine Murray: The suspect would still be at liberty and the conditions—for example, there might be a curfew or they might be told not to go anywhere near the complainer or whatever—would fall after 28 days.

Assistant Chief Constable Graham: Arguably, the conditions would fall in a rather arbitrary way.

The Convener: John Finnie wants in. You have a look on your face that suggests that you disagree.

John Finnie: I am never sure when enough is enough. Will six months be enough, Mr Graham? Will a year be enough? For how long do you see that cliff being on the horizon?

Assistant Chief Constable Graham: We have not sought to put in a period for which the 28 days could be extended. Clearly, there would have to be a limit, but it would be reasonable for there to be a period beyond 28 days for the exceptional circumstances that we have highlighted in the appendix. Perhaps it would be another 28 days.

10:45

John Finnie: Would a judge, rather than a chief police officer, grant the extension?

Assistant Chief Constable Graham: It could be done either way. Different measures are in place for various sections in the bill and in various other pieces of legislation. Some decisions have to
go back to a court; sometimes a specific rank in the police is specified; sometimes it is a matter of guidance from the Lord Advocate; and sometimes it is for the police to make a decision about the matter. We have not made a specific recommendation, but we could work with either approach.

The Convener: I will go back to investigative liberation. Somebody has been arrested but—I have forgotten the term already—has not been officially charged although they are under suspicion and you have sent them out with conditions for 28 days. That relates to what you think they did, but what happens if, in the middle of that, you find something completely different that they might have done? The 28 days and the conditions apply to the first thing; what happens to the second? Do you have to bring the person back in, arrest them on suspicion of having done it and set another 28 days running because of the separate matter, which has nothing to do with the first job?

Assistant Chief Constable Graham: There might be circumstances in which it would be reasonable to do that.

The Convener: That is what I was trying to work out. It would not be connected at all. We could have two or three cases all with this technical stuff running.

Assistant Chief Constable Graham: That would be the same under the current system when somebody is detained, albeit that the timescales are far shorter. Clearly, the test of the fairness to the accused person when we get to court would have to be met. Therefore, if the circumstances were part of the same course of conduct, the police would not seek to commence a separate process.

The Convener: I appreciate that. I am being clear that I am asking about a completely separate matter—something never occurred to you and, “Oh, whoops, this has turned up.” I just want to understand how it would operate.

Margaret Mitchell: The Faculty of Advocates and the Law Society of Scotland believe that the period of investigative liberation should be reviewed by the courts. Would you like that to be explicit in the bill?

Assistant Chief Constable Graham: We would be satisfied if the period could be reviewed, depending on the timescale and the extension, by a senior police officer, but we could work with either system.

Margaret Mitchell: Does anyone else have a view on that?

Calum Steele: It never surprises me when the legal profession wants to have more work.

Margaret Mitchell: How cynical.

The Convener: Dearie me. I hope that you are never up on anything yourself, Mr Steele.

Margaret Mitchell: Elaine Murray mentioned Scottish Women’s Aid. It specifically wants there to be a requirement for the complainant to be notified of the suspect’s release on investigative liberation and of whether any conditions have been attached to the liberation. Do you have views on that request?

Assistant Chief Constable Graham: I would be happy if that was the case.

The Convener: It is a bit like bail conditions.

Margaret Mitchell: It would not be overly onerous but quite reasonable to do.

Assistant Chief Constable Graham: Yes, definitely.

Chief Superintendent O’Connor: To go back to a point that Calum Steele made, the impact of investigative liberation on police resources should not be understated. In addition, we will clearly need some form of technology for custody management to support the measure and track all the different investigative liberations throughout Scotland. Police Scotland needs to work towards that as we go forward.

Margaret Mitchell: Would you expect that to be built into the information technology system that Police Scotland is currently considering?

Assistant Chief Constable Graham: Absolutely.

John Pentland (Motherwell and Wishaw) (Lab): I have a supplementary question to the one that Margaret Mitchell asked about police resources. Calum Steele made a general comment that, sometimes, the cost and the resource will not be worth the benefits that we will draw from the bill. Does he believe that what David O’Connor asked for would be a waste of money?

Calum Steele: That is a loose paraphrasing of what I said. I am saying that the police service has little money at this moment, like every other public service. We might not necessarily suddenly materialise or magic up the money that will be required to develop the necessary IT systems, to bring about the changes and training that will be required and to put in place the staffing—the police officers or police staff—to manage the clocks or the times and to ensure that the timescales that apply to an investigation are not breached overall.

Taking a piecemeal approach would be a waste of time. Whenever anything is done piecemeal, it never works. By the time that the rest of the
service catches up with what is a very low common denominator many years on from the start, much of what is being used is invariably antiquated and further out of date than it was to begin with.

I make it perfectly clear that the practice of investigative liberation is a good thing in its own right. However, significant resources are required to make it happen smoothly—not just in a way that is effective for the police service but in a way that causes minimum disruption for the legal profession and for suspects. There is no indication of where those resources will come from.

**John Pentland:** You have given the example of investigative liberation. Do you have other examples of where danger might arise if the resource does not follow the bill? What will be the practical challenges after the bill is implemented?

**Calum Steele:** There are simple things. I go back to where we started, with arrest and detention. I am sure that Stevie Diamond will talk about this shortly, because he has intimate knowledge of the subject. Some computer systems that are used across the police service still require floppy disks. They are not just 3.5 inch floppy disks but 5.25 inch floppy disks—disks that are genuinely floppy. The notion that we could simply replace that just because we have to change the terminology and the process approach to arresting someone on suspicion rather than detaining them is fanciful.

Where such computer systems are not used—that is largely in more rural areas—and where we have paperwork and correspondence to go through, that is done methodically and logically. The notion that we will destroy stocks of paperwork just because of different terminology is nonsense. We are expecting to train people in what are essentially the same provisions in new clothes, which does not make sense either.

When the service has the least amount of cash resources, adding something that seems to deliver the least benefit seems particularly burdensome. That is difficult to justify when whatever resources are available could be used to deal with the ongoing challenges that the service faces.

**The Convener:** I see that Malcolm Graham and Stevie Diamond want to contribute. We will eventually come to John Gillies’s bit, which is the police negotiating board—we should bear it in mind that we have another part of the bill to ask about. Does John Gillies want to respond to John Pentland, too?

**John Gillies:** Yes, if I could.

**The Convener:** Has Mr Diamond spoken yet?

**Stevie Diamond:** Yes—once. I made a short comment.
resources, we must make it clear that the issues around checks and balances and review are not insignificant, particularly for inspecting ranks.

**Assistant Chief Constable Graham:** I agree with much of what has been said. The point about the dependency between the service’s ability to deliver an information and communication technology system that is fit for the service, in the shape that we are currently in, and the implementation of the eventual act, is absolutely key. That is a dependency that we have recognised from the outset.

Work is on-going to ensure that the i6 programme can be designed, at the stages that it is at, to encompass as many of the proposals in the bill as possible. Stevie Diamond made an accurate point, however, that we cannot design in those proposals with any degree of certainty until the bill becomes an act. The phasing is critical, and the dependency is clear. We do not want to have to put in place cumbersome and bureaucratic paper systems to service the needs of some of the complexities of the bill if we can design them into the ICT system that will be delivered after the time when, as I understand it, the bill may be enacted.

**The Convener:** You also have all your duties under the Victims and Witnesses (Scotland) Bill, which is coming up. That will require tracking for all the data and so on. Is too much being asked?

**Calum Steele:** I do not think that anyone watching this discussion would think that too much is being asked of the Police Service in what it is meant to give the general public. Sometimes, however, the burden, whether it is self-applied or applied by others with regard to how day-to-day policing activity takes place, can seem too much. In much of what is likely to come out of the bill before us, that burden is not insignificant.

**Assistant Chief Constable Graham:** Without overstating it, the bill is the most significant piece of proposed legislation since the Criminal Justice (Scotland) Act 1980. It is the largest proposed change to criminal justice, with the largest impacts on policing, since that time. The change is required, and we are supportive of what is in the bill, but there needs to be a recognition that a cost will be associated with it.

We have worked hard to assess and capture those costs accurately, as is represented in the financial memorandum accompanying the bill. I agree with everything that has been said and with the point that a lot is being asked, but the bill represents a generational change—it will not be a recurring event every two, four or six years. It is a generational change that we need to commit to for the right reasons, as John Gillies has said. It is about fundamental changes for human rights, for our society and for our legal system, ensuring a fair and equitable balance between the rights of those who are accused or suspected of crimes and the victims. We should commit to doing that properly.

**Chief Superintendent O’Connor:** It is a matter of timing. We are six months into the transition to Police Scotland, which is the biggest change in policing in Scotland that we have ever seen. On the back of that, we have one of the biggest changes to the criminal law in Scotland in a generation. I know that there is a longer run-in for the bill but, to return to where I started, there has to be the right understanding, knowledge and training for police officers and police staff as we go forward. It is a big ask, but it is doable.

11:00

**John Pentland:** I become a wee bit concerned knowing that the Scottish Police Authority has to save £72 million next year. We have heard about the bill being implemented successfully, but will its implementation be successful only if the money comes along to make that happen?

**Assistant Chief Constable Graham:** I can answer that very clearly. We articulated the costs in the way that we did because there are additional costs associated with the bill. As you rightly point out, it will be very hard, and increasingly so, for us to find those costs from within the existing budget that Police Scotland has been offered.

**The Convener:** Does anybody else wish to comment on costs or on resources in general, such as staffing?

**Calum Steele:** The question is slightly oversimplified. The bill’s success will very much depend on whether the right things are in it. The Police Service of Scotland’s ability to deliver on the bill’s expectations will absolutely depend on ensuring that the correct amount of money is given to the service to make that happen.

**Stevie Diamond:** We are already under huge financial constraints over the next two years. We agree that the bill is required and needs to go forward, but there must be a realistic expectation about when and how its provisions will be delivered and whether the funding will come from within the service.

**The Convener:** Are you disputing the financial memorandum?

**Stevie Diamond:** Not as such. We are saying that there must be a realistic period of time to deliver what the bill requires.

**The Convener:** Does anybody else want to comment on resources? This is your chance to tell us.
Chief Superintendent O'Connor: Everything comes at a cost, and we need to look at the bill's value in keeping people safe, improving services to victims, and improving the criminal justice system. There are conflicting priorities and competing demands with—dare I say?—an ever-reducing pot of money. Very difficult decisions have to be made by the chief constable, but for us, the bill has been costed and must be taken forward.

The Convener: I want to move on, because we are running into a long day and there are still questions on the police negotiating board for Scotland, for example.

Alison McInnes: I want to look at section 27 and post-charge questioning. Police Scotland has welcomed the proposal, but others, such as the Edinburgh Bar Association, have urged caution. Justice Scotland said that it “considers that the perceived value of post-charge questioning is overstated and is unsure of what value it will add in the Scottish context.”

Will Police Scotland give its views on why it has welcomed that provision?

Assistant Chief Constable Graham: We have given it a cautious welcome, as you pointed out. We do not have experience of post-charge questioning, but we have experience of wanting to do it on a number of occasions, particularly in serious and complex long-running cases in which the point of charge potentially comes at a stage in the investigation when there is still a large amount of investigative work to do, in fairness to the accused and in the wider interests of justice. To be able to go back with questions would not only further the investigation, but be deemed to be a fair opportunity, should an accused wish to provide more information than we had the opportunity to get at the first point of questioning. We welcome the proposal for those reasons.

Our best guess — this is a professional judgment — is that the approach would be used sparingly; it would not be used routinely in more straightforward summary cases. In all likelihood, we would use the tactic in consultation with the Crown, should the provision become enacted.

Alison McInnes: Is there any conflict with the European convention on human rights?

Assistant Chief Constable Graham: I do not see any conflict, given the way that the courts have laid it out and the argument for there being a proportionate balance in the justice system — on a case-by-case basis, obviously. As is the case with everything that the police do, that would be a test that the court would consider.

Alison McInnes: Is there any benefit in trying to limit and set out more clearly the circumstances in which that questioning could be done—for example, in dealing with evidence that comes to light after the charge is first brought?

Assistant Chief Constable Graham: That is clearly one set of circumstances. We sometimes wish that we had a device or mechanism for doing such questioning. In the first instance, it probably extends beyond such circumstances to more serious and complex cases in which, at times and due to the volume of material, the information might be there but we might not have got to it by the stage at which we require to put other processes in place. I do not think that we would want to be constrained to the specific limitation that you mention, but that would undoubtedly be one of the sets of circumstances in which what you suggest would be relevant.

Roderick Campbell: I want to go back to section 25, which is on consent to interview without a solicitor. Does the panel have views on the suggestion in section 25 that 16 and 17-year-olds who are not suffering from a mental disorder can consent to being interviewed without a solicitor with the agreement of a relevant person? Should they be allowed to waive their right to a solicitor?

Calum Steele: The abilities of 16 and 17-year-olds are a very topical issue. There is a debate on whether they should be allowed to vote. Well, they are allowed to vote, so they should know their own minds in that regard. However, I can understand why the argument can be advanced in both directions. There is, of course, the additional balance that in the criminal justice system there is a definition of when someone becomes an adult. I do not have an answer. I will leave that to the legislators.

Roderick Campbell: Thank you.

Assistant Chief Constable Graham: I share the concerns expressed by the Police Federation, and there is an additional concern about some of the implications. Circumstances might arise in which the police would, in effect, be instructing a solicitor on behalf of a person who had already stated, with questionable competence or otherwise, their desire to waive their right to a solicitor. I am concerned about how that would work in terms of who instructs the solicitor. I say that from the perspective of seeking to achieve the same aims as the bill seeks to achieve; indeed, they are the same as Lord Carloway’s aspirations. However, a technicality is involved that relates to the services of a solicitor being instructed by the police rather than the individual who rightly should be giving such instructions.

The Convener: Is there some confusion here? We have just completed stage 1 scrutiny of the Victims and Witnesses (Scotland) Bill and the age...
at which young people can be treated differently is 18. Why are we sticking with 16 here? A witness or an accused can also be a victim. Why are we not tidying this up?

**Calum Steele:** I think that that is a question for Lord Carloway. [Laughter.]

**The Convener:** Let me rephrase the question, Mr Steele, as you are being awkward with me. Do you want the age to be 18 or over so that it ties in with other legislation that we are putting through? Would that be sensible?

**Assistant Chief Constable Graham:** That is my point. As a result of the passage of time, there is now a mix of ages. European case law is fairly clear on the age of a child and some of our legislation differs from that because of history. Things would be clearer and operations would be simpler for sure if there was consistency around the age of a child.

There is a connected issue around the rights of suspects, whether children or adults, while they are in custody and the use of the appropriate adult scheme. The bill requires the police to ensure that an appropriate adult is made available for certain vulnerable suspects. I know that others have expressed a concern about that in their written submissions, and I emphasise our concern that, although that is absolutely the right thing to do and it is consistent with common practice, we have seen a huge increase in the number of requests for appropriate adults because of an enhanced understanding of the circumstances in which that is fair and proportionate. However, different schemes are in place in different local authority areas, and they are creaking at the seams. To impose such a condition on the police without any statutory requirement for there to be a scheme in every area could leave the police in a difficult position. It should not be our responsibility to supply that independent person.

**The Convener:** I am aware of the time and the fact that we have another panel of witnesses.

**John Finnie:** Can I ask a very brief supplementary on that point? Setting aside the bill, are there not huge challenges for the police service in identifying vulnerable people, with people sometimes coming forward after the event and identifying themselves as vulnerable?

**Assistant Chief Constable Graham:** That could undoubtedly be the case. However, we have never had more checks and balances at the point when somebody is questioned or detained, to ensure that we do everything that we can to identify whether we need to call on the services of somebody to offer support and independent advice.

**The Convener:** Is what is in the bill on the proposed police negotiating board for Scotland all absolutely fine and no problem? Do you have any comments about that? Is there anything that you are happy—or unhappy—about on that, Mr Gillies?

**John Gillies:** Police Scotland welcomes the creation of the PNBS. We are certainly pro collective consultation, with the opportunity for staff associations to get round the table to negotiate on key matters, as set out in the legislation. We have made submissions on elements of the detail that we think can be developed. For example, special constables are not included in the bill at this point. We have asked why, if specials are afforded the same equipment and clothing as regular officers, there is no specific reference to them. However, we are generally very supportive of the proposals. The Police Negotiating Board operates informally in Scotland, so it is just a case of taking that forward.

**Calum Steele:** The SPF and, indeed, the wider staff side of the existing PNB standing committees welcome the creation of a new police negotiating board for Scotland in its own right. However, in our view, the disbanding of the UK PNB is abhorrent and does a fundamental disservice to the fine women and men of the police service in England and Wales—and, indeed, in Northern Ireland, whose position currently remains unclear.

We submitted a fairly comprehensive response to the separate consultation on the PNB for Scotland, which closed on Friday of last week. I appreciate that most committee members have probably not got our response in front of them. We have some issues with the proposals.

This is not a point of debate between John Gillies and me, but in our view the issue of uniforms and equipment should not be negotiable: uniforms and equipment are either provided or not. Special constables are not covered because this is about terms and conditions—in effect, pay and rations. Unless a decision is taken to have salaried special constables, we see no reason why they should be covered by the proposed police negotiating board for Scotland.

The cabinet secretary has made some helpful comments about the shortcomings that currently exist in terms of the ability of the respective secretaries of state or, indeed, the Home Secretary to overturn the decision of an arbiter or an arbitration tribunal. An arbitration tribunal decision is binding on one side only: the staff side. We consider that to be manifestly unfair. The cabinet secretary has indicated that he would be willing to have binding pay decisions. However, although the legislation is structured in such a way that future cabinet secretaries can be bound, it does not necessarily bind Parliament. We need to
ensure that that is addressed in the bill, because although we might have confidence in an individual cabinet secretary’s ability to do the job, binding that individual to an agreement is not the same as having binding arbitration in its own right.

Although our response has many further lengthy elements, on the whole we are very supportive of the proposals, albeit that we see shortcomings in some areas that can be improved. It would be a massive lost opportunity if we simply took up what has been a broken system—certainly in recent years—that the Home Office has dominated for no purpose other than to ensure that the Government’s agenda is not breached. We must not just replicate that model in Scotland without trying to overcome some of its weaknesses.

The Convener: Mr Diamond, do you want to comment from your members’ point of view?

Stevie Diamond: We are not covered by the PNB.

The Convener: Right. John Finnie has a question.

John Finnie: Will the chief officers participate in the PNBS?

John Gillies: Our chief officers are covered by the current arrangement. The Scottish Chief Police Officers Staff Association is currently represented on the informal PNB. We envisage the SCPOSA continuing to be represented as one of the three constituent staff groupings in Scotland.

11:15

John Finnie: For the avoidance of any doubt whatsoever, am I right that the terms and conditions of all police officers in Scotland will be dealt with by the PNBS?

John Gillies: The Scottish Chief Police Officers Staff Association, the Association of Scottish Police Superintendents and the Scottish Police Federation are all covered.

Calum Steele: That is absolutely correct in terms of the proposal in the bill. However, it remains unclear whether the Scottish Chief Police Officers Staff Association will take the view that it should fall within the ambit of the Review Body on Senior Salaries. It is certainly the view of my association—David O’Connor will speak for himself—that if that was to happen, it would be a fundamental issue for the proposed police negotiating board for Scotland. If we lose very senior officers’ buy-in to the view that the negotiating mechanism is the right way of dealing with pay and conditions across the service, we lose a fundamental link in ensuring that there is a common, negotiated and fair approach to terms and conditions. An elitist approach could be created, from which some could infer that they were better than the rest. We think that that would be particularly damaging.

The Convener: Thank you. Given the pressure of time this morning, please feel free to write to me as committee convener with any points that you think perhaps we should have pursued, which I will then circulate to committee members. I have learned during this session that the expression that I must get into my head is “arrested but not officially accused”.

11:16

Meeting suspended.

11:22

On resuming—

The Convener: I welcome our second panel of witnesses: David Harvie, director of serious casework, Crown Office and Procurator Fiscal Service; Grazia Robertson, member of the criminal law committee, Law Society of Scotland; Ann Ritchie, president of the Glasgow Bar Association; and Murdo Macleod QC of the Faculty of Advocates.

Thank you for your written submissions. Again, I invite the committee to ask questions on the same parts of the bill as before. I know that you are all ready with your pencils sharpened.

Margaret Mitchell: One area that we did not cover in the previous evidence session was the authorisation for keeping in custody. The Faculty of Advocates and the Law Society of Scotland’s recommendation is that keeping a person in custody should be authorised by an officer of the rank of sergeant, as opposed to a constable. Could you say a little about why you consider that that should be the case?

Murdo Macleod QC (Faculty of Advocates): If I may, I will start by saying that the Faculty of Advocates is grateful for the opportunity to give evidence and to assist the Justice Committee with its scrutiny of the bill. We support the simplification, clarification and modernisation of the law of arrest and detention in Scotland. We have made certain comments in writing, which I hope we can discuss, on 14 of the 56 sections in part 1, but in broad terms the faculty welcomes the thrust of the reforms set out in part 1 and the general direction of travel. Any criticisms will, I hope, be largely constructive.

The Convener: We always view criticism from the faculty as constructive, notwithstanding comments that have been made by other witnesses.
Murdo Macleod: With regard to Mrs Mitchell’s question, which I think is directed to section 7 of the bill, I think from recollection that the proposal is that it should be someone of the rank of constable who determines whether an arrestee should be kept in custody.

However, section 9, on “Review after 6 hours”, which is another innovation, indicates that continuing detention is to be reviewed by someone “of the rank of inspector or above”.

It is quite a leap from constable to inspector, so we suggest that, rather than having a police constable look at what another police constable is doing, it should be done by a sergeant, who would of course be senior to the rank of police constable.

Margaret Mitchell: There seems to be a certain consistency in that proposal. Do any of the other panel members—

The Convener: Yes. Sorry. I was just going to ask that. Ms Robertson is first.

Grazia Robertson (Law Society of Scotland): The Law Society of Scotland, too, welcomes the opportunity to address the committee today on the Criminal Justice (Scotland) Bill. On Mr Macleod’s specific point, the duty sergeant, as he is known, currently takes decisions with regard to keeping people in custody and releasing people on bail undertakings—he has responsibility for those tasks at present. We felt that it would be more appropriate for someone of that rank to have the obligations as stated in the bill.

The Convener: Do other panel members want to comment?

David Harvie (Crown Office and Procurator Fiscal Service): This is obviously a matter directly for Police Scotland, but it is my understanding that, as my colleague said, in respect of primary custody sites decisions are taken by custody sergeants; at secondary sites, which are sometimes opened up if there are large numbers, the most senior officer may be a constable rather than a sergeant, but my understanding is that decisions are referred to a custody sergeant. So, at present, regardless of whether the senior officer is a constable or a sergeant, the decision is always taken at sergeant level. It would be a matter for Police Scotland, but I wonder whether the proposal from the Faculty of Advocates would have any significant impact on Police Scotland’s current process. It would appear that in practice the decisions are taken at sergeant level, regardless of whether the person is at the site or not.

Margaret Mitchell: The bill would open the possibility of decisions being made by a constable, which is not the case at present. It is a fair point to have raised.

David Harvie: Indeed.

Ann Ritchie (Glasgow Bar Association): This is perhaps a bit of a notional concept, but I wonder whether a police officer of any rank in a busy police station on a Saturday night would be likely to overrule the investigating officers. It is likely that the officer would take their lead from those who had investigated the case. I wonder how many times the decision of those who bring a person into custody by arresting them on whether the arrestee should be retained in custody is likely to be overruled. I would be surprised if that happened very often.

Margaret Mitchell: Would you nonetheless welcome the proposal that the decision should be taken by a duty sergeant?

Ann Ritchie: I do not think that the decision should be taken by someone of a similar rank; it should be taken by a higher-up sergeant or inspector.

Margaret Mitchell: That is helpful. Thank you.

Elaine Murray: I would like your views on the 12-hour limit. Police Scotland believes that the current capability of extending the limit to 24 hours should be retained for exceptional circumstances, whereas other organisations argue that it should not be retained. Indeed, I believe that the Edinburgh Bar Association suggests that we should reimpose the six-hour limit. I invite reflections on that issue.

Murdo Macleod: The faculty is content with the 12 hours and welcomes Lord Carloway—I think he started this off—reining in the 24 hours, which was the response to the Cadder case in the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. If one looks carefully at the responses, one sees a thread, namely that 12 hours would be sufficient. Of course, that consists of six hours, then a review of six hours. One would imagine that that would be pretty readily granted in the circumstances by a senior officer of the rank of inspector or above.

All that I would say additionally is that they would of course still have the 28 days, during which a person could be released and the police could impose conditions which, if allowed—I am sure that we will come on to discuss them—could be quite stringent. The hours limit is not the end of the road as far as the police are concerned.

Grazia Robertson: The Law Society’s position is similar to that of the Edinburgh Bar Association in that we feel that six hours is a sufficient and proportionate time for the police to carry out their tasks, although we acknowledge the arguments in favour of 12 hours.

We welcome the fact that the bill proposes at least to curtail the period of time to 12 hours, as
opposed to extending it further, in recognition of the fact that it is the restriction of someone’s liberty. As Lord Carloway said, the measure should be taken only when there is an absolute necessity for it. However, the Law Society echoes the position of the Edinburgh Bar Association and feels that six hours is appropriate.

11:30

David Harvie: The Crown Office’s written submission suggests that, given the small number of cases that we are talking about—Police Scotland has indicated that we are looking at only 0.4 per cent of all persons detained—there is an argument, in the most serious cases involving the most complex investigations, for there to be the possibility of the period being longer than 12 hours. Police Scotland’s written submission is helpful in providing comparators from other parts of the UK. There is no suggestion that the power that is currently available to the police to detain someone for up to 24 hours in top-end investigations involving only 0.4 per cent of all persons detained—which Police Scotland says equates to one person every two and a half days—is being used excessively. In those instances, they have found that necessary and proportionate to further the investigation.

Roderick Campbell: I refer to my registered interest as a member of the Faculty of Advocates.

My first question is of a general nature. Does the panel think that the bill as drafted is keeping up with the thrust of developments on the European convention in the European Court of Human Rights case law? Are there any respects in which the panel thinks that we might not be up to speed?

Ann Ritchie: I think that it is—the bill is certainly attempting to be up to speed. The Cadder case did not result in suspects being provided with some added advantage of having a right of representation in a police station. I would be concerned if the committee thought that there was anything other than the minimum protection that is required to secure a fair trial and that a rebalancing exercise was required because suspects are obtaining the advantage of a solicitor when they are in custody, resulting in our having to do something like remove the requirement of corroboration, although I appreciate that that is a separate issue. It is not about that. I ask the committee to be aware that the rights of the suspect in the police station are the minimum protections required under the ECHR, rather than something that needs to be offset with, in effect, some disadvantage.

Grazia Robertson: The ECHR provisions were in our minds when we formed our response, and that is indicated in the comments that we have made on the provisions in the bill. I commend to the committee the written submission that you received from the Scottish Human Rights Commission, which focuses on the ECHR provisions. It is useful to see how those fit with the bill as it is drafted.

David Harvie: Rather than look at this as an incremental response to recent case law, it should be regarded as an opportunity to do what Rod Campbell describes, which is to ensure that the system that we are all seeking to operate is a just and fair one that will be convention compliant. We welcome, for example, the phraseology in section 10, which, reading across, makes direct reference to some of the provisions in article 5 regarding the checks and balances that are included in relation to judicial intervention and review at particular stages during the investigation process, which are new.

You asked what I felt about the bill in its entirety, and there is one thing that I would pick up on. I missed the beginning of the conversation involving the earlier panel, but I know that there were issues around the powers of a constable and the fact that, when someone has been arrested, detained or whatever we eventually decide to call it, it will be necessary to take them to a police station.

I wonder whether, in circumstances in which, for example, evidence comes to light prior to getting to the police station that the person in custody may be the wrong individual, the strict terms of the bill as drafted might mean that the person has to be taken to a police station even though at that stage they are no longer under suspicion.

Murdo Macleod: Section 5(3) refers to a European directive. That is about the letter of rights, which the committee will be familiar with. The European directive on rights of access to a lawyer is coming in shortly, although Britain may not opt into it. That is not clear, but there have been indications that we may attempt to follow the majority of implementations. The bill as drafted attempts to fall into line with both those directives and with Cadder and the lessons learned from that.

I agree with Ann Ritchie, who makes an important point. Giving rights to the accused, such as a reduction in the amount of time that they can be in custody, is not a quid pro quo for the abolition of corroboration. Those are standalone provisions that, in the faculty’s view, would have had to be enacted in any event.

Roderick Campbell: Do you have any brief, general thoughts on how the letter of rights provisions are working at this early stage?

Murdo Macleod: They came in only in July but, as we have said in our written submissions, we
would direct the committee’s attention to section 5(3), which is the Government’s attempt to say that the terms of the letter of rights directive must be implemented and that the arrestee “must be provided as soon as reasonably practicable with such information (verbally or in writing)”. We would say strongly that that information should be given both verbally and in writing.

It is an unfortunate but inevitable consequence of the state of Scottish society that many arrestees or people who are brought into custody have literacy problems. They may also be frightened by what has happened, and it seems only fair to us that, rather than simply being handed a letter with the seven rights on it, the rights are also read out to them. It would not take long, and that is after all what happens when you are cautioned by the police. You do not have to say anything.

The Convener: Is it not the case that you have to understand the process—whether the problems are to do with literacy or language—or the process could be at fault?

Murdo Macleod: Precisely.

Ann Ritchie: There are studies that show that information that is given verbally and in writing is more easily understood, and that is important if we are trying properly to protect the rights of suspects in a meaningful way.

Sandra White: I do not know whether members of this panel heard the evidence of the previous witnesses, but we got into a good discussion about detention and arrest. I note that the Law Society of Scotland is questioning whether the need for change has been demonstrated, and I believe that that is what Calum Steele also said. What are your thoughts on that? I cannot quite get my head around the need for change, either.

Grazia Robertson: I was interested to hear the police officer Calum Steele’s comments and also the response from committee members. It is my view that someone who is not officially under suspicion or investigation, or whatever the precise term is—

The Convener: That is it. One cannot remember.

Grazia Robertson: Well, I try to remember it and then I forget it.

If we are trying to simplify and modernise, I find that concept particularly difficult. Lord McCluskey said that law should be kept simple, if only for the benefit of the profession. I know that he was making a joke, but the real point is that we as solicitors have to explain to our clients what it all means. If you tell someone that they are not officially accused, but they then undergo an interview in which questions are put to them that in effect accuse them of various offences, it becomes difficult to know what their status is.

You will see from the Law Society’s written submission that I am sympathetic to the points that Calum Steele raised. The Law Society cannot see a reason for the change that makes sense in relation to simplifying things. I can see that it would change things, but not that it would necessarily simplify or modernise them. I suggest that the system, as changed in the light of Cadder, seems to have bedded in well and to be working well.

Ann Ritchie: I agree. I wonder whether it is necessary to legislate or whether changes and improvements could be achieved through recommendations or Lord Advocate’s guidelines. The committee should think about the law of unintended consequences. I am concerned that things could be introduced under the bill but then forgotten about. There needs to be some sort of meaningful review. If the bill was enacted in its present form, how its provisions worked would very much depend on the manner in which the police enforced them.

There are a number of consequences to the bill, not least for the legal aid system. My understanding from the Scottish Legal Aid Board’s submission is that there is no parallel at present for all the pre-charge work. For the most part, the trigger for legal aid is the service of prosecution papers and, as I understand it, any change to that will require changes to primary legislation. There are many factors that it would be easy simply to overlook in the vigorous move to pass the bill to be ECHR compliant.

The Convener: With respect, I was not about to overlook that. I was looking at section 24 and the provisions about times and the right to have a solicitor and I was going to ask about the issue, but we will come back to it, including the implications for the Scottish Legal Aid Board and firms in terms of costs and resources.

Do others want to comment on whether we need the change in the first place? Are we not better off where we are?

Murdo Macleod: I will strike a different note from that of my two colleagues. First, I should qualify what I say by recognising that they meet clients regularly and discuss things with them, which is one step removed, as it were, from where I and my colleagues come in. However, the Faculty of Advocates believes that the proposed change would simplify matters. My colleagues might have a better take on this, but might it not be the case that, if someone is told that they are not officially accused and then their status changes and they are officially accused of something, that is simpler than our saying to them, “You’re
detained under section 14’, “You’re here by virtue of a statutory warrant” or “You’re here by virtue of a common law warrant”? I respectfully suggest that the proposed change will simplify matters.

Following Cadder and the sequelae to that, it seems to me that the distinction between detention and arrest is almost academic anyway, because people are now entitled to have their solicitor present with them during detention as well as afterwards. We are in favour of the adoption of the change.

David Harvie: On whether there is a requirement for simplification, I brought with me a couple of pages from Renton and Brown, which many of you will be familiar with. I pause simply to observe that the first comment under “Common law offences” is:

“It is difficult to state clearly the common law regarding arrest without warrant”.

When one looks under “Statutory offences”, it starts with:

“It is not clear what common law rights the Scots police have to arrest without warrant for statutory offences.”

That is the starting position as far as the main textbook on criminal procedure is concerned.

I welcome, and the Crown welcomes, the attempt to make the procedure more straightforward. I take the point that was raised earlier about perception and the use of language in relation to sections 1 and 2, but the underlying aim of those sections is to provide one system in which, if there is reasonable suspicion, an individual has a particular status. I support the aims of the bill in that endeavour.

Sandra White: For me, Murdo Macleod hit the nail on the head in what he said about perception. He may have heard what the previous panel said about that.

I am interested in something that Ms Robertson said. I keep saying this, but I am not a lawyer and I do not have a legal background. Ms Robertson, you talked about making the law easier for people who are engaged with it, be they witnesses, victims or even accused. I thought that you said something quite interesting—

The Convener: She said many interesting things.

Sandra White: Yes, but the one that caught my interest was that you had to explain to clients their rights and that they might be accused of certain things. Could you expand on what happens at present if someone is detained, and what difference it will make if the bill comes to fruition and people are arrested? What did you mean by what you said?

11:45

Grazia Robertson: I was simply saying that the procedure at the moment is to explain to the client that they are detained, and to advise them of their obligations and what powers the police have in relation to that. There is then a natural change in the person’s status after the period of detention: they are either released or charged, or they might be simply released and told that the procurator fiscal will take a decision. That procedure is well established and there is a flow that can be explained to the client.

Under the bill, we will have to say to someone that they are now of the status of being not officially accused, but their power to leave the police station is curtailed and they will be asked questions in the course of a police interview that will necessarily make accusations against them.

At present, at least, the whole purpose of the interview is for the police to say that the person is there in connection with, for example, a charge of assault. Accusations are then presented and he or she is asked to comment on them, although the person can choose whether to comment.

The term “not officially accused” seems clumsy at the least. Does it serve a purpose and does it enhance or progress matters? From the provisions, we cannot see how matters are progressed or how the current system is enhanced, particularly given that the system was changed and improved relatively recently in light of the Cadder decision. Procedures are now in place that in our view seem to work well.

The Convener: Does anyone else wish to comment on the issue? I think that it is troubling the committee.

Ann Ritchie: I appreciate that I might appear to be excessively critical of some provisions of the bill, but I am trying to put forward the perspective of the Glasgow Bar Association and our members, who are at the coalface and who go into police stations on a daily basis—I do that, too.

To answer the question, we could look at section 5, for example, which is called “Information to be given at police station”. That is information to be given to a suspect or arrested person. Sections 5(1) and 5(2) are drafted in a way that is excessively complex, bearing in mind that section 5 relates to information that is to be given to an arrested person whose solicitor has not yet arrived at the police station—in effect, it involves telling them that they have the right to a solicitor. I appreciate that not many suspects will go home and read the law but, although the bill is supposed to be an improvement on the present law, what would the man in the street think if he looked at section 5 and was told that those are his rights if he is arrested? If anybody can assist me to explain
in layman’s terms what that means, I would be grateful.

I deal with legislation every day, but I find section 5 incredibly and unnecessarily complex. I wonder whether introducing such complex legislation could on any view be deemed to be an improvement. Section 14 of the Criminal Procedure (Scotland) Act 1995 provides fairly straightforward rights on which we can advise clients. At present, detention is for up to 12 hours, and section 14 provides a statutory formulation of a suspect’s rights. It is clear that they have to give their name, address and date of birth. Section 5 of the bill sets out the information that is to be given to suspects, but I have to say that I cannot see how it will improve the situation.

The Convener: So how much of the bill would you delete? I mean that seriously: which sections would you suggest?

Ann Ritchie: I do not think that deletion is the right word. The provisions should be rephrased and set out in clear terms. Basically, section 5 needs to lay out that a person has a right not to say anything and a right to access by certain people, and it should name those people. The cross-referencing makes that very difficult. If the section was handed to a member of the public walking past the building today, they would be none the wiser as to their rights.

The Convener: I take it that you would substitute detention for arrest—detention should make a reappearance. From a person’s point of view, there is a watershed between detention and arrest. They know that they are moving into a different zone. To talk about arrest with that phrase that none of us can remember, and then change it to arrest with that other phrase, is difficult to follow.

Ann Ritchie: I have perhaps strayed from the original issue, but section 5 is about giving suspects rights. Perhaps someone else here can assist me by explaining how I can put that in a nutshell.

The Convener: Should we perhaps substitute “arrest” with “detention”? The process itself may not be at fault entirely, but perhaps the terminology makes it complicated. If the provision referred to “information to be given on detention”, that would begin to adjust matters a little. I am putting the issue very broadly, but is that the point that you are making?

Ann Ritchie: That is not really the point that I am making. Regarding whether we need to change from the present situation, under which a suspect is “detained” to one in which the suspect is “arrested”, Mr Macleod has indicated that the Faculty of Advocates thinks that such a change would be a good move and Mrs Robertson has said that the Law Society takes the view that it is perhaps not necessary. I am suggesting that the change is perhaps not necessary because the detention procedures are fairly clearly understood at present.

Grazia Robertson: One extra point that I want to make relates to our criticism that the bill is full of legalese. Words such as “detained” or “arrested” are quite easy for people to understand. We are always striving for the law to be more understandable.

David Harvie: Without wanting to go back over the definitions of “arrest” and “detention”, I want just to clarify the point that was raised about section 5. I appreciate that section 5 has been drafted in such a way that it cross-references to a number of different sections, but as I read it the person will be told verbally and/or in writing—depending on whether the committee picks up the legitimate point that the Faculty of Advocates has made about how people understand information—that says, “You don’t need to say anything. You have the right of access to a solicitor. If you happen to be of a particular age, you can have the right to have another person to assist you.”

Regarding section 5(3), those are the kinds of things that I would have thought would be necessary from a convention perspective and from a European Union perspective. If any of us found ourselves in a situation where we were taken to a police station, we would want to know those things. The unobjectionable intent is to say to people before the solicitor even arrives, “This is the basic information that you need to know about what your rights are.” Therefore, I do not think that the section needs to be deleted. I think that the section is one of the key foundations that makes the bill convention compliant.

Murdo Macleod: I have some sympathy with my colleague Ms Ritchie on the need to flick through the bill to get to the relevant qualification or section. Unfortunately, however, many pieces of legislation are like that. Even the Criminal Procedure (Scotland) Act 1995, which is our day-to-day guidebook, is full of alterations and amendments.

I will play devil’s advocate, if I may. Although we did not make this point in our written submission, I think that the arrestee—or whatever you call the person who has been arrested—will have a letter of rights that sets out all their rights. I am not at the coalface, but I am not sure that an accused would be poring over section 5 in any event. The accused will just want to know what their rights are, and they will derive that knowledge from the letter of rights that they are now given as of two months ago.
The Convener: They will be more worried about what will appear in the local paper, given the terminology.

Margaret Mitchell: I have a question specifically for Mr Macleod and Mr Harvie, who have both indicated that they are in favour of the simplification in the new provisions on the power of arrest.

Do you have any concern that an unintentional consequence of the new powers-of-arrest definitions—I can only assume that this is unintentional—is that the power of arrest to prevent a crime is not explicit in the bill? Do you have a view on that, given that the Police and Fire Reform (Scotland) Act 2012 places a specific duty on constables to prevent crime?

David Harvie: I do not know what the intention is in relation to that and I do not know whether it is an omission. However, from a public interest perspective and a convention perspective in terms of the rights of the public in a broader sense, the power would be a crucial element in enabling the police to intervene at the appropriate time if it is necessary to prevent criminality from taking place.

As we know, there are a number of occasions on which the police might have evidence of conspiracy to commit an offence that has not yet taken place. Therefore, it would seem sensible that the power of arrest or detention—or whatever it is eventually called—applies in those circumstances.

Margaret Mitchell: If it was not included, would you shift your view from being in favour of the simplification to supporting the status quo?

David Harvie: I suppose that as a prosecutor I would seek to argue that, if it was a conspiracy, the people were already committing an offence and, therefore, we could arrest. I would seek to work within the legislation.

Murdo Macleod: Or, indeed, an attempt to commit an offence.

David Harvie: There would be ways of arguing it, but I agree that it is not explicit in the bill.

Margaret Mitchell: Surely the fact that we are even having the debate defeats the argument that it is a simplification.

David Harvie: I said that I supported the intention to simplify. There was some informed discussion earlier about perception and use of terminology but, to go back to the Renton and Brown position that I quoted earlier, the key textbook acknowledges that the overall position on common-law arrest and how it relates not only to common-law offences but to statutory offences is not straightforward. Therefore, the attempt to simplify it is most welcome. The bill goes a long way towards that, but part of the reason why we have this process is because there are opportunities to refine the thinking.

Margaret Mitchell: That is a huge distinction and a welcome one—supporting the attempt to simplify without stating that the bill does that.

Murdo Macleod: It is not something that we had addressed previously but, echoing to some extent what Mr Harvie says, I notice that section 1(1) says that a person can be arrested if they have committed or are committing an offence, so there is a power for the police to stop someone in the process of committing a crime. As Mr Harvie says wearing his prosecutor’s hat, if someone is conspiring to commit a crime or even attempting to commit a crime, they could be arrested at that stage. However, I take Ms Mitchell’s point.

John Finnie: I have a question about section 23, “Information to be given before the interview”. We have received evidence from the Scottish Human Rights Commission, which “welcomes the requirement for the information to be given on arrest, set out in Section 3.”

However, it goes on to say:

“the Commission is of the opinion that the suspect and his solicitor should be informed prior to interview of the content of the ‘reasonable grounds for suspicion’.”

I concur with that view. Do the witnesses have a view on it?

Murdo Macleod: I concur with it. Considering the coalface, my understanding is that some information can be given to solicitors when they attend at the police station, but I am not sure whether that is codified anywhere.

What the commission suggests seems sensible, but the Faculty of Advocates also finds peculiar subsection (2) of section 23, which concerns the caution and which says that, “Not more than one hour before” the commencement of the interview, the person should be cautioned that they need not say anything.

We submit that that should be amended to say, “Not more than one hour before and at the commencement of any interview” because, currently, as you will all be aware, at the beginning of the interview—many are tape-recorded—the arrestee would be cautioned that they need not say anything. Sometimes, that caution is repeated. That should happen at the commencement of the interview as well as “Not more than one hour before”.

Ann Ritchie: It strikes me that the caution that is mentioned in section 23(2)---

“that the person is under no obligation to say anything”---
states only half of the present common-law caution, which is that they are under no obligation to say anything and that anything that they do say may be noted and may be used in evidence.

I do not know whether that is simply an omission but I suggest that, under the present law, if that was the limited nature of the caution—just to advise that they are not under an obligation to say anything—the answers to any questions given in interview would be deemed to be inadmissible as unfair. I wonder whether an addition should be made to the caution to say that any information that is given may be used against the person.

12:00

Grazia Robertson: The Law Society view on the information that is to be given is that, to make the interview with a client meaningful, it is necessary to have a certain amount of information to be able to advise them. It is then that a solicitor’s private consultation with their client has some meaning and significance and serves its purpose. If the solicitor has no information, or very little information, the private consultation will be of no great assistance to the client and, to a degree, will not fulfil its purpose of providing legal advice. It is essential that the solicitor has a certain amount of information.

As a practising solicitor, when I go to a police station, I ask police officers for information and I am usually provided with sufficient information to allow me to give some meaningful advice to my client. I do not think that that has been a problem to date.

With regard to cautioning, on a practical level, when a solicitor attends for interview with their client, the caution is repeated on tape, as Murdo Macleod indicated. That is done for the protection of everyone, including the police officers. It ensures that there is evidence that they are performing their function properly, and it is also a reminder to the client of the very important protection that they need say nothing but that, if they do say something, it may be used in evidence. Again, that is working well in practice.

Ann Ritchie: I have found that the practice on how much information is given varies with different police officers. Recently, I have been in situations in which the police officers have simply stated that I would become aware of what evidence they had through the questions that they asked. To my mind, that is pointless. In such situations, as Grazia Robertson indicated, the pre-interview consultation becomes meaningless. My advice to the suspect would have to be that they should make no comment, on the basis that I have not been given any information on what the case against them is. The practice seems to vary. Full disclosure would assist.

Grazia Robertson: I am not trying to jump on the next bandwagon, but if the provision to abolish corroboration were to come in, our advice might well require to change in that pre-interview consultation. There are many factors that, in due course, would indicate that a certain amount of information would be required from the solicitor for him or her to perform their role properly.

The Convener: There will be an opportunity to have a big bite at corroboration at a later stage.

Grazia Robertson: Not by me, but I am sure that my colleagues will be here.

The Convener: I was referring to the various professions as well as others.

Murdo Macleod: I think that the provision of information to arrestees is of crucial importance; in our view, it is, to some extent, neglected. For example, with regard to investigative liberation, it seems to us that when a person is liberated—when they are not officially accused—they should be told, in essence, what Grazia Robertson tells us that she has been told by some police officers. That should be done on a formal basis—the arrestee should be told what it is that he is suspected of having done and what the evidence is. Without that, the appeal to the sheriff that is provided for at two stages would have to be heard in vacuo, with the defence having no understanding of what the evidence was against the arrestee.

Following on from what Mr Finnie said, I believe that the provision of information to the accused at various stages of the process must be catered for.

The Convener: Before we move on, I am minded to drop item 6 on the agenda so that we can have a good cross-examination of the panel that is before us and deal with the other items on our agenda. Next week’s meeting will not be too long—we will hear from two panels—so we can consider the draft report on the Tribunals (Scotland) Bill then. I am also mindful of the fact that many committee members will speak in this afternoon’s debate, which will probably start at about 10 past 2. Are members happy with that?

Members indicated agreement.

The Convener: I just wanted to alert members. “Don’t panic,” as someone once said.

John Finnie has a supplementary question.

John Finnie: I want to clarify a couple of points with the panel.

Will the issue of the caution require to be dealt with in the bill? Process-wise, could there not be a series of cautions throughout the process?
We have also heard about the Lord Advocate’s guidelines on the retention of people in custody. Would your associations have routinely been consulted on such matters or, indeed, would there be any benefit in being consulted on them?

Ann Ritchie: No.

Grazia Robertson: No.

Murdo Macleod: No is the answer to your second question.

Your first question brings us back to the point made, I think, by Grazia Robertson about the ongoing process and the fact that the caution is repeated various times. As you will know yourself, Mr Finnie, the caution is repeated when, for example, there is a rest break. However, the bill seems to say just that the caution should be made not more than an hour before the interview, which I am very curious about.

Ann Ritchie: If the bill is to improve the status quo and what we have at present, I see no reason why the full caution should not be stated in it. It seems fairly simple.

John Finnie: Some people might take the jaundiced view that it is down to the involvement of the Scottish Human Rights Commission. Is it your view that the interests of justice are served if there is equitable treatment?

Murdo Macleod: Undoubtedly—and it cuts both ways. If someone is not properly cautioned, is not following the proceedings and is not reminded of their statutory duties, it might lead to an appeal in due course. It is therefore to everyone’s benefit that the rights are reiterated.

Ann Ritchie: There is no great advantage in having suspects being acquitted on what the public would deem as technicalities. That is not particularly satisfactory for any party.

Grazia Robertson: I agree.

David Harvie: I did not envisage section 23 as meaning that a caution would be administered off-tape—for want of a better phrase. If that is what is envisaged, it does not help anyone. Given that this is a process in which an individual goes through a number of stages, my reading of the section was that as and when an individual is told that they can have a solicitor they will also be reminded of the current position. Equally, I would expect that, at the commencement of any interview that is being recorded, the person will be reminded of their status and the caution.

Alison McInnes: Scots law has traditionally prohibited any questioning following police charge. However, section 27 introduces the idea of post-charge questioning, and a number of people who have submitted written evidence have questioned the value of such a move and its compatibility with the right to guard against self-incrimination. What are the panel’s views on that point?

Murdo Macleod: The faculty is relatively relaxed about that. I think that I am right in saying that an application for further questioning after the person is officially accused must be run past a sheriff. In other words, it must be justified and cannot be done on some spurious basis; given that a solicitor has to be present during any subsequent questioning by the police, we think it unlikely that there is any great scope for miscarriage of justice. It would be a counsel of perfection to say that such questioning should always be done in front of the sheriff.

I came in at the end of the previous evidence session, but I heard one of the police officers who was giving evidence say that it would rarely happen. However, if it was not the norm—one can understand how it would not be the norm, given the pressures that the police are under and the limited time that they have—and if they went through this process in the knowledge that they had more time to do it, it might clog up the courts a bit if it always had to happen in front of a sheriff. We will have to see what happens, but we are satisfied that the checks—namely, that the application has to come before a sheriff or, in the High Court, a judge and that a solicitor will be present and able to advise the arrested or, indeed, the accused by that stage not to say anything if that is thought appropriate—meet the issues that you have highlighted.

Alison McInnes: You see no need for any further protections or safeguards such as full disclosure.

Murdo Macleod: The reasons for making the application would obviously be ventilated in court and one would expect the defence and the sheriff to ask about the nature of the further inquiries.

Ann Ritchie: I see no need for the proviso at all. If exculpatory evidence became available in the course of an inquiry after a person had been charged, it would be disclosed to the defence. Is it being suggested that, if the accused person was questioned formally about that, a prosecution would simply be dropped if they came up with a response to it? I find that very unlikely.

On the other hand, if incriminatory evidence were to be obtained from the accused, there is a question whether that procedure would fall foul of article 6 of the ECHR and the right against self-incrimination after charge. Regardless of the outcome of that questioning, I cannot see how it assists either the prosecution or the defence. In my view, it is unnecessary.

Grazia Robertson: I think that the Law Society’s submission sets out our view that we are opposed to post-charge questioning on principle.
There comes a time when the Crown must be put on notice that it is its obligation to prove the case against the accused, and when the accused can no longer be obliged to, as it were, facilitate his own conviction.

However, there is also a pragmatic element to all this. For example, when the police officers were discussing certain aspects of the bill, they mentioned the difficulties of carrying out these procedures and how cumbersome and time consuming they might be. As envisaged, this authorisation will involve an application to the court that states that the person accused has an opportunity for representation. I assume that that would happen by way of a solicitor because it seems unfair to make the person speak on his or her own behalf, but that means that it becomes another hearing. Mr Steele said—very light-heartedly, I am sure—that lawyers are always looking for more business; I would respond equally glibly that police officers are always looking for more power, and there comes a time when that must stop and someone must say, “We will not assist you any further—you are on your own to prove the case and investigate it appropriately.”

Both in principle and on a pragmatic level, what is envisaged is cumbersome, will make things somewhat bureaucratic and will result in our being back in a police office with our clients, presumably in a large majority of cases advising them to make no comment.

The Convener: I cannot get my head around the information in the financial memorandum about the costs of all this to the Scottish Legal Aid Board. On page 72 of the memorandum, for example, it is estimated that the additional costs of breach of liberation proceedings will amount to £863,000 per annum.

Grazia Robertson: With regard to the costings, I also heard the police officers say that post-charge questioning would be used in very rare and serious cases, but the bill itself refers to matters before a sheriff or on indictment. In other words, it envisages the power being available for relatively less serious matters. With regard to SLAB, however, we cannot comment on what it has in mind by way of giving assistance.

The Convener: The figures are not from SLAB but from the financial memorandum, which the Government has to produce to let us know what the bill will cost. On page 72, it says that the additional costs of

“police or procurator fiscal liberation”

will be “£863,000 per annum”, while on page 74 there is a stream of costs related to the

“financial impact on the Solicitor Contact Line”,

the highest of which is nearly £2 million. On another page, there is a table setting out

“costs for SLAB resulting from additional prosecutions”,

the high estimate for which is nearly £8 million and the low estimate nearly £1.5 million. Those are big figures.

Grazia Robertson: They are, but they are probably more guesstimates than estimates. Other estimates for other provisions have traditionally been very rough, and I suggest that there might be some caution in those figures.

The Convener: The estimate for one of the costs runs from £1.5 million to £8 million, which is a huge range. My point is that, given the pressures on the criminal legal aid bill in particular, substantial pressure will be embedded in everything that now has to happen for people to have legal representation at the various testing stages in the process that is set out in the bill.

Grazia Robertson: The Law Society represents not only the public but its members, who are solicitors, and we would be very concerned if any pressure was brought to bear on solicitors to effectively have their funding cut to enable them to represent their clients and ensure that they fulfil their obligations under the bill. The Law Society is obviously concerned about how funding is envisaged.

I recall the comments that the police officers made in relation to certain elements. They said that costing should not always be an issue, and I agree. We cannot always decide not to proceed with something simply because it might be expensive. However, there has to be a balance, taking into account whether what you intend to introduce is necessary, proportionate and of value, and whether it assists in the administration of justice. If there is little value in the procedure, it has to be weighed up against the potential costs.

12:15

David Harvie: I will pick up on the point about costs, and then address one or two of the earlier points.

If one considers the costs of the justice system in its entirety, if there were to be some benefit to narrowing down the points at issue for trial in appropriate cases, that in itself might have a knock-on cost saving in relation to the matters that are clearly at dispute at trial, if it has been possible to narrow them down as a result of such a process. In costing terms—this has just occurred to me, so it has not been explored or costed—one has to consider the entirely, as opposed to each individual step. There may be circumstances in which that results in greater amounts of evidence being agreed and so on.
I will explain my view on that—and I take the point that was made earlier about the standard advice being not to say anything. I am not sure that that will always be the case. For example, if the accused has given instruction and has an explanation to give in relation to particular evidence, he or she may take the opportunity to do so at that stage, rather than having to give evidence at trial. That might be a perfectly legitimate tactical decision on the part of the defence—to provide information that gives an explanation or creates a disclosure obligation on the Crown, for instance. There are a number of elements to that, and one should not always assume that the advice will necessarily be to say nothing.

On the point about how regularly or otherwise such an approach may be taken, I have some sympathy with my colleagues regarding the administrative process that might be involved. The same would apply from a Crown perspective or a shrieval perspective. We can safely say that we will not be opening the floodgates to such applications, not least because, when one considers the criteria, it is apparent that there is a certain level of judicial scrutiny—there are appropriate hurdles that need to be crossed. Section 27 sets out the need for the seriousness of the offence to be taken into account, and we must also consider the necessity for the step to be taken.

Even at that stage, the hearing will be an adversarial process, as I understand it, with an opportunity for representations to be made. If the decision is that a further interview can be conducted, the parameters for that interview, including even the time of the interview, can be dictated by the court. All sorts of cross-checks and balances can be used to ensure that such an approach is taken in serious cases, when it is necessary to do so and in controlled circumstances where there is an opportunity for an alternative view to be put.

Assistant Chief Constable Graham highlighted some situations earlier concerning larger-scale investigations, and I think that Ms McInnes raised a point regarding instances in which new information has simply come to light beyond the interview. In very large cases, it may well be that the quantity of information that is available, even from the initial search, is of such a scale that it is not possible exhaustively to examine all that information and understand its import. In some investigations relating to material that has been recovered online, there might be many gigabytes of material. The committee will be familiar with comparisons that are made about printing out that amount of information on sheets of A4, and the paper stretching from here to the moon, or whatever. Such examples are precisely the reason why, in modern investigations, flexibility is needed to allow us to go back and say, “We’ve uncovered this information. Do you have anything to say about it?”

Murdo Macleod: I will respond to what Mr Harvie said and revert to the original question about the accused’s rights in such circumstances. Mr Harvie says that the timeframes will be limited by the judge or sheriff. The faculty has grave concerns about that and feels that they should be fixed periods, like the 12 hours, the six hours and the current 24 hours, rather than left to the whim of sheriffs, who might have different ideas on the matter. That relates to sections 27(6) and 29(2). We say that the maximum period for questioning should be a further six hours and that the maximum period of arrest to facilitate that—perhaps to enable people to travel to a police station—should be 12 hours.

Mr Harvie said that questioning after a charge provides an opportunity for the accused to put his position. Surely we cannot rely on the Crown going through the process of seeking to question after a charge as the opportunity for the accused to give his version of events. The committee will later discuss judicial declarations, which are to be abolished—perhaps that is a more controversial provision in the bill. The arrestee or the accused—we can call them what we like—must be given the opportunity to put forward a defence. They cannot rely on the Crown to give them that facility.

Ann Ritchie: It strikes me that considerable public money could be spent on someone who has not yet been charged, has had access to a solicitor for questioning, has been liberating pending further investigation and is questioned again. That person might never be charged. That public expense might be necessary, but perhaps the bill is introducing solutions that will create problems. I ask the committee to consider that.

The Convener: Does Alison McInnes have a supplementary question?

Alison McInnes: Yes—this was my question.

The Convener: You had been—metaphorically—deleted from my list. I should not have deleted you.

Alison McInnes: Mr Harvie said that we have safeguards because an application would be heard before a sheriff. The test in the bill is the interests-of-justice test, which seems far too wide. Mr Macleod addressed that and discussed safeguards that we might need to explore, so that is fine.

Roderick Campbell: If the provision is used, participants will be mindful of potential implications under article 6 of the ECHR if it is abused, so there are long-stops.
I asked the previous panel about section 25. I would be grateful for this panel's views on 16 and 17-year-olds being able to waive their right of access to a lawyer.

**Murdo Macleod:** I heard the previous question and the response. If the age limit was raised to 18, it would be curious that a person could get married and join the Army but could not waive that right. However, the faculty has not addressed the point in detail. The letter of rights draws a distinction between people up to the age of 16 and people up to the age of 18. If the suspect was availed of the additional safeguard of not being allowed to waive their right, that would only be to the suspect's benefit. We would be happy to entertain that idea.

**Grazia Robertson:** The Law Society's position is that the protection of being unable to waive the right to a solicitor should be given to those who are under 18. That is a safeguard; it is not an onerous obligation. It is appropriate to give under-18s the same protection as under-16s are given.

Even the bill defines a child as someone who is under 18. Given the particular vulnerabilities—on which I think that the police commented—of people of such an age who might find themselves in a police station, it is entirely appropriate that they should have access to legal advice. They need not take it—no one need do that—but it should be made available to them, because it is a protection and a safeguard.

**The Convener:** It is simpler and more consistent than having something for 16-year-olds and then something different for 17 and 18-year-olds, which would be unnecessarily complex.

**David Harvie:** The matter was considered recently by the appeal court in McCann v HMA. As a result of that, the Lord Advocate issued guidance that indicated that, in relation to 16 and 17-year-old suspects, there is to be a strong presumption that they should not be able to waive their right of access to legal advice. The guidance sets out various requirements that the interviewing officer must take into account. The key point is that the more serious the case, the less likely it is that the presumption should be rebutted. As it currently stands, the guidance offers perhaps a greater level of comfort than might be foreseen from the bare terms of the legislation. In essence, it is a rebuttal of strong presumption.

**Murdo Macleod:** There is another tricky point in section 25(2)(b), which is the provision in which a person

"Mental disorder" is a specific phrase. In our submission to the committee, we say:

“It may be very difficult for a police officer, without medical training and without any assistance from a police casualty surgeon, to assess whether or not a person is suffering from a mental disorder.”

We urge the committee to remove the words “owing to mental disorder” and leave the provision that the person is unable to understand what is happening—a police officer would be able to see that—and is not able to communicate effectively with the police. Why on earth should a person in that state not be availed of their rights? In any event, if they were not availed of such a right, the evidence would probably be inadmissible.

The committee should seek to remove the phrase “owing to mental disorder”. That applies in section 33, too.

**The Convener:** I bring this evidence session to a close, because the committee has more to do. If you think that we ought to have raised supplementary points and we have not done so, please feel free to write to me as convener; any such submissions will be distributed to the committee and put on our website.

I thank you for your evidence, and we look forward to receiving your drafted amendments—I expect that amendments will be drafted and sent to members of Parliament to lodge at stage 2. We might see some of you back here when we move on to discuss other issues in the bill.
The Convener: Item 2 is our third evidence session on the Criminal Justice (Scotland) Bill. As was the case last week, we will look only at part 1, which is on police powers to arrest, hold in custody and question suspects. We will hear from two panels of witnesses today. I welcome our first panel. Shelagh McCall is a commissioner at the Scottish Human Rights Commission, and Professor James Chalmers and Professor Fiona Leverick are from the University of Glasgow—I think that you were in a starring role last week. Thank you for your written submissions.

We begin the questions right away.

John Finnie (Highlands and Islands) (Ind): Good morning, panel. I have a question for Ms McCall. I am interested in the references that you make in your submission to the alterations that were made post-Cadder. You state:

“The notion that some sort of ‘rebalancing exercise’ requires to be carried out in the form of removal of other procedural safeguards, such as corroboration”— which we are not covering today—

“is mistaken and the provisions abolishing corroboration without providing an adequate alternative safeguard are of considerable concern to the Commission.”

Will you expand on that, please?

Shelagh McCall (Scottish Human Rights Commission): Certainly. I thank the committee for inviting the commission to give evidence.

One of the misunderstandings of the Cadder decision, as the commission sees it, was the notion that it gave suspects some added advantage and that, therefore, there required to be some recalibration of the system in favour of victims and witnesses. In fact, Cadder brought Scotland into line with the minimum measures that were necessary to comply with article 6 of the European convention on human rights, on the right to legal assistance.

From the commission’s perspective, there was a fundamental misconception about the starting point for the Carloway review and, indeed, the emergency legislation, which was the idea that there needed to be some tipping of the scales the other way. The most obvious tipping of the scales has been in the proposal to abolish corroboration. Following Lord Carloway putting forward that proposal, which now appears in the bill, there has not been—in the commission’s view—enough scrutiny of the implications of doing that without putting in another safeguard.
Shelagh McCall: I understand that.

The Convener: We are not looking at corroboration today.

Shelagh McCall: It would start to address them, but it would not address them fully. For them to be addressed fully, when a suspect is initially cautioned, he should be told of his right to legal assistance, and that should be enshrined in statute. Secondly, when a suspect is not to be taken to the police station but is to be questioned, he should be offered the opportunity of legal assistance and that should be facilitated in the way that it would be if he was at the police station.

John Finnie: If that was not the case, is there a danger that it would taint the whole system?

Shelagh McCall: If that was not the case, there would be a danger that suspects would not be made fully aware of their rights at the initial point of interaction with the police. There would also be a danger that, when people were interviewed outwith a police station and they gave incriminating answers, that would be in breach of their right to legal assistance under article 6 and might render the trial unfair.

There is also a flip-side. The ability to facilitate legal assistance outwith a police station would avoid the unnecessary interference with people’s private lives that is caused by taking them to a police station when it is not otherwise necessary.

The Convener: John Finnie will know about this. Is it not tricky for a police officer to know when the questioning has slipped into their saying, “I think you may have committed an offence”? A police officer might start off by just asking questions about an incident but, in the course of asking those questions, become aware that the person may be involved in another way that could reasonably be suspected to be criminal. I am thinking about the practicalities for the officer on the ground.

Shelagh McCall: That is one of the reasons why we say that the bill should attempt to define what a suspect is. If there is a definition of a suspect that states which people need to be given a caution, a right to legal assistance and all the things that follow from that, a policeman will know whether someone falls within that definition and it will give clarity for both the suspect and the police officer.

I appreciate what the convener says. There is obviously a middle ground. For instance, if a policeman comes across a scene in the street in which someone is dead on the floor and there are 10 people standing around, the policeman will ask, “What happened?”, and some people may answer that. At that stage, the policeman will not know whether a crime has been committed, never mind whether any of those people is a suspect. There is a spectrum.

However, a statutory definition of what a suspect is and what triggers their rights would assist police officers in such situations.

The Convener: Do you have one?
Shelagh McCall: I do not have a written definition in front of me. I am not a parliamentary draftsman.

The Convener: It will help the committee if, in due course, someone proposes an amendment on that, in the event that the Government does not, because it will enable us to test how useful a definition would be.

Sandra White (Glasgow Kelvin) (SNP): Good morning, everyone.

My question follows on from John Finnie’s question about the reformed powers of arrest. The SHRC raised the issue, but any of the witnesses can answer. The Carloway report expressed concern that the “marking of a person as a suspect could be given undue weight by the public and media, to the detriment of the suspect and subsequent criminal proceedings”.

Do you have any thoughts on that? You put forward your thoughts on the Carloway report, but will you expand on them?

Shelagh McCall: In the situation in which someone is released under what will be called investigative liberation—in other words, when they are essentially bailed to be brought back by the police at a later stage—our position is that, to ensure proper respect for their rights to private life under article 8 of ECHR, which include the right to reputation, and given that they will not be officially accused of anything at that time, they ought to have a right to anonymity, and that ought to be built into the bill.

An example of how that can go terribly wrong was in the Joanna Yeates investigation in England, when Christopher Jefferies, a former teacher who was her landlord, was named as having been arrested.

The Convener: We went through that previously, so we are well aware of that tale and the trial by newspaper and so on.

Shelagh McCall: That is an example of precisely the situation that one would seek to avoid. While someone is not officially accused, a lot of their private rights will be at stake, including their employment rights, and they ought to be protected at that stage.

Sandra White: Does anyone else have thoughts on that?

The Convener: The witnesses are not nominating themselves to answer, so I would just leave it.

Sandra White: Okay.

The Convener: You are doing a Margaret Mitchell on me, now. That is what I call inviting other witnesses to speak. I am sure that the witnesses are perfectly able to tell me when they want to say something.

Professor Fiona Leverick (University of Glasgow): We will jump in if we need to.

Sandra White: Can I ask a quick supplementary question, convener?

The Convener: Of course.

Sandra White: Other people might come in on the liberation aspect, but I want to talk about the suspect aspect. Concerns have been raised in evidence about the issue of being detained and arrested, which is obviously connected to somebody being a suspect. Are you concerned about the use of the wording “detained” and “arrested”?

Shelagh McCall: I do not think that the wording is the problem. That is a conceptual issue. It is what is actually happening that is the issue in terms of people’s rights. We think that the bill would be greatly improved if, at the beginning, a principle for interpreting the provisions was inserted that sets out the presumption of liberty. That would mean that, when officers wonder whether they should arrest a person at all, keep a person in custody or put conditions on a person’s liberation, that could be informed by the guiding principle of being in favour of liberty unless it is necessary to do otherwise. As we set out in our written submission, perhaps a dozen or so sections of the bill could be improved by having that principle at the start.

Sandra White: Thank you.

The Convener: You referred to anonymity, Ms McCall, but if somebody is arrested without being officially suspected and they are then released on investigative terms, the condition might be that they do not approach other people because they could corrupt or intimidate possible witnesses. How could there be anonymity in that situation? Other people would have to be told that the person had been arrested and that, although they had been released, the police were continuing to investigate them. Surely some people would have to be told that.

Shelagh McCall: The police will obviously know what the conditions are. It is similar to the bail situation—

The Convener: But some members of the public will have to know.

Shelagh McCall: I suppose that it might be argued that, if there is a complainer who is the direct victim of the alleged offence, there might be a duty to protect them from potential harm. However, we have seen that for the police to publicise someone’s name in such a situation can be extremely problematic.
The Convener: So there should be anonymity in the sense of the police not publicising the person’s name, but you concede that there could be circumstances in which some people would have to be informed that somebody was out on investigative release.

Shelagh McCall: There could be such circumstances, because the police have a positive duty to protect people from breaches of their rights under articles 2 and 3, which are the right to life and the right to be protected from cruel treatment and so on.

Roderick Campbell (North East Fife) (SNP): Good morning, panel. Last week, we heard a variety of views on the concept of bringing detention and arrest together. Given that “arrest” is not defined in the bill, I referred the various panels of witnesses at last week’s meeting to Lord Carloway’s recommendation in his report that “arrest should be defined as meaning the restraining of the person and, when necessary, taking him/her to a police station”.

Chief Superintendent O’Connor said that his understanding of arrest “is that the person is no longer free to go about their lawful business, or has not been advised that they are free to do so.”—[Official Report, Justice Committee, 1 October 2013; c 3293.]

That was generally considered to be, in many respects, just a redefinition of the current position in relation to detention. I heard what Shelagh McCall said earlier about the difficulties in merging the concepts of detention and arrest without having a definition of “arrest”. Do you have any thoughts on that?

Professor James Chalmers (University of Glasgow): I do not see any difficulty in merging the two concepts. In fact, I think that doing so will give us a much more rational and sensible system than the one that we have. One of the difficulties with defining “arrest” is that existing law is quite unclear on it. The committee heard evidence from a previous witness who quoted from Renton and Brown’s “Criminal Procedure”, the standard textbook in the area, which starts with the statement that it is “difficult to state clearly” the law of Scotland on “arrest”. The bill does not provide a comprehensive scheme for regulating arrest but simply sets out the circumstances in which that power might be exercised.

I am not sure that the bill is the place to define arrest comprehensively or that the Carloway review gives us a good basis for doing that. It might be valuable to define arrest, but I am not sure that it can be done in the bill.

Roderick Campbell: Where would it be done?

The Convener: Sorry, but I want to let Professor Leverick in.

Professor Leverick: I agree with Professor Chalmers. The important point is that the bill clarifies what was previously quite a confusing situation in which both detention terminology and arrest terminology were used. What is in the bill is a vast improvement on that because it simplifies the structure.

The Convener: Do any committee members disagree with that point? Professor Leverick is thinking in terms of the accuracy of the process, but as politicians we are probably thinking about perception, which is a huge factor not only for politicians but for a person who has been arrested but “not officially accused” of an offence. The concern is that we will have situations like the Yeates case, in which somebody is arrested and given investigative release, and the press then run stories about the person’s arrest.

I do not know why the bill is changing the use of the terms “detention” and “arrest”. I understand the distinction between being detained and being arrested, which are different situations. Frankly, I do not understand why the bill uses the term “arrest” for both situations. You solidly support the bill’s change in that respect, Professor Leverick.

You can tell me whether I am misguided in my view. I am happy to be told that I am misguided, because I am told that all the time.

Professor Leverick: I do not think that the terminology is as problematic as you think it is. I do not believe that there is much distinction between the term “arrest” and the term “detention”. For one thing, we cannot guarantee that the press will report the terminology accurately anyway. The important point is that we have a real protection here that is not available in other jurisdictions, which is that the detention period—it is the period of “arrest” under the bill—is very short. There is perhaps more of a problem with investigative liberation, which can be a lengthy period. However, I honestly do not think that the term that is used, whether it is “arrest” or “detention”, is important. If it concerns you that much, you could just swap “arrest” for “detention”, because that would not really make any difference to the bill.

The Convener: That is what I am asking about. The terminology does not make any difference to what is done. I think that it is just the different label that is the issue. Do committee members feel the same as me about that?

Roderick Campbell: I do not. I am interested in following up Professor Chalmers’ point about where one would seek to clarify the terminology. What priority should the committee give to doing that?
Professor Chalmers: I do not think that that is a priority, because the general term “arrest” has been used successfully for quite some time, despite the fact that nobody can state exactly what the law in that area is. The area could be reviewed by the Scottish Law Commission or an ad hoc working group to try to bring some clarity to it. However, I do not think that that is a priority, because the present system appears to be workable.

I will pick up briefly on some other points that have just been made. The current position in England is that arrest involves reasonable suspicion that somebody has committed an offence, and detention in Scotland involves reasonable suspicion that somebody has committed an offence, so in effect the terms serve the same purpose. I am not sure that the distinction between arrest and detention is well understood by the general public; they both involve largely the same thing, which is somebody being taken into custody.

I take the point about the media coverage that has occurred in England on a number of occasions, but there are two important differences to note. First, the lengthy periods of detention that are permissible in England allow a head of steam to build up in a way that would not be possible in Scotland, particularly if the Criminal Justice (Scotland) Bill is passed in its current form. The second difference is the rather stricter approach of the Scottish courts to contempt of court, which might affect the way in which Scottish newspapers choose to report cases. I would be surprised if a change in terminology in itself made a difference to the reporting of cases.

Shelagh McCall: I will throw something into the mix. I do not think that the words that we use to describe it really matter. We have to think about what the function is. One function is to tell the police what powers they have, so that they are clear that what they are doing is lawful. The flip-side of that is what, from a suspect’s point of view, flows from the decision to arrest, detain or whatever it is.

In rights terms, the Strasbourg court is moving towards talking about curtailment of freedom of action rather than being deprived of liberty. The curtailment of freedom of action is what triggers, for example, the right to legal assistance. The committee needs to be aware that, whatever we call the power, there will be circumstances in which people’s freedom of action is sufficiently curtailed that they ought to have legal assistance even though they are not being taken to the police station.

We saw an example of that in the G case in the Supreme Court last year, when someone who was present during a search under section 23 of the Misuse of Drugs Act 1971 was not given legal assistance because they were not in a police station. The Supreme Court said that, as the person was essentially handcuffed and not free to leave, they should have had a lawyer. That is the difficulty; it is a functional question rather than a question of description.

Elaine Murray: The problem is that, although the words may mean the same thing, the public think that, when someone has been arrested, the police have sufficient evidence that they may have committed a crime. There is a difference between a situation in which the police have a suspicion and want to know what is going on, so the person is taken in to find out what is going on and what they know about it, and one in which there is sufficient evidence that the person may have committed an offence to trigger an arrest.

Professor Leverick: I am not sure that the word “detained” would not also carry that implication. I am not sure that one word is necessarily any better or worse than the other.

Professor Chalmers: Your question seems to rest on the premise that, first, the public do not know what detention means—that may be true—and, secondly, that that might be a good thing. I am not sure that that is true at all.

The Convener: They know that detention is different from arrest. They may not know the technical things that lawyers know, but they know that it is different from being arrested.

Professor Leverick: But they might not necessarily see it as being better or worse. We are all casting around and making claims, but we just do not know. If somebody wishes to do a public survey of what is generally understood by the two different terms, we could have the discussion on an informed basis, but until that happens this matter is a bit of a red herring.

Professor Chalmers: I am reasonably confident that the public know that there is a difference between being detained and being charged with a criminal offence. However, I am not sure that there is a public understanding that detention and arrest are different things. Arrest is normally combined with a charge, and that is understood as being a different stage, but that is not quite the same point.

Professor Leverick: We could be wrong. Nobody will know the answer until somebody does some sort of survey.

The Convener: Or until the first press reports come out after the law changes and somebody says, “So much for the restraint of the press. I see that they’ve arrested that man”, because the press have not put a bit in parentheses in the report to say that the man has not yet been—what is it?—
officially accused. I struggle to remember that phrase. Maybe we, as politicians, are just a bit prickly about those things and about perceptions. Who knows?

**Elaine Murray:** What are your views on the reduction in the time period from 24 hours to 12 hours? Some witnesses, particularly those from the police, have said that on occasion a bit more than 12 hours will be needed to complete an investigation. Should there be a provision on exceptional circumstances? Under what circumstances should an exception be granted?

**Professor Leverick:** I do not have the operational understanding of police matters to be able to say whether exceptional circumstances would justify a 24-hour period. That may be the case; it is something that the police would be able to advise you on.

I would be happy with the 12-hour limit. You have to remember that, if we extended it to 24 hours in exceptional circumstances, the police would not necessarily get 24 hours in which to question the suspect because there would probably have to be a break period within the additional time. It would not be compatible with ECHR to question someone continuously for 24 hours. In England and Wales, where an extension is permitted, a provision in the code of practice states that suspects must have—I think—an eight-hour break from questioning.

In effect, if you extended the time period in exceptional circumstances, you might gain an additional four hours or so, at most. The police might be able to give convincing evidence on cases where that would be justified, but I am not in a position to do so. Until I have seen such evidence, I would be inclined to stick with the 12-hour limit.

**Shelagh McCall:** The commission has a completely different view. Taking someone into custody engages their rights under article 8, which contains their right to a private life, as it interferes with their private life. Under article 8(2), the state must justify that, and part of the justification must be that it is necessary. The Strasbourg court has said that that must be based on evidence and not anecdote. There is no evidence that a 12-hour period is necessary for the purposes of detaining someone or keeping them in custody. In fact, when the data was collected during the Carloway review, it showed that 83 per cent of people were released in fewer than six hours.

Going back to Mr Finnie’s question about the commission’s comments after Cadder and the emergency legislation, we said at that time that there was no justification for increasing the period to 12 hours, and certainly none for increasing it to 24 hours. That remains our position because the evidence has not changed. The bill should be amended to reintroduce the six-hour period, because that should be the norm, with the possibility of extending it to 12 hours should there be a particular reason why that is necessary. However, the reasons must relate to the provision of article 6 rights, such as the right to legal assistance, the right to an interpreter, the requirement for medical treatment, or something of that nature. It is not about the police being allowed to go and do X while someone is sitting in the cells.

**Colin Keir (Edinburgh Western) (SNP):** I want to ask about the 83 per cent figure that Shelagh McCall mentioned. I have not seen the figures, but perhaps you could let us know about the 17 per cent who were not released in fewer than six hours. Do you have any idea how many people in that 17 per cent ended up being convicted?

**Shelagh McCall:** I have absolutely no idea because the data was not collected by the Association of Chief Police Officers in Scotland and Lord Carloway.

**Colin Keir:** It would be interesting to know whether the extensions were justified in those cases.

**Alison McInnes (North East Scotland) (LD):** I want to follow up Elaine Murray’s point about the custody hours that are available. Could I hear the panel's views on the impact on children and vulnerable adults, and whether the six-hour limit that is proposed by the SHRC should ever be extended in particular cases?

**Shelagh McCall:** We state in our written response that the committee and the Parliament should think carefully about whether it is ever appropriate to hold a child or a vulnerable adult for more than six hours. I know that the committee will hear from the children’s commissioner later, and I am sure that he is better informed than I am. One of our recommendations is that the bill should state that taking a child into custody is a measure of last resort because it really ought not to happen unless it is absolutely necessary.

**Alison McInnes:** Does Professor Chalmers have a different view?

**Professor Chalmers:** One protection that will remain is that the admission of any statement that is made in police custody is subject to a test of fairness when the prosecution seeks to lead it in court. In applying that test, the court will be able to take into account whether someone who is vulnerable has been held in circumstances that made it difficult for them to exercise their right to silence and made it more likely that they would confess to acts that they did not commit, and so on. The court could take those facts into account and could decide not to admit a statement
regardless of the fact that the legal maximum had been complied with. The police would have to be careful about holding a vulnerable adult or child right up to the wire.

10:00

**The Convener:** I refer to your article in *The Modern Law Review* at page 849. You state:

“Lord Carloway states that ‘there are very strong arguments that a child under the age of 16 should not be able to waive the right of access to a lawyer’ but does not set out explicitly what these are, other than alluding to the serious nature of cases involving children that are likely to end up in court.”

You might want to comment on that.

Secondly, you state:

“these proposals go beyond the equivalent provisions in England and Wales, where an appropriate adult can request legal assistance for a child who has indicated he does not want it, but a child ‘cannot be forced to see the solicitor if he is adamant that he does not wish to do so’. They also go beyond what is necessary under the ECHR, as the European Court of Human Rights has never suggested that children cannot waive procedural rights, although for waiver to be valid, the assistance of a legal adviser or appropriate adult may be required.”

I would like you to comment on that.

We have talked about the difference between 16 and 18-year-olds and whether we should just move the bar to 18 anyway. Will you comment on that, too, please?

Will you comment and elaborate on what you put in the article? Do the proposals go too far? Should we say no?

**Professor Leverick:** What is in the article is not particularly a statement of opinion by us. The things that we put in the article are correct.

**The Convener:** Indeed, but do we require to say that absolutely no child of 16 or under can waive their rights?

**Professor Leverick:** I do not think that we require to do that. There is certainly no legal reason why that is required. If I had to offer a personal opinion, I would probably say that the bill has got it about right. Under-16s probably should not be permitted to waive the right to legal assistance, but imposing legal assistance on all 16 and 17-year-olds even if they are adamant that they do not want it and are capable of understanding the implications of that decision may well be disproportionate in respect of the costs involved.

**The Convener:** So you would keep the distinction in the bill.

**Professor Leverick:** I think that the bill has got it about right. Having said that, I cannot claim to be a great expert on child psychology.

**The Convener:** I do not know what to say to that. None of us claims that. We try to do our best with the information that is in front of us.

**Professor Chalmers:** Our statement that the proposals “go beyond what is necessary under the ECHR” is not meant as a criticism in any way; it is simply an observation. I know that the committee has been concerned about the idea of future proofing the criminal justice system against ECHR developments. None of us can give guarantees on how ECHR case law might develop in the future, but the views of the European Court of Human Rights might change in the area, and it would certainly be advantageous for the system to offer more protection than the bare minimum that is required by the convention.

**The Convener:** Ms McCall, do you want to comment on the distinctions in the bill? Are you content with them?

**Shelagh McCall:** The Scottish Human Rights Commission’s view is that the bill is right to say that children under 16 should not be allowed to waive legal representation. As Professor Chalmers has said, that is not because Strasbourg says that children cannot waive their rights—they can—but Strasbourg looks extremely critically at the circumstances in which that happens, because one of the important things about a waiver of rights is that it has to be exercised with full information about the facts and the consequences of waiving rights. Whether children, in the absence of a lawyer to tell them about the consequences, can properly make that decision, given their lesser maturity and capacity compared with adults, is a real issue.

In the commission’s view, it is not appropriate to substitute parents as the decision makers for children, who are the holders of their own rights. It is not a parent’s or an appropriate adult’s job to do that. There is a danger that the parent may be just as ill informed or misinformed about the importance of legal representation as the child may be. That is why we say that the bill has got it right in that respect.

**Alison McInnes:** To remain on children’s rights, what are the panellists’ views on whether the bill is a missed opportunity to raise the age of criminal responsibility to 12 and on other Committee on the Rights of the Child requirements?

**Shelagh McCall:** The commission’s view is that it is a missed opportunity, and this committee ought to take the opportunity to recommend that. It is clear that Scotland has an extremely low age of criminal responsibility and that the international trend is upwards from where we are. There is a
real opportunity in the bill to do something about that, and that opportunity ought to be taken.

**The Convener:** I was just checking whether that would fit under the purposes of the bill in any event.

**Professor Leverick:** I do not necessarily disagree with Shelagh McCall, but I think that there is already an awful lot in the bill. Relatively recently, a long consultation process on the age of criminal responsibility was carried out by the Scottish Law Commission and I am not sure that the bill is necessarily the best place to revisit that.

**Alison McInnes:** When and where would be best?

**Professor Leverick:** I am not sure that the issue needs to be revisited at all. If it does, the bill is possibly not the right place to do that, given that there is already an awful lot in it.

**Alison McInnes:** We want to make sure that our bills have an awful lot of the right stuff in them rather than an awful lot of things that we are not sure are necessary.

**The Convener:** I do not know whether you are agreeing or disagreeing, Alison—you are having a bit of a mumble to yourself. That is allowed, though—mumbles are allowed.

**Roderick Campbell:** I would like to address the issue of people receiving legal advice by telephone. Section 36(3) describes a person’s right to consultation with a solicitor when they are in police custody. It states that “consultation’ means consultation by such means as may be appropriate in the circumstances and includes (for example) consultation by means of telephone.”

What is the panel’s view on that provision?

**Shelagh McCall:** The commission’s view is that there will be circumstances in which a telephone consultation is inadequate. The purpose of legal assistance is twofold: first, it is to protect the right against self-incrimination; and, secondly, it is to provide a check on conditions of detention and to ensure against ill treatment. In that second respect, it is difficult to assess over the telephone someone’s vulnerability when they are in custody.

Also in relation to section 36, the choice of the method of consultation with a solicitor belongs to the suspect, and the bill ought to make that clear. The police may say—as I think that they do at the moment—that the suspect can first have a chat on the phone with a solicitor. However, if the solicitor and the suspect decide that the solicitor should come to the police station and be present, that choice should belong to the suspect, not the police.

**Professor Chalmers:** It is important to read that provision together with section 24, which creates the right for the suspect to have a solicitor present during the interview. However, as Ms McCall has said, that is not the only function of a solicitor. I agree that it would be useful if the bill made it clear that the choice must be that of the suspect, not that of the police.

**Professor Leverick:** The point about one of the solicitor’s functions being the ability to check the conditions of detention is important. The European directive on the right of access to a lawyer in criminal proceedings sets out that that is one of the solicitor’s functions in that situation. Therefore, we must ensure that the bill complies with that. That means that, if somebody wants their solicitor to visit them outside the interview situation, we probably have to allow that.

**The Convener:** Have you finished, Roddy?

**Roderick Campbell:** I have finished, but Colin Keir wants to ask a question.

**The Convener:** You cannot bring him in, because John Pentland is waiting.

**John Pentland (Motherwell and Wishaw) (Lab):** Yes, I have a question.

**The Convener:** I wondered whether you were going to ask about vulnerable witnesses, but that is fine. Were you going to ask about that, Colin?

**Colin Keir:** I want some clarification of what has just been said. What if people up in the darkest Highlands engage a Glasgow solicitor? How would that affect the process?

**The Convener:** I do not know whether we will let you talk about the darkest Highlands—they might be gloriously sunny autumnal Highlands. However, I will let you ask about that, and I will then bring in John Pentland.

**Colin Keir:** That was basically my question. How would it affect proceedings if someone was somewhere up in the Highlands and Islands that was not terribly accessible and, following the telephone call, it was decided that a solicitor had to travel from Glasgow, Edinburgh or Dundee? There would be a delay. How would that progress in a practical sense?

**Professor Leverick:** I am probably not the best person to answer that question, as I do not have the practical experience.

**The Convener:** There you are, Colin—there is your answer.

**Shelagh McCall:** I can answer the question. Under article 6 of the ECHR, the state ought to respect an individual’s choice of legal representative in so far as that is possible. If an individual who is in custody in the islands says that
they want to speak to Mr Smith in Glasgow, that should and can be facilitated. However, if an appearance in person by the solicitor is required, it may be legitimate to say that the person’s choice of solicitor cannot be respected because it would take the solicitor nine hours to get there, whereas Mr Y from just down the road could come and provide legal assistance. It may be legitimate, on such an occasion, to depart from respecting someone’s choice of representative. Nevertheless, the state must have measures in place to ensure that solicitors can be brought to the police station to perform that very important function.

The Convener: There would need to be a bit of common sense about it.

Colin Keir: Sometimes that has been sadly missing, convener.

The Convener: John Finnie’s face was a picture when you referred to the “darkest Highlands”.

John Finnie: I was thinking that it was an interesting geographic term.

The Convener: Absolutely, but we will have no violence, John—no violence.

John Pentland: Would the panel care to expand on their views with regard to vulnerable adult suspects? The SHRC reckons that the bill might be too narrow in focusing only on people with a mental disorder. Professor Leverick and Professor Chalmers have stated that it is notoriously difficult to identify vulnerable adult suspects.

Shelagh McCall: There is a real challenge in identifying vulnerable people, and the police must be properly trained to do so. It is good to have an understanding that mental disorder, as defined in the Mental Health (Care and Treatment) (Scotland) Act 2003, gives rise to vulnerability. That is encouraging. However, that definition misses people who do not suffer from a mental disorder but who appear, for whatever reason, not to understand what is going on. That may be because they have taken some intoxicant, because they are medically unwell rather than mentally disordered, or because there is a language or communication issue. There are all kinds of reasons why people’s vulnerability can be increased in custody. At the moment, the bill does not allow the police the flexibility to deal appropriately with people who are not evidently mentally disordered, and we would encourage some amendment in that respect.

Professor Leverick: I agree entirely. We do not have to follow slavishly what happens in England and Wales, but the equivalent terminology used in the legislation in England and Wales refers to mentally vulnerable suspects, which does not necessitate any mental disorder as such.

Professor Chalmers: The provision on support for vulnerable people refers to someone who, “owing to mental disorder”, is “unable to understand sufficiently what is happening or to communicate effectively with the police.”

It might seem slightly odd that somebody who is “unable to understand sufficiently what is happening or to communicate effectively” for another reason does not fall within the scope of section 33. If somebody met that criterion, support would have to be provided, otherwise the court would hold as inadmissible any incriminating statements—or any statements—that they made, because the fairness test would not be met.

The Convener: That is a fair point to make about section 33.

John Pentland: Shelagh McCall said that one of the measures that we could put in place would be proper training for the police. Do you think that any other measures may be necessary?

Shelagh McCall: In our written submission, we raised some concerns about funding for appropriate adults. The state has an obligation to put in place a proper system, so there must be a conversation and a decision about how appropriate adults are going to be paid for. In addition, appropriate adults must be properly trained. I know that there is provision for regulations to be made about that, but the training will be critical. We must also ensure that appropriate adults are used in the right way, not the wrong way. They cannot be substitute decision makers; they are just there to facilitate communication and to use their expertise for that purpose. That is why we welcome the view that vulnerable persons should not be able to waive their right to legal assistance. There must be someone present who is capable of advising properly on decisions to be made by a vulnerable suspect.

The Convener: There would also be a protection, in that any statement would be inadmissible in court if the solicitor were able to show that, in taking evidence, the police had been oppressive or whatever to somebody who was vulnerable.

Roddy, do you still have a question on vulnerable people?

10:15

Roderick Campbell: No.

The Convener: Right. It is not you next; it is Elaine Murray, who is not on vulnerable people.
Elaine Murray: No, I am not on vulnerable people today.

Lord Carloway expressed some concern about the period after someone has been officially accused, when they can be released, liberated on an undertaking or detained prior to going to court. He was concerned about the period that could elapse between being a person being officially accused and getting to court, which is not addressed in the bill. Are you concerned about that? I presume that resource issues are part of the reason why that has not been addressed in the bill, but ought it to have been?

The Convener: Ms Leverick, you are nodding.

Professor Leverick: I agree entirely with Lord Carloway’s sentiments. I think that the period could be unacceptable long. I am not sure whether that ought to have been addressed in the bill, although it is addressed in the equivalent legislation in England and Wales.

We probably have to make some provision for weekend and perhaps holiday court sittings, which obviously has a resource implication. Whether that needs to be addressed specifically in the bill, I do not know. If practice does not change without legislative intervention, there might have to be such intervention.

Shelagh McCall: For some time, we in Scotland have been at the outer reaches of breaching article 5 of the ECHR—article 5 being the right to liberty—which is why Lord Carloway recommended in his review the introduction of a 36-hour period. He identified situations in which a suspect may be held for four days or so before appearing in court, which is pushing at the boundaries of a human rights breach.

Elaine Murray is right to observe that the bill does nothing to address Lord Carloway’s concern. The commission’s position is that the rule has been the same for many years but the situation has not improved and working practices have not changed, so a legislative solution is necessary. Lord Carloway’s original recommendation would be an appropriate way to solve the problem.

Elaine Murray: Do you have any concerns about people being questioned after charge, which is a new development in the bill?

Professor Chalmers: It is not something about which I have any concerns, given the safeguards that are in place—in particular, the requirement for an application to be made to the court before such questioning happens.

Professor Leverick: I agree with that. If those safeguards were not in place, I might be concerned about repeated harassment of people who were being held in custody. However, with the safeguards that are in place, including the fact that the accused person will be notified of an application being made to the court—it will not come as a terrible surprise to them—and able to make representations as to why that might be inappropriate, I do not have any particular concerns about it.

Shelagh McCall: The commission has concerns. In European human rights case law, there is nothing that prohibits questioning after someone is officially accused, but one has to think about what the purpose is. If the sole purpose is to overcome someone’s right to silence—in other words, to get them to incriminate themselves—that may breach article 6 and the right against self-incrimination.

I thought about this before coming to the committee today, and it is very hard to think of situations in which the questioning would be designed for any purpose other than to try to get someone to say something against their interests when confronted with, for example, DNA evidence, closed-circuit television footage or something of that nature.

There is a danger that such questioning might fall foul of article 6 because of its purpose. As a matter of principle, there is not a difficulty with it, but I am just not sure that the protections of judicial oversight are sufficiently robust.

The Convener: If the sheriff consents to post-charge questioning and the accused refuses to say anything, would that be held against them in proceedings? They might maintain their right to silence, if you will, and when questioned say, “I am not going to say anything.”

Shelagh McCall: It should be made explicit in the bill that, if the person chooses not to say anything, no adverse inference can be drawn, because Strasbourg is moving towards saying that drawing an adverse inference from silence is a breach of article 6. It is not there yet but, in our view, it is likely to start to go there. We see a withdrawal and a backing off from that position in England, and it would be very foolish for this Parliament to introduce a bill that walked into that situation.

The Convener: So, at the moment, adverse inference can be drawn from silence.

Shelagh McCall: It is not clear, because the method of questioning has never been allowed before. Our recommendation is that the bill should be amended to include no adverse inference.

The Convener: Do you want to comment on that, Professor Chalmers?

Professor Chalmers: I would be surprised if, on the basis of the bill, the courts felt able to draw adverse inferences from failure to answer questions in such situations, but there would be no
harm in making it explicit that none should be drawn.

The Convener: Is that what you would wish to see in the bill?

Professor Chalmers: I certainly agree that there should be no possibility of adverse inferences being drawn in such situations.

Professor Leverick: I suspect that it would not happen anyway, but there would be no harm in putting in a specific provision to that effect.

The Convener: At stage 1, we are looking at points to raise in debate and on which to have responses, so it is important to tease the matter out.

Roderick Campbell: Lord Carloway referred to the possibility of having Saturday courts to reduce long delays in court appearances. Do the witnesses have a view on whether the bill adequately ensures that suspects are not held in custody for too long before a court appearance, or could it do better?

Professor Chalmers: I endorse what Ms McCall already said on that point. It could be dealt with without legislative intervention, but we are at risk of eventually falling foul of article 5 of the ECHR, which may require Saturday courts.

Professor Leverick: I suspect that we need Saturday courts. Whether we need legislation to bring them about I am not sure.

The Convener: Are there issues with court closures if we try to have Saturday courts but the courts do not exist?

Professor Chalmers: We have plenty of space in courts on Saturdays, so I suspect that that is not the issue. The issue is the people to put in them.

Professor Leverick: I guess that I would not be terribly happy if I was the one who had to work in the Saturday courts; unfortunately, we need to introduce them, with all the implications that that has for the people who then have to work on Saturdays and for resources. Sadly, it is necessary.

The Convener: I might have to open up a local court again. I might have to take the key and let them in on the Saturday, or get the jannie to open it specially.

Sandra White: Section 4 of the bill says that an arrested person should be taken "as quickly as is reasonably practicable to a police station."

Do the witnesses have any concerns or comments about how that would affect the police or the suspect?

Professor Leverick: In what sense?

Sandra White: Would it have an adverse effect on the suspect or the police, or could it be a good thing? There is a concern that, because of the provision in section 4 that a suspect should be taken "as quickly as is reasonably practicable to a police station", the police might act too quickly.

Professor Chalmers: There might be an argument that, in some circumstances, the police would arrest someone too quickly, but I am not sure that that can be addressed in the bill. No concerns have occurred to me about the section.

Shelagh McCall: The decision to arrest someone is the critical decision in terms of interfering with a person's private life and liberty. If the consequence of arrest is that certain rights, such as legal assistance, need to be facilitated, the quicker that is done, the better, because it means that, ultimately, someone might spend less time in custody.

The question is interesting in relation to the grey area before the decision is taken to arrest somebody. In our view, that is properly addressed by the police facilitating legal assistance wherever they are and not having to go to the police station for that purpose. The concern is not about taking people too quickly to the police station, but about unnecessarily taking them there.

The Convener: On the other hand, if you are taken to the police station, you know that you are in trouble. If you are questioned in your house, you might not be aware of that, but if you are taken to the police station, the whole agenda has changed.

Shelagh McCall: However, if you are given a proper and full caution when the police arrive at your door—for example, "We have grounds to suspect that you have committed the offence of blah, you need not say anything and you are entitled to a lawyer"—the caution will bring home to you that you need to be aware that you are in trouble and that you have certain rights.

The Convener: Thank you.

Do the witnesses have anything else that they wish to say to us, other than what a lovely panel we are?

Professor Leverick: You are a lovely panel.

The Convener: You can compliment us on that, but is there anything that you wish we had asked that we have not asked?

Shelagh McCall: The only thing that I will say—this follows on from Sandra White's question—is that the reasons why someone may be taken to the police station ought to be defined in the statute. For example, they should be told, "We are taking you there to question you", "We are taking
you there to recover evidence that we could not recover otherwise”, or, “We are taking you there because we think that you might destroy evidence that we need to get.” Providing specific reasons for arresting someone and taking them to the station would provide clarity both for the police officers and for those being arrested.

John Finnie: I have a question that I do not think has been covered—please forgive me if it has. On the investigative liberation provisions in sections 14 and 17, the SHRC refers to the implications for “a suspect’s work and family commitments” and the implications in terms of article 8. Can you expand on that, please?

Shelagh McCall: As I understand it, under the investigative liberation provisions, the bill envisages that someone may be released on the condition that, for example, they need to come back to the police station at a particular time. That time may not be convenient for them due to their caring commitments or important work commitments or, indeed, their solicitor’s commitments, so there may be some issues there.

If a person is released under conditions such as a curfew, that is a serious interference with their private life and may in fact interfere with their right to liberty. The bill does not build in enough limitations around the reasons why people might be released under such conditions, what the limits of those would be and when those would be appropriate. As we say in our written submission, we think that the investigative liberation provisions could be improved by a bit more scrutiny of such issues.

John Finnie: Is your concern that we would have a situation in which the police would consider the full range of options—curfews, timings and so on—and then de-escalate them due to the level of compliance by the accused, rather than a situation in which evidence would escalate the conditions?

Shelagh McCall: Exactly. In interfering with someone’s private life, it is for the state to justify how far that goes, and it should go only the minimum distance necessary to secure the aim that is being pursued, such as the proper investigation and detection of crime.

John Finnie: How would a curfew-like condition be recorded? Would the report that ultimately goes to the Procurator Fiscal Service record the reason why liberation with a curfew was suggested?

Shelagh McCall: Similar to the bail provisions that exist at the moment, there could be standard conditions, such as that the person will be of good behaviour and that they will not interfere with witnesses. The application of additional or extra conditions such as a curfew should be done only to secure compliance with those standard conditions. In other words, is a curfew necessary to ensure that the person is of good behaviour and does not interfere with a particular witness or behave in a particular way? All of that should be recorded in the police report, so that there is a proper record of why things were done. There would be an opportunity for the fiscal and the sheriff to scrutinise that, so it needs to be properly recorded at that stage.

John Finnie: What would be the implications for the system if disproportionate liberation conditions were applied to an accused person?

Shelagh McCall: The implications for the system would be that the accused might have some claim for breach of his rights, sheriffs might be unnecessarily burdened with reviewing investigative liberation conditions and the fiscal’s time might be clogged up with reviewing and remedying inappropriate conditions.

The Convener: Sorry—we are not at the end, because John Pentland wants to ask a question. I thought that we had finished, but there is a postscript.

John Pentland: Convener, I tried to catch your eye, but you turned your head.

The Convener: Dearie me. I will make a point of not doing so from now on, John.

John Pentland: Thank you very much.

It is often said that prevention is better than cure. Police witnesses have argued that section 1 of the bill should be amended so that constables are clearly empowered to arrest a person in order to prevent crime. Can I have your comments on that?

10:30

Professor Chalmers: Let me make two comments. First, I know that the witnesses last week suggested that, because the Police and Fire Reform (Scotland) Act 2012 imposes on the police a statutory duty to prevent crime, they might therefore need the power to arrest people to prevent crime. I find that slightly surprising, as that is not, presumably, a new duty for the police. For some time, the police have had a duty actively to prevent crime. I am not sure that that legislation creates the need for a new power.

Secondly, I can see an argument for a power to arrest to prevent crime, but I would want more detail on how the police would envisage exercising that power. I am not entirely clear what would be done with someone who was arrested solely for the purpose of preventing a crime. If someone is suspected of attempting to commit a crime or conspiring to commit a crime, they can be arrested
because they have already committed a criminal offence and they can be brought before a court. If someone has not committed a crime of any sort, I am not sure what would be done with them once they were arrested. If a power of that sort was to be created, I would like some clarity on that from the police, who suggested it.

**Professor Leverick:** Under the equivalent legislation in England and Wales, there is a power to arrest if there are reasonable grounds to suspect that someone is about to commit an offence. Like Professor Chalmers, I would like to know a bit more about how that would actually work. If someone has not committed an offence and you have arrested them, what do you do with them next?

**Shelagh McCall:** Following the exercise of that power in England, there have been some European cases that have not gone in the police’s favour. We would be extremely concerned about the idea that the police could arrest someone who had done nothing contrary to the criminal law. Section 1(3) of the bill sets out reasons why a constable may arrest someone for a non-imprisonable offence, one of which is that the person would “continue committing the offence”. That would seem to cover the situation where someone had begun to commit an offence, the situation was going to escalate and the police wanted to intervene. We suggest that the list in section 1(3) is probably adequate to assist the police in that situation.

**Professor Chalmers:** This may echo some of the evidence that the committee received last week, but I think that it is worth noting that the Scottish law of attempt and conspiracy is rather broad. A conspiracy is committed at the time that any two people agree to commit a criminal offence; an attempt to commit a crime is committed not at the last minute before a crime takes place but at the point when the accused moves from planning a crime to perpetrating the crime. Both those devices would allow the police to intervene at a very early stage. As Ms McCall says, the idea that someone could be arrested without having done anything contrary to the criminal law is quite disturbing. It is not clear why that would be necessary.

**The Convener:** I am looking in John Pentland’s direction now very carefully and will make a point of doing so.

Rather than say that there are no further questions—someone is bound to put their hand up if I do—let me just say thank you very much for your evidence.

I suspend the meeting for five minutes.
“if the 16 or 17 year old is considered vulnerable (i.e. they have a mental disorder and cannot communicate effectively or understand what is happening to them) then they will not be able to waive their right to legal advice.”

We must be clear that vulnerability for a 16 or 17-year-old may be due to their age and stage of development and not a mental disorder. The problem is that the multiple definitions of vulnerability that exist are not properly drawn out. In particular, the reliance on mental disorder as the determinant of vulnerability is unhelpful, because there are many more reasons why adults, children and young people can be vulnerable and require support specifically to deal with that vulnerability.

Tam Baille (Scotland’s Commissioner for Children and Young People): Trying to define vulnerability is a thankless task. The policy memorandum has made a stab at it. We could suggest improvements, but, at the end of the day, it will come down to judgment, which will have to be exercised on the basis of experience, training and guidance.

We cannot just have blanket coverage. There are certain times when we want to identify those who are vulnerable as opposed to those who are not. We will come on to talk about our views on the waiver, which is really where the vulnerability provision comes in.

Vulnerability is really difficult to define. I have experience of running hostels for children and young people, where we took in the most vulnerable. We ended up trying not to define vulnerability too tightly because, at the end of the day, it came down to individual judgment. However, that judgment will need to be backed up by one of the key things in the bill, which is the training and guidance that will be offered as a result of the bill’s implementation.

The Convener: I take the panellists to section 33(1)(c), which I think is what John Pentland was looking at. The expression “owing to mental disorder” is the bogey phrase there. I was going to ask you about that, Ms Stewart, because I think that your submission explained the complexities of defining vulnerability.

Rachel Stewart: From SAMH’s point of view, the mental disorder definition, which comes from the Mental Health (Care and Treatment) (Scotland) Act 2003, encompasses quite a wide range of mental health problems, learning disabilities, personality disorders and autistic spectrum disorders. Each of those conditions requires a different response, different training and different support. Although, as has been said, it is narrow and it takes just one condition or disorder, it does not set out how people would need to be treated. Sorry—I am not being very clear.

The Convener: That is all right.

Rachel Stewart: You could argue that anyone in custody is vulnerable. It is a stressful and anxious environment for people to be in, and police need support and training to be able to support people who are in that situation.

The Convener: There might be some right toughies in custody, though—people who are not that vulnerable. We might have a dispute about that.

John, do you want to go back to that issue?

John Pentland: Tam Baille mentioned that training is essential. Rachel Stewart’s organisation goes a step further and recommends that we set up a stand-alone appropriate adults service. I ask her to expand on that. I think that the SAMH submission also mentions that the relationship between the national health service and Police Scotland should be strengthened. Is there a weakness there at the moment?

Rachel Stewart: To take the appropriate adult provisions first, we welcome their inclusion in the statute but we note that there are no plans in the policy memorandum to set up any back-up for existing services and schemes. Those are run in different guises across Scotland: some of them are funded, and some of them rely on social worker extraction. We think that, to improve the patchy nature of the service, it would be better to resource it to ensure that appropriate adults receive training and support, that they are retained and that they have assistance to deal with some of the issues that they will face and improve their own mental health.

Some people get a good appropriate adult service because there is that back-up. Others wait for several hours before getting a social worker who might not have training in a certain area. Those people might not be facilitated in the same way and their rights could be affected.

The second point was about links between the NHS and the police.

10:45

John Pentland: Yes. Your written submission says that those links need to be strengthened. Have you identified a weakness?

Rachel Stewart: A lot of people who enter custody are in crisis, and there are some pilot schemes in Scotland in which the NHS and the police work together on alcohol issues. If someone in a custody suite had severe anxiety or depression, they might not need an appropriate adult to help them to communicate, but they might need a nurse present who could say whether they needed to see a doctor and ask when they last
took some medication. For such issues, we would like to see that level of support. There is a bit of a precedent, in that the NHS provides treatment in prisons nowadays, so the links between the justice system and the health service are closer. We think that that should be taken to its logical conclusion.

Mark Ballard: Aberdeen City Council’s appropriate adults service highlighted in its written submission the issues around the fact that section 33 provides statutory support only to those aged over 18 who are deemed to have a mental disorder and that there is a gap in the legislation regarding 16 and 17-year-olds. The policy memorandum states:

“The Scottish Government ... expects that the police will still be able to request the support of an Appropriate Adult for vulnerable suspects, and accused persons aged 16 and 17 years old, and also for victims and witnesses aged 16 and over, through the current non-statutory route.”

We have concerns that, if it is not a statutory requirement to provide that service, local authorities that are under severe financial pressure may not support the provision of the service. It is not clear how that support will be guaranteed unless its provision is made statutory in the bill.

The Convener: I am a bit confused. I am talking about the appropriate person rather than an “appropriate adult”. The term that the bill uses is “appropriate person”. Is that right?

Mark Ballard: Yes.

The Convener: Section 31(5) defines an appropriate person, and it seems to me that they do not have to be provided by the state, the voluntary sector or anybody else. Section 31(5)(b) states that,

“if a constable believes that the person in custody is 16 or 17 years of age, an adult who is named by the person in custody and to whom a constable is willing to send intimation”

could be an appropriate person. Am I right, or am I misunderstanding the issue? I am all for granny being the appropriate person.

Tam Baillie: You are talking about the “appropriate person” for 16 and 17-year-olds, but the policy memorandum talks about a “responsible person”. The Convention of Scottish Local Authorities has already made representations that if the assumption is that the “responsible person” for a 16 or 17-year-old will be a social worker or legal representative, it seems to me that they do not have to be provided by the state, the voluntary sector or anybody else. Section 31(5)(b) states that,

“if a constable believes that the person in custody is 16 or 17 years of age, an adult who is named by the person in custody and to whom a constable is willing to send intimation”

The Convener: That phrase does not appear in the bill—it is just in the policy memorandum.
would still be able to have a responsible person present, but they could waive their right to legal representation. However, I understand that, if they did not have a responsible person present, they would have to have legal representation. Also, there may well be vulnerable young people for whom you would want legal representation to be present. Therefore, it is a judgment call.

In my estimation, the bill strikes just about the right balance, but I recognise that there may be pressures. People may say that there should be blanket legal provision, but that would have resource implications. I am mindful of the representations that have been made to the committee about the need to be careful if children aged 16 or 17 waive their right to legal representation. Therefore, there is a judgment to be made.

**Morag Driscoll:** We have some real concerns about the issue. As Tam Baillie correctly points out, the age of majority is 18, and a young person who is believed to have committed an offence will normally be dealt with through the children’s hearings system. However, we get calls to our advice line about the issue. Last year, we received 3,800 calls and a substantial number of those dealt with criminal matters.

We find that young people waive their right to a solicitor when they should have one present because they do not understand the situation. One autistic youngster was offered a lawyer and when his father, who was not allowed to be with him at that stage, asked why he had declined, the youngster said, “What’s a lawyer?” Some young people’s parents will also tell them, “You don’t need a lawyer because you’re innocent.” The young man who did not know what a lawyer was had a social worker with him.

There are so many stresses that a young person can be under and assumptions that they can make—they can be frightened or feel that they do not need a lawyer—that I worry about their having the ability to waive the right to legal representation. Having somebody with them is no guarantee that the right decision will be made. I would rather that we errred on the side of providing legal representation for all people who are vulnerable enough not to be considered full adults.

Having a parent present is not necessarily appropriate, as parents no longer have the right to direct once the child is over 16; they have only the right to guide. If the young person wants their parent to be with them, that is great and a sign of a healthy relationship. However, they may not have a healthy relationship with their parent—it may be fraught with difficulties or the parent may be involved in the crime. Therefore, I would favour the young person having the choice or, by default, a professional being brought in when necessary.

**The Convener:** The parent could be the victim, too.

**Morag Driscoll:** Yes, or a sibling could be the victim. All sorts of conflict could be set up. I worry about saying that, because somebody is 16 or 17, we will recognise their autonomy in the way that is proposed. It is great to recognise their autonomy, but protections must be built in, in case the child is a high-functioning sufferer of an autistic spectrum disorder, for example, and nobody has realised. For somebody who is in care, it may be more appropriate that they have their foster parent with them.

**The Convener:** Do we not then come back to the judgment of what is vulnerable? There is an issue about evidence. If a vulnerable person does not get protection, the evidence could be disallowed.

**Morag Driscoll:** Perhaps we should presume that someone who is under 18 is vulnerable, unless we are sure that they are not. We should not be saying that someone is not vulnerable until we are sure that they are.

**The Convener:** I would have difficulty with that, but I am just mumbling away to myself. Can an 18-year-old who has two kids be presumed to be vulnerable?

**Morag Driscoll:** No. It is about 16 and 17-year-olds.

**The Convener:** Can a 17-year-old with two kids be presumed to be vulnerable?

**Tam Baillie:** I am not going to go to the wire on that one. The bill has just about got it right. I recognise some of Morag Driscoll’s reservations. If the committee feels strongly that there should be no discretion as a matter of course, it will need to satisfy itself that that is manageable and that it will achieve the right result, which is proper safeguards for children and young people. At some point, we will have to look at the definition of vulnerability.

**Morag Driscoll:** I am not suggesting that there should be no discretion at the ages of 16 and 17, but we need to be satisfied that a young person understands the right that they are waiving.

**Mark Ballard:** Barnardo’s Scotland entirely shares Morag Driscoll’s concerns.

Section 42 says that when constables are deciding whether to hold a child in custody or interview a child about an offence, the wellbeing of the child should be of primary concern. That is directed at everyone under the age of 18. However, section 30(2) says that intimation must be sent if the child is under 16, but may be sent if the child is over 16; section 30(3) says that intimation is to be sent to the parent if the child is...
under 16, but can be sent to any person who is “reasonably named” by a child who is over 16; and section 31(5) says that an “appropriate person” for the under 16s means any person who the constable considers to be appropriate, but for 16 and 17-year-olds, it can be any adult who is reasonably named by the young person.

It seems to us that there is an inconsistency between the blanket position described in section 42, which is that someone who is under 18 is a child and their wellbeing should be the primary concern, and the way in which sections 30 and 31 treat 16 and 17-year-olds as if they are adults and in the same category as adults. There seems to be a disconnect between different sections in the bill.

Tam Baillie is quite right to say that a judgment needs to be made, but from Barnardo’s Scotland’s point of view, there is a disconnect between whether we consider those who are under 18 to be children, as in section 42, or adults, as is effectively done in relation to intimations in section 30(2).

The Convener: I should say to Tam Baillie that shrugging or making faces is not recorded—you have to say something.

Tam Baillie: I do not have a problem with increased protection for young people up to the age of 18, at the same time as there is increased recognition of the capacity of children as they reach the age of 18 to know their voice, their views and their opinions. I do not think that that is a contradiction.

The Convener: That is an interesting point, and the committee will probably reflect on it in its stage 1 report. There are conflicting views about the differences between under 16s, and 16 and 17-year-olds.

Elaine Murray wanted to draw attention to something.

Elaine Murray: Yes. Section 25 is about consent to interview without a solicitor. Sub-paragraphs 25(2)(b)(i) and (ii) provide for someone who is unable to “understand sufficiently what is happening”.

Surely the young person who does not understand what a solicitor is or thinks that they do not need one because they are innocent would be caught by that provision.

Morag Driscoll: You are relying on the police who are doing the interview to spot that, and they might not necessarily spot it in someone who is apparently high functioning. You are asking frontline police officers to have a lot of expertise in spotting these things. That is worrying, particularly when so many of these kids appear to be confident and to know what is going on; in fact, they are not confident and do not know what is going on. They can be very reluctant to say, “I don’t get it,” and just retire into saying, “No comment,” or, as some young people have said, “It was easier to say that I had done it.”

11:00

The Convener: Okay. You have made that point.

Alison McInnes: I turn to the length of time that suspects can be held in custody. The bill reduces the current 24-hour maximum detention period, but we heard from the SHRC representative on the previous panel that it would like the period to be reduced to six hours. In particular, the SHRC questioned whether it was ever right for vulnerable or young people to be held in custody for longer than six hours. What is the panel’s view on that issue?

Morag Driscoll: The Child Law Centre feels strongly that consideration should be given to how long a child should be held and whether a child should ever be held in a police station. There are protections in the Children’s Hearings (Scotland) Act 2011 in relation to children not being held in police stations unless absolutely necessary, in which case they should be held for the minimum time possible.

Vulnerable witnesses can be interviewed in much more relaxed surroundings, such as the amethyst room; perhaps we could look at options along those lines. If a child has to be held because of their behaviour, could we look at alternatives? Children could be held in units or other places. We must also look at the length of time for which a child is held. Is it appropriate for a child to be held for the same length of time as an adult? We have some concerns.

There is the idea that children could be questioned at home. That sounds wonderful, but we are getting too many calls about situations in which children have not had solicitors because the police have told the family, “We could talk to you at home. You can have a lawyer, but you will have to go to the police station for that.” Children are being done, because the parent is torn between taking their child down to a place that they have seen on television, or keeping them at home, in which case the child will not have a solicitor. There are real tensions around where children are interviewed and held. Sometimes it is necessary to hold a child who is really going off the scale or has been accused of something that is very dangerous, but we still have to look at the appropriateness of the practice. Such an approach is taken elsewhere in legislation.

Alison McInnes: Can you explain what an amethyst room is?
The Convener: What room?

Alison McInnes: I think that Morag Driscoll mentioned the amethyst room, where children could be interviewed.

Morag Driscoll: Child witnesses or young people who are allegedly victims of a sexual offence are usually interviewed by a specialist police squad called the amethyst squad. The interview room tends to be very comfortable—it is a sitting room with padded chairs and a camera that can record the interview. They are interviewed in an environment that is much more comfortable than a normal police interview room, which has hard furniture that is stuck down, and which usually does not smell very nice.

The Convener: I do not always have an image of someone under 17 who is taken in by the police being a sensitive flower. Without prejudging them, some of them can be gey tough.

Morag Driscoll: Yes, they can be, but I am talking about children from 13 up to maybe 16 or 17. They are not all tough. If they were all that tough, we would not send them through the children’s hearings system.

The Convener: I never said that they are all tough, but they are not all shrinking violets. I am balancing it with what the public see.

Morag Driscoll: That is my point. I am saying that there must be a balance between the vulnerable accused—the police might get better information from an interview in a less intimidating environment—and the tough nut who has been there lots of times before and is quite proud of that because they come from a family that regards it as a rite of passage. A balance must be struck. However, I would always question whether we should automatically hold children in a police station, and there are already protections in the Children’s Hearings (Scotland) Act 2011.

Tam Baillie: I said that I warmly welcome the bill’s definition of a child as someone under the age of 18, because that is consonant with the UNCRC. In fact, it is quite clear that, to be in line with the UNCRC, a child should be held or detained as a last result and for the minimum possible period. That approach should be adopted in the bill. If a child is detained for longer than six hours, there should be stringent safeguards around why that is the case. We already attend to the issue diligently in the children’s hearings system, as there are very strict rules about children being held in secure accommodation. There is an opportunity to bring in a similar discipline under the bill, on the basis that people under the age of 18 are children.

Mark Ballard: I agree entirely with that. Again, I draw the committee’s attention to section 42. The stringent safeguards that Tam Baillie talked about should be built into the early parts of the bill that deal with arrest, for example. At the moment, no clear link is drawn between the different treatment of children outlined in section 42 and the early parts of the bill that, as Alison McInnes pointed out, deal with matters such as six-hour and 12-hour stays in a police station. That needs to be drawn out more fully to enable the police to understand how to take into account their responsibilities under section 42.

Rachel Stewart: It is up to the police to determine within six hours whether suspects who may have a mental disorder are vulnerable and require assistance with communication. Getting an appropriate adult, social worker or someone else who can help to facilitate the information transfer between police, solicitor and the individual can take a lot of time, especially in rural areas, especially if the scheme that the local authority operates is not well resourced and especially if a social worker has to be extracted from their day job or the person is needed in the middle of the night. That is something to consider.

Alison McInnes: Has an opportunity been missed in the bill to tackle the requirements of the United Nations Convention on the Rights of the Child and raise the age of criminal responsibility to 12?

Tam Baillie: Yes.

Alison McInnes: Would you urge us to raise the age?

Tam Baillie: Yes. The Government has already made a commitment to consider the matter. The issue is whether the bill is the way to do it. In the absence of any indication that there will be another criminal justice bill, the matter must at least be raised to get some clarity on how the Government will give effect to its commitment to raise the age of criminal responsibility, which I welcome.

Mark Ballard: I completely agree with what Tam Baillie has just said. I draw the committee’s attention to the commitment that the Scottish Government made in the “Do the Right Thing Progress Report 2012” on its progress on advancing the rights of the child and the UNCRC. It said that it would “give fresh consideration to raising the age of criminal responsibility from 8 to 12 with a view to bringing forward any legislative change in the lifetime of this Parliament.” As Tam Baillie says, in the absence of any other legislation that could do that “in the lifetime of this Parliament”, it would seem entirely appropriate for the Scottish Government to do it in the bill. That would be in
appropriate to insert it at this stage. That is the time to test the proposition thoroughly so that we Government would have the mechanism or the doubt whether, at this stage, we and the committee ought to test such propositions. It is about process. The Government and the substantive decision has been made.

The Convener: Do you accept the point that the previous panel of witnesses made on that? They were sympathetic to the idea, but they said that it is a biggie. It would be a really big thing to do in the bill at this stage. We would have to go out to consultation and have more witnesses before the committee at stage 1. We are already on our fourth panel, I think. Although the previous witnesses were sympathetic—I am not pre-empting how members of the committee might feel about the idea—they felt that it is too big a thing to plump in now. It might be better to put it in another bill.

Mark Ballard: In response to that, I again highlight the commitment that the Scottish Government made in the “Do the Right Thing Progress Report 2012”—

The Convener: It is nothing to do with commitment.

Mark Ballard: —that it would consider introducing such legislative change

“In the lifetime of this Parliament.”

The substantive change was delivered through the Criminal Justice and Licensing (Scotland) Act 2010, under which the age of criminal prosecution was raised to 12. From our point of view, we are talking about a loophole that needs to be closed. The substantive decision has been made.

The Convener: I am talking not about principle but about process. The Government and the committee ought to test such propositions. It is doubtful whether, at this stage, we and the Government would have the mechanism or the time to test the proposition thoroughly so that we could get it right, so I am not sure that it would be appropriate to insert it at this stage. That is the only point that I am making. The members of the previous panel were quite sympathetic to the idea of raising the age, but they doubted whether it could be done in the bill.

Alison McInnes: In the evidence that it gave as part of the previous panel, the Scottish Human Rights Commission made it clear that the bill is absolutely the right vehicle for raising the age.

The Convener: It did. Forgive me—it was the two professors who had doubts.

Alison McInnes: The point is that raising the age is unfinished business from the 2010 act.

The Convener: I misrepresented the SHRC, but the two professors were of the view that there is already enough going on.

Morag Driscoll: The Children and Young People (Scotland) Bill, which is also going through the Parliament, deals with getting it right for every child, talks about supporting young people and puts emphasis on the UNCRC. The proposed change is unfinished business. As my colleague said, it is not a major change but a leftover change. It would stop us having the youngest age of criminal responsibility in Europe, which is something to be ashamed of. In other countries that do not criminalise the under-12s, the sky has not fallen in, and we have other ways of dealing with the issue. Let us finish the job. Last time, we did only half the job; in fact, we did three quarters of it. This is the last bit, and the bill is the perfect opportunity to do it.

The Convener: You have made the case powerfully. Does anyone else wish to comment?

Tam Baillie: At the very least, the committee should raise the issue in its report.

The Convener: I think that we will. The matter has been raised in our evidence sessions. Members will have views on whether the issue ought to be included, but it is certainly a good point to raise.

I will take John Finnie next, because he has not been in yet. I have to watch my Johns.

John Finnie: You are very kind, convener.

I go straight to section 42, which is entitled “Duty to consider child’s best interests”. There is engagement between the public sector, the police and the local authorities, all of which signed up to the GIRFEC principles with regard to joint investigations. I understand that, despite the fact that great improvements have been made, there is still a tension to do with whose interests are being served and what objectives the different sides have to achieve. Section 42(2) states:
"In taking the decision, the constable must treat the need to safeguard and promote the well-being of the child as a primary consideration."

On one level, that may seem a laudable concern, but I am sure that many cops would say, “My job is to investigate crime.”

My question is twofold. The bill states that “the well-being of the child” should be “a primary consideration”, but the SHRC says that it should be the paramount consideration. Would you like to comment on the existing tension? How will training—I imagine that considerable training will be required—address the implementation of that provision? I ask that as someone who used to be a representative of police officers, who would see their obligation as being to investigate crime.

**Tam Baillie**: I warmly welcome the fact that the phrase “child’s best interests” is in the bill, but I suggest that we should be consistent in our use of terminology, because “best interests” turns into “well-being” in section 42(2). I think that it would be wise to have “best interests” in section 42(2).

This discussion has a resonance with some of the debate that will unfold as part of the consideration of the Children and Young People (Scotland) Bill, where, in my estimation, “best interests” turns into “well-being” in section 42(2). I do not entirely see how best interests can be treated as a paramount consideration. I am uncertain how wellbeing, which is multifaceted, could be primary, but I can entirely see how best interests can be treated as paramount. As Tam Baillie said, there is case law on it, but we have case law on “best interests” as well. We are in a place where we should consider how consistent we are with regard to those obligations.

**Mark Ballard**: I strongly agree with everything that Tam Baillie said in supporting having “best interests” in the bill and on the challenge that police officers will face in making the transition. As he said, it is part of a wider transition that is driven by the getting it right for every child agenda.

I also agree with the points that the convener and Tam Baillie made about wellbeing. As defined in the Children and Young People (Scotland) Bill, it is a multifaceted term that covers all the articles of the UNCRC. The more usual use, as the convener pointed out, is that the best interests or the welfare of the child are paramount, which is in accordance with article 3 of the UNCRC.

The different rights in the UNCRC that are translated into the GIRFEC wellbeing indicators might be in conflict; there might be a conflict between the right to privacy and the best interests of the child. It is important to us that welfare has paramountcy over all other rights and considerations. I am uncertain how wellbeing, which is multifaceted, could be primary, but I can entirely see how best interests can be treated as paramount. As Tam Baillie said, there is case law on that and on how a child’s welfare can be treated as a paramount consideration. I am not sure whether “wellbeing” is the right term. As has been pointed out, the title of section 42 contains the phrase “best interests”, which is not quite the same as wellbeing. It would be more helpful for police officers and consistent with things such as the Children and Young People (Scotland) Bill if “welfare” or “best interests” were used as the primary consideration.
We fully support the principle that “best interests” should be in the bill and that GIRFEC will require change. We have seen that change happening in police forces, particularly in Highland.

**The Convener:** The darkest Highlands. [*Laughter.*]

**Mark Ballard:** Highland has been the GIRFEC pathfinder area.

**John Finnie:** Well said, Mr Ballard.

**Morag Driscoll:** There is a great degree of unanimity here. I endorse what both Tam Baillie and Mr Ballard have said. Wellbeing is a difficult concept to define in a legal context, whereas best interests and welfare have a long history, are well understood and are consistent across the legislation. The Faculty of Advocates has spoken strongly about the matter, as has the Law Society of Scotland, in relation to the Children and Young People (Scotland) Bill. We need that consistency in relation to the Criminal Justice (Scotland) Bill as well.

In respect of young people who offend or are dangerous to themselves and others, the Children’s Hearings (Scotland) Act 2011 already allows us to override the child’s best interests. It may not be in the child’s best interests for them to go into secure accommodation, but that may be necessary in the interests of the safety of the child or other people. When it comes to investigation, if the police are required to regard the best interests of the child as paramount, there may still be times when that needs to be overridden because things are dangerous or extreme. Such times are, mercifully, rare.

**The Convener:** I understood that. It is not your fault—it was mine for not understanding the explanations.

**Tam Baillie:** It is not clear to me from section 14, on investigative liberation, whether, in the exercise of that provision, the best interests of the child must be considered. That may be a drafting issue or it could be down to the fact that I have not quite understood it. However, I can imagine circumstances in which the imposition of a curfew would have a significant impact on a child’s best interests—for example, if the thing that kept them off the streets was the youth club that they attended and the curfew cut across that. It would be worth seeking reassurances on that.

My reading of the bill is that the intention is that consideration of the child’s best interests will ribbon its way through every stage of the process and will be taken into account particularly in relation to investigative liberation. If that is not the case, it should be, in order to make section 14 consistent with the other sections.

**Mark Ballard:** I offer clarification of the position of Barnardo’s on wellbeing. In relation to the Children and Young People (Scotland) Bill, we believe that wellbeing is the appropriate term to use in planning children’s services, which needs to be done in the round, and in conducting a needs assessment, when the breadth of the child’s needs must be considered. We are concerned with wellbeing as a primary consideration and think that there are situations when, in relation to the Children and Young People (Scotland) Bill, wellbeing is the appropriate standard. However, we do not see it as the appropriate terminology for the Criminal Justice (Scotland) Bill, for the reasons that we have discussed.

**The Convener:** I foresee a long debate at stage 1 about the drafting of the bill and that word.

I thank you all for your evidence. Is there anything that you want to add that we have not asked about?

**Mark Ballard:** I want to highlight issues where children are affected by the justice system through parental imprisonment. There is evidence to show that up to a third of prisoners’ children are present when their parent—

**The Convener:** Sorry, but where does that appear in the bill?

**Mark Ballard:** It is not in the bill, but we would like to see recognition of it in the bill. We talked about section 42 and the duty to consider the child’s best interests. Consideration should also be given to the impact of the imprisonment, detention and arrest of a parent on children and young people. We would like the committee to think about that as the bill goes forward.

**The Convener:** Thank you for putting that on the record.

**Rachel Stewart:** The training in supporting vulnerable persons that is specified in the policy memorandum, which will be dealt with in regulations, is very much for the appropriate adults. There might be a missed opportunity to ensure that the police, who are the gatekeepers for support for vulnerable people, are given appropriate training. As my colleagues have discussed, it is sometimes difficult to ascertain someone’s vulnerability.

**The Convener:** To give the police their due, in the past few years they have got a lot better at recognising the subtleties of autistic spectrum disorders and so on. I understand that they now undergo training in that.

**Rachel Stewart:** I agree. However, the custody sign-in sheet asks whether the person has a mental disorder or an illness and whether they have ever attempted suicide.
The Convener: We are not happy with the use of the phrase “mental disorder” in the bill, which would be reflected on forms and so on. The evidence to date has certainly not made us happy with that.

Alison McInnes: Is Ms Stewart’s point not that it is not sufficient to give someone a form and ask them to identify whether they are vulnerable? Are you not looking for more in-depth training?

Rachel Stewart: The questions that the police ask people when they enter custody might not catch somebody with a learning disability, as they might not say that they have a mental disorder. Also, some people who have a mental health problem and who have had a bad experience previously with the police might not want to disclose the fact.

The Convener: The point is that we are not happy with the use of that expression in the bill in general.

Tam Baillie: I offer a point of clarity following Mark Ballard’s point about children who are affected by their parents being arrested, detained or sentenced. If consideration of the best interests of the child is going to ribbon its way through the bill, it would be advisable to look at the sections that deal with arrest, detention and investigative liberation to ensure that they take account of the best interests of a child who may be affected by decisions on any of those things. That is the point of reference that you were looking for when you asked where the issue appears in the bill.

The Convener: Home might not be a good place to be sent back to, or it might be a good place.

Tam Baillie: Yes. It cuts both ways, but as long as it is in the bill, it will be a consideration.

The Convener: Thank you all very much for your evidence.
Criminal Justice (Scotland) Bill: Stage 1

The Convener: Let us get back into harness, team. I welcome to the meeting today’s first panel of witnesses on the Criminal Justice (Scotland) Bill. Murray Macara, Queen’s counsel, is from the Law Society of Scotland; James Wolffe QC is vice-dean of the Faculty of Advocates; Michael Walker is a senior policy officer of the Scottish Criminal Cases Review Commission; and Fraser Gibson is the head of the appeals unit in the Crown Office and Procurator Fiscal Service.

I would like to take questions from members in segments, as that will help the panel and help the clerks to draft the stage 1 report. We will start with questions on sentencing for weapons offences, then move on to sentencing of offenders on early release, then on to appeals and finally to the SCCRC. Can I have questions on sentencing for weapons offences?

Roderick Campbell: I will kick off with a very basic question. Does the panel think that the courts need increased sentencing powers to deal with offences involving the possession of knives and other offensive weapons?

The Convener: Panel members can self-nominate to answer questions; the microphone will come on and I will call you. Michael Walker is first, please.

Michael Walker (Scottish Criminal Cases Review Commission): No. I defer to Murray Macara on this issue. I am here principally to speak to the issues involving the SCCRC.

The Convener: I beg your pardon. Who wants to answer this question, then? Murray Macara does.

Murray Macara QC (Law Society of Scotland): First, I thank you, convener, for the opportunity to give evidence. In answer to—

The Convener: I hope that you keep that spirit in mind as we get to the end of the evidence session.

Murray Macara: I might as well get the compliments out early.

The Convener: You must have heard that I do not do flattery. On you go.

Murray Macara: The Law Society has no particularly strong views about sentencing. It is not very long since the maximum sentence for carrying a knife or a bladed instrument was increased to four years. I do not know, but I suspect that that maximum sentence has not been imposed terribly often.

Having read the consultation document that accompanied the material that I was supplied with, I can readily understand the public’s concern about the prevalence of knife crime and the Parliament’s desire to address the scourge of knife crime.

Fraser Gibson (Crown Office and Procurator Fiscal Service): I, too, thank you very much for the invitation, convener.

Sentencing is clearly a matter for Scottish Government policy, rather than for the Crown Office and Procurator Fiscal Service. I note from the policy memorandum that the Scottish Government has outlined its policy on knife crime offences and, of course, as the Lord Advocate has often said, we are committed to tackling the scourge of knife crime in Scotland.

Roderick Campbell: This question is for Mr Gibson in particular. Are you able to say how many offences attract sentences close to the current maximum of four years?

Fraser Gibson: I am not, I am afraid. I do not think that we necessarily hold statistics on that at the moment.

Margaret Mitchell: I am given to understand that the figure might be that just one out of 805 offenders was given a sentence of four years and that 95 received a sentence of less than two years. In view of that, will the bill’s proposal to increase the maximum sentence from four to five years, which sounds good and as if it would be more of a deterrent, make a huge difference? If not, what would?

The Convener: I do not know whether anyone on the panel wishes to address that or feels able to do so.

Murray Macara: I do not know whether increasing the maximum sentence from four to five years will make much of a difference. I have no reason to doubt the statistics that Mrs Mitchell has quoted. However, I suspect that the answer lies in culture rather than penalty. Somehow, in some areas of Scotland, the culture of certain people carrying knives needs to be changed. I would think that deterrent sentences can address that culture only so far.

Margaret Mitchell: If the statistics are right that only one out of 805 offenders was given a sentence of four years, surely the maximum deterrent has not been tested sufficiently to justify bumping it up to five years.
Fraser Gibson: Perhaps one point to bear in mind is that anybody who pleads guilty to a crime will get a discount in sentence. Certainly, in cases with guilty pleas we would not expect to see the maximum four-year sentence imposed, even if the judge was discounting that. The actual sentences that have been imposed might not give the full picture.

Margaret Mitchell: Is there a more general point then that we really need the statistics and evidence before us in order to judge how sentences are working and how effective the bill’s proposals might be?

The Convener: I do not know whether that is a matter for the Crown Office, but it might be a matter for Mr Macara.

Murray Macara: The material that I have been supplied with—in other words, the policy memorandum—contains a lot of information about the progress that has been made in recent years but I suspect that more research is needed.

The Convener: Just to clarify for the record, what type of cases relating to possession of a knife or offensive weapon would attract the maximum sentence?

Murray Macara: The record of the accused would determine the imposition of the maximum sentence. Undoubtedly, someone sentenced to four years’ imprisonment—which, indeed, has been imposed on one occasion—must have a significant record for either carrying knives or violence.

The Convener: In your experience, have any first-time offences attracted the maximum sentence? What kinds of offensive weapons or knives would a person have to be carrying in that case?

Murray Macara: It is inconceivable that a first offender would attract the maximum sentence.

The Convener: So a person wandering about Princes Street with, say, a machine gun would not in theory get the maximum sentence.

Murray Macara: We are talking about knives here, though.

The Convener: We are talking about knives and offensive weapons.

Murray Macara: Someone with a machine gun would be prosecuted under different legislation.

The Convener: Glad to hear it.

Elaine Murray will ask about the sentencing of offenders on early release.

Elaine Murray: Section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 allows a court to order that a person who has committed an offence during a period of early release from a custodial sentence be returned to custody to serve part or all of the period of the whole sentence still outstanding at the point when the new offence was committed. Although sections 72 and 73 alter that in some respects, the policy memorandum suggests that those changes “do not substantively change the overall powers of our courts in this area”.

Do you agree that the proposed changes will have a minimal effect on the courts?

Fraser Gibson: That is certainly my view.

Murray Macara: I agree. In my experience, courts are alert to the fact that the man who is about to be sentenced has been released early and they will generally take into account the provisions in section 16 of the 1993 act. I do not think that this change to oblige the court to take the matter into account will make a significant difference.

The Convener: We are whizzing on here. With regard to the appeals procedure, do you share concerns raised in the Carloway report about delays in progressing appeals in the current procedure? Surely that cannot be in the interests of justice either for the person appealing or for the Crown, which might itself be making an appeal.

Fraser Gibson: There have been a number of cases in the recent past—not, I hope, so much nowadays—in which appeals have taken an excessive length of time to come to a conclusion.

The Convener: What do you mean by an excessive length of time? Are we talking about years?

Fraser Gibson: Indeed. An example of that is the recent European Court of Human Rights decision on the William Beggs case, as a result of which Mr Beggs was awarded a sum of money because of the considerable number of years that his appeal had taken.

The Convener: I am afraid that I do not know that case. How many years are we talking about?

Fraser Gibson: I do not have the details with me, but I think that it might have been as many as five or six.

Michael Walker: I can also tell the committee that an SCCRC referral appeal that was heard on Friday has taken six years to reach the preliminary hearing stage. We are not even talking about a final decision in that case.

The Convener: Do these cases involve people in custody?

Michael Walker: Yes.
The Convener: Do people remain in custody all that time while they wait for their appeal to be heard?

Michael Walker: Generally, yes.

The Convener: Are they ever released pending the appeal?

Fraser Gibson: They are entitled to apply for interim liberation. Obviously, the court assesses the risk that the person in question poses before reaching any decision.

The Convener: What causes these delays? Six years seems an extraordinary length of time.

Fraser Gibson: The European court opinion on Beggs contains a detailed analysis of the cause for the delay in that case.

The Convener: Crumbs—I missed that. Can you give me the bullet points?

Fraser Gibson: I can certainly make that available to the committee. In some cases the delay has been down to appellants seeking to add new grounds of appeal over the years as the appeal goes on, or seeking to recover other documents, which has spun out the legal process to the extent that it takes a number of years. I can think of another commission referral—Graham Gordon—that took a number of years to come to a conclusion.

Michael Walker: It is not always the fault of the court or the process. Sometimes the appellant changes solicitors or legal teams and, each time they do that, the new team comes to the case anew. As Fraser Gibson said, appellants sometimes add additional grounds and the case can seem to spin out of control before it eventually comes to an end.

The Convener: What do the proposals in the bill do to remedy that? Do they go far enough? Should something else be done to accelerate appeals within reason, given that those other issues will remain?

James Wolfe QC (Faculty of Advocates): I belatedly add my thanks to the committee for allowing me to appear today.

No one could justify delay in the disposal of criminal appeals. In Scotland, we are proud of the expedition with which we deal with first instance business in the criminal courts and we should collectively be striving to achieve the same in the appeal court.

The committee should perhaps appreciate that the proposals in the bill, particularly in sections 76 and 77, are specifically focused on the question of late notes of appeal and late grounds of appeal and the like. They do not deal directly with the subsequent progress of appeals. That is very much left to the courts’ case management responsibilities and that is firmly within the province of the court.

The specific proposals to deal with late notes of appeal and late grounds of appeal allow the court to permit those to be lodged in what is described as “exceptional circumstances” and the court must then have regard to certain things in deciding whether the circumstances are exceptional.

Wearing my other hat as a council member of Justice Scotland, I draw the committee’s attention to the observations of that body in its written evidence to the committee. It makes the point that, on the face of it, the provisions in sections 76 and 77 would restrict access to the appeal court. The court already has a discretionary power to refuse to receive late notes of appeal and grounds of appeal. One would imagine that the court might be relied on to allow such documents to come in only when that is properly justified. Justice Scotland expresses the concern that narrowing access to the appeal court at the stage of an appeal being taken would restrict access to justice by restricting access to a process that puts right miscarriages of justice. It is ultimately tied to the consideration that the committee will have to give to the role of the SCCRC. If appeals are knocked out at that stage, they might simply go to the SCCRC and be considered at a later stage.

Murray Macara: I do not want to introduce a note of complacency but, until now, the questions have focused on the issue of delay and one or two examples have been given of exceptional delay. However, those are exceptional cases. I appreciate that Lord Carloway is concerned about the possibility of delay in the appeals process, but some appeals are processed expeditiously; I am thinking particularly of appeals against sentences that come up within two months or so.

We have a system that is capable of delivering appeals to conclusion very quickly. What must be remembered are the causes of delay. Michael Walker’s example of a six-year delay was in an SCCRC referral. Inevitably, a commission referral takes longer than conventional appeals because anyone who is successful in obtaining a commission referral must have exhausted the conventional appeal process before going to the commission.

11:15

Fresh evidence and defective representation appeals inevitably take longer than other appeals. For example, defective representation appeals invariably involve a change of solicitor. Therefore, there are reasons for delay. My concern is that introducing an excessively rigid system could bring about miscarriages of justice. In the wider picture,
it may not necessarily be—I will trot out a phrase that we will no doubt use later—in the interests of justice that an appellant with a good appeal should be denied the opportunity to appeal simply because of an excessively rigid and fixed timetable.

The Convener: Generally, you are not happy.

Murray Macara: Generally not happy.

The Convener: That is fine. Other members will probe why that is the case.

John Finnie: My question is perhaps a bit off script but, given that we are talking about delays, I wonder whether the panel will comment on the circumstances of someone who is convicted, serves a period in custody and then, some years on, seeks avenues of redress, which may be limited, only to find that the Crown no longer retains some or all of the documentation.

The Convener: That matter is not related to the bill.

John Finnie: That is why I gave a preamble and hesitated about asking the question.

The Convener: I am sweeping your question to the side, but you have made your point.

Roderick Campbell: How often are they used? Does anyone have statistics on that?

The Convener: Nobody is indicating that they wish to respond; I will not force anyone to do so.

Alison McInnes: Roderick Campbell has just covered the issue that I was going to ask about.

I draw members’ attention to my entry in the register of interests and the fact that I am a council member of Justice Scotland.

Margaret Mitchell: I take what was said about restricting access to justice, but is there not a balance to be had in a little bit of flexibility? Will the panel therefore comment on the Carloway report’s recommendations that were not taken up, such as the High Court’s power to impose sanctions with the aim of enforcing time limits and procedural orders and, in particular, the power to order particular steps to be taken, such as not making funds available from the public purse?

The Convener: The panel cannot comment on that.

Margaret Mitchell: Without being too prescriptive in relation to the recommendations, I know that the Crown is quite supportive of doing whatever it can to increase efficiency and effectiveness.

The Convener: Perhaps the Crown does not want fines or conditions imposed on it. It might be the Crown at fault. I am not saying that the Crown is at fault—I am just saying that it might be.

Fraser Gibson: I am not sure that it is appropriate for me to comment on that, convener.

Margaret Mitchell: Nobody has any comments?

The Convener: Are there any practical things that the court could do to focus agents on both sides on increasing efficiency? You cannot tell me that no delays can be avoided. There must be delays that could be avoided in the appeal procedure. Should the court perhaps have some means of penalising parties, so to speak?
Fraser Gibson: It is perhaps fair to say, lest the committee comes away with the impression that delays are commonplace in appeals these days, that the court has made substantial progress over the past few years in dealing with delays. It has done that primarily by dealing with business efficiently, by appointing an administrative judge for appeals and by being strict about applying time limits on cases and allowing additional grounds of appeal to be lodged late. That is why sentence appeals are now dealt with expeditiously and solemn conviction appeals are dealt with much more quickly than they were a few years ago.

The court has made some progress in that direction, for which it is only fair to give it credit. That is not to say that other improvements could not be made, but I do not think that it is the Crown Office’s place to say exactly what they should be.

James Wolffe: I concur with that observation. Mr Gibson has a much closer and more intimate knowledge of the appeal court than I do, but it would be wrong to give the impression that nothing has been done or is being done by the court in the exercise of its case management powers.

The court can do a great deal by being rigorous in the application of time limits, by exercising discretion carefully and by insisting on explanations that are satisfactory before steps are allowed to be taken out of time. Ultimately, the court needs to bear in mind its responsibilities not only to administer justice but to secure that justice is done within a reasonable time.

The steps that the court is able to take are perhaps not steps that are susceptible to legislation because they depend on the court exercising the powers that are available to it in the course of a case, with a view to securing the effective administration of justice. I concur with Mr Gibson that a great deal of the work can be done through the court’s administration powers.

Margaret Mitchell: Can I put it another way, convener?

The Convener: I do not know, but you can try.

Margaret Mitchell: Do you feel that the Carloway recommendations on the court being able to impose sanctions, which would enforce time limits and procedural rules and perhaps help efficiency, are unnecessary? By and large, there is not a problem—that is coming over loud and clear—and I do not think that anything ever works perfectly, so has the Carloway report highlighted unfairly that that proposal should be considered?

James Wolffe: Perhaps I can offer this comment—our difficulty with that particular proposal is that lawyers who are involved in the representation of their clients could be penalised for steps being done out of time in circumstances in which that was not their fault.

If one thinks of a change of agency, for example, a new agent may take the view that it is their professional responsibility to seek to advance a new ground of appeal even though it is very late. The agent may take the view that that is the right thing to do in the interests of their client. It would be unfair, one might think, if such a lawyer were to be penalised simply because their application was being made late.

Margaret Mitchell: The recommendation is that the court can impose measures; it is not that it must impose them. There would therefore be an element of discretion to cover the situation that you outlined. However, where there was no justification the sanction would be there to send the very strong message that there is no excuse for a delay in particular situations.

James Wolffe: One would then have a satellite set of inquiries into precisely how a particular state of affairs came about. The Scottish Government has perhaps wisely taken the view that it does not wish to pursue that particular proposal.

Margaret Mitchell: So, the Carloway review obviously failed to take that into account when it made its recommendation.

James Wolffe: In many of these issues, we are dealing with matters upon which different views may reasonably be taken by different people.

Margaret Mitchell: Much could be said on both sides.

Sandra White: I will pick up on those points about different views from different people, penalties and so on. When a case is moved to another lawyer, the original lawyer may feel penalised if they are not able to bring forward the appeal. Is it the client or the lawyer who would feel penalised if he was not able to make the appeal? If an appeal was made, would that be on the basis of new evidence? What would be the relevant aspects?

You suggest that appeals that take six years to be heard are the exception. I note your comments about people having different opinions. What are the criteria for appeals if a case goes on for six years, particularly bearing in mind situations that involve changing lawyers or a lawyer finding a new piece of evidence? I would like to hear your opinion on that, and on exactly what constitutes a late appeal. Is it the lawyer or the client who is penalised?

James Wolffe: The basic ground of appeal is that of a miscarriage of justice. There are a variety of different ways in which a miscarriage of justice might be said to have occurred. There could be a variety of circumstances in which a particular issue
arises outwith the normal time limit. Ultimately, if an appeal is not allowed to proceed or if a particular ground of appeal is excluded, it is the client—the accused, or the convicted individual—who is losing the right of appeal or the opportunity to appeal.

If a ground upon which one could reasonably conclude that there had been a miscarriage of justice is knocked out of the ordinary appeal process, the person has the remedy, in our system, of going to the Scottish Criminal Cases Review Commission. The commission then has to exercise its judgment as to whether the appeal should be referred back to the appeal court. Ultimately, if a potentially good appeal is excluded from the system, it goes without saying that it is the convicted individual who does not have the opportunity to ventilate that ground in the appeal court who is losing out.

**Murray Macara:** In this respect, we are talking about appeals against conviction, rather than appeals against sentence. The problem is that we cannot generalise about appeals against conviction. There are straightforward appeals in which the sole point might concern there being insufficient evidence to allow the jury to convict. There might have been a misdirection by the trial judge. Such appeals can and do take place very swiftly.

The problem often arises because the appellant thinks that he has fresh evidence or that his existing solicitor or previous solicitor and counsel misrepresented him. Invariably, those issues require investigation and that is where delay creeps in. Often, what an appellant thinks is a good argument for an appeal with regard to, say, defective representation or fresh evidence does not, in fact, fit within the fairly narrow framework that the courts apply in such appeals. However, nevertheless, to satisfy the client, those matters require to be investigated.

That might be an aspect of the case that the appeal court is reluctant to acknowledge, but the client’s wishes have to be followed to an extent in investigating whether the previous solicitor did not represent the accused to an appropriate standard.

**Sandra White:** That was the point. Thank you very much for being so concise and clarifying it for me. If the appellant is not happy with the representation, he can appoint another lawyer to appeal the case.

**Murray Macara:** Invariably, that leads to delay and the system must be able to accommodate that delay. That is simply what I am saying.

**Sandra White:** Thank you. That has clarified it for me.

**The Convener:** This area is quite technical for us and I will ask a couple of questions to get at some of your issues. Do I take it that you are not happy with the phrase “exceptional circumstances” popping up throughout section 76 and into section 77? Would you be happy if the bill just said “the High Court may make a direction only if it is satisfied that doing so is justified” period and left it to the court to take a view on whether it is justified, rather than introducing a test of exceptional circumstances? You have talked about process and ensuring that cases are managed more efficiently. Would you prefer that the words “exceptional circumstances” were simply not in those sections?

**Murray Macara:** I would like it toned down.

**The Convener:** What does that mean? Does it mean that we should take out “exceptional circumstances” or that we should put in other words?

**Murray Macara:** We should put in another phrase, such as “unless it is satisfied in the interests of justice”.

**The Convener:** It already says: “only if it is satisfied that doing so is justified”. Instead of “justified”, do you want words such as “in the interests of justice”? I am not asking you to amend on the hoof, but do you want something like that?

**Murray Macara:** Something like that. Everything in law is about setting barriers or thresholds. No doubt the parliamentary draftsmen who were responsible for section 77 were entrusted with the task of ensuring that the threshold was set high in that provision. Our argument is that the bar should not be set quite so high.

**The Convener:** That applies in section 76 as well.

**Murray Macara:** Indeed.

**The Convener:** So something along the lines of “unless it is in the interests of justice” would be acceptable.

I move on to section 78, “Certain lateness not excusable”. That seems to me pretty draconian. There is no flexibility at all for the bench on written intimation of intention to appeal or the lodging of a note of appeal.

**Fraser Gibson:** It seems to me that that provision simply seeks to prevent people from circumventing the earlier provisions. There is a general power of dispensation in section 300A of the Criminal Procedure (Scotland) Act 1995 and
section 78 simply says that it is not possible to use that general power of dispensation to get round the conditions in relation to the sections on solemn and summary appeal.

The Convener: So you are happy. I see happy faces, so that section is okay. I am trying to get to the issues with that fairly technical procedure.

Rod, do you want to come in?

Roderick Campbell: No, convener. I intended to ask a question on section 78, so you have stolen my thunder.

The Convener: Heavens. You have lots of thunder to come, though.

Murray Macara: We are not happy with section 78, because—

The Convener: You are not happy? I thought that you were all smiling at me.

Murray Macara: I am personally not particularly happy with section 78. Some imaginative lawyer will try to advance an argument as to what might constitute “exceptional circumstances” under sections 76 and 77. As Fraser Gibson explained, the purpose of inserting section 78 is to demonstrate what does not amount to an exceptional circumstance: a failure to lodge a note of appeal in accordance with the appropriate time limit.

The Convener: If we remove the words “exceptional circumstances”, what impact does that have on section 78?

Murray Macara: I would think that it has an impact on section 78.

Fraser Gibson: I am not sure that it does. All it means is that you would try to use section 300A. All that section 78 is doing is saying that you cannot use section 300A to circumvent the other provision, whether that involves exceptional circumstances or something else. Whether or not the test should be about exceptional circumstances would depend on the terms of the relevant section laying down the time limit for summary or solemn appeals. The Crown’s position is that a high test is justified for a late appeal. There should be some reason beyond the ordinary—whether it is classified as exceptional or something else—when someone is seeking to appeal late.

Mr Finnie raised a point about papers being destroyed. That just illustrates why if someone wants to seek remedies, they should do so quickly. No system can operate by perpetually revisiting old cases; it simply has to move on and litigate the current cases, otherwise it will cease to function. There is an onus on people, if they wish to exercise their right to justice, to do it quickly.

It seems to me that, as it is phrased, the exceptional circumstances test, although it contains the word “exceptional”, has an element of flexibility. The phrase “exceptional circumstances” is used, but the bill goes on to list the things that the court has to look at in reaching a decision, and part of that is the proposed grounds of appeal, which obviously brings into consideration the merits of the grounds of appeal, the length of time that has elapsed—in other words, how late someone is applying—and the reasons that have been given for their applying late. When you look at the reasons, you can see that the proposal allows the court to perform quite a careful balancing act, weighing how much merit it sees in an appeal against the reasons why it is so late, and to arrive at an accommodation that serves the interests of justice. That is how the court approaches such appeals at the moment—balancing the reasons for lateness against how good the grounds of appeal are before coming to a decision. I would be surprised if the court would substantially depart from that under the new test.

The Convener: How long do you keep papers for?

Fraser Gibson: It depends on the type of case, and it also depends on whether an appeal is marked on time, but we clearly cannot keep everything forever. It is not just a question of papers. Witnesses’ memories dim; witnesses die; some forensic evidence degrades. Nothing can exist in perpetuity.

The Convener: I ruled out John Finnie’s question about losing papers, and I jumped on him when he was trying to ask what would happen if the papers were not there. However, if somebody is lodging an appeal and one of the exceptional circumstances is that the papers were not available, that ties in with his question. I am just curious to know how long they are kept. Solicitors have to keep certain papers for quite a long time. How long do you keep papers for?

Fraser Gibson: It depends on the type of case.

The Convener: A solemn case.

Fraser Gibson: You asked about “papers”; it depends on the type of papers. Productions, for example, even in a murder case, may belong to a witness. If no appeal is lodged, that witness is entitled to get those things back. They might belong to an accused person, so the Crown does not have a right to hold on to productions or labels in perpetuity, even though in the most serious solemn cases the Crown papers should be retained for a long period of time. It depends what you mean by “papers”. It is not necessarily the same thing as evidence.

The Convener: I hear that. We shall come to the SCCRC in a minute. There may be fresh
evidence or it may be felt that there has been a miscarriage of justice, so the court might need the papers some considerable time after conviction.

Fraser Gibson: That is the point that I am trying to make about why people should seek remedies quickly.

The Convener: I have to let John Finnie in now. I apologise.

John Finnie: If there were clarity about a document retention policy, which should apply across the public sector so that the citizen can know how long documents are retained for, there would be no dubiety about why, of a group of documents of similar status, some could be found but others could not, and it would be clear that there was nothing untoward about that.

Fraser Gibson: No system is perfect, no matter how you try to make it so. It simply would not be feasible to hold on to everything in perpetuity. An appellant knows, or should know, the time limits for lodging an appeal. They are there for a reason.

John Finnie: I previously tried to establish whether there was a document retention policy. Is there one?

Fraser Gibson: There is one. I do not have the exact detail of it to hand, but I can make that available to you.

The Convener: You have some homework now.

We will move on to the SCCRC, which is a hobby-horse of mine. During the progress of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill in 2010 as emergency legislation, I tried to delete the entire section that changed the way in which the SCCRC operated and made referrals to the High Court. I do not know whether you are aware of that, Mr Walker.

Michael Walker: I was not aware of that.

The Convener: It would be helpful to me and other committee members if you could remind us of the process that applied before the 2010 act, including the criteria that the SCCRC applied before a referral and how the High Court had to respond.

Michael Walker: Of course, convener. The commission has a dual test. It must ask itself whether there may have been a miscarriage of justice and, as the second part of the test, whether it is in the interests of justice to refer the case to the High Court. What the emergency legislation in 2010 did was to give the appeal court—the High Court—for the first time the power to reject a reference by the commission where the court took the view that it was not in the interests of justice for the reference or the appeal to proceed to a full appeal hearing.

You are right. The commission’s position in 2010—and it remains its position—was that there should be no veto of a commission reference by the appeal court in the interests of justice at either stage of the appeal process. The current position is that, as I have just said, the court has the ability shortly after the reference is made to knock out the commission referral. The proposal in the bill is to move that to the end of the appeal process.

I will give you a couple of statistics that I think support the commission’s position. In the 14-year period since the commission’s inception in 1999, 67 per cent of the referrals that the commission has made to the appeal court have been successful. I think that it is fair to say that the commission has a high strike rate and does not—

The Convener: Does that figure refer to referrals on sentence and conviction?

Michael Walker: Sorry. I should have said that it refers to conviction and sentence. The total number of successful referrals is split almost 50:50 between conviction and sentence.

The point that I was going to make is that that statistic shows in blunt terms that the commission does not clog up the appeal court with spurious referrals. The 67 per cent statistic compares very favourably with that for normal appeals, where the success rate is under 1 per cent.

I will give one other statistic. Since the emergency legislation that gave the appeal court the power came into force, the commission has made 21 referrals to that court, of which the first 20 proceeded to a full appeal. That statistic shows that it is reasonable to infer that the commission does not use its interests of justice test unreasonably.

The Convener: What happened to the expression “finality and certainty” in relation to the SCCRC? It still lurks, does it not?

Michael Walker: “Finality and certainty” is in the emergency legislation. When the commission applies its interests of justice test, it has to have regard to finality and certainty.

The Convener: Did you do that before the emergency legislation?

Michael Walker: We did, convener. It was always part of the commission’s remit to do that. The legislation simply put it in statute. What is the definition of “finality and certainty”? That is a difficult question to answer. It would bring in the idea, which Fraser Gibson alluded to, that the proceedings have to come to an end at some point, so the age of the conviction is important. That is a factor that the commission would take into account in deciding whether it is in the interests of justice to refer the case.
Against that, however, a balance has to be struck, because the whole point of the commission’s function and its ethos is to allow recourse to someone who has had an appeal and, perhaps many years later, feels that they have suffered a miscarriage of justice and comes to the commission. If the commission takes the view that there may have been a miscarriage of justice in the case, the simple fact that it is old, even with our having regard to finality and certainty, is not a determinative reason not to refer the case.

The Convener: I do not know whether you have the figures on this, but how many cases in which people have considered that there may have been a miscarriage of justice have you not referred in the interests of finality and certainty and the interests of justice? How often has the test been applied and, as it were, prevented a referral?

11:45

Michael Walker: I do not have the second figure to hand. On your first point, the key statistic is that the commission rejects approximately 90 per cent of the applications that it receives, so only a very small number of cases are referred to the appeal court. Of that number—

The Convener: Is the commission refusing those applications on the basis that, in its view, there is no possibility that there has been a miscarriage of justice?

Michael Walker: Yes.

The Convener: I am trying to tease out how far the other test applies.

Michael Walker: I was going to come on to that. It is not common for the commission, where it has concluded that there may have been a miscarriage of justice, to conclude that it is not in the interests of justice to refer the case. I do not have the exact figures on that, but I can certainly get them for you.

The Convener: That would be useful—thank you.

Michael Walker: I can give you a couple of examples of where the commission takes that view. Sometimes an applicant asks the commission to review a particular offence, and the commission looks at the case and decides that there may have been a miscarriage of justice. However, if the person has been convicted of numerous offences in the same indictment or complaint, we may take the view that it is not in the interests of justice to refer the case because that would make no difference to the applicant’s sentence.

I will give a more topical example. There have been occasions following the Cadder judgment on which the commission has taken the view that a piece of evidence is inadmissible and that there may have been a miscarriage of justice in a technical sense but has gone on to say that the inadmissible evidence in question was not disputed at trial so it is therefore not in the interests of justice to refer the case.

The Convener: Yes, I see.

Michael Walker: We use that power—albeit sparingly, perhaps. In every case for which we are considering referral we will always take into account the interests of justice. To come back to my original point, we do not feel that the commission, following on from the Sutherland committee, should have its functions and remit—as the Lord Justice-General made clear in a recent case—simply duplicated by the appeal court. As the bill proposes, the appeal court should take its own view on whether it is in the interests of justice to knock out a case.

The Convener: So your position—as I understand it—is simply that you are glad that the gatekeeping role is gone, but that, if there has been a miscarriage of justice, the appeal should be allowed.

Michael Walker: I am saying that, in the vast majority of cases—

The Convener: By the High Court.

Michael Walker: It should not be for the High Court to decide whether it is in the interests of justice. The role was given to the commission, and if the commission decides that it is in the interests of justice—

The Convener: Absolutely—you are pushing at an open door with me in that regard, Mr Walker.

Michael Walker: Okay—I will say no more about it.

The Convener: I have not changed my position since the emergency legislation was introduced. Does anyone else want to ask the SCCRC any questions?

Roderick Campbell: Yes. I would like to clarify something, Mr Walker. It is my understanding that one of the reasons for the inclusion of the gatekeeping role in the emergency legislation was that it was feared that there would be a lot of applications post-Cadder. That situation has not materialised, as Lord Carloway has said.

Michael Walker: Right—it has absolutely not materialised. We received numerous Cadder applications, the bulk of which we rejected. Of those cases that we referred to the appeal court, which numbered fewer than a handful, all were successful. The opening of the floodgates that was predicted did not happen.
The Convener: What do you think of Lord Carloway’s argument that, if a case is referred by the SCCRC and we take away the gatekeeping of the High Court and the appeal court, but during the course of the appeal—this is very suppositional—the appellant confesses to another offence, it would not be in the interests of justice to allow such an appeal to be granted?

Michael Walker: That is an interesting argument to consider, and we have thought about it before. If the commission reached the view that there may have been a miscarriage of justice in a particular case—by applying some of the tests that James Wolfe pointed out—and then uncovered new information or evidence, or if the applicant confessed to that particular crime, we would perhaps not consider a referral to be in the interests of justice, albeit that we believed that there may have been a miscarriage of justice.

From what I understand, you are saying with regard to Lord Carloway’s example that somehow the confession may be made post the commission’s referral—

The Convener: Yes.

Michael Walker: That has never happened, and I do not foresee it ever happening.

The Convener: I thought that there would just be another trial.

Michael Walker: The applicant could certainly be retried.

The Convener: The argument was that it would therefore not be in the interests of justice. I think that Mr Gibson wants to say something.

Fraser Gibson: I think that something similar has happened in England. After the Criminal Cases Review Commission, which is the English equivalent of the SCCRC, referred a case, further forensic work was carried out and DNA evidence was uncovered years later that implicated the appellant in the murder. It was quite a famous case, but I cannot remember the name of it.

Michael Walker: Was it the Hanratty case?

Fraser Gibson: Possibly.

Michael Walker: I do not see that as an argument for retaining the interests of justice test.

Fraser Gibson: But it might have been what Lord Carloway had in mind.

The Convener: I do not think that it would be the same case. Would it not involve a separate crime? Of course, it could be the same case if there were a confession.

Fraser Gibson: The Crown Office supports the retention of an interests of justice test for the court for two reasons. First, it future proofs the system against things like the Cadder case happening again and, secondly, it guards against the possibility of error.

As Michael Walker has said, all the Cadder cases that the commission has referred and which have gone to argument before the appeal court have been successful. What that demonstrates is that in change-of-law cases one has to be careful about finality and certainty. After all, if a case is referred in which the essential corroborating admission is no longer available after the Cadder decision, because that admission was given without the benefit of legal advice, it is inevitable that the referral and appeal will succeed because, by the time we get to the appeal, there will be insufficient evidence. If the court did not have this power, it would not be able to do anything with a case referred in error in terms of the finality and certainty test except quash the conviction. Everyone accepts that the SCCRC does a very valuable job, performs a very valuable function and does an extremely difficult job, but anyone is capable of making an error. Of course, the appeal court recently rejected a referral in the case of Francis Carberry.

Michael Walker: As I understand it, the Carberry decision is still being litigated; Mr Carberry’s solicitors have sought special leave to go to the Supreme Court. As a result, I am not sure whether it is appropriate to discuss that case.

The important point is that, when you look at the commission’s track record, you just will not see all these mistakes that Fraser Gibson has suggested might or might not happen. In fact, our track record shows precisely the opposite. As for Mr Gibson’s very specific and technical point about sufficiency of evidence in the Cadder cases, I have already said that, in many of those cases, the commission applied its own interests of justice test and did not refer the cases to the appeal court. It is not that there has been a change of law, evidence has become inadmissible and the commission has simply referred every case to the appeal court—quite the reverse. The commission looked at all those cases and, in many instances, rejected them. They did not even reach the appeal court. I come back to my point that, in my view, that should be the function of the commission, not the appeal court.

The Convener: So you are the gatekeepers.

Michael Walker: I think so. The establishment of the commission followed the recommendations of the Sutherland committee, which made it quite clear that this particular role should not be given to the appeal court. That is why the commission exists.
Roderick Campbell: How is it equitable that only SCCRC appeals have an interests of justice test and other forms of appeal do not?

Fraser Gibson: The rationale, I guess, is that they are special. For a start, they emerge with time. Some cases arise many years late and in many of those cases a retrial will not be possible. Ultimately, the commission has to consider whether it is in the interests of justice to refer them; that is not a requirement for any timeous appeal, as long as it can be argued that the appellant can raise it and that it can get past sift and be heard by the appeal court.

Murray Macara: The Law Society of Scotland’s position is that the commission’s approach is an appropriate one. Since the commission was established in 1999, it has established a strong reputation and has great credibility. It sets about its tasks very conscientiously. From 1999 to 2013, it has applied all the appropriate tests: it has looked at whether there has been a miscarriage of justice; it has applied the broad test of the interests of justice; and it has looked at issues of finality and certainty. Our argument is that the commission should be trusted to continue doing that and that the High Court, as the appeal court, should concern itself simply with whether it has been established that there has been a miscarriage of justice.

James Wolfe: That is also the position of the faculty. Lord Carloway said in his review:

“The case for maintaining a gatekeeping role for the High Court would have greater force if there were a perception that the SCCRC had a significant track record of frivolous or inappropriate references and it were thought that some further measure was required to bring greater discipline to their activities. The Review is content to note that there has been no suggestion from any source, nor is there any other reason to suppose, that this is the case. Indeed, it seems to be widely accepted that, despite the occasional lapse, the SCCRC has been a conspicuous success in discharging its duties conscientiously and responsibly.”

Michael Walker: I would echo those thoughts.

The Convener: Quelle surprise!

Murray Macara: I wonder whether I can say something else. I know that we are not considering corroboration today—

The Convener: Oh please—do not mention the C-word!

Murray Macara: That is a treat yet to come for this committee. It must be a matter of concern to the commission that corroboration is likely to be abolished or may be abolished, because that could lead to the floodgates opening in terms of the number of applications going to the commission. You can imagine that an individual who was convicted on the basis of a single source of evidence might well want to pursue whatever remedies are open to them—the only remedy that might be open is an application to the commission. I suspect that if corroboration goes, the commission’s work will increase significantly.

The Convener: I already thought that that issue would be coming down the track. Roderick Campbell and Alison McInnes want to ask questions. I will take Alison first.

Alison McInnes: Convener, I am not having a good morning.

The Convener: It is allowed. I often have mornings like that.

Alison McInnes: I was going to discuss section 82, but I think that we have had a very clear exposition of the points of view on it already.

The Convener: Okay. I call Roderick Campbell.

Roderick Campbell: What do panel members think public opinion would be in circumstances where the court took a view that there was a miscarriage of justice but did not think it was in the interests of justice to allow the appeal? I know that it would depend on the case, but are there any general thoughts on that?

Michael Walker: I think that the public would have some difficulty coming to terms with the court at the end of the process finding that there had been a miscarriage of justice but saying, for another reason, that it was not in the interests of justice to allow the appeal. The role of the commission is to try to increase public confidence in curing miscarriages of justice. Will the public have less belief in its role if, at the end of the process, the appeal court simply stamps its foot and refuses to allow the appeal?

The Convener: I am not going to go into the merits or otherwise of corroboration, but do you think that abolishing it might result in a heavier workload for the SCCRC? Are you building that into your projections?

Michael Walker: I am not entirely sure whether we have thought that far ahead. We are entering the realms of a certain amount of guesswork. We have a very close relationship with our colleagues in the English commission. Given that they do not have corroboration, we have asked for statistics about the number of cases that they have. The picture is not clear. They generally deal with a proportionally similar number of cases and referrals to the SCCRC, but in England there are other safeguards—principally, the provision that in a jury case there must be a 10 to 2 majority, which we do not have. You cannot make a like-for-like comparison because it is difficult to find empirical data.
The Convener: Do you think that there would be an immediate impact on your workload?

Michael Walker: We are in the realms of guesswork, but yes, possibly.

The Convener: We have exhausted our questions for you. I thank the panel very much for attending. We will get to corroboration at some point. I will suspend the meeting for a couple of minutes while we change panels, but members should stay put.

11:59

Meeting suspended.

12:01

On resuming—

The Convener: I welcome our second panel of witnesses. Alison Di Rollo is head of the national sexual crimes unit in the Crown Office and Procurator Fiscal Service and Bronagh Andrew is assistant operations manager of the trafficking awareness-raising alliance project at Community Safety Glasgow. Thank you for waiting. We will go straight to questions from members.

Sandra White: Good afternoon. It is nice to see you here. My question is on a procedural matter. The bill will create two statutory aggravations relating to people trafficking, and provisions in relation to aggravating factors in general, where it is proven that someone committed an offence in circumstances in which one of the statutory aggravations is also established. How might the proposed statutory aggravations be used in practice? What difference will they make?

Alison Di Rollo (Crown Office and Procurator Fiscal Service): It probably falls to me to answer that. Aggravation will provide another element in the toolkit for prosecutors on receipt from the police of a case that could be about wide-ranging criminal activity of a sexual nature, of a financial nature or whatever.

Where it is not possible to find sufficient credible and reliable evidence to libel a substantive trafficking offence in section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 or section 22 of the Criminal Justice (Scotland) Act 2003, the aggravation will enable us to lead evidence and to put to the court and the sentencer a context or background of trafficking that would aggravate the offence and so lead to a more extensive sentence. It will also allow the courts and criminal justice system to record more accurately human trafficking activity in this country.

I am pleased to be able to sit here today in a position where, to use that horrible phrase, the direction of travel—

The Convener: I agree—it is a horrible phrase.

Alison Di Rollo: The phrase is ghastly, but it makes the point that we have made progress in awareness, detection, prosecution and conviction of offenders who are involved in trafficking. We will—-one hopes—continue to do that. The proposed aggravation will give us increased flexibility and increased powers to bring evidence to the court to shine a light on that activity so that statistics are more robust and accused persons who are convicted of such heinous crimes are sentenced to longer periods of imprisonment.

Bronagh Andrew (Community Safety Glasgow): I agree with Alison Di Rollo that the aggravation will be another tool in our arsenal in the fight against human trafficking. Many of the women whom we support are extremely traumatised and have little information about the human traffickers, so it can be difficult for investigations to progress. We support the statutory aggravation offence for trafficking women.

Sandra White: I might be straying into another area—I seek your advice on that—but we have seen the recent revelations about young girls apparently being brought up to Scotland for genital mutilation. The bill includes aggravated offences. I am not suggesting that the bill should be rewritten, but do you think that aspects of the bill might pertain to that practice? It has been suggested that young women from England, Wales and other places are being brought up to Scotland for genital mutilation. Could that be considered in the context of the bill?

Alison Di Rollo: I do not think that the bill needs to be strengthened or expanded in that regard; rather, I think that that is a good example of the kind of context in which it could be used.

I will stress something that Baroness Kennedy mentioned in the Equality and Human Rights Commission’s report, which is that the aggravation will give us an opportunity to prosecute sexual offences in a wider context because genital mutilation crosses borders between child abuse, sexual abuse and physical abuse. If we had uncorroborated or evidentially weak information that a child had been trafficked in order to be mutilated, I am content that the provisions of the bill would allow us to factor that into preparation of our case and the evidence that we would lead in support of it, because the mutilation aspect is a discrete criminal offence in this country.

I am anxious to get back to my desk, because I am dealing with a trafficking case that involves extremely serious sexual offences. It might be the...
right decision to prosecute for the extremely serious sexual offences, which include rape—an offence that attracts life imprisonment—along with either the accompanying substantive trafficking offences, if we can prove them, or with the aggravation that the rapes in question have been committed against a background of trafficking. Your point about female genital mutilation is highly pertinent. The case that I am dealing with strengthens my conviction that the aggravation provision is a helpful one.

I take the opportunity to make a clear statement that I hope will be of assistance to the committee: it will always be in the public interest to bring a substantive trafficking charge, either under section 4 of the 2004 act for exploitation, or under section 22 of the 2003 act for prostitution, where there is sufficient credible and reliable evidence, and we will do so. I make that statement to clarify that the aggravation will not be used as an easy option or a shortcut.

The Convener: I am looking at the bill’s definition of “people trafficking offence”, which refers to other legislation. I do not have a clear understanding of that definition, which has been extended. One tends to think of it as applying to sexual exploitation or exploitation at work, but I did not think about it in the context of the issue that Sandra White raised. What is the definition of “people trafficking offence” in law? I see that it is an offence under section 22 of the 2003 act.

Alison Di Rollo: Section 22 of the 2003 act is the provision that deals with trafficking in relation to prostitution. There are two key elements to it. That is interesting, because if we fall down on either of them, we will not be able to prosecute under that charge and we may fall back on the aggravation. The first essential element is to prove that the accused has arranged or facilitated “the arrival in the United Kingdom ... or travel there”.

That is the trafficking bit. We need to prove that they have been complicit in moving the person around.

The additional element, as far as section 22 of the 2003 act is concerned, is that we need to prove that the trafficking is for that person to “exercise control over prostitution”. That means that they have exercised “control, direction or influence over the prostitute’s movements in a way which shows that the person is aiding, abetting or compelling the prostitution.”

It is about controlling, influencing and moving people around.

That can be contrasted with the provisions of section 4 of the 2004 act, on trafficking people for exploitation. Again, the essential element is the trafficking element, which is the facilitation of the arrival of the person in the country of people, or moving them around. That could refer to taxis going from the west end of Glasgow to the south side; we take a very broad-brush approach to that aspect.

The committee will be aware that exploitation could be about slavery or forced labour, or offences under the Human Tissue Act 2004 involving body parts, organs and so on. With regard to forced labour, section 4 of the 2004 act would require us to prove that the complainant was “subjected to force, threats or deception designed to induce” them to provide the services.

The Convener: From what you have just said, what my colleague referred to—female genital mutilation—does not come under the heading of people trafficking.

Alison Di Rollo: No. That is a discrete offence in its own right.

The Convener: Yes, I know, but it does not come under the bill’s provisions on people trafficking.

Alison Di Rollo: No.

The Convener: I think that we have been endeavouring to see whether we could make a link and bring female general mutilation under the bill as being associated with trafficking. Am I making sense? People trafficking is defined in the bill, but female genital mutilation was introduced as something that might be regarded as an aggravated offence under the bill. Can that be done for female genital mutilation, given that the bill is to do with people trafficking?

Alison Di Rollo: Yes, because what is in the bill does not refer to section 4 of the 2004 act or to section 22 of the 2003 act. That is my reading of it.

The Convener: The bill defines people trafficking.

Alison Di Rollo: Yes.

The Convener: So, it does. I cannot see how the aggravated offence—what my colleague referred to—cannot be extended. Am I misunderstanding it?

Alison Di Rollo: With respect, convener, you are, because we can apply the aggravation to rape, identity fraud, theft and drugs offences. Any offence, such as rape, could be aggravated.

The Convener: What section are you talking about?

Alison Di Rollo: It is section 83(2), which states that “An offence is aggravated by a connection with people trafficking activity”.

...
Sandra White: So that could mean any offence.
Alison Di Rollo: Yes.

The Convener: I do not agree, but I must not debate it with you. I will have to think that one through, because I think that I am thinking differently. I will let others in now.

John Finnie: My question is for Ms Di Rollo. If I noted it correctly, you talked about awareness, detection and prosecution. I note that you are the head of the national sexual crimes unit, and I know that tremendous work has been done by TARA and the Crown Office and Procurator Fiscal Service. With regard to awareness, I wonder whether the association of trafficking with the sex industry is a challenge. I represent the Highlands and Islands, and I am aware of two instances relating to forced labour and drugs cultivation. I do not think that there is sufficient awareness out there. What is being done to increase awareness that trafficking is not simply an urban prostitution-related issue but a much broader one?

12:15

Alison Di Rollo: Police Scotland, through its national unit, is doing a good deal of work to raise awareness and to encourage reporting—in particular of cases outwith the sex industry, such as you referred to. For example, in respect of youngsters going round in vans on charity collections, or cannabis farms being found in private housing estates, people are generally becoming more aware of the possible connection with trafficking.

Beyond that, as we have heard in a recent conference and in evidence to the committee, it has been recognised that raising awareness is a wider societal issue. I must confess that, as a prosecutor, I sit at the end of the food chain, if you like, and take cases that are reported to us from the police. We help and play a role in securing convictions and gaining publicity for those convictions, so that people are aware that such crimes are happening on their doorsteps.

Bronagh Andrew: Perhaps I can help. Last month, the UK human trafficking centre published statistics for 2012 on use of the national referral mechanism. The statistics show a definite increase in individuals being identified about whom there are concerns that they have been trafficked for labour exploitation. As you know, our colleagues in Migrant Help are funded by the Government to support victims about whom there are concerns that they have been trafficked for labour or domestic servitude. It is unfortunate that the organisation is unable to attend today. I am aware that it is getting busier. The message on trafficking is getting out there.

The Scottish Government has convened a sub-group of the anti-trafficking progress group to look specifically at awareness raising and training. The sub-group is very keen to ensure that there is a wider awareness of the different types of exploitation from which human traffickers profit.

John Finnie: Does the legislation go far enough? Are there other elements that could have been picked up on?

Bronagh Andrew: That is quite a difficult question. In our written submission, we raised concerns that there is in Scots law no definition of human trafficking. Colleagues work to the Council of Europe definition, which has three key elements. Those cover the act of exploitation, including the recruitment, the means, the deception, the coercion and the abuse of a position of vulnerability; the intention to exploit; and the exploitation itself. It would be helpful to have an agreed shared definition that is legally binding.

Following the bill’s introduction, two consultations are taking place on legislating specifically for human trafficking. The UK Government is gathering evidence on the need for a modern slavery act and, in the Scottish Parliament, Jenny Marra MSP has issued a consultation on her proposed human trafficking bill for Scotland. Both look at pulling together the disparate legislation and seek to agree a shared definition of human trafficking in domestic legislation.

John Finnie: Clearly, Scots law is distinct. What liaison, if any, is there with other authorities? Human trafficking recognises no boundaries. There were issues in the north of Ireland; there will be issues with the border with England. Is there cross-border co-operation?

Alison Di Rollo: Absolutely. We refer a lot to “operation factor”, which involved extremely close co-operation with the Police Service of Northern Ireland. We also have regular dialogue with the Crown Prosecution Service; we recently spoke to it about the possibility of identifying expert evidence to lead prosecutions in Scotland in the way that one might use expert evidence from drugs officers on how that industry operates. We are looking at that and we have very close co-operation, as is increasingly the case across Europe. Indeed, the case to which I return after this session has very much an international dimension, with on-going dialogue through Interpol.

John Finnie: To return to the previous point on the absence of a common definition on human trafficking, while accepting that there are various jurisdictions, surely to have a Europe-wide—for argument’s sake—definition would be of benefit?
Alison Di Rollo: That is a matter for the legislature and others. I am content to work with whatever legislative provisions are deemed to be appropriate. I work contentedly with the current legislation. I am not suggesting that a common definition would not be a good idea, but that is more for others.

John Finnie: The lack of a definition is not problematic in your dealings with other jurisdictions.

Alison Di Rollo: It is not, either technically or legally, given the definitions that we are working to.

The Convener: We must move on because I am mindful of the need to finish by 12.30 pm. I call Roderick Campbell to be followed by Elaine Murray.

Roderick Campbell: Ms Di Rollo mentioned that we should not think of aggravations as being a soft option that could be used in preference to section 22 of the 2003 act and section 4 of the 2004 act. I believe that I am right in thinking that there have been only a handful of convictions for people-trafficking offences but are more such cases coming through the system?

Alison Di Rollo: Yes.

Roderick Campbell: Are there substantially more offences?

Alison Di Rollo: There are materially more. I think that between 2007 and 2012 only two people were convicted of trafficking offences in Scotland; that number has increased to seven. I am aware of the increase because, as lead prosecutor, I see all the cases; they come through my unit of specialist prosecutors. At the moment, there are seven cases pending. We have secured additional convictions and there are in train more cases covering domestic servitude, trafficking for prostitution and forced labour. On John Finnie’s point, the cases are not focused entirely on prostitution; we are getting cases across the board.

Roderick Campbell: Thank you. That was helpful.

The Convener: Do you have a question, Elaine?

Elaine Murray: I had a question about the need for further legislation, but it has pretty much been answered. I presume that even if there were further legislation the aggravated offences would be useful in prosecutions.

Alison Di Rollo: Yes.

Sandra White: Perhaps I did not make myself clear enough earlier; Bronagh Andrew’s response about the European definition of trafficking clarified the matter for me. Trafficking is all about making people move against their will and without their permission.

I will go back to the controversial question of how we might use the aggravation provision; I think that Alison Di Rollo mentioned body parts. Trafficking is about moving people against their will; if you move young women across Britain and up to Scotland because, for example, you think that it is easier to perform genital mutilation, surely that will produce body parts, so classing those as two separate aggravations would help to convict anyone who was involved in such activity. Can you clarify whether that is the case?

Alison Di Rollo: That would depend on the circumstances. I think that I see the point that you are making; if a child was brought to Scotland to be subjected to the offence of genital mutilation, it might or might not be possible to establish a trafficking background. On the convener’s point, to bring a child to Scotland for that purpose on an isolated basis rather than on an organised or commercial basis would not necessarily be a trafficking offence.

The Convener: Yes, I think that that is right.

Alison Di Rollo: As far as I am concerned, the fact that a child had been brought from her home country to a strange foreign country to be subjected to female genital mutilation would, in and of itself, be an aggravation and we would seek to lead evidence of that. However, it very much depends on the people responsible and their wider activities whether an aggravation or some other substantive offence could be proved.

The Convener: I am mindful that we must not get into a big debate about the subject, but my point, which referred to the two definitions that you mentioned and the references to the other pieces of legislation, was about someone being brought into the country not just against their will but against their will for a specific purpose, which did not include the issue that was raised by my colleague. I am concerned that you are being trammelled by the definitions. The point is that the people in question were brought into the country not just against their will but for the purposes of exploitation, whether that meant menial work, slavery or sexual exploitation. However, genital mutilation is not covered and I wonder whether, in view of the definitions, that offence would be difficult to prosecute as an aggravation under the bill.

Alison Di Rollo: If that aggravation was not present, it would not be appropriate to prosecute it.

The Convener: I appreciate that but I am talking about the specific purposes. I think that I
will need to read the material again and give it a bit more what I would call thunking.

Alison Di Rollo: We can be confident that we have created a discrete offence in relation to female genital mutilation; we also have discrete offences for trafficking and we will now—God willing—have the additional tool of evidential aggravation, where the evidence supports it. We still need evidence to prove the aggravation.

The Convener: Perhaps not corroboration, but we are not going to mention that word today.

I thank the witnesses very much for their evidence and patience and the committee for their questions.

I say to members before they put away their papers that there are other items on the agenda; however, as we have only five minutes left, I suggest that we take items 3, 4 and 5 next week. We do not have time to consider them tomorrow because we have two panels of witnesses. [Interruption.] Apparently we have three panels. Is that not good? Buy one, get one free. With members’ leave, we will take items 3, 4 and 5 on today’s agenda next week.

Members indicated agreement.
Scottish Parliament
Justice Committee
Wednesday 20 November 2013

[The Convener opened the meeting at 09:30]

Criminal Justice (Scotland) Bill: Stage 1

The Convener (Christine Grahame): Good morning. I welcome everyone to the 33rd meeting of the Justice Committee in 2013. I ask those who are present to switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system even when they are switched to silent. No apologies have been received.

We move on to our fifth evidence session on the Criminal Justice (Scotland) Bill at stage 1, with two panels of witnesses today. We will consider provisions on corroboration and related reforms—we have got to it at last, committee—and will hear evidence from the Lord President and, later, from the Lord Advocate.

I welcome our first panel: the Rt Hon Lord Gill, Lord President of the Court of Session; Roddy Flinn, legal secretary to the Lord President; and Elise McIntyre, deputy legal secretary to the Lord President. Good morning to you all.

I understand that the Lord President wishes to make a brief opening statement.

Lord Gill (Lord President): Thank you, madam convener. I will make three brief points. I am here today to give you the view of the judges. Different judges have different points of emphasis, of course, but I would like to convey the judges’ general feeling on this controversial issue.

First, in my view, the abolition of the rule of corroboration is a matter of constitutional importance. In my opinion, the rule is not simply a technical rule of the law of evidence that can be changed as part of a discussion of evidence; it is part of the constitution of this country and one of the great legal safeguards in our criminal justice system. Therefore, a change of such profound importance, if you are contemplating making it, should be made as part of a much wider consideration of criminal evidence and not simply as an ad hoc response to one particular decision of the United Kingdom Supreme Court, which is the situation in which we find ourselves.

Secondly, there is a remarkable degree of opposition to the change across the entire legal profession. I am not suggesting that that, in itself, is a conclusive consideration against the abolition of corroboration—please do not misunderstand me on that—but such a degree of opposition across the entire profession should give us all pause for thought. Those are the views of people with considerable experience in the practical operation of the criminal justice system.

Thirdly, time and again throughout the controversy the point has been made that other countries can do without the rule of corroboration, and it is asked why Scotland is out of step. I think that that is the wrong way to look at it. We should, in fact, be proud of the fact that we have something that other jurisdictions do not have. It is one of the great hallmarks of Scottish criminal law.

We are all privileged to live in a just society in Scotland, the reason for which is that our criminal justice system is rooted in the idea of fairness. Corroboration is, in my opinion, a critical element in that. I am not here to apologise for the fact that we have corroboration; I think that we should all be grateful that we do.

Those are the three main points that I wanted to make, madam convener. In the course of the committee’s questions, I might be able to suggest other ways out of the problem, but that is the general view of the judiciary. In preparation for the response of the judges to the Scottish Government’s consultation, I asked every judge to express their view individually to me. With the exception of my colleague the Lord Justice Clerk, all the judges were opposed to the abolition of corroboration.

The Convener: Wow! You have cheered me up, I can tell you. My position on abolishing corroboration is well recorded, although that may not be my colleagues’ position. We will now take questions from members.

Elaine Murray (Dumfriesshire) (Lab): Lord Gill, I appreciate what you are telling us about the views of the judiciary on the issue, but organisations that support sufferers of domestic abuse and sexual abuse take a different view. They make the argument that, if corroboration were abolished, there would be more prosecutions of domestic and sexual crimes and that the verdict would rest on the quality of the evidence that is presented in court rather than on the quantity of evidence, as happens at present under the requirement for two pieces of independent evidence. How would you respond to those two points?

Lord Gill: Obviously, it is a matter of concern to ensure that sexual crime and domestic abuse are properly and effectively prosecuted. It is in the nature of those types of crime that proof is difficult to produce—that is just a fact of life. We should be careful of the risk that, by legislating in an attempt to cure one perceived problem in one corner of the...
criminal justice system, we make a reform the consequences of which are completely unknowable across the whole spectrum of the criminal justice system.

Elaine Murray: Is there an alternative that would address the problems with domestic and sexual crimes? It has been suggested to me that there could be a pilot in which we abolish the need for corroboration for those particular crimes to see how successful that is. Alternatively, we could further amend what is considered to be corroboration to make it easier to prosecute those crimes.

Lord Gill: I think that that would not be a wise method of legislation. If you legislated specifically for one type of offence and relaxed the evidential requirements in respect of it, you would create, in a sense, a privileged class of complainers for that type of crime, which would have an unsettling effect on the rest of the criminal justice system. If you legislate on the matter, the legislation must apply across the board.

Elaine Murray: Would no further development of what is considered to be corroboration help to address the problems with those types of crimes?

Lord Gill: It is remarkable how corroboration has strengthened in my time in the legal profession and on the bench. When I was a young lawyer, corroboration often came in the form of a fingerprint, but we do not hear much about fingerprints nowadays. The advances in DNA testing have been quite extraordinary, with the result that many crimes that 20 years ago would never have been detected, or that would certainly never have been prosecuted, can now be prosecuted successfully. I realise that that is not entirely an answer to the point that you are making, Mrs Murray. However, I feel that corroboration works with deadly effect nowadays in the sort of cases that I am talking about.

Margaret Mitchell (Central Scotland) (Con): I appreciate your opening statement, Lord Gill, because there has been a feeling that it is a done deal that corroboration will be abolished, so we should look at the safeguards. It has been of particular concern that a third way has not been considered. A third way, whereby we retain corroboration but look at how we can improve the law of evidence, would be worthy of exploration. I know and have met representatives of Rape Crisis Scotland and we have had good conversations about their concerns—there is mutual agreement on some points. Adult survivors of abuse who have experience of court have come up with some excellent suggestions as to how a third way could be achieved.

You mentioned progress in the quality of evidence, which should, in theory, make corroboration easier. Others have mentioned the fact that, in court, a time limit is often applied in relation to the application of the Moorov doctrine. If that were relaxed, it would help to achieve convictions in interpersonal-type cases. We could also provide more training for procurators fiscal to enable them to understand why it might take three days for a rape victim to come forward, so that that can be explained to a jury. Do you think that it is worth looking at a third way?

Lord Gill: I do. It is not wise to assume that if you abolish corroboration you will increase the conviction rate. I am sceptical of that claim. What you are doing is giving the defence the chance to make a really powerful speech. Instead of having to face a corroborated case, the defence can go to the jury and say, “Would you convict my client on the word of one person with nothing else to support it?” That could be a very powerful line to take with juries. I am not persuaded that if you abolish corroboration that will increase the conviction rate.

To return to your main point, Mrs Mitchell, I do not think that we should just take one brick out of the wall, as it were, and say, “We’ll change this. It’s a rule of evidence, so we can change it.” You have to think about the effect on the whole system. The system that we have today is quite coherent and logical. It consists of a series of checks and balances that attempt to achieve not just fairness to the defence, but fairness to the prosecution as well. The overriding principle in all our trials is that justice should be fairly dispensed.

If you are going to consider a change of such profound importance, it must be looked at against a wider picture. My suggestion is that there should be an examination of all the various safeguards in the criminal system in the round. There could be, for example, reconsideration of the admissibility of certain statements, a re-examination of the use that can be made of confessions, a re-examination of the right of the accused not to testify, an examination of the right of the accused to withhold his defence at the earliest stage of a prosecution, and so on. Those are the various tensions within the system, and the problem must be looked at in that context.

The Parliament’s legislative record over the past few years shows an openness to change and an open-mindedness to consider the issue in a wider context to reach the wisest outcome. I think that we are looking at the issue in much too narrow a context.

09:45

Margaret Mitchell: The other concern is that the committee is under pressure. It is scrutinising a lot of legislation—indeed, not only is this the
second time that we have met this week, but we had to meet twice in a week very recently—and there is a concern that we are not giving these important issues the time that we would like to give them. Is there an argument for considering the third way of retaining and trying to improve the current system, looking at very complicated issues such as the rights of the accused, which are paramount, and defence evidence, but taking this particular issue out of the bill and getting some other body to examine it properly in depth? Would that be a sensible way forward?

Lord Gill: I would suggest as much myself. In the past, the Government has appointed royal commissions, departmental committees and so on to examine such issues, and I think that such an approach would be a good way out of our difficulty. An examination of all the various facets and their interaction would allow a balanced judgment to be reached.

Margaret Mitchell: That is very helpful.

Lord Gill: I do not think that that would necessarily take a lot of time or cause a great deal of delay. The public in Scotland are very knowledgeable, as is the profession, and we have academic support from the law schools. As the issues are pretty well known, it should be possible to come to a wise conclusion by looking at the matter overall.

Margaret Mitchell: That would allay the fear that, by getting a commission to examine the issue, we would simply be knocking it back. That would certainly not have to be the case. A commission could deal with the issues, which, as you have said, are well known.

Lord Gill: It would not be a way of avoiding the problem; it would be a positive way of getting a better outcome.

The Convener: You say that the process would not necessarily take a long time. Can you give us some idea of a timescale for it?

Lord Gill: I do not know, but I cannot imagine that it would take years, if that is what you are worried about.

The Convener: That is what I wanted to know.

Lord Gill: I do not think that it would take that length of time.

The Convener: You have opened up the issue of the different ways in which evidence is used in court. You might not know the answer to this, but has there been any inquiry or academic research into why, when the Crown thinks that it has a terrific case, juries do not convict or, indeed, into how juries think about things? I realise that the anonymity of the juries would have to be maintained in such research.

Lord Gill: That is a big question. The restrictions on one’s access to the views of juries are so tight that it has never been possible to carry out proper academic research on how juries reach their verdicts. I am afraid that jurors cannot be interviewed.

The Convener: Should there be some academic research that maintains the anonymity of juries but which still examines certain issues? After all, we sometimes get perverse decisions. We would not be seeking to blame jurors; the point is that we do not know how, on the basis of the evidence presented, juries reach their verdicts. Of course, I realise that that is part of the whole drama of the courtroom.

Lord Gill: I have no developed views on the subject and have not gone into it in my own mind in any great detail. However, my experience has been that, by and large, juries get it right.

The Convener: That answers that question.

John Finnie (Highlands and Islands) (Ind): Good morning, Lord Gill. Like my colleagues, I have been very reassured by your comments and have three questions for you based on the evidence to the committee. First, can you comment on the suggestion in the written and oral evidence that we have received that, given the terms of reference of Lord Carloway’s review, the proposal to abolish corroboration is a “rebalancing” act?

Lord Gill: I would put it more strongly than that. You have to think very carefully about the consequences of the move. It is not a rebalancing act at all, but a major change that will have consequences, many of which are unknowable at this stage. It is not just a piece of law reform in the narrow area of the law of evidence, but something that would affect our society’s whole approach to justice and which could have very serious consequences.

By and large, we do not have many miscarriages of justice in Scotland and when they are discovered we put them right. We have very few at the moment, but my fear is that there would be many more if corroboration were to be abolished.

John Finnie: Another point that has been raised by many sources and which you have touched on briefly is that with advances in DNA testing, and with closed circuit television and other covert surveillance, more corroboration is available.

Lord Gill: Indeed. If the prosecution does not need corroboration, the risk is that in some cases it might take the view, “Why go looking for it? We’ve got the complainer and their word might be good enough.” My other worry is that looking for
corroboration can be costly in terms of police time and resources and it would be unfortunate if, at a time when resources are scarce—and if corroboration were available—economies were to be made in that direction.

Finally, what happens if a prosecution is brought without corroboration? If the defence can show that corroboration might have been available, it would be a very powerful defence point.

**John Finnie:** Thank you very much. You have covered my points.

**Alison McInnes (North East Scotland) (LD):** I, too, welcome your comments. I am very concerned about this profound change and have been calling for a royal commission on the matter for some time now.

I want to pursue the likelihood of wrongful convictions and fears that you have expressed in that respect. Other reforms have been galloping through our system—changes to double jeopardy and the proposals on admissibility of evidence of bad character and previous convictions. When the change on corroboration is taken with those, will the accumulated changes bring great risks?

**Lord Gill:** That comes back to my point that corroboration has to be seen in that much wider context. If a change of such importance is to be considered, those other considerations are exactly what must be taken into account.

**Alison McInnes:** That was helpful.

We know that England and Wales has a lot of checks and balances that we do not have. However, I am not sure how useful it would be to get into a discussion about whether it would be a little bit better if we had this instead of that, given your position that we should set the matter aside and look at things in the round. Is that right?

**Lord Gill:** Yes.

**Alison McInnes:** Thank you.

**The Convener:** Are you alluding to the size of juries and the three verdicts, which no one has raised yet?

**Alison McInnes:** Yes.

**The Convener:** Should we be considering those matters as well?

**Lord Gill:** The moment you say, "If we're going to abolish corroboration, let's change the majority from the necessary 8-7 to 10-5 or whatever", you are actually conceding that by abolishing corroboration you are creating a greater risk of a miscarriage of justice. To bring in that kind of safeguard would be, I think, an acknowledgement that abolition of corroboration would bring a greater risk of things going wrong.

**The Convener:** Should the three verdicts, including not proven—the whole thing—also be considered?

**Lord Gill:** That could usefully be looked at too, as part of the general survey of the criminal law.

**Sandra White (Glasgow Kelvin) (SNP):** You mentioned that you are looking at corroboration, and we are looking at the Criminal Justice (Scotland) Bill in the round. Jury changes, double jeopardy and other parts of the law have been touched upon. Are you saying that the Justice Committee should go ahead with the Criminal Justice (Scotland) Bill, but that corroboration should be taken out and looked at as a separate entity?

**Lord Gill:** That would be a wiser course.

**Sandra White:** I just wanted clarification on that point. Following what John Finnie said, Lord Gill mentioned advances in corroborative evidence, including DNA testing. You said that there is now more corroboration available, and I think that you also said that, if there is corroboration available and you have other witnesses, why go looking for it? I was concerned by that remark, because you have mentioned that the majority of judges are not in favour of abolishing corroboration, but we are also talking about victims here, not just the judicial system. Victims do not always get justice in some aspects of the law—for example, in domestic violence cases, in rape cases, or in offences against older people or offences against children in children's homes, when there is not a person who can corroborate. If there is other corroborative evidence there without another person, why would you not go looking for it? You said, "Why go looking for it?"

**Lord Gill:** Forgive me, but I—

**The Convener:** I do not think that is what Lord Gill was saying.

**Lord Gill:** I do not think I said that.

**Sandra White:** I wrote down exactly what Lord Gill said. I would like him to clarify that point.

**Lord Gill:** I am sorry if I have not expressed myself clearly enough. I am as concerned as anyone if a crime of a sexual nature, a crime against a child or a case of domestic abuse goes unpunished or unprosecuted. That would plainly be a matter of concern. However, in attempting to provide a solution to that problem, we must be careful not to make a reform that spreads across the entire criminal justice system. Abolition of corroboration would not apply only in cases such as you mentioned; it would apply in every criminal case. It would apply, for example, if any of us were to be involved in an accidental misunderstanding in a shop, if the shop assistant said, “I saw you...
picking up something and putting it in your pocket.”

**The Convener:** I wish you had not been looking at me when you said that.

**Lord Gill:** If any of us found ourselves in that kind of situation, we would begin to see the value of the law of corroboration. It applies widely.

**Sandra White:** You have not quite addressed the point that I was making. Maybe I have picked you up wrong, but you certainly said that even if you did not go looking for it, the defence would ask, if they had corroboration from another person, why they should go looking for it.

The point that I am trying to make is about corroboration by DNA, video cameras—as were mentioned by Mr Finnie—and other forms of corroborative evidence. On the example that you gave, most shops have CCTV cameras, which would supply corroborative evidence of whether a crime had been committed, although I do not particularly want to go down the road of discussing somebody being accused of taking something from a shop. What I am asking is whether justice is served if defence lawyers do not bother going looking for other corroborative evidence if they have another person.

**Lord Gill:** I was thinking more about a case in which the prosecutor who has to make the decision whether to bring a prosecution has the word of one witness, and decides that that is enough and that they can go ahead with the prosecution, thereby failing to follow up other lines of corroboration. That might present the defence with quite a good argument—that other evidence was there if the prosecution had looked for it but it did not bother. That was really the only point I wanted to make.

**Sandra White:** You were looking at the question from the other angle.

10:00

**The Convener:** I might get myself into trouble now, but here goes. One of the things that I heard the cabinet secretary say—I have heard it said before on behalf of Rape Crisis Scotland and Scottish Women’s Aid—is that we are not talking about securing more prosecutions, but about access to justice. I do not know what that means, so would you comment on that? I thought that the purpose of putting the proposal into the legislation was to secure more prosecutions but, apparently, that is not the case and it is about securing access to justice. I remember hearing that clearly on a television interview, and I have heard it subsequently.

**Lord Gill:** The only rational justification for the proposal must surely be to increase the rate of convictions. It must be. What other reason could there be?

**The Convener:** I agree with you, but I was allowing you to corroborate what I think about it. That statement was quite extraordinary, because I thought increasing the number of convictions was the driving force behind the proposal, even if we narrow it down just to cover sexual and rape offences, although it will apply across the piece.

**Alison McInnes:** Following on from that, we know that the number of rape convictions in other jurisdictions is still very low and the rates are not improved by their not having a requirement for corroboration. Other forces are at work that prevent juries from coming to conclusions about those cases. We are in danger of moving from prosecuting in the public interest to prosecuting in the victim’s interest. I wonder whether the cabinet secretary is moving towards allowing the victim to have their day in court. How would you respond to that?

**Lord Gill:** That is not the basis on which our prosecution system works. It works on the basis that the Lord Advocate decides whether, in the public interest as he sees it, a case is to be prosecuted. It is a marvellous feature of our criminal justice system. The privileged position of the Lord Advocate as the head of the prosecution system is one of the things that makes it so fair. He makes an independent, unbiased decision by looking at the case and deciding whether it is in the public interest to prosecute it. If he says that he will not prosecute a case, no one can gainsay that decision. It is not for the complainer to say that they want the case to be prosecuted.

**Christian Allard (North East Scotland) (SNP):** I have looked at the papers and evidence from a different background because this is only my second meeting at the Justice Committee. After hearing what I have heard this morning, I would like to hear you develop the point about the problem of access to justice. At one point you said that there were problems with the justice system and that we should somehow find solutions to change it. Will removing corroboration improve access to justice, in your view? Will it be more about the quality of evidence than the quantity?

**Lord Gill:** I do not think that removing corroboration will improve the quality of justice in Scotland in any way. There is a serious risk that there will be even fewer convictions, for the reasons that I have already given. I also think that if we make this change in isolation without looking at the wider picture, we might find that there will be consequences that are unknowable at the moment but that could be adverse to the system.
Christian Allard: So, you think that we should not start by removing corroboration. We should establish something else.

Lord Gill: No. To remove the requirement for corroboration is to start in exactly the wrong place.

Christian Allard: On access to justice, would abolishing corroboration increase the number of cases that would be brought to prosecution?

Lord Gill: No.

Christian Allard: Definitely not?

Lord Gill: It might increase the number of prosecutions, but I am not convinced that it would increase the number of convictions.

Roderick Campbell (North East Fife) (SNP): I declare an interest as a member of the Faculty of Advocates.

Good morning, Lord Gill. I have listened carefully to what you said, which has to a degree pre-empted a line of questioning on which I was going to embark.

To be fair to Lord Carloway, when he gave evidence on 24 September, under questioning from me he basically accepted that it is not necessarily the case that there would be more prosecutions under the proposed new prosecutorial test. One does not need to be too harsh on what he suggested.

I take your point on what the purpose of the change would be if there were not more prosecutions or convictions and have taken on board everything that you have said so far, but let us speculate for a moment. The Scottish Human Rights Commission regards corroboration as performing a “quality control function”. What other quality-control functions are there in the system? What kind of quality-control functions would you like to see in a different system that did not rely on corroboration?

Lord Gill: I do not know, but I am pretty certain that changing the majority rule is not the answer. It is illogical, actually. If there is a good solid intellectual case for abolishing corroboration, there should be no need for any safeguards. The moment that we say that there have to be safeguards, we are conceding that the change creates a risk of miscarriage of justice, which, in my view, it will.

Roderick Campbell: Should statutory provisions to exclude evidence such as those in England under section 78 of the Police and Criminal Evidence Act 1984 be considered in Scotland, or are you happy with common-law powers?

Lord Gill: No. I make it clear that I am not here to suggest that the status quo in Scottish criminal law should be preserved immutable and unchangeable. Every legal system must constantly renew itself because it must adapt to changing needs and circumstances. Therefore, it is perfectly right and proper that Parliament should reconsider corroboration among many other questions in the criminal law. I am not suggesting for a moment that the subject is off-limits for discussion—far from it. We can all benefit from reconsidering our most comfortable assumptions and examining them to determine whether they are still valid in modern conditions. However, one ought not to make an ad hoc response to one decision of the Supreme Court and say that we can change that particular rule of evidence. That is not the path of wisdom.

Roderick Campbell: In a nutshell, considering things in isolation is the wrong way. Is that your view?

Lord Gill: There are other rights of the accused that could usefully be looked at. For example, the fact that the accused can withhold his defence until a fairly late stage in the prosecution could usefully be re-examined, as could the vexed question of the use of statements, which has been a constant source of trouble in the courts. That can all be seen as part of one general problem, which is how to keep the law just, fair and up to date.

The Convener: I see that members have supplementaries but I think that we have pretty well established the position and do not want to have Lord Gill repeating himself over and over again. Are you bringing something new to the discussion, John?

John Finnie: Yes, convener.

The Convener: Well, we’ll see.

John Finnie: We will—and I am sure that you will keep me right.

In advance of our evidence session with the Lord Advocate, from whom we will hear next, we have received supplementary written evidence from the Crown Office and Procurator Fiscal Service, which says:

“It is important to be clear at the outset that the abolition of the requirement for corroboration is not about improving detection or conviction rates. It is about improving access to justice for victims”.

The submission then cites a Supreme Court of Canada ruling from 1954, which states:

“It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime.”

Are there any frailties in that approach?
Lord Gill: I think that that is a rather simplistic statement from the Crown. What is the point in bringing a prosecution unless there is a reasonable prospect that it will succeed? Surely the criterion for bringing prosecutions is that it is in the public interest for the person in question to be prosecuted in order to be convicted and punished for the crime that has been committed. If it is simply a matter of giving access to justice, I have to say that that is not my understanding of the Lord Advocate's role. Of course, I might be wrong.

John Finnie: And clearly such a premise would not result in justice for the accused.

Lord Gill: If your case is unlikely to succeed, I am not convinced that you are doing the complainer any favours by bringing it. After all, it is an ordeal for them.

The Convener: I would not have thought that court would be therapy for anyone.

Alison, did you wish to ask a question?

Alison McInnes: No. I think that Lord Gill's counsel has been very wise and that he has covered most of the points.

The Convener: I do not think that John Pentland has had an opportunity to ask a question yet.

John Pentland (Motherwell and Wishaw) (Lab): I just have a supplementary.

The Convener: Please ask it. I think, however, that we have clearly established the position.

John Pentland: I certainly think that Lord Gill's remarks have raised the bar with regard to the contentions associated with the bill.

You told us that one should not assume anything, but should the Government get its way are you satisfied that the proposals provide sufficient checks and balances to protect witnesses and combat a culture in our courts with regard to the rights of the accused? So far most of the comments that I have heard have come from professional bodies and agencies; I have not heard that much about witnesses. Do you foresee any pitfalls or downsides, should the bill get the go-ahead? Do you think that the bill contains the required protections for those who appear in court?

Lord Gill: Altering the majority rule is an exercise in damage limitation. It might do some good but my feeling is that the issue has not been fully thought through and that there could be some adverse consequences.

The Convener: That has taken my breath away. I think that Lord Gill has underlined—indeed, double underlined—his position; I do not think that, with phrases such as "damage limitation", you can ask any more of him.

That said, Lord Gill, do you have any final comments?

Lord Gill: I would like to leave you with one thought. The controversy that has resulted from Lord Carloway's review has actually served quite a useful purpose in bringing out into the open a great many things that, over the years, we have just taken for granted. It is always useful to re-examine one's assumptions and see whether they are keeping up to date with a very fast-changing world. However, although it has been a useful exercise, it all points to the need for a wider and more general re-examination of all the checks and balances that apply.

The rule of corroboration is not some archaic legal relic from antiquity. We did not get where we are by accident. The fact that our law has this rule—a rule that I regard as one of its finest features—is the result of centuries of legal development, legal thought and the views of legal writers, politicians and practitioners down through the ages. It has been found to be a good rule. I simply ask the committee to listen to the wisdom of the ages—it has a lot to tell us.

The Convener: Thank you very much, Lord Gill.

10:16

Meeting suspended.

10:24

On resuming—

The Convener: Our second panel of witnesses comprises the Rt Hon Frank Mulholland QC, the Lord Advocate, and Catriona Dalrymple, the head of the policy division in the Crown Office and Procurator Fiscal Service. Good morning—it is still morning.

As with the Lord President, I offer the Lord Advocate the opportunity to make a brief opening statement.

The Lord Advocate (Frank Mulholland QC): Good morning, everyone. The committee is concerned with the proposal to abolish the corroboration rule, which has exercised most of the debate on the bill. I will make a few opening remarks about that.

I support abolition, for a particular reason. Prosecutors and I see the acute effect of the rule of corroboration in certain areas of criminal offending—particularly sexual offending, including rape, and domestic abuse. As women and children are very much in the majority of victims in those areas of criminality, the effect of the corroboration
rule is disproportionate on them. That is why I support the abolition of corroboration.

Witnesses have raised a number of matters with the committee, and I will deal with two of them. I am of course happy to answer any questions that members have. It has been said that the abolition of corroboration is intended to increase the conviction rate for rape or other sexual offending. I have never seen that as the purpose and I have never ever said that it was all about increasing the conviction rate.

I see abolition as being about access to justice for victims of domestic abuse, rape and other sexual offending. Any modern criminal justice system should have that. It seems that a class of victims in those areas of criminality are denied access to justice, particularly because of the legal requirement for corroboration. I will illustrate the point with figures. In 2012-13, 2,803 domestic abuse charges could not be taken up because there was insufficient admissible evidence. I suggest that it is a real concern that we are not providing the possibility of access to justice for a sizeable proportion of victims in those charges.

Yesterday, I asked the Crown Office and Procurator Fiscal Service's policy division to give me the figures for the rape charges that could not be taken up in the past two years because of insufficient evidence. The information is not statistically robust, as a full double-checking exercise was not undertaken, but I wanted an indication of the number of charges that could not be taken up because of the requirement for corroboration. About 13 per cent of rape charges that were reported to the Crown were affected—that was about 100 in one year and 70 in the other year, which makes 170-ish over two years. I suggest that that is a cause for concern for anyone who is interested in delivering justice in Scotland.

I accept that we must ensure fairness in any criminal justice system. All Scotland’s prosecutors—certainly those whom I work with—are imbued with that notion of fairness. I can speak in due course about the checks and balances, which I have no doubt that I will be asked about.

The suggestion has been made that, if corroboration is abolished, the police and the prosecution will look for only a limited amount of evidence and will not look for additional evidence. I refute that suggestion. If it were correct, we would expect the police and prosecution currently to stop at corroboration from two sources of evidence. They do not do that. Under the Human Rights Act 1998 and the European convention on human rights, we have a duty to deliver effective criminal sanctions, which includes an effective investigation and effective prosecution. A raft of case law, particularly Smith v Her Majesty's Advocate in 1952, sets out the duties of the police under common law.

10:30

On the suggestion about limited evidence, I think that the chief constable has already commented that that will not happen; it certainly will not happen under my watch as Lord Advocate. I do not subscribe to the notion that we would wish to bring cases with limitations on the amount of evidence that could have been available and present that to a court and jury.

I am happy to take questions from members.

The Convener: Thank you very much. That is very useful.

Elaine Murray: Lord Gill advised us that he surveyed the judiciary on its views on the removal of corroboration, and all but one were opposed to that. Has a similar survey been undertaken with procurators fiscal to ascertain the views of the people on the ground?

The Lord Advocate: No; we have not surveyed all COPFS members of staff. When Lord Carloway’s review was published, we had quite an extensive meeting in the Crown Office, which was attended by most senior civil servants and procurators fiscal, including the three federation heads, the Crown agent, the head of operations and the deputy head of operations. We had quite a robust chat about the Crown’s position and, at the end of the meeting, I did not detect any dissension among the leaders of the COPFS.

The answer to your question is that we did not have a full and comprehensive survey, but that was an indication.

Elaine Murray: So that is not the view of the service overall; it is the view of senior people in the service.

The Lord Advocate: I think that that must be the case.

Elaine Murray: I want to go on to the effects on victims, which is obviously the primary consideration in the suggestions. You say that you do not think that there would be a larger number of successful prosecutions and that this is about access to justice. I wonder about the victim who does not get to go to court and there no longer being the view that that is because of corroboration but because they were not believed, or somebody who goes to court and the jury does not believe them. There are all sorts of reasons why people do not believe women when it comes to domestic violence or rape; it is about prejudices in the jury and so on. Will not there be an even more deleterious effect on the victim? They may go through the process, in which it is her word
against his, and at the end of the day the jury may not believe her and it is basically perceived that she has lied. Is not that even worse for a victim than being told that they cannot go to court because there is no corroboration?

The Lord Advocate: I have many years of experience as a prosecutor and have been involved in many difficult conversations with complainers about charges of sexual abuse and rape to explain to them why we cannot take up the case, and in all my time as a prosecutor, I have never known anyone to express thanks for our not being able to take up a case. On the contrary, in my experience, people have wished for the opportunity for their version of events and account to be heard in a court of law with the possibility that the jury, with the burden of proof and all the protections, would reach a verdict on that.

Elaine Murray: Admittedly, people may not give thanks for a case not being taken to court, but could it not be even worse if a person went to court, went through all the process, and was not believed at the end of the day?

The Lord Advocate: I am not saying that there might not be some validity in what you say. All I am saying is that, from my experience of having those difficult conversations, I have never known that sentiment to be expressed. Can I just take your point one stage further? It is a matter for the Parliament, but if corroboration is abolished, the prevailing view among procurators fiscal is that it will lead to much more difficult conversations with complainers and victims because rather than say that there is insufficient evidence within the law to take up the case, we will need to explain the reasons why the evidence is not credible or reliable. That will be much more difficult than explaining to a complainer or victim that there is insufficient evidence. However, we do not shy away from that. We think that it is a point of principle to give greater access to justice for victims. We think that that is the right thing to do, particularly in the two areas of criminality that I spoke of.

Christian Allard: Good morning, Lord Advocate. You referred to access to justice in your opening remarks. You made your point clearly and gave us a lot of statistics. I am not keen on statistics because sometimes they do not tell the whole story. You gave us a number of case studies in your supplementary evidence. Would you like to tell us more about one of those?

The Lord Advocate: Yes. They are anonymised real cases, and there are many more. I can speak from personal experience about where the effect of Cadder is most acute. In a rape case prior to Cadder, it was fairly common that the victim or complainer stated that she was raped by a named person. The requirement for corroboration requires us to corroborate the crucial facts, and in a charge of rape there are three crucial facts: first, we need to corroborate penetration; secondly, we need to corroborate lack of consent; and thirdly, we need to corroborate mens rea, which is the accused’s intention. Those are the three crucial facts that we must corroborate.

Elaine Murray referred to the dynamic of the type of offending that is rape. It is fairly common in rape cases—we refer to it as counterintuitive—for victims to think about whether to report an allegation of rape to the police. The victim might want to think about it and talk about it with their family or friends, or it might not dawn on the victim what happened, or they might be unsure about precisely what happened, so there is commonly delayed reporting of rape allegations. We are told by the experts that that is normal behaviour and we will explain that to the jury in rape prosecutions.

In pre-Cadder cases, it was fairly common during interviews for an accused person to say, “Yes, we had intercourse, but it was consensual.” In those circumstances, we have corroboration of penetration because we have the complainer’s evidence that she was penetrated and raped and we have corroboration from the accused’s statement under interview by police officers. However, post Cadder, the effect of Cadder in many such cases is that, on advice, accused persons are saying nothing. I am not being critical of that option being taken; it is just a fact that, in many such cases, we do not have that source of evidence now.

The effect of Cadder in many rape cases is that we do not have corroboration of penetration because, by the time the alleged rape is reported, forensic opportunities are lost and gone. There is no point in taking intimate samples one or two weeks after the alleged rape, so we will not get corroboration from that source. Where prosecutors had sufficient evidence pre Cadder, we do not have that now, and therefore we cannot take up many rape cases. That seems to me a matter of real concern.

I will give you an example of a case that I dealt with about three weeks ago, which I will anonymise. I heard Margaret Mitchell speak on the extension, or perhaps redefinition, of Moorov. However, we can never get away from the fact that Moorov requires two victims as complainers. I had a case in which two sisters had been horrifically sexually abused as children over many years by a member of the family. The girls were told that no one would believe them or love them if they spoke up, so they did not do so. Eventually, as adults, they got the courage to speak up and make a complaint to the police because, quite
simply, they were concerned that their relative had access to children of the same age.

We took up the case and indicted it in the High Court, and we were prepared to proceed to trial. However, one of the victims could not, mentally, go ahead with it. We tried to give the woman as much support as was necessary throughout the process, and we got medical reports on whether it would be too detrimental to her health, but we could not force her to give evidence. That meant that the whole case fell, because it was a Moorov case. The Parliament, the committee and the public at large should be concerned about that.

I respect the views of people in the legal profession, judges and police officers. Everyone who is involved in the criminal justice system and beyond has an opinion on the matter. However, they do not see the cases that cannot be taken up because of the requirement for corroboration. Police and prosecutors are seeing that class of case.

The abolition of corroboration would have a disproportionate effect on women and children. I have heard others say that, although there are people who oppose that view. The United Nations Committee on the Elimination of Discrimination against Women, which is a powerful voice, supported that view in a report published in July this year that called for the abolition of corroboration.

The Convener: I think that I speak on behalf of the committee in saying that we would wish those prosecutions to be successful; we are not at odds on that. Our concern is that, given the substantial evidence that we received earlier from the Lord President on behalf of all the High Court judges bar one, it seems that abolition may be counterproductive for those victims, for whom we share your huge concerns.

Lord Gill suggested a review of all the rules of evidence, some of which you have mentioned, such as the right to silence. He made it plain that he does not view corroboration as set in aspic, but he suggested that we look at everything so that the difficulties that you find as a prosecutor might be overcome in a different way. I would like your comments on his proposal because, although we would all wish for successful prosecutions, we are concerned that abolition will not achieve for those victims what you and I, and the public, would wish it to achieve.

The Lord Advocate: I have a couple of points on that. First, on the hypothesis that corroboration is abolished, how would the Crown approach its work in deciding whether to take up a case? In my two written submissions to the committee, a distinction is drawn between corroborative evidence and supporting evidence. I am sure that everyone here understands that. I would not—and prosecutors would not—take up a case without any supporting evidence. However, that is different from a legal requirement for corroboration. Of course, when reaching a decision, we would want to look at evidence that supports what the complainor or victim is saying and we would apply the reasonable prospect of success test and look at issues of credibility and reliability. I hope that that gives the committee some reassurance.

10:45

On your wider point about a review, which was maybe the principal thrust of your question, I completely respect Lord Gill, as I do Lord Carloway and all the judges in Scotland. They have a difficult job and they have a view. However, I have a view as well, and the prosecutors have a view. In the past couple of days, I read Lord Carloway’s review report, which seems a major piece of work. It took a year, there was a review group and a reference group, there were four or five roadshows, there were visits down south and to the continent, the review group spoke to experts and visited the Scottish Criminal Cases Review Commission and Glasgow sheriff court and there were various other matters, all of which are in Lord Carloway’s report. It was an extensive piece of work, and what we are discussing is his recommendation, although it is not his only recommendation, as the report covers a raft of areas.

My view is that it is not necessary to go down the road of having a royal commission or having the Scottish Law Commission look at the issue. However, I respect other people’s views, and if that is the view of the Parliament and the Scottish Government, I will be happy to go along with it. We will contribute to any review, but I reiterate that I do not think that one is necessary given the extent of the work of the Carloway review.

The Convener: I will let other members pick up on whether Carloway’s view on corroboration was thorough. That could be—if you will forgive me—open to challenge. If members want to pick up on that, I would be very pleased.

Alison McInnes: I absolutely agree that no one should be beyond the reach of the justice system and that we need to strive to do all that we can to help victims of rape and sexual assault, but is it not the case that conviction rates are poor across many jurisdictions and they are not significantly different in, for example, England?

The Lord Advocate: Do you mean conviction rates for rape?

Alison McInnes: Yes.
The Lord Advocate: It is well recognised that there are issues. Elaine Murray hit on a number of public perceptions, such as that a woman who wears a short skirt is asking for it. I completely disagree with that, but such views are out there and it is important that we counter them in the presentation of cases. Through the national sexual crimes unit, we have been using expert evidence on many of what I will call the rape myths to educate the jury as part of the trial process, and that work will continue.

The statistic is often quoted that 3 or 4 per cent of rape allegations that are made to the police result in convictions. In Scotland, of the charges that are taken up, the conviction rate is running at about 48 to 50 per cent. However, I would say—I feel strongly about this—that the justice system is not about conviction rates; it is about delivering justice. My concept of justice is that it is for the accused, the victim and the public. The conviction rate is a barometer of how we are doing; it is not the be-all and end-all of matters.

Alison McInnes: Can we be clear that you think that it is important for a victim to have their day in court, as it were, whether or not it is in the public interest to prosecute?

The Lord Advocate: No. It is important in cases in which there is supporting evidence and an account or allegation that can be regarded as credible and reliable by a jury. There should not be any barrier to justice for such victims in situations of horrific allegations—rape is a horrific crime. Circumstances in which there is supporting evidence that can be regarded as credible and reliable are the circumstances in which a complainer should have access to justice.

Alison McInnes: In your introductory remarks, you said that, because of a lack of corroboration, 2,803 domestic abuse cases and about 13 per cent of rape cases had not been taken forward. You have also said clearly that there will need to be rules on sufficiency of evidence. How many of those cases in which there was no corroboration would not have been taken forward because there was not a sufficiency of evidence?

The Lord Advocate: We have done shadow marking exercises to ascertain the proportion of those cases that would be taken up if we applied a reasonable prospect of conviction test and where there was supporting evidence. Catriona Dalrymple was in charge of that exercise so, if you do not mind, I will hand over to her to give you the figures.

Alison McInnes: Can I just check whether the answer will relate to the figures that the Lord Advocate gave earlier or to an earlier piece of desktop work that was done for Lord Carloway?

Catriona Dalrymple (Crown Office and Procurator Fiscal Service): It is an earlier piece of work—

Alison McInnes: So you are not comparing the same two things this morning.

Catriona Dalrymple: No. The shadow marking—

Alison McInnes: So I am not sure that that answers my question. It does not help me much at all.

The Convener: The issue that Alison McInnes is raising relates to the Lord Advocate’s remark that Lord Carloway did a thorough piece of work. That would embrace corroboration, although we appreciate that there are other issues that are far less contentious.

Paragraph 7.2.31 of the Carloway report talks about the cases that were looked at by the Procurator Fiscal Service. I understand that the work was done by two procurators fiscal, one of whom was active and one of whom was retired. Pronouncements were made in relation to the number of cases that would have gone to prosecution and that would have been successfully prosecuted. It has since transpired that the work, which was part of the empirical basis for getting rid of corroboration, was done over a three-week period by two PFs. I think that that is what my colleague is asking about. Obviously, Lord Advocate, you are entitled to bring other evidence as a separate matter. I will pass my copy of the report to Alison McInnes if she wishes to follow up the point.

Alison McInnes: No, thank you. I am well aware of that, and I note that the desktop exercise was brisk and not very thorough. I was referring to the Lord Advocate’s evidence this morning. He gave us figures and suggested that we should be shocked that 2,803 domestic abuse cases were not taken forward because there was no corroborating evidence, but he cannot tell me how many of those would have been knocked out with the new rules on sufficiency of evidence, and therefore—

The Lord Advocate: No, I can.

Catriona Dalrymple: We can.

The Convener: We will hear that, then.

Catriona Dalrymple: It might be helpful if I explain the broad shadow marking exercise that the Procurator Fiscal Service conducted and thereafter explain how we narrowed that down and did an additional exercise in relation to domestic abuse cases.

The purpose of the exercise was to assess the impact of the abolition of the requirement for corroboration on the prosecution service. We
consulted statisticians and identified a relevant and random selection of cases. That was about 950 cases that had been reported to the Procurator Fiscal Service. The statisticians were confident that the sample size that was chosen provided an accuracy of plus or minus 5 per cent, so the results are designed to have a 95 per cent accuracy and confidence level. Members will have to excuse me, because I am not a statistician—I am a lawyer.

The Convener: Neither are we, although we might have one here.

Catriona Dalrymple: I am glad.

The Convener: If you get bamboozled, we will get bamboozled.

Catriona Dalrymple: The cases had previously been marked. They were real-life cases that had been reported to the Procurator Fiscal Service between October and November 2012. We conducted a selection process to choose the individuals—and they were provided with draft guidance and the new prosecutorial test.

With the six people who were identified, we tried to replicate a normal team within the fiscal service that would make decisions on cases, so we had a broad range of experience. We had some people who are relatively recently qualified and in whom the corroboration mindset is perhaps not so ingrained, and we had other individuals who have in excess of 30 years of experience of working in Scottish criminal law.

The six markers looked at about 160 cases each. To avoid any contamination of decision, they were given access to the police reports and they were not aware at all of the initial case marking decision. It was all done offline and they did not know what had happened to the cases previously. There was no impact in relation to the forum, or where the case would be prosecuted, because ultimately the exercise was designed to assess whether more or fewer cases would be prosecuted. The forum does not come into the equation when you are looking at the abolition of corroboration.

In the exercise, the prosecutors were given 160 cases each and they were given their own time to do the work. We then analysed the results. In essence, the impact of applying the new prosecutorial test to the business was a mid-range 1 per cent increase in summary cases, which would mean about 1,227 new cases being reported. In solemn cases, there was a mid-range 6 per cent increase, which would mean an extra 721 cases.

You might ask how that compares to Lord Carloway’s exercise. It is kind of like comparing apples and pears, but we have managed to do some comparison. Annex A of Lord Carloway’s report looked at 458 cases and an extra 141 sexual cases. The percentages that are quoted there are percentages of the cases that they looked at. When Lord Carloway’s figures are multiplied out, looking across all solemn business, our statistician worked out that they demonstrate within the range of a 9 per cent increase.

The shadow marking exercise that we conducted with the six prosecutors who were identified and selected is in no way inconsistent with Lord Carloway’s exercise.

The Convener: Just to clarify, is that 9 per cent of cases that are taken to court?

Catriona Dalrymple: It is a 9 per cent increase in the amount of solemn business that is taken to court.

The Convener: Were there any predictions of how many cases would have been successful? That is the issue.

Catriona Dalrymple: No. That is a jury question, not a job for the prosecutors.

The Convener: Yes, it is, but Lord Carloway’s review makes predictions about how many cases would have been successful.

Catriona Dalrymple: It should be borne in mind that our test is based on a reasonable prospect of conviction. We make an assessment of the credibility of the allegation based on whether there is a reasonable prospect of conviction before we decide to mark a case for prosecution.

The Convener: That is a very important piece of evidence. Could we have that in written form?

Catriona Dalrymple: Yes. We have written to the Finance Committee because this information is in the financial memorandum, but we can follow that up with a letter to the Justice Committee.

The Convener: It is in the financial memorandum?

Catriona Dalrymple: Yes, it is in the financial memorandum on the Criminal Justice (Scotland) Bill.

The Convener: I missed that. My apologies.

Catriona Dalrymple: We were concerned because we have to look at the impact of the business that is also reported to the COPFS. We needed to work with the Police Service of Scotland to identify what increase in business is likely to be seen in the reports. I am sure that the Police Service of Scotland will provide its own evidence on the exercise that it conducted, but it might reassure the committee to know that we conducted our exercise in tandem. We offered
guidance to the police as the Lord Advocate would in relation to the reporting of cases to the COPFS.

In that exercise, the police had a similar sample size and the increase in the number of reports was about 1.5 per cent, which equates to another 3,720 cases being reported.

The Convener: We see it now. It is on page 44 of the explanatory notes.

Catriona Dalrymple: That is right. We have to look at the increase in the number of cases that the police receive, which was likely to be 3,720. In planning for the legislation, we thought that the 1.5 per cent increase was quite low, so I sent one of my team out to the police station to review what the police had decided to report for the exercise. It became apparent that the police had made correct judgments in most of the cases, and there was little in addition to that that we thought would meet the reporting test to the COPFS. We are therefore relatively confident about the exercise that the police conducted.

11:00

Ms McInnes followed up on the issue of domestic abuse. The other exercise that we conducted internally was an exercise to look at domestic abuse cases, because we were acutely aware of the barrier that prevails there as far as access to justice is concerned. We looked at an additional 328 cases that had been marked no proceedings because of insufficient admissible evidence and we applied the new prosecutorial test to them. We thought that an additional 1,000 domestic abuse cases per year could be prosecuted in the light of our new prosecutorial test.

Given that we have demonstrated an increase of 1,227 in the summary cases in the shadow marking, it is clear that our assumption is that the majority of the increase in the number of cases that we are likely to take to court—on the summary side—will be in domestic abuse cases. That is the evidence that we have to date from the exercises that we have conducted. I hope that that is helpful.

The Convener: For the avoidance of doubt, will you clarify exactly what the new prosecutorial test is? There might be more to it than simply not having corroborated.

The Lord Advocate: The test is one that is applied in other jurisdictions, and it is whether there is a reasonable prospect of conviction. In other words, the test is whether it is more likely that, if the evidence were presented to a reasonable jury, it would result in a conviction. Obviously, there are component parts of that test.

The Convener: I see. Alison, do you want to follow up on that?

Alison McInnes: When did the Lord Advocate first come to the view that corroboraton needs to be abolished?

The Lord Advocate: I have always thought that, but I have never said it because, as someone who worked in a system that had corroboraton in it, I did not think at the time that there was much support for its abolition, so I kept my own counsel. I have always been of that view—I have not recently had a conversion on the road to Damascus.

The Convener: Or on the road to the Criminal Justice (Scotland) Bill.

Margaret Mitchell: Good morning. I would like to tease out which other jurisdictions the reasonable prospect of conviction test was based on. What factors were taken into account? What was applied?

The Lord Advocate: We visited and spoke to senior prosecutors at the Crown Prosecution Service in England and Wales. We also spoke to the Director of Public Prosecutions in the Republic of Ireland and others. I was recently at a heads of prosecuting agencies conference that was attended by heads of prosecution from Commonwealth jurisdictions around the world.

Margaret Mitchell: Could you be a bit more specific? What precisely was in the tests that you looked at and applied to the cases that we are talking about?

The Lord Advocate: We looked at others’ tests and their component parts. In applying the reasonable prospect of conviction test, it is necessary to look at the principal allegation, so the complainant’s version or account is considered. Factors are looked for that tend to suggest that her or his account is credible and reliable. Among the factors that are assessed is whether there is supporting evidence for the complainant’s account, whether it is circumstantial evidence and what evidence there is against that account—in other words, is there any counterbalance? Then a view is reached on the totality of the evidence.

In Scotland, we do not look at complainant or victim-centric evidence; we look at the allegation and whether there is supporting evidence for it. If we considered that there was sufficient independent supporting evidence for the allegation, we would reach the view that there was a reasonable prospect of conviction.

A load of factors are taken into account. The decision depends on what the evidence is—it might be eye-witness evidence, forensic evidence or medical evidence. It is difficult to talk about the generality of cases; the test depends on the facts
and circumstances of each individual case. An attempt is made to ascertain—on the basis of an objective assessment of the evidence as a whole—whether there is a reasonable prospect of conviction.

As part of the process—on the hypothesis that the conclusion has been reached that there is a reasonable prospect of conviction—the public interest test would be applied: is it in the public interest to raise proceedings? We would take into account various factors, such as the seriousness of the charge, the antecedents of the person who is accused and any mitigation that was apparent from the information before us, in deciding whether it would be in the public interest to raise proceedings. That is how we would go about it.

Margaret Mitchell: I am still struggling to understand what is going to be introduced in the law of evidence—the nitty-gritty of it, the quality of evidence or whatever—that will be different from the system just now and which you saw in the Northern Irish, Welsh and English systems. Am I correct in saying that this is based on how things are done in England, following the Carloway report and the two PFs that looked at cases for that?

The Lord Advocate: No.

Margaret Mitchell: In the research that the procurators fiscal did for the Carloway report, did they make a comparison with the outcome if the cases had been prosecuted under the English system?

The Lord Advocate: What we needed to do was—

Margaret Mitchell: Can you answer my question, please?

The Lord Advocate: I will endeavour to answer it. We looked at what test—

Margaret Mitchell: I am asking about Carloway specifically. We can return to the research that you have just done.

The Lord Advocate: The test did not come from the Carloway report. What we—

Margaret Mitchell: I know, but I am asking you just now about Carloway. You mentioned other jurisdictions in talking about the new test that you used after the Carloway report test was found lacking. I am asking what the Carloway fiscals' research was based on—was it the English system, in which there is no corroboration?

The Lord Advocate: I think that it was the English system—was it?

Catriona Dalrymple: Yes, I think that that is right.

Margaret Mitchell: Did either of those procurators fiscal have any experience of the English system?

The Lord Advocate: No, I do not think that they had experience of the English system, but they have experience as—

Margaret Mitchell: In your opinion, then, would it—

The Convener: Please let the Lord Advocate finish. You can then come back in.

Margaret Mitchell: Certainly.

The Lord Advocate: They have many years’ experience as prosecutors, so they know how to apply a test and assess the evidence. They know how to look for evidence in support of or against an allegation and they know how to apply the public interest test.

Margaret Mitchell: Would it not have been better to have passed the cases to prosecutors who are au fait with and have experience of the English system, to get their opinion? Similarly, in the exercise that you have just carried out, in which you looked at Wales and Northern Ireland, would it not have been better to have passed the cases to those jurisdictions for independent and objective analysis from their experience? Would that not have been better than taking the Scottish experience and saying, “We think that this would have made a difference”? Would that not have provided more conclusive evidence?

The Lord Advocate: No, I do not think so. It would have been possible to send the cases to CPS prosecutors. There is no doubt that that could have been done, but those involved were very experienced prosecutors with years of experience. They know how to apply a test and analyse a case—they know what to look for. I do not think that, had the cases been passed to prosecutors down south, the results would have been different.

Margaret Mitchell: I beg to differ.

You are the Lord Advocate for the whole criminal justice system—for every accused. Today, we have heard startling, compelling and welcome evidence that there would be unintended consequences from the abolition of corroboration. Your remarks have almost totally concentrated on the victims of sexual crimes. What about other victims and the unintended consequences in their cases? Given the weight of concern that exists and the Lord Advocate’s comments this morning—

The Convener: It was Lord Gill.

Margaret Mitchell: I am sorry—I mean the evidence of the Lord President, Lord Gill.

Corroboration has not stood still; it has changed over the years. We have the wisdom of the
institutional writers and court practice over the years, which have been passed down in Scotland and of which we should be proud. Does all that give you any pause for thought that you might be wrong and that there might be another way than abolishing corroboration that could be looked at to help the victims of sexual abuse, to make it paramount that the accused’s right to be presumed innocent is not compromised, to ensure that we have no more miscarriages of justice and to provide a better system for everyone?

The Lord Advocate: I am not saying that I am always right. I fully accept that other people may have a different view. Other people may be right and I may be wrong—I do not know. However, I think that I am right.

You mentioned alternatives and other possibilities. In a recent article in Holyrood magazine, Lord Hope was asked whether we should relax corroboration for the category of cases that we have talked about—sexual offending, sexual abuse and domestic abuse. His view was that we should not. When Lord Gill was asked a similar question, he said that it would not be appropriate. I agree with their views on that.

I have heard Margaret Mitchell speak about the possibility of developing the law of evidence or corroboration. We have developed things over the years—for example, in relation to Moorov. In the Moorov case, a four-year gap between two allegations was held to be insufficient for the application of the Moorov approach. Recently, we had a case where we argued generational abuse and the court applied a gap of about 13 years in applying Moorov. We have greater corroborating lesser, and we have argued that an attempt corroborates a completed act. It seems to me that prosecutors have been pretty creative in legal arguments to try to place cases before the court.

However, the law of evidence has a limit. It is a legal requirement to have evidence from two independent sources that the crime was committed and the accused was the perpetrator and on the crucial facts of the case. We can never get past that if we have the requirement for corroboration.

Can I tell you what effect corroboration has? We have to corroborate the taking of buccal swabs from alleged offenders, so two police officers are required for that. We have to corroborate the taking of intimate swabs from a complainer in a rape case. That may involve a child and injuries to the sexual parts. We have to corroborate—

Margaret Mitchell: Can I stop you there?

The Convener: No—let the Lord Advocate finish. We have plenty of time.

The Lord Advocate: In the case of child pornography, we need to corroborate that children are under the age of 16, so that must be done by two witnesses. We have to corroborate forensic analysis, so two forensic scientists have to speak to the results of forensic examination, and transmission of samples is required to be corroborated. That seems completely unnecessary. That is where I am coming from.

Margaret Mitchell: We seem to be back to sexual offences. I am looking at the whole system and every accused who comes into the criminal justice system. My question is whether you are prepared at least to look at a third way, in which corroboration is retained. We are looking at all aspects of the law of evidence.

You mentioned the need for two witnesses. Without corroboration, if a case comes down to a witness’s credibility, it is likely that vulnerable witnesses—who at present can give evidence via videolink or under special measures—will be required to attend, because judging their credibility will be all important. That is perhaps a downside, in contrast to the other things that you say are positive.

We are looking at the matter in the space of a couple of hours this morning. We have spent time on corroboration, which is one aspect of a huge bill. Given the importance of getting this right, would it be more sensible to take the abolition of corroboration out of the bill, to look at the third possibility of retaining and improving corroboration, as well as the other possibilities of retention and abolition, and to have a commission to properly hammer this out so that we are sure that we are being transparent, that justice will be seen to be done and that the right answers have been decided on?

11:15

The Lord Advocate: I have two points. You mentioned the effect that the abolition of corroboration might have on alternative means of giving evidence, such as by CCTV. You suggested that, rather than give evidence from a remote site, witnesses would have to come to court to give evidence. You used the example of assessing a witness by seeing them. I do not think that giving evidence by CCTV or remote link in any way affects the assessment of credibility and reliability. In my humble opinion, I do not think that that should or would be the effect of the abolition of corroboration.

To go back to your principal question, which was about giving the issue more detailed consideration, you may have it in mind that a royal commission or the SLC would look at it. I have heard and respect all members’ views. Ultimately,
the decision is for the Scottish Parliament and not for me. I am only giving you my view. Given the extent of the work that Lord Carloway did in his review, I do not think that more consideration is necessary.

Margaret Mitchell: Given the pressure on the budgets of Police Scotland and various others, can you micromanage to avoid the kind of situation that Lord Gill said could possibly happen in which, if you do not need to establish corroboration, you do not go the extra mile to incur the costs of looking for corroboration, and the effect of that is unsuccessful prosecutions?

The Lord Advocate: I touched on that in my opening remarks. The police are under a common-law duty to investigate a case fully. The case of Smith v Her Majesty’s Advocate sets out those duties. As prosecutors and police, we are under a duty, in the European convention on human rights, to properly and fully investigate cases and bring forward all relevant evidence. We are also under a duty in our disclosure obligations to ensure that cases are properly investigated and that any evidence that is in favour of or adverse to an accused person is properly disclosed.

Prosecutors are under duties to ensure that a trial is conducted fairly. The notion that we would not want to bring to court the strongest case that we could is alien to me. The work done by police and prosecutors can sometimes result in an accused person being exonerated—not being taken to court. That is perhaps sometimes overlooked. There are plenty of examples of good investigative work carried out by police and procurators fiscal that results in no prosecution at all.

I can give a serious example of that from way back in the early 2000s when, just before hogmanay celebrations, a number of people were accused of terrorist offences. They were arrested when living in a flat in Easter Road in Edinburgh. Some sinister productions or exhibits were found in the flat, one of which looked like a diagram of where a bomb would be placed in Jenners and the Edinburgh Woollen Mill on Princes Street.

I know for a fact that the police, with support from the procurator fiscal, traced all the flat’s occupants. One of them was traced to Perth in Australia, and he said, “Yeah, that’s my work. I work for Glenmorangie whisky company and I prepared that diagram. It was where I was having a whisky display in Jenners and the Edinburgh Woollen Mill.” As a result of that investigation, the case went nowhere and was—quite properly—not taken up. That is an example of the determination and the morality—the notion of the right thing to do—required to investigate a case fully, which could exonerate someone who is accused of very serious offences.

To answer your question directly, what I am saying is no, not on my watch, and I suspect not on the watch of any future Lord Advocates or chief constables in Scotland. We would always want to bring the best case that we could to court.

Margaret Mitchell: The point is that you cannot micromanage every case. We know that there will be pressures; there is no doubt about that. If you do not need corroboration—I rest my case.

The Convener: She has rested her case. That is good, because I have a lot of people waiting to ask questions.

Lord Advocate, you gave examples of when two police officers need to speak to something in which it appears to me and other committee members that corroboration is over the top. Is there a way in which, under a review procedure, we could look at dispensing with the requirement for corroboration in such instances, unless a challenge is made? I am not an expert, but you seem to have made a fair case for its being too much. However, we have not been able to examine the issue, and I suspect that Lord Carloway did not have time to look at it. We are talking about getting rid of corroboration across the piece and not in a particular set of circumstances. Could it be useful to examine that as part of a review of the whole area of evidence?

The Lord Advocate: That might be useful and I do not demur from the suggestion. However, when work is being carried out on corroborating the taking of samples, we do not know whether we will be required to lead corroborated evidence. In a homicide case, for example, the body has to be identified. The way in which that happens in Scotland is that family members have to attend a mortuary and identify their loved one—thankfully, by looking at a screen—prior to a post-mortem examination. I suggest that nothing could be more horrendous than having to do that.

That identification must be corroborated. The Criminal Procedure (Scotland) Act 1995 says that, if the identification of the deceased referred to in the post-mortem report is not challenged within six days of the trial, that evidence is presumed and evidence of identification does not need to be led. However, at the time when identification is required, we do not know whether there will be a challenge six days from the trial, so police officers require a double identification to comply with the rule for corroboration. The rule could be looked at again, but I am giving examples of how it applies in practice.

The Convener: That is helpful but, having raised the issue, we have moved from corroborating evidence in court to what is corroborated in gathering evidence and what happens in transferring and transmitting
evidence—moving it from one place to another. I simply wanted to follow up on whether the issue could form part of any review of what does and does not require corroboration in court. That is it.

**The Lord Advocate:** Of course it could.

**The Convener:** Thank you.

**Sandra White:** I was going to ask you about the requirements and technical burdens, but you have already answered that question.

I have no doubt that all of us around the table want justice for victims, although we may go about it in different ways. We have been looking at court cases and at the prosecution and defence, but we must remember that there are victims who want access to justice, and there have been 2,803 domestic abuse cases and 170 rape cases that have not even gone to court. To me, that is a dereliction of justice for those victims. The statistics highlighted by Ms Dalrymple show a possible increase of between 1 and 7 per cent in the number of such cases going to court. We would all welcome that, but getting to that point involves the issue of corroboration.

In his evidence, Lord Gill was very much of the view that we should not get rid of corroboration and that the judiciary were very much opposed to doing so. I broached the question of guidelines, as we are looking at the Criminal Justice (Scotland) Bill in the round, and he seemed to say that corroboration should come out and that other aspects, such as the not proven verdict, should be looked at again.

What is your view of Lord Gill’s opening comments on that issue? Members of the committee have talked about evidence going forward to prosecution, and Elaine Murray mentioned juries. If corroboration is abolished and more such cases go to court and before juries, so that access to justice is opened up, it may be that juries’ attitudes and social attitudes, will change and that we will see more justice done for victims.

**The Lord Advocate:** That is a good point. Social attitudes change over time. I frequently give the example of the social attitudes to drink-driving in the 1960s or to racial abuse in the 1970s compared with now.

There have been studies throughout the world into what are called jury myths—how jurors throughout the world view certain evidence, such as delayed reporting, a lack of physical resistance or the way that a woman is dressed. Prosecutors and police must recognise that.

We hope that, over time, the public—or some members of the public; not all members of the public subscribe to those views, although a proportion do—change their attitudes. That would be a good thing. We recognise those views and, in certain cases, lead expert evidence that, for example, delayed reporting is normative behaviour.

**Sandra White:** Convener, could I follow that up?

**The Convener:** Of course. I do not want to curtail the discussion. I will certainly take the other members who are down to ask questions, but we should bear in mind the fact that we have another panel of witnesses and they have to be away by 12.45. I alert members to that and ask for short questions, if possible.

**Sandra White:** Thank you very much.

Lord Advocate, my other question is, obviously, about corroborative evidence. That is what it all comes down to. I asked Lord Gill about that, and he mentioned the prosecution. In regard to the defence, if there are two witnesses in a case, one could be someone’s friend—they could be a witness on behalf of the defence, not necessarily on behalf of the victim—and they may not tell the truth. We still have two witnesses. You have made it plain that the police and procurators fiscal do their utmost to get corroborative evidence.

I am probably wrong about this—I am not accusing anyone—but is it more likely that the defence would not necessarily push so hard for the case to go ahead because there were only two people there without looking at the corroborative evidence that could be obtained? I am talking not about the prosecution or the victim, but about the accused.

**The Convener:** I am completely lost.

**Sandra White:** Perhaps everybody is lost, but in my head that seems to be—

**The Convener:** I am completely lost.

**The Lord Advocate:** Let me answer it this way—

**The Convener:** You are not lost. That is good, because, to be frank, I did not understand the question.

**The Lord Advocate:** I will answer it from the accused’s point of view. The accused is not required to corroborate anything. That is a rule of law and a good one. I do not have a problem with it.

Defence counsel and solicitors do a very good job in Scotland. To have a fair trial, counsel and solicitors are required to be at the top of their game to challenge and test the evidence. My experience from many years in the criminal justice system is that that is what happens. It is part of the suite of legal protections to ensure a fair trial that we have legal representation, that we have robust testing of the evidence, that the defence is able to
carry out its own investigations and lead its own witnesses if it wants to and that the accused is able to make a statement during interview on legal advice and to give evidence if they want. There are many more protections.

The accused does not need to corroborate anything. That is a fundamental rule of law in Scotland.

John Finnie: Lord Advocate, you alluded to the Cadder case and, if I noted you correctly, said that you were not critical of it. You also outlined for us that, as a result of Cadder, one of the three essential requirements in relation to corroboration in a rape case—they are all part of the consideration of the public interest. If there were sufficient credible and reliable evidence to place a case of rape before a jury, it would be inevitable that, given the seriousness of the charge, you would take proceedings, because that would be in the public interest.

John Finnie: You have already acknowledged that, as a result of Cadder, there has been a rebalancing with regard to the accused, who is now entitled to see a solicitor. That will normally result in their not saying something that would have provided some of the evidence that in the past would have supported your bringing a prosecution. You are saying that that has now been removed.

The Lord Advocate: I will try to answer that question with reference to a situation in which a woman displays counterintuitive behaviour and delays reporting. As a result, there are no forensic opportunities to corroborate—

John Finnie: That would be like example 1 in the Crown Office's supplementary submission.

The Lord Advocate: Yes.

There might still be supporting evidence. There might, for example, be powerful evidence of recent distress; the woman might say that her pants were ripped and—lo and behold—she has retained them and they are indeed ripped; and there might be forensic evidence that is consistent with her account. However, you can never fill in the gaps in such a case because there would be no corroboration of penetration. In those circumstances, no matter the quality and quantity of the supporting evidence, you would never have sufficient evidence to take up the allegation of rape.

John Finnie: So where, apart from a suggestion from the accused that the act was consensual, would the corroboration of penetration ordinarily come from?

The Lord Advocate: It would ordinarily come from the forensic evidence, if there was the
opportunity to get that. If you could not get that evidence, it would in most cases be difficult to obtain corroboration. It may be, for example—

John Finnie: So your conclusion in example 1 is a statement of fact rather than a summary of the outcome of the particular set of circumstances that it narrates.

The Lord Advocate: I am sorry—I do not appreciate the point.

John Finnie: The outcome of example 1 is

“As there is no corroboration of penetration, we cannot prosecute the charge of rape.”

The Lord Advocate: Yes. That is the case.

John Finnie: But, in any case, that is just a statement of fact.

The Lord Advocate: Yes, but if you abolish corroboration, there is still supporting evidence that would require you to take up that case. It is a matter for the jury whether, having tested the evidence, they find the case to be proven beyond reasonable doubt. That is an example of a case that we cannot take up at present with the rule requiring corroboration. If corroboration is abolished, that is the type of case that we would take up, as there would be supporting evidence as well as the complainer’s account.

John Finnie: The information that is outlined in the supplementary written submission does not say whether there was a medical examination—possibly a delayed medical examination.

The Lord Advocate: Such a medical examination would not provide the evidence to identify or corroborate the identification of the perpetrator.

John Finnie: We will move on.

You discuss the reasonable prospects of conviction in the supplementary submission. You cite a Canadian case, Boucher v The Queen, from 1954. The Supreme Court of Canada stated:

“It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction”.

Does that conflict with anything that you have said—namely, that you would proceed only if there was a reasonable prospect of conviction?

The Lord Advocate: No, I do not think that it does. If a person is innocent, I want him to be found innocent. I do not want a miscarriage of justice, and I do not want someone to be wrongly convicted. In assessing whether there is a reasonable prospect of conviction, a gateway test is used to determine whether the case is to be indicted. In those circumstances, the case is put before the court and is properly tested. Ultimately, it is for the jury to decide.

The requirement for corroboration has an effect, as the gates are shut for many victims of rape, sexual abuse, domestic abuse and other crimes predominantly involving those categories of criminal offender.

John Finnie: I wish to ask about false allegations. In your supplementary written evidence, you provide what might be reassuring commentary for

“police officers, teachers, social workers, health professionals and prison officers”

regarding the depth of scrutiny that is applied to false accusations. What about joiners, van drivers, shop workers or unemployed youths?

The Lord Advocate: We must recognise that teachers and other professionals, including police officers, are perhaps in a more vulnerable position in relation to false allegations. There are currently procedures in place for allegations against teachers, for example, before a decision can be taken whether to prosecute. The matter must be referred to Crown counsel so that the case is thoroughly looked at. The same applies to cases involving police officers.

I would like to think that procurators fiscal throughout the country apply their common sense. They are trained, they analyse a case and they look at the evidence. They look for any indication that an allegation may be false. Ultimately, if proceedings are raised, the evidence will be rigorously tested before a court of law. That is the same for a joiner as it is for a teacher or a police officer.

The Convener: John Finnie should not look concerned. We must move on to the next agenda item, but—I have discussed this—we will have a further opportunity, if required. I will let Roderick Campbell in, because he has been sitting there waiting, but anybody who has not come in—

John Finnie: I have concluded, anyway.

The Convener: Excellent—I just do not want anybody to worry that I am curtailing this evidence session, as it is a very important analysis. We might invite you back at some point, Lord Advocate, if we have further questions. The same might be true for Lord Gill or other witnesses on this issue. I do not want members to feel that I am suppressing debate and questions on the matter. I want to hear the last question, which is from Roderick Campbell. I know that Alison McInnes is on the list, but we can come back to her later, if that is all right.

Roderick Campbell: I wish to follow up on the differences that the new prosecutorial tests will make. I have read paragraph 15 of your additional submission, Lord Advocate. As regards the qualitative assessment, can you clarify the
difference that the new test will make in comparison with current practice?

The Lord Advocate: Current practice does not have that test. We will be applying the test across all our consideration of criminal allegations. When we consider a case, the primary focus—an undue focus, in my view—is currently on quantity. Is there corroborated evidence? If the answer is yes, we then consider credibility and reliability, but no test of reasonable prospect of conviction is currently applied by prosecutors.

To give some reassurance to the committee and the Parliament, I am saying that, if the Parliament chooses to abolish corroboration, we will apply a reasonable prospect of conviction test where there is supporting evidence for an allegation. I hope that that will reassure the committee and the Parliament.

Roderick Campbell: There might not be a formal test currently, but you consider credibility and reliability.

The Lord Advocate: Yes, but we do not consider credibility and reliability against a reasonable prospect of conviction test.

Roderick Campbell: I am just about with you, I think.

The evidence of a victim’s distress is a comparatively recent addition as a corroboration tool. Could you explain to the committee some of the difficulties that it gives rise to?

The Lord Advocate: Do you mean in relation to the evidential value of recent distress?

Roderick Campbell: In addition to corroboration as it was in centuries gone by, how that operates in practice and the difficulties that it causes.

The Lord Advocate: Recent distress is obviously a piece of evidence. In a non-forcible rape, it only corroborates the lack of consent; it does not corroborate penetration and it does not corroborate mens rea. It will only take you some distance regarding the three crucial facts that you must consider or corroborate in a charge of rape.

There are conditions in relation to distress. It must be recent, and it must be displayed to the first natural confidante. There is a raft of case law regarding the gap in time between an allegation being made and distress being displayed and whether that can be taken into account by the jury.

To return to the example that we have been discussing, the effect is that distress does not corroborate penetration and cannot be used to that effect.

Roderick Campbell: My final point—given the time—is in relation to the two written submissions from the Crown Office. There is no comment on what might be described as safeguards if corroboration is removed. Is that because you did not want to get drawn into that debate?

The Lord Advocate: Yes, in the sense that there is also the question whether the not proven verdict should be abolished. The Scottish Government has announced that that will be considered by the Scottish Law Commission, which I welcome. I do not have a problem with that.

There are many safeguards in the trial process, and I have alluded to some of them today. I did not think that we were being asked about those particular additional safeguards. If that is something on which the committee wishes further information, however, we can respond in writing.

Roderick Campbell: I am quite interested in that. In view of the time, I am happy to leave the matter there for the moment.

The Convener: If you could follow that up in writing, Lord Advocate, that would be very helpful.

I bring this evidence session to an end, simply because we must now move on to other business. Thank you very much for your evidence, Lord Advocate and Ms Dalrymple. I suspend the meeting for five minutes to allow the table to be set up for a round-table session.

11:43

Meeting suspended.
The Convener (Christine Grahame): Good morning. I welcome everyone to the Justice Committee’s 34th meeting in 2013. Please switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system, even when they are switched to silent.

No apologies have been received.

Under agenda item 1, we will continue to take evidence on the Criminal Justice (Scotland) Bill. This is our sixth day of evidence at stage 1. We will hear from our panel of witnesses on corroboration and related items.

I welcome to the meeting Robin White, who is vice-chair of the Scottish Justices Association; Raymond McMenamin, who is a solicitor advocate and member of the criminal law committee of the Law Society of Scotland; James Wolfe QC, who is vice-dean of the Faculty of Advocates; and Mark Harrower, who is president of the Edinburgh Bar Association. Good morning and thank you for your written submissions.

We will go straight to questions from members.

Elaine Murray (Dumfriesshire) (Lab): Last week, we heard from the Lord Advocate that he is very supportive of the abolition of corroboration on the basis that, post Cadder, it is now very difficult to get corroboration, particularly in rape cases—even corroboration that intercourse had taken place, whether it was forced or not. What is your response to the concern that Cadder has changed the landscape and that we now need to think about removing corroboration in order to protect rape victims?

Mark Harrower (Edinburgh Bar Association): Good morning. Thank you for allowing me to give evidence.

The landscape has changed in that, now that suspects have the right to legal advice before formal police questioning, they are more likely to exercise their right to silence. I understand the concern that a rebalancing of the evidential layout as a result of Cadder is needed, but my concern is that the removal of corroboration is not really the right place to look. I think that we are starting in the wrong place.

It is true that, if fewer people confess, there will be corroboration in fewer cases from that source, but that does not mean that there will not be corroboration from other sources. Cadder is a development in that line but, as we have heard, methods of sourcing DNA evidence are always improving, and we are able to get evidence from other sources in many more cases that we possibly could not have got in days gone by.

Do we need to remove corroboration because there will be fewer instances in which penetration is corroborated? That would be a dangerous way to go. The rates of conviction by juries in such cases are notoriously among the lowest rates of conviction in jury trials that go ahead. It is too simple to say that juries take that approach because there is not enough supportive evidence. I think that juries are hesitant to convict in all serious cases, and there are many reasons why they acquit in rape and attempted rape cases. We need to look at the whole picture.

The removal of corroboration across the board would certainly be a massive step simply to get at crimes that are committed in private, as it is recognised by Lord Carloway as one of the pillars of our system at the moment. We need to be a bit more imaginative if we want to assist the Crown in finding ways to support complainers’ evidence rather than removing corroboration across the board.

James Wolfe QC (Faculty of Advocates): I, too, am grateful to be giving evidence on the proposal, which, in respect of its systemic impact on the criminal justice system as a whole, is perhaps the most significant that the committee will have had to consider.

Like Mark Harrower, I would respond to the question in a number of ways. The first point is the one that he made. In circumstances in which one might be less likely to get an admission at police interview, one answer is to look harder for other sorts of evidence. In many cases of the sort that we are talking about, DNA evidence is a realistic option.

The second point is that the proposal to abolish corroboration will affect every case across the whole criminal justice system. As I suspect that we all appreciate, the rule reflects, at root, the practical common sense that if there is evidence from more than one source there can be a degree of confidence that the case is well made. At root, there is a serious policy question to be asked. Is that rule—as a safeguard against miscarriages of justice, which is fundamental to the operation of the justice system—a good rule, which we should hold on to, or is the particular issue that has been identified in relation to the cases that we have been talking about of such significance that the rule needs to be changed?
If one is going to change the rule, there are a number of things to look at. Are there alternative approaches, short of abolishing corroboration across the board? Should one be looking at modifications of the way in which corroboration operates in particular types of case? In any event, given the systemic and fundamental nature of corroboration at every stage of our system, one must look very hard at what one is putting in its place, and one must ask whether one is getting the right balance between safeguards against miscarriages of justice on the one hand, and a reasonable system for prosecuting crime on the other.

Fundamentally, that is why the faculty supports the recommendation that Lord Gill made to the Justice Committee last week—that is, that the issue ought to be examined looking at the whole criminal justice system in the round. Indeed, the faculty’s position from the outset has been that the issue is of such fundamental importance to our criminal justice system that, if we are going to look at it, we must give it to a body such as a royal commission or the Scottish Law Commission, with the widest possible remit to consider the implications right across the system.

Raymond McMenamin (Law Society of Scotland): Thank you for the invitation to give evidence on behalf of the Law Society of Scotland, convener.

It is important to remember that Cadder was nothing to do with corroboration. Cadder was to do with the rights of individuals in police stations and what should apply in that particular set of circumstances. The Carloway review opened up the issue of corroboration and how it might fit into the bigger picture. The Law Society of Scotland welcomes the wider debate; the society thinks that there should be a debate about the whole thing, which should not simply focus on how one can get people convicted following Cadder and how one might apply evidential rules in order to get convictions. I would go so far as to say that if the motivation for the bill is to have people convicted in certain classes of case, that is wrong and indeed quite shameful.

There must be a degree of deliberation about where we are starting from in all this and where we wish to go, because if the bill passes into law in its present form we will be in danger of having a system of justice in which the safeguards against wrongful conviction are so minimal as to be capable of being described as basic—and, indeed, compared with other jurisdictions, primitive. Commentators and lawyers from other jurisdictions will look at Scotland and wonder why we are going backwards in this area. They will wonder whether we have learned nothing at all from the Cadder experience.

The Law Society takes the view that we have a great opportunity to widen the debate to look at corroboration and other safeguards that might apply, and at how those might fit into our system. To that end, the Law Society has invited a number of parties, for and against the retention of corroboration, to a debate in January next year. For the moment, however, we have to consider the initial starting point, which is Cadder and the rights of individuals, not the issue of how we can convict people.

Robin White (Scottish Justices Association): I have four points to make that, to a large extent, underline what has been said already.

The Lord Advocate’s observations are powerful, but they seek to extrapolate from a limited range of examples. Rape is an appalling crime, but it is not clear to me that one should, from the difficulties of convicting in such cases, extrapolate to every criminal case that there is. It is easy to forget that, according to much of the literature on the issue, more than 90 per cent of all criminal cases are summary cases. There is a heavy emphasis on juries in much of the debate, but they are involved in a narrow range of cases. They are important—quantity is not the only dimension—but they are involved in only a tiny proportion of all cases, and, of course, sexual assaults and rapes are a tiny proportion of jury cases. I am not suggesting that those cases are not important; I am pointing out that the effects of abolishing corroboration would be felt enormously more widely than that.

The second point, which has been touched on and has been referred to in written evidence, is that there has never been an easier time to get corroboration, because of the scientific and medical advances of the past few decades. In some senses, therefore, it is a strange time to be talking about abolishing the requirement.

The third point, which is slightly more fundamental, concerns the balance metaphor that is explicit or implicit in much of the debate. I have trouble with the balance metaphor because it assumes that there are only two interests to be weighed—a set of scales or a chemical balance is obviously the idea behind it—whereas there are frequently more than two. It assumes that there is some sort of unit of account that allows you to say, “I have put more on that side of the balance, so I must put the same amount on the other side.” However, there is no unit of account that can be applied. It assumes that you can tell when the balance is in balance—you may recall that a chemical balance has a little indicator that shows when that is the case, but there is no such indicator in this debate. The use of that metaphor leads to an infinite debate whereby one change is argued to require another change somewhere.
else, which is argued to require another change, and so on. That infinite continuation of debate is, perhaps, unfortunate.

My fourth point, again, reiterates what others have said. The essential issue is that corroboration, like cross-examination, is a means of testing the quality of evidence. Much of the debate has been about corroboration as quantity. There is clearly a quantitative aspect, but one should not forget that there is also a qualitative aspect: it improves the case if there is corroboration. Therefore—as others have said; this is hardly novel—there is a need to consider everything in the round. I notice that the not proven verdict has been sent off to the Law Commission. That is an interesting and quite important issue but I suggest that it is of enormously less importance than the corroboration question, so why should corroboration also not be sent off to the Law Commission or some other body to be considered, as well as the alternative safeguards that would be put in place if it were to be abolished?

Elaine Murray: The Lord Advocate has also argued that the proposed prosecutorial test, which, I presume, is similar to the test that exists in England, would act as a safeguard against prosecutions that were based on flimsy evidence, as it is based on a reasonable prospect of conviction.

I was therefore quite interested in Mr McMenamin’s comment about other jurisdictions, because we have been told by supporters of the proposal that very few jurisdictions across the world use corroboration and that, because we have it, we are somehow behind the times.

Raymond McMenamin: A lot of people are under the apprehension that corroboration does not exist in other jurisdictions when, in fact, it does. The English have it; the Police and Criminal Evidence Act 1984 contains provision for requiring corroboration of confessions made to the police by persons with mental handicaps. If our bill passes into legislation, we will not have the same safeguard that is built into the English system, which will mean that vulnerable people will be better off in England than in Scotland by virtue of corroboration. The Dutch system, too, uses corroboration for confession evidence. A lot of people are therefore wrong to think that we are the only country that applies corroboration.

It is true that our application of corroboration is more widespread and that we rely on it more than any other country, but other countries also apply it. I have cited the English and Dutch jurisdictions but I know that the United States uses corroboration a lot and, indeed, research will show that other jurisdictions think that corroboration must be considered in many cases. In England, the system contains certain safeguards whereby judges in certain cases can caution juries regarding corroboration and prosecutions based on single-source evidence.

I am not saying that that is right or wrong but it is different from our system, which we have developed in a different way. We are now about to see that aspect disappear and, unlike in many other countries, corroboration will simply not feature. I agree with my colleagues that it is the main safeguard that will go if the bill goes through; as Mark Harrower has pointed out, the minimum that could be done in solemn cases is to increase the votes on a jury by two. Some will say that we still have the not proven verdict but no research has been carried out on its impact as a safeguard; all we know is that it is a verdict of acquittal. We cannot look into the minds of juries—indeed, we are prevented from doing so.

My point is the same as that made by the Lord Justice General. This has not been thought through, and it needs to be thought through a lot more thoroughly than it has been. We need to do more research into other jurisdictions, into what systems might apply here in Scotland and into whether we entirely abandon corroboration or—as is a distinct possibility—retain it in part for certain cases. That approach might well work but it has not been looked at. If we simply throw corroboration out altogether, we will be in danger of throwing the baby out with the bathwater.

The Convener: As you have rightly pointed out, how juries think about cases and come to their decisions is an unknown quantity but Mr Harrower said that he thought that there were reasons why juries do not convict. What are those reasons? What are your thoughts based on?

Mark Harrower: Juries find it very difficult to assess cases involving crimes, particularly of a sexual nature, that are committed in private. They go into court not looking to acquit people but wanting to do their job properly, and I think that the jury system is probably the fairest method of trying someone that can be used.

As a defence lawyer who over the years has represented a number of people accused of rape, I know that such complaints come out of emotionally charged situations in which alcohol is often present and in which the people involved very often know each other and have history between them. More than any other type of case, juries find it very difficult to assess cases of rape and other such allegations because they see a witness—and indeed the accused, if they give evidence—for only a short time in the witness box. Moreover, when witnesses give evidence in court,
they find it an unnatural environment; for example, they might be giving evidence via a television screen as a result of special measures. A person—this applies both to the accused and to the complainer—may not perform well on the day because of the pressures of being in court.

Although some contributors of evidence on the bill have referred to certain preconceptions in Scotland that need to be tackled—regarding how women dress, for example, or other things that have in the past been identified as problems—modern juries nowadays are hesitant to convict in rape cases because, even with corroboration, the case very often boils down to one person’s word against another’s. Even if the case gets to court with corroboration of penetration, the question comes down to whether there was consent or not, and that is still a very difficult assessment for juries to make.

That assessment will become even more difficult if we put cases into court where there is no corroboration. At present, as the Lord Advocate said, there needs to be some support for the three essentials in order to prove rape: penetration, lack of consent, and mens rea on the part of the accused. Currently, the cases that go to court have that element of additional evidence. What is proposed is that we put cases into court where that additional element is absent. How can we expect juries to be more sure when that evidence is not there?

With regard to the qualitative test that Elaine Murray mentioned, we need only look over the border to a very recent case that involved a very high-profile prosecution for rape based solely on the evidence of a complainer. That resulted in an unanimous acquittal of the person who was accused, but we must consider what effect the case has had on the system. Whether that was a miscarriage of justice depends on one’s definition of the term; I know that Lord Carloway says that the matter is so important that we need that discussion, to say that one thing should happen prematurely, given the need for wider research and discussion, to say that one thing should happen.

When someone is acquitted in a high-profile case such as the one in England, it is equally damaging for the criminal justice system if we are left wondering why the case ever got to court in the first place. In the newspaper reports about the Le Vell case, commentators were asking how on earth that case got to court in the first place. The case would never have made it to court in Scotland, because of corroboration. The result of the Le Vell case is that the accused’s life is ruined, and there is a lot of rebuilding to be done. In addition, we must consider the effect on the complainer in future, as she has been disbelieved and will have to deal with that.

We need to make difficult decisions in our justice system about which cases we put into court. It is not simply a question of just putting witnesses in and letting them get on with it. The rules that we have established over a very long time have—as Lord Gill said—served us extremely well. We have very few miscarriages of justice in this country because we have set the bar quite high and said that we will not put cases into court unless we can be sure that, if a conviction is returned, we have got the right person.

The Convener: I will take Margaret Mitchell first, followed by John Finnie, Roderick Campbell, Sandra White, Alison McInnes and John Pentland. All the questions are on corroboration, so there is no such thing as a supplementary. I see that Christian Allard wants to come in too.

Margaret Mitchell (Central Scotland) (Con): We have heard quite a lot of evidence this morning, and I want to be clear about three things. First, do panel members agree that other jurisdictions’ not having corroboration is not a reason to abolish corroboration in Scotland?

Secondly, the Carloway report examined two options: to abolish and to retain corroboration. The third option is to retain corroboration and to improve the law of evidence in order to make corroboration easier. That option seems to be viable, but it was not considered. Would the panel favour consideration of that option? I am thinking in particular of the Law Society of Scotland’s upcoming debate, which will address the options of retention and abolition but, perhaps, not the third option, which might usefully be added.

Thirdly, Lord Gill made another suggestion which—for the avoidance of doubt—two of the panellists have already indicated would be good. The committee is very worried about pressure of work and the fact that we are considering the very lengthy Criminal Justice (Scotland) Bill, which has many other provisions with which abolition of corroboration is slotted in. Given the importance of corroboration to the criminal justice system and Scots law, and the weight of opinion against abolition, would the panel favour taking the provisions out of the bill and giving them to a royal commission, for example, so that the issue could be properly examined?

Raymond McMenamin: On that last point, yes—the Law Society of Scotland would favour the provisions on corroboration coming out of the bill and going before a royal commission. We think that the matter is so important that we need that wider debate. We also need wider research, as I have already mentioned. I agree entirely with the suggestion.

Margaret Mitchell: What about the options?

Raymond McMenamin: At present, it would be premature, given the need for wider research and discussion, to say that one thing should happen
over another. However, at the moment, corroboration should not go; we have nothing to put in its place that would provide the safeguard that corroboration currently provides.

Margaret Mitchell: Could I ask you to look at it another way—to look at retaining corroboration but improving the law of evidence to make corroboration easier? As Mr White already said, with new technology and with more DNA evidence, we should be able to use the law of evidence to try to make corroboration easier.

Raymond McMenamin: I think that we already do that, because corroboration has in various respects been whittled down—for want of a better expression—to the bare minimum. For example, in cases where there is scientific evidence, there is now statutory provision—there has been for some time—for only one scientist to be called to give evidence for the Crown, and notice is given by the Crown, in the service of an indictment, that that is to happen. Only one person is needed to speak to scientific evidence.

Lord Carloway, whom I have heard speak on corroboration on a number of occasions, has stated that in his view, corroboration has been reduced in various areas to almost nothing, which is one of the reasons why he advances his argument for its abolition. It is correct that it has been reduced; in our evidential rules, it does not take much at all to corroborate a confession. For example, special knowledge confessions basically mean that if somebody makes in a confession a reference that suggests that they may have been the perpetrator—that they have knowledge of how a crime was committed—that is enough. We already apply a very much-weakened rule regarding corroboration in many respects.

Margaret Mitchell: I think that we are looking at this in different ways. I am looking to strengthen corroboration and to see how it could be improved and more easily established, and not just as it relates to DNA and new technology but in terms of what happens in court at the moment—for example, the Moorov doctrine and the timescales that are applied in practice, which could be relaxed a little to improve things. Those are just two propositions that we are bringing to the panel today, which I think rather proves the point that there is an argument for a third way, which is at least to consider retention while improving the law. I do not think that either of us—

The Convener: I caution you about using the word “we”. I have no problem with what you are saying, but you need to speak for just yourself—as does everyone else.

Margaret Mitchell: Yes—okay. It is something to consider.

On the third point, with regard to what other jurisdictions do, Lord Gill made the point in his opening statement at last week’s meeting that what other jurisdictions do is not a reason in itself to retain or abolish corroboration.

The Convener: We have had Mr McMenamin’s answer; do other witnesses concur? Mr Wolfe?

James Wolfe: Thank you, madam convener. I agree with all three propositions that have been put to me. On that last point on comparison with other jurisdictions, it is perhaps a mistake to look narrowly at the question of corroboration and what other systems have in relation to the rule of corroboration. You have to look at a system in the round. A much better informed authority than me, the regius professor of law from the University of Glasgow—along with his colleagues—has submitted written evidence to the committee that states that if

"the Criminal Justice (Scotland) Bill as it now stands" were to be enacted, it would

"reduce the level of protection against wrongful conviction offered in Scotland below that offered in any other comparable jurisdiction."

That statement is by three distinguished academics from the University of Glasgow; I suggest that it must be taken seriously.

The other point that perhaps is worth making in relation to the contrast between Scotland and other jurisdictions is that, over the years, a variety of options that form part of the suite of safeguards in other jurisdictions have been looked at in Scotland, but have been rejected on the basis that we have, among other reasons, the protection of corroboration. I can give the examples of dock identification and the picking out in court of the accused by a witness. Many systems regard that as an unfair procedure, but it is regarded as being acceptable in our law, within limits. One of the reasons why it has been found to be acceptable in our system is that we have corroboration.

10:30

If we are to abolish corroboration across the board, we have to look again at a variety of the rules that we apply routinely in our courts, and to decide whether they should remain an acceptable part of a modern criminal justice system that does not have corroboration. I suggest that it is therefore important to look at corroboration not in isolation, and I have given a number of reasons why. The Faculty of Advocates does not suggest that there is no issue to be examined. We welcome the debate on such a serious and important issue. However, if corroboration is to be examined, we should look in the round at all the structures and rules of our criminal justice system.
Robin White: If the system were unique, that would look like a very good reason for abolition: “They’re all out of step except our Johnny”. However, the common objection is not that that is not an argument but that it is a burden of proof issue. That is to say that it is an argument, but no more than an argument. If you like, it is not a knock-down argument, hence the suggestions that the matter needs to be looked at more fully.

Mark Harrower: The proposal to abolish corroboration should be taken out of the bill. I do not think that I have spoken to a single solicitor in my jurisdiction who supports abolition. You might think that my profession would be the one to benefit most from more cases going to court, but we do not want it.

Every solicitor who has been doing the job for a long time, running trials week in and week out, will be able to talk about a handful of cases—I hope only a handful—in which he or she genuinely believes there have been miscarriages of justice. Most such miscarriages of justice are below the radar because they happen at summary level; as we have heard, the majority of prosecutions in Scotland are at summary level. In 2011-12, 96 per cent of people who were convicted were convicted in the sheriff summary courts and justice of the peace courts, and the so-called safeguard of the majority raising jury will not even touch that because juries never go near the sheriff summary courts or JP courts. The majority of convictions in this country have nothing to do with jury voting. That is one of our main concerns. Nothing in the bill is proposed as an additional safeguard on summary business.

Apart from that, most solicitors will be able to tell you that they have dealt with a number of cases in which people were convicted, and most decisions on guilt were based on questions of credibility and reliability, which means who the judge or jury believed and who they rejected. When a judge or jury comes to a decision that goes against a solicitor’s client, there is not much that the solicitor can do about it: that is the end of the line. You only get one shot at a trial in Scotland and you only really get one appeal. Appeals against conviction generally have to be based on errors in law. You cannot ask the appeal court to revisit all the evidence and come to a different decision about who the sheriff or jury believed.

We have a one-stop shop, which is why we in Scotland have been so determined to ensure that we get it right first time around. That is why the formula at which we have arrived has produced very few miscarriages of justice. During the past few decades in England, a number of high-profile miscarriages of justice have been overturned in the appeal court. Many of those convictions were based on single sources of evidence—primarily confessions—whereas we in Scotland always look for an independent check. We have avoided what has happened in England by virtue of the formula at which we have arrived over a long period. To change that suddenly and to take one part of that equation away without looking at what we need to replace it with would be a big mistake.

As far as evolution of the law of evidence is concerned, it would be possible to look more at what we could do in particular cases to assist the Crown to get cases to court. However, we need to look at that very carefully because the law of corroboration would need to be watered down in respect of crimes that were committed in private if we are to get more of the cases that the Lord Advocate talked about into court. Is that what we really want to do, though? Do we want to create a special class of case in order to get cases involving one against one into court so that juries can make a decision?

We can look at the options. The law of corroboration has managed to evolve over the years; in recent times we have managed to bring home two convictions for murder in cases in which no body was recovered. That happened in a system in which we have all the challenges that corroboration puts in front of the Crown. I think that we can say that our justice system actually serves this country very well in respect of such difficult cases.

I agree with everyone else that we cannot just rush to judgment on this matter. We need to look at the whole system because all the elements are interdependent. I have heard sheriffs say many times that they have found proof beyond reasonable doubt in corroboration. Sheriffs, of course, will give reasons for their decisions in a conviction case, but juries cannot do that. Perhaps we need to look more closely, too, at how juries arrive at their decisions before we can safely say that a jury majority of 10 is a safe margin.

The Convener: I have raised previously the issue of how juries arrive at decisions. I put it to you that you would say what you said about corroboration because you are a defence lawyer, so if we were to get rid of corroboration, fewer of your clients would get off. How do you answer that?

Mark Harrower: Many solicitors start off on my side of the fence as defence lawyers, but quickly become prosecutors or go to other parts of the system. We all have an interest in the system working properly. As I said earlier, we can all think of cases—we do not really forget them—in which we know deep down that there have been miscarriages of justice.

I can think of a case from a few years ago of a rape conviction that was returned against a man in
his early 20s who had no previous convictions. After a night’s drinking he met a young woman in the town and they got together; there was evidence on video of their being together. Later on, intercourse happened in a public place and according to the complainer it was non-consensual, but according to him it was consensual. Without going into all the details of the case, I remain convinced to this day that that young man was innocent and nobody will ever convince me otherwise. He was very well represented by someone who was a defence solicitor, and is now one of the top prosecutors in Scotland, who will not be convinced otherwise, either. Because it was a decision that was based purely on credibility and reliability, there was nothing I could do. I had to sit and tell him and his mother that because our law is that all questions of credibility and reliability are exclusively for the jury or the judge, his case was at the end of the line.

I do not want to see an increase in cases like that, which is the reason why all my colleagues and I are opposed to the abolition of corroboration. We believe, as does Lord Gill, that abolition will mean an increase in miscarriages of justice. It stands to reason that if we lower the standards that are required, we will convict more innocent people.

James Wolffe: As professional lawyers, we are fundamentally interested in the proper administration of justice both in securing convictions against the guilty and in acquittal of those who are not guilty. In looking into the matter, the Faculty of Advocates convened a committee that included advocates with considerable prosecution experience as senior advocate deputes, as well as those with experience from the defence side. It is important that the committee understands that it was that body that put together the response from the Faculty of Advocates.

The faculty’s fundamental concern with the bill is that if the provision in relation to corroboration is enacted with the ancillary provision that would increase the jury majority from eight to 10, we would be left with a system that fundamentally runs an unacceptable risk of an unfair trial in Scotland.

The Convener: I thought that it was important to get that on the record because one of the issues that will be raised is that you are speaking from the defence side alone. It gives an opportunity for that to be challenged elsewhere.

John Finnie (Highlands and Islands) (Ind): Good morning, panel. I have a question about the phrase “access to justice”, which keeps cropping up in evidence. The argument that is being put is that the requirement for corroboration is denying people access to justice. I would appreciate your comments on that, along with issues around sufficiency of evidence and what the rationale for prosecution is in relation to the public interest.

Raymond McMenamin: Prosecution should always be in the public interest. That must be the starting point.

There is an issue with our system of corroboration in that when certain persons make complaints and there is no corroboration or back-up evidence, they are not in a position to give evidence. A prosecutor will decide that the case cannot go to court because of a lack of corroboration. That may well have to be looked at.

In considering that, we must have a system that is robust and fair to all—that is, to witnesses and accused persons. It is a difficult thing to reconcile, but at present the Law Society—whose members, I hasten to mention, consist of defence lawyers, prosecutors and those who represent the interests of people who have been victims of crime—feels that there is now a great opportunity to look at all that and to come up with a system that will serve us well in the future. However, it is a difficult issue and I accept totally that in our corroborative system, there are some people who will make complaints who will not have the chance to give evidence.

James Wolffe: Perhaps one needs to look at it this way. One ought to be concerned about access to effective justice. We do not serve anyone’s interests by bringing a prosecution that does not have a reasonable prospect of success. It is not in the interests of a complainer to be put through a trial in which the jury will only acquit. To put an accused person through a trial when there is not a reasonable prospect of conviction is not only a waste of public resource but deeply unfair to that accused person.

If one is going to talk about prosecution in the context of access to justice, it is important that we are talking about access to effective justice and not simply the airing of an allegation in the abstract.

Robin White: Given the remarks that “Defence lawyers would say that, wouldn’t they?”, I have the advantage of being disinterested in this matter, being neither a prosecution nor a defence lawyer—

The Convener: That was a correct use of “disinterested”. That is one of my bugbears.

Robin White: I am glad that it will appear in the Official Report.

The Convener: Yes. I love it.

Robin White: I am pleased to have given you pleasure.
The Convener: I am not saying that you did not know what you were saying, but so many people use it in the wrong way. Miss Campbell taught me how to use it.

Robin White: We must keep up standards.

As a minor member of the judiciary, I speak with a degree of disinterestedness. On access to justice, I take it that that was, in effect, a reference to victims. I am concerned by some aspects of the view that is being taken of victims in the criminal justice system. Victims and witnesses tend to be collapsed into one group. There are clearly very important issues about witnesses; they are not infrequently victims. In the past, the criminal justice system has been very remiss in treating them simply as prosecution fodder—or defence fodder, as the case might be.

We have to distinguish the interests of victims as victims, from the interests of witnesses who may be victims. The significance of that is that there is a danger of losing touch with—I think it is uncontroversial to say it—the underlying purpose of the entire criminal justice system, in so far as it is a system, or with criminal law and criminal procedure. Criminal law is that part of the law that identifies behaviours that are to be punished—I will use that word—and for which sanctions are to be applied. Criminal procedure is the means by which rules for identifying those people are laid down. The underlying purpose of the criminal law is to identify those who have done a category of wrong that we will punish.

10:45

Another part of the law is entirely concerned with compensation of victims of one sort or another—the law of delict. There is masses wrong with the law of delict, just as there is masses wrong with the criminal law, but we have to be careful not to trespass out of the criminal justice system into the delictual system and assume that the function of the criminal law is to provide a remedy for victims. If it does that, that is all well and good, but I hope that it is uncontroversial to say that that is not its fundamental function. If we are going to try to change the criminal justice system’s fundamental function, we should know that we are trying to do that and not do it by a side wind.

I have a second point on sufficiency and public interest. The prosecutor’s test for prosecution has already been mentioned, and I think that we are coming back to it. I am certain that I am correct in saying that, in the Carloway report, there was no discussion of what that test might be if corroboration were to be removed. I see that the written evidence from the Crown Office mentions what it thinks the test should be, but I think that it is accurate to say that there has been little discussion of that. What the Crown Office writes might be sensible, but it is not something on which there has been general debate. If the nature of the decision to prosecute is to change, as it must, there will have to be considerable debate about what the test will be.

Mark Harrower: We have to remember that our system, like all systems of justice, is a human system that is never going to be perfect. We can never convict everyone who is guilty and we cannot protect everyone who is innocent every day of the week. All that we can try to do is achieve a balance whereby we properly and fairly process as many guilty people as possible while keeping miscarriages of justice to a minimum. I think that we have managed to achieve that.

The phrase “access to justice” implies opening up the courts to those who have complaints and who want to see the person whom they perceive has wronged them brought to justice and convicted and punished. We have to remember that not everybody who makes a complaint is telling the truth. Unfortunately, because it is a human system, although many people come to court to do their best and tell the truth, a number of people come to court to lie. It is difficult for a human system, especially if it deals with witnesses in a short space of time, to ascertain who is telling the truth and who is lying.

We ask juries to make those decisions, and we recognise that it is difficult to do. In Scotland, we have given them some assistance by saying, “Look for something else—an independent check.” That is true not just for juries but for sheriffs, and it has worked very well for us. By lowering the standard of proof, you will open the doors of the court to more complainers and increase the risk of convicting more people on lesser evidence, which will increase the risk of miscarriages of justice.

John Finnie: With regard to the crime of rape, the three elements that you mentioned—consent, mens rea and proof of penetration—were alluded to last week by the Lord Advocate, who said that, before Cadder, we had a situation where an accused may have previously admitted to consensual intercourse and one of the elements had then been proved. If one of the catalysts for the removal of the requirement of corroboration is to improve the conviction rate for heinous crimes including rape, do you think that there will be an alteration to the three elements, or are there other consequential effects of that? It would seem that, if you do not prove penetration, you are talking about another heinous crime, potentially.

Mark Harrower: As I said earlier, even with corroboration, juries find it difficult to decide who they think is telling the truth in such situations. I do not know how you are going to corroborate
penetration other than by an admission from the accused or forensic evidence. It is just not going to happen unless you can find some compelling supporting evidence.

The supplementary Crown submission provides a number of examples that I think are powerful arguments but which do not amount to corroboration as we know it. Either you have corroboration or you do not and if you get rid of it, it will be possible to convict someone of rape who might never have met the person in question. I know that the Crown intends to apply a qualitative test and look for supporting evidence, but I have not heard it say, "We'll definitely not prosecute if there is no supporting evidence." We need look only at the Le Vell case down south, which, despite the lack of supporting evidence, was prosecuted all the way. We should seek to avoid such a situation in Scotland, however difficult such choices might be and however difficult it might be to tell someone you think might make a very good witness. "I'm sorry but this is the rule." We need such rules to ensure that we maintain the balance that has been struck here.

The Convener: Have you concluded, John?

John Finnie: No, convener. I have one final question on Mr Harrower's point about the two recent murder convictions in cases where no body had been found, which showed that, with corroboration and sufficient investigation, a conviction could be obtained. That would often require a Crown Office direction to the police service and the availability of dedicated police resources. Do you think that, as presently configured, our system has sufficient resources for the Crown to ensure that that would happen in every case?

James Wolffe: Although we are discussing fundamental principles with the committee, one cannot ignore the resource question. Indeed, the Faculty of Advocates has made a response to the bill's financial memorandum. On its own analysis, the Crown predicts an increase of between 3.5 and 12.5 per cent in the number of solemn prosecutions if corroboration is abolished, which equates to 220 to 760 additional cases prosecuted on indictment each year, and a much greater number of additional summary prosecutions. We have sought in our written comments to address the various assumptions that the Crown has built into its approach to resources, but the bottom line is that, as a result of the measure, significant additional costs have been identified as being required at all stages of the criminal justice system, particularly in the Crown Office and the courts. Indeed, the estimate for the courts is £3.25 million in staff resources and about £900,000 in training.

A striking feature of the financial memorandum is its statement that the additional costs to the Crown and the courts system will be absorbed without any increase in funding. Of course, if this is the right thing to do, one will have to find ways of resourcing it, but with such a systemic change one needs to take a clear-eyed view of the practical consequences for the system. We must be concerned that, first of all, a system that one might already regard as stretched will become overstretched and, secondly, any investigation that does not have to be carried out might not be. I say that, of course, without suggesting any want of integrity on the part of the police or prosecutors.

The Convener: We will move on. I call Roderick Campbell.

Roderick Campbell (North East Fife) (SNP): I refer to my entry in the register of members' interests; I am a member of the Faculty of Advocates.

As it says in the submission from the Crown Office and Procurator Fiscal Service, the second part of the new test for prosecution, which requires a prosecutor to make an assessment about the public interest, is no change from the current situation. However, the first part—the evidential test—will be made up of three elements. As the Crown said, those will be:

- "(i) a quantitative assessment—is there sufficient evidence of the essential facts that a crime took place and the accused was the perpetrator?"
- "(ii) a qualitative assessment—is the available evidence admissible, credible and reliable?"
- "(iii) on the basis of the evidence, is there a reasonable prospect of conviction in that it is more likely than not that the court would find the case proved beyond reasonable doubt?"

To what extent will the new test provide safeguards against potential miscarriages of justice when prosecutions go forward? How much of an improvement will it be?

Raymond McMenamin: It might not provide any safeguards. That is largely speculative. There are assessments that a professional prosecutor will have to make, based on his or her experience, but within that there are no real safeguards.

That is especially the case given the point that has just been made. There is a widespread perception in the legal profession that the Crown is struggling with its workload, which is a concern. That might not be something that the Lord Advocate will readily accept or admit to, but I am a practising defence lawyer and can confirm that there is such a view of the Crown. We are talking about beleaguered procurators fiscal marking cases—and Crown counsel perhaps less so. If the prosecution system is under stress, our chances
of having prosecutors think about safeguards as they mark cases are diminishing all the time.

James Wolffe: As I said, I do not for a moment doubt the integrity with which prosecutors will seek to apply the test. However, there is a constitutional point. In looking at the bill, the Parliament is looking at the statutory structures within which a trial will take place and the safeguards in that regard, but the Lord Advocate's guidance to prosecutors is not to be enshrined in statute and has as yet been the subject of relatively little debate, as Mr White said.

Lord Advocates come and go and may change their guidance. I note that the Lord Advocate has acknowledged that for certain classes of individual, which are identified in paragraph 33 of the Crown Office's supplementary submission, “proceedings ... would not be taken up without strong supporting evidence.”

One understands why the Lord Advocate said that in the context of those particular cases. However, that is an example of how the guidance that will be provided will result in the test being applied in different ways to different classes of case, in ways that are, as yet—and in saying this I am not being critical of the Crown's written evidence—unclear and unknown.

Legislators who are looking at the bill must ask, “Are we putting in place a system that adequately secures the conviction of the guilty and the acquittal of the innocent? Will the structure that we put in place provide adequate assurance in that regard?” Of course the prosecutor's role is important, but it is not a legislative safeguard, and precisely how the test will be applied remains to be seen.

The Convener: Does anyone else want to comment?

11:00

Mark Harrower: On the ground, in the courts, the bar is seeing prosecutors who are under increasing pressure. They have big workloads nowadays, and there seem to be categories of case that they are on instruction to proceed to trial with, come what may. That rather counts away from the tradition that we have always had in which prosecutors have had the discretion to discontinue cases if they did not believe that they were in the public interest.

In recent times, certain cases have been highlighted as being of particular concern to society, such as cases with racial or religious aggravations. I have spoken to prosecutors about that. A stalking case was highlighted in the Daily Record as recently as last week. According to the Daily Record, the Crown Office stated: “pleas of not guilty in such circumstances should not be accepted without evidence being heard at trial.”

Stalking cases under section 39 therefore now seem to fall under the category of cases that have to go to trial.

As recently as this morning, I spoke to a prosecutor to ensure that what I am about to say is right. There is a certain category of cases in which a certain sensitivity is identified, and it is thought that almost all cases of that type should proceed to evidence. Certain cases are therefore prioritised for trial.

The proposed new test will require prosecutors to do a great deal of independent assessment of the evidence and to take on responsibility in those cases, as they will need to assess what supportive evidence there is, the quality of that supportive evidence, and whether it is enough to justify the case going to court. They are expected to make a decision on whether the case could reasonably proceed to a conviction on the basis of what will often be written statements.

A lot of people are prosecuted year on year. In 2011-12, 124,736 people were proceeded against in court and prosecuted. If corroborative evidence did not apply to all of those cases, how would that assessment be made? We do not expect prosecutors to get in the complainers in every single case, so they will need to make the assessment based on written statements. In the smaller cases—the summary cases that I have mentioned, in which people can still get up to 18 months in jail if they are convicted—those written statements will very often be taken by police officers, who will sometimes not be very experienced. They can be taken late at night when those officers are under pressure—for example, in the middle of George Street when a big rammy is going on. How are prosecutors to make a proper assessment of whether the case has a reasonable prospect of conviction, based on statements alone, especially when prosecutors may be subject to the additional influence of having to be careful of cases with particular sensitivity? I worry about how that test will apply and how our prosecutors, who are so used to corroborative evidence, will change their mindset to apply it properly.

The Convener: You are being delicate but, given the stalking case example, are you implying that, because of the sensitivity, sexual assault, rape and domestic violence cases will be taken to court almost no matter what? Is that where you are going?

Mark Harrower: I think that we see categories of case going into court in which prosecutors are clearly under instruction to get on with it. For example, just a couple of weeks ago, I saw a domestic abuse case file sitting on a table in court
with a big note from a senior prosecutor to the junior prosecutor that said that there was a reluctant complainer in the case, but proceed anyway.

It could be said that it is in the public interest to proceed with all domestic abuse cases, as that is quite rightly an area of concern, but I think that, if we apply that to every single case of a particular type, we will plug up the courts with cases that have to proceed to a conclusion. For example, I had a jury trial in the sitting in Edinburgh last week that was one of nine jury trials that were adjourned out of that sitting. I think that that was the third or fourth trial diet that that case of mine had got to.

As Mr Wolfe said, we have to be able to balance the resources in this country, which are not infinite, with prioritising cases that truly are the most important ones, and we need to guard against imposing blanket directions in cases of a particular type because we are worried about what the Daily Record might say.

Roderick Campbell: I want to move on to another subject: the reasonable jury point, which was in the Scottish Government's second consultation on safeguards and which is not proceeded with in the bill. What is the panel's view on that point? Lord Carloway suggested that there were two reasons why the proposal would be inappropriate. One was that, if the judge got it wrong, it would be very late in the day for the prosecutor to try to appeal the decision, and it would be costly in terms of resources. The second was that, if one judge alone made the decision, it would be an opportunity for an idiosyncratic judge to decide, whereas if the decision is restricted to the appeal court with three judges, they are more likely to get it right.

Are there any thoughts on that and on the implications?

James Wolfe: As I understand it, Mr Campbell is raising the question of whether the trial judge should have the right to withdraw a case from the jury on the basis that the evidence does not meet the appropriate standard, whatever it is.

First, we have a ground for appeal in our system that allows the appeal court to set aside a conviction on the basis that no reasonable jury would have convicted. Logically, that implies that we recognise that, on occasion, juries bring in verdicts that are unreasonable. It seems odd that we are depriving the one independent and impartial judge, who is highly trained and has seen the evidence, of the power to withdraw a case from the jury in those circumstances.

That ties in with the point about prosecutorial discretion. For example, a prosecution may be brought in good faith on the basis that it is thought that the evidence meets the test, but at trial, when the witnesses appear, the evidence does not meet the test. One would hope that, in those circumstances, the prosecutor would withdraw the case from the jury, but he or she might not. Are we to say that the judge may not say, "I do not take the view that the evidence meets the test that would have allowed the case to be prosecuted in the first place, and I am going to take it away from the jury"? It is odd that such a proposal has not been taken forward.

To meet immediately the objection that the provision would put power in the hands of a trial judge who may exercise it idiosyncratically, the Parliament has recently provided for a right of appeal where a trial judge upholds a no-case-to-answer submission. We have had experience of such appeals, and appeal courts are convened very swiftly—effectively overnight—so that the appeal court can review the trial judge's decision to uphold the no-case-to-answer submission and remove the case from the jury by that means. The appeal court is convened swiftly so that, if the Crown appeal is upheld, the case can go straight back to the jury and the jury can decide it. The Parliament has already put in place the mechanism that can deal with the concern that Lord Carloway expressed. There is no reason why a similar Crown appeal could not be made available against a decision of the type that we are discussing.

Robin White: I emphasise again the point about the propensity of trials to be summary. We are discussing further safeguards that are to be introduced, but the discussion has related entirely to jury trials, which—as we know—make up a tiny proportion of trials. It is difficult to imagine how that particular form of safeguard could be operated in summary trials, because the fact finder and the law decider are collapsed into one, so a summary sheriff or a justice of the peace would presumably have to advise himself on the matter.

Roderick Campbell: On the question of the number of jurors in agreement—whether it should be 10 or 12; I will put it that way—the judges collectively seem to be happy enough with two thirds. However, the written evidence from the Faculty of Advocates suggests that, as that would still mean that potentially five people would take a different view, it would not be a safe way of preventing miscarriages of justice. Are there any further comments on that, or is there just a difference between the faculty and the judges?

Raymond McMenamin: If a third of a jury have reasonable doubts, does that not raise alarm bells about the conviction, even more so than in the current situation, in which we need only eight out of 15 jurors to convict?

I appreciate that senior judiciary have expressed the view that 10 out of 15 might be appropriate,
but where has that come from? Again, no research has been carried out on the matter. For example, we have not looked in detail at other jurisdictions. If we are going to take the English and Welsh system as a template for a system that does not use corroboration in such a widespread fashion, we should remember that the juries in that system are, in the first instance, directed to return unanimous verdicts. Only on the judge’s direction can there be a 10 out of 12 majority verdict for a conviction, which is still a substantially higher standard than 10 out of 15.

Referring, again, to the academic studies that James Wolfe mentioned earlier, I note that the only other system that applies a single straightforward majority is the Russian one. I am not decrying that system in any way, but I understand that it is different; for a start, it relies not on a single verdict but on a kind of questionnaire that the jury has to fill in. Moreover, we know that in other jurisdictions juries sometimes sit with qualified lawyers or others who might advise them.

As I said very early on in this session, the Law Society of Scotland is deeply unhappy with the proposal to simply increase by two the number required for conviction without any background or research.

Mark Harrower: I agree that insufficient research has been carried out into how juries reach their verdicts. For example, in a jury trial that I conducted a couple of years ago of a nurse accused of assaulting an elderly patient, the nurse was—rightly, in my opinion—acquitted unanimously. However, when I went into the jury room after the case to help the bar officer to clear out all the productions—we had received very voluminous defence productions for the case—we found a piece of paper on the table that said, “10 not guilty, two not proven, one don’t know”. We would never have known how that jury reached its final verdict—if that was, of course, how it reached its verdict—but the fact is that jury deliberations have traditionally been shrouded in secrecy and we do not know how juries arrive at their decisions. All that we can hope is that they can understand in a very short space of time the complex directions that we give them. Sometimes they will come back with questions, to which the sheriff must give concise answers that, again, one hopes they will understand.

Occasionally you will get a verdict from a jury that you cannot understand but, by and large, juries do their best. Nevertheless, before we reach any view on whether 10 out of 12 is safe, it might be that we should take more of a look at how juries arrive at their verdicts in the first place.

James Wolfe: As I understand it, the norm in common-law systems is unanimity or near unanimity. Moreover, the very difference of opinion on this one issue shows that we need to look at the system at large and all its elements so that we can secure a system that strikes the right balance between prosecuting crimes effectively, including those sexual crimes and crimes of domestic abuse that rightly raise public concern, and avoiding miscarriages of justice.

The Convener: As time is pressing, we will move on.

Sandra White (Glasgow Kelvin) (SNP): Good morning. I am glad that Mr Wolfe has mentioned crimes of domestic violence, because last week we were given figures that showed that hundreds of domestic violence and rape crimes do not reach the courts. Obviously that was a matter for concern and we considered those figures alongside the issue of corroboration. I mention that simply because Mr Harrower has constantly referred to one miscarriage of justice down south; I would argue that those figures show that there are hundreds more miscarriages of justice. After all, justice is also for victims, which is indeed the issue that we are considering in the round in this bill.

The Lord Advocate has said that because of the corroboration requirement, he is unable to prosecute many crimes that have been committed, simply because they happened in private, the victims of which, of course, could be children and elderly people. Although the supporting evidence might be persuasive, the cases cannot be prosecuted because the corroboration rule has not been met. If corroboration remains, what do you as experts in the justice system suggest we put in place to ensure that victims in such cases receive justice?

11:15

James Wolfe: First, there is understandable public concern about those categories of cases, which are rightly ones to be taken extremely seriously. Secondly, as I recall, the Lord Advocate gave statistics to the committee on the number of cases in those categories that were marked for no prosecution on the basis that there was insufficient evidence. Alison McInnes then asked a very pertinent question, which was how many of those would be prosecuted by applying the new test. It is important to recognise that, at least on the Lord Advocate’s view of his own test, not every case in which a complaint of sexual crime or domestic abuse is brought would be prosecuted. So, I think that one has to be slightly careful about the numbers that one looks at.

Thirdly, it is important to understand that abolishing corroboration is not a panacea for the difficulties that those cases raise. Mark Harrower has already identified some of the difficulties that I
suspect any of us who have prosecuted serious sexual crime will recognise.Fourthly, those of us who have prosecuted those crimes recognise the value of corroborating evidence in supporting a complainer’s evidence and in persuading a jury to accept that evidence. Further, the corroborating evidence might be extremely important if the complainer is, for a variety of reasons, a difficult witness. It is therefore very important that we do not end up with a system in which there is a diminution in the efforts that are put into ensuring that all investigations are carried out and evidence obtained.

I do not suggest that there might not be room for examining the way in which corroboration works. If I understand it correctly, Lord Hope has suggested that one might look again at the role that distress plays in corroborating the different elements of a sexual crime. One might look at the corroboration of crimes by reference to facts and circumstances that are consistent with the complainer’s account. I do not wish to commit the faculty to a view on those points, but—

**The Convener:** They are just observations.

**James Wolffe:** I do not suggest that there is not a case for examining the way in which corroboration works in relation to sexual crimes, nor do I for a moment suggest that the issues in relation to those crimes do not create a case for examining whether corroboration is a doctrine that we should retain. Our fundamental concern is that if we are going to take away corroboration—ultimately, there is a serious policy question about whether to do that or not—then we must appreciate that the whole system will look completely different at every stage: the investigation stage, the prosecution stage, the trial stage and the appeal stage. One must look very hard at whether we will leave ourselves with, as the academics from Glasgow say, a system that fundamentally runs an unacceptable risk of unfair trials taking place in this country.

**Sandra White:** Thank you very much for that, Mr Wolffe. I agree with your point about the number of cases not coming to court because of a lack of corroboration. The Lord Advocate was very honest in saying that it is still high compared with the number in respect of some other crimes.

I want to pick up on some of Mr McMenamin’s comments about corroboration and no one having said what could be put in its place. We talked about corroboration being removed from other countries’ judicial systems. Mr McMenamin said that in England there is a provision for vulnerable people under the Mental Health Act 2007 and that there is similar provision in Holland. You also said, Mr McMenamin, that we rely on corroboration more but that it has been whittled down to almost nothing.

When we talk about corroboration as a separate issue, you say that it has been whittled down even more, but we use it more. Will you elaborate on that? Why do we need to keep corroboration as it stands if we rely on it too much and it has been whittled down to almost nothing?

**Raymond McMenamin:** Over the years, there have been a number of cases before the appeal court that have addressed corroboration in various areas of law. I will not go into the detail of those particular cases but suffice it to say that not everything has to be corroborated. The essentials of a criminal case—that a crime was committed and the identity of the person who committed the crime—have to be corroborated, and we have corroboration of those essential matters in such cases as a check and a system of safeguarding against miscarriages of justice.

It is correct that corroboration has diminished in that what is today being called the corroboration doctrine does not apply as strongly to certain evidential aspects as it does to others. However, if you are going to convict someone in a court of law, you need a system of checks and balances to avoid miscarriages of justice, and at the present time we have corroboration; we have nothing else of any substance. It is important to acknowledge that. Until we can come up with something to replace it—although we might never come up with something that will satisfy everyone—I suggest that corroboration has to stay.

**The Convener:** You say that corroboration has been whittled down, but the Lord Advocate said in committee last Wednesday:

“Can I tell you what effect corroboration has? We have to corroborate the taking of buccal swabs from alleged offenders, so two police officers are required for that. We have to corroborate the taking of intimate swabs from a complainer in a rape case...In the case of child pornography, we need to corroborate that children are under the age of 16, so that must be done by two witnesses. We have to corroborate forensic analysis, so two forensic scientists have to speak to the results of forensic examination”.

That does not sound to me as if the use of corroboration is being whittled down. Would you care to address that?

**Raymond McMenamin:** As I mentioned before, in certain areas, such as forensic science evidence, the Crown can serve notice that it is going to call only one forensic scientist although that might mean that it needs to call two forensic scientists during the course of the case, or have two forensic scientists prepare a report. When it comes to the service of indictment, the Crown is entitled to give notice that it intends to call only one witness.

**The Convener:** I accept that that is true for the collection of evidence. Should any alleged inquiry
into or review of corroboration look at the requirements of corroboration in the collection of evidence as well as in court proceedings?

Raymond McMenamin: Yes. There is scope for looking at the application of corroboration throughout the evidential procedure and perhaps in relation to the classes of cases in which it might apply. That is worthy of debate.

The Convener: I am sorry to have interrupted but no one else had raised that point, and I know that the Lord Advocate said:

“That is where I am coming from.”—[Official Report, Justice Committee, 20 November 2013; c 3745-46.]

The point seemed to be a substantial one for him when he was giving evidence last week, and you have addressed it.

Sorry, Sandra.

Sandra White: No, that is fine. I was going to go a wee bit further but you have clarified some of my points, convener.

Mr McMenamin, you said that we do not have anything else apart from corroboration. I asked previously whether anyone had any ideas about what we could have as guidelines. There are the proposed jury changes—which some say are fine and some say are not—and the judge being able to take the decision away from the jury. Do you agree with those aspects of the bill? I am not just speaking to Mr McMenamin—

The Convener: Mr McMenamin is giving you the eye.

Sandra White: Yes. These are ideas that have been proposed and there are areas in which I probably have a lot of confusion. We are looking at the Criminal Justice (Scotland) Bill in the round and, as Mr Wolffe has said, there is not just one part to it; it has lots of different parts. If we were to take the corroboration issue out of the bill and look at it separately, what knock-on effect would that have? What would be the effect if we passed the rest of the bill without including the abolition of corroboration?

The Convener: The question is whether that would sabotage the bill. Could the bill proceed without that in it?

Raymond McMenamin: The position of the Law Society is that all matters that are subject to the bill should have been subject to consideration on a wider scale than has been the case. However, we are where we are. As has been suggested, if the provisions concerning corroboration and jury numbers are taken out of the bill, we would support that. We would also support further consideration being given to those aspects.

The Convener: I think that the term that I was struggling for is “wrecking amendment”. Would the bill still function without those provisions?

James Wolffe: It seems to me that the only provision that is linked—in practical terms, if not logically—with the abolition of corroboration is the increase in the majority that is required for the jury.

I should say, as the committee will appreciate, that the Faculty of Advocates broadly supports many parts of the bill. In particular, although we have made some observations about them, we support the provisions in part 1 relating to arrest and custody. We would certainly welcome the removal of the specific provision dealing with corroboration and the one associated provision that deals with jury majority, precisely so that those other parts of the bill can proceed swiftly to enactment.

Alison McInnes (North East Scotland) (LD): I refer members to my entry in the register of members’ interests and the fact that I am a member of the council of Justice Scotland.

I want to return to a couple of points and then, if I have time, touch on one new thing.

The Convener: Yes, I want us to touch on something new.

Alison McInnes: John Finnie talked about access to justice, and I want to pursue whether the panel shares my concern that the issue seems to be driven by a desire to give victims their day in court rather than by the need to secure prosecutions in the public interest, and my worry that that might be a dangerous road to go down.

Mr Harower made detailed points about the prosecutorial guidance and the decisions to pursue certain cases regardless, in a way, because they were, perhaps, politically sensitive. Beyond the dangers of individual miscarriages of justice, might these profound changes be significant, constitutionally, in the hands of a less benign Government?

The Convener: Less benign! You could be a minister, the way you are going. I sense a new coalition.

Mark Harrower: Many solicitors worry about some of the emphases that are being placed on certain types of case in court. All types of case that go to court are important, and the consequences in all cases are important for the people who are affected by them. We seem to be concentrating on certain types of case. I understand the drivers behind that, such as the focus on domestic abuse, which has obviously been a problem in Scotland. The problem is that, when that approach is applied in practice, wide nets are cast and in every type of case that is categorised as, for example, domestic abuse,
people are brought into court and there are regular appearances from custody. The numbers in Edinburgh sheriff court have gone up substantially this year as far as prosecutions are concerned. Since April this year, there has been a 50 per cent increase in cases that are registered in the JP court, where we now see fairly serious road traffic cases—of course, there is a policing initiative on road traffic at the moment—and a 38 per cent increase in cases that are registered in the sheriff court, where there are drives on issues such as domestic abuse and the football legislation.

We just worry that there seems to be an ever-increasing desire to cast a very wide net and let the courts sort it out—to put more cases into court and let the judges and juries make their decision. Unfortunately, when you do that, you end up catching all sorts of cases, some of which could be dealt with in other ways.

There is a political drive behind the review and the Government is obviously under pressure from various groups. However, we must remember that we have come across these problems in the past. In days gone by, there was a particular concern about people being robbed on the highways when there were no witnesses. Those crimes were committed in private, but back then we were able to resist the temptation to remove the requirement for corroboration, although that would obviously have dealt with the problem.

Now, we have a similar type of problem, although a different section of society is affected by it. The media highlight the issues and the public, I think, understand the problems. As a justice system, we have to make sure that we do not make rash decisions, because once we get rid of corroboration, it will be gone. In my submission, that would be to the detriment of our system, unless we have properly thought out checks and balances in its place.

11:30

Robin White: I will address those two points, if I may. I am not sure that I would characterise the first point in precisely the same terms. I repeat that there is a danger of extrapolating from a narrow range of what are, no doubt, dreadful cases. The suggestion is not that the requirement for corroboration be removed from sexual assault and domestic abuse cases but that it be removed from everything—theft, ordinary assaults, breach of the peace and so on.

I turn to the second point, which is the “less benign Government” point. When Mr Wolfe addressed it, he described it as the constitutional point. It is not entirely clear to me why the new test, post-corroboration, should not be put into statute.

Raymond McMenamin: The question was about whether the proposal is motivated by the desire to give victims their day in court. To put it bluntly, it should never be motivated by that. In fact, victims are not victims until it has been established in court that they are victims. That is the first point.

Secondly, as I think Mr Finnie mentioned, it should always be a case of prosecution in the public interest. In certain circumstances, it may not be in the public interest to put a single witness in court to give evidence. It may not even be in the interest of that particular witness to stand in a court of law with no back-up evidence, be cross-examined at length and find that the accused is acquitted.

Also, going back to the point that hundreds of cases could be brought to court, I think that it is easy for some people to be swayed by the numbers game here. We cannot approach it on that basis. We have to look at each case individually and decide whether it is appropriate to bring a prosecution and whether it is in the public interest.

James Wolfe: I will make an observation on the last part of the question. It is important to have in mind the constitutional significance of what we are doing here. We are considering the way in which the criminal justice system operates, and ultimately we should all be concerned about securing the rule of law in Scotland for the long term. That is why our fundamental focus is on the safeguards that are required to make sure that, notwithstanding changes of Lord Advocate, changes of Government, changes of social attitudes and moral panics about one thing or another, we have a system of criminal justice that secures the liberties of the citizen in Scotland while at the same time ensuring that those who commit crimes can be brought to book.

That is why the Faculty of Advocates welcomes the debate that putting the issue on the agenda has given rise to, but it is also why the faculty cannot support the proposals in the bill and would welcome a much broader review of the criminal justice system.

Alison McInnes: The new point that I said I wanted to make is that, in tandem with considering the bill, we are considering a petition that calls for the retrospective application of the removal of the requirement for corroboration. It would be useful to have on the record the panel’s views on the implications of such a move.

Robin White: If I can leap in, I would say that there are almost never any justifications for any retrospective criminal legislation.

Raymond McMenamin: In two words, it is unworkable and inappropriate.
James Wolfe: It is fundamentally unconstitutional.

Mark Harrower: I agree with the other contributors.

The Convener: Thank you. We needed to get that point down.

I call John Pentland, to be followed by Christian Allard. Those will be the last questions, because we have had a long session and time is moving on.

John Pentland (Motherwell and Wishaw) (Lab): I have not been on the Justice Committee for long, so I am sure that you can understand that my knowledge of the legal system has been severely stretched.

What we have is a proposal for the abolition of corroboration. I find that there are two teams: yourselves and the Lord Advocate. In the Lord Advocate’s submission, he highlights clearly the point that the system needs to be modernised for the reasons that have been outlined, such as that nearly 2,800 potential victims have not had their day in court. I agree that the phrase “their day in court” is not the right terminology; perhaps we should say instead that they have not had their opportunity to see justice done.

This is the second evidence session that we have had on corroboration. While the Lord Advocate came up with ideas, other witnesses last week and the witnesses today have not been helpful to the extent that, although they have said that we need to change, they have not suggested any modifications that would help the people whom we believe are not getting access to justice.

Is it too early for me to ask whether you have any fresh ideas that would help the people whom we think the system is failing? Do you have any ideas about how we could ensure that those people get their opportunity to see justice done? Do you think that, somewhere along the line, consensus could be reached on the proposal that is being made? The grenades that have been thrown into the ring include statements that the prosecutors office may not be up to speed in dealing with all the people who could come to see it. Instead of finding a solution, it seems that we will end up miles and miles apart. I would have found it helpful if you had given us ideas so that I could understand what would be the best way to ensure access to justice.

The Convener: I heard Mr White say that we could perhaps look at corroboration in particular cases. I think that that was the issue that you were raising. What you said surprised me, because I would have thought that we would be looking at something that would apply in any case. It might help John Pentland if you could expand on that.

Robin White: I certainly do not deny saying those words, but I have no recollection of doing so.

The Convener: Oh dear. We will check the Official Report during the week.

Robin White: Which I will certainly trust.

I did not wish to be understood to be proposing that there be corroboration in some cases and not in others.

The Convener: No. I thought that the inference was about what constituted corroboration. That would fit in with something that I think Mr McMenamin said. I cannot actually remember who said it—it has been such a long morning—but I think that the expression, “It has gone to almost nothing” was used. It would be helpful to know if there is any way forward that would reconcile the Lord Advocate’s position on corroboration, which we understand, with yours. We understand the difficulty that is posed for domestic abuse and sexual assault cases and for people who genuinely do not have a remedy in the criminal law.

Raymond McMenamin: It might have been me who said that it is perhaps worth looking at what categories of case require corroboration.

The Convener: It might have been. I beg your pardon, Mr White.

Raymond McMenamin: The basis for saying that was that I know that in certain jurisdictions in the United States there has been application of corroboration to particular types of case. I am not suggesting that we do that, but it is perhaps worth looking at.

The Convener: In an overall review.

Raymond McMenamin: In an overall review—exactly.

If the committee will forgive me, I am not going to come up with any solutions today, and I would be very surprised if any of my colleagues did so. We are dealing with a very complex situation, and corroboration can at times be a very complex area. It has occupied rather a lot of the appeal court’s time over the past few decades.

However, we must acknowledge that it is a system that has developed here, and that to move away from it would be a seismic shift for Scotland. We must also take into account that, for all that the Lord Advocate has stated his argument for the abolition of corroboration, the people who are against its abolition, certainly at present, include the major legal institutions in this country: the Scottish Law Commission, the Faculty of Advocates, the Law Society of Scotland, the Scottish Police Federation—as I understand it—
and almost all of the shrieval bench. If that does not tell you something, frankly it ought to.

To discard corroboration in the light of the opinion of those bodies is a rash act, and perhaps a foolish one. The issue is worthy—as we have all said—of greater debate and consideration.

James Wolffe: There is, of course, a perfectly respectable view that the doctrine of corroboration as we have developed it over a long period of time reflects the practical commonsense notion that one wants to cross-check evidence from more than one independent source on the essential facts before bringing a case to court.

However, as I said earlier, I would not for a moment suggest that there is not a case for looking at the way in which corroboration works in certain types of case. I would not immediately be attracted by a system that says that we should have corroboration for some types of case and not for others, although it is interesting that, for some time—as I understand it—in the law of England and Wales, corroboration was required only in sexual cases, precisely because of some of the difficulties that those cases present.

To illustrate some of the things that might be examined, I mentioned earlier the question of the role that distress plays, which at present is quite limited. It can corroborate certain elements of the crime, but not others. That could, along with the question of corroboration of mens rea, be considered, although—as I said earlier—I would not wish to commit myself to a view on them.

The Convener: You also mentioned facts and circumstances.

James Wolffe: Indeed, and there is the question of whether one needs to have an independent source of evidence that positively incriminates rather than simply providing a cross-check of consistency. There may well be ways in which the doctrine itself could be adjusted. As I said, I do not come with a menu, or a prescription that those suggestions are necessarily the right way to go.

It is interesting to note that the Lord Advocate, in his guidelines, does not by any means suggest that the cross-check is unimportant or not useful. Ultimately, the question that is before you as legislators is the abolition of corroboration, and you have to look at that in the context of the other things that have been done by way of adjusting and compensating in a system that has until now—in ways that cannot be overemphasised—been fundamentally based on that doctrine being at the heart of our criminal justice system.

The end point for the Faculty of Advocates is not that there are certain things that one might not wish to look at or that there is no debate to be had, but that the proposal in the bill to abolish corroboration with the very limited adjustment to the jury majority and no additional safeguards in summary cases is not one that the faculty can support.

11:45

The Convener: I do not want us to go over old ground. However, I thought that John Pentland asked a good question. It is certainly the issue that the committee has to consider.

John Pentland: It is just a pity that with regard to any suggestion that modifications or solutions be found, Mr McMenamin’s mind seems to be made up. I might have picked him up wrongly but I note that in response to Sandra White, for example, he said that it was unlikely that the Law Society would support any change and that he thinks it rash for this proposal to be in the bill in the first place. If we are going to try to help victims who do not get any justice in court, Mr McMenamin might have to open up his mind a bit.

Raymond McMenamin: The Law Society’s position is that it is prepared to look at the overall situation; after all, we have invited people to debate the matter with us. We just think it utterly illogical to approach the issue by saying, “What’ve you got to replace corroboration? Nothing? Well, let’s get rid of corroboration then.” That is the situation in which we find ourselves just now.

Robin White: In essence, Mr Pentland’s point is that last week, the committee heard evidence that corroboration ought to be abolished entirely; this week, it has heard evidence that such a course of action is not appropriate. He is asking whether there is no middle point. At the risk of going over old ground, I would respond by pointing out, first, that there was a further consultation paper on safeguards, which, in mentioning only two or three things about juries, seemed a little perfunctory. Secondly—this is the main point that many people at this end of the table have made this morning—the distance between those positions is the very reason why the matter should be referred to the Scottish Law Commission, a royal commission, a departmental committee or whatever. There might be a number of middle points but no one has looked for them.

The Convener: We move on to a final question from Christian Allard. Members should bear in mind that this session has lasted nearly two hours and we still have more work to do.

Christian Allard (North East Scotland) (SNP): Good morning—or is it afternoon?

The Convener: It is nearly afternoon.

Christian Allard: I seek some clarification on what we have heard this morning and what we
heard last week from Lord Gill. As I understand it, we are talking about removing the requirement for corroboration but, this morning, we have heard that it will be taken out of the system altogether and simply discarded with nothing to replace it. Is it not the case that in other jurisdictions and judicial systems where there might be no requirement for corroboration it is still used extensively in many cases? Surely if in removing the requirement for corroboration we can still retain it in the system the evidence that Lord Gill gave last week does not make sense. After all, he made it very clear that the legislation must apply across the board. Do you agree with that view? From what I have heard this morning, it seems that some of you might not.

Mark Harrower: It will be difficult to create different classes of case, some of which will require corroboration and some of which will not. Moreover, cases very often come to court with a number of different charges. If a complainer has alleged a number of different types of crime against the same person, how do we explain to a jury that charges 1 and 2 do not require corroboration but charges 3 and 4 do? Juries have to absorb a lot of directions in a short space of time; it is sometimes difficult for them to get their heads around them but they do their best. It will make things very complicated if we create certain classes of case in which corroboration is not required.

The Convener: So that the committee and the public understand the point, can you give an example of the kind of complaint that would have those different elements to it?

Mark Harrower: If a complainer alleged rape at knife-point, there might be a charge of rape for which the evidence could come from the complainer alone, irrespective of evidence of penetration, if the requirement for corroboration was removed. However, if there was an accompanying charge of possession of a knife in a public place, perversely we might need a witness to state that the man had a knife in a public place. In practice, the Crown would probably not be too bothered about the additional charge. However, it would have to be explained that two witnesses were needed for that charge but that only one was needed for the rape charge. There might also be a charge for an act by the accused to try to destroy or get rid of evidence; again, we would have to decide whether such a charge would require two sources of evidence or just one.

Lord Gill’s point is that creating different classes of case, some of which would require corroboration and some of which would not, would be a very complicated exercise. To go back to Mr Pentland’s question, if there is a determination to remove or weaken evidential requirements—in effect, that is what getting rid of corroboration would do—in order to improve access to justice and give witnesses their day in court, we must understand that more cases going to court would not be the only consequence. What else would be achieved? I do not think that any of the contributors to the consultation that I have heard, including Lord Carloway, can say that more convictions would be achieved. In fact, Lord Gill quite clearly believes that a decrease in the conviction rate would be achieved. It stands to reason that if we weaken the rule on the amount of evidence that is needed, we are even less likely to get convictions in the type of cases in which juries are already reluctant to convict.

If more and more people were acquitted of sexual crime, what would be the knock-on effect for the system? That would not increase public confidence in the system at all. If one or two high-profile miscarriage of justice cases were produced as a result of the evidence change, that would be very costly for the system financially because appeals to the Scottish Criminal Cases Review Commission are very costly and compensation must be paid if convictions are overturned. In addition, many years down the line when some people come out of prison, the public sometimes wonder what went wrong. Miscarriage of justice cases are very costly for the system in terms of both money and public confidence. Until now, we have managed to avoid them for a reason and, to me, corroboration is the main reason.

Christian Allard: I want to press you on what you just said about the rate of conviction. I pressed Lord Gill on that subject and asked him:

“On access to justice, would abolishing corroboration increase the number of cases that would be brought to prosecution?”

He answered, “No.” When I pressed him further by saying “Definitely not?”; his answer was:

“It might increase the number of prosecutions, but I am not convinced that it would increase the number of convictions.”—[Official Report, Justice Committee, 20 November 2013; c 3727.]

What do you think?

The Convener: That is Mr Harrower’s point.

Mark Harrower: I agree with Lord Gill on that. If we are going to have more cases in which there is deemed to be enough evidence, we will increase the number of cases that go to court. All the additional cases that the Lord Advocate talked about could end up in our courts. However, I do not see how the conviction rate, or the percentage of cases in which we achieve a conviction, can do anything other than stay the same or fall.

I have figures for 2011-12 that show that for rape and attempted rape cases, 20 were “Acquitted not guilty”, 16 were “Acquitted not
proven” and 50 were “Charge proved”. So, 36 were acquitted and 50 were charge proved; an additional eight people had pleas of not guilty accepted or the case was deserted. The conviction rate is about 50:50 at the moment.

The Convener: Those figures are for what year?

Mark Harrower: They are from the statistical bulletin “Criminal Proceedings in Scotland 2011-12”, which the Scottish Government produced on 27 November 2012. There is a table on page 23 that shows how many people were proceeded against in court and a breakdown of the outcomes.

The Convener: That is fine. We have the reference for the Official Report. The figures are interesting.

Mark Harrower: Nobody is saying that juries are not doing their job properly or that they are going into court and trying to find ways of acquitting people. Juries are going into the court at the moment and hearing corroborating evidence, but they are not being convinced. How do we expect to increase how often they are convinced if we take away one of the major checks on the proof of the allegation that is put to a jury?

The Convener: I will stop now unless anyone else wants to come in. It seems that Mr Wolffe does.

James Wolffe: May I make two brief observations? First, like Mr Harrower, I am not attracted by having different rules for different types of crime, which is why I am pretty diffident about offering possible modifications. The issue is well worth looking at, but one would have to look very hard at possible modifications.

Secondly, on the consequences for the conviction rate, our real problem is that we just do not know what they will be. Lord Gill talked about as yet unknown consequences and he was right to do so, because at first flush one might expect the rate of conviction for sexual crimes to decrease, because one is prosecuting crimes with a lesser evidential basis, but at the same time we are removing a requirement for corroboration across the board—judges will no longer uphold no-case-to-answer submissions, and juries will no longer be told that they must find corroborated evidence—so for all that we know there might be an increase in the conviction rate, not in sexual cases but across the board. Whether that will be so, and what the implications for the system and its resourcing will be, are anyone’s guess.

The Convener: I am looking at the clock and thinking that this has been a long evidence session. I thank the witnesses very much. We will have a five-minute break. I apologise to our witnesses for the next agenda item, who are waiting to give evidence.

11:56

Meeting suspended.
On resuming—

Criminal Justice (Scotland) Bill: Stage 1

The Convener: I welcome to the meeting Assistant Chief Constable Malcolm Graham of Police Scotland; Chief Superintendent David O’Connor, who is president of the Association of Scottish Police Superintendents; and David Ross, who is vice-chairman of the Scottish Police Federation.

This is our seventh day of evidence on the Criminal Justice (Scotland) Bill at stage 1. We will hear evidence on corroboration and related reforms.

Good morning. I thank all the witnesses for their written submissions. We will go straight to questions from members.

Christian Allard (North East Scotland) (SNP): Good morning. Let us start with corroboration. The Scottish Police Federation’s written submission states:

“The abolition of corroboration will inevitably result in the lower end cases being subject to appeal.”

There will be a great difference in relation to corroboration. On the same page, the federation says:

“there should be no blanket abolition of the requirement for corroboration.”

That is the exact term, as opposed to removing corroboration altogether. What are your views on that? In the debate out there about corroboration, is there perhaps a mistake in the language? We are talking about the removal of the requirement for corroboration as opposed to the removal of corroboration, and saying that removing the requirement for corroboration does not mean that corroborative evidence or corroboration will be taken out altogether.

The Convener: I appreciate that you have not been on the committee for long, Christian, but I think that everybody on it understands that we are discussing the removal of the absolute requirement for corroboration. We are very clear: although we

David Ross (Scottish Police Federation): As discussion and debate around corroboration has moved on, the intention of what is contained in the bill has become clearer. Our view is that we are now talking about the removal of the requirement for corroboration of every strand of evidence in favour of checks and balances across all the evidence and other safeguards. In truth, our view is now that those checks and balances mean having other evidence that supports the evidence of an eye witness, rather than there being two eye witnesses.

The Convener: I am afraid that we have always known that it was never two eye witnesses, Mr Ross. We have been aware of what it is. Perhaps you can clarify what you mean by “every strand”. Are you talking about the ingathering of evidence rather than the court process? It would be helpful if you could analyse what you mean in that way.

David Ross: By and large, the gathering and reporting of evidence is done using two police officers or two forensic scientists, for example. Our view has always been that that is unnecessary and costly and does not provide any great benefit to the criminal justice system. That view of corroboration was part of our response, so we were always opposed to its blanket removal.

The most recent comments from the Cabinet Secretary for Justice and the Lord Advocate suggest that we are talking about checks, balances, safeguards and other evidence. In truth, we are talking about corroboration from different sources rather than, for example, each eyewitness’s account being corroborated by another eyewitness’s account, or, indeed, forensic evidence being corroborated by some other form of evidence. If that is what we are talking about—I understand that absolutely it is—we have moved to a position where we are quite supportive of it.

The Convener: That still sounds like corroboration to me.

David Ross: Absolutely; it sounds like corroboration to me, too.

We have the requirement for corroboration now. In every case the police have always gathered and reported, and will always gather and report, as much evidence as is available. It was never the case that we would stop as soon as we had a sufficiency of evidence and that will not be the case, irrespective of the outcome of the passage of the bill.

Assistant Chief Constable Malcolm Graham (Police Scotland): It is helpful that you have provided clarity, convener, that we are discussing the removal of the absolute requirement for corroboration. We are very clear: although we
understand that particular facts must be corroborated before any proceedings would commence—for instance, identification and certain elements of the essential facts in a crime—that is often done irrespective of the weight or quality of other supporting evidence that would not be considered to meet the technical requirement of corroboration. That is an unfair bar to justice for many victims of crime, particularly in crimes in which vulnerable people have been exploited and in which, in the commission of the very offences that perhaps we would most seek to address, there is an intention on the part of the perpetrator to exploit some of the technical rules that prevent proceedings from taking place.

Chief Superintendent David O’Connor (Association of Scottish Police Superintendents): Our association has taken time over the past year to look at and engage in the debate and the consultation. At the outset of the debate, we had concerns about the wholesale abolition of corroboration, but some clarity has been brought to the debate recently. We were concerned that we could end up with a situation in which we would have cases with a suspect or an accused and a victim, and that we might move from the criminal burden of proof to something that looked more like the civil burden of proof. A key safeguard for us is that we are retaining the criminal burden of proof—that is, we have to prove a case beyond all reasonable doubt.

The Convener: That was always the case, so I am surprised that it took you a year to work that out. I am sorry to be rude, but what you were concerned about has never been on the agenda.

Chief Superintendent O’Connor: Absolutely, but there has also been a great deal of debate and discussion. Over the past year, we have been seeking some reassurance that some of the safeguards with regard to corroboration of the different strands of evidence that David Ross referred to are going to be put in place.

The Convener: I believe that Christian Allard has a question on this matter.

Christian Allard: Do you think that the removal of the requirement for corroboration will lead to more prosecutions?

Assistant Chief Constable Graham: The intention behind our support for the proposal to remove the absolute requirement for corroboration is that a larger number of victims will get access to justice, which might mean more prosecutions. We have conducted some exercises on the police’s current role in carrying out thorough investigations to gather the available evidence—I am sure that we will come back to that later—as well as, over the past two years, exercises that show a small increase in the number of cases that we would report to the procurator fiscal based on our understanding of what the change in the law would mean if Parliament were to pass the bill.

That small change would move things disproportionately towards more solemn procedures, which would mean a larger increase in cases reported to the Crown that, under the current system, would not be reported and which would likely be heard by a sheriff and jury or in the High Court. A number of those cases would be serious sexual crimes and the types of cases that I mentioned earlier, in which the particular dynamic with which the crimes are committed and the ways in which the perpetrators often target victims result in a lower likelihood of the technical barrier of corroborating every essential fact being overcome. When we looked across that large valid data set, we found that, with the proposed changes, there would be an increase of around 2 per cent in the number of cases that would be reported, which equates to almost 3,000 additional victims being given access to justice. At the moment, the police assess those cases and conclude that there is not a technical sufficiency of corroboration to allow us to report them to the Crown Office and Procurator Fiscal Service.

I am also aware that the Crown Office and Procurator Fiscal Service has conducted similar exercises based on what we report to them and the new prosecutorial test. Indeed, I believe that the Lord Advocate has already submitted evidence on that.

The Convener: Given the difficulty that the committee has had with the term “access to justice”, it might be helpful if you could define it for us.

Assistant Chief Constable Graham: Access to justice is a broad term. There are different stages at which victims can access justice. First of all, I should stress that one of the areas that Police Scotland is focusing on is our clear role in keeping people safe; one way of doing that is to prevent people from committing crime, and one way of preventing people from committing crime is to ensure that they are brought to justice for the crimes that they have already committed.

The term “access to justice” would include people reporting to the police that they have been the victim of a crime. We will do everything that we can to investigate such reports thoroughly; indeed, I would be very happy to describe what I mean by that because it is clear from the wider speculation around the debate that some of the people who are commenting on the matter perhaps do not understand the rigours of police procedure and the investigatory process. In broad terms, however, “access to justice” would mean giving the people the opportunity for their case to be considered by the Crown Office and Procurator Fiscal Service.
and the prospect of its being taken to court. Our assessment is that if the law were to be changed as proposed an additional 3,000 victims would have the opportunity to have their case considered by the Crown Office and Procurator Fiscal Service. At the moment, those victims do not have that opportunity at all.

I would be very happy to supply some specific examples of cases—

**The Convener:** I think that the committee now understands the police perspective with regard to access to justice. The problem is that each panel of witnesses that gives evidence has a different line on it because the people concerned are at different points in the process. However, what you have said has been very helpful.

I have a list of members who wish to ask questions. John Finnie is first up.

**John Finnie (Highlands and Islands) (Ind):** I have some questions for my former colleagues and friends Mr Ross and Mr O’Connor on what might be perceived as the staff associations’ changing position on this matter. The Scottish Police Federation’s submission says:

“Corroboration is also particularly important in maintaining public confidence in the criminal justice system.”

In fairness, though, I should note that earlier in the submission the federation says:

“The SPF are not opposed to making some amendments in relation to ... the service of legal documents or ... the transportation of productions”.

That said, the federation says in the same submission:

“Blanket removal of corroboration would risk exposing not only police officers but every other member of the public “to more spurious and malicious allegations which would be harder to refute”.

What, if anything, has changed in this debate? I certainly hope that nothing has.

**David Ross:** In truth, I think that you are quoting from our response to Lord Carloway’s report rather than our response to the bill. [Interruption.]  

**The Convener:** Just bear with us while we confirm that.

**Roderick Campbell (North East Fife) (SNP):** The comments are actually on page 2 of your written submission, which says:

“Blanket removal of corroboration would risk exposing police officers to more spurious and malicious allegations which would be harder to refute and similarly so for every other member of the public.”

**David Ross:** Our position is and remains that the blanket removal of any requirement for corroboration would potentially expose the criminal justice system to all of those things.

**The Convener:** Forgive me, but that is exactly what the bill is proposing. It is proposing the blanket removal of the mandatory requirement for corroboration.

**David Ross:** Coming back to the clarity that I mentioned earlier, I do not think that that was necessarily our understanding when the submission was written. We were responding to the notion that corroboration was being taken out of the system altogether. Our view was predicated on comments from many different sources but the notion that evidence from one source, whether from an eyewitness or whatever, could be sufficient to convict someone was, for us, a step too far with regard to this debate. It has been made clear that that will not be the case. If we are talking about the general requirement for corroboration of each strand of evidence as opposed to the requirement for corroboration across the whole of the evidence, our position would be that we would support the latter but not the former.

**John Finnie:** For the avoidance of doubt, I must point out that the function of the committee is to scrutinise the specifics of the legislation, and I have been referring to your response to that.

More than one witness has referred to clarity in the debate. I do not know what the source of that clarity has been; perhaps it was Lord Gill, whose position was unequivocal. However, notwithstanding where either of you believes that that clarity has come from, we are scrutinising the legislation—not what you might think it is, but what it is—and I have quoted from your written evidence on the proposals in that legislation. Does your submission still stand or should we expect a further submission from the Scottish Police Federation?

**David Ross:** Given all the discussion and debate that has already taken place, it is very difficult for me to answer your question. I do not consider our position to have completely turned from one of resistance to one of support. As our understanding has grown about what we are talking about in the legislation, our position has moderated to the extent that we would support the removal of the general requirement for corroboration in favour of a sufficiency across the whole of the evidence to prove guilt beyond a reasonable doubt.

**John Finnie:** I will come on to Mr O’Connor in a moment but, Mr Ross, has your evolving position—if I can put it that way—been influenced by the Crown Office and Procurator Fiscal
Service’s supplementary written submission? In paragraph 33, it refers to false allegations against professionals and the measures that would be put in place for
“police officers, teachers, social workers, health professionals and prison officers”,
which would be that
“proceedings in such cases would not be taken up without strong supporting evidence.”
Has that reassurance altered the federation’s response?

10:30

David Ross: I would not say that it is just that reassurance that has done so; it was partly that and partly general comments about corroboration by the Cabinet Secretary for Justice, the Lord Advocate and the Solicitor General. However, it was specifically about the Lord Advocate’s comments to us regarding, for want of a better description, checks and balances, and safeguards for complaints about professionals.

John Finnie: I fully understand your obligation to represent your members’ interests and that that reassurance would be helpful, but I return to the SPF’s statement that
“Blanket removal of corroboration would risk exposing police officers to more spurious and malicious allegations which would be harder to refute”.
You might have gained some reassurance with regard to that, but your submission stated that the case would be
“similarly so for every other member of the public.”
I presume that it is not your view that there should be a higher threshold.

David Ross: Absolutely not. Our view is that there should be the same threshold for everyone, irrespective of what position they do or do not hold.

John Finnie: Okay. Thank you.
Mr O’Connor, your written—

The Convener: Mr Graham wanted to come in. Do you still wish to do so, Mr Graham?

John Finnie: I will come to Mr Graham.

The Convener: Are you working your way along the line?

John Finnie: I am indeed.

The Convener: Go for it.

John Finnie: Mr O’Connor, the ASPS’s written submission states that, with regard to the abolition of corroboration,
“it remains not wholly convinced—"
which I would have as being unconvinced—
“of the case for complete abolition.”
Can you comment on that in the light of the questions that I posed to Mr Ross, please?

Chief Superintendent O’Connor: Yes. We have had a great deal of debate, and one of the things that we keep coming back to from a police perspective is that in terms of policing nothing will change, because police officers will continue to go out there and conduct very comprehensive investigations and gather all the evidence. They are bound by disclosure in terms of the gathering of evidence and will report the facts and circumstances to the Crown. Nothing will change and full, detailed and comprehensive investigations will continue in the police service.

John Finnie: You have been a senior investigating officer dealing with very serious crimes.

Chief Superintendent O’Connor: Yes.

John Finnie: We heard that there have been two murder cases in which no body was recovered but convictions were obtained and that the basis of the convictions was the collation of huge tracts of circumstantial evidence, for want of a better phrase. Is that correct?

Chief Superintendent O’Connor: Yes. Circumstantial evidence can be a strand in the chain of evidence, as can many other parts of evidence. During the debate on corroboration, we have found that it can mean different things to different people. It is not just about having two eyewitnesses but about the whole gamut of evidence, and the science has moved forward considerably in recent times.

John Finnie: Yes, indeed. I do not think that you would find anyone who would dispute that Police Scotland will pull out all the stops for a serious crime such as murder. It will often do that at the direction of the Crown Office and Procurator Fiscal Service, which will lead the investigation.

Chief Superintendent O’Connor: Yes.

John Finnie: However, I do not think that you can give such an assurance for, say, a minor breach of the peace or a minor assault. They can be very traumatic events for the victim, but there will not be the same level of energy or chasing forensic examination for such offences, because—as you know—there are many of them and they are particularly frequent at weekends.

Chief Superintendent O’Connor: As I have said, evidence can come from a variety of sources. I have absolute confidence that the police service will continue to seek corroboration from whatever source; thereafter, it is a matter for the
Crown to look at the veracity, sufficiency and competency of the different strands of evidence.

John Finnie: But I am not talking about the initial response; I am talking about, if you like, the supplementary response. We know that follow-up inquiries will take place, often at the direction of the Crown Office and Procurator Fiscal Service. However, that will not happen with the run-of-the-mill breach of the peace in which it might be a single individual, who is a credible witness, who is accused, or with an assault or something of that nature.

Chief Superintendent O’Connor: I would certainly have confidence in the service that whether it is a matter of public disorder, a minor assault or whatever, the investigating officers would seek evidence from eyewitnesses, closed-circuit television or mobile telephones. There is a variety of modern ways by which evidence can be drawn in, even for minor matters. Barely an incident goes by for which there is not access to mobile phones or CCTV.

John Finnie: It is for those very reasons—we have all those additional sources of evidence that were not available historically—that we have been told that there is less requirement than ever before to remove the requirement for corroboration.

Chief Superintendent O’Connor: Yes—each of those different parts can corroborate. To return to where I started, I have absolutely no doubt that the police service will continue to carry out investigations and to draw in evidence from whatever source it takes to put together a case to allow the matter to be reported to the Crown Office and to allow it to make the decision.

John Finnie: What is the position of the Association of Scottish Police Superintendents on the proposal to abolish the absolute requirement for corroboration? Are you for it, or agin it?

Chief Superintendent O’Connor: At this time, we are more content with the proposals provided that, as we move forward, we are quite clear about what the marking rules will be. Indeed, we have heard a great deal about looking for not just the quantity but the quality of evidence. To return to my starting position, the criminal burden of proof will remain the same in as much as a case must be proved beyond all reasonable doubt against the accused.

Assistant Chief Constable Graham: John Finnie is seeking assurance on Police Scotland’s position were the law to change. I am in a position to offer that assurance: with neither hesitation nor qualification, I can say that the standard of investigation across the board would not change, were this law to be brought in as proposed. There is an absolute requirement on the police to undertake investigations, with diligence and rigour, to an evidential standard that is established through case law, which would not change as a result of any of the bill’s proposals.

I will go through what some of those requirements are in the case law. In Smith v Her Majesty’s Advocate in 1952, it was opined that it is the duty of the police to put before the procurator fiscal everything that may be “relevant and material” to the issue; in McLeod v HMA in 1998, it was opined that “all material evidence for or against the accused” must be disclosed; and, more recently, under McDonald, Dixon and Blair v HMA in 2008, all material evidence that either materially weakens the Crown case or materially strengthens the defence case must be disclosed, so the evidence must be disclosed whether it shows that the suspected party is innocent or guilty. The police must supply all that information to the Crown.

The police’s position, whether an offence is minor or serious, will not change the rigour and diligence with which we will investigate crimes and gather all available best evidence.

I must address very strongly the contentions from a number of quarters. You referred to Lord Gill’s fear that the police may not go seeking corroboration. We do not set out to seek corroboration; we set out to investigate the circumstances of an offence or crime that has been reported to us or has come to us by other means. That means that we need to establish whether a crime has occurred; if it has, we need to establish who has committed the crime.

John Finnie: You will of course rely on what is termed a credible witness; someone can appear to be a credible witness—

Assistant Chief Constable Graham: We do not set out to gather evidence that corroborates or otherwise one or two stands; we set out to gather all the evidence available. In some cases, multiple strands of evidence will corroborate the same fact; in other cases—the ones to which I referred—we know that that is extremely unlikely. That is because the nature and dynamic of the offending means that some of the essential facts will be corroborated in a higher proportion of cases.

It is clear from international perspectives on the current corroboration laws in Scotland that that is deemed to be discriminatory against some of those who are most likely to be victims of certain crimes. It is clear from the police perspective that, in some cases, an assessment of the quality and sufficiency of the evidence as a whole is prevented because of a technical barrier in one of the facts of the charge not being corroborated technically in the way that the law is constructed.
John Finnie: Could one of those characteristics be penetration? That is one of the three characteristics that we heard would be required to prove the crime of rape.

Assistant Chief Constable Graham: If it is an essential fact in any crime—penetration is an essential fact to be proved for rape—it can be difficult, at times, to provide corroboration of that fact. It is highly likely that we are talking about circumstances in which eyewitnesses, with the exception of the victim, are unlikely to be present. Therefore, we must find supporting evidence that is consistent with the account of the victim. However, meeting the artificial and technical barrier in law of corroboration is not always possible. My contention in relation to our experience of dealing with victims is that, in a large number of cases in which there is credibility and a large amount of quality evidence, the failure to get over that technical barrier can prevent, in the terms that I have previously explained, victims of serious and less serious crimes getting access to justice.

John Finnie: I am aware that “access to justice” is the current buzz phrase, and it has featured strongly. Has Police Scotland made any assessment of the likely increased level of charges of false accusation of crime or wasting police time that might be associated with any proposed change?

Assistant Chief Constable Graham: We have not made any assessment of that, and I can explain why. It is interesting, when we are trying to focus on the victims of serious and less serious crimes, that the debate is sometimes brought back to the issue of false allegations. We have done work on the number of false allegations that are currently made, and we have seen that the level is extremely low. I would prefer that we focus our attention on dealing with the large number of victims of crime, who, at the moment, do not have their needs or expectations met by the justice system.

John Finnie: It would be entirely wrong to paraphrase questioning of this nature in a way that suggests that it was not supportive of victims. You would not want anyone to be the victim of a false accusation, I presume.

Assistant Chief Constable Graham: Absolutely not and, at the moment, if that were the case—

John Finnie: Can I ask about policy formulation?

The Convener: Let the witness finish, please.

Assistant Chief Constable Graham: We absolutely would not want anyone to be the victim of a false allegation and, as you are aware, there are cases in which, when someone is falsely accused of an offence, that is investigated thoroughly to the same standard that I have described and, occasionally, that results in proceedings being taken and prosecutions being made through the justice system. That is an extremely small number of cases compared with the overwhelming and rising number of reports that we are receiving about serious sexual crime, which is a far bigger issue to focus on.

John Finnie: It is certainly an important issue.

We have heard from a number of witnesses that the proposal is about rebalancing after Cadder. We heard from the Lord Advocate that Cadder brought about challenges connected with the investigation of the crime of rape, as an accused who formerly might have indicated that the event was a consensual act is now saying nothing, which means that one of the three characteristics that is required to prove the crime is removed. Could you comment on that? Is it a rebalancing?

Assistant Chief Constable Graham: Following Cadder, there was a requirement to examine whether a rebalancing was required. My understanding is that Lord Carloway was asked to do that piece of work. As a result of his widespread and in-depth examination of the legal issues that arose from the Cadder case, he came up with a number of recommendations.

I do not feel that the proposal is a response to the rebalancing of Cadder, because the issues that I am describing were present in police investigations, and had subsequent consequences in the justice system, before the Cadder decision was made. That issue notwithstanding, the Cadder decision provided a different balance in the legal considerations of those cases and, therefore, following Lord Carloway’s examination of the impact of the decision, it is entirely right and proper that he should come up with a number of recommendations to ensure that there is an equal focus on the rights of everyone who is involved in the justice system.

John Finnie: May I ask one more question, convener?

The Convener: I will let you back in, but you have had a good run and we have a big queue.

John Finnie: I appreciate that.

Can you advise us how policy formulation is done by Police Scotland? How do you come to a point at which this view is agreed to be Police Scotland’s view? Is it Mr House’s view, or is there engagement and consultation with staff associations and operational officers before the view is formulated?
10:45

**Assistant Chief Constable Graham:** Ultimately, I am here as a representative of the chief constable, so it is the view of the Police Service of Scotland, which is endorsed by the chief constable, albeit that—as the committee will accept—he cannot personally be here to offer that view on every occasion. I am not sure what your question was intended to infer. If you are asking whether we just take a view from the chief constable and then replicate it in any forum that we attend as his representatives, the answer is no.

A large amount of work is done on developing an informed and comprehensive position on issues that are extremely important not just for Police Scotland but across Scottish society. We consult the staff associations, as I am sure my colleagues will confirm; other agencies, to allow us to take account of their perspective; people with whom we work and on whom our work impacts; and—in this case in particular—some of the organisations that represent victims. At times that work involves us asking police officers to do specific pieces of work to develop proposals, which would then be endorsed by the governance forums of Police Scotland and ultimately by the Police Scotland executive team that is led by Sir Stephen House.

**The Convener:** I think the point of the question was that it seemed that Police Scotland and the SPF had different views at one point.

If John Finnie is going to pull that face, I will let him back in later.

**Margaret Mitchell:** There seems to have been quite a movement in the SPF’s position. The issue is obviously quite complex, and we as a Justice Committee are very concerned that we do not have enough time to scrutinise a decision on an issue of such magnitude in the way that we would like. In view of that, would you be in favour of taking the issue out of the bill and moving it to, for example, a royal commission so that it can be looked at thoroughly to satisfy everyone? That option was not considered in the Carloway review, which looked only at abolition or retention. I would like to hear the panellists’ views on that suggestion.

**Assistant Chief Constable Graham:** I am happy to go first on that. On the question of time, I go back to the points that I made about the other decisions that were made and implemented very quickly in the justice system. John Finnie referred to the Cadder decision, which in effect came from the Salduz case in the European Court of Human Rights. The timescales for the decisions and in particular for the implementation of the changes that resulted were extremely tight, and posed considerable challenges for the justice system.

Lord Carloway was given a substantial period of time in which to make his considerations and report to the Scottish Government. The long time since that report was made has allowed us all to consider the matter carefully. I have described what Police Scotland has done; I am sure that colleagues can speak about what they have done to formulate their views and perspective, and how their position may have evolved as more information and clarity from some of the key agencies that are involved has entered the public domain.

I do not think that we need more time to look at some of the issues, or indeed to look at any of the issues that we have covered today in some detail. There are a large number of victims of serious crime who are not having their expectations of the justice system met in this society.

**The Convener:** Whatever the committee’s views are—I think that I speak for us all—about the retention of mandatory corroboration, we are absolutely on the side of those victims you are talking about who are not having their day in court or having the Crown consider whether their case ought to be prosecuted. That is not the issue for the committee. The issue is whether this change will deliver justice and bring fairness for the victims. The reason why we are—and John Finnie is—testing you on the matter is that, although it may appear that we have had sufficient time, we have already had the SPF changing position in the course of its evidence to this committee.

I apologise to Margaret Mitchell—I just wanted to make that plain. You must not portray us as somehow not wishing to see those cases dealt with. What I have described is the position of everyone on the committee, whatever their position is on corroboration. That must be put on the record. We have got people coming before us next who represent victims and so on, and I want them, too, to know that. Sorry—it is not the case that because we are testing you we are somehow against them.

**Assistant Chief Constable Graham:** Thanks for the clarification, convener. It was not my intention to suggest that you were not supportive of victims. It is incumbent on me to present the perspective of Police Scotland and to try to balance some of the corroboration arguments that have been made by some members in the debate that has been going on more widely than in this room.

**Margaret Mitchell:** It is still unclear to me what you are saying, Mr Graham. I think that you are saying that Police Scotland would implement the provisions tomorrow because you are perfectly happy with them. I am asking you to consider the fact that, regardless of how long Lord Carloway took to come to his opinion, it was the opinion of
just one judge. There has been a weight of opinion expressing real concern about the abolition of corroboration as proposed by the Carloway report. Does that give Police Scotland any pause for thought? Do you totally rule out taking the provisions out of the Criminal Justice (Scotland) Bill, so that they will quickly go into law next year without being properly tested by something like a royal commission? That might not take very long but would ensure the depth of scrutiny that the issue deserves.

Assistant Chief Constable Graham: The depth of scrutiny that the issue deserves has been addressed in Lord Carloway’s report and the consideration that has taken place thereafter. The process of parliamentary scrutiny will enhance that consideration, and we are delighted to be providing evidence in that process, as we do for many bills. I do not think that there would be any enhancement of the position as we understand it or that there would be any change to the Police Scotland view should we delay the proposal as it currently stands.

Margaret Mitchell: Thank you. That allays all my worst fears about a single police force.

Chief Superintendent O’Connor: You talk about deferring the proposal and other ways of scrutinising the bill, but those are matters for the committee. I return to where I started. Whether or not you defer the proposal now and implement it in a year’s time, nothing will change about the way in which the police go about their business of gathering evidence and reporting the facts and circumstances. We will continue to conduct thorough, professional investigations and report the facts and circumstances to the Crown.

Margaret Mitchell: That is not the question, Mr O’Connor. My question is whether you think there would be merit in fully discussing the proposal and having it looked at inside out to make sure that we get it right for your police officers and for the ordinary man in the street who goes into the courts. Would there be some merit in putting the proposal to a royal commission so that every aspect of it is looked at thoroughly by those from all walks of life who are in the best position to contribute to that?

Chief Superintendent O’Connor: I believe that the scrutiny that is being applied by the committee today, which is raising the important issues that have been raised to date, is part of that scrutiny. There may be merit in taking it forward to a full royal commission and bringing other professionals and other views into the equation for a full discussion, but that is a matter for others. From a police perspective, I hope that the level of scrutiny that is being applied just now will inform the debate.

Margaret Mitchell: But you would not rule out a royal commission looking at it.

Chief Superintendent O’Connor: That is very much a matter for others.

David Ross: Our view is probably similar to that of our colleagues in the ASPS. If you asked me whether our current position is the unanimous view of the Scottish Police Federation, I would have to say no. It is our view, on balance, that we support the removal of the general requirement for corroboration. However, irrespective of whether we have a royal commission, I do not think that that will ever be the unanimous view of the Scottish Police Federation nor of the whole service. There are a wide variety of views not just in the Police Service but across the whole criminal justice system about whether the removal of corroboration is the right or wrong thing to do, and a lot of people’s views sit somewhere in the middle. I genuinely do not know whether a royal commission would bring more clarity and afford people more opportunity to make up their minds about whether they support the proposal. I tend to think that the more information people are provided with and the more scrutiny is applied, the better, because it is important that, whatever we do, we get it right and that the criminal justice system is not damaged by progressing the bill.

I take the same view as David O’Connor on what we would do as a service. We will do the same as we are doing now irrespective of whether the bill is passed as it is or not.

Margaret Mitchell: Could I pin you down, please, Mr Graham? Police Scotland’s submission says:

“corroboration of all material facts will always present significant challenge.”

What do you understand is required just now as the very basics of corroboration in the criminal justice system?

Assistant Chief Constable Graham: As the committee has heard, and as Lord Carloway explained in his report, the current law in relation to corroboration in different cases is extremely complex. That is one of the issues that are under examination. The complexity is based on the legal developments over the years, from the starting position, which was identified by Lord Carloway as dating back to some principles from the Old Testament, to a position where the “corroboration fiddles”, as some commentators have described them, have twisted and adapted it to fit in with developments in society, legal process and evidential availability, and the original concept in very simple terms has perhaps been overtaken by all those changes and developments. If your question is, “What do you understand by the current law under corroboration?”, my answer is
that there is a complex set of case law that lies underneath that and it would take some time to go into it.

Margaret Mitchell: That is an amazing answer. Are you saying that, given that complexity, you do not think that there is a case for the issue being taken out to a royal commission?

Will I tell you what the basic requirement is? It is really quite simple. Two essential facts require to be established: did an offence occur, and did the accused do it? Both of those essential facts require to be corroborated, nothing else. That should not be too difficult, should it, Mr Graham?

The Convener: Now, now. I know that everyone is passionate about the matter, but could we keep the tone polite, please?

Margaret Mitchell: I will keep the tone, with great difficulty.

The Convener: I know, but you will manage it. She is good at that.

Margaret Mitchell: We are looking at a tenet of Scots law that has been passed down by the institutional writers, which has been flexible and which has not only provided justice for victims but, crucially, protected the rights of the accused. Once imprisonment is imposed on someone unjustly, you can never get that back, which is why the standard of proof is beyond reasonable doubt.

So I ask you again, given the complexity that you have talked about, whether there is not a case for taking the matter out? Have the views and evidence that you have heard today not changed your mind in the very slightest?

Assistant Chief Constable Graham: I will go back to where you started by describing the current legal position that the essential facts require to be corroborated. I had already covered that in my evidence and I understand that position clearly.

Margaret Mitchell: You clearly did not.

Assistant Chief Constable Graham: I had thought that your question was what corroboration—

The Convener: In fairness, Mr Graham, you said that there has been a crime and there has been identification—or words to that effect. I appreciate that members are concerned about the matter.

Assistant Chief Constable Graham: Could I perhaps finish my answer?

Margaret Mitchell: Convener, I sought clarification specifically on the comment about all material facts needing to be corroborated way down the line, which is simply not the case.

Assistant Chief Constable Graham: What I was trying to provide in my answer was some exploration of the depth of concern that there is about the complexity of what corroboration actually means in the huge variety of different cases. Although the test at a high level is simple, the interpretation of what corroboration means in different cases has been twisted and has developed through time.

Margaret Mitchell: I think that we prefer the word “evolved”, rather than “twisted”. You may not want to use the word “twisted”.

Assistant Chief Constable Graham: I accept that, but there is certainly a perception that that evolution has perhaps gone to a point where the original concept now needs to be revised in the way that is being proposed.

My answer to Ms Mitchell’s final question about whether I am not now convinced, based on what I have heard today, that further examination needs to be taken—in whatever terms that would happen—is that I am not convinced of that at all, for the reasons that I have outlined, which I will not repeat, noting the convener’s earlier comments. However, there needs to be a clear focus on what the justice system is there to achieve. The current law around corroboration is unclear to people and the proposal would provide clarification and simplification. It is very clear that there is a long history of the law evolving and developing to take account of changes in society, public values and so on. It is absolutely appropriate that the proposal that is currently in the bill is taken forward now.

11:00

Margaret Mitchell: On a different point, I have a question for Mr Ross and Mr O’Connor. Following on from John Finnie’s point about professional witnesses being susceptible to malicious allegations, the Lord Advocate has given some assurances—some guidance, almost—that proceedings in such cases would not be taken without strong supporting evidence. Does it give you any cause for concern that the Lord Advocate may change and a new Lord Advocate may have a different view?

David Ross: As we are the staff association that represents the vast majority of police officers, the proposal initially gave us quite significant concern because our members frequently find themselves in positions where they themselves are uncorroborated. They may be on their own attending an incident and dealing with several people who could make some sort of spurious allegation against them, corroborated by each other.

That has always been the case and, to date, such allegations have not resulted in a vast
number of police officers being prosecuted. The evolution of CCTV, mobile phones and so on—indeed, in some areas, our own cameras on police officers—has provided a degree of protection to prevent that. What the Lord Advocate has said in relation to measures that he would put in place regarding other evidence to support any such allegations has indeed provided some reassurance.

However, I am personally aware of significant numbers of individuals who have not been proceeded against for making false accusations of crime against police officers and wasting police time on the basis that it would not be in the public interest to do so. Certainly when I was a joint branch board secretary in Northern Constabulary, I had a drawer full of letters from the procurator fiscal in Inverness telling me precisely that. Although there might have been a sufficiency of evidence to prosecute an individual, it was not in the public interest to do so.

Chief Superintendent O’Connor: It is a fair and valid point. We have raised concerns and, over the years, we have seen false allegations and acts of what we would consider to be public mischief. It has been an issue of concern in the past. The Lord Advocate has given a reassurance, but I have to say—and I hope that David Ross would agree—that there would be some concerns among our members that it could be an issue.

Assistant Chief Constable Graham: It is important to stress—it was already hinted at, so my apologies if I did not pick it up properly—that I do not think that anybody would be seeking a different standard of investigation or legal process to be applied to people in different positions in society or in different professions.

We can agree on the point that was made about the burden of proof, which will remain as it is just now. The sufficiency of evidence that will need to be gathered for that burden of proof to be met will be changed slightly in relation to the quantitative assessment of the evidence that is put forward. Assessment of the quality of the evidence is absolutely key in relation to the final outcome in court and the sufficiency test being met—it is very important to emphasise that.

Sandra White (Glasgow Kelvin) (SNP): Good morning, gentlemen. I put on the record my thanks to Police Scotland for its work during the recent tragedy at the Clutha Vaults in Glasgow.

The Convener: You say that on behalf of the entire committee. We appreciate how involved not just the chief constable but the Scottish Fire and Rescue Service and the Scottish Ambulance Service have been.

Assistant Chief Constable Graham: Thank you.

Sandra White: I want to go over some of the issues that have been raised, more for clarity than for anything else. The convener was correct to say that we have been looking at the corroboration issue for quite some time and we all know about it but, for the general public out there and the press, you will confirm that, whatever your thoughts on the issue, it is vital for us to remember that it is the legal and technical aspects of corroboration that we are proposing to remove and not corroboration per se?

The Convener: I think that we have established that.

Sandra White: Convener, from speaking to the general public and the press, as we all do, I think that it is necessary to get it on the record that it is the legal and technical—

The Convener: In fairness, I think that I put it on the record clearly when Christian Allard asked his questions that we know exactly what it means, and I said clearly—

Sandra White: Convener, I am not disagreeing with you. I would just like it on the record, for the sake of the public and the press—

The Convener: You have said it again.

Sandra White: —that it is the legal and technical aspects that we propose to abolish and not the whole thing.

In Scotland, corroboration has a narrow technical meaning. In a recent article, Professors Chalmers and Leverick stated:

“The Scottish law of corroboration has become technical and highly complex, and cannot simply be described as a ‘two witness’ rule.”

You mentioned that, Mr Graham, and so did David O’Connor and David Ross, but will you elaborate on the point? You talked about evidence and said that this area is technical. We could talk about rape victims, but I am also talking about older people who are in nursing homes and children who are in care homes, where there may be no other witness. Will you elaborate on what evidence you would look for? Would evidence of distress be enough to be corroborative evidence?

Assistant Chief Constable Graham: I am grateful for the opportunity to provide clarification. We have already discussed the fact that we are talking about the removal of the absolute requirement for corroboration, but there is an important point about public consciousness. It is impossible to explain the nuances and technical complexity of the area in a short time. Even in the length of time that the committee has to examine the matter, I would not be able to articulate it in any depth given the case law from different cases and the different admimicles of evidence. Where
the standard of corroboration would be met is a highly complex matter and it has developed to such an extent that it is difficult even for those who practise law and indeed High Court judges to interpret it consistently, as we have heard.

On the examples that you raised, I think that I have already said that one of our key concerns is that the law as it stands is potentially discriminatory against particular vulnerable groups. We examined a case that involved what we would call bogus or fraudulent workmen and an elderly victim. An elderly woman was approached at home by some people who were looking to do roofing work. They offered to do the work for £500. She thought that her roof needed some maintenance and she gave them the money from her purse. They went away for a short time and came back later to say that they needed £300 for materials. She gave them the money for that as well, and they said that they would go to a builder’s yard to get some materials, but they never turned up at the house again.

That case was reported to the police with detailed descriptions of the men and the registration number of the van. The two males who were in the van were stopped a short time later and they were wearing similar clothes. In addition, the ladders on the roof of the van matched the description that had been given, and a quantity of business cards were found that were similar to a business card that had been given to the woman. In all the circumstances, there was a high quality of evidence, but it was deemed that the essential facts of the case did not pass the test of sufficiency for each of the essential facts to be corroborated. That case is a good example because, despite the overall quality of evidence, it is the type of case that might not hit the bar at the moment. That case did not. In future, there will be an increased prospect that such cases will hit the bar.

I need to be clear that that is not to say that we will be able to resolve all such cases through the justice system. The part that the police play in that is just one of many. I think that it is illustrative of the point that I am trying to get across, which is that there is a technical barrier that prevents the overall quality of the evidence from being assessed and which therefore does not allow such evidence to be presented to a court and a jury in the justice system that we quite rightly have in Scotland.

Chief Superintendent O’Connor: Corroboration is a highly technical and complex subject. Over the years, as a commander and a senior investigating officer, I have seen many cases being reported to the Crown in which we believed that there was corroboration. For one reason or another, many of those cases were not proceeded with. We clearly believed that there was corroboration, but the Crown took a different view. For me, that highlights the complexity of the subject.

Sandra White: Mr Ross?

David Ross: I have nothing to add, other than to say that the police’s role is to gather the evidence and to report it to the Crown Office and Procurator Fiscal Service. It is a matter for the Crown and the courts to determine whether that evidence is sufficient and whether they believe the evidence that has been presented.

Sandra White: Is it not a fact that the International Criminal Court does not ask for what, in technical terms, is known as corroborative evidence?

Assistant Chief Constable Graham: I am less qualified to comment in detail on international law or jurisprudence than many other witnesses who will appear before the committee.

As I said earlier, without trying to articulate international law, I understand that it has been reported fairly widely that the technical barrier of corroboration in Scotland, as it is now deemed, is seen as being potentially discriminatory in comparison with what happens in other legal systems internationally.

Sandra White: To clarify my point, I will quote the International Criminal Court’s rules of procedure and evidence. They say:

"a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence."

Corroboration is not a legal requirement of the International Criminal Court. People might get fed up hearing this, but I say again that we need to remember that it is the abolition of the legal and technical requirements for corroboration that we are talking about.

Can I ask about the test for prosecution, or should I come back to that?

The Convener: I do not know whether that is relevant to this panel. Quite rightly, we are looking at the issue from the point of view of the police, and I do not know whether that question falls within that box. The witnesses can answer it if they would like to, but I do not know whether that is an area that they want to wander into.

Assistant Chief Constable Graham: Clearly, I would not wish to speak on behalf of COPFS or the Lord Advocate. However, we will be working with them to develop the proposals to ensure that the guidance that the Crown provides to the police remains appropriate. I think that the Lord Advocate has outlined some of the measures that would be
put in place to ensure that there was a clear understanding that—to echo what has already been said—in essence, there will be no change to the standard of police investigation. That is an extremely important point to make.

The Convener: I do not think that we challenge that.

Can I move on, Sandra?

Sandra White: Yes—thank you, convener.

The Convener: I do not want to shorten questions, but I am conscious of time and we have had a good bite at the issue and have resolved quite a lot—or perhaps not.

Elaine Murray (Dumfriesshire) (Lab): My first question is for ASPS and the Scottish Police Federation, which are organisations that represent police officers of particular ranks—I assume that is correct. I just wonder whether the change in position on corroboration has been discussed with your membership.

David Ross: Indeed it has been. We consult our members through our joint central committee on almost all decisions that we make. Ultimately, our position is determined by that committee, which is representative of the whole of the country. Every police officer in Scotland who is a member of the Scottish Police Federation has had the opportunity to comment on the matter, but they have not all chosen to do so, and the view is not the unanimous view of the Scottish Police Federation. Indeed, our previous position was not the unanimous position of the federation; it was our view on balance. Our view now is our view on balance, based on how the debate and our understanding have developed.

11:15

Elaine Murray: What do you think changed your membership’s view on the matter?

David Ross: Probably a better understanding of what we are talking about. The initial fear when people talked about the blanket or wholesale abolition of corroboration was that corroboration in all its forms would no longer exist. I absolutely understand that that was not the intention, and those who sit at the helm of the Scottish Police Federation understood that, too, but it was not necessarily our members’ understanding as the debate came out, broadly because a number of them had read Lord Carloway’s report and that is not what it said. It seemed to indicate that corroboration in the criminal justice system would simply be completely eradicated.

Elaine Murray: Obviously, we are discussing the bill, not Lord Carloway’s report. The bill says: “If satisfied that a fact has been established by evidence in the proceedings, the judge or (as the case may be) the jury is entitled to find the fact proved by the evidence although the evidence is not corroborated.”

The bill does not talk about different strands; it says that the fact can be “proved ... although the evidence is not corroborated.” That has always been the position in the bill; it has not changed.

David Ross: Yes. The word “corroboration” is probably a misnomer, because we are talking about a sufficiency of evidence to prove beyond reasonable doubt that somebody committed an offence.

Elaine Murray: I appreciate that the police are often frustrated by presenting a case to the procurator fiscal that is then not taken forward. Police officers have said to me over the years that it is an extremely frustrating experience for them to have done the investigation and then to find that the case is not taken forward.

I think that Mr Graham made a case around the 3,000 additional victims who would be able to have their cases taken to court.

The Convener: No—to the Crown.

Elaine Murray: Yes, to the Crown. The Crown would then decide whether to take the case to court.

The evidence from England is that the conviction rates for sexual offences and domestic abuse, for example, are no higher there than they are in Scotland. Therefore, are we not just talking about people’s ability to go to court to be disbelieved rather than their being told that their case cannot be taken to court in the first place?

Do the proposals mean greater justice for victims, or will people just get further down the process before their case is kicked out?

Assistant Chief Constable Graham: I would be happy to address that.

Eventual outcomes in the whole justice process and outcomes in court cases are very difficult for the police to predict and comment on, and a comparison with England and Wales is perhaps not a straight comparison, because there are a large number of differences in legal procedures and criminal law that might have an impact beyond the changes that are proposed in the bill. Indeed, my understanding is that the conviction rates for certain types of crime that I have covered are currently higher in England and Wales than in Scotland.
There have been many fairly significant changes in how some crimes are approached. You mentioned serious sexual crimes. Since Police Scotland was created, we have fairly dramatically changed our approach to investigating and working with victims and victim support agencies on serious sexual crime. We work very closely with the Crown Office and Procurator Fiscal Service to ensure that we all work together to take advantage of any opportunities where there is quality evidence. Therefore, if the law is changed, it will be very hard to determine what impact that will have alongside all the other changes that are currently going on.

I already mentioned the increase in reporting of serious sexual crime to the police, which is an extremely positive development that in part is down to the proactivity of the police in tackling domestic abuse and working with victims groups. Overlaying that, some of the measurement and assessment will make it very complex to unpick and understand what has had the impact on the eventual outcomes.

What is important is that we are doing everything that we can to demonstrate that support and outcomes for justice are extremely important for the victims of such serious crime. Elaine Murray said that the police are frustrated at times when a case is not taken forward. In such times, the organisation has a sense of frustration regarding the mission that we are here for: to keep people safe and to act in the interests of victims of crime who have come forward and expect that we will do everything that we can to meet their expectations.

Elaine Murray: Mr Ross referred to checks and balances. Of course, one is the prosecutorial test, which we have already discussed. The other two are the judge’s ability to dismiss a case and the change in the jury majority, which we were told would not affect something like 96 per cent of summary cases and so will not be a check or a balance. Are those checks and balances sufficient?

David Ross: We are probably more persuaded of that element now than we were when we responded on the bill initially. The checks and balances across the whole case—not just by the Crown but by the court—are sufficient that whatever evidence is presented will still need to meet the burden of proof.

Elaine Murray: There was never any intention of changing the burden of proof, was there?

David Ross: I do not think that there was, but there was a widespread perception that there was.

Elaine Murray: Really?

The Convener: I am flabbergasted that anybody in the criminal justice system, from the police onwards and upwards to the High Court, ever thought that we were looking at touching the burden of proof or the standard of proof.

David Ross: That is not what I said. I am talking about corroboration. If we had talked about a sufficiency of evidence, rather than used the word “corroboration”, and explained the intention in those terms, it would have been easier for everyone to understand.

Roderick Campbell: I have an anorak question for Malcolm Graham, I am afraid. We heard from the Crown Office about an exercise that looked at the number of cases that the police might refer to it. Its evidence was that “the increase in the number of reports was about 1.5 per cent, which equates to another 3,720 cases being reported.”—[Official Report, Justice Committee, 20 November 2013; c 3741.]

You may have been talking in global figures earlier, but do you agree with those Crown Office figures? Do you want to write to us to confirm the slight differences?

Assistant Chief Constable Graham: I could write to you with a greater level of detail. We have done two exercises and the Crown did a separate exercise that came out with broadly similar but slightly different figures. The Crown used different case samples and in at least one of the exercises there was a distinction between solemn procedure and summary procedure. I would be happy to write with the details of all the figures.

Broadly speaking, the overall figure was a 2 per cent increase in cases, and that is where the figure of 3,000 victims came from. I am happy to clarify that in writing.

Roderick Campbell: I am happy to leave the question there.

In his report, Lord Carloway did not recommend that any safeguards would be necessary if the requirement for corroboration was abolished, on the basis that in his view the principle safeguard is the requirement to prove a case beyond reasonable doubt. I am now confused as to what appropriate safeguards the SPF thinks have emerged in the system that they were not aware of before. Can you clarify what safeguards you believe will be necessary if the requirement for corroboration is removed?

David Ross: In truth, as I have already explained, I think that there was an issue of perception rather than reality in our understanding of what was initially meant in Lord Carloway’s report regarding the removal of the requirement for corroboration.
As I have already articulated, it has always been our position that we gather and report as much evidence as is available and that it is for the court to determine whether there is a sufficiency of evidence to prove beyond a reasonable doubt whether somebody is guilty.

I do not think that our position has changed, but our understanding has changed in terms of what we are talking about here. If we are talking about corroboration being achieved across the whole of the evidence, I think—as I have said—that we are sufficiently persuaded that that will continue. We have talked about checks and balances, the whole of the evidence, special measures and so on. All those things taken together still mean corroboration for me.

I suppose that, in terms of perception, that was not our initial understanding. There was, rightly or wrongly, a perception among us that the evidence from one single source could provide sufficient proof to take a case to court and to convict somebody, and that was a step too far for us.

Roderick Campbell: In your written submission, you state that the “link between corroboration and low conviction rates ... needs further detailed research”.

I assume that you now do not want to carry out “further detailed research”. Your submission went on to say that you believe that the “majority verdict of juries would ... have to be reconsidered”.

Is either of those points relevant to you now?

David Ross: I think that the research has already been done to some extent by Police Scotland. Whether the issue would benefit from more research, I genuinely cannot comment on. I am mostly content to accept the figures that Mr Graham has put forward, which I am sure are accurate.

I do not think that the majority verdict is a matter for us to form a view on; it is a matter for those in the legal profession.

Roderick Campbell: Finally—I am conscious of the time—we talked earlier a bit about penetration. Presumably you would accept that, if the only evidence in the absence of corroboration is the complainer’s evidence that there has been penetration, the case might be sufficient to pass to the Crown Office but might present difficulties for it in deciding whether to proceed further.

Assistant Chief Constable Graham: If we are speaking about rape and serious sexual crime, the complexities of not only the essential facts that need to be proved for the different offences that now exist under more recent statutes but the circumstances in which corroboration would currently be considered would take some time to work through.

In relation to the specific point that you made, the easiest way in which to address that is to point out that the Lord Advocate has been very clear that he would not expect a case to be received with solely the testimony of one witness and no supporting evidence. In your example of a serious sexual crime, it is highly unlikely that that would be the case, but it is not impossible. I therefore reiterate what I have already said, which is that we will continue to do everything that we currently do to investigate thoroughly and professionally all such crimes and report matters to the Crown.

In relation to cases of serious crime, I think that the point was made at the start by Mr Finnie that it is more likely that we would report to the Crown where there is a higher level of doubt on our part that there might be a sufficiency. Quite understandably, such cases come under more scrutiny in terms of whether the evidential sufficiency test is met.

Alison McInnes (North East Scotland) (LD): What a very strange morning. We have been told repeatedly that we are removing corroboration but we are not removing corroboration. There is a lot of Newspeak going on here, which concerns me immensely. Let us be clear: the bill will remove the need for corroboration. There is no point in trying to fudge that, but I think that that is what has been going on this morning. I am really rather disturbed by that.

There has rightly been a great deal of focus on the victims, whom you have said might well have access to justice. However, Elaine Murray pointed out that access to justice might not be well served if the requirement produces more prosecutions but not more convictions. We have heard a lot of evidence in this committee that the removal of corroboration will mean the likelihood of many more miscarriages of justice. I would like the panel’s view on whether we should pay no heed to that evidence.

11:30

Assistant Chief Constable Graham: I do not think that you should pay no heed to it. Everyone who comes before the committee presents a valid view for assessment and it is certainly not for me to say otherwise.

I am not sure of the basis of those views and, in monitoring some of the positions that people have held, I have not seen terribly much evidence to support the position that there would be more miscarriages of justice. I have represented our current position in comments that I have already made, and I note a previous caution about repetition.
The Convener: But have there not been some high-profile miscarriages of justice—the Birmingham six, for example?

Assistant Chief Constable Graham: What I was saying is that I am not clear that the people who have presented the position in Scotland—

The Convener: A member of the Scottish Criminal Cases Review Commission gave us that evidence.

Assistant Chief Constable Graham: I am genuinely not clear about the link between those cases and the question of whether there was corroboration, because I have not examined the matter. I just do not think that there is any credible evidence to suggest that there would be more miscarriages of justice in Scotland. What I was going to say—without repeating myself—is that I think it a travesty of justice that so many people are not being given access to what they would expect because of the technical barriers that remain in place.

Alison McInnes: So you are not concerned at all about protecting the rights of the accused.

Assistant Chief Constable Graham: I would be concerned if I thought that there would be an enhanced chance of miscarriages of justice as a result of these proposals, but I have no evidence—and I do not believe—that there is such an enhanced chance. As we have said, it is clear that the burden of proof, the test of sufficiency put before the court and all the other measures for carrying out a qualitative assessment of the inadmissibility and so on of evidence are in place.

Alison McInnes: But they will not be in place when this legislation goes through.

Assistant Chief Constable Graham: Well, I disagree with that.

The Convener: You made the interesting comment that people are not being given access to what they would expect. I appreciate the difficulties that the police face in meeting the expectations of, say, victims of rape, sexual abuse or domestic violence when they cannot take their cases to the Crown Office, but what do you think those people will expect if this legislation goes through and there is no requirement for mandatory corroboration?

Assistant Chief Constable Graham: I deliberately used a phrase that lacks clarity and definition because what victims expect is different in different cases.

Assistant Chief Constable Graham: It was suggested earlier that it would not be a better outcome if this change in the law merely resulted in more victims’ cases being taken to court without any increase in convictions. However, that is not the case with all victims.
Alison McInnes: That is fine.

John Pentland: Mr Graham, on behalf of Police Scotland you have welcomed the proposal to abolish the requirement for corroboration. Unlike some, you have outlined the reasons why. However, this proposal comes at a time when Police Scotland will face significant financial pressures. Is there any connection? Has your support for the proposal perhaps been financially driven?

Assistant Chief Constable Graham: I agree that the proposal comes at a time when there are substantial financial pressures on Police Scotland and indeed the wider public finances. That has been well reported through the parliamentary committee structure. However, it is absolutely not the case that our support for the proposed changes to the law on corroboration is driven in any sense by financial pressures.

Indeed, members may be aware that the financial memorandum that accompanies the bill demonstrates that our assessment was that there would be a slight increase in costs associated with the changes that are proposed. That is because we anticipate that, as I have already said, we would have to report a slightly higher number of cases to the Crown. We would have to support for longer a slightly higher number of solemn cases, which would require a greater capacity in our information technology systems and greater resource.

The cost increase is not substantial, but I want to make it clear that, in our assessment, what is being proposed in the bill would cost us a little more money. There are no cost savings associated with the law change as it is being proposed.

The Convener: I have one final question. This is something that we have not touched on: investigative liberation and section 14, "Release on conditions", in which the person not officially accused—there is that expression again—is released before the 28-day period has expired.

Let me give you the opportunity to put your response on the record. That approach might be seen as helping the police when they do not have any corroboration: the police already have a "person not officially accused" but they are releasing them on conditions so that they can go and find the evidence that they perhaps should have had in the first place—I am not saying that that is your position—but the person was taken in as "not officially accused".

How do these things interact?

Assistant Chief Constable Graham: If I may challenge the phrase "perhaps should have had in the first place", it is a wild assumption—

The Convener: No, that is not my position. I am saying that that proposition might be put to you.

Assistant Chief Constable Graham: Okay. Is the question whether there is a link between the proposed change in corroboration and the investigatory liberation proposals in the bill?

The Convener: Yes. That is the question.

Assistant Chief Constable Graham: I do not think that there is a link between the two proposals, because I think that the position that we have taken on corroboration relates to all the circumstances of all the cases that we deal with.

There is a continuum that covers many situations, from long-running investigations in which, for very good reasons, we are trying to gather evidence—we know that a crime has occurred; it might be a serious crime or a less serious crime, but it might be many weeks or months before we identify who is responsible or get what we feel is a sufficiency of evidence to report to the Crown; and such a case would not necessarily fit within the requirements of the investigative liberation sections of the bill—to a position in which we arrest somebody in the commission of a crime and there is sufficient evidence at that point.

We have taken our position on the proposed change for corroboration out of principle, and we have supported the proposals on investigative liberation out of practicality.

The Convener: Actually, the test is "reasonable grounds for suspecting that the person has committed an offence".

Some might say that "reasonable grounds for suspecting" is quite a light test.

Assistant Chief Constable Graham: That is the current test for somebody being detained and has been since 1980.

The Convener: So there is no change.

Chief Superintendent O'Connor: Not in terms of investigative liberation. I take on board the point that has been made about finding evidence against the accused, but the investigation should draw in all evidence. Some of that evidence may clear the accused, so the investigation has to be very balanced. That is what the time needs to be used for.

The Convener: Thank you. You do not need to add to that, Mr Ross. I simply put the point to the panel as part of the test of the legislation.

I thank you for your evidence session, which, for reasons that I think I understand, has been far longer than anticipated.
11:41

Meeting suspended.

11:50

On resuming—

The Convener: Okay—we are back in the saddle.

I welcome to the meeting Shelagh McCall, commissioner at the Scottish Human Rights Commission; Tony Kelly, chair of Justice Scotland; Alan McCloskey, acting deputy chief constable of Victim Support Scotland—wait, acting deputy chief constable? That is what it says here. I did not write this script. What would you like to be?

Alan McCloskey (Victim Support Scotland): Acting deputy chief executive.

The Convener: Then that is what you shall be.

I also welcome Sandie Barton, helpline manager and national co-ordinator at Rape Crisis Scotland; and Lily Greenan, manager at Scottish Women’s Aid.

I am sorry that you have all had such a wait, but you will appreciate that we really wanted to dig into the evidence from the previous panel. We will do the same with you.

I thank you all for your written submissions. Some of you have been here before and some have not. If you wish to make a comment or answer a question, indicate that desire to me and I will call you. Your microphone will come on automatically, as mine has done—it happens even when I have been saying indiscreet things, so I have to watch what I say.

Alison McInnes: I draw members’ attention to my entry in the register of members’ interests, which notes that I am a member of the council of Justice Scotland.

The Convener: Do you want to ask a question? You could get in first, if you wanted to.

Alison McInnes: All right, I will do that.

We are focusing entirely on corroboration at the moment. We have heard a lot this morning about access to justice and whether access to justice is increased if removing the requirement for corroboration results in more prosecutions, even if it does not necessarily lead to more convictions. I would be interested to hear panel members’ views on that.

Tony Kelly (Justice Scotland): Access to justice would be facilitated by the removal of corroboration. The problem is that that is a skewed view of things, and there are much greater things at work than increasing access to justice for victims and complainers. The problem is that, as Lord Carloway correctly identified, corroboration is at the foundation of every aspect of the criminal justice system, so the removal of the requirement for corroboration would operate at the stage of the reporting of crime to the police, the stage of the police reporting to the procurator fiscal’s office and the stage of the matter being taken to court, which is where the issue of access to justice is being invoked. Corroboration also acts during the course of the trial at present, and that safeguard would be removed. Most importantly, the power of the judge to rule on the question of the evidence that is being led would be wholly removed if the provisions were brought into force.

Sandie Barton (Rape Crisis Scotland): The issue of access to justice is important, although it has been spoken about in an almost derogatory way. The provisions are about improving the situation in relation to cases such as those involving domestic violence or sexual abuse, where there are real difficulties in gathering corroborative evidence. In the discussion with the previous panel, the confusion around corroboration was highlighted. It is not corroboration that is being removed but the quite high bar that requires every element of the case to have corroborative evidence.

There is no suggestion that the police will not look for supporting evidence to back up a report. That is a crucial point. The measure is about improving access to justice, whether that relates to reporting to the police or the number of cases that proceed to prosecution. The Lord Advocate gave compelling examples of cases in which there was a high level of supporting evidence. Most people would look at those cases and think that the supporting evidence corroborated the report that was given. The measure is about giving such cases access to court in a way that does not happen at present.

Alison McInnes: To clarify, I do not think that anyone has spoken in derogatory terms about access to justice or about the issues that you refer to, but it has been suggested in earlier evidence sessions that people somehow have a right to have their day in court, as if that in itself was important. I am interested in the other panel members’ views on that.

Alan McCloskey: From our perspective, access to justice is a wide-ranging term, but it starts with the victim being believed in the first instance that something has happened. They need access to information and support and they need justice to be done. In the simplest terms, they want justice to be done. They want the police and the Crown to help them to get access to justice. Yes, there are absolute rights for the accused, but victims and witnesses also have rights. That forms part of it. I take it to be a very simple concept.
The Convener: Does anybody else wish to comment on that?

Shelagh McCall (Scottish Human Rights Commission): I will zoom out slightly and say that, from the perspective of human rights, the Parliament has to ensure that the bill does two things: first, that it provides a right to effective investigation and prosecution where appropriate for victims of serious crime, which undoubtedly includes rape and domestic violence; and, secondly, that it ensures that, when an accused is brought into the investigation and prosecution system, he or she receives a fair trial.

Mr Kelly is right that the effect of corroboration plays differently in those two respects. I agree with him that, if we remove the legal requirement for corroboration, more cases will potentially get to court, although I pause to sound a note of caution about just how many more. I listened to the evidence from the Lord Advocate and the head of policy at the Crown Office. As I understood Miss Dalrymple’s evidence—members will have a better recollection of it than I do—she said that a review of 2,803 domestic incidents that were reported to the police found, I think, that 1,000 would have proceeded to court under the bill. The point is not that there will be an open door and everything will get through, because the prosecutorial test will have an impact. However, there will no doubt be an increased opportunity to get to court.

Once a case is in court, access to justice for an accused person includes there being the proper means by which to challenge the quality of evidence against him. At present, corroboration serves that function as a means of quality control. If we abolish it without reassessing the system and seeing what other safeguards might be needed, there will be nothing, apart from the ability to cross-examine, to provide the proper means to challenge the reliability of evidence. The European Court of Human Rights recognises some areas of evidence as inherently problematic, such as dock identification and hearsay evidence. We have to keep both perspectives in mind when we talk about access to justice.

Lily Greenan (Scottish Women’s Aid): I would like to add something about evidence. We should be clear that, with crimes of violence against women, whether it is sexual violence or domestic abuse—with respect to Shelagh McCall, I point out that domestic abuse is on the whole dealt with not as a serious crime but at summary level, although corroboration is still required to get it there—the evidence is not usually the driving force for whether there is a conviction; instead, the driving force is attitudes, assumptions and prejudice. The notion that removing the requirement for corroboration will in any way change that situation is false.

I represent the interests of a particular group of victims in the criminal justice system, although they are a substantial number—30 per cent of the cases that go through Glasgow sheriff court involve domestic abuse, so the workload is not insignificant. In relation to that group of victims, removing the requirement for corroboration will provide the opportunity for the kinds of discussions that happen in backrooms at the moment to be heard in the court.

That is an important part of the process of moving towards justice. We will not get there by removing the requirement for corroboration, but we will open up the discussions about the evidence that really exists about violence against women by having them in the courtroom rather than before anything gets near a sheriff—it is mostly sheriffs in our case.

It is important that the committee takes account of the fact that evidence is sometimes secondary to attitudes and prejudice in decision making, whether that is at shrieval level or in solemn proceedings.

The Convener: I am interested in comments from others on the panel.

Tony Kelly: It is an interesting recognition that the proposed abolition will not be a panacea that cures all the criminal justice system’s ills—perceived or otherwise. I completely agree that the conviction rate for incidents of violence against women is scandalous, but the focus of abolition seems to be on getting cases into court. No one concludes that getting all such cases into court will deal with the appalling conviction rate. I completely agree that at the root of that appalling rate are prejudices and attitudes. Further consideration and work will be needed before we get anywhere near addressing that.

Sandie Barton: I know that a lot of the debate has focused on whether removing the requirement for corroboration will make the difference. I agree that it will not do so of itself, but a number of other important measures are being considered as part of this bill and the Victims and Witnesses (Scotland) Bill.

For example, we are talking only now about automatic rights to special measures. Having a screen can make the difference in whether somebody feels able to give evidence. Not having female forensic examiners can be a massive barrier for some.

Of itself, removing the corroboration requirement will not make the difference, and none of us believes that it will. However, as an important step forward, alongside other important measures, it could make the difference.
The numbers might be small, but the cases are significant to the people involved. The impact on public safety also matters. When there is a large amount of good-quality evidence that indicates that someone is guilty of an offence but the case is not taken forward, that has a massive implication for the victim and for the safety of the public in Scotland.

**Alan McCloskey:** I echo those comments. This goes wider than corroboration and involves the whole system. If victims, witnesses and the public have more confidence in the system, they will be more likely to come forward to say, “This happened to me. Can somebody do something about it, please?” That is entirely reasonable.

Removing the requirement for corroboration contributes to that. If that allows more cases to be considered and potentially taken forward on the basis of a reasonable prospect of conviction—beyond that, the beyond reasonable doubt test will still apply—that will allow confidence in the system. Removing the corroboration rule forms an important part of that.

**The Convener:** I put to you the proposition that removing the requirement might have the opposite effect. We hear about the need for a change in attitudes and so on. The Crown might feel that it must take more cases forward and might lower its test of a reasonable prospect of success because corroboration is no longer a necessity in court, but the result might be that victims have a harder time in court because their credibility is challenged more. Do you have any concerns that the proposal might backfire?

We have spoken in private to people who have been through the court process in cases in which the accused has been acquitted, and they feel that they have been let down. Years later, that pain is still there. Do you have concerns that this might not work out how you think it will?

**Alan McCloskey:** As I said, it goes wider than corroboration. It is about the whole system, the Victims and Witnesses (Scotland) Bill and the journey that victims and witnesses go through, and it is their experience—

**The Convener:** I want you to focus on the Criminal Justice (Scotland) Bill and the essential requirement for corroboration at court level. We have looked at the Victims and Witnesses (Scotland) Bill and have a good idea of what that is about—indeed, it has many good proposals in it.

Are you concerned that the proposal might not work out how you think it will? It might have a deterrent effect, because people might think, “I went through that all for nothing and to be not believed at the end of the day.”

**Alan McCloskey:** That is a potential outcome, but our view is that the removal of corroboration is positive.

**Tony Kelly:** I bow to the greater expertise of the witnesses from Scottish Women’s Aid and Rape Crisis Scotland, but it is crucial that, as Mr McCloskey said, witnesses must appreciate that they will be believed. That is, first off, what causes them to decide whether to report the matter. If, after going through the whole process, the verdict is one of acquittal and the witness has not been believed, the trauma is added to. That is my experience and that of the other people whom I have spoken to. Is that end in itself—that airing of the case and that access to justice—worth in and of itself the abolition of corroboration, regardless of the outcomes? No one seems to be focused on what those outcomes will be, or perhaps they are disregarded because we do not have to concern ourselves with them. However, they may well be crucial for the victims of crime.

**Sandie Barton:** On the convener’s point about the Crown Office feeling that it should put cases forward, the Lord Advocate was clear in outlining that there would be a determination about whether it is in the public interest to put a case forward and whether the quality of evidence is there, so I do not think that the Crown will feel under pressure to make a decision based purely on the victim’s needs if the supporting evidence to back up the decision is not there.

Court can be a very harrowing experience for people, regardless of whether there is corroborative evidence. I have worked with many women in cases in which there is an overwhelming amount of evidence, but the evidence is not the defining factor in how those cases play out in court. My point is a bit like Victim Support Scotland’s point—it is about changing the culture.

We are doing a bit of research with people who have gone through court. On judicial protection, some people say that there was clear monitoring of the questioning, and that the point and relevancy of the questioning were looked at. As I say, court is often a very traumatic experience, but are we saying that we cannot put victims forward because they might have a hard time and that we are doing that ultimately to protect them? The Lord Advocate highlighted that not many people would be thankful to be told not to go to court because it might not be a good place for them to be. That is not the answer.

**The Convener:** Victims always have a hard time, but they will have a harder time.

**Sandie Barton:** Victims have a very hard time at the moment, and dealing with that is about changing the culture of the courtroom. We have talked about judicial training with Mr MacAskill.
There is something in there about how victims are treated in a courtroom, but I do not know that removing the requirement for corroboration will impact on that in any way.

**Lily Greenan:** I echo what Sandie Barton has said: court cannot be any harder for victims in rape or sexual violence cases, who get grilled and ripped to shreds in court. That is perhaps less the case with domestic abuse cases because many of them go to summary court, where an awful lot of the technicalities of the case happen much faster, so there is not the playing-to-the-jury element.

I do not think that court is a pleasant experience for victims. Certainly, for victims of interpersonal crimes such as domestic abuse, rape and sexual assault, I do not see how it could be worse or how we could get a worse conviction—or failure—rate. I therefore do not accept those arguments as a reason not to consider abolishing the requirement for corroboration.

The police and the Crown Office will still look for the best evidence that they can find and we will get away from some of the more technical drudges that go on in the system, which prevent cases from going to court simply because there is no piece of DNA that says that a certain man was in a certain place at a certain time, although there is plenty of other evidence to link him to the crime. In recent times, we have been accused online of using anecdotal evidence. We have done that, but if 40 years of anecdotal evidence is not good enough for the committee and the Parliament, I do not know what is.

Anecdotally, we know of a woman who was beaten so badly by her husband—

**The Convener:** I am sorry to stop you, but I do not know what that is about. I am not online, you see.

**Lily Greenan:** No—that is fine.

We deal with the issue outwith the committee, and it has been interesting to read the suggestions that the arguments made by Scottish Women’s Aid and Rape Crisis Scotland, in particular, are irrelevant. If a woman who has been so badly beaten that her neighbours fear for her life and who runs into the street with her clothes hanging off her is unable to get into court because there is no corroboration that it was her husband who did it this time, there is something wrong with our system. That is the kind of situation that we want to address. Although that evidence is anecdotal, it is fact—that is what happened: the case could not go to court because there was insufficient corroboration in relation to his presence in the house at the time of the assault.

Yes, it is an emotive subject. Yes, it is about anecdotes and stories, but these are real people. I have some strong views on the need to remove the requirement for corroboration.

**The Convener:** Lord Gill mentioned the idea of a review of evidence in Scotland, looking at all the facts and circumstances that might have applied if we had had a different evidential base. For some committee members, the issue is that we perhaps need to look at the broader evidential base in court rather than narrow it down. That might have applied in that case, given that there was a history of such incidents. Would you like to comment on Lord Gill’s proposal that we look at the broader aspects?

**Lily Greenan:** We could and should do that whether or not the requirement for corroboration is removed. Investigators and prosecutors should always consider the full range of evidence that is available. I am concerned that, because we have a corroboration rule, there is not a tendency but a temptation to say, “We’ve ticked the two boxes—we can put that one forward.” That is not a criticism of how the fiscal service operates as a rule; it is just a recognition that, when people are pressured, they do the minimum that they need to do to move on to the next thing on their list. There are some concerns about how the system is working currently.

**Alison McInnes:** I would like to go back to Ms McCall’s point about the right of the accused to a fair trial. Justice Scotland and the SHRC have concerns about the removal of corroboration. We have also heard compelling stories from Police Scotland and Ms Greenan about people who are unable to access justice at the moment. In the interests of understanding both of the tests that need to be done, it would be useful if you were able to elaborate on your concerns about the miscarriages of justice that might occur if the need for corroboration were removed. Can you talk about the issue of less credible witnesses and accused people to help us to understand your concerns?

**Shelagh McCall:** I make it clear that the commission is not opposed to the abolition of corroboration as a matter of principle—it is not a requirement for a fair trial under the European convention on human rights. However, we are opposed to its abolition in the terms of the bill without proper consideration having been given to the unforeseen and unintended consequences of that or to how that will play out against what the Lord President described as centuries of legal development and a finely calibrated system. Undoubtedly, persuasive arguments are made—and rightly so—about more cases getting to court in which guilt is particularly difficult to prove. We have absolutely no difficulty with that; the issue is whether we are properly exploring what happens
when we are in court, which brings me to your question.

12:15

First of all, let me pose a scenario. I listened carefully to the Lord Advocate's comment that, with regard to the prosecutorial test, a case would not be brought to court without supporting evidence. I welcome that. As I understood the Lord Advocate, if a case comes to the Crown Office without supporting evidence, he or his representatives will need to have a difficult conversation with complainers and tell them, "We will not take your case to court because there is no support." The difficulty arises when the case gets taken to court with supporting evidence that the Crown Office had and, during the trial, that evidence does not materialise from the witness box. It happens all the time—witnesses do not speak up, there is some flaw in the process or the evidence has been undermined in some way—but if, for whatever reason, the supporting evidence does not pass muster, the judge will have absolutely no power to do what the prosecutor would have done had he known the situation before the case came to court. We suggest that that problem could be addressed by giving the judge a no-reasonable-jury power to allow him to say, "The evidence in this case is of such poor quality that it cannot bear the weight of a fair conviction."

As for the other part of your question, which was about the types of evidence that cause us difficulty, the court in Strasbourg has made it very clear that certain types of evidence are inherently unreliable and, when cases with such evidence come to Strasbourg, the first thing that the court does is look for corroboration as a matter of fact, not as a legal requirement. Those types of evidence include hearsay evidence; indeed, in a case in which the Lord President, Lord Gill, issued the opinion, he said that the protections in England with regard to the quality of hearsay evidence admitted to a trial are not present in Scottish legislation and common law and that it would be "prudent" to introduce them.

Another example is dock identification. In evidence to the committee, Lord Carloway said that there were, of course, other safeguards in place in that respect. However, when the Judicial Committee of the Privy Council told us that dock identification was convention compliant, it said that the other safeguard was corroboration, which is what is being taken away. This is why such evidence is not allowed in England. Strasbourg is also concerned about evidence from anonymous witnesses and undercover witnesses, because it is very difficult for the defence to challenge its quality and ensure its integrity.

As we have listed all those types of evidence in our written submission, I need not rehearse them all with you. Although they are far removed from the types of evidence in the domestic abuse, sexual violence and other such cases that the other panellists deal with day and daily, they are nevertheless an example of the breadth of the implications of abolishing corroboration across the system. The committee's focus has for much of the time been understandably directed at such very difficult cases, but the fact is that this proposal will cover everything, which is why we are concerned that time be taken to examine the matter properly.

I agree with the Lord President that such work need not take a long time. This is not a case of kicking the matter into touch. The work could be done relatively quickly and in a participative way to allow everyone with expertise to input into the considerations and to ensure that a proper view is taken on whether this is the right way to do this or whether there is, in fact, a better way.

Sandra White: Can I ask a question, convener?

The Convener: I have got a lot of people waiting to ask about the same stuff, Sandra.

Sandra White: But it was on that particular issue.

The Convener: You will have to forgive me, but I think that others will follow up that particular issue.

Roderick Campbell: I refer to my entry in the register of interests as a member of the Faculty of Advocates.

On the no-reasonable-jury test that Ms McCall mentioned, we heard evidence last week from the Faculty of Advocates that Lord Carloway had made two points in opposition to it, the first of which was that it might slow the process. The faculty's evidence was that we have a similar situation now in relation to no-case-to-answer submissions, where an appeal court can be convened quite quickly if it is thought that the decision that an individual judge made was wrong. The faculty therefore did not accept the point about delay. In the Government's second consultation, Victim Support Scotland and Scottish Women's Aid, I think, were against the proposal. Could you expand, or would the panel generally like to comment, on what has been said on the no-reasonable-jury point?

The Convener: Who wants to comment first?

Roderick Campbell: In the policy memorandum, the Scottish Government indicated that one of the reasons that it had not proceeded with the safeguard was opposition from victims groups, so I am giving you the opportunity to expand on that point.
Lily Greenan: Sorry, can you clarify which safeguard you are talking about? I missed it.

Roderick Campbell: It is the safeguard of a judge having the opportunity to withdraw a case from the jury when he thinks that no reasonable jury could convict on the nature of the evidence as it is being presented. It was one of the three safeguards in the second consultation.

Lily Greenan: I am on record as suggesting to the committee previously that shrieval education and judicial education should be quite high up the list of things that we need to do in terms of safeguards for victims. There is a concern from our perspective that decisions are sometimes made based on attitude, assumption and prejudice not just by juries but by judges and sheriffs. That would be our concern about giving that discretion to judges.

Roderick Campbell: Do you have any comments, Mr McCloskey? You were opposed to the safeguard in your written submission to the second consultation.

Alan McCloskey: That would remain our position on that.

Roderick Campbell: You have nothing else to say on it?

Alan McCloskey: That would remain our position.

Roderick Campbell: Mr Kelly, do you wish to comment?

The Convener: You are doing a Margaret Mitchell now, Roderick.

Roderick Campbell: Sorry.

The Convener: I really do not mind. I can go to sleep and pass the list over. It is okay, Mr Kelly?

Tony Kelly: I am talking about post-abolition.

The Convener: Yes, so am I.

Tony Kelly: There would be no question of there being no case to answer, because the question of sufficiency would fly off. There is no way that we can judge sufficiency in the absence of corroboration because that was the only test for sufficiency.

The Convener: For the record, can you explain what can happen?

Tony Kelly: At the end of the Crown case, the defence can make a no-case-to-answer submission saying that the Crown case, at its highest, does not meet the minimum test of sufficiency of corroborated evidence and that therefore the case cannot proceed to the jury. If you abolish corroboration, no case to answer must fly off. If you do not put in a further safeguard about no reasonable jury, the judge has no power whatsoever after the trial starts—post-abolition—to rule on the question of sufficiency or the matter going to the jury.

The Convener: Ms Greenan, I hear what you are saying about judicial training and shrieval training. Can that not be done in a way that is detached from the bill? Should that not be happening anyway?

Lily Greenan: It is on-going—it is a work in progress. As with everyone else in the system, the awareness of judges and sheriffs changes over time. It is a long game. This is not something that will be fixed in a year or two years or five years. A generational culture shift is required in order to address the particular issues of violence against women differently in the justice system.

I want to pick up on what Tony Kelly said about “no reasonable jury”. That makes the assumption that juries are reasonable. I do not intend to be contentious about this—

The Convener: But you are going to be, anyway.

Lily Greenan: I am going to be contentious. I have only one experience of being on a jury. It was a long time ago.

The Convener: I must caution you. You cannot discuss having been on the jury or what took place.

Lily Greenan: I will not discuss what took place. Am I allowed to say something very general about—

The Convener: I would caution you against doing that.

Lily Greenan: That is fine. From my experience of the past 35 years of working in the field of
violence against women, I can say that juries have sometimes made decisions that beggar belief. Without adequate research on how juries function—as I understand it, we still do not have legislation in place that would allow that to happen, although I have heard from Sandie Barton that there has been some research in England and Wales—we do not actually know what a reasonable jury is. It is a jury of our peers, which in practice appears to mean a particular demographic of people who are available during the day.

The Convener: In fairness, people have to leave their work to do jury duty. It is not just for people who are available during the day. I do not think that you are allowed to get off jury duty that lightly.

Lily Greenan: That comment is based on the research that was done around the establishment of the domestic abuse court, when there was a bit of side research on the make-up of juries. It was not about how juries function, but just about the make-up, so I will take that out. However, it raises a question about what a reasonable jury is and how that is assessed in law.

The Convener: Tony Kelly looks as if he is at the starting gate.

Tony Kelly: I am just about to start, if that is allowed. I am using a shorthand when I say “no reasonable jury”. The full safeguard would allow the judge to arrive at a decision in law that no reasonable jury properly directed would return a verdict of conviction. Of course, the response to that point in all the submissions that I have come across is to ask whether it is being suggested that a particular jury was unreasonable, and that takes us into a another discussion about that.

The Convener: That is not what we are talking about.

Tony Kelly: What I am talking about is judicial input, and the test is that no reasonable jury would return such a verdict. I am not questioning whether juries are reasonable, or asserting that they always are. I am talking about a judicial input that represents a minimum safeguard post-abolition.

Roderick Campbell: I would like to raise a couple of other points. First, something that we have not touched on this morning is the question of jury size. Mr Kelly, in your written submission to the second consultation, Justice Scotland posed the question of what proof beyond reasonable doubt means in terms of the size of a majority jury verdict. What is the panel’s view on the proposals in the bill?

Tony Kelly: Justice Scotland’s view was that there was nothing particularly sophisticated or scientific about plucking a magic figure out—pushing the majority figure up and then tweaking it in the event of jury members falling out. That did not attach a magical significance that would ensure proof beyond reasonable doubt. In the absence of any research or further work, we thought that that was quite a blunt way to deal with the removal of corroboration. I agree with Lord Gill that, as soon as we recognise that there must be a tweaking of the majority verdict, we recognise that what we are doing post-abolition is completely changing the field.

Sandie Barton: In his review, Lord Carloway did not think that there needed to be a change in the majority. In some ways, it feels as if it is being suggested in response to popular opposition to the removal of corroboration. We were opposed to an increase in majority partly, as Lily Greenan said, because of what we know about prejudicial views, particularly in cases of sexual violence.

I know that there are limitations on the research that can be conducted with juries, but there has been research conducted in England using real transcripts of court cases, to look at how decisions are arrived at, and much of it is not really down to legal fact and argument but based on myths such as, “If it were me, I would have fought to the death,” and “If it were me, I would have told straight away.” All those great myths are played out in jury decision making. Research that the Scottish Government commissioned highlighted the fact that a quarter of people still believe that a woman is partly responsible if she has been drinking or if she has been wearing revealing clothing, so we have concerns about what increasing the size of the majority would mean for the likelihood of reaching agreement, and also given what we know about the use of the not proven verdict, particularly for sexual crimes, where its use is disproportionately higher than for other crimes.

The Convener: Surely, according to what you say, if the requirement for corroboration is abolished, that will make things worse. Given that you say that juries are often perverse, they will have nothing other than credibility to go on, which will make an acquittal or a not proven verdict more likely.

Sandie Barton: There is corroboration and there is the jury majority, which the bill proposes should be increased.

The Convener: I am talking about the way that juries think. If there is corroboration of a sexual offence such as a rape, the jury must at least deal with that, but if there is no corroboration, what concerns me about what you say is that the jury would be even less likely to convict.
Sandie Barton: I suppose that that is what has concerned me about much of the discussion on the issue. There seems to be a view that either the corroboration requirement is totally met or there is no supporting evidence at all. In the vast majority of cases, there is supporting evidence. In the examples that the Lord Advocate gave, it is clear that there was a lot of supporting evidence but there was no corroboration in a particular element of the case. Of course that will be the case if there was only one witness. There has been much mention of that issue. Some of the underlying discussion has been about false allegations and the misconception that women make up stories. I think that that has underpinned some of the debate, but in the vast majority of cases that we, the Crown Office and the police are talking about, there is a significant amount of evidence, but they are still not getting to court.

The Convener: I do not think that we have heard a great deal about false allegations. The issue has been dealt with, but I do not think that it has dominated the discussions on corroboration. I am looking at other members of the committee. The point has been raised, as it ought to have been, but it has certainly not dominated the discussions.

Sandie Barton: It has not necessarily dominated the committee’s considerations; I am talking about some of the media reporting.

The Convener: We do not care about the media. The committee has integrity. We just look at the evidence as it is presented to us.

Roderick Campbell: We have dealt with two of the proposed safeguards in the Government’s consultation. Does the panel have a view on whether other statutory changes should be made, such as the insertion of a provision equivalent to section 78 of the Police and Criminal Evidence Act 1984? The bill does not include any additional safeguards in relation to summary cases in the event that corroboration is removed. Would the panel like to comment on that, too?

Tony Kelly: My view is that all those potential safeguards indicate that this is such a big topic that, rather than make amendments that tinker with how the criminal justice system as a whole operates, we need to study in greater detail the effect of those safeguards. There is some controversy about the effect of the abolition of corroboration and the effect, post-abortion, of the proposed safeguards—a provision equivalent to section 78 of the 1984 act, the no-reasonable-jury test and majority verdicts.

In the Government consultation paper, there was only very brief discussion about two of those safeguards. As I said in relation to majority verdicts, no sophisticated analysis was done of their effect. As a whole, those potential safeguards suggest to me that the matter is worthy of further investigation and further analysis.

Shelagh McCall: As Mr Campbell knows, we said in our written submission that the introduction of something like section 78 of PACE—which, put short, is a power for a judge to exclude a piece of evidence if allowing it would compromise the fairness of the trial beyond the point at which that would be tolerable—would be a good idea.

Lord Carloway suggested that Scottish judges already have a power whereby, if the trial is going to be unfair, they can exclude evidence. I do not necessarily agree with that. I think that the Scottish power is much narrower. In support of that view, I point to the fact that the commission can find only two reported cases in which the court considered that power and exercised it, and they were both appeal cases that involved Lord Gill. That is one thing that could be done.

I hark back to where the whole process began—Cadder and the emergency legislation. The committee will know that the Scottish Human Rights Commission is on record as criticising the Government for legislating in haste and potentially repenting at leisure. We are potentially about to do the same again with regard to the abolition of the need for corroboration, because while there is no objection in principle to it, no one has yet done a proper analysis of how it will impact on the rest of the system and how that might impact on fair trial rights.

We can sit here and give you examples of alternative safeguards from other systems, but I cannot possibly suggest that they are the answers to all the problems—one needs to do the proper scrutiny. More important, the question of a fair trial is a legal matter and a question of law, so we need to give a judge the tools to fulfil his duty to meet the requirements of the law. Without going through the exercise of asking what tools a judge will need if we take away the corroboration tool, we might increase the risk in real terms of unfair trials.

Christian Allard: We have talked a lot about the removal of corroboration, but I would like to have your thoughts on a particular point. The debate in the media so far has been about the removal of corroboration as opposed to the requirement for corroboration. Do you think that, given the evidence that we have received from the police this morning, very few cases would come forward without corroboration and that cases would have corroborated evidence? Do you think that it would be an incentive for cases to go forward—I am not talking about the isolated cases that we have discussed but solemn cases and so on—without corroboration just because the requirement for that will have been taken away? Can you quantify that?
Shelagh McCall: I cannot quantify that. I did not hear all the police evidence this morning. I came in at the end, but I think that I got the gist of what they were saying. Let me put it this way: as I said at the beginning, there seems to me to be no doubt that removing the technical requirement for corroboration will increase the number of cases that the police can report to the Crown and that the Crown can take to the court. There is no doubt about that and I do not think that anyone would suggest that there is any doubt about it.

In terms of whether ultimately cases will come forward from the police to the Crown without supporting evidence, I do not know. That is a matter for whatever the directions of the chief constable are at the time. Whether the Crown, through the Lord Advocate—not the present incumbent of that office, but a future one—would change the guidelines, I do not know. What is meant by the term “supporting evidence”, I do not know. What level that will reach, I do not know. Until we test all that, we do not know exactly what it will look like.

One might say that in a rape case, for example, we will have all the supporting evidence that we would normally expect now and that the only thing that we will not have to do is corroborate penetration, which I accept is a very difficult thing post Cadder. That might be so and might be fine, and we might always be in that position. However, when we are at the other end of the criminal justice system and we have a 16-year-old boy who is charged with breaking into a car, will the police investigate as thoroughly? I do not know the answer to that; it is a question for the police to answer.

I therefore do not think that any of that is quantifiable. However, with respect, I do not think that the issue is about what gets to court; I think that the issue is about what happens once an individual is in court. Those of us who work in court know that, day and daily, the supporting evidence does not always come up to snuff and that the judge has no power to do anything about it—that is the point that we are making.

Christian Allard: So you think that the quality of corroborative evidence is not always up to scratch.

Shelagh McCall: I think that every prosecutor, defence lawyer or judge will tell you that day and daily in courts witnesses’ evidence is not what it is expected to be on paper. If that happens and the remaining evidence in the case that we are left with, whatever it might be, is of poor quality, we are not giving our judges the power in the course of the trial to do anything about that to ensure a fair trial—that is the problem. Currently, they have some power through the corroboration requirement.

Christian Allard: Do other panel members have a comment?

Sandie Barton: In terms of the quality of—

The Convener: It is a Margaret Mitchell moment. I do not mind. We are adopting it now. I am just laughing because I usually get to call witnesses, but the members are all doing it themselves now. That is all right; I am devolving power to them. Right. Ms Barton.

Sandie Barton: I was just going to say, with regard to the collection of evidence beforehand and the decision about whether there is sufficient evidence to get to court, that however that is played out and whatever materialises—something may be anticipated that does not happen—if the decision is that no reasonable jury could convict, but the case is already being heard in front of a jury, perhaps it should be left to the jury. If the case has passed the bar in getting into the court, it will be in the court process, and it is up to the jury to make a decision. The bar is beyond reasonable doubt, which is a fairly high bar to meet.

The Convener: I am being asked whether some photographs can be taken for press reasons. I will certainly not agree to that, unless you agree. I will allow that only if you are not unhappy about it.

Lily Greenan: That is fine.

The Convener: Is Roderick Campbell unhappy about that? Do you want to comb your hair first?

Roderick Campbell: I presume that they will not be photographs of the committee.

The Convener: I do not know who they will be of, but I am asking the witnesses the question. They are quite content, so the photographer may proceed.

Shelagh McCall: I would like to follow up on the particular point that was being discussed.

The artificiality is that the appeal court overturns verdicts of juries on the basis that no reasonable jury that was properly directed could have come to a conviction. We are saying that, rather than go through the entire appellate process to the same outcome, that power could be given to the judge the first time round. If the Crown wants to appeal, that can be facilitated; it is facilitated now with no-case-to-answer submissions. If the defence wants to appeal, it can appeal at the end of all the proceedings in the usual way. I appreciate that there are often verdicts by juries that surprise everyone, but we are talking about a legal test that already exists and putting it into a forum in which it can be utilised at the right time.

The Convener: I think that we have tested that. If the committee will forgive me, we will move on. I think that we have got the gist of the test that will not be there.
We would like to finish by 2 o’clock. That will concentrate minds.

Roderick Campbell: Sorry, but I will be in the chamber this afternoon.

The Convener: I know you will. That is why I am moving along.

Elaine Murray: We have heard about some of the problems that corroboration creates for one-on-one types of crime in particular, such as rape and domestic violence, but the removal of the requirement for corroboration will affect the entire criminal justice system. Is another option the possibility of reforming what is considered to be corroborative evidence? Corroboration has changed over the years anyway. Things such as the Moorov doctrine have come in, so what is considered to be corroboration has changed. Is a possible alternative looking at further reform to corroboration to deal with some one-on-one crimes, such as domestic abuse or sexual violence crimes, to allow, for example, the victim’s distress to be considered as corroborative evidence in those crimes without having to change the system for everything, including shoplifting? Somebody could accuse me of shoplifting, and I may have lost the receipt. If there is no further evidence, I could be taken to court.

The Convener: Is that a confession?

Elaine Murray: No.

The Convener: I was just checking.

Elaine Murray: The removal of corroboration will affect a whole range of other crimes. Is it possible to reform corroboration so that victims of domestic abuse or sexual violence have greater access to justice without the whole of the rest of the justice system being affected?

Lily Greenan: Can I clarify something? Are you suggesting that an alternative would be to remove the requirement only for crimes such as sexual violence?

Elaine Murray: No. I am suggesting that the definition of corroboration could be reformed. The alternative has been suggested to us that it could be removed for certain crimes but not for the entire system.

Lily Greenan: We have argued that we should not look at removing the requirement only for certain categories of crime. The justice system should be for everyone on an equal basis. It is a bit of an all or nothing for us on that one.

On what else might be done to broaden the definition, I am not a lawyer, but my understanding is that corroboration now is not what it was when it first came into common use; that it evolves over time; that bits and pieces of it get tinkered with; and that there are different ways to look at the technical corroboration of evidence. It is in a constantly evolving state. I am not sure whether one can quantify that in statute and say, “We’ll do it this way and add this in” or, “We’ll allow this”, although I do not know enough about how that would work technically.

12:45

Elaine Murray: In principle, though, would it be an alternative to the blanket removal of the notion of corroboration?

Lily Greenan: Yes, it is perhaps worth considering, but I am not sure how it would be done in a way that is different from the way in which it has been evolving over the past couple of hundred years.

The Convener: Does anyone else wish to comment?

Sandie Barton: I know that the cross-party group on child sexual abuse has argued for a third way and looked at such reforms. In some ways that is unfortunate because, while the group’s ultimate goal is the same as ours, in some ways it is at odds with the rest of the victim organisations. The group’s submission states clearly that it would like the opportunity for justice and for more people’s cases to be heard.

There is an opportunity here. Our proposal is not about abolishing corroboration, but about considering how we apply the notion as widely as possible, looking at the supporting evidence. As Lord Carloway said, the narrow definition at present is so narrow as to be an impediment to justice. There has been a lot of discussion about miscarriages of justice that might happen, but we are concerned about the miscarriages of justice that are currently happening.

Lord Gill suggested some other areas of evidence that we could review. That would be helpful; I know that there are other provisions and other plans—to look at the not proven verdict, for example. I do not think that this bill is the only opportunity for looking at our criminal justice system and getting it right. However, we support the abolition of corroboration and the idea of looking at much wider supporting evidence in cases.

Shelagh McCall: Our concern is that, if the bill is passed and corroboration is abolished, what would happen in the interim to those people going through the trial process while the other changes are made and the law of evidence is reviewed? There is not an issue in principle, but the way in which the bill addresses the issue is a potential problem. Time should be taken to do precisely what has just been suggested by the witnesses and by Lord Gill and others, which is to review
properly the implications and the other adjustments that may advance the system.

**Elaine Murray:** Do you think that the possibility of redefining what counts as corroboration might be part of that?

**Shelagh McCall:** I do not see why that should be off the table if the review covers the whole system of evidence. We need to look at future-proofing the system too, and the committee should guard against making a change now that will later need to be adjusted in some other way. I have made the commission’s position quite clear: we do not object in principle to the abolition of corroboration, but proper consideration is needed.

The Convener: Mr Kelly, are you at the starting block again?

**Tony Kelly:** No, I am not.

The Convener: You are not keeping apace with us here. I will take Sandra White followed by Margaret Mitchell and John Pentland, and then I will bring the session to an end, because we have other business—I am sorry.

**Sandra White:** Ms McCall said that the commission is not against the abolition of corroboration and that it had put forward a number of ideas. However, the reason that the Government did not pick up on the idea of the withdrawal of a case from a jury was that the judiciary and other groups were very much against it. I think that she is on her own on that particular aspect.

The Convener: Was that a question?

**Sandra White:** I am coming to my question. I am allowed to comment, surely.

The Convener: I just wanted to clarify whether members of the judiciary were against it as well. I cannot remember whether they were in favour.

**Sandra White:** No, they were not—it is in the report.

**Roderick Campbell:** The majority of the judiciary were against it; a minority of judges supported the line that Mr Kelly and Shelagh McCall have taken. Of the submissions, 20 were in favour of the judge having the power, and only three were against it.

The Convener: Thank you for that—I just wanted clarification.

**Sandra White:** Yes, absolutely—I am sure that Ms McCall would have clarified it herself.

I want to raise a point about the Strasbourg court, as Ms McCall mentioned its approach to corroboration. The Supreme Court of Canada, the United Nations Committee on the Elimination of Discrimination Against Women and the International Criminal Court also say that there is no requirement for corroboration. You picked the Strasbourg court because it is in favour of corroboration, but would you disagree with those other courts that say there is no requirement for it?

**Shelagh McCall:** No, I would not. You must understand that those other systems have other safeguards to ensure the quality of evidence. I understand that the International Criminal Court has a rule about the admissibility of evidence of insufficient quality and so on. It also has the equivalent of a no-reasonable-jury test. The difficulty with looking at other systems and saying that they do just fine without corroboration is that you are comparing apples and pears. All the checks and balances in those other systems are unseen. For example, in England, from the point of investigation, there are all the guidelines in the Police and Criminal Evidence Act 1984 about how evidence is gathered, recorded and disclosed. There is then the prosecution test and the safeguards of the trial. I do not disagree with those other systems, but they have other safeguards in place that prevent or guard against the dangers that we are identifying.

The difficulty for Scotland is that, in recent years, the safeguards that we had that allowed some quality control have gradually been abolished. For example, the no-reasonable-jury test existed at common law in Scotland until the Criminal Justice and Licensing (Scotland) Act 2010 was passed. It seemed to me that judges had no difficulty in applying that test, and I am not aware of a flood of appeals suggesting that idiosyncratic decisions were being made by judges in such cases. That was a relatively limited power that was rarely used; nonetheless, it was there. We have now abolished that and one or two other powers that could be cited if necessary.

**Sandra White:** Certainly, safeguards have been put in place. The Government has also asked groups such as yourselves and experts to suggest other safeguards, so I do not suppose that you are saying that there will be no safeguards if the legal and technical requirement for corroboration is abolished.

Does anyone else have a comment about that? I would like to open up the discussion.

**Shelagh McCall:** We are saying that to some extent. One has to think about how corroboration acts as a safeguard. Yes, it is a quantitative issue—we all know that. However, in its essence as a safeguard it is a measure of quality control. It allows a fact finder, a jury or a judge, in deciding whether to believe a main piece of evidence, to determine whether there is something that supports it that they accept—something that backs it up and gives them confidence in the quality of
that main piece of evidence. That is how corroboration operates as a safeguard currently.

If corroboration is taken away, we will have no means of preventing evidence of extremely poor quality from ending up as the basis of a conviction because we do not have the no-reasonable-jury test or a proper exclusionary rule such as section 78 of PACE. From the point of view of quality control, once we remove corroboration there is nothing obvious that remains. There may be safeguards in jury majorities, the standard of proof and so on. However, Strasbourg says that it is important to give an accused person an effective and proper means to challenge the reliability of evidence and have it excluded if appropriate. That is what will be lacking.

Sandra White: In previous evidence sessions we heard about miscarriages of justice in England but not in Scotland. However, something like 3,000 people are not getting access to justice. Is that not against their human rights?

Shelagh McCall: That is why I said, right at the beginning, that the challenge for the Parliament is to provide the right to an effective investigation and prosecution for people who are victims of serious crime. Going back to Ms Greenan’s point, I mean serious crime in the European convention sense, not in how it is treated domestically; offences against a person and so on would tend to fall into that category.

The Parliament must achieve that, and we have acknowledged that there is a problem for victims of particular types of crime in getting their cases into court. One of the answers to that is the abolition of the requirement for corroboration, which will undoubtedly increase the opportunity for cases to go to court. However, we are concerned about what happens in court and the lack of adequate safeguards at that point to protect the fairness of trials. That is why I said that we are not opposed to the abolition of the requirement for corroboration in principle, but we believe that it needs to be thought through.

Tony Kelly: I echo those comments. The Strasbourg court does not require corroboration. It looks at the matter in the round and considers whether there has been a fair trial under article 6 of the convention. It is not a requirement of article 6 that there be corroboration, but whenever Scottish cases have gone there, or even when Scottish cases have been discussed by analogy with English cases and article 6 has been analysed, the first stop has been corroboration.

If you take that away, as is proposed, with nothing in its place other than the one safeguard of majority verdicts from juries, which would not apply in the vast majority of cases, which go before a sheriff, it is difficult to see what the argument would be when Scotland goes to the European Court of Human Rights to respond to an accused person’s complaint that he has not had a fair trial. A discussion of the safeguards in a summary case would be a very brief discussion because there would be none. The safeguard that we constantly harp on about is corroboration—that is our first stop. If we do not have that, and in a summary case there is nothing else, the irresistible conclusion would seem to be that there will be an unfair trial and a breach of article 6.

One way in which to avoid that is to introduce the other safeguards that have been proposed in a wider context. That would involve a wider appraisal of what the criminal justice system is about and what those safeguards are intended to ensure post abolition.

Alan McCloskey: Sandra White made a couple of points about the quality of evidence. The issue is about the quality of evidence and not necessarily about the quantity. Quality is the overriding principle. The criminal justice system must be human rights compliant for all—that is, for victims and witnesses as well as people who are accused. There are safeguards in the system. As I said, there will still need to be a reasonable prospect of conviction, and the jury or the judge will have to consider that the matter is beyond reasonable doubt. Those absolute cornerstones of our system will still be there, and they should remain.

The Convener: The Crown might rightly think that there is a reasonable prospect of conviction given the statements and the evidence, but it does not always turn out like that in court. The witness that we think is going to say something may say something completely different when they are challenged. I am not saying that the Crown does not apply the test, but once a case gets to court, things can sometimes unravel. I think that Ms McCall’s point is that, at that stage, there should be the prospect of saying that there is no case to answer, or certainly the prospect of the judge saying that no reasonable jury would convict on the evidence because it has turned out differently. Do you see that that can happen?

Alan McCloskey: I see that that could happen, but what we have now sometimes fails victims and witnesses. There are miscarriages of justice where the offender has walked away free and the victim is left—

The Convener: I am specifically testing you on the business of the judge being able to say to a jury that there is insufficient evidence given that the evidence that the Crown has quite rightly taken has not turned out as expected in court. Do you see that there would be a purpose in that?

Alan McCloskey: Yes.
The Convener: Do you think that we should have that?

Alan McCloskey: That is something that could be considered.

The Convener: I think that that is the point that was being made. I hope that I have understood.

Sandra White: I want to pick up on what Sandie Barton and Lily Greenan said. We should consider the issue in the round because, as we have heard, corroboration is just one part of it. My question is about the culture of the judicial system. I asked the Lord Advocate this question as well.

Sandie Barton gave an example involving a woman who has drunk too much or who is dressed in a certain way. If we get rid of the legal and technical form of corroboration and the Crown Office and Procurator Fiscal Service deems that more cases will go forward, that will be noted by juries and judges. Eventually, as more cases come forward, the culture will surely change, because people will be confronted with sometimes horrific evidence that they would not necessarily have heard if those cases had not gone into the judge-and-jury trial system. I would say that people will not be quite so blasé—I hate to use that word, but sometimes some of the decisions seem quite blasé.

In the long term, will there be a change in attitude to people who have suffered from sexual abuse and domestic violence?

13:00

Shelagh McCall: Others are perhaps better placed to comment on that than I am. You mentioned the observations by the UN Committee on the Elimination of Discrimination against Women about the problem with corroboration. The commission made a submission to the treaty body in which we said that there needs to be a comprehensive strategy for tackling violence against women, as well as an action plan for how to put that strategy into place. One part of that is undoubtedly the criminal law, but there are other parts that others are better placed to speak about than I am. It is important to understand that the reasons for the appalling conviction rate are wider than the existence of corroboration, as has been acknowledged. Undoubtedly, corroboration is an impediment to getting cases to court for some types of crimes, but we need a much wider strategy to try to shift those cultural norms, if they are norms.

Sandie Barton: Unfortunately, I think that they are norms.

I echo that point. Our focus on moving towards the abolition of the requirement for corroboration is part of a much wider drive. We do a lot of work jointly with the police. It was heartening to listen to Malcolm Graham, who echoed a lot of our thoughts on corroboration. We do a lot of training with the police. We have prevention workers across Scotland who look at how to change values and attitudes. The measure would be part of a much wider cultural shift that we need to make, but it is an important part in relation to the criminal justice system.

The Convener: I want to move on. Time is moving on and we have more work to do on our agenda that I cannot park.

Margaret Mitchell: The provision on corroboration has been introduced because of the lack of convictions in interpersonal assaults and crimes. The assertion has been that if we get rid of corroboration we will get more prosecutions. I want to turn that round and see whether there is another way to look at the issue. Current court practice does not allow consideration of evidence that could be used to establish corroboration, such as circumstantial and hearsay evidence and the testimony of expert witnesses. That could be changed. It could help victims immensely if those rules were changed and cases were brought to court with the prospect of conviction because of the certainty that the evidence was corroborated, which would therefore make the conviction more secure.

Another view that has been expressed is about quality and sufficiency of evidence, but those are subjective matters and much more subjective than considering whether something has been corroborated, yes or no.

Do you rule out retaining corroboration and looking at those rules of evidence to make convictions more secure and, in doing so, guarding against the very real danger that Mrs McCall has expressed of the accused being able to cite not having access to a fair trial?

Sandie Barton: I welcome some of those suggestions on what should be included. Our concern is that, if we have rules, we have exclusions. If the requirement is removed, there will be flexibility in building up the case and the picture of supporting evidence, but there would be less flexibility if we were prescriptive and exact about what evidence would and would not count under the rule of law. As much as possible, the police and the Crown Office look at the broadest picture that supports the complainer’s version of events, and I would welcome the widest application of that. However, the requirement in its technical form needs to go.

Just to clarify, this has not been brought about as a result of the low conviction rates, because conviction rates have been pretty abysmal for a very long time. This has come about because of
the Cadder ruling. There has been a real focus on the rights of the accused. Their rights have continued to increase without any commensurate increase in the rights and protections afforded to victims.

Margaret Mitchell: The point, according to the evidence today, was not that the police would not look for anything. They have all this circumstantial evidence but the Crown does not take it into account. In the compelling example that you gave earlier, Ms Greenan, the circumstantial evidence would be taken into account, it would help the case to go to court and it would be counted towards establishing corroboration.

Without getting into the nitty-gritty of every single thing that could be done, is there not a case for at least considering retention and looking at the law of evidence to improve corroboration? It is so much easier to say, “Yes, we have a conviction because we have corroboration, and corroboration has been made easier.”

Lily Greenan: It sounds as if you are proposing something similar to Elaine Murray’s earlier proposal on looking more widely at what counts as corroboration and what supports it. I have already answered that point.

When we are talking about solemn proceedings, anything that makes the process more complicated is going to be harder. Technical directions to juries are problematic in terms of what counts and what does not count. I have a concern about adding more layers to something that is already problematic when it comes to getting cases into court. I am not sure in what way what you suggest is different from what was suggested earlier.

Margaret Mitchell: I suppose that I am looking at the subjective element that you have already said exists in juries. I might think, “That is quality evidence”, whereas someone else might not. Therefore, it is not as clear-cut as asking, “Was there corroboration? Yes or no.” It is much more difficult for a jury to be subjective about corrobative evidence.

Lily Greenan: It is still going to come down to how it is played by the prosecution and the defence and the extent to which the evidence is not the issue in such cases. Attitudes such as whether the woman consented or not play their part in the defence case. The issue is to do with notions of consent and what women are responsible for and what they are not responsible for. In relation to domestic abuse, it is about attitudes such as, “If it’s that bad, why is she still there?” The attitudinal stuff that can come into play overrides some of the evidential requirements.

Margaret Mitchell: My fear is that, by going to sufficiency and quality of evidence and not looking at the quantity that establishes corroboration, that will only continue.

The Convener: John Pentland has the last question, as usual.

John Pentland: I think that this is the first time that we have seen witnesses for and against. I congratulate them on that interaction. I have a question for each of you individually and for the organisations that you represent. What would be the consequences of corroboration if it were removed?

Lily Greenan: Do you mean if the requirement for corroboration was removed?

John Pentland: Yes.

Lily Greenan: I believe that the figure for domestic abuse incidents that did not proceed beyond police reporting was 2,800. A small proportion of those—about 1.5 per cent—would pass the new prosecutorial test. That is not a huge amount.

Being able to have the debates in the court with the solicitor, rather than in the fiscal’s office, opens things up. For me, it is about looking at the longer term. Sandra White mentioned the contribution that removing the requirement would make to a longer-term cultural shift. A greater opportunity to have the discussions and probe the issues in the courtroom, using quality evidence rather than a technical number of pieces of evidence, is the way forward.

It is part of a long strategy. I agree with Shelagh McCall that we need a violence against women strategy that addresses some of the issues in the justice system and an action plan to support that. My understanding is that that is on the way.

The question is how such a move can support a long-term shift in the justice system’s response to those issues. It will not be a magic fix, it will not sort stuff in the short term and it will not lead to more convictions. Previous witnesses talked about victims getting their day in court but that is not what it is about; it is about ensuring that people can be heard and that issues that are not reaching court at the moment can be discussed in court in Scotland. It is all about fairness.

Sandie Barton: I very much echo Lily Greenan’s comments. For us, the removal of the requirement for corroboration is part of a long-term picture that includes access to judicial training, some of our wider prevention work on changing values and attitudes and the introduction of female forensic examiners, which will present huge opportunities for those who previously have been unable to access the very crucial DNA evidence that can make the difference.
It is also about changing the culture of the courtroom and affording rights to complainers. Much of the discussion about miscarriages of justice has focused on the accused, but what about complainers’ rights? I know that amendments with regard to independent legal representation have been proposed to the Victims and Witnesses (Scotland) Bill, but we need to think about complainers’ rights and privacy. When you are raped, your medical records can be accessed and your mental health, sexual history and so on are fair game in court. This is all part of a much bigger push with regard to victims’ rights. This is not an either/or—you can strengthen the rights of both the accused and the victim to access to fair justice.

Alan McCloskey: We believe that the removal of corroboration will improve and strengthen Scotland’s criminal justice system. Although the issue is linked to the need for wider public confidence in the system, its removal will put victims and witnesses in a better position.

Tony Kelly: We just do not know what the consequences will be. I am sorry to sound like Donald Rumsfeld but there are probably too many known unknowns. We can point to areas of concern but we do not know what effect removal will have on the overall fairness of trials in relation not just to victims of sexual crimes but to victims in general and accused persons in Scotland.

Shelagh McCall: We can probably all agree that we want a system in which the public is confident that the innocent will be acquitted and the guilty convicted through a fair process. In our view, abolishing corroboration without looking at the system in the round increases the risk of unfair trials and miscarriages of justice and loses the opportunity to do just what Sandie Barton has talked about and find a way of increasing the rights of the victims of crime to an effective remedy and the rights of the accused to a fair trial.

The Convener: May I end on that comment, John?

John Pentland: Yes.

The Convener: Thank you very much. I thank the witnesses for waiting their turn and for their interesting evidence. You must forgive me, but we have to move on and I am going to keep talking.
Criminal Justice (Scotland) Bill: Stage 1

10:28

The Convener: Item 3 takes us back to the workface again. We are back to talking about corroboration and related provisions in the Criminal Justice (Scotland) Bill.

I welcome our panel of academics. Professor Peter Duff is from the University of Aberdeen; Professor Pamela Ferguson is from the University of Aberdeen—

Professor Peter Duff (University of Aberdeen): Dundee.

The Convener: Dundee? How dare I? Oh, heavens. Am I forgiven? No. There was a look that shows that I am not forgiven.

Professor Fiona Raitt is from the University of Dundee; Professor James Chalmers is from the University of Glasgow—not Edinburgh; and Professor John Blackie is from the University of Strathclyde.

I welcome you all to the meeting and thank you for your written submissions. We will go straight to questions from members.

Christian Allard (North East Scotland) (SNP): Good morning. I would like to clarify something that we talked about last week. I am pleased that Assistant Chief Constable Malcolm Graham came back with clarification, which I would like you to hear and compare with the written evidence that some of you have given. He said:

“I am conscious that those who oppose the proposal often appear, perhaps conveniently, to abbreviate it, simply referring to the ‘abolition of corroboration’. I hope that my evidence to the committee assisted in dispelling this popular misunderstanding and clarified that the proposal is to abolish the absolute requirement for corroboration, not corroboration itself.”

He added:

“Corroboration will continue to have a place in Scots Law and feature within court proceedings. It is simply that our law currently requires that certain particular facts must be technically corroborated before any proceedings can be commenced.”

Some of the written evidence that we have received from you uses the abbreviation of “removal of corroboration”. You will know your own evidence, but the first line of the written submission from the University of Dundee says:

“We are not satisfied that the case for abolition of corroboration has been made.”

It goes on:

“The argument that other jurisdictions do not have corroboration, and therefore Scotland is ‘out of line’, also
adds little: there is no corroboration requirement as such in England, but it is our understanding that prosecutors routinely look for corroboration and do not generally prosecute without it.”

That is exactly what the prosecutors of Police Scotland are saying: corroboration will not be removed, but they are happy to have the requirement for corroboration to be removed and for the situation to be as it is in England. Corroboration will still be used.

10:30

**The Convener:** First, I have to correct you: the police are not prosecutors and I do not think that they would be happy to be called that. That was a long question. I was asking for short questions and Christian Allard has set the bar. Witnesses know that they should self-nominate and indicate to me if they wish to respond. I think that we should take Dundee before Aberdeen.

**Professor Pamela Ferguson (University of Dundee):** I acknowledge that the legislation intends to abolish corroboration as a formal requirement. However, I fail to see why we are having this debate at all if we are saying that it will be business as usual because prosecutors will still look for it. In that case, why not keep it as a formal requirement?

I also acknowledge the fact that many jurisdictions look for corroboration. A couple of weeks ago Professors Duff, Raitt and I were in the Netherlands at a conference about the presumption of innocence. During coffee and lunch breaks, we asked academics about corroboration in their jurisdictions and, generally speaking, they said, “Oh no. We have no such thing as corroboration. Scotland is bizarre in having its corroboration requirement.” However, when we probed a bit more deeply, they all said, “But of course no prosecutor would go ahead without what you call corroboration or two pieces of evidence” and that judges would not find someone guilty beyond a reasonable doubt just on the witness of one complainer. Even if it is not called a formal requirement, corroboration operates unofficially, if you like, in many jurisdictions.

**Christian Allard:** So you agree that we are not talking about the removal of corroboration.

**The Convener:** Professor Duff will enter the fray.

**Professor Ferguson:** Just a quick point first—the answer will depend on the practice of the prosecution.

**Professor Duff:** That is the problem. As a commonsense rule of thumb, we all use corroboration in our everyday lives. We are more likely to act on confident information and we are more likely to have confidence in that information if it has come from two sources. As a matter of practice or an everyday rule, corroboration will still exist.

The important point about corroboration being a formal requirement—and the reason why I think that Malcolm Graham’s response is somewhat disingenuous—is that, at the moment, a prosecutor will not prosecute and a judge or jury cannot convict when there is no corroboration. That is the precaution. The bill will allow a judge, jury or prosecutor to go ahead when there is no corroboration and there is the possibility of conviction with no independent evidence.

Furthermore, we all know—and prosecutors complain—that the pressure on prosecutors in sexual assault and domestic violence cases is very great. They are under great political pressures to prosecute every case. What will happen, and what the justice minister envisages will happen, is that in cases in which there is only one witness to that sexual violence or domestic violence, the prosecution will go ahead. Prosecutors will be instructed to do that.

That brings with it a danger of miscarriages of justice, so having the formal requirement does make a difference. As Pamela Ferguson says, if we take the words in Police Scotland’s supplementary submission literally, there is going to be no change anyway, so why bother with it? That is not the message that we have been given.

**Christian Allard:** I want to hear from Professor Chalmers on the point because he said:

“While we express no view on the desirability of abolishing corroboration, we do not support the case made by the Carloway Review to justify this proposal.”

Again, you are talking about abolishing corroboration, but it is clear that that is not what we are talking about.

**The Convener:** Well, we know that we are not talking about abolishing corroboration per se; the issue is that, at the moment, it is a mandatory requirement. That particular comment is, I think, just shorthand. We do not need to go through all this again, but I ask Professor Chalmers simply to confirm that he objects to the removal of the mandatory requirement for corroboration.

**Professor James Chalmers (University of Glasgow):** The idea of removing corroboration itself makes no sense; indeed, it cannot be done. Police Scotland’s supplementary submission seems to suggest that there will be the possibility of corroboration and that it is not going to be abolished. It cannot be abolished unless we introduce a rule that prosecutions have to go ahead on the basis of one source of evidence. The defence that the bill does not propose the remove
of corroboration itself is simply nonsense and the committee should pay no regard to it.

Christian Allard: I am—

The Convener: Please let Professor Blackie speak, Mr Allard.

Professor John Blackie (University of Strathclyde): I want to make two points. First, in civil cases, in which the requirement for corroboration was abolished in 1998, there have been all sorts of changes in practice. One could not have predicted what those changes were going to be when it was introduced.

Secondly, it is important that requirements with regard to evidence—for example, the use of hearsay in criminal law—are stated as such because they then become part of what is sometimes called in academic literature the protections for an accused. There is a complete difference between practice—after all, you will not go ahead with cases that you do not think that you will win—and requirements. I have not yet said what I mean about that requirement or indeed what is desirable in that respect, but practice and requirements are different things.

Alison McInnes: I am glad that Christian Allard has mentioned this new and rather strange defence that has been flying around for the past week and which I think simply plays around with words and attempts to obfuscate the quite significant change in the law that is being proposed.

Last week, Shelagh McCall of the Scottish Human Rights Commission told us about concerns about miscarriages of justice, given that, once corroboration is removed, there are very few other safeguards in the system to allow a case to be thrown out of court. Does the bill contain enough additional safeguards to avoid miscarriages of justice?

Professor Fiona Raitt (University of Dundee): This is going to sound like a circular argument, but I think that the requirement for sufficiency of evidence is much more important than people have recognised or commented on.

Given the tendency of the legal profession and the judiciary to be quite conservative, they will not need to look very far in their interpretation of sufficiency to find that corroboration would actually provide it. Given the discussion that we have had, I suspect that we will come full circle on this matter and that, in cases involving sexual offences, domestic abuse, children and vulnerable witnesses in general, prosecutors and, in particular, juries will seek the security of something equivalent to corroboration to achieve sufficiency. Juries will be charged by the judge to find sufficiency of evidence, which can usually be found in two sources.

Professor Duff: Taking the broad view, I know that the five of us are not of one mind about whether corroboration should be abolished. I am on the fence myself.

The Convener: Are you finely balanced on it or tipping one way or the other?

Professor Duff: I am teetering at the moment.

The Convener: Which way?

Professor Duff: I do not know. It depends on the breeze. [Laughter.]

Coming back to the previous question, I think that this issue should be looked at. Indeed, the majority of the Carloway expert group, of which I was a member, said that the issue had to go to the Scottish Law Commission for a balanced consideration—

The Convener: That is an interesting comment. Were any of the rest of you on that group?

Professor Ferguson: No.

Professor Raitt: No.

Professor Chalmers: No.

Professor Blackie: No.

The Convener: Perhaps your membership should have been declared at the beginning of the session.

Professor Duff: I am sorry, convener—

The Convener: It is no fault of yours, Professor Duff—I believe that this is the first time we have heard about the group. Can you tell us a bit more about it?

Professor Duff: I know that the group’s minutes have been made public because a student of mine found them on the web and wrote about them in their dissertation.

The vast majority of experts in the Carloway reference group wanted the issue referred to the Scottish Law Commission. I make that point because safeguards were the kind of thing that we wanted to be considered if corroboration were to be removed. Some of the people in the group were against the removal of corroboration per se; others, including me, were ambivalent. However, we all thought that, if we are to remove corroboration, we have to have a very good think about it and about what all the other safeguards are.

We have that one view and, of course, all the other judges disagree with it and again want the issue bumped to the Scottish Law Commission. I think that it is precisely what the Scottish Law
Commission should be looking at—what kind of safeguards we will have if we get rid of corroboration. Could we get rid of it? Should we get rid of it? Most other countries do not have corroboration; that is fair enough, but what other safeguards are there? We have to come up with the right balance.

The suggestion that has been made at the last moment—which seems to be rather plucked out of thin air—is that the required jury majority be changed from the bare majority, with no evidence to support whether that would make any difference and no detailed consideration of it. It is a suggestion that goes back to the Thomson committee in the 1970s, but there has never been any research on it or on its likely impact.

If the issue were to go to the Scottish Law Commission, it could have a detailed look at what other safeguards we might want, including the one that Fiona Raitt mentioned—would sufficiency ensure that someone would be protected from the very credible but lying witness?

**Professor Ferguson:** I agree with Professor Duff. If we think about why we are where we are today, it is because we ended up with the Cadder case, which led to the police having to have solicitors present when interviewing suspects. As a knock-on effect, it was then mooted that we should abolish corroboration, and as a knock-on effect of that, we are now thinking about changing jury majorities. It seems to me that this is piecemeal reform. No one is stepping back and taking a broad view of the criminal process, looking at the checks and balances and doing a proper comparative study with other jurisdictions.

**Professor Blackie:** We know that there are some wrongful convictions—there are wrongful convictions in any system, however perfect it is. However, we do not know how many there are, and nor do we know how many wrongful acquittals there are, by which I mean people who have committed an offence that cannot be proved.

One thing that is greatly lacking in Scotland is empirical evidence, which exists in other jurisdictions. In America, there is a mass of literature on the impact of various protections and non-protections being in place, on the ability of juries to detect unreliability in evidence—which is very low, according to psychological work—and on witnessing as well.

Here we are in Scotland, not having addressed any of that interdisciplinary research, and we have come up with one thought—that we get rid of something—when what is needed is to look at the system holistically. It may be that we would then come up with many other changes, which might include the removal of the requirement for corroboration.

**Professor Raitt:** To add to that, I was struck by a comment that the Lord Advocate made when he gave evidence. I did not read the comment in the Official Report, so I hope that this is correct.

The Lord Advocate gave the example of two women who, when they were young girls, were very seriously abused. The prosecution went ahead but, when it came to the moment of appearing at trial, one of the women simply could not do it. The Lord Advocate commented that that is the problem with corroboration. I was very struck by that, because that is nothing to do with corroboration. The question is: why did a woman not wish to give evidence in court? The answer is to do with the adversarial process rather than anything else.

That point adds to the case for a broadening out of what we are looking at to consider all the issues that feed into where corroboration plays a role in the system.

**The Convener:** We are also at stage 3 of the Victims and Witnesses Bill this week—that bill will have an impact on court process and on how victims and witnesses feel within the court process.

**Alison McInnes:** We have heard the cabinet secretary stress quite a lot that he wants to widen access to justice—that is how he explains it. What is the panel’s view on whether the change on corroboration will result in more prosecutions but not necessarily more convictions?

**Professor Chalmers:** We have seen evidence—at least in the financial memorandum—from Police Scotland and from the Crown Office that suggests that they believe that there would be additional prosecutions. However, we know from evidence in other jurisdictions that it is difficult to get a conviction when there is no corroboration, so the ultimate number of convictions is unlikely to go up in that situation.

The danger with abolishing corroboration is unlikely to be that you would create a significant number of additional wrongful convictions; it is that you would let cases through the net that are really too risky to get to that stage. However, the effect on numbers is likely to be small.
juries. Did you read that evidence? I would be interested in your comments.

**Professor Chalmers:** I cannot add anything to your own comments. There is difficulty with seeing court as therapeutic. That is not a view that is often expressed by people who have been through the court process.

**The Convener:** Does anybody else want to comment? Did you feel that there was merit in that suggestion?

**Professor Ferguson:** I have certainly heard people from Rape Crisis Scotland say that, although for some women getting the accused into court is a big part of it, the vast majority are really looking for a conviction. The danger with the bill is that expectations will be raised and people will go to the police and say, “I know it’s just my word against his, but that’s good enough now because there’s no corroboration requirement,” but it will not be good enough because juries will not convict.

**The Convener:** The conviction rate for rape is poor. It is about 50 per cent, I think—I will just check that by looking at a recent parliamentary question that I asked. The answer shows 41 per cent of rape cases result in a verdict of acquitted not guilty or acquitted not proven.

**Professor Chalmers:** Those are figures for cases that have already got—

**The Convener:** They are figures for 2011-12. I wanted to find out the difference. I think that there are more successful prosecutions in domestic abuse and sexual abuse cases, but rape has a poor conviction rate.

**Professor Chalmers:** Those are figures for cases that have already got over the corroboration threshold, in the view of the Crown Office at least, because they have been taken to court. Abolishing corroboration could not raise that figure at all. It might raise the number of cases taken to court, but it is impossible to see any way in which it could raise the proportion of convictions that result.

**Elaine Murray:** I will carry on with the theme. The rationale behind the proposal to abolish corroboration is the lack of ability to take certain one-on-one crimes, such as sexual and domestic abuse, into court. It has also been said that there could be a case for retaining corroboration but with some reform—for example, inclusion of the distress of the victim as corroborating evidence—or indeed that a definition of what might be considered corroboration would be helpful in assessing whether or not cases should be taken to court. What are your views on that? Should we be recommending further investigation of the case for reform of corroboration?

**Professor Duff:** Lord Carloway rightly identified one of the problems, which is that the law on corroboration is very complicated at the moment. The reason why it is complicated is that judges have, on occasion, tried to find a way around it so that they can open the way to conviction for those who they think are guilty. In fact, a victim’s distress already can corroborate.

As Lord Carloway says, the problem is that the law has become so complicated that nobody really understands it properly. Judges continually try to define it and then finesse their definitions, so I do not think that defining it in statute would actually help. It would be almost impossible anyway, given how complicated the situation is. All that would happen is that the definition would get overlaid with another layer of case law and matters would come back to where they are now, with nobody knowing where they stand and it being difficult to predict whether there is corroboration.

If you were to simplify the definition greatly, there is a risk that fewer cases would get through the net. I am not sure what should be done about that, but again that is something that the Scottish Law Commission could perhaps look at.

**Professor Chalmers:** Can I disagree with that?

**The Convener:** You would not be academics if you did not disagree. In fact, you would not be lawyers if you did not disagree—and we would not be politicians if we did not disagree. [Laughter.]

**Professor Chalmers:** Students complain that we do not tell them the right answer because we do not agree.

The committee has before it supplementary evidence from the Crown Office giving a number of case examples. It gives five examples, although there are really only four, because number 3 is not an example at all.

What is significant about the examples is that none is a case in which there is no supporting evidence at all; there is always some supporting evidence thrown into the mix. I am surprised that in at least some of those cases the Crown Office does not believe that that evidence meets the legal requirement for corroboration, but that appears to be its view.

**The Convener:** For the record, what is the difference between corroboration and supporting evidence? You are saying that, in some of the cases, the supporting evidence could have been corroboration.

**Professor Chalmers:** Corroboration requires supporting evidence on all the essential elements of the crime and the fact of the accused being the perpetrator; it requires supporting evidence across the board. In some of the examples that the Crown
Office gave, I am not sure why it took the view that such evidence was not there.

What is significant about the examples is that the Crown Office is not seeking to persuade the committee that it really wants to bring single-witness cases; it appears to be seeking to persuade the committee that it wants to bring cases where there is supporting evidence. That might be achieved through clarification of the law on corroboration.

Professor Duff mentioned distress as corroboration. One of the problems with that, which is flagged up in one of the examples, is that the extent to which distress can corroborate is limited; it can corroborate certain things but not others. That issue could be looked at.

The second thing I wanted to pick up on is the argument that corroboration is complex and that that might be a legitimate reason for thinking about abolishing it. We ought to remember that systems that do not have corroboration will safeguard against wrongful conviction through a wide range of different measures that are designed to prevent it. In the aggregate, those measures might turn out to be as complicated and confusing as corroboration itself. It is not clear that a system without corroboration is necessarily simpler.

The Convener: Professor Duff, do you wish to retaliate?

Professor Duff: No. I agree with much of what James Chalmers said. To try to define corroboration absolutely would be very difficult, although it could perhaps be defined more simply. As James said, once you start putting in place other mechanisms, you would get arms and legs growing and you would probably end up with as complicated a system.

I would not say that corroboration should be abolished just because it is complicated; it is complicated, but all evidentiary doctrines are complicated. I am not sure that one can really address it in an atomistic way—that goes back to Professor Blaikie’s point about a holistic view—without looking at the overall context.

The Convener: Is it Professor Blaikie or Blackie?

Professor Blackie: It is Blackie. Blaikies live in the north-east of Scotland; Blackies live in the south.

Professor Duff: Sorry.

The Convener: I got the University of Dundee wrong earlier, so you can get something wrong as well, Professor Duff. [Laughter.]

Professor Blackie: There are complexities and the explanation given is absolutely correct that judges have acted to water down corroboration in cases where it has got in the way. I rather suspect that the routine cases that come up day to day do not feel terribly complex. The complexity is perhaps with circumstantial evidence, rather than the paradigm of two witnesses.

On thinking about tweaking corroboration, there are quite a lot of jurisdictions around the world that have half-way houses. For instance, in South Africa there has to be corroboration of confession evidence. In some places, the requirement applies to an extraordinary range of different crimes, ranging from perjury through speeding to feigned marriages. I am not terribly keen on those examples.

More important are examples of jurisdictions where warnings are given. The difficulty with that, however, is that, if the warnings are discretionary, they depend on the judge’s understanding. Also, they only bite at the end of the trial, so they have no effect on the wider criminal justice process that starts with police work.

Those examples simply have not been looked at, and I do not have a firm view on them, either. I can see a ground for applying corroboration to certain serious crimes or crimes that are tried before juries only. There are all sorts of permutations, which is a reason in itself for having a holistic, wide, in-depth look at the whole system. The Scottish Law Commission is the obvious place to do that.

Alison McInnes: Professor Chalmers, you referred to the examples that the Lord Advocate gave and said that you were surprised that some of them had not made their way through to the courts. The Crown Office and Procurator Fiscal Service has recently rearranged how it deals with some cases and has specialist markers. Would not that assist in understanding? Professor Duff said that the process is very complicated, but a specialist marker for particular types of cases would make the process more efficient and easier to understand.

Professor Chalmers: Yes. I am absolutely sure that that is correct. My understanding of the examples that the Crown Office provided is that they are not real examples in that they have been anonymised and some details have been changed, so they might not really be cases that did not go through. In fact, it is clear that they are not cases that did not go through in that form.

I am concerned that we are not getting examples of real cases—albeit with anonymisation—and that details are having to be changed. That might be being done only for the purpose of anonymity, but it is impossible to tell.

Professor Duff: I agree that specialist markers might well help, and they might be able to spot that there is a possibility of corroboration when a
less experienced marker would not. However, the danger, as I alluded to earlier, is that there is a great deal of political pressure on the Crown Office to prosecute all sexual offence cases. However specialist the markers are, they will be aware of the pressure that they should prosecute all rape cases. They are already aware of the pressure in respect of domestic violence cases. They complain constantly about having to prosecute what they regard as minor, trivial cases. They might be wrong or they might be right, but that is the pressure that they feel. I think that if corroboration goes, they will feel the pressure to prosecute all sexual offence cases regardless of whether supporting evidence or corroboration exists, which brings with it the danger of miscarriages of justice.

Elaine Murray: The change in the jury majority was mentioned earlier. Was there a debate in the round at the Law Commission about what would have to be done if the requirement for corroboration is abolished? What other factors should be taken into the discussion? What other safeguards, if you like, ought to be considered in conjunction with any consideration of abolishing the requirement for corroboration?

The Convener: I think that we are asking you to write the remit.

Elaine Murray: Just briefly.

The Convener: Yes, a brief remit; a few bullet points.

Professor Chalmers: I think that the committee has already had some written evidence on that from Professors Ferguson and Raitt, as well as from me. A possible remit for the Law Commission might be for it to consider generally what safeguards would require to be put in place if corroboration is abolished, and possibly whether a package of such safeguards would be preferable to corroboration or whether retaining corroboration would be preferable.

The Law Commission or another body could consider conviction on particular forms of evidence, such as dock identification, anonymous witnesses or hearsay evidence; the majority jury verdict; and the power or lack of power of a judge to withdraw a case from the jury. That is not a comprehensive list, so there might be other things to consider.

Professor Blackie: The Law Commission might want to look at the educational side of it. One thing that has been mooted is that experts could assist in instructing juries on the dangers of eye-witness identification evidence. There are problems with that and the courts are currently not happy about it. There is also the issue of police practice; for instance, in England, under the Police and Criminal Evidence Act 1984 codes of practice, the whole process of questioning suspects and other people is much more regulated than it is here. I am not saying that that is necessarily a good thing, but there is a big agenda there as well.

Professor Duff: That is the Scottish Law Commission tied up for five years already.

The Convener: Lord Gill told us that it would be a year, tops.

11:00

Professor Raitt: A difficulty that some people have alluded to in other papers is how evidence is or is not gathered in cases in which corroboration is difficult, such as sexual and domestic abuse cases. I know that the women's groups often feel that, especially when they have been working with women who have survived an attack, a lot more evidence could have been or might still be capable of being accessed that is not always followed up. That is very much a police practice issue and might not be one that you want to explore, but it should not be ignored. If the evidence is not gathered early on, it will not be there at a later stage.

There is—I think that everyone will subscribe to this—excellent practice in the sexual assault referral centres. There is a SARC in Glasgow, and one was to be set up in Dundee, but I do not think that it has got off the ground yet. They have a clinical, medical method of collecting evidence, which makes the process of the medical examination much more conducive, and women are more willing to consent to it happening. A great deal of therapy can go on with that at the same time, which would not happen in a usual examination at a police station. There are lots of small things that could make a difference.

The Convener: That is interesting. The Victims and Witnesses (Scotland) Bill also deals with gathering medical evidence and determining the sex of the doctor who will examine a person, in so far as that is practicable.

Professor Raitt: Yes.

The Convener: We have heard little bits from everybody, apart from Professor Ferguson. Do you wish to say anything? You do not have to.

Professor Ferguson: The more we discuss the issue, the more we seem to be saying that the consequences that we are hoping for are unlikely to be achieved. In those sexual offence cases in which it is the word of the complainer against that of the accused, getting rid of corroboration will not help. Moreover, doing so will be dangerous in cases involving confession evidence and fleeting-glance eye-witness identification, which are notorious in every jurisdiction for miscarriages of justices.
If a witness is positive in their identification of the person who attacked them, it is very hard for a jury to ascertain whether they are correct. The witness might genuinely believe that they have identified the correct person, but they could well be mistaken. The Innocence Project in the United States of America has found that the major source of miscarriages of justice in that jurisdiction is a witness who is convinced that they have pointed to the perpetrator but who is shown later to have been quite wrong about that.

The Convener: Perhaps the panel can assist the committee by providing a general view of the time between a crime and when a case goes to court. The time between a crime and when the alleged victim identifies someone might be very long, and is even longer by the time they get to court. Will you give us some idea of the difficulties regarding the timeline for identification of the accused, which I think can be substantial?

I am looking for help and I am not getting any.

Professor Chalmers: A criminal trial can take place, especially in a summary case, well over a year after the incident took place. The committee can judge itself how difficult it is to remember faces a year after the event. We cannot offer special assistance on that.

A few moments ago, I referred to evidence from Professors Ferguson and Raitt when I should have said that it was from Professors Ferguson and Davidson. I mention that to be fair to Professor Davidson, who is not here.

Professor Blackie: A lot of psychological work has been done—principally in America, but some has been done in England and there is some foreign language stuff, too—to try to structure those issues, which we all feel intuitively. Broadly, in the first place, there are problems about the perception of one’s witnessing, remembering—the storing of the memories—and recall. At each stage, there is a danger of distortion. Although that is common sense, it is structured common sense, and plenty of evidence exists about that. The American literature is quite striking on the high levels of inaccuracy. After a year, it is as high as 40 per cent in some cases.

Professor Ferguson: The issue is compounded in our jurisdiction because we allow dock identification, which many jurisdictions do not. It is perfectly possible for a witness to say to the police that they think that they might know the person again in court, assuming that they will be asked to point the finger in a couple of weeks. However, as James Chalmers said, when a year down the line, they are in court giving evidence and at the end the prosecutor asks them whether they can identify the person whom they have spent the past hour and a half telling the court about, there is huge pressure on the witness to look at the person in the dock and say, “It must be him.”

That definitely occurs. I was briefly a prosecutor about 20 years ago and I have seen, first hand, witnesses who, when asked to identify the accused, say, “It’s that person there,” and point to the person who happens to be sitting in the dock.

The Convener: Mercifully, they do not point the finger at the judge. That would be intriguing.

Professor Blackie: It has happened.

Professor Ferguson: Usually, with a bit more probing—

The Convener: Has it happened? Excuse me a minute, Professor Ferguson. This is interesting.

Professor Blackie: It happened to me. I was an advocate for a very brief period, donkeys years ago, and it happened.

Professor Chalmers: Was the judge convicted? [Laughter.]

Professor Blackie: It was a sheriff, and no.

The Convener: So when asked to identify the person, the witness pointed to the judge. Oh, heavens. Did the judge acquit himself?

Professor Blackie: The case fell apart. [Laughter.] I was prosecuting, in the new Kilmarnock sheriff court.

The Convener: Professor Ferguson, please go on. I am sorry.

Professor Ferguson: I was just saying that usually, with careful probing, it is possible to get the witness to admit that they are pointing the finger at an individual because that individual is sitting in the dock. However, when the accused is unrepresented, it is easy to take what the witness says as ticking the identification box and then just to move on to the next witness.

Professor Duff: John Blackie is right to point to the wealth of social psychological research on the matter and the results of that research. What is striking is that although our common sense tells us that identifications that happen two, three or six weeks later, or indeed three months or a year later, are bad—we know that—the research indicates that the situation is much worse than a commonsense approach would suggest. We are much less reliable than we think we are, even when we think about the matter sceptically and objectively. That is often not realised.

Professor Blackie: That means that when we sit as juries or, indeed, judges—as fact finders—we come from an overoptimistic view about identification.
The Convener: I got a bit distracted by your story about the judge being identified, I must admit. We will not identify the judge in the case—that would not be appropriate. It was an interesting diversion for us though. We will move on.

Margaret Mitchell: The motivation for the proposed change seems to be to address low conviction rates for certain interpersonal crimes such as sexual assault and rape, on the basis that corroboration is the barrier. As we heard from Professor Chalmers, that does not explain why cases that pass the corroboration threshold are not resulting in convictions.

It seems to me that we should be looking more at court practice. I am interested in Professor Raitt’s suggestion that the complainer in a rape or sexual assault case should have legal advice. Women’s groups have told us that there is sometimes a problem with inbuilt prejudice in juries, which must be overcome. In the current financial climate, the prospect of that is nil. However, as the convener said, the Victims and Witnesses (Scotland) Bill is going through the Parliament, and an amendment to the bill has been lodged in advance of stage 3—

The Convener: Is this a trail? Is it your amendment?

Margaret Mitchell: Yes, it is.

The Convener: Ah, there is a surprise.

Margaret Mitchell: The idea is that rape victims would be given legal advice about whether to give permission for their medical records to be used, to ensure that victims are a bit more careful about exactly what they give permission for. Very often, the whole medical record is accessed, and things that are totally irrelevant are brought up in court, to discredit the complainer. Would the approach that I have proposed help with conviction rates? It could be piloted relatively cheaply and put in place pretty soon.

The Convener: Professor Raitt, I think that Margaret Mitchell is looking for a quotation in support of her amendment—I can see that you know that; it is written all over your face. I think that we can talk more broadly about court process and procedures.

Professor Raitt: I will not comment on the specific model that Margaret Mitchell suggested—

The Convener: I knew that you would not do so.

Professor Raitt: I have written about a possible model. The approach builds on the type of model that is available on the continent and, most important, is available in other adversarial jurisdictions. Ireland and Canada are the two main examples, but I suppose that England is also an example to some extent, because it has piloted voluntary sexual violence advisers—I think that Rape Crisis Scotland is trying to do the same thing. Of course, voluntary advisers are not legally qualified.

It is thought that women who know their rights in relation to access to their medical and sensitive records and in relation to sexual history evidence, and who therefore do not just assume that the Crown will defend their privacy rights, are in a much stronger position in respect of the evidence that they are able to give when they are cross-examined on what is in their records or on the facts of the case that is being prosecuted.

The evidence from the large studies that have been done, mostly in European countries, shows that women feel a lot more confident and are more willing to discuss intimate and difficult matters in court if there is someone there whom they know, who has been supporting them and who will object if anything inappropriate is mooted.

The difficulty is that although we always hear that judges have a role in intervening when witnesses are being pushed and they feel that they are being given a really hard time, judges are reluctant to intervene. Some time ago, I did a study with judges and when I asked about that, they all said, “We have to be very careful if we intervene because it could lead to an appeal.” They are put in a difficult position. Without that, we only have the Crown trying to do all the things that it has to do—to ensure a fair trial, look after the rights of the accused, prosecute in the public interest and, somewhere, look after the complainer’s rights.

We are in a problematic position in relation to the Human Rights Act 1998 if we do not recognise that women may need independent advice. In the particular situation of a rape case, the focus is on them, and it will become more so if corroboration goes. Juries tend to find it difficult to know what to do in a he-said-she-said situation, so independent advice could help.

Professor Duff: Margaret Mitchell is right. We have to look at the broader court procedures. We know that the conviction rate in rape trials in other jurisdictions that do not have the corroboration requirement is similarly bad, so it is nothing to do with corroboration. It is about court procedures.

Comparative research could be done to look at what is done elsewhere. I am aware of the cost issue but, if I recall correctly, the number of rape trials in Scotland last year was under 100. There would be a cost, but it would not be huge if you restricted the legal representation to rape trials, as Fiona Raitt has argued elsewhere.

The Convener: I have the figure. In 2011-12, there were 75 trials.
Professor Duff: Okay, so we had an advocate or a solicitor representing the woman complainer in 75 trials. That is a cost, but it is not a huge cost.

Professor Raitt: I add that it would not be for the whole trial, if we followed the models of other countries.

The Convener: Does anyone else want to comment? Margaret Mitchell does—good try, Margaret.

Margaret Mitchell: I was going to say, “Given the complexity of the matter”, but it is not necessarily complex. On the point about efficiency, I think that the stuff that has been going round about the quality of evidence is a total red herring. If there is more evidence, that will surely only help to prove the case.

Given that there has been such confusion, not least last week, when we heard depressing evidence from the police, is it the panel’s view that the issue should be taken out of the Criminal Justice (Scotland) Bill and looked at either by the Scottish Law Commission or by a royal commission, where a panel of experts could look at it in depth and deliver some findings perhaps faster than the Law Commission could?

Professor Duff: Yes.

Professor Ferguson: Yes.

Professor Raitt: Yes.

Professor Chalmers: Yes.

Professor Blackie: Absolutely.

Margaret Mitchell: Thank you for that.

The Convener: There was a chorus there, although not in song—well, it is Christmas, after all.

I call Sandra White, to be followed by Roderick Campbell.

Sandra White: Thank you, convener, and good morning—

The Convener: Oh, wait a wee minute. John Finnie was slow to wake up. He has a supplementary question.

John Finnie: The policy memorandum, which the layperson is perhaps more inclined to go to, states at paragraph 130:

“The policy objective is to remove the requirement for corroboration in criminal cases”.

That is the very clear statement that the Government makes. On the issue that my colleague Margaret Mitchell raised, it states:

“the Scottish Government considers that Lord Carloway’s recommendations are intended to be implemented as a coherent package, and by failing to implement a significant aspect of the recommendations contained in his report, there is a very real risk of undermining Lord Carloway’s stated aim of ensuring the justice system is appropriately balanced.”

That is in the section of the policy memorandum on corroboration. Do you—

The Convener: You are on camera, Professor Duff, and you are grinning, so you had better answer that one.

John Finnie: My reading of that is that the recommendation to refer that aspect to the Scottish Law Commission puts the rest of the bill in jeopardy. Do the witnesses have a view on that?

Professor Duff: My view is that it absolutely does not. It is only one substantive section and two other little sections of the bill. The main thrust of the Carloway report and the main thrust of the bill is to cope with Cadder, new arrest procedures, new representation at police station procedures and so on—that stands alone. The removal of the corroboration part would make no difference to the rest of the bill in my view.

11:15

The Convener: Given your disclosure that you want the issue of corroboration to be referred to the Scottish Law Commission, were the rest of you on the review panel happy with most of the other issues?

Professor Duff: There was more or less general agreement to the rest of the package.

Professor Chalmers: Not only do I not believe that, but I do not believe that the Scottish Government believes it either.

The Convener: Can you take that past me again? I do not believe that you do not believe that I do not believe? That is one of those—

Professor Chalmers: Yes; exactly.

The Convener: What exactly do you not believe?

Professor Chalmers: The Scottish Government has not taken forward all the evidential recommendations in Lord Carloway’s review. Lord Carloway made specific recommendations on the admissibility of confession evidence that the Government decided could be left out of the Criminal Justice (Scotland) Bill without destroying the “coherent package” that has been referred to, so the suggestion that the corroboration requirement cannot be taken out because it is all or nothing is not one that the committee should be persuaded by.

The Convener: I followed that.

Professor Ferguson: The jury verdict change is also not in the package as I understand it. The
package is a moveable feast, to mix some metaphors.

The Convener: A package is a moveable feast. That does not displace my moment of the day, which was the case of the judge who was pointed at when the witness was asked to identify the accused. I wish I had been there. John Blackie was the defence at the time, I take it.

Professor Blackie: Yes.

The Convener: You would not have been very happy. [Laughter.] Anyway, we should get back to business. I digress.

Sandra White: I would like to go over some issues in order to clarify where we are. We have established that the bill is not about abolishing corroboration per se, but is about removing the mandatory requirement for corroboration. We established that in last week’s evidence, when the convener said it.

The Convener: That is long since gone. We are all clear as a bell about that.

Sandra White: There is a second point that we all seem to agree on. In his submission, Professor Duff said that the corroboration “requirement has been so ‘watered down’ over the years, principally by judges” that it is “not nearly as strong a safeguard against wrongful convictions” as was previously claimed.

Professor Duff also said—I am quoting; I am not saying this—that “Additionally, the ‘fiddles’ that judges have created to get around corroboration have led to a confusing, illogical and inconsistent set of evidentiary rules which practitioners, including judges themselves, often have great difficulty in applying.”

If that is absolutely true and if, as Professor Ferguson said, there is a tick-the-box approach to dock identification, why is corroboration so important? Why is it the be-all and end-all? It is not in other jurisdictions, which have other safeguards. Why do academics including you, judges and so on say that we cannot get rid of corroboration? We have talked about victims, people who experience miscarriages of justice and the accused, as Professor Blackie mentioned. Why is there a big difference between academics, judges and lawyers, and victims, who feel that 3,000 cases of domestic abuse, rape and so on are not being heard because they do not meet the specific requirement?

Professor Duff: I will go first, because you quoted me. As I said, I am on the fence about corroboration. It is not the absolute guarantee against miscarriages of justice that it is often thought to be, because judges have been forced to water it down in order to secure or to open the door to convictions where they think that that is necessary. However, it still has some value in preventing miscarriages of justice.

I am not against getting rid of corroboration, although some of my colleagues may be. It is an important part of the Scottish criminal justice process—I will avoid the word package—and the collection of protections that are there for the accused.

If you are going to get rid of corroboration—which, as I said, I am quite open to—you have to think more holistically, as John Blackie said, about other protections that you might need to put in place. You need to examine other systems that do not have corroboration to see where to strike the balance between the right of the victims of an offence to expect a prosecution, the rights of the accused and, in fact, the rights of all of us not to be convicted wrongfully of a crime that we did not commit. All I am saying is that one has to have a proper look at this. We are not convinced that the Carloway review looked at the matter in the round.

Professor Chalmers: I do not want to put words in my colleagues’ mouths, but I am not sure that any of us would say that a criminal justice system “requires” corroboration. Clearly it does not; many systems around the world do not use corroboration. However, where the system of protecting people against wrongful conviction has been built around the corroboration requirement, you cannot simply withdraw that requirement and put nothing in its place. It is the foundation of the system that we have built up over the years. I appreciate the concern about victims not having cases brought to court, but it is in no one’s interests—victims or anyone else—to have a system that wrongfully convicts people for crimes of which they are not guilty.

Professor Blackie: We were talking earlier about the conviction rate in sexual offence cases. However, the bigger social problem is not the conviction rate but that many, many more sexual offences do not go to court. It might be thought that by abolishing the corroboration requirement, that will change. In my view, it will not, and there are other matters that we probably ought to be looking at urgently with regard to that whole area. The situation is deplorable, and I would be very worried if abolition of corroboration was being seen as a quick fix—which it would not be—to a serious social and justice problem.

Sandra White: Thank you for your comments. Professor Chalmers mentioned wrongful conviction. However, it is wrongful for victims, too, if evidence does not meet the criterion.
Safeguards have been mentioned, and the committee has been considering that issue. The panel mentioned a number of them, such as jury size and the issue of distress. Have any of you, as academics, been asked by the Government, the Law Society or anyone else what safeguards you would put in place?

Professor Duff: We have been asked here to give some ideas.

The Convener: I asked for a remit.

Professor Duff: As I said, I was on the Carloway expert reference group. One of the reasons, among many others, why I was there was to talk about that issue.

To follow up Professor Blackie’s point, there is another side to the coin. We are perhaps focused unduly on wrongful convictions—we talked about it earlier. The problem is that if a lot more prosecutions fail, we do not know what will be the impact on the victims; they may be very disappointed. We all appreciate that court can be a terrible ordeal for victims but, as we have seen, removal of corroboration would do nothing about that. They may go through that terrible ordeal and end up with the accused getting an acquittal, which the victims might see as a slap in the face—the jury not believing them—which would make their situation worse. One of the problems is that an increase in prosecutions—which clearly the Crown wants—may result in an increase in acquittals and more unhappiness on the part of victims so, rather than resolving the problem with a quick fix, the Government would have succeeded in making the problem worse.

Sandra White: I do not think that I have a right to tell a victim that they cannot be heard in court and that their case cannot go forward. I cannot see into the future and know whether victims will feel better or worse. We should not assume that if there is an acquittal, every victim will feel bad about it. We should perhaps look at some of the positives. Rape Crisis Scotland and others said that it might be worse for victims, but others said that victims might feel better.

We should get this right and make it clear that going to court is not always a negative thing. People’s experience can be positive, because they feel able to tell their story. They might not be believed, but at least victims would feel that there had been some justice.

I am sorry, convener. That was a statement rather than a question.

The Convener: The simple point is that we do not know. As we have thoroughly aired the issue, we shall move on. Roderick Campbell is up next.

Roderick Campbell: Good morning. What are your views on the new prosecutorial test and the evidence that was given by the Lord Advocate on 20 November on the Crown’s general approach to evidence and the need for supporting evidence before reaching a view as to whether there would be a reasonable prospect of conviction?

Professor Chalmers: The test that is outlined in the Crown Office’s evidence is sensible; indeed, it is probably the only test that could have been proposed in the absence of corroboration and is consistent with what happens south of the border in England, where corroboration is not required. However, it would be wrong to suggest that it offers additional safeguards. All it does is ask the question that the prosecution would have to ask in the absence of the requirement for corroboration.

As for the need for supporting evidence, I do not understand the position that there should be no requirement for supporting evidence but that, without it, prosecutions will not go ahead. That is simply incoherent.

The Convener: Incoherent. That is a wonderful word. Does anyone else wish to comment?

Professor Duff: I agree entirely with Professor Chalmers. Just as people have objected to the removal of corroboration without its being given sufficient thought, those who are in favour of retaining it keep changing their arguments and have found themselves in some very inconsistent positions. As we have said, we are not clear about the difference between corroboration and supporting evidence. If we do not need corroboration but need supporting evidence, one has to ask what that supporting evidence is. Actually, it is simply corroboration by another name, which is the position in most other jurisdictions. In short, therefore, my answer is yes—the position is incoherent.

Roderick Campbell: The bill makes no provision for any additional safeguards, for want of a better word, in relation to summary cases—which of course make up the majority of criminal cases—if the mandatory requirement for corroboration were to be removed. Do you have any comments about that?

Professor Ferguson: One might argue that if corroboration is to be abolished it should be done for summary cases; after all, although they form the bulk of the work of the courts, the stakes are not as high as under solemn procedure. I find it more worrisome that someone could be convicted of a very serious offence under solemn procedure without corroborated evidence. Again, a law commission or expert body could consider whether there is an argument for taking a more nuanced approach and saying that some crimes or forms of evidence need corroboration, instead of its simply being abolished across the board.
Professor Duff: As Professor Ferguson said, the stakes in summary cases are not as high. The other point to make is that decisions about guilt or innocence in such cases would be made by sheriffs, who are experienced lawyers and who will—we assume, perhaps without justification—be well able to see the failures in witness testimony and realise that witnesses who have come across as being credible are actually not. Because sheriffs will be more aware of such dangers, the real danger is that a jury will be taken in, as it were, by a very plausible witness who presents well in court but who is simply not telling the truth. A sheriff is less likely to be taken in by that sort of witness.

Professor Blackie: Of course, not all summary cases are presided over by sheriffs; some are presided over by justices of the peace. One might consider whether, in such cases, it would be better to have three justices instead of one.

The other issue is the use of resources in small cases. As the Carloway report points out, the police do not devote a lot of resources to getting corroboration in summary cases for the very obvious reason that, as has been pointed out, there is such a huge number of them. That, again, might be an argument for taking a different approach to summary cases.

Professor Chalmers: Anecdotally, a number of sheriffs have said—I think that one went to print with an example—that they have heard summary procedure cases in which they found a first witness’s evidence to be persuasive and convincing and would have been prepared to convict based on that evidence. Only when a second witness gave evidence did they realise just how shaky and unreliable the prosecution case was, and that the standard of proof beyond reasonable doubt had not been met. If corroboration were abolished, I would be surprised if the Crown would continue to call such second witnesses.

11:30

Roderick Campbell: I am conscious of the time, so I will move on to a question about the Scottish Law Commission’s role. I recently took the opportunity to review my book collection and came across Professor Raitt’s excellent book on evidence—I think that it is a 1990s edition. In it, you refer to the background to the abolition of corroboration in personal injury cases. Can we deduce from that that reference to the Scottish Law Commission is not necessarily the answer to all our problems?

Professor Raitt: I suppose that that must be true. The composition of the Scottish Law Commission changes, and most people have quite firm views, one way or another, on corroboration. Perhaps Peter Duff and I are no different; I, too, feel pretty much that I am on the fence in that I do not think that a great deal will change if corroboration is abolished. I may be completely wrong about that, but I think that the pull of relying on familiar culture will mean that we will not see a great change. However, I may be wrong; let us not put any money on that.

To answer the question a bit more fully, I think that the Law Commission would welcome the matter being referred to it. I am sure that it must feel that it was extraordinary that its “Report on Similar Fact Evidence and the Moorov Doctrine” came out at the time when the Carloway report came out. I suppose that the two had not really been speaking to each other because of events, but it seems to me that that very important Law Commission report got buried in respect of the media attention that it received and of attention to it in literature. A referral back so that the matter could be opened up in a wider context seems to me to be a much more sensible way forward.

Professor Blackie: I recently read the Hansard debates on that early legislation. Things have changed a great deal. That was the first-ever piece of work by the Scottish Law Commission. In its preliminary work—it was called “the memorandum” in those days—it recommended abolition of corroboration in personal injury cases but in the report, which was extremely brief, that suddenly changed to abolition of corroboration in everything. The proposals were introduced in the House of Lords, and Lord Reid was a Scottish judge there—they were political in those days, of course. Basically, the proposals were ripped apart because of that. All the research on the suggestion had been done in relation to personal injury. I honestly do not think that that example is a good guide as to what would happen today.

Roderick Campbell: Okay.

Professor Duff: It is interesting that it was thought appropriate, in order to get rid of corroboration in civil cases, to refer the matter to the Law Commission for its due consideration. It has always been accepted that corroboration in criminal cases is more important, which is why it has remained. Therefore, it seems strange that where removal of corroboration would be less important, the matter goes to the Scottish Law Commission for full consideration, but where removal of corroboration is more important, it does not.
The Convener: Are you finished?

Roderick Campbell: I would like to wrap up generally.

We have touched on the safeguards a couple of times this morning, but no one has really been drawn on the matter. Is that because you feel simply that the bill is misconceived? Why will you not be drawn on the question of what safeguards could improve the bill?

Professor Chalmers: Safeguards could not be dealt with adequately during the passage of the bill. The question is very complex and would require extensive comparative research. That could be done quite quickly—I do not agree with Professor Duff that it would tie up the Law Commission for five years—but the matter could not be dealt with by way of amendment to the bill.

The Convener: Were you being frivolous, Professor Duff?

Professor Duff: I was being frivolous.

The Convener: Can you amend what you said? How long do you think such work would take?

Professor Duff: I renege on my previous comment.

The Convener: Are we talking about a year? It is a serious point.

Professor Duff: How long did the SLC’s report on similar facts and previous convictions take? I think it was a couple of years.

Professor Raitt: Yes.

Professor Duff: I think that a couple of years would be a realistic time.

The Convener: Do the other panellists agree?

Professor Chalmers: It could possibly be done a little quicker than that, but it would depend on the Law Commission’s other commitments, on which I do not have information.

Professor Raitt: It struck me when looking at the options on safeguards that that is where we would see the interconnectedness of the rules of evidence unravelling. For example, hearsay evidence might become more important as part of the supporting evidence, which could be a disaster because the rules for hearsay evidence are even worse than those for corroboration.

The Convener: Yes. I remember doing essays on hearsay way back in the mists of legal time.

Michael McMahon is giving evidence next on his member’s bill. I know that this is the tail end of this evidence session—do not look at the clock. Could the panel comment on the advantages and disadvantages of the three-verdict system, on whether abolition of the not proven verdict should be considered, and on what would be the most appropriate time for such abolition? I know that the Government is considering referring the matter to the Law Commission. Professor Duff is a man who gets into the fray.

Professor Duff: I have written about the not proven verdict in the past and said that it should be abolished. That has been considered at least twice in the past 20 years. However, for reasons that are not clear, it has been kept; it is probably because of a historical fondness for the fact that it is very different. To me, though, the presumption of innocence leaves no room for the not proven verdict. In a trial, someone is either found guilty or the presumption of innocence means that they must be found not guilty. There is no room for a kind of second-class acquittal that states “Well, we’re finding you not guilty, but we’ll leave you with a bit of bad press hanging around your name.”

The Convener: What should be the route for abolishing the not proven verdict?

Professor Duff: I would be quite happy for it to stay in the bill, although it has come in by complete accident. However, it has been considered often enough before. Frankly, I do not think that it is important enough to go to the Scottish Law Commission.

The Convener: That provision is not in the bill.

Professor Duff: Is it not?

The Convener: It is in a member’s bill.

Professor Duff: Right—it is in Michael McMahon’s Criminal Verdicts (Scotland) Bill. I thought that it had been put into the Criminal Justice (Scotland) Bill along with the provision on changing the majority verdict, but I acknowledge that it is a separate matter. I would just treat it as an issue on its own merits, then.

Professor Ferguson: I agree that the not proven verdict does not need to go to the Law Commission and that it should be abolished. The biggest problem with the verdict is that jurors are not told by judges what it means specifically. When we talk to first-year law students about what the not proven verdict means, quite a number of them assume that it means that the Crown has not established the case beyond reasonable doubt, which means that the jury could not make up its mind and the Crown could have another bite at the cherry. That is quite wrong. People do not appreciate that the not proven verdict is the same as a not guilty verdict. It is a historical anachronism and we should get rid of it.

The Convener: I am asking you to consider the impact on abolishing the requirement for corroboration of absorbing into the bill the abolition
of the not proven verdict. Is that one of the other things in the mix? Could it be done separately?

Professor Ferguson: It could be done separately; in my view, the two proposals are unrelated.

The Convener: That is fine.

Professor Raitt: I agree that the not proven verdict should go because it does not add anything.

Professor Chalmers: If juries are doing what they are asked to do—we must assume that they are; if they are not, we have other serious problems—then they must consider whether a case is proved beyond reasonable doubt. If so, they convict. If not, they do not. If they do not convict there is then the question of what acquittal they reach. On that basis, abolishing the not proven verdict would make no difference whatever. I agree that there is absolutely no reason for it to go to the Law Commission, and I cannot see any rational reason for retaining the verdict.

Professor Blackie: Another reason for abolishing the not proven verdict is that only about 10 per cent of acquittals are based on not proven verdicts, so it is not very common. Historically, it might have been better that we had the two verdicts of proven and not proven; there was no emotionally loaded language. We have the not proven verdict because that is what we had before the middle of the 18th century.

The Convener: The number of not proven verdicts is quite high in rape cases.

Professor Blackie: It is correct that the proportion is higher in rape cases than in others.

The Convener: It is 20 per cent.

Professor Blackie: Yes. It is interesting that the percentage is out of line in rape cases, which obviously says something.

The Convener: Yes.

Professor Blackie: In my ideal world, we would have two verdicts—proven and not proven—with no emotive language attached. It is has been well charted that the not guilty verdict came about by historical accident in the middle of the 18th century when a jury asked whether it could follow the English approach and bring in a verdict of not guilty, so it is anachronistic. That is particularly the case now that we have abolished the double jeopardy rule, which means that there can be retrials.

The Convener: Yes. Thank you very much, panel. I am glad that we managed to have that discussion, which Michael McMahon can hear about in the next evidence session.

Meeting suspended.

On resuming—

The Convener: I welcome to the meeting Michael McMahon MSP, who, as members will know, has just introduced his Criminal Verdicts (Scotland) Bill. We will be scrutinising Mr McMahon’s bill at a later date, but there is some crossover between his bill and the Criminal Justice (Scotland) Bill and it will be useful to hear his views.

Given that I do not know how many parts your bill has, Mr McMahon, it would also be useful if you could explain what it does. As you will know, the previous panel endorsed the abolition of the not proven verdict. There you are, then—you start from a very good position.

Michael McMahon (Uddingston and Bellshill) (Lab): I certainly welcome that support, which is in line with the support that I received for the bill in general.

The bill, which has two main provisions and runs to only a page and a half, is very simple and will not be the most technically demanding piece of legislation that a committee has ever considered. Section 1 removes one of the acquittal verdicts, while section 2 amends the size of the majority in juries. In the responses that I received on that matter, some pointed out that there was no correlation between juries and the removal of the second acquittal, while others argued that, for a variety of reasons, it was important to take such changes into account. I am happy to explore those issues if members wish to fire questions at me.

The Convener: Indeed. Questions, please.

John Finnie: Is public perception an important part of your motivation for introducing the bill, Mr McMahon? I should also say that I share your view on the matter.

Michael McMahon: It is important. We need to have confidence in our judicial system and I believe that the third verdict is illogical and creates confusion. Sheriffs in our courts are not allowed to explain to the jury what the verdict means; in fact, when they have done so, it has led to action being taken against them and cases being reviewed. The verdict itself is set out only in common law, not in statute. That is creating confusion and we need to get clarity into the system so that people can have confidence in it.

That is why section 2 of the bill is so important. People need to have confidence that a jury has considered the evidence and found, one way or another, beyond a reasonable doubt. A simple
majority leaves that question hanging. As the responses to my consultation made clear, the fact that very serious cases can be concluded one way or another on a straight majority needs to be looked at.

**John Finnie:** How would the two new verdicts be styled? I do not know whether you heard Professor Blackie’s comments on the matter.

**Michael McMahon:** I did not, but in my consultation I made the point that the original Scots law verdicts were proven and not proven and that it was the not guilty verdict that was added. However, it is only through custom and practice, the common law and common usage that these three verdicts are allowed in Scotland and, as a result, the current system exists by dint of history rather than through any considered decision on the matter. In short, we should bear it in mind that the system was not designed to be this way and, indeed, that is where I think part of the confusion arises.

The not guilty verdict was added to the proven and not proven verdicts and then the guilty verdict replaced the proven verdict. As I said, the system that we have now was not designed, but developed over about 400 years and we need to look at it. In my consultation I suggested that we could either revert to the original verdicts or, given how controversial the not proven verdict has become, move away from it altogether and have only guilty and not guilty. Most people preferred the latter option but I am open to being persuaded that we retain proven and not proven in order to have a distinctive Scots law system. However, the danger is that the confusion about the not proven verdict would be carried over. A clean break might be better.

**John Finnie:** When we discuss juries, we always hear about the lack of research into their integrity and ability. Have you come up against the same issue with regard to your bill?

**Michael McMahon:** It is a very difficult issue. In fact, I could not use a number of responses to my consultation because people are not allowed to comment on what happens within a jury. There are academics who have commented on their own knowledge and experience of the issue but, although I could tell the committee many anecdotes that I heard about people’s experiences of serving on a jury—

**The Convener:** You are not allowed to, Mr McMahon.

**Michael McMahon:** Exactly. Because that evidence is purely anecdotal, it has not been included in my consultation findings.

**Elaine Murray:** Section 2 of your bill is pretty much identical to section 70 of the Criminal Justice (Scotland) Bill on changing jury verdicts, which has been included partly as a safeguard should the requirement for corroboration be removed. Do you feel that the argument with regard to your proposal on jury verdicts is a separate one and that the change is required, even if the proposal to remove the requirement for corroboration is referred back?

**Michael McMahon:** When I consulted on the removal of the third verdict, respondents also raised the issue of juries. I think that only one or two academics who responded said that juries should be looked at in terms of the third verdict and corroboration. Most respondents focused on the third verdict and juries. One academic said that, regardless of whether we change the law on corroboration or the third verdict, we should look at juries anyway, because the straight majority requirement raises questions about whether a conclusion has been arrived at beyond reasonable doubt.

**Elaine Murray:** The previous panel seemed to suggest that the not proven verdict was being referred to the Scottish Law Commission for consideration. Have you had any discussions with the Government about that?

**Michael McMahon:** The matter is reviewed periodically and, in my experience, the conclusion has always been that it should not be addressed. Again, despite the consultations that we have had and the commissions that the Scottish Government has set up—the Carloway commission and others—the not proven verdict has never been addressed. Although it is always a matter for conjecture and discussion, it has never progressed to consideration by a formal commission or by the Scottish Government in any of its consultations.

The Criminal Justice (Scotland) Bill does not refer to the matter at all but focuses on the verdicts—although, as I said, some people have made a connection between the two issues.

**The Convener:** The Scottish Government states in the policy memorandum that accompanies the Criminal Justice (Scotland) Bill that, in response to its consultation on whether the not proven verdict should be abolished,

> “a significant minority of respondents were concerned that time should be given to allow the impact of implementing Lord Carloway’s recommendations to be assessed before making changes to the three verdict system.”

We may end up with a criminal justice bill that includes the abolition of the requirement for corroboration and a change to juries, or we may instead end up with a bill that leaves out the issue of corroboration and possibly jury size too. That clutters up what you are doing in a sense. I am sympathetic to your position, but I do not know
how we can disentangle your proposals from what has been included in the Criminal Justice (Scotland) Bill. Apparently, from the evidence that we received, it seems that there was not a great deal of research behind the proposed change to a majority of 10 out of 15 jurors; that just sort of came about.

I am not saying that your proposal in that regard just came about, but that is what happened with the Criminal Justice (Scotland) Bill. How do you reconcile that? What if the bill addressed just the not proven verdict on its tod, as it were, and did not touch juries? The jury issue is a difficult one for me.

Michael McMahon: I consulted twice on my proposed bill. The first consultation did not focus much on juries, but the information that I received made me realise that the jury aspect could not be disentangled, so I decided to have a second consultation as I felt that we needed to consider the issue much more thoroughly than had previously been the case.

The original consultation focused purely on the removal of the third verdict, but the issue of juries was a prominent feature in the responses that I received. I took stock of that, and carried out a further consultation on a proposal to introduce a bill in two parts, specifically because of those two issues.

I am aware of the legislation that the Government has introduced on previous occasions, and I have waited on it doing some work on the not proven verdict. However, I felt that it was time to move the issue forward, which means having to address the issue of juries—

The Convener: I appreciate that.

Michael McMahon: We will just have to wait and see what impact the Criminal Justice (Scotland) Bill will have.

Taking part 1 of my bill into the Criminal Justice (Scotland) Bill could be considered, depending on the committee’s findings and on whether the Government thinks that there has been sufficient consultation to allow it to incorporate my proposal on the third verdict as we move forward.

Sandra White: Good morning, Michael—it is still morning. I am very supportive of the context around your proposed bill, and I have learned some interesting historical facts from you and Professor Blackie—for example, that our verdicts were proven and not proven until 400 years ago, when we took on the English legal terms of guilty and not guilty. Funnily enough, I have said that we should perhaps just go back to the verdicts of proven and not proven, as you mentioned. We might want to have a wee look at that.

We have discussed the jury issue, and you said that you went back out to consultation on that subject. Was that because it could be part of a safeguard if you got rid of the not proven verdict?

Michael McMahon: Some people have suggested that that could be considered as a safeguard. If we removed the third verdict and left the simple majority, that would be a concern to a number of people. That was highlighted quite clearly. It was pretty much a response to those questions being posed in the first consultation.

Sandra White: The Government has said that it is supportive and that perhaps it will go to the Scottish Law Commission. Can you give us a timescale for when you would like to see your bill being passed? If the issue went to the Scottish Law Commission would your bill take longer to go through?

Michael McMahon: That might well mean that it would take longer. However, convener, I am in your hands because the committee’s work programme dictates whether my proposed legislation could be fitted in anyway. I am certainly open to having a discussion about how quickly the bill could be introduced. Whether it would have to wait on a Scottish Law Commission investigation would be worth considering.

We have been here for 14 years and looked at an awful lot of legislation. This is one of the most controversial areas of the judicial system—

12:00

The Convener: Not quite.

Michael McMahon: One of.

The Convener: Close.

Michael McMahon: It is one of the most controversial aspects of the Scottish judicial system and we have never looked at it. I feel that we have to address the issue of the not proven verdict, one way or another.

Sandra White: I want to clarify something convener, because I do not know whether I have overstepped the mark.

The Convener: You never do that, do you?

Sandra White: I just wanted to clarify that the Government has indicated that it agrees in principle with the Scottish Law Commission that a review should be carried out.

The Convener: I think that I said that, but I know that no one ever listens to me so I do not take it personally.

Sandra White: I wanted to clarify the point for Michael McMahon.
Michael McMahon: I am aware that that is under consideration.

The Convener: You will understand that if your bill progresses, its second part would change jury verdicts and there is another piece of legislation that does that. The committee might want to consider that when we review our work programme. The jury issue is the main issue for the committee and we are exploring that area in our scrutiny of the Criminal Justice (Scotland) Bill.

However, you had good support, as you know. Do feel free to come to the committee the next time.

Michael McMahon: I did not want to overstep the mark.

The Convener: Oh no, no. We are very relaxed in here; too relaxed sometimes. I thank you. You have been very helpful.
On resuming—

Criminal Justice (Scotland) Bill: Stage 1

The Convener: Time presses, so we will move on to agenda item 4, which is another evidence session on the Criminal Justice (Scotland) Bill, on court procedure provisions. I welcome Sheriff Principal Edward Bowen, who conducted the review of sheriff and jury procedure, Morag Williamson, project manager to the review, Stewart Walker, the Scottish Court Service secondee to the review—I have never got to say the word “secondee” before; what a lovely word—and Gerry Bonnar, secretary to the review. I understand that the sheriff principal wishes to make an opening statement.

Sheriff Principal Edward Bowen (Review of Sheriff and Jury Procedure): I shall be brief. Thank you for inviting me here this morning. I begin by saying that I have been retired for two and a half years.

The Convener: Have we dragged you out of retirement for this?

Sheriff Principal Bowen: You have indeed, so please forgive a certain rustiness on my part. I have been involved in criminal cases in the High Court during that period, but I have been out of touch with what has been going on in the sheriff court. However, I am accompanied by three members of the team who assisted me with the review, who are well up to speed and more than capable of keeping me right.

The Criminal Justice (Scotland) Bill contains only a few provisions that arise from the report, because many of the recommendations relate to areas of organisation and practice that do not call for statutory provisions. As you might be aware, the main problem that was identified and addressed in the report was the waste on a large scale of the time of victims, witnesses, police officers and others who are required to appear at trial diets that do not proceed. The report proposed that that be dealt with by the introduction of a system that is in line with High Court practice, whereby cases are indicted to a first diet, with trials assigned only if the case is likely to proceed.

I also wanted first diets to be effective, so I recommended a statutory duty on fiscals and the defence to meet face to face before service of the indictment. That recommendation has not been accepted in its terms, but the new provisions will introduce a statutory obligation to communicate within 14 days after service of the indictment, and will require the lodging of a joint statement of
preparations two days before the first diet. I understand the reasoning behind that and I am content with those proposals, although they do not exactly reflect what I recommended.

Beyond that, the remaining provisions in the bill are, in the main, consequential on that change of procedure—in particular, the proposed removal of the 110-day rule and its alteration to 140 days, which might give rise to some issues. That is all that I wish to say at this stage. I hope that that helps to set the scene.

**John Finnie:** Does your decision that business meetings should be compulsory indicate failure under the existing system?

**Sheriff Principal Bowen:** In a word, yes. I heard a lot of sheriffs say that they gained the impression that the first time that the Crown and the defence spoke to each other was at the first diet and not before then. I heard from defence solicitors who said that they could not get hold of fiscals and from just as many fiscals who said that they had difficulty in speaking to defence agents when they wanted to. The clearest possible way forward was to place a statutory duty on both parties to communicate.

**John Finnie:** To what extent did you determine—if you determined it—that demands on staff in the Crown Office and Procurator Fiscal Service contributed to the lack of communication?

**Sheriff Principal Bowen:** It was difficult to get to the bottom of that. At times, one felt that the cause boiled down to the inappropriate operation of telephone lines—to something as basic as not being able to get through on the phone.

I cannot help but feel that the pressures that the present system generates as a result of all the work and scurrying around that must go on at trial diets—because everything is resolved at the last minute—must have a backlash further down the line. Fiscals who ought to be available to speak about cases at an early stage of preparation are too busy trying to sort them out when they are due to come to trial.

**John Finnie:** Telephone contact has been raised with me as an elected representative. The situation is similar in Police Scotland, which has a centralised telephone system. Is the issue as stark as that? Do the defence and the fiscal exchange direct line numbers?

**Sheriff Principal Bowen:** I heard from defence agents that they had been provided with hotline numbers that did not work. That was the position three or four years ago, but I know that communications have improved since then, particularly by email. I would not like to rely too heavily on what I said about my fairly limited communication findings.

**John Finnie:** Could it be said that you are trying to replicate the High Court model?

**Sheriff Principal Bowen:** Indeed. Aspects of the High Court model are acknowledged to be a considerable improvement—particularly the fact that trial sittings now proceed. In the main, the trials that are set down now go ahead. The figure is not 100 per cent, but it is a vast improvement on the situation before Lord Bonomy reported. I take the same line.

**John Finnie:** The High Court system is not without its frailties.

**Sheriff Principal Bowen:** It is not perfect.

**John Finnie:** Did you suggest any enhancements on it for the sheriff and jury system?

**Sheriff Principal Bowen:** The statutory duty to communicate goes beyond the High Court system, as does the written statement of preparation. That structure is more formalised than that in the High Court.

**The Convener:** I know that an act of adjournment is to be made, but what information do you expect to see in the written statement of preparation to assist in accelerating cases and preventing delays and adjournments?

**Sheriff Principal Bowen:** That will vary from case to case, but the basic starting point is the witnesses whom parties will require, as not every witness who is on a list that is appended to an indictment ends up giving evidence—far from it. The defence might say that it has not received sufficient information about the interpretation of mobile telephone evidence and that it needs further time to consult an expert or look into that. If there were vulnerable witnesses and special measures were needed to take their evidence, I would expect that to be included. I would also expect to see general issues that relate to forensic evidence and whether the fiscal and the defence have discussed any resolution of the case.

10:15

**The Convener:** I see that the written record is to be lodged not less than two days before the first diet, although there is shrieval discretion. The bill states:

“The court may, on cause shown, allow the written record to be lodged after the time referred to”.

What would happen if it was not lodged and the sheriff was angry about it and thought, “I’m not exercising my discretion here”? [Laughter.]
The Convener: Oh, believe you me, I have been on the other end of it.

Sheriff Principal Bowen: We agonised long and hard over the question of sanctions, both for the defence and the fiscal, if the document is not lodged, and we came to the conclusion that it was virtually impossible to come up with an appropriate sanction.

It is very much a matter for sheriffs to take a strong line, making it clear that, if that is not done, not only the court but the public will be inconvenienced. They can appeal to people’s consciences on the matter.

The Convener: So you think that the sharp edge of the court’s tongue will suffice.

Sheriff Principal Bowen: That puts it very nicely—yes.

The Convener: That expression was once used to me, which is why I remember it. It is ingrained, although it was directed not at me but at the other party.

Sandra White: I welcome your report, Sheriff Principal Bowen, having been on the sharp end of witnesses, you might say. I am sure that others here have been there, too. The churn and the lack of communication between prosecution and defence need to be dealt with for the sake of victims, witnesses and the general public, so I very much welcome your report.

I understand the point about the compulsory business meetings. Perhaps the word “compulsory” was too strong, but I think that we have to knock a couple of heads together—perhaps that is the wrong phrase—to make sure that people are speaking to each other.

John Finnie talked about replicating the High Court system. However, the Law Society of Scotland has questioned whether a system that works comparatively well in the High Court can be transferred to sheriff and jury courts. Do you have any comment on that? Are there any other reforms that might produce a culture of knocking heads together in the judiciary to stop the churn in the courts?

Sheriff Principal Bowen: First, in my view, there is a lot to be said for sheriff and jury procedure and High Court procedure being the same. We have a summary system of justice and a solemn system of justice. Purely from the point of view of professional familiarity, it makes sense not to subdivide solemn procedure again and to have different types of procedure for the two courts.

Secondly, the culture that you speak about should plainly be common to both courts. A number of cases start life on petition and one does not know whether they will be heard in the High Court or in a sheriff and jury court, so there has to be a degree of common approach in all cases.

The third factor is in fact a joint factor. Not so long ago, the sentencing power of sheriffs was increased from two years to five. It is likely that, when the wider reforms that were proposed in Lord Gill’s review go ahead, a much larger volume of cases will be dealt with by sheriffs. The fact of the matter is that, at the top end of the sheriff and jury scale, in terms of seriousness and complexity, there is not much to choose between the cases that go through that court and the cases that proceed in the High Court. The argument in favour of making the two systems pretty much the same is quite compelling.


Sandra White: I would like to do that, actually.

Margaret Mitchell: Having been on the Justice 1 Committee when the Bonomy reforms were first considered, I was supportive of the preliminary hearing to ensure that everything was in place and ready to go to trial. However, some concerns have been expressed about how practical it would be to replicate the system in sheriff and jury cases, given that the numbers of solemn cases are much higher in the sheriff courts. For example, last year, 691 people were found guilty in the High Court compared with 4,298 who were found guilty under solemn procedure in the sheriff courts. Does that huge difference in volume cause any concerns about whether it is practical to undertake the compulsory business meeting?

Sheriff Principal Bowen: When one starts to look at volume, one gets a picture of an even greater problem in the sheriff court and of the time wasted when trials do not go ahead. The numbers are quite revealing. Off the top of my head, I think that we were talking about expecting something like 1,200 cases out of 8,000 to go on. The difference is huge. The downtime—the time when the sheriff court programme is set aside for sheriff and jury trials that do not take place—is considerable. I think that I have a figure for that somewhere. [Interruption] I will find it.

If more of that wasted time was devoted to preparing cases, that is to say, if the maximum effort went in at the earlier stage, the overall saving in not only court time but witness inconvenience time would more than justify the fact that more time would be spent at the first diet and preparation stage—that would be inevitable—but that is the improvement in the system. There were 1,750 days programmed in Glasgow in 2009 and only 780 days were used. That is an awful lot of court time that had to be moved at the last
minute and could be used much better at a different stage of the programme.

The Convener: Sheriff principal, other members of the panel can give evidence if they wish or provide data. It is just an evidence-taking session, so anyone can speak.

Sheriff Principal Bowen: Thank you.

Margaret Mitchell: Are you saying that, instead of tabling everything automatically and discovering at the last minute that there was no case to answer, there would be a much more realistic prospect of everything being in place? Is the answer to the huge volume that the same number of cases will not appear?

Sheriff Principal Bowen: I am happy to accept the view that the volume means that a lot of time will be spent at first diets and that that will have to be managed, but my answer is that it will save a lot of time further down the line.

Margaret Mitchell: Is there any resource implication? Does the closure of sheriff courts create any additional pressure?

Sheriff Principal Bowen: There must be a resource pressure on the Crown Office and Procurator Fiscal Service to change the way that it approaches matters. In preparing the report, I got a great deal of support from the COPFS and its response to the report was positive. I understand that it is still behind the proposals so, whatever the resource implications for it are, it is prepared to address them in the interests of efficiency.

I am sorry, what was the second part of your question?

Margaret Mitchell: Will the sheriff court closures have an impact?

Sheriff Principal Bowen: I do not think that there is any significant implication in that the courts that are scheduled for closure are, in the main, those with a low volume of sheriff and jury business, whatever else they might have done. Under the proposals in the Gill review, the movement towards centralised sheriff and jury business is inevitable. Indeed, as I understand it, the Crown Office has reorganised its system to make it more centralised. I do not think that changes in the sheriff and jury system raise any issues in terms of the court closure programme.

The Convener: I noticed that the panellists were in the public gallery when we were dealing with criminal legal aid earlier. It may not be within the remit but, broadly speaking, would there be any savings to criminal legal aid if we stopped having so many delays?

Sheriff Principal Bowen: I would not like to put money on that. I think that there will be substantial savings in the amount of money that is paid out to witnesses who turn up needlessly and the amount of police overtime—that sort of area. I would not like to make a prediction about legal aid.

The Convener: There may very well be savings to other areas of the criminal justice system.

Sheriff Principal Bowen: I would be very disappointed if there were not.

The Convener: Apart from more accelerated justice.

Sheriff Principal Bowen: Yes.

The Convener: Mr Bonnar, you are nodding.

Gerry Bonnar (Review of Sheriff and Jury Procedure): I am nodding. I am looking at paragraph 7.16 of the report, in which we calculated the numbers of witnesses who might be saved attendance, depending on several models. If an average of three witnesses were cited per case, we calculated that 7,224 witnesses might be saved from citation—if saved from citation is an appropriate way of describing it. If the average was five witnesses, just over 12,000 would be saved from citation and it would be almost 17,000 if the average number of witnesses per case was seven. Those figures were based on assumptions—

The Convener: I feel an arithmetical problem coming on, in which we multiply all these witnesses by some figure and come out with another figure. We are not doing that just now. Do you have that figure? Do you have an idea?

Gerry Bonnar: Paragraph 7.16 of the report sets out potential numbers of witnesses—

The Convener: But not in cash.

Gerry Bonnar: Not in cash; no. Sorry.

The Convener: That is the bit that I am thinking about. We can do that later.

Gerry Bonnar: Further modelling would—

The Convener: Yes, but there is obviously a real cost saving in this, and I presume that there is a saving in court time and sheriffs' time. Is there?

Sheriff Principal Bowen: I would like to think that they would be doing something else.

The Convener: Heaven forfend! I thought that you were away knitting or something instead.

Sheriff Principal Bowen: I am sure that their time would be filled. They would be more productive, because they would not be sitting in their chambers, waiting to find out whether or not a case was going to start.

The Convener: Yes. I hasten to say that I have not seen knitting pins in sheriffs' chambers. That was just a metaphor for time passed casually.
John Pentland: Sheriff Principal Bowen, you said that you were two and a half years out of the system. Please excuse me if you are feeling a wee bit rusty. I advise you that I am 20 years out of the steelworks and if you think that you are rusty, how do you think I feel? [Laughter.]

In your report you recommend the establishment of a compulsory business meeting and you advise that that would be appropriate. Should sanctions be applied if people fail to attend compulsory business meetings?

Sheriff Principal Bowen: The compulsory meeting recommendation was not picked up in the bill. Instead, there is a statutory obligation to communicate—whatever way you do it—and I can see the thinking behind that. I am quite happy with it.

In my answer to the question about the lodging of the joint statement of the state of preparation I spoke about sanctions. We also wondered about sanctions for not communicating and again came to the conclusion that it was a matter for sheriffs to take a firm line and point out that the obligation to communicate is a professional statutory duty and that it would let everybody down not to do it.

By and large, everyone I spoke to in the profession appreciated that it was the right thing to do. It is not something that is being forced on defence solicitors or fiscals; they want to do it. I do not have the notion that they will say, “This is all too much,” although resource problems are possible. I hope that, with the enthusiasm that the Crown Office has shown, it will pick that up without difficulty.

John Pentland: If that is picked up, do you believe that the evidence that is used in the business meetings could be taken to court?

10:30

Sheriff Principal Bowen: It will not be evidence as such, although areas of agreement that are reached at the business meeting might then be put before the court formally. Usually, there is a joint minute of agreement that sets that out, which in itself avoids the need for witnesses to come forward. So part of the benefit of the process will be the early identification of the areas that can be agreed without the need to call witnesses to deal with them.

Roderick Campbell: Do you foresee any difficulties in changing the culture of defence solicitors, fiscals or the shrieval bench in relation to the provision?

Sheriff Principal Bowen: With fiscals, there should be no difficulty, because they are very much in favour of it. The defence agents who were involved in the review, particularly those from the Glasgow Bar Association, were all in favour of early engagement, so I do not think that there will be a difficulty with them.

Sheriffs also see the need to resolve cases early. There will have to be a change of programming because, at present, in some courts, sheriffs hear up to 40 first diets a day. That will not be possible with the system that I propose. I have indicated that each first diet needs at least 15 minutes. So if the day is not to be unbearable, the number of first diets will have to be brought down to 20 or fewer—18 is probably realistic. Given the sheriffs’ acknowledgement of the benefits of the system, provided that they get the time to do it, I think that they will happily do their best to make the system work.

Roderick Campbell: So you do not foresee difficulties in ensuring that the written record of the state of preparation is lodged timeously. Will it be down to sheriffs to try to ensure that it happens in practice?

Sheriff Principal Bowen: If there are difficulties, pressure can be brought to bear, although I would like to think that doing so in open court would be the last resort. In the course of the review, I visited a number of sheriff courts. In the one that was working the best—I am happy to flatter the sheriffs there by saying that it was Kilmarnock—there was a good working relationship between the sheriffs, the fiscals and the local bar. In my view, they all pulled together well. That is the sort of local co-operation that I see as necessary to make the system work, and the proposals in the bill will help people to do it.

Roderick Campbell: How will we measure success and when should the system be evaluated?

Sheriff Principal Bowen: The only true measure of success will be when every single sheriff court jury trial that is set down for trial proceeds to a conclusion. We will never quite get to that, because some people will always change their minds when they get to the door of the court, but if we have a marked reduction in the figures that we have mentioned this morning on wasted time at trial diets, the system will have succeeded.

Gerry Bonnar: For completeness, I add that chapter 10 of the report makes recommendations on monitoring and evaluation.

The Convener: We will of course speak to the participants in the process in the next panel.

Margaret Mitchell has a question. She has told me that it is very short, so this is a test—I want to know whether it is short. Sandra White is the master of short questions.

Margaret Mitchell: Okay.
Sheriff Principal Bowen, you recommended increases in the time limits for various stages of solemn cases. In effect, that was because people cannot pack in more and prepare effectively without that. In an ideal world, would you have preferred the resources to be increased to meet the current time limits?

Sheriff Principal Bowen: The obvious answer is yes, but it is difficult to see that happening. The starting point in Scotland is the time limit that Lord Bonomy referred to as the jewel in the crown, which is the fact that we do not keep people in custody for more than 80 days without telling them what the charges are. The indictment has to be served within 80 days. When you think about it, in a case of some complexity, that is a very short interval of time. It is what follows from that that necessitated the recommendation that the 110-day limit be raised to 140 days.

In the current climate, in which cases are far more complex because of things such as DNA analysis, mobile telephone analysis and closed-circuit television, it is difficult to see how our timescales could be any shorter. To keep the 110-day limit, we would have to reduce the 80-day limit, which I do not think is possible.

Margaret Mitchell: That is helpful.

The Convener: That was quite a short question, although not the shortest.

I thank our witnesses for their evidence. I suspend the meeting for five minutes.

10:36

Meeting suspended.

10:41

On resuming—

The Convener: I welcome to the meeting our second panel on the Criminal Justice (Scotland) Bill: John Dunn, procurator fiscal, west of Scotland, Crown Office and Procurator Fiscal Service; Grazia Robertson, member of the Law Society criminal law committee, Law Society of Scotland; Michael Meehan, Faculty of Advocates; and Cliff Binning, executive field services, Scottish Court Service. Good morning to you all.

Margaret Mitchell: What are the implications of this reform for the Crown Office and Procurator Fiscal Service?

John Dunn (Crown Office and Procurator Fiscal Service): The implications for us include the opportunity to allow us to focus on the cases that actually require to go to trial, in the same way as we did in the High Court; the opportunity to reduce the number of witnesses who are brought to court; and the opportunity to have cases brought to trial on the first occasion, which will minimise inconvenience to witnesses and jurors.

There is also the opportunity to learn from the lessons of what happened in the High Court. I do not think that we can replicate that experience, because there is a different order of business in the High Court and in the sheriff and jury courts. However, we can be informed by the experience of what happened in the High Court, which Mrs Mitchell will remember from the Justice 1 Committee.

If we compare where we were with where we are now, there has been a very significant change. You will recollect that before Lord Bonomy started his report, 1,605 cases—at the highest and worst point—were indicted into the High Court per annum. There are now, on average, 750 cases being indicted into the High Court per annum and in 300 of those cases, evidence is required to be led in a trial. If we can capture a proportion of that in the sheriff and jury courts, where we get roughly 6,000 cases per annum, that will be a good place to be.

Margaret Mitchell: A number of witnesses in their written evidence have cited the Crown Office and Procurator Fiscal Service as being particularly under pressure, yet when we hear evidence directly from the COPFS there seems to be a reluctance to say that there is any pressure on resources. There are quite diametrically opposed views on that point.

John Dunn: We are living in times in which there is a requirement to make public sector savings, which inevitably puts pressure on us all. However, we have attempted to deal with that pressure by organising ourselves in such a way that we can cope with it. In the past—if I look at what I used to do back in 1989—I would do a little bit of this and a little bit of that. I would do some case marking, some summary trials, some sheriff and jury trials and some High Court preparation work. I was a jack of all trades and arguably the master of none.

We are now organised along lines of federations, or larger groupings of what used to be 11 areas. Within the federations, we are organised along functional lines so that we do a proportion of business that allows for some specialisation. There is pressure, but we have dragooned ourselves in such a way that we can try to accommodate that pressure in light of the savings that we have all had to make.

The Convener: Does anyone else want to come in on that? Mr Binning?

Cliff Binning (Scottish Court Service): No.
The Convener: You should not make little movements with your hands because I see you and think that you want to come in.

10:45

Michael Meehan (Faculty of Advocates): I was a full-time advocate depute for three years, which involved me preparing High Court cases for preliminary hearings. A point that has been made by all is that the scale is very different. In a four-week preliminary hearings cycle, an advocate depute will spend two weeks preparing cases and there will be two weeks in which hearings will take place but they will not be in court every day. On average, I prepared between 10 and 15 cases. That might seem to be a small number, but there could be five drugs cases with a huge number of productions, or murder cases in which every detail is very important. Even with that size of case load, the person who was preparing the case would have to read every single page of the productions and witness statements. That means that when we were speaking to the defence, we knew the case back to front when we were agreeing evidence and negotiating a plea.

A difficulty with the sheriff and jury model is that it seems highly unlikely that there could ever be a fiscal depute who was involved in dealing with sheriff and jury cases having that number of cases. If someone is not so well apprised of a case because of the sheer volume of cases that they have had to prepare, it is not so easy to discuss a case or conduct negotiations.

I have heard it said that it is only at the trial diet, when the fiscal who will prosecute the sheriff and jury case has watched the CCTV or has gone over the papers in that detail, that the plea has then been agreed. I am sure that the committee is aware, although it is not always apparent from discussion, that the impression is given of the defence suddenly offering to plead guilty, or the accused changing his mind. Sometimes there is more of a middle ground in which, perhaps because the evidence has been scrutinised more carefully or even because Crown witnesses do not turn up, and they were not expected to turn up, a plea is negotiated at the trial diet that would not have been accepted at an earlier stage.

Grazia Robertson (Law Society of Scotland): I wanted to say on behalf of the Law Society of Scotland that the suggestion of meeting and attempting to resolve resolvable cases would help the defence solicitors to know which cases to prepare for by way of a trial and give them some knowledge of when that trial might take place. At the moment, it is often unclear whether a trial that is allocated to a sitting will take place during that sitting or whether it might require to be adjourned to a later date. In our response, therefore, we have said that we support the measure.

However, it would be unfair if we did not indicate that the resource implications are not a minor factor. To enable the measure to serve the purpose for which it is intended, there will have to be proper resourcing. If it is not properly resourced, there could be further delay in the system. The clear suggestion is that if the sheriff is not satisfied that both parties are prepared for trial, he will not fix a trial diet. If both parties come to their first diet not fully prepared, there could be further delays in the system, which is why the Law Society’s responses emphasise the financial implications while taking on board the earlier comments about the financial reality in which we are now working, and the changes that that has imposed on us over the previous years.

Margaret Mitchell: Would that be true for the defence and the COPFS?

Grazia Robertson: I would say so, yes. Both have to be properly resourced and organised in such a way that we can meet requirements. I find the suggestion that we need our heads to be knocked together quite understandable, especially having heard what Sheriff Principal Bowen said. However, when John Dunn is sitting in his fiscal's office and I am sitting in my defence lawyer's office, we are not having a coffee and wondering what to do next. We are, in our own ways, endeavouring to resolve cases that are resolvable, and to prepare those that are not resolvable to ensure that we can proceed to trial. There are difficulties with the suggestions that have been made, but we recognise their benefit with regard to meeting at the appropriate time and identifying those cases.

Margaret Mitchell: Convener, I am concerned that we are hearing evidence from the COPFS that it is managing perfectly well, whereas we are hearing from others that that is not necessarily the case.

The Convener: We heard an interesting point about the preparation of a case, in that it might be a different member of the PF team who deals with a case as it goes through. I am referring to what Mr Meehan said. When an advocate is handed a case, they will read it inside out, but it might sometimes be the case—perhaps I have got this wrong—that the party who is dealing with the case for the Crown, on the PF's side, might first get a good look at the papers only when the trial is staring them in the face, whereas the other people will already have looked at them. Is that the case? Would there be lots of fingers in the pie before the case reaches trial?

John Dunn: We aspire to minimise the number of fingers in those pies, as it were. It is not always
the case that the same person will be able to deal with the case from cradle to grave. Glasgow sheriff court is the busiest court by a long chalk. We are trying to organise ourselves into teams so that the case preparers sit on the same team as the case prosecutors. It is inevitable that there will be many instances in which it is not possible to have the same people dealing with a case from start to finish—all that we can do is to maximise the chances of it being the same person.

The Convener: That is helpful to know. However, will the provisions in the bill concentrate minds? When somebody is looking at the papers for a prosecution, and it seems likely that the case will go to trial, that can attract a more concentrated focus, because the statement or record has to be lodged within a certain time. That draws things together. I am not saying that there is a question of things being slipshod, or of tardiness, in the Crown Office and Procurator Fiscal Service, but perhaps the provisions will concentrate minds more, so that the case has to be sharp and the focus has to be brought earlier.

John Dunn: Your comment is fair. That represents a change in ethos and in the way in which we undertake our preparation for cases. Previously, sheriff and jury cases were prepared with the purpose of reporting to the Crown Office, and there were instructions from the Crown counsel on indicting the case. Essentially, there was a report to someone else to get their permission to indict the case. Nowadays, our case preparation involves a living document, which is prepared as if it were a trial document, so as to try applying that focus—preparing for trial if there is one.

If all that happens as a consequence of the measures in the bill is that we add another layer of procedure without changing anything else, it will not work. We must change the culture. From June 2012 to June 2013, 769 cases were resolved by plea at the trial diet, which was 16 per cent of the case load. If the only thing that we do is to move a proportion of those pleas, if not all of them, to an earlier stage, that must create capacity to focus on the cases that are actually trials. All the things that we need to do—checking where the witnesses are, citing them, checking which evidence is actually required and seeing what can be agreed—are good things to apply to cases that will go the distance and which will involve witnesses giving evidence in court. It is a matter of focusing the issues.

The tools are all there, in the Criminal Procedure (Scotland) Act 1995: section 257 on the agreement of evidence, section 258 on statements of uncontroversial evidence, and defence statements under section 78. It is not for me to comment on judicial management, but it is well known that part of the culture is to apply the same sheriff management to sheriff and jury cases as now applies in the High Court.

Sandra White: I am interested in what you have just said about changes to the culture, and I was going to ask a question about that. I will not talk about knocking heads together, but—

The Convener: You have just done it again.

Sandra White: Yes; I will do it again anyway. When I am out and about in Glasgow, that is what people mention to me in this regard.

The Convener: Now you are blaming Glasgow.

Sandra White: No, no—I am talking about members of the general public being called to be witnesses in many weeks’ time. That is a resource matter as far as I and others are concerned. I will return to the subject of resources in a minute.

Regarding the change in the culture, you have all agreed that holding the early meetings is correct, and that you can move along with that. Can you suggest anything else that would improve the culture between prosecution and defence lawyers who get together?

John Dunn: There are three things that will make that work. One is disclosure, which I hope that we are now on top of given that we have the secure disclosure website. It means that we are better at disclosing a case in earlier course to keep the defence informed about the case and its strength from the Crown’s perspective.

The second thing is the opportunity of deploying a sentencing discount under section 196 of the 1995 act. A five-year sentence is a long time in anyone’s view, and if the chances are that someone will get a third off that sentence if they plead guilty, they might find that an opportunity worth seizing.

We have spoken about early engagement, and heard about fiscals not getting defence agents and vice versa. I can sit here next to Grazia Robertson and we can throw pebbles at each other about how we cannot get in touch, but that will not help at all. We need to move forward constructively, which we are trying to do by having hotlines and advertising that service more widely so that people know who they can contact.

Another thing that we must do—and which we already do with the Faculty of Advocates in relation to the High Court—is ensure that the compilation and submission of the written record, which will contain sensitive information about vulnerable witnesses, is done securely. The Faculty of Advocates is almost universally signed up to the criminal justice secure email system, and we are trying to roll out the system to different practitioners at the sheriff and jury levels. Again, I
can sit here and tell the committee that our take-up rate is low, but we need to look at the reasons for that. Are there practical difficulties that explain that? The answer is yes.

We put quite a lot of effort into assisting defence firms in operating the secure disclosure system, and that has borne fruit, so I suggest that we will have to do the same with criminal justice secure email. One practical issue—we had not appreciated it at first—is that if someone signs up to criminal justice secure email and starts using it, and then stops using it for a month, their account is suspended. Those are the sort of things that we must appreciate and engage on to get them sorted out.

Again, there is the simple expedient of using the telephone, and ensuring that people know who they can contact in order to talk about the case. In the immediate aftermath of the accused’s first appearance, the case preparer will now write to the nominated solicitor who is engaged in the case to identify themselves and say, “This is my direct line, and this is my solemn manager”, and to begin to canvass the outlines of what might be an acceptable plea.

That is very early in the process—probably too early for anything meaningful to be discussed—but the information is there in early course. Where that starts to move slightly adrift in a jurisdiction such as Glasgow is where the case goes into the court system with regard to the sitting arrangements and knowing who has the case. Again, we have to work on that so that people know who to speak to, because communication is everything.

The Convener: Perhaps Mr Binning can comment. Does the Scottish Court Service have a role in that regard as part of a triangle that includes the defence, the prosecution and the court?

Cliff Binning: I would not necessarily see SCS personnel playing an active facilitation role in that particular context.

I reinforce what Sheriff Principal Bowen and others said earlier. In the context of programming the business of the courts, we seek to ensure the expeditious disposal of business and the best use of available court time. Both of those things are predicated on having the best level of certainty that is possibly achievable at the first diet, which covers certainty of intention as to the plea, and certainty of preparation and of length. The greater the level of certainty in those respects, the more effective the programming of the core business will be with regard to achieving those objectives.

The Convener: Who sets up the criminal justice secure email that you have?

John Dunn: We sponsor it.

The Convener: We all use email, attachments and so on for committee business. Will the record be lodged as an attachment in e-form?

I wanted to bring in the SCS so that I could hear about the communication between you, and whether you can say, “Yes, we are ready and this is here—we can send it as an attachment or an email. This is what we are putting down as a record and what we have as a minute of agreement, and it is all going in.” Is that all in train?

11:00

John Dunn: It is all in train in the High Court, I believe. I think that the written record is submitted electronically in the High Court, and that is the aspiration that I would have for the sheriff and jury courts as well.

The Convener: Yes. Why is that not the case? What is the problem?

John Dunn: We do not yet have written records to submit. The issue is that the extension of the secure email to the defence community is at an early stage. It has not been without its practical difficulties, one of which is that the system is owned not by the Crown Office and Procurator Fiscal Service but by the Ministry of Justice, which means that we do not have complete control over it. However, that should not prevent us from working on the issues that are preventing people from communicating, so that we can do so securely. I reiterate that the communication has to be secure.

The Convener: Of course. We appreciate that. The information is sensitive and cannot be in the public domain.

Grazia Robertson: In our written submission, we said that, in the High Court, the Crown submits what is, in effect, its bit of the closed record and then we do the same from the defence perspective. It is not a collaborative bit of work to produce the one document.

The Convener: No, but any minute of agreement following on from that would have to be collaborated on, obviously.

Grazia Robertson: Yes. However, I should emphasise that, with regard to putting in the record, the Law Society had indicated that a system that was akin to that of the High Court system, where each party puts in its record in turn, rather than having to meet and do that together, would be slightly more sensible than the other way that has been proposed. That is just a practical concern. We are saying that, if we use the same system that the High Court uses for the lodging of the closed records—that is, the lodging of the
records—that would assist. That was me getting my terminology mixed up.

The Convener: I was thinking that.

Michael Meehan: I would make very much the same point that Grazia Robertson has made. The practice in the High Court is that each party puts in its own written record. I think that the Crown’s one is called schedule 1 and the defence’s is called schedule 2. The Crown will set out in schedule 1 its position with regard to a variety of matters—vulnerable witness applications, agreement of evidence, what technology is required by way of video recorders, whether interpreters are required and so on. Each accused—it is worth bearing in mind that there will be cases in which there are multiple accused—will put in their own schedule, which will be circulated electronically. There could be practical difficulties involved in getting everybody together to put in one document and, if you cannot get everybody together, no one can move forward. It would be easier if the prosecution could prepare its document, submit it to the court and copy other people in, and then each defence party did likewise. Under the proposal, if, in a case with five accused people, one of the accused had sacked their legal team or had disappeared, nothing could be done. However, if everyone else could be doing their bit, the process would not be delayed.

It is difficult to see how the system could work as well as it does in the High Court if it were not being done electronically. For example, the Crown will copy in the victim information and advice service when it puts in its written record, so the service will be able to update the complainers about what is going on. That is done easily by simply adding an address on an email.

The Convener: That issue would link into the Victims and Witnesses (Scotland) Bill, which we have just passed.

Michael Meehan: Yes.

Cliff Binning: I cannot think of any technological barrier to having the same system in the sheriff courts as is used in the High Court. The technology is there.

Sandra White: I think that we have wandered a wee bit—

The Convener: It was important to tease out the issue, because it is about information sharing.

Sandra White: Absolutely. I would have picked up on some of the stuff—

The Convener: But I pre-empted you.

Sandra White: I would like Grazia Robertson to respond to the question that I asked Mr Dunn about the culture change.

Grazia Robertson: As a defence practitioner who practises in Glasgow, I am not entirely at one with the idea of a culture change. You will have heard Sheriff Principal Bowen saying that, in his investigations and in the preparation of the report, there seemed to be a consensus that it was in everyone’s interests to resolve resolvable cases and properly prepare for those that are going to trial.

It is not that the profession is reluctant to engage; rather, there is a sad realism born out of bitter experience. As the years have gone on and it has become more difficult to resolve cases for a variety of reasons, there is an expectation that matters will not progress. There might be an element of that but, if the systems are properly resourced—I hate to keep going on about that—and implemented, this proposal could work and, if witnesses are not required to attend court unnecessarily and matters can progress at a reasonable pace, there might be savings to the public purse. That is in the interests of everyone, including defence solicitors.

Sandra White: I was going to ask about resources, but you seem to agree that the situation has to improve not just for the courts themselves but for witnesses, victims and the accused.

Grazia Robertson: Yes. It is recognised that it does not help the perception of Scottish justice if members of the public who attend court do not have things explained to them and have to go away and come back again. There is of necessity certain information about a case that cannot be imparted to witnesses and sometimes a full explanation of what is going on has not been given. As a result, people go away with a very poor impression of what has gone on, and the fact that they cannot see what is being done leads to the suggestion that we are all sitting around not doing a great deal.

Additionally, panel jurors themselves might not be used and, as a result, will constantly have to go back and forth to the court. That is very wearing on people and I have sympathy for those people I see day and daily attending court and perhaps having to be sent away. It does not always happen but, when it does, it is unfortunate, and anything that lessens such a situation will benefit everyone.

Sandra White: That is not just a perception but the reality for many people, whether they be jurors or witnesses, who turn up at court and are not called. The trial might go on for six months. In some respects, the Scottish Court Service is very good at giving out information through texts, phone calls and letters, but the problem that most people see is the churn.
With regard to resource implications, Mr Dunn talked about replicating certain practices in the High Court and said that where 1,600 cases were being indicted into the High Court per annum previously, only 750 were being indicted now, and only 300 of those were actually going to court. I would think that bringing the numbers down in the same way in the sheriff court—and, indeed, improving on what has happened in the High Court—would result in a resource saving. After all, those who turn up at court get witness expenses and whatever and any savings that could be made in that respect could be put into having, say, a computerised system. Of course, it is not just about monetary savings but about saving people the bother of having to turn up at court when nothing is going to happen. When you talked about resource implications, were you talking about the computerised system? If we are going to save money from the witness expenses that are paid to people who have to turn up at court, could those savings not be put into other resources?

Grazia Robertson: There must be a system in place not just in Glasgow but elsewhere to ensure ease of communication between the parties. I imagine that the email and computer system will be of significance in that respect, but there are staffing issues to bear in mind, as someone needs to be at the other end of an email to respond to it and communicate with the sender; indeed, defence solicitors are cognisant of their own obligation to engage in that kind of communication.

As for any suggestion that people are not playing their part, the sheriff comes in at the first diet to ascertain what the parties have done and where the problems and issues lie. Each of us has to stand up in court and explain what has happened to date and why matters have not progressed as well as they should have done.

The Convener: Just for clarification, I believe that Mr Dunn said that the Ministry of Justice had ownership of the criminal justice secure email systems. Were you talking about the UK Ministry of Justice, or was that comment simply a slip?

John Dunn: I was talking about the UK Ministry of Justice.

The Convener: Thank you.

John Dunn: I cannot give you the exact detail on that, but what I can say is that we are trying to get better control over the system’s administration to resolve some of the practical issues that defence agents are facing in using it.

The Convener: I do not want to dwell on the matter, but thank you for clarifying the point. The committee might well want to find out more about the system in place and even the historical reasons why the UK has ownership of it when justice is in the main devolved, apart from the international aspects.

Sandra White: I was going to pick up on the same issue, convener, but I think that we also have to get clarity about the resource implications. There seem to be a number of financial resource implications, but I have to say that I have not heard any answers about where the resources are going to come from to cover a member of staff who might, for example, have to open up all these emails. Surely if you stop the churn and have fewer cases going through and therefore have less of a workload and fewer witnesses turning up, the money that would be saved would offset any financial implications further down the line.

As for the matter involving the UK Ministry of Justice, do you know whether the Crown Office and Procurator Fiscal Service pays into that account?

John Dunn: I am not sure—I would have to check.

The Convener: That is why I said that we will have to use our own resources to find out more about why the Ministry of Justice runs the system and how we might bring ownership of it under the demise of the cabinet secretary and his department and expand it out. The discussion has taken an interesting route.

Sandra White: I believe that Mr Dunn wants to talk about the financial implications.

John Dunn: On the point about resources, I have already said that we could reduce our witness expenses and start to reduce the inconvenience to witnesses as a consequence of being repeat cited by ensuring that they come to court only when the case in question has gone through the gateway, if you like, and been deemed fit for trial. In the financial memorandum, that particular element was costed at £128,000 but, to reinforce my earlier comment, I have to say that only adding the compulsory meeting to this and changing nothing else will not be a recipe for success. We need to invest savings in the additional things that we need to do, such as engaging early with the defence, having the compulsory business meeting, compiling the written record and getting ourselves into a state of readiness to ensure that, if the court identifies that the case must be adjudicated through a trial, that happens first time out as far as possible.

Elaine Murray: Two principal differences between the bill and Sheriff Principal Bowen's report are the timing of the compulsory business meeting, which is to happen after the service of indictment, and the lack of a requirement for face-to-face meetings. Sheriff Principal Bowen seemed fairly relaxed about the fact that the bill was different; indeed, he seemed to understand the
reasons for those differences. Do you share his relaxation about the differences between the report and the bill?

John Dunn: I have to confess that, as a member of the reference group, I always held the view that the best time for the meeting was after the case had been indicted. Up to that point and until we get Crown counsel’s instructions, we do not have the authority to indict it as a solemn case; in fact, if Crown counsel forms the view that it does not require a jury sentence, it might be reduced to a summary case. Of course, the case might also go to the High Court if it is found to be more serious than had first been thought. We do not know any of that until we get the authority to indict, at which point we know what we are dealing with.

There is nothing wrong with communicating beforehand, but there are certain issues that we cannot address at that point. For example, I would imagine that the first question that an accused person is going to ask themselves when they get the petition, which will not necessarily bear a close resemblance to the charges on the ultimate indictment, is, “What am I being charged with? What am I pleading guilty to?” This approach might work in some cases where there is only one charge but not in others.

Communication is certainly a good thing and stipulating that the compulsory meeting follows the indictment of the case is no bar to people speaking to each other beforehand. It simply means that, at the point at which you are required to communicate and detailed engagement has to kick in, there is a focus, because you know, for example, whether it is a jury case and what the charges are. As a result, I am quite happy with the proposal.

Grazia Robertson: The Law Society supports the timing suggested in the bill as appropriate.

Elaine Murray: Coming back to the financial implications, I think that Mr Dunn mentioned a figure of £128,000. According to the financial memorandum, the total cost of Sheriff Principal Bowen’s provisions is £87,000 a year whereas the possible savings amount to £228,000 a year. Is there any reason for that discrepancy?

John Dunn: I suspect that I am looking at different figures. The figures that I have were submitted by COPFS, which identified savings of £128,000 from witnesses—

Elaine Murray: I am sorry—you were talking about your savings. Overall, the figure is £228,000.

John Dunn: And the figure for admin costs is an additional £6,000.

Elaine Murray: Right. Do you think that the estimates in the financial memorandum are reasonable? After all, they represent a significant overall saving as a result of the proposals.

John Dunn: I think that they are probably realistic, given what we have seen in the High Court but, as I have said, there will be additional costs from additional parts of the business.

11:15

Roderick Campbell: I refer to my entry in the register of interests, which says that I am a member of the Faculty of Advocates.

The bill provides that, although the written record of the state of preparation is supposed to be a joint agreement of the parties, it is the prosecutor who will have to lodge the written record with the sheriff clerk. In practice, will that put extra pressure on the Crown Office to make the running in that procedure? Will it not have significant resource implications?

John Dunn: As Grazia Robertson has referred to, if we are required to have a single document, that could be quite onerous—especially in a multiple accused case. As I understand it, the practice in the High Court is that there are separate written records, or a proportion of the written records are separate—Mr Meehan will correct me if I am wrong. That does not mean that we are all blindsided to what each other has submitted—records will be copied across so that we are all aware of what we are recording as the output of the communication that has been undertaken.

If it were the case that the Crown compiled a single document and was required to chase down every defence agent in a multiple accused case, that could be quite difficult. That is not how I perceive that it would operate in practice. It is not how it operates in practice in the High Court.

Roderick Campbell: Are you happy with how the bill is drafted on this subject?

John Dunn: I think that it is drafted in the same way as legislation for the High Court is. It is my understanding that “jointly”, in essence, refers to an awareness of the contents.

Michael Meehan: I did not check the bill against what is in statute for the High Court. In my evidence earlier I indicated that the practice is that people put in separate written records.

This is fresh legislation. Some minor amendments could take out, for example, references to joint preparation. Subsection (4) of proposed new section 71C of the 1995 act says:

“The prosecutor must lodge the written record with the sheriff clerk.”
Instead of that being a joint written record, it could be an individual written record, and each party would lodge with the sheriff clerk a copy of their written record and intimate a copy to the other parties. Minor amendments could be made to reflect the practice in the High Court.

Mr Campbell made a point about the Crown making the running. Albeit that the position is that there are individual written records, the Crown tends to make the running. The Crown issues its written record to the parties first of all, then others come in. There is no rule that requires the Crown to be first, but very often the Crown written record will be circulated to parties and then the defence party will send a written record to the High Court of Justiciary and copy in the Crown.

The Convener: Roddy, are you referring to the fact that there may be confusion? It looks like that to me.

Roderick Campbell: It is something that we can reflect on.

The Convener: The bill says that the prosecutor and the accused's legal representative will “jointly prepare a written record” and “written record” is singular thereafter, so it can be inferred that one record is being lodged. Is that not the case in those sections?

Michael Meehan: They give that impression. Subsection (2) of proposed new section 71C of the 1995 act talks about what should happen after the meeting.

The Convener: Yes; it says that they will “jointly prepare a written record”.

Michael Meehan: If the word “jointly” was taken out and subsection (2) was amended to say they will “prepare a written record of their respective states of preparation”, that would work well.

The Convener: Thereafter there could be a plural reference to written records. I presume that if there were multiple accused, there would be multiple records, multiple defenders or whatever.

Grazia Robertson: The Law Society comments on the same issue in its written submission. The requirement for a joint written record could be misleading or lead to difficulties.

John Dunn: It has been nuanced in the practice note that the High Court delivered in 2005, which says that parties must prepare a joint

“written record of their state of preparation with regard to their cases. The written record must be a joint one, although it may contain separate statements of the prosecutor’s and the accused’s representative’s state of preparation.”

There seems to be a degree of nuancing with regard to how the written record would be submitted.

Roderick Campbell: To refer back to the first panel and to Sheriff Principal Bowen’s comments on the question of culture—without misrepresenting him, I hope—I think that he seemed to take the view that we were at least halfway to achieving culture change, given the attitudes that had been displayed to his review. Does any of you disagree with that view and feel that it will be more difficult in practice to change the culture, or are you content with that view?

John Dunn: It is fair to say that enhanced judicial intervention will bring a rigour to matters, which is evident in the High Court. As to whether that is a bad thing, I suspect not.

The Convener: Does that mean sheriffs taking people into chambers and saying stuff?

John Dunn: Not in chambers.

The Convener: I know that sheriffs would say things in public as well, in front of a busy open court. I am talking about a situation in which both sides might be involved and there was displeasure—I take it that sheriffs would also have a quiet word in the ear as well as saying things in open court.

John Dunn: I spoke earlier about the absence of sanctions in relation to the written record not being submitted and parties not being prepared. The 2005 practice note says that the High Court judge would regard that state of affairs as “unacceptable”. However, the reality is that those provisions have been in place for some eight years now and I am not conscious of there being any occasion when a written record has not been submitted.

Of course, there is a sanction for the Crown, if you remember, because we have time bars that require to be operated to. If we did not comply with the legislation, the court could properly say, “You have a time bar that is about to expire on X date and I am not going to extend it, because you have not done what you should do,” so there is a disciplinary consequence.

The Convener: That would be bad news.

John Dunn: That would be bad news.

Michael Meehan: The written record form that is completed in the High Court has been revamped relatively recently in that, if the parties are not in a position to fix a trial date, they need to give detailed information about when the party was first instructed—about when disclosure was made. That will provide the preliminary hearing judge with detailed information setting out, before
the case calls in court, various steps along the way showing what has been handed over.

Both the Crown and the defence forms have changed somewhat relatively recently, so that type of information is available, which will inform the judge. Presumably, if one was to then conduct a review in later years, the forms would contain very useful information about why cases were perhaps not ready to go ahead when they should have been. An act of adjournal perhaps about a year ago changed the form to provide more information.

The advantage of what is contained in the bill about what is to go in the form—I think that it is covered in subsection (6) of proposed new section 71C of the 1995 act—is that it is to be prescribed by act of adjournal. It can therefore be amended as people become used to how it works in practice and find out what works, what does not work, what could be improved, what could be left out and so on.

Grazia Robertson: From the perspective of the Law Society, the written record could also be an opportunity to highlight any problems that emerge with regard to the preparation of cases or any problems from the defence perspective. If we are requiring people to put this information in the document and the document is there for the court to see, if any issues arise in the earlier stage of the preparation of the case, they may be highlighted by the written record. It would be a good opportunity to focus on any problems that might occur.

To take a simple example, if there turned out to be a technological difficulty at some stage with closed-circuit television footage—with regard to having it copied, having it disclosed, checking the quality or having it assessed—that could be highlighted in the written record. It could then perhaps be looked at and addressed. The written record could therefore provide an opportunity for focusing on any issues and resolving them.

The Convener: John Finnie is next with a question.

John Finnie: Thank you, convener—the point has been covered.

The Convener: I am not looking at anybody else so that I can say that I do not see anyone else with a question—I am blinkered in case somebody decides to ask a last gasp question. I thank the witnesses for their helpful evidence, which clarified some points that had not been raised before.
Criminal Justice (Scotland) Bill: Stage 1

09:33

The Convener: Agenda item 2 is the Criminal Justice (Scotland) Bill. Am I going too fast for you?

Margaret Mitchell (Central Scotland) (Con): Just a tad.

The Convener: I will slow down for you, Margaret, until you get your bearings again.

Our next item is to take evidence from the Cabinet Secretary for Justice on the Criminal Justice (Scotland) Bill. The cabinet secretary will give evidence on part 1 of the bill, which is on arrest and custody; part 4, which is on sentencing; part 5, which is on appeals and the Scottish Criminal Cases Review Commission; and part 6, which is on people trafficking, television links and the police negotiating board for Scotland. I remind members to keep to those segments—"segment" is my mot du jour. We will move on to other items next week.

We will start by looking at part 1. We will then have a break to allow officials to change over for parts 4, 5 and 6.

I welcome to the meeting Kenny MacAskill, Cabinet Secretary for Justice, and Scottish Government officials. Elspeth MacDonald is deputy director, criminal justice division. Lesley—Bagha?

Lesley Bagha (Scottish Government): Bagha. Lesley Bagha.

The Convener: Thank you. Lesley Bagha is the bill team leader. Aileen—oh, somebody should tell me how to say it—Bearhop?

Aileen Bearhop (Scottish Government): Bearhop, yes.

The Convener: There we go. Why can you not have Smith as your name? It is so much easier. Aileen Bearhop is head of the police powers team. Jim—Devoy?

Jim Devoy (Scottish Government): Correct.

The Convener: Gosh. Jim Devoy is policy officer, youth justice. Anne Hampson—you are a good person—is policy officer, victims and witnesses team.

Cabinet secretary, I understand that you wish to make a brief opening statement, after which I will take questions from members, who should be ready with their hands up to get on my list.

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you, convener. A good new
year to you, members and all. I welcome the opportunity to give evidence today on the bill’s provisions relating to arrest and custody, sentencing, appeals and other issues. In this opening statement I will focus on police powers and the rights of suspects.

We all want Scotland to have a modern and effective criminal justice system—one that is fit for purpose and which properly balances the rights of individuals and the duties of the state. I believe that the bill’s provisions will deliver that system. The bill will clarify and modernise police powers of arrest. It will streamline current police powers by moving from detention followed by arrest when a sufficiency of evidence exists to a single power of arrest on suspicion of having committed an offence. The provisions will improve the law and will be easier for the police to apply than those under the current system.

The statutory arrest power will replace the existing complicated landscape of common law and statutory arrest. It will bring the Scottish system more into line with the European convention on human rights, which refers to arrest with initial deprivation of liberty and detention as the period of police custody following arrest.

The bill recognises that modern investigations are often complex and protracted. In line with Lord Carloway’s recommendations, the bill balances the needs of a thorough police inquiry with a suspect’s right to liberty, for example through the introduction of investigative liberation.

The bill’s provisions put Scotland at the forefront of human rights protection. The bill will extend the rights of those held in police custody. Everyone will now have the right to speak to a solicitor, regardless of whether they will be interviewed by the police.

The bill provides greater protections for children and vulnerable persons held in police custody.

The committee has heard evidence from representatives of various organisations involved with the criminal justice system and I have listened to their views and concerns. As a result, I intend to lodge a number of Government amendments to the bill.

One area in which change is needed is to make provision for the release of a person from arrest when the grounds for that arrest cease to exist. That has been referred to in evidence as “de-arrest”. I will lodge an amendment to section 4 to make a de-arrest provision.

I am also aware of police concerns about the 12-hour limit for keeping persons in custody and the need to consider provisions to allow an extension in exceptional circumstances. There is a serious issue here about balancing an individual’s right to liberty against protection of the public, and I continue to listen to all the arguments for potential extension in exceptional circumstances.

Police powers of detention and arrest, both at common law and statutory, have served Scotland well. However, it is time for us to modernise our systems and recognise that modern-day investigations require modern-day legislation. We must ensure that the public are protected by police who have the powers to do the job that we entrust to them. We must also protect the rights of individuals in police custody.

I am grateful for the opportunity to answer your questions on those and other provisions in the bill.

The Convener: Thank you, cabinet secretary.

It was remiss of me—I will not be forgiven—not to welcome Graeme Pearson to the meeting. He seems to want to join us on many occasions. You are welcome back, Graeme.

Graeme Pearson (South Scotland) (Lab): Thank you.

The Convener: It is nothing; I just felt in a good mood.

I want us to start off with arrest and police custody, if that is all right with everyone, before we move on to other questions. Elaine Murray will be followed by Mary—sorry, I mean Margaret Mitchell. I beg your pardon, Margaret.

Elaine Murray (Dumfriesshire) (Lab): Thank you, convener. Happy new year.

Cabinet secretary, in your opening statement you explained a bit about the definition of arrest and detention—detention being the period after arrest when one is being questioned. I suppose that the problem is that public perception of arrest and detention is slightly different. In the public mind, arrest is when the police think that someone may have done something and they charge them, and they could be questioned prior to that. Because of that perception, could there be damage to the reputation of people who are arrested but who do not go on to be charged?

Kenny MacAskill: No, I do not believe so. I understand and recognise where you are coming from. Many of the points that you make relate not to nomenclature or the statutory definitions of arrest or detention but to media profile. I am thinking of the example of a high-profile case in England a year or so ago—never mind the fact that, although I do not recall any prosecution against Nigella Lawson, every time I saw the television, I thought that she was on trial because that is how the media portrayed matters. That is for a separate debate and must be dealt with separately.
In Scotland, we must remember that the presumption of innocence remains sacrosanct. Although somebody may be arrested by the police, they are presumed innocent until a court case conclusively proves otherwise. I think that everyone in Scotland recognises that point, although, sadly, it sometimes does not appear to be portrayed in that way in the media.

It is correct that we move towards the European definition in relation to arrest and detention. The concept of detention is relatively new in Scotland, as Mr Pearson and Mr Finnie will no doubt be able to confirm. When I started my law degree, detention did not exist, but by the time I became a law apprentice, the Criminal Justice (Scotland) Act 1980 had come in, so what Charles Stoddart taught me was superseded.

Detention has been with us only since the 1980 act, and we are providing greater clarity in the bill. The bill provides clear definitions of arrest and detention, which are beneficial and will apply not only in Scotland, because they apply across other jurisdictions. However, we must also remember that those who are arrested on suspicion—it is on suspicion only—are presumed innocent. That will always remain the case, and perhaps we must all work with the media to ensure that that applies to people who are arrested for whatever reason. Indeed, as in the high-profile case to which I referred, sometimes people are not even arrested but simply interviewed by the police.

Elaine Murray: I understand what you are saying. From listening to the media in England, I myself have sometimes misapprehended what an arrest has meant when somebody has been taken in. I am thinking of the case that you mentioned. If the bill is enacted, are there ways in which we can tackle the public perception so that, if somebody is arrested, it is not presumed that they have done something?

Kenny MacAskill: Some of that might have to be for another day—dealing with the media certainly is—but the bill provides greater clarity. If we were to ask them, we would find that ordinary citizens in Scotland find it pretty hard to explain the difference between arrest and detention and why some people are arrested straight by the police and others are detained.

There is a desire, which is correct and comes from Europe, for a clear difference between detention, which is when someone is deprived of their liberty, and arrest, which happens at the outset. We are heading towards that. It might take some time, but it will be a lot clearer than the current situation in Scotland, where someone is detained under the 1980 act but can be arrested under common law, which is probably harder for people to understand. It will become quite clear that detention is when someone is detained and their liberty is affected, but the point of arrest is when there is the suspicion that an offence has been committed.

Greater clarity will come as we row back, perhaps, from what was introduced in 1980.

The Convener: I subscribe in part to what Elaine Murray says. I agree that it is a matter for the media, but I do not think that they will be contained in that way. Might there be room at some point to consider giving accused parties in certain cases the anonymity that is provided to the principal witness?

If we are going to move to people being arrested and not officially accused, the public will say that there is no smoke without fire in certain very serious cases. If the case in London to which you referred, the man’s life was pretty well ruined. He had to change his appearance and all kinds of things. I presume that he has never got over the fact that he was tried by the papers and, to some of the public, will still have been found guilty by the press. Can we not do something in law that would provide protection?

Kenny MacAskill: That is a jurisprudential debate that we can have. The only caveat that I would add concerns the world of social media. Various high-profile footballers who have had court orders or anonymity south of the border have appeared on the front page of The Scotsman newspaper, albeit with some masking of their eyes, and anyone who had any passing knowledge of football knew who was being discussed.

I am always happy to look at such matters because they have great consequences. The difficulty is when such things happen in a different jurisdiction or the information is available on Twitter or YouTube. Even if there were a court order it would be pretty hard to enforce.

09:45

The Convener: Nevertheless, if one were to go in that direction, there would be a breach.

Quite rightly, we have protections for the principal witness in certain cases, particularly sexual offence and rape cases. All I am saying is that, in those circumstances, it may be worth considering allowing the accused protection, given that we will have in custody persons who are not officially accused, which seems to take it a step on from being about perception. I appreciate the difficulties with the media, but that applies to all our laws.

Kenny MacAskill: You are correct. Such protection applies at present to minors, unless the court were specifically to exclude that and allow for publication. At present, the young person’s
“I have yet to hear a cogent argument for why it makes something better to change terminology largely without changing content, and I fear that the consequence of the wrong information being recorded because officers are dealing with a new set of processes, even if the general principles of fairness are applied, could lead to cases being thrown out of court.”—[Official Report, Justice Committee, 1 October 2013; c 3288.]  

Kenny MacAskill: I do not believe that will happen. What Lord Carloway is proposing, which is part of a general direction within Europe, will make things clearer. We are moving from the current position, in which an officer has to decide whether to arrest somebody or detain them under the 1980 act. The bill will make it clearer. The officer will simply arrest someone on suspicion—it has to be a reasonable suspicion. The situation will be clearer for officers, although I accept John Gillies’s point that officers will require to be given some training. I go back to the point first raised by Elaine Murray, on people’s understanding of detention and arrest. At present, detention and arrest blur into each other. We should head towards the situation in which—as correctly encapsulated by Europe—arrest should be at a point when there is suspicion, and detention should be the deprivation of someone’s liberty.

We will have to see how the media and the public interpret that approach but I think that it will give greater clarity than exists at the moment. If someone were to be detained by a police officer now, would they be arrested or detained? At the moment, the answer could be both. It would all depend on what the officer has decided and which act he was following. The situation will be clearer when the bill is passed because people will simply be arrested. There may come a point at which they will be detained but, to begin with, they will be arrested on suspicion.

Margaret Mitchell: In that case, you will not agree with Assistant Chief Constable Graham of Police Scotland, who feared that the new definition could prevent a person from being arrested in order to stop a crime. Are you quite satisfied that arrest on suspicion fully covers that?

Kenny MacAskill: Yes.

Margaret Mitchell: So you see no need for the power of arrest to prevent a crime to be implicit in the bill.

Kenny MacAskill: The Association of Scottish Police Superintendents was correct to express its concerns on the matter but I make it quite clear that the common-law powers of arrest, other than that changed by the formal statutory arrest procedure, remain and will always be available. The power of arrest to prevent a crime and indeed to ensure public safety remains.

Margaret Mitchell: But your opening statement suggested that you were seeking to clarify the
common law in statute. Surely this is an opportunity to make it clear that the power to arrest on the ground of prevention is within the powers available to the police.

Aileen Bearhop: In part 1 of the bill, we are making the common-law power of arrest a statutory power. Other common-law powers are not affected at all and will continue. Our concern about putting into the bill the power to arrest on the ground of prevention is all about what someone who has not committed a crime would be arrested for. The bill allows for someone who is committing a crime to be arrested.

The Convener: What if someone with a brick in their hand is standing next to a car window?

Aileen Bearhop: I think that that would come under intent to commit a crime.

The Convener: Under common law.

Aileen Bearhop: If the brick were sitting on the pavement and the person in question had not moved towards it, they would not have actually done anything.

The Convener: What if they have the brick in their hand and are looking at the car window? That situation would not be covered by this power because they would not be committing an offence. They might just be holding a brick.

Aileen Bearhop: The point at which the person in question becomes someone who will commit a crime is an operational decision for the police. They would be in the act of committing a crime.

The Convener: So someone standing with a brick in their hand looking at a car window would be committing an offence under the bill.

Aileen Bearhop: Yes.

The Convener: I am just asking because surely it would be difficult to know. After all, the person could defend themselves by saying, “I’m a brickie,” or, “This is my car.” Could you explain the common-law provision that deals with such a situation?

Aileen Bearhop: It does not come under common-law provisions. It is an operational decision about the point at which a person is seen to be committing a crime.

The Convener: Okey-dokey.

Aileen Bearhop: I believe that the Civic Government (Scotland) Act 1982 also contains powers to allow the police to pick up, say, a known housebreaker with housebreaking kit who is walking towards a building.

The Convener: What is “housebreaking kit”? A T-shirt?

Aileen Bearhop: The police can also pick up someone who is in a building they should not be in and who looks as if they are about to commit a crime. Other powers are available.

The Convener: I must apologise to Margaret Mitchell. I was just intrigued by the issue.

Margaret Mitchell: Perhaps I can tease this out a bit more. How does the new power to arrest on suspicion of committing a crime differ from arresting someone to prevent a crime from being committed?

Aileen Bearhop: I have just been handed a note—from the lawyers, I think—that says that there is a common-law offence of attempting to commit a crime and conspiracy. That will remain.

Kenny MacAskill: I think that we are getting into esoteric matters. If there is evidence to show that someone is conspiring to commit armed robbery, that person will be arrested. If someone is standing with a brick in their hand and it looks as though they are about to put it through a car window to take a handbag or whatever else might be lying around, they are clearly about to commit a crime.

The difficulties for police and law enforcement come, to some extent, from the position that there is no jail for thought, as such. There are people out there whom we think might be considering offending, but unless we can show conspiracy we are not really able to charge them.

Aileen Bearhop referred to specific statutory matters. For example, if someone is in the curtilage of a property or in a common close—in a stair where they do not live and where there is no reason for them to be—with a screwdriver in their back pocket, an assumption can be made, especially if they have previous convictions, that might mean that they could be detained. I am trying to remember whether that would be under the Civic Government (Scotland) Act 1982.

Aileen Bearhop: Yes, it would be.

Kenny MacAskill: The difficulty arises when people are thinking about offending. Unless that can be proved, or there is a risk of a sexual offence and we can get a sexual offences prevention order, or the person is subject to an order for lifelong restriction, there are difficulties, which present huge challenges for all jurisdictions. What would the person be charged with if they were arrested—”We think that you are thinking of committing an offence”? They would say, “What offence?” We might know that the person has a propensity for doing evil things. That causes great problems, which is why we created the SOPO, for example. However, if someone is standing with a brick or has gone into a common close with a screwdriver in their back pocket, that can be dealt
with and will be dealt with under the new statutory provisions.

Margaret Mitchell: Do you envisage that the police will need more training?

Kenny MacAskill: When any new legislation comes in, as happened post-Cadder, the police look to ensure that they can deal with it. What we are talking about will not happen in isolation; Lord Carloway has taken a position about matters from the point of first suspicion through to the ultimate appeal, so there will be a whole area in the legislation in relation to which the police will have to get trained up to deal with the changes.

The police will work through those matters, and we have had discussions with them. They will take time to ensure that training is given—some of it will be on the job, some of it will be online and some of it might take place at Tulliallan. That is a matter for John Gillies and the senior officer command team. As I said, post-Cadder, only a few years back, the police showed that they were able to deal with the situation and I do not think that people noticed a change in the quality of service in our communities.

Margaret Mitchell: Concern has been expressed about the provision whereby the person who is arrested must be taken to a police station as soon as is practically possible. It has been suggested that the provision lacks flexibility. Will you comment on that?

Kenny MacAskill: That is to do with the interview. Apart from in exceptional circumstances, such as a kidnapping, in which access is denied—there will be very few such cases—a person who is arrested will be taken to a police station, where they will be advised by their letter of rights, which will be available in a variety of languages and scripts. Officers and senior officers will have to indicate whether the person is vulnerable because of their age, capacity and so on, and legal advice will be offered.

Margaret Mitchell: Lord Carloway recommended a less rigorous approach. He said that the arrested person should be taken to a police station only “when necessary”. Why has the Government gone further?

Aileen Bearhop: The wording is there simply in recognition of the fact that in some cases—for example, in rural areas—it might take longer to get the person to a station. As the minister said in his opening statement in the context of de-arrest, it is recognised that there will be cases in which the grounds for arrest no longer apply and the person should no longer be under arrest, so we will change the bill to ensure that the arrest can be stopped and the person can be released straight from the street without having first to be taken to a police station only to be sent home.

Margaret Mitchell: Lord Carloway said that a person should be taken to a police station only “when necessary”—never mind the de-arrest, which I think muddies the waters. I admit that I am not a great fan of the term “de-arrest”, which sounds a bit confused.

Aileen Bearhop: I think that the reason for requiring that a person be taken to a station is the recognition that people must be accorded their rights. Individuals must be given access to a solicitor and proper recording must be done, so that the right process is followed.

Margaret Mitchell: If that happens for every crime, will that not change dramatically how things work in practice?

Aileen Bearhop: If the police could charge persons on the streets, they would not have to go to a police station.

10:00

Kenny MacAskill: Many of the challenges that we have faced post-Cadder have related to statements or admissions that were made at the scenes of road traffic accidents or other such scenes when the person had not been cautioned, and the person who admits that they were the driver could incriminate themselves. I think that there is good reason for people being taken as quickly as possible to a police station and for ensuring that when the police want to interview a person it is done at a police station at the point of arrest.

We must have latitude, however. Scotland is not a uniform country; we have rural and isolated communities. Such challenges arise rarely, but I have heard of officers in Shetland, for example, having had to hire a boat in order to arrest someone who lived not on their beat but on one of the smaller islands. It takes time to get to those islands. On other, larger islands that are closer to the mainland there may be no lawyer present when a death has occurred in a section 1 road traffic accident, so we must ensure that there is latitude.
There must be fairness for the accused when the police have formed a suspicion. The person has a right to know that they have the right to legal advice, and I do not think that that can, in the main, be dealt with at the roadside or in the common close. Down at the police station, things can be formalised and a balance can be struck between officers seeking to interview people and advice being made available to those who may or may not wish to make comment.

Margaret Mitchell: For the avoidance of doubt, convener—

The Convener: I want to move on. I have a list of members who want to speak.

Margaret Mitchell: Are you saying that, under the bill, every person must be taken to the police station at some point?

Aileen Bearhop: That is not so if the officer decides that they can charge the person immediately—in which case the person can be charged and then released for appearance in court at a later date.

Kenny MacAskill: That process is for dealing with very minor matters. We know the challenges that police officers face, for example when they encounter somebody urinating in the street at night. That is unacceptable behaviour whether it is being done in their own close or wherever. It is downright offensive. Do we need to take officers off the streets to take such people back to the police station? We might if their behaviour became more unacceptable, but the officers might just be able to deal with the matter there and then. We must provide the flexibility to allow officers out on the streets to make that decision.

If somebody needs to be taken off the street and interviewed, we must balance their rights. If their behaviour is unacceptable but can be dealt with at a later date, we can move on. They do not have to accept the ticket—they can challenge it—but the matter can be dealt with later. The bill provides flexibility for the police officer in such circumstances.

The Convener: Thank you for that full explanation. I want to move on to supplementaries on this line of questioning.

Roderick Campbell (North East Fife) (SNP): You have covered most of what I was going to ask about in your most recent response, cabinet secretary.

The Scottish Human Rights Commission has suggested that there should be more statutory definition of the reasons for which someone can be taken to a police station. Will you comment on that?

Kenny MacAskill: We are happy to consider that, but the SHRC would have to spell out what it is suggesting. We have had discussions with it to ensure that, through the letter of rights, people will understand what is happening to them, what their rights are and what may happen thereafter. Other than that, the best thing that we can do in the circumstances is let people know that they have a right to additional advice, if they want it, through access to a lawyer either by telephone or in meetings, depending on the views and wishes of both the individual and the legal representative. I think that that is the best way of addressing the matter.

John Finnie (Highlands and Islands) (Ind): Good morning, cabinet secretary. You said that common-law and statutory powers of arrest have served us well—I think that that was the term that you used. You went on to say that the common-law powers remain. On the changes that have taken place, do you think that the 1980 detention legislation was an improvement on the previous legislation?

Kenny MacAskill: I do not think that I am able to comment on that. I did my evidence and procedures in 1977 and the detention act came in in 1980, so my life as a practising lawyer started with the 1980 act coming in. It was just kicking in when I was a law apprentice—I was the last of the jurisdiction of law apprentices before the move to law trainees. So, I had a historical training from Sheriff Stoddart on the common law from Sheriff Gordon’s textbook, but all my practising life we have had detention, so I do not think that I am best qualified to comment. What that shows, however, is that detention has not been with us forever. Regardless of whether people were arrested or detained, to some extent what mattered was that they were down the police station.

John Finnie: Of course, prior to 1980 people who were down the police station “helping police with their inquiries” had a very indeterminate status. The 1980 act formalised an arrangement, which I would have thought the legal profession welcomed.

Kenny MacAskill: “Helping police with their inquiries” was a euphemism that could have a variety of meanings, some of which were perfectly acceptable but some of which began to go to the margins of what would be viewed as acceptable. Greater clarity was provided.

That is why Lord Carloway went away and looked at matters. He is quite correct that, from the public’s perspective—and sometimes even from the perspective of a police officer—it might be an arbitrary judgment call as to whether someone should be arrested or detained. Equally, if people are in police custody, various things have to kick in, particularly access to rights and the availability
of legal knowledge. Therefore, we could not and should not go back to a situation where people are “helping police with their inquiries.”

John Finnie: I agree. Do you acknowledge that the purpose of the power of arrest would change if the bill goes through? What would the purpose of the power of arrest be?

Kenny MacAskill: I do not think that it would change, necessarily. Police officers detain people when they think that a crime has occurred, or is about to occur, and they have to intercede. There are, doubtless, instances—John Finnie has probably experienced this more than I have—when officers have had to decide whether to detain someone under the statutory powers or to arrest them under common law. The bill makes it clearer that officers will simply arrest on suspicion. The basis will not be flimsy, however. People will not be arrested because the officer does not like the cut of their jib or their gait. Something will have to have happened; there will have to be a clear reason.

Immediately on a person’s being arrested, rights will kick in, because we have to retain balance. The bill provides greater clarity—certainly for the man or woman in the street, who probably would not understand whether the person had been detained under the statutory powers for six hours or whether they had been arrested. All that they would know is that their son, husband or whoever was down at the police station.

John Finnie: Section 1(1) of the bill states:

“A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person has committed or is committing an offence.”

Given that, do you think that there is any possibility of a reduction in people being reported for summons?

Kenny MacAskill: No. I think that it will come down to good practice. We do not want officers to be off the street when they could instead deal with situations by issuing fixed penalty notices or in a variety of other ways. This is simply about allowing officers to use their discretion so that matters can be dealt with in other ways, such as giving information or issuing a fixed penalty notice. We want to keep that rolling.

It is a matter of balance. If someone’s behaviour has been unacceptable and can be dealt with by a fixed penalty notice, we think that that person would prefer to accept that notice and then go away suitably humbled to being taken down to the police station for many hours. It will come down to how the legislation is implemented in practice, but I have no reason to believe that the police will not continue to use their discretion, which I believe is at the core of policing in Scotland.

John Finnie: I agree that discretion is the strongest power that any constable has.

Section 1(2) qualifies the power of arrest by stating:

“a constable may arrest a person under subsection (1) only if the constable is satisfied that it would not be in the interests of justice to delay the arrest in order to seek a warrant”.

Section 1(3) lists the circumstances in which that would be legitimate. If the common-law powers of arrest have served us well and will be in place, why does section 1(3) not refer to the common-law powers of arrest, rather than being worded as it is?

Aileen Bearhop: We recognise the need to be clearer in law about what police officers are arresting for. The bill is clearer in that regard than the current position, in which some police use common-law powers of arrest because they are not entirely sure what the proper statutory power of arrest might be.

John Finnie: I acknowledge that I might be extremely rusty on this, but aspects such as someone having no fixed abode or their giving a name and address that are believed to be not correct do not seem to feature in the bill.

The Convener: What about the catch-all phrase, “otherwise obstruct the course of justice”?

Does that help?

John Finnie: My question is this: if the common-law powers have served us well, why are they not reproduced in the bill?

Aileen Bearhop: We considered that the wording of that particular provision was sufficient for the purposes of arrest in Scotland.

John Finnie: So, just to clarify, will section 1(3) supersede the common-law powers? Are we in for one of those many legal debates?

Aileen Bearhop: There will be no common-law powers of arrest.

John Finnie: I am sorry, but I understood the cabinet secretary to say that those powers will remain.

Aileen Bearhop: There will be no common-law powers of arrest. In response to a question that came up earlier, we talked, in terms of prevention arrangements, about there being common-law powers regarding attempts to commit crimes.

Lesley Bagha: Just to clarify, in talking about the difference with common-law powers, the ones that are remaining are not criminal common-law powers or offences. They are still there as statutory offences; it is just the common-law power
of arrest that is being replaced by a statutory power in the bill.

John Finnie: So, if the bill is passed, the common-law power of arrest will cease. Is that correct?

Aileen Bearhop: Yes.

John Finnie: Okay. Thank you very much.

Sandra White (Glasgow Kelvin) (SNP): Good morning everyone and happy new year. I think that a number of my questions have already been answered.

The Convener: Excellent. So this will be a short question.

Sandra White: I have supplementary questions. To go back to the first point about detention and arrest, which I think has had a very good airing, I just want to pose to the Cabinet Secretary for Justice—and perhaps to committee members, as well—a particular question. We are talking about people being innocent until proven guilty and the different terminology, but I just wonder whether you would agree that there is also a responsibility on the media and press. The convener mentioned the fact that we could perhaps look at some way of explaining it. Do you agree that the media also have a responsibility with regard to people being innocent until proven guilty when this law comes in?

Kenny MacAskill: Absolutely.

The Convener: Can I just stop you, cabinet secretary? Can we have questions on the bill?

Sandra White: The question is on the bill.

The Convener: No.

Sandra White: I am sorry, convener. The question is on the bill. It is about people being detained or arrested. We have discussed it.

The Convener: I think that we have pretty well examined the role of the media and the fact that we cannot deal with the media in this bill.

Sandra White: I am sorry, convener, but—

The Convener: I will let you go on.

Sandra White: Thank you very much, convener.

The Convener: You are looking peeved.

Sandra White: I was third to come in for a question, but unfortunately I am now about sixth. I am not bothered about that. I just want clarification on a point.

The Convener: Forgive me, but I think that you are bothered because you have mentioned it. Your colleagues came in for supplementaries. If you had asked for one, I would have allowed it.

Right. On you go.

Sandra White: I just want clarification on the point that I raised. Do you agree that the media have a role, and that they have a responsibility to people who are innocent until proven guilty?

Kenny MacAskill: Absolutely. As the convener said, that is a jurisprudential argument, but people are innocent until proven guilty, which should be reflected. Clearly, the courts have powers if matters are reported inaccurately; occasionally editors are summoned. In the main, we try to ensure that we get that balance right.

Sandra White: My next question may be a supplementary question. It is on what Margaret Mitchell said. Again, the first premise of any justice system is that people are innocent until proven guilty, and that obviously applies to where there is suspicion that a crime has been committed. In that regard, we talked about the housebreaking kit, for example. John Finnie and Graeme Pearson obviously have a lot more experience in such areas and I think that, by the looks on their faces, they will certainly come up with more issues. We have talked about suspicion of crime, cabinet secretary, and common law and the new law that will come in. Will the new law protect the police as well as suspects, and make it clearer for the police that they have a power of arrest?

10:15

Kenny MacAskill: The intention is that the bill will make it clear that the common-law power of arrest for offences will be repealed and replaced with a power of arrest on suspicion of having committed a crime. All other common-law powers will remain. An issue was raised by the ASPS, understandably, about the powers that officers would have if someone was about to jump off a bridge, for example. The powers will therefore remain for the police to protect people from harming themselves and others.

The bill will provide greater clarity and certainty and will allow us to avoid situations such as the ones that John Finnie mentioned. Inviting people to come to the police station when they did not feel that they could decline was inappropriate, and people did not have certainty. Post Cadder, we have made sure that we provide access to lawyers and information about rights. The bill will make the situation clearer and retain that which was sought by ASPS, which is the general catch-all question about what the police do when they think that something dreadful is about to happen, but it is not necessarily a criminal offence.

Sandra White: Thank you, convener.

The Convener: Not at all. That was very graciously said, Sandra.
Alison McInnes (North East Scotland) (LD): I turn to custody of suspects prior to their first appearance in court. You will recall that the Carloway report outlined concerns about the length of time for which some suspects are held in custody, particularly during bank holidays and long weekends. During our evidence sessions, a number of witnesses raised concerns about whether we could continue to comply with article 5 of the European convention on human rights if that continues. What practical measures are you putting in place to ensure that people are not held in police custody for unacceptably long periods?

Kenny MacAskill: We have, for example, courts that sit on Saturday when there are public holidays. We have a working group that is led by Police Scotland, and which also includes the Scottish Court Service and the Crown, to consider what can, should or might be done relating to what are called Saturday courts; I have never heard anyone suggest that there should be a Sunday court. That is being looked at because I am aware of the pressures on courts, and on those who do the detaining as well as those who are being detained. I am happy to keep the committee apprised as that progresses.

Alison McInnes: Are you comfortable that we do not need a stronger legislative framework within the bill to cover the concern?

Kenny MacAskill: It is more a matter of practice than of the legislative framework. We need to see whether the problem can be worked out without putting the specifics in the legislation. There is a general understanding that there are pressures on the system.

Those concerns do not just come from the police who detain individuals. I get complaints from sheriffs about Mondays when courts can sit well into the evening, which affects everyone involved. I do not think that we require any legislative change. The situation is not straightforward or simple; for example, employees’ terms and conditions have to be considered, as do a raft of other matters. The Crown has to be brought in because if someone is arrested for an offence on a Friday and is in court on the Saturday, the indictment or complaint has to be prepared. The detail is important.

We recognise the desire that Lord Carloway encapsulated; I sympathise with him. We just have to make sure of the practicalities if someone is to appear in a court on a Saturday. Is the fiscal’s office open? Are staff available? Can the issue be dealt with by the following morning? I do not think that legislative change is needed, but I assure the committee that the working group is up and running and that I will meet officials regularly.

Alison McInnes: I accept what you say about not needing legislative change, but I am not sure that there is enough momentum in the system at the moment. Clearly, your responsibility is to ensure that the legislation complies with the ECHR. Do I have your assurance that you will take a keen interest in the issue?

Kenny MacAskill: Absolutely. I will meet the chief executive of the Scottish Court Service later this week; I am more than happy to take on board points that the committee might wish to make about the desirability of Saturday courts. I will also be happy to feed back to the committee.

Alison McInnes: I have one more question to ask, if I may, convener.

Sections 31 and 33 of the bill deal directly with protecting the rights of child suspects. Can we consider the age of criminal responsibility? I know that your Government’s 2012 publication that reported on its action plan to deliver progress against the 2008 concluding observations of the United Nations Committee on the Rights of the Child said that you would “give fresh consideration to raising the age of criminal responsibility from 8 to 12 … in the lifetime of this Parliament.”

It seems to me that the bill is a good bill to do that. Why did not you choose to do that in the bill? Will you consider lodging an amendment to address that anomaly?

Kenny MacAskill: I think that we would require to consult. We have raised the minimum age of prosecution, which was always unacceptable and was not applied in practice, to 12, and we are aware of the calls for the minimum age of criminal responsibility to increase. We are happy to see what we can do within the lifetime of this session of Parliament, but I do not think that it would be practical to raise the age in the bill, especially given that consultation will have to take place and that there are disputes about what that age should be.

Alison McInnes: There was extensive consultation in the run-up to the bill. Would it have been sensible to take forward such consultation at the same time? What is behind your reluctance?

Kenny MacAskill: I do not think that we are in a position to do that at the moment. We must consult on the matter, and we are happy to work to have that dealt with within the lifetime of this session of Parliament.

Not everything can be included in the bill. There is a limit to the on-going consultations that we can have at any one time. As I said, we have addressed the minimum age of prosecution. There are understandable concerns about the age of
criminal responsibility, and we are happy to give an undertaking to work on that.

Alison McInnes: Thank you.

The Convener: I think that Elaine Murray has a supplementary question.

Elaine Murray: Yes. Does the bill achieve an appropriate balance by allowing 16 and 17-year-olds to consent to be interviewed by the police without a solicitor being present?

Kenny MacAskill: I think that we have struck the correct balance. Those under 16 clearly are protected—Lord Carloway is right about that—but we have recognised as a Parliament and we recognise as a Government that 16 and 17-year-olds in Scotland are in a different position. They still have to be protected, but they can marry, pay taxes or join the army. Clearly, they must have advice, which is why I think that we have the correct and appropriate balance. They would have to have the presence of a responsible adult—that would have to be taken on board—before they could renounce anything.

We take the view that protection is sacrosanct, so to speak, for under 16s. Given the position that 16 and 17-year-olds have and the rights to which they are entitled in Scotland, however, while we provide that protection we also have to give them some responsibility to be able to overrule if they have taken advice on board before they could renounce anything.

Elaine Murray: In the recent Victims and Witnesses (Scotland) Bill, we defined a child as a person up to the age of 18. We received evidence from witnesses, such as the Law Society of Scotland, who believed that somebody who is under 18 should not be able to waive that right.

Kenny MacAskill: We have had on-going debates about things such as the age at which people should have the right to vote in the referendum and the age at which people should be able to drive a car. We live in a world in which people can get married at 16, cannot drive a car until they are 17, cannot drink alcohol until they are 18, and cannot get a high-powered car until they are probably around 25 or 27, given the insurance issues.

We take the view that we have to protect those who are under 18. Those who are under 16 are in a specific position that has to be protected. Those who are 16 or 17—whether because of their voting entitlement that will come not only in the referendum but probably across the board, marriage or whatever—should have some ability to overturn that position so long as they have the benefit of some responsible advice.

John Finnie: Cabinet secretary, the Scottish Human Rights Commission raised two issues, the first of which relates to the information to be given to suspects. It seeks—and I hope that you support—a simplification and strengthening of the advice that is given to suspects. Will you consider that?

Kenny MacAskill: I think that we have done that. The letter of rights has been drafted and, as far as I am aware, the SHRC is happy and content with it. Part of the issue is then about how it is made available. As I recall off the top of my head, it comes in something like 34 different languages and in a variety of scripts. Everything that can be done is being done to make the information as readily available as possible, and to make it available in a manner and format that is understandable.

John Finnie: Are the levels of illiteracy among people who find themselves in custody being taken into account?

Lesley Bagha: I can add to what the cabinet secretary said.

I note that the letter of rights has been used in police stations since July. It is the plain English version at the moment. As the cabinet secretary said, the letter has been translated into 34 languages, and we are now looking to roll out those versions to address the point that you make and to ensure that suspects who have special needs, particularly those who are vulnerable, have access to the letter in additional formats. We are going to set up a couple of groups, including an advisory group with third-sector organisations that deal with such individuals, to ensure that we have the most appropriate formats so that the letter can be as effective as possible in practice.

It is not yet a statutory letter of rights, but that is on-going work. The letter of rights will need to be amended again if the bill is passed and the rights are enhanced, but that work will continue over the next few months.

John Finnie: That is welcome. Could the committee be kept apprised of the progress of that work, please?

Lesley Bagha: Absolutely.

John Finnie: Thank you. The second point is on access to legal advice and whether it is made clear to individuals that they have the right to face-to-face contact with a solicitor and not just the right to speak to them. I acknowledge that there are challenges regarding geography—they have been alluded to in relation to other matters—but can some regard be paid to that? The role of a solicitor is not simply to give advice; sometimes, it is to check on the conditions in which individuals are being held.

Lesley Bagha: If I may, I will answer that question as well. We are trying to keep some
flexibility in the bill. The normal default would be that the suspect has the right to choose, but we did not want to place too much in the bill to say that the contact has to be face to face because it might be that, in some circumstances, that is not appropriate. If the suspect is going to be—

John Finnie: In what circumstances would it be inappropriate for a suspect to be given advice in that way?

Lesley Bagha: It may be that they speak to their solicitor and their solicitor does not think that it is necessary for them to come out. The suspect may not be being questioned.

The aim is just to keep some flexibility. If the suspect is being questioned, there is a right for the solicitor to be present, which is an enhancement from the current position. It may be that in many cases a telephone call is sufficient, although there may be other circumstances where that approach would not be appropriate. The suspect would be told that they have a right to speak to their lawyer. They would discuss the matter with their lawyer, and their lawyer might choose to come down.

The aim is to maintain flexibility. The bill enhances the right to legal advice for suspects who are taken into custody. We want to ensure that it works effectively in practice for all those who are involved, and particularly for persons who are in custody, according to what is appropriate in individual cases. In most cases, it is for them to decide what is appropriate.

John Finnie: Will you clarify whether discussions have taken place with the Law Society? It previously made representations on the circumstances that you have mentioned, where an accused changes their mind and a question arises about the reimbursement of fees to a lawyer who has travelled a distance only to find that the contact has been cancelled.

Lesley Bagha: We have spoken to the Law Society about the bill. The legislation enables a suspect to change their mind. It may be that, initially, they do not want to take legal advice and that, having been informed of their rights, they say, “No, I want to waive my right to legal advice”, although that cannot happen in the case of certain categories such as vulnerable persons. However, even if they choose to waive their right to legal advice, the bill does not prevent them from changing their mind, saying, “I’ve now decided that I want to obtain legal advice”, and asking for their solicitor to be contacted.

Kenny MacAskill: Some of this is a matter of custom and practice for lawyers. When I practised and I got a call from an officer such as you, Mr Finnie, or Mr Pearson in the early hours of the morning, if it was a serious charge, the likelihood was that I would go down, but if it was a less serious charge or it involved somebody with past experience, I basically went back to my bed—

The Convener: That is too much information.

Kenny MacAskill: What we find is that lawyers speak to their clients and give them advice over the phone. If they feel that it is appropriate for them to attend because of the nature of the charge or the nature of the client, they will attend. A lot of decisions to deal with matters by telephone come from lawyers themselves, who have no desire to go to the police station.

John Finnie: Absolutely, but if someone travels 30 miles to a police station and arrives there only to find that the accused or the suspect has changed their mind, will they be reimbursed?

Kenny MacAskill: That would be a matter for the Scottish Legal Aid Board. I do not know the particular rules or regulations there, but—

The Convener: We are wandering off the bill here.

John Finnie: Are we?

The Convener: Yes.

John Finnie: All right. I will be guided by you, convener.

The Convener: Legal aid costs are not in the bill.

Kenny MacAskill: We have the duty agent scheme and the contact line that the Scottish Legal Aid Board has set up.

10:30

John Finnie: Okay.

The Convener: Legal aid costs are not in the bill, John—they are covered in another bill. You are giving me a quizzical look, but I am telling you—that is the fact.

Sandra White has a supplementary question.

Sandra White: Yes, I do.

The Convener: It had better be a supplementary question—I feel that I am being tested this morning.

Sandra White: I feel as though I am in court or on trial—

The Convener: You are close.

Sandra White: But thank you very much convener—this is a supplementary question.

I was very interested in what Ms Bagha said about working with the third sector to give information and advice. From past experience on other committees, I know that there was a problem with people who are deaf and dumb being able to
get interpreters and suchlike. Would you be looking at the voluntary sector being able to work with them? Can we get an appraisal of that approach?

Lesley Bagha: Yes. I am aware that there is also another EU directive about interpretation, but that might be separate from languages. We have not yet set up the group to do this, but the first thing to do is to identify the groups of people currently in custody who are most in need of information in other formats. One of our first tasks is to identify our priorities. Over the next few months, once the group is set up and we have identified where other formats may be appropriate, we will be more than happy to write to the committee to let you know about that.

The Convener: That is close to the bill, but we are drifting a bit. An arrest is challengeable—all these processes are challengeable if the party does not understand the proceedings.

Sandra White: You are awfy tetchy this morning.

The Convener: I am not tetchy. I am just trying to keep to the facts of the bill and not drift into other areas—interesting though they are.

Roderick Campbell has a question. I hope that it relates to the bill—I am sure that it will, given that he is an advocate.

Roderick Campbell: It definitely relates to section 14 on investigative liberation.

Section 14(2) states that

“If releasing the person from custody, a constable may impose any condition that an appropriate constable”—

that is deemed to be an inspector—

“considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence.”

There seems to be a right to apply to a sheriff to have the conditions reviewed if there are concerns about them. Is it your view that the bill says enough or balances the rights of an accused sufficiently in these circumstances? For example, if, as has been suggested by one witness, curfew conditions were imposed, which would certainly have an impact on liberty, is there enough balance in the bill to protect the rights of the accused?

Kenny MacAskill: I am happy to take on board any thoughts that the committee may have, although ultimately I think that these details have to be considered by the court. To some extent, it is about the ability to get the issue to court: if we are looking at the rights of the accused, there has to be some form of appeal and the appeal on the decision of the senior officer, albeit that it is not a formal legal appeal, would be to the court.

In years to come, the courts will no doubt set down what they view as appropriate. Some of these things have to come from working parties. On a lot of issues the concern has also perhaps come in relation to the rights of victims of domestic abuse to ensure that people who are being released will not return to the matrimonial home or into a certain area. Some of the issues are best dealt with at a local level, where senior officers will work with the judiciary to get an indication of what is acceptable and how they wish to deal with matters. Equally, when the conditions are not acceptable, we have to enable the accused to get to court as quickly as possible to challenge them.

I am open to providing greater detail in the bill, but I find it difficult to see how the issue could be dealt with, because a lot of the conditions might be geographically specific or specific to individuals and might relate to the nature of the curfew or the street or address that the accused cannot go to. Understandably, in cases of prolific shoplifting it may be that the accused is denied access to the town centre or, if it is an assault, they may be denied access to a housing scheme. I am open to any thoughts or suggestions.

Roderick Campbell: Is the 28-day period right? Police witnesses have suggested that they should be able to apply for a longer period.

Kenny MacAskill: The 28-day period is what Lord Carloway came back with. I think that, in the main, 28 days should be sufficient. There may be challenges on some aspects related to forensics or other issues, but as you said at the outset we have to balance that with the rights of the accused.

Again, I am happy to hear and take on board members’ thoughts on the matter, but the 28-day period seems appropriate and reasonable to me. I certainly think that the accused and, indeed, victims and witnesses need finality and certainty, and given that the people concerned will be in something of a limbo we need to keep things tight.

Roderick Campbell: Do you think that the 28-day period will have significant resource implications? Some have suggested that the whole investigative liberation scenario will have a resource implication.

Kenny MacAskill: I cannot for the life of me see why it should. After all, no matter whether the person was remanded or detained, the police would probably be doing the same work anyway and making further inquiries either through technical means such as computers or forensics or through investigatory means and dogged police work. What investigative liberation does is provide greater flexibility for the person under suspicion.

Roderick Campbell: I also have a short question about post-charge questioning.
The Convener: Before you ask it, Mr Campbell, I would like to get the issue of investigative liberation straight in my head.

At that stage, the person will have been arrested but not officially accused or charged of anything, but will there be a crime—say, attempted burglary—that can be labelled or defined as such? My concern is that, if a person is arrested under investigative liberation, the police might—to use common parlance—try to find something to pin on them. In that case, it might be like a fishing warrant. Am I on the wrong path? Will the investigation in question be pretty narrow?

Aileen Bearhop: The person in question will have been told the general reason for their having been arrested.

The Convener: What do you mean by “general reason”? How broad would that be?

Aileen Bearhop: It would be as it is now—[Interruption.]

The Convener: I beg your pardon. Did you want to say something, Roderick?

Roderick Campbell: I think that section 14(1) gives some indication, convener. It has to be “a relevant offence”.

The Convener: Yes, and it also includes the phrase:

“by virtue of authorisation given under section 7”.

However, section 7 just mentions “a person ... in ... custody ... arrested without a warrant, and”

who “since being arrested ... has not been charged with an offence”.

It does not say that the reason has to be pretty specific.

Jim Devoy: We have to be clear about the purpose of the criminal procedure that the police will be undertaking at that point, which will be to investigate a crime.

The Convener: Yes, but what crime are we talking about? Will the person under the investigative liberation procedure—or indeed their lawyers—have any clear idea of what on earth they have been accused of?

Jim Devoy: The police will be clear about the complaint that they have received in relation to the offence that has been committed. The charge might change based on the investigation and the information that is gathered, but the police will be clear about the investigation that they are undertaking and the suspect will be clear about what the investigation relates to and what the alleged offence is.

The Convener: What would happen if something else turned up that had nothing to do with what the person in question had originally been arrested on suspicion for? Could that form another investigation?

Jim Devoy: Yes. As happens at the moment, that would be a separate matter that would be dealt with separately.

Kenny MacAskill: The usual view of caution and charge is that it relates only to the reply that is given at the time. However, if someone is arrested or detained, cautioned and charged on breach of the peace and other matters come to light, the complaint or indictment served by the Crown can differ significantly from that to which the caution and charge relates. As I have said, the caution and charge relates only to the reply that is given at the time.

The Convener: I understand that, but is investigative liberation like having a search warrant? Does it involve digging into material things, looking at people’s computers and cupboards or going into their factories or whatever?

Aileen Bearhop: It gives the police time to undertake their investigations and acknowledges that in a modern society such investigations can be rather more complex.

The Convener: I understand all that, but will police officers and so on still have to apply for a search warrant?

Aileen Bearhop: Yes.

Kenny MacAskill: Absolutely.

The Convener: But might the investigative liberation procedure supersede all that?

Aileen Bearhop: No.

Kenny MacAskill: No, it will not change the warrant procedure. However, it will avoid the accused being remanded or the police not having specific evidence in a world where, as Aileen Bearhop has made clear, we have access to computers, forensics and so on. It does not give them any right to go in and do anything that would otherwise require a warrant.

The Convener: Thank you—that is clear now. The issue had concerned me.

Margaret Mitchell: Cabinet secretary, I seek clarification of the logistics of how investigative liberation would work. It would cover a 12-hour period but could be for an hour or half an hour at a time, and someone could be released but be officially under suspicion all that time. They could be brought in for two hours and released, and then brought in for another half an hour and released again over a 28-day period. Are you confident that
the information technology system that is being developed by Police Scotland as we speak will be able to cope with that? The Scottish Police Federation has raised real concerns about that, and we have raised the issue in the Justice Subcommittee on Policing. It seems to me that a very complicated set of recordings could be required.

Kenny MacAskill: I am confident that the IT system will be able to cope. In the main, people will be released for a period of time before they return, which will allow the police time to investigate. I think that you are mixing up investigative liberation with periods of detention. As we know, the computer system requires to be upgraded. That is a priority for Police Scotland and it will ensure that the system is fit for purpose to deal with both the current and future issues and challenges.

The Convener: Roderick Campbell has a different question.

Roderick Campbell: I have a short question on post-charge questioning. The Scottish Human Rights Commission takes the view that the bill should state that no adverse inference should be taken from silence. What is your view on that in the—we hope—relatively rare circumstances of post-charge questioning?

Kenny MacAskill: That seems to be the current position: more and more, interviews in the presence of a lawyer and under caution are dealt with by the simple response that, on the advice of their solicitor, the person has no comment to make. That may be the advice in the context of post-charge questioning just as in the context of judicial examinations, which were the previous way in which the matter would have been dealt with.

In my limited involvement with judicial examination, the advice that I gave to my client was that they should say that, on the advice of their solicitor, they had no comment to make. No real questions can be asked if that is the line that the accused takes, so I do not see how any inference can be drawn.

Lesley Bagha: The position on post-charge questioning is very much the same as the position on pre-charge questioning, which takes place before somebody is officially accused, in that there is a right to silence and the person does not have to say anything.

Under the current legislation, when there is a judicial examination, rather than the possibility of adverse inference as such there is a provision that enables, in certain circumstances, comment to be made during a trial as a result of something that happens at the judicial examination. The legislation tends to have to enable comment to be made rather than it being the other way about.

Therefore, rather than the legislation saying that no adverse inference should be made, it is assumed that there is a right to silence and that people have a right not to say anything.

Roderick Campbell: That answers my question. Thank you.

Elaine Murray: I have a question on section 33, on the support for vulnerable people, particularly in relation to people who are suffering from a mental disorder, which is defined as having "the meaning given by section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003".

Section 33 requires a constable to assess whether intimation should be sent to a person who is "suitable to provide the support."

The constable must also assess whether the support is required. Is it not rather a burden on the constable involved that they should, for a start, be aware of the definition of "mental disorder" in the 2003 act?

Kenny MacAskill: We have had the definition for a considerable time. A mental disorder is defined as a "mental illness", "personality disorder" or "learning disability", and there is tried and tested practice according to which the police have been assessing the vulnerability of suspects, accused, victims and witnesses for many years. I tend to think that the term "mental disorder" is perfectly understandable. We are not asking police officers to act as psychiatrists; we are asking them simply to make an assessment of somebody's ability. That has been routine custom and practice and has worked well.

Elaine Murray: You do not agree with the Law Society's concerns that it might be difficult for a constable to assess whether somebody has such a condition.

Kenny MacAskill: No. Over the years, officers have shown their ability to make an appropriate assessment and, as I said, when they have doubts on aspects they go to a police surgeon.

The Convener: Right. I am going to stop this section. I thank the other witnesses; the cabinet secretary is staying. We will suspend for two minutes to allow the officials to change places before we move on to the next sections.

10:45
Meeting suspended.

10:46
On resuming—

The Convener: We will press on, because we are dilly-dallying a bit today. We move on to parts
4, 5 and 6. In addition to the cabinet secretary I welcome to the meeting Elspeth MacDonald—I beg your pardon; I am not welcoming her at all, as I have done that already. Wait a minute. Where am I going? She is still here, but in addition—I will need to learn to read my script—I welcome Kathleen McInulty, policy officer, criminal justice bill team; Philip Lamont, head of the criminal law and licensing team; and Ann Thomson, head of the workforce sponsorship unit. I still have Lesley Bagha and, of course, Elspeth MacDonald. We have settled it now. Thank you.

I will move on to questions. What am I doing now? It is sentencing and—

Roderick Campbell: Appeals.

The Convener: Sentencing and appeals and so on. Right.

Elaine Murray: I have a question on delays in appeals. Why do the bill’s provisions concentrate on the initial stages—the late notice of appeal and so on—rather than the progress of appeals? I am sure that the cabinet secretary will remember the case of one of my constituents, Adam Carruthers, who was convicted of rape of a couple of people who were also my constituents. There was a series of appeals that dragged on and on. At that time, I had quite a lot of contact with one of the victims, who felt that the appeal process was an additional burden on her as she had to relive the crime. The bill does not seem to address that part of what is often a very traumatic—

The Convener: Can I ask whether those proceedings are concluded?

Elaine Murray: Yes. The person has served his sentence and has been released, so we can discuss it.

That part of a victim’s experience, when the appeal process can continue to torment the victim, does not seem to have been addressed.

Kenny MacAskill: You make a fair point, which is why the bill has to take cognisance of the rights of victims and those involved in the court process. On-going appeals, which there have to be as a consequence of the ECHR, which I think nobody challenges, have caused families significant pain and had a significant impact on them.

There are two things. One is that we must have some certainty and clarity for those who seek to appeal and those who are affected by that—the victims—which is why Lord Carloway has correctly put in specific timescales that apply other than in exceptional circumstances where there is a reason why an appeal has not gone in.

Some of the other aspects that you touched on relate to case management, which is down to the judiciary. Some of that will be dealt with through, and will I hope benefit from, court reform. It is down to individual case management by the appeal court and the judiciary.

I think that we have struck the right balance. The Lord President and the Lord Justice Clerk both understand that delays affect not simply the rights of the accused but the rights of the victim. You made a fair point, but the latter aspect is more about case management; the other aspect relates to what has to be in the statutory provisions.

Elaine Murray: So the bill is not the place to deal with the latter aspect, because it is not a legislative issue.

Kenny MacAskill: Government and Parliament would always hesitate to get involved in case management and how proceedings run in court. Aspects of evidence and how long the case should run for should be dealt with by those who are, quite correctly, set up independently. That is why we passed the Judiciary and Courts (Scotland) Act 2010.

What we are doing here is giving the accused clear intimation of what the timescales are for marking an appeal against sentence or conviction or both. That also makes it clear to victims that if an appeal is not in by a specific time, it will not come in—barring exceptional circumstances.

I understand the point about on-going delays in an appeal, but some of that has to be left to those who are administrating it. If new evidence has to be obtained, that issue has to be left to the courts. I think that we would face difficulties if we said that an appeal has to be dealt with within a period of X. If someone said, “I’ve got to get additional evidence”, it could be a period of X plus Y.

Elaine Murray: While we are on that topic, we had evidence from the Law Society that the exceptional circumstances test might be unduly restrictive. Are you able to comment on that?

Kenny MacAskill: I do not believe that it is. It is for the judiciary and the appeal court to interpret that, but I think there is common parlance of what is viewed as exceptional circumstances. The fact that someone just could not be bothered or had not quite made up their mind does not constitute exceptional circumstances. Ill health or clerical error could constitute exceptional circumstances. I think that the appeal court can work with the test and solicitors clearly understand that exceptional circumstances are beyond something that just did not fit in with someone’s schedule.

The Convener: Is that not the case anyway just now? Is that not the way the court behaves anyway if there has just been sloppiness on the part of an agency?

Kenny MacAskill: Yes, which is why we decided not to go down the route of sanctions. It is
a matter for the administration of the system by the courts or those in professional practice.

John Pentland (Motherwell and Wishaw) (Lab): Section 71 talks about extending the maximum term for weapon offences from four to five years. At the committee’s meeting on 19 November witnesses were questioned on that topic, but they were unable to provide much guidance on whether there is a need for increased sentencing powers. What evidence do you have for the need for the extension?

Kenny MacAskill: We have made significant progress in tackling knife crime in Scotland. We have seen a 60 per cent reduction in the offence of handling an offensive weapon since this Government came to office, but there have been tragedies. Every member of the committee and probably every area of Scotland has been touched by such tragedies in some shape or form.

As an Administration, we are not prepared to take our foot off the accelerator in tackling and driving down knife offences, because they affect families, communities and the whole country. We therefore think that we are heading in the right direction. The average sentence now for handling an offensive weapon is over a year. I think that that gives the court the appropriate balance. When they think that some leniency can be shown because of the background to the case, they can show it. Equally, when it is quite clear that there was malevolence and malice, they correctly impose tough sentences, which we fully support. This is about continuing to make Scotland safer and continuing to address an issue that has scarred Scotland. The situation is getting better, but we would be remiss if we were complacent.

John Pentland: If section 71 is approved, what impact do you expect the availability of longer sentences to have in practice?

Kenny MacAskill: It will give greater discretion to a sentencing judge or sheriff. Our position has always been that the sentence is for the judiciary to decide, which is why we have never supported mandatory sentences. Indeed, as the average sentence in Scotland is over a year, why would we wish to impose a mandatory tariff that is less than that? The measure is simply about giving the judiciary discretion and recognising the significant harm that knife crime can cause. It will be for the judiciary to decide whether to impose that length of sentence. I think that they should have the right to impose such a sentence, but it will be for them to decide whether to do so, on the basis of clear facts and circumstances that merit that.

Alison McInnes: I have a tiny supplementary question. The bill does not seek to alter the maximum custodial sentence for summary offences. Will you explain your rationale for that?

Kenny MacAskill: It is for the Crown to decide whether a case should be a summary one or an indictment. A sheriff might feel that his sentencing powers are inappropriate. That is really a matter for the Crown and the judiciary. They will have to decide whether to proceed on summary complaint or under the solemn procedure.

Philip Lamont (Scottish Government): It might be helpful to clarify that the current maximum for handling an offensive weapon when prosecuted at the summary court is 12 months, which is the maximum general sentencing power of the summary court. If we were to increase that, we would be going beyond the general maximum that has been provided for in other legislation. That is why we have not done that.

The Convener: Do we have the figure for how many sentences of four years have been dished out?

Philip Lamont: It is very low. I think that the most recent statistics indicated that the maximum had been given in only one or two cases, although it is sometimes complicated because other offences are wrapped up together. Not very many people received the maximum but, as the cabinet secretary explained, we feel that the measure is about empowering judges by making an increased maximum available, perhaps for repeat offenders who have a track record of using knives and who once again are caught carrying them. It will be for judges to decide on the basis of the individual circumstances of the case.

Roderick Campbell: Human trafficking is an issue on which things have been moving quite quickly in recent weeks and months. I welcome sections 83 and 84, and I have read the cabinet secretary’s letter to the convener dated 16 July 2013 but, for the record, will you outline the Government’s thinking in connection with human trafficking? What do you say to the critics who say that Scots law should have a definition of human trafficking?

Kenny MacAskill: A statutory people trafficking aggravation is the first stage. The Government has recognised that there is a problem. We are aware that people have been trafficked here and that Scots have been involved in carrying out trafficking and have been correctly sentenced in other jurisdictions, particularly in Northern Ireland. We are aware of the issue. We believe that the first necessary step is to bring in a general aggravation, because we are conscious that that will help to raise awareness and allow evidence to be led. I think that it will make it easier for us to deal appropriately with those who perpetrate human trafficking.

However, we are persuaded that more has to be done, so the question then is how we do it.
Marra has proposed a member's bill on the issue, and we are in on-going discussions with the United Kingdom Government on its draft modern slavery bill. Indeed, I recently attended an event down at number 10 that was chaired by the Prime Minister. We are introducing the general aggravation to show our willingness and desire to deal with the issue, and to show the necessity of doing so.

11:00

On the broader aspect of the legal definition of human trafficking, we are happy to look at what is best and see whether matters can be dealt with in the draft modern slavery bill. We are talking about a criminal offence that, by its nature, crosses jurisdictions. We are in discussion with the UK about whether the bill will apply to Scotland, and if it can do so appropriately, we will be more than happy to take that route, because that will be the quickest way of ensuring that Scots law is fit and appropriate.

The Convener: I am interested in section 82, "References by SCCRC". You might recall a little tussle, which I lost—not for the first time—in the context of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which was emergency legislation on the back of Cadder. It was thought that there would be a flood of applications to the Scottish Criminal Cases Review Commission, so the 2010 act introduced, first, a gatekeeping role for the High Court, so that it could refuse referrals from the SCCRC. Secondly, the act provided that, even if an appeal was successful, the sentence might not be quashed if that was in the interests of justice. That is the background.

I am glad that the gatekeeping role is going; I am not glad to see that the second aspect remains. For the life of me, I do not understand why, when an appeal has been successful on its merits, the High Court, sitting as the appellate court, should be able to reject the appeal, on the basis that quashing the sentence would not be in the interests of justice, having regard to “finality and certainty”.

The example that Lord Carloway gave—of a person pleading guilty to the crime in the middle of the appeal proceedings—is not helpful, because such an event is very unlikely. Why are we retaining the approach? I do not understand why we are doing so. There was no flood of applications to the SCCRC after Cadder. You are always talking about access to justice, but the approach seems to fly in the face of justice.

Kenny MacAskill: The proposals in the bill strike the correct balance. I am aware of your concerns and I think that we have retained what is necessary while taking on board your concerns. It is clear that the role of the SCCRC, which we in Scotland cherish, is to consider miscarriages of justice and seek review. It is important that the High Court should consider and take cognisance of whether there has been a miscarriage of justice and, at the end of the day, it is the High Court of Justiciary, sitting as the appeal court, that must decide whether something is in the interests of justice. The provisions are likely to be used or considered very sparingly.

The point that the Lord Justice Clerk made has merit. There could be circumstances in which, for whatever reasons, matters were not dealt with appropriately at first instance and there was a miscarriage of justice, but there has been an admission of guilt. In such a case, it seems to me that the court of appeal should be able and required to take into account the interests of justice, or we might end up with the absurd situation in which a person is acquitted by the court of appeal and in the following week we must consider an application in the context of double jeopardy, on the basis that there is good reason to believe that the person committed the crime.

The Convener: I would have no problem with such an application, now that we have got rid of the double jeopardy rule. My concern is that, in any other appeal process, if the appeal is successful it is successful. However, if there is a successful appeal in a case that was referred by the SCCRC, which will already have applied an interests-of-justice test before referring the case, it will be treated differently from any other appeal, solely because it has come from the SCCRC. That is my problem. The principle should be the same as it is for every other appeal: if the appeal is successful, it is successful.

Kenny MacAskill: I see where you are coming from but, in the main, appeals that come from the SCCRC tend to be a lot more historic. Years will have passed and every other avenue will have been considered—there will probably have been a great deal of events over a long timescale. At the end of the day, the SCCRC must be protected and cherished for what it does in allowing reviews in such cases, but it is fundamental that in an appeal the High Court should remain the ultimate arbiter of not simply whether there has been a miscarriage of justice but whether action is in the interests of justice. The SCCRC makes the referral, but the ultimate decision should be made by the High Court.

The Convener: May I clarify something? If an appeal goes through the normal appellate procedure rather than being referred by the SCCRC, is it the case that, even if the appeal is successful on its merits, the High Court can apply an interests-of-justice test and reject the appeal?
Philip Lamont: No. That is not the case.

The Convener: The High Court can apply that extra test only if the reference was from the SCCRC.

Philip Lamont: That is right.

The Convener: Well, that is my problem.

Philip Lamont: As the cabinet secretary explained, the approach reflects the fact that, since the commission was established in 1999, it has always had to apply the interests-of-justice test as part of its consideration. As the cabinet secretary said, that reflects the type of case that the commission often deals with and its special role. What Lord Carloway recommended—we agreed and put the provision in the bill—was that the commission should review cases and be the avenue by which cases can come back to court, and that it should consider the interests of justice in so doing, but that the High Court should apply the same tests. That is what is in the bill.

The Convener: The test has already been applied, but the High Court applies it again.

Philip Lamont: Because of the type of cases that we are talking about.

The Convener: We are just going to have to differ on this. It seems to me that when you say “type of cases” you are making two classes of appeal, which is completely unnecessary and was not the case before. The SCCRC’s sifting procedures are rigorous, as you know, and the commission has a good record at achieving success either on sentence alone or on conviction and sentence. The SCCRC’s sifting procedure is pretty tough.

I understand why the approach was taken initially, but for the life of me I do not understand why we are retaining it. Cabinet secretary, I must give you notice that I will lodge an amendment to delete the provision and take us back to where we were before the 2010 act. I will see whether I am successful this time.

So there you go. I think that Roderick Campbell wants to raise a different subject.

Roderick Campbell: Yes. Calum Steele, of the Scottish Police Federation, expressed concern about whether the police negotiating board’s remit will include the terms and conditions of all police officers. Can the cabinet secretary update us on the position?

Kenny MacAskill: Yes. We were waiting only to hear from the Scottish Chief Police Officers Staff Association, which has indicated that it is willing in that regard. We have never pushed on that; we have always taken the view that a willing volunteer is better than a reluctant conscript. We hoped that the SCPOSA would come forward, as it has done.

All police officers, from the newest constable to the chief constable, will therefore be dealt with by the board.

The Convener: If members have exhausted their questions—I see that we are exhausted—I thank the cabinet secretary very much.

11:07

Meeting continued in private until 12:15.
Scottish Parliament
Justice Committee

Tuesday 14 January 2014

Criminal Justice (Scotland) Bill:
Stage 1

09:32

The Convener: Our next item is our second evidence session with the Cabinet Secretary for Justice on the Criminal Justice (Scotland) Bill. The cabinet secretary will give evidence on corroboration and related reforms, such as the jury majority, admissibility of statements, and sheriff and jury proposals. Those provisions are contained in parts 2 and 3 of the bill.

We will start by looking at the provisions on corroboration and related reforms and the admissibility of statements. For the benefit of all the witnesses and the cabinet secretary—and, indeed, me and the committee—we will have a five-minute break after we have dealt with this batch of provisions, after which we will move on to the next sections.

I welcome to the meeting the Cabinet Secretary for Justice, Kenny MacAskill, and Scottish Government officials. Iain Hockenhull is policy manager in the Criminal Justice (Scotland) Bill team; Elspeth MacDonald is deputy director, criminal justice division; Lesley Bagha is the bill team leader; and Kathleen McInulty is policy manager in the bill team.

I understand that the cabinet secretary wishes to make an opening statement before members ask questions.

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you.

Last week, we discussed the bill’s proposals for reforming police powers and increasing the rights of and protections for persons who have been accused of crime. Today, we will address the protection of the public.

Abolition of the corroboration requirement is an essential and long-overdue reform and is at the heart of a bill that seeks to ensure justice for all members of society in 21st century Scotland.

I do not seek conflict with the legal profession. As a former practitioner, an MSP and a citizen, I am proud of our system, but as the Cabinet Secretary for Justice, I have to consider the interests of all society. If we cannot protect the vulnerable, we as a society will have failed. We have a duty to provide an effective justice system for all citizens, not just those whose cases happen to meet complex corroboration rules that even judges find confusing.

Committee members will have heard the significant concerns that have been aired about justice being denied because of the corroboration
rule. Brave individuals, backed up by organisations such as Rape Crisis Scotland, Victim Support Scotland and Scottish Women’s Aid, have spoken out.

Assistant Chief Constable Malcolm Graham spoke passionately here about there being 3,000 victims every year whose cases do not even get submitted to prosecutors. A United Nations committee has highlighted its concern that the requirement for corroboration impedes the prosecution of sexual offences. I know that some committee members have challenged witnesses to make positive suggestions about what can be done. I do not wish to dwell on the deficiencies of our rules on corroboration. Members have heard how they have been stretched, eroded and circumvented in order to cope with hard cases, but that has made for bad law.

Members have heard that no comparable system has the general requirement for corroboration, which is onerous in some cases and in others is, in the words of the Law Society of Scotland, “whittled down ... to the bare minimum.”—[Official Report, Justice Committee, 26 November 2013; c 3791.]

Few would adopt a corroboration rule in designing a system from scratch. Ensuring that cases are high quality must surely be the focus of a modern criminal justice system. Scots have every right to the same degree of access to justice as that enjoyed by their neighbours.

I know that some have concerns. There seems to be a popular view that the abolition of corroboration will mean prosecutions that are based purely on one person’s word. That is not our intention, nor is it the Lord Advocate’s. Simply looking at other systems should provide reassurance here. Their courts are not awash with cases based on a single source of evidence. The Lord Advocate has said that he will require supporting evidence to bring any case.

Let me make clear what is meant by supporting evidence. It means allowing cases like the examples presented in written evidence by the Crown Office and Procurator Fiscal Service to go forward. I think that most people would agree that those examples feature enough evidence to merit a court hearing. The second example features a victim’s testimony, with her distress and her special knowledge of the accused’s distinctive underwear and a description of the scene, but there is no corroboration of the alleged indecent assault. That case could not proceed in our country, but it could in others. That is what the Lord Advocate and I mean by supporting evidence.

I appreciate that many of those calling for further study are not wedded to the past, resistant to change or unsympathetic to the plight of victims, but a further review of whether the corroboration rules should be abolished would take us no further. We would hear the same voices, the same terms and the same suggestions, but I am convinced that in the end we would still be looking at the same recommendation: to remove the requirement for corroboration from our law. In the meantime, the manifest injustices would continue.

The Lord Advocate shared his personal experience of some of the hundreds of strong cases denied a hearing every year. We cannot wait a further three, four or five years to address those injustices. We need to hear those who have been suffering in silence behind closed doors: the elderly victim who is robbed by a bogus caller; the person who suffers day in, day out at the hands of a violent partner; and the rape victim attacked in her own home. We need to give them access to justice as soon as we can.

Although I am passionate about the need for reform, I will respond to constructive suggestions. I met with several stakeholders over the festive period and I look forward to the committee’s stage 1 report. However, members should not doubt my commitment to seeing the corroboration rule abolished. The provision of justice is not a game; this is about getting it right for everyone: society, victims and accused.

I repeat that I remain open to constructive suggestions, but I cannot stand by and allow our system to perpetuate disregard for those being denied access to justice.

The Convener: I thank the cabinet secretary, although I have to say that I do not think that anybody on the committee considers that the abolition of corroboration is a game. I think that we take it very seriously indeed, which is why we are taking trouble over this very important issue.

John Finnie will be followed by Elaine Murray, followed by Roderick Campbell, followed by Christian Allard, followed by Sandra White, followed by—well, it is John, then Sandra. I wonder why they are so interested in asking questions. We do not normally have this flurry.

John Finnie (Highlands and Islands) (Ind): Good morning, cabinet secretary. The Scottish Human Rights Commission described corroboration as being a legal safeguard. Similarly, the Lord President described it as being “one of the great legal safeguards in our criminal justice system.”—[Official Report, Justice Committee, 20 November 2013; c 3717.]

Is it for that reason that you propose to alter the jury numbers?

Kenny MacAskill: I just put it on the record that the term “game” actually came from Derek Ogg
QC in a programme on corroboration, and I think that it is referred to in a letter to the committee from Colette Barrie. She said that it is not a game to her but part of the suffering that she sustained. I think that that letter will be part of the committee’s evidence.

I had a very useful and helpful meeting recently with Professor Alan Miller and Shelagh McCall from the Scottish Human Rights Commission. We are happy to consider any additional safeguards. That is why we went out to consultation. One basis for seeking to increase the required jury majority from 8:7 is to have an additional safeguard for protection.

This is always about ensuring that the scales of justice are balanced. We have to protect the rights of the accused as well as the rights of the victim. I believe that corroboration impedes the rights of the victim. I also believe that if we remove corroboration, we have to ensure that the scales are calibrated appropriately. One suggestion, with which I am comfortable, is to move to a two-thirds majority. That seems to me to be a reasonable position to be in.

**John Finnie:** If that is one way of addressing the removal of corroboration that applies to solemn procedure, what additional or alternative safeguards have you put in for solemn procedure?

**Kenny MacAskill:** Do you mean summary procedure?

**John Finnie:** For summary procedure. I beg your pardon.

**Kenny MacAskill:** For summary procedure, that should be considered by the sheriffial bench. We are happy to consider any additional safeguards. For example, it was suggested to me in discussions with the Faculty of Advocates that we should consider dock identification. That issue is long overdue for consideration. We are open to considering any such suggestions. The other suggestion is to consider whether matters should be removed from the jury. Obviously, that does not apply to summary procedure.

**John Finnie:** You have put a proposal in place in relation to solemn procedure, but you have not put any alternative proposal in place in relation to summary procedure.

**Kenny MacAskill:** No, because those are the safeguards on which we went out to consultation. They were approved by the senators of the College of Justice. I met Shelagh McCall and Alan Miller, who are not so much looking for additional safeguards. I think that where they are coming from is how the system operates in the new landscape, if I can put it that way. Some of that would be down to judicial training through the Judicial Institute for Scotland.

However, the position remains that, although we are open to any suggestions for additional safeguards, so far few have been forthcoming.

**John Finnie:** But the reason why safeguards are mentioned is that it is frequently said that the Scottish system is the only one in which corroboration is retained. Other systems, where corroboration does not necessarily apply, have alternative safeguards. Is that the case?

**Kenny MacAskill:** No. Again, I have been looking at potential safeguards and discussing the issue with academics. I think that the Lord Advocate wishes to get to the system in the Netherlands, where there requires to be additional evidence. That is why an additional safeguard that may be suggested—it has not been, but I would be open to it—would be to put the prosecutorial test in legislation.

The Netherlands system is not corroboration in that it is not required throughout the whole strand of evidence. However, for a conviction there has to be additional evidence beyond the principal matter, whether that is a confession or the main substantive piece. The Lord Advocate seems to have indicated that that is where he wishes to take the prosecutorial test, the quantitative and qualitative tests and the evidential test. The additional safeguard, if you wish, that would be available would be to put that on the face of legislation and enshrine what has to be proven before there can be a conviction.

**John Finnie:** The police staff associations’ position seems to support you, cabinet secretary. It has clearly taken reassurance from the Lord Advocate about the protection that would be afforded its members prior to any prosecution being instituted. It is the same for the teaching and social work professions, and quite rightly so. What protection can the Lord Advocate give the unemployed labourer?

**Kenny MacAskill:** There are specific consequences for those professions, given the other organisations involved and other challenges in their employment when parallel investigations are going on.

The assurance that we have in the example that you gave is that safeguards can be brought in. If safeguards that exist in other jurisdictions are not referred to, I am happy to have them invoked. So far, the suggestion has been dock ID. We are also happy to consider putting the prosecutorial test on the face of the bill. Beyond that, it would be for others to state what is there.

Equally, the system that operates in the 47 countries that have signed up to the European convention on human rights seems to be fair and balanced. Scotland is unique and alone in its current system, but I am happy to sign up to the
additional safeguards that I have mentioned. If there are additional safeguards that you think should be brought in, I ask that you specify them and I would be more than happy to seek to implement them.

09:45

John Finnie: Do we take from your response that the Scottish Government will propose amendments in the form of additional safeguards?

Kenny MacAskil: It has always been our intention to lodge amendments to update the system and ensure that safeguards are in place. We have made clear our commitment that corroboration must go because it is denying access to justice for not tens or hundreds but thousands of people each year. That is unacceptable. I give the commitment that we must have the scales of justice properly calibrated. On that basis, it has always been our intention that there would be amendments to provide greater safeguards. We are discussing those safeguards and looking to have those confirmed or clarified, and I am looking to hear from the committee what additional safeguards you wish to suggest. I give you a commitment that we would be happy to look very favourably at them. That is also why we are engaging with other stakeholders. It is through those discussions that, for example, dock ID has been raised as a matter in which there must be some change.

John Finnie: In solemn procedure, do you favour allowing submissions of no case to answer, with the judge able not to refer the matter to the jury?

Kenny MacAskil: I am perfectly comfortable and relaxed about that. That was the situation before, but it was changed. I can see some good reasons why it should be in the power of the judge to take a matter away from the jury if he or she believes that there is an insufficient case to go forward with.

John Finnie: What would your understanding be—

The Convener: Can I just interrupt, John? I want to let other committee members in. I will let you come back in. In fairness, I have given you quite a long whack at it—you have had about quarter of an hour.

John Finnie: Okay.

The Convener: Elaine Murray has some questions.

Elaine Murray (Dumfriesshire) (Lab): I start by saying that I and all other committee members, irrespective of our views on the abolition of the requirement for corroboration, are equally concerned about the lack of delivery of justice to people who are victims of sexual crimes and domestic abuse.

First, I return to a point made by John Finnie. The abolition of the requirement for corroboration would apply to the trade unionist on the picket line and the protestor on a demonstration, as well as to the victims of the crimes that I have mentioned. Do you have no concerns about civil liberties?

Kenny MacAskil: I am satisfied with where the Lord Advocate is coming from. It will be inadequate simply for one officer to say that a crime has been committed. Additional supporting evidence will always be required before a case is brought. The need for additional supporting evidence provides some backstop along with any other safeguards. The requirement is for two or more witnesses—indeed, if there are two or more, they will be brought—but, as I say, no case will be brought without additional supporting evidence.

Elaine Murray: The problem is that that is the word of the current Lord Advocate and it does not tie any future Lord Advocate. It would no longer be in legislation, so it would tie nobody; it is only a desire of the current Lord Advocate and you as cabinet secretary.

Kenny MacAskil: That is a fair point and that is why I am perfectly happy to lodge an amendment to include it in the bill.

The Convener: In the instance that Elaine Murray gave of someone on a picket line and a police officer what would supporting evidence be as opposed to corroboration?

Kenny MacAskil: That would ultimately be for the Crown to decide. It could be closed-circuit television, for example. All these things depend on context. Normally, there would be more than one officer present at any melee, whether that is at a picket line or a football game. What any additional evidence would be would depend on the context or the circumstance. However, what you have an assurance of from the Lord Advocate and me is simply that the word of one individual will not, on its own, be enough.

Elaine Murray: Surely that is what corroboration is—it is supporting evidence and not necessarily a second witness.

Kenny MacAskil: The difficulty is that we do not know what corroboration is. I met two of our most senior academics and I asked them whether they could give me a one or two-page synopsis of the law of corroboration. They admitted that they probably could not get one on which they would agree. It is quite clear that the judiciary find it difficult to agree what corroboration is. If the committee can tell me what corroboration is and agree to it, that will probably mean some progress.
Elaine Murray: Could there not have been an alternative to abolition of the requirement for corroboration? You mentioned in your opening statement that the corroboration rules are complex and that they have been stretched, eroded and circumvented. Would an alternative have been to ask a body such as the Scottish Law Commission to draw up a definition of what counts as supporting evidence? It could include the distress of the victim and special knowledge, for example, as contributing towards corroboration. Would it have been an alternative to abolishing the requirement to have a stricter, recognised definition of what counts as corroboration?

Kenny MacAskill: There are two arguments there. One is that we should not abolish corroboration, but I think that the case against corroboration is made. When not tens, not hundreds, but thousands of people every year do not get access to justice, it is a clear impediment. It is not simply about rape and sexual offences. As the Solicitor General for Scotland has commented, and as has been raised by Sandra White, whether we are talking about elderly and vulnerable people who are victims of assault in their own home or a care home, an elderly person who is a victim of a scamming offence, or child victims, people are being denied access to justice. That is why every victims organisation that appeared before the committee, such as Scottish Women’s Aid, Victim Support Scotland and Rape Crisis Scotland, was quite clear. I think that the case against corroboration is made, and I cannot see how we can tweak it.

I accept that there can and must be something that will allow us to get safeguards right in the new landscape. We have been and are open to consideration of further safeguards. We are open to discussing the issue and to placing it in the bill. We are perfectly comfortable with that in order to make sure that we do not remove a manifest injustice for those on one side of the equation and replace it with a manifest injustice for those on the other side.

The status quo is not, however, tenable. I firmly believe that the case against corroboration is proven.

Elaine Murray: I do not know, cabinet secretary. I might just be a simple-minded scientist rather than a lawyer, but I do not understand the difference between the supporting evidence that the Lord Advocate requires and the supporting evidence that is required for corroboration. They sound to me as if they are the same thing.

Kenny MacAskill: I do not want to put my own interpretation on that, but a view will be required from the very beginning right through the whole case. At present, two forensic scientists have to speak to a sample and two police officers have to speak to the collection of a CD-ROM from London. All that has to be done because such evidence is part of the integral thread of the case. The Lord Advocate is talking about the principal evidence that goes to court and how that happens in the Netherlands, for example. If people can tell me why we have to have two forensic scientists sign off on a label when the issue is not being challenged, I am open to being persuaded, but according to the rules of corroboration that is what is necessary when such evidence is part of the fundamental aspects of the case. That is why, as I say, corroboration cannot be tweaked or altered. We have to get rid of corroboration, but, in doing so, we must make sure that the safeguards, checks and balances, and the operation of the system, are appropriate.

Elaine Murray: The two police officers or the two forensic scientists are not the issue in domestic abuse and rape cases. It is the supporting evidence and the definition of the supporting evidence that will corroborate statements.

Kenny MacAskill: Yes, but that is not the law of corroboration, which requires not simply what happens in the court case—

The Convener: We appreciate that, and I understand your argument about the threads that lead up to the court case. However, to focus on what happens once a case is in court, I and others are concerned about the discretion or flexibility that exists for corroboration, and I think that the same thing will happen in relation to what is, or is not, supporting evidence. The judiciary will continue to make the same decisions. I agree with Elaine Murray: in the court context, I cannot see that there is a huge distinction, if any, between supporting evidence and what is now admitted as corroboration, in the widest sense, in the circumstances of each individual case.

Kenny MacAskill: That is probably because we have difficulties with the definition, and academics and the judiciary have difficulty with announcing what corroboration is.

The Convener: Will the same issues not also pertain to what the judiciary concludes is sufficient supporting evidence in the case? It seems as if we are changing labels to some extent.

Kenny MacAskill: No. What we are looking to do is start afresh, which is why we looked at the safeguards. Let us remember that when corroboration was brought in, it was meant to be evidence from two people. It has since been ameliorated and watered down. Is it evidence from two people? No. What is it? It depends on the circumstances. It has been ameliorated, understandably, for the right reason—to provide
flexibility, whether in relation to Moorov or a variety of other things.

I think we should get away from the view that corroboration has to be there, given all the difficulties that it causes from the very beginning. There is duplication of resources, as we heard from ACC Graham, given what individuals have to do, right through to the impediment of justice, given that cases of indecent assault do not even get into the court arena because there is no corroboration.

The Crown put forward evidence about a young girl who was assaulted and who was able to identify the perpetrator, who was apprehended because they were wearing distinctive underwear. That seems to me to be additional supporting evidence, because how could that girl know about the underwear? Why would she make it up? Was it just pure chance that she knew? A jury could decide, but, as things stand, such cases do not even get into court.

That shows why the case against corroboration is proven. Case law will always come up. In the world in which we live and the common-law system in which we operate, the court will always have to interpret the law and set rules. We can set down the matters that the committee and others feel are necessary. That is not just about the size of the jury majority or whether the prosecutorial test should be enshrined in statute, although they can be enshrined to make things quite clear. However, we will always have to have some flexibility for the judiciary because every offender is different and every case is unique.

The Convener: Yes. We understand that.

Roderick Campbell (North East Fife) (SNP): In the first supplementary written submission from the Crown Office—CJ46a—paragraph 4 states:

“It is important to be clear at the outset that the abolition of the requirement for corroboration is not about improving detection or conviction rates.”

When the Lord President gave evidence, he said:

“I think that is a rather simplistic statement from the Crown.”

He went on to discuss matters that I think are largely incorporated in the new prosecutorial test. He then said:

“If it is simply a matter of giving access to justice, I have to say that that is not my understanding of the Lord Advocate’s role. Of course, I might be wrong.”—[Official Report, Justice Committee, 20 November 2013; c 3729.]

Can you clarify the Government’s thinking at the present time about detection and conviction rates?

Kenny MacAskill: Conviction and detection rates are for the police and, ultimately, the courts. I agree with the Lord Advocate that this is about access to justice.

I come back to the letter sent to the committee by Colette Barrie. She wanted access to justice. When I met her, she was quite clear that she hoped that that would result in a conviction. She would be disappointed if it did not, but she would accept the view of the jury. She was groomed and abused as a child and had to live with the consequences. Despite the fact that she is a bright, intelligent woman, what happened to her affected her whole life in tragic ways.

Colette Barrie wanted her day in court. She told me that she wanted to look her abuser in the eye and say, “You ruined my childhood and you’ve damaged my life.” She would be disappointed if there was no conviction, but she recognises that neither I nor the Lord Advocate can make up the jury’s mind: it is down to the jury to decide. The jury might make a decision that is unacceptable to her, but she would at least have her day in court. As she put it, she wanted to be able to look her abuser in the eye. She wanted access to justice. She knows that we cannot deliver beyond that, because it is for the judge or jury to decide. She hopes that greater access to justice will result in more justice being delivered, but she recognises that the decision will be for the judiciary and the jury. Access to justice is about giving the Colette Barries the opportunity to have some closure on what has happened to them.

Roderick Campbell: But you will accept that as far as conviction rates are concerned what will happen is really a matter of speculation.
Roderick Campbell: Moving on to the question of—

The Convener: Before we move on, Mr Campbell, I note that the cabinet secretary referred to the people in question as victims. We have to be very careful with our language because, notwithstanding some of the horrors in the examples that have been highlighted, they are not victims until the case itself is proven. What of concerns about access to justice for the accused? You have talked about balances and recalibrations but there have been false accusations and one concern might be that, if those accusations come to court, there will be trial by media. Notwithstanding what happens at the end of a case and whether the person in question is acquitted or indeed the verdict is not proven—if that verdict is kept—their life will have been ruined.

Kenny MacAskill: We simply have to ensure that adequate safeguards are in place. That issue has been raised by Mr Finnie and I have already mentioned discussions that I have had with other bodies. My door is open to suggestions about additional safeguards and I will welcome any comments that the committee makes on the matter.

Equally, it is quite clear from discussions that I have had with many people that the issue is not just about the number of safeguards. When you look at other European or western democracies and even other Commonwealth countries, you will see that the additional safeguards are probably not all that great. The issue is how everything stitches together. We are happy to look at the matter and take time to get it right. As I have said, however, we have the opportunity to give victims access to justice.

As for the question of publicity, the courts have some powers over that issue—indeed, it has been touched on by commissions and inquiries elsewhere—but the bill is about getting the balance right. I accept that corroboration resolves matters but I believe that, in giving victims access to justice, we also have to provide adequate protections, not just safeguards, for the rights of the accused.

Roderick Campbell: I welcome your comments this morning about safeguards but I am slightly troubled by Lord Carloway’s view that, if the requirement for corroboration was abolished, there would be no need for any rebalancing through the introduction of further safeguards. Moreover, in his evidence to the committee on 20 November, the Lord President said:

“If there is a good solid intellectual case for abolishing corroboration, there should be no need for any safeguards. The moment that we say that there have to be safeguards, we are conceding that the change creates a risk of

miscarriage of justice, which, in my view, it will.”—[Official Report, Justice Committee, 20 November 2013; c 3727.]

Is it not a matter of concern that the two leading figures in the judiciary have taken what I consider to be a slightly negative view of safeguards?

Kenny MacAskill: I am happy to accept that there have to be additional safeguards. We are perfectly comfortable with and think there are good reasons for, as Elaine Murray suggested, enshrining the prosecutorial test in statute and protecting it from political changes. I do not think that the issue is necessarily the number of safeguards that are in place but how things operate collectively once we remove corroboration.

Equally, however, a lot of the requirements for corroboration that I have mentioned are only a prelude. The issue is not simply what happens in court on that particular day.

It is accepted across the political spectrum that it is daft that two police officers have to go down to London to pick up a CD-ROM. Why do two forensic scientists have to sign off a label? That is core, so you do not necessarily have to counterbalance the safeguards there. However, when it comes to court hearings, we must ensure that when corroboration—albeit ameliorated from the days when two eye-witnesses were required—is gone, we have enshrined what is necessary. We must also ensure that any other issues that have been identified—such as dock identification, which I have always been somewhat sceptical about—are properly analysed, and the Administration is happy to review them properly and take time to get things right.

Roderick Campbell: Why do you think that it is important for the reform to take place now?

Kenny MacAskill: The reform must take place now because, as I said, Lord Carloway was asked to go away and carry out a review following the Cadder decision, he has done the review and he has given us the opportunity to draft the Criminal Justice (Scotland) Bill, which covers the point of first suspicion through to the point of final appeal. We have the benefit of seeing that process laid out in one bill.

Secondly, as we have not tens, not hundreds, but thousands of victims of crime who are denied access to justice every year, we need to act, and Lord Carloway’s review has given us the opportunity to do so. We are quite comfortable about taking some additional time to get it right, so that the new landscape and new evidential regime are right and fit for purpose before we say that the reform is good to go.

The Convener: We shall hear from Graeme Pearson next, followed by Christian Allard, John...
Pentland, Sandra White, Alison McInnes and Margaret Mitchell. After that, John Finnie can come back in if he has supplementarys.

Graeme Pearson: Cabinet secretary, you mentioned the Cadder decision, which was taken by the Supreme Court, of which Lord Hope was a member. Lord Hope gave the judgment and has recently gone public in indicating that he thought that the current Administration’s approach to corroboration and its abolition as a principle is wrong. His voice and his view are joined by those of the Lord President and many other significant people in our community. Even Miscarriages of Justice Organisation Scotland has come on side, indicating its concerns. It is a controversial issue and one that causes concern.

Is there time to take a breath, and not lose years over the next stage but at least take the next months to ensure that we get the approach right and that we have a balanced process of delivering justice? We talk about what checks and balances we can put in place. Corroboration is one of those checks and balances in the current system, and it does not sit well merely to call it an outdated technical requirement; it is part of a process that has taken hundreds of years to hone down to its current state.

Have you taken time to think about whether the Scottish Law Commission or some other mechanism can be utilised to look at the judges’ powers, the size of the jury—never mind what a majority looks like—and the not proven verdict, the use of hearsay evidence within the trial, dock identification, which you have mentioned, and the impact of corroboration on forensic science and post-mortem analysis? There are now minutes of agreement that do not require two witnesses to come forward. Is there time to stand aside for a moment and to get it right for everybody concerned?

Kenny MacAskill: There is time to get the new system of evidential requirements and the other aspects that you mentioned right, but I do not think that there is any time to delay in getting rid of corroboration. The view that it is archaic came not from me but from Lord Carloway. I know that there are other senior members of the judiciary who disagree with him, but let us be clear about the fact that Lord Carloway is the only judge who went away and spent a year investigating the issues. None of the others did. He came back persuaded of the need for abolition.

I have listened respectfully to Lord Hope. Equally, I note that at no stage has it been suggested in the Supreme Court of the United Kingdom or in other places, whether in the Commonwealth, the Caribbean or elsewhere, that a requirement for corroboration should be introduced in England, Wales, Northern Ireland, St Lucia or anywhere else.

I believe that the case against the requirement for corroboration is made. We have time to make sure that we have the system right and that it is the best system that it can possibly be. That will give it merit. It seems to me that the Netherlands, Germany and other countries are not awash with manifest injustices. They seem to me to be decent democracies that are signed up to the ECHR, and they do not have a requirement for corroboration.

I can certainly give you an assurance, Mr Pearson. We can take time to get it right, but I do not think that we can delay in getting rid of the requirement for corroboration.

The Convener: Before Graeme Pearson goes any further, I note that you said that Lord Carloway took a year out. Did the rest of his review panel take a year out as well? Were they out doing the work, too?

Kenny MacAskill: They were a reference group, so—

The Convener: The reference group spent a long time on the work too, did it not?

Kenny MacAskill: I do not know. The reference group was there to engage with Lord Carloway, whereas he was doing nothing but the work.

The Convener: We were told that the vast majority of the reference group opposed the abolition of corroboration. It was not a one-man operation; there was a team as well. I mention that just for clarification.

Graeme Pearson: Lord Carloway took the year out. He was a member of the bench at that time and has since been promoted to his current position. We have a huge number of people with similar experience to Lord Carloway—some might argue that there are people who have far more experience of the administration of justice in Scotland—who take an alternative view. That causes concern to people like me, who are trying to come up with the right way forward.

On your point about other jurisdictions, I did a brief review of miscarriages of justice in England and Wales, and in recent decades 62 cases have been found, after many years of people being imprisoned, to have been miscarriages of justice. Thankfully, that has not been the case in the Scottish system; in comparison, we have had very few miscarriages of justice.

Is it really the cabinet secretary’s view that we can be as cavalier as this? We have motored on and considered all the issues in a matter of months. You say that the Government is open to suggestions from the public, the committee and others, but surely it was for the Administration to
Kenny MacAskill: We are building on Lord Carloway’s review. This was not done by officials—

Graeme Pearson: The justice system is not Lord Carloway’s system. We are talking about Scottish justice, and we have a community of people who have said that they are very concerned about the issues. They too seek justice for victims—as we all would.

Kenny MacAskill: First, let us deal with the question of justice. I cannot comment on the cases that you mentioned south of the border because I do not know them. Other aspects of the system there might be relevant. I do not think that you could say necessarily that they were all related to corroboration, although it is not for me to comment on them.

Equally, countries that are signed up to the ECHR, those in the Commonwealth and others do not operate a requirement for corroboration, but I am not aware of manifest injustices in Scandinavia, Canada, New Zealand or Australia. Doubtless they will have some, and miscarriages of justice also happen in Scotland. It is for those reasons that we quite correctly have the Scottish Criminal Cases Review Commission—which is a tribute to my predecessors, who brought it in—because occasionally the system does not get it right.

We should recognise that the requirement for corroboration has not avoided miscarriages of justice here, and equally that the lack of corroboration has not resulted in them elsewhere. They occur for a variety of reasons. The fact that we are one of the few countries that have a commission to review criminal cases is a tribute and testimony to the serious view that we take of the matter. That is the position.

10:15

Very few people are arguing for retention of the requirement for corroboration, but an awful lot of people are expressing concerns about the new landscape after the requirement for corroboration has gone, which is understandable. Very few, it seems to me, have come here to say that the requirement must stay. Those who have would probably caveat that by saying that the issue should go to a commission or whatever.

The Administration has been happy to consult on safeguards after the Carloway report. In response to that consultation, the senators of the College of Justice, for example, did not seek to have the right to remove the case from the jury. I am happy to take a contrary view to the senators on that. They were happy with a requirement for a two-thirds majority for a guilty verdict, but we are open to taking more time to get the new landscape right. I will come back to the point: corroboration has been shown to be “archaic”. That is Lord Carloway’s word, not mine.

Graeme Pearson: I am conscious that I am a guest of the committee. Can I ask one last question?

The Convener: We are very good to guests.

Graeme Pearson: You have said that you will take time. Would the Government accept an amendment to the effect that if it gets its way on the future of the requirement for corroboration, it will not enact the change until a group had reported on the appropriate checks and balances to be put in place when the change occurs?

Kenny MacAskill: Of course. We cannot go from the old regime to the new regime without ensuring that we have got it right. I am saying that if we have to ensure that we get it right, we have to give that time.

I am also conscious, as Graeme Pearson will be from his professional background, that we have to train not just police officers but the judiciary and prosecutors for the new landscape, so there must be some delay in its implementation.

Graeme Pearson: Yes, but before that training can take place that new landscape must be clarified and understood. Whether it be through the Scottish Law Commission or some other structure, it needs to be clear to us how you would do that.

Kenny MacAskill: We are happy to take the time to get it right and we are conscious that we cannot start training people until we have decided on that. We are also conscious that this is a busy year, with strain on the police from the Commonwealth games and so on, so we have never anticipated that police training would begin until a considerable period had passed.

The Convener: Can you clarify what you are actually saying? You have come out with a lot of substantive but not firm proposals—tests about other tests that you would put in place if the requirement for corroboration were to go. I, for the life of me, cannot see how we can deal with those at stage 2 or stage 3, because we would have to take further evidence, certainly at stage 2.

Are you saying that you would keep the removal of the requirement for corroboration in the bill but that it would not be enacted, pending something else?

Kenny MacAskill: No.
The Convener: You are not.

Kenny MacAskill: I am saying that the requirement for corroboration has to go. We believe that its removal must remain in the bill and we must trigger that. Graeme Pearson made a perfectly valid point, but we never anticipated that when the bill received royal assent we would immediately go live. The likelihood is that royal assent would be given before training and so on had taken place.

We also recognise that we have to get the landscape right and we must balance the scales of justice. We have to remain committed to the removal of the requirement for corroboration and adhere to the principles that have been set down by Lord Carloway, but we must ensure that the change does not take place until we have got right the new landscape in which the prosecution and the judiciary must make decisions.

The Convener: I am concerned about the phrase “got right”. Would there be a role for the committee? Perhaps I should be asking not you, but the clerks. I appreciate that you say that the change would come later, but if it will not be enacted right away, is there a way that the committee or Parliament could look at it again? It would be in the bill and in the act as passed, but in suspended animation until such time as further evidence came back to the committee. That would allow us to say, “Okay. Now we have taken our time, which was better than trying to do it at stage 2.” Maybe I am asking the wrong question; I do not know.

Kenny MacAskill: I think that such matters will be triggered by subordinate legislation but they can come back before the committee and Parliament through, say, the affirmative and super-affirmative procedures. Indeed, from my discussions with various people, including academics, I think that such a method would provide for greatest scrutiny.

The Convener: Do you want to come back on that, Graeme?

Graeme Pearson: In the light of that particular thought process, is it your intention that the bill will contain not only a commitment to discarding corroboration as a basic requirement but a safeguard that that discardation or whatever you might call it—

The Convener: Discardation? That is a new word.

Graeme Pearson: I am glad that I have invented it, convener. Do you intend that the bill will contain a safeguard to the effect that discarding will not occur until a committee or some other vehicle proposes safeguards with which the committee is satisfied?

Kenny MacAskill: Yes. We are perfectly comfortable with that direction of travel.

Elaine Murray: I want to ask a wee supplementary because, again, I am getting a little bit confused. Part of your argument for having to do this in the bill was that thousands of victims are not getting access to justice, even if the bill might not deliver justice for them. However—I have to say that I am, to a certain extent, reassured by this—you are now arguing that you would suspend such a move until the various safeguards had been interrogated, which might well put it off for a couple of years.

Kenny MacAskill: We never intended to bring the new regime into place until 2015 anyway, because the police had made it quite clear to us that with the Commonwealth games, the Ryder cup and so on, officers would simply not be able to undertake training either online or at Tulliallan in 2014. Although the bill will go through and receive royal assent, it has always been our intention that the changeover would not be triggered until 2015 or whenever. As with many bills, things can come in at different stages; we have that window of opportunity.

Elaine Murray: So, your argument about the urgency of the move was actually irrelevant.

Kenny MacAskill: No. There is urgency to get this done as quickly as possible, but this is as quick as it can be done. It cannot be done any quicker than that. I cannot ask the chief constable to take officers away from carrying out necessary orders during what will be a busy time for Scotland, but they will have to be trained up. As a result, the measure was never going to come in until 2015. In fact, the period before it would come in had not even been considered, although it will happen in 2015. That gives us a window of opportunity to get it right. Does that mean that some people will suffer from lack of access in 2014? Well, yes—but we were never going to be able to do this in that time. We need to get this done as quickly as possible and, indeed, that is what we have discussed with Victim Support Scotland, which supports that position.

We need to get this right. Corroboration has to go, but we must replace it with something appropriate and we will take the time to get it and the timing right.

Sandra White (Glasgow Kelvin) (SNP): Having spoken to Victim Support Scotland and others about corroboration, I am concerned about the timescale. Are you saying that the measure will come in no later than 2015? Given the reference to the Scottish Law Commission, my great concern is that we could be talking about two, three or even four years before something is put in statute. Can you confirm that, if this process
has to go ahead, it will not take any longer than a year?

**Kenny MacAskill:** The Lord President himself said that it should not take longer than a year. Given that we did not, in any case, think that the police could be trained in less than a year, we think that we can use this dead time—if I can put it that way—to get this right. We want to get the balance of the scales of justice right between doing this as quickly as possible and having sufficient time to get it right, but at this juncture we can carry out a further review. The principle that will be enshrined is that corroboration will go, and that will be triggered as soon as possible to end the manifest injustice that so many victims face.

**The Convener:** Forgive me, but I was just checking with the clerk, because you have thrown in mention of the super-affirmative procedure. The committee will have to find out exactly what that does to primary legislation. I do not think we have done that before, but I know that the process allows us to take evidence and take a matter back to Parliament. However, I do not know what the procedure would do to a measure that is already enacted. As you say, cabinet secretary, the provision is coming in, but whether corroboration is abolished or not depends on Parliament; the committee will have to keep its finger on the pulse of that change.

**Graeme Pearson:** My question is about the change. You have shared a new approach with us today, cabinet secretary, saying that you would set up a review group. Have you thought about who would lead on that group? Would it be the Law Commission, with a timescale set to report back by a certain date, or do you see it being led by some other body?

**Kenny MacAskill:** I do not think that the Law Commission would be appropriate. It does not currently have the resources for that. We have some thoughts, but we are open to views from the committee. As I said, the principle that the Government is enshrining is that corroboration will go, and we will take time to get the safeguards and related matters correct, after which we will implement the change. We are happy to discuss other matters with the committee and, indeed, with other parliamentary groups.

**Christian Allard (North East Scotland) (SNP):** On that point, I would like to know more about the training of police officers. Do you think that we need to wait for all the safeguards to be debated before we start to train police officers?

**Kenny MacAskill:** Not necessarily, but it would probably be better. I would have to leave that to the police; it is a matter for them. The only discussions that we have had with the police were about the fact that, after the Commonwealth games, the referendum, the Ryder cup and the homecoming, police officers will probably need time off, as I am sure John Finnie and the Scottish Police Federation will agree. It would be difficult to organise in 2014 the training that is required, so we gave the police a commitment that we would not proceed with it this year. I am happy to leave that to the good offices of the police and the federation. What matters is that they get the training and get it right. They could probably start doing some training, but it might be easier to leave it until everything is sorted. However, that is a matter for the police and their staff.

**Christian Allard:** So it is a question of timing, and we have room to make sure that it starts as soon as possible, if we all agree that the removal of corroboration is the way forward, which now seems to be the view of the committee—everybody is talking about timing as opposed to whether we should remove the requirement for corroboration. I will go against the committee on that and go back to the suggestion that the requirement for corroboration could be abolished only for some cases, although when Lord Gill gave evidence he said that, if the requirement for corroboration were removed, it should be removed across the board. Did you think about the possibility of removing it only for some cases? How would you address that situation?

**Kenny MacAskill:** We thought about it, but there is a good reason why the law of evidence should apply to all cases. Although the Lord President did not use the terminology that I would normally use about different categories, I understand where he is coming from. Why should I have to find myself telling people whose son has been murdered that the case could not proceed because corroboration was required, yet if I was speaking about a rape offence, it could be that that case proceeded?

The creation of two categories would cause great difficulties for those who operate the system. The police and forensic scientists could turn up at a crime scene not knowing whether the crime that had been committed was a serious assault, a murder or a sexual offence. The victim could be unconscious or dead, so what law of evidence would they apply—the law for murder and assault or the law for rape and sexual offence? Take your pick. All the way through the system, forensic scientists normally know what to do, and we cannot have a system in which they do not know whether evidence needs to be corroborated or not. What would happen when a rape victim died, as sometimes happens? The police and forensic scientists would start out with no corroboration requirement, but then, all of a sudden, the law would change.
I think that the law of evidence should be, in the main, clear across the board. We considered the suggestion to which you refer, but the Lord President and the Faculty of Advocates were opposed to it, and in all the evidence that I have heard from forensic scientists and the police, they are opposed to it, too. Superficially, it might be easy to say that the requirement for corroboration would be abolished in cases of rape and sexual offence and that that would be it, but what about an old lady who was the victim of scamming? Would corroboration be required? What about an assault of a vulnerable victim? At the end of the day, in terms of both implementation and operation, it would be too difficult if people had to ask, “What rule of evidence am I going to apply today?” I think that there should be one law of evidence.

Christian Allard: It was just an alternative to your proposals. Is there any other alternative to your proposals?

Kenny MacAskill: The alternative to our proposal to abolish the law of corroboration as a routine requirement is to ensure that we have the appropriate safeguards, that the system fits together and that there are checks and balances. That is how all other regimes operate. Reference has been made to the fact that the Netherlands has corroboration, but it does not—the Netherlands has something much more akin to what the Lord Advocate is advising, which is that there should always be supportive evidence. I am comfortable with that. It does not need to be provided at the beginning or require two officers to go and collect a CD-ROM, for example. No other country has gone there.

I remember my first discussions with Lord Carloway about the matter. He said that he had tried to work out why we introduced corroboration, in which law it was introduced and when it was introduced. He could not trace it. As far as he could see, it came from Romano-canonical law. It seems to me that Scotland and the world have become different places since we routinely applied Romano-canonical law in Scotland. On that basis, I cannot see any alternative other than to ensure that we get the best safeguards, have the right landscape and go in the direction that most other modern, western and European democracies have gone in.

Christian Allard: Let us take the particular example of the Netherlands. We heard evidence from the University of Dundee—

The Convener: Before you go on to that, other members want to ask supplementary questions.

Margaret Mitchell (Central Scotland) (Con): On the law of evidence?
different approaches in relation to separate categories of offence.

**Christian Allard:** I would like to go back to the position in the Netherlands. We heard from Professor Pamela Ferguson and Professor Fiona Raitt, both from the University of Dundee, who told us that Scotland was bizarre in having the corroboration requirement. However, when they thought about it, they said that, in the Netherlands, although there is no requirement for corroboration, there is a system of corroboration that operates unofficially, as is the case in many jurisdictions. That leads me to think that removing the requirement for corroboration will be a lot more seamless than was first expected.

**Kenny MacAskill:** I think that you are right. I disagree with Margaret Mitchell’s view of the current law of evidence, and the Procurator Fiscal Service has always operated as it does. What she suggests is unnecessary.

With regard to the points that you make about the Netherlands, the Lord Advocate has specified that he sees the position as being that additional evidence should always be required. I would take the view that the system in the Netherlands is not one of corroboration but one in which additional evidence is required. I think that every right-minded person would expect that. As Elaine Murray said, we do not want a situation in which an accusation that is made by one police officer or individual is sufficient for a conviction. That is not and will not be acceptable. There will always have to be additional evidence. Equally, it seems to me that, in the examples that were given by the Lord Advocate—the woman raped in her own home or the indecently assaulted child—there was additional evidence that would have meant that the cases could have proceeded in the Netherlands but, because of corroboration, not in Scotland.

I do not think that removing the requirement for corroboration will be entirely seamless, but I accept the point that you make. Margaret Mitchell tried to make the point—I think; whether I am right in saying so is for her to say, of course—that a lot of what goes on is viewed as perhaps being needless corroboration. However, I think that it cannot be dispensed with simply by the Lord Advocate saying, “I am not going to have corroboration evidence with regard to that CD-ROM.” Far too many cases have fallen because an aspect in the build-up or preparations was not corroborated, and there was therefore no outcome.

**John Pentland (Motherwell and Wishaw) (Lab):** We are now in our 11th evidence-taking session on the matter and I am still unsure whether the Mexican stand-off will be avoided. However, from your opening remarks, I wonder whether you are softening in your pursuit of an all-or-nothing approach to the issue, given that you talked about taking on board suggestions or reaching compromises. On that point, bearing in mind that conflicting evidence exists, it is interesting to note that Lord Cullen and Lord Hamilton have said that limited exclusions from the requirement for corroboration would be better than its complete removal. Might that be one of the compromises that you would be prepared to reach?

**Kenny MacAskill:** No. I have the greatest respect for Lord Cullen and Lord Hamilton and was grateful for their contributions. However, their suggestion regarding limited change was rebutted by others.

I am clear that the case against corroboration is made. We are not softening our position on that in any shape or form. However, we recognise that there are concerns about the number of safeguards and how the system will work in the new landscape that will exist after corroboration has gone. We are happy to take the time to get that right. I do not think that we can have a partial removal of corroboration. I think that corroboration is past its sell-by date, given that it came from Romano-canonical law and that it is not applied in any other jurisdiction. Equally, we probably want to ensure that, later in the game, in the new jurisdiction and system that we will operate, we get the best aspects from wherever and that the system is fit for purpose in our land.

**John Pentland:** You have emphasised that we really need to get access to justice for victims of rape, sexual assault and domestic abuse. I certainly support that. However, have you looked at any alternative to the removal of corroboration?

**Kenny MacAskill:** Corroboration is not sacrosanct. The point has been made that when corroboration first came in it required two eye-witnesses to speak to an incident. It came in in a world that did not have CCTV, forensic science, 3 million-to-one certainty or professional legal defence teams. However, all those aspects have come about. The world has changed in that respect.

For good reason—because justice was being denied—the courts brought in the Moorov doctrine, which was a fundamental change to corroboration. Moorov has been tweaked, changed, ameliorated and broadened because it was just not working, and it still does not provide everything. There have been wholesale changes to the law of corroboration over the years. That is why I think that it has long passed its sell-by date. It causes more difficulties because it is unclear. When I speak to learned academics and they tell me that the definition of corroboration cannot be agreed, I think that we have a problem.
I therefore think that corroboration has to go. We must ensure that we get the alternatives right. However, I do not see how corroboration could be tweaked. It has been tweaked; Moorov was probably further broadened even within my time as a lawyer.

**John Pentland:** There is widespread opposition to the bill, so if it is unsuccessful do you have a plan B?

**Kenny MacAskill:** I do not think that there is widespread opposition to the bill, although I accept that there are concerns about it within the legal profession. However, we should remember that on the other side are Victim Support Scotland, Scottish Women's Aid; Rape Crisis Scotland, Police Scotland, the Scottish Police Federation and the Association of Scottish Police Superintendents. I do not seek to minimise the legal profession's understandable concerns about ensuring that whatever system we move to is right. However, I think that the case is made on corroboration, because those who suffer from injustice overwhelmingly seek the change that is the removal of corroboration.

**John Pentland:** Do you have a plan B if the bill is unsuccessful?

**Kenny MacAskill:** No. I think that we have a plan to deliver access to justice and, as I said, to take the time to get the safeguards and changes to the system.

**Sandra White:** I concur with what my colleague John Pentland said about the corroboration issue and access to justice for certain crimes that people are victims of. John Pentland and other colleagues have mentioned that most of the judiciary are against getting rid of corroboration. However, a number of members of the judiciary have also said that if they were starting afresh with the justice system, corroboration would not be part of the law. Have you heard that comment, cabinet secretary? Is that a fair summing-up of the position on corroboration?

**Kenny MacAskill:** It seems to me that most of the opposition is not about preserving corroboration, because I think that everyone accepts the difficulties that exist with it because we cannot define it.

I take the view that in the main laws should be understandable not just to lawyers but to the general public. In some instances, corroboration is not even understandable to the legal profession. One lawyer will disagree with what another views as corroboration; in fact, we should remember that although the Lord Advocate highlighted some cases as not being capable of going forward, one of Scotland's foremost legal professors disagreed and said that they could go forward. Surely a case either is or is not capable of going forward to court.

The fact is that people are unable to write down in one or two pages what the law of corroboration in Scotland is. Are two witnesses required for every case? No. Well, then, which cases are they not required for? Given that the law is not capable of being understood and given that, having been in place for hundreds of years, it cannot be tweaked or refined, the time has come to look at what works elsewhere. Graeme Pearson is right about protecting ourselves from miscarriages of justice, which is why we are looking at what is happening, say, in the Netherlands and building that in. The point is that we need to give people the right to access justice when there is a sufficiency of evidence and to ensure that we get the safeguards right. However, I just do not think that we can simply tweak this.

10:45

**The Convener:** The inability to define or describe something does not always mean that it does not exist. For example, people know an elephant when they see one, but it is very difficult to define or describe an elephant to someone who has never seen one so that they know exactly what it is. On the other hand, a judge or, indeed, a jury might well know what corroboration is when they come across it because of the facts and circumstances of a case.

**Kenny MacAskill:** I would accept that argument in many spheres of society. However, in a court of law, when we are talking about imprisonment and justice, we cannot say, "We'll know this when it comes in the room." No—we should know what it is and it should be understandable. When we cannot get the academics or the judiciary to agree on the law of corroboration, we are leaving it to individuals to make a decision—probably the right one—about access to justice, and there is something fundamentally wrong with that. Some areas of law, such as those applying to information technology or conveyancing and land and, indeed, certain laws of evidence, are very complex and are not understandable to the ordinary man or woman, but when such a fundamental law—the requirement for two sources of evidence—that superficially appears so simple is, when you get into it, not simple at all, that law is no longer fit for purpose.

What matters is not so much the intellectual argument but the fact that every year 3,000 victims are not able to get access to justice.

**The Convener:** I still stick by my elephant example, cabinet secretary, but there we are.

**Sandra White:** There are actually two types of elephants, convener, not just one. [Laughter.] I am not a lawyer or a member of the judiciary; I might be an MSP but I am also a member of the public.
and I think that the cabinet secretary is absolutely right: the public should know exactly how the law works. After all, it should be for them, not just for the higher echelons, the intelligentsia or whatever you want to call them.

The committee has listened to the discussions, arguments and disagreements over whether the removal of corroboration will lead to further prosecutions. In that respect, I noted the cabinet secretary’s opening comments about access to justice and Colette Barrie. I do not know whether he will agree but, having spoken to Scottish Women’s Aid, I certainly agree with it that for many years domestic violence was hidden and that the more it came to light and the more people were heard in court, no matter whether there were prosecutions, the more people reported it.

Cabinet secretary, do you agree that, with the removal of corroboration, more people will feel more comfortable about coming forward and reporting such incidents and that, eventually—although perhaps not in six months or a year—we will see a cultural change among juries and others with regard to not just domestic abuse but rape, sexual assault and, say, assaults on older people in homes where there is no witness?

Kenny MacAskill: One would hope so. All the evidence points to an increase in sexual offences and the reason for that is that people feel more comfortable about reporting such matters and believe that they will be dealt with better by the police and the prosecution, that they will be better protected in court and that there will be better outcomes.

If people feel more secure that the law will support them in the challenges that they face, they are more likely to report crimes. I do not necessarily believe that more sexual offences are being committed now than before; I think that more sexual offences are being reported now than before.

Your point has merit. There are various factors that we do not know in why juries come to decisions—we will never hear the end of that—but if victims believe that the law provides support for them, they are more likely to report crimes and go through all the stages that can be traumatic for them.

Alison McInnes (North East Scotland) (LD): Cabinet secretary, over the past couple of years, you have used your parliamentary majority to drive through legislation that has been controversial: I am thinking of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 and the creation of the single police force. On both those occasions, you sat in front of this committee and, in your chirpy, friendly and confident way, told us that everything was fine and there was nothing to worry about. However, as the legislation was implemented, we saw very quickly that it had flaws.

We are at a critical stage of this bill and a host of voices have given evidence and wise counsel to this committee that cautioned against this move. Why are you deaf to that?

Kenny MacAskill: I listen respectfully to the voices of those who are concerned about the removal of the routine requirement for corroboration, but I cannot ignore the fact that not tens, not hundreds, but thousands of people are denied access to justice.

I can understand that the judiciary applies the law and will say that justice has been done—they would not necessarily even see the problem. The lawyers will submit their note or whatever and say that they have done their job. However, I have to meet the victims of crime who do not get access to justice—it goes with the turf. I have met Colette Barrie and I will meet the woman who gave her story to The Herald recently, because she contacted me. I have to listen to their stories, which are very poignant. Something is manifestly wrong when I have to say, as justice secretary, “Well, that’s the law.” When they tell me that they are denied access to justice, I have an obligation to them, others and Victim Support Scotland to make a change for the better.

Alison McInnes: I put it to you that you have an obligation to protect the justice system in Scotland, not to offer false hope to people. There is a real concern that you are raising false hope about prosecutions and convictions. If all you are doing is trading a compromise in the justice system for false hope, that is not a good way forward.

You have spoken a lot this morning; you keep saying that we must get this right, but you seem to have put the cart before the horse. You have said that it is essential to abolish the requirement for corroboration and you have started to acknowledge that there might need to be some safeguards, but I do not sense that you are doing anything to identify what kind of web of safeguards you need to put in place. I put it to you that there would be some sense in doing what many of us have called for for many months: ask either the Scottish Law Commission or a royal commission to look at the whole process, rather than somehow muddle through. We are beginning to get a bit of a muddle now, are we not?

Kenny MacAskill: I do not believe that I am raising false hope about access to justice. I return to the point I made about Colette Barrie. She was quite clear about this and I said that it is not for me or anyone else in Government or in politics to impose a conviction; it is about access to justice. She accepts that. She has said that she would be
deeply disappointed if there were not more convictions and she believes that there will be more, but she accepts that this is about access to justice, so I do not think that we have ever given false hope. The position of Rape Crisis Scotland, Victim Support Scotland and Scottish Women’s Aid is the same, although—probably because of its strength—Colette’s testimony sticks in my mind most of all.

On safeguards, we have always had the same position. Once Lord Carloway published his report, we did a further review of safeguards, which took on the view of the senators of the College of Justice, which included the no case to answer submission—if we can put it that way—which is about the right of the judiciary to take the case away from the jury. If the committee feels it fit, we are happy to consider that we should not take the senators’ view on that.

Equally, as I said then, as I have said since and as I say again, we are open to other suggestions. That is why, when I meet James Wolffe and he raises the issue of dock identification, I say, “Fine; let us have a look at it.” I accept that 21st century dock ID has moved on from what it was when someone was charged with stealing a horse in the 19th century.

We are happy to take the time to get this right but, as I say, I believe that the right of victims such as Colette Barrie to access to justice is sacrosanct.

Alison McInnes: Do you not think that taking a pick-and-mix approach, with members throwing in amendments at stage 2 and other people coming forward with concerns, puts at risk the integrity of the system? Would it not be better to look in the round at all the possible safeguards that we would need and come up with a comprehensive package that assures everyone that there are still strong foundations that will protect everyone against miscarriages of justice?

Kenny MacAskill: That is what we seek to do and is where I hope we get to. I do not believe that a royal commission would be appropriate, nor do I believe that the Scottish Law Commission is in a position to accept such a review. However, we have time to make sure that we can give some consideration to ensuring that the system will operate fairly for all—for victims as well as for accused. The issue can be dealt with and we can stay on course. I will take on board the views of committee members about how it can be dealt with.

We are currently engaging with individuals and organisations to make sure that we take on board the points about appropriate safeguards and the interoperability of the system.

Alison McInnes: How will you determine when you have got it right? What test will determine that?

Kenny MacAskill: Ultimately, that will be for the Parliament.

The Convener: I agree with Alison McInnes. It seems that issues are being raised ad hoc about safeguards. I do not know whether the cabinet secretary has actually said that if the committee was to propose the super-affirmative procedure, he would be amenable to accepting that proposal.

Kenny MacAskill: I am happy to look at that.

The Convener: Before I let Margaret Mitchell come in, I will make that point plain because she might want to focus her questions. I have a note from the clerks about what that would mean; I was not too sure myself. If the provisions on corroboration were kept in the bill, they could be subject to the affirmative or the super-affirmative procedure; it would need to be specified in the bill. Affirmative procedure would allow the committee to consider whether the proposed additional safeguards would be sufficient; that would mean three weeks of evidence. The super-affirmative procedure, under which the committee has already considered prison visiting committees, would allow us to take more evidence before final orders were laid. The Government would have to put final, super-affirmative subordinate legislation to the Parliament for it to accept or reject the commencement of the provisions on corroboration. I hope that I have explained that properly. That is how the procedures would work. As the committee is talking about having real concerns about safeguards and so on, that is a procedure that could be used. I just thought that I had better explain it, because it does not come up very often.

Elaine Murray has a question; is it on this matter?

Elaine Murray: It is actually on Alison McInnes’s point about the Scottish Law Commission. The cabinet secretary has been very reluctant to refer the issue to the Scottish Law Commission but the Government has suggested that the third verdict be referred to the Scottish Law Commission, and we heard last week that section 53 of the Title Conditions (Scotland) Act 2003 is to be referred to the Scottish Law Commission, so why the reluctance to refer something as fundamental as the abolition of the requirement for corroboration and what will come in its place?

Kenny MacAskill: The view is that because of the nature of its staffing at the moment, the Scottish Law Commission is not necessarily best placed to deal with criminal matters. We do not think that the Scottish Law Commission is the
appropriate place to go at the moment. It also has a pretty full calendar because of everything that has been put there and its on-going research. It has published its work programme and the difficulty is that it is lacking in the specific criminal skills, and it has limited time and ability.

Elaine Murray: But that is not the case for the third verdict.

Kenny MacAskill: Well, it has some time. We discussed that issue with it and it was going to take it on board. It has a new commissioner going in—Lord Pentland—but its resources in terms of criminal staff are not great, or huge in number.

The Convener: Roderick Campbell has a supplementary question.

Roderick Campbell: Just to clarify, it is my understanding that, in respect of section 53 of the Title Conditions (Scotland) Act 2003, the Scottish Law Commission could not commence work until 2015 anyway.

11:00

Kenny MacAskill: It has published its work programme—I cannot remember for how many years, but it is pretty busy. It does do criminal work but, if I recall correctly, Patrick Layden is on his own at present and is having to do everything.

The Convener: I call Margaret Mitchell.

Margaret Mitchell: I think that we should deal with the red herring of the affirmative/super-affirmative suggestion that you have thrown into the pot this morning, cabinet secretary. All that it means is that the Government would use its parliamentary majority to force through a decision on something that is causing widespread concern.

One thing is not in doubt this morning. You and I agree that access to justice is crucial. You said this morning that 3,000 victims of serious sexual assault do not get access to justice. The other side of the coin is the hundreds and thousands of people who go through our criminal justice system every year and have a right to a fair trial. That is what is in jeopardy. You are also raising the prospect of many more unsafe convictions, and you are doing this, it seems, because Lord Carloway's report and your own experience as a prosecutor in the courts, which was some time ago now, have led you to believe that the case has been made on corroboration.

Your evidence this morning has been confusing. Early on, you suggested that the case for corroboration is not proven, but I suggest to you that that is the case. The people who have come forward are not saying that we absolutely must retain it. A lot of us feel that we should retain it, but many are saying, "My goodness, why shouldn't we look at it?"

I want to nail this. How long did Lord Carloway spend looking at corroboration? I remind the cabinet secretary that the bill covers arrest and custody, arrest by police, custody of persons not officially accused, investigative liberation, police liberation, rights of suspects in custody and police powers and duties—we have not come to corroboration yet—as well as breach of liberation conditions, common law and enactments, disapplication and interpretation of parts, sentencing, appeals by the SCCRC and miscellaneous provisions. How long did he spend looking at corroboration?

Kenny MacAskill: I think that, rather than taking hearsay evidence, you would have been better to ask Lord Carloway that when he was here.

Margaret Mitchell: With respect, cabinet secretary, you are saying that the case has been made on corroboration because Lord Carloway has convinced you, yet you are asking me to go back and ask him how long he spent on it. Did you not ask him that?

Kenny MacAskill: It is not a matter of going back. You had him here before as a witness. You should probably have asked him the question.

Margaret Mitchell: Should you not have satisfied yourself before—

Kenny MacAskill: I have to say—

The Convener: Now, now. Can we not have a barney and talk over each other? Passion is wonderful, but can we have civility?

Kenny MacAskill: It was difficult to understand what the question was.

Margaret Mitchell: Do you know, cabinet secretary—

Kenny MacAskill: I think that the question was what period of time, in the one year in which Lord Carloway carried out his review, he spent on corroboration.

Margaret Mitchell: Yes.

Kenny MacAskill: I have to give you the answer, Ms Mitchell, that I cannot answer that. I do not know how long he had for coffee breaks or how long was applied to anything else. He was asked to carry out a review. He was appointed not by me but by the Lord President. He took time off from sitting on the bench to go away and investigate—

Margaret Mitchell: You have answered the question. You do not know, cabinet secretary.
Kenny MacAskill: I do not know. You would need to ask Lord Carloway—

Margaret Mitchell: Right. Well, I think that that is material if we are talking about evidence that he has produced that has convinced you overwhelmingly that the case on corroboration has been made. I turn to the Carloway expert review group. Do you know what it recommended?

Kenny MacAskill: It was split. Some did not agree and some did agree.

Margaret Mitchell: But do you know what the group recommended?

Kenny MacAskill: It was a reference group to Lord Carloway. It is Lord Carloway’s report that is put to me.

Margaret Mitchell: You do not know what it recommended. I will tell you, then, because we heard evidence on it. It recommended—

Kenny MacAskill: It was a reference group.

Margaret Mitchell: —that corroboration be put to a law commission. Okay?

Kenny MacAskill: It was a reference group to Lord Carloway.

Margaret Mitchell: Yes, and that is what it recommended to Lord Carloway.

Kenny MacAskill: And Lord Carloway made a report—

Margaret Mitchell: It seems that you did not know that, cabinet secretary.

The Convener: Please do not talk over each other. Please talk one at a time, because I am having difficulty hearing.

Margaret Mitchell: Did you know that information?

Kenny MacAskill: Lord Carloway made a report to me. I asked the Lord President for a judge to carry out a review after the Cadder decision. The Lord President appointed Lord Carloway, who had a reference group to give him support and advice. Lord Carloway produced the report, which he submitted to me. I am aware that many members of the reference group did not agree with his position on corroboration, but others, including the former chief constable of Lothian and Borders Police, David Strang, did. The report came to me and I support it, as I have said.

It is fair to say that what has persuaded me most that corroboration requires to go is not the eloquence of Lord Carloway or any other legal practitioner but the testimony of Colette Barrie. She has not given evidence before the committee, but she would be happy to do so or to give evidence directly to you.

Margaret Mitchell: Let us not go off at more of a tangent—you are an expert at doing that. You owe it to the hundreds of thousands of people who go through the criminal justice system every year, who expect a fair trial, to take the issue seriously and not go off at tangents.

The Convener: In fairness to the cabinet secretary, I do not think that he is not taking the issue seriously. I know that you and he are at opposite ends of the spectrum.

Margaret Mitchell: He should not go off at a tangent.

The Convener: The suggestion is most unfair. I accept Margaret Mitchell’s position, but I ask her to test more questions.

Margaret Mitchell: The question is about the fact that the cabinet secretary has said that the need is immediate and that we must get justice for the victims now. At the same time, he has said that it is important to take time to get this right.

The Scottish National Party Government has a majority. Surely any reasonable person would consider the weight of expert opinion that we have heard. There has been a damaging attempt to polarise opinion by placing the judiciary and the legal profession on one side and victims on the other, which does a huge disservice to victims, as we know from the evidence of the cross-party group on adult survivors of sexual abuse, for example, whose firm opinion is that the accused’s rights must be protected to get a fair trial for victims and ensure that justice is done. It does victims a disservice to use a numbers game and polarise opinion.

Given all that, your testimony today that you want to get this right and the fact that you have no clue how long Lord Carloway spent on looking at corroboration, is it not reasonable to give the issue not to the Law Commission, which we accept that you say is far too busy, but to a royal commission set up to look at the law of evidence, as Lord Gill suggests? It is clear from the evidence that we have heard and what you have said that that law is not being applied properly in court. Your evidence is contradictory—you say that corroboration has been whittled down to almost nothing, but it is also supposed to be a barrier. Given all that, surely any reasonable person would say that, while we look at possible safeguards, we should look at whether to retain or abolish the corroboration requirement.

Kenny MacAskill: No.

Margaret Mitchell: I did refer to any reasonable person.
The Convener: I am not having that, please—let us contain our emotions.

I have a question for completeness. A petition has been lodged to ask that, if the mandatory corroboration rule is abolished, that decision will have retrospective application. Will you address that point?

Kenny MacAskill: I do not think that retrospectivity can be brought in.

The Convener: Will you develop that a little? That would be helpful, as somebody has taken the trouble to bring a petition to the Parliament on the issue.

Kenny MacAskill: Retrospectivity would cause great difficulties for prosecution. I appreciate the sensitivity, because people have suffered injustice. However, there must be clarity and certainty. I say to Ms Mitchell that that comes back to the point that the law must be understandable. People must know whether the law applies to them. Retrospectivity causes difficulties with that. Our position is that retrospectivity would not be possible, although I have sympathy for those who seek to bring it in.

The Convener: I call John Finnie.

John Finnie: Has Margaret Mitchell finished?

Margaret Mitchell: I am finished.

The Convener: I did not just wade in.

John Finnie: I asked in case you thought that I had a supplementary question, convener.

The Convener: I did not think that.

John Finnie: My question is about Romano- whatever law—Romano-Greco law?

Kenny MacAskill: Romano-canonical law.

The Convener: Romano-Greco—that sounds like a restaurant.

John Finnie: Cabinet secretary, you said that a lot has changed since people were being charged with horse thefts and the like. That is the case, because we now have CCTV, IT, mobile phones, forensic science, DNA and a record number of police officers—we are able to use all those resources. That is all the more reason to acquire corroborative evidence, many would say.

Kenny MacAskill: It is about justice. One of the interesting discussions that I had with the chair of the Scottish Human Rights Commission and his colleagues was on that point. As we know, because of ECHR, a victim might choose eventually to go to Europe to challenge the system because they are not getting access to justice. People have gone to Europe frequently about convictions or whatever.

At some stage or other, it is possible that a victim would go to Europe and Scotland could face significant difficulties if we were challenged—we have the UN report relating to sexual offences. We have to prepare for that possibility and certainly the SHRC accepts that it is within the bounds of credibility that such a challenge could come. Perhaps, as in other instances, such a challenge has not been brought so far because the poor and the victims tend not to have access to the lawyers.

One of the other aspects of the proposal is about ensuring that Scots law is fit for purpose, can sustain challenges from the ECHR or wherever and provides that correct equilibrium for the scales of justice.

John Finnie: So the Scottish Government's position is that Scots law as it stands, with the requirement for corroboration, is challengeable under the ECHR.

Kenny MacAskill: It could be challenged, yes.

John Finnie: That point does not feature in any of the previous representations, explanatory notes, policy memoranda and so on that we have had. When did it come to light, cabinet secretary?

Kenny MacAskill: I have discussed the matter with past Lord Advocates.

John Finnie: And yet we have nothing in our papers to suggest that and I would have thought that it is of great significance.

Kenny MacAskill: The Lord Advocate has expressed concerns. I have certainly had discussions not simply with the current Lord Advocate but with past Lord Advocates about the possibility that, ultimately, we could face difficulties if a challenge was brought.

John Finnie: What changes would there be in work practices and attitudes were the requirement for corroboration to be removed from the Scots law system—in particular with regard to police officers? I asked Mr Graham about the amount of effort a police officer would put in with regard to someone who was the subject of a single witness accusation, perhaps with some CCTV evidence or whatever. Would the police be going out looking for evidence that would support the assertion of the accused that he had not committed the offence?

Kenny MacAskill: Yes—if we accept the position of the Lord Advocate, the police would always look for additional evidence. Probably the easiest way, once they had heard from one witness, would be to try to get a second or third witness. It would only be in cases where the police were restricted in terms of witnesses that they would not try to get that evidence from witnesses and they would look for additional evidence.
I think that the work practices of police would remain exactly the same. If there was an incident and a large number of witnesses were there, the police would get as many witness statements as possible. They might cite only a few of them, but that is probably the situation at present. You probably know of instances yourself in which there might have been 100 people who saw an offence. That does not mean that all 100 of them would be called—the police would probably just have noted their details—but it would help to make sure that charges were brought. I do not think that the proposal will make any difference to the work practices of the police.

The proposal will ensure that we avoid duplication of resources in matters that are not fundamental to the case—as in the example of two officers having to go down to London to collect a CD-ROM. You have probably experienced such situations yourself. The kernel of the matter comes back to what Lord Carloway was saying: it is about the quality, not the quantity, of evidence; it is about making sure that the case is proven; and it is about making sure that there is a sufficiency of evidence.

That is why we are looking at building on the qualitative and quantitative test by the Lord Advocate—the evidential and prosecutorial test. Is there sufficiency there? Is it in the public interest? Is there not just a single source but additional evidence? If there are several sources, that is what you want. If it is a situation with only one eyewitness, what additional evidence can you get? Is it that the pants of the perpetrator look the same as the description given by the young girl? Is it that she was able to identify a locus that she does not know? Is it that she is clearly able to express all those things? Those are all additional pieces of evidence but, at present, because of the arbitrary rule of corroboration, such a case cannot go to trial. However, in any other western democracy, it would proceed and it would be for the jury to decide. I do not think that the measure will change the practices of the police, apart from getting rid of the duplication that I think everybody concedes is unnecessary.

11:15

The Convener: Can I stop you a minute because everybody is chipping in again? I will let the discussion be exhausted but, just for enlightenment, I will tell members who is waiting to ask questions. Alison McInnes is indicating that she has only a small question, but I have a lot of members doing that. I have questions from Roderick Campbell, Sandra White, Elaine Murray, Christian Allard and now Alison McInnes. I am happy to take you all, but let us not go over old ground—let us pick up new things. I ask John Finnie whether he has finished. I see that he is perched and ready to go.

John Finnie: I have a question on one further issue.

The Convener: Okay—as long as it is new.

John Finnie: It is regarding domestic violence. There has been a welcome change of approach, certainly since I was in the constabulary a long time ago. As I understand it, following the Lord Advocate’s guidelines, perpetrators, who are overwhelmingly male, can be arrested on uncorroborated evidence and detained in custody, only for the case not to proceed to court when the fiscal gets the papers in the morning. I understand that another dimension is the growing practice of counter-accusations through which the initial alleged victim finds themselves the subject of an accusation, and both parties are arrested. Under Cadder, both parties summon solicitors, who give advice that it would be inappropriate to say anything, which results in a logjam. That is in no one’s interest. Were we to remove corroboration, do you fear that there would be more counter-accusations? That is happening with corroboration.

Kenny MacAskill: No. The issue that you raise relates to the policy that is operated by the Crown and the police. That relates to a zero tolerance policy and to better training for police officers in relation to what they are looking for. I do not think that the law of corroboration makes any difference to that, so I do not think that the change would affect police policy.

Roderick Campbell: Just for good order, I refer to my entry in the register of interests, which shows that I am a member of the Faculty of Advocates.

To follow on from the point that John Finnie made about the ECHR, I think that I am right in saying that Dame Elish Angiolini made a speech on the issue last year. That might not be in the policy memorandum, but it is certainly something that previous Lord Advocates have talked about.

The Convener: What did she say?

Roderick Campbell: She talked about the policy of challenge under the ECHR if corroboration was not abolished.

The Convener: That is helpful.

Roderick Campbell: Again for good order, I want to refer to a comment by Lord Gill, who said:

My suggestion is that there should be an examination of all the various safeguards in the criminal system in the round. There could be, for example, reconsideration of the admissibility of certain statements, a re-examination of the use that can be made of confessions, a re-examination of the right of the accused not to testify, an examination of the right of the accused to withhold his defence at the earliest
stage of a prosecution, and so on.—[Official Report, Justice Committee, 20 November 2013; c 3720.]

In considering safeguards, will you take on board the Lord President’s comments?

Kenny MacAskill: Yes. Some of those aspects might be for other reviews, but all of them would at least have to be considered initially as to whether they would be appropriate. It is becoming clearer to me that the issue is not simply about safeguards and the number of them; it is also about the operability of the systems and other aspects, such as those that the Lord President raised, which you have correctly touched on. We are happy to take the appropriate steps to ensure that we consider those.

Sandra White: I have a small point of clarification that is similar to the point that Rod Campbell made earlier. Perhaps the clerks could check this, but I seem to recall that, in evidence to the committee, Lord Carloway said that he was protecting the Scottish Parliament against someone taking a case to the European Court of Human Rights, which could happen if we still had corroboration.

The Convener: In considering our report, we can go back to look at the evidence.

Sandra White: John Finnie said that he had not seen any evidence on that, but I am almost certain that it was part of the evidence.

John Finnie: If that is the case, I accept that.

The Convener: We will deal with that issue when we look over the evidence that we have received. Members are beginning to exchange with one another and we are getting evidence from members.

Sandra White: Sorry—I just wanted to point that out.

Elaine Murray: I return to the possibility of the requirement for supportive evidence being put into the bill. That would change it from being a bill that abolishes the requirement for corroborative evidence to one that replaces it with a requirement for supportive evidence, which is quite different.

I am quite attracted to that idea on the first glance, but we would need time to take evidence on it to see whether it would satisfy some of the concerns that have been raised with us. We received a lot of evidence—a big file of it—from people on both sides of the argument. Would you, on behalf of the Scottish Government, be prepared to give time for that as the bill goes through the Parliament? Secondly, and importantly, why did you not put that provision in the bill in the first place before it was introduced to Parliament?

Kenny MacAskill: We consulted on safeguards. It is becoming clear to me that the issue is not only safeguards but the operability of the system. We seek to get as much consensus as possible. Sometimes, it is not possible to get consensus. We have, on one side, those who say that corroboration can never go and, on the other, those who think that it has to.

We are persuaded that corroboration has to go. We recognise the need for safeguards, which is why we have collaborated on a few. We are aware of continuing concerns, which is why we have always said that the door is open. We have even had discussions within the past fortnight or so. The Faculty of Advocates raised dock identification, to which we were perfectly happy to give consideration. Roderick Campbell made a good point about other aspects, so we are happy to consider that.

It is about getting the balance right, as Sandra White said, within time. We are happy to take time to try to ensure that we get it right. We think that the principle is established that corroboration is past its sell-by date and archaic. Equally, you make a good point. With the removal of corroboration, we have an opportunity to decide what is necessary to prove a case. We can take time to ensure that we set that out.

The Convener: Would that be incorporated in the prosecutorial guidance that, if I have kept my bearings during the discussion, you are now considering putting into the bill?

Kenny MacAskill: The prosecutorial test would go into the bill. Prosecutorial guidance is a matter for the Lord Advocate.

The Convener: I understand that; sorry, that was my mistake. The prosecutorial test—

Kenny MacAskill: That could go into the bill.

The Convener: Would that be a place to put something like that?

Kenny MacAskill: Yes, that would be the place to do it.

The Convener: Before I get any more confused, I call Christian Allard to be followed by Alison McInnes. After that I want to have a suspension before we move on to the next set of questions, if that is all right with members.

Christian Allard: Thank you, convener. I do not want you to be more confused about that matter, but I am confused about something that I heard. It concerns the number of prosecutions and convictions that there will be if we remove the requirement for corroboration.

At the start of the debate, the people who did not want to remove the requirement for corroboration claimed that there would be no increase in the number of cases brought to prosecution. When I asked Lord Gill about that, he
answered no, there would not be an increase. When I pushed him on it, he answered that it might increase the number of prosecutions. Again, we are not sure whether the numbers will or will not increase.

We heard from Margaret Mitchell that many more unsafe convictions could arise if we remove the requirement for corroboration, but Lord Gill said that he was not convinced that it would increase the number of convictions. I would like your views, cabinet secretary: what would it be?

**The Convener:** I do not think that Lord Gill said that it would increase the number of convictions. Do you have that in front of you?

**Christian Allard:** He said:

“1 am not convinced that it would increase the number of convictions.”—[Official Report, Justice Committee, 20 November 2013; c 3727.]

**The Convener:** That is correct.

**Christian Allard:** That does not add up to many more unsafe convictions.

**Roderick Campbell:** The issue is the number of cases in which there might be a miscarriage of justice, not the number of convictions per se.

**The Convener:** Yes. The evidence from the SCCRC was that it thought that there would be more unsafe convictions and, therefore, that more appeals would go to it. That was another point, so there were two points there.

**Christian Allard:** Nevertheless, my question is on the number of convictions.

**Kenny MacAskill:** I do not believe that there would be an increase in the number of miscarriages of justice, as Lord Carloway made clear, and certainly not when the appropriate safeguards are in place. We already have an SCCRC, unlike many other countries, excepting England and Norway.

The removal of the corroboration requirement will increase access to justice, and it is likely that increased access to justice will lead to more convictions, but we cannot confirm or guarantee that any particular offence that is prosecuted as a result of that increased access would result in a conviction. As Sandra White said, it is likely that more people who might previously have pleaded not guilty despite the evidence or in the hope that the evidence would not hang together, thinking that they would be able to evade justice, might plead guilty and acknowledge their offending.

**The Convener:** We will move on. Alison McInnes will have the last word.

**Alison McInnes:** Mr MacAskill, you said in response to John Finnie’s question about police practice following the abolition of the corroboration requirement that there would not be many changes apart from a reduction in the duplication of resources. Have you quantified the savings that might be made in police and forensic services if they did not need to have all those double resources?

**Kenny MacAskill:** Her Majesty’s inspector of constabulary was going to do some work in that area, but he has not yet reported on the costs of duplication, which are hard to quantify. The abolition of duplication will not create financial savings as such, but it will mean that two officers who have to go down to London to pick a CD-ROM—

**The Convener:** We do not need to hear about two officers and a CD anymore; I think we all know about that by now.

**Kenny MacAskill:** I got the example from the federation—

**The Convener:** I know—forgive me, cabinet secretary. We accept the example of the two officers and the CD, but I think that the point has been made.

**Kenny MacAskill:** To conclude, rather than having two officers going to London—I do not need to expand on that—perhaps one officer will go while the other will stay on the beat in Aberdeen, Glasgow or wherever. That is replicated so that, in future, rather than two forensic scientists doing something, one of them could get on with some analysis. They would be able to do the work that they are paid to do rather than simply having to sign a chitty to say, “I was there too.”

**The Convener:** I appreciate that. I am beginning to wonder what was on that CD-ROM, but we will park that subject.

We have finished this session, and I suspend the meeting for a five-minute break, which is much needed by the convener and possibly by others, including the cabinet secretary.

11:27

**Meeting suspended.**

11:34

**On resuming—**

**The Convener:** We are back, refreshed and energised, and we move to the second set of questions, on the sheriff and jury proposals in part 3 of the bill. The cabinet secretary and his officials are still with us. I seek questions from members, although I do not see the flurry of hands that we had in the previous session—I do not know why.

Margaret Mitchell has a question.
Margaret Mitchell: On the proposal to increase the majority that is required for a conviction in jury cases, is there not a problem with considering that as a safeguard?

I am wondering whether I am on the right subject here.

The Convener: I do not think so.

Margaret Mitchell: No, I am not—my apologies.

The Convener: That issue is related to corroboration, and that moment has passed.

I hope that your point was not about a CD. You are not one of those two policemen, are you? No.

Margaret Mitchell: My apologies.

The Convener: That is okay. John Finnie will go next.

John Finnie: Cabinet secretary, the bill contains some wide-ranging proposals to improve the business management of the court system. In the past, the introduction of intermediate diets was intended to serve a similar purpose. Why would such a change work this time if it has not worked previously?

Kenny MacAskill: It has worked in the High Court. We are discussing sheriff and jury cases, and the proposals are predicated not so much on bringing back the intermediate diets that were introduced in the 20th century as on Lord Bonomy’s report at the start of the noughties, on which the changes to the High Court were based. The change has worked remarkably well there and, given the nature of the High Court, it should work reasonably well in sheriff and jury cases. It is different from what has taken place in summary cases, and the changes in the High Court are the main comparator.

John Finnie: I acknowledge that my experience in relation to such matters is from a previous century.

Kenny MacAskill: As is mine.

John Finnie: Yes. With regard to the secure email system and the question of ownership that was discussed, will that provide challenges given the additional number of sheriff and jury cases in comparison with the number of High Court cases?

Kenny MacAskill: We face challenges with the IT system at present, so we know that there will be challenges, but we have to make those changes anyway, and I am confident that Crown prosecutors and everyone else will be able to resolve the issues. That will take time, but we already know that the IT systems require to be improved across the justice domain. New systems bring challenges, but we are changing the system to get it right.

Roderick Campbell: We heard in our second evidence session on the bill from representatives of the Faculty of Advocates and the Crown Office. There was discussion about whether, under section 46, the written record of the state of preparation should be a joint statement, or whether the prosecution and defence could both sign and prepare their own statements, in which case the bill would require to be amended. Do you have any comments on that?

Kenny MacAskill: We are aware of the concerns about who will do what, so we are happy to review the issue and see how we can resolve it.

Roderick Campbell: Secondly, do you have any comments on the resource implications of those proposals?

Kenny MacAskill: We have set out those details in the financial memorandum. There will be increased costs through legal aid that we will have to address, but there will also be savings in the systems as a result—it is hoped—of having fewer citations not just for witnesses and jurors but for specialist witnesses. We know that there are issues to be addressed, but we have quantified the costs and worked with the relevant agencies, and we believe that we can manage them.

The Convener: When you say that you will go away and look at the issue of the written statement about the state of play in a trial, I take it that you are sympathetic to the submission of separate records by the prosecution and the defence. I can recall there being difficulties with a civil minute of agreement, where one party got the blame when it was the other party that was dragging their feet.

Kenny MacAskill: I am happy to try to ensure that we get that right. Perhaps Kathleen McInulty can comment on that.

Kathleen McInulty (Scottish Government): Yes. The issue needs to be considered and given further thought because if there are separate schedules it is likely to take sheriffs longer to assimilate the information. Indeed, because of the volume of cases, it is likely to have a more significant impact on the sheriff court rather than the High Court.

The Convener: But you take my point that if the Crown or the defence were dragging its feet you would at least know that if each side had to have the schedule in within the appropriate time.

Kathleen McInulty: Yes.

The Convener: I will press the point no further but will simply say that such an approach would be fairer to both parties.

Margaret Mitchell: On section 67 and compulsory business meetings, the Government has decided that such meetings could be held by
electronic means and—contrary to the Bowen review, which recommended that they be held before indictment—that they should be held after indictment but before the first trial. Why was that decision taken and will the timing make the business management meeting any less effective?

**Kenny MacAskill:** The defence and prosecution both preferred the meeting to be held post service of the indictment because it would give them the opportunity to focus on the matter. I understand that when Sheriff Principal Bowen gave evidence to the committee he indicated that he was happy and content with such an approach. Everyone is happy for the meeting to be held at that point. I can certainly see the logic in that; when the indictment is served, it focuses minds on the charge that is being faced while, prior to that, some edging around goes on. We have simply gone with what all those involved seem to have wanted.

**Margaret Mitchell:** What has the Scottish Government done to ensure that resource pressures do not hamper the reform’s effective implementation?

**Kenny MacAskill:** We seek to fund all the agencies and parties involved from the Scottish Legal Aid Board through to the Crown Office and Procurator Fiscal Service and the Scottish Court Service and each is aware of the challenges. We have taken account of all this; in some areas, there will be savings while, in others, there will be expenditure but we have prepared for all that and believe that we are capable of dealing with it.

**Margaret Mitchell:** Are there any lessons to be learned from the High Court reforms, which introduced something very similar that has worked well?

**Kenny MacAskill:** The lesson to be learned is that the sheriff and jury procedure is much more akin to the procedure in the High Court. We know that the volume of cases in the sheriff and jury system is greater but you are quite correct that there is good practice in the High Court, including the earlier resolution of cases, and that the reforms have worked well. Sheriff Principal Bowen looked at that and we are seeking to expand it. The challenge is that there are more cases in the sheriff and jury system but the principles, such as taking an early focus, minimising what has to be discussed and debated and ensuring that we inconveniencce people as little as possible if they do not have to be cited or called, are the same.

**Margaret Mitchell:** Thank you.

**Elaine Murray:** I am reasonably content with most of the provisions in this part of the bill but I want to probe the approach taken in section 65, which changes the pre-trial time limits, and the Scottish Government’s analysis of the responses to the Bowen report. For example, some people felt that there was no strong justification for change and I wonder whether you can give us any information on the proportion of sheriff and jury custody cases in which the court agreed to extend the current 110-day limit.

**Kenny MacAskill:** We do not have that information because it is not recorded. However, we know how things are operating in the High Court following Lord Bonomy’s review and that Lord Bonomy himself said that “the real jewel in the crown” of solemn procedure was the requirement for someone on remand to have their indictment served within 80 days. That remains sacrosanct and the extension of the limit from 110 to 140 days puts solemn procedure in the sheriff and jury system in line with that in the High Court. We have retained the principle that the indictment has to be served within 80 days but the change simply takes into account the complexities of many cases as a result of forensics and other aspects.

**Elaine Murray:** The limit can be extended at the moment but we do not know how many cases have required such an extension.

**Kenny MacAskill:** No.

**Kathleen McInulty:** Those figures are available for High Court cases but, as I understand it, they are not recorded in the management information systems for sheriff and jury cases. Instead, that information is recorded in the written minute of the court proceedings.

**The Convener:** Do we have the figures for High Court cases?

**Kathleen McInulty:** According to the Scottish Court Service’s 2012-13 annual report, it was normal for there to be at least one extension of the 140-day rule in cases.

**Elaine Murray:** The 110-day rule.

**The Convener:** The 110-day rule.

**Kathleen McInulty:** I am sorry—it was 140 days in the High Court.

**Elaine Murray:** Of course.

**The Convener:** Of course. [*Laughter.*] It is like a duet.

**Elaine Murray:** Will you consider monitoring the extension of the limit in sheriff court cases to get some idea whether the 140 days is appropriate?

**Kenny MacAskill:** We are happy to do so, but the fact is that High Court cases are by their very nature likely to be more complicated than sheriff and jury cases. However, as we stated in response to Sheriff Principal Bowen, we intend to monitor the implementation of the proposals.
When the limit was 110 days, any extension was granted reluctantly and, with the change to 140 days, the situation will have to be monitored to ensure that any extension is granted only with good cause. There are checks and balances and there is, of course, the opportunity to seek bail in some instances.

**The Convener:** I am not going to look at the rest of the committee but I do not think that anyone else has put up their hand to ask a question. I therefore thank the cabinet secretary and his officials very much for their attendance.

As agreed earlier, we now move into private for item 3.
Written evidence to the Justice Committee

Aberdeen City Council Appropriate Adult Service
Aberlour Child Care Trust
ASSIST
Association of Scottish Police Superintendents
Auchie, Derek P, University of Aberdeen
Barnardo's Scotland
Barrie, Colette
Barrie, Colette (supplementary submission)
Chalmers, Professor James; Farmer, Professor Lindsay; and Leverick, Professor Fiona; University of Glasgow
Chalmers, Professor James (supplementary submission))
Children in Scotland
Children Are Unbeatable! Scotland
Community Safety Glasgow
Convention of Scottish Local Authorities
Crown Office and Procurator Fiscal Service
Crown Office and Procurator Fiscal Service (supplementary submission)
Crown Office and Procurator Fiscal Service (supplementary submission)
Crown Office and Procurator Fiscal Service (supplementary submission)
Crown Office and Procurator Fiscal Service (supplementary submission)
Duff, Professor Peter, University of Aberdeen
Edinburgh Bar Association
Equality and Human Rights Commission Scotland
Evangelical Alliance
Faculty of Advocates
False Allegations Support Organisation
Families Outside
Ferguson, Professor Pamela R, University of Dundee and Davidson, Fraser P, University of Stirling
Glasgow Bar Association
Green, Hayley; Bremner, Val; and Sharp, Laura; Robert Gordon University
Her Majesty’s Inspectorate of Constabulary for Scotland
Highland Violence Against Women
Howard League for Penal Reform in Scotland
JUSTICE Scotland
Law Society of Scotland
Law Society of Scotland (supplementary submission)
Mental Welfare Commission for Scotland
Petal
Police Scotland
Police Scotland (supplementary submission)
Police Scotland (supplementary submission)
Rape Crisis Scotland
Salvation Army
Scotland’s Commissioner for Children and Young People
Scottish Appropriate Adult Network
Scottish Association for Mental Health
Scottish Child Law Centre
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Aberdeen City Council Appropriate Adult Service

Introduction

1. Aberdeen City Council operates and supports the “Appropriate Adult” service within the Aberdeen City geographical boundary. Appropriate Adults presently facilitate communication between the police and adults (persons aged 16 or over) who have a mental disorder. This is defined as “any mental illness, personality disorder, learning disability however caused or manifested”. In practice this includes people with acquired brain injury, autistic spectrum disorder and dementia.

2. Aberdeen City Council presently has no legislative requirement to support or coordinate an Appropriate Adult service. The service is currently provided by the Council on a voluntary basis using its existing resources and there is no dedicated funding to support the running and development of the Appropriate Adult scheme.

3. This submission will primarily confine itself to the specific sections of the Bill that relate to “Vulnerable Persons” [s.33 and s.34] – as these have significant relevance to Appropriate Adult services. Reference will also be made to the Bill’s policy memorandum and explanatory notes, where they refer to and/or elucidate those sections of the Bill.

General

4. Overall, Aberdeen City Council welcomes the recognition in the Bill of the need for support to those considered vulnerable whilst in police custody. Although Appropriate Adult services have been in place in Scotland (in one form or another) since 1990, this is the first legislative recognition for the service. However various agencies have made specific reference to Appropriate Adult services previously (for example Guidance on Appropriate Adult Schemes (Scottish Office Circular No: SWSG8/98), and the Lord Advocate’s instruction to Chief Constables in relation to Appropriate Adults and the waiving of legal advice – dated 27 September 2012).

5. However, Aberdeen City Council has concerns in relation to ‘age range’, ‘responsibility’ and ‘funding’ as we feel these issues will become increasingly significant if/when the Bill becomes law.

Age range of provision of appropriate adult services

6. It is recognised that the Bill extends provision for a ‘responsible person’ to 16 and 17 year olds. However, there are some concerns that this will mean that 16 and 17 year olds with a mental disorder, who presently get the specialist support of an Appropriate Adult under the informal system, will no longer automatically get the same access to this support. The ‘responsible person’ would not be required to have the same abilities/training in supporting communication and understanding as the
Appropriate Adult. There is therefore a real risk of disadvantaging 16 and 17 year olds who have a mental disorder whilst in police custody.

7. It is recognised that nothing in the Bill prevents the informal use of Appropriate Adults to support 16 and 17 year olds in police custody. However we do feel that there is potentially a missed opportunity here to ensure that 16 and 17 year olds with mental disorder get access to an Appropriate Adult in the same way as those aged 18 and above.

8. It is therefore Aberdeen City Council’s suggestion that the definition contained in s.33(1) be expanded to include 16 and 17 year olds.

Responsibility for provision of appropriate adult services and associated funding

9. It is noted that s.34 allows Scottish Ministers to make further provisions as to who may be considered suitable to provide “Appropriate Adult” type support. However, we are unclear if this provision will allow for the stipulation of who will be responsible for ensuring the provision of Appropriate Adults as a service. From our reading of the Bill it does not appear to do so.

10. We note that paragraph 128 of the policy memorandum for the Bill states that “The Scottish Government does not intend at present to make any particular body statutorily responsible for the delivery of Appropriate Adult services...with the expectation that the non-statutory service will continue to run alongside these statutory provisions”.

11. In addition, we also note the statement in paragraph 236 of the Bill’s explanatory notes that “The provisions in the Bill in relation to vulnerable adult suspects will be of interest to local authorities but will not entail additional costs as Appropriate Adult Services are provided at present on a non-statutory basis”.

12. Aberdeen City Council has grave concerns in regards to the assumptions underpinning the two statements quoted above. It is our view that not making a particular body responsible for the provision of Appropriate Adult services could prove highly problematic. It is also our view that the belief that there will be no additional costs as a result of the vulnerable adult suspect provisions in the Bill is wildly optimistic.

13. It is our view that the formalising of the duties on the Police to contact a suitable person (i.e. an Appropriate Adult) via s.33(2) is very likely to result in an increase in requests for Appropriate Adults. Aberdeen City Appropriate Adult service has already experienced an increase in requests following the circulation of the Lord Advocate’s instruction in 2012. We anticipate further increases if the Bill’s ‘vulnerable person’ provisions go live. This would be expected as a consequence of the increased visibility of the requirement, alongside a focus on compliance with the Bills’ provisions.

14. At present, some Appropriate Adult services in Scotland receive funding from various bodies (local health boards, Police Scotland, Local Authorities etc) to employ
Appropriate Adults and pay for the administration of their schemes. Other
Appropriate Adult services, however, do not receive any funding from any agency at
all – except, perhaps, ‘in-kind’ support in relation to training, infrastructure and some
staff member time.

15. At present, ‘Appropriate Adult’ services which do not have dedicated funding
from public agencies struggle at times to meet current requests from the Police –
particularly at weekends and outside of working hours.

16. We may therefore have, with the Bill’s provisions, the difficult situation where
there is an increase in demand for Appropriate Adult services due to the requirement
for the police to seek those services, but no clear responsibility for meeting that
subsequent demand.

17. There therefore may be the real risk that agencies which are providing
Appropriate Adult services ‘informally’ - with no dedicated funding, and no legal
requirement to do so, may withdraw from providing this service. This would be due
to the significant pressures on their existing resources to meet an increasing demand
when they have no statutory obligation to do so.

18. As a result, there may be the difficult situation where the police have a legal
responsibility to seek the services of an Appropriate Adult but are unable to meet this
responsibility if there is either no Appropriate Adult service to call upon or the
existing Appropriate Adult service lacks sufficient resources to respond.

19. It is Aberdeen City Council’s view that the issue of responsibility and funding for
Appropriate Adult services must be addressed if a statutory duty to seek Appropriate
Adults is being given to the police. To do otherwise may (at a minimum) lead to
inequalities in Appropriate Adult service/access throughout Scotland, and may (in a
worst case scenario) lead to the withdrawal of existing Appropriate Adult services
where responsibility and funding to meet increased demand cannot be agreed. This
would be to the significant disadvantage of adults with mental disorders who have
contact with the police.

Summary

20. Aberdeen City Council is delighted to see Appropriate Adult services recognised
in statute (albeit tangentially).

21. There are some concerns about the potential disadvantage to 16 and 17 years
from not being included in the standard ‘requirement’ for the police to notify in
s.33(2).

22. More fundamentally, there are very significant concerns that the lack of clarity in
relation to who is responsible for providing and funding Appropriate Adult services
may lead to significant service delivery problems if/when the ‘vulnerable person’
provisions go ‘live’.

Aberdeen City Council Appropriate Adult Service
August 2013
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Aberlour Child Care Trust

About Aberlour
Aberlour is Scotland’s largest solely Scottish children’s charity. Working in over 40 locations across Scotland in fields such as disabilities; residential and foster care for looked after children and parental substance use, we’ve been helping to improve the lives of Scotland’s most vulnerable children, young people and their families for 140 years.

Our service portfolio links into criminal justice issues in a number of areas, including the work we do in HMP Cornton Vale supporting the Mother and Baby Unit there; in working with young unaccompanied asylum seekers and victims of trafficking in Scotland’s only guardianship service; in our street based youth work service YouthPoint which seeks to offer diversionary activities to young people who might otherwise be associated with antisocial behaviour and in our work with families affected by parental substance use. As such we have a keen interest in certain aspects of the draft bill. We shall restrict our comments to only those sections of the Bill which pertain to children in general or those areas in which we work.

The age of criminal responsibility
The Scottish Government’s 2012 publication reporting on its action plan to deliver progress against the 2008 concluding observations of the UN Committee of the Rights of the Child: ‘Do the right thing – a progress report’ stated:

‘Following the raising of the age of criminal prosecution in the Criminal Justice and Licensing (Scotland) Act 2010, we will give fresh consideration to raising the age of criminal responsibility from 8 to 12 with a view to bringing forward any legislative change in the lifetime of this Parliament.’

Given that this Bill represents an entirely appropriate legislative vehicle for such a change, we were dismayed that no such provision has been made in the Bill, particularly when sections 31-33 deal directly with protecting the rights of child suspects.

We strongly urge the Committee to consider using this Bill as an opportunity to act on the Scottish Government’s 2012 commitment to the UN Committee by increasing the age of criminal responsibility to 12.

The rights of child suspects
We welcome provisions in chapter 5 sections 30-33 of the Bill which seek to ensure that the highest standards of protection are offered to children in the formal justice system. Ensuring access to the support of a parent, carer or other responsible person goes some way to honouring our country’s outstanding commitments to article 37 of the UN Convention on the Rights of the Child. As such we would urge the committee to seek explicit reference to article 37 in sections 30-33 of the Bill.
Provision of advocacy to child suspects - chapter 5 section 32
Section 32 supports the right of under 18’s in custody to have ready access to the person or persons intimated about their arrest. The Bill stipulates that this will normally be the child’s parent or carer or other ‘responsible person’. Where it is inappropriate for the parent or carer to support the child in custody or they cannot be located, the Bill suggests that it will be up to the local authority to appoint a ‘responsible person’ to support that child.

We feel that this section would be strengthened with an explicit provision for a right to independent advocacy in the context of the ‘other person’ that a child may have access to in section 32. This would be consistent with section 122 of the Children’s Hearings (Scotland) Act which gives the right to the service of a trained advocate for children appearing before the panel. Such a right to advocacy must be underpinned by the standards defined in the Government’s guidance: ‘Independent Advocacy and Guide to Commissioners 2013’

A trained advocate is different but complimentary to the role of a solicitor in this regard in that they are trained to interpret what is happening for the child in question and communicate the point of view of the child more effectively. If we recognise the needs of children to have access to the service of a trained advocate in the legally sanctioned proceedings of a children’s panel, to cut through technical language and processes on behalf of a child, then we should make similar provision in the formal criminal justice system.

The repeal of section 51 of the Criminal Justice (Scotland) Act 2003
Section 51 of the 2003 Act creates a legal defence of ‘justifiable assault’ for parents who hit their children (with certain limitations). It is our contention that this defence is unlawful and in direct contravention to our commitments to the UN Convention on the Rights of the Child and as one of only 5 member states still to offer such a defence, that we should now take the opportunity afforded by this bill to consider giving equal protection from assault for our children by repealing it.

In the past, proponents of retaining the ‘Justifiable assault’ defence have argued that without this defence we would criminalise the normal parenting behaviour of thousands of Scottish parents who would subsequently be charged and possibly imprisoned. Organisations like ours who support the removal of this defence have sought not to criminalise parents but to bring about a cultural shift, through legislation that would end physical punishment in the same way legislation shifted attitudes to smoking in public places.

The element of discretion afforded to police constables in clauses 1-3 of Chapter 1 Section 1: Power of a Constable in the Bill could support the possible repeal of section 51 of the 2003 Act. This section establishes a reality in which constables are further encouraged to exercise judgement and proportionality when deciding whether to arrest. This would support the cultural shift intended in the repeal of section 51 without leading to the unnecessary criminalisation or prosecution of hundreds of parents.

We ask that the committee consider the repeal of the ‘justifiable assault’ defence in the context of Chapter 1 in this Bill.
**Definition of well-being**

Section 42 (subsection 2) covers the consideration of a child’s best interests when a constable is deciding whether to place a child under arrest. That subsection states:

> In taking the decision, the constable must treat the need to safeguard and promote the well-being of the child as a primary consideration.

We are not clear why the Government has sought to prioritise the well-being of the child when the Children’s Hearings (Scotland) Act 2011, makes a child’s welfare the primary concern.

The Scottish Government uses the term ‘well-being’ interchangeably but the most prevalent definition of well-being is found in the application of Getting it Right for Every Child in the context of the Government’s SHANARRI well-being indicators. Whilst the intent of this subsection is to be welcomed, we would contend that depriving a child of their liberty may not always be compatible with SHANARRI indicators. As such, if the intent is to proceed with the definition of well-being we would like to see explicit reference to GIRFEC and SHANARRI well-being indicators in the context of section 42 either on the face of the Bill or in robust guidance underpinning this.

**Aggravation in connection with people trafficking**

Working with Scotland’s young unaccompanied asylum seekers, many of whom have been trafficked into this country against their will, we warmly welcome the aggravation that this Bill seeks to attach to an offence connected with people trafficking in section 83.

Alex Cole-Hamilton
Head of Policy
29 August 2013
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from ASSIST

Thank you for the opportunity to comment on the Criminal Justice (Scotland) Bill. ASSIST, functioning since 2004, is a Specialist Independent Domestic Abuse Advocacy Service. The aim of ASSIST is to ensure all victims of Domestic Abuse are safe, informed and supported throughout their involvement with the criminal justice process.

ASSIST is colocated with Police Scotland in Glasgow, East Kilbride, Clydebank, Kilmarnock and Renfrew. ASSIST provides information daily to the Procurators Fiscal in all the courts in the legacy Strathclyde Police Force area and is linked to the Specialist Domestic Abuse Courts at Glasgow and Ayr Sheriff Courts and, for male victims, Edinburgh’s Domestic Abuse Cluster Court. ASSIST provides a service to half of Scotland’s population and is the only Scottish organisation to achieve accreditation through CAADA’s Leading Lights process.

We welcome some aspects of the bill for example, the abolition of corroboration, however we have major concerns that the proposals around investigative liberation if applied to victims of domestic abuse will be dangerous and lead to victims’ experiencing further harm.

Any changes to the way domestic abuse is policed or prosecuted should only be taken forward if it is considered that the change would improve the current situation either in terms of victim safety or perpetrator accountability.

Rather than improving the current situation, these proposals are dangerous. In their current form, they will increase the risk to victims and could deter victims coming forward to report what is happening to them. From a victim’s perspective, the effect of this change is that the issue of domestic abuse is being downgraded to a minor crime, which flies in the face of all the work that has been done by successive Scottish Governments.

ASSIST receives direct referrals from the police after a domestic incident and contacts the victims within 24 hours. The current period between arrest and appearance in court allows a robust risk assessment and safety planning process to be carried out and in areas where ASSIST operates, information to be provided to the Sheriff to inform her/his decision at the initial hearing of the case, usually the following day. Sheriffs regularly say to us that they see the gap when they sit in other courts, particularly family courts.

The current procedures also indicate to both the Accused and the victim that Scottish society views domestic abuse very seriously. Given the complexities of domestic abuse and the close relationship between the Accused and the victim, the power of this should not be underestimated.
The literature on domestic abuse risk assessment for example by Dr Amanda Robinson amongst others, states clearly that the victim’s fear is a crucial element that requires to be taken into account when considering the risk of further violence by the perpetrator. If the proposals for investigative liberation are agreed, perpetrators will be released a short time after the incident without this vital information. I accept that protective conditions may help, but they still do not answer the questions about how an appropriate risk assessment could be undertaken, or the issue of downgrading domestic abuse.

If victims of domestic abuse cannot rely on the Police, the Procurators Fiscal and the Court to keep them safe, why should they report what is happening to them.

I am incredibly worried by these proposals and am concerned that this proposal is being considered due to the costs of keeping people accused of domestic abuse in custody and the pressure on the court system rather than improving the current system. In other words, that the change is planned as an administrative measure to ‘solve’ the problem of victims coming forward in ever greater numbers.

There are undoubtedly difficulties for agencies due to the amount of domestic abuse being disclosed; however, this is not the way to solve it. The figures for domestic incidents are reducing in the legacy Strathclyde Police force area; due I believe to the robust way that domestic abuse is policed and the partnership between Police Scotland and ASSIST, which is unique. The move to Police Scotland is ensuring that a similar approach is adopted across the country and this is surely a far safer way to reduce the amount of domestic abuse. However, it will take time for systems and practice to be embedded and ensure that victims throughout Scotland receive a similar service no matter where they live.

I hope that the Justice Committee will consider very seriously the proposals for investigative liberation and I would welcome the opportunity to explain in further detail, the real difficulties these proposals will cause.

Thank you for again for the opportunity to respond to the consultation.

ASSIST
30 August 2013
Justice Committee
Criminal Justice (Scotland) Bill

Written submission from the Association of Scottish Police Superintendents

1 Introduction

We welcome the opportunity to comment on the general principles of the Bill as presented.

2 Police powers and rights of suspects (Part 1 of the Bill)

The police powers as drafted give rise to uncertainty in a number of areas.

3 Arrest (Section 1)

The powers differ from the current Common Law powers of arrest when considering the “grounds” for a constable to consider when deciding whether or not to make an arrest. They fail to explicitly cover an important element where an arrest is executed in the interests of the offender or in the interest of public safety. The powers of arrest are not wholly consistent with the general duties\(^1\) of a constable defined in the Police and Fire Reform (Scotland) Act 2012, in that they lack an explicit power to arrest to prevent a crime.

Police Powers of Arrest in England and Wales enable arrest, without warrant, anyone who is about\(^2\) to commit an offence. Is this an implied power in Scotland or is it the intention to curtail any power to arrest for a person about to commit a crime? While the Criminal Procedure Scotland Act 1995\(^3\) provides that an attempt to commit a crime is punishable as a crime, new powers of arrest should be clear that an arrest can be made to prevent an attempt to commit a crime.

4 Arrested person to be taken to police station (Section 4)

It may be worth considering a clause that provides for the immediate de-arrest of an arrested person where the grounds of arrest no longer apply. This can be done at any time and should not require a person to first be taken to a police station as required under Section 4, just because they have been arrested. There is also a public interest and justice need to consider enabling an arrested person to be lawfully taken by arresting officers immediately upon arrest to where a living person is concealed (kidnap) or a dead body is located or to recover property or other evidence that might be lost. It should be clear that this should be done in very rare circumstances which must be justified.

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1 \[\text{http://www.legislation.gov.uk/asp/2012/8/section/20}\]
2 \[\text{http://www.legislation.gov.uk/ukpga/1984/60/section/24}\]
5 Authorisation for keeping in custody (Section 7)

The practicalities of this, particularly in some of the more remote areas should be noted. It may be appropriate to consider providing that it is not necessary for the authorising constable to be physically present to reduce the scope for any legal challenge arising as to the competency of any authorisation where the authorising officer was not physically present to apply the test in Section 10. It may worth considering including similar wording as in Section 19 (3) regarding “a constable not to be subject to any claim whatsoever” by reason of authorising keeping a person in custody. It is important to ensure that the role of the officers applying the test for Section 7 is adequately understood and respected by arresting officers and Senior Investigating Officers. It is important that the Authorising Officers responsibilities and authority is adequately covered in law and supporting guidance or Code of Practice provided. The role of arresting and investigating officers may also need to be addressed in supporting guidance or Code of Practice.

6 Review after 6 hours (Section 9)

The practicalities of this, particularly in relation to setting the reviewing rank at Inspector, should be considered. It may be appropriate to consider providing that it is not necessary for the reviewing Inspector to be physically present to reduce the scope for any potential legal challenge arising as to the competency of any authorisation where the authorising officer was not physically present to apply the test in Section 10. The pressures on Police Scotland to achieve savings through “management delayering” are significant. Reduction in supervision ratios may place the Inspecting ranks under significant pressure. It is important to ensure that new responsibilities under this Bill are given sufficient consideration by Police Scotland and that these responsibilities are not just “bolted on” to Inspectors performing Duty Inspector roles, where a potential conflict of interest may arise, in terms of ensuring an appropriate response to crime whilst safeguarding the rights of arrested persons.

7 Test for section 7 and 9 (Section 10)

The test relates to whether the keeping in custody following initial arrest can be authorised and whether at the review point of 6 hours continued keeping in custody can be authorised. The important point about that the reviewing Inspector has “not been involved in the investigation”, may need additional guidance or a Code of Practice to ensure that this is adequately understood. It should be clear if an Inspector performing a Duty Officer Role, responsible for leading and managing the police response to incidents, can be reasonably regarded as “not involved in the investigation” and can carry out the reviewing role to the satisfaction of Parliament.

The degree to which an Inspector is regarded as “not involved” in the investigation may be a point of dispute in legal proceedings unless this is explicitly understood. The reference to “necessary and proportionate” at 10, (1), (b) and (2), (a), (b) and (c) does not adequately meet the policy objectives outlined in paragraph 45 where it provides the police must, when considering custody, take into account:
The degree to which police working practices may need to change should not be underestimated. The importance in legal proceedings of decisions both “authorising” and “reviewing” should be understood. The likely inclusion as witnesses in any legal proceedings of such officers and the examination of their decision making should be clarified.

8 12 hour limit: general rule (Section 11)

The degree to which police working practices may need to change should not be underestimated. By specifying that “the person may continue to be held in police custody only if a constable charges the person with an offence” constrains police action. Currently a person who is detained under Section 14 of the Criminal Procedure (Scotland) Act, status changes when they are placed under arrest. There is no requirement to charge them at that point, although that may happen. If a person is being detained for appearance at court from police custody there is a period of time during which police are able to prepare the charges and then formally charge the arrested person. The wording in Section 11 (2) may result in additional costs (financial through overtime or opportunity by handing the case over to others to deal with) to Police Scotland by removing the flexibility currently available about specifying exactly when a person is charged. Alternative wording to be considered that still ensures the arrested person understands why they are being kept in police custody might be: “The person may be continued to be held in police custody only if the constable informs the person that they are going to be charged with an offence.” This can negate the requirement for the full details of all the charges to be ready by the completion of the 12 hour period, in those cases where a person is to be held in police custody prior to appearing at court and this would still be fair to the accused.

9 12 hour limit: previous period (Section 12)

The challenge to monitor and implement the 12 hour limit – previous period should not be underestimated. It will require a technology fix to support this. The implementation of this legislation could be done on a paper basis but the some of the complexities will need a technical solution. The design of the technical solution is dependent upon the final version of the Bill and managing the dependency with the technical solution providers will be an important point to get right to avoid additional costs around technology. Failure to get this right may lead to the loss of criminal cases at court and justice not being done.

Given the additional rights and safeguards in the Bill there is serious doubt in the practicality of completing all the activity that is required within a 12 hour limit. It is perhaps expecting too much to manage the increasing complexity of progressing a criminal investigation relying on external third parties for Forensic Analysis and other enquiries, safeguarding an arrested persons wellbeing and ensuring an arrested persons rights are met all within the context of a 12 hour time limit and 28 days Investigative Liberation. Getting the balance right in an interview where the suspect
is regarded as vulnerable may require additional breaks (see paragraph 119 of the Policy Memorandum). A 24 hour period is more reasonable and is likely to be more feasible and achievable than a 12 hour period. Additional ECHR safeguards could be built in by review from a Superintendent, not connected to the investigation, in those cases where 12 hours is assessed as being insufficient.

10 Medical treatment (Section 13)

The implementation of this legislation could be done on a paper basis but the some of the complexities will need a technical solution (tracking exact times). The design of the technical solution is dependent upon the final version of the Bill and managing the dependency with the technical solution providers will be an important point to get right to avoid additional costs around technology. Failure to get this right (breach of time limits) may lead to the loss of criminal cases at court and justice not being done.

11 Investigative Liberation (Section 14)

The Policy Memorandum (paragraph 58) indicates that these powers “are most likely to be of use in the investigation of serious crimes which often involve complex and technical examinations of telephones, computers etc.” This is a new power for Scotland but there is a similar power that has been available for some time in England and Wales. The study “Police use of pre-charge bail” carried out by the former National Policing Improvement Agency (NPIA) published in 2012 identified four aspects of the pre-charge bail or in the Bill’s terms Investigative Liberation, perceived to be driving the use of this power, and were potentially sources of unnecessary use:

1) Unplanned arrests
2) Insufficient quality in initial investigations
3) Demands on limited custody space
4) Differing perceptions on levels of evidence required for charging leading to delays in the process.

Some of the reasons for this included Force policies and processes driving individual officer’s decision to arrest, risk aversion, performance pressures, resource pressures where response officer numbers are depleted through increased number of specialist investigative units. Police Scotland has a robust performance management regime and its impact on the implementation of Investigative Liberation will need close monitoring.

The NPIA research paper identified the types of reasons why pre-charge bail would be appropriate, it included not only the time consuming technology investigations but also, DNA, fingerprints, wellbeing of suspect (illness, injury, drug or alcohol intoxication) and that similar factors applied to victims and witnesses all of which could necessitate release while investigation took place. If all of these factors are to be considered in terms of fairness to the suspect it is likely that Investigative Liberation may be required on fairness grounds for more than just “serious crimes”, as presumably fairness is required for all suspects’ not just suspects for serious crime. On fairness grounds it may well be that Investigative Liberation becomes

used more frequently than envisaged in the Policy Memorandum, given the prevalence of drug and alcohol in crimes investigated by police in Scotland. Further guidance and/or a Code of Practice may be required for this new development to learn the lessons of Investigative Liberation in other jurisdictions and to ensure the policy objective is achieved. That it is used where it is necessary and proportionate with regard to fairness to any suspect rather than “mostly in the use of serious crimes which often involve complex and technical examinations of telephones, computers etc.” (Policy Memorandum, paragraph 58).

12 **Investigative Liberation - Release on conditions (Section 14)**

The implementation of Investigative Liberation could be done on a paper basis. However, managing the process, ensuring resources are available, there is sufficient cell capacity, that conditions are automatically updated to the Criminal History System in time etc. will need a technology solution. Ensuring there is sufficient numbers of Inspectors and that they have the capacity to meet this new requirement given the requirements for “management delayering” to achieve savings, is something the Justice Committee may wish to receive assurance on from Police Scotland. Setting of conditions will need to conform to ECHR tests of proportionality, necessity and lawfulness. Conditions will need to take into account the PM objectives of “needs of the enquiry”, “public safety” while “balancing the fundamental rights of a person suspected of having committed the crime”. The officer setting the conditions will need to have sufficient information from the investigating officer to satisfy themselves as to the lines of enquiry required, why they cannot be completed at the time, how long they will take and if there is a reasonable prospect of them being completed within the 28 days.

The NPIA report highlighted it generally took 4 weeks for forensic examination (DNA, blood fingerprints, digital etc.). What is the current average time for the results of Forensic analysis of all types to be provided to Police Scotland? Is there a Service Level Agreement between the Scottish Police Authority and Police Scotland that specifies a limit of within 28 days? In terms of public safety the officer setting the conditions will need access to sufficient information to assess the risk of harm to the victim and witnesses, the general public and the suspect – either from risk of self-harm or indeed by persons seeking to harm the suspect. A “tick box” approach is unlikely to meet the policy objective; proper consideration of the facts will be required.

13 **Investigative Liberation – 28 Day limit (Section 14)**

It is likely that this time period will be insufficient, particularly if the Police Scotland performance management approach drives an increasing number of submissions for forensic examination in an increasing number of cases. The Bill is silent on the detail around the detail of the operation of Investigative Liberation (IL). Is it competent to specify a condition that the person released on IL must attend a specified police station at a specified time and date – once the further enquiries have been completed? It would appear to be competent for a Constable to then arrest the suspect for the purpose of questioning the suspect on matters arising from the result of the further enquires in relation to the matter in which he was arrested – exercising the power under Section 1 in accordance with Section 2. Depending on how much
time is left on the 12 hour “custody clock” – this may not be sufficient time to ensure the suspects rights are fully safeguarded and still complete any necessary interview. 12 Hours may not be sufficient and the balance of fairness may be more heavily weighted in the suspects favour. A period of 24 hours may represent a more fair balance between the suspect and victims.

14 Conditions ceasing to apply (Section 15)

The need for a technology solution is noted to keep records up to date.

15 Modification or removal of conditions (Section 16)

The need for a technology solution is noted to keep records up to date. The requirement on Inspectors to “keep under review” investigative liberation will create new work for the Inspecting ranks and consideration should be given to whether the review of investigative liberation conditions is placed at the right level or if it should be placed at a Custody Sergeant level.

16 Review of conditions (Section 17)

The potential for new work for police in relation to managing conditions is noted. Additional reports to COPFS for any review of Investigative liberation conditions being heard by the Sheriff. The need for a technology solution is noted to keep records up to date.

17 Information to be given before interview (Section 23)

Some clarity over what is meant by “voluntary attendance” and what rights any person who attends voluntarily at a police station has would be helpful. This might include the requirement in law to inform any such person they are

- Not under arrest
- Free to leave at any time
- Not obliged to answer any questions

Clarifying what is meant by “police custody” would also be helpful. Does this mean a person who is under arrest or otherwise detained under other statutory power for the police to detain a person (Misuse of Drugs Act etc.)? Some clarity over whether there is a requirement to make a record that Section 23 has been complied with may be helpful.

18 Right to have solicitor present (Section 24)

Occasions – very rare - may arise where it is necessary to remove a solicitor from an interview. There is no reference to this in the Bill.
19  Consent to interview without solicitor (Section 25)

Is the use of the words “mental disorder” sufficient and is there a need to consider “incapable”, in terms of the in the Adults with Incapacity (Scotland Act 2000, Section 1, (6) which includes physical disability.

20  Questioning following arrest (Section 26)

Clarification would be welcome on the police powers to question a person under arrest for an offence and having charged (officially accused) that person in relation the offence for which they were arrested, now seeking to question them in relation to other crimes and offences not relating to the offence they were initially arrested for or arising from the same set of circumstances as the offence. This may arise whereby they are initially arrested for an assault and are subsequently charged. Checking of police recorded crimes may reveal that they are suspected of other recorded crimes and police may need to question them regarding those crimes. Would police have to arrest the person in relation to those other crimes and would the entire process have to start again – with fresh authorisations, reviews and custody clock? Subsection (3) may need to include another item at (f) - the person’s occupation. Some occupations are very relevant – particularly in relation to public protection where placing a requirement to give their occupation may be important. This might be relevant when dealing with someone who may be in a position of trust and may avoid revealing their occupation because it may have an immediate impact. Is there a need to consider making it an offence not to disclose occupation?

21  Authorisation for questioning (section 27)

This new provision will require new work for police and COPFS in preparing the case for seeking court authorisation. There will be an opportunity cost. Such authorisation could have been provided by a police Superintendent within tight time limits and guidelines and saved COPFS and Courts time and money.

22  Arrest to facilitate questioning (Section 29)

This new provision for a warrant to arrest for further questioning under Section 27 will require new work for police and COPFS in preparing the case for seeking court authorisation. There will be an opportunity cost. It is likely that a warrant will be required in most cases to facilitate questioning. Such authorisation could have been provided by a police Superintendent within tight time limits and guidelines and saved COPFS and Courts time and money.

23  Right to have intimation sent to other person (section 30)

Subsection (5) is an important judgement to be made regarding delaying intimation and additional guidance/Code of Practice may be necessary.

24  Right to have intimation sent: under 18s (Section 31)

Subsection (5) (a) for a person believed to be under 16 years of age it should specify parent, guardian or other appropriate person. For police to fail to inform a parent or
guardian of a person they believe is under 16 is likely to give rise to unnecessary complaint. There may also be occasions when it is inappropriate to inform the parent or guardian (they may be a suspect) and so a lawful alternative needs to be available. Evidence of compliance with this right will be necessary and will require a paper based and technology solution to record compliance. Restricting access is an important judgement and further guidance and/or a Code of Practice may be required.

25 Support for vulnerable persons (Section 33)

Is the use of the words “mental disorder” sufficient and is there a need to consider “incapable”, in terms of the in the Adults with Incapacity (Scotland Act 2000, Section 1, (6) which includes physical disability. As it is for the police to assess vulnerability (see Policy Memorandum paragraph 121) a review of the current level of training to identify vulnerable suspects may be necessary. Some consideration may be necessary as to which constable has the responsibility for assessing the vulnerability of a suspect. Is it the constable authorising or reviewing detention, the arresting officer or the investigating officer or Senior Investigating Officer in serious crime cases? How are any disagreements between constables as to the vulnerability of a suspect to be addressed in a manner that safeguards the Human Rights of the suspect?

26 Right to have intimation sent to solicitor (Section 35)

There may be investigative reasons to delay sending intimation to a solicitor, in very rare occasions, and explicit lawful provision should be made for this that goes beyond “as soon as is reasonably practicable.”

27 Right to consultation with solicitor (Section 36)

It would be helpful to clarify what is meant by “at any time”. Does this mean that the person can demand multiple consultations during their period in police custody? What sort of circumstances might apply that equate to “necessary in the interests of justice”? Who determines the method of consultation?

28 Use of reasonable force (Section 37)

Consider alternative wording similar to “A constable may use the minimum reasonable force necessary....”. This supports the requirement of police to act in compliance with the European Convention on Human Rights and apply the proportionate, legal and necessity test within a framework of policing by consent. Note police use of force is provided for in various other legislation such as the Criminal Procedure (Scotland) Act 1995.

29 Common Law power of entry (Section 38)

An opportunity is missed here to modernise police powers of entry and search without a warrant that would save money, improve justice for victims, enhance opportunity to preserve and secure evidence and improve justice.

30 Common law power of search (Section 39)

An opportunity is missed here to modernise police powers of search. What use of minimum reasonable force applies here?

31 Power of search etc. on arrest (Section 40)

What use of minimum reasonable force applies here?

32 Breach of Liberation Conditions - Offence where condition breached (Section 43)

Is there a deliberate intention to curtail any preventative power of arrest (is likely to break\footnote{www.legislation.gov.uk/ukpga/1995/46/section/28}) in relation to liberation, as can be found in relation to Bail in Section 28 of the Criminal Police Procedure Act 1995. What are the implications for the Lord Advocate guidelines – will breach of a Liberation Condition be grounds for holding accused in police custody for court?

33 Abolition of pre-enactment powers of arrest (Section 50)

Is the common law power of arrest by a citizen unaffected and is there a need to refer to citizen powers of arrest?

34 Meaning of officially accused (Section 55)

Is there any implication here for the statutory warning of intended prosecution under the Road Traffic Offenders Act 1988\footnote{http://www.legislation.gov.uk/ukpga/1988/53/section/1}?

35 Corroboration, admissibility of statements and related reforms (Part 2 plus section 70 of the Bill)

I remain not wholly convinced of the case for the complete abolition of the requirement for corroboration.

36 Police Negotiating Board for Scotland (Part 6 (section 87) of the Bill)

I welcome this proposal.
38 Conclusion

The Bill as drafted raises a number of questions. It may be necessary and advisable to provide additional guidance and/or Codes of Practice to ensure the intention of Parliament is appropriately implemented.

Association of Scottish Police Superintendents
29 August 2013
Summary

1. The essence of the corroboration rule is not two sources of evidence, but instead is confirmation by coincidence, and the urge to seek such confirmation exists in everyday life, to reduce the risk of mishap, which is the rationale of the corroboration rule. It is difficult to see why such confirmation is not required in the criminal courts.

2. The corroboration requirement is flexible and applies in different variations, giving the prosecutor a toolkit of applications to suit the case.

3. The Carloway Review, at least as far as its examination of corroboration is concerned, is a starting point for a wider debate; it is not a sufficient basis alone for legislation abolishing corroboration.

4. There are a number of reform possibilities short of abolition, none of which have been explored (including in the Carloway Review).

5. In conclusion, it would be rash and dangerous to the administration of criminal justice in Scotland to abolish corroboration in the absence of a wider debate.

Part A: The corroboration rule in Scotland

1. The starting point for examination of the proposals is consideration of the corroboration rule as it currently applies in Scotland. The corroboration rule in Scotland requires that the facta probanda (essential facts) of each criminal charge are proven by corroborated evidence. There are two facta probanda for each charge: that a crime was committed and that it was committed by the accused. These are the only two facts which require to be corroborated. In the basic case, there is a main source of evidence (for example the eyewitness account of the victim) and that main source is ‘confirmed or supported’ by another admicicle of evidence from an independent source (such as the accused’s DNA found on the weapon used to commit the crime). A variation on this might be the eyewitness testimony of the victim, supported by the eyewitness testimony of a bystander. The idea is that there are two sources. They may be of the same type (as in the latter example) or of different types (as in the former example). The doctrine, in its traditional form, operates by the identification of one of the pieces of evidence as the main admicicle, which is ‘confirmed or supported’ by the other piece of evidence. Of course, there may be more than two admicicles, but the minimum requirement is two.

2. Today, the requirement to corroborate might accurately be described as a de minimis requirement. This is for two reasons: the technical nature of the rule and variations on its basic (traditional) application. Both are considered later. Before we
do so, we need to consider the essence of corroboration, and in doing so we consider its underlying rationale.

**The essence of corroboration in Scotland**

3. This has not changed at all since the time of the institutional writers, where the current concept finds its roots. The content of the doctrine has changed, not its essence. Content is considered below. On essence, the key to corroboration is coincidence or correlation, as demonstrated by confirmation. In order to understand this, we need to consider how confirmation is valued in everyday life. Some examples will demonstrate this. These include: the need to have a four digit code as well as a bank card in order to withdraw money from an ATM; photographic (as opposed to non-photographic) identification (involving an identification card/document of a certain specification, confirmed by the use of an incorporated photograph for comparison purposes); elaborate forms of ID such as passports; special security measures on tickets for events—all involve confirmation of entitlement above and beyond mere possession.

4. The human urge for confirmation does not end there. In everyday life, we seek confirmation of something we strongly suspect to be the case. If we notice someone we think we know across the street, we will make sure that we have not made a mistake before drawing attention to ourselves. We do this by taking a second look or looking for confirmatory clues in the gait, height, clothing, hair or other physical quality of the person we think we recognise.

5. Why does this urge for confirmation exist? The answer is simple. We wish to avoid mishap, to avoid an error. Of course, the presence of confirmation does not guarantee that an error has not been made; a bank card might be stolen in circumstances where the thief has acquired the matching four-digit password; we might mistakenly spot someone who is uncannily similar to someone we know in the street; we could miss an error on the document we are completing; convincing forged passports are available. However, the likelihood of such outcomes is considerably reduced by the use of confirmatory techniques.

6. This brings us to a criminal charge. The possible consequences of guilt are clear and harsh—a criminal record, loss of reputation, loss of employment, imprisonment. It is not difficult to see why the natural, everyday urge for confirmation should apply here too; indeed, why it would be stronger, given the consequences of a conclusion on the question of guilt, when compared with the consequences of lack of confirmation in everyday life.

7. Considered in this way, the essence of corroboration lies in the confirmation provided by coincidence. In this sense, corroboration is not about the number of sources or even the strength of the individual adminicles; it is about the coincidence between them. So, it could be said that a stronger case for guilt arises from the combination of two adminicles of weak evidence, compared to the existence of one adminicle of strong evidence.

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8. Sometimes the essence of the requirement to corroborate is described in numerical terms; two sources are required. This can make the doctrine seem rather technical, artificial or arbitrary. Indeed, often the test is stated to be a quantitative one rather than a qualitative one. However, this is misleading. It suggests that the two are unconnected, that the corroboration requirement must fall into one camp or the other. As we will see later, when considering the Carloway Review’s analysis, the requirement for confirmation is both quantitative and qualitative; the quality of the Crown case is measured by whether confirmation exists.

9. This all leads us to consider the rationale for the corroboration rule. It is often said that its justification is that it is better to exonerate the guilty than to convict the innocent. However, there is no need to resort to such general (and perhaps controversial) platitudes, pitting one undesirable outcome against another to determine which is the least desirable. The case for corroboration can be more simply put: the desire to reduce the risk of mishap. It is often said that there are two main risks: that a witness may lie or is mistaken, and so gives inaccurate evidence against the accused. On lying, those who have represented clients in the criminal courts, as well as those who deal with criminal trials, are only too well aware of how witnesses can (and are) motivated to lie by dislike, revenge, jealousy, loyalty, money, love or self-preservation, naming just a few common motives. Some witnesses are good at lying. The honest witness (and it is safe to say that most fall into this category) will be truthful, but can often be mistaken. Crime happens quickly, leading to fleeting glimpses. Add to this the lengthy time period between the event and the trial (compounded in Scotland by the emphasis on dock identification – see later) and one can see how a witness might make an error in identification or in remembering the details of who did what to whom. A further source of mishap is the reliability of scientific evidence of guilt, a prominent source of high profile appeals.

10. The consequences of mishap are clear – someone may be convicted of a crime which he/she did not commit. By requiring a minimum level of confirmation from coincidence, the requirement to corroborate reduces that risk to an acceptable level.

The scope of the corroboration rule in Scotland

11. Now that we have considered the basic rule and its essence, we need to consider in more detail its content (or scope) before examining how the Carloway Review process handled the doctrine.

The technical nature of corroboration

12. A number of points of clarification of the concept in its modern form require to be stated. The most fundamental of these is that the Crown case need only be capable of being corroborated. This is the position when the court is considering a no case to answer submission at the end of the Crown case. In order to adjudicate on such a submission, the judge (whether or not sitting with a jury) must pretend that the Crown

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2 See the interesting and practical comments of former sheriff, DJ Cusine in To corroborate or not to corroborate 2013 SLT 79.

3 It has been noted that “humans are surprisingly poor at using witness demeanour to discern dishonesty, not least because the alleged signs of lying, such as sweating and a raised voice, may also indicate nervousness, and this can be suppressed by practised liars.” See Nicolson and Blackie, Corroboration in Scots Law: “Archaic Rule” or “Invaluable Safeguard”? Edin Law Rev, 17.2 (2013) 152 at 170 and the research cited at footnote 122.
case is perfect: that all witnesses will ultimately be regarded as credible and reliable; that all ambiguities in the evidence will be resolved in favour of the Crown; in short, that the Crown evidence will ultimately be accepted.\(^4\) The reason for this rather artificial consideration is clear: the court cannot yet assess the evidence, since at that stage, only the Crown case has been presented. For the purpose of corroboration, however, what is being considered is the technical, legal requirement of corroboration.

13. The second point to be made is that the admicile of evidence used to ‘confirm or support’ the main (or other) piece of evidence need not be, in itself, incriminating, demonstrating how little is required by way of confirmation. The requirement to ‘confirm or support’ has led the courts in some cases to the conclusion that certain evidence is neutral, and so cannot corroborate.\(^5\) However, as discussed later in considering possible reform, in these cases there is confusion between evidence which is incriminating and evidence which is not but which could be incriminating.

14. The third point is that not all admiciles of evidence need to be corroborated; only the *facta probanda* are caught by this rule. In this sense, then, it is not facts in the ordinary sense that need to be corroborated, but rather it is two parts of the Crown case: crime and identity. For this reason, thinking of corroboration as requiring the confirmation or support of facts, is misleading, making the requirement seem more onerous than it is.

*Variations on a theme*

15. So much for the technical nature of corroboration, what of the variations on its basic operation? Not surprisingly, there are many such variations which have developed in order to cater for the multitude of circumstances which can arise from the configuration of evidence available in any particular case. These variations are sometimes considered as exceptions to the corroboration rule; however, this is misleading. They are simply examples of the operation of the basic rule as it applies in certain situations. They all have in common the application of the essence of corroboration: confirmation from coincidence. They also have in common the fact that they do not fit the mould of the traditional application of the corroboration rule: namely the identification of the main source of evidence, confirmed or supported by another source.

16. The main variation of the corroboration rule is the *Moorov* doctrine. The idea here is simple. Rather than taking the confirmation of the main admicile (almost always the account of the complainer) from other evidence related to the charge (as such confirmation does not exist) the confirmation comes from a course of offending, a pattern of conduct. Such a pattern need only consist of two similar offences. The confirmation, then, arises from the similarity between each pair of offences. The similarities need not be between all of the offences on the complaint or indictment; for the purposes of the application of *Moorov*, charges are paired up. Indeed, *Moorov* might apply between two charges in a four charge indictment, the

\(^4\) The question is whether there is sufficiency in law, and so this requires the judge to assume that the Crown evidence will be accepted: *Williamson v Wither* 1981 SCCR 214.

\(^5\) For examples, see the cases of *Gallagher v HMA* 2000 SCCR 634 and *Gonshaw v HMA* 2004 SCCR 482. In the latter case, of Lord Macfadyen’s dissent is hinged on the capability of confirmation or support, and his reasoning is convincing.
other two charges each attracting their own corroborating evidence. This rule has been classified as a kind of ‘similar fact’ evidence rule.

17. Another variation is the rule on ‘special knowledge’ confessions. Confession evidence is very powerful, and so attracts special protection in many jurisdictions. As Lord Justice-Clerk Thomson observed:

“One reason for this rule is to ensure that there is nothing phoney or quixotic about the confession. What is required by way of independent evidence in order to elide such a risk must depend on the facts of the case, and, in particular, the nature and character of the confession and the circumstances in which it is made.”

18. In Scotland, little is required by way of corroboration where there is an admissible confession. Where all that is available is the confession, in order to be sufficient, the confession needs to disclose some knowledge of the crime such that the only reasonable explanation for the suspect having that knowledge is that he was involved in the crime. In fact, it would be unusual for a suspect to confess to a crime in such a way that special knowledge is not displayed. This means that in the vast majority of cases where there is a confession, nothing else will be required.

19. A further significant example of the corroboration rule involves cases categorised as ‘circumstantial only’ cases. These occur where there is no direct (eyewitness or confession) evidence connecting the accused to the crime. Instead, the Crown focuses on indirect evidence which, when taken as a whole, points to the guilt of the accused. There is no requirement in such cases to identify the principal piece of evidence and find independent confirmation of that; indeed, none of the admindices of evidence relied upon in such cases need be, when taken alone, incriminating at all. It has been made clear that in circumstantial only cases, the concentration is on the indirect evidence taken as a whole, and not on whether the admindices are, on their own, incriminating. These cases essentially involve an examination of sufficiency in the round, in much the same way as the English prosecutor would examine sufficiency (see below). There is a requirement that the indirect evidence does not all come from one source, and so in this sense, the core of corroboration (confirmation) is retained. Indeed, at its core, these cases demonstrate the value of coincidence since it is this value which compensates for the lack of direct evidence.

20. Where the libel consists of a number of component parts (common in assault and breach of the peace cases) not all parts of the libel require to be corroborated; the rule seems to be that the main part of the libel should be, but that the remainder of the libel can be proven by one source: *Campbell v Vannet*. This means that in a case where there are three alleged actions by the accused (for example, punch, kick

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6 *Sinclair v Clark* 1962 JC 57 at 62.
7 *Woodland v Hamilton* 1990 SCCR 166; 1990 SLT 565. The explanation as to how the suspects may have innocently acquired the knowledge should not be speculative, for example he may have been a witness may have visited the locus or via the media, where there no evidence that this was the case: see *Beattie v HMA* 2009 JC 144. In other words, there must be some evidential foundation for the alternative explanation.
8 See, for example, *Little v HMA* 1983 JC 16, *Norval v HMA* 1978 JC 70, and for a case where the evidence was deemed insufficient, see *Broadley v HMA* 2005 SCCR 620.
9 *Al-Megrahi v HMA* 2002 JC 99; *Scott v HMA* 2008 SCCR 110.
10 1998 SCCR 207.
and slap) only one of these elements needs to be corroborated, meaning that two-thirds of the libel (or four fifths, or some other proportion) may be proven on a single source.

21. The corroboration rule applies in a flexible (although unsatisfactory) way where fingerprint or DNA evidence features. The basic rule is this: where the fingerprints or DNA of the accused is found in a place which is not a public place nor a place to which the accused has access as a matter of course, where this place is the scene of the crime, it is presumed that the accused is guilty of that crime, and the Crown will have a sufficient case. The onus then shifts to the accused (not formally, but in practical terms) to offer an innocent explanation as to why his DNA or fingerprints have been deposited at the crime scene.

22. Where the accused’s fingerprints or DNA are found at the scene of a crime, a number of assumptions need to be made before the presence of such material can be taken to be an indication that the accused committed the crime, but these assumptions are indeed made. Given the importance of DNA and fingerprint evidence, this evidential shortcut makes many criminal prosecutions much easier.

23. Other more minor variations of the rule allow evidence of the identity of the driver of a vehicle to be corroborated by the status of the suspect as the registered keeper of the vehicle.

24. Taken together with corroboration in its ordinary application (an adminicle from a principle source confirmed or supported by an adminicle from a subsidiary source) these variations represent a toolkit from which the Crown may choose the most convenient tool when seeking to justify corroborative sufficiency. One can readily see that very little in terms of volume is required to compile sufficient corroboration. However, corroboration is not about volume; it is rooted in the value of a basic, de minimis level of confirmation.

**Part B: The Carloway Review (‘the Review’)**

25. The Carloway Review fails to capture the essence of corroboration. In any event, the Review is far too limited in length on corroboration to be adequate as the basis for abolition. It considers corroboration over only 35 single-spaced pages (less than 13,000 words). This includes a three-page description of an empirical study. This is limited treatment of a critical, distinctive and enduring cornerstone of the Scottish criminal system of proof, and is certainly less exhaustive than one would expect as the basis of a case for a recommendation of outright abolition. This contrasts with the rigorous approach to law reform adopted by the Scottish Law Commission (‘SLC’). The SLC produces much more detailed reports on what are sometimes less fundamental law reform proposals. For instance, the SLC _Report on Similar Fact Evidence and the Moorov Doctrine_ extends to 162 pages, and arguably the reforms suggested there are less far reaching than the abolition of corroboration (they would not apply to every prosecution, by any means). Indeed, it is very surprising (some might even say inexplicable) to note that such a major reform of the law is being carried out without a reference to the SLC, especially when one considers the remit of the SLC; its task is to “recommend reforms that improve, simplify and update the law of Scotland” and it offers the Government “independent

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11 Scot Law Com No 229, May 2012.
advice on law reform”. The work carried out by the Review team is a valuable starting point for what should be a much wider debate about the law of evidence in criminal cases in Scotland. Further, it is clear from the Reference Group views (as minuted and published) and the views expressed both during the Review’s consultations and the Government’s consultation that there is very little appetite for reform as a result of the Carloway Review’s process (even among those who support reform or might support abolition).

26. A further limitation of the Review is its failure to fully consider the wider legal context of abolition, such as the SLC’s proposals on previous conviction/prior conduct relevancy, the weaker tenor of the ‘beyond reasonable doubt’ directions in England and Wales; the discretion to prosecute as it operates in other jurisdictions compared with in Scotland, and Scotland’s uniquely unusual liberal attitude to the admissibility of the internationally discredited dock identification process. Indeed, the rules on identification sufficiency generally have been seriously weakened over recent years. All of these points are of considerable importance, to avoid a situation where Scots Law is made more vulnerable than other systems (such as England and Wales) in the event of corroboration abolition; it will arguably be left in a weaker state, with a greater risk of miscarriage of justice than at present and than exists in other systems.

27. The Review’s comparative discussion is flawed too, failing to take account of French Law which arguably carries a requirement to corroborate (Federal Code of Criminal Procedure Article 80-1 requiring ‘strong or concordant evidence’). There are other corroboration requirements, such as in the US in relation to confessions, which are not considered by the Review, and other corroboration requirements exist elsewhere. In the absence of a proper survey of corroboration requirements internationally, there is a real danger that the Government will proceed on an incomplete (and therefore inadequate) survey of the global position. When one considers the wider context factors in those systems (as described above, such as standard of proof and other evidential rules) there is a real risk that the Government will make Scots Law weaker than in many other systems.

28. Further, there is little discussion of reform of the law of corroboration in the Review – the choice seems to be all or nothing. It is not clear why this is so. Some possible reform options are discussed below.

29. The empirical research in the Review is limited and of little use. It is aimed at gathering evidence of the impact of corroboration, when such evidence is simply not available reliably, and there are several obvious flaws in the research methodology. The impact of the empirical research is, therefore, overstated by the Review.

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12 These comments are on the “About us” page of the SLC’s website: [http://www.scotlawcom.gov.uk/about-us/](http://www.scotlawcom.gov.uk/about-us/). See also s.3(1)(e) of the Commission’s founding legislation, the Law Commissions Act 1965, which provides as one of the functions of the Commission: “to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government of the United Kingdom or the Scottish Administration with proposals for the reform or amendment of any branch of the law.”
Part C: Possible reform of the corroboration requirement

Option 1: retention with some reforms

30. There are some aspects of the current corroboration requirement which are problematic, and could be reformed by legislation:

(1) the requirement of corroboration of *mens rea* could be removed. This has caused some considerable confusion in the law, and even recently has had to be considered by the High Court.\(^{13}\);

(2) the definition of corroboration could be enshrined in statute, indicating that corroborative evidence is evidence which is capable of supporting or confirming an adminicle of incriminating evidence, and includes evidence which may otherwise be considered neutral. This would prevent acquittals in cases where the evidence might be regarded as neutral, when in fact it could also be regarded as being capable of providing an independent check on the principal source.\(^{14}\)

(3) the ability of the jury to consider whether a legally sufficient case has been presented could be removed; currently, the accused may make a submission of no case to answer following the close of the Crown case, and, in the event that this fails, can still argue that the accused should be acquitted due to lack of corroboration. Where a submission of no case to answer is not made, or is made and rejected, the accused should not be able to argue legal insufficiency (around corroboration or for any other reason) before the jury. This is consistent with the notion that corroboration is about the capability of certain evidence to support or confirm other evidence; the actuality need not be instrumental. There would remain a right of appeal against the refusal of a submission. This reform would mean that the only test which the jury would need to consider is the ‘beyond reasonable doubt’ standard. This would mean that the jury could still convict on uncorroborated evidence (for example if there are two eyewitnesses and one is believed and the other is disbelieved) but the Crown would still require to present (by the close of its case) evidence such that a corroborated case is possible. In other words, corroboration would be limited to being a pure sufficiency barrier, and would not limit the jury’s discretion.

(4) The reform recently suggested by the SLC (the retention of *Moorov* but absent the requirement for evidence of a course of conduct) could be introduced, making proof in *Moorov* cases easier.

(5) On corroboration by distress, considered by the Review,\(^{15}\) it would seem that this is capable of corroborating the complainer’s evidence, and should be permitted to do so (not just to corroborate lack of consent, as is currently the case). The source of the evidence of distress is not the complainer but is the witness who perceives it (the idea that the source is the complainer is flawed,  

\(^{13}\) *Adamson v HMA* 2012 JC 27.  
\(^{14}\) See the cases of *Gallagher v HMA* 2000 SCCR 634 and *Gonshaw v HMA* 2004 SCCR 482. In the latter case, the dissenting opinion of Lord Macfadyen is very persuasive.  
\(^{15}\) Para 7.2.21.
since the evidence is an observation of the condition of another, not the
distress itself). This would make conviction in cases of sexual assault easier;

(6) The requirement that the gathering of a confession (and of fingerprint and
DNA evidence, if such a rule exists) by two witnesses should be abolished,
since, as argued above, this is not a requirement born out of a proper
application of the rule requiring the corroboration of the \textit{facta probanda}.

31. Taking together these reforms, many of the current problems with corroboration
can be ironed out, leaving the requirement in place offering clear, consistently
applied and a minimum level of protection against unfair conviction.

**Option 2: abolition for only certain crimes**

32. One of the concerns in modern criminal cases in Scotland is the low conviction
rate in rape cases, and this seems to have heavily influenced the Scottish
Government’s desire to abolish the corroboration requirement.\footnote{See the Scottish Government’s Policy Memorandum to the Criminal Justice (Scotland) Bill at paragraph 136, available at: \url{http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx}} The requirement for
corroboration in such cases may deter victims from reporting the crime, especially
where there is a perception that conviction is more difficult, and can lead to less
convictions where cases are prosecuted.\footnote{Some commentators have highlighted the fact that prosecutions for sexual assault often fail even in the
presence of corroboration since they hinge largely on credibility and reliability issues mainly
around the question of consent. The other flaw in the sexual prosecutions argument is that in the
absence of a corroboration requirement, more victims of sexual crimes will require to give evidence in a
‘complainant’s word against the accused’s’ context, leading to more concentration on the
complainant’s credibility and character than is the case currently: see Nicolson and Blackie,
17.2 (2013) 152 at 165-166. For a detailed discussion of this issue as one of the possible unintended
consequences of the abolition of corroboration, see Cairns. I., \textit{Does the Abolition of Corroboration in
Scotland Hold Promise for Victims of Gender-Based Crimes? Some Feminist Insights} [2013] Crim L R
640 at 651-652.} The abolition for sexual crimes (as
defined in s.288C of the 1995 Criminal Procedure (Scotland) Act) would be simple to
legislate on, and could be justified on the basis that such crimes are normally
committed in private. There is a precedent for different evidential rules applying to
sexual crimes: see ss.274-275A of the 1995 Act on the posing of sexual history
questions and the effect that granting an application to ask these has on the
exposure of evidence of the accused’s previous sexual offending.\footnote{This reform is supported by Professors Raitt and Ferguson but in cases where the accused is
known to the complainant and so identification is not in issue, and where the issue is whether or not
consent was given – see \textit{A Clear and Coherent Package of Reforms? The Scottish Government
Consultation Paper on the Carloway Report} [2012] Crim LR 909 at page 924.}

**Option 3: retention for only certain crimes**

33. Corroboration could be required in only the most serious charges (for crimes
which could be statutorily defined) and abolished for all other charges. In England,
the corroboration requirement is retained for only certain crimes, as the Review
notes. In Scotland, these crimes could be the most serious ones, defined by name or maximum sentence.

34. It would be possible to combine options 2 and 3: a corroboration requirement for the most serious offences, but abolition of this requirement for all sexual offences.

Option 4: a new test

35. A more flexible option would be to define the requirement to corroborate according to the reasonable availability of corroborative evidence. The requirement could be to corroborate an incriminating adminicle of evidence only where such evidence is ‘reasonably available’. Reasonable availability could be statutorily defined with reference to a number of factors: the seriousness of the crime, the impact of the crime on the victim, and the reasonable expenditure of public funds. This would mean that where there is no corroborative evidence which is reasonably available, an uncorroborated case would be sufficient. Examples of areas where disputes might emerge would include: whether DNA testing should have been carried out or whether a more extensive search for a missing witness should have been undertaken.

36. This option would lead to case law on the question of whether ‘reasonable availability’ exists in any particular case, but this would be a distinctive and innovative approach which would protect against the danger of complacency in the face of a complete abolition of the corroboration requirement. Options 2 and 3 would not, then, apply, since there would be no need to define the requirement by reference to crime-type or severity. The reforms suggested under option 1 could still (with any other reforms) be enacted.

37. Option 4 would lead to the retention of a balance between the legitimate protection of the accused’s rights and the effective prosecution of crime, especially given the more weakened state of the corroboration requirement if reformed from its current position.

Concluding comments

38. It seems ironic that corroboration is being abolished now, at a time when the detection and prosecution of crime is easier than it has ever been, given the variations of corroboration coupled with the increase in technological and scientific evidence gathering and presentation techniques. The purpose of the current rule on corroboration is to provide for an independent check against the principal source of...
evidence. As has been recently stated: “Witnesses lie. They can be mistaken.”

In abolishing a concept designed to counter the possible ill effects of these undeniable observations, carefully developed and adapted over hundreds of years, the Scottish Government has demonstrated its preference for radical change in haste (and against the tide of powerful opinion) over sober, careful law reform debate. I hope there is still time to have that debate and that the current proposal in s.57 of the Bill is abandoned, at least until that debate has been concluded.

Derek P Auchie
Senior Teaching Fellow
University of Aberdeen
29 August 2013

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Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Barnardo’s Scotland

Barnardo’s Scotland welcomes the opportunity to provide written evidence for the Committee’s Stage 1 scrutiny of the Criminal Justice (Scotland) Bill.

Links to children’s rights issues

Section 42 of the bill represents an important step towards bringing the criminal justice system in Scotland fully into line with the UN Convention on the Rights of the Child (UNCRC). By ensuring that the police treat the need to safeguard and promote the well-being of the child (defined as a person under 18) as a primary consideration when making decisions to arrest a child, hold a child in custody, interview a child about an offence or charge a child with an offence, police practice will be brought into line with Article 3 of the UNCRC “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

However, we would welcome further explanation of why ‘well-being’ has been used rather than ‘welfare’, given the fact that welfare is used in other justice legislation such as the Children’s Hearings (Scotland) Act.

The bill as currently drafted represents a missed opportunity to bring greater alignment between the criminal justice system in Scotland and children’s rights.

Barnardo’s Scotland, along with other leading children’s charities, recently wrote to the Minister for Children and Young People to highlight the omission in the Bill of measures to raise the minimum age of criminal responsibility from eight to 12 years old in line with the commitment in the Scottish Government’s Do the Right Thing Progress Report 2012 to give this fresh consideration “with a view to bringing forward any legislative change in the lifetime of this Parliament.”

We recognise that in practice most offending activity committed by children under the age of 16 is dealt with through the children’s hearings system, and welcomed the raising of the age of criminal prosecution to 12. However, it is still possible for a child as young as eight to acquire a criminal record through the hearings system, which we believe is incompatible with the Scottish Government’s commitment to children’s rights.

We therefore urge the committee to consider using this bill as an opportunity for acting on the Scottish Government’s commitment to the UN Committee on the Rights of the Child by increasing the age of criminal responsibility to match the age of criminal prosecution.

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1 (1989) UN Convention on the Rights of the Child
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
Children in the justice system

We welcome the provisions in sections 30-33 of the bill, which seek to ensure that the highest standards of protection are offered to children in the formal justice system. We believe that ensuring children have access to the support of a parent, carer or other responsible person will help implement Article 37 of the UNCRC in Scotland. As such we would like to see a more explicit reference to Article 37 of the UNCRC in this part of the bill.

As the bill sets out in section 32, where it is inappropriate for the parent or carer to support the child in custody or they cannot be located, it will be up to the local authority to appoint a ‘responsible person’ to support that child.

We feel that more explanation is required about the role and responsibilities of this ‘responsible person’, and would like to see an explicit reference to the right to independent advocacy. This would be consistent with section 122 of the Children’s Hearings (Scotland) Act which gives the right to the service of a trained advocate for children appearing before the panel. Any such advocacy provision should be modelled on that available under the Mental Health (Care and Treatment) (Scotland) Act 2003, and be in line with the recently published draft guidelines for the commissioning of independent advocacy.

A trained advocate would complement the role of a solicitor. An advocate would help ensure that the child understood the process, and could communicate effectively. If we recognise the needs of children to have access to the service of a trained advocate in the legally sanctioned proceedings of a children’s panel, to cut through technical language and processes on their behalf, then we should make similar provision in the formal criminal justice system.

Children affected by parental imprisonment

As well as the commitment to safeguard and promote the well-being of children in the justice system, the well-being of dependent children should be considered when an adult is detained in police or prison custody. There is a wealth of Scottish and international research which has highlighted the short- and long-term impacts on children and families when a family member is imprisoned. It has been estimated that around a third of prisoners’ children were present during the arrest of their parent, and this can have a traumatic impact on the well-being of the child.

We would therefore like to see a greater recognition in the bill that the well-being of children in the justice system should also include the well-being of children affected by parental imprisonment.

Barnardo’s Scotland is currently working with Families Outside and other children’s and criminal justice organisations to promote the use of a Child and Family Impact

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Assessment at key stages in the criminal justice process. An important first step in this would be to ensure that the use of the 'Child in Need' assessment, which the police currently have the option to request from the local authority when a carer is arrested and detained, should become mandatory.

Conclusion

We look forward to working with the Committee and Parliament to deal with the issues highlighted above, in the context of our work to strengthen the links between the Scottish Government’s policy agenda for children and young people, centred on GIRFEC and children’s rights, and justice policy.

Barnardo’s Scotland
2 September 2013
I am delighted by the fact that the Criminal Justice (Scotland) Bill includes provisions which will abolish the requirement for corroboration in criminal trials.

The Justice committee Stage 1 scrutiny of the Bill has thus far involved 3 meetings and at the first of these – 24 September 2013 – it was agreed to keep my petition open and further discuss my request to incorporate a retrospective component to the new legislation.

Prior to and shortly after the meeting on the 24th September, I was contacted by a clerk to the Committee, and asked if I wished to add anything further to the submissions which I provided when the committee first discussed my petition in September 2012. I updated the clerks regarding the endeavours which I have made in the intervening period to both promote awareness of my petition and garner additional support of its aims. Continuing to waive my rights to anonymity, I have agreed to:

- Submit an article for publication in Rape Crisis News
- An interview with the Daily Record in March 2013
- Speak at a seminar organized by Rape Crisis Scotland in March 2013 and at which Mr MacAskill also spoke
- An interview with BBC ‘Good Morning’ in April 2013

I have also offered to provide an oral submission to the committee and, following the committee’s decision that this would not be required, I have been asked whether I would submit further, supplementary information supporting why I consider retrospective legislation to be so necessary.

**Why Retrospective Legislation?**

I am disappointed to read in the minutes of the meeting held on 24th September that, with regards to making new legislation retrospective, a committee member feels that ‘It seems [...] to be a proposition that will not go anywhere, so [...] wonder whether there is any point in considering it further’. Yet I am the heartened by the thoughts of another member who says that ‘There are requests to look at making it retrospective, particularly in the case of historic sexual abuse. There is therefore an opportunity to at least give further consideration to the issue’ and it is in relation to all sexual abuse cases – historic and current - that I wish to now further elaborate.

**Some statistics**

*Child Sexual Abuse (CSA)*

The NSPCC have recently published statistics on the prevalence of childhood sexual abuse (CSA), and two recent World Health Organization (WHO) reports have estimated figures at 20% for women and 5% for men.
The 2001 Census records Scotland’s adult population as 4,089,946. Of these, 2,155,701 are female and 1,934,245 are male. Using the WHO findings, this means that, in Scotland:

431,140 women may have been sexually abused as children

96,712 men may have been sexually abused as children

The percentage of these women and men who have been able to approach the police about their abuse is unknown. So too is the percentage who may ever be ready to do so.

With over half a million of Scotland’s adult population as possible victims of CSA, how many of Scotland’s adults are actually perpetrators? One perpetrator can have several victims but some also have a single victim to whom they have unquestioned access. I don’t know what ratio to apply to get a meaningful estimate but even if we allow 1:3 (one perpetrator being responsible for three victims) it is feasible that, in Scotland, there are 171,191 perpetrators of Child Sexual Abuse. With Scotland’s current prison population being 7845, it may be reasonable to suspect that many of the possible 171,191 CSA perpetrators live undetected within their communities.

**Adult Sexual Abuse (ASA)**
Available data suggests that nearly one in four women worldwide may experience sexual violence by an intimate partner in their lifetime (WHO, 2002). (Available online at [www.who.int](http://www.who.int))

With Scotland’s adult female population being 2,155,701, this ‘one in four’ translates as a possible 528,925 victims

In 2012/13, 1372 rapes and 90 attempted rapes were reported to the police in Scotland. (Statistical Bulletin Crime and Justice Series, Recorded Crime in Scotland 2012-13). I cannot find any data regarding prosecution and conviction rates regarding these cases. However:

In 2009 / 2010. Rapes recorded by police: 884. Number prosecuted: 92. (10.4%) Number convictions: 41 (4.6%)

In 2007 /2008. Rapes recorded by police: 821. Number prosecuted: 85 (10.35%). Number convictions: 26 (3.1%)

Corroboration has been a barrier to justice. Research by the Crown Office found that in 2010, there were more than 458 cases where an accused person was placed on petition but where the case did not go any further because of a lack of corroboration.

Fiscals looked at a further 141 sexual offences not prosecuted in 2010, and found 94 (67%) had a good chance of a conviction had they made it to court. This would have meant that there would have been a total of 135 convictions in 2010, representing 15.3% of cases reported; whereas, as figures above prove, only 4.6% were.
Effects & Impact of Sexual Abuse

People are affected in different ways and to different extents by abuse. Survivors live their lives just like anyone else, but for some there are long-term effects:

- Mental and physical health problems
- Alcohol and drug misuse to cope with trauma
- Homelessness and suicide

Not all survivors go on to have these problems, but many suffer long-term trauma in one form or another. (http://www.survivorscotland.org.uk/about-sexual-abuse/)

As the committee will be aware, I am a survivor of childhood sexual abuse and it was many years – and even then only owing to having been in therapy for some time – before I was able to approach the police and make a statement about what had happened to me. Therefore, on a very personal level, I have a clear understanding of the trauma and effects of such abuse.

I also have some professional understanding. During my career as a probation officer, I have worked as the case manager for sex offenders, the treatment programme facilitator for domestic abuse perpetrators – many of whom employ power and control tactics to coerce partners into non-consensual sex – and a Woman’s Safety Officer, working to protect abused women.

Within my caseload are also young men who have been sexually abused as children or raped as adults and it is even harder for them to find the courage to seek justice.

I have seen how the trauma experienced by these groups of people has manifested in low self-esteem, powerlessness, stigma, self-loathing, feelings of shame and guilt, unhealthy relationships, substance misuse and self-harming.

A Question of Justice

The statistics which I have quoted in this document suggests that there is a high proportion of Scotland’s population who are survivors of Child Sexual Abuse or Adult Sexual Abuse and that current criminal justice legislation is failing them when they seek justice. Abolishing the corroboration requirement is one step towards remedying this but in itself it is not enough.

The current low rate of sexual offence convictions means that there are an unacceptable number of sex offenders living unmonitored within their communities.

When the probation services assess risk of harm posed by perpetrators, we use an evidence base which tells us that ‘the predictor for future behaviour is past behaviour’. Therefore, unmonitored as they are, these sex offenders are likely to reoffend and this means new victims.

I know from personal experience how brave one must be to report sexual abuse and what it costs to do so. It took 3 years from initial contact with the police to finally having a court date. I never expected it to take this long and these 3 years were
exhausting. I went through the precognition with the Fiscal and also with my abuser’s solicitor, the access to and sharing of my medical and therapy records, a Viper ID and verbal abuse from my abuser’s supporters. The whole process was one which re-traumatized me. I could once again taste, feel, smell and hear my abuser and each and every thing that he did to me was as once more as clear as when he first did them. I am certain that my experience is shared by all who take the brave step of seeking justice; we lay ourselves open to reliving the trauma. Yet we do so in the hope that finally there will be an ending to it; an ending only made possible when our abusers are finally held to account for what they have done to us.

By making the new Criminal Justice (Scotland) Bill retrospective, Scotland’s legislators will accord to us the opportunity to once again seek justice for the harm caused to us and the pain which we continue to endure. We may once more have hope of healing and an ending to such pain. When one is wounded by something harmful which leaves shrapnel imbedded in the flesh, the usual response by professionals is to remove the shrapnel and thus prevent further pain or injury. Sexual abuse leaves its own unique shrapnel embedded in the very core of the victim and, survive as we do, the wound can never fully heal until the invading presence is neutralized.

**What Costs?**

I know that there are concerns about how far back is it realistic for retrospective legislation to apply. I am sure that most of the hesitation arises from concerns about the costs involved should hundreds of cases once deemed insufficient to proceed owing to lack of corroboration now be deemed sufficient. The increased workloads for the Crown and Courts obviously has a monetary value.

The committee will be aware of the cases regarding Jimmy Saville and Stuart Hall; the sheer number of victims across a period of several decades. No doubt there is a vast amount of money involved in pursuing justice for their victims yet this is precisely what is happening. Not solely owning to the fact that, in so doing, the prosecutors seek to facilitate healing for the victims – this removal of the ages old shrapnel which blights their lives – but also because it is in the public interest. The message to other abusers must be clear – no matter who you are or how long ago you abused your victim(s), you will be held to account. Such a message will hopefully encourage other victims to come forward and also deter unmasked abusers from further abuse.

It is my belief that my abuser continues to abuse – for why should he not? He has been getting away with it for years, the one chance I had for him to be held to account for this and stopping him from harming another was thwarted by the corroboration requirement. His employment provides him with access to children and another thing which my training has taught me is that when a person is sexually aroused by children, they will always be sexually aroused by children. They don’t ‘grow out of it’ and there is no ‘cure’. It is only by engaging in treatment programmes that they learn the strategies to employ to prevent themselves from acting upon the urge to satisfy their sexual cravings. Unconvicted, my abuser has obviously not engaged in such treatment and therefore has no strategies to prevent him acting on his urges. It has been 19 months since the second victim withdrew and my case
against him was dismissed. He was reinstated by his employer almost immediately and has thus had 19 months in which to continue satisfying his sexual deviance. How many more victims might he have claimed? One more is one too many.

The corroboration requirement means that other rapists and abusers have not been held to account and are, in all likelihood, continuing to rape and abuse. So how many more victims? Again, one more is one too many.

Retrospective legislation will incur a cost including additional staffing and court time. When this is determined on a cost per case basis, perhaps it will be several thousand pounds. Are we truly living in a society which is prepared to say to a rape victim or a childhood sexual abuse victim that the harm caused and the pain they endure is not worth such a financial cost? When the psychological and emotion cost to them in incalculable? Is today’s Scotland prepared to dismiss the risk which unprosecuted perpetrators pose to future victims?

A reminder of the rape cases recorded by the police since 2007: 3077 in total. Number prosecuted: 177. Number of convictions: 67.

Not all of the cases which failed to satisfy the rule for sufficiency of evidence will suddenly do so once the corroboration requirement is abolished. Referring back to the Fiscals’ findings that in 2010, of the 141 sexual abuse cases they re-examined, 94 stood a good chance of conviction if the corroboration requirement had not prevented them getting to court. Although 94 represents 67% of the 141 cases examined, it represents 10% of the 884 reported during 2009/2010. Therefore it might not be several thousand cases which retrospective legislation affords the opportunity to reapply for justice. It may be several hundred.

How far back should retrospective legislation go? I am not going to dismiss the impact which such legislation will have on the criminal justice system and am appreciative of how overwhelming it may be to have hundreds of cases return for consideration. Perhaps the retrospective component of any new Act could be specific to sexual offences.

In making retrospective the legislation which abolishes the requirement for corroboration, the Scottish Parliament is not taking a bold new step. Rather, as this committee will be aware, it will be following the precedent of The Double Jeopardy (Scotland) Act 2011 which itself allows retrospective application. As cited in my petition, the legislators at that time stated that ‘it is immaterial whether the conviction or, as the case may be, the acquittal was before or after the coming into force of the Act’.

What was important – what is important – is that victims of crime have access to justice and that perpetrators of the most heinous acts are held to account for their actions and prevented from harming others.

Colette Barrie
12 November 2013
In calling on the Scottish Parliament to urge the Scottish Government to pass new Criminal Justice System legislation which allows for the retrospective abolition of the corroboration requirement thus ensuring full access to justice for victims of crime, mine is not a lone voice.

As the debate regarding the proposed abolition of corroboration continues, much attention is given to the thoughts and opinions of various professional agencies and bodies. Although several victim organisations are mentioned, I don’t believe that there is equity in the coverage given to them and that given to criminal justice professionals. One may argue that the criminal justice professionals have a greater understanding of the minutiae of the legal process and therefore a greater understanding of how abolition may threaten or impact upon the delivery of such. However, of those whom I have heard speak against the abolition of corroboration, none have spoken of the victim with any tangible, genuine compassion. I detect a lack of victim empathy – for anyone who does sincerely empathise with the victim would surely not stand against a legislative change which will give them access to justice.

On 13th November 2013, Scotland Tonight featured an interview with Kenny MacAskill regarding the proposed Criminal Justice (Scotland) Bill and included footage of Derek Ogg, QC, sharing his opinion as to why the corroboration requirement is necessary. (http://video.stv.tv/bc/news-131113-st-justice/?redirect=no)

During his ‘summing up’, Mr Ogg gives the impression that Law & Order are somehow quite different from Justice. Perhaps he agrees with the late American Supreme Court judge, Oliver Wendell Holmes, that ‘This is a court of law, young man, not a court of justice’?

Mr Ogg concludes with part of his job being to protect people against wrongful conviction and this being ‘part of the justice game’. Justice game? I did not know that justice is a game. Perhaps though Mr Ogg has voiced what many have long suspected as ‘game’ suggests winners and losers; more skilled, practised and cunning opponents succeeding over less skilled, less practiced, less cunning ones. Yet the responsibility for protecting people from harm, for administering appropriate punitive measures to those who are guilty of causing harm and for ensuring the safety of current victims whilst preventing offences against future ones is surely no ‘game’?

I share Mr Ogg’s desire that no innocent person is wrongly convicted. I doubt that anyone, anywhere in Scotland, wants such a thing. However, in his passionate stating of what seems such an obvious and fundamental tenet, his defence of the needs of the accused seems to eclipse the needs of the current victim and does not heed the danger posed to future victims should a guilty person be acquitted. Such a
person may be guilty of further crimes which may be fatal to innocent victims who need not have been victims if justice had been put first and the need to ‘win the game’ put second.

Law and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress. (Martin Luther King, Jr.) Social progress in this context being the continued advancement which the Scottish legal system is making towards public protection; safeguarding communities by punishing perpetrators, monitoring / rehabilitating offenders and protecting victims.

The corroboration requirement is a keystone in the ‘dangerously structured dam’ and it has blocked justice for far too long.

In offering to give oral evidence to the committee, my hope was to further promote the victims voice in this debate. In my written submission in September 2012, I included comments from other victims / supporters who are signing my petition. I now do so again:

JB
The abused need all the help they can get, and the least we can do is give them justice.

VW
I am a victim of rape, as far as I know I am his second victim with no justice!

MK
Survivors of abuse must have the full backing of the Law.

MA
I am part of a group of women survivors who want to change the law in Scotland so that victims of sexual violence get the justice that they are currently denied.

SA
Anyone with a heart would care and want this law changed.

LS
Justice cannot ever be served if accused are able to avoid a trial based on this requirement and irrespective of the quality of the evidence.

NT
I think children who have been abused deserve to see justice being done.

LM
Justice should lie with the lay people (juries) not advocates who have a vested interest.
LG
I'm tired of victims of sexual abuse not receiving justice when they're brave enough to strive for it, and laws like this play easily into the hands of attackers. A few of my small circle of friends were raped as very young women (all bar one by her boyfriend at the time) but we all know it's hardly worthwhile even reporting it, the men know this best. It feels like it's the last crime that isn't seen by the authorities as a real crime, it's like the authorities play lip service to it. Many men just don't see rape as a crime.

RJ
Justice for victims they are going through enough without this extra burden

JH
Because the current system is unjust

ED
This is important because justice for victims of crime particularly victims of sexual abuse is very often not served.

CM
As a counsellor working in the field of domestic and sexual abuse for decades I am appalled that victims have to suffer such an aggressive and adversarial so-called 'justice' system.

VC
The low rate of conviction is the tip of the iceberg, in no other crime would the victim be asked how they were dressed, past history of partners and trivia like this?

In his Review Report, Lord Carloway quoted Gladstone when he cited: Justice delayed is justice denied. In my petition, I express my belief that justice has been delayed for far too long and thus has been denied for far too many for far too long.

In this addendum which now contains several quotations from others, I would like to conclude with the following:

'Justice for crimes against humanity must have no limitations' (Simon Wiesenthal) Hence why the War Crimes legislation is retrospective. ‘Crimes against humanity’ includes rape… or any other form of sexual violence of comparable gravity; other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury. In describing the effects and impact of Child Sexual Abuse (CSA) and Adult Sexual Abuse (ASA) in my submission dated 12th November 2013, I have listed traumas which satisfy this definition.

This again is why new legislation abolishing the corroboration requirement must be retrospective.

Colette Barrie
18 November 2013
1. While this submission focuses on those aspects of the Bill about which we have
concerns, that should not detract from the fact that we are broadly supportive of the
proposals made by the Carloway Review and are similarly supportive of the Bill. We
have no comments to make on those aspects of the Bill which do not stem from the
Carloway Review.

2. James Chalmers and Fiona Leverick have published an extensive analysis of the
Carloway Review’s proposals (“‘Substantial and radical change’: a new dawn for
Scottish criminal procedure?” (2012) 75 Modern Law Review 837-864) and a shorter
analysis of the related issue of majority jury verdicts (“Majority jury verdicts” (2013)
17 Edinburgh Law Review 90-96). We would be happy to supply the Committee with
copies of either publication should these be of assistance. In broad terms, we are
concerned that the Bill as it stands would leave Scotland with a lower level of
protection against wrongful conviction than any comparable system, insofar as such
comparisons are possible.

3. With these general comments in mind, we wish to make the following points in this
submission:

(1) Some aspects of the drafting of the legislation are excessively complex.
(2) While we express no view on the desirability of abolishing corroboration, we
do not support the case made by the Carloway Review to justify this proposal.
(3) We do not consider that section 70 (providing for new rules regarding guilty
verdicts returned by juries) provides an adequate safeguard against wrongful
conviction in the absence of a corroboration requirement.
(4) We believe that the trial judge should have the power to withdraw a case from
the jury where the evidence is such that no reasonable jury could convict on it.
(5) We believe that section 82, requiring the High Court to apply an additional
“interests of justice” test when considering references from the Scottish
Criminal Cases Review Commission, serves no appreciable purpose and that
the resulting cost to the public purse would be wasteful and inappropriate.

4. The remainder of this submission deals with each of these points in turn.

(1) The legislative drafting

5. Some aspects of the drafting of the legislation are excessively complex. For
example, the abolition of corroboration is achieved by way of four sections with
multiple cross-references. The same effect could be achieved in a single section, as follows:

57 Corroboration not required

(1) If satisfied in any criminal proceedings that a fact has been established by evidence, the judge or (as the case may be) the jury is entitled to find the fact proved by the evidence although the evidence is not corroborated.

(2) Subsection (1) applies only to proceedings for an offence committed on or after the day on which it comes into force, including proceedings for a continuous offence committed during a period of time which includes that date.

(3) Subsection (1) does not affect the operation of any enactment which provides in relation to the proceedings for an offence that a fact can be proved only by corroborated evidence.

6. Even this section is a relatively cautious and lengthy approach to drafting the necessary rule. It is not clear why the drafting needs to be as lengthy or complex as it is, nor how this is believed to assist in making the legislation comprehensible and accessible.

(2) The abolition of corroboration

7. There is no doubt that corroboration is a complex and unsatisfactory area of the law which has little parallel in other jurisdictions. While we would not wish to make a positive case for its retention, we are not satisfied that the case for its abolition has been made out. James Chalmers and Fiona Leverick have already made extensive criticisms of the approach taken by the Carloway Review to corroboration in their article “Substantial and radical change: a new dawn for Scottish criminal procedure?” (2012) 75 Modern Law Review 837-864, noting in particular the inadequacy of the empirical research upon which the Review relied and the Review’s apparent unawareness of research conducted on behalf of the Royal Commission on Criminal Justice which ran contrary to some of the claims made in the Review.

8. The broader problem is that the Scottish criminal justice system has been constructed around the requirement of corroboration. Other systems which do not employ a corroboration requirement have developed a variety of other mechanisms to safeguard against wrongful conviction. In Scotland, such mechanisms have consistently been rejected on the basis that Scotland offers an alternative safeguard in the form of corroboration. To remove corroboration without a full reassessment of safeguards would, therefore, verge on the reckless. Making a token change to the rules regarding majority jury verdicts is patently insufficient.
(3) Majority jury verdicts

9. We do not believe that requiring a majority of 10 jurors from 15, in the absence of a corroboration requirement, provides an adequate safeguard against wrongful conviction. We note that the Scottish Government chose, in consulting publicly on additional safeguards, to ask whether a majority specifically of 9 or 10 should be required. Despite this, a significant number of respondents to the consultation went beyond the terms of the question asked and indicated that a higher majority was necessary.

10. As James Chalmers and Fiona Leverick have explained elsewhere (“Majority jury verdicts” (2013) 17 Edinburgh Law Review 90-96), lay jury systems worldwide typically require either unanimity or near-unanimity in order for an accused person to be convicted. The only significant exception appears to be the Russian criminal jury, where a verdict of guilty can be returned by seven of twelve jurors. The Russian system, however (which was wrongly characterised as one with “no additional safeguards” in the Scottish Government consultation) counterbalances this rule with a number of safeguards which have no parallel in Scotland: (a) extensive rights to question and object to potential jurors; (b) a minimum period of three hours’ deliberation before a vote may take place (a unanimous verdict may be returned before this) and (c) jury verdicts being returned in the form of answers to a questionnaire, thus providing additional information regarding the basis of the jury’s decision which is not available in Scotland.

11. Insofar as it is possible to quantify the level of protection against wrongful conviction offered by any criminal justice system, the effect of the Criminal Justice (Scotland) Bill as it now stands would be to reduce the level of protection against wrongful conviction offered in Scotland below that offered in any other comparable jurisdiction. We are not aware of any other jurisdiction which has chosen to experiment with the combination of (a) no corroboration requirement; (b) a near-simple majority requirement within the jury and (c) minimal judicial supervision of jury verdicts (see (4) below). We are unclear on what basis the Scottish Government has felt able to conclude that the Criminal Justice (Scotland) Bill would represent a safe manner in which to run a criminal justice system.

(4) Withdrawing a case from the jury

12. We have previously argued that a trial judge should have the power to withdraw a case from the jury on the grounds that the evidence is such that no reasonable jury could convict on it. We repeat that submission here. We are concerned that the failure to permit the trial judge to do this leaves the level of protection against wrongful conviction in Scots law at a dangerously low level, and in addition risks needlessly wasting public funds.

13. We note the statement in the Carloway Review (at para 7.3.19) that:
“If the requirement for corroboration were to be abolished, there is no need for any further change to the existing law on sufficiency of evidence at the trial stage. The issue for the trial judge would be the same as it is at present, except that there would be no need for corroboration.”

14. We find this statement peculiar to say the least. A no case to answer submission currently requires the trial judge to consider whether there is corroborated evidence available in respect of each fact which is crucial to the prosecution case. To say that if corroboration were abolished the issue for the trial judge “would be the same… except that there would be no need for corroboration” seems to us to misrepresent the practical reality of the current law.

15. Because the abolition of corroboration would bring Scots law into line with English law, it is helpful to note how a no case to answer submission should be dealt with in that jurisdiction (as did the Carloway Review). In *R v Galbraith* [1981] 1 WLR 1039, Lord Lane observed that a submission should succeed in the case (1) “where there is no evidence that the crime alleged has been committed by the defendant” and (2) “[w]here the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it”.

16. Case (2), however, is currently excluded from the ambit of the Scottish no case to answer submission as a result of the Criminal Justice and Licensing (Scotland) Act 2010, which inserted a new section 97D into the Criminal Procedure (Scotland) Act 1995 to this effect. Consequently, implementing the Carloway proposals as they stand would mean that the no case to answer submission would verge on the redundant and would offer significantly weaker protection against wrongful conviction than that available to accused persons in England and Wales.

17. As the consultation paper notes, the Scottish Law Commission previously recommended that it should be possible to sustain a no case to answer submission on the basis that no reasonable jury could convict on the evidence led (*Report on Crown Appeals* (Scot Law Com No 212, 2008)). The government chose not to implement that recommendation, but as the consultation paper again acknowledges, this was in the context of the accused being protected by a requirement of corroboration. This is consistent with a longstanding view that the requirement of corroboration minimises the need for trial judges to be given further powers to prevent wrongful conviction (see e.g. Scottish Home and Health Department, *Identification Procedures under Scottish Criminal Law* (Cmnd 7096: 1978) para 5.03). If corroboration is to be abolished, the Scottish Law Commission’s proposals should be implemented.

18. We cannot see why, if an appeal court is permitted to quash a conviction on the grounds that no reasonable jury would have convicted (as it is under section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995), a trial judge (who is in a
far better position to judge what the jury can reasonably do, having heard all the
evidence) should not have a similar power to prevent a case proceeding at the end
of the prosecution case. We accept that the practical importance of such a rule
would have been relatively limited while a requirement of corroboration remained in
place, but this is unlikely to be so if that requirement is abolished. If a judge were of
the view that no reasonable jury could convict on the evidence led, they would surely
be obliged to state this in their report to the appeal court in an appeal against
conviction, and the appeal court would in turn be all but obliged to accept the view of
the judge who had personally heard all the evidence. Requiring such cases to be
dealt with by way of an appeal against conviction is a waste of public resources and
would unjustly and unjustifiably leave the individual concerned with the stain of a
criminal conviction, notwithstanding its being quashed on appeal. We are fortified in
this view by the fact that the other recommendations of the Scottish Law
Commission in its 2008 report, as implemented in 2010, now mean that it would be
possible for the appeal court to correct any error made by a trial judge in this regard
in the unlikely event that this should be necessary.

(5) Scottish Criminal Cases Review Commission references to the appeal court

19. Section 82 requires the High Court to apply an additional “interests of justice” test
when considering references from the Scottish Criminal Cases Review Commission.
We believe that this section of the Bill should be removed except insofar as it repeals
section 194DA. Either the SCCRC is competent to decide the interests of justice
point or it is not. It makes little sense to argue, as Lord Carloway did, for section
194DA of the 1995 Act (which allows the appeal court to refuse to consider a
reference if it would not be in the interests of justice to do so) to be repealed only to
re-introduce an “interests of justice” test at the point when the appeal is determined.
Indeed, this proposal is more objectionable than the present situation, as it would
prolong proceedings unnecessarily and waste resources. We would refer to
References by the SCCRC in the cases of RM and Gallacher [2012] HCJAC 121,
where the appeal court expresses its full confidence in the Commission’s ability to
decide the interests of justice test.

20. Under the current section 194DA of the 1995 Act, introduced in the post-Cadder
emergency legislation, the appeal court has the power to rule that it is not in the
interests of justice that an SCCRC reference should proceed to an appeal. Case law
(see RM and Reference by the SCCRC in the case of Mark Chamberlain-Davidson
[2012] HCJAC 120) has suggested that the Crown has little interest in pursuing the
“interests of justice” point but has nevertheless invited the court to rule on this point.
This seems only to have wasted public time and money.

21. It is difficult to see exactly what problem Lord Carloway is attempting to address
here. In evidence to the Justice Committee, he gave the example of someone who
had their case referred to the High Court by the SCCRC but who, in the interim,
confessed to the crime. But this unlikely scenario could happen in any appeal. There
is no reason to think that it is more likely in a case referred by the Commission; if anything, it is less likely. If this is the basis for section 82, section 82 is a wholly inadequate means of addressing it. In any event, the problem does not need to be addressed: it could be dealt with by the High Court’s existing power to quash the conviction while granting permission for a retrial. Moreover, it is not clear how section 82 could ever address the problem, as it creates no power for the court to hear evidence of the alleged confession and so take it into account.

22. In summary, section 82 is an inadequate means of addressing a non-existent problem and will result only in a waste of public time and money.

23. For these reasons, our view is that the test for determining SCCRC appeals should be the same as the test for determining any other appeal against conviction: whether or not there has been a miscarriage of justice.

Professor James Chalmers;
Professor Lindsay Farmer; and
Professor Fiona Leverick.
University of Glasgow School of Law
28 August 2013
1. I am grateful for the opportunity to provide supplementary evidence to the Justice Committee in light of the evidence given by Lord Carloway on 24 September 2013. I have written an article for a forthcoming issue of the Scots Law Times dealing with this issue, and summarise that article here.

2. In summary, I note in that article that Lord Carloway made three particular claims in his evidence to the Committee, as follows. First, that “other countries” are disturbed by Scotland’s application of a corroboration rule. Secondly, that Scotland is the “only country in the civilized world” to retain such a rule. Thirdly, that corroboration’s abolition could be supported by the lack of evidence to suggest that the rate of miscarriages of justice in Scotland was higher than elsewhere.

3. I suggest in the article that these claims cannot be justified. First, I am not aware of expressions of concern by “other countries” about corroboration, and such references to the Scottish rule of corroboration in the international literature as I can identify are either positive or neutral. I note, however, that international concern has been expressed about the Scottish simple majority verdict in jury trials, accepting that this unusual rule may be counter-balanced by the corroboration requirement. I note also that the reforms proposed to the simple majority verdict in the Criminal Justice (Scotland) Bill would still leave Scotland significantly out of line compared to common law jury systems around the world.

4. Secondly, I note that it would be wrong to suggest that Scotland is the only country which retains a rule prohibiting conviction on the evidence of a single witness. The Netherlands continues to maintain a general rule to this effect, while various other countries prohibit such convictions in particular circumstances.

5. Thirdly, I note that there is an absence of evidence on rates of miscarriages of justice in Scotland. No material is available which would allow us reliably to assess this issue. In any event, if all that can be said is that the rate of miscarriages of justice in Scotland is no higher than elsewhere, it is doubtful that we can afford to remove a key safeguard against wrongful conviction such as corroboration.

6. In conclusion, I suggest that the failure to recognise corroboration’s importance as a safeguard against wrongful conviction is a lacuna in the Carloway Review. I do not support calls for a further broad review of the criminal justice system. The Carloway Review itself was such a broad review, and an excellent one. However, the issue of safeguards was omitted from that review and deserves further careful consideration.

7. Further review of this issue need not delay the progress of the Criminal Justice (Scotland) Bill. If the Scottish Government is determined to abolish corroboration, it could do so on the basis that the relevant provisions will not be
brought into force until the Scottish Law Commission, or an ad hoc body, has completed a focused review of safeguards against wrongful conviction and any legislation which is necessary as a result of that review has been enacted.

Professor James Chalmers
School of Law, University of Glasgow
18 November 2013

Abolishing Corroboration: Three Bad Arguments

On 24 September 2013, Lord Carloway gave evidence to the Justice Committee of the Scottish Parliament as part of its Stage 1 investigation into the Criminal Justice (Scotland) Bill. Unsurprisingly, a considerable part of the questioning was taken up with the issue of corroboration, which has proved to be the most controversial part of the Bill by some distance.

A great deal has already been written about the possible abolition of corroboration, and this article will not rehearse these debates. However, Lord Carloway’s appearance before the Justice Committee provided him with an opportunity to refine the arguments which he has made for removing this rule, and to emphasise certain key points.

There were three such points repeated by Lord Carloway throughout his evidence. The first was a claim that “other countries” were disturbed by Scotland’s application of a corroboration rule. The second was a claim that Scotland was the “only country in the civilized world” to retain such a rule. The third was that corroboration’s abolition could be supported by the lack of evidence to suggest that the rate of miscarriages of justice in Scotland was higher than elsewhere.

Each of these points was made more than once by Lord Carloway, with the second being described as “the critical feature that I ask the committee to bear in mind” (col 3247). They seem now to form a core part of the case – perhaps the core of the case – which is being made for corroboration’s abolition. This article assesses each of these arguments in turn, arguing that none of them can be justified. All references to column numbers are references to the Official Report of the Justice Committee for Tuesday 24 September 2014.

The views of other countries

Lord Carloway asked the Justice Committee to take into account “what other countries think about our having such a rule”, which he described as an “extremely persuasive reason why the rule must go” (col 3248). He repeated this point subsequently: “Other countries regard the fact that we have such a rule as disturbing” (col 3258).

This is a surprising statement. Scotland is a small jurisdiction and it is unlikely that our corroboration rule is particularly well-known in other jurisdictions. Silence should, therefore, not be taken as endorsement. However, the claim that other countries have expressed criticism of the Scottish corroboration rule is a new one. No such
criticism was cited in Lord Carloway’s report, and so it is unclear on what basis this claim has been made.

I have reviewed the international literature to try and identify comments from abroad about the Scottish rule. There are not many, but such references as I can identify – there will doubtless be others – have been either positive or neutral. I include a list of examples at appendix A to this article.

Perhaps more importantly, international observers have consistently expressed concern about the possibility of a jury convicting on the basis of a simple majority verdict, while accepting that this may be counter-balanced by the corroboration requirement. I include a list of examples at appendix B. While the Bill would increase the majority required for conviction from 8 of 15 jurors to 10 of 15, this remains out of line with the general requirement in the common law world that lay juries must return unanimous or at least near-unanimous verdicts. Civilian systems are more likely to permit conviction without near-unanimity, but counterbalance this with a degree of judicial supervision of the jury which is absent from the Scottish system.

In summary, it is not clear on what basis Lord Carloway felt able to assert that the corroboration rule has provoked concern internationally. It is clear, however, that the reform which his review proposed – allowing a jury to convict by a simple majority on the basis of uncorroborated evidence – is something which would be regarded with concern outside of Scotland. The Scottish Government’s separate proposal to adjust the jury majority required for conviction does not provide an adequate answer to this concern.

**The uniqueness of the rule**

Lord Carloway described Scotland as “the only country in the world that has the rule” (col 3240), going on to say that “Scotland is the only country in the civilised world – I include in that the whole of Western Europe and all the Commonwealth countries – that has a rule that requires corroboration.” (col 3242). Finally, he remarked that “Scotland is the only country in the civilised world that retains this archaic rule of medieval jurisprudence” (col 3247).

In his Report, Lord Carloway identified the requirement of corroboration as having Romano-canonical origins, and so being influential both within Scotland and in continental Europe. He suggested that the corroboration rule was abandoned by other European systems in the eighteenth and nineteenth century, stating (at para 7.1.14):

“...advances in thinking changed the approach entirely. Provided society could ensure that its judges were learned, reasonable and impartial, the essence of proof of guilt would involve the subjective persuasion of the trier of fact. The test would become, in French, ‘l’intime conviction’ and, in German, ‘freie Beweiswürdigung’. This is the antithesis of a system with formal rules of evidence, including a requirement for corroboration. Instead, there are no rules of proof and conviction depends upon the view of the judge, or subsequently a jury, having heard all relevant evidence placed before the court.” *(Carloway Review: Report and Recommendations (2011) para 7.1.14)*
This is an accurate statement of the manner in which criminal procedure has developed in continental Europe, in general terms (see e.g. the comments about French and German law made by H Mannheim (1950) 13 MLR 90). However, the more sweeping statements made by Lord Carloway in his evidence to the Justice Committee are problematic.

The Scottish corroboration rule can fairly be described as unique, insofar as it represents our own modern development of a rule with its foundations in Romano-canonical law. However, the suggestion that all other countries have abandoned the Romano-canonical rule requiring more than one witness is wrong. The Netherlands appears to retain a general rule of unus testis nullus testis (“one witness is no witness”: art 342(2) of the Dutch Code of Criminal Procedure), which prevents a conviction being based on the evidence of one witness alone, although the two witnesses may speak to different matters and so not provide corroboration in the sense required by the modern Scottish rule. (See P J P Tak, The Dutch Criminal Justice System, 3rd edn (2008) para 7.17; S van der Ah, Stalking in the Netherlands (2010) 191-192; App No 39024/97; LN v Netherlands, European Court of Human Rights, 9 November 1999.)

Perhaps more importantly, a 2006 study published by the Council of Europe suggested that a number of European jurisdictions remained sceptical about conviction on the basis of a single witness’s evidence in particular contexts, applying special rules prohibiting conviction on the basis of, for example, incriminating testimony delivered by an anonymous witness, an alleged accomplice of the accused, a witness who refused to be cross-examined, or a witness who gave evidence by video-link. (See Council of Europe, Terrorism: Protection of Witnesses and Collaborators of Justice (2006) 20-21, referring to the law of Belgium, France, Germany, Italy, Luxembourg and Portugal.)

Such rules provide a lesser safeguard against wrongful conviction than the Scottish corroboration rule, but they provide significantly more of a safeguard than would remain in Scotland were the Criminal Justice (Scotland) Bill to be enacted in its current form.

I do not intend here to make any general claims about the approach of continental European jurisdictions to corroboration, and would not claim any comprehensive understanding of the many different criminal justice systems in Europe. It may be that the Dutch rule is unique on the continent, but that is mere speculation. When, in 1997, the International Criminal Tribunal for the Former Yugoslavia had to consider whether unus testis nullus testis represented a general rule of law which it should apply to its own procedure, it felt able to say only that the Dutch rule represented “an exception to the prevailing rule in the civil law” (Prosecutor v Tadić, ICTY Trial Chamber, 7 May 1997 para 538, emphasis added.) Importantly, the Tadić court concluded that unus testis nullus testis was not a general rule which it should apply. It would clearly be correct to say that most countries have abandoned such requirements. It is not, however, correct to claim that Scotland remains uniquely isolated in requiring a plurality of witnesses for conviction.
It would be possible for the Scottish Government to commission the necessary research to establish the extent to which this rule persists across Europe, although it would be a time-consuming process which would require the assistance of experts in each jurisdiction and an understanding of the criminal justice system as a whole in any given country. No such research was carried out as part of the Carloway Review, and it is doubtful that any such research would have been particularly helpful. However, now that the supposed uniqueness of the Scottish rule has been stressed so strongly to the Justice Committee, it is important that the committee does not uncritically accept the claim that “Scotland is the only country in the civilised world that retains this archaic rule of medieval jurisprudence”. Scotland is at least unusual, but the research which would be required to justify such a strong claim as the one Lord Carloway made in evidence has not been carried out. In any event, the claim seems simply to be incorrect given the Dutch rule.

The rate of miscarriages of justice

Lord Carloway referred to the lack of “material to suggest that the incidence of miscarriage of justice... is different from that in any other country in the civilised western world or the Commonwealth” (col 3240); later “there is no evidence whatsoever that Scotland’s incidence of miscarriages of justice is any lower than that of any other country in the civilised world” (col 3250); saying later that “there is no suggestion that the incidence of miscarriages of justice in England is greater than it is here” (col 3261).

There are two serious problems with this argument. First, it cuts both ways. If there is no evidence that the Scottish incidence of miscarriages of justice differs from other countries, this suggests that we are not in a position where we can afford to abandon one of our principal existing safeguards against wrongful conviction.

Secondly, it is not at all clear what the evidence for this claim is. As Donald Nicolson and John Blackie have noted in their important review of corroboration, “[n]o one has begun to estimate the rate of unjust acquittals in Anglo American jurisdictions, whereas the rate of convictions of the “factually” innocent have only been capable of reasonably accurate estimation following the advent of DNA testing and then only where DNA was available to establish innocence.” (D Nicolson and J Blackie, “Corroboration in Scots law: ‘archaic rule’ or ‘invaluable safeguard’?” (2013) 17 Edin LR 152 at 158-159). There is no clear evidence on the rate of miscarriages of justice in Scotland, nor is it clear how such information could be reliably compiled. The best mechanism we have for establishing guilt or innocence is the criminal justice process itself. Outside of the narrow category of cases where DNA evidence was not initially available, but is at a subsequent date, and can be regarded as determinative, we lack any secondary mechanism which we can use to check the overall accuracy of that process.

In summary, the Justice Committee should place no weight on the claim that Scotland’s miscarriage of justice rate is no different from elsewhere. There does not appear to be any evidence which supports that claim, and in any event there would be no means of reliably testing it. But even if we accept that Lord Carloway is right to suggest that the Scottish miscarriage of justice rate is no different from elsewhere, that would suggest that we could not afford to abolish corroboration. If our existing criminal justice system
is as it stands no better at preventing miscarriages of justice than other systems, how can we afford to remove one of its key safeguards?

One other aspect of Lord Carloway’s approach to miscarriages of justice during his evidence is worthy of note. He explained to the Justice Committee that additional safeguards were not required, because the abolition of corroboration “would not cause miscarriages of justice of the type that we are discussing in the narrow sense of appellate jurisdiction – that is, something going wrong in the trial process” (cols 3243-3244). That is correct, but it is also irrelevant. The “narrow sense” Lord Carloway refers to treats a miscarriage of justice as consisting of a significant failure to follow the rules governing a criminal trial. That means that Lord Carloway appears to have claimed that changing the rules governing a criminal trial will not cause the rules governing a criminal trial to be breached. On that approach, no change to the rules of evidence or procedure could ever cause miscarriages of justice. The claim is a meaningless one and tells us nothing about whether abolishing corroboration would be likely to lead to an increase in the number of factually innocent people convicted of criminal offences.

**Why does this matter?**

In identifying corroboration as an “archaic rule”, the Carloway Review failed to recognise that however archaic the rule may be, it is by virtue of its lengthy heritage the rule around which so many other aspects of our criminal justice system have been constructed. The existence of a broad corroboration rule has meant that we have simply never engaged in debate about a whole range of more specific problems. We have never, for example, had to consider whether it would be safe to allow a jury to convict based solely on the evidence of an accomplice, an anonymous witness, hearsay evidence or dock identification. Corroboration always rendered such questions moot; even if we might have doubts about particular forms of evidence, there would at least have to be two incriminating sources.

Moreover, we have been able to assuage our doubts about permitting simple majority jury verdicts, an approach which looks remarkably lax compared to the rest of the common law world, by pointing to the counterweight offered by corroboration. We have resisted a rule which would allow trial judges to withdraw unsafe cases from juries, but maintained a meaningful no case to answer procedure on the basis that trial judges assess whether corroborated evidence has been presented by the Crown. And aside from questions of corroboration (and fresh evidence), we have permitted very little review of the factual basis for a conviction on appeal.

If corroboration is abolished, the assumptions which underpin Scots law’s position on every single one of these positions is undermined. It is remarkable, therefore, that Lord Carloway takes the view that alternative safeguards against wrongful conviction are simply not “directly relevant” (col 3244) to the question whether or not corroboration should be retained.

This does point to a way forward. Some criticisms of the proposal to abolish corroboration have suggested that there should be some form of broad review of the Scottish criminal justice system before such a change is made. This is a suggestion which is unlikely to find favour with the Scottish Government, and for good reason: it
is difficult to see what the Carloway Review was if not a broad review. However, there is a clear lacuna in that review. The failure to acknowledge corroboration’s importance as a safeguard against wrongful conviction, and the manner in which the criminal justice system has been constructed around it, means that further work must be done to identify what safeguards the criminal justice system should put in its place. The Scottish Government’s own consultation on this matter, which canvassed only the most minimal of changes, provides a starting point for this but cannot claim to be an adequate review of the issues involved.

The narrow issue of safeguards is a focused one which could realistically be referred either to the Scottish Law Commission or to an independent body, to be addressed in a relatively short timescale. That need not even impede the passage of the Bill: if the Scottish Government is determined to abolish corroboration, it could do so in this Bill but delay the implementation of that provision until a safeguards review is carried out and any necessary changes are made.

This would not be revisiting the Carloway Review itself, but addressing an issue which was omitted from that exercise. It would remain possible, of course, to make the argument that no safeguards actually are required, although that seems to be a view which is unlikely to command much support.

**Conclusion**

Lord Carloway’s review has been an enormously valuable exercise. The Criminal Justice (Scotland) Bill will put a large part of the Scottish criminal justice system on a footing more sound and rational than that which currently exists. Lord Carloway’s proposals give great weight to the protection of suspects at the investigative stage, and will ensure that Scots criminal law continues to give greater protection at this stage than many other jurisdictions. There is a danger, however, that the abolition of corroboration will seriously damage the review’s legacy. If corroboration is to be abolished, serious consideration needs to be given to safeguards against wrongful conviction in Scots law. Lord Carloway himself claimed that there is no evidence that the incidence of miscarriages of justice in Scotland differs from elsewhere. If that is true – although it is difficult to see how we could reliably know this – then we cannot afford simply to abolish our principal safeguard against wrongful conviction and leave nothing in its place. A focused review of safeguards against wrongful conviction would fill the gap in Lord Carloway’s own work, allow the Government to proceed with its settled intention of abolishing corroboration, and ensure that Scotland retains a criminal justice system which properly recognises the dangers of, and seeks to prevent, miscarriages of justice.
Appendix A: international observations on the Scottish corroboration rule

L Griffin, “International perspectives on correcting wrongful convictions” (2013) 21 William and Mary Bill of Rights Journal 1153 at 1207 (noting how the Scottish rule would avoid certain single-witness convictions which have proved problematic in the United States); P Hardin, “Other answers: search and seizure, coerced confession and criminal trial in Scotland” (1964) 113 University of Pennsylvania Law Review 165 at 183 (describing corroboration an “important” and “salutary” rule); S Mount, “A criminal cases review commission for New Zealand?” [2009] New Zealand Law Review 455 at 462 (suggesting that the “added hurdle[] to conviction” presented by corroboration might make miscarriages of justice less likely in Scotland than in New Zealand); C Sherrin, “Jailhouse informants in the Canadian criminal justice system, part II: options for reform” (1997) 40 Criminal Law Quarterly 157 at 160-164 (expressing scepticism about how much protection corroboration could offer as a safeguard against wrongful conviction on the basis of false testimony from an informer, but expressing no disturb as to the general rule).

Appendix B: international comments on the Scottish simple majority verdict

Justice Committee  
**Criminal Justice (Scotland) Bill**  
**Written submission from Children in Scotland**

**Evidence on Criminal Justice (Scotland) Bill**

Thank you for the opportunity to provide written evidence for the Committee’s Stage One proceedings on the Criminal Justice (Scotland) Bill. Children in Scotland previously contributed to the Scottish Government’s consultation on Lord Carloway’s recommendations leading up to this Bill. Further to that we warmly welcome the apparent reflection of those recommendations in section 42 of the Bill in respect of placing a duty on police constables to consider the best interests of the child when holding, arresting, interviewing or charging a child. We would however seek assurance that the use of the word “well-being” in section 42 (2) in the Bill is fully consistent with this. We also warmly welcome the Bill’s definition of a child as under-18 in line with the United Nations Convention on the Rights of the Child (UNCRC) and view these as important steps forward. We would, however, like to focus our Committee evidence to two areas of particular interest and concern, which we feel should also be addressed through this Bill.

**Age of Criminal Responsibility and Prosecution of Children**

Children in Scotland was amongst signatories to a joint letter to the Minister for Children & Young People following the Bill’s publication from a range of children’s organisations concerned at the omission in the Bill to raise the minimum age of criminal responsibility from eight to 12 years old in line with the commitment in the Scottish Government’s *Do the Right Thing Progress Report 2012* to give this fresh consideration “with a view to bringing forward any legislative change in the lifetime of this Parliament.”

We would, however point out that a minimum age of 12 would still be lower than most other European jurisdictions which (apart from Scotland) range from ten in England & Wales to 16 in Belgium. In practice most alleged offences committed by children under the age of 16 are dealt with through the Children’s Hearings system providing for child’s “needs and deeds” to be considered in the round with an overarching welfare and rehabilitation focus in line with the ethos of the Kilbrandon Report. In this regard Scotland is an exemplar to the rest of the world, however it does however mean that, unlike the rest of the UK, Scotland does not have a distinct system of juvenile courts. As such it remains theoretically possible, and has occurred in practice, for a child as young as 12 (or for a crime alleged to have been committed at that age) to be prosecuted as an adult and obtain a conviction and criminal record for which it may be unclear relates to when he or she was a minor with the attendant impact that may have on that child’s future life chances.

Whilst we recognise that children can, and sometimes do, engage in offending behaviour, we strongly believe that, even if reflected in sentencing and slightly different provisions under the Rehabilitation of Offenders Act 1974, it is inappropriate

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1 (2012) Scottish Government: [http://www.scotland.gov.uk/Publications/2012/05/3593/23](http://www.scotland.gov.uk/Publications/2012/05/3593/23)  
a child can be prosecuted and receive the same conviction and criminal record as a fully mature adult.

It should be made clear that none of this is to say that offending behaviour by children should not be addressed or appropriately punished, but recognises that the mental, physical and sexual maturation process is by definition less advanced in children and scope for change and rehabilitation considerably greater and that this should be reflected in the procedures and sanctions pursued and imposed. Children are not simply small adults.

In addition to the moral issues concerning the treatment and welfare of an individual child, there are also wider practical reasons arising from societal benefits, both socially and financially for the focus to be on addressing offending behaviour and rehabilitation rather than early criminalisation. There is a range of examples of effective good practice provided by a number of our membership organisations in this regard.

As such we would support a strengthened presumption against criminal prosecution and in favour of constructive alternatives for children aged up to at least 16. For the same reasons we would also be in favour of widening the definition of a “child” as described in section 199 of the Children’s Hearings (Scotland) Act 2011 to a person under the age of 18. At the moment the definition extends only to those 16 and over who are subject to a compulsory supervision order or if referred to the Principal Reporter before they turned 16. This would be a logical extension of Lord Carloway’s recommendation taken forward in the Bill that, for the purposes of arrest, detention and questioning a “child” should be defined as anyone under the age of 18 years as previously mentioned. It would also be in keeping with the definition found in the United Nations Convention on the Rights of the Child (UNCRC) to which the UK is a signatory and which the Scottish Government has a stated commitment to as well as the definition set out in its current Children & Young People (Scotland) Bill.

If not reflected in primary legislation we would also impress on the Committee the need to ensure robust guidance for police and Procurators Fiscal in relation to proceedings, criminal or otherwise where children are involved. Developments in technology and legislation have created extra scope for falling foul of the law through, for example posting of inappropriate comments or images online. Whilst we are very concerned about the potential consequences and support appropriate action preventing and dealing with so-called “cyber-bullying” and “sexting” for example, it should be recognised for reasons mentioned above that the nature of such behaviour and the appropriate sanctions are very different if perpetrated by children than by a fully mature adult towards a child and that such nuances should be properly taken account of in a consistent manner. It remains a considerable anomaly that a child can in theory be prosecuted and convicted like an adult and even placed on the sex offenders register for activity to which they are rightly legally unable to properly consent. It is particularly important to avoid a situation where children and young people may feel prevented from seeking help or advice or are potentially vulnerable to blackmail on this basis.
Equal Protection from Assault

As the law currently stands children are the only group not to be protected by law from being hit due to the defence of “justifiable assault” (physical punishment) in the Criminal Justice Act 2003. While this legislation did prohibit the use of implements, blows to the head and shaking, the fact that children are not afforded at least the same protection as every other individual against physical assault, particularly the enshrinement in law of certain forms of assault against children as “justifiable”, leaves Scotland increasingly out of step with the majority of other European jurisdictions.


In May of this year, the UN Committee Against Torture examined the UK’s (including Scotland’s) compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Its concluding recommendations state: “The Committee takes note of amendments in legislation in England, Wales, Scotland and Northern Ireland, which limit the application of the defence of ‘reasonable punishment’ (or ‘justifiable assault’ in Scotland), but remains concerned that some forms of corporal punishment are still legally permissible in the home for parents and those in loco parentis.„The Committee recommends that the State party prohibits corporal punishment of children in all settings…repealing all legal defences currently in place, and further promote positive non-violent forms of discipline via public campaigns as an alternative to corporal punishment.”

This call has been echoed by the GB Equality and Human Rights Commission (EHRC)4, the Scottish Human Rights Commission (SHRC)5 and Scotland’s Commissioner for Children and Young People.6

If the Scottish Government is serious about its stated commitments to make Scotland “The best place to grow up” and to the United Nations Convention on the Rights of the Child it needs to explain why it will allow Scotland to be one of the increasing minority of European jurisdictions where equal protection for children from assault is not in place.

This is not to say that children do not need to be disciplined, but that hitting is neither an appropriate, constructive nor an effective form of punishment and that parents should be supported to use other methods to teach children correct behaviour. The current law is confusing, ambiguous and undermines the ability to protect children

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3 Para 27 http://www2.ohchr.org/english/bodies/cat/cats50.htm
4 (August 2012) EHRC submission to CAT on list of issues on the UK 5th periodic report
5 (April 2003) SHRC submission to CAT, Para 31
from harm. Arguments that prohibition of corporal punishment would lead to widespread criminalisation of parents or juvenile indiscipline have not been borne out in the jurisdictions which have changed their law to provide equal protection from assault. What we do know is that smacking can, give a bad example of how to handle strong emotions, may lead to children hitting or otherwise bullying others and can lead to anger and resentment adversely affecting their development.\textsuperscript{7} Similarly, the argument that corporal punishment is a necessary last resort as children do not have the full capacity to reason would be totally unacceptable in relation to vulnerable adults.

We therefore view the absence of any provisions in this Criminal Justice Bill to take similar steps to other European countries in this regard as a serious omission and missed opportunity to match the Scottish Government’s stated ambitions on children’s rights and wellbeing.

I hope this is helpful to the Committee in its deliberations but please do not hesitate to contact us if we can be of any further assistance to its Members or staff.

Yours faithfully

Children in Scotland
5 September 2013

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Children Are Unbeatable! Scotland

The Scottish Government is committed to a challenging modernising agenda to ensure our justice system is as efficient and effective as possible in meeting the needs of a modern and progressive country and to ensure that Scottish criminal law and practice is compliant with the European Convention on Human Rights ("the ECHR") and able to withstand challenges on Convention grounds. The Criminal Justice (Scotland) Bill is the legislative vehicle to take forward the next stage of essential reforms to the Scottish criminal justice system to enhance efficiency and bring the appropriate balance to the justice system so that rights are protected whilst ensuring effective access to justice for victims of crime.

Children are unbeatable! (CAU) Scotland agrees that the Bill should serve this purpose but there is a significant omission: the Bill fails to give children the same protection from assault as adults.

Children are unbeatable! (CAU) Scotland is an alliance of individuals and organisations opposing the use of corporal punishment in the home and is campaigning to ensure that children enjoy equal protection from assault, under the law, as adults.

Adults hitting children is a human rights issue. It is out of date, out of sync with the majority of countries in Europe and delivers a harmful message that hitting is a way to solve problems. The current law in Scotland is confusing and undermines our ability to protect children from harm. By removing the current legal ambiguity about what constitutes physical harm to a child we can keep all children safe and respect their human rights.

In the work of our member organisations such as ParentLine Scotland, which is a free helpline and email service for anyone with a concern about a child, and professionals such as doctors we are in touch with real life experiences and the harm caused by violence. So in addition to the need for legal reform, the ethos underpinning our campaign is:

- Discipline is a critical element of parenting but smacking is not an effective or constructive way of dealing with a child’s bad behaviour
- We want to support parents to use other methods to teach their children the difference between right and wrong
- We know that nurture in the early years is a key priority for Scottish Government and we believe that equal protection will help to achieve this.

Justifiable assault

It is ten years since the Scottish Parliament passed the Criminal Justice (Scotland) Act 2003 which introduced, in Section 51, a defence for adults of 'justifiable' assault when they hit children as a punishment, and sought to prohibit the use of
implements, blows to the head and shaking\textsuperscript{v}. Despite promises to mount a public information campaign and to monitor the use of the law, there has been little activity on this matter in the last ten years.

Section 51 undermines the Scottish Government's ambition for 'Scotland to be the best place in the world for children to grow up'. That ambition is unrealistic as long as the law justifies the assault of children and they are treated differently in law and in practice from adults. As it was the Criminal Justice (Scotland) Act 2003 that justified this defence, we feel that this Criminal Justice Bill is an appropriate vehicle to remove this defence. Simple legal reform will send a clear message that hitting children is as unacceptable and unlawful as hitting anyone else. CAU is concerned that there is no evidence that the law is working effectively which is another reason to listen to the UN and take action now. There would be no financial cost involved in the removal of section 51.

The existence of Section 51 for ten years contradicts other policies. Although it supports "tough action to punish those who break the law and invests in work to tackle the causes of violence\textsuperscript{vi}" it refuses to change the law on hitting children. In practice there is a real potential for conflict as the oath of Scotland's new National Police Force, operational since 1st April 2013, states "I, do solemnly, sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable with fairness, integrity, diligence and impartiality, and that I will uphold fundamental human rights and accord equal respect to all people, according to law.\textsuperscript{vii}

In the Scottish Government's recent response to the Universal Periodic Review it was stated that "that the existing law provides the right protection of children and young people" and that there are "no plans to change this approach". However the description given of the existing law was incorrect, stating that "it is already illegal to punish children by shaking or hitting them.\textsuperscript{viii} Although S51 of the Criminal Justice (Scotland) Act 2003 prohibits the administration of blows to a child's head, the shaking of a child and the use of an implement in the chastisement of a child, it does not make it illegal to punish children by hitting them. This emphasises the confusion caused by the complexities of the current law.

We believe that children need and deserve at least equal protection in all circumstances as adults. In this particular situation children do not currently have even equal protection to adults.

It is now time that the law on hitting children is consistent with international human rights law.

Positive parenting

We welcome the Scottish Government’s commitment to supporting alternative ways for parents to raise children, including positive parenting\textsuperscript{x}. We would, however, like to see this translate into a more meaningful commitment. Along with the removal of the defence of justifiable assault we would like to see reporting requirements on local authorities, to see what they have done to promote positive parenting in their area, and a concurrent evaluation of the impact of this.
We welcome the new section 51, and would expect the police and other relevant agencies to take the best interests of the child into account when deciding whether to prosecute a parent who has hit their child. We feel strongly that a removal of the defence of justifiable assault should not lead to disproportionate responses or parents unnecessarily being criminalised. We are, however, very clear that in cases where there is criminal injury we do support criminal sanctions. We believe that in cases where no serious injury is inflicted there may still be a need for some form of follow up, and consideration should be given to what these supports and/or sanctions should entail.

International example


The UN has repeatedly recommended that the UK and Scotland change its laws:

- In 2008 when assessing the UK’s compliance with the Convention on the Elimination of All Forms of Discrimination against Women, the UN Committee on the Elimination of Discrimination against Women “further recommends that the State party include in its legislation the prohibition of corporal punishment of children in the home.” A further Hearing on UK compliance took place in July 2013, and the physical punishment of children was discussed. Concluding observations stated: ‘The Committee further recalls its previous concluding observations (A/63/38, paras. 280 and 281) and is concerned that corporal punishment remains lawful in the home. The Committee urges the State party to… Revise its legislation to prohibit corporal punishment of children in the home.’

- In October 2008, the United Nations Committee on the Rights of the Child stated in its concluding observations on the UK: “The Committee is concerned at the failure of State party to explicitly prohibit all corporal punishment in the home and emphasises its view that the existence of any defence in cases of corporal punishment of children does not comply with the principles and provisions of the Convention, since it would suggest that some forms of corporal punishment are acceptable.” In June 2006, the United Nations Committee on the Rights of the Child said that giving children equal protection from assault is “an immediate and unqualified obligation” under the Convention on the Rights of the Child (UNCRC).

- In May 2009, when assessing UK compliance with the UN Convention on Economic, Social and Cultural Rights ‘The Committee reiterated its recommendation that physical punishment of children in the home be prohibited by law’.
In May 2012 the UK’s human rights record was examined by the UN Human Rights Council and Sweden, Finland, Norway and Hungary recommended that the UK must ensure the freedom of children from corporal punishment, in accordance with the UNCRC.

In May 2013, the UN Committee Against Torture examined the UK’s, including Scotland’s, compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In its Concluding Observations, published on 31st May 2013, the Committee urged prohibition of physical punishment of children by adults: “The Committee takes note of amendments to legislation in England, Wales, Scotland and Northern Ireland, which limit the application of the defence of “reasonable punishment” (or “justifiable assault” in Scotland), but remains concerned that some forms of corporal punishment are still legally permissible in the home for parents and those in loco parentis. In addition, it expresses concern that corporal punishment is lawful in the home, schools and alternative care settings in almost all overseas territories and crown dependencies. The Committee recommends that the State party prohibits corporal punishment of children in all settings in Metropolitan territory, Crown Dependencies and Overseas Territories, repealing all legal defences currently in place, and further promote positive non-violent forms of discipline via public campaigns as an alternative to corporal punishment.”

Conclusion
The case for legal reform has already been successfully made in many countries to change the law on physical punishment. It is extremely disappointing that Scotland has failed to learn from their example. Currently Section 51 of the Criminal Justice (Scotland) Act provides parents/carers with a “justifiable assault” defence if they hit a child as a punishment. It is bizarre that the law should permit and define “justifiable assault” on any human being. CAU urges the committee to consider the issue of physical punishment and the adult defence of ‘justifiable assault’. If the opportunity presented by this Bill is not utilised to repeal this defence, Scotland cannot claim to be the best place for children to grow up.

By amending the law and removing this defence, the human rights of children will be respected and protected. Children should have the same legal protection from violence as adults currently enjoy.
Appendix 1 - Evidence

The extent and use of physical punishment in Scotland is not well understood. The investigation into child abuse and neglect in the Western Isles was published in 2005 and is instructive about the use and effect of physical punishment in one home. The Social Work Inspection Agency concluded that "...the children were subjected to physical abuse throughout their childhood until their removal from home. Some of the physical injuries to the children were caused by over-chastisement by Mr A. Once in England and twice in Eilean Siar he admitted at the time to losing his temper and/or causing an injury. In a later statement to police he said: ‘I did have a temper…like anybody I became aggressive, shouting and shaking…if I had to smack them I would smack them, but I’m heavy handed …on the legs…bruising…'

The Report went on to point out: "We recognise that during the period when these physical injuries to the children occurred, common law entitled someone with parental responsibilities and rights relating to a child and someone with care and control of a child to physically punish the child. It entitled parents to use force to discipline their children provided their actions could be justified in court as ‘reasonable chastisement’. Section 51 of the Criminal Justice (Scotland) Act 2003 set out to clarify the law relating to the physical punishment of children. The 2003 Act specifically prohibited blows to the head, shaking and the use of an implement."

"However, in all other cases the defence of ‘reasonable chastisement’ remains and the onus is on the prosecutor to prove that the punishment went beyond this. Mr and Mrs A were, and still would be, legally entitled to physically punish the children and if prosecuted could have claimed a defence of ‘reasonable chastisement’. While there is evidence that professionals, particularly in England, did encourage Mr and Mrs A to use more positive methods of discipline, they could not legally prevent them from using physical punishment." (para 80, Ibid)

A study of the ChildLine database by the Centre for Research on Families and Relationships at Edinburgh University found alarming levels of violence reported in calls from children suffering physical abuse. Children tell of physical assaults that are frequent, brutal and sadistic. Whilst they use many terms to describe the nature of their abuse including smacking, slapping and hitting, they more commonly discuss it in terms of ‘being battered’, ‘beaten’, ‘hammered’, ‘punched’, ‘kicked’ and so on. Children often talk about having marks, bruises and abrasions after assaults and some children talk about being kept off school until their bruises are healed.

Children subjected to corporal punishment have been shown to be more likely than others to be aggressive to siblings; to bully other children at school; to take part in aggressively anti-social behaviour in adolescence; to be violent to their spouses and their own children and to commit violent crimes.

Children and parents alike tell us that they do not like physical punishment, and that it doesn’t work. The intention of law change would not be to criminalise parents, but to help them understand that physical punishment is unacceptable. In conjunction with this law change we would want to see support for parents to use other methods of discipline and approaches to parenting.
Children subjected to corporal punishment have been shown to be more likely than others to be aggressive to siblings; to bully other children at school; to take part in aggressively anti-social behaviour in adolescence; to be violent to their spouses and their own children and to commit violent crimes xiii.

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Children are Unbeatable! (Scotland)
29 August 2013

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i Criminal Justice (Scotland) Bill Policy Memorandum paras 3-4 pub by Scottish Government
ii For example the UK is one of only five EU countries not to have committed to introduce a ban to prohibit corporal punishment.
xiv S51 (1) of the Criminal Justice (Scotland) Act 2003
v Ibid S 51 (2)
vii Police and Fire Reform (Scotland) Act 2012: Section 10: Constable’s Declaration
viii Roseanna Cunningham’s letter to Lord McNally regarding the UPR process, dated 29th August 2012
ix http://www.scotland.gov.uk/Publications/2012/10/4789
xi http://www.endcorporalpunishment.org/pages/pdfs/hittingwrong.pdf
xii ‘Respecting children, supporting parents’, a short film about physical punishment based on calls to ChildLine Scotland and ParentLine Scotland
xiii http://www.endcorporalpunishment.org/pages/pdfs/hittingwrong.pdf
xiv ‘Respecting children, supporting parents’, a short film about physical punishment based on calls to ChildLine Scotland and ParentLine Scotland
1. Introduction

1.1 Community Safety Glasgow (CSG) (formerly Glasgow Community and Safety Services) welcomes the opportunity to comment on the general principles of the Criminal Justice (Scotland) Bill.

1.2 CSG’s Trafficking Service, TARA, has supported women who have been trafficked for the purposes of commercial sexual exploitation since 2005. Therefore, the focus of this submission will be on the principles of the bill that relate to the prosecution of this dreadful crime.

2. Corroboration (s57)

2.1 We are supportive of the removal of the requirement for corroboration and view this as a further step to improve access to justice for victims of human trafficking, especially those exploited in domestic servitude and/or those exploited in off street prostitution. The hidden nature of trafficking often means exploitation and the subsequent offences are often committed in private residences and/or removed from the view of the authorities and general public.

2.2 Frequently there are no witnesses other than the victim or the accused. Victims of trafficking simply do not hold sufficient information to assist with the identification of potential witnesses such as those who have paid for sex with them. (CSG would argue that such purchasers, especially those who have bought sexual services from a trafficked woman (or man) are in effect perpetrators of violence against women.) Lack of corroboration in such cases should not be a barrier to justice for the victims of this serious crime.

3. Aggravation as to people trafficking (s83-85)

3.1 We are pleased to see the introduction of an aggravation as to people trafficking. We believe this will be a useful tool to further combat Human Trafficking in Scotland and promote Scotland as a hostile environment for perpetrators of this serious breach of human rights and crimes against people.

3.2 The introduction of this offence is clearly aimed at tackling Scotland’s low rate of prosecutions for the crime of Human Trafficking) and endeavours to assist with the evidential difficulties inherent in prosecuting Human Trafficking. These principles are to be warmly welcomed. However, CSG’s TARA Service is very concerned that there is significant risk that existing legislation, which carries up to 14 years imprisonment, will be ignored in favour of the simpler aggravation offence.
3.3 Despite this welcome addition, in particular sections 83 and 84, CSG’s TARA Service remains concerned that even with the introduction of an aggravated offence, legislation within Scotland remains piecemeal and is contained within several acts of parliament and associated amendments.

3.4 With regards to s 85 (1) there is, currently, no legal definition of Human Trafficking within Scots Law. All government agencies and support services work to the definition contained within the Council of Europe Convention on Action Against Trafficking in Human Beings. Whilst in agreement with this definition and being cognisant that Scotland is subject to the Convention’s legal obligations, TARA considers the lack of a Scots law definition problematic. In particular, s85 (1) which refers to s22 of the Criminal Justice (Scot) Act 2003 and s4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 for the meaning of ‘a people trafficking offence’. In effect this means two definitions of the same crime.

3.5 CSG’s TARA Service also believes that s22 of the Criminal Justice (Scot) Act 2003 does not reflect all forms of commercial sexual exploitation for which women are (disproportionately) trafficked. The sex industry, and the demand for women to fulfil its demands, is especially profitable for traffickers and organised crime groups. ‘Prostitution’ and ‘obscene material’ is insufficient and the exclusion of a broader understanding of commercial sexual exploitation has the potential to cause difficulties utilising the proposed aggravated offence.

4. Supplementary Considerations

4.1 Although outwith the scope of this evidence gathering exercise the committee may wish to consider any opportunities within this bill to include offences addressing the demand for trafficked persons and their labour which is generated within Scotland. In particular, addressing the demand for women trafficked to be exploited in the sex industry, is one of the key prevention tools that CSG’s TARA Service recommends.

4.2 CSG’s TARA Service urges the committee to consider including the provision of Judicial Direction in the bill, which the Scottish Government has previously committed to introduce in sexual offence cases (by providing factual information on the responses of victims). TARA believes it to be necessary to improve juries’ knowledge of human trafficking and the impact on victims of this crime given the complex issues surrounding Human Trafficking, the means used by traffickers to coerce and control, trauma and how they combine to impact on survivors of this crime.

4.3 The Scottish Government considers the current legislation to be ‘broadly compliant’ with its legal obligations following the ratification of the EU 2011/36/EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims. A number of provisions were included in the Criminal Justice and Licensing (Scot) Act 2010 making amendments to the Criminal Justice (Scot) Act 2003 and s4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. However, a recent article, Human Trafficking in Scotland: The Legislative Response’ by Paul Arnell and Tracy Ogilvie from Robert Gordon University, published in the August edition of the SCOLAG Legal Journal notes that ‘in England and Wales the law has
been explicitly amended to affect compliance with the Directive, in the form of two new offences in:

i. s 59A of the Sexual Offences Act 2003
ii. section 4 (1A) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004
iii. Trafficking People for Exploitation Regulations

It appears a case could be made that Scots law in this regard is lacking – both in comparison to England and Wales and in regard to the Directive itself.

4.4 The committee may also find it interesting to note that the Home Secretary, Teresa May, recently announced the intention of the UK Government to introduce a Modern Slavery Bill and the appointment of a Modern Slavery Commissioner to oversee changes. TARA are extremely supportive of the introduction of such a bill and Commissioner. These recent developments may have future implications for the Scottish Government and Parliament.
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from COSLA

1. COSLA welcomes the opportunity to comment on the Criminal Justice (Scotland) Bill and is generally supportive of the stated policy goals of the Bill to enhance efficiency and ensure appropriate balance between the rights of the accused and effective access to justice for victims. Although the provisions of the bill are wide-ranging, the majority of the five themes identified in the committee’s call for evidence relate to police powers and the technical aspects of law and detention. A minority of these may impact on local partnerships, depending on the nature of those arrangements, and our members may wish to make individual comment in this respect. For the purposes of this response, we have focused on those points our members feel are likely to impact across local authorities and which are of political concern; there may be further issues of a professional nature and again, our members may wish to comment on these separately and/or through relevant professional networks and associations.

2. Our comments deal mainly with the first of the Committee’s scrutiny themes (theme i. Police powers and rights of suspects) and specifically with those provisions relating to the provision of responsible persons for 16-17 year olds and solicitor access, and support for vulnerable adults in custody (Part I, Chapter 4, section 25 and Part I, Chapter 5, sections 31 to 33). We would also wish to draw the Committee’s attention to a number of further issues, which, although not included within the provisions of the Bill itself, relate to regulations Ministers may make in exercising powers the Bill establishes, or to further service reform which may be considered in the future.

Provision of an “Appropriate Person” for children (Part 1, Chapter 5, section 31)

3. The Bill establishes the requirement for intimation to be sent to an ‘appropriate person’ when a person under 18 years of age has been taken in to police custody. In practice, there may be occasions where local authority social work staff a required to fulfil this role – for example, where the child is in local authority care, or where attempts to contact a parent or guardian have been unsuccessful. While this is entirely in keeping with the historical role and current expectations of the social work profession, we would caution that it may not always be the case that the ‘appropriate person’ is a registered social worker.

4. Indeed, the Bill itself does not seem to include any requirements in relation to the qualification levels of an appropriate person. However, it will be important to ensure that any supporting regulations or guidance reflect this and make it absolutely clear that local authorities can exercise discretion when identifying an appropriate person, and that there is no requirement for this person to be a registered social worker. Any attempt to remove this discretion through regulations relating to the training, qualification or experience levels of an appropriate person would limit local
authorities’ ability to meet need and incur additional costs which have not been accounted for in the financial memorandum accompanying this Bill.

Young People aged 16 & 17 years (Part 1, Chapter 5, section 32)

5. The supporting documentation accompanying the Bill (Financial Memorandum, paragraph 227 ff) acknowledges that the provisions of the Bill in relation to 16 and 17 year-olds mean that local authority provision will be the ‘backstop’ where no other appropriate person is available. We understand that the detail of this role is still to be developed, but that it is intended the appropriate person would be required to:

- Act as the ‘relevant person’ described in section 25(3), with whom any request by the young person to be interviewed without a solicitor present must be agreed
- Remain in the police interview whether the lawyer is present or not, if it is requested by the 16 or 17yr old

6. It will be important that appropriate guidance to clarify the scope and nature of this role is formulated and that this is developed in partnership with COSLA and ADSW, as there are a number of potential issues arising which are dealt with in the section on solicitor access below.

Solicitor Access (Part I, Chapter 4, section 25)

7. The Bill sets out circumstances under which 16 and 17 year olds may consent to being interviewed without having a solicitor present and establishes a requirement for this to be agreed with a ‘relevant person’. In practice, there may be occasions when a social worker acting as an appropriate person is asked to fulfil this role. The Bill is not sufficiently clear about what is being asked of the appropriate person here. It could be read as them being asked to determine whether the 16-17yr old understands and is able to make this decision, or to decide whether it is the right decision and one with which the social worker agrees.

8. We would argue that an appropriate person should only be expected to agree on whether the young person understands the situation and is capable of making an informed decision, and never to form a view on whether their decision is the right one. To ask a person to consider the crime and circumstance of the 16-17yr olds and come to their own view about whether a solicitor’s advice is needed goes beyond what can be reasonably expected of a person who does not have the relevant legal training or experience, and begins to encroach on other roles such as that of safeguarders. This would apply irrespective of whether the appropriate person is a registered social worker or not. The Bill needs to be amended in this respect and regulations and guidance will need to make it clear that appropriate persons can only form a view on whether the young person is capable of making a decision, and not whether the decision is the right one.

Support for vulnerable persons (Part I, Chapter 5, section 33)

9. As COSLA understands it, one of the Bill’s aims is to ensure that vulnerable adults who are taken in to custody are supported to understand what is happening,
and that effective communication between the vulnerable person and the police can take place. We further understand that the bill places no new or additional duties on local authorities in relation to vulnerable adults, but rather requires the police to contact a person they consider suitable to provide support, to inform them of the situation.

10. Although this places no new duties on local authorities, in practice, local authorities are often the agency that police contact – either directly, or through an ‘appropriate adult’ service that the local authority commissions. Some councils feel that this new police duty is likely to result in a rise in the number of occasions when the police contact the relevant appropriate adult services that are provided or commissioned by local authorities. Indeed some councils are already experiencing a shift in practice for requests for appropriate adults and a move away from providing victim support to providing support to vulnerable suspects or accused persons, which has resulted in significantly increased demand.

11. The provisions of the Bill will make this practice a requirement, and although this shift is to be welcomed in policy terms, it may result in significant increases in demand for appropriate adult services, and a resulting rise in the cost of meeting that demand. It is difficult to estimate how demand and cost may increase across Scotland as there are variations in both, for example in relation to the service model and in terms of the effect of deprivation on the numbers of people being taken in to custody. However, some councils who have experienced the described shift in practice, have reported referrals tripling over a four-year period.

Future regulation further defining appropriate or relevant persons (Part I, Chapter 5, section 34)

12. The Bill establishes Ministerial powers to make changes to the nature of support to be provided by ‘appropriate persons’; and (through future regulation) to specify who can act as an appropriate person – including what training, qualifications and experience they should have. We would caution against any regulations which move away from the flexibility on the face of the Bill in relation to appropriate persons. Depending on where the ‘bar’ was set, for example at registered social worker level, this could lead to additional costs and difficulties in identifying appropriate persons at certain times or in certain circumstances and may not be necessary to deliver the required support.

13. Local authorities should be given maximum flexibility in shaping appropriate person provision to fit with local need. For example, there may be occasions where a qualified social worker is required, however there may also be occasions where this is not needed and a local voluntary or community organisation is better-placed to provide support. Local authorities need to be able to shape provision to respond to local need and to build on community assets – regulations which restrict local flexibility could arguably act as a barrier to this.

14. These points notwithstanding, regulations which specify who can act as an appropriate person will have cost implications that rise in proportion to where the bar is set in terms of training, qualifications or experience. Should these powers remain within the Bill, we would seek assurance that any subsequent regulations protect
local authorities’ discretion and are agreed with COSLA and ADSW. We would also seek assurances that any cost implications are met in full by the Scottish Government.

Service models

15. We also understand that different service models that could be adopted in the future are currently the subject of discussion with the police, and that this includes a model whereby the police would centrally co-ordinate and commission appropriate adults services. COSLA hasn’t yet had the opportunity to view these proposals, and while we recognise that this discussion is not connected to the Criminal Justice Bill itself, we would want be clear that any move to further centralise local authority functions, or to change their role or funding arrangements, would need the political agreement of COSLA and professional agreement through ADSW.

Resources

16. Given that the requirements of the Bill will result in increased demand, we would want to be clear that the provisions in relation to vulnerable persons will not be cost-neutral. As highlighted above, some councils are already experiencing increases of as much as 300% as a result of shifts in policy intent. It is reasonable to expect that this trajectory will continue and gather pace as the police move from a voluntary policy position operating in some areas, to a legal duty that will apply across Scotland.

17. Furthermore, although the costs attached to appropriate persons provision are not significant when compared to the overall local government settlement, the financial memorandum (at paragraph 230) dismisses these as ‘opportunity costs’. We would wish to be clear that local government cannot continue to absorb even small amounts within the current economic environment, and we would therefore expect that the provisions of the Bill should not result in any additional costs to local authorities. That point notwithstanding, we are also concerned that those estimates set out at table 26 of the financial memorandum may prove to be too conservative – they relate to new provision for 16 to 17 year olds and we therefore have limited means to say with any certainty whether those estimates are accurate. Even if overall estimates of case numbers were accurate, it is difficult to say within what the level of need will be. Equally, we cannot say with certainty how complex the cases will be and how long an appropriate person would be required to stay, and 4 hours may be an under-estimate in a number of cases. This will also vary depending on issues of rurality, transport infrastructure etc.

18. We would therefore want an assurance that all assumptions (and the overall cost of provision, including for both young people and vulnerable adults) will be closely monitored and would be reassessed after a set period to reflect emerging evidence. We would also want the Scottish Government to discuss the distribution of these funds with COSLA.

COSLA
5 September 2013
Introduction

1. In Cadder v HMA 2010 S.L.T. 1125 Lord Rodger said “the recognition of a right for the suspect to consult a solicitor before being questioned will tilt the balance, to some degree, against the police and prosecution”. Recognising that as a result of the Supreme Court decision there would require to be both legislative changes and changes to police and prosecution practice, he stated that there was also a need “to ensure that, overall, any revised scheme is properly balanced and makes for a workable criminal justice system”. Lord Carloway in his review sought to identify how to re-cast criminal law and practice in Scotland to meet the challenges and expectations of a modern society and legal thinking. His recommendations adopted this balanced approach with some, such as the abolition of the requirement for corroboration, being perceived as favourable to the victim; and others, such as the relaxation of the approach taken to a suspect’s admissions, being perceived as favourable to a suspect. His central aim was to ensure that a human rights based approach was fully integrated into criminal justice practice and procedure. The Scottish Government now seek to implement these recommendations in this Bill.

2. The Crown Office and Procurator Fiscal Service (COPFS) welcomes the introduction of the Criminal Justice (Scotland) Bill which proposes significant changes to Scottish Criminal Law and Procedure. The reviews conducted by Lord Carloway and Sheriff Principal Bowen provide the framework for this Bill which codifies their recommendations into a coherent structure of evidential and procedural reforms.

3. The Bill will have a significant impact on COPFS and how we deal with the cases reported to us. In particular, the abolition of the requirement for corroboration will result in a revised approach by prosecutors assessing available evidence when considering whether to take action in a case. The current prosecution test has two parts: firstly a technical quantitative assessment as to whether there is sufficient evidence for each essential fact, that is two sources of independent evidence; and secondly whether it is in the public interest to take action.

4. In response to the changes around the technical requirement for corroboration that the Bill introduces, COPFS proposes to introduce a new prosecution test. The proposed test would have two stages, namely an evidential test and a public interest test. In considering if a case meets the evidential test the following matters must be considered:-

   (i) a quantitative assessment– is there sufficient evidence of the essential facts that a crime took place and the accused was the perpetrator?

   (ii) a qualitative assessment – is the available evidence admissible, credible and reliable?
(iii) on the basis of the evidence, is there a reasonable prospect of conviction in that it is more likely than not that the court would find the case proved beyond reasonable doubt?

If a case meets the evidential test, the second part of the prosecution test must then be satisfied – is prosecutorial action in the public interest?

The full details of this test will be published in due course in an updated COPFS Prosecution Code which will inform all prosecutorial decision making including the wider decisions that prosecutors make which do not involve a decision to prosecute.

5. The “reasonable prospect” test is based on considerations of quality of available evidence. The current technical rules are focused on quantity of evidence in that a prosecutor requires to look for two sources of evidence before considering the second stage of the prosecution test relating to whether prosecution is then in the public interest. The new test will focus on the credibility of the allegation and the quality of evidence which supports the allegation, requiring prosecutors to assess all available evidence with regard to its admissibility, credibility and reliability.

6. COPFS has engaged fully in the consideration of a number of changes that will require to be made to implement the new approaches required as a result of the provisions of the Bill. We have carried out scoping exercises on the likely impact of the removal of the technical requirement for corroboration on the numbers and types of cases reported to us by the police. We are adapting our administrative processes to ensure they are efficient and fit for purpose in respect of the new test and we are developing extensive training resources to ensure that all our staff are prepared for the changes in working practices that will be required.

7. The law, and those who practise it, are sometimes viewed by society at large as antiquated, out of touch, resistant to change and restrictive. However this Bill is progressive and focussed on Human Rights entitlements of both suspect and victim, and will improve access to justice for many victims of crime who have previously been denied this most basic of rights.

**Police powers and rights of suspects (Part 1)**

Chapter 1

8. COPFS regard Sections 1 to 6, which introduce an entirely new regime of arrest without warrant, as a welcome simplification of the often complex rules regarding powers of arrest. It is in line with Lord Carloway’s views on an ECHR compliant system; it is consistent with the provisions of Article 5(1) (c) of the Convention which provides that deprivation of liberty will only be appropriate “on reasonable suspicion of having committed an offence”; and in combination with provisions such as s10 (test for keeping in custody), s14 (investigative liberation) and s41 (duty not to detain unnecessarily), protects the position of those reasonably suspected of having committed crimes.

Chapter 2
9. COPFS considers that in conjunction with s51 which abolishes the requirement to charge (and thus also the concept of chargeable suspect) these provisions meet Lord Carloway’s aims and allow the police to fully investigate allegations of criminal conduct whilst ensuring that a suspect’s Article 5 & 6 rights are protected.

10. There has been some debate around the 12 hour period contained within the provisions. This is considerably shorter than the law allows at present and is also a more restricted period than the equivalent detention periods in other parts of the UK. COPFS has previously indicated its support for provisions to extend the 12 hour period in certain circumstances and continues to take the view that this may be appropriate in a limited number of the most serious cases where there are exceptional reasons for such an extension. The Police Service of Scotland have indicated that only 0.4% of all persons detained require to have their detention extended beyond 12 hours and in their written evidence to this committee have provided a number of strong examples of when such extensions have been necessary. Such extensions are used in the most serious of cases where there are compelling reasons to do so.

11. The provisions state that a person may be held in custody for a “continuous” period of 12 hours from the time his/her custody without charge is authorised under section 7. The policy intention is that this period can be over a length of time as long as the entire period the suspect is in police custody does not exceed 12 hours. COPFS support the contention that the period should be continuous counting only the period of time spent in police custody and not time whilst at liberty having been released on investigative liberation, irrespective of the number of occasions the individual is within police custody in respect of one inquiry.

12. The provisions recognise a suspect’s Article 5 rights providing a clear regime to justify any deprivation of liberty whilst introducing the concept of “investigative liberation” to also ensure that a suspect is not kept in custody if that is not required. Investigative liberation respects the suspect’s right to liberty whilst also protecting a victim’s rights by the imposition of certain conditions on that suspect for a limited period of time. It is similar in effect to ‘police bail’ which has operated in England & Wales for many years. The ability of the police to impose conditions on liberation is not a new power and the police have had experience of imposing conditions on a suspect since the introduction of s22 of the Criminal Procedure (Scotland) Act 1995 some time ago. In addition, the Bill provides for a robust system of judicial scrutiny and review of any such conditions imposed.

13. s51 and the abolition of the requirement to charge has necessitated the introduction of the term “officially accused” which is first referred to in this chapter and is defined at s55.

Chapter 3

14. This chapter largely repeats similar provisions in the 1995 Act and COPFS is satisfied that these provisions are appropriate.
Chapter 4

15. One of the novel provisions of the Bill is found at s27-29 which introduces a regime of “post charge questioning” for the first time in Scotland. COPFS are supportive of this provision. As we have said previously, the concept that an accused cannot be interviewed after charge is not based on a human rights analysis and is not required in a modern justice system. It is often the case that certain pieces of evidence such as the results of forensic examinations are not available at the time of an initial investigation and at present a suspect cannot be asked about them. It is without doubt the case that in many situations, as a matter of fairness, an accused should be given the opportunity to comment on matters which may not have been available at the time they were initially questioned by the police. This gains particular significance in light of s62 which abolishes the distinction between exculpatory, incriminatory and mixed statements made by the accused. In some circumstances it may be in the interests of an accused to state his position at an earlier stage of an investigation and then to rely on that position at trial without the requirement to give evidence.

Chapter 5

16. s30-36 relate to the rights of a suspect when in police custody and COPFS have no specific comments to make on this chapter other than to confirm it is supportive of the suspect’s right to legal access regardless of whether or not they will be interviewed.

Chapter 6

17. s37 to 40 expressly provide for the continuation of the common law in respect of powers available to a police officer. This is a pragmatic and practical approach and COPFS supports the policy intent that current common law powers which attach to arrest will continue alongside the new power of arrest without warrant introduced by s1.

18. COPFS also consider that s41 and 42 demonstrate the practical application of Lord Carloway’s intent to create a Human Rights based system by emphasising the right to liberty and the rights of a child, both provisions reflecting on earlier provisions in the Bill seeking to protect these same fundamental rights.

Chapter 7

19. These provisions are self explanatory and COPFS is of the view that they are clear and straightforward.

Chapter 8

20. COPFS welcomes the simplification of arrest powers which is introduced by s50 and refer to earlier comments made in this regard in respect of s1 above.

21. COPFS have repeatedly expressed the view that there should be no requirement to charge a suspect as long as that suspect is notified of the nature of
the allegation against them and what will be happening to them as a consequence. In many instances currently the terms of the charge narrated by the police is very different from that finally brought at court. In addition, the importance of the concept of “charge” has diminished and the position has been clarified in the recent case of Lukstins v HMA 2013 SLT 11 in the Appeal Court in Scotland and Lauchlan v HMA and O’Neill v HMA 2013 S.C.C.R. 401 in the UK Supreme Court. COPFS accordingly are supportive of s51 which abolishes the requirement to charge.

22. The remaining provisions in this chapter are relatively straightforward and do not require further comment.

**Corroboration, admissibility of statements and related reforms (Part 2)**

23. COPFS strongly support the abolition of the requirement for corroboration and welcome the terms of s57. COPFS consider that this provision will allow proceedings to be raised in a number of cases where at present the Crown cannot proceed due to a technical lack of corroboration but where otherwise the available evidence is of high quality and supports the victim’s version of events. In particular this provision will allow COPFS to consider cases which arise from areas of law which currently disadvantage certain groups of victims purely due to the nature of the offences committed against them such as domestic abuse or sexual crime. The abolition of the requirement for corroboration is not about improving detection or conviction rates but is about improving access to justice for victims of crime.

24. The issue of corroboration is particularly acute in the charge of rape where currently a number of essential facts require to be corroborated for a charge to be proved in court. Penetration is one of the essential facts that must be corroborated in a rape case. It is normative behaviour in many cases of rape for a victim not to report the matter to the authorities until some time later. This means that forensic opportunities which may provide corroboration of penetration, such as vaginal swabs containing semen, are lost. The victim’s evidence is one source of this but there has to be corroboration or a second source of evidence to establish this. Pre-Cadder, it was common for a suspect to deny the charge of rape but explain that intercourse was consensual. This provided corroboration of penetration. Post-Cadder, it is the experience of police and prosecutors that this source of evidence is no longer available in the vast majority of rape cases. Accordingly, the technical requirement for corroborated evidence of penetration cannot be established regardless of how otherwise credible and compelling is the allegation and evidence to support it. And if penetration cannot be established then the crime of rape cannot be proved. Such a position, in denying rape victims access to justice, is surely untenable in a modern society.

25. In the English case of DPP v Kilbourne [1973] AC 729, the Lord Chancellor, Lord Hailsham of St Marylebone, observed: “The word ‘corroboration’ by itself means no more than evidence tending to confirm other evidence”. Dictionary definitions of “corroborate” include “to strengthen; to support with other evidence; or to make more certain”. Despite this, in the Scottish Criminal Justice system, “corroborate” has often come to have a technical and complex meaning resulting in cases which would meet the test for prosecution in other common law jurisdictions throughout the world not being taken up in Scotland due to this technical requirement.
for corroborative evidence. The Scottish criminal justice system, with its continuing retention of a technical rule of corroboration, is in an isolated position and as a result some victims of crime in Scotland are currently denied access to justice. As a modern, 21st century society, Scotland must ensure that its criminal justice system is human rights compliant not only for suspects and accused but also for victims and witnesses.

26. Lord Carloway has said that there is a “critically important aspect to the Convention’s declaration of individual rights and this is the concept of the rights of the victims or potential victims of crime. The state has a positive obligation to secure and protect those rights; not merely to avoid infringing them.....(these rights) can only be meaningful if the state secures their protection through an effective system for the prevention, investigation and prosecution of crime”. The importance of effective criminal sanctions has been repeatedly stressed by the European Court of Human Rights. The Court’s research report “Child sexual abuse and child pornography in the court’s case-law” published in June 2011, states “The Court has found a positive duty on the part of the Contracting states to protect their inhabitants in a range of cases. In such cases, the state is not the primary violator of rights (i.e. it is not the state that beats, rapes, enslaves etc.), but rather the state has inadequate structures in place to prevent these kinds of abuse. This can mean that the state does not provide adequate criminal sanctions for actions that violate Convention rights. States may also be compelled to provide regulations and policies that effectively deter and prevent abuse.”

27. In addition, in the case of M.C. v Bulgaria, Application no. 39272/98 - (2005) 40 E.H.R.R. 20 at paragraph 149 the court said “....the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals ....150. Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State’s margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection ....152. Further, the Court has not excluded the possibility that the State’s positive obligation under Article 8 to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation ....153. On that basis, the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.” The abolition of the requirement for corroboration is a vital step towards ensuring effective criminal sanctions and improving access to justice for victims of crime.

28. In recognition of the importance of securing access to justice, COPFS is committed to increasing public confidence in our policies and procedures regarding
case marking decisions and to ensuring that these are consistent with the EU Directive on Minimum Rights of Victims. If a victim or witness is dissatisfied with the decision taken by a prosecutor they may raise that under the COPFS Customer Feedback Policy and consideration of a victim’s right of review is also ongoing in respect of the Victim and Witnesses Bill which is currently before Parliament.

29. The abolition of the requirement for corroboration will result in a move from a largely quantitative assessment of evidence to a more nuanced qualitative assessment. In this regard, it is worth noting the comments of the US Supreme Court in the case of Weiler v US 323 U.S. 606

“Our system of justice rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy. In gauging the truth of conflicting evidence, a jury has no simple formulation of weights and measures upon which to rely. The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact in our fact-finding tribunals are, with rare exceptions, free in the exercise of their honest judgement, to prefer the testimony of a single witness to that of many”.

30. In addition the European Court of Human Rights demonstrated its concern for the quality of evidence relied upon for conviction in the recent case of Gafgen v Germany (22978/05)(Grand Chamber 1/6/12) at paragraph 164.

“….. the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker ....”

31. It is vital to remember that it is the requirement for corroboration which is being abolished, not the concept of corroboration itself. The removal of the requirement for corroboration will not extinguish or even reduce the requirement to thoroughly explore all investigative avenues. In many cases corroborative evidence as we currently understand it will be available. In all cases the police and COPFS will look for evidence which supports the credibility of the allegation of the commission of a crime as it is this supporting evidence which will often be a check and a balance against possible injustice.

32. The abolition of the requirement for corroboration will not be an excuse to diminish either police standards of investigation or prosecutorial rigour in the assessment of the evidence. The duty on the Crown to fully investigate is emphasised in the COPFS Book of Regulations which is publically available on our website:

2.1.2 - The Procurator Fiscal has responsibility for the investigation of crime committed within his jurisdiction ... Procurators Fiscal accordingly must ensure that the police are made aware that they are subject to control in the investigation and reporting of criminal offences which fall to be dealt with by the Procurator Fiscal.
2.1.4 - It is the duty of the Procurator Fiscal to ensure that all evidence which may be relevant to the crime under investigation is secured. This includes any evidence which may be favourable to an accused or potential accused. Accordingly Procurators Fiscal must ensure that the police and other reporting agencies submit all evidence which may be relevant to the offence under investigation.

33. The case of Smith v HMA 1952 JC 66 also confirms the responsibility of COPFS to investigate crime:-

"When a crime is committed it is the responsibility of the Procurator Fiscal to investigate it...The duty of the Police is simply one of investigation under the supervision of the Procurator Fiscal, and the results of the investigation are communicated to the Procurator Fiscal as the enquiries progress. It is for the Crown Office and not for the Police to decide whether the results of the investigation justify prosecution...It is their (the Police) duty to put before the Procurator Fiscal everything which may be relevant and material to the issue of whether they suspect the party is innocent or guilty...”

34. In addition, the standard of proof remains the same, namely that a charge must be proved ‘Beyond Reasonable Doubt’ which remains a high threshold. COPFS will also put in place a robust evidential test, the “reasonable prospect of conviction” test referred to at paragraph 4 above, to assess the quality of the available evidence. In tandem with a public interest test, this will ensure that only the appropriate cases are taken up. These tests will be publically available, as our current prosecutions tests are publically available, in a revised Prosecution Code.

35. In preparation for this Bill, COPFS and the police have conducted research into the impact of the abolition of the technical requirement for corroboration. The results of the exercises suggest a 1.5% increase in the number of cases which will be reported to COPFS by the police; a 1% increase in COPFS summary business; and a 6% increase in COPFS solemn business. The results for solemn cases, as far as any comparison can accurately be made, are within the same range as those suggested by Annexe A of the Carloway Report.

36. COPFS also welcome the terms of s59 which deals with the practical commencement of the abolition of the requirement for corroboration. This will be based on the date of the offence.

37. There were a number of possible mechanisms for the introduction of the abolition of the requirement for corroboration but each had its own difficulties and challenges. Although this provision will result in a “dual” system of cases running in tandem (cases which require corroboration and those which do not proceeding at the same time) this provision does avoid many of the difficulties that other possible solutions create and provides clarity and certainty for suspects, accused, victims and witnesses in respect of the offences which will be affected.

38. COPFS also support the simplification proposed by s62 which clarifies the position in respect of statements made by accused persons during interview and which abolishes the distinction between exculpatory, incriminatory and mixed
statements. The law in this area has become extremely complex and difficult to explain to juries. This provision simplifies this issue and complements s27-29 in respect of “post charge questioning” which recognises that it may be in the interests of an accused person to state their position at an earlier stage of an investigation.

Court Procedures (Part 3 plus s86 of the Bill)

39. COPFS welcome the provisions contained within Part 3 of the Bill built upon the recommendations contained within Sheriff Principal Bowen’s Independent Review of Sheriff and Jury procedure published in June 2010 and which amend Sheriff and Jury procedure. COPFS consider that the provisions will help reduce the inconvenience to witnesses and provide an opportunity to reduce churn in Sheriff and Jury procedure. COPFS supports the aims of Sheriff Principal Bowen’s report and many of his recommendations for reform. This includes the citing of cases to first diet only, earlier engagement between the Crown and defence and having a full discussion at first diet on the status of the case all of which should assist in ensuring that only those cases likely to proceed to trial are allocated to a trial diet.

40. Internal COPFS statistics suggest that in the period from June 2012 to June 2013 769 cases were disposed of following a plea tendered at the trial sitting without evidence having been led. That represents almost 16% of all sheriff and jury cases over that period. In the vast majority of those cases witnesses will have been cited to attend court. COPFS believe that more effective preparation and engagement between the Crown and defence solicitors will lead to an increase in the number of pleas secured before the trial diet and more use of section 76 procedures.

41. COPFS consider that in the majority of cases the most effective stage at which meaningful discussions can take place between the Crown and the defence is after the case is indicted but before the first diet. This will not be the first point of engagement with the defence however it is only at this stage that Crown Counsel will have given authority to indict upon the final charges the accused will face. As a result, this is the point at which some form of resolution is most likely to occur.

42. COPFS agree with the approach contained within the Bill which requires this engagement to take place after the indictment is served but prior to the first diet. This is made possible by the proposed extension of the period between service of the indictment and first diet to 29 days.

43. The provisions provide flexibility to allow discussions to take place by the most effective means. This reflects the reality identified by Sheriff Principal Bowen that sheriff and jury procedure covers a broad spectrum of cases. The advent of secure email and secure online disclosure allows for more effective means of communication between the Crown and the defence which in turn allows space to be created for those difficult cases which would benefit from a face to face discussion.

44. In respect of s86 which relates to the use of live television links, COPFS are encouraged to note that the provision will allow the use of TV links for all court appearances with the exception of hearings where evidence is being led. This will allow for a significant increase in appearances from custody via TV link, particularly first appearances from Police custody centres. The increased numbers of
appearance via TV link will produce benefits such as long term financial savings across the system due to the reduced requirement for prisoner movement around Scotland and reduction in the risks involved with the movement of high risk prisoners. It provides opportunity to better schedule individual appearances and will also allow greater flexibility to consider prisoner health and welfare issues arising from the current need to escort them to court securely. There will be environmental gains in reduction to the carbon footprint of prisoner movement. We recognise that this also meets the Scottish Government commitments to make greater use of IT and electronic processes to deliver services. It will also enhance the development of the Cross Justice Video Conferencing Project

Appeals, sentencing and aggravations (Parts 4, 5 & 6)

45. COPFS welcome the changes reflected in s74 to 82 in respect of appeals procedures. The draft provisions represent an across-the-board tightening of procedures and will improve the efficiency and effectiveness of the appeals process generally.

46. COPFS also welcomes the provisions creating a statutory human trafficking aggravation. There are often evidential difficulties in prosecuting human trafficking offences and a statutory aggravation will be a useful tool to allow prosecutors to bring those who exploit others to justice. The aggravation will be of use in circumstances in which there is insufficient evidence to proceed with a human trafficking offence but where other offences can be proved. At present, the lack of an aggravation means that in such circumstances prosecutors cannot lead evidence of the background or context of human trafficking against which an offence is committed.

47. s57 which provides for the abolition of the requirement for corroboration does not remove the need for or reduce the merit of introducing a statutory human trafficking aggravation. There may be some cases, particularly around peripheral matters relating to human trafficking, where it would be appropriate to consider labelling a statutory aggravation rather than a human trafficking offence. For example, actual criminal activity may relate to ancillary offences such as identity theft, fraud, drugs or sexual offences but these offences may be committed against a background of human trafficking. In some cases there will not be sufficient evidence to prosecute for human trafficking but it will still be possible to prosecute for other offences. The use of a human trafficking aggravation will allow COPFS to highlight to the court the context of such offences and therefore allow the court to properly sentence on the basis of the full circumstances. The absence of such an aggravation would give a false impression of the extent of the criminal behaviour of the accused and would not allow a properly targeted sentence to be considered.

Conclusion

48. COPFS are highly supportive of the provisions contained within this Bill which recognise the complexity of the investigation of crime in the modern era. COPFS considers the Bill strikes a balance in a criminal justice system set in a modern society between the rights of the suspect and the need to properly investigate
criminal allegations and question the suspect. The Criminal Justice (Scotland) Bill will have a significant and positive impact on the criminal justice system in Scotland.

Crown Office and Procurator Fiscal Service
12 September 2013
Justice Committee

Criminal Justice (Scotland) Bill

Supplementary written submission from the Crown Office and Procurator Fiscal Service

In anticipation of the Lord Advocate and Catriona Dalrymple, Head of Policy’s appearance at the Justice Committee on 20 November 2013, COPFS considered it would be helpful to provide further information about the Crown’s position on the abolition of the requirement for corroboration.

Introduction

1. COPFS support the abolition of the requirement for corroboration and welcome the terms of s57 of the Criminal Justice (Scotland) Bill.

2. The technical requirement for corroboration has proved a barrier to justice for victims in many cases which would be prosecuted in most other jurisdictions in the world, a fact recognised by Lord Carloway in his report.

3. As stated at paragraph 23 of our written evidence to the Justice Committee dated 12 September 2013, COPFS consider that this provision will allow proceedings to be raised in a number of cases where at present the Crown cannot proceed due to a technical lack of corroboration but where otherwise the available evidence is of high quality and supports the victim’s version of events. In particular this provision will allow us to consider cases which arise from areas of law which currently disadvantage certain groups of victims principally women and children purely due to the nature of the offences committed against them such as domestic abuse or sexual crime.

4. It is important to be clear at the outset that the abolition of the requirement for corroboration is not about improving detection or conviction rates. It is about improving access to justice for victims of crime. The comments of the Supreme Court of Canada in Boucher v The Queen (1954) 110 Can CC 273 at 270 are highly pertinent:-

"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime."

5. It is also vitally important to remember that it is the legal and technical requirement for corroboration which it is proposed to abolish, not the concept of corroboration itself. In many cases corroborative evidence as we currently understand it will be available - that will not change.

6. The abolition of the requirement for corroboration will not diminish the necessity of professional and thorough investigations by the police under the direction of the Lord Advocate. In all cases police and prosecutors will seek out
evidence which supports the credibility of the allegation of the commission of a crime.

**What is corroboration in law?**

7. In order to prove a crime in the law of Scotland the Crown must lead evidence from 2 independent sources of the essential facts. These are: that a crime has been committed; and that the accused committed the crime. However over the years what the law regards as corroboration has significantly altered from its original form. Another area in which the courts have developed the concept of corroboration in the legal context is the doctrine of mutual corroboration. This is known as the “Moorov doctrine”, which provides that where the accused has carried out a series of offences and there is only one witness to each of these offences, corroboration of each of the offences can be found in the fact that he or she behaved in a similar manner to another victim. There is only one witness to each crime. This method of corroboration is particularly used in the proof of sexual cases.

8. Dictionary definitions of “corroborate” include “to make strong” or “to strengthen”; “to confirm”; “to support with other evidence”; and “to make more certain”. These definitions and explanations of what constitutes corroboration appear straightforward to apply. Yet in Scotland, “corroborate” has come to have a narrow technical meaning, as acknowledged by Professors Chalmers and Leverick in their recent article.

“The Scottish law of corroboration has become technical and highly complex, and cannot simply be described as a ‘two-witness’ rule”

9. Scotland finds itself in an isolated position in its continuing requirement for corroboration. This requirement is not found in other jurisdictions. Notably it is not required in supranational courts such as the International Criminal Court. Its rules of procedure and evidence state:

“……. a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.”

10. Corroboration as a legal principle in Scots law is different from the application of evidence which supports the credibility of the allegation. Support can be found in evidence that does not at present amount to the legal definition of corroboration, but is none the less highly persuasive.

11. *Three recent appeal cases demonstrate the uncertainty of what amounts to corroboration in Scotland. The case of HMA v Mair [2013] HCJAC 89 related to a*

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1 “Substantial and radical change’: a new dawn for Scottish criminal procedure?” (2012) 75 Modern Law Review 837
charge of murder; HMA v Hutchison [2013] HCJAC 91 and Mutebi v HMA [2013] HCJAC 142 to allegations of rape. All three cases proceeded to trial in the High Court and in all three cases the defence made a “no case to answer” submission at the end of the Crown case. It was argued that the Crown had failed to lead sufficient that is corroborated evidence of the crime charged. In the cases of Mair and Hutchison, the High Court judges hearing the trials agreed with the defence that there was insufficient evidence and stopped the prosecution after the Crown case. The Crown appealed these decisions. In both cases the Appeal court, consisting of three other High Court judges, upheld the Crown appeals, disagreeing with the trial judges and deciding that there was in fact corroborated evidence in both cases. Conversely in Mutebi v HMA, the High court judge ruled that there was corroborated evidence and refused the defence submission. The case was determined by the jury who found him guilty. The defence appealed the conviction. The three appeal court judges decided that the trial judge had erred in concluding that there had been corroborated evidence. The appeal was allowed and Mutebi’s conviction quashed. It is therefore clear that there are disagreements and misunderstandings as to what amounts to corroborated evidence even at the highest levels of our legal system.

12. Another area of complexity is the treatment of evidence of a victim’s distress. It can have differing evidential weight depending on the circumstances of the crime it relates to. So the evidential significance of distress of the victim of an assault and theft may be regarded differently to that of the distress of a rape victim. And even in cases of rape, the evidential weight of distress will be different in cases of a rape where force was used to those of non-forcible rape such as where the victim was asleep or intoxicated.

13. These examples amply illustrate that the technical requirements of corroboration have resulted in a complicated set of legal rules which can often be difficult to apply and for victims to understand.

14. It may be of assistance to look at a number of areas to give some further information on how the abolition of the requirement for corroboration may impact on COPFS and the justice system as a whole.

Test for prosecution

15. The abolition of the requirement for corroboration will require the introduction of a new test for prosecution. The proposed test would, as at present, have two stages, namely an evidential test and a public interest test. However it is proposed that the evidential test will be in different terms to our current test which is largely based on assessment of the quantity of evidence. Under the new test the prosecutor will have to make the following assessments:-

   a. a quantitative assessment– is there sufficient evidence of the essential facts that a crime took place and the accused was the perpetrator?

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3 A “No case to answer” submission is not based on the quality of the evidence, only on the quantity and is made when the defence does not think the Crown have lead corroborated evidence of the crime charged.
b. a qualitative assessment – is the available evidence admissible, credible and reliable?

c. on the basis of the evidence, is there a reasonable prospect of conviction in that it is more likely than not that the court would find the case proved beyond reasonable doubt?

16. Only if a case meets the evidential test, will the prosecutor consider what, if any action, to take in the public interest. This aspect of the test will not change and public interest considerations will remain as at present.

17. The proposed new test focuses on the credibility of the allegation and the quality of evidence which supports that allegation. The evidence must be sufficient to allow a reasonable prospect of conviction.

18. We consider the application of the test will allow proceedings to be raised in a number of cases where at present the Crown cannot proceed due to a technical lack of corroboration for what are credible allegations where there is compelling supportive evidence. In particular this provision will allow us to consider cases in which some victims are disadvantaged purely due to the nature of the offences committed against them.

19. This test will be published as part of the Prosecution Code which will be publically available and which will give further guidance on the way this test will be applied.

Supporting evidence

20. We have noted the concerns expressed by many commentators that this will allow the Crown to raise cases on the evidence of a “single witness” or “one witness” cases. Such terms are unhelpful and can misrepresent the evidential position in a case. The removal of the requirement for corroboration will not extinguish or even reduce the requirement for the police and prosecutors to thoroughly explore all reasonable investigative avenues.

21. It is wrong to suggest that the abolition of the requirement for corroboration will result in sloppy police investigation or poor prosecutorial analysis. The police and COPFS are professional organisations which have duties to investigate crime which are independent of the evidential basis of our decision making.

22. It is wrong to suggest that the Crown would be content to attempt to convince a court beyond reasonable doubt at trial on the basis of the account of one person which had not been investigated further or where no attempt had even been made to obtain evidence without supporting evidence. To do so demonstrates a complete misunderstanding of the ethos and standards of COPFS. The Crown will always look for supporting evidence in every case.
Case examples

23. Case examples can be found at Annex A. We consider that these examples could meet the new prosecution test should the requirement for corroboration be abolished. These examples are from real cases which were marked for no proceedings due to insufficient corroborated evidence and accordingly the perpetrator was not prosecuted. In each example there is evidence which supports the credibility of the allegation and is of such quality as to give a reasonable prospect of conviction. The cases have been anonymised and specific details changed to protect the parties.

Sexual offences

24. Sex offenders do not wait until there is someone about before committing a crime, rather they do the opposite. They will wait until the victim is isolated and alone, when there is no-one and nothing to corroborate the victim’s account. By their very nature sexual offences are committed in private when there is no-one else around. As a society we find ourselves unable to prosecute many such crimes, as the supporting evidence does not amount to corroboration but is highly persuasive as outlined in the examples. This is one reason why COPFS supports the abolition of the requirement for corroboration

Domestic abuse

25. Domestic abuse often occurs behind closed doors where there are no other witnesses. In such circumstances, it is often the case that there is a lack of corroborative evidence. The domestic abuse examples at annex A demonstrate that in many cases of domestic abuse there is evidence which goes to support the credibility of the allegation made and so makes access to justice possible.

26. Each of these crimes deserves to be prosecuted. Each victim deserves access to justice. Each accused person deserves to be punished for their behaviour. In each of these scenarios, COPFS were unable to take action due to the technical requirement for corroborated evidence. In each case, there is sufficient quality and quantity of evidence to put before a jury. In each case, we assess there is a reasonable prospect of conviction. It should properly be for the judge or jury to consider the facts and whether they point to guilt.

Effective criminal sanctions

27. As a modern, 21st century society, Scotland must ensure that its criminal justice system is human rights compliant not only for suspects and accused but also for victims and witnesses, a fact that Lord Carloway recognised in his report. The importance of a state having effective criminal sanctions has been repeatedly stressed by the European Court of Human Rights.

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“The Court has found a positive duty on the part of the Contracting states to protect their inhabitants in a range of cases. In such cases, the state is not the primary violator of rights (i.e. it is not the state that beats, rapes, enslaves etc.), but rather the state has inadequate structures in place to prevent these kinds of abuse. This can mean that the state does not provide adequate criminal sanctions for actions that violate Convention rights.”

28. This question of whether Scotland provides effective criminal sanctions has recently been commented on by the United Nations Committee on the Elimination of Discrimination against Women in their report dated 23 July 2013 at paragraph 26:-

“The Committee is concerned that, following the findings of the Carloway Review of criminal law and practice in Scotland, the burdensome requirements of corroboration impede the prosecution of rape and other sexual violence cases”

29. The abolition of the requirement for corroboration is a crucial step towards ensuring effective criminal sanctions and improving access to justice for victims of crime. As we have said earlier, the abolition of the requirement of corroboration is not about improving detection or conviction rates. It is about improving access to justice. It is about changing the law to ensure that criminals are not immune from prosecution, protected by complicated rules of evidence that create injustice. And it is about ensuring that the victims of those crimes do not have to sit in silence but have the opportunity for their voices to be heard.

30. Concerns have been expressed from various commentators about the Crown being able to take forward certain types of case. In particular cases based on solely confession evidence, what has been termed as the one witness case and false allegations against professionals. It is important that we make our position on these areas of concern clear.

Confessions

31. Confessions are now rarer following the ruling in the Cadder case that a suspect has right of access to a lawyer. This was recognised by Lord Rodger in his opinion in the Cadder case

“the recognition of a right for the suspect to consult a solicitor before being questioned will tilt the balance, to some degree, against the police and prosecution. “

32. It is though recognised that people will confess to crimes they have not committed. The Lord Advocate agrees with Lord Hope’s comments in the recent article from Holyrood magazine\(^5\) that no-one should ever be convicted on the basis of a simple confession alone. Therefore it is essential that there is evidence to prove that a confession is true. The police and the Crown will

\(^5\) Edition dated 04 November 2013
always look for supporting evidence which in cases of confession evidence will be evidence which supports the truth of that confession.

False allegations against professionals

33. COPFS acknowledges that certain professional witnesses are susceptible to malicious allegations, including police officers, teachers, social workers, health professionals and prison officers. Again proceedings in such cases would not be taken up without strong supporting evidence.

34. We already have measures in place to guard against the taking of proceedings based on false allegation. In the case of allegations against teachers by pupils in the course of their employment, prosecutors must investigate these and precognosce the eye witnesses. Proceedings against a teacher can only be instructed by Crown Counsel. In the case of allegations of criminality by police officers, COPFS has a dedicated specialised unit to investigate these. Criminal proceedings against police officers can only be taken on the instruction of a law officer. Such processes ensure that prosecutions founded on malicious allegations are guarded against. The abolition of the requirement for corroboration will not change that approach. In each and every case the evidence will be carefully scrutinised and robustly examined to protect all individuals against malicious allegations.

Conclusion

35. As prosecutors in the public interest we are justly proud of the criminal justice system in Scotland where the rights of those accused of crime are robustly protected by the courts. As prosecutors though we support the abolition of the requirement for corroboration to ensure that all victims of crime have access to justice and to ensure perpetrators of crime can be brought before courts for their guilt or innocence to be determined, rather than be hampered by technical rules which do not allow us to present strong cases to the court.
Some case examples

Example 1

The victim was at home asleep at night. She woke up to find the accused, who was a complete stranger, standing in her bedroom, brandishing a weapon. He raped her and threatened her, telling her not to report the crime to the police after he left. He also forced her to wash herself to get rid of evidence. She was terrified and did not contact the police. The following day whilst she was out, the accused entered the house again and stole items which may have linked him to the crime had they been forensically examined. A number of witnesses saw the accused taking these items away. The accused was clearly trying to destroy any evidence of sexual activity. The victim is credible and reliable and there was recent distress after the incident and the circumstances are highly supportive of her account.

As there is no corroboration of penetration, we cannot prosecute the charge of rape.

Example 2

The victim is a girl under 12 years of age. She was going to play with friends when she was grabbed by the accused and pulled behind a building. She recognised the accused as he lives near her. The accused unfastened his trousers and she could see he was wearing distinctive underwear. He put his hand under her clothing and indecently touched her. She tried to run off but he stopped her and threatened her. She managed to run away again but tripped over items and was grabbed again. She managed to break free again, ran home and told a family member what happened. She was screaming hysterically and showed where the accused had touched her. The accused was detained a short while later and was found to be wearing similar clothing and underwear as that described by the victim. On going to the locus, the police found a number of items which the victim had described, all of which support the credibility of the account given by the victim.

No action could be taken as there was no corroboration in law of the commission of a crime.

Example 3

In a Moorov case, where the evidence of one complainer to each crime corroborates the, the failure of one witness to be able to give evidence at the door of the court has resulted in the collapse of the case as a whole. The evidence of the one witness, even if there was for instance evidence to say the accused and the victim were seen together at the time of the offence, would not be sufficient to provide corroboration.
Domestic abuse examples

Example 4

The victim and accused has been in a relationship for a few months and the accused had been violent towards her on a number of previous occasions, none of which had been reported to the police. On the date in question the victim was in a neighbour’s flat waiting for a workman to arrive at her own flat. The only other person with a key to the victim’s flat is the accused. The victim and her neighbour heard the sound of someone entering the victim’s flat. The victim left but the neighbour did not go out or see who had entered the flat. On entering her flat the victim found the accused was inside. He immediately attacked her and then dragged her out the flat and down the stairs. A neighbour later described what they thought was furniture being dragged along the floor. The accused dragged her along the street making a number of threats as he did so. She managed to escape and ran into nearby premises where she asked for the police to be contacted. She was injured and very distressed. She was taken to hospital by ambulance and detained in hospital due to her injuries. Her injuries were consistent with her account of the attack. When police attended at the victim’s home to uplift personal items for her, they found the accused waiting within. He denied any assault.

Although there is evidence of an attack and the accused being the perpetrator, there is no corroboration that it was the accused who carried out the attack and as such proceedings could not be taken.

Example 5

The accused and the victim had been in a relationship and have a child but have now separated. The accused attended to uplift the child for access. He was under the influence of alcohol or drugs, was behaving aggressively towards the victim, and was shouting and swearing at her. The victim decided that the child should not go with the accused due to his behaviour. The accused then grabbed her by the neck and ran her towards the door causing her to strike her head against the door. He then grabbed her by the throat and pushed her to the floor causing her to strike her head against the floor. All of this occurred in the full view and presence of the child who was sitting in a highchair. The accused then left the house but he continued to shout and swear and threatened her with violence. The police were called and found her to have swelling and reddening to her left cheek and a substantial lump to the back of her head with fresh scratches to her body. The police also spoke to a witness who heard the sounds of a male voice shouting and a female screaming.

Again there is no corroboration that the accused committed the assault. We can say only that it was a male. Proceedings could therefore not be taken.

Catherine Dyer
Crown Agent & Chief Executive
15 November 2013
At the Justice Committee hearing on 20 November 2013, the Lord Advocate and Catriona Dalrymple, Head of Policy, undertook to provide written details of matters discussed regarding (i) shadow marking exercises conducted by COPFS, and (ii) further information on additional safeguards in the trial process.

Shadow Marking Exercises

To assist with COPFS consideration of the impact of the proposal for the abolition of the requirement of corroboration three separate shadow marking exercises have been carried out. Firstly by the police to allow estimates in numbers of reports to the Procurator Fiscal; secondly by COPFS in relation to numbers of cases that would be taken up under any new prosecution test; and thirdly in relation to the impact on domestic abuse cases in particular. I will also provide detail of the marking exercise which was carried out for Lord Carloway’s Review.

By the Police

1. In summary, five officers of the Police Service of Scotland considered about 1400 cases where a suspect had been identified, but the case had not been reported to COPFS due to a lack of corroboration. The officers assessed these cases applying draft guidance issued by COPFS based on our proposed new test for prosecution, and considered how many of the cases would be reported if the requirement for corroboration was abolished. A member of COPFS was involved in reviewing this exercise and was satisfied that the police were applying the COPFS guidance appropriately in relation to the evidence required to report the case. The results suggest that there is likely to be an increase of 1.5% in the number of cases reported to COPFS by the police.

2. In 2012-13, 280,942 criminal reports were received in total. Of these, around 248,000 were reported by the Police. So a predicted increase of 1.5% would imply that around an extra 3720 or so cases annually would be received from the police.

By COPFS

3. In order to assess the likely impact on the numbers and types of cases that would be taken up following a change in prosecution test, COPFS carried out its own internal shadow marking exercise. This was conducted by Scots prosecutors who understand the law of evidence and the definitions of crimes in Scotland. This is essential to the process. I attach a link to the letter COPFS sent to the Finance Committee outlining the detail of this shadow marking exercise: COPFS letter to Finance Committee - Detail of Shadow Marking
The Crown Agent in her evidence to the Justice Committee on 29 October 2013 in relation to the Draft Budget Scrutiny 2014-2015 spoke in general terms about the results of the shadow marking exercise. During these discussions, reference was made to the 6% figure relating to Sheriff and Jury cases. To clarify the position, I would confirm that the figure of 6% in fact relates to all solemn cases, that is both High Court cases and Sheriff and Jury cases combined. Therefore the results of the shadow marking exercise suggest a 6% increase in overall solemn business which includes both High Court and Sheriff and Jury cases.

Annex A

5. Annex A to the Carloway report featured analysis of a selection of cases which might be impacted by a change in prosecutorial test. Two experienced Scots lawyers looked at these cases and a two-stage test was applied. First, they considered for each case whether there would be sufficient evidence to prosecute if the corroboration requirement were removed. Secondly, they applied a qualitative test to the available evidence; looked at the credibility and reliability of the available evidence; and considered whether there was a reasonable prospect of securing a conviction.

6. At first glance the results from Annex A and the COPFS shadow marking exercise look different. For example, Annex A indicated that 58.5% of the solemn cases (268 of the 458) would meet a "reasonable prospect" test; and 67% of the sexual cases (95 of the 141) would also meet that test. However, the additional cases predicted by Annex A need to be considered in the context of the increase that they represent to the total number of solemn disposals that there would be during the year in question. Once that figure is calculated, it indicates that the results of Annex A actually suggest a 9% increase in solemn business. The shadow marking exercise predicted a 6% increase but within a range of a possible increase of between 2% and 10%. Accordingly, as far as comparison is possible, the results of Annex A and the shadow marking exercise are not inconsistent with one another.

Domestic Abuse

7. COPFS also recently carried out another shadow marking exercise in respect of domestic abuse cases. In 2012-13, 2803 domestic abuse charges could not be taken up because there was insufficient admissible evidence. These 2803 charges related to 2210 cases (some of the cases feature a number of charges of domestic abuse). A statistically relevant sample of 328 of these domestic abuse cases was considered, and the new prosecutorial test applied to them. This provided an estimate of the proportion of cases (about 60%) where action might be taken under the new prosecution test.

8. The outcome of this exercise suggests a yearly increase in domestic abuse prosecutions of around 1000 cases. The vast majority of these cases would proceed on summary complaint.

9. These results therefore indicate that a relatively large proportion of the net additional summary cases estimated in the main shadow marking exercise will be domestic abuse cases.
Safeguards in Scotland’s criminal justice system

10. There has been some discussion as to whether additional safeguards should be introduced if the requirement for corroboration is abolished. In what was a major review, Lord Carloway did not consider that additional safeguards were necessary. During his appearance before the Justice Committee on 20 November, the Lord Advocate explained that there are at present many safeguards in the trial process.

Current Safeguards

11. The most important of these are that the accused is presumed innocent and that it for the Crown to establish that the accused is guilty of the offence charged beyond reasonable doubt. This criminal standard of proof is rightly a very high standard of proof.

12. There are many other existing safeguards in the trial process a number of which are outlined below:-

- The police and Crown are under a legal duty to thoroughly investigate all criminal allegations;
- The accused has the right against self incrimination and the right to legal advice before interview;
- The Crown is obliged by law to disclose to the defence all material information for or against the accused;
- The judiciary is independent and impartial;
- Criminal trials proceed in public;
- The trial process itself has regard to common law fairness;
- COPFS and the judiciary are both obliged to uphold an accused’s Article 6 ECHR rights;
- Evidence irregularly or unlawfully obtained is *prima facie* inadmissible;
- Evidence obtained by coercion or unfairly obtained by police officers will be inadmissible;
- The accused’s representative can challenge the admissibility of evidence;
- Defence agents and counsel can cross examine all witnesses;
- The accused can call his own witnesses and lead evidence in his or her defence;
- An accused can decide not to give evidence and no adverse inference can be drawn. He has the right to be legally represented if so wished;
- The law of evidence prohibits hearsay and collateral evidence subject to certain exceptions, prescribed by law;
- In solemn cases, judges provide clear directions to juries explaining to them how they must apply the law, and approach their task as masters of the facts;
- In solemn cases, a majority of the jury must be satisfied beyond reasonable doubt of the guilt of the accused; and there are two acquittal verdicts;
- If convicted, the accused has a right of appeal on the basis of any alleged “miscarriage of justice”, or in solemn cases that the jury returned a verdict which no reasonable jury, properly directed, could have returned;
The right of appeal is supplemented by the ability of the Scottish Criminal Cases Review Commission to refer cases to the High Court to be considered on grounds of a “miscarriage of justice” or “in the interests of justice”.

13. These safeguards ensure that there is a system of fair trials for accused persons, and compliance with the European Convention on Human Rights.

Other potential safeguards

Jury majorities

14. Section 70 of the draft Bill proposes raising the number of jurors required for a guilty verdict from the present 8 to 10 of 15. COPFS is supportive of this proposal in line with the responses to the Scottish Government consultation on this matter.

15. In this regard, and in contrast to other jurisdictions, it is significant that Scotland has three verdicts open to jurors, with the “not proven” verdict functioning as a second verdict of acquittal.

The Not Proven Verdict

16. The Cabinet Secretary for Justice has indicated his intention to refer consideration of the Not Proven verdict to the Scottish Law Commission and this was welcomed by the Lord Advocate, as he stated when he gave his evidence on 20 November.

Withdrawal of cases from juries by trial judges

17. The Scottish Government also consulted on this proposal. COPFS consider that cases should be allowed to go to juries where there is a sufficiency of evidence. COPFS agrees with the position that was taken by Scottish Government in the consultation paper on safeguards namely that it would be very rare that, at the conclusion of a trial, the prosecution's case would rest on a single source of evidence of doubtful credibility. This is especially unlikely in light of the proposed prosecutorial test.

I trust that this information assists the Justice Committee and would be pleased to assist further if required

Catriona Dalrymple
Head of Policy Division
9 December 2013
Justice Committee

Criminal Justice (Scotland) Bill

Supplementary written submission from the Crown Office and Procurator Fiscal Service

During the evidence panel session on Part 4 of the Criminal Justice (Scotland) Bill on 19 November, I agreed to provide some further information to the Committee in writing.

In particular in relation to delays in appeals, I attach a copy of the case of Beggs v United Kingdom Application no 25133/06 on the website of the European Court of Human Rights (ECtHR), which was the case I mentioned during my evidence.

In this case the ECtHR held that there had been a breach of Article 6(1) due to the periods of inactivity they identified on the part of the judicial authorities. It is fair to say that there were a number of complications which led to delay in this case, including a period during which the case was adjourned to wait for a decision of the Supreme Court. In paragraphs 211 to 273 of the judgement the ECtHR outlines what happened at each stage of the case and which periods they considered contributed to the appeal proceedings not being held within the reasonable time requirement of Article 6(1) of the European Convention on Human Rights. The appeal took 10 years in total to conclude. Not all of that period though was attributable to delays by the state. The court recognised that a substantial proportion of the delay was attributable to the applicants own conduct, as well as delays through waiting for clarification of certain aspects of law.

I referred in my evidence to the gate keeping role of the Appeal court to reject a reference from the SCCRC. In my evidence I mentioned the case of Carberry v HMA [2013] HCJAC 101 in which the court recently rejected the reference. I attach a copy of that opinion for the attention of the Committee.

In relation to the sections 79 and 80 of the Bill the Committee asked for information about how often Bills of suspension and Advocation are used. In the 2 years up to end of October 2013, COPFS have a record of 108 Bills of Advocation and 140 Bills of Suspension.

Lastly the Committee asked for details of the COPFS’ Records Management Policy, and I attach a link to the full policy which is available on the COPFS website.

COPFS Records Management Policy

The policy in relation to retention of case papers depends on the forum of the proceedings. For a High court case papers should be retained for a period of 10 years within COPFS, after which time the papers will be transferred to the National Records Archive for permanent retention. The policy in relation to Sheriff and jury and summary case differs between sexual and non- sexual cases. In Sheriff and Jury sexual cases they will be retained for a period for 10 years within COPFS, and then destroyed. All other Sheriff and jury papers are retained for a period of 5
years from trial or appeal and then destroyed, unless the Procurator Fiscal considers it necessary for further retention. For summary cases involving sexual offences the papers are retained for 5 years. In all other summary case the papers are only retained for 2 years.

This policy only applies to the Crown’s paperwork. As I explained to the Committee, following the trial and any period in which the accused has to lodge an appeal, if no appeal is lodged the Crown has to return the physical items of evidence relied upon at trial, which are know as ‘the productions’, to their owners. Some productions may actually require to be destroyed – for example where the production presents a bio-hazard, for instance if it is blood stained. Other biological material may degrade over time and witness’ memories may dim. The ability to successfully mount any retrial is accordingly not simply dictated by the availability of the Crown papers.

I hope that this information is of assistance to the Committee in its consideration of part 4 of the Bill.

Fraser Gibson
Head of Appeals Unit
31 December 2013
Supplementary written submission from the Crown Office and Procurator Fiscal Service

Evidence on the secure email system

I can confirm that the secure email system referred to on the Crown Office and Procurator Fiscal Service (COPFS) website is the Ministry of Justice hosted application Criminal Justice Secure Email www.cjsm.net.

By way of background, COPFS has continually sought to improve the efficiency and effectiveness of its communication with defence solicitors. The introduction of the use of Criminal Justice Secure Email is the latest step in this process and should be viewed in conjunction with other COPFS initiatives over recent years such as electronic disclosure of evidence to the defence through the development by COPFS of our secure disclosure website.

As was appreciated by the Committee, any email system used for communication between prosecution and defence must be secure because of the sensitive nature of much of the general information contained in correspondence around criminal charges and which must at times include personal data.

The Crown has always used secure Government hosted email networks as do the police and Scottish Courts and that means that all of the criminal justice public authorities send email between one secure network to another. COPFS was formerly part of the Government Secure Internet (gsi) and is now a member of the Public Service Network (psn).

The issue that arose when we wanted to explore use of email communication with the defence was that the Crown had secure email while defence solicitors did not. They had individual arrangements for email accounts with no overarching facilities supplier arrangements.

We will not send email containing sensitive data to an insecure network as that would invalidate our secure network authorisation and violate the Data Protection principles (which defence agents are also required to comply with).

It became apparent that the quickest and simplest initial solution was for the Crown to facilitate arrangement of use of a current secure network for parties outwith Government networks. In the short term it was recognised that CJSN was available immediately while time was going to be needed to explore any potential longer term solutions.

CJSN allows secure email transmission between various Government Secure networks and private web based email accounts.
Over 600 defence agents and all Faculty of Advocates members are now currently registered. CJSM can be used by defence representatives in both Summary and Solemn cases, it is not reserved to just High Court or Sheriff & Jury business.

The matters that Mr Dunn referred which caused some initial difficulties to defence solicitors making use of CJSM were that CJSM is set up so that if any user does not sign into their CJSM account for 30 days then their password is locked and they have to contact a CJSM administrator to have it unlocked. If any account has been inactive for a period of 90 days, then that account will be suspended and will require to be reactivated via the administrator. If an account has been inactive for 180 days it will be deleted.

All of these conditions were clearly set out when users signed up to CJSM however, as with all new systems, it has taken time for some new users to fully engage with the system.

The introduction of the use of CJSM by defence solicitors was monitored by COPFS from the outset. We noted that the lack of regular use by some defence agents initially caused them to experience some of the issues referred to above. To minimise inconvenience COPFS is discussing with the Ministry of Justice a change to the current arrangements and place COPFS in the position of as administrator for the defence solicitors in Scotland which would allow quick reinstatement of access to CJSM if such issues arise.

COPFS is currently reviewing all methods of communication with defence agents with the aim of further improving the time taken to exchange all information necessary to allow the most efficient resolution of cases. We will be working with defence solicitors locally in the coming months to explain the revised processes we are putting in place and detail the benefits of using the secure email system and dedicated phone numbers referred to by Mr Dunn.

I hope this summary of the position is of assistance.

Danny Kelly
Policy Division
10 January 2014
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Professor Peter Duff

Proposed abolition of corroboration

1. I have no fundamental objection to the abolition of corroboration. First, no other major jurisdiction still has such a requirement and there is no evidence that this leads to a greater number of miscarriages of justice. Second, the Scottish requirement has been so ‘watered down’ over the years, principally by judges anxious to avoid the acquittal of the obviously guilty, that is not nearly as strong a safeguard against wrongful convictions as its supporters claim. Additionally, the ‘fiddles’ that judges have created to get around corroboration have led to a confusing, illogical and inconsistent set of evidentiary rules which practitioners, including judges themselves, often have great difficulty in applying.

2. On the other hand, I very much doubt that the abolition of corroboration will have much impact upon the conviction rates for rape, indecent assaults, domestic violence and the like, as is often claimed. Commentators are generally agreed that the Crown Office ‘research’ carried out for the Carloway Review, purporting to show that a large number of cases that do not presently proceed would be prosecuted if corroboration was abolished, is highly questionable.

3. To make the most obvious point: the Crown Office reviewers of the sexual assault cases that were not prosecuted for lack of corroboration simply assumed that all such cases would have proceeded if there was no requirement for corroboration. This ignores the fact that many rape victims are under the influence of drugs or alcohol at the time and/or suffer from addiction problems, mental illness etc. Unfortunately, such vulnerable women are particular targets for rape. The defence is usually one of consent and, in the absence of the corroboration requirement, the Crown would inevitably have to make a decision on the likely credibility of the victim and, in particular, whether she will stand up to robust cross-examination in court. There is much research demonstrating that juries are reluctant to convict accused of rape in a ‘he says, she says’ dispute over consent and unless the jury has almost complete faith in the complainer’s version of events, it will acquit.

4. The Crown Office reviewers implied that all such cases where there is no corroboration would be prosecuted in England but the practice south of the border is that the Crown will only proceed if there is a ‘reasonable chance’ of conviction. In many cases, the likely credibility of the complainer will be highly questionable and there will be no proceedings. The ‘research’ would have had some validity if, for instance, English prosecutors had been asked to review the Scottish cases where there was no corroboration and to determine whether they would have embarked upon a prosecution. All the evidence suggests that in England the Crown is often reluctant to proceed where there is no evidence supporting (ie corroborating) the victim’s account where her potential credibility in front of a jury is questionable. This is borne out by the fact that, as is well known, there is no difference between conviction rates for reported rapes in Scotland and England.
5. In my view, the best hope for increasing the number of prosecutions and convictions in cases of rape and other sexual assaults is a reform allowing the appointment of a lawyer to safeguard the complainer’s interests during the trial. This has long been advocated by Professor Fiona Raitt of Dundee University and I would suggest that you might take this possibility up with her.

6. Finally, if corroboration were to be abolished, there is the question of replacement safeguards. I think it advisable to ‘tweak’ the rules of evidence in some areas. For instance, I think a conviction based solely upon ‘dock identification’, even by more than one witness, should not be permissible. Second, I am not convinced that the proposal to adjust the majority verdict will act as an alternative safeguard, simply because there is no evidence as to how juries reach decisions in Scotland nor on the effect of the bare majority rule. In contrast, many studies have been done by social psychologists demonstrating that ‘peer pressures’ within jury rooms will strongly influence ‘hung’ juries in one way or the other. Therefore, most 8-7 majorities for conviction may simply become 10-5 majorities in practice. We simply do not know. I am ambivalent on the question of granting the judge the power to remove the decision from the jury where, in his or her view, ‘no reasonable jury’ could convict. On the one hand, this would prevent ‘perverse’ convictions which I think are inherent in trial by jury. On the other hand, this would require one judge, rather than 15 jurors, to make a decision on the credibility and reliability of a witness or a piece of evidence (eg a purported DNA match) and the judiciary, of course, are not immune from misjudgements in this area and the influence of extraneous matters.

Peter Duff
Professor of Criminal Justice
Law School, Aberdeen University
21 October 2013
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from the Edinburgh Bar Association

The Criminal Justice Bill lays out a number of sensible provisions designed to protect accused persons being processed by the justice system. It is therefore a great shame that it also contains provisions that threaten to seriously damage that system - predominantly the abolition of the need for corroboration at Section 57. As requested in the Government’s request for responses, the Edinburgh Bar Association’s response will follow the order of the provisions within the Bill.

Following the decision in the case of Cadder, police were given the power to detain members of the public in custody for extended periods - in some cases for up to twenty-four hours. Lord Carloway raised concerns that this increase in detention was unnecessary and should be reconsidered. Clearly this has been given consideration, leading to the provisions contained in sections 9 to 12 of the Bill. Therein, a twelve-hour time limit is enshrined, with the necessity of detention to be reviewed after six hours. We say the Bill should go further and instead re-impose the six-hour limit previously in force. As an association, our experience is that this allows ample time for solicitor contact to be made and consultations to take place (in cases where it is requested). An extension beyond a six-hour limit is unnecessary and should not be provided for.

Post-charge questioning will be possible if Section 26 of the Bill comes into force. It is proposed that the Court be given power to grant warrant to arrest for questioning, "If it seems to the court expedient to do so". The phrasing of this provision is worrisome to the association. Expedience is convenience. "Where it seems to the court that there is good reason to do so" would represent a higher and more appropriate test. The right not to be detained unnecessarily is a theme in the Bill and would be better served by a shorter time limit, out with which further questioning should take place only where good reason is demonstrated.

Section 36 confers a right upon a detained person to consult with a solicitor at any time whilst in custody. Typically, this will take place prior to interview by police officers. We suggest that consideration be given to placing an obligation on constables to provide pre-interview disclosure to the solicitor. Disclosure should include all information relating to the subject matter of the interview necessary to advise the detainee - principally on the subject of the "right to silence".

The need for corroboration in criminal cases should not be abolished. No proper case has been made out for abolition. Lord Carloway describes the standard of proof as "the real protection" against miscarriages of justice. There seems to be a desire to dismiss corroboration as a sacred cow that serves no real purpose and will not be missed. Nothing could be further from the truth. Abolition places accused persons, at every level of prosecution, at risk of conviction on the testimony of a single, convincing liar. No cross check required. It is commonly said that the standard of proof in Scotland is a high one, and it is. But that does not mean that on its own it is sufficient to protect against grave miscarriages of justice. In a civilised society such
as ours we should not be seeking to pare back the legal protections of our citizens to a bare minimum. Scotland deserves better than that.

Concerns have been raised that abolition will make the jobs of our police and prosecution service more difficult. Corroboration provides a sensible, reasonable base line which inquiries and prosecutions require to meet before they are proceeded with. It allows decisions regarding reporting or prosecuting to be made quickly and fairly. If corroboration is removed, then all single witness allegations will - technically - meet the test of sufficiency of evidence. This will place enormous, and potentially unbearable, strain on police officers: firstly to make the reporting decision and secondly to follow up and prepare the greater number of prosecutions that will inevitably follow. The same can be said of the Crown and Procurator Fiscal Service. A lower prosecution threshold necessarily means more cases in a system that is already struggling to cope. This is evidenced by the move to extend custody time limits in sheriff and jury cases. We understand that reporting/prosecuting decisions will be made on the basis of whether there is a realistic prospect of conviction. This is an entirely subjective test. It is entirely possible to envisage the test being applied in different ways across the country. It would be a great surprise if that were not the case. Stepping away from the current objective test - "is there sufficient corroborated evidence to proceed?" - is stepping backwards.

Consideration has been given to safeguards, in the event that abolition does happen. The proposed safeguards are inadequate. In jury cases, a guilty verdict will be passed when ten jurors are in favour. This is a far lower threshold than in other jurisdictions where corroboration is not required. England is an obvious example, where ten out of twelve jurors must vote for a guilty verdict to result in conviction. A smaller majority means weaker protection. Perhaps most obviously and most importantly, the Bill does not propose any safeguards whatsoever in relation to summary prosecutions. The vast majority of prosecutions are at summary level. Conviction at summary level can result in imprisonment for up to twelve months - eighteen in aggravated cases. The stakes are high. Should there not also be additional protection in these cases? The logical course is to retain corroboration and solve the problem before it arises.

As indicated above, pre-trial time limits are to be extended in sheriff and jury level custody cases. As practitioners in Edinburgh, we are aware that there is often a large backlog of sheriff and jury cases and that the system is under pressure. However, extending the custody time limits is no way to go about resolving the problem. Inefficiencies and under-staffing in the Procurator Fiscal service, coupled with a number of recent policy decisions increasing the number of cases tried on Indictment, are to blame here.

It is disappointing that the Bill seeks at section 66 to introduce written records in sheriff court solemn cases. This would place a further bureaucratic burden on both prosecutor and defence. Defence solicitors are already required to lodge Statements of Defence – written records would mean duplication of work. We are under obligations to our clients in terms of quality of service, and to the court as officers of the court. There seems little justification for further provision on this point.
Naturally, the focus of responses such as this is criticism. The Edinburgh Bar Association hopes that in considering our views, the Scottish Government will understand that we share its objectives. Our sole concern is that the justice system in Scotland is protected and - where possible - improved. If the issues raised here can be are addressed, we see no reason why the Bill cannot be a success. If they are not, fairness in our courts may soon be a thing of the past.

Edinburgh Bar Association.
30 August 2013
Justice Committee
Criminal Justice (Scotland) Bill

Written submission from Equality and Human Rights Commission

Introduction
The Equality and Human Rights Commission promotes and protects equality across Scotland, England and Wales, working to eliminate discrimination, reduce inequality and make sure that everyone has a fair chance to participate in society. In Scotland, we share our role as a National Human Rights Institution with our colleagues in the Scottish Human Rights Commission (SHRC).

There are several aspects of the Criminal Justice (Scotland) Bill which are relevant to our remit, including:

1. The proposal for an aggravation for people trafficking
2. The abolition of corroboration rule
3. The proposals for rights of suspects in police custody including vulnerable adults.

Proposed human trafficking aggravation
In November 2011, the Commission published its report on the Inquiry into Human Trafficking in Scotland. The inquiry aimed to understand better the factors which underpin human trafficking in Scotland, as well as to examine the legal, institutional and policy shifts required to address it more effectively.

One of the main findings from the inquiry was that legislation on human trafficking in Scotland is piecemeal and inconsistent. Human trafficking is addressed in a range of legislation, such as sexual offences, asylum or immigration law, and these different pieces of legislation carry different definitions for what is essentially the same act. Since the inquiry’s publication, the Council of Europe’s Group of Experts on Action against Trafficking in Human Beings (GRETA), in its report on progress in the UK, has also highlighted the need to work to the best and most comprehensive definition of human trafficking. The inquiry recommended that the Scottish Government introduce a comprehensive Human Trafficking Bill based upon a review of all its legislation relating to human trafficking. While recognising that a new statutory aggravation does not address these wider points, we welcome the proposal and believe it can be an important additional weapon for police and prosecutors.

Abolition of corroboration rule
The Carloway Report reflected on the experience of women victims of violence and noted the challenge of corroborating offences whose hidden nature makes this difficult, if not impossible. Our human trafficking inquiry also identifies the evidential bar set by corroboration as a barrier to cases getting to court. Scots law requires corroboration for a criminal offence that can be proved only by “leading evidence from at least two independent sources that the crime was committed and that the accused was the perpetrator”. In the view of the COPFS, this requirement, together

with the inherent difficulty of getting traumatised survivors to be witnesses, poses "real challenges in obtaining a sufficiency of evidence to satisfy the requirement for corroboration".\(^4\)

There are however, wider and deeper factors which contribute to the very low conviction rates for certain crimes. Systemic issues around appropriate questioning and support, and wider public attitudes to rape and sexual offences may be just as important, if not more so, than the issue of corroboration rules stopping cases reaching court. Similarly, juries’ reluctance to convict in rape trials is linked to wider assumptions and negative attitudes. In order to address low conviction rates, there is much work that to be done to build the capacity of sheriffs, judges, police, and the members of juries, to respond appropriately to sexual and domestic violence. Clearly if changes to the corroboration rules proceed, the Government must also ensure that the human right of accused persons are appropriately protected.

**Rights of suspects in police custody, including vulnerable adults**
The Commission welcomes the provisions in the Bill which define a vulnerable person on arrest, detention and questions as a person aged 18 or over who is assessed as vulnerable due to a mental disorder as defined in section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Again, there are wider challenges around awareness-raising and training for staff working in criminal justice agencies. In order to strengthen rights and protection for disabled accused persons, the Commission recommends that Article 13 of the United Nations Convention on the rights of Persons with Disabilities is given meaningful effect in practice: ‘In order to help to ensure effective access to justice for persons with disabilities, State Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.’

Equality and Human Rights Commission
29 August 2013

\(^4\) COPFS evidence to human trafficking inquiry, p 70.
Justice Committee

Criminal Justice (Scotland) Bill

Written Submission from Evangelical Alliance

Introduction

1. The Evangelical Alliance in Scotland is the largest body serving evangelical Christians in Scotland and has a membership including denominations, churches, organisations and individuals. Across the UK, Evangelical Alliance membership includes over 700 organisations, 3500 churches and thousands of individuals. Our members in Scotland include the Baptist Union of Scotland, Vineyard Churches, the Salvation Army, Newfrontiers, Elim Pentecostal Churches, Assemblies of God, The Free Church of Scotland, Brethren, a number of congregations within the Church of Scotland and other independent churches. We have a number of organisations as members in Scotland including Glasgow City Mission, Bethany Christian Trust, Tearfund and Scripture Union Scotland.

General Comments

2. The Evangelical Alliance welcomes the opportunity to comment on the proposed Criminal Justice (Scotland) Bill. As a representative organisation we have members engaged at almost every stage of the criminal justice process whether as individual members in the policing or legal professions, churches involved in community safety initiatives such as Street Pastors, or organisations working with offenders and their families before, during and after time imprisonment. The church has always taken an interest in supporting vulnerable people, whether those at risk of offending, or those who are victims of crime. In addition the provision of fair and equitable justice is a core theme of Christian theology and one in which we believe is one of the fundamental hallmarks of a modern, civilised society. We would be happy to give oral evidence to the committee as representatives of civic society and communities across Scotland, should that be helpful to the committee.

Police powers and the rights of suspects

3. The Evangelical Alliance is in broad agreement with the provisions contained in the Bill on police powers and the rights of suspects. We welcome the clarity given by having a single state of custody, a single maximum 12 hour period of questioning and the provision of the Bill to ensure that cases are heard at the next sitting day of the court. We believe these are broadly sensible proposals that strike a reasonable balance between the rights of the person detained, and the time needed for the police to properly investigate and question a suspect.

4. We also welcome the provisions on the rights of suspects. In particular we welcome placing the right to a solicitor on a permanent, statutory footing. This was an anomaly of Scots law that was tolerated for far too long and we believe that placing this provision at the heart of the Scottish Criminal Justice System is an important step following on from the provision of the 2010 Act. We also welcome the provisions for Child Suspects and Vulnerable Persons who may be under arrest.
Corroboration

5. In common with the majority of respondents to the Scottish Government’s consultation, the Evangelical Alliance has concerns about the planned removal of the need for corroboration in criminal cases. This issue is a very difficult and sensitive one and we have great sympathy for cases where victims of crime feel that the requirement for corroboration affects their ability to access justice. However we also believe that the provision of corroboration provides an important safeguard in the criminal justice system and the removal of corroboration comes dangerously close to lowering the burden of proof required to secure a criminal conviction. Successful prosecution should rely on effective policing, compassionate support services to victims and deterrent sentences upon conviction, and however heinous a crime the state should not resort to changing the legal standards necessary to secure a conviction.

6. In our approach to this issue we wholly recognise the sensitive nature of cases, particularly of sexual crime and domestic violence, which are advocated by the Scottish Government as reason to remove corroboration. We would advocate providing additional resources in these areas for policing and victim support services, as well as tougher sentences upon conviction of these crimes to act as a deterrent.

Court Procedures

7. We broadly welcome the provisions for court proceedings as outlined in Sheriff Principal Bowen’s recommendations. Often court proceedings are unnecessarily complicated, unwieldy and inefficient for victims, witnesses and suspects alike and we support any recommendations to streamline the provision of services and provide better value for the taxpayer.

8. We also welcome the provision of the early communication between prosecution and defence as a way to improve efficiency. However we are concerned that the increase of remand time to 140 days is excessive and are not convinced that such a large extension is necessary to accommodate this meeting. This seems to us to be an unacceptable price to pay in the liberty of those who at that stage have not been convicted. We are also concerned that this will lead to increased pressure on an already overburdened prison system.

9. Whilst we are not persuaded about the removal of corroboration we do agree that the jury majority required should be increased to two thirds, whether or not the corroboration requirement is removed.

Statutory Aggravation for Human Trafficking

10. The Evangelical Alliance has been heavily involved with partners in trying to raise awareness of the issue of Human Trafficking. We welcome the new focus being given to this issue in Scotland and also the provision of the statutory aggravation for offences with a human trafficking background.
INTRODUCTION

1. On 26 June 2013 the Scottish Parliament’s Justice Committee issued a call for written evidence on the Criminal Justice (Scotland) Bill. The call sought views on the general principles of the Bill.

2. The Faculty of Advocates is the independent bar in Scotland. Its members include advocates who have considerable experience of the criminal justice system, both as defence counsel and as prosecutors. The Faculty’s written evidence is in the form of an executive summary followed by a more detailed response in respect of each part of the Act.

EXECUTIVE SUMMARY

3. The Faculty welcomes the simplification, clarification and modernisation of the law of arrest and detention. Although the Faculty has comments on certain specific features of Part I (and these are set out below), generally speaking the Faculty welcomes the thrust of the reforms set out in Part I of the Bill. The one point which the Faculty would wish to highlight is the importance of the review provided for in section 17. If this is to be an effective safeguard, the police should be under an obligation of disclosure, and funding arrangements will require to be in place.

4. The Faculty does not support the proposal in Part 2 of the Bill to abolish corroboration. The following are the Faculty’s principal reasons:

   (i) The requirement of corroboration is central to the administration of criminal justice in Scotland at all stages. It cannot be removed without considering (and responding to) the ramifications for all stages of the criminal justice system.

   (ii) There is no clarity as to what will be put in its place. We do not know what test prosecutors will apply in deciding whether or not to prosecute a case. Without knowing what will substitute for corroboration, it is difficult to make a meaningful assessment of the effects of removal.

   (iii) Corroboration is a safeguard against miscarriages of justice. The only counterbalance proposed in the trial process, in light of the abolition of corroboration, is the increase of the jury majority from a bare majority to two thirds (10 out of 15). The consequence – that an accused may be convicted on the uncorroborated evidence of a single witness whom five out of fifteen jurors disbelieve – leaves the safeguards against wrongful conviction at an unacceptably low level.
(iv) There is no evidence to support the contention that the abolition of the requirement of corroboration will result in an increase in the proportion of sexual offence cases which result in a conviction. At present, the only cases which proceed to trial are those in which there is corroboration. The proportion of those cases which result in an acquittal reflects the fact that, even with a requirement of corroboration, such cases may present difficulties. It is a fallacy to believe that, by prosecuting cases even where there is no corroboration, the proportion of successful cases will increase. The reverse is more likely to be true.

(v) At the same time, the abolition of corroboration may disadvantage victims of crime. Cases may be prosecuted where there is, in fact, no strong likelihood of success, putting complainers through a trial process only to see the accused being acquitted. At the same time, if there is no legal requirement for corroboration, there is at least a risk that the police will not investigate with a view to finding corroborative evidence if it exists. This could mean that cases which currently result in a conviction will, following the change, result in acquittal - because it may be the corroborative evidence which persuades the jury to believe the complainer's account, or to prefer the complainer's account to that of the accused.

(vi) In the current environment, the resource implications of abolition cannot be ignored. The analysis in the Financial Memorandum is open to criticism for all the reasons set out in the Faculty's draft response to the Finance Committee's call for evidence (which is attached as an Annex). Perhaps most seriously, the Financial Memorandum assumes that the additional resources required can largely, if not entirely, be absorbed through efficiency savings. In relation at least to the COPFS and the Court Service, this seems to the Faculty to be unrealistic.

5. The Faculty's position is elaborated in more detail below.

6. The Faculty does not consider that the proposal in Part 3 of the Bill to increase the majority required for a guilty verdict from eight to ten out of fifteen goes far enough. To convict an accused where five out of fifteen jurors are not convinced of his guilt is not consistent with the requirement of proof beyond reasonable doubt. The Faculty would take this view even if corroboration were not being abolished. In the context of the abolition of corroboration, this change is insufficient to secure a trial process which provides reasonable assurance against miscarriages of justice.

7. The Faculty offers some specific comments on other parts of the Bill as set out below.

**PART 1 ARREST AND CUSTODY**

Chapter 1 Arrest by police

8. The Faculty supports the simplification, clarification and modernisation of the law of arrest and detention in light of the European Convention. As the Faculty pointed out in its previous response to the Scottish Government, one of the key features of
such a system is that an individual should not have his liberty restricted without good reason.

9. The Bill introduces a new police power to re-arrest a suspect on the same grounds and to hold the suspect in custody for the unexpired balance of the 12 hour period. The Faculty suggests that there should be a statutory obligation on the police to inform a suspect upon release that (i) he may be re-arrested and (ii) then held for the unexpired balance of the 12 hour period. Such a provision could be added to section 11.

Section 5

10. The Faculty understands that as of 1 July 2013, all people held in police custody are given a letter informing them of their seven key legal rights. The Faculty submits that the letter must be given to the person at the earliest opportunity and that the rights must also be read out to the person to assist their comprehension. Accordingly, subsection (3) should be amended to state that the information must be provided ‘verbally and in writing’.

Chapter 2 Custody: Persons not officially accused

11. In respect of individual sections of the Bill, the Faculty wishes to make the following observations and suggestions:

Section 7

12. The Faculty believes that authorisation for keeping a person in custody should be by an officer of the rank of sergeant or above rather than the rank of constable. The Faculty notes that section 9 requires the review after 6 hours to be carried by a police inspector or above.

Section 9

13. The Faculty believes that there should be a statutory requirement that a record of the review of detention after 6 hours is maintained. This is an important safeguard against individuals being detained for longer than is necessary and proportionate.

Section 11

14. The Faculty believes that the section should make clear that upon expiry of the 12 hour period the person shall be informed immediately that the period has expired and that he should be released immediately from custody.

Section 12

15. There should be a statutory requirement upon arrest and upon arrival at the police station to inform a re-arrested person of the maximum period he may be held for, namely the 12 hour period less the period spent in custody previously.
Section 13

16. Subsection (6) envisages the questioning of a suspect at hospital. Suspects are not regularly taken to hospital for treatment; suspects are usually examined within a police station by a casualty surgeon. In circumstances where the police feel that it would be appropriate to take a suspect to a hospital for treatment, the Faculty believes that it would be inappropriate to question such a suspect until he is taken back to the police station.

Section 14

17. The Faculty notes that this provision bears a similarity to the existing power of the police to release a person on an undertaking in terms of section 22 of the Criminal Procedure (Scotland) Act 1995 and in terms of sections 19 and 20 of the Bill. However, important requirements of section 22 of the 1995 Act are missing. Section 22 of the 1995 Act requires that the person agrees to provide the undertaking and that he signs the undertaking. If not, then the police may either liberate him without an undertaking or refuse to liberate him. The Faculty believes that section 14 of the Bill should be amended to include these requirements.

18. In addition, the Faculty believes that upon release under section 14 of the Bill the person should be provided with a copy release document. Furthermore, the copy release document should include a section informing the person of his right to apply to a sheriff to have the conditions of his release reviewed under section 17.

Section 17

19. As indicated in our evidence in respect of section 15, the Faculty believes that the copy release document provided to the person upon release should include a section informing him of his rights under section 17.

20. The section does not specify that the length of the period of the investigative liberation as something which can be reviewed by the court. The Faculty believes that this should be capable of review.

21. In the absence of a requirement to provide the person with a summary of evidence (which is now routinely provided by COPFS to persons appearing in court), it is difficult to see how meaningful representations can be made on the appropriateness and proportionality of the conditions. For the same reason, it is difficult to see how a sheriff could carry out a meaningful review.

22. The section is silent on important procedural matters. Would there be a hearing on the application or would the application simply be dealt with in chambers? Would there be a time limit fixed by statute within which the application must be heard? Would the person have notice of, or an opportunity to comment on, the procurator fiscal's representations? Would legal assistance be available? If so, how would it be funded? What impact would the processing of these applications have on the police, COPFS and the courts?
23. In order for a review to be practically effective, the Faculty believes that there would need to be: (i) a disclosure protocol in respect of the information which apparently led to the imposition of the conditions (ii) a procedural structure and (iii) funding for legal advice.

Chapter 3 Custody: Persons not officially accused

Section 19

24. The Faculty notes that liberation of a person on an undertaking requires the person to give an undertaking. However, the section does not require that the undertaking is in writing nor does the section require that it is signed by the person. The existing police power to release on an undertaking contains these requirements. The breach of an undertaking is an offence. The Faculty believes the section should mirror the existing legislation: it should contain specific requirements that a person released on an undertaking signs it and is provided with a copy of it.

25. In addition, the Faculty believes that the copy undertaking should include a section informing the person of his right to apply to a sheriff to have the conditions reviewed under section 22.

Section 20

26. The Faculty recognises that giving the police the power to release a person on conditions may often be in the interests of that person. It allows him to be released sooner; if the police did not have this power, then the person would need to be held in custody until his court appearance when the same conditions might be imposed by the court.

27. The imposition of a curfew on a person who has not been officially accused of committing a crime is a significant restriction on that person’s liberty: it effectively places a person under house arrest for a period of up to 12 hours in any 24 hour period. The Faculty believes that if the police feel that a curfew is appropriate then an application should be made to the court.

Section 22

28. As indicated in our evidence in respect of section 19, the Faculty believes that the copy undertaking provided to the person upon release should include a section informing him of his rights under section 22.

29. In the absence of a requirement to provide the person with a summary of evidence (which is now routinely provided by COPFS to persons appearing in court), it is difficult to see how meaningful representations can be made on the appropriateness and proportionality of the conditions. For the same reason, it is difficult to see how a sheriff could carry out a meaningful review.

30. The section is silent on important procedural matters. Would there be a hearing on the application or would the application simply be dealt with in chambers? Would there be a time limit fixed by statute within which the application must be heard?
Would the person have notice of, or an opportunity to comment on, the procurator fiscal’s representations? Would legal assistance be available? If so, how would it be funded? What impact would processing these applications have on the police, COPFS and the courts?

31. In order for a review to be practically effective there would need to be: (i) a disclosure protocol in respect of the information which apparently led to the imposition of the conditions (ii) a procedural structure and (iii) funding for legal advice.

Chapter 4: Police interview

Section 23

32. The Faculty believes that subsection (2) should require that the specified information is given at the start of the interview as well as being given not more than one hour before the interview.

Section 24

33. Subsection (4) would enable the police to interview a person without a solicitor “in the interests of the investigation”. The Faculty believes that this is far too low a threshold. The existing provision in section 15A(8) of the Criminal Procedure (Scotland) Act 1995 provides the higher threshold of “in exceptional circumstances”. Furthermore, the recently proposed European Directive on Rights of Access to a Lawyer provides for a similarly high threshold. The Faculty firmly believes the police should not be allowed to interview a person without a solicitor unless such a higher threshold is met. The Explanatory Notes to the Bill fail to mention the existing statutory provision.

Section 25

34. The Faculty believes that the words “owing to mental disorder” where they appear in subsection (2)(b) should be deleted. It may be very difficult for a police officer, without medical training and without any assistance from a police casualty surgeon, to assess whether or not a person is suffering from a mental disorder. The Faculty believes that any person who appears unable to understand sufficiently what is happening or communicate effectively with the police should be provided with support. Furthermore, it is highly unlikely that such an interview, if challenged, would be regarded as admissible. If the words are deleted, subsection (6) should be deleted as a consequential amendment.

Section 29

35. The Faculty believes that maximum length of time a person may be held in custody for post charge questioning under subsection (2) should be fixed by statute rather than left completely to the discretion of the court. This period of detention should include the period between arrest and arrival at the police station.
Chapter 5: Rights of suspects in police custody

Section 33

36. The Faculty believes that the words "owing to mental disorder" where they appear in subsection (1)(c) should be deleted. It may be very difficult for a police officer, without medical training and without any assistance from a police casualty surgeon, to assess whether or not a person is suffering from a mental disorder. The Faculty believes that any person unable to understand sufficiently what is happening or communicate effectively with the police should be provided with support. As we indicated earlier in our comments in respect of section 25, it is highly unlikely that such an interview, if challenged, would be regarded as admissible. If the words are deleted, subsection (5)(a) should be deleted as a consequential amendment.

Chapter 6: Police powers and duties

37. The Faculty has no comment to make on this chapter.

Chapter 7: Breach of liberation conditions

38. The Faculty has no comment to make on this chapter.

Chapter 8: General

39. The Faculty has no comment to make on this chapter.

PART 2: CORROBORATION AND STATEMENTS

Section 57

40. The Faculty does not support the proposal in the Bill to abolish the requirement of corroboration. The following are the Faculty’s principal reasons:

(i) The requirement of corroboration is central to the administration of criminal justice in Scotland at all stages. It cannot be removed without considering (and responding to) the ramifications for all stages of the criminal justice system. Yet there is no clarity as to what will be put in its place. We do not know what test prosecutors will apply in deciding whether or not to prosecute a case. Without knowing what will substitute for corroboration, it is difficult to make a meaningful assessment of the effects of removal.

(ii) Corroboration is a safeguard against miscarriages of justice. The only counterbalance proposed in the trial process, in light of the abolition of corroboration, is the increase of the jury majority from a bare majority to two thirds (10 out of 15). The consequence – that an accused may be convicted on the uncorroborated evidence of a single witness whom five out of fifteen jurors disbelieve – leaves the safeguards against wrongful conviction at an unacceptably low level.

(iii) At the same time, the abolition of corroboration may not benefit victims of crime. Cases may be prosecuted where there is no reasonable prospect of success,
putting complainers through a trial process without the satisfaction of a guilty verdict at the end of it. It is often the corroborative evidence which convinces the jury that the complainer’s account is to be preferred to that of the accused. If there is no requirement for corroboration, there is a real risk that the police will not investigate with a view to finding corroborative evidence if it exists, and prosecutors may prosecute without insisting on corroboration.

(iv) In the current environment, the resource implications of abolition cannot be ignored. The analysis in the Financial Memorandum is open to criticism for all the reasons set out in the Faculty’s draft response to the Finance Committee’s call for evidence. Perhaps most seriously, the Financial Memorandum assumes that the additional resources required can largely, if not entirely, be absorbed through efficiency savings. In relation at least to the COPFS and the Court Service, this seems to the Faculty to be unrealistic.

41. In its response to the Scottish Government’s Consultation on Lord Carloway’s Report, the Faculty emphasised that:

(i) the matters raised are of fundamental importance to the administration of justice in Scotland;

(ii) given the centrality of corroboration to the system of criminal justice in Scotland, any review of corroboration should be undertaken as part of a review of the Scottish criminal justice system as a whole and having regard to distinctive Scottish features such as the routine reliance on dock identification;

(iii) if the requirement of corroboration were to be abolished then an accused person could be convicted of the most serious crime on the basis of the uncorroborated evidence of a single witness whom seven out of fifteen jurors do not believe; such a proposition is unacceptable in any modern justice system.

(iv) in the absence of corroboration, the criterion to be applied by prosecutors should be made known and articulated in statute.

42. In respect of Point 3, Lord Carloway did not consider an alteration to the majority necessary for a conviction as “either necessary or desirable” [Carloway Report, para 1.0.20]. The Scottish Government has rejected Lord Carloway’s position and the Bill now seeks to increase the majority in a jury of 15 from 8 to 10 jurors. The Faculty maintains the position set out in its response to the Scottish Government’s Additional Safeguards consultation. Many comparable systems with a jury of 12 require a majority of at least 10 jurors for a conviction. The Faculty questions why the Scottish criminal justice system should require proportionately fewer jurors to be convinced of the guilt of the accused. The Faculty would favour a reduction of the jury to 12, with a requirement of at least 10 for a guilty verdict.

43. In respect of Points 1, 2 and 4, the Faculty maintains its position. The Faculty remains concerned that fundamental reforms of the Scottish criminal justice system are being considered in a piecemeal fashion. Support for the Faculty’s position can be found in Lord Carloway’s evidence to the Justice Committee (on 29 November 2011) which illustrated the complexity and interdependence of the issues involved: “if
we go down the route of examining majority verdicts, we must examine the not proven verdict. If I had gone down that road, there would have been another 150 pages in the report.” Notwithstanding this evidence, the Scottish Government now proposes to alter the size of the majority verdict but not to examine the not proven verdict; instead, it intends to refer the not proven verdict to the Scottish Law Commission.

44. The Faculty would not wish to be understood as opposing any re-assessment of the place of corroboration in the criminal justice system. The Faculty recognises the real concerns that, in some cases, the requirement can result in crimes going unpunished. But if corroboration is to be abolished, this should only be done following an assessment of its place in the criminal justice system as a whole, that it be done only in conjunction with measures designed to ensure that miscarriages of justice do not occur, and that it be done with eyes wide open to the potential resource implications of the change.

The effect of removing the requirement of corroboration

45. The requirement of corroboration permeates the criminal justice system at every stage. The abolition of this safeguard would, if no other changes were made, create a system which would look quite different at every stage.

(i) The police would presumably report cases to the fiscal on the basis that there was a single piece of evidence supporting each of the two essential facts: a crime had been committed and the accused was the person or one of the persons who committed it.

(ii) Assuming a single piece of evidence to support the two essential facts, the only question for the prosecutor in deciding whether or not to prosecute the case, would (if no other change was made to the criterion to be applied by prosecutors in marking cases for prosecution) be whether the public interest favoured prosecution.

(iii) On the assumption that there is at least a single piece of evidence supporting each of the essential facts, there would be no basis upon which the trial judge could withdraw a charge from the jury no matter how unsatisfactory the evidence.

(iv) Juries would be directed that they could convict on the basis of a single piece of evidence acceptable to them which established the two essential facts.

(v) An accused could be convicted on the uncorroborated testimony of a single witness or a single piece of evidence, even if (on the proposals in this Bill as regards majority verdicts) five out of the fifteen jurors found that single witness or single piece of evidence incredible or unreliable.

(vi) On appeal, again assuming a single piece of evidence supporting the two essential facts, the only basis upon which the appeal court could review the case by reference to the quality or sufficiency of the evidence would be the “no reasonable jury” test.
46. The proposal to abolish the safeguard of corroboration invites at least the following questions, the answers to which would be relevant to any decision as to whether it is a wise or appropriate step:—

(i) What safeguards or guarantees are there, against a backdrop of significant and sustained pressures in funding, that the police will not short-circuit the investigation of individual cases?

(ii) What criterion are prosecutors to apply when deciding whether or not to prosecute cases?

(iii) On the assumption that prosecutors are to be required to apply some criterion in deciding whether or not to prosecute, should the trial judge not have power to withdraw the case from the jury if, in fact, the evidence at trial does not meet that criterion?

(iv) Separately, should trial judges be given the power – or indeed the duty in all or certain classes of case – to warn the jury of the dangers of convicting on the basis of uncorroborated evidence?

(v) Is it acceptable that an accused could be convicted on the basis of one uncorroborated item of evidence even if five out of the fifteen jurors do not accept that evidence or do not find it a sufficient basis for conviction?

Investigation of crime

47. There is a legitimate concern that if corroboration is not required as a matter of law, the police will not carry out exhaustive enquiries directed to finding corroborative evidence if it exists. This is a real concern in the current climate where there are significant pressures on resources (and where it is recognised that the abolition of corroboration will result in additional cases being prosecuted). This could easily have the effect of causing, rather than preventing, miscarriages of justice for complainers as well as for accused persons. Often, it is the apparently minor piece of corroborative evidence that makes rather than breaks a case. For example, in an allegation of sexual assault through nerves, vulnerability or for some other reason a complainer may not appear to be a convincing witness and on his, or her, testimony alone the jury would not be satisfied beyond a reasonable doubt. However, further police or forensic investigations may reveal a piece of evidence, which not only provides the technical corroboration but confirms the complainer’s evidence and satisfies the jury to the required standard. In a justice system where corroboration is not required, there is a risk that, in such a case, the corroborative evidence will not be found, and the complainer’s evidence alone will not convince the jury of the guilt of the accused.

Decisions to prosecute

48. Corroboration is not just a technical requirement. If there is corroborated evidence that the accused committed the alleged crime, this provides a reasonable assurance that the case is one which has reasonable prospects of success. If the requirement of corroboration were to be abolished without substituting any other
criterion upon which prosecutors are to proceed when marking cases for prosecution, there would be pressure on COPFS to prosecute any case where some evidence exists regardless of the quality of that evidence. Cases would be pursued and complainers subjected to the trial process where there is, in fact, no realistic prospect of conviction. Such a situation would be unfair both to complainers and to accused persons and would involve a waste of public resources.

49. It seems to be accepted or acknowledged that, if the safeguard of corroboration were to be abolished, prosecutorial marking decisions would not simply be based on a test of sufficiency (plus public interest), but would be based on some qualitative assessment of the evidence as a whole. The comparative exercise carried out as part of Lord Carloway’s review used a “reasonable prospect of conviction” test. Slightly different formulations of the test could, at least in theory, have a significant effect on the type and number of cases which would be prosecuted. Are prosecutors, for example, to prosecute any case where there is some evidence unless there is no reasonable prospect of conviction? Or are they to prosecute a case only if there is a reasonable prospect of conviction?

In the Faculty’s view, the question of what test should be applied by prosecutors in the event of the abolition of corroboration is a question which cannot be avoided if corroboration is abolished – indeed is intrinsic to the question of whether or not corroboration should be abolished. The effects of abolition cannot meaningfully be assessed without knowing what criterion is to be put in its place. That question is one of great public interest. It should be the subject of explicit, informed and public debate, and any test should be prescribed by law.

50. The application of a qualitative test of this sort would depend significantly on individual judgment. Further, prosecutors mark cases on the basis of the papers. They rely on the statements which have been taken by the police. Precognition by a member of the COPFS staff is, today, unusual. In these circumstances, the prosecutor’s ability to make a realistic assessment of the quality of a witness’ evidence is limited. Take, for example, a case where a complainer alleges sexual assault. Without seeing the witness, how is the prosecutor to form a view as to the prospects of success?

**The role of the trial judge**

51. If prosecutors are to apply a “reasonable prospect of conviction” test, or indeed, some other qualitative test, in deciding whether or not to mark a case for prosecution, what is to happen if the evidence as it in fact emerges at trial is not of a quality which should properly have been held to meet the test? Surely the prosecutor should then be obliged to withdraw the case from the jury. And if the prosecutor were not do so, the trial judge should have the power to withdraw the case from the jury. It would surely not be acceptable to have a system in which, if the evidence does not come up to the standard which would have justified a prosecution in the first place, the defence could not make a submission to that effect, and the trial judge could not withdraw the case from the jury.

The fact that our system permits the Appeal Court to overturn a conviction on the basis that no reasonable jury would, on the evidence, have convicted implies a
recognition that juries, sometimes, do behave unreasonably. The Appeal Court, in applying that test, recognises and respects the advantages which those present at the trial, who saw the evidence, have over the Appeal Court, which can proceed only on the papers. Why should the trial judge – the one professional independent judge who has seen and heard the evidence – not be entitled to take the view that the case should not be left to the jury if the evidence is not such as would justify a conviction?

52. In any event, if the requirement of corroboration were to be abolished, the question of how the judge should charge the jury would have to be addressed. Judges would presumably, at least, have to direct juries that there must be at least one piece of evidence which the jury accepts and which supports each of the following facts: (i) that a crime has been committed; and (ii) that the accused is guilty of the crime. But should the judge be required to direct the jury on the need to consider all the evidence that they have heard and to consider whether there is evidence which supports, or on the other hand, undermines, the Crown case? If (as our system has hitherto assumed) there are dangers in convicting on the basis of uncorroborated evidence, judges should have the power, if they consider it appropriate to do so in the particular circumstances of the case, to give juries a warning to that effect.

Resource implications

53. Quite apart from these issues of principle, it seems to the Faculty that the resource implications of the proposal require to be addressed. In order to assess the potential impact of the proposal on the resources required by the criminal justice system, it would be necessary to consider at least the following:

(i) What is the likely impact on the number of additional cases reported by the public to the police? It seems reasonable to surmise that a number of crimes go unreported because there is only one witness.

(ii) What is the likely impact on the number of cases reported to the procurator fiscal?

(iii) What is the likely impact on the resources required by COPFS in the precognition and marking of cases?

(iv) What is the likely impact on the number of cases which are prosecuted at a time of court closures?

(v) What is the likely impact on the incidence of convictions?

54. The Faculty has dealt in detail with this in draft evidence to the Finance Committee of the Parliament. Given the significance of the issue, the Faculty appends that evidence to this response also. That evidence is in draft, not least because the Faculty has requested from the Scottish Government sight of two “shadow” exercises which were undertaken and which inform the assessment of the effects of the change. If those were to be provided, the Faculty would wish to consider its evidence on the resource implications of the Bill in light of that material.
Section 59

55. In the event that the safeguard of corroboration is removed, the Faculty agrees that this should not be with retrospective effect. Legal advice is given on a lawyer’s understanding of existing law and practice. If the law in respect of corroboration was to be changed with retrospective effect, then an accused may be prejudiced for acting on advice which was sound legal advice at the time it was given but which would not have been given had there not been a requirement for corroboration. In particular, an accused may have been advised to refrain from making either a mixed or an exculpatory statement.

Section 60

56. This section provides that where the period of time during which a continuous offence is committed includes the relevant day, the specified condition is deemed to be met in relation to the whole offence. This effectively means that the abolition of corroboration is to be given retrospective effect in relation to a “continuous offence”. The Faculty opposes this proposal. It gives the abolition of corroboration retrospective reach – which the Faculty does not believe is consistent with principle. It would permit, for example, a prosecution to be brought in relation to events long predating the relevant date and continuing until after the relevant date and for a conviction to be brought on the basis of a single uncorroborated piece of evidence even if the whole period after the relevant date was, at trial, deleted from the charge.

Section 62

57. This section effects a significant change in respect of the admissibility of statements made by an accused. For important public policy reasons, exculpatory statements and/or mixed statements (containing incriminating and exculpatory material) led by the defence were not admissible as proof of any fact contained therein. In effect, this meant that an accused could not rely on exculpatory statements which he had previously made and thereby avoid having to give evidence on oath and be subjected to cross-examination at the trial.

If this provision were to be enacted, then an accused person, who made a statement to the police or other official, would be able to have his position e.g. consent to a sexual charge, self-defence to an assault considered by the fact-finder without himself having to give evidence on oath and be subject to cross-examination.

PART 3: SOLEMN PROCEDURE

Section 63

58. This section deprives the accused of an opportunity to make a declaration in respect of any charge. It is not clear why this change is being made. Why should the accused not be entitled to make a declaration if he wishes to do so?
Sections 65 to 67

59. The Faculty has some concerns that the volume of cases in the sheriff court and the pressure on the COPFS, particularly in Glasgow and Edinburgh will make it a difficult task to transpose, in effect, High Court procedure into the sheriff court.

Section 70

60. This provision amends the size of the majority for a guilty verdict. For the reasons set out above, the Faculty does not consider that the increase in the majority goes far enough. To permit an accused to be convicted when a third of the jurors are not convinced by the case against him does not seem consistent with the principle that an accused should be convicted only if the evidence against him establishes guilt beyond reasonable doubt. The Faculty would take that view even if corroboration were not being abolished. In the context of the abolition of corroboration, this provision is insufficient to secure a trial process which provides reasonable assurance against miscarriages of justice.

PART 4: SENTENCING

61. The Faculty offers no comment on this Part of the Bill

PART 5: APPEALS AND SCCRC

Section 82

62. The Faculty is concerned about the imposition of additional criteria only in respect of appeals referred by the Scottish Criminal Case Review Commission. The effect of this section would be that a conviction which the Appeal Court was satisfied amounted to a miscarriage of justice might not be set aside. Establishing to the satisfaction of the Appeal Court that there has been a miscarriage of justice is a very high threshold. The Faculty believes that it cannot be in the interests of justice to allow a conviction which the Appeal Court has found to have been based on a miscarriage of justice to stand.

PART 6: MISCELLANEOUS

Section 86

63. This section provides for the participation of a detained person by means of a live TV link. The Faculty welcomes the appropriate use of technology in courtrooms. It believes, however, that the successful use of technology will depend on the facilities made available. In particular, it will be essential that there is a facility for the accused to speak privately to his legal representative in advance of, or in the course of the hearing, if required.

Faculty of Advocates
6 September 2013
1. Introduction
This paper aims at providing a response to the consultation on the Criminal Justice (Scotland) Bill issued by the Scottish Government in June 2013, after Lord Carloway’s review of key aspects of Scottish criminal law and practice. This paper also discusses a few issues not raised by the Bill but which are worth considering to the end of improving the Scottish criminal justice system.

It is an undeniable fact that false allegations of crime can and do exist. Although admitting that quite often crime figures and statistics are inaccurate and difficult to be collated, the relevant authorities themselves confirm the existence of false allegations. The fact that in some areas, such as rape and domestic violence, the number of people persecuted for perverting the course of justice is significantly smaller than the number of prosecutions is by no means evidence that malicious or misguided allegations are irrelevant, but it might rather indicate the greater difficulty met when persecuting false allegation makers. By the same token, the same figures should not lead to underestimate the impact false allegations might have on the individual concerned and on the system of justice as a whole.

It should also be remembered that the goal of any change in the law should not be to merely increase conviction rates at all costs but rather make sure that only the guilty is punished. Thus, any change in the current law and practice must not skew the balance in favour of the Crown but rather confirm the overriding principle that a person is innocent until proven otherwise.

2. Corroboration
It is our understanding that the Bill recommends the abolishment of corroboration in Scots law.

A number of arguments are put forward against the retention of this principle, such as the increase of bureaucracy, the quality v. quantity argument, the difficulty of the general public to grasp such a concept.

The corroboration principle has however served Scottish law very well over the years mostly avoiding persecution based on petty evidence and inception of numerous and costly trials resulting in no convictions. The selection of cases going to trial needs indeed a filter, which should be as far as possible objective (rather than left to the prosecutor fiscal judgement’s and thus subjective) as persecuting any allegations would by contrast obstruct justice, for instance by dramatically increasing the prosecutors and courts' workloads as well as the associated costs.

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Providing for the persecution of single evidence cases is likely to result in trials solely started on the basis of the persecutor’s own perception of the credibility and reliability of the complainer, or the likelihood of success. Therefore, a subjective test would be used when determining the quality and sufficiency of evidence.

The public interest is better served if the legal system is just, impartial and efficient and, therefore, corroboration should be retained. By the same token, the argument that corroboration should be abolished in order to balance the system appears faulty because our system is based on the overriding principle of presumption of innocence, and thus the Crown and the defendant are not supposed to be on an equal footing but rather the former should prove the latter guilty beyond any reasonable doubt. The presumption of innocence is indeed a legal instrument to favour the accused based on the legal inference that most people are not criminals.

Furthermore, the fact that the Scot law is unique in providing for corroboration should not be viewed in isolation. In jurisdictions where there is no corroboration, further safeguards are often provided to avoid miscarriage of justice and to ensure that a person is only convicted if found guilty beyond any reasonable doubt. For example, in most European jurisdictions, the appeal stage allows for full reassessments on not only points of laws but also of facts, and the right to appeal is always granted to the accused, as opposed to being subject to a permission by the relevant court. Therefore, the corroboration principle may be better defined or explained but should be retained by the Scottish legal system.

3. Jury Majority and Size
The increase of the number of jurors (from 8 to 10) required to make a guilty verdict as envisaged in the Bill is welcome because it upholds the overriding principle that one must be proven guilty beyond any reasonable doubt in order to be convicted.

Any possible change in the number of jurors needed for a jury must be accompanied by a system of weighted majority because, inter alia, the risk of verdict contaminated by prejudices of individual jurors increases in smaller juries.

Furthermore, it is well known that in some jurisdictions (such as Canada and New Zealand) where the number of jurors is lower than in Scotland, unanimity or at least a qualified majority is always required.

No change in the number of jurors making a jury shall, therefore, be made without careful consideration and implementation of sound measures, which preserve justice.

4. Not proven
It is often said that the Scots system is unique in providing for the “not proven” verdict.

In fact, this is not accurate because similar acquittals verdicts are indeed present in other jurisdictions. For instance, under the Italian Criminal Procedure Code, in addition to the two verdicts that resemble the Scottish not proven and not guilty, three further acquittal verdicts are present, namely that no crime was committed by anyone; that the defendant acted justifiably; and that a procedural technicality requires acquittal.
Furthermore, in the US a number of academic proposals favouring the introduction of not proven verdicts have been made in the last years. The main reason why some scholars in the US would favour a system which resembles the Scottish one is because they believe the two-verdict system limits the jury's speech. Furthermore, in cases such as rape, often revolving on the credibility of both the accuser and the accused rather than on totally convincing evidence, a not proven verdict would appear particularly helpful because it would allow a jury to acquit the defendant without casting doubts on the honesty or reliability of the victim. The same scholars conclude that consequences of introducing this verdict would amount to more information, more acquittals, and more stigma depending on the case.

Some detractors of the not proven verdict would favour its abolition based on the argument that in sexual related crimes, the number of not proven verdicts is indeed higher compared to other types of offences. However, this information should only be interpreted as reflecting the jury’s difficulty in making a decision, particularly in cases where due for example to different gender or cultural interpretations of certain behaviours, it could be extremely complex to draw clear cut conclusions. The not proven verdict should, therefore, be retained.

5. The confrontation clause under article 6 of the European Human Rights Convention (EHRC)

Article 6 of the EHRC provides that everyone charged with a criminal offence has, inter alia, the right to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

It is our understanding that Scots law already provides for the possibility of defence lawyers to read any witness statements and to obtain pre-recognition statements from the same. However, it is also our understanding that, under Scots law, witness statements cannot be disclosed to the accused, but just provided to their lawyers on the strict understanding that they are to be treated as highly confidential, and they will not be copied to an accused person. The motivation behind this seems to be that they ought to be kept out of the public domain.

This law seems unique across the European member states and poses questions on its compatibility with letter d) of article 6 of the European Human Rights Convention. If the accused has a right to a fair trial, he should be put in the position of being fully aware of the details of the charges against him. Obviously, being able to read a witness statement by oneself or being told of it by a third party can make a difference including in the understanding and interpretation of the same witness statements. Not allowing the defendant to have direct access to witness statements impairs the defendant's confrontation right and does not seem fully justifiable on the basis of the need to keep such statements out of the public domain.

Furthermore, since the prosecutor is likely to have access to any statement, the same right should be granted to the accused.

The right to a fair trial is indeed an essential right in all countries respecting the rule of law and it is worth bearing in mind that the trial rights listed by article 6 of the EHRC are clearly and expressly defined as minimum rights.

6. Directions given by judges to the jury
It is our understanding that some organisations are urging the Government to introduce judicial direction in sexual offence cases. In other words, judges would be required to inform juries that factual information such as delayed disclosure and lack of physical resistance should be disregarded when making a verdict.

It is self-evident that if judges were to lecture juries, this would dramatically affect jurors decisions, and this would undermine one pillar of Scots criminal procedure law: either jurors are trusted to be able to make decisions or they are not.

Jurors should make their decisions without any influence whatsoever and are not supposed to be familiar with the law. This explains why some professionals and categories of people, such as those involved in the judicial/legal/social sectors, are actually considered ineligible to serve as jurors.

The jury is and should be required to make its decision solely based on the evidence provided.

7. Criminal records
It is understood that, under the current laws and procedures, when an allegation of rape or sexual abuse is made, any possible information on the arrest of the accused is retained on police computer records from the moment of the arrest for the rest of the accused’s life. The fact that such record won’t be removed even if the allegation is not followed by conviction or later proved to be false means that the accused may experience difficulties and restrictions in finding employment or involvement in some voluntary organizations. Furthermore, the keeping of such information can interfere with the right to a family life, as social services interventions dictate access to families (even those whose case has been dropped).

These restrictions contravene UN and EU Human Rights principles and in particular article 8 of the ECHR, which guarantees people the right to "private and family life". Therefore, if the current laws and procedure do not provide for removal of such records, they should be promptly amended or repealed.

It’s also worth noting that the European Court of Human Rights (ECtHR) in a recent case stated that "indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable."³

By the same token, the UK judiciary has recently expressed concerns about the impact that disclosure of past offences might have on an individual life, and has

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³ See the European Court of Human Rights (ECtHR) ruling in M.M v. the United Kingdom of November 2012, as downloadable from [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114517#itemid:"001-114517"] The ECtHR stated inter alia that retention and disclosure of a job applicant’s police records to potential employers was incompatible with the European Convention on Human Rights.
pointed out the need for “overdue reforms – properly balancing the aim of public protection with privacy rights”\(^4\).

If the disclosure of certain past offenses after some time from their occurring looks disproportionate to the judiciary and is also discouraged by some UK legislation, such as the Rehabilitation of Offenders Act 1974, the retention of records on people not convicted but simply investigated or arrested results completely unjustifiable.

Margaret Gardener  
FASO (UK) Director  
29 August 2013

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Families Outside

1. **Introduction**
   1.1 Families Outside is a national independent charity that works on behalf of families affected by imprisonment in Scotland. We do this through provision of a national freephone helpline for families and for the professionals who work with them, as well as through development of policy and practice, training, and face-to-face support. As such, specific sections of this Bill are of considerable interest to our work, and we are grateful for the opportunity to comment. We are happy to elaborate on any of these should the Committee require additional information.

2. **Part 1, Chapter 5: Rights of suspects in police custody**
   2.1 Families Outside welcomes Chapter 5, section 30 on the “Right to have intimation sent to other person” when someone is in police custody. Both the fact of custody and the location is likely to be pertinent to people other than the suspect. Good practice would be to ensure that this “other person” also receives relevant information such as contact details for support and queries, and we would like to see this incorporated into the Bill.

   2.2 We also welcome section 32, the “Right of under 18s to have access to other person” while in police custody. First, we welcome the recognition that the definition of young people should extend to at least age 18, commensurate with the provisions in the UN Convention on the Rights of the Child. Second, their age makes these young people potentially vulnerable, and older family members or carers may well have concerns for their welfare. Engagement with a responsible adult from the earliest possible stage, where this is in the best interest of the young person, is likely to be of benefit throughout the Children’s Hearing or Criminal Justice process and for resettlement afterwards.

   2.3 Families Outside also welcomes provisions for support for vulnerable persons (section 33) while in police custody. Again, we would want to ensure that the suitable person to provide support also receives information about the welfare of the person throughout the Criminal Justice process and has information such as contact details for queries and provision of information.

3. **Part 1, Chapter 6: Police powers and duties**
   3.1 Of particular interest to us in the Bill was section 42, “Duty to consider child’s best interests”. To subsection (1), we would add the following:
   (e) detain a person with caretaking responsibilities.

   3.2 We agree that “…the need to safeguard and promote the well-being of the child [must be] a primary consideration”, but these needs are not routinely assessed when an
adult is detained in police or prison custody. Research in Scotland and internationally reflects both short- and long-term impacts on children and families when a family member is imprisoned.¹ About a third of prisoners’ children are present during the arrest, and the trauma they experience from this can be considerable.² Families Outside is currently working alongside a number of interested organisations to promote a Child & Family Impact Assessment at key stages in the criminal justice process. However, police already have the power to request a ‘Child in Need’ assessment from the Local Authority and, when a carer is arrested and detained, should be required to do so.

4. **Part 4: Sentencing**

4.1 The short sections on sentencing would benefit from expansion to include a section to make it commensurate with the terms of the Children & Young People’s Bill. Specifically this section could usefully include reference to the importance of child wellbeing (or indeed ‘welfare’ or ‘best interest’ as defined under existing legislation and case law). It should also reflect a need to take the child’s best interest into account as a primary consideration in all actions that affect them (also Article 3.1 of the UNCRC). Section 278 of Part 18 of the Mental Health (Care and Treatment) (Scotland) Act 2003 asp 13 (Scottish Act) also sets a precedent in which the child’s interests have to be considered and addressed in state actions concerning the child’s parent(s) (“Duty to mitigate adverse effect of compulsory measures on parental relations”).

4.2 As noted above, such considerations could be assessed through a ‘Child in Need’ assessment with the Local Authority or through a specifically designed Child & Family Impact Assessment. Such an assessment should also question the impact of decisions on a child’s Right to Family Life under the Human Rights Act 1998. In *Slovakia v Denise Srponova*,³ this consideration prevented the extradition and imprisonment of a lady that would have resulted in her son’s placement in an orphanage following her breach of a probation order.

5. **Part 6, Chapter 1: Procedural matters**

5.1 Finally, we welcome the provision in section 86 for the use of live television links in court. However, this section could usefully be extended to include the use of such technology to maintain family ties; encourage family participation in prison case conferences; and promote positive parenting such as through participation in parent-teacher conferences, commensurate with recommendations in the National Parenting Strategy for additional support for imprisoned parents.


> Given that many prisoners come from marginalised and impoverished backgrounds, the cost of travelling long distances may mean it will not be possible for families to visit if the prison is a long distance from the area where the family lives.\footnote{Coyle, A. (2002) "A Human Rights Approach to Prison Management." London: International Centre for Prison Studies.}

Ten years later this is still the case, if not more so:

> … the poorest households with a car were spending at least 17% of their income on transport.\footnote{Dalton, A. “Families plunged into ‘transport poverty’." *The Scotsman*, 29 Feb. 2012.}

5.3 Travel to prisons for visits continue to be a barrier for families to maintain contact. Families Outside would recommend the use of video technology in prisons to lessen the burden for the families imprisonment separates.

6. **Conclusions**

6.1 As an organisation with a very specific remit in relation to children and families affected by imprisonment, we recognise that our evidence is similarly specific. In saying this, the broader implications when a family member is caught up in the criminal justice system means that elements of this Bill are key to ensuring that the rights of children and families are acknowledged and supported. In an address to the Early Years Collaborative in May 2013, Sir Harry Burns emphasised the fact that outcomes for children are inextricably linked to those of their parents and carers; this Bill is an essential opportunity to recognise this.

6.2 In conclusion, Families Outside broadly welcomes the Criminal Justice Bill but want to make sure that it does not miss the opportunity to address the broader implications for children and families. We appreciate the opportunity to comment and are happy to engage in further discussion where this would be helpful.

Prof Nancy Loucks
Chief Executive
Families Outside
30 August 2013
Summary

We are not satisfied that the case for abolition of corroboration has been made.

- Arguments to the effect that it is an ancient rule and out of keeping with developments in evidence in the 21st century do not make the case for abolition. If anything, improvements in CCTV techniques, DNA analysis, etc suggest that it may be easier to acquire corroboration than hitherto.

- The argument that other jurisdictions do not have corroboration, and therefore Scotland is ‘out of line’, also adds little; there is no corroboration requirement as such in England, but it is our understanding that prosecutors routinely look for corroboration and do not generally prosecute without it.

- Fact-finders (whether judges or jurors) will in practice seek some further piece of evidence which confirms or supports a complainer’s version of events. Abolishing the corroboration requirement is likely to raise false hope in victims of sexual assaults that their cases will result in conviction.

- We have had piecemeal tinkering: once it was recognised that those being detained and interviewed by the police had a right to legal advice, the period of detention was doubled and the abolition of corroboration proposed. To offset this, it is now proposed that the jury majority be changed. The Law Commission, or other specially appointed body, should be asked to evaluate the criminal process as a whole (trial and pre-trial; laws of procedure and of evidence), and to consider whether it strikes an appropriate balance between the rights of accused persons, and the wider public interest in preventing crime and securing that those guilty of breaking the criminal law are convicted and punished.

- If corroboration is to be abolished as a general requirement, an exception should be made for certain forms of visual identification evidence, and for confession evidence. Dock identification should no longer be permitted unless the witness has made a positive identification of the accused on an earlier occasion. Legislation should provide that evidence may be led from experts in the field of identification, in appropriate cases.

We can supply papers we have co-authored on some of these points, if this would be of assistance to the Committee:
Since it seems likely that corroboration will be abolished as a general requirement, we focus in this note on the argument that it should continue to be a requirement for two types of particularly problematic evidence, namely for visual identification and confession evidence.

(a) Eyewitness identification evidence: Identification may not be an issue at trial, for example, where an accused is pleading self-defence to an assault or homicide charge, or consent in a rape trial, but where it is at issue, a distinction may be made between cases in which the accused is well-known to the victim, and the circumstances are such that there was ample opportunity for the witness to see the perpetrator, and those cases in which identification rests on less solid foundations. In the former case, the veracity of the witness may still be in doubt – a witness who states categorically that her husband punched her; that she saw her neighbour trampling her prize roses; or that her boss forced her to have sexual intercourse may be lying, but if she is telling the truth then it is unlikely that her identification of the perpetrator is mistaken. In contrast to this, where a witness and perpetrator were not acquainted before the incident, then it is far more likely that even an honest complainer may be mistaken. In such cases, miscarriages of justice can and do occur. Likewise, where the witness caught but a ‘fleeting glance’ of the perpetrator, misidentification may occur, even when the accused is someone to whom the witness is well known. The Scottish courts have recognised the problematic nature of such evidence, indeed it has been stated that where a prosecution depends on eyewitness identification, ‘the risk of a miscarriage of justice is notorious.’ This echoes the view of the Criminal Law Revision Committee in England, who regarded ‘mistaken identification as by far the greatest cause of actual or possible wrong convictions’. Research from the USA similarly suggests that mistaken identifications account for more miscarriages of justice than all other causes combined.

Wrongful convictions may result from two types of eye-witness identification errors. Even when observers have a perfect view of an event or person, they interpret rather than straightforwardly record what they are seeing, while their memory of what they have seen is unconsciously adapted over time. Thus there may, for example, be a tendency to persuade oneself that a person one sees is actually someone whom one knows, while in one’s memory of that event the individual perceived becomes more and more like that person. Moreover, while it is commonly supposed that an individual is more likely to recall an event vividly and accurately if it is especially traumatic, the reverse is actually true. It is also the case that the prejudices of the witness may significantly distort perception, and, even when not prejudiced, observers are much less accurate when identifying members of racial groups different to their own. A second error may occur when the fact-finder, particularly if this is a jury, assesses the identification evidence and affords it more weight than it merits, since juries tend to place great weight on identification evidence. Their faith


in such evidence may often be misplaced, but it is usually difficult to assess whether the confidence of a witness in making a positive identification is well founded, and since such witnesses tend to be absolutely certain of the truth of what they are saying, cross-examination is rarely an effective means of testing the value of such evidence.

The problems of identification evidence are compounded in Scotland since we still permit dock identification of the accused as the perpetrator of a crime. Sometimes the purpose of this is simply to confirm that the person in the dock is indeed the person whom the witness has previously identified. However, dock identification can take a different form, where a witness has not previously been asked to make an identification at an identification parade. The appeal court has recognised that this type of dock identification is open to criticism and has stressed that trial judges should normally instruct juries on its dangers. These can include the fact that the witness is identifying someone they saw only once, perhaps some considerable time previously, that dock identification lacks the safeguards inherent in an identification parade, and that the accused is indeed sitting in the dock. (As a former prosecutor, one of us has had the experience of witnesses identifying the accused as the perpetrator solely on the basis that they assume the person in the dock must be the person who ‘did it.’) If a trial judge omits to warn a jury of these dangers, this will not necessarily lead to a conviction being overturned. Some years ago the Departmental Committee on Criminal Procedure in Scotland in its Second Report suggested that identification parades should replace dock identification, and that the latter should not be competent where the witness had failed to identify the accused at a parade. This was not acted upon, and the appeal court has rejected the argument that it is unfair to allow a witness to identify the person in the dock as the perpetrator, even where there was effectively only one person who could be identified, the court having been cleared. Several other appeal court decisions have upheld the acceptability of dock identification. This is a practice which ought to cease.

Given the risk of miscarriages of justice, trial judges should direct juries on the problematic nature of identification evidence, generally. However, precisely what a trial judge says in this connection is a matter for his or her discretion. In England, where a case rests on disputed identification evidence, the trial judge has to warn the jury of the need for caution before convicting on the basis of such evidence, explaining how it can be inaccurate, and making reference to its strengths and weaknesses in the case in question. Similar views have been expressed in other Commonwealth jurisdictions.

Moreover, the Scottish jury will not have the benefit of expert evidence on the dangers of mis-identification. The High Court has ruled against the admissibility of such evidence. This lack of expert assistance, coupled with the tendency, noted above, of juries to set particular store by such evidence, makes it doubtful how much impact judicial warnings have. In this context, the fact that juries tend to be convinced by such evidence means that the requirement of a two-thirds majority in favour of a guilty verdict – as proposed in the current Bill – is unlikely to represent much of a safeguard. Indeed the studies regarding the dangers of this type of evidence have all occurred in jurisdictions where similar safeguards are already in place.

An example of how reliance on such evidence can lead to miscarriages of justice is found in an American case where a man served 14 years' imprisonment for a crime
he did not commit, ultimately being acquitted on the basis of DNA evidence:

‘Though … the rape victim … spent more than forty-five minutes with her attacker in her brightly lit home, spoke to him face-to-face, and took special care during the attack to make careful observations and notes in her mind of all the attacker’s identifying characteristics, … [she] identified the wrong man in a photographic identification, in a line-up, and at trial. She claimed to be “100% certain” of her identifications on all three occasions.’

It has been suggested that corroboration of eyewitness identification ought to be required in the USA. It would be ironic if Scotland were to dismantle this important safeguard at a time when other jurisdictions are considering its reintroduction.

As it currently operates, however, corroboration offers little safeguard in cases involving visual identification evidence. Lord Justice-General Emslie summarised the approach of the Scottish Courts: ‘where one starts with an emphatic positive identification by one witness then very little else is required. That little else must of course be evidence which is consistent in all respects with the positive identification evidence’. In other words, it is not necessary that at least two witnesses positively identify the accused as the perpetrator. If one witness does so, the requirements of corroboration are met if another witness testifies that the accused has the same build as the perpetrator, or is the same height and has the same hair colour as the perpetrator. It was enough in one case that the corroborating witness indicated that the accused resembled the perpetrator in terms of basic looks. In one case the corroborating witnesses picked out the accused at an identification parade as resembling the man she had seen in terms of build, hair colour and hair length. She had also picked out another individual as resembling the man she had seen, yet the court saw this as no barrier to her evidence having corroborative effect.

There is also the issue of how positive the primary identification evidence, which is corroborated by the ‘weak’ identification evidence, has to be. It is clear that the witness does not have to be entirely certain that the accused is the perpetrator. It amounts to a positive identification if a witness says that the accused is ‘very like’ the person they saw. The same is true if one witness testifies to being ‘80%’, and another to being ‘75%’ sure that the accused is the person they saw. It can be appreciated then that the retention of the corroboration requirement as it currently operates would not offer much of a safeguard in quite a number of cases. The central problem with visual identification evidence is related to its very nature. No doubt in broad terms the more witnesses who can identify an accused, the more likely it is that the identification will prove to be accurate, but given that such evidence is often inherently suspect because of the factors mentioned above, the mere extent of visual identification evidence is no guarantee of accuracy. It may therefore be necessary to concentrate on improving the quality of identification evidence through such devices as the guidelines provided for the authorities under Code D of the Police and Criminal Evidence Act 1984 in England. The Bill represents an opportunity to strengthen aspects of the law of evidence. In 2004, Parliament recognised the legitimacy of admitting expert psychological or psychiatric testimony. It is suggested that a similar provision could be enacted which would allow evidence to be led from experts in the field of identification, in appropriate cases. Rather than trial judges merely warning of the dangers of accepting uncorroborated identification
evidence, such testimony could explain the inherent unreliability of the human memory in certain types of situations.

(b) Confession evidence: The second area where consideration might be given to the retention of a corroboration requirement relates to evidence of an extra-judicial confession. While Scotland is unique in retaining a general corroboration requirement, it is not the only jurisdiction to have a requirement in relation to confessions. Most US states maintain such a requirement. According to the US Supreme Court, the foundation of this

‘lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, ... further caution is warranted because the accused may be unable to establish the involuntary nature of his statement. Moreover, though a statement may not be “involuntary” within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation – whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past.’

It is impossible to assess how frequently false confessions are made, but there is ample evidence that they do occur, and one study has found that almost a quarter of all wrongful convictions in the USA may be attributable to false confessions. Quite apart from the situation where the suggested confession was never in fact made, individuals do make false confessions for all manner of reasons. As the Royal Commission on Criminal Justice observed,

(i) people may make false confessions entirely voluntarily as a result for a morbid desire for publicity or notoriety, or to relieve feelings of guilt about a real or imagined previous transgression; or because they cannot distinguish between reality and fantasy;

(ii) a suspect may confess from a desire to protect someone else from interrogation and prosecution;

(iii) people may see a prospect of immediate advantage from confessing (e.g. an end to questioning or release from the police station) and

(iv) people may be persuaded temporarily by the interrogators that they really have done the act in question...

In our view, Scotland ought to retain the requirement of corroboration in relation to confessions.

In practice, a confession can almost corroborate itself, in the sense that corroboration can be found in the fact that the circumstances of the crime coincide with the
confession. This approach might be seen to make perfect sense in cases like *Manuel v HM Advocate* where the confession revealed details which only the perpetrator could know: where the victim’s body and certain items of her clothing could be found. He then led the police to the body itself. In such a case, the concern that the confession might be fabricated is largely absent. However, the approach also seems to prevail when there is no such safeguard; it is no bar to conviction that the coincidence of the details of a confession with those of the crime providing corroboration are largely in the public domain, nor that while some of its points coincide with the details of the crime, others are actually at odds with those details.

It is apparent, then that the safeguard provided by the insistence that a confession must be corroborated has been significantly weakened, in practice. Special knowledge confessions can corroborate when the knowledge revealed is not so special, in that it is shared by many or could have been acquired other than by being the perpetrator of the crime. Indeed, a special knowledge confession can still corroborate even if parts of it are entirely inaccurate. To say that such matters are capable of being weighed by the jury is especially problematic, since it seems that juries are particularly impressed by confessions, thus the chances of being acquitted in such circumstances are very low, especially as judges in Scotland do not routinely warn juries of the dangers of relying on uncorroborated confessions, as happens in certain other jurisdictions. In contrast to identification evidence, the courts are more open to the admissibility of expert evidence in relation to the reliability of confessions. Thus experts can be heard on such matters as an accused’s peculiar susceptibility to pressure when questioned by the police, and the likelihood that several people who heard a confession being made would be able to recall it in almost identical terms. However, special circumstances must be present before expert evidence may be admitted.

It is recommended that Parliament should signal the continuing importance of corroboration in this area by retaining the requirement. For example, legislation could provide that:

> ‘A confession requires to be corroborated by evidence independent of the confession, except where the confession reveals special knowledge of the crime, the only reasonable explanation of which is that the accused was the perpetrator.’

Provision could also be made for expert testimony to be admitted, to explain to jurors that not all ‘confessions’ are genuine. Without such expert evidence to guide them, juries will struggle to fathom why an innocent person would confess to a crime. Simply requiring a two-thirds majority in favour of a guilty verdict is unlikely to provide any real safeguard, and certainly nowhere near as secure a safeguard as a proper corroboration requirement.
References

9. See generally Cutler and Penrod, n. 7 above, at 104.
14. 1975, Cmd 6218, paras 46.10 and 46.13.
18. Cutler and Penrod, n. 7 above, at 263 suggest the impact is minimal. See also R. C. Lindsay, G. L. Wells and C. M. Rumpel, ‘Can People Detect Eyewitness and Identification Accuracy Within and Across Situations?’ (1981) 66 Journal of Applied Psychology 79.

Murphy v HM Advocate 1995 SCCR 55.

Adams v HM Advocate 1999 JC 139.

Kelly v HM Advocate 1998 JC 35.

Gracie v Allan 1987 SCCR 364.

Nolan v McLeod 1987 SCCR 558.


Royal Commission on Criminal Justice (1993, Cm 2263).

R v Sykes (1913) 8 Cr App Rep 233 at 237.


As in Boyle v HM Advocate 1976 JC 32; where a soldier who had gone AWOL confessed to a bank robbery, because he preferred a civilian to a military prison.


1958 JC 41.


Gilmour v HM Advocate 1982 SCCR 590.


46  *Gilmour v HM Advocate* 1982 SCCR 590.

47  *Campbell v HM Advocate* 2004 SLT 397.
1. Introduction

1.1 The Glasgow Bar Association ("the GBA") was formed in 1959. The objects of the Association, as contained in its constitution, include the promotion of access to legal services and access to justice and to consider and, if necessary, formulate proposals and initiate action for law reform and to consider and monitor proposals made by other bodies for law reform. The GBA also offers legal education programmes and sponsors and supports legal education and debate at Scotland's Universities and Schools.

1.2 Today the GBA remains a strong, independent body. Its current member levels sit at around four hundred, by far the biggest Bar Association in the country. The GBA would encourage the Justice Committee to continue to seek its views on all legislative matters and is grateful to the Justice Committee for inviting our submission.

2. Section 57 Corroboration

2.1 The most significant and controversial proposal in the Criminal Justice (Scotland) Bill is found in section 57 and relates to the proposed abolition of the requirement for corroboration in criminal trials. The Glasgow Bar Association strongly opposes this proposal. The Scottish criminal justice system has for centuries required corroborated evidence before a citizen can be convicted of a criminal offence. We are strongly of the view that this important element of our justice system must remain.

2.2 The fact that a system is established is not justification in itself for its continued use and we welcome modernisation of the criminal justice system. However this proposal as advanced by Lord Carloway in his review has not been supported by any of the other Senators of the College of Justice and we are aware of widespread opposition to its implementation.

2.3 As the law presently stands it is a common misconception that corroboration in criminal cases means the requirement for two eyewitnesses to a crime. This is entirely inaccurate and it is well established that very little is required to provide corroboration of the testimony of one eyewitness. In addition, in certain circumstances evidence is considered to be self-corroborating. Examples of this are the presence of fingerprints or DNA at a crime scene. To provide an example, an undated but unexplained fingerprint at the scene of a robbery within a house would provide corroborated evidence that the person who left the print was the person who committed the crime.

2.4 It appears that the catalyst for the removal of corroboration is the apparent low conviction rate in sexual offences and in particular in allegations of rape. We are
not convinced that removing the requirement for corroboration would significantly increase the conviction rate. Without any corroborating evidence the jury may be left with two competing accounts without any assistance as to which to believe. It is often the corroborating evidence, found for example in the evidence of a neighbour who heard the complainer's distress which assists the jury in their determination. We are not clear how potentially removing this evidence from the case would assist in increasing the chances of conviction.

2.5 Any change to the present system would require to be workable for criminal cases which are heard by a jury and those which are heard by a single Sheriff or Magistrate. It is well recognised that one of the most effective ways of ascertaining if a witness is telling the truth is to test that person's evidence against the corroborating witness, both of whom may claim to have seen the same conduct. There are many occasions in criminal trials when a witness may appear to be telling the truth until it becomes apparent through cross-examination of the second witness that the former cannot have been truthful in his/her account. It is of great concern to our members who practice in the criminal courts that this ability to test the crown case may be removed. We believe that the requirement for corroboration provides a safeguard for all parties which is essential in the criminal court system.

2.6 We have not been able to ascertain how such a new system of prosecutions would work. Would any allegation of a criminal offence made by one individual require to be proceeded with, no matter how unreliable or incredible that witness was nor how unlikely the chances of a successful conviction? This would significantly add to the workload of the prosecution service while the alternative would be requiring the police to act as judge and jury in assessing the strength of the case pre report to the fiscal. If one person’s word against another’s were to be the starting point for a criminal prosecution then the courts can look forward to allegations and counter-allegations which could continue indefinitely.

2.7 The requirement for corroboration along with the standard of proof beyond reasonable doubt are the minimum safeguards which must apply in our criminal courts and we have heard no valid argument for their removal.

Glasgow Bar Association
30 August 2013
Police powers and rights of suspects (Part 1 of the Bill)

1. Part 1 of the Criminal Justice (Scotland) Bill (the ‘Bill’) as introduced deals with arrest by police without warrant. In particular Section 1(2) introduces a general police power to arrest a person without a warrant in respect of an offence not punishable by imprisonment. Subsection 2 states that such an arrest can only take place in certain circumstances, namely only if the constable is satisfied that it would not be in the interests of justice to delay the arrest in order to seek a warrant. Subsection 3 attempts to define circumstances where the interests of justice would not be served by delay in arrest.

2. These commentators would suggest that the terms of Section 1(3) as currently drafted are framed in such a way as to be unclear in two respects. Firstly Section 1(3) requires a constable to have a reasonable belief as to a negative assertion; i.e. that if the person is not arrested without delay that the person will act as described in subsection 3(a) to (c). It is understood that the rationale for this is perhaps to require the constable concerned to make an assessment of risk but given that this judgement will require to be made when the constable is on active duty as the circumstances unfold, it is suggested that the test should be made as clear as possible.

3. It is suggested that the test could be better worded if it allowed a constable to arrest without a warrant if the interests of justice demanded an immediate arrest. Parts (a) to (c) could then outline factors that could be taken into account when making this assessment.

4. As currently drafted Section 1(3) is silent as to whether parts (a) to (c) are to be read as a cumulative list or if these form alternatives. This is important in the context of arrest without warrant as it is unlikely that a constable could have a reasonable belief that all three potential actions on the part of the person would take place and therefore this subsection would be little used in practice. However if the three parts (a) to (c) are read as alternatives their individual application is likely to be much more frequent. If the latter interpretation is to be adopted then it must be understood that constables could interpret these subsections widely thereby allowing for the arrest of persons for what could be regarded as minor offences.

5. Whilst the subsection and its parts would be open to judicial interpretation these commentators are of the view that if Section 1(3)(a) to (c) are left as currently drafted there is the very real possibility that persons could be arrested without a warrant for minor offences without any real justification. Doubtless operational guidance would be issued by Police Scotland on this issue but these commentators would prefer to see additional wording within the subsection to qualify the scope of the circumstances where such an arrest can take place to include:
An overarching condition that there must also be a reasonable belief on the part of the constable as to the existence of a risk to public safety arising from the actions of the individual at the time of the intended arrest.

6. It is suggested that this wording would ensure that any arrest with the mandatory consequence of being taken to a police station was a proportionate and justified response to any offence which would present a risk to public safety rather than one which was no more than a minor contravention of a statute.

7. Chapter 4 of the Bill as introduced sets out the rights of the suspect in custody or who attends voluntarily and in particular Section 24 sets out the right of such a person to have a solicitor present during interview and in Section 36 the right to a consultation with a solicitor at any time whilst being held in custody. These sections appear to represent a development of the rights enshrined in Section 15A of the Criminal Procedure (Scotland) Act 1995 introduced following the decision in Cadder v HMA [2010] UKSC 43.

8. These commentators welcome the simplification of the right of access to a solicitor by a person in custody to allow a private consultation to take place at any time during the period of custody and not just prior to or during questioning. In addition the Bill introduces a right to have a solicitor present during interview which did not previously exist in statute although anecdotally it is known that in certain situations (e.g. serious sexual offences) some police officers are content to allow solicitors to be present at interview whilst continuing to operate in terms of Section 15A.

9. What is of concern to these commentators is the lack of financial provision for the exercise of this new right on the part of a person in custody within the Financial Memorandum attached to the Bill. SLAB have since the inception of access to legal advice post Cadder kept full statistical information regarding requests for advice and how these are dealt with. Whilst accepting that we are moving further towards the English system in which there is 70% attendance by solicitors and acknowledging that the right to a consultation at any time will certainly increase the number of requests for consultation itself, there seems to be little reference to the cost implication of a solicitor being present during an interview. Whilst currently a grant of ABWOR can be made and will be paid if personal attendance can be justified in order to consult, under the provisions of the Bill the solicitor might be requested to be in attendance for the duration of the interview leading to an increase in ABWOR expenditure.

10. These commentators suggest that insufficient consideration has been given to potential additional costs here in terms of the Legal Aid budget. Experience tells us that if people are given a right they will use it and it must therefore be likely that there will be at least a reasonable number of persons in custody who assert their right to have a solicitor present at interview. In these circumstances it is only proper that solicitors called upon in these situations are properly remunerated.
Corroboration, admissibility of statements and related reforms (Part 2 plus section 70 of the Bill)

11. There are implications in Section 57 of the Bill for the future of dock identification where no identification parade or similar procedure has taken place as a source of evidence which does not appear to have been considered. In Holland v H.M. Advocate 2005 I SC (PC) 3 Lord Rodger of Earlsferry at para 57 agreed with the Lord Justice Clerk that “except perhaps in an extreme case, there is no basis, either in domestic law or in the Convention, for regarding such [dock identification] evidence as inadmissible per se. The safeguards to which the Lord Justice-Clerk draws attention — the requirement for corroboration, the opportunity for counsel to contrast the failure to identify at the parade with the identification in the dock and to comment accordingly — are, of course, important. Their mere existence cannot be used, however, to justify the abstract proposition that in all cases in Scots law an accused who has been convicted on the basis of dock identification has necessarily had a fair trial.”

12. If the requirement of corroboration is removed it is at least theoretically possible that a case could be brought on the basis of a complaint from one witness that he was assaulted by an accused “who he could identify if he saw him again”. There would be no strict requirement to hold an ID parade. The case could come to trial and the witness could point out the accused in court as the person who committed the offence. Without the safety net of corroboration there is no way of knowing whether the accused has been picked out because he is in the dock.

13. Cases since Holland have quoted the comments of Lord Rodger and referred to the protection offered by corroboration. If that is removed might we have to look at making ID parades mandatory where dock identification is to be relied upon. Otherwise the accused has to rely on his defence team undermining the credibility or reliability of the eye witness and on the directions of the judge to the jury on the perils of eye witness identification. The LA’s guidelines on the subject are quite clear but they do not seem to be observed very closely, presumably for reasons of resourcing.

14. Section 63(1) has the effect of withdrawing from the accused the opportunity to make a judicial declaration when appearing before the sheriff to be committed for further examination or to be liberated in due course of law. Subsection 2 repeals the provisions on judicial examination. While it is acknowledged that persons appearing before the sheriff on petition rarely choose to emit a declaration, and while the use of judicial examination is saved mainly for murder cases, there seems to be no pressing reason to remove them.

15. The Explanatory notes and Policy Memorandum that accompany the Bill are silent as the reasons for the inclusion of Section 63 in the Bill other than to suggest that the abolition of judicial examination and the removal of the opportunity to make a declaration would become surplus to requirements if the proposals to grant the police extended powers to question a person officially accused of committing an offence contained in Sections 27-29 are passed, especially as the accused may also still make a voluntary statement to the police at any time (Policy Memorandum 92).
16. However, an accused person may in some circumstances prefer to make a
declaration, duly tape recorded and lodged as part of proceedings, in the security of
the court in the presence of an impartial judge. Furthermore, there may still be
circumstances in which it would be expedient for the prosecutor to judicially examine
an accused person and so unless the government can make out a more convincing
case for abolition of these procedures; these commentators recommend that they
remain available.

17. Section 69(2) amends Section 77(1) of the Criminal Procedure (Scotland) Act
1995 and has the effect of removing from Section 77 the requirement that the
accused, if he is able to do so, sign a written copy of the plea of guilty to an
indictment or any part of it and that such plea be countersigned by the judge. This
amendment seems to have emerged as one of the recommendations made by
Sheriff Principal Bowen in his Independent Review of Sheriff and Jury Procedure
(See 9.4).

18. Apart from the assertion that the removal of the need to sign a plea of guilty will
generate savings by allowing persons, presumably those accused remanded in
custody pending trial to plead guilty remotely, (Financial Memorandum 243) it is
nowhere explained in either the Explanatory Note or the Policy Memorandum which
accompany the Bill why this step is considered to be necessary or advisable, or how
it will benefit the smooth operation of proceedings or for that matter how great the
savings might be. It is assumed that savings could be made in the cost of
transporting accused from prison to court for a first diet to tender a guilty plea when it
is clear that the matter could not be disposed of without first obtaining background
reports, thus requiring the accused to appear in court on a further occasion. However, as has already been stated, no estimates are provided as to the possible savings.

19. Section 70(2) of the Bill inserts a new section, namely section 90ZA(1), into the
Criminal Procedure (Scotland) Act 1995, which has the effect of increasing the
number of jurors required to return a verdict of guilty (in both solemn and summary
procedure) from 8 to 10. This means that a majority of two thirds will now be required
to secure a conviction as opposed to the simple majority currently required.

20. The Bill also provides for situations where the total size of the jury falls below
15 members (see section 70(2) and the insertion of 90ZA(2)(a)-(c)). Where juror
numbers decrease for whatever reason, the majority of at least two thirds will always
be required. Thus if the total jury size decreases to 13 members for example, at
least 9 jurors would have to be in favour of a verdict of guilty in order to secure a
conviction.

21. One would expect to see clear reasons why the Government is specifically
proposing to increase the number of jurors to 10, yet the Policy Memorandum simply
states that the objective for choosing a two-thirds majority is to introduce an
additional safeguard into the Scottish criminal justice system (Policy Memorandum
171). What is not even remotely clear is why a two-thirds majority as opposed to a
larger majority has been deemed appropriate in providing such a fundamentally
important 'additional safeguard' in the face of corroboration being abolished.
22. If we look at the current system where a jury could legitimately decrease from 15 to 12 members due to juror illness or other extenuating circumstances for example, the jury could still return a verdict of guilty so long as 8 of the jurors were in favour of such a verdict. If we compare this situation above to the proposed two-thirds majority (apparently offering such an ‘additional’ safeguard), the percentage of jurors required in order to secure a conviction is exactly the same. That percentage being 66%. (A majority of 8 to 4 in the first situation and 10 to 5 in the second). While it is acknowledged by these commentators that juries of 12 members are not commonplace in Scotland they are not rarities either.

23. It appears that the Scottish Government in its Consultation on Additional safeguards Following the Removal of the Requirement of Corroboration (the ‘Consultation’) only ever sought views on whether the majority required to return a conviction should be increased to either 9 or 10 jurors because this would provide a “less dramatic change to the current system”. Despite only being given the choice between 9 or 10 jurors, a significant number of respondents to the Consultation thought the majority should be higher than 9 or 10 in order to provide an additional safeguard. (http://www.scotland.gov.uk/publications/2013/06/7066).

24. These commentators are of the view that in the absence of any other safeguards proposed by the Bill, the two-thirds majority does not provide any real additional safeguard against potential miscarriages of justice. These commentators would suggest that in order to provide an additional safeguard a larger majority of at least three-quarters is required. In other words, 12 out of 15 jurors. Furthermore, this would have the effect of bringing the majority verdict required in Scottish in proportion with other Commonwealth adversarial systems. There is no compelling reason and certainly there are none offered by the Explanatory Notes or Policy Memorandum as to why the majority being proposed by the Bill should be much lower than other criminal justice systems.

25. In consulting on the possibility of a majority verdict being introduced, it was disappointing that no further consideration was given by the Government in potentially reducing the jury to 12 members and requiring a majority of 10, which is commonplace in many other common law countries. Despite the obvious financial savings in having fewer jurors to cite and pay expenses to, it seems entirely plausible and perfectly timed to consider such a change.

26. If corroboration is abolished by this Bill then juries will be asked to decide a person’s guilt or innocence based on the strength of that evidence and conceivably on the basis of single witness testimony and uncorroborated evidence. These commentators are of the view that a higher proportion of jury members being satisfied beyond a reasonable doubt of an accused guilt would go some way to providing a safeguard for accused and victims of crime in jury trials.

Court procedures (Part 3 plus section 86 of the Bill)

27. The wider proposals for reform of Sheriff and Jury procedure contained in Part 3 of the Bill emphasise the importance to case management of the first diet by bringing procedure into line with that followed in High Court cases since 2004. If a case can be made for the economic benefits of enabling the accused to attend
proceedings by way of live TV link, then it may make some sense to hold those first diets that it is known will result in a plea of not guilty by way of TV link from a remote location.

28. Some of the responses to the Bowen consultation expressed concern that the technology currently used to enable the accused to participate though live television link is not sufficiently robust to be used as a matter of course. (Reforming Scots Criminal Law and Practice, Reform of Sheriff and Jury Procedure: Analysis of Consultation Responses 8.8) If the equipment breaks down or television links are lost at crucial points it may increase the number of appeals or instances in which proceedings require to be adjourned. Even if the court room technology could always be relied upon, there is an important point of principle to be considered.

29. It was noted in the Analysis of the Consultation Responses 8.7 that to dispense with the accused’s attendance at proceedings at which he was to plead guilty was to detract from the gravitas of the situation and this commentator sees some force in this comment. To plead guilty to a case on indictment is a serious matter. To have the plea recorded on the accused’s behalf while he watches proceedings via a TV link removes an important aspect of the accused’s participation in proceedings. It detracts from the recognition of his personal responsibility for his situation.

30. At present the accused must sign his plea and if he has second thoughts he may refuse to sign, normally signaling the withdrawal of his representation and resulting in a delay in proceedings. However if that prevents the accused from subsequently making spurious allegations that he was persuaded to plead guilty, in order to secure a discount in sentence for example, so be it. Even if the accused is asked to confirm his plea of guilty via the television link and an audio recording is made of proceedings, there would still be greater scope for the accused to claim that in confirming the plea, he misunderstood the words of the judge or could not hear them sufficiently well to give him grounds to appeal. At present, the signing of the plea is a clear signifier of the accused’s acceptance of his situation and the courts will not normally permit a plea made on legal advice and signed by the accused to be withdrawn at a later date. See for example Crossan v H.M.Advocate 1996 SSSC 279.

31. In conclusion, these commentators are of the view that a compelling case for removing the need to sign a plea of guilty has not been made out. There is insufficient evidence that it would save time and money or to what extent, protects the accused’s representatives from allegations of defective representation and protects the accused in that he ultimately has the choice to sign, or not if he has doubts at the last moment. It is suggested that Section 69 be removed from the Bill.
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Her Majesty’s Inspectorate of Constabulary for Scotland

HMICS welcomes the opportunity to comment on the provisions in the Bill and recognises that these propose significant change to criminal justice processes and police procedures and powers. We believe that the provisions will help to safeguard the rights of individuals who are subject to police investigation but will also provide opportunities to prevent harm to victims and communities in Scotland.

In accordance with the call for written submissions we have structured our comments based on the five themes.

Police powers and rights of suspects (Part 1 of the Bill)

It is this aspect of the Bill that will have the biggest impact on policing in Scotland. In general we welcome the provisions as they set out to clarify police powers and procedures governing the arrest and detention of individuals subject to criminal investigation.

We consider that there are a number of areas within Part 1 that would benefit from clarification in terms of the intention of the provisions including:

- The implications of the abolishment of common law powers of arrest on other common law powers e.g. powers of entry and powers to search.
- Section 9 of the Bill makes provisions for reviews of detention after 6 hours but doesn’t explain how that should be done.
- Section 19 (2) (c) allows the police to refuse to release a person from custody once charged with an offence, but does not give any indication of the reasons for such a decision.
- Sections 14 to 17 introduce the concept of Investigative Liberation. Clearly the service will welcome this power as a useful aid to preventing further crime and protecting victims and witnesses. However the restrictions that are proposed weaken the provision. For example in more serious cases police inquiries will last longer than 28 days, e.g. historic sexual abuse, homicide etc. In such cases the value of any conditions would be meaningless if lost after 28 days. Additionally the introduction of a review process with no details as to frequency or how they are to be conducted introduces a level of bureaucracy that may result in the provision being inefficient and ineffective. It may be more appropriate to remove the 28 day limit for solemn cases and introduce provisions for formal reviews to be conducted e.g. every fourteen days with the outcome of the review being noted in the person’s custody record.
- Sections 30 to 36 set out the rights of individuals taken into custody with particular reference to safeguards for children and vulnerable people and widened access to legal advice. We welcome these measures as a means of ensuring the fair and just treatment for all individuals that are taken into custody. However, with such provisions comes additional bureaucracy to
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from the Highland Violence Against Women

Please find the response by the Highland Violence Against Women Partnership, part of the Community Planning structure in Highland, outlined below. Statutory members in the partnership addressing Violence Against Women in Highland are NHS Highland, The Highland Council, the Crown Office and Procurator Fiscal Service and the Police. These members work in collaboration with a number of voluntary organisations on this issue, including Caithness & Sutherland Women’s Aid, Lochaber Women’s Aid, Inverness Women’s Aid, Ross-shire Women’s Aid, Victim Support, Witness Service and Children 1st.

Our Focus
The aspiration of the Highland Violence Against Women Partnership is to end Violence Against Women. We recognise that to end all forms of gender based violence we need to improve current approaches to tackling perpetrators, ensuring the safety of victims and their children, and to work with the public on changing attitudes and increasing understanding of the causes and consequences of Violence Against Women. We also believe that it is important to consider the human rights of victims of crime – all women and men have a right to be protected from rape and when individuals have been affected, they have a right of access to justice.

We respond to the consultation on the Criminal Justice (Scotland) Bill from this viewpoint. In particular, we are responding to the proposal to abolish the need for corroboration and the suggested increase of a jury majority from 8 to 10 people.

Abolition of Corroboration
We welcome the proposal included within the Bill for the abolition of corroboration. We believe that this particular aspect of law disproportionately impacts on female victims as much of the violence they experience occurs in private spaces and is perpetrated by men known to them. We believe that the abolition of corroboration has the potential to increase conviction rates and, therefore, increase public safety; increase confidence in the criminal justice system for rape and domestic abuse victims; and will have the potential to deter future perpetrators. We recognise that a change in the way that these cases are dealt with in itself will not end Violence Against Women in Scotland, but it will send a clear public message that these issues are being taken seriously and that they are crimes.

We are, however, concerned that the abolition of corroboration will not be retrospective. Current media coverage of several, high profile, men who sexually abused children has, anecdotally, across the country, seen an increase in disclosures from adult survivors of child sexual abuse in a variety of settings, including to the police. It is widely recognised that many people affected by sexual violence in childhood or as an adult do not report to the police immediately after the event. This is for a variety of reasons including, fear they won’t be believed, embarrassment, feeling like it was their fault, worried about what the perpetrator might do, and/or feeling like it would be a waste of time as conviction rates are low. It must be recognised that people will continue to come forward about past experiences of sexual abuse and that these individuals should be afforded the same access to
justice. By ensuring that the abolition of corroboration applies retrospectively, we believe that the Bill can go some way to providing this.

Increase in Jury Majority
We agree with the concerns raised in the Rape Crisis Scotland Briefing on the Criminal Justice (Scotland) Bill, July 2013, in relation to the increase in the jury majority required for verdicts from 8 to 10 people (from a total of 15). We believe that this is extremely problematic for cases involving sexual violence due to the existing evidence in relation to attitudes about rape. These rape myths are prevalent in everyday society and usually involve blaming the victim for what happened and negating the behaviour of the perpetrator. As research suggests such significant proportions of the population believe these myths we are concerned about the proposed increase required for a jury majority and would urge the Scottish Government to retain the simple majority of 8 for a verdict to be reached.

We believe that to increase the majority required has the potential to lead to an increase in the ‘not proven’ as well as the ‘not guilty’ verdict. We understand the ‘not proven’ verdict to be potentially as devastating as a ‘not guilty’ verdict for those who have experienced sexual violence and are already concerned that rape cases receive the highest acquittal rates for both ‘not guilty’ and ‘not proven’ verdicts. We are also concerned that the potential result of a ‘not proven’ verdict, as well as ‘not guilty’ verdicts is an increased risk of further repeat perpetration of sexual violence by the perpetrator as not only has justice not been served, but the person has received a powerful message that they can ‘get away with it’. We would suggest that cases of ‘not proven’ will increase with a requirement for an increased majority.

The ‘not proven’ verdict for cases involving sexual violence is also significantly higher than for cases in general. Of all crimes proceeded against in 2011-12, less than one percent (0.8%) were ‘not proven’. For rape and attempted rape, during this time period, 17% were ‘not proven’ and for sexual assault this rose to 69% of all cases. We are concerned that the proposal for an increase in the numbers of jurors required for a verdict will result in increased rates of ‘not proven’ for crimes of sexual violence, which is already disproportionate when compared with other criminal offences.

Further more, whilst we appreciate that there will always be cases that are very difficult for juries to make decisions about, for a whole range of factors, we believe that a ‘not proven’ verdict leaves victims of sexual violence in a state of limbo. We would not accept the argument that it would be preferable for victims to receive that verdict compared with one of ‘not guilty’ as they remain in a situation where no sentence as been received and closure has not been granted. We would urge the Scottish Government to consider reviewing ‘not proven’ as an option for verdicts.

Highland Violence Against Women
28 August 2013

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1 Criminal Proceedings in Scotland 2011-12, Scottish Government, November 2012
2 Criminal Proceedings in Scotland 2011-12, Scottish Government, November 2012
ensure that the rights have been delivered correctly. These will introduce additional delays to prisoner processing and the overall investigative process, which may impact on the police’s ability to conduct relevant inquiries within the 12 hour time limits. We consider that it would be in the interest of the efficiency and effectiveness of the service and the interest of justice to suggest that provisions are made in serious cases for the extension of the 12 hour detention limit to 24 hours.

We recognise that the Bill itself may not be the appropriate place to specify the detailed intentions of the provisions and how they are envisaged as working. We suggest therefore that consideration is given to the development of a form of Codes of Practice to accompany the legislation that clearly articulate its meaning, intent and the processes and procedures required to achieve that.

Finally we suggest that the order in which Part 1 of the Bill is laid out may benefit from restructuring to follow the natural stages in the arrest and detention process as follows:

CHAPTER 1
POLICE POWERS AND DUTIES
Sections 1 – 2 Arrest without warrant
Insert here –
Sections 37 – 42 Powers of police
Sections 3 – 6 Procedure following arrest

CHAPTER 2
CUSTODY: PERSON NOT OFFICIALLY ACCUSED
Sections 7 – 13 Keeping person in custody
Remove and insert at * below -
Sections 14 – 17 Investigative liberation

Insert here –
CHAPTER 5
RIGHTS OF SUSPECTS IN POLICE CUSTODY
Sections 30 – 36 Intimation and access to another person; Vulnerable persons and Intimation and access to a solicitor.

Insert here –
CHAPTER 4
POLICE INTERVIEW
Sections 23 - 29 Rights of suspects
Followed by –
* Sections 14 – 17 Investigative liberation

Insert here –
CHAPTER 3
CUSTODY: PERSON OFFICIALLY ACCUSED
Sections 18 – 22 Person to be brought before court and Police liberation
CHAPTER 7
BREACH OF LIBERATION CONDITION
Sections 43 - 49

CHAPTER 8
GENERAL
Sections 50 – 56 Common law and enactments

Corroboration, admissibility of statements and related reforms (Part 2 plus section 70 of the Bill)
We have no comments on this aspect of the Bill.

Court procedures (Part 3 plus section 86 of the Bill)
We have no comments on this aspect of the Bill.

Appeals, sentencing and aggravations (Parts 4 and 5 and sections 83 to 85 of Part 6 of the Bill)
We have no comments on this aspect of the Bill.

Police Negotiating Board for Scotland (Part 6 (section 87) of the Bill)
We have no comments on this aspect of the Bill.

HM Inspectorate of Constabulary
29 August 2013
The Howard League for Penal Reform in Scotland

The membership of the Howard League for Penal Reform in Scotland (HLS) is drawn from a wide range of disciplines connected to criminal justice. The executive committee consists of academics, lawyers, criminal justice practitioners, a GP, and a justice of the peace. There is an even balance of those who are professionally involved in victims groups, the criminal courts and the delivery of criminal justice services.

The aims of HLS are:
“The Howard League for Penal Reform in Scotland is an independent organisation whose members seek improvements to the criminal justice system in Scotland.

We believe it is time for criminal justice policy and systems to take a different direction, a direction with much more reliance on effective community approaches to reducing crime and dealing with criminality. A direction with much greater chance of success in reducing crime.”

The mission statement of the HLS is:
“Whilst still committed to Penal Reform — the improvement of Prison conditions and the promotion of rehabilitation — the Howard League Scotland is convinced that a steady reduction in the numbers of people committed to prison is essential and achievable. Howard League Scotland members have extensive experience across all aspects of the criminal justice system in Scotland. They have no rosy-eyed view either of the effects of crime nor of the nature of criminality, even in its most drastic forms. HLS shares these views with many others, not just in Scotland but across the UK. In pursuit of these aims we work closely with our sister organisation — the Howard League for England and Wales.

HLS does not represent individuals nor provide services, nor does it plan to. It is a fully independent body, representing an enormous amount of experience and active engagement — with members (including Committee members) at all stages of careers. It seeks to draw from the wisdom of this experience and engagement to promote realisable goals for Scotland’s criminal justice system and help promote effective pathways to achieving those goals — which include a sustained reversal of the increase in prison numbers.”

HLS welcome this opportunity to state their view on the provisions of the Criminal Justice (Scotland) Bill.
Part 1: Police Powers and Rights of Suspects

HLS welcome the introduction of a statutory duty on the police to treat the need to safeguard and promote the well-being of a child as a primary consideration when making decisions regarding that child (section 42).

HLS have no other comment to make on the draft sections in Part 1.

Part 2: Corroboration and related reforms

HLS do not accept that removal of the requirement of corroboration for criminal proof is necessary or desirable. In some contexts, the removal of the requirement might be thought likely to result in higher rates of conviction, for example in charges of sexual offences. HLS recognise that there has historically been a low conviction rate on charges of rape. However, HLS members have expressed a range of concerns about the proposal to remove the requirement of corroboration.

HLS recognise that corroboration has formed an important principle of the law of criminal evidence for a considerable time (e.g. Balfour’s Practicks, 1754). Criminal procedure and the law of evidence have developed together. The consequences of removing a fundamental requirement of criminal proof are uncertain. Corroboration is not an element of criminal proof which can be considered in isolation. The requirement for corroboration has a direct bearing on the investigation of crime by the police, the Crown’s decision to prosecute and the conduct of criminal trials. The implications of its removal are likely to be substantial and may be unforeseen.

Moreover, the HLS is opposed to reform of such a central element of the criminal justice system on the basis of a consultation exercise. HLS consider that it would be far preferable for the matter to be considered by the Scottish Law Commission (SLC), the statutory body charged with recommending reforms which are just, principled, responsive and easy to understand. The SLC have previously reported on hearsay and similar fact evidence. In the view of HLS, the SLC is the appropriate body to undertake the task of considering and reporting on substantive law reform of this sort.

A number of potential concerns arise from the removal of the requirement for corroboration:

- Under pressure of time and limited resources, police officers may carry out less thorough investigations if corroboration of a charge is not required, with the potential for miscarriages of justice;

- The prosecution may find it more difficult to apply the test of whether a prosecution has a reasonable prospect of conviction where the only potential evidence of guilt is contained in the police statement of a single witness; it may be impossible to sift out vindictive or inaccurate complaints prior to trial;

- Precognitions are no longer obtained by the Crown where the decision to prosecute is made, so there is no further sifting of cases in which the evidence of a single witness may readily be shown to be incredible or
unreliable; there may be an increase in prosecutions where there is, objectively, no realistic prospect of proof of a criminal charge;

- If a single witness gives evidence that a crime has been committed and the accused committed it, the trial judge would be unable to withdraw the charge from the jury no matter how obviously unsatisfactory the evidence of that witness is; time and expense are likely to be wasted in such situations, with a greater prospect of miscarriages of justice occurring;

- the prosecution of charges where there is no realistic, or very poor, prospects of proof of a criminal charge would unnecessarily and unfairly put witnesses and victims through the ordeal of giving evidence.

- Careful consideration is required of the present jury system of majority verdicts if the requirement for corroboration is removed; it would be substantively unjust in many cases for an accused to be convicted on the evidence of a single witness whose evidence is rejected as incredible or unreliable by 7 members of a jury; the precise number to constitute a jury and a just majority system requires careful thought; a recommendation on these matters should only be formed after careful consideration of the Scottish system and a comparative analysis of foreign jurisdictions; that work is most transparently and effectively undertaken by the SLC.

The requirement for corroboration in criminal proof operates as part of the finely balanced system of criminal justice. HLS have serious reservations about changes to this isolated area following a public consultation exercise. The SLC have the particular expertise to carry out research and impartially consider the impact of the proposals. It is not clear why the SLC have not been consulted on the proposal contained in the Bill. That omission is particularly concerning where the Senators of the College of Justice (as the senior judiciary in Scotland) are unanimous in recommending that the requirement for corroboration is not removed (with the exception of Lord Carloway).

**Part 3: Court procedures**

HLS welcomes the simplification of the constitution of a jury and requirements for returning a verdict. HLS however consider that the majority required to convict on a charge is a matter which should be considered by the SLC along with the proposal to abolish the requirement for corroboration. If both sections are made law, a person may be convicted on the evidence of a single witness where 5 members of the jury found that witness could not be believed. By contrast, in England and Wales, the majority required for a guilty verdict is 10 to 2. Some jurisdictions require unanimity.

**Part 4: Sentencing and appeals**

The HLS recognise the harm caused to individuals and the damage caused to society through the prevalence of offensive weapons. HLS support measures to reduce the number of weapons carried and used in the commission of crime. However, HLS do not believe that an increase in sentences for carrying offence weapons is the most effective means of preventing offending and rehabilitating
offenders. An increase in the maximum sentence available is likely to result in an escalation of sentences for carrying offensive weapons.

A change in the culture of carrying or using offensive weapons is likely to be more effective than any deterrent effect of an increase in sentences.

The combined effect of clause 78 and 81 is to remove the inherent jurisdiction of the Court of Appeal to cure a miscarriage of justice in the most highly exceptional circumstances (through exercise of the nobile officium). The Court has repeatedly affirmed that this is a very limited jurisdiction. However, where the clearest miscarriage of justice has occurred in a prosecution and through no fault of the convicted person a time-limit is missed, the proposed amendments to the 1995 Act would remove the ability of the Court of Criminal Appeal to consider the matter. The removal of this very limited jurisdiction is an unnecessarily draconian step, which in due course, is likely to result in miscarriages of justice.

Howard League for Penal Reform in Scotland
30 August 2013
Introduction

1. JUSTICE is a UK-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the UK section of the International Commission of Jurists. On Scottish matters it is assisted by its branch, JUSTICE Scotland.

2. In general terms, we welcome the Bill as a means of bringing forward reforms to the Scottish criminal justice system, particularly to amend changes brought about through the emergency legislation hastily enacted in response to the Cadder case\(^1\) that recognised the right of access to a lawyer during police detention. The Bill follows extensive consultation over the past few years by the Government, through dedicated enquiries and cabinet reviews. We have responded to many of these in great detail. For ease of reference, we do not repeat that detail here, but refer to those responses which can be found on our website.\(^2\) We agree that reform has been needed for some time to the arrest and detention procedure. The Bill allows the Scottish Parliament to focus on how the system might be improved. We have some suggested amendments to the proposed reforms, informed by standards provided in England and Wales under the Police and Criminal Evidence Act 1984, jurisprudence of the European Court of Human Rights, and research that JUSTICE has been engaged with for the past two years in police stations in Scotland.\(^3\) However, we continue to have concerns regarding proposals for other reforms to the criminal law, in particular, the abolition of corroboration and restrictions on appeal, which we do not consider have yet been justified, nor appropriate replacements envisaged.

3. We have focussed on particular elements of the Bill in our written evidence below. Silence with regard to any sections should not be taken as acceptance of the proposal.

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\(^1\) Cadder v HM Advocate [2010] UKSC 43

\(^2\) See the Scottish section of our website [http://www.justice.org.uk/pages/policy-work-events-and-news.html](http://www.justice.org.uk/pages/policy-work-events-and-news.html) and in particular our response to the Carloway consultation where we set out comparative legal provisions and relevant case law.

\(^3\) J. Blackstock, E. Cape, J. Hodgson, A. Ogorodova, T. Spronken, *Inside police custody: an empirical account of suspect’s rights during police detention*, (Intersentia, forthcoming). The research was conducted in two sites in England and Wales, France, the Netherlands and Scotland, with an average of two months spent in each site.
Part 1 – Arrest and Custody

Chapter 1
Sections 1 – 2: Statutory power of arrest

4. Whilst JUSTICE Scotland welcomes the decision to place the power of arrest on a statutory footing, the clear benefit of creating a legislative framework to govern police powers of compulsion is to sufficiently circumscribe those powers, to promote public confidence and to enhance legal certainty both for individuals and for police officers exercising those powers. We are concerned, however, that the powers set out in Sections 1 – 2 do not satisfy these benefits by being overly broad. We would welcome amendment of these provisions to make it clear that the power of arrest must be exercised proportionately. For example, in England and Wales, the Police and Criminal Evidence Act 1984 provides that a person should only be arrested where it is necessary for a limited number of purposes. These are in order to prevent the person arrested: a) causing physical injury to himself or any other person; (b) suffering physical injury; (c) causing loss of or damage to property; or (d) making off before a constable can assume responsibility for him. Some of these justifications are recognised in section 1(3), in the context of arrest without warrant for non-imprisonable offences, but are still not circumscribed with sufficient detail.

5. With regard to arrest for non-imprisonable offences we are concerned with the principle that the provisions in Section 1 would extend the power of arrest without warrant, in a range of circumstances, to relatively minor offences not attracting a custodial sentence. We find it difficult to assess any circumstances in which it might be necessary and/or proportionate to deprive someone of his liberty, albeit temporarily, in order to properly investigate a relatively minor offence for which a later power of arrest could be obtained by warrant, or more appropriately, a summons to court. If this power is to remain, further proscription of the power as set out in paragraph 4 above is essential to limit the likelihood of an interference with the right to liberty pursuant to Article 5 of the European Convention on Human Rights (ECHR) or the right to respect for private life pursuant to Article 8 ECHR.

Section 5 – Information to be given at police station

6. Section 5(2) lists the information about which a person must be informed when taken into police custody. Section 5(2)(b) refers to other sections of the Bill where substantive rights are set out. Section 33 should be included in the notification of information, regarding support for vulnerable persons, as this is a matter upon which persons with vulnerability should be informed. The assistance of an appropriate adult is a right that a suspect retains. The constable assessing vulnerability may not appreciate that a suspect is in need of assistance. By informing the suspect that support is available, they may be able to indicate whether this is needed, which will assist the constable in making their assessment pursuant to Section 33. Section 24 should also be included in this list, so that the suspect knows from the outset that they have not only a right to consult with a solicitor, but that the solicitor can accompany them to any interview.

7. Furthermore, no right to interpretation or translation is set out in the Bill. This right must be notified under Section 5(2) and inserted as an additional provision. It is
fundamental that suspects held in police custody are provided with the assistance of an interpreter and that certain documents are translated to assist them, in order to ensure that they understand the process and can communicate with their lawyer, should they request one and the police. It is also necessary to include notification and provision of the right pursuant to EU directive 2010/64/EU on the right to interpretation and translation in criminal proceedings and directive 2012/13/EU on the right to information in criminal proceedings.

Chapter 2
Section 7 – Authorisation for keeping a person in custody

8. Section 7 provides the circumstances in which an arrested person may continue to be detained in police custody following arrest. It only applies to persons arrested without a warrant. Since a warrant only authorises the arrest of a person, we consider it necessary that the section apply to both those arrest without and with a warrant.

9. We welcome the provision in Section 7(3) that authorisation may only be given by an officer who has not been involved in the investigation of the suspected offence. However, we do not consider this goes far enough to ensure that a fair and objective decision is made. Upon arrival at the police station, the investigating officer presents the suspect to the custody sergeant. This is the person who should authorise the decision as to whether the suspect should remain in custody. The custody sergeant is independent, may be of senior rank to the investigating officer, but most importantly, is responsible for the welfare and control of the suspect during detention.

Section 10 – Test for sections 7 and 9

10. We welcome the test set out in Section 10 since it focuses on whether continued detention is necessary following arrest in order for the police or prosecution to make the decision whether to charge. However, Section 10(2)(a) as drafted provides that regard may be had to ‘whether the person’s presence is reasonably required to enable the offence to be investigated.’ We believe this test to be set too low, given the incursion of the suspect’s liberty. The person’s continued detention must be necessary to enable the offence to be investigated otherwise there is insufficient justification to keep him in custody.

Section 11 – 12 hour limit: general rule

11. The six hour detention period was extended to 12 hours by way of the emergency legislation. We did not believe a case had been made out for the extension then, nor has one since. The justification at that time was a concern that the introduction of solicitors to police stations would delay the investigation, risking the six hour period of detention expiring prior to a decision being taken as to charge. This has not happened. In practice, most solicitors are able to attend a police station.

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4 OJ (26.10.10) L 280/1
5 OJ (1.06.12) L 142/1
6 Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
within a matter of hours. We therefore consider that the maximum period of detention should be six hours. In complex cases, the possibility to extend the period up to 12 hours could be made available upon the decision of a senior ranking officer.

Section 14 – Release on conditions

12. Section 14 provides for the possibility of conditions to be placed upon a suspect who is released from police custody prior to charge where a constable considers it necessary and proportionate to impose such conditions for the purpose of ensuring the proper conduct of the investigation. Whilst we have no concerns about release on condition in principle, firstly we believe that the decision should be taken by an officer of the rank of inspector or above, as has been provided for in Sections 9, 16 and elsewhere for decisions concerning the suspect’s detention. This will ensure that the decision is taken by an officer independent of the investigation and with seniority to the investigating officer. Secondly we consider that the conditions that could be imposed must be set out in the legislation by way of an exhaustive list, to ensure that officers exercise their powers within reasonable limits and uniformly across the Police Service.

Section 16 – Modification or removal of conditions

13. Section 16 provides for the review of conditions imposed upon release by a constable of the rank of inspector or above, but it does not specify a period for such review. The review must be carried out at reasonable intervals between the release from custody and the end of the 28 day period of release upon conditions, provided in Section 14. We would propose seven day intervals of review to be reasonable, so as to ensure that the investigation is being pursued throughout the period of conditional release.

Chapter 3

Chapter 4

Section 23 – Information to be given before interview

14. Section 23(2) states that ‘Not more than one hour’ before a constable interviews a person about an offence, they must inform the suspect of their right to silence, to have a solicitor present in interview with them and to the other rights under Chapter 5. The time period specified is far too short to enable the suspect to exercise their rights effectively. Should a suspect wish to have consultation with a solicitor, as provided by Section 36, this will have to be organised. The SLAB Solicitor Contact Line must be contacted by the investigating officer, which must take sufficient details concerning the case in order to instruct a solicitor. Contacting a solicitor to act on the suspect’s behalf will take over half an hour. Once the solicitor has agreed to act, they may speak to the suspect by telephone prior to attending. They will need travel time to attend at the police station from their location. The suspect is then entitled to consult with their solicitor prior to interview. In order to allow for proper discussion and advice we suggest that allowance should be made for the consultation to last not less than half an hour. In complex cases it may take considerably longer. With respect to assistance from a parent, guardian, appropriate
adult or interpreter, this may also take over an hour to organise and for the relevant person to attend.

15. In our view the suspect should be informed of the rights contained in Section 23, at the point in time specified in Section 5. The omission at Section 5 is to notify the suspect of their right to have a solicitor present during interview, as provided in Section 24, which as we set out above, should be included at Section 5. If the intention of Section 23 is to repeat the rights available to the suspect, it should state that the person must be informed not less than two hours before interview of the rights set out in Section 23, where these have not already been exercised. To repeat the rights unnecessarily and out of context can only serve to confuse suspects about what their rights are and can lead to them not exercising them effectively when they may well benefit from the assistance of a particular right.

Section 24 – Right to have a solicitor present

16. Section 24 provides that a person has the right to have a solicitor present while being interviewed. This does not adequately describe a solicitor’s role, as understood in the judgment of the UK Supreme Court in Cadder. The section should specify that a person has the right to be assisted by a solicitor while being interviewed. This would ensure that a solicitor is able to make appropriate interventions on behalf of their client so as to effectively represent their interests. Section 24(4) provides that a constable may proceed to interview without a solicitor present in certain specified circumstances. As in the instances above, this is a decision concerning the exercise of the rights of the suspect whilst in police custody. It must therefore be taken by an independent officer of the rank of inspector or above, so that the decision is objective and fair in the circumstances. Furthermore, the exceptions to this requirement should be more tightly drawn so as to reflect the fact that Strasbourg has indicated that access should be allowed unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right.7

Section 25 – Children and waiver of legal advice

17. Broadly, Section 25 provides that children under 16 cannot consent to the waiver of their right to have a solicitor present. In effect, this will ensure that children cannot be interviewed without their having received legal advice in some form. We welcome this provision. Children in custody are particularly vulnerable and although accompanied by a relevant person in interview, that relevant person – often a parent or guardian - may have minimal or no experience of custody, little understanding of gravity of the offence which the child has been arrested in connection with, and no grasp of the significance of the right to have a solicitor present.

18. The Bill would exclude children aged 16 and 17 from this waiver, but would provide that they can waive consent only with the approval of their relevant person. We consider that many of the same risks will apply to all under 18s as apply to those aged 16 and under. The Bill may be designed to recognise that older children and young adults have increasing cognitive capacity and competence to understand

7 Salduz v Turkey (2009) 49 EHRR 19, para 55.
complex decision making and to take responsibility for their own choices. However, this approach is somewhat undermined as the determinative decision on waiver will ultimately be taken by the relevant person in many cases. The relevant person will often be in a significant position of responsibility and able to influence the decision of the young person in custody. Parliamentarians may wish to ask the Scottish Government to further explain the rationale behind this two step approach to under 18s and waiver. If the Bill is to adopt the distinction between under and over 16 year olds, we consider that it will be important to ensure that both the relevant person and the young person in custody are given clear guidance on the right to legal representation, the significance of the right to legal representation and the relevance of the waiver decision. In all circumstances this information should be provided in an accessible format which both the young person and the relevant person assisting them can readily understand. The requirement that this guidance be given should be statutory.

**Sections 27-29 – Post-charge questioning**

19. Section 27(1) allows for the questioning of a person after being accused of having committed the offence. This is immediately followed by the limitation of questioning to cases where it is in the interest of justice to do so (Section 27(2)) and where it satisfies a three-part test of determining: (i) the seriousness of the offence; (ii) the ability to have questioned the accused person pre-charge about the offence; and (iii) that the information, having been obtained earlier would have cleared the accused of any wrong-doing (Section 27(3)). JUSTICE Scotland considers that the perceived value of post-charge questioning is overstated and is unsure of what value it will add in the Scottish context. For offences such as terrorism which may require post-charge questioning, enabling provisions already exist.  

20. From our perspective, the general prohibition on post-charge questioning should be retained as: it prevents unfairness to and oppression of suspects and it may be contrary in certain instances to the jurisprudence of the European Court of Human Rights. As explained in our response to the Consultation, JUSTICE Scotland considers that any expansion of post-charge questioning must be accompanied by a legal framework providing safeguards in line with the recommendations of the Joint Committee on Human Rights. These include that:

- the post-charge questioning deals with evidence which has come to light after charges were brought;
- the total period of post-charge questioning last for no more than 5 days in aggregate;
- the presence of the accused’s lawyer is necessary during any questioning;
- review of the transcripts from questioning after it has occurred by the same judge who authorised the post-charge questioning to ensure it remained within the prescribed scope of questioning;

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8 Counter Terrorism Act 2008.
10 Memorandum from Professor Clive Walker, Centre for Criminal Justice Studies, School of Law, published in Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill (HL 50/HC 199: 7 February 2008)
11 Ibid, Para 37.
• the questioning be completed within the allotted time; and
• post-charge questioning should be limited to the period before the commencement of a trial.

21. We welcome the acknowledgement in the Bill that post-charge questioning must end when a trial is commenced. It is also important that any questioning will be authorised by a judge and that the individual concerned will be able to make representations. However, many of the other safeguards are omitted. Importantly, the test to be applied by the relevant judge, as proposed in Section 27, is extremely vague. An ‘interests of justice’ test is extremely flexible and is clearly not limited to circumstances where new evidence comes to light which was not available at the time when the investigation leading to charge was ongoing. Equally there is no statutory time limit for the questioning authorised. Although the judge has the discretion to set a time frame for the questioning, there is no statutory framework for that discretion proposed, beyond that it be in the interests of justice. In theory, the time-scale set by order could provide for questioning over a period of months during a significant pre-trial period. Significantly, there is no provision, beyond authorisation, for judicial supervision. The rationale of the JCHR was that without supervision, there would be a significant potential for post-charge questioning to be abused. JUSTICE Scotland would urge the Committee to consider a recommendation that this provision – if not removed – should be amended to reflect the clear safeguards above.

Chapter 5
Section 30 – Right to have intimation sent to another person

22. Section 30(5) affords to a constable the power to delay the exercise of intimation. We repeat as set out above in relation to Section 24 that this decision should be made by an officer independent of the investigation of the rank of inspector or above.

Section 31 – Right to have intimation sent: under 18s

23. Section 31(4) distinguishes between juveniles under 16 or over 16 in relation to whether a constable should continue to contact a parent or guardian to attend at the station on their behalf where it has been difficult to reach them. We do not believe this distinction should be made between these age groups. A 16 or 17 year old child may become impatient at waiting for assistance and decide that intimation is no longer necessary simply to seek to avoid further delay and detention in the police station, rather than because they no longer need the support. Section 31(4)(b) should be deleted.

Section 32 – Right to under 18s to have access to other person

24. Section 32(3) again makes provision for the refusal of access in exceptional circumstances. As with other exercise of this power, the decision must be taken by an independent officer of the rank of inspector or above.
Section 33 – Support for vulnerable persons

25. Section 33(1) distinguishes between adults and juveniles with regard to whether they need assistance owing to a mental disorder. We do not think the distinction ought to be made. It cannot be assumed that a parent is able to provide appropriate assistance to a child with a mental disorder. The officer should make enquiries of the parent as to whether further assistance is needed, and have the residual discretion to obtain further support where they consider it necessary, even if the parent does not.

Section 34 – Power to make further provision

26. Section 34(1) provides that the Scottish Ministers may amend by regulations section 33(1)(c) and 33(3). It should be made clear by the Justice Secretary to what end these amendments may be made and we would encourage the Committee to seek clarification as to the purpose of this section.

Section 36 – Right to consult with a solicitor

27. Section 36(2) again makes provision for the refusal of access in exceptional circumstances. As with other exercise of this power, the decision must be taken by an independent officer of the rank of inspector or above.

28. We do not agree with the provision in Section 36(3) that appropriate consultation may be provided through telephone advice. Solicitors are unable to adequately advise their clients by telephone alone since they are unable to assess the suspect’s welfare and demeanour; nor does the solicitor have the same opportunity for access to information from the police concerning the suspected offence. Furthermore, the solicitor cannot readily make effective representations to the police concerning the decision to charge or further detain if they only advise their client by telephone. Allowing solicitors to give advice only by telephone risks condoning the provision of inadequate advice. We would therefore propose that Section 36(3) be amended to provide that ‘consultation means consultation in person but initial advice may be by such means as may be appropriate in the circumstances and includes (for example) consultation by means of telephone.’ As stated above in relation to Section 24, the exceptions to this requirement should be more tightly drawn so as to reflect the fact that Strasbourg has indicated that access should be allowed unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right.

Chapter 6
Section 37 – Use of reasonable force

29. Whilst we welcome the setting out of the need to use reasonable force, we consider it necessary to define what reasonable force entails, and when it may be used, in order to ensure that all police officers apply the power uniformly. The use of force must be legitimate in the circumstances, not excessive, and never applied
The provision of clear guidance, training and support for officers on when force will be reasonable and proportionate is essential.\textsuperscript{12}

**Sections 39 - 40 – Power of search etc on arrest**

30. Sections 39 - 40 concern the powers of police officers to search persons, seize an item from them and to place them in an ID parade. For completeness and to ensure the power is used appropriately, we consider it necessary to include at Section 40(2)(a) that the subsection applies to a person who is in police custody having been \emph{lawfully} arrested without a warrant. By inserting 'lawfully' the section ensures that the power is used in accordance with the appropriate exercise of the power to arrest.

31. Further, since these powers are now placed on a statutory footing, we consider it necessary to set out when each power may be exercised. In relation to search, this must be on the basis of a reasonable suspicion that an illicit item (including any item which might be used to cause harm to himself or others), or item connected with a suspected offence, is concealed on the person. In relation to seizure, this must be on the basis that the item may present a danger to the public, is illegal, or is evidence in the commission of an offence. In relation to an identification parade, there must be a necessity for a witness to identify the suspect in connection with a suspected offence, and an identification parade must be the most appropriate means of securing that identification. Statutory proscription of the conditions of any search and the treatment of property seized would also be appropriate.\textsuperscript{13}

**Section 42 – Duty to consider child’s best interests**

32. We welcome the statutory provision of the child’s best interests as a primary consideration. We are concerned however that the Section includes the possibility of holding a child in police custody. Custody should be used as a last resort in relation to children and for the shortest possible time.\textsuperscript{14} Rather, where their arrest is deemed necessary, a child must be taken to a place of safety. The Section should be re-drafted to reflect this as the standard procedure, and police custody only in circumstances of last resort where no other accommodation is available.

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\textsuperscript{12} The current guidance given by the Crown Prosecution Service in connection with the prosecution of police officers in England and Wales alleged to have acted excessively, provides: Where force is alleged to have been used in the prevention of crime or arrest of an offender necessity may not equate with reasonableness. The following must be considered: the nature and degree of force used a) the seriousness of the offence which is being prevented or in respect of which an arrest is being made; b) the nature and degree of any force used against an officer by a person resisting arrest. See http://www.cps.gov.uk/legal/a_to_c/allegations_of_criminal_offences_against_the_police/

\textsuperscript{13} In England and Wales, these powers are expressly governed by provisions in the Police and Criminal Evidence Act 1984 and further guidance given in the associated Codes of Practice. These measures provide for greater certainty of police powers on arrest. For example, search on arrest (PACE, Section 32), searches of detained persons (PACE, Section 54). PACE Code D deals in detail with the issue of police identification. It, for example, explains that where suitable, for example, video identification should be used as an alternative to an identification parade.

\textsuperscript{14} Article 37 UN Convention on the Rights of the Child
Part 2
Corroboration of Statements

Section 57 Corroboration not required.

33. The Bill proposes that in future criminal proceedings in Scotland, a judge sitting alone or with a jury will be able to find a fact proved without corroboration. This would implement one of the most controversial recommendations of the Carloway review.

34. As we stressed in our earlier submissions, JUSTICE Scotland does not support the proposed removal of the rule of corroboration. Corroboration is still considered by many to be the mainstay of Scots criminal law and it is a principle around which the investigation and prosecution of crime in Scotland have long been formed. We are concerned that the seriousness of this change has not been sufficiently grasped by the Scottish Government. In order to effect such a profound change to our law of evidence and procedure, Parliament must be satisfied that the proposals which will replace it will maintain not only fair trial standards for persons accused of crime but will instil within the public at large confidence that our system of criminal justice will ensure, as far as possible, that the guilty will be convicted and the innocent acquitted. We are not persuaded that the case has been made for such a significant change to the criminal law in Scotland, nor have sufficient safeguards against ill-founded prosecutions and miscarriages of justice been proposed. In summary:

- The Carloway Review did not identify any specific problem with the operation and application of the doctrine of corroboration in practice. Before the conduct of this review, there was little or no discussion of the need to change the rule of corroboration, whether by practitioners or civil society. We find it difficult to identify why the changes prompted by the decision in Cadder could justify such a wholesale change to the law without further evidence to support the case for reform.

- Without provision for alternative mechanisms to protect the quality of evidence, the right of the accused to a fair trial and the credibility of our criminal justice system, we are concerned that the removal of the requirement for corroboration is highly likely to lead to miscarriages of justice. In our earlier submissions, we stressed our concern that the Review – and the subsequent Consultation – did little to address the risk of miscarriages of justice. We return to this issue below.

- The Review focused predominantly on the rights of victims, and particularly, vulnerable victims and victims of sexual offences. We acknowledge that there has been some concern expressed about the implications of the need for corroborative evidence on the prosecution and investigation of some types of offence. However, we are concerned that the Review did not conduct a full investigation into the implications of corroboration for the effective prosecution of sexual and other sensitive offences and other means of protecting victims in those cases. We are concerned that there is no direct evidence that removal of corroboration alone will improve prosecution rates. In many
countries where corroboration is not required, prosecution rates for sexual offences remain low (see for example, the long history of investigation of the low rate of conviction for rape in England and Wales). In any event, if the requirement for corroboration is removed, without appropriate consideration of safeguards to protect the safety of any ultimate conviction, this will be to the detriment not only of the criminal justice system but individual victims. If convictions are unsafe, we run the risk not only that the wrong people will be unfairly and unlawfully convicted, but that the true perpetrators of those crimes will go free.

35. We are not satisfied that any sufficient safeguards are proposed on the face of the Bill and we remain gravely concerned about the future of Scottish criminal law in the absence of corroboration. We consider that, without significant change, successful challenges to convictions under Article 6 ECHR as miscarriages of justice and incompatible with the right to a fair hearing are inevitable, whether before the Appeal Court, the UK Supreme Court or the European Court of Human Rights. The obvious points for challenge will arise in those areas of evidence where – as in historical miscarriage of justice cases identified by JUSTICE in our work in England and Wales – the risk of miscarriage of justice is most obvious: identification evidence, disputed expert testimony and the admissibility and weight to be afforded to confessions.

36. We are concerned that the only proposed amendment to the Scots system of criminal justice provided to try to compensate for the removal of corroboration will be a shift in the proportion of jury members needed for conviction from a bare majority to a majority of two-thirds (10 of 15, with adjustments for smaller juries). As noted in our response to the consultation, this measure, taken alone is altogether insufficient to compensate for the removal of corroboration. As a minimum, the consensus required in England and Wales for a conviction without corroboration is more robust (10 of 12 jurors, only after direction by a judge that a majority verdict will be accepted following an appropriate period attempting to secure unanimity). None of the other safeguards in place in systems where formal requirements for corroboration have been removed were considered seriously by the Consultation, nor are they proposed by this Bill. We are anxious that without these specific statutory safeguards, there will be inadequate, or perhaps even no, opportunities for judicial oversight of the quality and strength of the evidence in a prosecution case. Since, without a formal requirement for corroboration, quality of evidence will be at the heart of a criminal trial, this should be a serious concern for Parliamentarians. As we explained in our earlier submissions, without further protections to preserve the presumption of innocence, the right to silence, the prosecutorial burden of proof and the standard of proof ‘beyond reasonable doubt’, and the possibility to exclude unfairly prejudicial evidence, the likelihood of miscarriages of justice is high.

37. The prosecutorial burden of proof means that it is for the State to prove its case against any accused. The high criminal standard of proof serves a similar purpose: to ensure that the triers of fact, whether judge or a jury, set a high bar for conviction. We are concerned that after the removal of the requirement of corroboration, it is unclear what steps will be taken to ensure that these standards remain in place. While we expect that the Government intends that directions will be given to police, prosecutors and judges to ensure that cases are only presented and
prosecuted when evidence is sufficient to secure a conviction, the tests proposed for Scotland have not been explored or provided to Parliamentarians for scrutiny. This should be a matter of significant concern. Equally, judicial oversight of the sufficiency and quality of evidence is crucial. Without clear guidance and control on sufficiency and standards of evidence, the jury will be the ultimate arbiter of fact, but will also be required to adopt an entirely subjective assessment of the sufficiency of evidence in any individual case. Against this background, clearly any or only 'some' evidence could be deemed sufficient, bringing a real risk of serious inconsistency. This standard is no standard at all and would clearly violate the right to a fair hearing as protected by Article 6 ECHR.

38. Furthermore, there is no provision in the Bill to provide for judicial oversight and control in cases where a prosecution is clearly ill-founded, or the evidence presented involves a bare sufficiency, but unacceptably, poor quality (for example, by statutory provision for submissions of no case to answer). It is unclear whether the Government intends that existing criminal procedure rules might be used for the purposes of submissions of no case to answer. This is unacceptable. We struggle to see what role there would be in the future for section 97 of the Criminal Procedure (Scotland) Act 1995. With ‘no reasonable jury’ submissions already abolished by section 97D of the 1995 Act, there appears to be no role whatsoever for the Court in relation to the quality of the evidence, outwith a corroboration rule. Absent clear provision for judicial supervision of the quality of the prosecution case – according to high standards designed to maintain the prosecutorial burden and the requirement for proof beyond reasonable doubt, and sufficient powers to assess the quality of the evidence by the Court – JUSTICE Scotland considers that Parliament must remove these piecemeal and inadequate proposals from the Bill.

39. Before this Bill progresses Parliamentarians must, at a minimum, require the Scottish Government to explain precisely what standards will apply to ensure consistency and sufficiency in the rules of evidence and make provision for clear powers for judges to intervene when those standards are not met. In JUSTICE Scotland’s view these standards must be expressed clearly and grounded in statute.

Part 3 – Solemn procedure

40. This Part of the Bill implements some of the recommendations of the Bowen report on indictment procedure in the sheriff court. Those recommendation in large part replicate the Bonomy reforms in the High Court and are on the whole to be welcomed. JUSTICE Scotland remains concerned about the resources available for the implementation of these changes and that proposed changes to time limits and the written record may not be appropriate or necessary. These reflect the concerns we expressed in connection with the consultation on Sheriff and Jury Procedure.

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15 Independent Review of Sheriff and Jury Procedure Report by Sheriff Principal Edward F Bowen June 2010
Resources

41. The qualified success of the High Court reforms may not easily be achieved in the Sheriff Court. Notably, the volume of cases is considerably greater. As Sheriff Principal Bowen noted in his original report, the overall trend is of an increase in the volume of both routine and priority cases in the Sheriff Courts. The disclosure obligations on the Crown have greatly increased since the date of the report and accommodation pressures, brought about by court closures, the relocation of justice of the peace courts and the proposed reforms to the civil jurisdiction of the Court of Session, are significant. If the aims of the reforms are to be achieved, it is crucial that adequate resources are made available to COPFS and Scottish Courts, to try cases within a reasonable period of time, and to ensure that victims, witnesses, and accused persons are able to access the courts. Further as both Lord Bonomy and Sheriff Principal Bowen have observed, successful implementation will require adequate funding of defence solicitors in relation to the additional (and earlier) work required of them as a result of the proposed reforms.

Section 65 - Time limits

42. Section 65 proposes an increase in the time limit between committal and trial. We do not support the proposal to simply increase the 110 day timelimit to 140 days wholesale. The justification for such an increase has not been made out. Lord Bonomy's view that the timelimits in the Sheriff court should be altered to bring them into line with his proposals for the High Court were not, at that time, accepted by the Scottish Government which noted that extensions of time limit were less frequently sought in the Sheriff Court. In any event, an evaluation of the Bonomy reforms noted that they had done little to alter the culture of applications for extensions in the High Court, even after the increase in time limit to 140 days. Whilst there has been a rise in the complexity of some cases indicted even in the Sheriff Court, very many are comparatively straightforward and a longer period before the case must be brought to trial may prove counter-productive to the aim of ensuring parties prepare their cases at as early a stage as possible. Of most significance is the period of time victims must wait for justice to be served, and accused persons to be tried, particularly those remanded in custody. The length of time between charge and trial must be kept to a minimum to ensure a fair trial can take place, within a reasonable period of time.

Section 66 – The written record

43. Section 66 of the Bill seeks to introduce the written record procedure to the Sheriff Court. The proposed section departs from the High Court procedure by requiring the parties to communicate within 14 days after service of the indictment and imposing upon the procurator fiscal the obligation to lodge the written record. JUSTICE Scotland considers that neither change is desirable, adding a layer of bureaucracy which is unnecessary. Pre-trial communication in busy jurisdictions may impose significant burdens on all parties and in particular the Crown. It is inevitable in custody cases that problems with disclosure, forensic reports or defence experts

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19 By inserting a new s71C in the 1995 Act.
will arise relatively late in the process, and after the stipulated meeting which has to take place at least two weeks before the first diet. In the High Court the perceived problem of late or inadequate communication has been addressed by changes to the written record form, requiring parties to detail the dates and nature of their communication. We consider that a similar approach is equally apt for the Sheriff Court and that section 66(3) is unnecessary. Equally, placing the obligation on the procurator fiscal to lodge the complete written record seems unnecessarily burdensome. The current High Court practice, whereby parties e-mail their own part of the written record to the clerk, seems preferable.

**Part 5 Appeals and SCCRC**

**Sections 76 and 77 – Limiting the discretion to extend time**

44. Both Section 76 and 77 would limit the discretion of the court to allow appeals out of time to cases where applicants are able to show ‘exceptional circumstances.’ JUSTICE Scotland is concerned that there appears to be little or no evidence that such a change is necessary or justified. The primary mischief identified by the Carloway Review related principally to the overall length of time taken to deal with appeals, not to the need for appeals to be started on a more timely basis. As we highlighted in our response to the Consultation, there is no evidence that unmeritorious appeals are being allowed to proceed without justification. On the contrary, it is our view that courts are increasingly robust in their approach to finality and the exercise of their discretion on time limits, in the interests of preserving the finality and certainty of proceedings. Without such evidence, JUSTICE Scotland is concerned that this new statutory qualification would fail to strike the right balance between the need for an efficient appellate system and the right of appeal itself.

45. The time limits which apply to the lodging of appeals are already closely circumscribed. For example, the commencement of an appeal against a summary conviction is an application for a stated case which has to be lodged with the Clerk of Court within one week of the conclusion of proceedings (section 176(1)(a) of the Criminal Procedure Scotland Act 1995). The discretion to extend time, although already closely guarded, may be key to ensuring justice in an individual case.

46. It should be recalled that section 181 of the 1995 Act was last amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, with the purpose of avoiding floodgates appeals post *Cadder v HM Advocate*. JUSTICE submitted before the Supreme Court in *Cadder* that the floodgates argument was overstated. The Court’s workload has not multiplied as was predicted by the Crown in *Cadder*. It is therefore difficult to see why a further strengthening of this power, and consequent greater difficulty in gaining access to the Court for appellants, should be adopted.

47. We recommend that the Committee asks Ministers to provide clear evidence that a further hurdle is necessary and justified and will not pose an undue restriction on the individual right to appeal. If the test is to be restricted, we have a number of concerns about the procedure proposed:

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a. There is no guidance provided in the Bill or in the Explanatory Notes on what circumstances may be considered exceptional. If this discretion is to be left to the court, it should be broad and uncircumscribed.

b. We are concerned that the effect of these provisions is that the Appeal Court will deal with any application for an extension of time solely on papers. Whilst an explanation in relation to delay should be provided and the proposed ground of appeal must be stated, the strength of those arguments, and their basis may not be readily identifiable simply from a perusal of papers. The appellant is encouraged (see *Lilburn* and *Toal*) to state his ground of appeal as soon as the information comes to hand. The outstanding preparation for appeal, and an explanation for the delay, can be best justified in oral submission. 21 If the ‘exceptional circumstances’ test is adopted, as a minimum, the right to make representations and provision for a hearing before permission is refused, must be included.

Section 82 - References by the Scottish Criminal Cases Review Commission (SCCRC)

48. JUSTICE Scotland welcomes the repeal of section 194DA of the Criminal Procedure Scotland Act 1995 which granted the High Court the power to reject references from the Commission where it did not consider the action was ‘in the interests of justice’. This measure was introduced to encourage finality and certainty in the proceedings. We objected to the introduction of this measure and we consider that it should be repealed. We reiterate the words of Lord Kerr which have a wider application in relation to this Bill and the general approach to time limits and finality:

Lord Atkin’s remark in *Ras Behari v King Emperor* (1933) that ‘finality is a good thing, but justice is better’ seems to me to be infinitely preferable to that of his near contemporary Justice Brandeis in 1927 in *Di Santo v Pennsylvania* that it is ‘usually more important that the law be settled than it be settled right’. 22

49. JUSTICE Scotland deeply regrets that it is instead proposed to reinstate the ‘interests of justice’ hurdle in section 194B. The standard required of the Appeal Court to find that there has been a miscarriage is already a high one. We cannot fathom how if such an injustice has been identified, there could be grounds based on the ‘interests of justice’ not to allow the appeal and quash the conviction.

50. In reintroducing the ‘interests of justice’ qualification, the High Court is required again to have regard to the need for ‘finality and certainty’ in the determination of criminal proceedings. Beyond Lord Kerr’s principled preference as outlined above, we note that the application of the finality and certainty test has so far been applied by the Scottish appellate courts to the significant detriment of the individual right of appeal, particularly when considered in the context of the ‘interests

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21 *Toal v HM Advocate* 2012 SCCR 735, at [108]; *Carberry v HM Advocate* [2013] HCJAC 101 at [7].

of justice’. We are concerned that, in some cases, the need for finality is conflated with a determination that it would not be in the interests of justice for any appeal to proceed, which is a different and important determination.23

51. Much of JUSTICE’s early work related to miscarriages of justice. Working with the BBC’s Rough Justice and Channel Four’s Trial and Error programmes, JUSTICE helped secure the release of many prisoners who had been wrongly imprisoned. Our policy work and recommendations helped inform the reforms that brought about the establishment of the Criminal Cases Review Commission and subsequently the Scottish Criminal Cases Review Commission. We consider that the proposed change in Section 194B (Section 82 of the Bill) will pose a significant challenge to the ability of the Scottish Criminal Cases Review Commission to help to identify miscarriages of justice and to secure redress and remedy for those individuals affected by failings in our criminal justice system. We would ask Parliament to accept the repeal of Section 194A, but require the amendment of Section 82 of the Bill to delete new Section 194B.

JUSTICE Scotland
16 September 2013

Justice Committee
Criminal Justice (Scotland) Bill
Written submission the Law Society of Scotland

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of its Criminal Law Committee ("the Committee").

General Comments

The Committee welcomes the opportunity to respond to the Scottish Parliament’s Justice Committee’s call for written evidence upon the general principles of this Bill which was introduced into the Scottish Parliament on 21 June 2013.

The Committee has been actively engaged with the Scottish Government and Scottish Parliament since the Judgement in Cadder v HMA [2010] [UKSC] 43 and has also responded to a number of Scottish Government Consultation Papers which have been taken forward and which now form the basis of much of the Bill including the Scottish Government Consultation Paper entitled “Reforming Scots Criminal Law and Practice: Carloway Report” in October 2012, “Reforming Scots Criminal Law and Practice: Additional Safeguards following the removal of a requirement for corroboration” in March 2013 and “Reforming Scots Criminal Law and Procedure Reform of Sheriff and Jury Procedure (the Bowen Report)” in March 2013.

With particular reference to the Carloway Report which was published in July 2012, the Committee, while welcoming many of Lord Carloway’s recommendations, a number of which are contained in the Bill which will introduce safeguards concerning vulnerable suspects, child suspects under 16 not being able to waive their rights to legal representation and the reduction of the maximum detention period without charge to 12 hours, remains seriously concerned with regard to the proposal to abolish the requirement for corroboration in criminal proceedings as referred to in Section 57 of the Bill.

The Committee believes that in so doing, whilst also failing to introduce sufficiently strong safeguards in the Bill, will simply result in a contest between two competing statements on oath and result in an unacceptably increased risk of miscarriages of justice.

The Committee believes that the requirement for corroborated evidence is not an antiquated outmoded legal notion but is a fundamental principle on which the Scottish Criminal justice system has been founded. Any proposal to remove this
requirement should be set against the background of a wider review into the Scottish criminal justice system.

While the Committee notes that Section 70 of the Bill amends Section 90 of the Criminal Procedure (Scotland) Act 1995, by changing the number of jurors required to return a verdict of guilty from 8 to 10, this change alone is insufficient to remove the risks created by abolishing corroboration.

The Committee strongly believes that there needs to be full and informed public debate on the prosecution policy and criteria in respect of cases in which there is no corroboration.

The Committee strongly believes that careful consideration requires to be given to the leading and evaluation of identification evidence in trials. Routine reliance on dock identification of an accused person, sometimes years after an alleged offence, is a distinctive feature of the Scottish criminal justice system. In the past, the requirement for corroboration (i.e. identification from another source) has been used to justify this procedure. Without corroboration, continued reliance of dock identification of an accused by a single witness is likely to increase the risk of mistaken identification leading to a miscarriage of justice.

The Committee strongly believes that in cases where there is no corroboration, the trial judge should have the statutory power to withdraw the case from the jury on the basis that the evidence would not entitle a reasonable jury to convict.

Such safeguards have not existed previously precisely because there has always been a requirement for corroboration.

The Committee should like to respond to the Bill as follows:

PART 1: ARREST AND CUSTODY

CHAPTER 1: ARREST BY POLICE – (Sections 1-6)

The Committee believes the current system is working well and there is no requirement to move to a system of arrest on the basis that a constable has reasonable grounds for suspecting that the person has committed or is committing an offence in terms of Section 1 of the Bill.

CHAPTER 2: CUSTODY

Person not officially accused (Sections 7-13)

The Committee notes that the Bill incorporates Lord Carloway’s recommendation of the maximum time the suspect can be held in detention should be 12 hours without being charged or advised that he or she is to be reported to the procurator fiscal.

In respect of section 7, the Committee believes that an officer of the rank of sergeant, rather than the rank of constable, should authorise the keeping of a person in custody.
The Committee notes that the 12 hour limit cannot be extended and indeed, requires to be reviewed after 6 hours in terms of Section 9 of the Bill by an officer who is of the rank of Inspector or above and has not been involved in the investigation in connection with which the person is in police custody all in terms of Section 9(3) of the Bill.

**Investigative Liberation (Sections 14-17)**

This appears to reflect the position in England and Wales with regard to Police Bail where there have been criticisms regarding the accused not being in a position to make representations regarding bail or conditions.

The Committee is concerned that Investigative Liberation will become the norm rather than the exception and, with particular reference to Section 14 (Release on conditions), is concerned with regard to the period of 28 days referred to in Section 14(1)(c) of the Bill. It is noted from Lord Carloway’s Report, that he recommended that the period of liberation on conditions should be limited to a maximum of 28 days. The Committee believes that the period should be any period up to a maximum of 28 days as opposed to a blanket 28 day period as is provided for in the Bill.

The advantage in allowing a shorter period upon which a person can be released from custody is that more onerous conditions of investigative liberation may be accepted on the basis that a lesser period is provided for.

This will also have the advantage of there being fewer applications for a review of conditions as provided for in terms of Section 17 of the Bill.

The Committee notes that Section 17 of the Bill allows a review of conditions before the Sheriff, but suggests that the time period should also be subject to review. Such a review should be undertaken within 48 hours of an application being made, in writing to the Court. Where a review hearing has been fixed, the Crown must provide the accused, or his agent, with full written details of the evidence relating to the case, as at the date of the hearing. Said summary of evidence to be provided to the accused, or his agents, prior to the hearing to review special bail conditions.

The Committee highlights the Legal Aid implications for this new procedure of investigative liberation and review and welcomes clarification in this regard.

**CHAPTER 4: POLICE INTERVIEW**

**Rights of Suspects (Sections 23, 24 and 25)**

The Committee notes that Lord Carloway’s recommendation that the rights to have a solicitor present should apply to a person either in police custody or attending a police station or other place voluntarily for the purposes of being interviewed by a constable is now incorporated in Section 24 of the Bill.

In respect of section 24, the Committee believes the proposed threshold of “in the interests of the investigation” allowing the police to interview a person without a
solicitor is inappropriate. The Committee strongly believes that the threshold should echo the existing statutory test of “in exceptional circumstances”.

The Committee, while welcoming that a person may not consent to being interviewed without having a solicitor present if that person is under 16 years of age, also believes that this should apply to 16 and 17 year olds who should not be permitted to waive their rights to a lawyer at all. The Committee is concerned that many 16 or 17 year olds are vulnerable and require protection during police interview. The Committee does not believe that such protection could be afforded by a parent or relative, its, in some cases, may be ill-equipped for the task.

In respect of section 25, the Committee believes that any person who appears unable to understand sufficiently what is happening or communicate effectively with the police should be provided with support. Support should not be restricted to situations where this is due to mental disorder. The Committee makes the same observation in respect of section 33 of the Bill.

PART 2 CORROBORATION AND STATEMENTS

Corroboration not required (Section 57)

The Committee refers to its general comments and to its comments expressed in previous consultations and maintains that the requirement for corroboration is an essential evidential safeguard. Its purpose is to protect against miscarriages of justice. Other than increasing the minimum jury majority for a guilty verdict, no other safeguards against miscarriage appear to have been considered. The Committee observes that Lord Carloway himself did not consider an increase in the minimum majority to be “necessary or desirable”. The Committee notes that Lord Carloway’s position has been rejected.

In paragraph 7.0.6 of Lord Carloway’s Report, it is stated that independent research was commissioned to assess the impact of corroboration in the progress of criminal cases through the system and that, after thorough consideration of this research alongside all other information, evidence and submissions on the subject, the Review is able to recommend with confidence that the system would be best served by removing the requirement. However, the Report did not consider the alternative safeguards which exist in other jurisdictions which do not have the safeguard of corroboration.

The Committee further notes that the Bill does not take into account police reporting standards nor prosecutorial tests in the absence of the requirement for corroboration.

The Committee further notes that other safeguards incorporated in other jurisdictions where there is no such requirement, such as rules of admissibility of eyewitness identification evidence and the possibility of withdrawal of unreliable evidence by a judge from a jury as safeguards are restricted in Scottish criminal procedure precisely because there is a requirement for corroboration. It is noted that such safeguards have not been considered and do not appear on the face of the bill other than a minor change from a simple to a weighted majority verdict at Section 70. The Committee reiterates its previously stated position that any change to the law in
Scotland requiring corroboration requires to form part of a full scale review of Scottish criminal procedure and should under no circumstances be contemplated in isolation in order to prevent miscarriages of justice from taking place.

As a consequence of the removal of the requirement of corroboration, the Committee remains of the view that cases will be less likely to be thoroughly investigated by procurators fiscal taking into account resources used and that there will less evidence presented at trial. The Committee believes that proper research should be commissioned into the removal of requirement for corroboration in that any change to the size of a jury majority as is proposed in Section 70 of the Bill may well have resulted in acquittals in cases where there had previously been a conviction on a majority verdict. The Committee believes that research into assisting juries should be part of the overall review of the Scottish criminal justice system. In particular, there is no evidence that a jury of 15 persons is better able to determine questions of guilt or innocence than a jury of 12 persons.

The Committee remains seriously concerned that this proposal runs the risk of radically transforming the criminal justice system in Scotland from one which is widely recognised as having a very strong procedural safeguards for the prevention of miscarriages of justice to one with weaker procedural safeguards.

The corroboration rule in Scots Law has consistently been cited by successive Governments as a reason for not introducing into Scots Law safeguards against wrongful conviction which are common in other jurisdictions. Removing the corroboration requirement without, as a minimum, properly reassessing the case for these other safeguards, would be wholly inappropriate.

The Committee further notes that the removal of the requirement for corroboration will expose a large cross section of the public who deal with the individuals on a one-to-one basis, to the possibility of inappropriate prosecutions. What prosecution policy will apply in the case of an individual alleges that he was assaulted by a police officer or a prison officer? Or a pupil alleges that a teacher or social worker acted inappropriately?

The Committee notes that no consideration has been given to the test of sufficiency of evidence at trial and, on the basis that corroboration is an integral part of this test, this proposal to abolish the requirement for corroboration will be problematic given the terms of Section 97D of the Criminal Procedure (Scotland) Act 1995 whereby a judge has no power to direct a jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed in the evidence, could convict on the charge and accordingly, no submission based on that ground or any ground of like effect is to be allowed.

The Committee believes that, on the basis that the requirement for corroboration is to be abolished in terms of Section 57, it should therefore be possible for the trial judge to sustain a submission that no reasonable Jury could convict on the evidence led. The Committee notes that the Scottish Law Commission has previously recommended this (Report on Crown Appeals) Scot Law Com No. 212, 2008).
**Statements by accused (Section 62)**

The existing rule was designed to prevent an accused from avoiding giving evidence on oath and being subject to cross-examination by relying instead on exculpatory or mixed statements (containing incriminating and exculpatory material) made earlier. This new provision would allow an accused alleged to have committed a sexual assault to have his position of consent considered without going into the witness box.

**PART 3: SOLEMN PROCEDURE (Sections 63-70)**

The Scottish Government’s Consultation entitled “Reforming Scots Criminal Law and Practice: Reform of Sheriff and Jury Procedure” identified at that time a number of practical issues regarding proposals for reform in this regard.

In particular, and with reference to Section 66 of the Bill (Duty of parties to communicate), the Committee remains concerned regarding the resource implications of this provision for both Crown and Defence. The Committee believes that responsible practitioners will seek out procurators fiscal and vice versa in order to set up discussions with a view to progressing the case in any event without the requirement for legislative change.

With regard to the written record of state of preparation, the Committee notes that in High Court cases the practice which has developed is for each party to individually prepare and email to the court an electronic record of that party’s preparation. An electronic copy of the record is also emailed to the other parties in the case.

Accordingly, the Committee believes that there should not be a requirement for a joint written record as referred to in Section 71(c)(2) of the 1995 Act as asserted by Section 66(3) of the Bill. Rather, the requirement should be for an individual written record.

**First diets (Section 67)**

The Committee believes that, as indicting cases to the first diet will happen every day in Sheriff and Jury Courts in both Glasgow and Edinburgh, consideration must be given to the impact that this proposal will have on “hub” jury courts in rural areas and how this will work in practical terms.

**Guilty Verdict (Section 70)**

The Committee refers to its general comments and believes that proper research should be carried out under the direction of the Scottish Law Commission in order to determine the number of persons who sit on a modern jury and the majority required for any verdict.

The Committee notes that this was not part of Lord Carloway’s remit, and that such research has not been undertaken.
The Committee believes that this research should look at the existing system in Scotland as well as other modern jurisdictions where serious charges are determined by lay juries.

The Committee believes that it may well be the case that 12 jurors rather than the traditional 15 jurors is the appropriate number. The Committee notes that if the number was reduced to 12, as is the case in many modern jurisdictions, then this would result in significant savings in expense to the public purse and a deduction in the inconvenience caused to persons who sit on juries and to the large number of people who are cited to attend for jury duty.

A reduction in the quorum of all juries throughout Scotland would inevitably result in significant and sustained savings. In a time of pressure on public funding, these savings would free up money for investment in practical and effective measures to assist juries e.g. the one-off investment in electronic tablet devices to view photographs and documents instead of the present practice of providing printed copies for each jury member. In addition, money could be spent on providing juries with paper or electronic copies of the lengthy legal directions given at the end of the trial. At the moment, juries have to listen, try to note down, understand and then apply legal directions to the facts of the case.

The Committee further notes that, in England and Wales, a minimum number of 10 out 12 jurors is required for a verdict of guilt with a further safeguard that, in the first instance, juries are instructed to seek a unanimous verdict.

On the basis that Scottish juries continue to have 15 members, the Committee suggests that, in line with other modern jurisdictions, consideration should also be given to requiring 12 out of 15 jurors to be persuaded before any verdict is returned. The Committee believes that this provision is, however, only piecemeal reform and believes that proper research into the working and findings of juries in Scotland should be undertaken as soon as possible as there is at present no information available regarding jury verdicts in Scotland. Regard should also be given as to the age of jurors and who should be eligible to sit on a jury as part of overall jury reform. The Committee notes that the Scottish Government consulted in 2008 ("The Modern Scottish Jury in Criminal Trials") Other than the limited provisions at Sections 93-97 of the Criminal Justice and Licensing (Scotland) Act 2010, there has still been little in the way of jury reform.

Separately, the Committee notes that the not proven verdict is not a matter which has been placed on the face of the Bill.

With reference to Lord Carloway’s evidence to the Justice Committee on 29 November 2011, he stated that “if we go down the route of examining majority verdicts, we must examine the not proven verdict. If I had gone down that road, there would have been another 150 pages in the Report”.

Although the Committee understands that the Scottish Law Commission is to consider the three verdict system, the Committee believes that the research it has previously recommended be undertaken, should also consider the impact of the three verdict system.
In this regard, the Committee refers to its general comments that, rather than piecemeal reform, a wider review into the Scottish Criminal Justice system is necessary.

PART 4: SENTENCING: (Sections 71 to 73)

The Society has no comment to make on the basis that sentencing is a matter of public policy.

PART 5: APPEALS AND SCCRC (Section 82 References by SCCRC)

The Committee welcomes the repeal of Section 194DA of the 1995 Act which removes the High Court’s ‘gatekeeping role’ The Committee believes, however, the SCCRC should be in a position to decide the interests of justice point or otherwise and accordingly the Committee sees no merit in this repeal only to be introduced as an interests of justice test at Section 194B of the 1995 Act as inserted by Section 82(2) of the Bill at the point when the appeal is to be determined.

The Committee does not believe that it can be in the interests of justice for the Appeal Court to allow a conviction based on a miscarriage of justice to stand. Such an approach would undermine the credibility of the court and confidence in the Scottish criminal justice system in which the SCCRC plays a respected and important role.

PART 6: MISCELLANEOUS (Section 86 Use of live television link)

The Committee supports the policy intent of this provision on the basis that the Court should only allow the Hearing to proceed by television link on the basis that it is satisfied that it is not contrary to the interests of justice to do so.

Law Society of Scotland
6 September
Justice Committee

Criminal Justice (Scotland) Bill

Supplementary written submission from the Law Society of Scotland

I refer to the oral evidence session on 1 October at which Grazia Robertson provided evidence on behalf of the Law Society of Scotland on the general principles of Part 1 of this Bill. At the end of this session, you invited supplementary points.

Unfortunately, there was no opportunity for Mrs Robertson to address the Committee upon Section 14 of the Bill.

This has been brought into sharper focus given the position of Police Scotland who stated that 28 days would potentially be restrictive as an absolute time limit.

The Law Society of Scotland is also concerned with regard to the period of 28 days but notes Lord Carloway’s Report where he recommended that the period of liberation on conditions should be limited to a maximum of 28 days. The Society believes that any time period fixed should be a period up to a maximum of 28 days as opposed to the blanket 28 day period as is provided for in the Bill.

The Society believes that there is advantage in allowing a shorter period of investigative liberation upon which a person can be released from custody in that more onerous conditions of investigative liberation may be accepted on the basis that a lesser period is being provided for.

This will also have the advantage of there being fewer applications for a review of conditions as provided for in terms of Section 17 of the Bill.

With regard to Section 17 of the Bill, the Society welcomes the review of conditions before the Sheriff but suggests that the time period should also be subject to review.

Section 17 does not provide for a time period within which a review should be undertaken and the Society accordingly suggests that a review should be undertaken within 48 hours of an application being made in writing to the Court and that where a Review Hearing has been fixed, the Crown must provide the person who is subject to a condition imposed under Section 14(2) of the Bill or his or her agent full written details of the evidence relating to the case as at the date of the hearing and that such a summary of evidence should be provided to the person or his or her agent prior to the hearing to review special bail conditions.

The Society also highlights the practical issues of securing the simultaneous attendance at a police station of the police officer, solicitor, person suspected and in some cases, appropriate persons and/or interpreters.

The Society further highlights the Legal Aid implications for this new procedure of investigative liberation and review and would welcome clarification in this regard.
I trust that these further comments will be of benefit to members of the Justice Committee.

Alan McCreadie
Deputy Director, Law Reform
9 October 2013
Write to the Secretary of State for Justice

Criminal Justice (Scotland) Bill

Written submission from the Mental Welfare Commission for Scotland

The Commission is grateful for the opportunity to comment on this Bill. Most of the Bill relates to matters not within our remit and on which we can offer no comment.

The one matter on which we wish to comment is the proposal to prescribe a statutory duty to provide an “appropriate adult”.

We warmly welcome sections 33 and 34 of the Bill. We have previously expressed concern that there was no statutory procedure in Scotland to provide an “appropriate adult” to support a vulnerable person held in custody. While it was custom and practice to do this, we considered that a statutory basis would be important to ensure that vulnerable individuals’ rights are protected.

We look forward to further consultation on regulations under section 34 after the Act is passed.

Donald Lyons
Chief Executive
Mental Welfare Commission for Scotland
August 2013
The Case for the Abolition of Corroboration

The case for abolition involves 3 main arguments:

1. The rule, in being difficult to understand, inconsistent and ineffective, is not fit for purpose in the modern Scottish criminal justice system.

2. It is unnecessary because fact-finders can and should be trusted to accurately evaluate the strength, persuasiveness and reliability of evidence free from legal regulation and technical rules, and because there are a range of other protections against unjust convictions, most notably the high standard of proof which ‘beyond reasonable doubt’ requires.

And, most pertinent to Petal’s standpoint as an organisation which supports victims’ families through their understanding and experience of our criminal justice system at a time of great trauma and anguish:

3. It is disproportionately prejudicial to the interests of victims, their families, witnesses and the public

1. As the Carloway Report notes, the corroboration requirement is “frequently misunderstood by lay persons and lawyers, not least judges”, difficult to explain to juries and applied differently by different judges. Moreover, alterations to the rule, such as the development and application of the Moorov doctrine: has further complicated the rule. We suggest that the simplification of jury directions is in the interests of justice, and so the abolition of corroboration is necessary.

Moreover, in addition to complexity, the resulting “interpretations, refinements, exceptions, loopholes and pure ‘fiddles’” ensure that “corroboration is not as strong a safeguard against miscarriages of justice as many of its supporters believe”.¹ For instance, a study by Duff² points to case law holding that:

- ‘corroborating evidence need only be consistent with evidence that needs to be corroborated rather than more consistent with such evidence than with alternative explanations for such evidence’³;
- “where one starts with an emphatic positive identification by one witness, then very little else is required”
- dock identifications can corroborate even when not preceded by an identity parade or even where the witness identified one of the stand-ins;
- distress may corroborate lack of consent in sexual offences although it can be easily feigned;

¹ REFERENCE
² REFERENCE
³ NICOLSON reference
• confessions may be corroborated by special knowledge of the crime, even where that knowledge was not uniquely known by the suspect.

There is no doubt that these examples considerably weaken the corroboration requirement.

2. In response to those who claim abolition poses a threat to civil liberties, as well as the fact there is no evidence for the proposition that corroboration prevents wrongful convictions it is clear that there will and should still be a test against which cases will be judged before they can proceed to court, but it should be one based on qualitative, not quantitative, considerations. Police and prosecutors will continue to seek the best evidence in every criminal case, and fact-finders will be unlikely to convict on the basis of flimsy or unreliable evidence. Abolishing corroboration should, however, enable the Crown to bring prosecutions in cases where there is a lack of corroboration but where they believe there is still sufficient evidence to give a reasonable chance of conviction.

The protections for suspected and accused persons in Scotland following implementation of the Bill will continue to be substantial - access to legal advice, right to silence, extensive rights of disclosure, the high standard of proof of beyond reasonable doubt (which seems, rather obviously, the greatest protection afforded to an accused person, given that in practice juries are really being asked to assess the quality of witness evidence), the unique and stilted three verdict system, and robust rights of appeal (which are not enjoyed by complainers, victims or their families). As such, we do not believe that the abolition of corroboration will result in an unfair or fundamental unbalancing of the system.

3. As is noted in the Carloway Report, the corroboration rule has its origins in a different era: one in which there was little or no scientific evidence, and which included the presence of capital punishment. It was designed to prevent miscarriages of justice occurring in the form of wrongful convictions. Today, however, as the Report highlights, there is no evidence that corroboration prevents such wrongful convictions. Rather, the rule now serves all too often to actively prevent justice from being done, and from being seen to be done. Potentially meritorious cases are prevented from proceeding to trial on the basis of what is, and is observed by victims, their families, and witnesses as being, a ‘technicality’. The Report suggests that but for the corroboration rule, an additional 450 serious cases would have proceeded to trial in Scotland in 2010. Although this does not necessarily mean that these trials would have led to convictions, the victims, their families, and witnesses would have been given their day in court and a chance to see justice being brought to bear on factually guilty people.

In short, the rule can bar prosecutions that would in another legal system seem entirely appropriate, and victims of crime are denied access to the courts simply because the prosecutor could not bring proceedings due to a lack of corroborated evidence. As has been stated elsewhere, that situation is due to variations of fate or providence, which in a modern legal system is not acceptable.\(^4\) In this we agree with Lord Carloway’s position that convictions should not depend on matters of chance, such as whether there is more than one source of evidence, which may in fact be

\(^4\) REFERENCE
less persuasive than “a single independent or impartial eyewitness, whose character cannot be impugned”.  

As an organisation which supports the families of victims of serious crime, and campaigns for changes and improvements to the criminal justice system in their interests, Petal agrees that the present situation, where witnesses and victims see an accused who may in fact be guilty go free due to an outdated technicality, must now change.

**JURY AND VERDICT**

Although we are of the position that the abolition of corroboration is necessary and that it does not fundamentally alter the balance of the criminal justice system, we recognise that the simple majority required for conviction may need to be revised to adequately protect the accused in solemn trials should abolition happen.

As such, we accept the Bill’s proposal that a guilty verdict can only be returned should 10 out of the 15 jury members agree.

**NOT PROVEN VERDICT**

Some commentators have suggested that removal of the corroboration requirement would impact upon use of the ‘not proven' verdict.  

One justification offered for the not proven verdict is that it can be applied where a jury considers that an accused may be guilty but does not think that there is adequate corroboration. As a result some might argue that removal of the requirement for corroboration would render the not proven verdict unnecessary. There is also an argument that has been advanced that, without the requirement for corroboration; the distinction between not proven and not guilty would become much harder to appreciate, running the risk of confusing jurors as to its use.

We at Petal welcome and agree with these arguments. For us, however, the three verdict system has long been a barrier to justice, rather than posing a threat only upon the abolition of corroboration. It provides the defence and the accused with a 2:1 advantage, given that the not proven and not guilty verdicts are of the same effect – acquittal. Petal can find no justification or logic in having three verdicts when two are of the same effect.

Also, it is not clear that juries understand that this same effect occurs, or indeed understand the three verdict system itself. They are not given an explanation of either at trial, and so it is open to their own interpretation. Indeed, in a study by Hope et al, results showed that understanding of the Not Proven verdict was poor, highlighting ‘inadequacies in the nature of judicial instructions relating to this verdict’. This in itself can only hinder the workings of justice, certainty and consistency.

Furthermore, for victims of crime, their families and also witnesses, the three verdict system presents confusion, disappointment, and frustration. A return of the ‘not proven’ verdict can leave these people bereft of the justice, redress and conclusive

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5 REFERENCE  
6 REFERENCE  
answers they sought from our legal system, given how it is commonly understood as being positioned between the ‘guilty’ and ‘not guilty’ verdicts. Such an eventuality can be devastating for the families and loved ones of victims.

As an organisation which supports victims of crime and their loved ones and which has advocacy as a central concern, Petal therefore strongly suggest that the abolition of corroboration in the Criminal Justice (Scotland) Bill should lead to a re-examination of the not proven verdict’s place in our legal system. We are firmly of the opinion that a two verdict system should be reinstated in Scotland, be it ‘guilty’ and ‘not guilty’ or ‘proven’ and ‘not proven’. It is in the interests of justice and fairness, and legal certainty. Juries should be able to reach their decision of whether they are satisfied beyond reasonable doubt that the accused is guilty/case is proven based not on outdated technical rules of corroboration or the availability of an outdated and manifestly unfair third verdict, but upon the quality of the evidence before them. Moreover, victims’ families deserve conclusive answers as to the accused’s guilt or innocence.

Petal
29 August 2013
Justice Committee
Criminal Justice (Scotland) Bill
Written submission from Police Scotland

The provisions within the Criminal Justice Bill represent some of the most significant changes to the laws of criminal procedure in Scotland for at least a generation, arriving at a time when Police Service has undergone its most radical structural change since the 1970s.

Police Scotland is determined to ensure that the challenges of implementing the proposed legislation are embraced and deliver the maximum benefits to the people who live, work, visit and invest in Scotland, further reduce crime and anti-social behaviour and keep them safe.

Police Scotland welcomes and supports many of the provisions within the Bill, including:

- Removal of the separate concepts of arrest and detention and the move to replace them with a power of arrest on ‘reasonable suspicion’, laid out in statute, will simplify the process and ensure that suspect rights are more fully aligned with prevailing solicitor access provisions;

- The proposal that the police should be given express power to liberate a suspect from detention, pre-charge/report, subject to appropriate conditions, will enable the pursuit of evidence and further investigations whilst minimising threat or risk of harm from any offending related to the matter(s) under investigation;

- A system whereby the police may seek judicial authority to question a suspect further, after the point of charge or intimation of a report being sent to the Procurator Fiscal, but prior to the individual’s first appearance at Court would be used when new evidence emerges or other material becomes known. We note the requirement to seek permission from the court provides an independent safeguard to this position;

- The move to redefine the age of a child as in line with most other European jurisdictions, European jurisprudence and emerging European Union Law; and

- We strongly support the proposal that the absolute, quantitative requirement for corroboration should be abolished and believe it is the quality of evidence, not quantity that should be taken into account.

We will revisit some of these issues and others in greater detail within this submission and would welcome the opportunity to further discuss them as part of our oral evidence.
1. ARREST

1.1 Police Scotland supports the removal of the separate concepts of arrest and detention and replacement with a statutory power of arrest.

1.2 Police Scotland understands that despite the abolition of the common law power of arrest, all other current common law and statutory provisions in relation to search and seizure will remain available to the service. These include powers of arrest for non-criminal activity such as Matrimonial Homes legislation, Adult Protection Orders and those reported absent without leave from the Armed Forces etc.

1.3 However, it appears that the initial recommendation contained within the Carloway Review that a suspect should be taken to a police station when necessary has been superseded by the proposed legislation contained within the Criminal Justice Bill (Section 4) in that when arrested all suspects must be taken as quickly as is reasonably practicable to a police station.

1.4 This requirement to take an arrested person to a police station on every occasion gives little or no scope to carry out enquiries at the locus to determine whether or not an arrested individual has in fact committed the offence for which they have initially been arrested on suspicion.

1.5 Police Scotland would also strongly argue that the wording of Section 4 is unduly restrictive and could lead to persons being unnecessarily or disproportionately detained and taken to police stations e.g. minor offences where they may be subsequently released for report, or where identification is a potential issue or it needs to be established that a prima facie crime has been committed.

1.6 This may require the person to remain with officers for a few minutes, the reality of which being that if they chose to leave they would require to be prevented from doing so in the interests of justice and effectively be the subject of some degree of compulsion. Such individuals may therefore be considered to be under arrest and required by Section 4 to be taken as quickly as is reasonably practicable to a police station.

1.7 Where officers are able to conduct brief but diligent enquiries at the scene of the incident or crime the suspect’s identity and address can often be verified and the facts established that there is no likelihood of repetition of their conduct, making their arrest and subsequent detention at a police station unnecessary and disproportionate.

1.8 The current wording of Section 4 would seem to contradict the presumption to liberty enshrined within Lord Carloway’s Review. It would be beneficial in minimising the breach of an individual’s human rights if there was an ability for an officer to ‘de-arrest’ a suspect when grounds for the continued arrestment of their liberty cease to exist.
1.9 Operational scenarios which afford examples of such circumstances may be found within Appendix A.

1.10 It is understood that Section 13 of the Criminal Procedure (Scotland) Act 1995 is to be reviewed and potentially amended. This may afford the opportunity to modify this legislation and enable a constable to require a person suspected of an offence to remain with them while making reasonable enquiries to establish whether an offence has been committed and whether reasonable grounds for suspecting that the individual has committed the offence.

2. MAXIMUM DETENTION PERIOD

2.1 The Criminal Justice Bill proposes that a suspect’s detention in police custody should be limited to 12 hours. Police Scotland is of the view that this would be an insufficient period of time for a limited number of serious and complex investigations.

2.2 The Criminal Procedure (Scotland) Act 1995 (as amended) currently provides Police Scotland with the ability, in exceptional circumstances to detain individuals in police custody for up to 24 hrs without charge. Police Scotland has worked closely with Criminal Justice colleagues to ensure that persons suspected of committing an offence are not detained for any longer than is absolutely necessary.

2.3 The decision to grant an extension period beyond the 12 hour threshold to a maximum of 24 hours can only be done on review by a custody review officer. This officer requires to be satisfied that the continued detention is necessary to secure, obtain or preserve evidence relating to that offence in connection with which the person is detained; that the offence with which the person is detained is one that is an indictable offence and the investigation is being conducted diligently and expeditiously. The custody review officer is currently a police officer of at least the rank of inspector and is unconnected to the investigation. Guidance remains that, not only must the offence be indictable, but likely to be prosecuted by indictment.

2.4 A recent study (June 2013) has indicated that only 0.4% of all persons detained require to be extended beyond 12 hours, which equates to approximately one case each 2.5 days. Although small in numbers, these can represent some of the most serious matters that Police Scotland is required to investigate.

2.5 Such extensions are required to allow the police to complete sufficient enquiries to prove a charge and ultimately report the offender to the Crown while at the same time mitigating any risk to victims, and promoting public safety and confidence where such enquiries could not be concluded and the suspect released from custody.

2.6 A person’s detention in custody is currently reviewed on an ongoing and dynamic basis by Police Scotland Custody Division personnel who are trained to review the necessity of a person’s detention. Their conduct and behaviour is dictated by a comprehensive Police Scotland operating procedure relating to
the care and welfare of persons in police custody. The operating procedure explicitly advises that no person should be held in custody for longer that is absolutely necessary to complete all police enquiries and ensures that any persons charged with an offence should appear in court from custody or be otherwise released from custody.

2.7 Police Scotland strongly assert that the current parameters for detention should continue. Further, that there should be no diminution of police powers to detain persons for up to 24 hours where it can be demonstrated to be necessary and proportionate.

2.8 Operational examples in support of this proposal have been included within Appendix B regarding this topic.

3. **STATUTORY REVIEW OF SUSPECTS DETENTION**

3.1 Section 9(2) of the Criminal Justice Bill proposes a requirement for a review of a person’s detention when they have been in custody for 6 hours. It is proposed that this would be done by a police officer of at least the rank of Inspector. Police Scotland remains unconvinced as to the necessity for such a review to be enshrined in law.

3.2 Currently the review of persons held in police custody is conducted on a dynamic basis during their period of detention. This is undertaken by dedicated officers and staff from Police Scotland Custody Division and governed by comprehensive Police Scotland operating procedures. The appropriateness of individuals remaining in custody is additionally scrutinised by an Inspector during each shift. Details of such reviews are recorded within associated records.

3.3 Police Scotland consider formalising such a review is unnecessary and adds no additional value to the protection of an individual’s rights. It would create an additional unnecessary layer of management intervention and associated demand on the service. Police Scotland propose that the current operational protocols within Custody Division continue and as such do not require to be enshrined in legislation.

4. **INVESTIGATIVE LIBERATION**

4.1 Police Scotland welcome the inclusion of the concept of investigative liberation within the provisions of the Criminal Justice Bill. This proposal affords the service more operational scope and contributes to the protection of the public. The proposed limitation to the application of conditions to such liberations to 28 days, while reasonable for the simple and more mainstream investigations would however potentially cause significant difficulties in its application to the investigation of a small but significant minority of serious and complex crimes.

4.2 These offences often involve, or are heavily dependent on, international enquiries, complex forensic examinations, financial enquiries or acquisition of
digital/communication data and are unlikely to be progressed sufficiently within the 28 day window.

4.3 It follows that any conditions placed upon suspects designed to moderate their behaviour or conduct would be lost to investigating officers. Operational examples in support of this position are contained within Appendix C.

4.4 The Criminal Justice Bill (Section 16(3)) proposes that a Police Inspector review these investigative liberations on a regular basis. It also provides that the suspect may make representations to a court in relation to such conditions.

4.5 An option for consideration might be that conditions could be initially applied by a Police Inspector, however could be extended beyond 28 days on the authorisation by an officer of the rank of a Police Superintendent, where it can be shown to be necessary and proportionate.

4.6 We note the requirement to keep the necessity and proportionality of investigative liberation conditions under review has no foundation within Lord Carloway’s Review. Police Scotland would wish to identify that the use of investigative liberation will be a new business practice. Its proposed authorisation and review by a Police Inspector is likely to have a clear impact on police resourcing, specifically the role and responsibility of Police Inspectors within Custody Division.

5. WRITTEN UNDERTAKINGS

5.1 The Criminal Justice Bill proposes some changes to the legislation that currently relates to the liberation of individuals from police custody on a written undertaking to appear at court on some future time and date.

5.2 Currently any police officer can grant an unconditional undertaking or undertaking with standard conditions when releasing an individual from custody.

**Standard Conditions** (Officer in charge of station or person who charges the accused):

- Not to commit an offence while on the undertaking;
- Not to interfere with witnesses or otherwise obstruct the course of justice in relation to either themselves or any other persons;
- Not to behave in a manner which causes, or is likely to cause, alarm or distress to witnesses;
- Comply with any other special conditions (Imposed by Police Inspector).

**Special Conditions** can be additionally applied to undertakings (Imposed by Police Inspector) where the officer considers such additional conditions are necessary to secure that the conditions that are referred to in the standard conditions are observed.

5.3 Under the proposed legislation contained within the Bill, the thresholds associated with the application of conditions to a written undertaking have been
revised. As proposed they continue to enable any police officer to grant an unconditional undertaking to appear at court on some future time and date.

5.4 Where any further conditions are required to be applied (including a number which are currently standard conditions), this must be authorised by a police officer of at least the rank of Inspector who must believe that they are necessary and proportionate for the purpose of ensuring the person does not obstruct the course of justice in relation to the offence for which they are in custody.

5.5 This is likely to significantly increase the role and costs associated with Police Inspectors deployed within Police Scotland Custody Division.

5.6 The proposed undertaking regime is more restrictive than is currently available to the Service as it only applies to ‘obstructing the course of justice’ whereas currently conditional undertakings also limit any behaviour which causes, or is likely to cause, alarm or distress to witnesses catering for conduct by an accused which potentially may fall short of a substantive offence.

5.7 In addition to this the proposed conditional undertaking would only relate to the offence for which the suspect had been charged and would not restrict or potentially moderate further offending behaviour by the accused or protect the wider public interest.

5.8 Our support to the overarching presumption to liberty within the Criminal Justice Bill set against our objective of keeping people safe leads us to suggest it would be helpful in striking a balance if more preventative measures were available to the Service when granting Written Undertakings to seek to prevent the commission of further offences. Further, that the standard conditions currently applied should not be diluted.

6. VULNERABLE SUSPECTS

6.1 There has been an Appropriate Adult Scheme in place within Scotland since 1990. The Scheme has no legal standing but in following advice from Scheme members, police officers and police staff are able to ensure that they meet their obligations imposed by the Equality Act 2010.

6.2 Appropriate Adult Services are expected to follow the guidance and standards issued by the Scottish Appropriate Adult Network (SAAN).

6.3 In 2012 cases were brought to the attention of COPFS in which the suspect has had an appropriate adult present at interview but has waived the right to legal advice. There have been subsequent serious concerns that the accused did not understand the caution or terms of the interview and, accordingly, the admissions made during the interview would be held to be inadmissible. Given the significant impact this can have on a case and the quite proper scrutiny of the fairness of the interview likely to be undertaken by any court in such circumstances, the Lord Advocate has considered the matter and issued the following instruction to be issued to all police officers, from 1 October 2012:
"Any case involving suspects of any age who require the support of an appropriate adult must be provided with access to a solicitor prior to interview. They should not be allowed to waive this right".

6.4 The draft Criminal Justice Bill places the requirement for a vulnerable adult suspect to be provided with the services of an appropriate adult on a statutory basis. Scottish Ministers will have the authority to amend the category of person entitled to support from an appropriate adult, and what that support should consist of. They will also be allowed to specify who may be considered a suitable person to provide support to a vulnerable person and what training, qualifications or experience are necessary to undertake this role.

6.5 Provision of Appropriate Adult Services has not been placed on a statutory basis within the Bill. There is therefore some concern, based on limited reporting, that funding may not be secured or maintained within the constraints facing the public sector as a whole.

6.6 It is of note that year on year there has been a 23.5% increase in the use of appropriate adults by the police service in 2012 – 2013 which has placed considerable additional burden upon the Scottish Appropriate Adult Network.

6.7 The provision of a durable appropriate adult scheme is of critical importance to the protection of the rights of some of the most vulnerable members of society. There are currently 19 Appropriate Adult Services across Scotland in receipt of varying degrees of funding from Local Authorities. Fourteen of these services are provided with appropriate adults from existing social work resources. Given that the provisions of the Bill do not place a duty on Local Authorities to provide Appropriate Adult Services, it is expected they will continue to operate as at present with ad-hoc funding arrangements.

6.8 There appears to be no explicit provision within the Bill (Section 33) for the provision of an appropriate adult to a suspect under 18 who is or appear to be suffering from a mental disorder. This is of some concern to Police Scotland as it presents the situation where a vulnerable 17 year old may choose to waive their right to support from a responsible person.

6.9 While Police Scotland in such circumstances would be required by the legislation to initiate suspect access to legal advice, there appears no legitimate basis for Police Scotland to instigate the services of an appropriate adult in these circumstances.

6.10 Police Scotland would maintain that a properly constituted and resourced Appropriate Adult Network would be better placed to ensure the protection of vulnerable suspects and in many cases expedite their release from police custody.

7.  CORROBORATION

7.1 Police Scotland fully supports the contents of Section 57, ruling that it is open to the Judge (or Jury) to find any fact established in evidence to be proved,
regardless of the presence of corroboration, effectively abolishing the requirement for Corroboration in material facts.

7.2 The historical relevance and significance of the Corroboration rule cannot be denied, in the protection of accused persons and the prevention of miscarriages of justice, where a person may have stood accused by a sole witness. However, given the multiple sources of evidence available in courts today, the retention of a requirement for corroboration of every material fact is truly an anachronism. Police Scotland agrees with Lord Carloway where he notes:

“It is an archaic rule that has no place in a modern legal system where judges and juries should be free to consider all relevant evidence.”

7.3 Police Scotland, through thorough and professional investigation, currently do, and always will, seek to present best evidence to the Crown. Indeed, the rules surrounding Disclosure require that all reasonable lines of enquiry are satisfied, be they incriminatory or potentially exculpatory.

7.4 The quality, not quantity, of evidence presented should act as the cornerstone on which the Court and Jury determine guilt or otherwise. In our view, it is the exclusion of such evidence that may deny justice to the victims of particular crime types, such as serious sexual crimes, where, by their very nature, corroboration of all material facts will always present significant challenge.

8. POST CHARGE QUESTIONING

8.1 Police Scotland welcomes the proposals for post charge questioning within the Criminal Justice Bill which we see as a progressive addition to our criminal justice processes. Given that this is a new concept it is difficult to anticipate how frequently it will be utilised during criminal investigations. However instinctively it is our belief that it would prove to be the exception as opposed to the rule and carefully employed when appropriate in consultation with COPFS, in relation to more serious and complex investigations.

9. POLICE NEGOTIATING BOARD

9.1 Police Scotland supports the proposals to establish a Police Negotiating Board for Scotland and will provide a more detailed response to the Consultation Document in due course.

10. WEEKEND COURTS

10.1 A central principle of Lord Carloway’s Review and of the Criminal Justice Bill is that persons suspected of an offence are not unnecessarily or disproportionately kept in custody, making a number of recommendations that provisions within the Bill seek to put into practical effect; e.g. the introduction of investigative liberation and a drive for greater use of written undertaking.

10.2 Whilst these will clearly impact on the length of time that persons are kept in custody, we firmly believe that a major opportunity to influence the length of
time suspects are kept in custody after charge has been missed through there being no provision within the Bill for weekend courts. We as a service have no desire to keep people in custody longer than is absolutely necessary but the lack of courts at weekends means that Lord Carloway’s desire to minimise the number of persons detained more than thirty six hours has been effectively compromised from the outset. In a modern and efficient criminal justice system the length of deprivation of a person’s liberty ought not to depend on the day of the week they are arrested.

10.3 Police Scotland support Lord Carloway’s view that individual’s rights in terms of the European Convention on Human Rights (ECHR) should not be infringed by being kept in custody for more than 36 hours and believe that the establishment of weekend courts would contribute significantly towards minimising detentions beyond this timescale. We also recognise there remains an opportunity to enhance the use of such a facility through greater use of technology, possibly enabling a limited number of courts to deal with custodies from across the country.

11. POLICE AUTHORISATION OF ENTRY & SEARCH OF PREMISES

11.1 The Criminal Justice (Scotland) Bill might also present an opportunity to update police powers to support law enforcement activity in the contemporary criminal justice landscape. One such area which is worthy of additional consideration relates to police powers of search, both with and without warrant.

11.2 Police officers in Scotland have no general power, either at common law or under statute, to enter and search private premises without a warrant, excepting in exceptional and urgent circumstances, and as subsequently agreed by courts on a case by case basis.

11.3 Currently where a person is arrested without warrant or detained on premises, the police have a common law power to search the premises where the arrestee/detainee was found. However, unless there is a significant degree of urgency, that power would not extend to the home address unless that is the place of arrest. Where police are seeking specific items current practice would be to seek a warrant to search the premises in question through application to a sheriff or justice of the peace.

11.4 Elsewhere in the United Kingdom, legislation within the Police and Criminal Evidence Act 1984 (PACE) provides statutory authority for a police officer investigating a serious offence to enter premises and search for a person and evidence in relation to the offence for which that person is sought. A senior police officer can additionally authorise the search of premises where an arrested person is reasonably suspected of having been immediately prior to his arrest. PACE also enables such searches to be conducted without written authorisation where it is necessary for the effective investigation of the offence. The detail of such conduct would be reviewed and retroactively authorised and recorded.
11.5 Police Scotland would propose that consideration should be given within the Bill for similar legislative provision, namely, to enable the authorisation of constables to enter premises to search for and arrest suspects and for senior officers to authorise post arrest search activities by constables. Police Scotland considers that this would better support the diligent and expeditious investigation of offences and further contribute to the reduction of time spent by suspects in police custody.

CONCLUSION

Police Scotland welcomes the Criminal Justice (Scotland) Bill and the opportunities it presents to offer a better balance within our criminal justice system to deliver positive outcomes for victims, while protecting the rights of those suspected or accused of crime.

We look forward to the opportunity of making oral representation to the members of the Criminal Justice Committee and exploring some of the issues raised within this submission.

Malcolm Graham
Assistant Chief Constable
29 August 2013
ARREST & ‘DE-ARREST’

The following are offered as being fairly typical operational examples where the implementation of the Bill provisions may lead to unnecessary and/or disproportionate detentions:

1. SHOPLIFTING

Police are called to a retail establishment regarding a female being detained by staff for shoplifting. On arrival, staff identified the suspect to the officers as the person responsible. It was unclear at that stage exactly what the extent of the evidence was, but it related to the theft of a £2 food item. On seeing the police arrive, the suspect stated that she wished to leave because her elderly mother (or a child) was waiting for her within her car at the car park. She also stated that the staff were holding her unlawfully as she has done nothing wrong. This presented the option of arresting her and taking her to the police station for a £2 theft where she would either subsequently have been charged or released (due to insufficient evidence) alternatively; officers could let her leave the locus and then trace her after full enquiry has been made with staff. She does not want to stay at the locus ‘voluntarily’ and the police have no power to make her do so without arresting her.

In these and similar circumstances it would be helpful if,

(a) The suspect could be arrested & held at the location to enable brief assessment of evidence to establish a prima facie case. Once established and determined that the removal of suspect to a police station was inappropriate, disproportionate or unnecessary the ability to ‘de-arrest’ to report or charge and release would be of benefit, and/or

(b) The proposed review of S 13 Criminal Procedure (Scotland) Act 1995 affords a constable the power to compel a suspect to remain in their presence at the location while brief enquiries as at (a) could be concluded, without having to proceed to formally arrest to do so.

2. MEDICAL INTERVENTION

Police officers attended outside a nightclub during due to a report from door staff that a male suspect is sitting over the top of another male and apparently assaulting him. An update has been received that the injured male appears to be unconscious and the attack is continuing. On arrival the police see the suspect sitting across an unconscious male, bodily shaking him. The male is arrested as the officers have reasonable cause to suspect that he has been committing an assault. The suspect is placed within the police vehicle and the officers proceed to administer first aid to the injured party. The male eventually recovers consciousness and asks the officers where his brother is. The male states that he is epileptic and relies on his brother to help when he takes fits. Enquiry reveals that the male suspect is the brother of the male and was merely trying to assist him. The grounds for arrest clearly no longer exist as no crime has been committed. The Bill requires that in these circumstances the suspect should be taken to a police station as soon as is reasonably practicable.
Currently Section 14 CP(S) Act 1995 allows the police to release from detention a suspect where grounds no longer exist without the need to return to a police station.

3. MINOR DISORDER

It is a busy Saturday night in a city centre with several licensed premises open and full of patrons. There is a police presence to keep people safe and these officers are called to an incident outside a bar where two males are having a low level brawl. They are separated, arrested and placed within the rear of two police vehicles. On further enquiry, it is revealed that both are friends and the conflict arose from a brief misunderstanding. Both are now calm and on checks confirm their identity and that they have no previous criminal history. By taking the males to the nearest police station it would involve a 40 minute drive and could be seen as disproportionate in the circumstances.

It would also deprive the general public of a police presence during a busy time due to the apparent requirement within the Bill to take them to a police station. It would be helpful in these and similar circumstances if there was derogation within the Bill to enable the charging of such individuals and their release from arrest without the compulsion to take them to a police station.

4. MIS-IDENTIFICATION

Police attend a report of a householder having disturbed a youth breaking in to his car. The householder provides a detailed description of the suspect, including clothing. Shortly afterwards, in a nearby street, police find a male fitting the description of the suspect. Following brief questioning (in line with current Case Law) he is arrested is being placed in the police vehicle when the householder attends and clearly states although there is a similarity, it is not the person who was breaking into his car. The grounds for arrest no longer exist however the Bill requires that in these circumstances the suspect should be taken to a police station as soon as is reasonably practicable.

Currently Section 14 CP(S) Act 1995 allows the police to release from detention a suspect where grounds no longer exist without the need to return to a police station.

Police Scotland believes that it would not be proportionate (in the aforementioned examples) to remove these individuals into custody at a police station and that in doing so it would unnecessarily impinge on their Article 5 human rights. The ability of an officer to exercise discretion and de-arrest in such circumstances would be sought as an amendment to the proposed legislation.

Constables should be able to ‘de-arrest’ individuals to facilitate their unconditional release, report or charge.
Appendix B

MAXIMUM DETENTION PERIOD

The following are anonymised examples where the suspect could not be released back into the community without an extension beyond the 12 hour threshold.

1. MURDER

The deceased and male suspect met up and began drinking early in the morning. They made their way to a secluded wooded area where they continued to drink alcohol and met a further suspect. One of the suspects encouraged the other to assault the deceased. The deceased was injured and left lying at locus by both suspects.

The suspects returned in the early hours of the following day having continued to drink in each others company. They both found the deceased injured at locus and repeatedly assaulted him again, resulting in his death.

The deceased’s body was found several hours later and the Major Investigation Team (MIT) took up the investigation.

Both suspects were identified and one detained later the same day. The suspect was still heavily under the influence of alcohol and removed to police station where the SARF process (Solicitor Access Recording form) was completed. The suspect underwent a full medical examination and also had injuries photographed. Given injuries found by the police casualty surgeon, it was recommended that the suspect be afforded an appropriate adult for support during any interview.

The Senior Investigating Officer (SIO) took the decision not to interview at that time given that it was now in the early hours of the following day and to allow the suspect to get a proper rest before being interviewed.

The investigating officers had also undertaken an extended tour of duty over a 24 hour period and were also in need of a rest before interviewing the suspect. The detention period was reviewed and extension beyond the 12 hour period agreed.

The following afternoon the suspect was interviewed by officers who had been fully briefed by the SIO and an Interview Advisor. Admissions were made which identified a further locus which was examined and forensic evidence recovered. The interview lasted for 4 hours and 20 minutes and the suspect was charged with murder.

Without the ability to extend beyond the 12 hour mark, any interview with the suspect would have been seriously questioned at court given their emotional state due to fatigue, alcohol consumption and vulnerability given the police casualty surgeon recommendation for an appropriate adult to be appointed. There was also the potential for evidence to have been missed due to the fatigue of the investigating officers and matters having to be rushed to interview the suspect within a 12 hour window. The SIO decision to allow the suspect and his interview team time to
recover before interviewing was not only considered best practice and in the public interest, but also in fairness to the suspect.

2. REPORT OF MALE IN POSSESSION OF A HANDGUN

An initial report was made to the Police that a male was observed in the street in possession of what appeared to be handgun. A firearms operation commenced and the accused was ultimately traced and detained but not in possession of any weapon. A search by officers near to the locus of his detention resulted in the recovery of an imitation handgun.

The male was found to be extremely drunk and volatile on being detained. On returning to the police station he was afforded his rights as per the SARF procedure, however when the Police attempted to facilitate his initial telephone consultation the accused became aggressive, threatening to smash the phone. It was apparent at this point that the accused would require a significant period before he was sober and compliant enough to have his rights as a detained person facilitated.

He was also assessed by the police casualty surgeon who supported the custody supervisor’s assessment the male was unfit for interview and would require several hours to sober up.

In the interim period further investigations revealed the suspect had been in the company of a number of persons, who would have seen the weapon in his possession. The extension period allowed these witnesses to be sought and further CCTV evidence from nearby business premises to be sought.

As there was not a sufficiency of evidence to arrest the suspect, coupled with his drunken and aggressive demeanour the decision to extend his detention period beyond the 12 hour limit was proportionate and necessary to complete all available lines of enquiry in order to serve the public interest. The male was interviewed regarding the matter on being deemed fit for interview later the following day. He was subsequently arrested and charged with a Breach of the Peace.

3. RAPE OF 16 YEAR OLD FEMALE

Two males were detained in rural Scotland prior to midnight for the rape of a 16 year old who was known to one of them.

The victim was forensically and medically examined by a police casualty surgeon at the nearest medical suite. She was only able to provide a partial statement to a Sexual Offences Liaison Officer (SOLO) trained officer due to the time of night and her traumatic experience. The journey between her home and the police medical suite took approximately 1 hour and 30 minutes.

The locus was stood by for examination until the next day during daylight hours as the circumstances indicated that there may be forensic opportunities on the bed clothes and which is viewed as best practice. A number of witnesses had also to be traced during the detention period in order to corroborate the victim’s statement.
Both suspects had to be removed to another police station to be examined by a Police Casualty Surgeon (PCS). The return journey between the detention office and examination suite is a round trip of approximately 2 hours notwithstanding the time necessary to complete the suspect’s medical examinations.

It was necessary to extend the detention period beyond the 12 hour threshold to allow further enquiries to be concluded and ensure the safety of the victim.

Both suspects were interviewed once the victim had completed her statement the following day and the other witnesses had been traced. A full forensic examination was also completed under the guidance of a Crime Scene Manager (CSM). Both males were subsequently arrested and charged with rape.

Without extending the detention period enquiries could not have been properly concluded and as a result both accused would have had to be released.

The community impact assessment was such that the victim and witnesses were considered potentially at risk if the suspects had been released. In addition the suspects could also have been at risk given the crime under investigation from reprisals. As a result this would not have been suitable for Investigative Liberation.

4. DOMESTIC ASSAULT - RAPE

There was considerable history of domestic violence between the victim and suspect with the former at considerable risk from the suspect had officers not been able to conclude all diligent and necessary enquiries.

The victim and suspect were in a relationship residing together at the locus. Both had consumed alcohol throughout the day at home.

The victim was woken by the suspect in their bed who then raped her. Afterwards she went downstairs and phoned the Police. On police arrival, in addition to being visibly distressed, the victim was found to be under the influence of alcohol.

The suspect was detained and the locus secured and arrangements for forensic examination instigated with the assistance of a Crime Scene Manager (CSM), Forensic Services and a biologist. A forensic medical examination took place of the complainer at Archway while additional enquiries such as door to door, forensic examination of locus, etc were undertaken.

The victim was still clearly distressed and suffering from fatigue and the effects of alcohol in her system. The victim also requested that she be allowed to rest between her forensic examination and her statement being noted.

The suspect was also under the effects of alcohol and police casualty surgeon opined that he was unfit to be interviewed at that time.

As such the decision to extend the detention period beyond the 12 hour threshold was made. Without this ability to extend there would have been insufficient time to complete the necessary police enquiries with the victim and attempts to trace other
potential witnesses. The suspect also required to sober up prior to interview and completion of the Solicitor Access process.

Investigative Liberation would have been unsuitable in these circumstances given the gravity of the crime and relationship of those involved.

The victim subsequently provided a full statement to the police allowing the suspect to be interviewed once deemed fit by a police casualty surgeon. He was subsequently interviewed and charged with rape having been arrested.

5. ABDUCTION AND RAPE

The victim and witnesses were within their home address and had retired to bed at various times over the evening. The following morning the victim heard creaking on the stair outside her bedroom and was confronted by the male suspect who was in possession of a knife.

A struggle ensued during which an adult male and his child left their bedroom. All parties were threatened by the accused. The accused cut telephone lines, collected mobile phones and pulled down blinds. A male witness and child were told to stay within their bedrooms or the victims would be killed.

The accused thereafter indecently assaulted and raped a female victim repeatedly before he fled the locus.

Police were called and enquiries commenced. The crime scene was secured for forensic examination by a CSM, assisted by a photographer and Scene of Crime Examiner. The victim underwent a forensic medical examination and provided a statement via a SOLO trained officer.

The male and child were also provided with medical assistance and provided statements over what was a prolonged period as the victims of the crime were extremely traumatised and required a period of rest during their interviews.

A male was identified as a possible suspect and a warrant sought and granted to search his home address. During this search distinctive clothing was found, believed to belong to the suspect.

He was subsequently detained in terms of Section 14 of the Criminal Procedure (Scotland) Act 1995. During his detention period extensive enquiries were still being undertaken at the locus and with the witnesses. An extension was sought beyond the 12 hour threshold to allow sufficient police enquiries to be completed prior to any interview with him. It was necessary to photograph him whilst detained in order to have him formally identified, as at this stage there had been no identification.

Had there have been no opportunity to extend the detention time to allow the identification, and if the accused had made a ‘no comment’ interview, then he would have had to be released for further enquiries to be completed.
This case would not have been suitable for Investigative Liberation due to the seriousness of the offence, public safety and reassurance issues and the danger of reprisals in the local community.

The male was subsequently arrested and charged with several offences including abduction and rape. He has since been convicted at Edinburgh High Court receiving a substantial custodial sentence.

6. TRAFFICKING

A property landlord reported a possible cannabis cultivation at one of his city properties. Uniform officers attended at this address as a ‘routine’ call and found 3 foreign national females working as suspect prostitutes. They also found 4 foreign national males (of different nationalities), two of whom were to be later identified to be involved in the trafficking, rape, prostitution of the females.

The detention of 5 persons was extended past 12 hours to allow a proper investigation/assessment to be carried out, particularly to determine the status of the females involved i.e. if they were victims or suspects. A lack of appropriate interpreters for witness and suspect interviews was largely a contributory factor in the extension, as was allowing the suspects adequate rest time.

During one interpreter-assisted interview, one of the females disclosed that there was another 2 brothels in the city and a pregnant female was possibly being held against her will. Enquires ultimately identified a network of foreign national males who were trafficking European females up and down Britain for prostitution.

The extended detention period allowed the Senior Investigating Officer to thoroughly complete the initial investigation as well as identification of additional victims of trafficking/sexual abuse. If the detention time had been limited the 3 females may well have been arrested for management of a brothel based on the witness testimony and would not have disclosed their trafficking and sexual abuse to the police. As a consequence, the males responsible for the human trafficking offences would have been released and the offences gone undetected.
INVESTIGATIVE LIBERATION

The following anonymised examples serve to highlight where the proposal to limit the operation of investigative liberation to 28 days, would potentially cause significant difficulties, as any conditions placed upon suspects and designed to moderate their behaviour or conduct would be lost to investigating officers.

1. DOMESTIC ABUSE CASE STUDY

In June 2010 a third party report was made to Police re a female having been assaulted by her partner. They were also informed that the male had stabbed the female’s pet dog twice, killing it. On police arrival the female was found to have been slashed on her foot and was taken to hospital where she received six stitches. Her partner was arrested; however the case was marked as no proceedings by the Procurator Fiscal due to a lack of corroboration.

The Domestic Abuse Task Force (DATF) instigated an investigation to trace previous partners of the perpetrator. This resulted in 5 other victims providing statements which detailed serious sexual and violent assaults by the male over a twenty year period. Their medical records were also traced covering the crime period.

In total, 23 charges ranging from rape, abduction, serious assault and sexual assault to breach of the peace were libelled following a 7 month investigation.

The perpetrator appeared at the High Court in Glasgow in March 2012 and was given a Life Sentence in the form of an Order for Lifelong Restriction and is not eligible to apply for parole for a minimum of six years.

This type of domestic abuse investigation is not uncommon for the DATF and records show the average length of enquiries carried out by the DATF is 3 months to bring a perpetrator to the point of charge. The 28 day Investigative Liberation period would not be beneficial in complex and lengthy enquiries such as this given that the perpetrator will know the victims and their whereabouts. The perpetrator may also be at risk of reprisals once the true extent of their crimes is known in the community.

2. COMPLEX FINANCIAL AND TELECOMMUNICATION ENQUIRIES

Police Scotland have and continue to investigate Serious and Organised crime groups operating throughout the United Kingdom and abroad. These groups area of criminality primarily involve large scale social engineering fraud whereby through complex methodology and group tiers the banking sectors security systems are overcome, resulting in multi millions of pounds being transferred into bank accounts controlled by the group. These receiver accounts can be situated anywhere in the world.
3. SERIOUS AND ORGANISED CRIME GROUP (MONEY LAUNDERING)

During December 2012 executive action was taken against one of the principal subjects of the crime group who at that time was suspected of receiving and transferring £40,000 of criminal money for the group. A Proceeds of Crime warrant was executed at the home address of this subject and substantial amounts of criminal money and telecommunication devices seized.

This subject was detained at this time and interviewed in relation to the above £40,000 Money Laundering.

During his detention a forensic download of numerous telecoms and computer devices was conducted. These contained extensive detail of the subject’s involvement in multi million pound world wide fraudulent activity. Due to the extent of the additional evidence uncovered the subject was interviewed and released from detention to allow the further enquiry to be conducted.

This enquiry identified a complex criminal financial network involving hundreds of members operating all over the world. The investigation required obtaining detailed financial evidence from a high number of financial institutions in addition to extensive forensic evidencing of the telecommunications devices.

As a result of these protracted enquiries the police were not in a position to re interview or charge the subject until August 2013.

This case highlights the timescales involved when conducting enquiries into Serious and Organised financial crime. The enquiry team would not have been in a position to re-interview the subject within a 28 day period after the initial detention, with the investigation likely to have been seriously jeopardised if required to meet this time restraint.

4. FIREARMS AND DNA EXAMINATIONS

During November 2012 intelligence was received to the effect that the controlled drugs were being transported to Scotland from England within a van. A male (A) was subsequently detained under terms of the Misuse of Drugs Act 1971 in Scotland. Within the rear of the van there was a brown barrel which was found to contain a large quantity of white powder. The van was searched and a quantity of controlled drugs recovered. The driver was then detained under terms of the Criminal Procedure Scotland Act 1995 s14.

As a result of enquiries, a house in Glasgow was searched under powers granted by a Justice of the Peace warrant. One person (B) was within the house at this time and was detained under the Misuse of Drugs Act 1971 s23.

The search uncovered what appeared to be ammunition and a firearm. As a result of which, the search was stopped and the Procurator Fiscal contacted, seeking a warrant issued under the Firearms Act 1968.
In relation to the items recovered two persons (A & B) were charged in relation to offences under the Misuse of Drugs Act 1971 and the Firearms Act 1968.

The householder (C) was not present at this time. She was subsequently traced during April 2013, arrested and charged.

The items recovered during the initial searches of the van and houses were subject to forensic examinations which were requested at the time of the incident.

During January 2013, DNA analysis of tapings taken from the firearm were received and identified a further suspect (D) from the Liverpool area with a DNA package received that same month. Instruction was consequently made by the Procurator Fiscal in February 2013 to detain this male.

In April 2013, the suspect (D) was traced as a remand prisoner within a prison in England. He was detained under terms of the Criminal Procedure Scotland Act 1995 s14 by officers from Police Scotland. He was then arrested and charged in relation to offences under the Firearms Act 1968.

The case proceeded to trial at the High Court of Justiciary in Edinburgh against A & B only. There were no proceedings against C & D.

Forensic examinations and specifically those in relation to the DNA analysis of the firearm, were crucial to the inquiry and identified a previously unconnected suspect. As revealed, even had Investigative Liberation been available and utilised, the 28 days would not have been sufficient to enable full enquiries to be carried out. If however this period could have been extended and the Police allowed to re-interview the accused in light of new/further information, all four would have appeared on indictment for this incident.
Justice Committee

Criminal Justice (Scotland) Bill

Supplementary written submission from Police Scotland

I would first wish to thank you for allowing me the opportunity to provide oral evidence to the Justice Committee on 1st October 2013 in support of Police Scotland’s submission on the Criminal Justice Bill. During my submission I undertook to provide some additional data to assist you in your on-going deliberations.

The Committee requested that I provide the number of people initially arrested or detained by the police who are ultimately not the subject of any form of proceedings. Unfortunately consequent inquiry has established that this data is not currently collated, nor is it readily available. I regret therefore that I am unable to provide this information.

Members also asked that I provide data in relation to the number of persons detained in custody by the police for more than 6hrs but less than 12hrs.

The figures in relation to persons detained in terms of Section 14 Criminal Procedure (S) Act are not routinely collated by Police Scotland, however during the period between 4 June and 1 July 2013 these figures were collated to assist in identifying the potential resource and financial implications to the police service arising from the details contained within the Criminal Justice Bill. The figures were as follows:

- 2693 persons were detained up to a maximum of 6 hours – 80.4%;
- 643 persons were detained between 6 and 12 hours – 19.2%; and
- 13 persons were detained beyond the 12 hour threshold – 0.4%.

We strongly believe that the facility to extend the current 12 hour provision to one of 24 hours, subject to appropriate review, is required. We were surprised and concerned at the suggestion made by some participants that we could potentially return to a period of 6 hours. Our view and experience, re-enforced by the above analysis, is that such a regressive step would prove operationally unrealistic, unworkable for critical cases and ultimately have a detrimental effect on our efforts to keep people safe.

I am similarly conscious that the Committee were compelled to seek the views of what was a diverse panel of witnesses across a range of complex matters in a short timeframe. I would therefore take this opportunity to provide further information which members may find of assistance.

Your observations in relation to the possibility of establishing a legislative definition for what constitutes an arrest were particularly helpful. As perhaps revealed in my response to Committee, Police Scotland has not sought a specific definition of arrest to be included within the legislation. Our understanding is that this would enable us to continue to work to the current legal understanding and definition of arrest, which, as commentary from the panel re-enforced, is well understood by the Service and will no doubt continue to be informed by evolving case law.
Police Scotland welcomes and supports many of the provisions within the Bill. We do not however consider that in whatever form it is enacted, it was ever intended to denude our existing powers to the detriment of the effective delivery of justice or provision of policing services to communities across Scotland.

Police Scotland currently, and will continue to, operate within the legislative framework set by Parliament. Should that framework succeed common law, and we recognise that emerging jurisprudence and case law increasingly may require that it does so; we will of course accord with the will of Parliament and shape our operational delivery accordingly.

It would however in our view be regrettable if the introduction of this legislation detrimentally affected our well established practices associated with the interview of witnesses or preliminary questioning of suspects outwith a police station, while trying to establish the veracity of a complaint, basic facts or identity of individuals. If such engagement by the police with individuals were to be considered to be a curtailment of their liberty and as such technically an arrest, the potential exponential increase in persons brought into police custody would be detrimental to our efficiency and effectiveness. More particularly, we consider it would undermine the overarching presumption to liberty enshrined within the Bill.

Police Scotland have also sought assurance from Scottish Government that there will be no erosion of our ability at common law to intervene to protect life and enable us to enter premises and detain or arrest individuals who are posing a risk to their own personal safety or by their conduct, the potential well-being of others. We share and wholly support the desire of the Justice Committee to satisfy itself that there will be no diminution of the ability of Police Scotland to adequately protect public safety consequent to the introduction of the Bill into law.

We consider the Bill will have a real and enduring impact on the Service. We fully recognise the need to consider, amongst other matters, evolving and emerging issues associated with effective training delivery and parallel ICT programme development. Foremost in our mind is the overarching requirement placed on the Service to maintain and sustain operational delivery throughout and beyond the introduction of what will represent a large-scale programme.

The timing and manner of introduction of the Bill is therefore significant to the Service.

As stated within our financial submissions to Scottish Government, the costs to Police Scotland associated with the implementation of the proposed Criminal Justice Bill, (£24m) were broad estimates of the potential costs associated with legislative compliance and adoption of new business practises. The acknowledged reality is that our understanding of costs continues to mature and can only ultimately be established following the implementation of the Act and incorporation of any new ways of working within the operational arena.

We look forward to working with partners as our understanding of these matters continues to improve.
I look forward to the opportunity to continue our discussion at a future meeting with
the Committee, when I understand the provisions in the Bill relating to the abolition of
the absolute requirement for corroboration and related reforms and admissibility of
statements (Part 2 and Section 70) will be considered.

I would also take this opportunity to reassure the Justice Committee that whatever
decision is ultimately made in relation to the future status of the evidential
requirement for corroboration in Scots Law, Police Scotland is, and will continue to
ensure that all reports of criminal conduct are comprehensively investigated.

Police Scotland has an enduring obligation to identify and secure ‘best evidence’ to
the Crown Office Procurators Fiscal Service. This commitment is not lessened by the
amendments proposed within the Bill.

I trust this information is of assistance to the Committee.

Malcolm Graham
Assistant Chief Constable
12 November 2013
I thank the Committee for affording Police Scotland the opportunity to continue to contribute to the parliamentary consultation on the Criminal Justice (Scotland) Bill and in particular those proposals in relation to the abolition of the absolute requirement for corroboration. I am conscious that the Committee requested that I provide further detail on certain matters discussed during the session of 3 December and would provide the following information.

To be clear, Police Scotland has consistently maintained its support for the proposal contained within Section 57 of the Bill for the abolition of the absolute requirement for corroboration in Scots Law and remains so disposed. This is not borne out of some form of self-interest, but rather cultivated over years of operational experience of dealing with victims of some of the most serious and vicious crimes who are currently denied access to justice because of a technical legal barrier.

Communities and their concerns remain at the heart of our operational activity, with this reflected in our ongoing commitment and effort to keep people safe. We consider the maintenance of such a technical barrier, and the devastating effect we see it having on the lives of those affected by it, is inconsistent with those efforts and our core values of fairness and respect.

I am conscious that those who oppose the proposal often appear, perhaps conveniently, to abbreviate it, simply referring to the ‘abolition of corroboration’. I hope that my evidence to the committee assisted in dispelling this popular misunderstanding and clarified that the proposal is to abolish the absolute requirement for corroboration, not corroboration itself.

Corroboration will continue to have a place in Scots Law and feature within court proceedings. It is simply that our law currently requires that certain particular facts must be technically corroborated before any proceedings can be commenced (e.g. the commission of an offence and identification of a suspect). This is irrespective of the weight or quality of other supporting evidence that has been established during any investigation. Our discussions revealed that Committee members already appreciate that there are often a series of essential facts within an offence that require to be evidenced and I shall therefore not rehearse them further.

It is our view that this technical requirement for corroboration is an unfair bar to justice for the victims of many crimes. We recognise that the term ‘access to justice’ may have differing meanings to diverse audiences, however within Police Scotland our view is that it simply means that a victim would have the confidence that the
circumstances of their case will continue to be investigated diligently by the police and reported to Crown Office and Procurator Fiscal Service (COPFS) with a prospect that it would be taken forward into court proceedings.

These include, but as revealed during the evidence session, are not limited to, cases of domestic violence and sexually motivated crimes, where the victims are often some of the most vulnerable and/or defenceless members of society who are often preyed upon by those who often seek to exploit the application of this technical requirement as a protection against prosecution. We do not accept this situation as a ‘fact of life’; where the necessary evidence in certain crimes is difficult to get, or less likely to be available, but as a ‘fact of the legal system’ we currently maintain.

We also believe that victims, having failed to clear the technical bar of corroboration, are unlikely to accept or consider an explanation of the Moorov Doctrine and its dependence on a further victim being claimed or identified prior to any action being capable of instigation on the part of the Crown, as a solution to their concerns, or indeed as being reflective of a criminal justice system which supports their desire to access justice.

Police Scotland believes that by abolishing the absolute requirement for corroboration, a significant number of these victims will be able to gain access to our justice system where that might have previously been denied.

While we believe the removal of the requirement will benefit victims, we do not see this to be at the expense of rights of suspects and accused. Fairness remains at the centre of our investigations and reporting, with statutory duties under Disclosure to investigate potentially exculpatory evidence; case law on the interpretation of fairness and admissibility of evidence and core policies to ensure fairness and well-being, all contribute to, promote and protect the rights of the accused.

We have previously demonstrated that we limit, insofar as possible, the time suspects are deprived of their liberty without charge. We make health and fitness assessments initially and continuously and where a detained person requires assistance it is and will continue to be provided. An individual’s fitness to be interviewed and detained is regularly examined. We consider these principles and practices demonstrate that our actings are not unfair to an accused person.

If and when a case does go to trial, it is important to remember that the existing and over-riding legal safeguard remains; the prosecution have to prove that person is guilty ‘beyond reasonable doubt’.

I note the position of the committee in terms of wishing to support victims and see justice, but consider that in the absence of any changes such as those proposed, there remains a danger that the justice system remains unbalanced against victims of crime and as such prejudices their opportunities. To our knowledge, there are no other measures currently being proposed which are likely to introduce a balance such as that afforded through the provisions of the Bill.

Indeed as highlighted by the Lord Advocate and within the previously reported shadow-marking exercises the numbers involved are not insignificant:
1. An approximate average of 85 additional victims of rape per year would be allowed access to justice - (Lord Advocate – 25th November 2013)

2. Police Shadow-Marking Exercises
   (a) During January 2012 police examined a statistically valid sample of cases not previously reported to the Crown Office and Procurator Fiscal Service (COPFS) due to the absence of the technical fulfilment of corroboration. This indicated that the abolition of the absolute requirement for corroboration would potentially increase the number of cases reported to COPFS by the Police by 4.77%.

   (b) During January 2013 a larger statistically valid exercise was undertaken by Police Scotland with support from COPFS which indicated a likely percentage increase of between 1.5% and 2.2% in the number of cases reported to the COPFS by the Police. Further detail is available in the accompanying Financial Memorandum and reported to the Scottish Parliament Finance Committee.

Each previously unreported case is potentially representative of a devastating incident befalling a person and the creation of an associated lifetime legacy of distress for them, their family, friends and associates.

I am conscious that the Committee requested that I provide further detail in relation to the significant number of extra cases that would be reported to the Crown were the absolute requirement for corroboration abolished and to this end I would provide the following information.

The estimated figure I mentioned during my oral evidence was extrapolated from the shadow marking exercise conducted by legacy Strathclyde Police, in conjunction with COPFS, during January 2013 and reflected an anticipated 2.2% (2,927) increase in number of cases that Strathclyde Police had reported (133,027). These figures (133,027) had not however been scaled up to reflect an estimate of the number of cases reported nationally by the Scottish police service to COPFS during this sample period.

Given that Strathclyde Police reported 133,027 cases during the sample period (which represented approximately 54% of all case reported by the Scottish police service to COPFS), the national total would have been approximately 246,346 cases. A 1.5% to 2.2% increase in this global figure would equate to between 3,695 (1.5%) to 5,420 (2.2%) extra cases that would potentially have been reported by police to the COPFS for their consideration. As I am sure the Committee will recognise these figures were a snapshot in time and our projections are clearly vulnerable to the effects of future statistical fluctuations in demand and performance.

I would also wish to address, on behalf of every officer and member of staff of Police Scotland, the suggestion made from a number of quarters that, as a result of the proposed abolition of the absolute requirement for corroboration, prevailing financial
pressures and performance targets that the quality, depth or intensity of police investigations will be somehow diminished.

I would again emphasise on behalf of Police Scotland that the abolition of the absolute requirement for corroboration in Scots Law will make absolutely no difference to the levels of diligence we currently demonstrate while investigating crime or otherwise discharging our policing responsibilities. Our obligations in this regard are enshrined in law which requires that all our investigations are conducted with diligence and rigour. As such there is absolutely no prospect of Police Scotland diluting our current standards of practice.

As related to Committee, this expectation is reflected in the following:

**Smith v HMA 1952**

“It is a duty of the police to put before the Procurator Fiscal everything which may be relevant and material to the issue”

**McLeod v HMA 1998**

“All material evidence for or against the accused must be disclosed”

**McDonald, Blair & Dixon v HMA 2008**

“All material evidence which either materially weakens the Crown case or materially strengthens the defence case must be disclosed” of whether the suspected party is innocent or guilty”

It is our duty on every occasion to provide the COPFS with the ‘best evidence’ available in support of any prosecution; this will remain unchanged.

We also have a statutory duty in relation to disclosure under the Criminal Justice & Licensing (Scotland) Act 2010. This requires Police Scotland to reveal to COPFS all relevant information and materials collected during the course of an investigation, including that which might undermine the prosecution or otherwise assist any defence. These obligations are non-negotiable.

The proposal to abolish the absolute requirement for corroboration is perhaps best viewed as part of the natural evolution of Scots Law that has been required over centuries to meet the challenges presented by changing public values and lifestyles; by way of example it is within living memory that rape within marriage did not attract criminal sanction and capital punishment was an acceptable criminal justice disposal.

Police Scotland anticipates that current and future advances in technology and science will continue to provide an increasing wealth of supporting evidence to our enquiries and investigations; much of which will emanate from a variety of global jurisdictions. The abolition of the absolute requirement for corroboration will assist in the logistics associated with the legal acquisition of such material evidence and therefore contribute to the collection and availability of supporting evidence.

The prospect of securing and presenting such evidence without a corroborative bar would contribute to our enduring efforts and desire to protect both the interests of
suspects and the communities we serve, whilst seeking to protect the latter from some of the contemporary and evolving threats facing society, e.g. sexual exploitation; bullying, harassment and other forms of cyber crime which impact on victims who are often targeted and manipulated due to their vulnerability.

In summary the position of Police Scotland is that it has always been consistent and unequivocal in its support for the broad content of the Criminal Justice (Scotland) Bill, including Section 57 and its proposal to abolish the absolute requirement for corroboration.

It is our view that the proposed abolition of the absolute requirement for corroboration represents a progressive development of our criminal law which will extend access to justice for victims of crime. We consider this notion will benefit a modern society which aspires to keep its citizens safe.

Malcolm Graham
Assistant Chief Constable
6 December 2013
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Rape Crisis Scotland

1. Introduction

Rape Crisis Scotland welcomes the opportunity to comment on the Criminal Justice (Scotland) Bill. We welcome the removal of the requirement for corroboration however we still have some areas of concern in improving access to justice for victims of sexual crime.

2. Corroboration, admissibility of statements and related reforms (Part 2 plus section 70 of the Bill)

2.1 Section 57 Corroboration

Rape Crisis Scotland welcomes the move to abolish the requirement for corroboration. In line with recommendations from Lord Carloway’s considered review we believe that the evidence should be reviewed based on its quality rather than quantity and that lack of corroboration in itself should not be a barrier to justice.

We do not consider that the removal of the requirement for corroboration will result in significant numbers of prosecutions based on a single source of evidence (in sexual offence cases this would normally be the complainant’s statement). The police and prosecution will be continuing to look for all possible supporting pieces of evidence. A case involving a single source of evidence is likely to be rare, as to proceed to court it will still need to be assessed as having a reasonable prospect of conviction.

What we do know is that the requirement for corroboration disproportionately affects complainers in sexual offence crimes, the vast majority of which are committed in secrecy and without witnesses. Lord Carloway’s Review was clear in its evidencing of the impact of corroboration on sexual offence case progression. The Review’s research examined 141 sexual offence cases dropped in the period July to December 2010. It concluded that 95 (67%), of those cases would have had a reasonable prospect of conviction without the requirement for corroboration. This is significantly higher than for other serious crimes. Whilst clearly not all of these would have secured a conviction this is explicit evidence that abolishing the requirement for corroboration would result in improved access to justice for victims of sexual crime.

Whilst some have raised concerns about a possible increase in miscarriages of justice there remains the considerable safeguard of the requirement to prove ‘beyond reasonable doubt’ that the offence took place which in our view is a significant protection against wrongful conviction. In addition there is no evidence to suggest that in other jurisdictions which do not have the requirement for corroboration there is a higher incidence of unsafe convictions.
2.2 Section 59
We are disappointed to note however that the removal of the need for corroboration should not apply retrospectively and would urge the Government to reconsider this. This in effect means survivors of historic child sexual abuse or rape will continue to face this barrier to justice and that regardless of the quality and nature of their evidence their case has no chance of being heard. Given that there is a precedent in applying retrospective application as in the Double Jeopardy (Scotland) Act 2011 we would urge the Government to review this.

3. Court procedures (Part 3 plus section 86 of the Bill)

3.1 Section 70 Jury Majority
Rape Crisis Scotland has some concerns about the raising of the majority required for a jury to reach a guilty verdict from a simple majority of 8 to 10 out of 15. Whilst we are aware of the need to ensure adequate safeguards are in place to maintain a fair and robust justice system we are also keenly aware of the prevalence of prejudicial attitudes and misconceptions around sexual violence and the impact this could have. One of the intentions of this Bill, as we understand it, is about improving access to justice; addressing the considerable barriers for victims of sexual crime and addressing the consistently low conviction rate. One concern we have is that in moving to a higher majority requirement the effect will be a lowering of the conviction rate, given what we know about public perceptions around sexual violence and the likely impact this has on jury decision making.

Research consistently shows that public perceptions are significantly negatively biased and victim blaming, particularly towards women, around a number of key issues in sexual violence cases, such as previous consensual sexual contact, alcohol consumption, the nature of clothing and previous sexual history.

Research commissioned by the Scottish Government\(^1\) shows that nearly a quarter of the Scottish public think women are at least partly responsible for rape if they have been drinking, and 27% of people blame women if they are wearing revealing clothing at the time of the attack. Juries are made up of members of the public and at least some of them are likely to hold these kinds of attitudes. We have real concerns about what this means for jury decision making in rape cases, and particularly so where a larger majority is required to reach a decision.

3.2 Judicial Direction
To assist juries in coming to informed decisions Rape Crisis Scotland would urge the Government to implement its previously stated commitment to introduce judicial direction in sexual offence cases, by giving factual information on delayed disclosure and apparent lack of physical resistance.


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3.2 Research
Given the extensive research on mock juries’ decision making and the influence of rape myths on this process \(^2\) we would also urge the Government to explore the feasibility of conducting research into the factors influencing the jury’s decision making process in Scotland. Whilst we appreciate the challenges this presents, in terms of addressing fair access to justice this issue merits further consideration.

3.3 Public Attitudes
On a wider note we would also ask that the Scottish Government commits to continuing to address and challenge prejudicial public attitudes, and thus those contained within juries as members of the public.

3.4 Evaluation
Given some of the thrust of the current Bill is to improve access to justice we would also like to stress the importance of ensuring some form of evaluation to address any unintended consequences, as appeared to be the case with the Sexual Offences Scotland Act 2002 – see below.

4. Further considerations

4.1 Not Proven Verdict
Rape Crisis Scotland welcomes the commitment of the Scottish Government to review the future of the ‘not proven’ verdict. The not proven verdict is most commonly used in cases of rape and sexual violence. According to the Scottish government statistical bulletin for criminal proceedings 2010-11 the proportion of people receiving a not proven verdict for rape or attempted rape was 26% with sexual assault at 30%, significantly higher than the overall mean of 16%.

Jury members can be notoriously reluctant to convict in rape cases, even in cases where there is significant evidence, and we are concerned that the not proven verdict could contribute to wrongful acquittals.

An argument which has been used in the past for retaining the not proven verdict is that it at least enables complainers to be reassured that the verdict didn’t mean that the jury didn’t believe them. However, a not proven verdict is still an acquittal, and can be just as devastating as a not guilty verdict. Following an article in the Daily Record about the number of men accused of rape who were acquitted by means of the not proven verdict, a number of rape survivors and their families wrote into the paper to tell of the devastating impact this verdict had on their lives (see for example http://www.dailyrecord.co.uk/news/scottish-news/mum-who-endured-double-rape-1393744). We believe that there is no convincing argument for retaining this verdict, and that it’s removal would lead to a less confusing jury decision making process.

\(^2\) For example BRIT. J. CRIMINOL. (2009) 49, 202 – 219 REACTING TO RAPE
Exploring Mock Jurors ‘Assessments of Complainant Credibility
Louise Ellison and Vanessa E. Munro
4.2 **Sexual History Evidence**

Whilst it is a matter not expressly covered by the Bill Rape Crisis Scotland would like to highlight our continued concern about the use of Sexual History evidence in Sexual offence cases.

The previous consultation document stated that the provisions of the Sexual Offences (Scotland) Act 2002 relating to sexual history and character evidence “help to ensure that complainers in sexual offence cases cannot be subjected to potentially distressing cross-examination relating to their personal life or sexual history where this is irrelevant to the charge before the court.”

In 2007, the Scottish Government published an independent examination of the effectiveness of these provisions, which found that rather than restricting the introduction of this type of evidence, the legislation had actually led to its increase:

- 72% of trials featured an application to introduce sexual history or character evidence
- Only 7% of these applications were refused
- The Crown rarely objected to defence applications to introduce this type of evidence

We are aware from research that the use of sexual history evidence can have a negative impact both on the experience of the complainant and also on the possible outcome of the case. The research mentioned previously highlights that 15% of the general public believe a woman is at least partly responsible for being raped if she is known to have had many sexual partners.

This evaluation is now 5 years old, and guidance has since been introduced within the Crown Office advocating a ‘robust’ approach to applications to introduce sexual history and character evidence. However, in the absence of any current data about what is happening with the use of this type of evidence, we cannot share the confidence of the Scottish Government in the effectiveness of the legislation in protecting complainers.

We consider that there is a clear need to commission further research in this area, to enable us to obtain an up to date picture of whether or not the legislation is protecting complainers in the manner which the Scottish Parliament intended when it passed the legislation. In the interim we would ask that clear and accurate data is made available on the use of sexual history evidence as well as medical and sensitive records in sexual crimes cases. Research is clear on these and other factors such as mental health concerns or self harm as influential factors in jurors’ perceptions of witness credibility. Having accurate factual information would allow fuller scrutiny of the court process and a clearer understanding of the influential factors in sexual crime cases outcomes.

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Justice Committee
Criminal Justice (Scotland) Bill

Written submission from the Salvation Army

The Salvation Army appreciates the opportunity to respond to the Government’s Criminal Justice (Scotland) Bill. The Salvation Army is a Christian Church and one of the largest charities in the UK, helping thousands of vulnerable people each day. Our mission statement says that we will ‘meet human needs … without discrimination’. Our services are freely on offer to all, regardless of gender, race or sexual orientation. We have an Equality and Diversity Policy which covers all protected characteristics under equality law and which applies to every of our service provision.

Whilst having no aspect substantive comment to make on the whole of the Bill, we would however wish to respond in support of Part 6, Chapter 1, Sections 83-85 of the proposed Bill. The Salvation Army is pleased to be associated with the comments submitted separately on behalf of the Action of Churches Together in Scotland (ACTS) Anti-Human Trafficking Group, and for ease of identification have appended a copy. However, because of our own work, internationally and within the United Kingdom, we would like to make some additional comments.

Since its inception, the Salvation Army has sought to reduce the worldwide phenomenon of abuse of individuals or groups of people for personal gain, now defined by the United Nations as human trafficking. It has established places of refuge for victims, sought legal challenges that would both prevent trafficking and punish those involved, and it has created alternatives for those vulnerable to trafficking. In particular within the United Kingdom we have made provision for a place of refuge as well as undertaken work with the Ministry of Justice Department United Kingdom Government in the delivery of specialist support services to adult victims of human trafficking in England and Wales since July 2011. It is against this background and from the perspective of direct service provision that we wish to encourage the Scottish Government to ensure a robust enactment of the proposal to introduce a statutory aggravation of people trafficked.

The Salvation Army would welcome the opportunity to continue discussing this and related matters with the Scottish Government and look forward to any such engagement.

26 August 2013
Salvation Army

Appendix 1

Copy of response from the ACTS Anti-Human Trafficking Group (submitted 29th August 2013, on behalf of the group by Revd Lindsey Sanderson)

Submission to the Criminal Justice (Scotland) Bill Consultation by the Scottish Churches Anti-Human Trafficking Group.
As Convener of the Scottish Churches Anti-Human Trafficking Group (membership listed below) I write on behalf of the Group to offer our support for the proposal to make human trafficking a statutory aggravation in law. Specifically we wish to support Part 6, Chapter 1, Sections 83-85 of the proposed Bill.

The Group believes that there is a need to strengthen the legislation concerning human trafficking as part of a package of measures to reduce and prevent human trafficking in Scotland. We see the introduction of the statutory aggravation as a useful and important step in doing so.

The Group welcomes the decision of the Scottish Government to implement the recommendation of the EHRC that human trafficking become a statutory aggravation and we encourage the Government to do all it can to stop the trade in human beings.

Convener, Scottish Churches Anti-Human Trafficking Group
29 August 2013
I welcome the opportunity to submit comments on the Criminal Justice (Scotland) Bill to the Justice Committee.

Although the Bill’s provisions are wide-ranging, I will focus on three issues of particular relevance from a children’s rights perspective: the rights and treatment of child suspects; the removal of the requirement for corroborated evidence in children’s hearings court proceedings; and the statutory aggravation relating to human trafficking offences.

I also wish to comment on three issues that are at present missing from the Bill: raising the age of criminal responsibility; the removal of defences to a charge relating to corporal punishment in the home; and taking into account the best interests of children of offenders and alleged offenders.

I. Comments on the Bill's Provisions

1. The Rights and Treatment of Child Suspects

The Policy Memorandum accompanying this Bill states that the aim of the Bill’s provisions relating to child suspects is:

‘to ensure that the highest standard of protection is offered to children who are involved in the formal criminal justice process.’

Whilst I question whether it is desirable to deal with children through the criminal justice system at all, I am pleased to note that the Bill, if enacted, would make some progress towards the Government's stated aim. There are, however, areas where the Bill could go further.

a. The Definition of Child

The Bill extends existing and new protections for child suspects to all children under 18. This is very welcome. Children who commit offences must be seen as children first and foremost. By virtue of their age and stage of development children are more vulnerable to violations of their rights, less able to assert their rights, and more dependent on adults to ensure that their rights are respected, protected and fulfilled.

Every international human rights instrument to which the UK has opted freely to commit itself and which defines ‘child’ requires or recommends that that definition include any person under the age of 18, as much of Scots child and family law has done for many years. I am therefore in full agreement with Lord Carloway’s

\[^1\] Criminal Justice (Scotland) Bill, Policy Memorandum, p. 18 at para 103.
conclusion to the effect that every suspect under 18 should be treated as a child, and welcome the Scottish Government’s action on this through the Bill.

b. Waiver of Right to Legal Advice and Assistance of Parent/Adult

I note the provisions in s. 25, under which a child under 16 would be unable to waive their right to access to a solicitor at police interview, and a child aged 16-17 would not be able to do so without the consent of a ‘relevant person’\(^2\). This is in line with Lord Carloway’s recommendations on this matter, which was underpinned by the key principle that child suspects are children first and foremost, and generally benefit from support and guidance during a police interview.

I accept that the Bill’s provisions relating to waivers may be seen by some to be based on a degree of paternalism, not least because of the lack of any waiver for under-16s and the requirement for consent of an adult for 16-17 year-olds. However, on balance I support those provisions. It seems to me that it does make the effective protection of the child’s rights more likely and prevents circumstances in which children and young people’s rights are under-protected\(^3\). ECHR case law seems to support such a precautionary approach to providing support to children at police interview with reference to the power imbalance inherent in such situations, and the role of lawyers and others in addressing it\(^4\). The provision of access to a solicitor does of course not oblige the child to engage with the solicitor, should the child not wish to do so.

c. Duty on Police to Consider Child’s Best Interests

I strongly endorse the duty on the police in s. 42 to treat the child’s best interests as a primary consideration in decisions about arrest, detention, interview and charge.

I would add, however, that other decisions taken by the police under this Bill should also be included in the list in s. 42 (1); for example, those concerning any conditions imposed on a child under s. 14 (2) in the context of investigative liberation. Further, the language used in s. 42 is somewhat confused, in that the section title correctly refers to the child’s best interests, as does the Policy Memorandum\(^5\), but s. 42 (2) refers to the child’s ‘well-being’ as that which must be promoted and safeguarded. I suggest that subs. (2) be amended to reflect the requirement in article 3 of the UNCRC, Lord Carloway’s recommendation, and the Government’s apparent policy intention.

Making decisions concerning a child in a manner that regards the child’s best interests as a primary consideration is a clear requirement of the UNCRC and one of its key principles\(^6\). Doing so would be broadly consonant with existing Scots Law in

\(^2\) Notably, ‘relevant person’ in this Bill does not have the meaning of the same term in children’s hearings legislation. This may cause some confusion, perhaps suggesting a need to reconsider the terminology.

\(^3\) In *Children’s Reporter, Applicant* 2012 S.L.T. (Sh Ct) 217, a child aged 12 had no access to a solicitor because their parent waived that right on the child’s behalf.


\(^5\) Criminal Justice (Scotland) Bill, Policy Memorandum, p. 18 at para 103.

\(^6\) Article 3 (1) of the UNCRC.
related areas\(^7\) as well as major children's policy initiatives such as *Getting It Right for Every Child*. It would further support the objectives of new diversionary approaches which are backed by our best evidence\(^8\). It would also be an opportunity for Scottish Ministers to demonstrate their stated commitment to the full implementation of the UNCRC in Scotland.

In practice, I would envisage that in order to fulfill the duty in s. 42, frontline decision-makers would assess all known circumstances of the child including the child’s views\(^9\), to establish what course of action may be in the child’s best interest. The result of that assessment would then be given due weight in the decision-making process alongside other relevant factors, and unless there are countervailing factors of ‘considerable force’, the option most in accordance with the child’s best interest should be followed\(^10\). This would require guidance and training for police officers and others who may be involved at the various stages of the process, such as procurators fiscal, as well as effective monitoring and accountability mechanisms overseen by senior officers. I would suggest that there may be considerable synergy with measures already being taken across the police service to embed the principles and processes of *Getting It Right For Every Child*, which are likely to pick up pace in light of the Children and Young People (Scotland) Bill currently before Parliament.

2. Removal of Corroboration in Children’s Hearings Court Proceedings

I note the provisions in Part 2 of the Bill abolishing the requirement for corroborated evidence in criminal proceedings, and Schedule 2, Part 2, Paragraph 21 which would have the same effect on proceedings before the sheriff relating to a referral to the Reporter on the ground that the child is alleged to have committed an offence. The likely result of this provision is that the Reporter’s evidential test may be met in cases in which is would currently not be met because of a lack of corroborated evidence.

While many of the children concerned will be vulnerable and likely to benefit from the intervention of the system, this again highlights the need to address the ‘unfinished business’ of the passage through Parliament of the Criminal Justice and Licensing (Scotland) Act 2010 and the Children’s Hearings (Scotland) Act 2011. I welcomed the limited progress being made on the ‘decriminalisation’ of children through those two Acts and secondary legislation to be made under the 2011 Act. However, it remains my position that the Scottish Government and its justice partners, particularly the police, should do more to ensure that the right balance is struck in terms of the retention of information on children and young people’s offending. This is essential to ensuring that children and young people can ‘move on’ from past

\(^7\) See, for example, s. 16 of the Children (Scotland) Act 1995, and more recently ss. 25-27 of the Children’s Hearings (Scotland) Act 2011.

\(^8\) For example, the *Whole Systems Approach*, which appears to heed the conclusion of the Edinburgh Study on Youth Transitions and Crime that an approach characterised by ‘maximum diversion’ is most effective in promoting children’s desistance from offending; cf. McAra, Lesley & McVie, Susan (2007), ‘Youth justice? The impact of system contact on patterns of desistance from offending’, *European Journal of Criminology* 4 (3), 315-345.

\(^9\) United Nations Committee on the Rights of the Child (2009), *General Comment No 12: The right of the child to be heard*, CRC/C/GC/12, para 70f.

\(^10\) *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, per Lord Kerr at para 46. This judgment contains a very useful judicial discussion on the correct application of the best interest principle, albeit in a different context; especially Baroness Hale’s and Lord Kerr’s judgments.
offending and do not have their life chances curtailed by the data legacy and the stigma associated with it for what in most cases are relatively minor offences.

I therefore call on the Committee to urge the Scottish Government and Police Scotland to intensify their efforts to address this matter.

3. Statutory Aggravation for Human Trafficking-Related Offences

I welcome the statutory aggravation for offences relating to human trafficking in s. 83, which is intended to increase the effectiveness of the Scottish legal framework for the prosecution of this crime. However, I have some concerns that as the overall legal framework remains somewhat fragmented, the aggravation may become the preferred option for the prosecution of traffickers rather that the specific human trafficking offences. I understand this is not the intention, but it remains a possibility. There would therefore appear to be a case for a review of the operation of the specific trafficking legislation and any barriers to its use for police and prosecutors, and how its effectiveness can be improved.

II. Comments on Issues Omitted from the Bill

I also wish to comment on matters which are not currently included in the Bill, but ought to be.

1. Raising the Age of Criminal Responsibility

Scotland’s very low age of criminal responsibility remains a matter of great concern to me. One of the lowest in the world at eight, it has long tarnished Scotland’s international reputation in terms of children’s rights: The UN Committee on the Rights of the Child recommended raising the age in 1995, 2002 and 2008\(^\text{11}\), and its authoritative guidance on the implementation of the UNCRC in the context of youth justice denounces an age of criminal responsibility lower than 12 as ‘not internationally acceptable’\(^\text{12}\).

I therefore welcomed the Scottish Government’s commitment to ‘give fresh consideration to raising the age of criminal responsibility from 8 to 12 with a view to bringing forward any legislative change in the lifetime of this Parliament’\(^\text{13}\). Prosecution of a child under 12 is no longer competent\(^\text{14}\), and a recognition of the dangers of criminalisation of children is now reflected in law\(^\text{15}\). Policy and practice have been moving away from the discredited approach which relied on justice solutions and criminalisation, towards an approach based on ‘maximum diversion’ and tackling root causes of offending\(^\text{16}\).

\(^\text{12}\) UN Committee on the Rights of the Child (2007), General Comment No. 10: Children’s Rights in Juvenile Justice, para 32.
\(^\text{14}\) Criminal Justice and Licensing (Scotland) Act 2010, s. 52 (2).
\(^\text{15}\) Children’s Hearings (Scotland) Act 2011, ss. 187f.
\(^\text{16}\) See, for example, the Whole Systems Approach to tackling young people’s offending: http://www.scotland.gov.uk/Topics/Justice/crimes/youth-justice/reoffending.
As a result, the current age of criminal responsibility at eight seems anachronistic. However, it continues to result in criminalisation of a small number of children whose offending behaviour, while cause for concern, is nearly always minor and is appropriately dealt with informally through Early and Effective Intervention, or through our welfare-based children’s hearings system and the wide range of interventions available to it.

I urge the Committee to press the Scottish Government on this issue, and to adopt an amendment raising the age of criminal responsibility in due course.

2. Equal Protection from Assault for Children

A further issue of significant concern is the continuing legality of corporal punishment against children by their parents/carers in Scotland. Section 51 of the Criminal Justice (Scotland) Act 2003 provides a defence of ‘justifiable assault’ to a charge relating to such punishment, except where the assault involved a blow to the head, shaking, or the use of an implement.

The Children and Young People (Scotland) Bill aims to ‘make rights real’ and to promote early intervention, including in the early years. The Scottish Government’s consultation document A Scotland for Children refers to the evidence for attention to the early years such as the large and growing evidence base relating to infant brain development and the destructive impact that trauma and abuse can have on a child’s whole life and their transition to adulthood. The single most important contribution the Criminal Justice (Scotland) Bill could make to the Scottish Government’s vision to make Scotland ‘the best place in the world for children to grow up’ is to repeal s. 51 of the 2003 Act and any similar common law defences, which have perpetuated the permissibility of the infliction of exactly the kind of childhood trauma that A Scotland for Children highlights. The fact that this Bill and the Children and Young People (Scotland) Bill coincide in their parliamentary timetabling presents an ideal opportunity to remove the statutory endorsement of this unjustifiable risk to children’s healthy development and wellbeing, and put in place improved support mechanisms for children and parents, coupled with initiatives promoting positive, non-violent parenting.

Providing equal protection from assault for children would answer a string of recommendations made by International Human Rights Treaty Bodies including the UN Committee on the Rights of the Child, the Committee to Eliminate All Forms of Discrimination Against Women and the UN Committee Against Torture, and by

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17 Please also note the evidence submitted by Children Are Unbeatable, which I endorse.
18 Criminal Justice (Scotland) Act 2003, s. 51 (3).
21 Ibid, p. 3.
23 UN Committee on the Elimination of Discrimination Against Women (2013), Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, para 35.
some of Scotland’s allies such as Norway, Sweden and Finland\textsuperscript{25}, which are frequently cited as models for progressive social policy by Ministers and others.

3. Duty to Consider Best Interest of the Children of Offenders

I have welcomed above the provision in s. 42 of the Bill, which requires the police to consider the child’s best interests in making decisions relating to arrest, charge and other matters. Another long-standing concern in the criminal justice system, which this office and its partners, especially Families Outside and Circle have been highlighting through a series of reports and other work since 2008 is the impact on children of the imprisonment of a parent\textsuperscript{26}.

A recent major study in 4 European countries including the UK confirmed much of our findings, and supported our recommendations\textsuperscript{27}. Chief among those has been the need to consider children’s best interests at various points of their parent’s journey through the criminal justice system including arrest, bail/remand decisions, sentencing and early release/Home Detention Curfew\textsuperscript{28}. We were pleased when the UK, with Scottish Government support, accepted a recommendation made in the course of the UK’s human rights peer review at the UN Human Rights Council asked the UK to

‘Ensure that the best interests of the child are taken into account when arresting, detaining, sentencing or considering early release for a sole or primary carer of the child, bearing in mind that visits of a parent in prison are primarily a right of the child rather than a privilege of the prisoner that can be withdrawn as a disciplinary measure.’\textsuperscript{29}

It is my view that this Bill presents a prime opportunity to make some progress on this important issue, which according to varying estimates affects up to 27,000 children and young people in Scotland each year\textsuperscript{30}.

Tam Baillie
Scotland’s Commissioner for Children and Young People
5 September 2013

\textsuperscript{24} UN Committee Against Torture (2013), \textit{Concluding observations on the fifth periodic report of the United Kingdom}, para 29.
\textsuperscript{25} UN Human Rights Council (2012), \textit{Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland}, Recommendations 110.78 (Sweden), 110.79 (Norway) and 110.80 (Finland).
\textsuperscript{27} Jones & Wainaina-Woźna (eds.) (2013), \textit{Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health} (COPING), Huddersfield, etc: University of Huddersfield and others.
\textsuperscript{28} Scotland’s Commissioner for Children and Young People (2011), op cit, Follow-Up Recommendation 5.
\textsuperscript{29} UN Human Rights Council (2012), Recommendation 110.96 (Slovakia).
Sections 30 to 33

Provision of responsible adults and Appropriate Adults

The extension to the age bracket within which an Appropriate Adult should be used from 16 years to 18 years raises concerns that 16 year and 17 year olds who would previously have been entitled to this kind of support will be disadvantage.

The bill does make provision for a responsible adult to be present for 16 and 17 year olds. However there is no explicit requirement for responsible adults to have the skills or training to address the communication difficulties these young people may present. Subsequently there is real concern that vulnerable adults who would previously had the support of an appropriate adult may now experience difficulties during the police process.

While it may still be possible for local appropriate adult services to provide support to 16 and 17 year olds on a voluntary basis this presents a potential for inconsistent practice across Scotland.

The extension to the age range within which a responsible adult is required from 16 years to 18 years raises resource issue for local authorities. Previously the responsibility for providing a responsible adult where a parent/carer/guardian was not available fell to local authorities.

The extension to the age range and the opportunities for 16 and 17 year old to choose not to have their parent etc informed may result in an increase in demand for input from local authorities in these situations. This raises concerns with regards to the availability of staff to provide the support and the increase in costs associated with providing this service.

Section 25

Consent to interview without a solicitor

The requirement to have a solicitor present in all interviews for adults aged 16 years and over who meet the criteria defined in subsection (6) (a) raises concerns.

The recent changes to legislation giving all suspects who are questioned in police stations the right to legal advice has resulted in lengthy delays in the interview process starting. This is particularly problematic for adults as defined under subsection (6)(a) where it is assessed as necessary for a solicitor to attend to provide advice.
The requirement for the solicitor to present for all interviews involving this group of adults has the potential to exacerbate this problem further if the availability of solicitors is not sufficient to meet the increased demand for the service.

This requirement also raises issues for appropriate adult services. At present Appropriate Adults are present when the person is given their rights to access a solicitor. Appropriate adults, especially in rural areas, are required to remain at the police station until the solicitor arrives to ensure they are available to assist during the police interview. The delay in solicitors attending presents major financial issues for those appropriate adult services that use dedicated, self-employed staff, as it results in Appropriate Adults being paid during a period when they are not actively involved in providing a service. For appropriate adult services that utilise existing local authority staff the delay presents a serious impact on staff resources. Currently there is no reliable system in place to indicate how long it will take for a solicitor to arrive at the police station.

**Statutory Responsibility**

The bill does not place a statutory responsibility on any agency for the provision of Appropriate Adult Services. This raises concern that some agencies may withdraw from providing the service when faced with having to prioritise statutory responsibilities within current financial restraints.

Ian Wilson  
Chairperson  
28 August 2013
SAMH is for Scotland’s mental health. Since 1923 we have been working across Scotland to promote mental health and get people talking. We do this through community based services across Scotland, supporting 2,500 people every week; promoting mental health through physical activity, working to prevent suicide, challenging the stigma surrounding mental health issues and tackling bullying; campaigning for positive change – influencing mental health policy and legislation; and raising funds to continue this vital work.

We are grateful for the opportunity to comment on the Criminal Justice (Scotland) Bill. We hope that this legislation will provide the required emphasis to improve the experiences of people with mental health problems who come into contact with the criminal justice system. Estimates for mental health problems and mental disorders within the Scottish prison population vary, given the difficulty in assessment, but the numbers are high. Therefore, ensuring that individuals with a mental disorder receive appropriate support is fundamental to their human rights. It also demonstrates a clear need to legislate in this area.

The Bill contains provisions to ensure that vulnerable adult suspects with a mental disorder (as defined by the Mental Health (Care and Treatment) (Scotland) Act 2003), are not disadvantaged in comparison to their non-vulnerable counterparts during police procedures. To clarify, the term mental disorder is used in this context to cover mental illness, personality disorders, dementia, autistic spectrum disorder, acquired brain injury and learning disabilities.

SAMH welcomes the intention of these provisions, as we know that historically, people with a mental disorder have not always got a helpful response from the police, and sometimes reported that there was a failure to recognise signs of mental distress. Since the Scottish Government’s 2002 evaluation of the Appropriate Adult Scheme, several measures have attempted to improve the operation and management of the schemes. The Committee will be aware of the National Guidance published in 2007 and the Mental Welfare Commission’s report, Justice Denied, also made a series of recommendations in response to Ms A’s treatment. Subsequent national standards were developed and issued to Appropriate Adult services to demonstrate how the service should be delivered.

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2Evaluation of the operation of appropriate adult schemes throughout Scotland in 2002. Dr Lindsay Thomson, Viki Galt, Dr RajanDarjee, Division of Psychiatry, The University of Edinburgh
4http://www.mwcscot.org.uk/media/51943/Justice%20Denied%20Ms%20A.pdf
Access to Appropriate Adults

SAMH understands that access to an appropriate adult is a reasonable adjustment specifically to ensure understanding, as much as possible, between a suspect, victim or witness with a mental disorder as defined by the Mental Health (Care and Treatment) (Scotland) Act 2003, who experiences communicative difficulties as a result, and the police. (Appropriate adults are not a stated special measure for court, although SAMH would contend that extending their use could improve communication and understanding in such settings for some people with a mental disorder). Therefore this measure will not be suitable for all people with a mental health problem, nor will it address all the possible needs associated with mental health problems. We would also be concerned that others who might require the service might be overlooked, especially people with autistic spectrum disorder who are high functioning but don’t communicate or process information in the way desired by police processes. As access to an appropriate adult may be required if the individual has a learning disability, dementia or brain injury, as well as a mental health problem, this potentially represents a significant number of people.

Ahead of the formation of regulations, it would be helpful to determine the satisfaction amongst people who have been supported by an appropriate adult; whether there are currently sufficient numbers of Appropriate Adults within Scotland to meet demand for suspects, victims and witnesses; and whether follow up with individuals who felt they were not provided with this support could be achieved.

Appropriate adults – workforce and training

The Bill will give Scottish Ministers regulation-making powers to detail who may provide Appropriate Adult Services and the training necessary to become an Appropriate Adult. We note that the requirements placed on states by Article 13 (Access to Justice) of the UN Convention on the Rights of Persons with Disabilities; while the proposed statutory provisions regarding appropriate adult support for vulnerable adults will make progress towards ensuring effective access to justice for persons with disabilities; however, the legislation does not satisfactorily address the requirements on other agencies to be able to identify people with mental health problems, which is necessary to then ensure that the vulnerable person is provided with appropriate support, either as part of the Appropriate Adult scheme, or in terms of medical support. As the Convention states:

‘And in order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.’

SAMH hopes that an increase in the numbers of trained Appropriate Adults will also be able to support vulnerable victims and witnesses to communicate with the police, when required. We note that Appropriate Adults are mostly drawn from social work backgrounds, and therefore we highlight the need to ensure that there is adequate workforce capacity within that field to continue to provide this role. In the forthcoming regulations, SAMH recommends that training of Appropriate Adults and service delivery of the Appropriate Adult scheme must be uniform across Scotland; and that it should sit as a funded, staffed, stand-alone service, rather than rely
upon extraction from social work departments. We are aware that in areas which have historically relied on social worker extraction, this is the biggest barrier to people getting help, as already stretched departments can rarely afford for a social worker to absent themselves for a significant period of time. The previous approaches of Tayside and Fife should be looked at as good practice, and their approaches should be costed, funded and rolled out nationwide. We look forward to further consultation on the regulations in due course.

According to the Policy Memorandum to the Bill, 'where a person is assessed as vulnerable, the police will endeavour to secure the attendance of an Appropriate Adult as soon as reasonably practicable after detention and prior to questioning. As is current practice, the Scottish Government would expect the police, in deciding whether a person is vulnerable: to be guided by comments from carers or others who know the person, to seek medical advice if necessary, and to keep matters under review in case vulnerability becomes apparent at a later stage.' However, it should also be noted that as Appropriate Adults are to provide impartial communication support, they may not be the most suitable person if the Police suspect the individual is 'vulnerable'. The suspect, victim or witness might require medical attention if they are distressed or unwell.

SAMH’s research with Capability Scotland\(^5\), which involved focus groups of people who had come into contact with the criminal justice system, also described the attitudinal and communication barriers as a major difficulty:

“People with mental health problems and other impairments find attitudinal barriers, and institutional failure to recognise signs of mental distress, PTSD, crisis, mania, psychosis, catatonia, depression or other mental health conditions highly problematic when interacting with the Police, the Courts, Solicitors and Prison staff.”

And recommended:

“Communications by Justice Professionals with (people who have mental health problems) must be respectful, active and inclusive and should seek to include families, peer supporters, advocates, social workers and CPNs where possible. When working with supporters Justice Staff should talk to the supported individual rather than ‘about them’.

These concerns are reinforced by the 2013 HMICS’ thematic inspection of the care and welfare of persons detained in police custody in Scotland\(^6\), where the following points were made:

“10.4 The inspection revealed widespread variation in how forces responded to situations where the mental health of an individual was a cause for concern. This is a challenging and difficult area, particularly when those health concerns are exacerbated by the immediate presence of alcohol and/or drugs.

Accordingly, forces find it difficult to provide definitive guidance which encapsulates the range of possible scenarios facing police officers and staff where there is a concern for the mental state of certain detainees.

10.5 Almost without exception, staff interviewed during the inspection expressed a desire to have clearer processes in place, including protocols with local mental health practitioners. Some of these factors are beyond the scope of resolution by the police service and accordingly the ACPOS Custody Manual of Guidance only offers advice on assessments under the Mental Health (Scotland) Act 2003.

10.6 HMICS is aware that there is currently an ongoing project sponsored by ACPOS, to engage with NHS Scotland, with a view to producing an appropriate healthcare model to support the care and welfare of any person brought into police custody and to reduce the associated costs that are currently borne by the police service. It is anticipated that this will extend to the identification and treatment of any persons coming into police custody with mental health issues. There is therefore an opportunity to introduce some uniformity of approach to ensure a standardised approach throughout Scotland."

The following recommendation was also made:

“Post-reform, the Police Service of Scotland should develop a standard national training course for staff working in the custody setting and that this should include a refresher training programme to support ongoing staff development.”

Our research with Capability Scotland highlighted that staff within the justice sector need to be able to ask sensitive questions that might allow someone to disclose information about their mental health; the national standards for Appropriate Adults also encourages this approach. The Scottish Government evaluation of Appropriate Adults in 2002\(^7\) showed that almost all Appropriate Adults had received training relating to their role, however training amongst other professional groups was low. SAMH is concerned about whether police officers in this position have the skills and have received the required training to meet the role which is being proposed for them; whether police support staff, who would be working in areas involving custody and detention, would have the skills, training and status to determine and question whether someone was potentially vulnerable, and what is the suitable response; and if a solicitor had the necessary training to determine whether the suspect was vulnerable and could therefore not waive their support.

SAMH recognises that evaluating the vulnerability and capacity of an individual is difficult, and can be compounded by the circumstances of being in police custody. Stress and anxiety levels are likely to be raised, and the use of alcohol, drugs and/or prescription medication could all have an impact on the individual’s behaviour.

We are aware that newly qualified police officers currently receive a level of training in mental health at the Scottish Police College – indeed, SAMH delivers suicide prevention training in this setting. However, it might be beneficial for mental health

\(^7\)Evaluation of the operation of appropriate adult schemes throughout Scotland in 2002. Dr Lindsay Thomson, Viki Galt, Dr RajanDarjee, Division of Psychiatry, The University of Edinburgh
awareness and mental health first aid training to be delivered to new recruits, and for continuing professional development of all officers to include mental health awareness and suicide prevention training. We think it would be beneficial if solicitors and police support staff also received this training. While not everyone with a mental health problem would necessarily qualify for an appropriate adult to support them in communicating to the police, improving training and awareness amongst the staff listed will ensure that the individual is treated appropriately, and this could improve take up of mental health community payback orders or access to diversion schemes.

To support the rights of vulnerable suspects to the highest attainable standards of mental health, SAMH also proposes that links between the NHS and the Police are strengthened, to ensure that prompt access to a GP, psychiatrist or CPN could be provided if a vulnerable suspect needed medical attention. We know that there are good examples of local partnerships in this regard – best practice needs to be disseminated and built upon, especially given the reforms to the health, social care and criminal justice landscapes.

SAMH
30 August 2013
INTRODUCTION

The Scottish Child Law Centre (SCLC or the Centre) is an independent charity, based in Edinburgh which provides services to the whole of Scotland. The Centre is the only law centre in Scotland dedicated solely to the law as it affects the under 21s. The aim of the Centre is to promote knowledge and use of Scots law and children’s rights for the benefit of children and young people in Scotland. SCLC provides free advice by telephone, email and letter on all aspects of Scots law relating to children and young people. In addition, the Centre provides publications on a range of subjects as well as providing training, conferences and seminars. SCLC also has a consultative and advisory function for local and central government and through this seeks to improve the content and practice of the law as it relates to and affects children.

RESPONSE

The Centre’s response is limited to those sections which affect children and young people. We support the aim of the changes that the bill proposes regarding children and young people, which is to safeguard their interests and extend protection.

Chapter Two: Custody: Person not officially accused

With regard to the time that a person may be kept in custody, we note that le s. 10 (b) provides a test that it must be necessary and proportionate. However we recommend that consideration be given to reducing the time that a child under 16 may be kept in custody.

We also recommend that a child should be kept in custody in a police station only in exceptional circumstances. See comments to Chapter 8, s. 56 below.

Chapter Four: Police interview, rights of suspects

s. 23

The Centre notes that information given before interview is commonly provided by means of a telephone discussion with a solicitor. We are concerned that while this may be sufficient for adults, it is not adequate for children. A telephone conversation is not likely to be sufficient preparation for a child, and does not easily allow the solicitor to be satisfied that the advice has been understood. We recommend that consideration be given to requiring that a child under 16 is able to have face to face information from a qualified solicitor prior to interview.
s. 25(2)

(a) The Centre fully supports the extra protections given to children under 16, by ensuring that they have a solicitor present during a police interview. The calls to the advice line of the Scottish Child Law Centre have revealed too many young people who have waived their right, or have had it waived for them by their parents, and who have struggled as a result. We are also concerned that this protection should include all police interviews, not only those which take place in police stations. We have encountered a number of cases where children have been told that if they have a lawyer, they will have to go to the station and that that would be much harder for them.

(b) The Centre supports the extra protection for those aged 16 and 17, but notes that there is a great responsibility placed upon the constable to identify that the person has a mental disorder.

s. 25(3)

The SCLC welcomes the support given to those aged 16 and 17 by a relevant person. We note that a person to which this subsection applies may waive the right to a solicitor only with the agreement of a relevant person. It has been the experience of our advice service that parents often do not understand the implications of refusing legal advice for their children. A typical example is the belief that if you are innocent you do not need a lawyer during a police interview. We are concerned that it will be necessary for the police to provide relevant persons and young persons aged 16 and 17 with clear information as to the implications of refusing legal advice.

s. 26

The Centre has some concerns that it will be necessary for those under 17 to have clear explanations from the police about the lack of obligation to answer any questions apart from those listed in subsection 3.

Chapter Five: Rights of Suspects in police custody

The SCLC supports the right to have intimation sent to another person, not only for the under 16s, but for those aged 16 and 17. This solves a current problem. It is particularly welcome that the young person may choose the adult who is to be notified. Consideration should be given to ensuring that where the young person is in care intimation is sent to those who have the care of that person.

Chapter Six: Police powers and duties

The SCLC welcomes the requirement that the constable has a duty to consider the best interests of the child, however we are concerned at the use of “well being” in subsection (2). The UNCRC and the rest of Scottish Child Law use “best interests” and “welfare” when referring to children. These have well established legal meanings and considerable case law. “Well being” is proposed in the Children and Young person (Scotland) Bill and has been criticised by the Law Society of Scotland, the
Faculty of Advocates, and the SCLC as being unclear, and out of step with the rest of child law. It is not helpful to introduce a concept that is less clear to compete with the rest of established law.

Chapter Eight: General

s. 56

S. 189 of the Children’s Hearing (Scotland) Act places restrictions upon a police station being used as a place of safety. This is for the good reason that a police station is not a suitable environment for a child. The SCLC recommends that similar restrictions be placed upon a child being detained in a police station. Detention in a police station should be for a minimum amount of time, and otherwise only in exceptional circumstances.

Part Two: Corroboration and statements

The requirement for corroboration has been an essential protection for those accused of criminal offences in Scotland for centuries. The SCLC questions whether it is equitable, just or justifiable for this protection to be removed.

The Scottish Child Law Centre has concerns that our court system may not be fully compliant with ECHR and UNCRC in cases where children are facing trial for serious offences. This Bill provides a suitable opportunity for the Scottish Parliament to consider how we can ensure our system is more compliant in these cases. We attach a proposal, contained in an appendix to our response, which may assist in these considerations.

Scottish Child Law Centre
6 September 2013
Scottish Child Law Centre response to the Criminal Justice (Scotland) Bill – appendix

Proposal

Where children have been accused of very serious criminal offences which are dealt with by the High Court, they are facing a complex legal procedure, must instruct not only a solicitor, but counsel, and will be required to face a stressful and often intellectually and emotionally challenging environment. While measures have been taken already to make that environment more “child friendly” there is more that can be done to ensure that a child has a trial that is compliant with the ECHR Article 6 (1) requirement that a trial be fair.

In the case of SC v United Kingdom (2005) 40 E.H.R.R. 10 the court held that Article 6(1) of the ECHR had been breached as the child had “notwithstanding his fitness to plead….was not capable of participating effectively in his trial to the extent required by Art 6(1).” We need to ensure that children in Scotland who are facing trial for serious offences are able to participate effectively in their own defence. In the case of SC it was stated that:

“a defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.”

This requires active participation, and an ability to understand often complex matters. The judgement further states that

“it is essential that proceedings take full account of his age, level of maturity and intellectual and emotional capacities, and that steps were taken to promote his ability to understand and participate, including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition.”

Children who become involved in the criminal justice system are often children who have complex difficulties. Studies have shown that a high proportion of young people in secure units and young person’s institutions have significant communication difficulties, and low educational attainment. In contrast to this, in cases involving sexual offences or serious injury, if the same child was a witness, rather than the accused, the presumption would be that they were vulnerable witnesses who would not even attend court to give evidence, but would give it from a remote location as the stress of attendance would be potentially too much to cope with.

In serious criminal cases the child’s capacity to instruct representation appears not given the same consideration as is the case in civil law. In recent years there have been cases in the English system where the children’s capacity to instruct was questionable. It is also the case that while a child may have capacity to instruct at the outset of a court case, the stress of the experience may lead to that capacity being reduced to the point where the child has no functional
capacity. While in recent years measures have been adopted with the intention of making the experience of court more “child friendly”, these measures do not fully address the problem of the child with limited or diminished capacity.

The Scottish Child Law Centre recommends that consideration be given to developing options for use in serious criminal cases, which would allow the evidence to be tested, while providing support for child accused to ensure that our criminal courts are further compliant with Article 6 (1) of the ECHR and Article 40 (3) of the UNCRC.

The following is an outline proposal only. Development would require expert criminal law contribution and evaluation.

When the options should be available to a court:

For use when a child is facing a High Court trial, although it should be available to a sheriff if a jury trial and they think circumstances warrant it. To ensure that in these comparatively rare cases that Scottish justice is fully ECHR compliant.

When should a court consider the options

Child should be assessed by suitably qualified professionals such as child psychology/ speech and language therapists for:

- Capacity to instruct legal advice and to participate in their own defence
- Assessed for factors such as: speech/language difficulties, any conditions such as ADHD/autism which may affect ability to participate, emotional age
- The child’s capacity to deal with the stress of attendance during parts of the proceedings

The results of the assessment should be made available to defence, prosecution and judge. If the assessment shows that a child will have difficulty in instructing legal representation, or coping with attendance at court then we suggest that a preliminary hearing could consider which options were appropriate for the child. Training for solicitors, advocates and judges would be needed to ensure they understood the relevant factors for the child. It would, of course, be for the judge to decide what explanation would be given to the jury.

Options open to the court could include:

- The appointment of a specialist curator. The curator should be a criminal law solicitor or advocate. He or she would have the responsibility of ensuring that the child understands what is going on, and assisting them to participate in instruction as much as possible. The curator would represent the interests of the child in proceedings, and would assist the child in following the evidence, and instructing legal representation. It would be necessary for he or she to attend the proceedings. The curator would be appointed for the child and their role with the child’s family should be limited, to avoid any conflict of interest.
- As with safeguarders in the children’s hearing system, government would need to set standards and training requirements for those acting in this capacity.

- Excusing the child from attendance during parts of the proceedings if it was considered that the child will not cope and that there would be no risk to the fairness of the trial.

- Allowing the child to attend by video link from another location if it was in their best interests.

The courts can already take steps to adapt some of the provisions for vulnerable witnesses in the case of vulnerable accused, but the SCLC believes that consideration should be given to the development of clearer rules and procedures.

It may be necessary to reassess the capacity of a child during a trial, as the stress of the experience may lead to loss of capacity. It may be also be necessary to reassess the ability of the child to cope with the stress of the trial. It would be the responsibility of the curator, or in the absence of a curator, the defence to bring this to the attention of the court and ask for a hearing, similar to the preliminary hearing proposed above, to consider the matter.

**Cost**

The proposal would increase the cost of a criminal case, but as these cases are comparatively uncommon there should not be a disproportionate cost to the public purse.

Scottish Child Law Centre
6 September 2013
Justice Committee
Criminal Justice (Scotland) Bill

Written submission from Scottish Children’s Reporter Administration

Background
The Children's Hearings System is Scotland’s distinct system of child protection and youth justice. Among its fundamental principles are:

- whether concerns relate to their welfare or behaviour, the needs of children or young people in trouble should be met through a single holistic and integrated system
- a preventative approach, involving early identification and diagnosis of problems, is essential
- the welfare of the child remains at the centre of all decision making and the child’s best interests are paramount throughout
- the child’s engagement and participation is crucial to good decision making

SCRA operates the Reporter service which sits at the heart of the system. SCRA employs Children's Reporters who are located throughout Scotland, working in close partnership with other professionals such as social work, education, the police, the health service, the legal profession and the courts system.

SCRA’s vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard
- Our hopes and dreams for the children of Scotland are what unite us
- Children and young people’s experiences and opinions guide us
- We are approachable and open
- We bring the best of the past with us into the future to meet new challenges.

Response

Corroboration
We recognise the complexities of this issue and the need to balance a number of different considerations. As in the adult criminal justice system, it is likely that the removal of corroboration would make it easier for the Reporter to establish grounds for referral that involve a child committing an offence. This is mitigated to some extent as the Children’s Hearings System is designed to promote the welfare of the child and the case of S v Miller confirmed that a child referred to a hearing on these grounds is not considered to be a person charged with a criminal offence. However, we recognise that, due to legislative provision in the Criminal Justice and Licensing (Scotland) Act and the Rehabilitation of Offenders Act (as modified by the Children’s Hearings (Scotland) Act 2011), acceptance/establishment of offence grounds within the Hearings System can result in potentially significant consequences for the child
(e.g. retention of DNA and forensic evidence or matters appearing in disclosure checks). On balance, we consider that if the requirement for corroboration is being removed for criminal proceedings, it should be removed in relation to our offence proofs as well.

In terms of potential impact, part of the Reporter’s decision making when considering whether to bring a child to a hearing is about the sufficiency of evidence. They are required to anticipate whether, if the case went to proof, they could establish the grounds to the necessary standard of evidence. Clearly the removal of the requirement for corroboration would factor in to the decision at that stage. So, it is possible that more children might come to hearings on offence grounds as a result of this change and this is likely to relate most commonly to offences that are committed in private, such as sexual offences. However we do not expect the numbers to be significant.

We understand that there have been some discussions in the context of the criminal system around potential additional safeguards. In relation to the Children’s Hearings System, we would make the following points.

Firstly, decision making within the hearings system takes place on a different basis than within the criminal system. For example, the test for referral to a children’s hearing is not simply based on the sufficiency of evidence, but also on whether or not compulsory measures of supervision are necessary for the child. In doing so, Reporters will take account of the welfare of the child. This is arguably therefore a higher test than that applied by the Procurator Fiscal when deciding whether or not to prosecute.

Furthermore, we understand that one of the additional safeguards under consideration for the criminal system is the introduction of a power for the sheriff to rule, on application by the accused, that there is no case to answer. We note that in relation to children’s hearings court proceedings, Rule 3.47(2) of the Child Care and Maintenance Rules requires the sheriff to consider whether sufficient evidence has been led of the offence at the close of the Reporter’s evidence, with all parties being entitled to make submissions on the point. Effectively this is a “no case to answer” test to be applied by the sheriff, even though it is not expressed in these terms. We do not therefore consider that there is a need for additional safeguards within the hearings system if the requirement for corroboration is removed. However, we are more than happy to consider any suggestions that might be brought forward by anyone else, with a view to ensuring that they fit within the overall ethos and structure of the system and that they would not have any adverse unintended consequences.

**Child suspects**

We are supportive of the provisions in Chapter 5 of the Bill, in relation to child suspects. In particular, the provisions which enshrine the need to make the best interests of the child a primary consideration in all decision making are to be welcomed. However, we note that there is some terminological inconsistency across legislation. The Children and Young People Bill, for example, refers to wellbeing.
While in practical terms there may be little difference in interpretation, some consistency would be welcome.

The definition of a child as being under 18 years of age is a positive step, as is the Bill’s recognition that children’s capacity evolves as they grow older and that there is a need for different provision for children aged 16 or 17 in relation to waiving their right to legal assistance or to the presence of an appropriate adult. We would suggest however that consideration is given to whether children aged 16 or 17 who are subject to compulsory measures of supervision, or who are subject to an open referral to the Reporter, should be granted additional protection as both are currently defined as “children” in the Criminal Procedure (Scotland) Act 1995 and Children’s Hearings (Scotland) Act 2011.

Investigative liberation
While we welcome the policy intention of this provision, we have some concerns about how widely the power is drawn. Our understanding is that the power would apply to all children, in relation to any offences (although the policy memorandum says it will be used only in more serious offences), that the conditions imposed could include a curfew, and that the only way to seek to vary or remove the conditions would be for the child to apply to sheriff. We believe that further consideration is needed to define the scope of the power and to restrict its application only to more serious offences, otherwise there is a risk that children will be drawn into formal court processes unnecessarily. A possible starting point would be for investigative liberation to only be an option where the offence is one of those in the Lord Advocate’s Guidelines to Chief Constables reporting to Procurators Fiscal of offences alleged to have been committed by children, in which case the child would be potentially subject to prosecution and the court would have a role.

In relation to the curfew power, we note that similar conditions imposed on children by a Children’s Hearing would be accompanied by support for the child by the local authority. We do not believe that such restrictive conditions should be an option for the police if that kind of support is not available to sit alongside the curfew condition.

Other issues
Section 43 of the Criminal Procedure (Scotland) Act 1995 makes provision for situations where children are arrested and either kept in custody by the police or released on an undertaking to appear at court. Despite a clear link between this section and various provisions of the bill, it would appear that section 43 is not amended by the bill. We consider that the “necessary and proportionate” test should apply to the continued decision making by the police about keeping a child in custody (and about where the child should be kept) and that section 43 should be amended accordingly. We also consider that further thought should be given to ensure that section 43 “fits” appropriately and consistently with the provisions of the bill.

Conclusion
We welcome the Bill and, subject to our comments above, the provisions that focus specifically on children and on the Children’s Hearings System. We look forward to
further discussions as the legislation progresses through the parliamentary scrutiny process.

SCRA
30 August 2013
Criminal Justice (Scotland) Bill

Written submission from Scottish Churches Anti-Human Trafficking Group

Scottish Churches Anti-Human Trafficking Group support for the proposal to make human trafficking a statutory aggravation in law. Specifically we wish to support Part 6, Chapter 1, Sections 83-85 of the proposed Bill.

The Group believes that there is a need to strengthen the legislation concerning human trafficking as part of a package of measures to reduce and prevent human trafficking in Scotland. We see the introduction of the statutory aggravation as a useful and important step in doing so.

The Group welcomes the decision of the Scottish Government to implement the recommendation of the EHRC that human trafficking become a statutory aggravation and we encourage the Government to do all it can to stop the trade in human beings.

Revd. Lindsey Sanderson
Convener, Scottish Churches Anti-Human Trafficking Group
28 August 2013

Annexe

Membership of the Scottish Churches Anti-Human Trafficking Group

Baptist Union of Scotland – awaiting confirmation
Care for the Family
Catholic Church in Scotland
Church of Scotland
Methodist Church
Religious Society of Friends
Salvation Army
Scottish Episcopal Church
United Reformed Church
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Scottish Criminal Cases Review Commission

1.0 Introduction
1.1 In June 2013 the Scottish Government presented a Bill to Parliament (the Criminal Justice (Scotland) Bill 2013) based upon the recommendations contained within the Carloway Report and issued a call for stakeholders and interested parties to submit written evidence on the content of the Bill. The Scottish Criminal Cases Review Commission (“the SCCRC”) welcomes this opportunity and is pleased to provide its short response which is by way of an update on the position outlined previously in its written responses both to the initial Carloway Review and to the subsequent Scottish Government Consultation Paper “Reforming Scots Criminal Law and Practice: The Carloway Report”. As with previous responses, it has restricted its written evidence to the issues which directly relates to the function of the SCCRC.

2. Response
2.1 The SCCRC notes that the relevant provision in the Bill is contained within section 82 as follows:-

82 (1) The 1995 Act is amended as follows.
(2) In section 194B—
(a) in subsection (1), for “section 194DA of this Act” there is substituted “subsection (1A)
(b) after subsection (1) there is inserted—
“(1A) Where the Commission has referred a case to the High Court under subsection (1), the High Court may not quash a conviction or sentence unless the Court considers that it is in the interests of justice to do so.
(1B) In determining whether or not it is in the interests of justice that any case is disposed of as mentioned in subsection (1A), the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings.”.
(3) The title of section 194B becomes “References by the Commission”.
(4) Section 194DA is repealed.

2.2 The SCCRC is pleased to note the intention to repeal section 194DA of the 1995 Act, as indicated in section 82(4) of the Bill. In the recent case of RMM v HMA, on the interpretation of section 194DA as presently enacted, the (current) Lord Justice General made the following comments:

“[33] An independent body specifically entrusted with considering cases of possible miscarriages of justice has decided that it is in the interests of justice that it should make these references (1995 Act, s 194C(1). In making that decision the Commission has considered the interests of finality and certainty (s

2 2012 SCL 1037
194C(2)). Although this court has been given the power to reject a reference in language that replicates the provision applicable to the Commission (s 194DA(1), (2)), it cannot be right for us simply to duplicate the Commission’s function and give effect to our own view. In light of the impressive record of the Commission, it is unlikely that we will have cause to differ from its judgment on this point. I think that we are entitled to assume, unless the contrary is apparent, that the Commission has considered the criteria set out in section 194C and has duly made its independent and informed judgment on them. In my view, we should reject a reference only where the Commission has demonstrably failed in its task; for example, by failing to apply the statutory test at all; by ignoring relevant factors; by considering irrelevant factors; by giving inadequate reasons, or by making a decision that is perverse.”

2.3 The Commission notes that the opinion of the Lord Justice General was supportive of the Commission’s previous written submissions on this matter to the effect that there is no empirical basis to conclude that the Commission has in the past applied its interests of justice test unreasonably, or that it is likely to do so in the future.

2.4 The Commission is opposed to the provision contained within section 82(2) of the 2013 Bill to insert the new subsections (1A) and (1B) into section 194B of the 1995 Act. In light of the sensitive relationship between the SCCRC and the High Court, it would be highly unsatisfactory for the High Court to refuse to consider a reference where the Commission, in the exercise of its powers, has concluded that there may have been a miscarriage of justice and that it is in the interests of justice that the conviction or sentence, or both, be reconsidered at an Appeal. The Commission remains of the view that there should be no veto of a referral at either stage of the appeal process. By introducing the new subsections (1A) and (1B) Parliament is retaining the “gatekeeping role” of the High Court which was the subject of so much criticism when originally introduced by S194DA of the 1995 Act. Simply shifting the implementation of that role from the start of the appeal process to the end of the process appears to be counter-intuitive and makes little pragmatic sense. If the Carloway reforms were intended to save time and expense and to reduce complexity, the changes now proposed in section 82 of the Bill flies in the face of them. It is entirely possible that the proposed reform will, in comparison to the currently prevailing scheme, result in greater expense to the justice system, slower processing of Commission referrals and, as a consequence of the proposed changes, a weakened Commission in the eyes of the public. This would appear to be contrary to the Government’s stated aim, in the policy memorandum which accompanies the present Bill, “to enhance efficiency and bring the appropriate balance to the justice system…”.

2.5 Of greater concern however is the shift in the construction of the proposed test from negative to positive. Whereas under 194DA the court is enjoined to reject the reference if it believes that it is not in the interests of justice to allow it to continue the new provision makes clear that the court may only quash a conviction or sentence if it believes that to do so is in the interests of justice. One might argue that these are two sides of the same coin. To do so, however, is to overlook the degree to which the
decision in *RMM* placed certain restrictions on any application of section 194DA by the appeal court. Out of adherence to constitutional principle, the court has taken what is, it is submitted, a most restrictive interpretation of that section. It was assisted in this task by the framing of the issue in terms of whether the interests of justice are served by allowing the appeal to continue rather than whether it is in the interests of justice to quash the conviction or sentence. The proposed amendment is, one might reasonably argue, constructed in such a way as to convey the impression that Parliament expects the court to consider the matter again. That is not to say that the court will not interpret the section more restrictively once more, but such an outcome is not guaranteed. When the Commission, having considered a case in full, concludes that there may have been a miscarriage of justice and it is in the interests of justice that a referral be made, there is no logical reason to place in statute a provision which allows the High Court to reject the case on the basis that it does not consider it in the interests of justice to allow the appeal.

2.6 It is worth stressing again that, at page 368 of his report, Lord Carloway suggested that the High Court might choose to bring a Commission reference to a conclusion by considering and applying, “*in whatever order it deems appropriate in the particular case*”, either leg of the proposed new two-tier test to be applied by the High Court under subsection (1A). Accordingly, whilst this new provision entitles an applicant to a full hearing of his appeal, the court may choose to address the second leg of the test first; and if the court is not satisfied that it is in the interests of justice to proceed the appeal could be dismissed, notwithstanding the fact that the Commission believes that a miscarriage of justice may have occurred. The Commission is of the view that such an outcome would seriously undermine both the independence of the Commission and its role in strengthening public confidence in the ability of the Scottish criminal justice system to address miscarriages of justice.

2.7 When considering the provision of an appropriate remedy for addressing historic miscarriages of justice the Sutherland Committee³ considered, and rejected, the possibility of giving additional powers to the High Court to carry out its own investigations into potential miscarriages of justice. As it stated at para 5.45 of its Report “…We doubted whether petitioners or the public would regard it as a satisfactory arrangement that the body which had already refused an appeal should be given the responsibility of considering and investigating whether there were any grounds in effect for a further appeal and should then determine it. We do not regard this as a sensible solution in relation to miscarriages of justice.” The Commission believes that the same principles can be applied to the present provisions which seek to introduce an “interests of justice” element to Commission appeals. It seems contrary to the *raison d’etre* for the creation of a Commission to create a new statutory provision whereby an appeal court can decide to ignore the grounds established for a possible miscarriage of justice by introducing a default position which entitles the court to reject an appeal “in the interests of justice” and applying the criteria of finality and certainty at this stage. As has

³ Sutherland Committee, “Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures” (Cm 3245, 1996)
previously been identified, Commission referrals can occur many months (sometimes many years) after a case has been concluded. A referral may be made in a case where the High Court has already considered an appeal, and on a ground that the High Court has already rejected or refused to allow as it failed to be raised within the time limits which applied during the original appeal. All of these matters would be considered by the Commission in applying its own “interests of justice” test. If a decision is subsequently taken to refer the case then the matter should proceed as a normal appeal and there is no reason why the High Court should apply a different test in Commission referrals.

2.8 The only matter which should concern the High Court is whether the appellant has suffered a miscarriage of justice. Whilst the SCCRC agrees and has publicly stated that matters such as finality and certainty, or the rights of the victim of crimes, should be fully addressed in any comprehensive, effective and fair criminal justice system, it does not believe that it is appropriate that, when hearing an appeal, the High Court should carry out some form of balancing exercise in deciding whether that appeal should be allowed. The SCCRC knows of no other modern criminal justice system where such a balancing exercise is carried out at the appellate stage.

Scottish Criminal Cases Review Commission
2 September 2013
Justice Committee
Criminal Justice (Scotland) Bill

Supplementary written submission from Scottish Criminal Cases Review Commission

For the period 1 April 1999 to 31 October 2013, there have been 29 cases in which the Commission has concluded there may have been a miscarriage of justice but it is not in the interests of justice to refer the case to the High Court.

The total number of referrals in that period was 120. The total number of cases concluded after a full review was 1064.

Scottish Criminal Cases Review Commission
25 November 2013
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Scottish Legal Aid Board

The Board

1. The Scottish Legal Aid Board (the “Board”) is a non-departmental public body established by the Legal Aid (Scotland) Act 1986. The Board is responsible for the administration of legal aid in Scotland in terms of the Act and has the general function of:
   - securing that legal aid and advice and assistance are available in accordance with the Act;
   - administering the Scottish Legal Aid Fund (“the Fund”); and
   - monitoring the availability and accessibility of legal services in Scotland.

2. As a key partner agency in the justice sector, the Board has been involved in the work undertaken by Scottish Government prior to the drafting of the Criminal Justice (Scotland) Bill (the “Bill”). Additionally, submissions by the Board on a range of financial aspects of the implementation of the bill were included in the Financial Memorandum.

Legal Aid

3. There are several different types of legal aid. The current consideration of the Bill principally engages with legal aid in the context of Scottish criminal law and procedure. There are two forms of legal aid relevant in the context of criminal proceedings although one of these types is sub-divided further into two forms – see paragraph 4 below. All solicitors who provide criminal legal assistance have to be registered with the Board so to do. Most, if not all, such solicitors undertaking criminal work provide both forms of legal aid relevant to the criminal context. Together, the forms of legal aid relevant in the context of criminal law are grouped together under the collective name criminal legal assistance, and in this paper, criminal legal assistance simply means one or other or both forms of legal aid relevant in criminal proceedings.

4. Criminal legal assistance comprises:
   I. Criminal Advice & Assistance
      (a) General Criminal Advice & Assistance
         Legal assistance which covers general work other than representation in a court, such as meetings, correspondence. This currently include work done by solicitors at police stations.
      (b) (Criminal) Assistance by Way of Representation (“ABWOR”)
         Legal aid for representation for certain specified hearings or types of case before a court or tribunal for which criminal legal aid is not available. Typically this covers proceedings where a plea of guilty is accepted, and other proceedings such as breach of existing court orders.
II. Criminal Legal Aid

The main form of legal aid for representation before a court. This form applies where an accused pleads not guilty, whether or not there is then a change of plea. There are different arrangements for summary criminal legal aid and solemn criminal legal aid.

Availability of Advice at Police Stations

5. The Board has a statutory obligation to ensure that suspects detained under s14 of the Criminal Procedure (Scotland) Act have access to a solicitor. For this purpose, the Board operates the 24/7 Solicitor Contact Line ("SCL") which is a one-stop point of contact for all police stations in Scotland. If the suspect has their own solicitor, the SCL notify the solicitor that advice is needed. If that solicitor is unavailable or the suspect does not have their own solicitor, the SCL solicitor can provide advice by telephone. This ensures that a suspect can receive advice quickly and effectively. If an attendance by a solicitor in person is required, the Board operates a duty solicitor scheme. The solicitors attending can be solicitors from the SCL, the Public Defence Solicitors’ Office or private solicitors.

RESPONSE TO THE CALL FOR EVIDENCE

6. The Board proposes to follow the suggestion of structuring the response in accordance with themes suggested in the call.

A Police Powers and Rights of Suspects

Part 1 Chapter 1 - Arrest

7. The Board recognises that the Bill adds to the provisions applying to persons suspected of involvement in crime, and their rights. It is anticipated that the changes will now lead to an increase in those seeking police station advice, given that arrest will not just apply to suspected crimes punishable by imprisonment as detention does now.

8. With the right to solicitor consultation being extended by Section 36\(^1\), and the right to have a solicitor present at interview (Section 24\(^2\)) there will be a significant increase in recourse to solicitors. In relation to Section 24 it is not clear that the natural meaning of the phraseology used in the Bill of “having a solicitor present” includes solicitor participation by video. Lord Carloway\(^3\) recognises that in many situations a video-based link will be as effective as physical presence. If there is no ability to have solicitor participation by video, this may create significant logistical and cost challenges especially in more rural areas. In that connection, the Bill could facilitate further recourse to video technology, beyond that provided for in the context of courts in Section 86 (and see separate remarks in connection with that section below).

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\(^1\) In terms of the Bill the right will become the right of any person in custody to consult with a solicitor. Currently this is restricted to those in custody who are interviewed or to be interviewed.

\(^2\) In terms of the Bill the right will become the right to presence of a solicitor at interview whether in custody, or voluntarily attending a police station or another place. Currently this is restricted to those in custody.

\(^3\) At 6.1.40 of his Review
9. As well as the frequency of solicitor involvement at police stations increasing (per observations at paragraph 8 above), it is also likely that the duration of such involvement will increase in line with the need for the police to give more information. Under the current law only very basic information need be provided. Under the Directive the phrase “all the information on the accusation necessary to enable them to prepare their defence and to safeguard the fairness of the proceedings” is used and this information requirement is likely to increase the scope of information given by the police, and the subsequent consideration by the suspect with their solicitor.

10. The Board, as the body responsible for ensuring that legal advice is available to suspects in police stations, and as administrators of the public funding of legal advice, assistance and representation, anticipates that the general effect of such further provision will be to increase the cost of legal services as a result of increased recourse by suspects to legal advice and assistance. However, these services can be delivered in different ways. We are working with the Scottish Government on how these services could best be delivered. For example, the current model of the SCL and duty solicitor provision could be expanded. Solicitors could be located in busy police stations to provide advice. The current system operates well and is highly regarded by Police Scotland and many solicitors within the legal profession. It ensures that advice is given quickly and effectively to suspects.

11. Much of this work will be covered under arrangements that can be made under the existing regime for criminal Advice & Assistance, which is essentially a time-based charging system. However, increases in frequency and duration of the involvement of solicitors at police stations both drive time-based charges up. Further comment on the changes to legal aid structures are made under our comments on Part 1, Chapter 2.

Part 1 Chapter 2 - Custody

12. Investigative liberation, police liberation and questioning are all areas that will challenge the existing arrangements for criminal legal assistance as well as give rise to increased costs for the Fund, particularly through the increase in solicitor police station work. The Financial Memorandum for the Bill contains estimated figures based on the current legal aid structures, but any projections are open to substantial variation.

13. While the ability to seek a review of a police bail condition to the Sheriff is an entirely new and welcome step, it can be predicted with some certainty that this will occur often in situations involving allegations of domestic violence and the resulting legal work may be significant.

14. The new regime will see an increase in both non-court advice and assistance, and court representation for hearings in relation to the various applications that can be made to court, and for which there is currently no real parallel. It is not just an

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4 Section 5(3) bases further information requirements on Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings

5 E.g. Application to the sheriff to review conditions of release under Section 17 or application to the sheriff for review of conditions of an undertaking under Section 22, etc.
issue, consequently, of scaling-up existing provision and costs. There will be completely new processes, and the possibility that the processes could occur more than once during a case. In turn, there may be significant cost ramifications. There may be a significant benefit from looking at overall restructuring of criminal legal assistance, and further remarks are made below.

15. As far as the legal aid mechanisms to deal with the changes are concerned “bolt-on” solutions, whilst simplest to articulate, may not be the best approach in the long term, and indeed are likely to be costly. Such bolt-on solutions might include providing for additional Advice & Assistance and additional criminal ABWOR (in relation to court hearings). A more considered approach may be for the Scottish Government to consider this as an opportunity for substantial simplification of criminal legal assistance, recognising that in essence the processes for which legal aid needs to be available start with the first involvement with the police at the police station, rather than the current system which although making some provision for preliminary processes, is based on the later service of prosecution papers as the procedural trigger for legal aid, and the subsequent court procedures. This would require primary legislative change.

16. The Board is of the clear view that a range procedures under the current heading/theme of “Custody” are susceptible to increased use of both (a) electronic communications to produce time, resource and cost efficiencies for such processes as would previously have been susceptible to paper-based steps, and (b) to video-technology for processes for which face to face meetings or court attendances might have previously been appropriate.

17. In addition, based on our experience of arranging legal advice and representation under the current system, the 12 hour maximum custody period envisaged by Section 11 may be very challenging in some cases, especially having regard to the geography of Scotland and practical difficulties such as bad weather and the availability of solicitors.

Part 1 Chapters 3 & 4 - Rights of suspects, etc.
18. In relation to police procedures quoad children and vulnerable adults, the safeguards need to be robust. Normally face to face interviews would be indicated where a child is involved, but especially in rural situations, it may be that provision for being able to facilitate interview by video would be useful as a failsafe.

19. We note that the safeguard provisions relating to waiver of the right to have a solicitor present at interview (other than those relating to those under 16) appear to be restricted to mental disorder and do not cover the position of poor literacy, other limitations on capacity or the fact that the accused does not speak English at all. We also note that in contrast with the position in England & Wales where a different approach is taken, and Code C of PACE6 applies, the suggestion from the Bill7 is that it is left, ultimately, to the decision of a police constable whether the person understands, and if they are over 18, whether the person has a mental disorder or

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6 Police and Criminal Evidence Act 1984 which applies to England & Wales
7 Section 25
not. This leaves the matter open to challenge and risks failing to achieve the ECHR test of effective participation. Under Code C of PACE the position is that:

1.4 If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered, or otherwise mentally vulnerable, in the absence of clear evidence to the contrary to dispel that suspicion, the person shall be treated as such for the purposes of this Code.

1.6 If a person appears to be blind, seriously visually impaired, deaf, unable to read or speak or has difficulty orally because of a speech impediment, they shall be treated as such for the purposes of this Code in the absence or clear evidence to the contrary.

20. The PACE provisions go a significant way to reduce the risk of the vulnerable suspect being interviewed without a solicitor and the Bill may be an opportunity for the position in Scotland to be put on the same footing. While it sets the bar higher for the police, it is more likely to ensure that proper regard is given to vulnerabilities which may not necessarily present easily for assessment by a police constable. It also reduces the risk of difficulty for the suspect or their solicitor where there is information as to mental disorder (or other vulnerability) but the police may not have given appropriate cognisance to it. Adopting the PACE provisions in this area would also reduce the risk of challenges to the admissibility of the interview on the grounds of fairness.

B Corroboration, admissibility of statements and related reforms
21. We have no submission to make in respect of this part of the Bill. The Board have provided estimates of what increased costs might look like, wholly based on views from the Crown, as to what increased levels of prosecutions might be. Expenditure in this regard will be directly driven by prosecution policy.

C Court Procedures and Video usage
22. As the Financial Memorandum relates, there will be increased costs of the front end procedure in solemn cases, but these could be at least partially controlled by the use of an inclusive fee (as opposed to time and line fees) for the work. The emphasis on front end work is designed to create efficiencies in terms of whether and how later procedure takes place, and there should be savings in that respect, but these are difficult to predict.

23. The Board considers that the use of electronic communication and video and/or telephone conferencing should be encouraged and that this would be assisted if a statutory footing was given to the option for use of video or telephone conferencing for all hearings or proceedings susceptible thereto, so as to enable and encourage the use of such facilities where ever possible, and to help achieve the attendant cost effectiveness. Section 86 (see below) addresses participation of a detained person in a specified hearing, but the use of video for other participants, beyond those who are detained, merits wider provision in the Bill.

Part 6 Section 86 - Live Television Link
24. The proposed arrangements to introduce an optional pre-hearing to clear the use of video before the substantive hearing threatens to make the system less
efficient rather than more. There are currently court cases involving detained persons being heard via video in Scotland that do not have the formality of such a pre-hearing in place, but nonetheless proceed effectively and efficiently. Additionally, other jurisdictions across Europe use video in an increasing number of cases without the need for such a hearing.

25. There is also good reason to make the provisions for use of the technology more permissive to as to encourage, as well as permit, wider use. In order to ensure that the introduction of new technology brings the foreseen benefits, but at the same time safeguards the accused’ rights, a more permissive wording for the (new) Section 288H(1) would be:

“The court may, on application to it by any of the parties to the case or ex proprio motu, determine that arrangement be made whereby any due participation, at any diet, hearing or examination of an accused who is a person detained in any place in Scotland is through a live television link from that place, the accused not being brought to the court-room.”

26. The (new) sub-section 228(2) would be retained, but sub-section 288H(3) could be removed as unnecessary.

27. It is also felt that the Bill should go further in the development of the potential for the use of television links and digital technology and the benefits and costs savings this will bring in the longer term. By enabling the use of such technology now, further opportunities can be explored within the justice community, including the legal profession.

28. Further use of video would be the giving of evidence in some diets, particularly more formal or uncontentious evidence, or evidence which is in short compass. Police evidence particularly could be susceptible to such treatment in a number of situations, and the efficiencies and resource advantages achievable by not having officers attend court are very significant. There are already precedents for the taking evidence from child and vulnerable witnesses as well as some witnesses outside Scotland, and nothing from that experience suggests that more extended use of video is anything other than advantageous. The procedural model given by Section 86 (and the new Section 288H of the 1995 Act) could fairly simply be applied to be available to the court for such hearings or in such circumstances as the court considers appropriate ex proprio motu or on application of a party to the case.

29. In relation to further use of digital technology the critical areas are in the permissions to serve and present necessary and important documentation digitally and to ensure that digital signatures are permissible.

D Appeals, Sentencing & Aggravations

30. The Board have no submissions to make in relation to these provisions of the Bill other than to record formally that the provisions of the Bill by increasing efficiencies and sifting out poor appeals should result in a concomitant saving on the Fund.
Police Negotiating Board for Scotland

31. We have no submissions to make in respect of this part of the Bill

Scottish Legal Aid Board
30 August 2013
Corroboration:

Sexual crimes – particularly historical cases or cases involving child witnesses – are complex and challenging. The sequelae of behaviour that so often accompanies sexual offending adds additional burdens on the management of these cases within the criminal justice system.

We are of the view that the consequences for civil liberties and the rights of the accused are vital and it is ill-advised to compromise these particularly where there may be an elevated risk of wrongful conviction. We acknowledge that current law on corroboration makes it more difficult to secure convictions in rape cases although we are of the view that a major issue may be the prejudicial views sometimes held by juries and there is no strong evidence to suggest that they would be more likely to convict where it is a case of one person's word against another.

However, we consider that removing the law on corroboration is a sweeping move. We would like much wider definitions of corroboration to be permitted in cases of rape, sexual assault, child sexual abuse and domestic violence where it is regularly a feature that there is unlikely to be witnesses. Widening the definitions and the types of corroboration that could be used would still maintain the principle in fairness to the accused. It seems disproportionate to do away with corroboration for all crimes when it only impedes justice in some crimes.

We would like further consideration of the introduction of more 'circumstantial' evidence to support the application of corroboration where this may help to complete the chain of evidence.

We would consider it important (in some cases such as those cited above) for the Court to carefully consider the accused previous offending history (if any) and modus operandii where sexual crimes (including child sexual abuse) are the subject of proceedings. In such cases we advise more systematic and constructive use of expert testimony which can enable the Court to fully understand the complex features of a victim's pattern of behaviour and traumatic reaction as well as the conduct and potential motivating factors of the accused. We have no difficulty with the current law on corroboration but feel very strongly that it's application and definition needs revision and tightening up.

We do understand that the introduction of previous offending histories and modus operandii information to juries may be seen as likely to cause them to become
presumptive and closed minded. Nonetheless we think that, properly managed by the Court, in such cases where an approach of this nature is determined as an effective way to improve the administration of justice, this information should be accessible to the Court in criminal cases.

The Moorov doctrine has offered a real opportunity for justice to many people in Scotland - particularly in crimes of interpersonal violence where the execution of the offences has relied on secrecy and concealment. The difficulty with it however is in its application. In our view the doctrine is generally applied by Fiscals with a ‘time period’ element - that is, not only do they need to be satisfied that the two separate alleged offences occurred with a similar MO but they also apply a time limit to the period between their occurrence and also the time that has elapsed since. This can dilute the application of the doctrine considerably and may deny justice when otherwise it may have had a chance of proceeding. Supporting circumstantial evidence may strengthen the application of Moorov in such circumstances but equally a more informed and ‘flexible’ stance by Procurators Fiscal in marking cases may also enhance the administration of justice in such cases.

Furthermore, single eyewitness testimony (where no other corroboration exists), for example, supported by compelling ‘circumstantial’ evidence in such cases should permit greater flexibility in determining whether proceedings might be taken and how such proceedings are managed by the Court.

We would also like to see the Crown put far more cases of child sexual abuse before juries to let them judge the integrity of victims, adults or children, for themselves rather than deciding that only a small minority of cases should come to court. Child witnesses are heard in a multiplicity of other cases involving serious crime so, in our view, supported by the provisions of the Vulnerable Witness (Scotland) Act 2004, if child witnesses are properly supported and wish to go ahead they should be allowed to.

In our view the Crown should therefore allow more cases to proceed to Court allowing the Judge/Sheriff and Jury to become more protagonist in determining the strength or weakness of particular evidential information. This is a risky strategy of course but we think that where the basic considerations for corroboration exist then the court should be the place to determine - this is far more in the public interest than ‘no-proving’ cases where corroboration clearly exists but is not perhaps strong enough for a sure fire conviction.

It is our considered view that doing away with the current law on corroboration is “throwing the baby out with the bathwater”. As with so many things we do not need to actually change the law of Scotland but improve the ways in which people apply the law. We need instead to take a more proportionate and considered approach. This would greatly improve the chances for victims and survivors to get access to justice in criminal proceedings. A clearer and more modern definition of corroboration would help. Improved regulations on the application of the law on corroboration (including advice on greater flexibility in cases of interpersonal violence or where the MO renders straightforward corroboration less likely such as those where grooming, intimidation, coercion etc. is present) would help. Greater and more informed use of expert testimony by the Court would also be of assistance (for
example where the features of witness or accused behaviour need explanation/clarification and which allow this to be taken into account by the Court).

It is also common police practice for two officers to be present at witness or suspect interviews in order to sustain ‘corroboration’ for criminal purposes. We are concerned about the burden of trust that this places, without dispute, on the shoulders of the police. While we are certain that in the vast majority of cases, police testimony is above and beyond doubt or reproach, we think it consistent with a modern criminal justice system to ensure that police corroboration in and of itself is not the single determinant in moving the burden of evidence ‘beyond a reasonable doubt’ when other evidence has no equal impact.

We are further concerned that the removal of corroboration per se could result in a greater preponderance of ‘plea bargaining’ with a knock-on effect on disposals reached by Courts and on sentencing policy.

In summary, we do not support the abolition of corroboration in criminal cases but recommend better application of the law on corroboration; greater flexibility by the Crown; improved use of expert testimony; greater admissibility of ‘circumstantial’ evidence to support corroboration where and as necessary; and improved definitions and regulations concerning the application of corroboration.

CPG on Adult Survivors
2 October 2012
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Scottish Police Federation

Part 1
Chapter 1 - Essentially removes Detention and replaces it with a general power of arrest. Whilst this may appear relatively straightforward it will have significant training implications for the Service. Every police officer and special constable will require to be trained which will present a major resourcing challenge. There will be cost implications in relation to this training and may also be a requirement for some work to be done on IT systems to accommodate the proposed changes at a time when the service budget is under extreme pressure.

Some clarity is required as to the requirement to obtain warrants for arrest and questioning, given the high volume of low level crime not punishable by imprisonment there may also be resourcing implications for the Courts which as we know are reducing in number. If as a consequence vast numbers of warrants are sought.

Chapter 2 - The issue of police bail will also have significant training implications and may well be an area of significant challenge in the Courts. The release and requirement to return will also present some challenge in managing times around officer’s shifts and other duty commitments etc may well prove to be an administrative nightmare and again may require some investment in IT to manage the proposed changes.

The capacity of both the service and the Courts to cope with this demand is also questionable.

The requirement for investigative liberation not to exceed 28 days will also present a significant challenge, what happens when this cannot be accommodated?

Chapter 3 - There does not appear to be any provision to add further conditions to an undertaking which may be required if circumstances change after the undertaking was made. If this is not in place undertakings are likely to have a vast number of conditions attached, just in case!

Chapter 4 - If a solicitor is requested the time taken for their attendance at a police station should be discounted from the 12 hour period.

Again these provisions will have significant training and resourcing implications and will be an administrative challenge and burden.

Chapters 5 - 8 - No specific comments.
Part 2
Corroboration - The SPF are not opposed to making some amendments in relation to corroboration and its application but hold the strong view that there should be no blanket abolition of the requirement for corroboration. In relation to some matters such as the service of legal documents or evidence relating to the transportation of productions or forensic and medical evidence the requirement for two witnesses may be unnecessary and costly.

Corroboration serves as a safeguard for the general public who come under suspicion of committing a criminal act, the accused and also for police officers who are on occasion subject to false or malicious complaints as a consequence of executing their duty.

Blanket removal of corroboration would risk exposing police officers to more spurious and malicious allegations which would be harder to refute and similarly so for every other member of the public.

Corroboration is an important safeguard against miscarriages of justice or wrongful conviction; a witness who is convinced their evidence is accurate may be mistaken. This is particularly pertinent to issues surrounding identification.

In other countries where corroboration does not exist there is a greater use of technology to enhance the quality of cases reported and to protect the police and suspects from injustices and oppression. This would require to be addressed here. Corroboration is also particularly important in maintaining public confidence in the criminal justice system.

The quality of evidence may be reduced and as a consequence the scrutiny applied to a single source of evidence must be increased. Other jurisdictions have established methods of weighing and scrutinising this type of evidence and it is possible that miscarriages of justice may occur in the interim while we adjust.

The abolition of corroboration will inevitably result in the lower end cases being subject to appeal. This could cause practical difficulties for an already stretched appeal court.

Under our system evidence from a single witness would receive far greater focus from defence agents. Greater effort will be made to discredit these witnesses and undermine their testimony. This could result in reluctance for witnesses to give evidence willingly.

The assertion that there is a link between corroboration and low conviction rates is something that in our view needs further detailed research and analysis before a decision to make a critical change in Scots Criminal Law and that this should be made publicly available. In the Carloway Review Report it was 'accepted and agreed that the number of areas which could be examined in detail was limited.' We would therefore encourage much more detailed analysis on the wholesale abolishment of corroboration.
In England where there is no requirement for corroboration, conviction rates are only fractionally higher. The Scottish Law Commission also rejected the proposal to remove corroboration for sexual offences in its 2007 report which culminated in the Sexual Offences (Scotland) Act 2009.

The majority verdict of juries would in our view have to be reconsidered as a removal of the requirement for corroboration would undermine and weaken our jury system.

In the civil system where there is no requirement for corroboration there is widespread use of skilled (and expensive) expert witnesses to substantiate uncorroborated claims in relatively modest actions.

The fact that our system is unique among other systems is of no relevance. All legal systems have procedural rules developed over time to fit within their specific requirements.

It is unsafe to look at the European model as these are inquisitorial systems and their approaches to corroboration are distinct to the adversarial system in Scotland.

Fundamentally the principle of corroboration provides some balance between the protection of individuals from wrongful prosecution and/or conviction and miscarriage of justice by the Crown who has significant power and resources at its disposal.

There is no doubt that there is a scope for change but not the wholesale abolition of one of the key safeguards in Scots Criminal Law.

Part 3 - No comment

Part 4 - We support the increase of sentence for carrying of offensive weapons and the provisions relating to offences committed by persons on early release.

Part 5 - No comment.

Part 6
Chapter 1 - We support the introduction of aggravations of offences relating to people trafficking.

Chapter 2 - Traditionally it was understood that PNB dealt with negotiable subjects and the Police Advisory Board (PAB) dealt with non-negotiable subjects. But as it states in 55B(4)(c), the issue, use and return of police clothing and equipment, was in legislation covering the PNB UK. However it was never discussed at PNB as it was not considered a negotiable subject.

There is an important principle here that there should be no connection between negotiable subjects and non-negotiable subjects. For example, a situation where improved safety equipment was offered in return for a reduced pay award would be entirely unacceptable.
SPF believes this should be removed from the PNB remit and placed on the agenda of whichever body takes over the role of the PAB.

**General Comment** - Whilst supportive of some of the proposals laid out in the Bill we believe that some have significant practical, cost and resourcing implications not just for the Police Service but also for COPFS and the Courts.

We are not convinced that there will be significant benefits from the introduction of these proposals and when balanced against the costs and other implications believe that there introduction may cause significant difficulties for all partners in the Criminal Justice System and require much more detailed analysis before progression.

Scottish Police Federation
30 August 2013
Justice Committee

Criminal Justice (Scotland) Bill

Supplementary written submission from the Scottish Police Federation

Meeting of Justice Committee on 1 October 2013

I refer to the above and to the invitation from the Convenor to submit any additional information for the Committee’s attention that was not able to be covered during the evidence session.

Before getting to the principal point of this correspondence I have observed a flow chart has been prepared to assist the Committee understand the differences in the arrest/detention process as they are now compared to how they will be under the provisions of the Bill.

Whilst this flowchart is generally useful, I must express my concerns as to its accuracy and indeed the weighting of the language used against the process as currently exists. Specifically in the processes shown on the left a person detained is not referred to as an “accused” as quite simply, at that stage in the process there is insufficiency of evidence to make such a determination. They are merely a suspect. Indeed if the evidence existed to determine the person was indeed to be “an accused” that would render the detention unlawful. It is also worth pointing out that at the parallel point in proceedings to the right hand side, the reference is to neither “suspect” or “accused” but simply to “person”. Quite simply if they are a suspect in the process shown on the left, they will similarly be a suspect in the process shown on the right. It is unclear to me why this different wording is used at what will be exactly the same stage in the process.

Turning now to the main purpose of this correspondence.

I appreciate the time did not allow for full scrutiny of the proposals for a Scottish Police Negotiating Board and I am sure the Committee Members will be made aware of the separate and detailed Staff Side submission on this issue. I would however like to emphasise a number of key points that the Scottish Police Federation believes are required to make the new body a success.

The SPF is wholly supportive of a negotiating body for police officers in Scotland (PNBS). We believe that it is only by sitting down and negotiating in a fair and transparent manner that police officers can have confidence their unique employment status is being properly considered and compensated. The SPF would despair if the mistakes that dogged the PNB in recent years were permitted or indeed if the structure, composition and remit of the PNBS was such as to permit them to be repeated in the future. We cannot emphasise enough how important this is and we have covered this in some detail in the Staff Side response. Quite simply if the foundations of the new PNBS are effectively a mirror of those we are leaving behind (bar some tinkering at the margins) the body will ultimately fail or be such that its members lose confidence in it.
It is for these reasons we believe the issue of arbitration and its binding nature (save in some aspects of overall pension policy) needs significantly enhanced. No one has yet given any reason why this wholly reasonable request should not be included in the arrangements for the PNBS. Staff Side raised a number of questions in our response to the separate consultation on the PNBS and I believe these are worth reiterating here. Why would a government not want to give police officers a fair crack of the whip here? Why would it be acceptable to be able to railroad police officer negotiations when the industrial relations landscape prevents such railroading of any other worker? We will ask these questions time and again if need be but believe the underlying message this approach sends to other collective bargaining organisations and trade unions in Scotland is one of the greatest concern.

The SPF, whilst welcoming the Cabinet Secretary’s oration on being bound on matters of pay, believe this does not go anywhere near far enough and believe a significant amendment is required to the Bill to ensure that such a binding is indeed statutory and not one merely self-imposed. We would seek similar statutory binding on any arbitration decision. We are overwhelmingly of the view that the prospect of a fully binding arbiter’s decision as an end point in the process will make negotiation and agreement more likely than not in almost every single instance.

The SPF also wishes the Committee to consider the fundamental importance of both an independent secretary and independent chairman. In the new Police Service of Scotland (PSoS) it is almost inevitable the bulk of the data required for the PNBS to do its work effectively will come from the PSoS. And it is only by having independence that the usefulness of that data, for both sides, can be guaranteed. The SPF does not support the notion that on occasions these roles should be performed by any of the constituent members.

The SPF and indeed the wider Staff Side will no longer have access to the part funded valuable PNB research located within the Police Federation for England & Wales as it is inconceivable this funding will continue one a Pay Review Body is introduced. This places SPF and Staff Side at considerable disadvantage when compared against the collective resourcing might of the PSoS, the Scottish Police Authority and the Scottish Government and its agencies and we consider it essential this gap is at least part bridged with some additional funding to permit us to overcome this lost resource.

Calum Steele
General Secretary
4 October 2013
Justice Committee
Criminal Justice (Scotland) Bill

Supplementary written submission from the Scottish Police Federation

Corroboration

Thank you for the opportunity to give evidence to the Committee on 3 December 2013.

Some members of the Committee considered that the Scottish Police Federation (SPF) had changed its position and I would like to ensure that our position in relation to ‘corroboration’ is clear.

The SPF has never supported a position which would allow the evidence from one single source to be sufficient to secure conviction. We do not believe that this is the intention of the Bill and further believe that sufficient safe guards are in place to ensure this could not happen.

The SPF has always believed that much of the duplication of largely non contentious evidence to satisfy the law in relation to corroboration is unnecessary and wasteful of time and money.

We are persuaded by debate and discussion on this issue to support the removal of the general requirement for corroboration in the knowledge that there will still be a requirement for a sufficiency of corroborative evidence across the evidential chain to satisfy the burden of proof. The SPF believes that this will not only improve the efficiency of the criminal justice system but more importantly will provide easier access to it for the victims of crime.

The police will always gather and report all available evidence to the Crown Office and Procurator Fiscal Service (COPFS) irrespective of the outcome of this Bill. It is a matter for COPFS and the Courts to determine the sufficiency and quality of this evidence.

I trust this clarifies our position.

David Ross
SPF Vice Chairman
5 December 2013
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Scottish Women’s Aid

Foreword
Scottish Women's Aid ("SWA") is the lead organisation in Scotland working towards the prevention of domestic abuse. We play a vital role in campaigning and lobbying for effective responses to domestic abuse.

We provide advice, information, training and publications to members and non-members. Our members are local Women’s Aid groups which provide specialist services, including safe refuge accommodation, information and support to women, children and young people.

An important aspect of our work is ensuring that women and children with experience of domestic abuse get both the services they need, and an appropriate response and support from, local Women’s Aid groups, agencies they are likely to contact and from the civil and criminal justice systems.

Introduction
SWA welcomes the opportunity to comment on the Criminal Justice (Scotland) Bill. We welcome the removal of the requirement for corroboration but have grave concerns about the operation of the proposals on investigation liberation and liberation on undertakings.

We would comment that the provisions of this Bill cannot be developed in isolation from the provisions of the Victims and Witnesses (Scotland) Bill also before the Committee. The latter seeks to strengthen support for victims and witnesses and also comply with, and implement, the requirements of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime ("the EU Directive"), which came into force on 15th November 2012. The UK as a Member State, and thus, the Scottish Government too, has 3 years to translate the requirements into law/procedure or ensure that existing law and procedure complies.

Specifically, certain proposals under this Bill in sections 3, 14-17 and 19-22 dealing with liberation of suspects and accused persons have to be compliant, and cross-referenced with general principles set out in the Victims and Witnesses (Scotland) Bill, which confer certain rights and protections on victims and witnesses and place duties on bodies such as Police Scotland and the Lord Advocate.

Section 1 (3) of the Victims and Witnesses (Scotland) Bill states that these principles are

(a) that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,

(b) that the safety of a victim or witness should be ensured during and after the investigation and proceedings,
(c) that a victim or witness should have access to appropriate support during and after the investigation and proceedings,
(d) that, in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings.

The rights of the suspect/accused have to be balanced with those of the victim, a position supported by the EU Directive on victims, Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”) and Article 47 of the Charter of Fundamental Rights of the European Union, which gives the victim a right to an effective remedy and to a fair trial. In considering the accused’s rights under Articles 5 and 6 of the Convention, the rights of victims of crime must also be considered, specifically

- Article 2- Right to life, liberty and security of person which has been interpreted to refer to a state’s obligation to protect through an effective system for the prevention, investigation and prosecution of crime
- Article 3- Prohibition of torture- in relation to victims, breaches occasioned by a failure of police procedure/investigation or a failure to prosecute
- Article 8- Right to respect for Private and Family Life
- Article 13- Right to an effective remedy, including that there be a proper investigation of alleged crime

It is important that the proposals contained within this Bill are implemented correctly, to protect and improve the experience of women, children and young people experiencing domestic abuse who become involved with the criminal justice system as a result of such abuse.

**Section 3- Information to be given on arrest**

When a constable arrests a person (or as soon afterwards as is reasonably practicable), they must inform that person of the general nature of the offence in respect of which the person is arrested and of the reason for the arrest. However, there is no requirement for the complainer to be so informed and the section must state this.

Women, children and young people experiencing domestic abuse, as complainers, must be made aware of what the police investigation and any resultant prosecution will focus on. Identifying the offence as involving domestic abuse will name the behaviour and make it clear to the abuser and complainer that the abuser’s behaviour is recognised as such by the criminal justice system, which also means that the provisions of the Joint Protocol between the police and the Crown on the investigation and prosecution of domestic abuse, currently under revision, (“the DA Protocol”) will be invoked and must be followed by police and prosecution.

This is also important in relation to the police investigation and their work in evidence gathering and risk assessment in relation to domestic abuse, particularly

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2 "In Partnership, Challenging Domestic Abuse”
since it is proposed that suspects may be released on investigative liberation or undertakings by the police.

It will provide clarity for complainers in relation to the eventual charges brought and situations where either the prosecution proceeds in a different direction or no prosecution is taken, particularly given the rights that victims have under the EU Directive to receive information on the proceedings generally and to challenge decisions.

Further, providing women, children and young people who have experienced offences involving domestic abuse with information to this effect will both allow them to access both targeted and specialised support provided by Women’s Aid groups and also signpost and passport them to specific domestic abuse-advocacy court support.

Investigative Liberation
Section 14- Release on conditions
Section 15- Conditions ceasing to apply
Section 16- Modification or removal of conditions
Section 17- Review of conditions

SWA has concerns about the operation of the proposals on investigation liberation in relation to the risk posed to complainers in cases involving domestic abuse and how this is assessed. Police Scotland share some of these concerns and we would urge the Committee to seek their views and observations on these matters.

Section 14- Release on conditions
There is no requirement in this section that the complainer be notified of the suspect’s release on investigative liberation, and, more importantly, whether or not this is subject to conditions and what these are. There is also no provision for the complainer to comment on whether any condition(s) is appropriate and sufficient for their protection.

In consideration of the latter, the second important point is how the appropriate constable (Inspector or above) assesses whether or not to impose a condition and whether a condition is necessary and proportionate. This test refers to “proper conduct of investigation” only and there is no wording to indicate that this encompasses the protection of victims and witnesses and consideration of the risk that the suspect poses to them. It will be necessary to gather the views of the victim in relation to this liberation, given the rights of victims under the EU Directive to obtain information.

Further, since the perpetrator has not been charged with any crime, we understand that this precludes the recording of these conditions on certain police databases, which means that a system will have to be created to allow circulation of details of special conditions within, and across, Police Scotland Divisions.

Section 16- Modification or removal of conditions
Our comments on section 15 also apply here. Section 16 does not provide that the victim is to be informed and consulted before any modification or removal of a
condition; how their views and safety are to be taken into account or how they are able to challenge decisions to modify or remove conditions; nor does it provide that a condition can be increased if not adequate to protect victim/witness.

The section also does not contain any provision for the procurator fiscal to be consulted and make representations before the police take a decision to modify or remove a condition.

Section 17- Review of conditions
This allows the suspect, at any time, to apply to the sheriff to have the condition reviewed and requires that the sheriff must give the procurator fiscal an opportunity to make representations.

Again, there is no duty to inform the victim and take their views and safety into account before a decision is made.

This section poses a particular problem to women, children and young people experiencing domestic abuse as it may interfere with the accurate assessment of the risk that the abuser poses and therefore, how they are supported and their engagement with the Multi-Agency Risk Assessment Conferences (“MARAC”). There is no mechanism for them to challenge the suspect’s application to have a condition reviewed or provision for the Fiscal to seek the imposition of a more onerous condition if those already in place are not adequate to protect the victim and/or witnesses. This is an issue of concern where offences involving domestic abuse are involved given the risk that abusers pose to women, children and young people.

The legislation, therefore, should explicitly state that an assessment must be carried out on the risk posed to the victim by the suspect not being detained. It is therefore crucial that the Lord Advocate continues to specify, through Lord Advocate’s Guidelines and the DA Protocol, that domestic abuse is a special case in these circumstances and that a detailed risk assessment must be carried out in every domestic abuse case where release from detention is considered.

Police Liberation
Section 19- Liberation by police
Section 20- Release on undertaking
Section 21- Modification of undertaking
Section 22 Review of undertaking

These sections represent a widening of the existing police powers to liberate an accused on an undertaking to appear in court on a specified date, sometimes referred to colloquially as ‘police bail’. We would reiterate the comments made in relation to sections 14-17 above on the risk posed to complainers in cases involving domestic abuse and how this is assessed. However, the issues are more serious here because the accused will be at liberty for a much longer period of time, and so the imposition of appropriate and adequate conditions and the maintenance of these until the court date are of high importance.
Again, we would urge the Committee to seek the views and observations of Police Scotland on these matters.

Sections 19 and 20
Sections 19 and 20 allow the police to liberate the accused with or without conditions, such conditions being “…necessary and proportionate for the purpose of ensuring that the person does not obstruct the course of justice in relation to the offence…” It is not clear whether this wording includes protection of witnesses and an assessment of any risk that the accused poses or that it would specifically prohibit interfering with witnesses, as per section 25 (5) (c) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act.”)

Again, the section does not provide the following: that victims be informed of the release of the accused and the nature of the conditions; that their views be taken of the risk that the accused poses and whether the conditions will be adequate; how these matters are taken into account in determining decisions to liberate and how victims can challenge conditions or seek the imposition of more appropriate and adequate protection.

As we have stated above, the legislation should explicitly state that an assessment must be carried out on the risk posed to the victim by the suspect not being detained. In this regard, a detailed risk assessment must be carried out in every domestic abuse case where release from detention is considered.

Sections 21 and 22
These sections are of particular concern. Section 21 allows the Fiscal to modify, remove, or alter any condition imposed under section 20 but section 21(2) specifically provides that any alteration to a condition in an undertaking should not make a condition more onerous on the accused. This prohibition is likely to compromise the safety of women, children and young people experiencing domestic abuse in situations where either the risk posed by the abuser was not adequately assessed at the time the original conditions were imposed or the conditions require to be enhanced to cover additional areas or a change in circumstances of complainers. This prohibition, therefore, should be removed from the section.

We recognise that the accused must sign the undertaking and therefore, would have to agree to the imposition of a more onerous condition. However, since the Fiscal is obliged to give the accused notice of any application under this section, it is possible to amend section 22 so that it also allows the accused to be heard by the sheriff where the Fiscal gives notice of an intention to impose a more onerous condition.

Under section 21(3), an undertaking will expire at the end of the day on which the accused is required to appear in court. There is potential for delays in the court process to be a problem here. If the case calls in court, and for any reason has to be continued at another date, we understand that the Fiscal would ask the Sheriff to reinstate the conditions. However, if the case does not call, it appears that the conditions fall and the accused would no longer be subject to any restrictions, a matter which requires further investigation.
Section 22 provides that the accused may apply to the sheriff to have the condition reviewed and that the sheriff must give the procurator fiscal an opportunity to make representations. Again, there is no duty to inform the victim and take their views and safety into account before a decision is made; no mechanism for them to challenge the suspect’s application to have a condition reviewed; no provision for the Fiscal to consider a risk assessment and no details as to the process by which the Sheriff will obtain the views of the victim as to the efficacy of any review.

We have serious concerns about the exercise of this power in relation to domestic abuse incidents as it constitutes a departure from the agreed procedure set out in the DA Protocol. While the police can currently liberate on an undertaking, this is a power used in limited circumstances and not routinely for domestic abuse, since, as a consequence of the Lord Advocate’s Guidelines and the DA Protocol, most domestic abuse cases result in custody if there is sufficient evidence to charge. There is already a problem with accused persons released on bail committing further offences and this would be exacerbated by the numbers likely to be afforded temporary release.

Detaining abusers
- gives them a very specific message in terms of the unacceptability and criminal consequences of their current and future offending behaviour
- gives women breathing space
- gives police and Fiscals a longer and better opportunity to properly risk assess in terms of release on bail and bail conditions.

It is therefore crucial that the Lord Advocate continues to specify, through Lord Advocate’s Guidelines and the DA Protocol, that domestic abuse is a special case in these circumstances and that a detailed risk assessment must be carried out in every domestic abuse case where release from detention is considered.

A further issue is how this process would be administered in terms of advising victims of the suspect’s liberation, a matter of significant importance in domestic abuse cases where the woman must be told as soon as possible that the abuser is being released and returning home. This is usually done by the police or VIA, where appropriate, but it is not clear how the police could continue to carry out this function in the face of increased numbers.

We would draw the Committee’s attention to the Scottish Government-commissioned research\(^3\) on the use of undertakings in summary criminal proceedings, the findings of which support our concerns, namely:-
- The biggest issue is that offenders released on undertakings felt that they had not been arrested “on a bad charge” and that the offence was minor and a lesser offence. There is a concern that abusers will begin to regard, or further regard in some cases, incidents involving domestic abuse as a “lesser offence” which is completely inappropriate.

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• Concerns amongst police that they were not able to devote adequate time into a decision on whether to release an accused on an undertaking. This means that a proper risk assessment for domestic abuse offenders may not be done, especially for those who are perceived as “first time” offenders.

• Generally, undertakings were not said to be pro-actively policed. Police officers reported that there were not enough resources to monitor compliance with undertakings conditions as effectively and adequately as the monitoring done on bail conditions. Undertakings conditions would only be pro-actively policed if the accused was reported for another offence while on an undertaking.

• A notable increase in the number of convictions for breach of undertakings in the period since April 2006 both nationally and in each of the case study areas, possibly due to increased use of undertakings for more complex offences.

• Factors cited as a reason to release someone on an undertaking were cell capacity or whether the accused had a medical condition. There is therefore a substantial concern that abusers who pose a risk would be inappropriately released simply because there was no room for them.

Section 51- Abolition of requirement for constable to charge
Paragraph 37 of the Policy Memorandum states that “The existing requirement that the police must charge a person upon arrest and prior to reporting the person to the procurator fiscal is removed.”

In terms of the right to information that will be given to victims of crime under the new EU Directive, complainers will have a right to information on decisions made by the police in relation to any incident reported to them. This will include access to information and an explanation as to why a suspect was not charged, a particular charge was proffered and a report not sent to the Fiscal. Either this Bill or the Victims and Witnesses (Scotland) Bill will also require to set out a procedure whereby a complainer can challenge the basis of any police decision not to report to the Fiscal or not to charge a suspect.

If the decision on charging is delayed until a report is sent to the Fiscal, this will result in uncertainty for the victims as to whether proceedings are to be taken and the basis on which this will happen. There will be additional issues relating to protection for complainers and witnesses and accurate assessment of risk that the accused presents if there is no clarity and early determination of the severity of the offence committed.

To ensure consistency across Police Scotland, the Lord Advocate will require to issue guidance defining and containing the exercise of police discretion on how and when police will charge and/or report to the Fiscal because this discretion cannot be unfettered. In particular, this guidance must refer to the instructions in the DA Protocol on the investigation and reporting of offences involving domestic abuse to the Fiscal and the presumption that these will be reported where the evidence is sufficient to do so.
These instructions should be contained in the Police Scotland Domestic Abuse Toolkit, an operational guidance document for all officers on the practical elements of policing domestic abuse.

Section 57- Corroboration
SWA welcomes the move to abolish the requirement for corroboration. We support Lord Carloway’s view that evidence should be reviewed based on its quality rather than quantity and that lack of corroboration in itself should not be a barrier to justice. Courts should have the opportunity to consider cases that previously would not have come before them solely due to a binary rule of counting evidence.

This is not to say that if corroborating evidence exists that it should not be gathered and submitted to the Crown, a position that should be supported by guidelines from the Lord Advocate, as referred to in the Report at paragraph 7.3.2, on page 288, viz “… It would also not detract from the need for the police to follow up all reasonable lines of investigation, including detecting corroboration if it can reasonably be found. “. A more robust evidence-gathering culture and process to inform and support prosecution decisions is required, with the police being instructed to carry out a thorough investigation. For domestic abuse, it is important that the DA Protocol remains resolute on the obligations on police and the COPFS in terms of securing the best possible quality and variety of evidence to support a prosecution for crimes involving domestic abuse

There has been concern raised in some quarters that removal of the requirement for corroboration would result in an increase in miscarriages of justice. Firstly, there is no evidence to suggest that this is an issue in other jurisdictions that do not have this requirement. Most importantly, the requirement to prove “beyond reasonable doubt” that the offence took place is a significant protection against wrongful conviction.

In relation to domestic abuse, changing to a requirement for an adequate quality, and not simply quantity, of evidence will:-

- Address the issue of domestic abuse cases not going forward due to technicalities, or cases collapsing, both of which deter women from seeking redress through the criminal law
- Redress the balance where, currently, a very persuasive and credible witness with no other evidence is being disadvantaged; this refers to women who have all the hallmarks of exposure to prolonged domestic abuse and have come forward for the first time to be heard, only to be told that there is not enough evidence for the case to be heard, that there is no corroboration
- Serve as both a preventative and punitive measure in terms of awareness of the criminal justice response to domestic abuse; by allowing greater numbers of women to come forward, there is more scope for perpetrators to be brought before the court and they, the public at large and women, children and young people experiencing domestic abuse will be aware of this fact.

We are clear that the removal of the requirement for corroboration as an access to justice reform in order to allow more cases to come to court is not the same as securing more convictions, nor should it be regarded as such. Convictions are the
sole preserve of the judge or jury and it is of vital importance that this independent consideration of the evidence continues.

Further support for the removal of the requirement for corroboration has come from the United Nations. The UN Committee on the Elimination of Discrimination against Women (“CEDAW”) has published its Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland, which called for the “burdensome requirements of corroboration” in sexual offence cases in Scotland to be removed.

CEDAW said the Scots criminal law requirement for corroboration “impedes” the prosecution of rape and other sexual violence cases, commenting, “The committee is concerned that, following the findings of the Carloway Review of criminal law and practice in Scotland, the burdensome requirements of corroboration impede the prosecution of rape and other sexual violence cases... The committee urges the State party to consider implementing the recommendations of the Carloway Review regarding the removal of the corroboration requirement in criminal cases related to sexual offences...”

Provisions on early release- sections 72 -73
Under section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, the court has a power to be able to punish a person who commits an offence while on early release. Section 72 provides that where the court has determined that a person was on early release at the time the offence was committed, the court must consider making an order under section 16; this power is separate and additional to the normal powers of the court to sentence the person for having committed the offence. SWA supports these proposals.

People trafficking- sections 83- 85
While we support these proposals as a useful tool to further combat human trafficking in Scotland, existing legislation, which carries up to 14 years imprisonment, should continue to be used and not ignored in favour of the simpler aggravated offence.

Legislation on human trafficking in Scotland has been criticised as being fragmented, and inconsistent with UK law and there is, currently, no legal definition of Human Trafficking within Scots Law. These matters should be further explored and it would also be useful to monitor the UK Government’s proposals to introduce a Modern Slavery Bill and how this legislation, if enacted, is implemented and the impact.

Issues not covered in the Bill
SWA support Rape Crisis’ Scotland position in relation to
- Seeking judicial direction for juries in sexual offence cases on delayed disclosure and apparent lack of physical resistance.
- Exploring the feasibility of conducting research into the factors influencing the jury’s decision making process in Scotland.
- Commissioning further research into sexual history evidence in sexual offence cases.
CONCLUSION

The successful implementation of the proposals in the Bill is not solely dependent upon the legislation.

The first step is to ensure that the police are completely clear as to what standard the COPFS will apply and how it is defined. In relation to domestic abuse, advances in police evidence-gathering should be built upon, to develop further tactics and opportunities and employ a more forensic style. This will also support judicial decision-makers in cases involving domestic abuse.

The new procedures must take into account the rights given to complainers under the new EU Directive and proposed Scottish legislation for victims, in terms of their entitlement to receive information as to why a case was not reported by the police to the COPFS and/or why a case was not subsequently prosecuted.

The new system and codes of decision-making will have to be strong, well-defined and transparent, to both face challenges, and to allow any such challenges to be made, in furtherance of complainers’ rights under the Directive and the ECHR.

For domestic abuse, it is important that the DA Protocol continues to clearly set out the obligations on police and the COPFS in terms of securing the best possible quality and variety of evidence to support the robust prosecution for crimes involving domestic abuse. The DA Protocol will also be the ideal vehicle for setting out to complainers in domestic abuse cases their rights under the new EU Directive and proposed Scottish legislation for victims we refer to above.

In the light of the radical changes proposed by the Bill across several areas of criminal procedure, it is important to ensure that a process of evaluation is put in place to identify and deal with, as soon as possible, any unintended consequences.

Having the relevant national and local protocols and procedures in place and enforced, along with the appropriate training and partnership working with local Women’s Aid groups, will help ensure that the legislation is used in a way that supports and protects women, children and young people experiencing domestic abuse. SWA welcomes the opportunity to work with the Scottish Government, the Lord Advocate and the new Police Service of Scotland in this.

Scottish Women’s Aid
20 August 2013
The Scottish Human Rights Commission is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with ‘A’ status by the International Co-ordinating Committee of NRHIs at the United Nations. The Commission is the Chair of the European Network of NRHIs. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law, policies and practice; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

INTRODUCTION

The Commission welcomes the opportunity to comment on the Criminal Justice (Scotland) Bill.

The decision of the Supreme Court in Cadder v HMA was welcomed by the Commission. It confirmed that the Scottish practice of detaining and questioning suspects without providing the right to legal assistance was contrary to the right to a fair trial under the European Convention. This deficiency in the protection of detainees had also been highlighted by the European Committee for the Prevention of Torture in two prior reports on the United Kingdom.\(^1\)

Following the Cadder judgement, the Scottish Government introduced, via emergency procedures, the Criminal Procedure (Legal Assistance, Detention and Appeals) Act 2010 (“2010 Act”). While legislation enshrining the right to legal assistance is to be applauded, the Commission is on record as expressing serious reservations about other aspects of this Act, and on the use of emergency procedures to introduce it.\(^2\) In particular the Commission opposed the extension of periods of detention from 6 to 12 (and 24 hours) in the absence of empirical evidence that this was necessary to facilitate access to a solicitor. The Commission was also concerned about proposals for telephone consultations; the reasons for which detention periods could be extended beyond 12 hours; the potential restriction on access to justice as a result of the appeals provisions; and the interference with the statutory independence of the Scottish Criminal Cases Review Commission.

During the passage of the 2010 Act, the Cabinet Secretary for Justice described the legislation as “a temporary fix that allows us to deal with the consequences of

\(^1\) CPT/Inf(96) 11, 5 March 1996, para 291; CPT/Inf(2005) 1, 4 March 2005, para 53

The Commission therefore welcomes the opportunity for the Bill to act as a “sunset clause” on that legislation.

In approaching its task, it is important that the Scottish Government recognises that the decision in Cadder did not provide a suspect with some added extra or advantage. The effect of the decision and the legislation which followed was to provide those suspected of crime in Scotland with the minimum protection necessary to secure a fair trial. The notion that some sort of “rebalancing exercise” requires to be carried out in the form of removal of other procedural safeguards, such as corroboration, is mistaken and the provisions abolishing corroboration without providing an adequate alternative safeguard are of considerable concern to the Commission.

It is essential that, so far as possible, Scots law does not repeat the experience of Cadder. The Criminal Justice (Scotland) Bill provides an opportunity to make sure that Scots law is fit for purpose in terms of meeting all relevant international human rights obligations. It is therefore important that the Bill properly identifies the rights and duties at stake, as well as anticipating developing trends across the ECHR contracting states.

**Legal Framework**

- European Convention of Human Rights (ECHR)
- International Covenant of Civil and Political Rights (ICCPR)
- Convention on the Rights of the Child (CRC)
- Convention on the Rights of Persons with Disabilities (CRPD)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Rules)
- Scotland Act 1998
- Human Rights Act 1998
- Criminal Procedure (Scotland) Act 1995
- Criminal Procedure (Legal Assistance, Detention and Appeals) Act 2010

Under the Scotland Act, the Criminal Justice (Scotland) Bill must be compatible with Convention Rights. The following articles of ECHR are relevant to the provisions of the Bill:

- Article 2 – Right to life
- Article 3 – Prohibition on Torture, Inhuman and Degrading Treatment
- Article 5 – Right to liberty and security of person
- Article 6 – Right to a fair trial
- Article 8 – Right to private and family life
- Article 14 – Non-discrimination

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PRINCIPLES

In line with the spirit of Article 5, the Carloway Review had at its core the presumption of liberty. While that presumption may be reflected in certain provisions of the Bill, the Commission believes that the Bill would be strengthened by making an express statement at the outset, to the effect that the presumption, albeit rebuttable, must be in favour of liberty. This would serve as the overarching principle in which light all provisions must be considered.

PART 1 ARREST & CUSTODY

Arrest without warrant (s.1 & 2)

In relation to section 1, the Commission recommends that the power of arrest without warrant apply only to offences punishable by imprisonment. This would more closely align with Article 5. Section 1(2) extends the power of arrest beyond imprisonable offences on the basis of “interests of justice”. While section 1(3) provides some assistance, it is not an exhaustive definition and therefore the provision is apt to give rise to uncertainty both for the police and for those suspected of non-imprisonable offences. The effect of arrest is to deprive a person of their liberty. Under section 14 of the Criminal Procedure (Scotland) Act 1995 (detention powers), this could only be done in relation to imprisonable offences. The Commission is not aware of any evidence of a need to alter the basis upon which a person can be deprived of their liberty. Non-imprisonable offences are at the lowest end of the scale of gravity. Further, taking a person into custody engages Article 8, as well as Article 5, ECHR. Under Article 8, the obligation is on the State to justify interference with the individual's private life. Such interference must be proportionate. In respect of non-imprisonable offences, deprivation of liberty will be much harder to justify in Article 8 terms. In such circumstances, the judicial oversight of the warrant procedure provides a safeguard against potential breaches of Convention rights.

The Commission agrees with Lord Carloway’s view that certain key terms should be defined in statute. Such definitions would assist in clarifying the purposes and the limits of Article 5. In particular, the Commission would encourage a statutory definition of the reason for arrest and subsequent detention. The purposes for which persons can be taken into custody should be strictly defined - such as interview, search, or recovery of evidence that might otherwise be destroyed.

In addition, the Commission would encourage a statutory definition of who is a suspect. This provides clarity for both individuals being investigated for crimes as well as for police officers carrying out inquiries. Such a provision guards against the danger of inconsistent police practice and maximises the opportunity to ensure that Convention rights are respected in every case. If a person’s status and their rights are properly and comprehensively defined, this will assist in ensuring that evidence obtained from a suspect in compliance with the statutory procedures will be admitted at the trial.
Information to be given on arrest and information to be given at police station (s.3 & 5)

The information to be provided in Sections 3 and 5 of the Bill does not provide sufficient information to fully protect the right to silence in Article 6 terms. The information contained in the common law caution includes the suspect being informed that anything he says will be taken down and might be used in evidence. This form of caution is fuller and more adequate in terms of providing the suspect with sufficient information to decide whether he wishes to waive his right to silence. While the terms of the common law caution may generally be used in practice, failing to include these in provisions enshrining a caution in statute increases the risk that a suspect will be told only this more limited information and thus not afforded their full Article 6 rights.

It is important to recognise that while the provisions of Part 1 envisage taking people to the police station, there may be other situations in which Article 5 is engaged but in which the person deprived of their liberty is not taken to the police station or “other premises”. An example of such a situation which may engage Article 5 is found in Gillan & Quinton v UK. This was a case challenging stop and search powers under s.44 of the Terrorism Act 2000. Although the ECtHR did not need to determine whether Article 5 was engaged (it disposed of the application by finding a violation of Article 8), the judgement suggests it would have concluded that there was a deprivation of liberty.

In Ambrose v Harris, the Supreme Court held that, in the case of G who was detained under section 23 of the Misuse of Drugs Act, there was “significant curtailment of his freedom of action” and therefore Article 6 was engaged and he was entitled to legal assistance before questioning.

Thus it can be seen that if the effect of the measure (arrest or other measure) employed in reality deprives the suspect of liberty, and if questioning is undertaken by the police at that time, then it is likely that the ECtHR would hold that the suspect is entitled to legal assistance.

In chapter 4 the Bill provides for legal assistance before interview for those in “police custody”. This appears to mean those arrested in terms of section 1 or by virtue of a warrant. The cases highlighted above demonstrate that there may be a number of mechanisms (other than arrest) which arguably deprive a person of their liberty and may trigger certain other rights (such as the right to legal assistance). The Bill does not make provision for legal assistance in such situations (discussed further below with regard to section 24). The Commission recommends that in order to avoid creating “grey areas”, suspects should be told of their right to legal assistance at the time of first caution (per Lord Carloway’s recommendation), whether questioning is to take place in a police station or not. This should be facilitated even if the person is not being arrested, but is going to be questioned.

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4 (2010) 50 EHRR 45
5 [2011] UKSC 43
Information to be given at police station (s.5)

The rights afforded by EU Directive 2012/13/EU are not clearly reflected by Section 5. Article 3 of the Directive requires that a suspect be provided with information about their rights either orally or in writing. Thereafter, Article 4, requires that suspects are provided promptly with a written Letter or Rights, which they must be allowed to retain while in custody. The Letter of Rights covers additional information to that which must be provided under Article 3. These are not alternative provisions; rather both the initial information and the Letter of Rights must be provided. Section 5(3) is unclear regarding this distinction. The provision should make clear that a suspect must be provided with both the initial information (verbally or in writing) as well as a written Letter of Rights.

Custody (s.7-13)

The Commission welcomes the abolition of the 24 hour detention period. The Commission’s view is that the period for which a person can be held in custody should be 6 hours and any extension of time beyond 6 hours should be allowed only in exceptional circumstances and only for the purposes of facilitating Article 6 rights.

The Commission criticised the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (the 2010 Act) for doubling (and potentially quadrupling) detention periods across the board in the absence of proper evidence that this was necessary in order to secure the provision of legal assistance.

Taking someone into custody engages Article 8 of ECHR and as such has to be justified under Article 8(2). This justification must be on the basis of evidence, not anecdote. It has not, to date, been shown to be necessary to keep a suspect in custody for longer than 6 hours in order to furnish him with legal assistance. In fact, the evidence is to the contrary and the vast majority (83.5%) of people are able to be released from detention within 6 hours. The Commission therefore recommends that the Scottish Government restore 6 hours as the standard detention period. Extensions of time should be allowed only in exceptional circumstances where a lawyer cannot be provided within the normal period or for other Article 6 requirements (such as provision of an interpreter).

The doubling of detention times under the 2010 Act, it might be suggested, was not intended to allow sufficient time to provide legal assistance, but rather to give the police longer to carry out inquiries. The Commission would be concerned if investigations which could equally be carried out while a suspect is at liberty resulted in extensions of the detention period. That would, in our view, not be justified. The Commission is unaware of any evidence which suggested that prior to October 2010 the police were systematically hampered in their efforts to investigate crime by the limits of the 6 hour detention period. Unless such evidence is produced, the greater interference with individual’s private lives involved in longer detention periods may not be justified.

The length of time and the purposes for which a child can be taken into custody should be tightly controlled. The Scottish Government should consider whether it is
appropriate to keep a child in custody for investigations beyond 6 hours in any circumstances.

It is important that the state ensures that data are collected about all detentions across Scotland. This will assist in identifying any systemic issues which may arise, for example, failure to provide sufficient legal assistance in any particular area or at any particular time. The state has a positive obligation to address such systemic problems and accordingly the situation should be kept under review.

The test for continued detention in section 10 should be expanded to include consideration of the probable disposal if convicted which, as Lord Carloway pointed out, serves to emphasise that only in exceptional circumstances should a person be detained where the charge is for a non-imprisonable offence.

The Commission recommends that s.10(2)(a) should impose a test of whether the person’s presence is “necessary” to enable the offence to be investigated, rather than “reasonably required”. The application of a test of necessity better comports with both a presumption of liberty and the requirements for justifying any Article 8 interference.

Investigative liberation (s.14-17)

Such a measure potentially provides an opportunity for greater respect for Article 8 rights by ensuring that people are only in custody when the aspect of the investigation being carried out requires them to be there.

It is essential to respect the presumption of innocence and the presumption that suspects should not be in custody unless it is necessary. Accordingly, it is necessary that limits on the exercise of this power are clearly delineated.

The Commission agrees with Lord Carloway’s recommendation that the police should be required to specify the nature of any enquiries which they intend to carry out under these provisions, unless doing so would compromise the investigation. In addition, as in the case of the general power of arrest, the purposes for which persons can be taken into custody should be strictly defined - such as interview, search, or recovery of evidence that might otherwise be destroyed. Any conditions imposed upon a suspect must be proportionate to the need to protect potential victims, witnesses and evidence.

Given that such suspects are not yet subject to court proceedings, there should be protections put in place to ensure that information about the suspect is not disclosed and Article 8 rights are respected. The Carloway review makes reference to this issue at para 5.3.12 in terms of the practical problems that such a suspect may face such as suspension from his/her job even though he/she is eventually cleared of all suspicion.

Any conditions need to be proportionate and respect Article 8 rights. Account should be taken, for example, of a suspect’s work and family commitments. Consideration should also be given to the availability of the suspect’s instructed solicitor to ensure consistency of representation if possible.
It is not clear from the current proposals whether the suspect is expected to return to the police station at a specified time, albeit this could be included in any conditions imposed. The proposals allow for broad discretion on the part of the constable who can impose “any condition” considered necessary and proportionate. In order to ensure that this provision meets Article 8 requirements, consideration should be given to defining in statute the standard conditions for investigative liberation. These standard conditions should be based on the minimum restriction necessary for the legitimate purpose being pursued. Any extra conditions should only be necessary to secure compliance with standard conditions. It may therefore be useful to specify the requirement to return to the police station at a specified time within these conditions, in circumstances where there is to be a charge or intimation that the matter is being reported to the procurator fiscal. The specified time would provide a clear point in time when investigative liberation ceases. This condition may not, however, be necessary in all circumstances and it is essential that the imposition of such a condition is considered in light of the presumption of liberty and respect for Article 8 rights.

While limited by an overall time period of up to 28 days, the provisions permit a person to be arrested repeatedly in respect of the same offence. Repeated arrest represents an interference with Article 5 and Article 8 rights. There is a risk of harassment if no further boundaries on the use of this power are put in place. The addition of principles emphasising the presumption of liberty (as discussed above at p.2) would be of particular assistance in relation to powers such as this.

**Person to be brought before court (s. 18)**

Anyone who is arrested or detained has the right to prompt access to judicial proceedings. In determining the meaning of ‘promptly’, regard must have been given to the circumstances of the case but some cases have shown that somewhere around four days may be considered the maximum period of detention before being brought before Court.\(^6\) The issue arising over bank holidays, where a person can be detained until the next sitting day up to five days later, risks reaching the threshold of being unacceptable under Article 5, a matter clearly identified by Lord Carloway. Section 18 does not, however, address this issue. While Lord Carloway recommended that the maximum period a person should be thirty six hours, the requirement set out by Section 18 makes no headway in ensuring that this time limit is met. The Commission believes that a time limit which meets the requirements of Article 5 should be introduced. If a time limit is not introduced, the Commission considers it essential that Lord Carloway’s recommendation that the period of time during which suspects are kept in custody for court should be kept under review by the COPFS be followed through and the issue of a statutory time limit revisited if necessary.

**Liberation by police (s.19)**

While section 41 stipulates a general duty for the police not to detain persons unnecessariliy, the relevant factors relating to those who have been officially accused

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6 Brogan & Others v UK Application no. 11209/84, Tas v Turkey (2001) 33 EHRR 15 at para 86
but have not yet appeared in court are not outlined. In order to strengthen protection of the presumption of liberty, this provision should outline appropriate factors for consideration by a constable when considering whether or not to release an accused from custody. Those factors should echo those under section 10; whether the person (if liberated) would be likely to interfere with witnesses or evidence or otherwise obstruct the course of justice, the nature and seriousness of the offence and the probable disposal if convicted (as discussed above). They should also include the factors identified by Lord Carloway, namely whether the accused is liable to escape, will not appear at an appointed court diet or is likely to commit further crimes. Specification of these factors in statute will assist in ensuring that any interference with Article 8 rights is necessary and proportionate.

**Release on undertaking (s.20)**

The Commission has some concerns regarding the availability of a condition of curfew in the terms of a release on an undertaking. This change in practice has implications for both Article 5 and Article 8. A curfew represents a restriction on the accused’s Article 8 rights. In addition, there is a risk that a curfew could lead to a de facto deprivation of liberty if used disproportionately. The Commission would suggest that a number of steps could be taken to mitigate these risks.

Firstly, confirming the overarching principle of the presumption of liberty in the Act, as suggested above, would serve to highlight the need to keep this under consideration in decisions such as these.

Secondly, this provision raises similar concerns as those in relation to the conditions attached to investigative liberation, as discussed above. Accordingly, consideration should again be given to defining standard conditions based on the minimum restriction necessary, with extra conditions, such as curfew, only available if necessary to secure compliance with standard conditions.

Finally, the dissemination of guidance as to the operation of this discretion would be beneficial, in order to highlight to constables the appropriate considerations to be taken into account. The existing guidelines from the Lord Advocate regarding conditions which can be attached to post-charge liberation should be expanded to include guidance on the use of curfews and the implications for deprivation of liberty.

**Review of undertaking (s.22)**

Given that the conditions of liberation constitute an interference with Article 8 rights, the Commission recommends that a time limit be introduced within which a review by the Sheriff must be carried out. The Commission would suggest that a hearing take place within 24 hours.

**Information to be given before interview (s.23)**

The Commission welcomes the requirement for the information to be given on arrest, set out in Section 3. However, the Commission is of the opinion that the suspect and his solicitor should be informed prior to interview of the content of the “reasonable grounds for suspicion”. Article 6(3)(a) requires that the suspect be informed of the
nature of the allegation against him. Article 6(3)(b) guarantees him adequate time and facilities to prepare his defence. Under the Scots system, his decision whether and how to respond to questioning by police is part of his defence. The police need to provide sufficient disclosure to ensure that Article 6(1) is respected and that the constituent rights under Article 6 are practical and effective. What is necessary for that depends on other matters such as rules of evidence and the circumstances of a particular case. However, a requirement to disclose the content of the grounds for suspicion would allow the suspect and his lawyer to make an informed decision as to how to proceed.

**Right to have a solicitor present (s.24)**

While the jurisprudence of the ECtHR is not yet clear on whether/when the right to legal assistance arises for those not in police custody\(^7\), as discussed above\(^8\), there are situations where measures other than arrest deprive the suspect of his liberty. The jurisprudence of the ECtHR appears to be moving towards recognising a right to legal assistance in situations where there is “significant curtailment of [his] freedom of action”\(^9\).

In order to pre-empt the likely development of this right by the ECtHR, the Commission takes the view that it would be sensible to consider that a curtailment of freedom of action, short of deprivation of liberty such as to engage Article 5, could trigger Article 6(3)(c). Similarly a measure that amounts to a deprivation of liberty, but which does not involve being held in police custody (meaning, in the police station or similar) could trigger Article 6(3)(c).

The Commission is anxious to ensure that any new regime for the questioning of suspects does not create new grey areas in which rights may not be properly respected. The most obvious grey area is where the police have grounds to arrest a suspect and take him to the police station for questioning, but choose not to do so. Instead they decide to question him where they find him – for example his home. Whether that suspect can have the right to legal assistance is currently subject to the whim of the police officers in deciding whether or not to take him into custody. Under the amendments to the 1995 Act introduced by the Criminal Procedure (Legal Assistance, Detention and Appeals) Act 2010, a suspect who attends voluntarily at the police station has the right to legal assistance. It would seem that Parliament, in providing such a right, has recognised that while a voluntary attendee may strictly be free to leave the station at any time, in reality if he stops co-operating, he will be arrested. This implied measure of compulsion or coercion or curtailment of freedom of action has been recognised by the legislature, as it is in the Bill (which proposes the same measure). There would seem little logical difference between the voluntary attendee being questioned at the police station, and the suspect questioned elsewhere whom the police could arrest but choose not to do so.

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\(^7\) as discussed in SHRC’s Response to the Carloway Review Consultation at http://www.scottishhumanrights.com/publications/consultationresponses/article/carlowayresponsejune2011

\(^8\) See above at pages 3 & 4

\(^9\) Zaichenko v Russia App. No. 39660/02, Judgement 18 February 2010 at para 48
Some may say that the issue is one of practicality. It may be said that the right to legal assistance cannot be offered or facilitated by the police other than in a police station or similar premises. Against that, it can be said that requiring every suspect who wants to avail himself of legal assistance to go to the police station in order to do so may be an unnecessary interference with his private and family life.

There are other jurisdictions in which the right to legal assistance arises at an early stage and can be facilitated without being taken to the police station. For example, there is reference to this occurring in practice in Canada where a police officer, at a roadside stop, offered the driver the opportunity to phone a lawyer and offered him use of a mobile phone.\textsuperscript{10} A similar practice exists in New Zealand.\textsuperscript{11} It would appear that the practicalities are not a bar. There may be an issue of availability of a lawyer to provide advice at the necessary time. That is no different to the problem which may arise if the individual is taken into custody. It is part of the state’s positive obligations under Article 6 to ensure that there is a sufficient system in place to provide timely legal assistance for those who require it.

The Commission welcomed the recognition by Parliament of the need for legal assistance by a suspect who attends voluntarily at the police station, not just for those arrested. The Commission is of the opinion that any suspect, whatever his location, who is to be questioned under caution should be afforded the right to legal assistance, be advised of that right at the time he is first cautioned, and be given an opportunity to avail himself of that right prior to questioning. Practically speaking, it would not seem an insurmountable challenge to facilitate the provision of advice over the telephone. Thereafter, if the suspect wishes to exercise his right further by receiving assistance in person, he will be able to choose to attend voluntarily at the police station. Such a regime would allow the individual greater control over the level of interference with his private life and liberty. It will also protect the police from criticism that might otherwise arise where they could have taken a suspect to the police station (thereby triggering his right to legal assistance) but chose not to do so (for reasons which may be the subject of later dispute).

Statutory protection should be in place to ensure all suspects are treated fairly. It is important to recognise that in assessing whether a trial is fair, regard must be had to the entirety of the proceedings including the questioning of the suspect before trial.

This is particularly relevant in relation to access to legal advice and representation. The Commission notes and commends the dissenting opinion of Lord Kerr in \textit{Ambrose} which sets out that the “features of a fair trial lead inexorably to the conclusion that where an aspect of the proceedings which may be crucial to their outcome is taking place, effective defence by a lawyer is indispensable. When one recognises, as Strasbourg jurisprudence has recognised for quite some time, that the entirety of the trial includes that which has gone before the actual proceedings in court, if what has gone before is going to have a determinative influence on the result of the proceedings, it becomes easy to understand why a lawyer is required at the earlier stage.”

\textsuperscript{10} \textit{R v Orbanski, R v Elias} [2005] 2 SCR 3, 2005 SCC 37, para 6, judgement of majority delivered by Charron, J.
\textsuperscript{11} s 23(1)(b) New Zealand Bill of Rights Act 1990; \textit{MOT v Noort, Police v Curran} [1992] 3 NZLR 260
It is important to bear in mind that the purpose of legal assistance is not only to protect the right against self-incrimination but also to provide a check on conditions of detention and any potential vulnerability of the suspect.

In addition, the requirement set down by Salduz is that a suspect must be provided with access to a lawyer from the time of the first interview unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right (emphasis added). Any restriction on that right must not result in prejudice to the right to a fair trial, which even a justified restriction can do. The Commission is concerned that the level of discretion allowed to a constable by section 24(4) is too great and may not, therefore, meet the necessary standard. In order to assist in assessing whether “exceptional circumstances” exist that would constitute sufficiently compelling reasons to restrict the right, it would be beneficial for exceptional circumstances to be more precisely defined. Further the Commission recommends that the approval of an inspector or higher be required for such a restriction. It is essential that the police record the reasons for their decision, to ensure that they are valid.

Consent to interview without solicitor (s.25)

The Commission welcomes the requirement for the police to record the reasons for a suspect’s waiver of the right to legal assistance. This will enable proper scrutiny as to whether the waiver is valid – meaning whether it is informed in the sense of being knowing and intelligent; and that it is unequivocal. In practice it will provide consistency by the police. It can serve to minimise subsequent challenges to the circumstances in which a waiver was said to have been given.

It is essential that the reasons for waiver are recorded but there are also strong arguments in favour of requiring a full record of the entire discussion around waiver.

There are, however, challenges in codifying provisions for waiver. In the context of rights, one size does not fit all. When procedural rights are at issue, any waiver must be attended by minimum safeguards commensurate with the importance of the right being waived. In the context of the right to legal assistance, the necessary safeguards will also depend on the vulnerabilities of the suspect. For example, the ECtHR has held that where the detainee was illiterate and a non-native speaker of the Turkish language, the right to legal assistance was not sufficiently safeguarded by accepting a pro-forma waiver in Turkish marked by the accused’s fingerprint in signature. Any statutory provision on the waiver of rights must take into account such differing vulnerabilities.

In order for a waiver to be knowing, intelligent and unequivocal, a suspect must be fully informed of the right, and the consequences of waiving it. A suspect should therefore receive the necessary advice to enable him/her to be “fully informed”. Such advice could be given in a variety of ways, such as by way of the information to be provided in terms of sections 3 and 5. At present, there would seem to be no means

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12 para 55
13 Pishchalnikov v Russia App. No. 7025/04, Judgement 24 September 2009
14 Salman v Turkey App. No. 35292/05, Judgement 5 April 2011
by which the consequences of the decision are communicated to a suspect prior to him being asked whether he wants to exercise or waive his right to legal assistance.

The provision of legal assistance to children has been held by ECtHR to be of fundamental importance. There is no Strasbourg authority to the effect that a child cannot waive the right to legal assistance. However, the ECtHR considers that the vulnerability of an accused minor is such that “a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequences of his conduct.” While this does not differ substantially from what is required for waiver by an adult, the case does suggest that the Court will look particularly critically at the circumstances in which a waiver is given by a child or the guardian of a child.

The validity of allowing waiver of the right to legal assistance by or on behalf of a child may be called into question having regard to Articles 3 and 37 of the Convention on the Rights of the Child. Article 3 is the “best interests” provision. Article 37 provides the right to legal assistance. It is questionable whether it is ever in a child’s best interests to waive the right to legal assistance given their vulnerabilities.

The Commission is of the view that children should always have legal representation, with no option to waive that right and welcomes the provisions of the Bill regarding under 16s. If children aged 16 and 17 are able to waive their right of access to a lawyer then it must only be allowed when it is a fully informed decision. The Commission considers that this would only be possible after obtaining legal advice, rather than the advice of a relevant person.

The role of the parent, carer or responsible person should not be to advise on whether to waive the right of access to a lawyer. The role of the parent should be clearly defined as providing support for the child to understand and cope with the pressure of the situation. It should not be confused with the role of the legal representative. Parents/carers/responsible persons are not legally qualified, and may be as inexperienced in police investigations as the child and should not be put in the position of having to guide the child through their rights and the legalities of questioning.

**Questioning of persons “officially accused” (s.27-29)**

There are no rules under ECHR that an accused person cannot be questioned beyond a particular point in proceedings, provided his rights under Article 6 are met. This reflects the fact that there are very different legal systems which exist among the Convention states, including inquisitorial systems.

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15 *Salduz v Turkey; Halil Kaya v Turkey* App. No. 22922/03 Judgement 22 September 2009; *Adamkiewicz v Poland* App. No. 54729/00 Judgement 2 March 2010

16 *Panovits v Cyprus* App. No. 4268/04 Judgement 11 December 2008 [emphasis added]
Scots law traditionally has prohibited any questioning following police charge. It views the individual then as an accused person under the protection of the court. The origins of this rule may lie in respect for the right to silence at trial.

Under Article 6, the right against self-incrimination applies at all stages of proceedings. The ECtHR jealously guards this right, especially during trial proceedings. The prosecution must prove its case without the assistance of the accused.

In deciding whether or not questioning following official accusation would be compatible with Convention rights, it is important to consider its purpose and how it might be done. If it is designed to obtain incriminating evidence from an accused, then it may fall foul of ECHR in that it may operate so as to extinguish the very nature of the right against self-incrimination.

Once proceedings are underway, there are many ways in which an accused person can provide further information if he wishes to do so in light of newly disclosed evidence or material. He can provide a voluntary statement to independent police officers. In solemn proceedings he can make a judicial declaration. He can give evidence at his trial. He can change his plea to one of guilty at any time. It would seem, therefore that there is no need to allow questioning of an officially accused person in order to provide him with the opportunity to exculpate himself or admit the allegation.

In solemn proceedings, an accused can be compelled to submit to judicial examination. In light of the existing system, careful consideration should be given to the purpose and necessity of allowing questioning after someone is officially accused. There is a danger that it may, in certain circumstances, fall foul of Article 6.

If there is to be any form of questioning after a person is officially accused it must be accompanied by relevant protections including the right to legal assistance, to proper disclosure and that no adverse inference be drawn.

**Child suspects (s.31 & 32)**

There are a series of international instruments in relation to children in the criminal justice system that must be considered, including the UNCRC, UN Minimum Rules for the Administration of Juvenile Justice: the 'Beijing Rules' (1985) and UN Rules for the Protection of Juveniles Deprived of their Liberty : the ‘JDLs’ (1990).

The Commission notes that the age of criminal responsibility has important implications regarding how early a child can come into contact with the justice system. In Scotland the age of criminal responsibility is 8, albeit that due to recent changes a child cannot be prosecuted for an offence committed when they were under the age of 12.

The Beijing Rules ask states to ensure that the age of criminal responsibility is not set too low and that emotional, mental and intellectual maturity are taken into account. The United Nations (UN) Committee on the Rights of the Child, in its authoritative interpretation of Article 40 of the CRC recommends that States:
“increase their lower minimum age of criminal responsibility to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level”.

The Committee reiterated this in relation to Scotland in its Concluding Observations on the United Kingdom. The Government should take the opportunity presented by this Bill to raise the age of criminal responsibility from 8.

It is important that the role and responsibilities of parents, carers and responsible persons is clearly set out. Part 1 of the Children (Scotland) Act 1995 sets parental responsibilities and rights, such as to direct and guide the child until age 16 and to guide until age 18. In the context of a child arrested, detained or questioned, it is important that there is clarity that the role is to support the child, not to make decisions on the child’s behalf or act as a legal representative.

**Vulnerable persons (s.33 & 34)**

There is a problem in providing a comprehensive definition of a vulnerable adult. The definition of “vulnerable persons” in the Bill considers vulnerability as being a consequence of mental disorder, however, vulnerability may exist for a variety of reasons. From an ECHR perspective, what matters is that anyone charged with a criminal offence is able to exercise their rights effectively. Some people will require support in order to be able to do that. The nature of that support will vary according to the particular vulnerability. The support required by someone with a learning disability will be very different to that needed by a person with a physical disability. The support needed by someone who does not speak English will be very different to the needs of, for example, a drug addict in withdrawal. The definition in the Bill covers only those who are vulnerable by way of mental disorder and as a consequence, there may be cases where the necessary support and advice to secure Article 6 rights is not provided.

Given that the Bill provides that it will be for police to identify vulnerability, it is important that police are adequately trained and supported to be able to identify vulnerability and that mechanisms are available to provide the necessary support to the suspect. Adequate training is the best means to avoid both failing to identify a vulnerable suspect as well as wrongly labelling a suspect as vulnerable. Such training should take into account the developing case law on legal capacity which increasingly refers to the rights set out in the United Nations Convention on the Rights of Persons with Disabilities, particularly Article 12. The rights of personal autonomy under Article 8 ECHR must be respected and the Government should ensure that, in applying this provision, the right to legal capacity is respected.

**Right to consultation with a solicitor (s.36)**

It is important that a suspect is properly and fully advised of their right to legal assistance, including what the purpose and benefit of legal assistance is. That enables the suspect to make an informed choice as to whether to exercise his right.

Where a suspect decides to exercise his right to legal assistance, the Commission has previously expressed concern about cases in which legal assistance is limited to a short telephone conversation with a solicitor. In order to comply with Article 6(3)(c)
it is not necessarily enough simply to appoint a lawyer. The right must be effective. Given that the purposes behind the right to legal assistance extend beyond protecting the right not to incriminate oneself, it would appear self-evident that cases will arise where a telephone call is inadequate to protect the suspect’s right to a fair trial. In particular concerns arise where a suspect is vulnerable in some way beyond simply being in custody. This may not become apparent to the solicitor during a short phone call. In addition, there is no opportunity to check on the conditions of detention and to guard against ill-treatment if the lawyer does not attend in person. Attendance in person provides greater opportunity to learn more about the investigation (in particular via presence at interview) in order properly to be able to advise the suspect on how best to proceed. It may not always be that the best advice is to remain silent particularly where it becomes clear there is sufficient evidence and there is a stateable defence or answer to the allegation.

There are obviously greater resource implications if in person assistance becomes the norm and this may be the argument against it. However, the state has a positive obligation to ensure the right to legal assistance is practical and effective. While the state cannot be held responsible for every shortcoming on the part of a legal aid lawyer, there will be an obligation to intervene if inadequacies in the availability of proper legal assistance are systemic or sufficiently brought to its attention, for example in police non-disclosure practices which prevent informed and professional legal assistance being capable of being provided to the suspect.

The terms of section 36 of the Bill are unclear as to who is to determine the appropriate means of consultation. The Commission would be concerned if this is a matter for the police rather than for the suspect and his legal advisor to determine.

**Best interests of the child s.42**

Scotland has a strong tradition in relation to the protection of the rights of the child. The Children (Scotland) Act 1995 provides that the welfare of the child concerned should be *the paramount* consideration when making decisions about them. This goes further than the minimum requirement set out in Article 3 of UNCRC of requiring the best interest of the child to be a *primary* consideration. The Commission’s view is that section 42(2) should use the higher standard of “paramount”.

The deprivation of the liberty of a child should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The Commission recommends that this should be explicitly stated in the terms of Section 42.

**Abolition of requirement for constable to charge (s.51)**

The process of charge under Scots law serves a useful function in terms of informing an individual of the reasons why they are being held and taken to court as required by Article 5(2) and Article 6(3)(a) of the European Convention on Human Rights (ECHR). It can also help towards providing the individual with adequate time and facilities to prepare their defence as guaranteed under Article 6(3)(b), which includes such things as the preservation of evidence.
Under the current system, the process of charge marks a clear point in the proceedings when a decision must be made about whether it is necessary and proportionate to continue to hold a person in custody. It also clearly marks the point when a suspect’s status changes so that suspects are aware they can no longer be subjected to unauthorised questioning or certain other evidence gathering procedures against their will. Thus it serves a useful purpose in protecting the right against self-incrimination. Under the proposals, any further questioning or gathering of evidence from the suspect (accused) will be subject to independent scrutiny by the courts.

Section 51 means that the benefits described above may not be retained. Under the proposals, a person may be charged by a constable or they may be informed that a report is to be submitted to the procurator fiscal. This dual route provides less clarity as to the point at which the suspect’s status changes and has the potential to create “grey areas”. The requirement for police charge provides clarity for the suspect, the police and the courts as to the suspect’s status, allowing clear triggers for Article 6 rights to be identified by all parties.

PART 2 CORROBORATION & STATEMENTS

Corroboration (s.57-61)

In its response to the Scottish Government’s earlier consultation on Reforming Scots Criminal Law and Practice, the Commission expressed its view that corroboration acts to safeguard the quality of evidence. It is a means by which the reliability and credibility of evidence can be tested by the fact finder. It plays an important role in Scots law in preventing an accused from being convicted on evidence of insufficient quality. Thus it assists in preventing violations of fundamental rights.

It is the Commission’s view that if corroboration is abolished and insufficient additional safeguards are introduced, there is a danger that Scots law will have inadequate measures in place to allow for effective challenge to the quality of evidence. The Commission’s concern is therefore that the risk of violation of Article 6 may be increased.

The Commission emphasises that, in light of the Government’s unnecessarily hasty response to the Cadder judgement, sufficient time needs to be taken to properly address the concerns of a wide range of stakeholders in order to ensure that the additional safeguards are fit for purpose and are sustainable. Failure to do so poses the risk of further adverse judgements, miscarriages of justice, disruption of the administration of justice and reduction of public confidence. To this end it is therefore necessary to fully understand the objective and consequent potential development of

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the interpretation of Article 6 so as to determine how to replace corroboration with adequate additional safeguards and so not, although unintentionally, create difficulties due to taking a more minimalist compliant approach.

In deciding whether there has been a violation of Article 6, the European Court of Human Rights (ECtHR) considers whether the proceedings as a whole were fair. It is possible to identify certain key features of a fair trial. Of particular relevance to the present context are the need for proceedings which are adversarial in character, and the need for fair rules of evidence.\textsuperscript{19}

Generally the ECtHR leaves the regulation of rules of evidence and procedure to the national systems. However, in considering whether the trial as a whole is fair, the ECtHR may require to consider broader issues relating to evidence and procedure, including the basis on which evidence has been obtained, the use to which evidence may be put, and the extent to which evidence may be relied upon.\textsuperscript{20}

In determining whether a trial is fair, ECtHR has regard to whether the rights of the defence have been respected. In particular, the ECtHR will have regard to the quality of evidence, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, whether an accused has the opportunity to challenge the authenticity of evidence and oppose its use, and with the quality of evidence relied upon for conviction. The ECtHR has confirmed that the stronger the evidence is, the less requirement for supporting evidence. By way of corollary, the weaker the evidence, the more important the requirement for supporting evidence.\textsuperscript{21}

The ECtHR recognises the existence of corroborating evidence as a procedural safeguard of a fair trial. There are many examples of cases in which the availability (or not) of corroborating evidence has played a role in determining whether a trial has been fair. Where there is a risk of evidence being unreliable, the need for supporting evidence (in other words, corroboration) is greater in order to secure a fair trial.\textsuperscript{22}

Corroboration performs a “quality control” function, whether it exists as a legal requirement for sufficiency in every case, or because it exists as a matter of fact in a particular case. Where there is a source of evidence being relied upon for conviction which attracts concern about its quality (whether in terms of how it was obtained, its authenticity, its reliability or its accuracy), corroboration provides a means by which one can assess whether basing a conviction wholly or partly upon such evidence is unfair. It is a very practical tool which assists in the assessment of reliability of evidence.

There are certain types of evidence which give rise to concerns about reliability and accuracy and which otherwise disadvantage the rights of the defence. These include dock identification, evidence admitted under section 259 of the Criminal Procedure (Scotland) Act 1995, evidence of anonymous witnesses or undercover

\textsuperscript{19} The other features are the principle of legal certainty, and the issuing of a fair and reasoned judgment. Reed & Murdoch: Human Rights Law in Scotland, 3\textsuperscript{rd} ed., pp 598-638

\textsuperscript{20} \textit{Gafgen v Germany} (22978/05)(Grand Chamber 1/6/12), para.162-163

\textsuperscript{21} \textit{Gafgen}, para.164 \textit{et seq}.

\textsuperscript{22} For example, \textit{Allan v United Kingdom} (App. No. 48539/99), para.43
police officers, and unlawfully obtained evidence. In relation to dock identification, corroboration has been considered an important protection (in combination with other safeguards) against a violation of Article 6.\textsuperscript{23} For other types of evidence, corroboration may not always provide a sufficient safeguard.\textsuperscript{24} If the legal requirement for corroboration is abolished, there need to be sufficient other potential safeguards in place to ensure that the fairness of the trial is not compromised. Otherwise, whether or not a trial is fair may be determined by whether there happened to be corroborative evidence – that is, determined by a matter of fact rather than because of legal safeguards. The Commission is concerned that the consequences of abolition and the alternative safeguards needed in cases involving particularly problematic types of evidence have not been adequately taken account of.

In considering what other measures the ECtHR recognises as performing a “quality control” function, it is notable that the court has recognised exclusionary rules of evidence as providing such a safeguard.

In \textit{Khan v United Kingdom},\textsuperscript{25} the applicant alleged a violation of Article 6 because his conviction was based on evidence which had been obtained in violation of Article 8. It had been the only real evidence against the applicant. The ECtHR held that there was no violation of Article 6. The reason for doing so was that the applicant had the opportunity to challenge the authenticity and use of the evidence, and could have availed himself of the exclusionary rule under section 78 of the Police and Criminal Evidence Act 1984. That section provides:

(1) In any proceedings the court may refuse to allow evidence on which the prosecution propose to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of proceedings that the court ought not to admit it.

Scots law has no equivalent of section 78 of PACE. The Scots common law rule allowing unfairly obtained evidence to be excluded is arguably a much stricter test and confers a far narrower discretion on a trial judge.

The ECtHR identified several other “strong procedural safeguards” in addition to corroboration, in the context of the use of hearsay evidence. In \textit{Al-Khawaja and Tahery v United Kingdom},\textsuperscript{26} the ECtHR had to consider the fairness of trials in which hearsay evidence was admitted and formed the basis of conviction. Strong procedural safeguards are necessary in this context because of the inherent danger of unreliability of hearsay evidence and the fact that it offends against the fundamental right of the accused to cross examine witnesses (and thus challenge the accuracy and reliability of the evidence).

The safeguards highlighted by the Court included\textsuperscript{27}:

\begin{itemize}
\item \textit{Holland v HMA} 2005 1 SC(PC) 3, para.57
\item for example, \textit{N v HMA} 2003 JC 140, para.26, per LJC
\item App. No. 35394/97
\item Applications nos. 26766/05 and 22228/06, Grand Chamber judgment 15 December 2011, para.147
\item Ibid at paras.148-151
\end{itemize}
• Safeguards contained in section 23 of the Criminal Justice Act 1988 and section 116 of the Criminal Justice Act 2003 (which provide limited exceptions to the use of hearsay);
• The right of the defence to lead evidence challenging the credibility and reliability of the statement, which would have been inadmissible if the maker of the statement was giving evidence in the usual way. There is no equivalent safeguard in the Scottish legislation.
• The power of a trial judge under section 125 of the 2003 Act to stop proceedings which was based wholly or partly on a hearsay statement where he is satisfied that the statement is so unconvincing that, considering its importance in the case, a conviction would be unsafe. This power does not exist in the equivalent Scottish legislation;
• The discretion of the trial judge in terms of section 126 of the 2003 Act to refuse to admit hearsay evidence if the case for its exclusion substantially outweighs the case for inclusion. This discretion does not exist in the equivalent Scottish legislation.
• The general discretion to exclude evidence under section 78 of PACE, which does not exist in Scotland;
• Jury directions on the burden of proof and directions on the dangers of relying on a hearsay statement.

It is important to note that, even with these strong procedural safeguards in place in England, the existence (or absence) of corroboration was the decisive factor for the ECtHR in determining whether or not there had been a violation of Article 6 in each case.

The ECtHR has recently confirmed that whatever the procedural safeguards may be, they must provide a real chance of effectively challenging the reliability of decisive evidence.  
While in Scots law an accused person can challenge the reliability of evidence in a variety of ways, most often through cross-examination, the Commission is concerned that the absence of an express statutory discretion on the part of the trial judge to exclude a particular piece of evidence of such poor quality that relying upon it for a conviction would be unsafe or might render the trial unfair, may be a deficiency.

For example, in N v HMA, dealing with whether a trial judge could exercise a common law power to exclude evidence that would otherwise be admitted under section 259 of the 1995 Act (hearsay), the Lord Justice Clerk (Gill) concluded that the trial judge had no such discretionary power.  
The Justice Clerk went on to commend the legislative safeguards in the equivalent English legislation as “prudent”.

The court has an obligation to ensure a fair trial under Article 6. If the court considers that the admission of certain evidence would render the trial unfair, it should exclude it or if it has already been admitted, it should stop the proceedings. It appears to

28 Papadakis v The Former Yugoslav Republic of Macedonia, App. No. 50254/07
29 2003 JC 140, para.22
30 Ibid at para.27
31 per Lord Gill, ibid at paras. 35-36.
the Commission that *N v HMA* remains one of the only cases in which the court has recognised the connection between excluding evidence and protecting a fair trial under Article 6. The Commission therefore considers that it may be valuable to provide judges with clear statutory powers both to exclude particular pieces of evidence where they consider that to admit them may render the trial unfair, and to stop proceedings which are based wholly or partly on evidence that is so unconvincing that, given its significance to the case, the trial would be unfair.

Allowing a jury to consider convicting an accused on the basis of very poor evidence, or evidence where the ability of the defence to challenge it has been significantly restricted, jeopardises a fair trial.

The requirement to ensure a fair trial is a matter of law. It is therefore an obligation that rests with the judge. The Commission disagrees with Lord Carloway’s view that all cases ought to be left to juries. Juries are masters of fact. The question of whether a verdict based on poor evidence is compatible with Article 6 in any given case is a legal question. The judge has to ensure the fairness of proceedings and protect the accused’s Article 6 rights.

Given the State’s positive duty under Article 6 to put in place a domestic system that meets the requirements of a fair trial, there must be adequate measures in place to allow the judge to give effect to his duty to prevent an unfair trial.

The introduction of a power to allow a judge to withdraw a case from the jury if no reasonable jury could convict on the basis of the evidence before it, would be a good procedural safeguard. It is a safeguard that addresses the quality of evidence, which in the absence of corroboration, is particularly important. Further, since the Appeal Court applies a “no reasonable jury” test in determining miscarriages of justice, it would seem to strengthen that safeguard if the same power is given to the trial judge who has had the benefit of seeing and hearing the whole of the case. The Commission would recommend such a power be introduced.

It should be noted, however, that the introduction of a “no reasonable jury” test would not, of itself, guarantee a fair trial. In *Al-Khawaja & Tahery*, in respect of Mr Tahery, the ECtHR considered that the English system (which includes an analogous power) did not prevent the trial from being unfair. The Court stated, “The absence of any strong corroborative evidence in the case meant the jury in this case were unable to conduct a fair and proper assessment of the reliability of T’s evidence [which was admitted through the statutory provisions allowing exceptions to hearsay]. Examining the fairness of the proceedings as a whole, the Court concludes that there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of T’s statement.”

Again the Commission notes the importance which ECtHR attaches to a fact finder’s ability to conduct a fair and proper assessment of the reliability of evidence. As has been stated, corroboration is a useful practical tool for that purpose.

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32 *Al-Khawaja & Tahery v United Kingdom*, para.165
The Commission considers that the introduction of a “no reasonable jury” test should allow the judge to stop a case going to the jury where the conviction would be partially based on evidence that is of very poor quality. It should also allow the judge to apply the same qualitative assessment to a particular piece of evidence prior to it reaching the jury’s ears. In the absence of measures to allow judges to exclude individual pieces of evidence upon which no reasonable jury could rely for conviction, the potential strength of this safeguard is reduced. Such evidence ought not to be heard by the jury at all, hence the need for the power to exclude it. The Commission has recommended the introduction of a discretionary power for judges similar to that in section 78 of PACE. That, combined with the “no reasonable jury” test, would provide a better matrix of procedural safeguards.

While the Commission acknowledges that in the majority of cases it is likely that corroborative evidence will be led (and will act as a procedural safeguard), the system of criminal law needs to have measures in place to provide sufficient procedural safeguards for those cases in which there is no corroboration. Further in respect of types of evidence which give rise to concerns about reliability or which restrict the rights of the defence, it has already been noted by Scotland’s now most senior judge, that additional procedural safeguards (such as those in England) are “prudent”.

Exculpatory and mixed statements (s.62)

The Commission welcomes this provision. The content of a statement by an accused should be available as proof of the truth of its contents whether it is exculpatory, incriminatory or mixed, provided the statement has been lawfully and fairly obtained. The Commission notes that the provision could, perhaps, be more clearly expressed.

PART 3 SOLEMN PROCEDURE

Increase to jury majority required for conviction (s.70)

The ECtHR has not spoken directly on the question of simple jury majorities.

In *Pullar v United Kingdom*, the majority did appear to consider that a jury comprised of 15 people was a procedural safeguard in the context of considering whether one of the jury’s number may not have been independent and impartial. In the partly dissenting judgment, reference was made to the fact that there was a majority verdict to support the dissenting judge’s position that Mr Pullar was objectively justified in having doubts about the impartiality of the jury.

It is obvious that requiring a greater than simple majority for a guilty verdict provides a stronger procedural safeguard. However, the Commission does not consider that

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33 Albeit in Mr Tahery’s case, such a matrix was still insufficient to guarantee a fair trial because of the absence of corroboration.
34 *N v HMA*, per Lord Gill
35 App. No. 22399/93
36 *ibid* at para.40-41
37 See Partly Dissenting Joint Opinion of Judges Ryssdal and Makarczyk joined by Judges Spielmann and Lopes Rocha
this is an adequate safeguard to balance the abolition of the requirement for corroboration, as more fully described above. That is because jury majorities do not play any part in securing that only evidence of sufficient quality can form the basis for a conviction.

**PART 5 APPEALS & SCCRC**

**References by SCCRC (s.82)**

The Commission welcomes the approach that there will be no further statutory listing of the criteria included in the “interests of justice” test for SCCRC references. The Commission also recommends that s194C(2) of the 1995 Act be repealed. It is clear that SCCRC already took account of finality and certainty in applying the interests of justice test. The continued existence of the provision carries the danger that, in time, finality and certainty will be taken to have some greater weight than other considerations. While finality is important for the rule of law, it is able to be interfered with for good reasons.

The Commission welcomes the repeal of section 194DA. However, the Commission opposes the introduction of an additional hurdle in the determination of an appeal for those whose cases have been referred by the SCCRC. The proposal that the test should include “it is in the interests of justice that the appeal be allowed” constitutes such an additional hurdle. There is no reason in principle or in practice to distinguish between victims of miscarriages of justice simply based on the route by which their case happens to have arrived at the appeal court.

This constitutes a barrier to access to justice without apparent justification. The Commission accepts that it may be justified to impose a higher test in cases occasioned by a change in law, such as those arising from *Cadder*, however, this reasoning does not apply to the broader category of cases referred by the SCCRC. The court will only have occasion to apply the test set out in s. 194B in cases where it has found that a miscarriage of justice has occurred. In these circumstances, the justification for imposing a further hurdle in the determination of the appeal has not been made out.

Scottish Human Rights Commission
29 August 2013
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from the Sheriffs’ Association

The Sheriffs’ Association has responded to a number of consultation documents relating to the topics you mention. Rather than attempt to distil our responses down, which we do not have the resources to undertake, we thought it might be helpful to draw your attention to the responses we have made and particular parts of those responses. To that end, I attach three documents previously prepared by the Sheriffs’ Association as its comments on the Government’s consultation on the Carloway Report, on the Criminal Justice Bill, and the proposals for reform of sheriff and jury procedure.

In relation to the themes which the Justice Committee is to consider, the Association draws the Committee’s attention to the following.

(1) Police powers and rights of suspects.
   See our response to questions 1 to 26 of the consultation on the Carloway Report. And response to the Criminal Justice Bill.

(2) Corroboration, admissibility of statements and related reforms.
   See our response to questions 31 to 35 of the consultation on the Carloway Report. And response to the Criminal Justice Bill.

(3) Court procedures
   See our response to the consultation on reform of sheriff and jury procedure.

(4) Appeals, sentencing and aggravations

See our response to questions 36 to 41 of the consultation on the Carloway Report. And response to the Criminal Justice Bill.

I also attach some further comments by way of an additional response.

Gordon Liddle
Secretary, Sheriffs’ association.
30 September 2013
THE CARLOWAY REPORT - CONSULTATION QUESTIONNAIRE

ARREST AND DETENTION (Chapter 2 of the consultation paper)

Question 1

*What are your views on the move to a power of arrest on ‘reasonable suspicion’ of having committed a crime, replacing the common law and statutory rules on arrest and detention?*

We agree. The new system must be easily understood by the public and police. This test is easy to understand and conforms to international standards.

Question 2

*What are your views on Lord Carloway’s recommendations for the police no longer to be required to charge a suspect with a crime prior to reporting the case to the Procurator Fiscal? How is this best achieved in practice?*

The majority view of the Association is that such a change is acceptable. However, if such a change were to be introduced, we think that there ought to be safeguards to protect the suspect from unfairness.

The minority view is that there is a strong basis for retaining the importance of the significance of the stage of charge in the present system. A charge tells the suspect that his status has changed, that he cannot be questioned further, except before a sheriff. It tells the accused what crime or offence he or she is in fact accused of having committed and, if held in custody, why. Even though to some extent the point of charge is in the discretion of the police, it is an important point, being one after which the suspect cannot be questioned and at which point his status as a person to be released on an undertaking, on bail or remanded in custody has to be considered. At that point the suspect must be told what it is that he is to be reported for prosecution for.

Question 3

*Do you agree that a suspect in a criminal investigation, who has not been detained or arrested, does not require any statutory rights similar to those conferred had that person been arrested and detained?*

Yes. As we understand the Convention jurisprudence, the Convention provides protection from the point that there has been some significant curtailment of the suspect’s freedom of liberty. We see no reason why Scottish domestic legislation should go further than that.

Question 4

*What are your views on the recommendation that a suspect should only be detained if it is necessary and proportionate having regard to the nature and seriousness of the crime and the probable disposal if convicted?*
We agree, subject to the proviso that regard needs also to be had to the interests of justice, such as the prevention of interference with the course of justice by destroying evidence, interfering with witnesses and so on. Further, the police must always be permitted to detain if the offence being investigated is sufficiently serious.

**CUSTODY (Chapter 3 of the consultation paper)**

**Question 5**

*Do you agree with Lord Carloway’s recommendation that the maximum time a suspect can be held in detention (prior to charge or report to the Procurator Fiscal) should be 12 hours?*

Yes. It appears from the data provided in the Report that in practice, in the vast majority of cases, no longer than 12 hours is usually required by the police to complete investigations and that in fact, the large majority of detentions in custody are for periods of less than 6 hours. The requirement that detention be reviewed after 6 hours is an additional safeguard.

**Question 6**

*What are your views on whether this 12 hour period could be extended in exceptional circumstances? How could this be regulated appropriately?*

There are bound to be some exceptional circumstances where an extension to the time limit is required. We think that a single extension of a fixed number of hours, perhaps 12, should require judicial authority.

**Question 7**

*What are your views on the need for the proposed 12 hour period of detention to be reviewed after 6 hours by a senior police officer?*

Yes, by a senior police officer unconnected with the investigation.

**Question 8**

*What do you consider the most effective way of ensuring that no person should be detained in custody beyond 36 hours before appearing before a Court, i.e. over the weekend period?*

  - *Are there any practical difficulties to be overcome in delivering a model that achieves this?*

We agree that it is undesirable in principle for any person to be unnecessarily detained in custody and that periods in custody before being brought before a court ought to be kept within reasonable bounds. We note that there is no rule in either domestic or Convention jurisprudence which sets 36 hours as a limit, but rather, a period of up to four days has been found to be Convention compliant.
It appears to us that at present, current arrangements for court sittings (which include Saturday sittings where a holiday succeeds a weekend) taken together with extensive powers available to the police to release suspects on an undertaking are also Convention compliant.

Increased powers of the police and Crown (proposed at para 5.3.18) would permit a much greater number of releases on bail and undertaking before the first court hearing which would be an improvement. Further improvement would result from increased and earlier Crown involvement with liberation decisions concerning those in custody who have not yet appeared in court. Greater consistency in the application of pre-Court liberation policies and closer liaison between the prosecution authorities and the police on such matters, would be desirable in itself. The result should be that the police, with the involvement of the Crown, should only keep in custody over a weekend those where there is no realistic alternative at that time, or where it can reasonably be thought that a court would refuse bail when the case first calls in court.

We believe that the establishment of regular Saturday Courts, whether on a regional basis or not, would impose an unacceptable degree of extra strain and excessive extra costs on an already overburdened criminal justice system which is already suffering major reductions in expenditure and would be quite unnecessary, especially if increased liberation powers are exercised by the Crown and police prior to court appearance.

- **Bearing in mind the desire for suspects to be held for as short a period as possible, current ECHR case law which indicates a limit of 4 days and affordability issues do you consider there to be an alternative time period to the 36 hour recommendation before suspects appear before a Court?**

We have nothing further to add.

**Question 9**

*What are your views on the police having the ability to hold an accused for court and report a case to the procurator fiscal without first charging the suspect?*

If we understand the proposal correctly, this would mean that the police would be entitled to arrest a person on suspicion of an offence, detain him for investigation and questioning, decide that they are unsure whether to charge him and advise the suspect that he will be reported to the procurator fiscal, but then continue to detain him until the next lawful court day, bring him before the court and the procurator fiscal could then oppose a bail application. We consider that as wrong in principle. If a person is to be detained for an extended period, whether by the police or the court, that should be on the basis of an explicit charge, rather than mere suspicion and the awaiting of a decision of the procurator fiscal.
LIBERATION FROM POLICE CUSTODY (Chapter 4 of the consultation paper)

Question 10

Do you agree with Lord Carloway’s recommendations that the police should be able to liberate a suspect from custody on conditions, referred to as investigative liberation?

Yes.

What are the practical issues with this and what comments do you have about conditions and safeguards?

We see the potential value, in some cases, of investigative liberation if, and only if, that is an alternative to prolonged detention. The principal safeguards would be a strict limit on the time of such liberation and the right of the suspect to challenge that decision by application to a court. This is a sensible way to deal with volume in appropriate cases. It mirrors the English position. It is imperative that the suspect understands the procedure for being called back for questioning.

Question 11

Lord Carloway suggests that a limit of 28 days be set on the period that the police can liberate a suspect on investigative liberation. Do you think that 28 days is sufficient in all cases? Please explain.

We note that there seems to be no explanation or justification for this period in the Report. We would prefer a clearer explanation of why this figure is proposed. Nonetheless, it does not seem an unreasonable period of time for this purpose as a starting point. It seems to us however that there could be many types of cases where this period would be too short: in cybercrime cases where computer forensics may well take longer. The period should be renewable on good cause shown on application to the Court.

Question 12

Are there practical issues with the police advising the suspect of a time and place for a return to the police station, at the point investigative bail is granted?

We have no comment.

LEGAL ADVICE (Chapter 5 of the consultation paper)

Question 13

What are your views on the recommendation for access to a lawyer to begin as soon as practicable after the detention of the arrested suspect, regardless of questioning?

- What do you see as the purpose of access to a lawyer when questioning is not anticipated?
As a deterrent to abuse of power by the police. To provide the suspect with information about his/her rights: see Dayanan v Turkey 2009. To enable a suspect positively to assist his defence, when matters are still fresh.

- What do you consider to be the best way of providing legal advice for suspects as soon as practicable after detention, whilst ensuring it is effective, practical and affordable?

By telephone or video-call to a lawyer: either a solicitor identified by the suspect, if available, or to a duty solicitor.

**Question 14**

_Do you foresee any difficulties with the recommendation that the standard caution prior to the interviewing of suspects outwith a police station includes information that they have a right to access a solicitor if they wish? If so, please explain what these are._

No.

**Question 15**

Lord Carloway recommends that it is for the accused to decide on the way legal advice is provided (by telephone, in person etc.) and whether their solicitor is present during a police interview. Do you agree with this approach? If not, please give reasons.

Yes.

- Are there any additional considerations for the form of legal advice when questioning is not anticipated?

In principle, we agree. However, the choice of method and identification of lawyer must be subject to practical considerations. For example, a suspect should not be permitted to insist on impracticable or impossible demands or deliberately to frustrate legitimate investigation of crime.

**Question 16**

_It is proposed that the right to waive access to legal advice, and the expression and recording of this, should be set out in legislation – do you agree? If not, please give reasons._

Yes. We agree with the recommendations.

- Lord Carloway also proposes that this right can only be waived once a person is fully informed of the right – what are your views on this?

We agree with the recommendations.
Question 17

Do you agree with Lord Carloway’s recommendation that the practice of only enrolled solicitors giving advice to suspects should continue? If you disagree, please set out an alternative approach.

Yes.

Please comment on the reason(s) for your answer.

We agree with the recommendations for the reasons given in the Report.

QUESTIONING (Chapter 6 of the consultation paper)

Question 18

Do you agree that the police should be allowed to question a suspect after charge (subject to the permission of the court and any conditions they apply), as outlined in the recommendations? Please explain.

The majority of the Association disagree with this proposal. After charge a person’s status changes. See further our remarks at Answer 2. From that point the right to silence and the right against self-incrimination cannot be breached. The only way of ensuring this is for there to be no exception to the rule. Once charged, an evidential sufficiency should exist. Further questioning would bring no further benefit. The accused is free to make a voluntary statement post-charge.

If such questioning were allowed, we believe that there would be additional difficulties. An order from a sheriff would be required. Even with the use of email, it may be some time before it is possible for a sheriff to give attention to such an application. That would mean the accused remaining in custody during that time. The Report states that an application for questioning after charge would not be to extend the period of custody, but we rather suspect that will be the practical effect and that such applications would be likely to be accompanied with applications for extensions of the 12 hour custody period. Increased periods in custody runs counter to the principle in the report of custody being kept to a minimum. Further, we note that such an application would not be intimated to the accused. That seems wrong in principle as does the idea that, therefore, the accused would be unable to make representations to the sheriff.

However, a minority of the Association believe that in some circumstances, questioning after charge ought to be permitted in certain limited circumstances, such as where new evidence has emerged. In that case, the suspect will continue to have the right to legal assistance and has the usual Convention protections. It is unlikely that such a power would be often used, especially in summary cases which form the vast bulk of all criminal matters coming before the courts.
Question 19

Do you agree that the procedure of Judicial Examination should be removed, whilst introducing provisions to allow the Crown to apply to the court to question a suspect after charge, as outlined in the recommendations? Please explain.

Judicial Examination is now somewhat of an anachronism and is not often employed and should be abolished. Similarly anachronistic is the procedure whereby a person on petition may emit a declaration, which rarely if ever happens in practice. We agree that petition procedure should be modernised and that in solemn cases, the accused be brought before the sheriff on petition but not for “examination”. However, we reiterate the concerns about police questioning after charge expressed above.

Question 20

Do you agree that the present common law rules of fairness concerning the admissibility of statements by suspects should be abolished in favour of the more general Article 6 test, as outlined in the recommendations? Please explain.

Yes, for the reasons expressed in the Report. However, we do not believe that in practice there would be much difference regardless of which test is applied.

CHILD SUSPECTS (Chapter 7 of the consultation paper)

Question 21

Do you agree with Lord Carloway’s recommendation that, for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years? Please explain why.

Yes. In light of current international conventions, the age which should define a child should be 18, for these purposes only.

Question 22

Do you agree that there should be a general statutory provision that, in taking any decision regarding the arrest, detention, interview and charging of a child, the best interests of the child shall be a primary consideration?

Yes.

- How would such a provision work in practice?

We agree, so long as it is understood that the best interests of the child are one of many primary considerations in this context and it is also understood that this primary consideration will not in all cases be the most important consideration. The need to protect others and the public interest in the apprehension, prosecution of suspects may often outweigh this consideration. The interests of justice should be paramount.
Question 23

Do you agree with the terms of the Report that the general role of the parent, carer or responsible person should be to provide any moral support and parental care and guidance to the child and to promote the child’s understanding of any communications between the child, the police and the solicitor?

Yes. We agree with the general role of the parent, carer or responsible person.

- Should the responsibilities of a parent, carer or responsible person be provided for in statute or achieved through guidance and the possible provision of support or in some other way?

In the first instance we consider that it should be sufficient to provide for the responsibilities through guidance. Legislation should only be considered if guidance is unsuccessful.

Question 24

Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a lawyer only with the agreement of a parent, carer or responsible person?

In order to avoid problems of admissibility at trial, the best solution is that there can be no waiver of the right of access to a lawyer where the suspect is under 18.

Question 25

Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a parent, carer or responsible person, but that in such cases they must be provided with access to a lawyer?

We suspect that there may be some 16 and 17 year olds, perhaps those most likely to come into contact with the criminal justice system, who have no competent parent or carer or responsible person. And there will be some who will refuse to have such a person with them. We agree that 16 and 17 year old children should be permitted to given fully informed consent to waiver of this right. However, as we say above, we consider that those under 18 should not be entitled to waive access to legal assistance regardless of whether they have a parent etc with them.

Question 26

What are your views on the recommendation that children under 16 should not be able to waive their rights to legal advice?

We agree.
VULNERABLE ADULT SUSPECTS (Chapter 8 of the consultation paper)

Question 27

Do you agree with Lord Carloway’s recommendation that there should be a statutory definition of a “vulnerable suspect”

Yes.

  o Do you agree with the definition proposed by Lord Carloway?

Yes.

  o If not, what do you think the definition should be?

We agree that there should be such a definition, especially since there exists already a definition of vulnerable in relation to witnesses. We agree that the definition of vulnerable in relation to a witness is cumbersome and should not simply be carried over to a definition of vulnerable suspect. We agree the definition should be more clearly expressed. We agree that it should include those suffering from a mental disorder. However, we consider also that that may be some suspects who are vulnerable through some aspect of their psychology or recent experience who may be vulnerable for a reason falling short of mental disorder or because of a physical condition. It might be wise to provide a catch all addition to the definition.

Question 28

Do you agree with Lord Carloway’s recommendation that the role of an Appropriate Adult should be defined in statute?

   o Do you agree with the definition proposed by Lord Carloway?

   o If not, what do you think the definition should be?

The issue here is similar to that raised at question 23. We think that a similar approach should be adopted for both. Therefore, in the first instance we consider that it should be sufficient to provide for the responsibilities through guidance. Legislation should only be considered if guidance is unsuccessful. There may be a role for mental health officers as appropriate adults.

Question 29

Do you agree with Lord Carloway’s recommendation that statute should provide that a vulnerable suspect must be provided with the services of an Appropriate Adult as soon as practicable after detention and prior to any questioning?

Yes.
If so, do you agree that the current role of an Appropriate Adult should be extended so that a vulnerable suspect can only waive their right of access to a lawyer if the appropriate adult also agrees to this?

No. The vulnerable adult must be provided with the services of an appropriate adult. In order to avoid problems of admissibility at trial, the best solution is that there can be no waiver of the right to access to a lawyer.

**Question 30**

Do you agree with Lord Carloway’s recommendation that statutory provision should be made to define the qualifications necessary to become an Appropriate Adult?

Yes.

If so, what steps do you think are required to decide what these qualifications should be?

We have no further comment.

**CORROBORATION (Chapter 9 of the consultation paper)**

**Question 31**

Lord Carloway concludes that the requirement for corroboration has no place in a modern legal system and should be abolished. Setting aside any question about whether this would require other changes to be made, do you agree with that conclusion?

There are concerns about this proposal. Some of the arguments in favour of retaining the rule are set out in the Report at paragraphs 7.2.36 to 7.2.40. It is unnecessary therefore to repeat them here. It is worth emphasising however, the difficulties that do exist in practice in deciding whether a witness is credible and reliable. Skilful liars and the honestly mistaken but apparently convincing witnesses are no strangers to the courts. Those difficulties will not be assisted by removing the corroboration requirement. While the corroboration requirement does not prevent wrongful convictions, it is likely to reduce the risk since the Court has support for its assessment of a single piece of evidence. Without corroboration, there is a risk of increased wrongful convictions. There would also be a risk of poorer investigation of crime by the police (especially in times of economic austerity), a risk that investigations are cut short (which might otherwise have revealed corroborating or exculpatory evidence) and a greater risk of accusations of improper conduct against police officers. It is undesirable that a person should be convicted on the word of a police officer or other witness alone. There would be a substantial increase in prosecutions and a greater number of defended cases going to trial since an accused may often think that if there is just one witness, his chances of acquittal are fair. More attacks will be made on the character of witnesses. The end result may well be more prosecutions but without a corresponding increase in convictions or perhaps even a fall in successful prosecutions. There would be a serious and substantial extra burden placed on the whole criminal justice system. The Courts and
other parts of the criminal justice system are already suffering considerable strains which are very likely to increase in any event. This is not the time to precipitate further stresses. The rule is a tool, well used by all in the criminal justice system. If that tool is removed, it is unclear what will replace it.

However, there are arguments in favour of abolition of the corroboration requirement which are well summarised at paragraphs 7.2.41 to 7.2.50 of the Report. It is unnecessary therefore to repeat them here. It is worth emphasising that it is undoubtedly true that there are many crimes which are not prosecuted because of the rule, despite the existence of one clear and convincing source of evidence and justice is therefore not done because of the rule. That may be especially true of some types of cases involving women and children, but it is also true of other common types of cases, such as assault and theft. It is also worth noting, as the Report clearly states, that the existence of the rule has led to a considerable amount of elaborate legal theories and intricate exceptions and qualifications to the rule so that there are many cases where it may be quite unclear how to apply the rule and judges may disagree among themselves as to its application. Further, it is worth noting how far out of line this rule of evidence is when compared with other legal systems. No other Western legal system has a quantitative standard of evidence: the argument is that Scotland should be moving to a qualitative model.

That all said, the corroboration requirement is an ancient part of Scottish evidential law. It is, as the Report correctly says, a rule with deep roots in all parts of the criminal justice system. Its abolition has only very recently been mooted. With great respect to the author of the Report and those who contributed to it, we do not believe that this Report is a sufficient basis on which a conclusion as to retention or abolition of the rule should be reached. We believe that before such a decision is reached, much more study, research and analysis needs to be undertaken on the question, the consequent effects of abolition on the rest of the criminal justice system and what other changes might be required as a consequence of abolition. We therefore recommend that whatever is done with regard to the rest of the recommendations of this report, determination of this question be deferred until that further work is done and further public debate takes place.

**Question 32**

*If the requirement for corroboration is removed, do you think additional changes should be made to the criminal justice system?*

Yes.

- *If you think additional changes should be made, what specific changes would you suggest and why? For example, if altering the size of jury majority required or verdicts what would a new system require or include?*

- *What evidence do you have to support your position?*

We believe that abolition of the corroboration rule would almost certainly entail changes to many other aspects of the criminal justice system. As we note above, we believe that much more analysis on this question needs to be done before a clearer
answer could be given. However, we believe that the following changes might well be necessary.

- Introduction of the qualitative test of evidence at trial before verdict.
- Warnings to juries about conviction on uncorroborated evidence
- Increase in size of the majority needed for a guilty verdict

Consideration of safeguards as to admissibility of evidence

OTHER CRIMINAL EVIDENCE ISSUES (Chapter 10 of the consultation paper)

Question 33

*Do you agree that the test for sufficiency of evidence at trial and on appeal should remain as it is now? If not what do you believe should change?*

*If* the corroboration rule were abolished, there would need to be changes. There would need to be a qualitative test for sufficiency of evidence. The test in a jury trial would, therefore, have to be along the lines of “whether, assessing the evidence as a whole, the Crown case, taken at its highest, is such that a jury properly directed could not properly convict”. The judge would need to have the power to remove the case from the jury where the evidence does not reach the required standard.

In a summary trial, as the judge sits alone, the test would have to be “whether, assessing the evidence as a whole, the Crown case, taken at its highest, would entitle a reasonable sheriff [or stipendiary magistrate or justice of the peace] to convict”.

Question 34

*Do you agree the rules distinguishing treatment of incriminatory, exculpatory and mixed statements should simplified allowing the courts to assess them more freely? If you do not agree, should any other change be made regarding these statements?*

Yes. We agree with the analysis in the Report and its conclusion that the rules of admissibility as regards such statements are now far too complex and unlikely to be fully understood by juries however carefully framed the directions given to them are. We agree that all statements given to police and other public officials during the course of investigation should be generally admissible at trial, at the instance of any party, whether as proof of fact or otherwise. That must be subject to the right of any party, and the judge, to make comment on them as regards the circumstances in which the statements were made, their content and what inferences could legitimately be drawn from the statement.

Question 35

*Currently no adverse inference can be taken from an accused person failing to answer police questions. Do you agree that this should not change?*

Yes. This is entirely consistent with the right to silence and the presumption of innocence enjoyed by the accused.
APPEAL PROCEDURES (Chapter 11 of the consultation paper)

Question 36

Do you agree that time limits in appeal cases should be enforced? What sanctions do you consider might be appropriate?

Yes. Time limits in appeals should be enforced. The sanctions should be as noted in the recommendations of the Report. They include denial of the appeal.

Question 37

Do the amendments Lord Carloway recommends to sections 74 and 174 of the 1995 Act, together with the retention of the nobile officium, cover all situations in which Bills of Advocation and Suspension might reasonably be used? If not, what other situations can you envisage?

Yes. We agree in principle that the present modes of appeal ought to be modernised and simplified. We agree in principle that the appeal route via Bills of Advocation and Suspension ought to be abolished providing that the revised modes of appeal permit the bringing under review the same types of decisions as are presently challenged using such appeal routes. We are not aware of any types of decisions where the proposed amended right of appeal, taken together with the petition to the nobile officium would not provide an effective remedy. We agree that such petitions should be used only for exceptional cases and that provision should be made to prevent such petitions being employed as a means of avoiding the statutory appeal procedure or the consequences of having failed to use the statutory appeal procedure.

Question 38

Do you have any comments on Lord Carloway’s other recommendations for appeals?

We do not consider that the Crown should have a right of appeal under section 74 or 174 of the 1995 Act without leave but the convicted person requires leave. In the interests of fairness, both should be subject to the same law.

FINALITY AND CERTAINTY (Chapter 12 of the consultation paper)

Question 39

Do you agree that section 194C(2) of the 1995 Act should be retained and that there should be no further statutory listing of the criteria included in the “interests of justice” test for SCCRC references?

Yes. The need for finality and certainty is an important consideration which ought to be taken into account by the SCCRC and it is worth enshrining that consideration in statute for the avoidance of doubt. We agree also that the SCCRC ought to be
permitted to take into account whatever other considerations it considers amount to the interests of justice and enumerating them would not be helpful.

**Question 40**

What are your views on Lord Carloway’s recommendation that section 194DA of the 1995 Act should be repealed?

We agree. It is wrong in principle that the very body whose decisions are being challenged can veto that challenge. The evidence is that the SCCRC performs an important role responsibly and we believe that its independence ought to be preserved. The evidence of its decisions on the Cadder cases referred to the SCCRC tends to show that there is no need for the restriction introduced by section 194DA. We think that consideration could be given to providing the SCCRC with a right of appeal against decisions of the Court.

**Question 41**

Do you agree with the recommendations that, when considering appeals following upon references from the SCCRC, the test for allowing an appeal should be:
   
   (a) there has been a miscarriage of justice; and
   
   (b) it is in the interests of justice that the appeal be allowed.

   o If not, what do you think the criteria should be?

Yes. Although we agree with this recommendation, we do see the strength of the argument that the only test ought to be miscarriage of justice.

**REFORM OF SHERIFF AND JURY PROCEDURE - CONSULTATION QUESTIONNAIRE**

**Statements to Accused**

**Question 1**

a) Do you agree in principle with the proposals for statements to an accused?

b) If not please give reasons

c) What will be the potential benefit to the system?

d) What potential problems could arise?

1(a) No.

(b) We consider the problems as set out in our Answer to Question 1(d) are such as to render the proposal potentially unworkable in practice and ill advised.
(c) We have, in any event, doubts as to whether there will be any noticeable benefit to the system. Agents should be telling their clients this anyway. The Case Law regarding discount makes it very clear that the discount clock starts ticking from the first appearance.

(d) The Consultation Paper states” it is not intended that these reforms should usurp the basic principle that the accused is entitled to require the Crown to prove their case.” Lord Carloway in his review endorses the right to silence.

It may be argued that the terms of the statement reflect what a solicitor should be advising his/her client in any event. Does the statement therefore encroach on that relationship?

The proposed wording is “full engagement with their solicitor”. What does “engagement” mean? It is unclear how the Sheriff will subsequently ascertain whether or not there has been such engagement without encroaching upon the solicitor/client relationship? What is the Sheriff to do if the solicitor submits that all his dealings with his/her client are confidential and privileged.

If through oversight the statement is not made by the Sheriff what happens? We pose this question as it is unclear whether or not “the discount of sentence” will be in some way affected.

There is no sanction proposed in the event of lack of “engagement” on the part of the accused. Is it to be inferred that failure to “engage” will be a factor the Sheriff is permitted to take into account when determining the level of discount of sentence to be afforded?

There is a further potential problem. It could be argued that the statement, particularly in referring to discount, is an attempt to influence an accused to plead guilty. In other words, full engagement should properly result in a plea of guilty. That assumption may not be well founded. Aside from anything else, whether an accused should be pleading to a charge depends on the strength of the prosecution case. Initial disclosure may not reveal a strong Crown case thus it would be perfectly proper and indeed appropriate advice to maintain a plea of not guilty. It will not matter in those circumstances whether there is engagement or not. It is all very well to say that an accused knows whether the offence was committed, the majority of accused persons do not however plead to charges until there is no realistic alternative option.

(e) We consider an amendment to section 196 will be required.

**The Compulsory Business Meeting (CBM)**

**Question 2**

a) Do you agree in principle to the proposal of a new compulsory business meeting procedure?

b) If not, please outline your reason(s)
c) What would be the potential benefits to the system?

d) What potential problems may arise?

2(a) Yes, although we have reservations about the proposed timescale.

2(c) It may result in earlier resolution of matters and also reduce the number of adjournments.

2(d) It is dependent upon the accused giving appropriate instructions to his solicitor.

Our concerns over the timescale centre upon the existing failure, under the present procedure, of COPFS to make timeous disclosure of evidential material to the Defence necessitating adjournments. Leaving aside what may be set out in the Rules as opposed to primary Legislation, any continuation or repetition of such failings by COPFS, whether due to lack of resources or otherwise, will simply frustrate the purpose of the CBM and result in an additional layer of procedure being prescribed for no real benefit.

Question 3

a) Do you agree in principle that the CBM take place before service of the indictment?

b) If not, please outline your reason(s)

c) What would be the potential benefits to the system?

d) What potential problems may arise?

3(a) Yes. If it does not take place prior to service, then there is no real change in the present system.

3(c) and 3(d) as in 2 above.

Question 4

a) Should sanctions be available if parties fail to comply with a requirement to hold a CBM?

b) If so, what should these be?

4(a) Yes. Without some form of sanction the CBM may amount to nothing more than another ineffectual and rather meaningless part of the Procedure. Defence Statements, without any sanction for failure to comply, are a case in point.

4(b) While it may be thought failure on the part of the accused should be a factor the Sheriff is entitled to take into account when considering discount on sentence, the majority view of the Association would be against this being provided for. The
potential for “conflict” between Agent and accused, resulting in Agents withdrawing from acting, is obvious. It is unclear how such a “reduced” discount would be calculated, nor what is to occur if it is the Crown who has failed to comply.

Further amendment to Section 196 would in our view be required.

**The Written Record of the CBM**

**Question 5**

a) *Do you agree in principle to the proposal for a written record of the CBM?*

b) *What would be the potential benefits to the system?*

c) *What potential problems may arise?*

5(a) Yes.

5(b) It would provide information to the presiding sheriff at the First diet as to what had been discussed/agreed at the CBM and may mean that more is achieved at the First diet.

5(c) As it is a written record Defence representatives may be reluctant to commit themselves. Questions of what authority did representatives have at such a meeting may arise. Accused can change their minds. What will the status of such a record be? For example, would the record contain any information regarding negotiation of pleas? If it did and the accused subsequently did not plead to these offences, could the record be put to him in cross examination at a trial?

A fuller Minute of what takes place at the First diet is likely to be required. Although it is preferable that the same sheriff presides at the First diet, any continuation thereof and any subsequent Trial, this can cause programming issues in larger courts and is not always achieved.

**Question 6**

a) *Do you agree with the proposal that the duty to lodge the written record of the CBM with the court be placed with the Crown?*

b) *If not please provide alternative proposals with reasons.*

c) *Is the time-scale for lodging with court appropriate?*

d) *If not please provide alternative time-scale proposals with reasons.*

6(a) and 6(c) Yes
Service of Indictments and First Diets

Question 7

a) Do you agree in principle that cases should be indicted to a first diet only as outlined in the proposals?

b) Do you agree with the proposal to amend the time scale in section 66 (6) of the 1995 Act to facilitate the proposed new procedure?

c) Do you have any comments on the proposals for amendment of section 71 with regards to parties’ responsibilities?

7(a) and 7(b) Yes.

7(c) No. We are unable to assess the full impact of the proposed amendments to primary Legislation at this stage. The form and content of the written record of the CBM is to be prescribed by Act of Adjournal. We reserve the right to comment upon it in due course.

Time Limits

Question 8

a) Do you agree in principle that the current time bar (section 65 (4)(b) of the 1995 Act) requires to be amended to facilitate the proposed new procedures?

b) Do you agree the 110 day period (section 65 (4)(b) of the 1995 Act) should be amended to 140 days as outlined in the proposals?

8(a) and 8(b)

There is no real justification put forward for the proposed increase. The only point in favour of increasing the period from 110 to 140 days is that it would be administratively convenient for the Crown for there to be the same period in Sheriff Court solemn procedure as in High court cases.

The majority of the Association consider there are, however, more important concerns which point to it being both appropriate and proportionate to retain the period of 110 days in Sheriff Court proceedings:

(i) The Consultation Paper proposes that there should be more preparation time at an early stage. That is the purpose behind the creation of the CBM. At this point the Paper is advocating the proposed extension because “more time is needed to prepare between the First Diet and Trial Diet”. Surely the Crown cannot have it both ways. The purpose of the First Diet is to establish inter alia that the Crown is prepared. If the Crown is not going to actively prepare its case until shortly before or after the First diet an extension to 140 days is unlikely to suffice.
(ii) It must be acknowledged that, particularly in these difficult financial times with numerous constraints upon the public finances, it is very expensive to keep accused on remand for another 30 days.

(iii) A number of cases in the Sheriff Court under Solemn procedure do not attract either a custodial sentence or a sentence of great length. Without considering the matter of "discount" a period of remand of 140 days represents a sentence of over 9 months.

(iv) The experience in the High Court suggests that the "140 day period" is frequently exceeded. This would be unconscionable in many Sheriff Court cases.

The majority accordingly favour retaining the period of 110 days.

**TV Links**

**Question 9**

a) *Do you agree in principle to the proposal for amendment to section 77(1) of the 1995 Act?*

b) *What are the potential benefits to the system?*

c) *What potential problems could arise?*

9(a) In principle yes, although as it is apparently a precursor to "changes being made in the future" we consider it may be premature to remove the requirement that the accused must sign the guilty plea.

9(b) Cost of transporting an accused.

9(c) Lack of reliable technology. Until reliable technology is available in ALL criminal Courts Section 77(1) should remain in its present form.

**Written Narrations**

**Question 10**

a) *Do you agree in principle with the proposal to introduce written narrations in sheriff court solemn cases, where a plea of guilty is tendered (no evidence having been led)?*

b) *What are the potential benefits to the system?*

c) *What potential problems could arise?*

10(a) In principle.

10(b) Those highlighted in the consultation document. Such a document would provide the sheriff with advance notice of the circumstances of the offences.
10(c) Written narrations are likely to be more practically achievable when the accused is pleading to a Section 76 indictment. Where no adequate notice of a plea has been given to the Crown, particularly in a busy First Diet Court or even at a Trial sitting, such narrations, containing mitigating factors by the Defence, are unlikely to be available. Mandatory written statements will result in a further calling of the case which may not otherwise be required if reports are unnecessary. If reports are however to be called for, the narrative can be prepared in the intervening period, in which event it would assist the Sheriff if the written narration is made available in advance of the sentencing diet.

SHERIFFS’ ASSOCIATION
RESPONSE TO THE FINANCE COMMITTEE OF THE SCOTTISH PARLIAMENT REGARDING THE CRIMINAL JUSTICE (SCOTLAND) BILL, INTRODUCED 20 JUNE 2013

[1] Sheriffs have no responsibility for costs or budgeting in the courts where they sit. In those circumstances, we have considered it appropriate to make only some general comments in response to the questions headed ‘WIDER ISSUES’. However it seems self-evident that if any reform leads to more court time being expended on cases, then there will be the following consequences:

- If courts have to sit late, then there is likely to be a requirement to pay staff overtime or give them time of in lieu of extra hours worked.

- There will be an increase in collateral costs, such as police, custody officers, legal aid.

- If courts are expected to spend more time on individual cases, then there will inevitably be delays in the processing of the cases through the courts.

[2] We would have thought it a very difficult task to predict the savings in time, if any, to be gained from the implementation of, for example, the Bowen provisions regarding sheriff and jury procedure. We consider that it will take some time for prosecutors and defence lawyers to become familiar with new concepts such as the compulsory ‘business meeting’ prior to the first diet and it is difficult to predict how effective that will be in saving time. An analogy might be thought to lie in the ‘defence statement’ introduced into solemn procedure by Section 124 of the Criminal Justice and Licensing (Scotland) Act 2010 (becoming section 70A of the Criminal Procedure (Scotland) Act 1995). Experience shows that perhaps less information is imparted in these statements than might have been expected or hoped for.

[3] It is therefore perhaps over-optimistic to attach any particular figure to any savings which it is hoped will flow from the changes set out in the Bill.

[4] The sheriffs have no control whatsoever over the number of prosecutions brought or the level (summary or solemn) or court in which they are to be brought. We therefore cannot comment on the effect of the Carloway provisions, i.e. the removal of the requirement for corroboration, on the number of cases brought.
[5] Similarly, we would have thought that it would simply be speculative to predict whether more or less cases will go to trial once the requirement for corroboration is removed.
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from South Lanarkshire Council

Please find attached South Lanarkshire Council's response to the consultation request on the Criminal Justice (Scotland) Bill. I would like to take this opportunity to contribute to the formulation of the proposed legislation.

Overall, it is our view that the Criminal Justice (Scotland) Bill represents an important opportunity to improve the delivery of justice to victims of certain offences, who have previously not been able to access court due to the need for corroborating evidence.

The other measures relating to knife crime, people trafficking and the role of the appropriate adult are also welcomed.

There is however great concern that the effect of the expected increase in nominated council officers undertaking the role of appropriate adult has been underestimated and will place a burden on local authorities.

Harry Stevenson
Executive Director
Social Work Resources
Children and Justice Services
23 August 2013

RESPONSE

South Lanarkshire Council, Social Work Resources provides a wide range of community services which will be affected by the Criminal Justice (Scotland) Bill. The Council in partnership with Lanarkshire Criminal Justice Authority provides supervision, guidance and support to offenders throughout South Lanarkshire. South Lanarkshire Council also provides a service to three sheriff courts within the Lanarkshire area.

In addition to this South Lanarkshire Council is at the forefront of developing strategies to tackle domestic abuse. This work is co-ordinated through Doorway - a multi-agency partnership involving social work, Women's Aid and other partners. This work provides and implements a strategic framework that promotes and supports multi-agency response to domestic abuse and provides improved protection for women, children and young people.

As such we would like to express our thanks for the opportunity to contribute to a statutory provision which will have an effect on our service provision.

This submission has been structured thematically, in the suggested format.

Police powers and rights of suspects (Part 1 of the Bill)
It is our view that overall the provisions made in the bill are reasonable and provide
adequate protection for accused persons, while allowing the police adequate opportunity to make investigation.

The provision of immediate access to a solicitor is now a requirement and in our view will reinforce the rights of the accused while safeguarding victims and witnesses.

We have no view on the reduction time that accused persons can be kept in police custody without charge, provided this is sufficient time for the police to make their investigations. It is noted that this part of the bill follows the recommendation of Lord Carloway and therefore we would on balance support this.

The inclusion of children up to the age of 18 and the provision for questioning children and vulnerable adults is welcomed, and it is hoped that it will lead to a more accessible and fairer system for accused persons within those categories. This provision however is likely to lead a substantial rise in the number of requests for officers of the local authority to act as appropriate adults. Disappointingly it is clear from the figures published that this has not been taken account of and the suggestion that Local Authorities will be able to manage this provision from existing resources is unrealistic and in our view requires revising.

It is proposed that the final say in whether or not a young person retains access to a solicitor will lie with the appropriate adult. This is very much welcomed by us as it takes account of intra familial offending and will enhance the rights of certain accused persons in particular circumstances. Again though this is likely to lead to an increase in demand for officers of the local authority to act as appropriate adults.

**Corroboration, admissibility of statements and related reforms (Part 2 plus section 70 of the Bill)**

In our view the abolition of the corroboration rule in criminal proceedings is to be welcomed. This measure will assist the victims of domestic and personally violating crimes to have a better opportunity to have their voice heard. The current system places an unreasonable and unrealistic burden on those responsible for the prosecution of these offences and it sets the bar so high as to deny meaningful justice to the victims of these crimes. The nature of these offences means that corroboration is often not available and while it is recognised that not every case can be convicted, victims are currently being denied justice unnecessarily. As an organisation which works in partnership to support the victims of these offences we have experience of the trauma and distress caused by these cases and therefore we would support the proposal.

**Court procedures (Part 3 plus section 86 of the Bill)**

The increase in the length of time which an accused person can be remanded for is not something that is to be welcomed, however in our view it is a better development than justice being denied to the victims of crime or those accused of a crime due to a lack of preparedness by either the prosecution or defence.

The increase in the majority required for a guilty verdict to be recorded is an understandable counterbalance to the abolition of the rule of corroboration. We have some concerns that certain offences which by their nature will always require a jury to assess the credibility of a witness, will on too many occasions become subjects of
unnecessarily intrusive questioning. It is our concern that in cases such as these where a victim of a crime has been subject to needless and invasive questioning Jurors will confuse trauma with unreliability and unduly find defendants not guilty.

Therefore we would ask that consideration be given to an evaluation of the efficacy of Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. It is our view that the removal of the corroboration requirement, coupled with an increase in jury majority may lead to an increase of incidences whereby victims of certain crimes are targeted by the defence and unduly traumatized.

Overall despite these reservations, we would support the increase from simple majority to two thirds.

**Appeals, sentencing and aggravations (Parts 4 and 5 and sections 83 to 85 of Part 6 of the Bill)**

We welcome the proposal to raise the maximum sentence for handling knives and offensive weapons from four to five years. It is our view that this will reinforce to both the public and those who commit this offence the seriousness of the offence.

The proposals for prisoners on early release is to be welcomed and recognises the breach of public trust committed by people who are on early release when they commit an offence. It is our view that this provision should be extended to include all community-based disposals. This would underline to the public at large and offenders the importance of complying with community-based punishments. By not including all community-based disposals within this legislation, it is our view that there is a subconscious devaluation of these disposals within a court setting and to the public at large.

We welcome the proposal to make people trafficking an aggravated offence factor. Scotland’s status as a destination country for trafficked people is unwelcome and it is important to recognise the role that we all have to play in the eradication of people trafficking. Making people trafficking an aggravating offence factor sends a message to those involved in this activity about the priority that will be given to their detection, prosecution and punishment.

The additional provision of television links for court is also a welcome development as it will allow vulnerable victims and witnesses of crime, to give evidence in a less intimidating atmosphere. Presumably it will increase the number of children and vulnerable adults willing to give evidence which can only be a good thing.

**Closure**

In summation we are supportive of a number of the proposals made in the Criminal Justice (Scotland) Bill, however we are concerned about the unintended consequences of some of the provisions such as:

- A large increase in the number of nominated Council officers undertaking the role of appropriate adult
- An increase in intrusive questioning of witnesses in certain cases
- An indirect devaluation of community based court disposals.
Overall though we welcome the abolition of the corroboration rule, the introduction of greater use of TV links and People Trafficking being made an aggravating factor.
Survivors Empowering, Educating and Supporting Abused Women (SEESAW) is a user-led group of women survivors of rape and child abuse. We set up the group in November of last year, empowered by having had one-to-one and group counselling at the Rape Crisis Centre in Glasgow.

The aims of the group are:

- to remain a user-led group of women survivors of sexual violence
- to offer support, empowerment, education and awareness raising for ourselves and other women survivors of sexual violence
- to support women survivors whether they have gone through the ‘justice system’ or not
- to campaign for an improvement in conviction rates and a cultural shift in attitudes to crimes of sexual violence

We are still closely involved with Rape Crisis Scotland (RCS) and have read their briefing paper (July 2013) on the Criminal Justice (Scotland) Bill. We are indebted to RCS for bringing the bill to our attention and for the comprehensive background they provide to the Bill.

As survivors of sexual violence, we would like to add our voice to that of Rape Crisis Scotland to highlight areas of concern we have with aspects of the Bill relating to crimes of sexual violence.

1. We agree with Rape Crisis Scotland that removing the requirement for corroboration would result in improved access to justice for victims of sexual crime but, because it will not be implemented retrospectively, survivors of historic child abuse or rape will not have their cases heard.

   If retrospective application can be applied to the Double Jeopardy (Scotland) Act 2011, why not to the abolition of corroboration?

2. Another concern is the raising of the simple majority verdict from 8 out of 15 to 10 out of 15. 8 out of 15 is a simple majority, so why not stick to that?

   One of our aims as members of SEESAW is to change society’s attitude to crimes of sexual violence. This is because public perceptions are largely negative and apportion blame to the victim when background information on the victim is allowed (in the vast majority of cases). If the simple majority is increased, so is the likelihood of unenlightened attitudes to be represented on the
jury. The conviction rate for perpetrators of rape and sexual violence is already shockingly low. We don’t see how this change will help raise the conviction rate.

3. The Scottish Government has previously indicated its commitment to introduce judicial direction in sexual offence cases by giving factual information on aspects such as delayed disclosure and apparent lack of physical resistance. Because of the lack of information and understanding surrounding crimes of sexual violence, we would very much welcome this guidance being introduced.

We hope you take into account the concerns we have before this Bill becomes an Act.

Margaret Airlie
Secretary, SEESAW
August 2013
Introduction

Together welcomes the opportunity to respond to this Stage 1 Call for Evidence on the Criminal Justice (Scotland) Bill. This response specifically focuses on the extent to which the provisions in the Bill will succeed in achieving the Scottish Government's policy aim of 'making rights real' for children and young people, as outlined in the Children & Young People (Scotland) Bill currently being scrutinised by the Education and Culture Committee. In producing this response, Together is drawing from its 2012 State of Children's Rights report and consultation with children's organisations through its 2013 State of Children's Rights seminars. The 2012 report is based on research evidence, views and opinions gathered from over 100 professionals working with and for children who attended Together's 2012 seminars and seventy-nine children's organisations who completed an online survey.

Together would like to concentrate on three specific issues in this response: the best interests of the child, equal protection from assault for children and the age of criminal responsibility. Together's key messages to the Justice Committee are that:

- The policy intention of section 42 to place a duty on constables to consider the best interests of the child when holding, arresting, interviewing or charging a child is welcome. Together seeks assurance that the use of the word 'wellbeing' in the Bill would achieve this policy intention.
- Together also urges the Justice Committee to ensure that the best interests of the child are also taken into consideration when holding, arresting, interviewing or charging a parent.
- Together calls on the Justice Committee to take heed of international calls to give children equal protection from assault and bring this forward through the Bill.
- The Bill provides an opportunity for the Scottish Government to fulfil its commitment to consider raising the age of criminal responsibility. Together urges the Justice Committee to take this forward through the Bill.

The best interests of the child

1. Together welcomes the policy intention of section 42 of the Criminal Justice Bill to place a duty on constables to consider the best interests of the child when holding, arresting, interviewing or charging a child. However, Together notes that the wording of the duty in section 42 (2) is to "treat the need to safeguard and promote the wellbeing of the child as a primary consideration" and seeks assurance that the use of the word 'wellbeing' would achieve the policy intention of considering the 'best interests' of the child.
2. Considering the best interests of the child helps to progress a recommendation made by the UN Committee of the Rights of the Child to the UK in 2008 to “take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children, including in the area of criminal justice and immigration”. Article 3 of the UNCRC states that “the best interests of the child shall be a primary consideration in all actions affecting children”.

3. Together would be keen that the Scottish Government takes into consideration the best interests of the child throughout the Criminal Justice (Scotland) Bill and not only within section 42. The adult criminal justice system can often fail to acknowledge the wider impact that decisions can have on children. For example, the decision to send a parent to prison is likely to have a tremendous impact on a child. Together would like to bring the Justice Committee’s attention to a recommendation made to the UK in the 2012 Universal Periodic Review process by Slovenia to "ensure that the best interests of the child are taken into account when arresting, detaining, sentencing or considering early release for a sole or primary carer of the child..."

4. Each year in the UK, more children experience a parent's imprisonment than a parent's divorce. Children's experience of a family member's imprisonment can be similar to experiencing bereavement, and its effects may include the child 'acting out' or becoming withdrawn, deterioration in performance at school, being bullied or becoming the bully, and increased risk of substance misuse. Children with a family member in prison suffer from serious mental health issues at three times the rate of other children and are at higher risk of offending and of ending up in prison themselves.

5. Following its Day of General Discussion in September 2011, the UN Committee on the Rights of the Child reiterated that children of prisoners have the same rights as other children and that State parties should “…ensure that the rights of children with a parent in prison are taken into account from the moment of the arrest of their parent(s) and by all actors involved in the process and at all its stages, including law enforcement, prison service professionals, and the judiciary”. Decisions that have a direct impact on children, such as the imprisonment of a parent, fail to take the child’s best interests into account as a primary consideration. Together would urge the Justice Committee to consider ensuring that the best interests of the child are also taken into consideration when holding, arresting, interviewing or charging a parent.

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Equal protection from assault

6. In Scotland, the continued acceptance of hitting children is detrimental to attempts to protect children from physical abuse. The current acceptability of physical punishment within Scots’ law means that children do not have the same level of protection from violence under the law as adults. Section 12(i) of Children and Young Persons (Scotland) Act 1937 preserved the rights of parents, teachers and others with lawful charge of or control over the child to administer punishment. The Children (Scotland) Act 1995 requires that, in exercising this right, adults must act in ‘the interests of the child’. While outlawing the assault, ill-treatment or neglect of a child, the 1937 Act therefore permitted the physical punishment of children as ‘reasonable chastisement’. In 2003, the Scottish Parliament passed the Criminal Justice (Scotland) Act. Section 51 of that Act prevents adults using implements, delivering blows to the head and shaking children as a physical punishment. While these specific practices are now prohibited, parents are still protected by the law when they physically punish a child.

7. Together would like to bring the Justice Committee’s attention to one of the UN Committee on the Rights of the Child’s recommendations to the UK in 2008 to “prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences”5. This recommendation has recently been repeated by a number of countries through the 2012 review of the UK through the Universal Periodic Review:

“Take measures to ensure the freedom of children from physical punishment in accordance with the Convention on the Rights of the Child.” (Norway)

“Introduce a ban on all corporal punishment of children as recommended by the CRC and other treaty bodies” (Finland)

“Reconsider its position about the continued legality of corporal punishment of children”6. (Sweden)

In addition, in May 2013, the UN Committee Against Torture recommended that “the State party prohibits corporal punishment of children in all settings…repealing all legal defences currently in place, and further promote positive non-violent forms of discipline via public campaigns as an alternative to corporal punishment.”7

8. Despite these repeated calls from UN treaty bodies and the UK’s examination under the Universal Periodic Review, children in Scotland still do not have the same protection from assault as adults in law. Children’s organisations continue to raise the need for the removal of the defence of ‘justifiable’ assault and for the promotion of positive, non-violent parenting methods. Together’s 2011 State of Children’s Rights report recommended that any form of physical violence against a person under 18 should be a criminal offence and that the Scottish Government should remove the defence of ‘justifiable assault’.8 Together’s 2012 State of Children’s

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7 Para 27 http://www2.ohchr.org/english/bodies/cat/cats50.htm
Rights report recommended that children be given equal protection from assault in law.9

9. The current ‘justifiable assault’ defence undermines the work that professionals are doing with families on positive parenting. The Scottish Government needs to promote positive approaches to discipline within their ongoing policy programmes and public information campaigns. Parents and carers need to be equipped with alternative forms of behaviour management techniques in order to allow them to support and manage difficult behaviour.

10. More than half of the Council of Europe’s 47 member states have either achieved full prohibition or committed themselves to do so soon. Among the 27 EU states, just four – the UK among them – have neither prohibited nor committed themselves to do so.10 If the Scottish Government is serious about its commitment to make Scotland “the best place to grow up”, it needs to give children equal protection from assault in law.

Age of criminal responsibility

11. Together would like to bring the Justice Committee’s attention to one of the UN Committee on the Rights of the Child’s recommendations to the UK in 2008 to “raise the minimum age of criminal responsibility in accordance with the Committee’s General Comment n° 10.”11 This recommendation has recently been repeated by a number of countries through the 2012 review of the UK through the Universal Periodic Review:

"Consider the possibility of raising the minimum criminal age". (Belarus)
"Consider the possibility of raising the age of criminal responsibility for minors“12.(Chile)

12. As reported in the 2011 State of Children’s Rights report, the age of criminal responsibility in Scotland currently remains one of the lowest in Europe.13 The introduction of a minimum age for prosecution set at 12 through the Criminal Justice and Licensing (Scotland) Act 2010 reflects a recognition that the children’s hearings system is the appropriate place to do so, rather than the criminal justice system. However, Scotland’s very low age of criminal responsibility remains in statute and the ‘criminal justice consequences’ of referral to the children’s hearings system on the offence ground, such as a criminal record, will persist for a number of children as young as 8 even after further changes made in the Children’s Hearings (Scotland) Act 2011 come into force.

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10 Within the EU, 17 states have banned it completely and another 6 are committed to doing so. Only four countries in the EU have neither achieved this reform nor committed to it: France, Belgium, the UK and Malta.
13. In the Do the Right Thing progress report, the Scottish Government has committed to give ‘fresh consideration to raising the age of criminal responsibility from 8 to 12’. This proposal, which addresses a recommendation from the UN Committee, is strongly supported by children’s organisations. It is hoped this change could lead to an increased emphasis on addressing the specific needs of children within the justice system which can often include issues such as neglect or abusive treatment. It is therefore welcome that the Scottish Government has pledged to take a fresh look at the issue, and Ministers should take action now.

14. Together was one of a number of children's organisations to write a joint letter to the Minister for Children & Young People following the Bill’s publication to raise concern about the omission in the Bill to raise the minimum age of criminal responsibility. The Scottish Government's commitment to give fresh consideration to raising age of criminal responsibility is with a view to bringing legislative change within the lifetime of this Parliament (2016). Its omission from this Bill would be a missed opportunity to fulfil the Scottish Government's commitment. Together urges the Justice Committee to consider raising the age of criminal responsibility through this Bill.

About Together
Together (Scottish Alliance for Children’s Rights) is an alliance of children's charities that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) in Scotland. We have 233 members including large international and national non-governmental organisations (NGOs) such as UNICEF UK, Save the Children, Barnardo's and CHILDREN 1st through to volunteer-led playgroups and after school clubs. Our activities include:

• Collating an annual State of Children’s Rights report to set out the progress made to implement the UNCRC in Scotland.
• Working in partnership with the Scottish Government and Scotland's Commissioner for Children and Young People (SCCYP) on the Scottish Children's Rights Implementation Monitoring Group to develop a common understanding on progressing the UNCRC.
• Submitting the NGO alternative report to the UN Committee on the Rights of the Child to provide an independent NGO perspective on the extent to which Scotland is meeting its UNCRC obligations.

Together (Scottish Alliance for Children's Rights)
30 August 2013

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Justice Committee
Criminal Justice (Scotland) Bill
Written submission from UNISON

Thank you for the opportunity for UNISON Police Staff at the Justice Committee on 2 October.

As you intimated during the meeting, there was insufficient time during the hearing for the role of the Police Custody and Security Office (PCSO) to be discussed.

Section 1 of the Criminal Justice (Scotland) Bill deals with custody. However, the main body of staff who deal with custody has been, with one exception, omitted from the Bill.

The role of the PCSO is defined in Section 28 of the Police and Fire Reform (Scotland) Act 2012.

This section gives the PCSO clear authority to carry out roles as prescribed by that Act.

However, it would appear that the Criminal Justice (Scotland) Bill does not reflect the duties and roles of the PCSO. Referring to “Constable” throughout the document and not allowing the use of PSCO’s as an alternative.

The only reference to Police Staff is in paragraph 33(5) which is very specific in that it refers to communicating with vulnerable people. It does not specifically relate to the role of the PCSO as it refers to Section 26(1) of the Act which is the Police Authorities general ability to appoint Police Staff. Examples of where it would be prudent to make specific reference to PCSOs are Chapter 6: paragraph 37: use of reasonable force; paragraph 40(2): power of search on arrest. These are specified in Section 28 of the Police and Fire Reform (Scotland) Act 2012.

We would be grateful if the Justice Committee would consider amendments to the Bill to reflect the PCSO role.

Stevie Diamond
UNISON Police Staff Branch
11 October 2013
INTRODUCTION

1. Victim Support Scotland welcomes the introduction of the Criminal Justice (Scotland) Bill. Victim Support Scotland regards the Bill as an important and progressive step towards achieving equitable and effective access to justice for victims of crime in a 21st century Scotland.

POLICE POWERS AND THE RIGHTS OF SUSPECTS

2. Victim Support Scotland welcomes the grounds for arrest being clearly set out in section 1; the concept of arrest on grounds of reasonable suspicion, with an investigation continuing beyond that, is likely to be more straightforward and easily understood by the general public.

Decision on charge – victims’ right to information

3. The Bill provides that the police may report a case to the Procurator Fiscal without charging the suspect. If a decision on charge isn’t taken until the Procurator Fiscal formally charges a suspect in court, this may result in a long delay for the victim – in some cases up to a year – before the victim is informed of the official evaluation / seriousness of the case, which can result in uncertainty and confusion on the part of the victim.

4. Whether the police decide to charge a suspect or report the case to the Procurator Fiscal without charge, it is pertinent that victims are informed at the earliest possible opportunity of any decisions taken. Victims’ right to information, set out in the EU Directive establishing minimum standards on the rights, support and protection of victims of crime,\(^1\) includes a right to receive information “enabling the victim to know about the state of affairs of the criminal proceedings.” In Scotland, this would certainly apply to decisions made on charges or reports to the Procurator Fiscal, but also to the nature of any charges brought.

5. Furthermore, both the aforementioned EU Directive and the proposals contained in the Victims and Witnesses (Scotland) Bill give victims the right to receive information about any decision not to proceed with or to end an investigation or not to prosecute, and the reason for that decision.

6. The need for the dissemination of this information is further emphasised by the victim’s right to review a decision not to prosecute, also introduced by the EU

Directive establishing minimum standards on the rights, support and protection of victims of crime[2]; it is crucial that the victim is informed of any decision taken regarding the prosecution of a suspect in order for them to timeously act on this right, as this would form an initial reference point for review.

Liberation from custody
7. Section 6 sets out the information that is to be recorded by police in relation to any arrest. Section 6 (4) (a) provides that if a person is released from custody there must be information recorded regarding details of the conditions imposed.

8. Any decision to liberate a suspect from custody must, as a priority, take the safety and security of the victim(s) and any witnesses into consideration. It is also pertinent that the victim is informed of the decision as quickly as possible.

9. Learning that a suspect will be released from custody may be a great source of anxiety and distress for a victim; they may be fearful that the suspect may get in contact or that they may run into the suspect in the local community. At the stage of release, with the investigation ongoing and the police gathering witness statements etc., there may be an increased risk of threat and intimidation towards the victim and other witnesses.

10. If a suspect is released and conditions are set, for instance that the suspect must refrain from contacting the victim, it is vital that the victim is informed of these conditions and where he/she should turn to report a breach.

11. Victim Support Scotland would welcome provision included in the Bill to ensure that the safety and security of victims and witnesses is routinely addressed, and that victims are timeously informed, when a decision is taken to release a suspect.

Period of custody
12. Victim Support Scotland notes that the Bill does not provide for an extension of custody without charge beyond the maximum 12 hours in exceptional circumstances.

13. Victims of any type of crime, no matter how ‘serious’ it is considered to be, may be vulnerable to threats and intimidation from the suspect. Therefore any decision about releasing a suspect must, in our view, consider first and foremost the safety and security of the victim, in addition to other factors mentioned such as seriousness of the crime and possibility that the suspect will attempt to destroy evidence.

Investigative liberation
14. It is stated that these powers are most likely to be of use in the investigation of serious crime (Policy Memorandum, page 12, para 58).

15. Again, the safety and protection of the victim and other witnesses must be the priority consideration when deciding whether or not to liberate a person from custody.

Where investigative liberation is granted, it is vital that the victim is informed of the liberation, any conditions and where he/she should turn to report a breach of conditions.

16. The Bill provides that a suspect can apply to a sheriff to have any conditions amended and/or terminated. Victims should be kept informed of any amendments or terminations, particularly those which relate to them directly.

17. Victim Support Scotland welcomes the provisions in section 14(3) setting out that a breach of any condition may be penalised by a fine or a prison sentence. The bill provides that any breach which would constitute an offence were the person not subject to liberation conditions may be taken into account in sentencing for that offence. Victim Support Scotland calls for stronger provision to ensure breaches are penalised and routinely taken into account in sentencing.

Questioning
18. Victim Support Scotland welcomes the provision allowing the police to question a suspect after charge. In so far as the rights of the suspect are protected, and further questioning would offer benefits to the investigation of crime, we believe this provision is justified and indeed conducive to an effective justice system.

CORROBORATION, ADMISSIBILITY OF STATEMENTS AND RELATED REFORMS

19. Corroboration represents an unfair and unnecessary barrier to justice for many victims of crime, particularly those for whom the crime was committed against them in private, such as many crimes of sexual or domestic violence. One likely consequence of the Cadder decision giving a suspect access to legal advice is that it will become even more difficult for police and prosecutors to provide corroboration of evidence as it will be less likely that a suspect will admit to a crime or provide corroborating statements. We are concerned and compelled by the statement on page 24 of the Policy Memorandum (para 137) that “it [corroboration] plays a major part in the solicitor’s decision to advise the client to say nothing for fear of the client inadvertently corroborating other evidence and thereby creating a sufficiency, which would otherwise not exist. As a result, whether a person is prosecuted for and convicted of an offence conviction which would be inevitable in other jurisdictions can depend entirely on whether the person elects to respond to questioning by the police.” The likely consequence is that fewer cases will proceed to court.

20. Victim Support Scotland therefore strongly agrees with and supports the Scottish Government’s assertion, stated on page 7 of the Policy Memorandum, that:

21. “abolition of the requirement for corroboration is a necessary step towards a system which is able to take account of all fairly obtained evidence, respecting not only the accused but also victims and their families”.

22. Removing the requirement for corroboration whilst retaining the ‘beyond reasonable doubt’ test required for a conviction will enable more cases to be prosecuted
in court on the basis of quality of evidence, as opposed to only those which pass the current rigid and bureaucratic quantitative test of the evidence. This means more victims will be granted access to justice, as is their right.

23. It is important to acknowledge that this does not mean that in practice the judge or jury will not take account of corroboration, or lack thereof, when determining how much weight should be given to the testimony of a witness. Even without requirement for corroboration, cases will still need to carry, according to the Crown’s judgment, a ‘reasonable prospect of conviction’ in order to proceed to court. Additionally, the judge or jury will still need to be satisfied that the evidence presented convinces them ‘beyond reasonable doubt’ that the accused committed the crime.

24. We are compelled by the findings of Lord Carloway’s research which found no evidence to support the argument that the requirement for corroboration protects against unsafe convictions. Victim Support Scotland wants to see a criminal justice system which acquits the innocent and convicts the guilty. It is important to remember that miscarriages of justice do not only occur when an innocent person is wrongly convicted,

25. “They also occur when the guilty are acquitted or when it’s impossible to prosecute when there is sufficient evidence there to convict.”

26. Victim Support Scotland would wish to reiterate the point made in the Policy Memorandum (page 23, para 134):

27. “It is not clear why, on the one hand, a case where there is a single independent and impartial eye-witness to an offence could not be prosecuted, while one involving a number of witnesses who may be unreliable (e.g. rival gang members in a street fight or feuding neighbours in a dispute) should be subject to this artificial restriction.”

COURT PROCEDURES

Increase to jury majority required for conviction

28. If the requirement for corroboration is removed, juries will still need to take into account the quality of all the evidence that has been led and to believe that the case has been proven ‘beyond reasonable doubt’ in order to convict. Moreover, a case will still require to pass the prosecutorial test to enable it to reach the stage of a trial; and the current provision to uphold a claim from the defence that there is ‘no case to answer’ will still be available to judges who believe there is insufficient evidence to prove a case after all evidence from the prosecution has been led. As such, we would welcome further information as to why there is a need to increase the jury majority required to convict in order to provide an additional ‘safeguard’ in light of the removal of the requirement for corroboration. The inference seems to be that the current majority required to convict is unsafe. Victim Support Scotland is concerned that the ultimate

3 Frank Mulholland, Lord Advocate. European Victims Week Conference, Glasgow 20 Feb 2012.
outcome is that one barrier to justice (requirement for corroboration) is simply being replaced by another (an increased jury majority required to convict).

29. Because the contempt of court legislation effectively bans research into how juries reach their decisions, it is impossible to produce evidence to support any particular formulation of the number required to reach a majority verdict. But Victim Support Scotland would suggest that it should not be so high as to act as an impediment to certain and swift decision-making in the interests of victims and accused persons.

30. In conclusion, Victim Support Scotland agrees with Lord Carloway\(^4\) in his initial consideration of increasing the majority required for conviction, as he

31. “did not...regard such an alteration as either necessary or desirable. [The review] did not consider that the system of majority verdicts was directly comparable with those in common law countries where unanimity, or near unanimity, is required for either a “guilty” or a “not guilty” verdict. Thus in these countries, failure to have a majority in favour of guilty does not lead automatically to acquittal, as it does in Scotland. Rather the elaborate process of a retrial may follow with all the implications that such a process might have on accused, witnesses and victims...The Review has been presented with no material to suggest that the majority verdict presents a problem or indeed that it results in a greater conviction rate than in other common law jury systems.”

Solemn procedure – implementation of Sheriff Bowen’s recommendations

32. Victim Support Scotland supports the provision requiring early communication between the defence and prosecution through the Compulsory Business Meeting.

33. Too often witnesses at Sheriff and Jury level are cited to appear on the first day of a sitting despite the fact that they will not be needed on that day. The resolution at an early stage relieves witnesses from having to attend a trial, protecting them from the potentially stressful and traumatic experience of giving evidence.

34. It is pertinent that victims are kept informed if/when a plea is accepted. If a plea has been accepted, the victim should be informed at the earliest possible stage by the appropriately assigned agency.

35. While many victims and witnesses do not want to go through the ordeal of having to attend court and give evidence, there are others who will want the opportunity to have their story heard and acknowledged. Where an early guilty plea is made, it is imperative that in eligible cases victims are at the very least given sufficient time and opportunity to provide a victim impact statement to the court. The victim impact statement should be considered an important source of information, particularly in regards to the gravity and impact of the offence, as well as allowing the victim an opportunity to have their voice heard by the court.

APPEALS, SENTENCING AND AGGRAVATIONS

Increase in maximum sentences for handling offensive weapons offences
36. Victim Support Scotland welcomes the increase in maximum sentences for handling offensive weapons offences. However, it will only be an effective deterrent in so far as it is part of a wider policy approach encompassing education and support aimed at promoting positive attitudes and choices to discourage people from placing themselves and others at risk of harm through the carrying and/or use of offensive weapons.

Sentencing prisoners on early release
37. Committing an offence while on early release should be treated as a serious offence in its own right, demonstrating an abuse of trust, and should be punished accordingly. Victim Support Scotland therefore welcomes the provision placing a duty on the court to consider imposing a section 16 Order in relevant cases, the aim of which is to raise awareness of the existence of these important powers for the courts.

Appeals and SCCRC
38. Victims involved in appeal cases may find that the process brings back many traumatic memories and experiences suffered as a result of the crime. Victim Support Scotland supports any reforms which will reduce any source of unnecessary delay in the appeals process whilst ensuring the process remains fair both to the accused and to the victim. It is also important that victims are kept informed and supported throughout the appeal process.

Aggravations as to people trafficking
39. Victim Support Scotland welcomes the provision introducing a statutory aggravation of people trafficking where it can be linked to other offences, for instance fraud, immigration offences, brothel keeping, drugs offences etc., bringing Scottish legislation into line with obligations under Article 4.3 of EU Directive 2011/36/EU on preventing and combating trafficking in human beings.

Nicola Merrin
Policy Officer
29 August 2013
Justice Committee

Criminal Justice (Scotland) Bill

Written submission from WAVE Trust

1. WAVE Trust welcomes the opportunity to comment on the proposed Criminal Justice (Scotland) Bill now under Stage 1 consideration by the Justice Committee. This brief submission will focus only on those areas in which WAVE Trust has significant knowledge and expertise. WAVE staff members are willing and able to provide additional information and offer testimony to the Justice Committee, if requested to do so.

2. This submission will be supplemented by making available to the Committee copies of WAVE Trust's report: Violence and what to do about it. That report and the conclusions summarised here are based upon more than a decade's work to identify, analyse and summarise the crucial lessons from hundreds of relevant research studies (and other credible sources of evidence) from Scotland, the UK and internationally.

3. There are three fundamental points that WAVE offers for this Committee's deliberations:

   a) **WAVE Trust strongly supports the proposed Bill's intent to give priority to the 'best interests' of children.** Scotland’s leaders have repeatedly expressed a commitment to making children’s rights 'real' in accordance with the UN Convention on the Rights of the Child (UNCRC). Successive Scottish Governments have also promoted the wellbeing of children. Both should be reflected in every relevant provision of this Bill. This means ensuring children are always accorded at least equal protection to that given to adults – and almost always accorded greater protection than adults (commensurate with their inherent vulnerability as children).

   b) **WAVE fully agrees with, and encourages the Committee to act favourably upon, the specific recommendations contained in the submission by the Children Are Unbeatable alliance about this Bill.** This proposed legislation is the appropriate vehicle to repeal the current Criminal Justice (Scotland) Act’s “justifiable assault” defence when children are subjected to corporal punishment by parents or those acting in loco parentis. This would bring this Bill into greater harmony with Scotland’s commitment to ‘Getting it right for every child’ (GIRFEC) and the Parliament’s recent cross-party vote in favour of Scotland becoming the best place to grow up.

   c) **WAVE’s research – spanning decades and continents -- reveals that there is not a credible evidence base for either the benefits of corporal punishment, or for physical discipline serving the best interests of the child.** On the contrary, there is a great deal of robust international evidence from a variety of perspectives and disciplines that undermines the rationale for a 'justifiable assault' defence for adults in relation to children.
4. In its *Violence and what to do about it* report, WAVE Trust extensively reviewed the research on the root causes of interpersonal violence. It also presents evidence-based recommendations for how best to prevent it from happening in the first place, as well as to keeping it from becoming an intergenerational problem for children, families, society and the public purse. This evidence base has grown and become more nuanced in the years since the publication of WAVE’s original report. Upon request, WAVE can provide key examples of the latest research.

5. To summarise, WAVE’s extensive review of the evidence showed that interpersonal violence requires an internal, personal propensity to react violently to the varied external, societal events that trigger such reactions. Without that propensity, such ‘triggers’ rarely result in violent behaviour. That propensity is not an inherent part of ‘human nature’. Instead, it is a learned behaviour/response. The social, emotional and neurological propensity to violence is usually learned – or, hopefully, avoided -- in response to the treatment and experiences of very young children in the earliest part of their lives.

6. The prime cause of a child developing a propensity to violence is absence of empathy; itself a result of the failure of parents or primary carers to attune and positively/securely attach with infants. Absence of such parental attunement/attachment, combined with harsh discipline, is a recipe for violent, antisocial offspring. The above findings flow from a body of research evidence tracing violent behaviour to parental competence and methods of family discipline; poor child rearing; and, “unskilled parenting”.

7. The same international, interdisciplinary research indicates that some parents unwittingly develop a propensity toward violence in their young children. Such parents use little positive reinforcement, while effective punishment for deviant behaviours is missing or erratic, and “dozens of daily interactions” reinforce coercive, negative behaviour. Poorly skilled parents often themselves respond by shouting or hitting, which can escalate in an upward spiral of aggressive interactions. The net result is that the child learns both the techniques and the moral justification for violence from the parents.

8. Most relevant to repealing the ‘justifiable assault’ defence is all the research indicating that a key predictor of future interpersonal violence is harsh family discipline. A plethora of studies indicate that harsh or explosive discipline of children leads to violence and criminality -- and that discipline styles typically run in families over many generations (as people tend, consciously or unconsciously, to copy the parenting styles of their own parents). These child victims of harsh and physical discipline are the ones most likely to grow up and perpetrate domestic violence, commit violent crimes and suffer mental health problems, both as young people and as adults. This process helps explain the truth of the famous remark by Professor David Farrington: "Anti-social children grow up to become anti-social adults who go on to raise anti-social children".

9. Three final points should be taken into account. First, parents (even in fairly extreme cases) rarely see or describe themselves as abusing or maltreating their children; rather, they are merely disciplining them. Second, some parents are simply “doing what comes naturally” by following the pathways laid down in their own early
learning, which is how the cycle of violence is perpetuated from generation to generation. And third, Scotland can, and must, break this negative cycle by properly supporting: positive parenting; alternatives to corporal punishment; and, secure, healthy attachment/attunement between babies (and young children) and their mothers/fathers/carers.

10. ‘Justifiable assault’ of children, in fact, has no justification. Therefore, this Bill presents a wonderful opportunity to adjust Scottish legislation in light of what has been learned about what does – and does not – actually result in effective discipline, thriving children, successful families and safe communities. Instead of perpetuating the slippery slope of ‘justifiable assault’, the Scottish Parliament now has the chance to draw a clear line marking the disapproval of corporal punishment within Scots law. Taking this action would benefit children, society and the public purse.

WAVE (Worldwide Alternatives to ViolencE Trust)
30 August 2013
1. The long title of the Criminal Justice (Scotland) Bill mentions its purpose as being to make provision about criminal justice. This includes provision about the rights of suspects in police custody.

2. In determining an appeal from the Divisional Court in Northern Ireland, the House of Lords confirmed in 2009\(^1\) that covert surveillance by public authorities of legally privileged consultations in prisons and police stations could in principle be authorised under the Regulation of Investigatory Powers Act 2000, but that enhanced authorisation procedures were necessary in order for such surveillance to be compliant with the European Convention on Human Rights.

3. The UK Government responded to the judgment by making statutory instruments\(^2\) which required, among other things, that any such surveillance be authorised by a Surveillance Commissioner rather than a senior officer of the relevant public authority. Different arrangements operate in the case of the intelligence agencies who now apply to the Secretary of State for authorisation.

4. In Scotland the relevant statute is the Regulation of Investigatory Powers (Scotland) Act 2000 which is an Act of the Scottish Parliament. It has the same lack of enhanced authorisation procedures for legally privileged consultations that was identified as a problem by the House of Lords in respect of the UK statute. However, corresponding provision to that made by the UK Government to rectify these defects has not been made to date by the Scottish Government.

5. It is submitted that the Government has been unacceptably slow in responding to this issue, potentially calling into question the legality of any such surveillance activity that has taken place to date. It therefore calls for Parliamentary intervention. Such intervention can usefully take place by making amendments to this Bill to provide for at least the same safeguards to be applied in Scotland as provided for in the UK statutory instruments.

6. The Committee is invited to recommend that such amendments be made.

Robert Wyllie  
17 July 2013

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\(^1\) In re McE (Appellant) (Northern Ireland), In re C (AP) and another (Appellants) (Northern Ireland), In re M (Appellant) (Northern Ireland) [2009] UKHL 15.  
About Zero Tolerance

Zero Tolerance is a national charity working to end men’s violence against women (VAW) in all its forms. We promote a primary prevention approach, believing that changing societal attitudes, values and structures is the key to ending gender-based violence. We also believe that pervasive gender inequality in our society creates a culture in which VAW is prevalent and tolerated and that this must change. More information about our work can be found on our website, www.zerotolerance.org.uk

Our comments on the Bill

We wish to comment on the aspects of the Bill which we believe will most affect people who have experienced sexual crime or domestic abuse. We are pleased that the Bill includes provision to abolish to requirement for corroboration; but concerned about the increase in the jury majority from 8 to 10 jurors.

We are concerned that changes to investigative liberation may have a negative impact on victims of domestic abuse, of whom at least 82% are female. (Reported incidents are the tip of a very large iceberg, and some forces seem to operate a dual arrest policy around domestic abuse incidents, so the real proportion of women victims may be much higher than 82%).

We agree with paragraph 278 of the policy memorandum that “The abolition of the requirement for corroboration will remove a potential barrier to the prosecution of domestic violence and sexual offences.” and with the statement in para. 136 that “The practical effect of the requirement for corroboration can be to deny access to justice for victims of [some] types of crime.” such as crimes often committed in private with no witnesses.

We share the concerns of Rape Crisis Scotland expressed in its evidence on the Bill that other aspects of the Criminal Justice system not covered by this Bill are not working well and need review or that more research and social campaigning is needed. For example:

- We would like the Scottish Government to act on its commitment to introduce judicial direction in sexual offences cases
- We believe that research into juries’ decision making processes is needed
- We believe there is a need for continued efforts to change public attitudes to sexual crime and domestic abuse (as all members of the public are potential jurors)
- We’d like a robust evaluation scheme
- We have concerns about the validity and value of the ‘not proven’ verdict and its use in rape cases
• We are concerned that sexual history and character evidence is still widely used despite provisions in the 2002 sexual offences act.

Zero Tolerance
30 August 2013
Justice Committee

Letter from the Cabinet Secretary for Justice to the Convener

Automatic early release of prisoners

This letter provides further background to the Scottish Government’s intention to end the system of automatic early release for certain categories of prisoners.

During his announcement today on the Scottish Government’s Programme for Government for 2013-14, the First Minister confirmed our intention to bring forward legislation to end the automatic early release of serious offenders. The proposals will affect serious offenders sentenced to serve prison sentences of 10 years or more, such as violent offenders, and sexual offenders sentenced to 4 years or more. These legislative changes, if approved by Parliament, will affect prisoners being sentenced after the legislative changes have been commenced.

We have stated clearly our aim to end the system of automatic early release once the conditions set by the McLeish Commission are met. The changes announced by the First Minister show we are committed to fulfilling that pledge.

The legislative basis for the current statutory system of early release has been in force since the Prisoners and Criminal Proceedings (Scotland) Act 1993 was enacted. The automatic element of the system applies to all offenders who receive a fixed (i.e. non-life) length of custodial sentence. Individuals sentenced to life imprisonment or who receive an Order for Lifelong Restriction are not released automatically, but on a discretionary basis after they have served the punishment part of their sentence set by the court and only as directed by the Parole Board taking account of public safety. Today’s announcement does not affect life or Order for Lifelong Restriction sentence prisoners.

The automatic element of the system of early release for fixed length sentenced prisoners operates in different ways depending on the length of fixed sentence imposed:

- Prisoners who receive a sentence of less than 4 years are called short-term prisoners and are released automatically and unconditionally at the half-way point of their sentence with the Parole Board having no role in the process.

- Sex offenders who receive a sentence of between 6 months and 4 years are subject to the above automatic early release rules at the half-way point, but are released on licence and liable to recall to custody for the remainder of their sentence if they breach their licence conditions.

- Prisoners who receive a sentence of 4 years or more are called long-term prisoners. They are entitled to be considered by the Parole Board for release between the half-way point and the two-thirds point of their sentence. If a long-term prisoner reaches the two-thirds point of their sentence and the Parole Board has not directed release by that point, they are released automatically. Long-term prisoners are always released on a licence.
Relevant provisions exist for the recall to custody of long-term prisoners who breach their licence conditions and the return to custody (by the courts) for both long-term and short-term prisoners who commit a further offence whilst released early as a punishment for abusing the trust placed in them after being released early.

**Proposals – overview**

Our announcement today is designed to help bring the focus back firmly on consideration of risks to public safety and public harm when our most serious fixed length sentence prisoners are being considered for early release.

For the first time since the current regime was brought in back in 1993, we will be empowering the independent Parole Board to take decisions about whether potentially dangerous prisoners should be released early with there being no longer automatic early release for the most dangerous fixed length sentenced prisoners. By empowering the Parole Board in this area, where a prisoner in this category is deemed (by the Parole Board) to pose an unacceptable risk to public safety, they will serve their entire sentence in prison.

Automatic early release will be ended for long term prisoners who are dangerous, such as violent offenders, who have received sentences of 10 years or more. The type of offences which would be covered includes culpable homicide, serious assault, attempted murder and robbery. In addition, automatic early release will be ended for sex offenders who have received sentences of 4 years or more. Full details will be included with the legislative provisions which are planned to be introduced, subject to its progress through Parliament, by way of amendments to the current Criminal Justice (Scotland) Bill.

**Proposals – detail**

By definition, automatic early release happens at present regardless of the risk to the public safety, i.e. even where a prisoner might be deemed an unacceptable risk to public safety, they are still released automatically. As a result of our proposed change to these arrangements, serious offenders, such as violent offenders, sentenced to 10 years or more will no longer be released automatically at the two-thirds point of their sentence. Instead, the Parole Board’s current role from the halfway point to the two-thirds point of sentence in assessing risks to public safety in terms of deciding early release will be expanded so that the Parole Board will be empowered from the half-way point of sentence all the way through to the end of sentence to decide whether a prisoner poses an unacceptable risk to public safety and, therefore, should not be granted early release.

Applying the policy to serious offenders receiving a sentence of 10 years or more will ensure a focus on those offenders who pose the highest risk to public safety. The vast majority of (non-life) offenders sentenced to prison for 10 years or more are convicted of serious crimes of violence such as serious assault.

There will be no change to the current system whereby if a long term prisoner is granted early release, the Parole Board will impose licence conditions on them. A breach of licence conditions can result in a prisoner being recalled to prison.
Subject to new provisions relating specifically to sex offenders (which are detailed below), long-term prisoners receiving sentences of between 4 and 10 years will continue to be treated under the present arrangements i.e. consideration for parole at half-way point of sentence, automatic early release at the two-thirds point.

**Proposals – sex offenders**

Sex offenders pose a particular risk to the public. This is already reflected in the special arrangements that apply for sexual offenders sentenced to 6 months to 4 years in prison who, when released early, are released on licence (in contrast with other short-term prisoners who, when released, are not released with licence conditions).

Given the special risks posed by sex offenders and in addition to the general policy of ending automatic early release for serious offenders sentenced to 10 years or more, we propose also to end the automatic early release of sexual offenders sentenced to prison for 4 years or more. As with serious offenders sentenced to 10 years or more, the Parole Board will have a new expanded role from the half-way point of sentence all the way through to the end of a sentence in assessing whether a sexual offender should be released with appropriate licence conditions. If the Board considers that a sexual offender poses an unacceptable risk throughout their sentence, the prisoner will serve his or her full sentence in prison.

As at present, the Parole Board, SPS and community justice services will ensure effective pre-release planning for those long term prisoners either being released early or reaching the end of their sentence.

**Timing**

We do not consider it possible to introduce these changes to the system of automatic early release retrospectively for those individuals already sentenced and serving their sentences under the existing system. The new system will apply, therefore, for offenders sentenced after the necessary legislative changes have been commenced.

Changes to the 1993 Act require primary legislation and the earliest opportunity to introduce such legislation will be through Scottish Government amendments to the current Criminal Justice (Scotland) Bill, subject to the Bill’s progress through Parliament. The Criminal Justice (Scotland) Bill already includes provisions to clarify the law on the powers of courts to impose additional sentences on offenders who commit offences while on early release from prison.
Impact of Proposal

The financial and other implications for justice bodies of the proposed changes to the system of automatic early release will be set out fully for Parliament when legislative amendments are introduced. The primary impact will be on the Scottish Prison Service, in terms of increased prisoner numbers, and the Parole Board for Scotland, through increased parole casework. As the changes will be applied to sentences only once necessary legislation is in place, the impact will take a number of years to feed through. The changes should be considered within the wider context of the overall reduction in crime and set of measures the Scottish Government is taking to reduce re-offending and ensure robust community-based alternatives to prison.

There will also be offsetting savings for community justice services in having to manage fewer high risk individuals in the community.

Summary

We consider that these proposals represent a practical and proportionate step towards our aim of completely ending the system of automatic early release, when the conditions set by the McLeish Commission are met. The change will ensure that for long-term serious offenders capable of causing serious harm to the public, such as violent offenders and sexual offenders, the risks to the public will assessed by the Parole Board and such offenders will only ever be released early if the Parole Board is satisfied that the risk to public safety of an early release is acceptable.

These changes will help ensure public safety is at the forefront of our system of early release for those who generally pose the biggest risks to the public, helping reassure victims, witnesses and communities.

Officials will engage with relevant stakeholders over the coming months to further clarify how these changes will operate in practice before, as noted above, it is our intention to bring forward Stage 2 amendments to the Criminal Justice (Scotland) Bill for the Committee to consider in due course.

I hope this is helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
3 September 2013
Justice Committee

Criminal Justice (Scotland) Bill

Letter from the Scottish Government to the Convener

I thought it would be helpful to write to you following the evidence session for the Criminal Justice (Scotland) Bill on 7 January 2014 to expand on some points that were discussed with regard to police powers of arrest in the Bill.

New power of arrest and existing powers

In line with the recommendations of Lord Carloway’s review, section 1 of the Bill will confer on the police the power to arrest a person without a warrant on suspicion that the person has committed, or is committing, a crime.

Currently the police have the power to arrest without warrant under the common law. In addition to their common-law power, the police also have powers to arrest conferred on them by various statutes. These powers are exercisable in relation to particular offences and are expressed in different ways in different Acts.

The Bill will simplify this landscape, making the law around arrest clearer for both police and citizens alike. Once the general power of arrest under section 1 of the Bill is in place, section 50 and schedule 1 will sweep away the present jumble of common-law and offence-specific statutory powers.

Section 1 of the Bill reflects what is reasonably understood to be the essence of the common-law power of arrest. With regard to non-imprisonable offences, section 1(3) lists examples of circumstances in which arresting someone for such an offence without waiting for a warrant can be considered to be in the interests of justice. The opening words clarify that it is not an exhaustive list and it ends with a catch-all reference to the risk of the person otherwise obstructing the course of justice unless arrested immediately.

Other than the abolition of the common law power of arrest, the Bill does not affect the existing powers of the police. This means that the police can continue to act to deal with cases arising from the need to protect people and property, for example when a person is threatening to commit suicide, or where a missing child is found and returned to her home address.

There was discussion during the evidence session about the powers available to the police to arrest a person in order to prevent a crime from being committed. Police constables have general duties under section 20 of the Police and Fire Reform (Scotland) Act 2012 in relation to preventing crime, maintaining order and protecting life and property. They can intervene in situations in fulfilment of those duties. Frequently the appropriate intervention will not be arresting a person, bearing in mind that arrest is the term used for taking a person into the police’s custody. It would be a very serious erosion of civil liberties if the police were given a general power to take people into their custody merely on the strength of a suspicion that a person might be about to commit an offence.
Of course this does not mean that the police need to stand by and watch an offence being committed. As mentioned, they can intervene in ways other than arresting a person. Moreover, as I said in my evidence, attempting or conspiring to commit a particular offence can itself be an offence for which a person can be arrested. Arrest in that circumstance is entirely consistent with the normal character of arrest as the person is taken into police custody not to stop the person doing something (or at least not just for that reason) but in order that the person can be dealt with in accordance with the law for committing an offence through attempt or conspiracy.

**Detention and arrest**

In the Bill, ‘arrest’ is the only label used for the act by which the police take a suspect into their custody with or without a warrant. At present the police can also take a person into their custody without a warrant by ‘detaining’ the person under section 14 of the Criminal Procedure (Scotland) Act 1995. Under the Bill as introduced the distinction between being in police custody having been detained, rather than arrested, will disappear. Like the move to a single statutory arrest power, this too gives effect to a recommendation of the Carloway Review.

The Government shares Lord Carloway’s view that it no longer serves any real purpose to use the distinct labels ‘arrest’ and ‘detention’ to describe the act of taking a person into custody on the strength of a suspicion that the person has committed a crime. Again, in the interests of simplicity and clarity, the Bill uses only one word to describe the act of taking a suspect into custody, i.e. arrest.

The committee has expressed concern that unless the label ‘detention’ is retained, the public and press will be unable to distinguish between the position of a person who is merely being questioned by the police and a person who is being held in custody to be brought before a court. The first point to be made in response to this concern is that all suspects are presumed innocent unless and until their guilt is proved to the satisfaction of a court of law. It is just as wrong to assume that a person who has been arrested is guilty as it is to assume the guilt of a person who has merely been detained.

The second point to be made is that, both in the present system and the system the Bill would create, it is the point of charge, not the shift from detention to arrest, which marks the important change in a suspect’s position. There will therefore still be an official vocabulary available to the press and public capable of expressing the different stages which an investigation against a person may reach.

**Officially accused**

Finally, having mentioned the word ‘charge’ it might be helpful if I say something about the expression ‘officially accused’. In colloquial usage, and in some legislation, the word ‘charge’ is often used to describe what the police do when they tell someone they are charging them with an offence. It is also sometimes used to describe what the procurator fiscal does in raising proceedings against a person by libelling a charge against the person on a complaint, petition or indictment. In some legislation the word is used loosely to mean either one of those things. In the
interests of clarity, the Bill uses the word ‘charge’ only in relation to the police charging a suspect.

In some places though, there is a need to refer in the Bill to any person who has been charged by the police and also to any person against whom proceedings have been raised. Conversely there are provisions in Part 1 of the Bill (including the whole of Chapter 2) which are to operate only in relation to a person who has neither been charged by the police nor been made the subject of a prosecution. This is necessary because certain things follow from the fact that an agency of the State has taken the formal step of saying it believes a particular person has committed a particular crime and that can be proved in court.

Rather than repeatedly writing out in section after section that it does, or does not, apply to any person who has been charged by the police or against whom proceedings have been initiated, it is more convenient to use a label to describe the status of those to whom the section applies. Since the relevant shift in a person’s status occurs when someone in an official position (be it a constable or a prosecutor) levels a formal accusation against the person, the label the Bill uses is ‘officially accused’.

I hope that this further explanation of key points will assist with your consideration of Part 1 of the Bill.

Kenny MacAskill
Cabinet Secretary for Justice
16 January 2014
The attached flowchart compares the current system of police detention against the powers which are proposed in the Bill.

The items marked in red are the proposed new processes.
Reasonable Suspicion

“Detention”

Charge Desk Officer determines if detention is necessary

Accused informed of legal right to access a lawyer

Detain

Liberation on Undertaking

Charge/Report

Release

Court

Release

Charge/Report

Reasonable Suspicion

“Arrest”

Charge Desk Officer determines if “detention” is necessary and proportionate and if approved commences the 12 hour detention period

Person informed of right to access and have solicitor present during interview

At approx. 6 hours continuous detention an Inspector not involved in the enquiry reviews if detention is still necessary & proportionate

Possible Release on Investigative Liberation - 28 days maximum if released on conditions which require an Inspector to authorise. If no conditions then no time limit applies

Charge/Report - ‘Officially Accused’

Detain

Liberation on Undertaking

Release without condition

Potential for Post-Charge Questioning with Sheriff’s Approval

Release

Court

Release

PROPOSED BILL PROVISIONS

‘Not Officially Accused’

Total maximum time in detention: 12 hours

CURRENT SYSTEM

Liberation on Undertaking

Release without condition

Court

Release

‘Officially Accused’

Release

Court

Release

‘Not Officially Accused’

Release

Court

Release

‘Not Officially Accused’

Release

Court

Release

‘Not Officially Accused’
Email exchange: Rt Hon Lord McCluskey and the Committee

I am offering to give evidence to the Committee, particularly on the matter of Corroboration.

John McCluskey
24 January 2014

Thank you for your email, which I have discussed with Christine Grahame, the Convener of the Justice Committee. She has asked me to thank you for your kind offer to give evidence in relation to the corroboration provisions in the Criminal Justice (Scotland) Bill. However, the Committee concluded its evidence-gathering at Stage 1 of the Bill on 14 January and we are now in the process of considering and agreeing our Stage 1 report.

It would be unusual for the Committee to take any further evidence during the passage of the Bill. However, if for any reason, the Committee does decide to do so, the Convener will of course alert Members to your kind offer.

Clerk
Justice Committee
24 January 2014

I am dismayed to receive this deeply regrettable answer.

- I am probably better qualified, by direct experience, to give evidence on this matter than almost everyone whose evidence has been received. I had stayed out of the matter because, having retired some years ago, I thought that others would demonstrate that the proposal to abolish the need for corroboration in ALL criminal cases in Scotland would have been dismissed without difficulty or abandoned in the face of the near unanimous opinion of the Judiciary.

- Additionally, when I came to read the evidence presented to the Committee, I realised that there have been serious errors in that evidence, including, I believe, evidence given by the Lord Advocate himself.

- The evidence of the Justice Secretary raised new matter, namely the idea that "supporting evidence" would be sought. The Lord Advocate said the same. This new matter raised important issues not properly canvassed.

- I am convinced that the Committee has not been given the whole picture, particularly about the practical alternatives to the drastic step of abolishing the need for corroboration.
• There has been a lively correspondence in *The Scotsman* since that newspaper published my article on Wednesday 15th January: is this material also to be ignored because it is out of time? Will it be formally before the Committee? Will my article itself before the Committee?

• It has also been suggested to me (though I am quite unable to speak to it from my own knowledge) that the Committee, or at least some members of it, may have received briefing from civil servants on this issue, being briefing material that has not been published: is this so?

• In these circumstances, I ask the Committee Convener to reconsider the matter urgently and agree to accept the evidence that I can offer.

• I am not sure that my request to be heard will have been intimated to other members of the Committee. Accordingly I am COPYING this email to all members of the Committee. For their information, the original email that I sent to the Clerk of the Committee (not then in her office) read as follows: -

“Dear Ms Fleming, I have recently contributed to the debate on Corroboration *via The Scotsman* newspaper. I should be willing to give evidence to the Committee, particularly with a view to correcting some errors – as I see it – in evidence already presented to the Committee. The article and the letters that I have written (in *The Scotsman*) may serve as my ‘papers’ for such an appearance.”

• I am able to provide copies of my article and subsequent Letters to the Editor in electronic form to any member of the Committee who would like to receive them.

• I have also prepared notes on the point raised in the last paragraph of my article, viz “*There are other ways of dealing with the problems that the Lord Advocate suggested to the Committee*” I do not believe that the Committee has had the opportunity to consider fully these alternatives.

• The pre-legislative scrutiny ought to be comprehensive. The timetable for the Committee’s scrutiny of the Bill (19 December 2013) does not appear to me to state that the last evidence session was to be on 14 January 2014.

• I sincerely hope that you will give this the most urgent and careful attention. I would not intend to let the matter rest if I were denied the opportunity to put my evidence before the Committee.

John McCluskey
24 January 2014
Justice Committee
Criminal Justice (Scotland) Bill

Letter from the Convener to Rt Hon Lord McCluskey

I write in response to your email to the Justice Committee on 24 January reiterating your request to give evidence to the Committee on the proposed abolition of the requirement for corroboration.

The Committee understands that this issue is controversial and that it is vitally important to ensure that the Parliament, as a whole, scrutinises the Government’s proposals. The Committee recognises your experience and expertise in this area and welcomes the continuing debate on the abolition of corroboration both inside and outside of Parliament, to which you are making a valuable contribution.

The Committee discussed your email at its meeting on Tuesday 23 January. We would have been happy to have received a written submission from you on the subject while we were taking evidence, and we would have been able to draw upon it when drafting our report. Furthermore, we could have discussed the possibility asking you to give evidence in person had we received your request to do so earlier. However, in our view, there has been ample opportunity for anyone to provide evidence to us. We are currently discussing and agreeing our Stage 1 report and to reopen the evidence at this stage is therefore not possible.

I note that you have particular concerns about the evidence provided by the Cabinet Secretary to the Committee on 14 January. It might be helpful to explain that it is customary for the Cabinet Secretary or Minister in charge of a Bill to provide the final evidence session of a Committee’s Stage 1 inquiry. This enables the Committee to use the evidence it has gathered, in the previous sessions and in writing, to question and scrutinise the Government. This is not, however, the last opportunity to scrutinise the Bill and I am sure that there will be robust debate at every stage of its passage through Parliament.

I have noted previously that we may take further evidence on the Bill at Stage 2 and if it covered the areas of policy that you are particularly concerned about, we would welcome your input.

Christine Grahame MSP
Convener
30 January 2014
CORROBORATION

Introduction

This is a completely rewritten version of notes that were originally prepared by Lord McCluskey in anticipation of his giving evidence to the Justice Committee. The Committee decided that it was too late to hear his evidence in the Stage 1 process but announced that the Committee might entertain additional evidence at the next stage on the Bill.

The original version of the notes was in two parts.

Part 1 Misleading material before the Justice Committee

1.1 The first part of the original version dealt with misleading statements about the legal character of “corroboration” in Scottish Criminal Law that were made to the Committee by the Lord Advocate and the Justice Secretary. A full copy of the notes detailing the errors in the misleading statements was sent to the Lord Advocate and to the Justice Secretary. Neither has responded in any way whatsoever to defend what they told the Committee or to criticise my critique of their representations to the Committee. I do not propose to repeat those criticisms in the main text of this document. Instead, I append them in Appendix 1. They are nonetheless important.

1.2 One continued important aspect of the failures by ministers to understand or express the law on corroboration is that it is reflected in what appears to be the practical everyday failure of the police to understand the law or apply it properly in practice. Thus, for example, the Justice Secretary repeated on many occasions the nonsensical view (presumably obtained from the police) that the law of corroboration required that two policemen had to go to London to collect a CD Rom (discussed fully later). Against that background of police misunderstanding, it is hardly surprising that assaulted women are mis-informed – by the police - as to the alleged reason why their cases are not going to be taken to court (viz “No corroboration”) and are thus led to support the false notion that abolishing the rule requiring corroboration is going to increase the prospects of justice for women. Because the diagnosis of the causes of the problem is mistaken, the wrong remedy (abolition of corroboration) has been chosen and the real causes are neglected. One has only to look at England – where corroboration is not required\(^1\) – to see that the problem of poor conviction rates in sexual assault cases there is as bad as, or even worse than, it is in Scotland. So ministers should have sought examples of jurisdictions where such cases are more satisfactorily dealt with than in Scotland and asked themselves if there were lessons to be learned from those countries.

\(^1\) As in much of the USA
Meaning of corroboration

1.3 The nature of corroboration was simply expressed by Lord Justice General Rodger in *Smith v Lees*\(^2\): “In order to corroborate an eye witness’s evidence on a crucial fact, the corroborating evidence must support or confirm that what the eye witness said happened did actually happen. So if a complainer says that she did not consent to intercourse ... then evidence of her distress will tend to confirm her evidence because a jury will be entitled to infer that the complainer was distressed because she was forced to submit and did not agree to it”\(^3\). In *Fox v H.M. Advocate* Lord Rodger added “The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met.”

These highly authoritative and plain words, explaining what corroboration is, will have to be kept clearly in mind when the Justice Committee comes to examine any proposed amendments to give effect to what ministers have said, namely that corroboration will be replaced by a requirement for “supporting evidence: at present it is really impossible to understand the distinction between corroboration as traditionally understood and “supporting evidence” of the kind that ministers have said will take its place. I simply do not believe that ministers have thought this through. If they had done so, the necessary provisions to give substance to the concept of “supporting evidence” would have been in the Bill as drafted and presented 27 February 2014 to Parliament for the vote on.

1.4 Imperfect understanding of the role of judges in ‘defining’ corroboration or assisting juries to apply it in cases

It is quite incorrect to suppose, as the ministerial witnesses before the Justice Committee implied, that judges have to define corroboration\(^4\). The Justice Secretary said, “It is quite clear that the judiciary find it difficult to agree what corroboration is... academics and the judiciary have difficulty with announcing what corroboration is”. The truth is this: when trial judges come to ‘direct’ the jury, they have to apply their well-honed understanding of the concept – because it is the judge, not the jury, to decide in the first place if evidence CAN be properly characterized as “corroborative”\(^5\). So the trial judge does not go into a long lecture on the nature of corroboration in every possible case. He/she does not define corroboration; the judge looks at the context and facts of the case before the jury and at the evidence that is said by the Crown to be corroborative; and then decides if any piece of evidence founded upon by the Crown as corroborative can, as a matter of law, be treated as such. The trial judge may get submissions from the lawyers on that issue – which is first a question of law. He/she then decides that question of law in the jurors’ absence; and (if he/she agrees with the Crown submission) says to the Jury: “the Crown/PF has suggested that you should treat XX as a piece of evidence that

\(^2\) 1997

\(^3\) It is no longer necessary to prove that force was used.

\(^4\) Appeal Courts may have to do so.

\(^5\) In appeal cases, judges have to analyse and re-examine the essence of rape in unusual cases (e.g. sleeping woman penetrated). But the complexities of their analyses are elementary compared with the verbal jungle seen in the *Sexual Offences (Scotland) Act 2009*.
corroborates the evidence of NN (the “complainer”) to the effect that XYZ….. I direct you that that evidence is capable of being corroborative in character and, if you accept that it is reliable, can be used by you to corroborate the evidence of NN to the effect that…."

1.5 Corroboration, like many other everyday legal terms, is difficult to define for ALL purposes – but, in a trial, it is quite unnecessary to attempt to do so. Appeal Courts may have to discuss the application of the law in unusual cases – as do Academics writing about the development of the law. The same applies to other vocabulary/terms of art used in courts every day: for example, familiar terms like: ‘reasonable doubt’, ‘satisfied’, ‘reliable’, ‘sufficient’, ‘consent’/no consent’, ‘dangerous (driving), ‘special reasons’, ‘cruelty’, ‘private’, ‘family’ etc. These terms are necessarily somewhat flexible and incapable of precise “definition”. The judge’s task is to recognize the concept when he/she sees it in the context of the trial evidence. In my experience, juries appear to have no difficulty in applying the law relating to corroboration when it is presented in this way. Jurors do not need, and do not get, a lecture on “The law applicable to corroboration in Scotland”. So the alleged concern about problems arising from alleged difficulties in “defining” corroboration is a red herring. Juries decide issues of fact not issues of legal definition. As I said in my judgment in Smith v Lees (1997), “In relation to common law crimes where the alleged victim is the only eyewitness, it is the daily practice of judges to direct juries that they cannot convict unless they find corroborative evidence, namely reliable evidence from an independent source… which separately points to the truth of the facts which constitute the essential ingredients of the crime”. Difficulties can arise when a novel set of circumstances comes before the court. That happens in all legal systems when they have to grapple with new and unforeseen circumstances. The genius of the Common Law countries has been the capacity of experienced and impartial judges (and Academics), when faced with unforeseen situations or new perceptions of injustice, to take a principled approach and reason their way to a solution that achieves justice. The Moorov decision is a good example of that. So is the gradual development of the law of corroboration by distress in the law of rape. New developments in the law governing fraud have followed new electronic and online methods of deceiving citizens. There are countless examples of that outstanding tradition. I thought that we all understand that: sadly it is not apparent that the Justice Secretary does.

1.6 The second part of the previous notes6 outlined some steps that I suggested should be considered in order to improve both the conviction rate in rape and other sexual crime cases, and indeed the ability of the prosecution authorities to bring such cases to court, without abolishing the centuries-old law governing corroboration. More sensible amendments to the law deserve consideration before the revolutionary step of abolishing the requirement for corroboration. I sent a note of these suggestions to Lord Bonomy as they may be considered relevant to the deliberations of the group that he is to chair. Others will no doubt suggest others. Matters of this kind might also be considered as suitable material for proposed amendments to the Bill.

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6 Copies were sent to members of the Justice Committee in February.
Meantime, I have made some revisals to the original discussion of such measures, particularly in the light of recent reported developments that again demonstrate clearly that the retention of corroboration in the Scots law of criminal evidence is essential to avoid the relatively infrequent – but nevertheless real – risk that errors and worse by the Police, and even by prosecutors and Judges, can result in cruel injustices. The frequent and egregious errors by the police that have come to light, especially in the wake of the Jimmy Savile scandal, highlight this point. The Scottish Police claim that they are somehow immune to the canteen culture that has characterized so many of these scandals in England, Wales and Northern Ireland: those who believe that are living in cloud-cuckoo land.

1.7 Policing failures – examples

It is clear that there are serious and continuing problems, especially with the police, in investigating and preparing cases where “domestic” violence, sexual or otherwise, is reported to the police. And police failures in other fields of activity are also blatant and alarming. The response of the police in Scotland has been to claim that notorious police failures in England, Wales and Northern Ireland (mirrored in the Republic of Ireland also) are not happening in Scotland and are anyway out of date. So, instead of facing up to the problems, their answer has been to spend £100,000 on videos to show what a splendid job the police do\(^7\). Clips of those videos shown on TV seem to emphasize the problems faced by uniformed police constables on the street. The real problem that arises in the context of the present Bill is not a problem of uniformed constables dealing with street hooliganism: it is more a problem of unsatisfactory investigation, after a “domestic” case has been reported, and also of investigative and prosecutorial judgments made by others, not necessarily by officers on the beat, as to disposal of the cases.

1.8 I have mentioned elsewhere some of the most notorious police failures in so many fields that have come to light elsewhere in the UK. In short, I list some of them:

- The Report by HMIC (Tom Winsor) on failures in the policing of domestic violence: 27 March 2014
- The continuing Hillsborough cover-up: proceedings pending
- The ‘plebgate’ saga – continuing
- The Jimmy Savile and Sir Cyril Smith cases
- The ‘monstering’ of Christopher Jeffries
- The “Cardiff Three” fabrication of evidence (Wales)
- The Stephen Lawrence case
- Numerous cases in Northern Ireland
- “119 Scottish police officers accused of crime’ (6/1/2014)
- “Innocent 91-year-old handcuffed, & held for 6 hours”: 23/3/14
- There are Scottish cases – though the fact that they do not always come to light is perhaps a reflection of the relatively impoverished nature of investigative journalism in Scotland.

Almost every day brings news of fresh discoveries of failures followed by attempts by police forces in the UK to cover up the wrongdoing. The common element in the reluctance to admit failure is the powerful sense that loyalty outweighs admitting the

\(^7\) The Scotsman 28/3/14
truth, a feature of the most recent police scandals in the Irish Republic, and apparently in the Hillsborough case. In Scotland, the Lord Advocate has power to give directions to the police. The Committee should consider how effectively that power is being used, especially in relation to “domestics”.

1.9 It is not my intention to criticize the police. They have a difficult task and generally perform it well. However, it is clearly unwise to discard the slow, considered judgment of centuries of judges and others and instead place our faith in the competence and reliability of what we know from ongoing experience to be flawed police practices. All our history – like that of other countries - shows that, in the administration of justice, it is infinitely preferable to rely on an independent, skilled judiciary, conducting its work transparently and with reasoned judgments and appeal reviews, rather than to put our faith in the competence and reliability of police forces that are significantly less transparent and accountable and have put shown to put other considerations before the pure interests of justice. The Justice Secretary has not been successful in demonstrating that his judgment is to be preferred to that of generations of judges.

The original paper concluded with more general notes: they too have been rewritten here. 8

2.0 Some suggestions for improving the conviction rate in rape and other sexual crimes without abolishing the centuries-old rules on corroboration.

(This is a revised version of the original Part 2)

(Note: References to s.18 or s. 270, or the like, are references to sections of the Criminal Procedure (Scotland) Act 1995, as amended.)

2.1 Previous convictions

We should consider allowing proof of analogous previous convictions if they point to the propensity of the accused person to engage in similar criminal sexual conduct: this would be a development – a real extension – of the thinking that led to Moorov. It needs careful assessment and thorough preparation and drafting (not least in the Human Rights Act context – as do all suggestions about altering rules of evidence) – but it is well worth thinking about. The right to admit such evidence could, and should, be made subject to Judicial Decision in any particular case – as is the case now when s. 270 (allowing proof of previous convictions) or s.274, is invoked. The Judge would have to decide if such evidence was likely to risk prejudicing a fair trial and also if it was capable of providing corroboration; then the jury (if the evidence was admitted by the judge) would decide if it was reliable, persuasive etc. and if it was corroborative in the circumstances. The jury would also be free (and specifically directed to this effect) that they were perfectly entitled to ignore the evidence of previous misconduct/convictions etc. if they thought that it unfairly prejudiced the accused or had no corroborative value. The test both for the judge in

8 This paper uses the statutory term “complainant” rather than “victim” when personal assault (including Rape) cases are being discussed, for the reason previously mentioned by the Convener.
deciding the “admissibility” question and the Jury in deciding the reliability questions would – as always in such matters of admissibility – be the test of fairness. We have in Scotland the excellent technique of serving a “narrative indictment” on the accused: that means that the essential facts of the actus reus must be clearly narrated\(^9\), plus notice of the evidence that the Crown intends to lead. Amending the law, to allow the possibility of revealing a relevant course of previous analogous criminal conduct, would require the Lord Advocate to think carefully about the form and content of the Indictment so as to show the relevance of any earlier conviction. In due course, this form of Indictment could become routine in appropriate cases and the framing of the Indictment would follow a fairly standard model, as in a Moorov-type case.

I understand that English legal procedure allows proof previous convictions in some cases\(^{10}\). That appears true in at least some Continental jurisdictions. I am not very familiar with practice in Continental countries but it should be examined (preferably by the Scottish Law Commission rather than by civil servants seeking to do their ministers’ bidding). The law of the European Convention on Human Rights does not appear to prevent such a course: but that obviously requires careful study\(^{11}\). It is not clear that the proposed change to our centuries-old law on Corroboration has had any such study.

2.2 **The Right of Silence (Self-incrimination not compellable)**

We should consider some departure from the near-absolute right of silence.

Given the modern – effective - controls against abuse of interrogation (behind closed doors) by police, why should the accused in a rape case have the right to remain silent from start to finish? I give some examples of relatively recent changes in this once necessary right.\(^{12}\) There are many Human Rights cases on this topic\(^{13}\)

- I suggest that we could properly undertake a reconsideration of the whole Judicial Examination procedure (ss.35 et seq). At present, post Cadder, the Lord Advocate says that suspects are advised by their lawyers to say nothing at JE - thus frustrating the hopes of the PF at the JE – and that this may well rob the Crown of possible corroboration of sexual penetration in a suspected Rape case\(^{14}\).

- Accordingly, why should we not introduce a rule that the judge who presides at the JE should have a discretion, at the JE or any adjournment thereof, to require the accused to answer a very limited number of well-defined questions, provided the questioning itself is fair and completely under judicial control? The PF would present a written application to the presiding judge, intimated to the defence, that the Crown is seeking

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\(^9\) I have never seen the contents of a CR Rom narrated as an essential fact.
\(^{10}\) as does the 1995 Act.
\(^{11}\) See Lord Reed’s book, supra
\(^{12}\) until 1898 the accused was not even allowed to give evidence in court.
\(^{13}\) see A Guide to Human Rights Law in Scotland, by Lord Reed, Article 6
\(^{14}\) That is no doubt true: but experience shows that, Cadder or no Cadder, experienced criminals have never needed advice from a lawyer to keep their mouths shut until they saw how the land lay: they don’t need to be told by a lawyer how to play the system.
answers\textsuperscript{15} (possibly just YES or NO answers) to “the following questions, being matters clearly within the personal knowledge of the accused” (e.g. Did YOU have sexual intercourse with X on/at DATE/PLACE?) After hearing submissions from the PF and the defence lawyer, the judge, if the PF’s submission was accepted, would say to the accused: “The question that you are about to be asked appears to be a question that is within your personal knowledge…” (This would obviously apply to a question about whether or not the accused had sexual intercourse with the named ‘complainer’ on the occasion in question)... “If you refuse to answer, any court before which you appear to answer the charge in the Petition may treat your refusal as evidence indicating that you did have sexual intercourse with the ‘complainer’ on that occasion”\textsuperscript{16}. (The wording of this would, of course, depend on how the law had been amended) The answer to the question, if YES, might justify the obvious follow-up question: “Did she (the complainer) consent to that intercourse?” The answers to these questions would make it clear to all what were to be the real issues of fact at the trial: this could result in considerable savings as well as removing what is seen as an obstacle to justice. Cross-examination of the accused would not be allowed at the JE: it could even be prescribed by law that such questions would be asked by the judge, not by the prosecutor, so as to provide an additional, important protection against unfairness.

- This procedure would be said to amount to “corroboration by silence”: but is it not worth a careful re-examination in the light of modern conditions? It would be a big step, but not as big as enacting section 57. The interests of justice are not served by the silence of a material witness on an essential fact that the judge rules must be within his knowledge. The rule against self-incrimination (which is not absolute) derives from a time when prisoners were subjected to torture, deception and cruel threats to get them to confess. That danger would not exist in a reformed JE procedure if great care were taken to avoid anything that would run counter to the developing jurisprudence of the ECtHR.

- The current law is that if the accused chooses to go into the witness box he voluntary forgoes that ‘right’: he will be open to questions directly asserting his guilt and that his evidence on particular matters consists of deliberate lies Yet in recent years the courts have concluded that if the accused chooses, before the trial begins, to make a voluntary statement that exculpates him or in any way contradicts the Crown evidence, the jury must be allowed to accept that evidence as evidence of fact, even although the accused cannot be cross-examined on it, because he declines to go into the witness box. Thus the current law allows the accused to give exculpatory evidence on vital facts without any risk of being challenged in court \textsuperscript{17}. The contrast with the position of the

\textsuperscript{15} Just as the accused must do now if he proposes to introduce evidence of the complainer’s sexual history.
\textsuperscript{16} OR “If you refuse to answer, you will be barred in court from challenging any evidence from the complainer that you did.”
\textsuperscript{17} As with the U.S. President: “I did not have sexual relations with that woman”. 
complainant is stark: she can be cross-examined harshly and at length.\(^\text{18}\) The law has become quite unbalanced in this important respect – against the complainant, and indeed against the interests of justice. One less dramatic reform would be to compel the accused to enter the witness box to allow him to be cross-examined in court on the contents of any exculpatory extra-judicial statement made by him.

- The right to silence, which is not mentioned in the European Convention on Human Rights, is not an absolute right. It has been derived by Judges as ancillary to the right to a fair trial (Article 6). The reasoning of the European Court of Human Rights rests upon the principle that evidence obtained from an accused person by means of coercion and oppression, or other unfair means, in defiance of the will of the accused should not be admitted. This was a clear principle of Scots Law long before the Convention was written.\(^\text{19}\) The traditional, absolute right arose, not least in the Common Law countries, out of the practice of police, security forces etc. of using improper methods to obtain answers – methods such as threats, physical abuse, coercion, deception and the like – commonly behind closed doors and with no access to lawyers or judges. But if a person is brought before an independent judge, having had prior access to legal advice, and is asked questions (of which he and his lawyer have been given written notice) on matters of fact that are bound to be within his personal knowledge, then what is “unfair” about that in the whole context of a Scottish trial? If the JE proceedings are all properly recorded (with video cameras) – so that a jury may make a final judgment about whether or not the process was fair, then why should that not be allowed in any jurisdiction where all the safeguards against abuse are very strong and written into law? The use of the replies by the accused at such a JE could properly be regulated by the legislature of the jurisdiction that established such a system. The JE would be properly seen as “judicial” – similar in broad character to the kind of thing that happens on the Continent with examining magistrates. Incidentally, the Justice Secretary referred to how “fair” European systems of justice were: there is no sign that he has given any thought to examining how these systems can obtain admissible evidence from the accused person?

- It is also at least anomalous, and at worst absurd, that, while a self-incriminating statement, allegedly made by an accused person to the police when apprehended, (even if the accused subsequently denies the making of the alleged statement) is admissible as evidence of guilt if the Court judges that it was fairly obtained, the accused is allowed a right of silence even in open court, with his lawyers and an impartial judge present to ensure that any questioning is “fair”. In the former situation, the question becomes simply, “Do you believe his denial or the assertions by the police?” and the court has no independent and reliable means of testing fairness; in the latter situation, everything is open for the Court to make a fully informed judgment.

\(^{18}\) Legislation in recent years has restricted the cross-examination to some extent.\(^{19}\) Cf. the powerful Opinion of Lord Cooper in HMA v Rigg 1946 JC 1.
• Note also **s.18**, which allows samples of saliva, fingerprints etc to be taken from a person arrested and in custody for the purpose of criminal proceedings. The statute *obliges* the arrestee to comply. That procedure is obviously an invasion of the absolute right of a suspect not to provide evidence against himself. Reed discusses these and other cases that depart from any absolute rule.

• Note also the terms of the English caution: "**{State name}, I am arresting you on suspicion of {State offence}, You do not have to say anything, But it may harm your defence if you do not mention, when questioned something which you later rely on in court. Anything you do say may be given in evidence**". This goes some way to attaching weight to an unjustified refusal to answer a question the answer to which lies clearly within the knowledge of the arrested person.

• The suggestion that we should re-visit the law governing self-incrimination would be opposed by those who believe that the so-called right of silence is prescribed by some legal deity: but it is not. It is a product of a history that we have left far behind. So it is surely worth careful re-consideration in the light of modern developments before throwing away the carefully developed rules governing corroboration that Scotland has had for centuries. It really is time that the rules about self-incrimination and the so-called right of silence were re-considered in the light of the totally changed circumstances that now prevail in relation to the investigation of crime and the rights of a suspect. However, no such change should be made just because some elected politician in a unicameral legislature gets a fixed idea into his head: such important changes should be the subject of extremely careful study and widespread consultation and consensus.

### 2.3 Hearsay evidence

Is it not time to look again at the rules about hearsay evidence in criminal proceedings? There are already rules permitting hearsay evidence to be admitted in some circumstances: see **s.259**. Instead of an (near) absolute ban on hearsay evidence, it could be made effectively a matter of reliability, with particular attention paid to recency and spontaneity – as happens with evidence of "distress", which is currently founded upon as supplying corroboration. **Distress**, if recent, is relevant AND can be treated by the jury as CORROBORATIVE, despite the undeniable fact that the distress originates from the ‘complainer’ (and is thus not truly ‘independent’); the observation of the signs of distress will be from an independent source, but it is the complainer who exhibits those signs, such as sobbing, hysteria, incoherence. They can be feigned, fabricated, exaggerated: so, in traditional terms, they barely pass the test of being independent. But the jury are free to accept that they do: so why shouldn’t the same tests, of spontaneity, reliability, be applied to **de**

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20 Hearsay evidence is admissible in civil cases.
21 Unless the witness is dead
22 The late Lord Hunter, sometime Chairman of the Scottish Law Commission and a very experienced criminal lawyer, was particularly supportive of admitting hearsay evidence. I believe he wrote about this; but I have not yet traced any such writing.)
recenti statements by the complainer, particularly if they are able to be seen by the jury as contemporary with, and as manifestations of, the same phenomenon as the distress itself? Evidence of a de recenti statement may be admissible under the current law governing evidence, but may be used by the jury only for a limited purpose, i.e. to test the credibility of the person making the statement; yet it may well be possible even under ECtHR jurisprudence to allow the jury to treat it as “supporting” the evidence of the person making the statement, viz the complainer. Corroboration is NOT such a strictly defined and pure concept that it cannot be adjusted - provided we retain the over-riding tests of fairness, reliability and reasonable doubt. Hearsay evidence is not prohibited under convention law: the test is fairness. The use of “distress” for corroborative purposes in sexual assault cases is a clear example of the capacity and the willingness of the Scottish Judiciary to use reason and commonsense to adjust the application of principles to the needs of Justice23.

2.4 Further encouragement of early complaints and investigation

Many of the problems encountered in practice derive from a failure to investigate the complaint at once and thoroughly – often because the complainer does not report it at once24. Forensic evidence (esp. semen/pubic hair), and injuries disappear; clothing is destroyed or lost or cleaned; potential witnesses cannot be traced; doubt is cast upon the complainer’s evidence because she remained silent for so long. We need to campaign actively to change the culture, of the police and of complainers: the two are inter-related. And it is not only the complainer who may suffer from delay. If there is no complaint to the police for a couple of weeks, valuable forensic and medical evidence (blood, age and character of alleged injuries, absence of the accused’s DNA, recollection of genuine alibi etc.) may be lost, to the detriment of justice.

A good deal has already been done in this respect, especially by the Law Officers, Elish Angiolini and Frank Mulholland, and police practice also improved during my career (1949 – 2004) and since. The changes introduced have improved markedly the treatment of complainers and increased greatly the chances of a conviction in sexual assault cases. (Indeed my impression is that we are now doing better than England & Wales in relation to that conviction rate: the up-to-date statistics should be made available to Parliament.) The poisonous legacy of Jimmy Savile has done one good thing: it has encouraged victims to complain and assured them of more understanding treatment. Our efforts should be concentrated on building on these changes in practice and ‘culture’, rather than just attempting to satisfy some complainers by granting their “wish for the opportunity to be heard in court” [3733].

It is also to be noted, however, that police forces in many countries, including our own, do not enjoy a good reputation for investigating such cases thoroughly25. One

23 Yates v HM Advocate 1977 SLT (n) 42; Smith v Lees 1997 JC 73.
24 This situation is likely to get worse as more police stations close.
suspects that some complainers have been fobbed off with the bland excuse that the inability to pursue the case is down to the law requiring corroboration; it is too easy to pass the buck in this way. The police/prosecution practice of blaming “absence of corroboration” is compounded by the apparent misconception – referred to earlier in the Introduction – as to the character and quantity of what is required by the law governing corroboration, properly understood.

OTHER MATTERS (originally in Part 3)

3.1 Most attention has been focused on sexual assault cases

Relatively little attention has been paid to the fact that Section 57 applies to all cases, including murder, assaults, fraud, theft, and countless Statutory Offences, including drugs cases with severe penalties. This is a revolution. Its far-reaching consequences have simply not been explored. It is a huge change based on the view of one judge, the police and the public prosecutor, with support from lobbyist groups mostly concerned with sexual crimes, (and whose members have often relied on police-based assertions that such cases have had to be dropped for “lack of corroboration”). There has been no examination of the likely effect on non-sexual cases. In areas of policing other than domestic violence there have been too many cases in which credible allegations have been made, and accepted by juries, that the police have planted evidence, not least in drugs cases. There has been no Royal Commission or the equivalent to try to assess the consequences, financial and in terms of the administration of justice. The revolutionary proposal overturns the wisdom and practice of centuries during which the outstanding Scottish Judiciary, and the Institutional writers developed pragmatically a system of justice that owed almost nothing to interventions by Parliament. It has been given very little attention in public discussion or elsewhere. And all of a sudden our whole system of justice is to be dramatically altered. There has been no calculation of the likely effect on the capacity of the Courts, the prosecution service or the cash-strapped, largely Legal-Aided, defence branch of the legal profession. The debate in the Scottish Parliament on 27 February 2014 was woefully inadequate in this respect. Even the Justice Committee paid relatively little attention to the extent and consequences of the change beyond the sexual assault cases. This is simply no way to make sweeping and massive changes to a mature legal system. That legal system recognizes that judges also make mistakes: but if one judge makes a decision it can be appealed to a higher court. If Lord Carloway’s judgment on this issue were to be referred to a higher court of appeal, it would be overturned by a vote of 33 to 1.

3.2 Continental Jurisdictions

The Justice Secretary’s assertion that the other continental countries have no requirement for corroboration, but have fair and balanced systems for administering the criminal law, is astonishing. Are Russia, Italy, Bulgaria, Greece and Turkey (all

following new CPS guidelines”: The Independent, 4 February 2014: it is suggested there that the drop “may be linked to cutbacks in police and CPS resources”.

26 NOTE the call of the Police & Crime Commissioner for Greater Manchester for a re-think about approaches to such cases: The Guardian, 6 February 2014.

27 At present, the only exceptions to the need for corroboration are found in relation to offences such as poaching, fishing and hunting, plus some Road Traffic Offences.
Council of Europe members) included in this generalization? What, if anything does the Justice Secretary claim to know about the administration of justice in such countries (some of which are in the EU)? Does his knowledge of the notorious case in Perugia, Italy (murder of Meredith Kercher), or the rich forensic history of Snr. Berlusconi not cause him to doubt if our system of investigation and trial is inferior to the system there? This former Prime Minister claims that the Italian State Legal Service is dominated by politically-motivated left-wingers? Do the claims by former Presidents Sarcozy and Chirac that the French state prosecution service are conducting political witch hunts not give him pause to qualify his desire to emulate the practices of other jurisdictions? My experience as a member for many years of the International Bar Association, and Vice-Chair (for 7 years) of its Human Rights Institute is also quite different from that asserted by the Justice Secretary. Our legal system is widely admired and envied round the world. Even when referring to the English law of evidence, it is far from clear that the Justice Secretary has made any in-depth study of the pluses and minuses of that system, especially in relation to sexual assault cases. The Jimmy Savile scandal again should give us pause for thought: the English system allowed Savile to get away with a lifetime of serious abuse without so much as a caution. Nor does our system of criminal justice owe anything to the continental traditions that developed following the Napoleonic reforms 200 years ago. We do not have examining magistrates or single-career judges. Our jury system is unique. Our trials proceed *de die in diem* NOT in the desultory fashion common on the Continent. Our judiciary is recruited from experienced independent and highly respected practitioners: by contrast, in much of Europe, recruits to the judiciary join as young professionals and make their whole career as judges. The high standing of judges in this country is entirely different from that of judges elsewhere, in, for example, Italy, Russia, Spain, even in Scandinavia. Some of our insights into Jurisprudence were indeed gained in Holland but that was some four centuries ago when that country followed Roman-Dutch law; and the law in question was civil.

3.3 Police resources

It may be - though I have yet to be persuaded of it – that, despite the abolition of the requirement for corroboration, the police would still look exhaustively for corroboration in sexual assault cases. But in more routine cases, especially where there is little media publicity, the temptation will be to cut the corners: the thinking is bound to be, “Why not effect some savings in the boring, resource-consuming search for corroboration when we don't need it?” That approach will pose an additional threat to justice and will also put more cases before the court that depend on the word of one person against that of another. This point should be considered against the current background in Scotland of reducing police resources and drastically cutting Legal Aid. Even the reduction in the number of police stations is bound to make it more difficult for victims to complain.

3.4 “Domestic” cases

It is fully appreciated that the principal drive for this change comes from a genuine wish not to deprive the victims of private sexual and ‘domestic’ abuse of the right to have their abusers brought to justice. No one can properly deny that that concern is real and worthy of respect. But huge advances have been made, and are still being
made, in dealing with this problem. Indeed Scotland has already had real success in effecting great improvements. We should continue to evolve improvements by methods such as those suggested here (and there are surely others); and should not sweep aside the long-standing law of corroboration across the whole field of criminal justice. Of course, there is injustice if a person who commits a crime is not brought to justice; but that already happens in a very great number of crimes and offences that go unsolved, for reasons that have nothing to do with the need for corroboration.

A pragmatic approach

The Scottish system of criminal justice has developed and evolved in a pragmatic way based on a case-by-case approach. To effect a revolution in our system of criminal justice, one that is opposed by almost all who practise in the courts of Scotland, is to risk an even greater injustice, that of convicting the innocent.

3.5 The announcement\(^{28}\) that Lord Bonomy has been appointed to lead an independent reference group in considering other areas of criminal law where reforms may be recommended in light of the proposed abolition of the corroboration requirement has no bearing on the real issue as to the “scrapping” of the long-standing law. The Justice Secretary has repeatedly stated his firm resolve to “scrap” the rule. It is clear that what the Minister now seeks is to find a few sweeteners to placate those who have sought to protect this vital aspect of the Rule of Law in Scotland. In an adversarial system, the interests of justice are not served by awarding token sops to one side or the other; the administration of justice is not a game in which free kicks are given to one side as compensation for the perpetration of fouls that advantage the other.

3.6 The proposal to abolish corroboration is an ill-considered and widely condemned proposal supported by arguments that betray an imperfect understanding of what the law requires; and promoted on the bizarre basis that we can learn lessons from the “fair and reasonable” imperfect foreign legal systems about how to administer criminal justice. If the proposal to enact section 57 is a model of how the Scottish legal system would be run after Independence then we have reason to be fearful for the future of Scots Law.

John McCluskey
31 March 2014

\(^{28}\) On 4\(^{th}\) February 2014
INACCURACIES IN EVIDENCE SUBMITTED

A 1.1 Corroboration of mens rea

On 20/11/13, the Lord Advocate, in evidence to the Justice Committee, stated (at col.3734):

“….in a charge of rape there are three crucial facts: first, we need to corroborate penetration; secondly, we need to corroborate lack of consent; and thirdly, we need to corroborate mens rea, which is the accused’s intention. Those are the three crucial facts that we must corroborate”.

The Lord Advocate repeated this at Col 3755 where he said:

“Recent distress is obviously a piece of evidence. In a non-forceful rape, it only corroborates the lack of consent; it does not corroborate penetration and it does not corroborate mens rea. It will only take you some distance regarding the three crucial facts that you must consider or corroborate in a charge of rape”.

A 1.2 The highlighted statements do not, in my view, reflect the current law accurately, and might therefore mislead the Committee. Mens rea is the “guilty mind” element of common law crimes: (statutes tend to use the word “intention” in some form). In a common law rape case, mens rea was not corroborated by evidence from witnesses saying they saw, heard or otherwise perceived mens rea: indeed it could hardly be, because evidence is led from witnesses about things/events/happenings that they have perceived with their senses. Witnesses are asked what they saw, heard, touched or smelled. Mens rea, being a state of mind, is not a matter of observable fact that a witness can say he saw, heard, touched or smelled. Mens rea, being a state of mind, is not a matter of observable fact that a witness can say he saw, heard, touched or smelled. Although suitably qualified experts are allowed to give Opinion evidence, no witness is allowed to express an opinion as to the accused’s guilt or innocence of the charge that he faces in Court. Subject to the special Exception noted below, evidence from witnesses describing or “corroborating” mens rea is not adduced at a criminal trial.

A 1.3 In a criminal trial of the common law crime of rape, the Crown had to prove the actus reus (the accumulation of the essential facts that constitute the crime). In a rape case that meant that the Crown had to lead evidence that the accused sexually penetrated the female’s vagina and did so without her consent. The primary evidence on each strand of that evidence came (usually) from the complainer.

29 Exceptions: If there was reason to believe that the accused was insane at the time when he committed the criminal acts, and thus incapable of forming the necessary evil intention, then opinion evidence could be led (e.g. from psychiatrists) in support of a plea of “insanity in bar of trial”. (Similarly, if the accused in a case pleads compulsion or sonambulism that made him act without mens rea). The absence of mens rea might thus be established by evidence, which did not need to be corroborated.

30 When the offence is one that is created/defined by statute, then “intention” has to be established – but not by witnesses saying, “I saw his intention: it looked evil to me”.

31 Not, of course, if she had been murdered.
Each strand of her evidence on these two matters had to be corroborated. The jury was then invited to draw the obvious and natural inference that the accused, when he performed the acts that constituted the *actus reus*, did so with *mens rea*; that is a matter of inference, not of sensory perception. So the Crown did not lead evidence from witnesses to the effect that they had ‘observed’ the accused’s intention to commit a crime (though witness evidence of observed motive, or of words uttered at the time, might assist the court to draw the inference that he possessed evil intention; but such evidence was not necessary). Thus the accused’s intention had to be implied/inferred from what he did, in performing the acts that constituted the *actus reus*. It follows that no evidence at all (and certainly no corroborative evidence) was led to show that the accused possessed evil intention (*mens rea*) when performing the acts that constitute the *actus reus*.

A 1.4 This field of law has been the subject of much legislation. In particular, the *Sexual Offences (Scotland) Act 2009* defined rape differently and more widely (*mens rea* was not mentioned). Absence of consent (plus absence of reasonable belief that there was consent) and penetration (also freshly defined) were made the essential elements of the crime – the crucial facts - to which there was added that the penetration had to be by a person who was *intending* the penetration or *reckless* in effecting it [S. 1(1)]. So the elements of intention or recklessness (replacing *mens rea*) can be seen as *facta probanda* after the 2009 Act. However, because intention (like *mens rea*) is a state of mind, and recklessness is a judgment, what is required, in each case, is evidence - in the ordinary sense of reliable observations by witnesses – from which the intention or the recklessness may be *inferred*. The material from which the intention can properly be inferred would be the observational, factual evidence that the accused *penetrated* the complainer *without her consent*: that evidence would have to be corroborated in both particulars. From that evidence the jury can legitimately *infer* the intention or the recklessness. If the jury makes the necessary inference, then conviction should follow. It is not necessary to have additional, far less corroborative, evidence from eyewitnesses or experts saying that the accused *intended* to penetrate (or did so *recklessly*). Of course, direct evidence that the accused uttered words or expressions at the time that plainly inferred an intention to penetrate (or his recklessness) would be relevant and helpful; but such separate evidence is not necessary. So it is difficult to see what is meant by saying that *mens rea* needs to be corroborated, as if it were a separate, distinct element in the constitution of the crime *needing to be separately proved by evidence in addition to the evidence that establishes the actus reus*: if the defined elements of penetration and no consent are corroborated, no further corroborative evidence is needed. Obviously the necessary inference, or judgment (of intention or recklessness), cannot be made except on the basis of corroborated evidence that establishes those two crucial facts (*facta probanda*); but that is all. The corroborated proof of the crucial facts is enough, without more, to warrant the inference of intention or recklessness required by S. 1(1). What the Lord Advocate calls *mens rea* does not erect a third evidential hurdle and does not require additional evidence to corroborate it.

As the standard text book (Walkers on Evidence, 2008 edn.) says:

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32 the *facta probanda*
“7.15 GUILTY KNOWLEDGE AND INTENTION  
Mens rea, dole or intention is a necessary element in crimes at common law....In all crimes requiring such proof, mens rea may be inferred from proof of the crime itself, and does not need to be separately established.” So to say that mens rea needs to be “corroborated” misleadingly suggests that evidence beyond that establishing the crucial facts (the facts constituting the actus reus) is necessary. To give a simple, relevant and classic, example (to which I return later), if the complainer states that the accused sexually penetrated her vagina, her evidence of penetration can be corroborated by forensic evidence that her vagina was found, shortly after the event, to contain sperm of the accused (demonstrated by the presence of his DNA). If she gives evidence that she refused consent to the intercourse, that refusal can be corroborated by evidence, e.g. of assault injuries judged to be contemporaneous with the intercourse. In each instance, the evidence from the independent witness consists of observable fact: the corroborating witness is not an eyewitness. But that evidence is properly described as corroborative. Nothing more is necessary to entitle the jury to hold, by legitimate inference, that the necessary intention is established. The corroborating witness does not need to be corroborated.

A 1.5 Errors as to what the law of corroboration requires

Both the Lord Advocate and the Justice Secretary made a similar error in relation to what the law governing Corroboration requires in everyday practice: the Justice Secretary repeated it several times.

The Lord Advocate said:

“Can I tell you what effect corroboration has? We have to corroborate the taking of buccal swabs from alleged offenders, so two police officers are required for that. We have to corroborate the taking of intimate swabs from a complainer in a rape case. That may involve a child and injuries to the sexual parts... .We have to corroborate forensic analysis, so two forensic scientists have to speak to the results of forensic examination, and transmission of samples is required to be corroborated. That seems completely unnecessary. That is where I am coming from.”

The Justice Secretary said more than once:

“At present, two forensic scientists have to speak to a sample and two police officers have to speak to the collection of a CD-ROM from London. All that has to be done because such evidence is part of the integral thread of the case”.

Leaving aside the meaningless phrase “the integral thread of the case”, these assertions are misleading: the law requires corroboration only of ‘the essential facts’, the facts that constitute the crime. The presence of the accused’s semen on a swab is not an essential fact in a rape case: ejaculation of semen in the course of intercourse is not an element of rape.

I seek to demonstrate the difference between evidential facts and essential facts with reference to the common alleged rape case in which the complainer says that she
was sexually penetrated by the Accused, and that he ejaculated\textsuperscript{33}. In such a case, the Crown will inevitably ask for an intimate (usually vaginal) swab, to see if there is semen there, and a buccal (mouth) swab from the accused to obtain his DNA for comparison. The evidence to be corroborated is the complainer’s statement that she was penetrated\textsuperscript{34}. The corroboration consists of the evidence that the accused’s semen/DNA was found in the swab. If that corroborative evidence is accepted, the essential fact of penetration is proved. \textbf{One witness can provide that corroborative evidence.} That would happen e.g. if one forensic scientist, acting alone, obtained the vaginal swab, then obtained the buccal swab and finally examined both, finding that the accused’s DNA was in the semen. His/her evidence to that effect would be clear evidence corroborating the primary evidence, of the complainer, that she was sexually penetrated by the accused. It would clear, independent evidence of the \textit{factum probandum}, viz penetration. \textbf{There is no need in law to corroborate the corroboration:} corroborative evidence does not need to be corroborated.

Exactly the same applies even if \textit{A} takes the intimate swab, \textit{B} takes the buccal swab and \textit{C} discovers the accused’s DNA therein: none of those three involved \textit{corroborates} either of the others; and the evidence of no one of them is itself incriminating, but the combined evidence of all of the three, provides a continuous, coherent, linked chain of ‘adminicles’ (≡ pieces or scraps) of evidence which, if accepted by the court, amount to one single piece of corroboration, viz that the accused’s penis penetrated the complainer’s vagina: which is the \textit{factum probandum}.

I repeat, because it is fundamental and elementary: evidence from someone - other than the complainer - that is corroborative of (clearly supportive of) the complainer’s evidence of a crucial fact does not need to be corroborated.

\textbf{A 1.6} I believe that I may understand why the practice of duplicating witnesses (whether policemen or forensic scientists) has grown up: if only one witness witnessed each of the three links in the chain and one of the three single witnesses died or went missing, the chain would be broken and vital evidence might be lost. But that has nothing to do with corroboration. So, having two witnesses to each link may be prudent to guard against losing evidence. But, quite apart from corroboration, \textit{even that precaution is unnecessary}. For it is standard practice for each such witness to sign a police label, narrating where the sample came from, whose person it was taken from, when it was taken and so on. That whole process could be filmed; and the film, plus the signed labels, would be usable to complete the ‘chain’ of evidence if any of the three was not available for the trial. There are also certain statutory provisions in the Act that given valuable evidential status to a document etc. that is signed by two witnesses: but these provisions are nothing to do with the common law about corroboration: the statute could be amended to require one only: a whole host of such evidential innovations have been introduced by statute since 1981. There is no reason not to rationalise and improve them further.

\textsuperscript{33} Clearly, if that statement is true, corroboration should be easy to find. If the complainer says there was no ejaculation, swab evidence is less likely to corroborate her evidence – so corroboration of the (negative) swab evidence does not help to prove the crime.

\textsuperscript{34} Ejaculation itself is \textit{not} a necessary element in \textit{proof of rape}. 
The other reason why two witnesses are used is to anticipate and meet a possible challenge to the reliability of one witness, e.g. an expert scientist. But that is to do with reliability, not with corroboration.

A. 1.7 Finally, to put the matter another way: clearly it is not criminal for a man to insert his penis into a woman’s vagina and to ejaculate semen there: so proof that that happened does not prove a crime. All that it demonstrates is that the man sexually penetrated the woman. Other evidence (of no consent) is required to make it criminal. Having several witnesses to each swab obviously sheds no light on the absence of consent. But the evidence obtained from the swabs is sufficiently corroborative of the direct evidence of sexual penetration.

A. 2.1 The Justice Secretary (col. 4098) repeated several times his assertion and belief that if a CD Rom had to be brought from London it had to be collected and brought by two Police Officers, for corroboration purposes - and spoke of a “duplication of resources” [4101]. For the reasons already explained this is simply wrong. Such duplication is entirely unnecessary. It is difficult to conceive of a common law crime in which the contents of a CD or DVD constitute the essential facts constituting the actus reus, though they may provide evidence. The Justice Secretary did not explain what he meant or what kind of statute-based case could require the contents of a CD or DVD to be proved by the evidence to two witnesses.

If, of course, the offence (statutory) itself were to be in possession of a particular disc, then two witnesses could be required to prove and corroborate possession. But it becomes very difficult to relate that to the idea of two policemen having to go to London to collect the disc. If the disc was in London, then it is not explained how that would constitute an offence in Scotland. This example by the Justice Secretary betrays the same error discussed in the earlier paragraphs. Whatever the reason why the police have adopted this practice, the law does not require it; it is very costly in terms of manpower and other resources; and there are various ways of achieving the safeguard of having a substitute witness if one falls by the wayside. The notion that abolition of corroboration would save “resources” is absurd: the government says the number of prosecutions, and therefore trials, will increase significantly; the calls upon the legal aid fund will increase correspondingly\(^{35}\). The cost of the administration of criminal justice is bound to rise as a result. As it is, the police cannot keep up with the demands imposed by the recent laws “stalking” law: only 32% of stalking cases have resulted in conviction.\(^{36}\)

JMC 31/3/14

\(^{35}\) The Crown Office recruited 60 extra legal staff last year: The Scotsman 10/2/14 p 10.

\(^{36}\) National Prosecutor for Domestic abuse: The Scotsman 10/2/14: Criminal Justice and Licensing Act 2009.
Justice Committee

Criminal Justice (Scotland) Bill

Letter from the Scottish Government to the Convener

I understand that the Justice Committee is currently considering its formal response to the Stage 1 evidence you received on the above Bill. It has been clear to me that the Committee has undertaken a thorough consideration of all the proposals contained within this significant piece of legislation and I look forward to receiving your Committee’s recommendations in due course.

One of the many important reforms within the Bill is the proposal to remove the corroboration requirement. I am still fully committed to this reform and consider it is only right that Parliament is given the opportunity now to vote on the principle of such an important change. In my view abolishing the requirement would set a solid and fair foundation for the way in which cases proceed to court i.e. moving the focus to the overall quality of the evidence available. As I indicated to the Committee when I gave evidence I consider, however, that there is time for further work to be undertaken. I have recently approached a highly respected senior judge to lead an independent reference group in considering other areas of criminal law where reforms may be recommended in light of the proposed abolition of the corroboration requirement. I am currently agreeing the details of the remit for this group and we are taking the Lord President’s views into account in that process. I will update the Committee further once the remit has been finalised.

My intention would be for the Government to then bring forward secondary legislation in light of any recommendations made. If the corroboration reform is passed, it would not be commenced before this secondary legislation has been approved by the Scottish Parliament. I think that this can be done without significant delay to the reform, which was always intended to be implemented in the Financial Year 2015/16. I am sure that the Justice Committee would wish to have a full and robust process for the procedure to be used to ensure thorough scrutiny of any secondary legislation by the Scottish Parliament. I agree this would be a necessity and I would intend to ask my officials to liaise with the Clerks of both your Committee and the Delegated Powers and Law Reform Committee, in order that we can be sure that any procedure proposed is satisfactory to the Parliament.

I hope this information on the Scottish Government’s intended way forward is helpful to you and your Committee.

Kenny MacAskill
Cabinet Secretary for Justice
4 February 2014
Justice Committee

Criminal Justice (Scotland) Bill

Letter from the Scottish Government to the Convener

I refer to my letter of 4 February which advised the Committee of my decision that an independent Reference Group is to be set up to consider further reforms which may be necessary in light of the corroboration provisions in the Bill.

I am now pleased to announce that The Right Hon Lord Bonomy has agreed to lead this group and that a remit for the issues to be considered has been agreed with him. The Committee will be well aware of the calibre of Lord Bonomy’s previous contributions to Scots Law. He was appointed as Senator of the College of Justice in January 1997, serving with great distinction and retiring in 2012. He also has international experience, serving as a judge of the UN International Criminal Tribunal for the Former Yugoslavia between June 2004 and August 2009 where he presided over many high profile war crimes cases. In 2001 Lord Bonomy conducted a comprehensive review of the practices and procedure of the High Court of Justiciary. Lord Bonomy’s report was published in 2002 and resulted in significant set of reforms to High Court practices and procedures. Lord Bonomy’s extensive knowledge and expertise on Scots Criminal Law makes him the ideal person to lead this important Reference Group.

Please find attached a copy of the remit for your Committee’s information. Membership of the Reference Group is still being considered, but arrangements are being made for the work of the group to commence as soon as possible.

I hope this further information is helpful.

Kenny MacAskill
Cabinet Secretary for Justice
5 February 2014
TERMS OF REFERENCE

In the context of provisions in the Criminal Justice (Scotland) Bill which propose the removal of the general requirement for corroboration in criminal cases, recognising that this is considered by many to be an integral requirement of the criminal justice system, to consider what additional safeguards and changes to law and practice are necessary to maintain a fair, effective and efficient system, to report, and to draft any legislation required to give effect to these changes.

In making its assessment, the review would be expected to consider the issues highlighted in the following, non-exhaustive, list:

- Whether a formal statutory test for sufficiency based upon supporting evidence and/or on the overall quality of evidence is necessary,
- Whether any proposed prosecutorial test (or a requirement for publication of any such test) should be prescribed in legislation,
- The admissibility and the use of confession evidence,
- The circumstances in which evidence ought to be excluded,
- The practice of dock identification,
- Jury majority and size,
- The future basis and operation for a submission that there is no case to answer at the end of the prosecution case,
- Whether a judge should be able to remove a case from a jury on the basis that no reasonable jury could be expected to convict on the evidence before it,
- Whether any change is needed in the directions that a judge might give a jury (including a requirement for special directions in particular circumstances),
- Whether any additional changes are required in summary proceedings.

Appeals are not expected to be considered by the review as they are for wider consideration, not related specifically to corroboration.
DELEGATED POWERS AND LAW REFORM COMMITTEE

5th Meeting, 2014 (Session 4)

Tuesday 4 February 2014

Criminal Justice (Scotland) Bill

Response from the Scottish Government

Background

1. The Committee reported on the delegated powers in the Criminal Justice (Scotland) Bill on 30 October 2013 in its 53rd report of 2013.

2. The response from the Scottish Government to the report is reproduced at the Annex.

Scottish Government response

Section 86 – Use of live television link

3. Section 86(1) of the Bill inserts new sections 288H – 288K into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). The new provisions allow the court to determine that a detained person is to participate in a specified court hearing by use of a live television link. In making such a determination, the court is to have regard to any representations made by the parties as well as the interests of justice.

4. The new section 288(J)(1) of the 1995 Act, as inserted by section 86(1) of the Bill, provides that the Lord Justice General may, by directions, specify the types of hearing in which a detained person may participate by live television link. The power of the court to determine that a hearing should take place by television link only operates in respect of “specified hearings” which are those types of hearing which have been the subject of a direction made by the Lord Justice General. Under section 288(J)(2), such directions may specify types of hearing by reference to the venues at which they take place, particular places of detention or categories of cases or proceedings to which they relate.

5. Whilst content with the power in principle, the Committee drew some matters relating to section 288(J) to the attention of the Parliament in its stage 1 report.

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1 Criminal Justice (Scotland) Bill [as introduced] available here: http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd.pdf
6. The power at section 288(J)(1) is exercisable by directions made by the Lord Justice General rather than by subordinate legislation. The directions made will therefore not be subject to any form of Parliamentary procedure or scrutiny. While the Committee agreed that the courts are best placed to specify the types of hearings which may take place by television link, it did not accept the Scottish Government’s view that the function of specifying hearings is purely operational in nature. The Committee considered the power to have legal significance and accordingly was of the view that the Parliament should be given the opportunity to have notice of and scrutinise its exercise.

7. Further to this, the Committee was of the view that parties who could potentially be affected by a specification should be afforded fair notice of the arrangements that are being made, and that such information should be available publicly in advance of the specification taking effect. The Committee considered that this could be best achieved by making the specifications using subordinate legislation, which would have to be laid before Parliament and therefore made publicly available before coming into force.

8. In its response to the Committee’s report, the Scottish Government adheres to the view that specifications of types of hearing at which appearance by television link may be appropriate should be made by directions. The Scottish Government does not consider it appropriate for specifications of hearings to be made by way of subordinate legislation given the procedures and timescales associated with the making of subordinate legislation as well as the likelihood that specifications may require to be made frequently and, in some circumstances, varied or revoked at short notice. The Government also makes reference to section 80 of the Criminal Justice (Scotland) Act 2003, which gives both the High Court and Sheriff Courts a wide discretion to allow a detained or imprisoned person to appear by means of television link at hearings in criminal proceedings, without regard to a prescribed test such as that imposed by the Bill, where the Court must consider both the representations of the parties and the interests of justice before determining that the hearing can take place.

9. In response to the particular concern the Committee had at directions being made at short notice, the Government has explained that its view is that any directions made at short notice are more likely to be directions varying or revoking existing directions, for example where the Lord Justice General becomes aware of a concern in relation to the use of television links in particular types of hearing. The Government does not envisage the making of directions at short notice which specify new types of hearing, although the power as drafted could still be used in that way.

10. In its report, the Committee was concerned with the manner in which the Scottish Government proposes that this power should be exercised i.e. by the making of directions not subject to Parliamentary scrutiny, as opposed to by subordinate legislation. The Scottish Government does not propose to alter this approach following the Committee’s report and members may wish to consider whether they accept the response on this point, or whether they wish to comment further.
11. The Committee was also concerned in its response that those who would be affected by the specification of hearings which could take place by television link ought to be afforded fair notice of any directions made, and that the laying of subordinate legislation before the Parliament would achieve that fair notice requirement. In its response, the Government has agreed to consider bringing forward an amendment at stage 2 to require the publication of any directions that are made, although it is not clear from the response what that amendment would be. The Committee may wish to consider whether it is satisfied that a commitment to consider the issue of publication further at Stage 2 is sufficient to alleviate the Committee’s concerns about fair notice and the protection of the rights of those who may be affected by directions made.

Conclusion

12. Unless amendments that will substantially affect the delegated powers provisions are made to the Bill at Stage 2, the Committee will not consider it again. Members are therefore invited to make any comments they wish on the Bill at this stage in light of the Scottish Government’s response to the Committee’s Stage 1 report.

Recommendation

13. Members are invited to note the Scottish Government’s response on the Bill and to make any comments they wish at this stage.
Correspondence from the Scottish Government, dated 17 January 2014:

28. The Committee therefore accepts the principle that the specification of hearings in which an accused person may be required to participate by live television link is a matter which should be regulated by the Lord Justice General as head of the Scottish court service. However, the Committee considers that the Parliament retains a separate interest in the exercise of this particular function. It is not persuaded that the function should be exercised without affording notice to the Parliament and the public in advance. Accordingly the Committee draws the power in section 288J(1) of the Bill to the attention of the Parliament and recommends that the Scottish Government consider bringing forward an amendment at Stage 2 to make the power to specify types of hearings which may be conducted by live television link exercisable by way of subordinate legislation to which section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 would apply.

The Scottish Government preface this responses by explaining that, since the coming into force of section 80 of the Criminal Justice (Scotland) Act 2003, both the High Court and the sheriff court have had the power to permit a detained or imprisoned person to appear by means of live television link at hearings in criminal proceedings other than a first appearance from custody, or a hearing at which evidence is led. Under the existing provisions the court is not required to apply any prescribed test and therefore has a wide measure of discretion. The provisions inserted by section 66 of the Bill innovate upon the existing law by only giving courts the power to make determinations for appearance by live television link where the hearing in question is of a type that has been specified for that purpose by the Lord Justice-General, and by prescribing an "interests of justice" test to be applied by the court.

The provisions are therefore designed to afford better protection of the right of accused persons to effective participation in proceedings by ensuring that appearance by live television link is only permitted both when the Lord Justice-General has been satisfied that the hearing in question is of a type that is suitable for that purpose, and when the court is satisfied, having heard representations, that the use of a live television link would not be contrary to the interests of justice in the circumstances of the particular case.

Whether the power to specify hearings is to be exercised by the Lord Justice-General by directions, or by the High Court by Act of Adjournment, it will be up to that person or body to decide on the approach to be adopted. However, as the proposed section 288J of the Criminal Procedure (Scotland) Act 1995 provides, hearings can be specified with reference to a number of different factors. Rather than specifying all hearings of a particular type, what is specified may therefore be hearings of a particular type, when conducted in a particular court, and when the accused is appearing by live television link from certain specified places of detention. There is therefore the possibility of types of hearing being specified with some frequency as and when the decision maker is satisfied that the live television link facilities available at particular courts and places of detention are of a requisite standard.
In their letter to the Committee dated 03 October 2013, the Scottish Government alluded to the possibility that a direction under section 288J might require to be made at short notice. The scenario the Scottish Government had in mind was not a direction specifying hearings, but a direction varying or revoking an earlier direction, for example if the Lord Justice-General became aware of concerns regarding the use of live television links for a particular purpose.

While the Scottish Government understands and respect the Committee’s view that the power to specify hearings should be exercisable by way of subordinate legislation to which section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 would apply, they still consider that this would not be appropriate having regard to the nature of the function in question, the procedures and timescales involved in promulgating Acts of Adjournal, the potential frequency with which hearings would be specified, and the possible requirement for directions to be varied or revoked at short notice.

The Scottish Government has also noted the Committee’s particular concerns in relation to the notice of specification of particular types of hearing. As stated in their previous response, the Scottish Government considered that directions would be published in accordance with the Scottish Court Service standard procedure and that this did not require to be included in primary legislation. However, in view of the Committee’s comments, the Scottish Government will consider whether to bring forward an amendment in this regard at Stage 2.
Present:

Richard Baker       Nigel Don (Convener)
Mike MacKenzie      Margaret McCulloch
Stuart McMillan (Deputy Convener)  John Scott
Stewart Stevenson

Criminal Justice (Scotland) Bill: The Committee considered the Scottish Government's response to its Stage 1 report.
11:38

The Convener: We come to agenda item 7. This item is consideration of the Scottish Government’s response to the committee’s stage 1 report on the bill. Members have seen the briefing paper and the response from the Scottish Government. Do members have any comments?

John Scott: Again, I am content; but there possibly should be amendment at stage 2.

The Convener: Is the committee content to note the response and, if necessary, reconsider the bill after stage 2?

Members indicated agreement.
Justice Committee

Criminal Justice (Scotland) Bill

Letter from the Scottish Government to the Convener on the Committee’s Stage 1 Report and further information on Lord Bonomy’s Review

I write in response to the Justice Committee’s Stage 1 Report on the Criminal Justice (Scotland) Bill. I would like to thank the Committee for its careful consideration of the Bill and all those who contributed to that consideration by giving evidence.

Please find attached the Scottish Government Response to the report.

I also wanted to take this opportunity to provide further information for your Committee on the Right Hon Lord Bonomy’s review to consider further reforms which may be necessary in light of the corroboration provisions in the Bill. My letter of 5 February to your Committee included the terms of reference for this work. The Secretary to Lord Bonomy’s review has now confirmed on behalf of Lord Bonomy that the following individuals have agreed that they are willing to participate as members of his Reference Group:

- Rt Hon Lady Dorrian
- Sheriff Michael O’Grady QC
- Sheriff Norman McFadyen
- Ian Cruickshank
- David McKenna, Victim Support Scotland
- Joe Moyes, Scottish Court Service
- DCC Iain Livingstone, Police Scotland
- Shelagh McCall, Scottish Human Rights Commission
- J D Murray Macara QC
- Murdo MacLeod QC
- Jane Farquharson, Advocate
- Frances McMenamin, SCCRC
- Sir Gerald Gordon
- Charles Stoddart
- Professor James Chalmers
- Professor Pamela Ferguson

The above list does not preclude changes in the composition of the Group in light of the development of the work of the Review.

I hope this additional information is helpful.

Kenny MacAskill
Cabinet Secretary for Justice
25 February 2014
PART 1 ARREST AND CUSTODY

1. The Committee accepts that there might be some benefit in simplifying the powers of arrest along the lines proposed in Part 1 of the Bill. However, we do have concerns regarding the possible consequences of this change and we therefore make a number of recommendations aimed at improving the provisions in Part 1 of the Bill under the relevant sections below.

The Scottish Government welcomes the Committee’s comments in relation to Part 1 of the Bill regarding the benefits of simplifying the process of arrest. We have responded on the specific issues raised below.

2. The Committee has concerns that use of the term “arrested” in relation to a suspect who has been taken into police custody for questioning but has not been charged may, amongst members of the public, be more suggestive of guilt than is currently the case for a suspect who is “detained” for questioning.

We consider the terminology in the Bill concerning arrest to be somewhat confusing and are not convinced that members of the public, the accused or the media will be able to distinguish between a “person officially accused” and a “person not officially accused”. We also have similar concerns relating to the proposal to allow the police to “de-arrest” a person when the grounds for arrest no longer exist (see paragraph 120 of this report).

The Scottish Government considers that the terminology used in the Bill is clear and accurately describes the new regime. Whether a person is guilty of committing the offence is a matter for the court. The presumption of innocence remains.

As to the ability of the press and public to talk about and understand the stage which an investigation has reached, it is already the case that it is the point at which the suspect is charged that marks the important change in the person’s position. This will remain the case under the system set out in the Bill.

The Government agrees with Lord Carloway, and the large number of witnesses who gave evidence to the Committee, that having a single process for taking a suspect into custody (called “arrest”) makes for a clearer system.

The terms “not officially accused” and “officially accused” have been used to differentiate between two distinct categories of persons, first people who are suspected of an offence but who have not been charged (“not officially accused”) and second, those who have been formally charged with an offence, which includes accused on petition, indictment or complaint (“officially accused”).

The term “de-arrest” is not used in the Bill and the Government has no intention of using it.

3. While we accept assurances from the police that, as with the current position, they do not intend to release a suspect’s name to the media until they have been formally charged with an offence, i.e. “officially accused”, we
consider that every effort should be made to ensure that the reputation of the accused is not detrimentally affected by these provisions. The Committee considers that the issue of suspects' anonymity is problematic, but merits further and careful consideration.

The Scottish Government is confident that the police will make every effort to avoid disclosure of a suspect’s identity to the media. The principle of “innocent until proven guilty” is well understood. Moreover, the police and the prosecutorial authorities in Scotland are aware both of the Scots law on presumption of innocence and the requirement under the European Convention of Human Rights that no public official reflects an opinion that a person charged with a criminal offence is guilty prior to trial.

There are no current plans to make changes in respect of suspects’ anonymity but the Government is willing to engage with interested parties with views on the matter.

4. The Committee is concerned that police officer training and adaptations to the new i6 programme required to effectively implement the provisions in Part 1 of the Bill may place a significant burden on an already stretched police service and individual officers. While we accept the Cabinet Secretary’s assurances that sufficient time will be given to Police Scotland to implement a training programme and to update the new ICT system before giving effect to the Bill, we ask the Scottish Government to ensure that adequate resources are made available to Police Scotland to carry out these tasks without further strain on its shrinking budget.

The Financial Memorandum was developed through close consultation and discussion with key partners, including Police Scotland. This process took place alongside the development of police plans for the i6 programme. The Government recognises the particular pressures on the police: for example, we have already agreed that due to pressures on the force during 2014, implementation of the Bill’s changes to police powers should be planned for 2015. We continue to discuss implementation and delivery with Police Scotland, to ensure that the timetable and programme is achievable.

The Scottish Government has undertaken to monitor the actual financial impact of the Bill during and after its implementation and maintain discussions with delivery bodies. If it becomes clear that there are additional financial costs as a result of the Bill, that will be considered in future funding discussions. The Scottish Government will ensure that delivery bodies have adequate resources to implement these reforms.

5. The Committee notes that the Bill does not give effect to Lord Carloway's recommendation that “arrest” be defined in the Bill. We further note that there was no consensus from witnesses as to whether arrest should be defined and, if so, whether this legislation was the best vehicle to do so. On balance, the Committee is not content with the Scottish Government’s decision to exclude such a definition in the Bill.

The word “arrest” is not defined in the Bill because, after considering the matter carefully, the Government concluded that no elaboration of the expression’s meaning is required, and any attempt to elaborate it could be counter-productive.
In one sense, the whole of Part 1 of the Bill defines what arrest by the police entails in the normal case. Part 1 sets out the circumstances in which someone can be arrested (with the use of reasonable force if necessary), that an arrestee is to be taken to a police station, given certain information, afforded certain rights and so forth. Picking a handful of those elements and simplifying them for the sake of concision would produce a partial and potentially misleading definition of what it means to be arrested. On the other hand, defining arrest to mean all the consequences set out in Part 1 of the Bill (and other enactments) would be circular and serve no purpose.

Similarly, trying to define arrest by reference to its purpose rather than its consequences is not without its difficulties. In his report, Lord Carloway proposed that arrest should be defined as bringing a person into custody with a view to bringing the person before a court. There is a risk that this could jeopardise the employment of widely-used alternatives to court proceedings, such as Police Fixed Penalty Notices.

In short, defining arrest poses difficulties for the smooth operation of the new system created under the Bill. Leaving the term to take its natural meaning within the context of the provisions in the Bill, ensures that this Bill will operate effectively alongside other legislation which makes provision regarding arrest and “arrested persons”.

6. The Committee notes the Scottish Government’s position that the power of arrest contained in the Bill combined with common law rules would be sufficient in allowing the police to arrest a person attempting or conspiring to commit an offence. However, we heard from the police that they were not yet convinced by the reassurances given, and from the SHRC that it would have serious concerns if the police were able to arrest a person “who has done nothing contrary to the criminal law”. We therefore call on the Scottish Government to further engage with both the police and the SHRC with a view to providing adequate reassurances on this matter.

The Bill will deliver the Carloway recommendation of having a single police power of arrest, under which a person can be brought into custody on suspicion of having committed an offence. There is nothing in the Bill which will permit the police to arrest anyone who has done nothing contrary to criminal law. The Government is continuing to engage with stakeholders on this matter.

7. The Committee notes the Scottish Government’s intention to bring forward an amendment to allow a person to be quickly released from arrest (“de-arrested”) when the grounds for arrest no longer exist. While we recognise that there may be situations where de-arrest could be a reasonable option, we have concerns that this should not lead to a situation where people are arrested without a proper assessment by police officers as to whether such action is appropriate. We would therefore welcome further details of the types of situation and expected frequency in which de-arrest would be used. The Committee also has concerns regarding use of the term “de-arrest” and consider the words “released” or “liberated” to be more appropriate.

The Government understands the Committee’s concern. However, having listened to the evidence presented to the Committee, the Government is persuaded that it should be possible for the police to release an arrested person, prior to arrival at a
police station, in certain circumstances. The Government will bring forward an amendment at Stage 2 to make provision for this.

An example has been provided by Police Scotland where such a liberation from initial arrest may be used:

*Police attend a report of a householder having disturbed a youth breaking in to his car. The householder provides a detailed description of the suspect, including clothing. Shortly afterwards, in a nearby street, police find a male fitting the description of the suspect. Following brief questioning he is arrested and on being placed in the police vehicle, the householder attends and clearly states although there is a similarity, it is not the person who was breaking into his car. The grounds for arrest no longer exist, but as the male has been arrested the Bill as introduced requires that the arrested person must be taken to a police office.*

In recognition of the Committee’s concern about the potential for misuse of the arrest power, the amendment will allow a person to be released prior to arriving at a police station only if there are no longer grounds to suspect the person of committing an offence. The police have an equivalent power at present in relation to people they detain under section 14 of the Criminal Procedure (Scotland) Act 1995 and its use is very limited. On this basis, the Government would not expect the power to release an arrestee before arriving at a police station to be used often in practice.

It will also continue to be possible to release a suspect where a constable charges the person with an offence and having done so decides that the person’s presence at the police station will not be required.

The Government’s amendments to the Bill at stage 2 will include a requirement to keep a record of the reasons where an arrestee is released before arriving at a police station.

8. The Committee welcomes the recent introduction of a “Letter of Rights” for those in custody, in accordance with the EU Directive on the Right of Information in Criminal Proceedings. We ask the Scottish Government to respond to the suggestion of some witnesses that information to be given to suspects at a police station should be provided both verbally and in writing with a view to ensuring that they clearly understand their rights.

The effect of section 5 of the Bill is that a person will be provided with information on their basic rights, verbally, on arrival at the police station. This information includes the right to silence, the right of access to a lawyer and the right of intimation to a third person. In addition to this, a person is provided with a written Letter of Rights which they are able to keep with them. The Scottish Government considers it is more appropriate for the decision whether to hand the letter to the person or read it to them to be made depending on the specific circumstances of each person. Section 5(3) of the Bill does provide this appropriate level of flexibility and where the person requires assistance to understand the letter it can be read to them.

9. The Committee heard a divergence in views amongst witnesses regarding the appropriate maximum detention limit. However, we note the statistics provided by Police Scotland relating to the period of 4 June to 1 July
2013 which show that, although the majority of persons (80.4%) were detained for up to six hours, a not unsubstantial number (19.2%) were detained for between six and 12 hours. Given these statistics, there are mixed views on the Committee as to whether detention beyond six hours is necessary.

The Scottish Government considers that the evidence makes it clear that the provision in the Bill is appropriate. It is clear from the evidence that a six hour period of detention is not sufficient for every case.

The fact that a person can be kept in custody for up to 12 hours has not meant that most detainees are. The Bill will formalise current practice to ensure that detentions do not go on longer than necessary by creating a mandatory custody review, performed by a senior officer not directly involved in the investigation (see section 9 of the Bill).

10. We note the Cabinet Secretary’s commitment to consider whether the detention limit should be extended in exceptional circumstances. While we recognise that there may be situations, particularly in relation to complex and serious crimes, where it may be necessary to consider extending the detention limit, we remain to be convinced whether this is really necessary, particularly when, under the Bill, the police would have the option of releasing a person on investigative liberation. We therefore seek further information on the types of “exceptional circumstances” in which the Scottish Government envisages that an extension to the detention limit would be granted, how often they are likely to be applied for, who would approve any extension, and how the Scottish Government intends to ensure that such extensions do not become commonplace over time.

The Scottish Government is continuing to consider whether to bring forward an amendment at Stage 2 to allow the 12 hour detention limit to be extended in exceptional circumstances.

Police Scotland has provided the Committee with written evidence detailing the circumstances in which the 12 hour period of detention has proved insufficient and when they have had to extend it under the existing powers in section 14A of the Criminal Procedure (Scotland) Act 1995. The examples given by Police Scotland provide strong evidence for the view that in rare but important cases, a 12 hour detention period is too short, for example when dealing with complex serious cases with suspects and potentially victims and witnesses under the influence of drink and/or drugs who are deemed by medical professionals to be unsuitable for interview.

The Government would expect that, should the police retain the power to extend the detention period, its use would continue to be rare. Any amendment would include similar safeguards against inappropriate use of the power as presently exist (eg. a requirement that the period can only be extended with the authorisation of a senior police officer). This would ensure the same high-level scrutiny of decisions and appropriate protection for those in police custody as presently exists. A copy of the examples provided by Police Scotland of the types of cases whereby an extension to the 12 hour detention period has been necessary is attached to this report.

Investigative Liberation is a new tool which police will utilise to manage their inquiries. It is, however, not an appropriate tool to use in the examples provided by
the police. Investigative Liberation cannot be used in all cases. When a person presents such a risk that no conditions set could mitigate that risk (for example, a very violent disposition) then investigative liberation is not appropriate. It should also be noted that it will not be possible to liberate a person, whether with or without conditions, when they remain heavily under the influence of drink or drugs and are deemed by a doctor to be not fit for interview. If the person is not fit for interview they cannot be safely released from custody and have an understanding of any conditions which have been attached to their release. The extension to the 12 hour detention period would serve a separate purpose to that of Investigative Liberation.

11. The Committee seeks assurances that investigative liberation will not have an unnecessary impact on the suspect’s private life, whilst allowing the police to conduct complex investigations which could not be completed while the person is initially detained. We note that a person may apply to the courts to have any conditions imposed either removed or altered, which we believe is a welcome protection against disproportionate conditions being applied.

Investigative liberation will provide an alternative to prolonged detention of suspects in certain cases, and as such is itself a method of reducing an investigation’s impact on the suspect’s private life.

The Bill requires that any conditions set must be “necessary and proportionate” (section 14(2)), thus there is an in-built legal requirement for the conditions not to have an unnecessary impact on the suspect’s private life. As the Committee notes, if the suspect feels the police have imposed a condition that is unnecessary or disproportionate the Bill provides a mechanism for that to be reviewed by the courts (section 17).

12. The Committee also notes suggestions from victims’ groups that the Bill should include a specific requirement for complainers to be notified of a suspect’s release on investigative liberation and of any conditions attached, however, we are unsure as to whether such a requirement needs to be placed on the face of the Bill. We ask the Scottish Government to work with the COPFS to ensure that, where they may be at risk, complainers are always informed timeously of the suspect’s release and of any relevant conditions applied.

Upholding the rights of victims in a criminal case is crucial to ensuring a fair criminal justice system. The Scottish Government is discussing with stakeholders, including Police Scotland and COPFS, the processes which will be required as a result of the Bill. These discussions include the process for notifying complainers where a suspect is released on investigative liberation.

13. The Committee notes that there are likely to be resource implications relating to investigative liberation.

Investigative liberation is a new procedure for Police Scotland and indeed COPFS and other key stakeholders.

The operational aspects of the administration of investigative liberation are a matter for Police Scotland. The anticipated resource implications are set out in the Financial Memorandum, which was developed through consultation with key stakeholders, including Police Scotland. The Scottish Government will monitor the
resource implications of implementing the Bill, and will ensure that Police Scotland have adequate resources to deal with investigative liberation.

14. Like many witnesses, the Committee is concerned that suspects are sometimes held in custody for unacceptably long periods before their first appearance in court. We believe that court sitting times must be extended to reduce such lengthy periods in custody and the backlog of cases. We also recognise that there are implications for police time and resources in holding people in custody.

Where the volume of custody cases on any given day requires a court to sit for extended hours, both SCS and COPFS facilitate that. Court programmes are regularly monitored and amended, under the authority of the sheriffs principal, to ensure that they allow for the efficient disposal of business and meet the needs of court users. Any permanent change in court sitting times, however, would have resource implications for Scottish Court Service, COPFS, and others involved in the criminal justice system, and would need to be considered carefully.

15. We are not however convinced that specifying time-limits for periods in custody in legislation is necessary at this stage, particularly when a working group is actively considering options for Saturday courts. We recommend that this work be completed in a timeous manner to allow any recommendations of the working group to be implemented as quickly as possible. The Committee welcomes the Cabinet Secretary’s assurances that he will “take a keen interest in the issue” and requests details of the timescale for meetings and completion of the work of the group.

The working group is presently meeting on a monthly basis, and reports regularly to the Justice Board. The group is evaluating the nature and scale of what will be required to introduce Saturday or weekend courts. At this stage, however, it seems clear that this will be a significant and complex piece of work involving process and policy changes across all criminal justice organisations, with considerable and ongoing consequences for the resources of those organisations, and implications for the employment terms and conditions of existing staff which will need to be addressed. It is hoped that the group will be able to report its initial conclusions by late summer 2014.

16. The Committee is content that sufficient safeguards are provided in the Bill regarding liberation of those officially accused from custody, in particular the right to apply to the sheriff to have any conditions imposed by the police reviewed.

The Scottish Government welcomes the Committee's view in this regard.

17. The Committee notes the different experiences of witnesses from the legal profession in relation to when the caution is given to suspects by the police under current arrangements. We therefore ask the Scottish Government to respond to the specific suggestion made by the Faculty of Advocates that the Bill should specify that the caution, which must take place not more than one hour before any interview, should also be repeated at the commencement of the interview.

The Bill recognises the importance of a person being reminded about their rights prior to the commencement of questioning. As currently drafted, the Bill is
sufficiently flexible to allow for a suspect to be reminded of their rights at an appropriate stage prior to interview, including at the commencement of the interview. The timing within the Bill enables a suspect to consider these rights and make decisions such as whether they wish to seek legal advice where they had not sought it initially, for example, with sufficient time to make arrangements prior to interview.

As is the practice at present, the police will continue to caution a person at the start of an interview, under common law. In addition to this, a Letter of Rights is, and will continue to be, provided to a person on arrival at the police station and they will be able to keep it with them.

The Scottish Government recognises the importance of ensuring that a person is aware of their rights at all times and we consider that the Bill delivers this, and that no further provision is required.

18. The Committee welcomes the extension of the right of access to a solicitor to all suspects held in police custody, regardless of whether the police intend to question the suspect, and that suspects are entitled to face-to-face contact with a solicitor. We recognise that there would be difficulties in specifying in the Bill that a suspect should be entitled to receive assistance from a solicitor of their choice, particularly in the more remote areas of Scotland, and we therefore agree with the Scottish Government on this matter.

The Scottish Government welcomes the Committee’s support of the extension of the right of access to a solicitor.

19. The Committee is content with the procedure specified in the Bill allowing a constable to question a person not officially accused following arrest.

The Scottish Government welcomes the Committee’s support of this provision.

20. The Committee is persuaded that post-charge questioning may be required in certain complex and lengthy investigations. We also note that the majority of witnesses were content that the requirement on the police to apply to the court for approval for post-charge questioning provides sufficient judicial oversight to minimise the risk of miscarriages of justice.

21. However, post-charge questioning should only be used when absolutely necessary. To this end, we ask the Scottish Government to maintain a record of the circumstances and frequency in which post-charge questioning is used, including details of the applications that are refused by the courts. We further seek confirmation from the Scottish Government that existing rules providing that no adverse inference may be drawn from a suspect’s refusal to answer police questions would apply equally to post-charge questioning.

The Scottish Government welcomes the Committee’s support for the post-charge questioning provisions. We will discuss with criminal justice organisations the detail of how the post-charge questioning provisions will be implemented. This will include: estimates of how often such applications will come before the courts, what systems can be put in place for the recording of the information required, and what the resource implications for those organisations would be.
The specific statutory provision which allowed comment on a failure to answer questions at a judicial examination is being abolished by this Bill, together with the judicial examination procedure itself.

As the Committee may be aware, Lord Carloway specifically considered the issue of “adverse inference from silence” as part of his review. Lord Carloway’s recommendation was that no change should be made “to the current law of evidence that prevents inferences being drawn from an accused’s failure to answer questions during the police investigation” (chapter 7.5). The Scottish Government accepts that recommendation and also agrees that there should not be a rule in place which would permit an adverse inference to be drawn from a refusal to answer questions during post-charge questioning. We can confirm that no rule to permit adverse inference in relation to post charge questioning is being introduced in this Bill.

22. The Committee notes that the Victims and Witnesses (Scotland) Bill defines a child as a person up to the age of 18. The Committee asks the Scottish Government to explain why there is inconsistency between the protections for under-18s in this Bill compared with this recent legislation.

The provisions in the Victims and Witnesses (Scotland) Act 2014 and this Bill serve entirely different purposes. In the context of this Bill, the Scottish Government does not consider it is appropriate to apply blanket provisions for all under 18s. Also, we consider it is important to provide protection up to the age of 18 whilst recognising the rights of 16 and 17 year olds to self-determination.

In considering the age distinctions within the Criminal Justice Bill, we recognise the importance of distinguishing between the different needs, stages of development and potential circumstances of older and younger children. While it might appear attractive to treat all individuals under 18 years consistently, the age-based laws which allow for seventeen year olds to be living independently and marry reflect the quite different contexts and degrees of self-determination that can exist between a 10 and a 17 year old. The Scottish Government prefers an approach which would allow children aged 16 and 17 years to make their own decisions with safeguards in place to support them in this.

23. The Committee has concerns regarding the lack of consistency in use of the terms “welfare”, “best interests” and “well-being” of the child in this and other legislation. While we make no comment on which is the most appropriate term, we ask the Scottish Government to ensure consistency in the language used in section 42 of the Bill.

The term “well-being” in the context of this Bill is understood by the police and is consistent with their wider assessments of the needs of children. It is this wider scope of primary consideration that we seek they take in relation to the arrest, detention, interview and charging of a child. The factors that they will consider will be dictated by the circumstances of the investigation they are dealing with, therefore, the term has not been defined in relation to any other statute or Bill to ensure that the holistic needs of the child are a primary consideration in relation to the decisions the police take.

The Scottish Government notes the comments made by the Committee in relation to section 42 of the Bill, and will seek to adjust the heading of this section to ensure consistency of language. This may not require a formal amendment.
24. The Committee welcomes the Cabinet Secretary’s undertaking to give consideration to raising the age of criminal responsibility and would welcome regular updates on this work.

The Scottish Government will provide the Committee with regular updates.

25. The Committee has concerns that the definition of vulnerable person in the Bill may not capture all individuals needing additional support when in custody. We also note comments from the police that there are difficulties in identifying vulnerable persons. We therefore ask the Scottish Government to give further consideration to the definition of vulnerable persons in the Bill and to reflect on whether this is consistent with the definition in the Victims and Witnesses (Scotland) Act 2014. We also ask that the Scottish Government ensures that sufficient resources are provided to the police to undergo training in this important area.

The Scottish Government notes the Committee’s concerns in relation to the definition of vulnerable person. The definition is in line with Lord Carloway’s recommendations which expressly link the definition of “vulnerable suspect” to a person who is not able to understand fully the significance of what is said to them, the questions posed or of their replies because of an apparent mental illness, personality disorder or learning disability. This is consistent with current practice whereby access to an appropriate adult is linked to “mental disorder” (which is defined as mental illness, personality disorder or learning disability), which is a tried and practiced criterion on which police have been assessing the vulnerability of suspects, accused, victims and witnesses for many years.

In relation to consistency with the definition in the Victims and Witnesses (Scotland) Act 2014 (the 2014 Act) we would emphasise that the 2014 Act and this Bill serve very different purposes. However, mental disorder is one of the criteria used in assessing vulnerability for the purpose of entitlement to use special measures to give evidence to the court.

On the issue of training, police are already familiar with the need to identify whether a person suffers from a “mental disorder” and, where they do, to make arrangements for an Appropriate Adult to be present during police procedures. The resource implications of police training as a result of the Bill are covered in the Financial Memorandum, which was developed through consultation with key stakeholders, including Police Scotland. We will continue to work with Police Scotland on implementation and delivery of the Bill’s reforms, and will monitor the actual financial impact.

26. The Committee asks the Scottish Government to respond to concerns raised by witnesses that its decision not to place the provision of appropriate adult services in the Bill could lead to a lack of funding by local authorities already facing significant financial challenges.

The Scottish Government expects that under the Bill, provision of appropriate adults will continue to operate as at present. It is on this basis that we agreed with COSLA that there are likely to be no additional costs for local authorities as a result of the Bill.

We have made a specific commitment to COSLA to review the impact of the Bill in relation to vulnerable adults after implementation. We will examine data collected by
the Scottish Appropriate Adult Network and the police, and continue to liaise with key stakeholders including COSLA and Police Scotland in order to identify any financial impact.

PART 2 (CORROBORATION AND STATEMENTS) AND SECTION 70 (GUILTY VERDICT)

27. The majority of Committee Members are of the view that the case has not been made for abolishing the general requirement for corroboration and recommend that the Scottish Government consider removing the provisions from the Bill.

The Government notes the view of the majority of the Committee, but it remains convinced that the case for abolition of the corroboration requirement has been made. It agrees with the opinion of a minority of Committee Members, as expressed in paragraph 413 of the Report, that:

“access to justice will be improved by such a reform, in particular, for victims of crimes which often occur in private.”

The extensive public debate since Lord Carloway reported in 2011 has exposed a system that simply does not operate as we would wish for victims in whole categories of crime. It does not adequately respond to crimes committed in private.

The Government has a duty to provide an effective justice system for all citizens, both victims and accused.

The Committee’s Report recognises the need to ensure that our system features appropriate protections for suspects at the same time as addressing the well-known problems in prosecuting sexual offending and other crimes typically committed in private. The Government would in particular highlight two of the Report’s observations in paragraph 412 of the Report. Firstly, the need to ensure:

“that the system as a whole is properly balanced and gives due weight to the interests of those facing criminal allegations, complainers and society”

And secondly, that we must:

“improve ‘access to justice’ in a meaningful way for victims of crimes, such as rape and domestic abuse, which are often difficult to successfully prosecute”.

Both of these statements accord with the principles of the Criminal Justice Bill, which seeks to deliver the rights of victims of crime as well as enhancing the rights of accused persons.

Substantial evidence on the cases affected by the requirement was presented by those responsible for investigating and prosecuting crime. The research assessments undertaken for the Carloway Report and for the Bill’s Financial Memorandum were made by prosecutors and police officers: the professionals responsible for investigating and assessing cases on a day to day basis. Their research consistently indicates that a substantial number of cases do not proceed to court because of the technical corroboration rule: cases which would progress in
other jurisdictions. The Government considers that it is not acceptable in a modern society to have victims across whole categories of crime denied access to justice.

The Government considers that sufficient evidence has been presented for Parliament to make a decision on the principle of removing the requirement for corroboration, and that the case has been made for abolishing the requirement for corroboration.

28. The Committee is convinced that, if the general requirement for corroboration continues to be considered, this should only occur following an independent review of what other reforms may be needed to ensure that the criminal justice system as a whole contains appropriate checks and balances.

The Government has listened to the evidence presented and the views expressed to the Committee. It accepts that many of the issues aired and identified in the Committee’s Report are based on genuine concern about the future operation of our system following abolition of the corroboration requirement. There is universal agreement on the need to ensure any new system does not increase the risk of wrongful conviction. The Government’s aim is to move Scottish criminal justice to a system where prosecutions proceed based upon the overall quality of evidence in a case, not on whether or not a narrow, technical, rule has been complied with.

It was in recognition of the concerns expressed to the Committee that the Cabinet Secretary for Justice asked Lord Bonomy to conduct a further review, the terms of which were set out in his letter to the Committee of 5 February.

The Government, along with many others, is convinced that the case for abolition has been made and that Parliament should vote this year on the overall principle. As a consequence, the provisions removing the requirement will remain in the Criminal Justice Bill for Parliament to consider this year.

However, abolition of the requirement should only occur once Lord Bonomy’s Reference Group has reported and Parliament has a full opportunity to deliberate upon its findings. As the Cabinet Secretary for Justice acknowledged in his evidence session on 14 January, there is a need to take time to ensure that we have the right landscape for the future without the corroboration requirement. Lord Bonomy will fulfil that role in considering areas of criminal law and practice where reforms may be required.

29. The majority of Committee Members do not believe, in the event that the requirement for corroboration is abolished, that concerns relating to the need for further reform can be adequately explored during the passage of the Bill. The Cabinet Secretary’s proposal that the commencement of the provisions abolishing the requirement for corroboration be subject to a parliamentary procedure requires further explanation and consideration, which the Committee requires before Stage 2.

The Government expects Lord Bonomy’s Reference Group to take a year to recommend any reforms it considers necessary. It will proceed on the basic principle that criminal cases should be assessed on the overall quality of evidence. It will carefully assess the overall balance of our system once the corroboration requirement is to be removed, looking at any additional safeguards and changes to law and practice thought necessary to maintain a fair, effective and efficient system.
The Government is convinced that this process will answer and address the concerns aired around abolition of the corroboration requirement.

The Cabinet Secretary made clear in his letter of 4 February that commencement of the corroboration reform will not occur until any legislation proposed in light of the Bonomy review is approved by the Scottish Parliament. Parliament will be afforded a full opportunity to ensure that it is satisfied that the new system will be in balance and that it will not increase the risk of wrongful convictions. To that end, the Government intends to bring forward amendments at Stage 2 to specify that commencement of section 57 of the Bill will not occur until Parliament has approved any such reforms.

The Government will discuss the details of procedure with Parliamentary authorities, but the intention is for a draft order based on the Reference Group’s recommendations to be published and consulted upon, with ample time allowed for Committee evidence-taking. The Order would then be amended following the results of this consultation and evidence gathering process and laid in final form for the usual Parliamentary scrutiny under affirmative procedure. The intention is that this would have to be passed before the provisions abolishing the requirement could be commenced. The Government is confident that arrangements can be agreed to permit full Parliamentary scrutiny and legislation passed by the end of 2015.

30. The Cabinet Secretary’s letter dated 4 February 2014 came in the late stages of consideration of this report, and therefore cannot form part of this report. The Committee calls on the Scottish Government to provide, prior to the Stage 1 debate, further information on any review of additional safeguards (including the proposed remit, who might be involved, likely timescales and options for implementing recommendations).


31. The Committee calls on the Scottish Government to provide more information on how any requirement for supporting evidence would differ from the current need for corroboration.

The Government has made it clear that no person should be convicted on one source of evidence alone (however reliable and credible it may be). All parties agree that something more is necessary, and the Government wants to move to a quality based system.

In the Government’s view, a court should be free to look at all relevant surrounding circumstances, considering all the admissible evidence, in deciding whether it is satisfied beyond reasonable doubt that a crime has been committed, and that the accused committed the crime. This approach would usually include, but not be limited to, cases that meet the current rules of corroboration. Such an approach would also allow cases like the real cases submitted by the Crown Office in its written evidence to the Committee (which could not proceed under the rules of corroboration) to be taken forward.

However, the whole area of sufficiency of evidence will be considered in depth by Lord Bonomy’s Reference Group. The Government looks forward to the outcome of those considerations.
32. The Committee also notes the Cabinet Secretary’s willingness to consider placing a revised “prosecutorial test” on the face of legislation. The Committee accepts that such a step might form part of new checks and balances in response to the proposed abolition of the requirement for corroboration, but recommends that the matter should be included for full consideration in any review process.

The Committee’s position is noted. Lord Bonomy’s Reference Group is indeed expected to consider whether any proposed prosecutorial test (or a requirement for publication of any such test) should be prescribed in legislation.

33. The Committee is fully aware of continuing concerns relating to how the justice system responds to cases of rape, domestic abuse and other offences which often happen in private. Members note ongoing efforts to improve the situation for victims of such offences and agree that further steps need to be taken, including measures aimed at addressing low prosecution and conviction rates.

The Committee’s position is noted.

34. The Committee calls on the Scottish Government to actively review all evidence relating to how improvements with regard to offences such as rape and domestic abuse may be achieved. This should include consideration of public attitudes as well as the justice system. In relation to the latter, all stages must be included, from initial contact with the police to the giving of evidence in court (e.g. whether victims of such offences should have access to legal advice and support where their personal or medical details may be revealed in court).

The Government notes the Committee’s comments. It agrees that there are many concerns on this issue and many strands of work. A range of activity is underway and further detail can be provided if wished by the Committee. However, none of these initiatives address the problem identified in our system of a rule that prevents many cases of rape, sexual assault and domestic abuse from making it to court. Abolition of the corroboration requirement is not by itself the answer to difficulties inherent in pursuing offences such as rape and domestic abuse. But it is a key element in allowing such cases to make it to prosecutors and to our courts.

35. The Committee agrees that, if the requirement for corroboration is abolished, it should not apply retrospectively.

The Committee’s position is noted.

36. On balance, the Committee considers that there is a case for a review of the role of hearsay evidence in the criminal justice system but that this should be included in any wider review of the law of evidence.

The Committee’s position is noted.

**PART 3 SOLEMN PROCEDURE**

37. On balance, the Committee accepts the need to extend the pre-trial time limits as proposed in the Bill. However, we do have some reservations as to whether the proposal to extend the current 110 day limit within which the trial
of an accused person held in custody must commence to 140 days is proportionate. We are therefore pleased that the Scottish Government plans to monitor the implementation of this proposal, in particular to ensure that trials are started as soon as possible and that any extensions to the 140 day limit are rare. We seek updates from the Scottish Government on any findings and outcomes arising from its monitoring of implementation of this pre-trial limit.

The Scottish Government will be setting up monitoring arrangements with justice organisations and will ensure that the Committee is kept updated on the outcome of this process.

38. While the Committee considers that achieving effective communication must, at least in part, be dependent upon the availability of adequate resources (discussed further below), we are persuaded of the potential benefits of this measure, in particular, in reducing the possibility of victims and witnesses having to attend court when their cases are not ready to proceed.

39. The Committee supports the proposals in the Bill for statutory communication between the prosecution and defence to take place after the indictment is served and for there to be flexibility in the method of communication to be used.

The Scottish Government welcomes the support of the Committee on the solemn procedures provisions of the Bill.

40. The Committee calls on the Scottish Government to work with the COPFS and the Law Society of Scotland in seeking to resolve current difficulties in rolling out the secure email system to all defence solicitors, with a view to resolving such difficulties by the time the Bill comes into force.

The principle of effective communication is an integral part of the reforms to solemn procedure. We understand that COPFS are currently reviewing communication methods with defence agents with the aim of further improving the exchange of information necessary to allow the most efficient resolution of cases. COPFS have advised that they are working with defence solicitors locally to explain the revised processes they are putting in place and detail the benefits of using the secure email system. The secure email system is appropriately a matter for COPFS but we will seek updates on how this work is progressing. The Scottish Government is content to be part of any discussions between COPFS and the Law Society on any difficulties in rolling out the secure email system, if they so wish.

41. The Committee welcomes the Cabinet Secretary’s commitment to review whether the Bill could usefully be amended to allow individual written records on the state of preparedness of cases to be submitted by the defence and prosecution.

The Scottish Government notes the Committee’s comments.

42. The Committee agrees with witnesses that both the prosecution and defence solicitors must be adequately resourced for the duty to communicate to work effectively as planned. We note that the Scottish Government has worked with criminal justice partners to anticipate the costs and savings that
may arise from this proposal, but we recommend that the Scottish Government closely monitors the resource implications during implementation to ensure that resources are in place where and when needed.

The Scottish Government has undertaken to monitor the actual impact of the Bill as part of our ongoing management of the implementation of the Bill, and will maintain discussions with delivery bodies. If it becomes clear that there are additional financial costs as a result of the Bill, that will be considered in future funding discussions. The Scottish Government will ensure that delivery bodies have adequate resources to implement these reforms.

43. The Committee notes that the Bill does not impose any sanctions if the written record is not submitted timeously.

The Scottish Government notes the Committee’s comments. As the Justice Committee will be aware, Sheriff Principal Bowen in giving evidence to the Committee indicated that he had given serious consideration to this issue but concluded that it was “virtually impossible to come up with an appropriate sanction”. Parties will be well aware of their professional obligations and it is for sheriffs to determine how to deal with those who do not comply.

44. The Committee agrees that the proposal in the Bill for a trial only to be scheduled once the sheriff dealing with the first diet is satisfied that the case is ready to proceed will reduce inconvenience to witnesses, and give certainty to both the prosecution and defence regarding the date of the trial.

The Scottish Government welcomes the Committee’s support in this regard.

PART 4 SENTENCING

45. The Committee welcomes the Scottish Government’s continued focus on knife crime and its efforts to change the culture of carrying knives. The Committee is content with the increase in maximum sentences for offences relating to the possession of a knife or offensive weapon from four to five years.

The Scottish Government welcomes the Committee’s support in this matter.

46. The Committee welcomes the provisions in sections 72 and 73 on sentencing offenders on early release.

The Scottish Government welcomes the Committee’s support in this matter.

PART 5 APPEALS AND SCCRC

47. The Committee welcomes the policy objective to speed up appeals and understands that there are practical reasons why appeals ought to be lodged timeously. We note the concerns that, in applying a higher test for allowing late appeals, cases with merit may not be heard unless they meet an exceptional circumstances test. We ask the Scottish Government to consider the Law Society of Scotland’s recommendation that sections 76 and 77 be redrafted with an emphasis on the interests of justice. The Committee also notes that Lord Carloway made other recommendations in relation to the speeding up of appeals.
The Scottish Government welcomes the Committee’s support for the policy objective of speeding up appeals.

The Scottish Government proposes that when deciding whether to allow an appeal late the test that the High Court should apply is to ask itself whether there are exceptional circumstances for doing so.

The alternative suggestion of an “interests of justice” test would fail to get across that it is only exceptionally that an appeal should be allowed to proceed in breach of the time limits. The High Court is already insisting that there must be exceptional circumstances before it will allow an appeal to proceed late (see eg. Toal v Her Majesty’s Advocate [2012] HCJAC 123, para [117]; Duncan v Her Majesty’s Advocate [2013] HCJAC 2012, para 6). The provisions as drafted support the Court’s approach to late appeals.

48. The Committee welcomes the removal of the gate-keeping role of the High Court when dealing with referrals from the Scottish Criminal Cases Review Commission (SCCRC).

The Scottish Government notes the Committee’s position in this regard.

49. However, we are concerned that the Bill retains the High Court’s interests of justice test, albeit during the determination of an appeal resulting from a referral from the SCCRC. Given that, according to Lord Carloway, despite the occasional lapse, the SCCRC has been a “conspicuous success in discharging its duties conscientiously and responsibly”, we are not convinced that the arguments for the High Court replicating the duties of the SCCRC in this respect have been made. Consequently, we recommend that the High Court should only be able to rule on whether there has been a miscarriage of justice in these cases, and if there has been, the appeal should be allowed.

In looking at this area, it is important to assess the wider role of the SCCRC and the High Court in the area of miscarriages of justice.

It is appropriate that the SCCRC is required to consider interests of justice when deciding whether to refer a case to the High Court for a further appeal. This is because the type of case the SCCRC investigates can often give rise to wider considerations than emerge through cases taken on appeal at first instance. This can be due to, for example, the passage of time or changes in the law since a case was originally considered by the court. This Bill does not change the SCCRC’s responsibility to consider interests of justice.

The SCCRC has an important role as part of the checks and balances within our justice system. However, the SCCRC is, and always has been, a review body rather than a decision body. It is the High Court that makes the decision as to whether a miscarriage of justice has occurred in any given case.

The Scottish Government considers it is appropriate that the High Court, as the decision maker, should be able to consider interests of justice as part of the test they apply for cases originating from a SCCRC reference, given:

- considerations of interests of justice are accepted as often being relevant in SCCRC referred cases,
- the SCCRC itself has to consider interests of justice, and
• the High Court has a fundamental constitutional role as final decision maker with Scotland’s criminal justice system.

MISCELLANEOUS

50. The Committee welcomes the two aggravations with regard to people trafficking proposed in the Bill. The Committee requests that the Scottish Government keeps it updated on progress with the Modern Slavery Bill and its extension to cover Scotland.

The Scottish Government welcomes the Committee’s support for the statutory people trafficking aggravations contained in the Bill. Any proposal for the UK Modern Slavery Bill to cover devolved matters in Scotland would, of course, be subject to the approval of the Scottish Parliament and as progress is made on this matter the Scottish Government will update the Committee.

51. The Committee welcomes the establishment of a separate Police Negotiating Board for Scotland which will include participation from all ranks of police officers.

The Scottish Government welcomes the Committee’s support for the establishment of the PNBS.

52. The Committee supports the general principles of the Bill. However, this is with the exception of proposals regarding the corroboration provisions. Our recommendations on this issue are set out in the main body of this report.
MAXIMUM DETENTION PERIOD

The following are anonymised examples provided by Police Scotland where the suspect could not be released back into the community without an extension beyond the 12 hour threshold.

1. MURDER

The deceased and male suspect met up and began drinking early in the morning. They made their way to a secluded wooded area where they continued to drink alcohol and met a further suspect. One of the suspects encouraged the other to assault the deceased. The deceased was injured and left lying at locus by both suspects.

The suspects returned in the early hours of the following day having continued to drink in each other’s company. They both found the deceased injured at locus and repeatedly assaulted him again, resulting in his death.

The deceased’s body was found several hours later and the Major Investigation Team (MIT) took up the investigation. Both suspects were identified and one detained later the same day. The suspect was still heavily under the influence of alcohol and removed to police station where the SARF process (Solicitor Access Recording form) was completed. The suspect underwent a full medical examination and also had injuries photographed. Given injuries found by the police casualty surgeon, it was recommended that the suspect be afforded an appropriate adult for support during any interview.

The Senior Investigating Officer (SIO) took the decision not to interview at that time given that it was now in the early hours of the following day and to allow the suspect to get a proper rest before being interviewed.

The investigating officers had also undertaken an extended tour of duty over a 24 hour period and were also in need of a rest before interviewing the suspect. The detention period was reviewed and extension beyond the 12 hour period agreed.

The following afternoon the suspect was interviewed by officers who had been fully briefed by the SIO and an Interview Advisor. Admissions were made which identified a further locus which was examined and forensic evidence recovered. The interview last for 4 hours and 20 minutes and the suspect was charged with murder.

Without the ability to extend beyond the 12 hour mark, any interview with the suspect would have been seriously questioned at court given their emotional state due to fatigue, alcohol consumption and vulnerability given the police casualty surgeon recommendation for an appropriate adult to be appointed. There was also the potential for evidence to have been missed due to the fatigue of the investigating officers and matters having to be rushed to interview the suspect within a 12 hour window. The SIO decision to allow the suspect and his interview team time to recover before interviewing was not only considered best practice and in the public interest, but also in fairness to the suspect.
2. REPORT OF MALE IN POSSESSION OF A HANDGUN

An initial report was made to the Police that a male was observed in the street in possession of what appeared to be a handgun. A firearms operation commenced and the accused was ultimately traced and detained but not in possession of any weapon. A search by officers near to the locus of his detention resulted in the recovery of an imitation handgun.

The male was found to be extremely drunk and volatile on being detained. On returning to the police station he was afforded his rights as per the SARF procedure, however when the Police attempted to facilitate his initial telephone consultation the accused became aggressive, threatening to smash the phone. It was apparent at this point that the accused would require a significant period before he was sober and compliant enough to have his rights as a detained person facilitated. He was also assessed by the police casualty surgeon who supported the custody supervisor’s assessment the male was unfit for interview and would require several hours to sober up.

In the interim period further investigations revealed the suspect had been in the company of a number of persons, who would have seen the weapon in his possession. The extension period allowed these witnesses to be sought and further CCTV evidence from nearby business premises to be sought.

As there was not a sufficiency of evidence to arrest the suspect, coupled with his drunken and aggressive demeanour the decision to extend his detention period beyond the 12 hour limit was proportionate and necessary to complete all available lines of enquiry in order to serve the public interest. The male was interviewed regarding the matter on being deemed fit for interview later the following day. He was subsequently arrested and charged with a Breach of the Peace.

3. RAPE OF 16 YEAR OLD FEMALE

Two males were detained in rural Scotland prior to midnight for the rape of a 16 year old who was known to one of them. The victim was forensically and medically examined by a police casualty surgeon at the nearest medical suite. She was only able to provide a partial statement to a Sexual Offences Liaison Officer (SOLO) trained officer due to the time of night and her traumatic experience. The journey between her home and the police medical suite took approximately 1 hour and 30 minutes.

The locus was stood by for examination until the next day during daylight hours as the circumstances indicated that there may be forensic opportunities on the bed clothes and which is viewed as best practice. A number of witnesses had also to be traced during the detention period in order to corroborate the victim’s statement. Both suspects had to be removed to another police station to be examined by a Police Casualty Surgeon (PCS). The return journey between the detention office and examination suite is a round trip of approximately 2 hours notwithstanding the time necessary to complete the suspect’s medical examinations.

It was necessary to extend the detention period beyond the 12 hour threshold to allow further enquiries to be concluded and ensure the safety of the victim. Both suspects were interviewed once the victim had completed her statement the
following day and the other witnesses had been traced. A full forensic examination was also completed under the guidance of a Crime Scene Manager (CSM). Both males were subsequently arrested and charged with rape.

Without extending the detention period enquiries could not have been properly concluded and as a result both accused would have had to be released.

The community impact assessment was such that the victim and witnesses were considered potentially at risk if the suspects had been released. In addition the suspects could also have been at risk given the crime under investigation from reprisals. As a result this would not have been suitable for Investigative Liberation.

4. DOMESTIC ASSAULT - RAPE

There was considerable history of domestic violence between the victim and suspect with the former at considerable risk from the suspect had officers not been able to conclude all diligent and necessary enquiries. The victim and suspect were in a relationship residing together at the locus. Both had consumed alcohol throughout the day at home.

The victim was woken by the suspect in their bed who then raped her. Afterwards she went downstairs and phoned the Police. On police arrival, in addition to being visibly distressed, the victim was found to be under the influence of alcohol.

The suspect was detained and the locus secured and arrangements for forensic examination instigated with the assistance of a Crime Scene Manager (CSM), Forensic Services and a biologist. A forensic medical examination took place of the complainer at Archway while additional enquiries such as door to door, forensic examination of locus, etc., were undertaken.

The victim was still clearly distressed and suffering from fatigue and the effects of alcohol in her system. The victim also requested that she be allowed to rest between her forensic examination and her statement being noted. The suspect was also under the effects of alcohol and police casualty surgeon opined that he was unfit to be interviewed at that time. As such the decision to extend the detention period beyond the 12 hour threshold was made. Without this ability to extend there would have been insufficient time to complete the necessary police enquiries with the victim and attempts to trace other potential witnesses. The suspect also required to sober up prior to interview and completion of the Solicitor Access process.

Investigative Liberation would have been unsuitable in these circumstances given the gravity of the crime and relationship of those involved.

The victim subsequently provided a full statement to the police allowing the suspect to be interviewed once deemed fit by a police casualty surgeon. He was subsequently interviewed and charged with rape having been arrested.

5. ABDUCTION AND RAPE

The victim and witnesses were within their home address and had retired to bed at various times over the evening. The following morning the victim heard creaking on the stair outside her bedroom and was confronted by the male suspect who was in possession of a knife. A struggle ensued during which an adult male and his child
left their bedroom. All parties were threatened by the accused. The accused cut telephone lines, collected mobile phones and pulled down blinds. A male witness and child were told to stay within their bedrooms or the victims would be killed.

The accused thereafter indecently assaulted and raped a female victim repeatedly before he fled the locus.

Police were called and enquiries commenced. The crime scene was secured for forensic examination by a CSM, assisted by a photographer and Scene of Crime Examiner. The victim underwent a forensic medical examination and provided a statement via a SOLO trained officer. The male and child were also provided with medical assistance and provided statements over what was a prolonged period as the victims of the crime were extremely traumatised and required a period of rest during their interviews.

A male was identified as a possible suspect and a warrant sought and granted to search his home address. During this search distinctive clothing was found, believed to belong to the suspect. He was subsequently detained in terms of section 14 of the Criminal Procedure (Scotland) Act 1995. During his detention period extensive enquiries were still being undertaken at the locus and with the witnesses. An extension was sought beyond the 12 hour threshold to allow sufficient police enquiries to be completed prior to any interview with him. It was necessary to photograph him whilst detained in order to have him formally identified, as at this stage there had been no identification.

Had there have been no opportunity to extend the detention time to allow the identification, and if the accused had made a ‘no comment’ interview, then he would have had to be released for further enquiries to be completed. This case would not have been suitable for Investigative Liberation due to the seriousness of the offence, public safety and reassurance issues and the danger of reprisals in the local community.

The male was subsequently arrested and charged with several offences including abduction and rape. He has since been convicted at Edinburgh High Court receiving a substantial custodial sentence.

6. TRAFFICKING

A property landlord reported a possible cannabis cultivation at one of his city properties. Uniform officers attended at this address as a ‘routine’ call and found 3 foreign national females working as suspect prostitutes. They also found 4 foreign national males (of different nationalities), two of whom were to be later identified to be involved in the trafficking, rape, prostitution of the females.

The detention of 5 persons was extended past 12 hours to allow a proper investigation/ assessment to be carried out, particularly to determine the status of the females involved i.e. if they were victims or suspects. A lack of appropriate interpreters for witness and suspect interviews was largely a contributory factor in the extension, as was allowing the suspects adequate rest time.

During one interpreter-assisted interview, one of the females disclosed that there was another 2 brothels in the city and a pregnant female was possibly being held
against her will. Enquires ultimately identified a network of foreign national males who were trafficking European females up and down Britain for prostitution.

The extended detention period allowed the Senior Investigating Officer to thoroughly complete the initial investigation as well as identification of additional victims of trafficking/sexual abuse. If the detention time had been limited the 3 females may well have been arrested for management of a brothel based on the witness testimony and would not have disclosed their trafficking and sexual abuse to the police. As a consequence, the males responsible for the human trafficking offences would have been released and the offences gone undetected.
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 3, No. 83 Session 4

Meeting of the Parliament

Thursday 27 February 2014

Note: (DT) signifies a decision taken at Decision Time.

**Criminal Justice (Scotland) Bill:** The Cabinet Secretary for Justice (Kenny MacAskill) moved S4M-09160—That the Parliament agrees to the general principles of the Criminal Justice (Scotland) Bill.

Margaret Mitchell moved amendment S4M-09160.1 to motion S4M-09160—

Insert at end—

“but, in so doing, calls on the Scottish Government to lodge an amendment at stage 2 to remove the provisions abolishing the general requirement for corroboration.”

After debate, the amendment was disagreed to ((DT) by division: For 61, Against 64, Abstentions 1).

The motion was then agreed to ((DT) by division: For 64, Against 5, Abstentions 57).

**Criminal Justice (Scotland) Bill: Financial Resolution:** The Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney) moved S4M-09149—That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Criminal Justice (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b) of the Parliament’s Standing Orders arising in consequence of the Act.

The motion was agreed to (DT).
On resuming—

Criminal Justice (Scotland) Bill: Stage 1

The Presiding Officer (Tricia Marwick): The first item of business this afternoon is a debate on motion S4M-09160, in the name of Kenny MacAskill, on the Criminal Justice (Scotland) Bill.

The Cabinet Secretary for Justice (Kenny MacAskill): I am delighted to open this stage 1 debate on the Criminal Justice (Scotland) Bill. The bill contains a significant package of wide-ranging reforms to our criminal justice system, so I record my appreciation of the time and consideration that the Justice Committee gave it. I also formally record my thanks to the many stakeholders and individuals who gave evidence to the committee.

Today's debate is of course about seeking agreement to the general principles of the bill. There are three general principles that underpin all the progressive reforms that are contained in the proposed legislation. First, the bill will modernise and enhance our justice system and update our procedures from the point of arrest onwards. Human rights are at the heart of the bill. It will ensure that people who are suspected or accused of criminal offences have improved and enhanced rights and protections.

Secondly, the bill makes necessary efficiency changes to our justice system. For example, there are changes to our system of appeals and changes to enable greater use of technology by our courts.

The third but equally fundamental principle is about bringing fairness for those who fall victim to criminal acts and the wider duty to protect our society. That includes providing for greater access to justice for victims by ensuring that cases can go forward based on the overall quality of evidence, and creating a statutory aggravation for offences that are linked to the appalling activity of people trafficking.

I will highlight some of the positive effects that I believe the reforms in the bill will have in meeting those principles. Part 1 sets out a new and modernised power of arrest for the police. It creates a single power of arrest on suspicion of having committed an offence. The current two-tier system of detention and arrest is complex and covers a myriad of powers that are spread across common law and statute. The bill provides for a more streamlined and effective process. The provisions will improve the law and will make it easier for the police to apply and the public to understand. The single power of arrest will also
bring the Scottish system more into line with the European convention on human rights.

The bill enhances provisions on a suspect’s right of access to a solicitor, whether or not they are going to be questioned, and it puts the letter of rights on a statutory footing. It also protects the rights of children and vulnerable people. Scotland’s Commissioner for Children and Young People has welcomed the fact that the bill defines a child as someone under 18. Additionally, the bill allows a protected level of self-determination for 16 to 17-year-olds, in recognition of the fact that those young people are, in other circumstances, entitled and able to make their own decisions.

The bill also reflects the fact that modern policing needs modern powers. Today’s investigations are often complex and protracted. In part, that is down to recent developments in technology. Police now regularly have to extensively examine electronic data, which takes time. The bill seeks to balance the needs of the modern investigation and the rights of a suspect to liberty. As part of that, the bill introduces investigative liberation, which will enable the police to continue to investigate incidents while allowing a suspect to be at liberty, with or without conditions.

I am aware of calls by the police to allow for possible extensions, in exceptional cases, to the 12-hour detention limit for keeping people in custody. Extensions are used very rarely but can be essential for the investigation of some of the most serious criminal acts, or, for example, where the suspect is intoxicated. There is a particular issue here about balancing an individual’s right to liberty against the public’s right to be protected. I would like to hear members’ views on the potential for an extension to the 12-hour detention limit in exceptional circumstances.

The bill also includes a number of provisions that will improve the efficient operation of our justice system, reducing unnecessary delays and wasted court time. Efficiency in solemn procedure will be enhanced, for instance by the creation of a duty on the prosecution and the defence to communicate before a trial to ensure that the case is ready to proceed.

As part of the package of reforms, the bill increases the pre-trial time limit from 110 days to 140 days, in line with that for the High Court. I am pleased that the Justice Committee has accepted the need for that change, and I confirm that we will monitor its implementation. In addition, the bill takes forward many of Lord Carloway’s recommendations on ensuring that appeals are handled in a timely manner. It is in everyone’s interests that appeals proceed in good time. That will mean faster resolution for both appellants and victims.

However, the bill’s scope goes beyond the modernisation of practice and extending the rights of suspects, as it also seeks to improve how we as a society respond to criminal behaviour. For example, by increasing the maximum term for handling offensive weapons, we will send a clear message about the consequences of carrying knives on our streets.

The bill also seeks to improve the way in which we pursue criminal cases. The past three years of debate have brought home the obligation on the Government—and indeed the Parliament—to protect all our citizens. We must answer the concerns that have been aired by brave individuals, support groups and campaigners that justice is not being delivered for victims across whole categories of crime. I acknowledge that there are legitimate concerns about how our system will work without the requirement for corroboration. The committee has done its duty in giving the matter full consideration. For my part, I have listened, I have reflected and I have acted. Lord Bonomy will undertake a thorough review of the changes that might be required as a consequence of abolition. He has assembled a veritable powerhouse of expertise on Scots criminal law.

Margaret Mitchell (Central Scotland) (Con): What does the Government have to fear from including consideration of whether or not to abolish corroboration in the remit of the Lord Bonomy review?

Kenny MacAskill: I say to Ms Mitchell that I am quite clear that, as I will go on to say, the case for abolition has been made. It has been made and supported by prosecutors and by the police, but it has been made and articulated most effectively by Victim Support Scotland, Scottish Women’s Aid and Rape Crisis Scotland. I stand with and I stand for those organisations.

Alison McInnes (North East Scotland) (LD): Will the cabinet secretary take an intervention?

Kenny MacAskill: Not at the moment.

The work of the distinguished experts in the review will allow us to modernise our system and ensure that it is in balance. I have complete confidence that the review will answer any and all of the legitimate points of concern that have been raised.

To be clear, the corroboration reform will not take effect until any legislation that is introduced in light of the Bonomy review is approved. The Parliament will be afforded a full opportunity to ensure to its satisfaction that the new system will be in balance. To that end, I will lodge amendments at stage 2 to tie abolition to any reforms that are brought in light of Lord Bonomy’s review. We will discuss the exact mechanism with
the parliamentary authorities, but at the very least I would expect a draft order to be published and consulted on, with sufficient time for committee evidence taking and a chamber debate. That process would result in an amended order being put to the Parliament.

**Patrick Harvie (Glasgow) (Green):** Will the cabinet secretary take an intervention?

**Kenny MacAskill:** Not at the moment.

All of us here share the same goal: a balanced and effective criminal justice system, and one that is safe and secure. Lord Bonomy’s review will give the Parliament an historic opportunity to remake our system. In doing that, we cannot forget the many voices that have raised concerns about the miscarriages of justice that occur now, under our current system. Too many compelling cases—often involving crimes that have been committed in private—cannot even make it to our courts because of this outdated rule.

**Alison McInnes:** The cabinet secretary, the Lord Advocate and, indeed, Scottish Women’s Aid have all openly admitted that the removal of corroboration will not in itself result in more convictions. Why is the Government proceeding with the proposal and raising false hopes? [Interruption.]

**Kenny MacAskill:** One of our most distinguished judges said that we cannot have a whole category of victims who are routinely denied access to justice. We cannot have those who suffer rape or domestic offences, those who suffer domestic abuse behind closed doors, those who are young, those who are vulnerable and those who are elderly preyed upon, picked upon and routinely denied access to justice.

**Margaret Mitchell:** Will the cabinet secretary take an intervention?

**Kenny MacAskill:** Not at the moment.

The voices of brave individuals have been echoed by those of the professionals who see the very personal and devastating impact that the corroboration rule can have in practice—not only our police and prosecutors but groups such as Victim Support Scotland, Rape Crisis Scotland and Scottish Women’s Aid, all of which play such a vital role in supporting the victims of crime. On Wednesday, I visited the Glasgow-based advice, support, safety and information services together project, which does great work to support the victims of domestic abuse.

**Patrick Harvie:** Will the minister give way?

**Kenny MacAskill:** Not at the moment.

The difficulties posed by the corroboration rule to the pursuit of individual real cases could not be more apparent. We have heard from Police Scotland that there are more than 3,000 cases every year that it cannot send to prosecutors because of the corroboration rule. Those are cases where there is quality evidence that, in other systems, would merit further consideration.

We cannot refuse to listen. We are talking about not just hundreds but potentially thousands of compelling cases in which people are being denied justice in this country under the current system. Those are not just numbers; real people’s lives are affected.

**Patrick Harvie:** Will the cabinet secretary take an intervention?

**Margaret Mitchell:** Will the cabinet secretary take an intervention?

**Kenny MacAskill:** After so much debate, we must now act. The bill sends a clear message that Parliament has listened and is acting to address that injustice.

The corroboration reform must stay in the bill. Commencement must wait until Lord Bonomy reports, but there must be no unnecessary delay. The reform must go forward now in this legislation. If members vote to take the provisions out of the bill, they are voting to continue that injustice in Scotland for so many people.

**Willie Rennie (Mid Scotland and Fife) (LD):** Will the minister give way?

**Kenny MacAskill:** Not at the moment.

**Willie Rennie:** Outrageous!

**The Presiding Officer:** Order, Mr Rennie.

**Kenny MacAskill:** The extent of that injustice is clear. Research for the Carloway review identified that, in 2010, 268 serious cases were dropped after the initial court appearance—cases in which there would have been a reasonable prospect of successful prosecution. The Lord Advocate has said that there were 170 rape allegations in the past two years where no proceedings were taken because of insufficient evidence. Crown Office research from last year suggested that around 60 per cent of domestic abuse cases—2,210 cases—could have progressed under the new prosecutorial test.

I have listened and I have acted on the legitimate concerns that have been raised.

**Willie Rennie:** Will the minister give way?

**Kenny MacAskill:** I now ask Parliament to listen to the voices of those representing some of the most vulnerable people in our society and to support the general principles of the bill in its entirety. I repeat that abolition will not occur until Parliament has approved any additional reforms
brought forward in light of Lord Bonomy’s review. With that assurance, I invite Parliament to approve the new guiding principle for our system—that cases in future will go forward based on the overall quality of evidence.

Willie Rennie: Will the minister give way now?

The Presiding Officer: The minister is in his final minute.

Kenny MacAskill: We need to set that important principle now and move discussion on to how to ensure a modern, efficient and fair justice system that is fit for 21st century Scotland.

The bill contains many important reforms. I look forward to a constructive debate.

I move,

That the Parliament agrees to the general principles of the Criminal Justice (Scotland) Bill.

14:44

Margaret Mitchell (Central Scotland) (Con): I thank the numerous witnesses who gave evidence and the Justice Committee clerks for their work in helping committee members to compile the stage 1 report on the Criminal Justice (Scotland) Bill. I also pay tribute to the convener of the committee and my fellow committee members for their efforts and for the spirit in which that powerful and compelling report was produced.

The bill will implement recommendations that were made in two separate expert reviews: those from Sheriff Principal Bowen, on sheriff and jury procedure, and those from Lord Carloway, on criminal law and practice. The Carloway review was set up in the wake of the Cadder case, which resulted in the provision that suspects have the right to legal representation when they are detained for questioning by the police.

Part 3 of the bill, on solemn procedure, was welcomed by the committee. It includes the proposal to introduce meetings between prosecutors and the defence and others to reduce unnecessary delays in criminal trials.

Part 1 contains provisions on arrest and custody. In attempting to simplify powers of arrest, there is a real danger that the proposed changes have instead done little more than confuse the situation. For example, at present the general public realise that, when a suspect has been detained for questioning, they have not been charged, and the presumption of innocence is still very much evident. I believe that, by changing the term to “arrest”, the public perception will be that the person is, to use the cabinet secretary’s phraseology, “officially accused”.

Indeed, the cabinet secretary’s response to the report and the introduction of terms such as “officially accused” and “not officially accused” do little to allay those fears. In giving evidence, the cabinet secretary also introduced the somewhat unhelpful term “de-arrest”, and said that he would bring forward a provision on that in an amendment at stage 2. I am glad that he has decided to drop that rather ridiculous wording.

The cabinet secretary’s deafness to the justified concerns about part 2 of the bill and the provision in section 57 to abolish the general requirement for corroboration has caused a storm of controversy. He has consistently attempted to misrepresent and polarise the debate, with victims on one side and the legal profession on the other. That is not only a complete distortion; it insults all those who oppose that move, including those who signed my amendment.

I do not doubt the cabinet secretary’s concern for victims; equally, I do not doubt the concern of leading judges, the Law Society of Scotland, the Faculty of Advocates, the Scottish Human Rights Commission and the cross-party group on adult survivors of childhood sexual abuse. All those organisations oppose section 57 not because they have an axe to grind but because they do not believe that it would be in the interests of the criminal justice system or victims of crime.

Kenny MacAskill: Margaret Mitchell missed out the police and prosecutors. Do they not have a say?

Margaret Mitchell: I listed the people who have expressed their opposition. As the cabinet secretary knows, for one reason or another the police gave very confused views and changed their position during the evidence sessions.

The views of those who have expertise and in-depth practical experience of the operation of the criminal justice system cannot and should not be dismissed, but the cabinet secretary has attempted to do that with well-rehearsed assertions, including the assertion that corroboration is archaic. In fact, as Lord Gill eloquently explained when he gave evidence to the Justice Committee,

“The rule of corroboration is not some archaic legal relic from antiquity. We did not get where we are by accident. The fact that our law has this rule—a rule that I regard as one of its finest features—is the result of centuries of legal development, legal thought and the views of legal writers, politicians and practitioners down through the ages. It has been found to be a good rule. I simply ask the committee to listen to the wisdom of the ages—it has a lot to tell us.”—[Official Report, Justice Committee, 20 November 2013; c 3730.]

Sandra White (Glasgow Kelvin) (SNP): Will the member give way?

Margaret Mitchell: Not just now.
Furthermore, a key part of the Government’s argument for abolition of the requirement is that access to justice will be improved, especially for the victims of interpersonal crimes, such as rape and domestic abuse.

Kenny MacAskill: Will the member take an intervention?

Margaret Mitchell: I want to make some progress.

More prosecutions does not mean more convictions, and there is nothing just in putting victims through the ordeal of gruelling interrogation by the defence when, under the Government’s proposal, their evidence could be the only source available and they would just end up seeing the accused acquitted.

Corroboration is not an overly onerous requirement, particularly in the light of the increasing availability of closed-circuit television and DNA evidence.

Kenny MacAskill: Will the member take an intervention on that point?

Margaret Mitchell: No, I am sorry—I must make progress.

Furthermore, corroboration does not require each and every single fact to be backed up with additional evidence. The rule applies only to the essential facts of a case: namely, that a crime was committed, and that the accused committed it.

Kenny MacAskill: Will the member take an intervention on that point?

Margaret Mitchell: In that regard, there is a definite need to look at how the Crown applies the requirement and whether the belt-and-braces approach, in which every fact is corroborated, is necessary or whether it is preventing cases in which there is a realistic prospect of conviction from going to trial.

Kevin Stewart (Aberdeen Central) (SNP): Will Mrs Mitchell give way?

Margaret Mitchell: Not just now, Mr Stewart—I may be able to give way as I progress with my speech.

In the meantime, the introduction of independent legal representation for rape victims to help to stop the use of irrelevant prejudicial information in court has the potential to make a difference in tackling the low conviction rates for rape.

As the legitimate arguments against abolition have mounted, the cabinet secretary’s handling of the issue has not been his finest hour. In one evidence session he contradicted himself, first telling the committee that the abolition of the general requirement could not be removed from the bill as it must be implemented immediately to give access to justice for victims of rape and domestic abuse, but then stating that it was necessary to take time to get the legislation right.

In general, the cabinet secretary has been on the back foot, and he has reacted to mounting criticism of the section 57 proposal with yet another consultation. Even on the day on which the committee signed off its stage 1 report, the cabinet secretary announced a further review. The membership of the review group, which is to be led by Lord Bonomy, was revealed only two days ago.

As a result of the mishandling of the issue, the Scottish Government is now in the ludicrous position of promising a review after corroboration is abolished. The Carloway review, on which the cabinet secretary has relied, was fundamentally flawed as it looked only at the options of retaining or abolishing corroboration. The third option of retaining corroboration but including it in a wider review of the law of criminal evidence was not considered.

The criminal justice system needs to be examined as a whole. When he was asked directly by Sandra White, Lord Gill told the Justice Committee that the corroboration proposal should be taken out of the bill and examined as a separate entity. He said that that

"would not be a way of avoiding the problem; it would be a positive way of getting a better outcome."—[Official Report, Justice Committee, 20 November 2013; c 3721.]

I do not believe that the cabinet secretary truly believes that retaining section 57 is the best way to legislate.

Kenny MacAskill: Will the member take an intervention now?

Margaret Mitchell: I will make progress.

The cabinet secretary is asking the Scottish Parliament to pass bad law and to vote to abolish corroboration before we know what system will replace it on a promise that the review, about which little is known, may fix the issue.

The Parliament’s integrity is at stake. The Justice Committee is not convinced by the Scottish Government’s proposal, and the Government should listen. For the Scottish National Party-led committee to take that view should give the cabinet secretary pause for thought, and the fact that the reasoned amendment in my name has been lodged with support from the Opposition parties and independent members John Finnie and Margo MacDonald indicates the strength of feeling among members of the Parliament about the Government’s proposal in section 57. Margo MacDonald has confirmed in no uncertain terms
The bill is, as we know, significant and complex, and covers a wide range of areas, although almost all the proposed reforms have been buried, understandably, by the focus on the reform relating to corroboration. As Margaret Mitchell has already said, the bill broadly implements the recommendations of Lord Carloway's review of Scottish criminal law and practice relating to police powers of arrest, holding suspects in custody, and corroboration; and the recommendations of Sheriff Principal Bowen's independent review of sheriff and jury procedure that was aimed at increasing the efficiency and cost effectiveness of solemn proceedings in the sheriff court.

The bill also introduces new measures on: weapons offences; offenders on early release; appeals; the Scottish Criminal Cases Review Commission; people trafficking; and a police negotiating board for Scotland. It is a huge bill. That substantive list evidences—some might say corroborates—my earlier point about the depth and width of the bill. It is worth saying at the outset that on most of those matters the committee was in agreement. However, we were unable, as is well known and understood, to reach agreement on the proposal to abolish the mandatory requirement for corroboration. I will address that in due course.

Part 1 of the bill aims to simplify police powers of arrest by removing common law and statutory rules on arrest and detention, and replacing them with a general power of arrest on "reasonable suspicion". The committee agreed that there might be some benefit in simplifying the powers of arrest but, as alluded to by Margaret Mitchell, the term "arrested", when used to refer to someone who has not been charged with an offence, may appear more suggestive of and give the perception of guilt to the public than the term "detained". Terms such as "person not officially accused" for someone who has been arrested bewildered me, and I kept forgetting the definition, as did some other members. We considered some terms, and the idea of "de-arrest", as confusing enough for some committee members, never mind the general public.

I somehow cannot see those terms becoming the stuff of newspaper reports. Accordingly, we were concerned that the reputation of the accused might be detrimentally affected by the provisions in the bill, and we have asked for assurances on that issue. We were all concerned about the no-smoke-without-fire syndrome and trial and conviction by the media.

Prior to the emergency Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, suspects could be detained for a maximum period of six hours. Currently, under the 2010 act, a person can be held in custody for up to 12 hours, with the possibility of an extension to 24 hours. The bill proposes a maximum 12-hour limit without any extension. The cabinet secretary told the committee that he was also considering whether to allow an extension to that period in exceptional circumstances.

We heard a mix of views on that issue. Police witnesses argued that 12 hours might not be sufficient in the most complex of cases, and the
Scottish Human Rights Commission told us that six hours would be more proportionate. The committee had mixed views on whether detention beyond six hours was necessary. We have requested examples of exceptional circumstances in which an extension might be granted, particularly as the bill also provides the option of investigative liberation.

What is investigative liberation? It would allow the police to release from custody for a maximum of 28 days and on conditions suspects who have not been charged while the police carry out further investigations into the suspected crime. The committee has asked for assurances that investigative liberation will not have an unnecessary impact on the suspect’s private life, while allowing the police to conduct complex investigations that could not be completed during the person’s initial detention. Witnesses assured us that it would not be used for a fishing expedition for evidence. We also noted that this and other aspects of the bill could have resource implications for the police that would need to be considered.

I come to the subject of corroboration. I make it clear that all committee members wanted more successful prosecutions, particularly for crimes of a sexual nature such as rape. As we understand it, that and other similar offences provided the momentum for reform.

Part 2, which aims to abolish the general requirement for corroboration, has quite rightly proved the most difficult part of the bill for the committee, with strong views on both sides of the debate. I must emphasise the phrase “general requirement”, because although the debate has focused on the crime that I just mentioned, the abolition of the requirement for mandatory corroboration would apply to all crimes for which corroboration is currently a requirement, such as shoplifting and vandalism. I ask members neither to lose sight of that nor to misunderstand—

Ruth Davidson (Glasgow) (Con): Will the member give way?

Christine Grahame: I really cannot respond to the member because I have to keep to the report. I hope that she understands.

Ruth Davidson: I understand that the member is speaking as the committee convener. However, she is also speaking as a member of the class of ‘99 in this chamber. Can she tell a new member like me whether she can recall a time in the history of the Parliament when members were asked to vote for a fundamental change in the law in the knowledge that they would find out only afterwards what they were being asked to change it to? How can she recommend that?

Christine Grahame: That is very naughty of Ms Davidson. I like to have a rammie in a debate as much as anyone else, but I made it plain from the very start that in fairness to all committee members I would be speaking as convener. I will not enter into a discussion on those points—another day, perhaps.

Going back to the general requirement for corroboration, I should not have to say this but I will say it anyway: corroboration does not mean the requirement for an eyewitness other than the alleged victim.

Some witnesses argued that removing the corroboration requirement would achieve access to justice for more victims of crime by allowing more victims of rape, sexual offences and domestic abuse to have their day in court and have their say.

Others argued that corroboration—

Sandra White: Will the member give way?

Christine Grahame: I am coming to my point. The member’s views will be reflected in it.

Others argued that as corroboration was a vital safeguard against wrongful conviction the requirement for corroboration was itself such a safeguard. There were mixed views among committee members and witnesses about what is meant by corroboration; indeed, that mixed view extended to a difficulty in understanding the legal or technical distinction between supporting evidence and corroboration. The Lord Advocate and the cabinet secretary gave some indication that supporting evidence could be required in cases in which corroboration is not available. However, we received limited information on how that might work in practice and have therefore asked the Scottish Government to provide specific information on how any requirement for supporting evidence would differ from the current need for corroboration.

The same issue arose with regard to the meaning of the term access to justice. For some, it meant getting the case to court; for others, it meant getting a successful conviction. That is another problem for the committee. As a result, although all members had serious concerns about the particularly low prosecution and conviction rates for sexual offences, rape and domestic abuse, we could not reach agreement on whether removing such an integral part of the criminal justice system would improve for victims of those crimes access to justice—whatever that means to members—in a meaningful way.

If we read what we actually said—

Alison McInnes: Will the member give way?
Christine Grahame: I have only one minute to read what the committee said about the issue, and it is important to get it on the record.

The committee concluded:

“The Committee is convinced that, if the general requirement for corroboration continues to be considered, this should only occur following an independent review of what other reforms may be needed to ensure that the criminal justice system as a whole contains appropriate checks and balances.

The majority of Committee Members do not believe, in the event that the requirement for corroboration is abolished, that concerns relating to the need for further reform can be adequately explored during the passage of the Bill. The Cabinet Secretary’s proposal that the commencement of the provisions abolishing the requirement for corroboration be subject to a parliamentary procedure requires further explanation and consideration, which the Committee requires before Stage 2.”

Those are the two points that the committee made, and I have tried as fairly as possible—

Alison McInnes: The main conclusion of the committee—

The Deputy Presiding Officer (Elaine Smith): Order.

Christine Grahame: I have done it as fairly as possible. I hoped that I could square the circle by saying that the majority of members are not convinced that the requirement for corroboration should be abolished and also by reading out the conclusions to the committee’s report.

I say to the other members of the committee that I hope that I have reflected our feelings about an extremely difficult issue that, I know, splits groups across the Parliament. It splits the Labour Party, it splits the SNP and it splits others. I know that for a fact, but I speak to the committee report.

I look forward to the debate, which, unfortunately, I cannot join.

15:05

Graeme Pearson (South Scotland) (Lab): I commend the convener of the Justice Committee for the fairness with which she has reported its deliberations. I am not a member of the committee, but I believe that she gave a just account of the deliberations that took place on the days on which I attended.

I also commend the committee, the clerks and the witnesses for the work that has been done.

I remind the chamber that the entire bill deserves thought and consideration. There are significant elements in the bill that affect police powers in relation to suspects; solemn procedure, with regard to improvements in the preparation of cases; sentencing, including the provision relating to the possession of knives and maximising sentences to five years; changes to appeal processes; and a number of provisions that deal with trafficking and the use of live television links between prisons and courts. It also includes provisions to establish a police negotiating board, which touches on important considerations around police conditions of service and so on. Those important issues are worthy of consideration.

As we anticipated, this afternoon’s debate has focused on the necessity or otherwise for corroboration in Scots law, but it is important that members do not neglect or lose sight of the other important changes while that consideration is going on.

Corroboration is the headline issue, and is extremely contentious. I come to the issue of corroboration as someone who had no prior conviction about the way forward. From the outset, I was determined to hear the Government’s proposals, listen to the evidence and, thereafter, decide my position.

Kenny MacAskill: Did the member not bear in mind Labour’s manifesto commitment to remove corroboration with regard to rape?

Graeme Pearson: My next sentence will address that, if the cabinet secretary will allow me to get to it.

The Scottish Labour Party’s 2011 manifesto committed us to considering the arguments on corroboration, and I am delivering fully on that commitment today. Following that deliberation, I agree with the Justice Committee’s recommendation regarding corroboration, and I will explain why.

I welcome the very late creation of Lord Bonomy’s reference group, but I note with extreme interest that neither Rape Crisis nor Scottish Women’s Aid is represented on the group. I find that surprising, given the significance that the cabinet secretary attached to the importance of dealing with sex crimes, such as rape, and domestic violence in particular, when demanding the removal of the requirement for corroboration. Lord Bonomy’s group should have been tasked much earlier and should have reported long before now in order to provide MSPs and the public with robust Government proposals in the event of the abolition of the need for corroboration.

The cabinet secretary is in effect asking us to allow him to put his plans out to tender now and to write us a blank cheque, with the promise that we will receive the goods sometime in the future. I would not do that at home, and I will not do it on behalf of victims.

In light of the one-year delay that he anticipates before any empowerment in relation to the abolition of corroboration, it would be prudent for
the cabinet secretary to remove that part of the bill that deals with corroboration. That would allow him to bring back a comprehensive and considered proposal at the conclusion of Lord Bonomy’s work and would allow the bill, with its remaining significant issues, to progress. After all, it is important that any changes focus on ensuring that victims and witnesses are provided with every opportunity to deliver their evidence effectively.

The Government should provide whether it will maintain the current system of 15 jurors alongside corroboration and the three verdicts that are the heart of our system, or whether it will move wholesale to an English system in which there will be two verdicts and 12 jurors who will be expected to deliver a unanimous verdict except in exceptional circumstances. Tinkering solely with corroboration and not dealing with the not proven and proven verdicts is short-sighted.

What will the Government propose for post mortem pathology and forensic examinations? Will those continue to require corroboration? What checks and balances will there be for the huge number of summary cases that are dealt with without juries? What is the impact of warning juries in those cases in which there is no corroboration of the essential facts? There is also a need to consolidate legislation, given the volume of changes that have already occurred over the decades and the changes that are now taking place. Will the cabinet secretary consider codifying our law in that respect?

Lord Carloway accepts that, although he had a group involved in the recommendations, he was solely responsible for the recommendation on corroboration. There are alternative views. Justice for the victims of rape and domestic violence requires a cultural change in public attitudes—it cannot be dealt with simply by removing one part of the justice system. Under the proposal, the requirement for corroboration would be abolished for all crimes, not only one-to-one crimes. It would apply, for instance, to trade unionists on a picket line or a youngster who was accused of shoplifting.

Other safeguards that need to be considered include what we would do about dock identifications and allowing judges to dismiss cases in which no reasonable jury could convict. Those matters are not fully dealt with in the bill. In any case, changing the jury verdict requirements as proposed in the bill would be no safeguard in the 96 per cent of cases that are heard without a jury.

**The Deputy Presiding Officer:** Draw to a conclusion, please.

**Graeme Pearson:** There are several key issues. How will we protect victims, their medical histories and their private lives? How will we defend victims from hostile and inappropriate cross-examinations in the new environment? How will we decide jury verdicts? What will we do with judicial examination, and how will we empower our judges for the future?

I implore the Government to take time to reconsider and allow that part of the bill to be held in abeyance, to be considered in the round in a year’s time when it can come back to the chamber fully considered.

15:13

**Christian Allard (North East Scotland) (SNP):** I thank my fellow members of the Justice Committee, the convener, the clerks and everyone who was involved in putting together the stage 1 report.

As members have heard, the committee agreed to support the general principles of the bill. We might have gone further and supported Lord Carloway’s recommendation to abolish the requirement for corroboration but, to my surprise, after months of taking evidence, the majority of the committee chose not to back Lord Carloway’s recommendation at our last meeting at stage 1, when Graeme Pearson joined us to write the conclusions of our report.

I will concentrate on why the minority of committee members, including myself, after listening to months of evidence from judges, prosecutors, the police and victim support organisations, concluded that we must trust our police, prosecutors, judges and juries to deliver equal justice for all. The case has been made and we must move forward, not sit on our hands. We must vote today to support the bill, including the provisions on corroboration.

**John Finnie (Highlands and Islands) (Ind):** Did the member change his view on the police approach to the matter when the police themselves changed their view?

**Christian Allard:** I will come on to that issue.

We all recognise that the situation in which we find ourselves is not of our making. In October 2010, the Cadder ruling started the process to reform our criminal justice system. The cabinet secretary wasted no time in responding, and emergency legislation followed.

In December 2010, Lord Carloway was asked to head a review team. The review process involved a range of evidence gathering, research, analysis and consultation. The consultation process ran from April to June 2011. The Justice Committee considered Lord Carloway’s report, which was followed by more consultations—the Scottish Government carried out two consultations during
2012 and 2013—before the bill came to the committee.

How many more consultations and reports do we need? The evidence is there and it is time to move forward. The justice secretary did not sit on his hands; nor should we.

We took evidence from many in the criminal justice system. In our report, members can read that the Lord President, Lord Gill, agreed that there is a concern to ensure that sexual crime and domestic abuse are properly and effectively prosecuted. He added that he was also concerned that abolishing the requirement for corroboration would result in weak cases with uncorroborated evidence brought forward but, to my disappointment, Lord Gill did not suggest any alternative, except that we should sit on our hands.

We heard that the focus should be on the quality not the quantity of evidence.

Margaret Mitchell: Will the member take an intervention?

Christian Allard: Not just now.

The Lord Advocate has made it clear that, after removing the corroboration rule, supporting evidence will always be sought before criminal cases go to court. The Lord Advocate said:

“I would not—and prosecutors would not—take up a case without any supporting evidence. However, that is different from a legal requirement for corroboration. Of course, when reaching a decision, we would want to look at evidence that supports what the complainer or victim is saying and we would apply the reasonable prospect of success test and look at issues of credibility and reliability.”—[Official Report, Justice Committee, 20 November 2013; c 3736.]

I trust prosecutors, judges and juries to deliver justice for all after we remove that barrier to justice. That barrier is not only for women who are denied access to justice but for victims of other crimes that take place in private. Sitting on our hands is not an option.

I also trust the police who gave evidence. The Scottish Police Federation, the Association of Scottish Police Superintendents and Police Scotland all came to the same conclusion, and they all support the abolition of the requirement for corroboration.

Members might have read that some changed their minds during our consideration of the bill; some even mentioned that fact to us. They changed their minds because, like many others, they looked at the evidence and reached the conclusion that sitting on our hands was not an option.

Others also changed their mind during the process. When I asked the Lord President, on the principle of access to justice, whether abolishing the requirement for corroboration would increase the number of cases that are brought to prosecution, his first answer was no. When I pressed him on his answer, he changed his mind and said that that might increase the number of prosecutions, but that he was not convinced that it would increase the number of convictions. The debate had moved on; indeed, the debate keeps moving on.

I leave it to other members to tell us why victim support organisations—many of which came to give evidence to our committee—are asking us to vote to abolish the requirement for corroboration. The justice secretary has been listening to the voices in the committee and others who came before us who want some safeguards to come with the change. I trust Lord Bonomy’s review on the matter.

Let us give Scotland a criminal justice system fit for the 21st century. The case has been made. Scotland is not on pause. The choice today is not to sit on our hands as the majority of the committee did on the day that we wrote the report’s conclusions. The choice is to vote on the opportunity to move forward and support the bill.

15:19

John Pentland (Motherwell and Wishaw) (Lab): The media attention on the bill has mostly centred on corroboration, and that is clearly the most contentious aspect today.

Along with my Scottish Labour colleagues, I am absolutely committed to tackling the abysmally low level of cases of rape and sexual assault taken to court and successfully prosecuted. The question is how that can best be done.

Kenny MacAskill: The Lord Advocate has stated that, in the past two years, 170 cases could not be brought because of the lack of corroboration. Will Mr Pentland tell me how Labour proposes to address that?

John Pentland: It would help to secure an answer from us if you would allow the review that Lord Bonomy is undertaking to be part of the measures on corroboration when the bill comes before us again. Corroboration should be removed from the bill, we should allow Lord Bonomy to come back with his review, and then we can make a judgment. Do not try to play with words. We are as serious about helping people as you are, cabinet secretary.

The Deputy Presiding Officer (Elaine Smith): Speak through the chair, please.

John Pentland: The solution must be right, not something that has the appeal of simplicity but fails to address the complexity of the problem.
I sat and listened carefully to a lot of conflicting evidence on the issue. On one hand, we have the legal establishment closing ranks and resisting any change. It has depicted the proposal as an attack on fundamental human rights that would lead to miscarriages of justice. On the other hand, we have the victims who are denied access to justice because their cases, which might otherwise be strong enough to secure convictions, do not meet the strict rules of corroboration.

To address those cases, the Scottish Government wanted to remove corroboration across the board. At first sight, that seemed an attractive solution to me. After all, cases would still need to be proven beyond reasonable doubt and there should be appropriate safeguards, with corroboration continuing to be sought wherever possible.

However, as I considered the pros and cons of removing corroboration, a number of things became clear. One is that the evidence advanced by both sides of the argument is, to say the least, patchy and inconclusive. Comparisons do not compare like with like. Evidence such as that about additional and wrongful convictions varies from speculative to hypothetical, and some of it would not be admissible in court. Indeed, it was admitted that the assertions about the dangers of wrongful conviction were impossible to prove. Although that might not always be an obstacle in politics, it is a serious matter in a legal debate.

The Scottish Government’s majority in the Parliament enables it to bulldoze through reform, but I detected that there were signs of movement in the legal establishment’s position. Lords Cullen and Hamilton conceded that allowing exemptions from the requirement for corroboration in certain cases might be preferable to outright abolition.

With a back-bench rebellion becoming a prospect because the whole legal establishment was against abolition, the Cabinet Secretary for Justice offered a review. People can be forgiven for thinking that that was just an act of tokenism or a ruse to buy off back-bench opposition because he is still determined to push ahead with abolition regardless and he does not anticipate the review causing any significant delay in that.

What the cabinet secretary offers by way of safeguards still leaves a lot to be desired. Although most countries do not require corroboration, they require greater majorities than the 10 out of 15 proposed for Scotland. Most require at least 10 out of 12.

What are the alternatives? We could examine whether the refusal to give evidence could be taken into account when considering a verdict. We could also examine how we define corroboration. Unfortunately, there is no definitive definition. There have been a few definitions and, in practice, it is often a case of considering the precedents for how the principle has been applied.

Over the years, various modifications have been proposed, including evidence of bad character, similar-fact evidence and the Moorov and Howden doctrines, in which there is mutual corroboration between cases based on time, character and circumstance. Moorov is already used in Scots law, but there are issues with its use that could be considered, especially in the context of crimes such as rape and sexual assault. Indeed, its incorporation into general statutory rules was considered by the Scottish Law Commission less than two years ago, but that report was bypassed by the proposal to remove corroboration.

Rather than seek to clarify or extend the concept of corroboration, the cabinet secretary chose to enter the fray with his own alternative—supporting evidence. Some thought that that was corroboration by another name, but attempts to compare the two soon revealed that the concept of supporting evidence also suffers from a lack of clarity.

The Deputy Presiding Officer: You must conclude, please.

John Pentland: Far from helping, it muddied the waters. Frankly, the more we look into the debate, the messier it becomes. I do not think that the proposal should be used as a political football and pushed through just to tick a few boxes.

The Deputy Presiding Officer: I am afraid that you need to close.

John Pentland: I hope that the suggested amendment will give us the time that is needed to give careful consideration to all the issues and options. We need to get this right, because hundreds of people every year are deprived of justice.

The Deputy Presiding Officer: You need to close, please.

John Pentland: To do that, we all need to work together to help find the best solution.

The Deputy Presiding Officer: I advise members that we do not have extra time for interventions. If members take interventions—even interventions from the front bench—they must do so within their own time.

15:26

Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP): Before I come to the crux of my speech, I commend the cabinet secretary for the new aggravation that relates to human trafficking, which I am sure that all members welcome.
Article 7 of the Universal Declaration of Human Rights says:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

If a person is raped or subjected to any kind of sexual or domestic abuse, as the law stands in Scotland they will not be treated equally. That assault on basic human rights is not the fault of the police or even of the Crown Office and Procurator Fiscal Service, its judges, its QCs or its lawyers. It is the fault of our failure, until now, to alter the legislation so that it can take into account the need to bring to trial the brutal and vicious men—virtually all of them are men—whose idea of a cosy night in is to get drunk, rape their partner and then batter her into unconsciousness before going back down the pub to tell their pals.

I appreciate that that is a stereotypical image, but if members talk to the police or Rape Crisis Scotland, they will—sadly—discover that the model is stereotypical because that is, in fact, usually how it happens. Depressingly, as co-convenor of the cross-party group on men’s violence against women, I see time and again just how accurate that stereotype is. It sounds like cavemen fighting over their spoils. The women, they will say, asked for it or provoked them so much that they had to hit out. They are 21st century cavemen indeed. “I gave her a good doing” is not just the language of cavemen; it is alive and thriving in certain favoured drinking dens across Scotland and—more important—in the private homes of too many women. As George Orwell put it, “All animals”—and perhaps cavemen—“are equal, but some animals are more equal than others.”

In my opinion, Napoleon the pig is well titled.

Deservedly, we see ourselves as a progressive, forward-thinking nation. We have a wealth of history to support us in our ambitions as we continue to push forward towards a fairer and more egalitarian society. I am absolutely astonished at the position that Labour has taken. The Bain principle is alive and well in the Scottish Parliament.

Patrick Harvie rose—

Christina McKelvie: Why is it that some of us seem to be so reluctant to change legislation that is outmoded, lacking in credibility and out of place—much like Labour’s position?

Patrick Harvie rose—

The Deputy Presiding Officer: Mr Harvie, the member is not giving way.

Christina McKelvie: Corroboration is a legal principle in Scots law that demands that two different forms of evidence must be in place before a decision is made on whether a case can go to trial. In a rape case, it is necessary to have two forms of evidence that penetration took place, two forms of evidence that there was no consent and that the accused acted with malintent, and two forms of evidence that it was the accused who committed the crime. The complainant has to prove that the accused understood that the act was not consensual. How does she do that? If the accused says, “Oh, she likes it that way,” how can she prove that she did not and does not like it that way?

Ruth Davidson rose—

Christina McKelvie: A legal worker from Scottish Women’s Aid, Louise Johnson—I had a phone call with her yesterday—told me recently:

“It is profoundly shocking and demeaning how women who are victims of sexual or domestic abuse are treated in our courts. For example, a request to look at previous sexual history may help turn up previous offences but it is often used as a way of attacking the victim’s morality.”

She also said:

“It is very rare that if a case gets to court at all it is a single event. There will almost always be a background of coercive, controlling and violent behaviour”.

There is no question but that we need robust evidence to be gathered to put before procurators fiscal so that cases can go to court and have a reasonable chance of a successful outcome, but it is not good enough just to say that there is not enough evidence so the cases should not get to court. Removing the need for corroboration in abuse cases will in no way undermine the demand for that evidence. On the contrary, it will allow women—who have been denied the opportunity to go to court—the chance to get justice and move on with their lives. Many have attempted and committed suicide because they have not had that access to justice. That is an indictment on all of us.

There is a significant number of victims of sexual violence and domestic abuse whose cases do not go to court. In the past two years, that has affected 2,800 cases of domestic abuse and 170 rape cases. The Tories, the Liberals and—astonishingly—the Labour Party might be happy with that, but I will not have that on my conscience. [Interruption.]

John Finnie: Will the member take an intervention?

The Deputy Presiding Officer: Order.
Christina McKelvie: This is not some airy-fairy notion of correcting an imbalance. Under the Council of Europe’s Convention on Preventing and Combating Violence against Women and Domestic Violence—the Istanbul convention—the action of preventing and combating such violence is no longer a matter of good will but a legally binding obligation. The steps that the Government has proposed are a moral imperative.

Some Governments, including our own, are implementing at least some elements of the convention, but we must do more. We must implement all its demands, to reduce and ultimately to eliminate the obstacles that limit women’s opportunities to claim their rights in court.

The burden of proof for rape in Scotland is extremely high—the Crown has to prove and corroborate not only that sexual intercourse took place and that the complainer did not consent to it but that the accused knew that the complainer did not consent. The fact that we have always done it in that way is not an adequate reason for continuing the corroboration requirement. We have a duty to victims in Scotland to seek actively to remove—as far as legislation can do so—the barriers that limit access to justice for them. On top of the fear, the shame, the lack of awareness about official procedures and about available assistance, economic dependence and concern for children, women face an additional and unnecessary burden in the judicial process.

Until 1982, women in Scotland could not be raped in a marriage. Equal marriage was agreed to only recently in the Scottish Parliament. Sometimes, we need to be bold in the face of opposition and to do what is morally right to ensure equality and justice. The proposal is morally right, and I ask all my colleagues to search their consciences before pressing their voting buttons at 5 o’clock.

15:32

Alison McInnes (North East Scotland) (LD):
The bill contains a number of welcome reforms. There is a clear need to ensure that Scotland’s criminal law and practice comply with the European convention on human rights. At stage 2, we should carefully consider many issues that the committee identified, including investigative liberation, the appropriate detention limit, the use of the term “arrest” and the basis on which all those activities are conducted.

To turn briefly to matters that are not in the bill, I share the belief of children’s charities including Barnardo’s that the Scottish Government has missed an opportunity to raise the age of criminal responsibility from eight to 12. I hope that we can return to that at stage 2.

In the short time that is available to me, I must focus on the part of the bill that has—rightly—attracted the most attention. I am of course talking about section 57, which proposes to scrap the requirement for corroboration.

When Parliament first debated Lord Carloway’s review back in 2011, the justice secretary told us that he wanted to “hear the views of those who disagree in whole or in part” with what “would clearly be a momentous reform.”

He claimed:

“There is no political dogma”.—[Official Report, 1 December 2011; c 4248, c 4246 and c 4249.]

Since then, the justice secretary has been patently partial and has relentlessly pursued only one outcome. He has been unwilling to act as the guardian of the wider justice system. The reasoned pleas of Scotland’s top judges, including the Lord President, and of legal professionals and human rights organisations have been ignored.

The justice secretary cites emotive cases and anecdotal evidence to make his case. I do not doubt that he speaks of genuine grievances and wrongs; I find it insulting when people think—wrongly—that we do not care about those genuine grievances. However, the proposal is a sweeping change that will impact on every criminal case—summary and solemn. Choosing to portray the debate as a contest between some sort of primitive justice system and the blood and tears of victims is disingenuous and misleading, and it devalues the debate.

I agree that we must strive to enable the victims of rape, sexual assault and domestic abuse to secure justice. However, it is because I am entirely sympathetic to their plight that I am concerned about the proposal. In the absence of corroboration, more prosecutions could rest on the credibility of the alleged victim. Victims could increasingly be subjected to the already unbearable cross-examinations that Christina McKelvie talked about. The “He said, she said” scenarios will make juries reluctant to convict.

Also, the Lord Advocate, the justice secretary himself and Rape Crisis Scotland have all openly admitted that they do not believe that the measure will result in more convictions, but simply increasing the number of cases that reach court is not enough; if we do not also endeavour to improve conviction rates, we are offering victims nothing more than false hope. The committee concluded that abolition of the requirement for corroboration will not improve access to meaningful justice, which is why we need a wide-ranging inquisitorial examination of how the entire
system can better respond to offences that occur behind closed doors.

I do not defend corroboration because of tradition; it is so much more than tradition. It protects against miscarriages of justice, false accusations, wrongful convictions and the erosion of the presumption of innocence. That pillar of our justice system cannot be removed without making the whole structure unstable. In the absence of checks and balances that are equivalent to those that exist in other jurisdictions, corroboration is central to ensuring that our courts secure the right conclusions through fair means.

After months of meticulously exploring detailed evidence, the Justice Committee concluded that the case has not been made for abolishing the general requirement for corroboration, and recommended its removal from the bill. That is an unequivocal message to the justice secretary. The reasoned amendment that has been lodged by Margaret Mitchell and signed by many of us is further testament to the gravity of what is at stake today.

Having failed to quell fears and disquiet, at the 11th hour the justice secretary has stumbled into the offer of a review. I do not know whether he finally got it or whether that was merely a fig leaf to cover his embarrassment.

The review group in itself demonstrates the scale of the problem. The justice secretary is recklessly urging members to pass legislation that he knows is so defective that it needs a 17-strong panel of distinguished minds to patch things up afterwards. The new dean of the Faculty of Advocates, James Wolffe QC, has described this approach as asking MSPs “to buy a pig in a poke”.

Lord McCluskey condemned placating opponents with “sweeteners” and said that “the interests of justice are not served by awarding sops to one side or another”

That is no way to legislate. Secondary legislation should establish comparatively minor details—it should not define how we prevent miscarriages of justice, or prevent the problems that the bill invites. Despite the justice secretary’s assurances, everyone here should know that an instrument that is subject to affirmative procedure leaves no scope for proper parliamentary scrutiny. In proposing the use of secondary legislation for such a momentous reform, the justice secretary demeans his office and reveals his contempt for Parliament.

The matter is now no longer only about whether we think corroboration should be abolished. It is also about how Parliament is regarded in terms of how seriously we take our role as legislators. I appeal to SNP members from the class of ’99 to think carefully about that.

The existing case for abolishing corroboration is deficient and unsubstantiated in so many respects. In this situation, there can be only one logical next step for the justice secretary: accede to the committee’s recommendations and remove section 57 from the bill, and allow Lord Bonomy’s group to conduct its review completely unfettered, after which Parliament could rightly return to the matter afresh. It is obstinate and absurd to suggest any other course of action.

15:39

Annabelle Ewing (Mid Scotland and Fife) (SNP): I am pleased to have been called to speak in the stage 1 debate on the Criminal Justice (Scotland) Bill. I refer to my entry in the register of interests, which states that I am a member of the Law Society of Scotland and that I hold a current practising certificate.

The bill that is before us today, like many criminal justice bills that have preceded it, deals with a number of important reforms to the criminal justice system, including corroboration, to which I will return. Key among the other provisions are the sections that deal with arrest and custody. Following the action that was taken as a result of the Cadder judgment, it has been recognised that there is no longer merit in having a discrete power of detention. The bill provides, in effect, that the only general power to take a person into custody is the power of arrest on reasonable suspicion that the person has committed a crime. That is a great step forward.

On custody, the bill will place on a statutory footing a 12-hour time limit, with review after six hours. There are provisions on investigative liberation, which offers an alternative to protracted custody, with safeguards to ensure that conditions are proportionate and necessary.

There are other protections in relation to the rights of suspects in custody. Section 25 provides that a person under 16 “may not consent to being interviewed” by the police “without having a solicitor present”. That is an important provision.

It is right and proper that the bill provides many important safeguards for persons in custody. However, an imperative of any properly functioning criminal justice system is the need to balance the rights of the accused with the rights of victims of crime—[Interruption.]

The Deputy Presiding Officer: I am sorry to stop you, Ms Ewing, but your microphone is
picking up the conversation that is going on behind you.

Annabelle Ewing: The need to balance the rights of the accused with the rights of victims of crime is a fundamental principle of our criminal legal system. That brings me to the issue on which I think most members have focused—the proposal to remove from Scots criminal law the general requirement for corroboration.

I speak as a member of the legal profession when I say that the law cannot and should not stand still. We must keep our criminal justice system under review in order to ensure that the balance of rights to which I referred is maintained. In all conscience, I cannot—as a lawyer or as a politician—accept a status quo that denies access to justice to so many people who are, as we have heard, the victims of sexual crimes, domestic abuse and other crimes that are committed in private.

We heard the dreadful statistic that in the past two years 170 cases of rape have had no proceedings taken, because of, inter alia, a lack of corroboration. I will cite an example—

Margaret Mitchell: Will Annabelle Ewing give way?

Annabelle Ewing: I think that I am about to deal with the subject of Margaret Mitchell’s intervention.

In the case of Lee Cyrus, in Perth, there were charges of rape and assault and robbery, but there was no prosecution. I wrote to the Solicitor General for Scotland, whose reply to me is dated 31 December 2013. She said, inter alia:

“Crown Counsel instructed that because of a lack of corroboration there was insufficient evidence to prosecute Lee Cyrus for the crimes reported.”

Graeme Pearson: Will Annabelle Ewing give way?

Annabelle Ewing: I need to make progress.

Scots criminal law is unique among the ECHR states’ law in hanging on to corroboration as a general requirement. We removed the requirement from civil cases some time ago. Moreover, if members ask two or more lawyers to give their precise definition of corroboration, they will get two or more definitions.

The law must evolve. I can think of no more highly regarded representatives of the legal profession than the people who, with others, will form part of Lord Bonomy’s review group. Those people are at the pinnacle of the criminal legal system of Scots law. We can place our confidence in their ability to come up with the appropriate balances and safeguards, which will be subject to the scrutiny of the Parliament.

Graeme Pearson: Will Annabelle Ewing give way?

Annabelle Ewing: I have just over a minute left and I want to use it, I am afraid.

The time to act is now, in the bill, by taking the approach that the cabinet secretary set out clearly again today, so that we can see the full effect of the reform in 2016.

To members who say that parliamentary process is key above all other considerations, I say that the delay that would be created if we took the provision out of the bill would result in our Parliament in effect condoning the denial of access to justice in hundreds, if not thousands, of cases between now and some indeterminate date in the future. It is sad that that appears to be the Labour Party’s position.

That is simply not good enough, if members believe, as I do, that there should be no second-class citizens when it comes to access to justice in Scotland. I urge all fair-minded members to think carefully about what they will do at decision time today. I hope that they will come to the conclusion that the way that has been proposed by the cabinet secretary is the best way forward to ensure that all our citizens have access to justice.

15:45

Rhoda Grant (Highlands and Islands) (Lab): The bill is wide ranging, but I will concentrate on corroboration.

For a number of years, I have been concerned that the requirement for corroboration in cases involving rape and domestic abuse has prevented people from receiving justice. I was therefore delighted when a proposal came forward to remove the need for corroboration. If I am honest, even when a number of people in the justice system and legal profession started to question the policy, I thought that that was simply because of fear of change rather than because of concern about the policy itself. However, as the clamour became louder, I began to become concerned. I was therefore pleased when the cabinet secretary set up a review group to examine the policy and the required safeguards.

Although I want to abolish corroboration for cases whose very nature means that corroboration will be difficult to find, we owe it to victims to do that properly so that it works and gives access to justice for those who are involved. A day in court is just not enough. At the least, it is traumatic, so it has to be followed by a conviction that provides a degree of closure. Surely we all want real justice for victims.

I ask the cabinet secretary to explain in winding up the debate why Rape Crisis and Scottish
Women’s Aid have not been included in the review group. Many groups exist to support women who have experienced violence and abuse, but all members will acknowledge that Rape Crisis and Scottish Women’s Aid hold the expertise in that area.

Kenny MacAskill: I am pleased to tell Rhoda Grant that I have spoken to Sandie Barton and have made it clear to her that I will make representations on the issue. The selection of the members of the group is up to Lord Bonomy, but I am happy to advise that I think that he should at least consider engagement with those organisations.

Rhoda Grant: I would be pleased if Lord Bonomy were to include them in the review group. If we are to introduce changes using subordinate legislation, we will not get the full impact of the information that those groups hold and we will not be able to consult them properly on the findings of the review. That is because subordinate legislation does not receive the same scrutiny in Parliament as primary legislation receives, and it does not provide an opportunity for stakeholders to be involved to the same extent.

Therefore, I ask the cabinet secretary to reconsider the proposed removal of the requirement for corroboration, so that he can build consensus and introduce primary legislation on the issue that can be properly scrutinised by the Parliament, that can involve the stakeholders and that we can all unite around.

Sandra White: Will Rhoda Grant take an intervention?

Rhoda Grant: I have taken an intervention, so I am struggling for time.

The review group has been asked to look at evidence that is admissible in court. Currently, in cases regarding violence against women, courts consider evidence that has no bearing whatever on the case; for example, victims have their sexual history examined, which has no bearing on their right to protection under the law. To allow such questioning creates the impression that the victim, having engaged in sexual activity in the past, cannot be raped. Therefore, evidence that involves someone’s sexual history should never be admissible in a court of law.

To be cross-examined in that way is devastating for the victim, who should be protected. It creates a barrier to justice by introducing evidence that should have no bearing whatever on the case, and it is a barrier to victims pursuing their cases. It is also a problem for wider society because it creates gender inequalities and promotes stereotyping. What steps can the cabinet secretary take to stop that practice? Judges continue to allow such lines of questioning. The only discouragement to it is that the judge can allow prosecutors to examine the perpetrator’s history, but no one in the court protects the victim from that type of questioning. The fact that people experience such an ordeal is likely to deter other victims from coming forward in the first place.

Another aspect of so-called evidence that should never be allowed in court is somebody’s medical history. Often, a defence will spend time going over someone’s medical records, and they will often highlight mental health issues. Again, that can be devastating for the victim, and again it has no bearing on the case. Being mentally ill does not mean that it is okay to be raped or abused—in fact, more protection should be afforded to people who are vulnerable. Again, there are wider implications for our society in that mental illness is being stereotyped.

Both of those types of evidence can repeat the abuse that the victim has already experienced. I very much hope that the Bonomy review will deal with those issues and take a clear stance on them.

I also hope that the review will consider what constitutes supporting evidence. Many people do not report rape and abuse immediately, and it is therefore important that behavioural changes and the like are admissible as evidence of a victim’s having suffered trauma. In cases of domestic abuse, the victims often cover up the crimes and believe that they are in some way responsible. Evidence that takes account of that must be admissible in court. I argue that it should be admissible now as corroboration, but the training of the people who operate our justice system is woefully inadequate in this area.

The Deputy Presiding Officer: You must conclude.

Rhoda Grant: I have had cases where the court has been used to perpetrate domestic abuse. Surely that is not right. I hope that the cabinet secretary will listen to the Parliament’s concerns, take the opportunity to build consensus and change the justice system to one that protects, rather than abuses, victims.

The Deputy Presiding Officer: Once again, I point out that interventions must be taken within the time that members have for their speeches.

15:51

Roderick Campbell (North East Fife) (SNP): I refer to my entry in the register of members’ interests as a member of the Faculty of Advocates.

Although the Criminal Justice (Scotland) Bill is substantial, public attention has tended to concentrate almost exclusively on the proposal to abolish the requirement for corroboration. The
Justice Committee was divided on the matter, and the witnesses who gave evidence to us had very different views. It is clear that many victims of sexual and domestic abuse and, indeed, other crimes, theft in particular, may well be denied access to justice by the rule. Indeed, the now-retired eminent judge Lord Hope, in his Holyrood article, accepted that we have a rule that impedes us in a particular class of case. However, I also take on board the evidence of James Wolfe QC, the new dean of the Faculty of Advocates, who told us that what really counts is access to effective justice.

I note the figures that have been produced in the Carloway report and by the Crown and police to support contentions on the number of additional cases that might proceed if the requirement is abolished, but I also bear in mind Lord Carloway’s point that there are cases that proceed at present but will not proceed under the new test. It would serve no useful purpose to seek to quantify those, but it is as well to be aware of that.

Whatever the increase in the number of cases that might proceed under the new test, no one can say with certainty how many will result in a conviction and what they will do to conviction rates. The Lord Advocate said in evidence:

“the justice system is not about conviction rates”. — [Official Report, Justice Committee, 20 November 2013; c 3737.]

I agree with the convener that no one should regard appearing in court as a complainer or victim as therapy. In traumatic cases, even lawyers can find the process stressful. Nevertheless, it is at the very least deeply unfortunate to deny individuals the opportunity to obtain justice and the right to tell their story, to be tested before their peers. I also reflect on the comments that the distinguished lawyer Maggie Scott QC—nowLady Scott—made to our committee in 2011, when she said:

“I understand people’s desire to have a day in court—that applies to accused people as well. However, I do not feel that, if there is little likelihood of a conviction, that particularly helps anyone in the process.”—[Official Report, Justice Committee, 20 December 2011; c 790.]

I hope that the new prosecutorial test will tackle that, at least in part, with its requirement that there be a reasonable prospect of conviction before proceeding.

The Lord Advocate advised us in evidence that questions of credibility and reliability are not considered against a reasonable prospect of conviction test at the present time. The Crown will have to consider carefully in respect of each case whether it is in the public interest to proceed. The new prosecutorial test will not change that.

Lord Carloway’s original recommendation to abolish the requirement for corroboration with no attempt to rebalance the system by introducing further safeguards has had scant support. The Government recognised that following its first consultation, and it took the view that a second consultation on safeguards was required, but it then proceeded with only one safeguard in the bill—to increase the majority required for a guilty verdict. Like the Faculty of Advocates, the Scottish Human Rights Commission and others, I strongly believe that a judge ought to have the ability to withdraw a case from a jury where he or she forms the view that no reasonable jury could convict on the evidence presented.

Despite the Government’s attempts to engage in discussion about appropriate safeguards, perhaps the strongest call we heard in evidence was for the whole question of the requirement for corroboration to be removed from the bill and considered by the Scottish Law Commission or a similar body.

However, even the Scottish Law Commission can get it wrong, particularly on corroboration. Those of us with very long memories should be aware that, back in 1965, the SLC consulted widely on the abolition of corroboration in personal injury cases only. Subsequently, it changed its mind and recommended the abolition in all civil cases. That recommendation was incorporated in a Government bill. Following a political and legal outcry, the Government of the day agreed to Opposition demands to abolish it for personal injury cases only. The bill was amended and it became law in 1968. It took a further 20 years, following a further SLC report, before it was abolished in civil cases altogether. Some of the concerns about reliance on one smooth-talking but apparently credible witness were heard then, but we have moved on and no one now would seek its return for civil matters. Controversy around corroboration is not new.

The Government has taken on board concerns. I would say that it has listened, reflected and acted on its proposal. I very much welcome Lord Bonomy’s appointment and the wide terms of reference for the group, which I am pleased to say go well beyond those for the Government’s second consultation.

I am pleased that Lord Bonomy will be looking at summary proceedings, under which the vast majority of cases proceed. I am pleased that he will look at whether a formal statutory test for sufficiency, based on supporting evidence and the quality of the evidence, is required. I am pleased that the question of whether a prosecutorial test should be placed in statute will also be considered.
What is absolutely clear is that it is vital that we have in place a system that provides appropriate balances to prevent miscarriages of justice, so that we do not replace one set of injustices with another.

Lord Bonomy needs time to carry out his work and we as a committee in Parliament will need to absorb that work and to consider and scrutinise it before any proposals pass into law. Most of all, we need sufficient time to build a new consensus. I accept that this might be optimistic, but I hope that this time that will include not only the Crown, police and witness groups but legal practitioners, judges and academics, too.

However, the bill is not just about corroboration. I note and agree with the Government’s comments on arrest provisions, particularly on a record of reasons where an arrestee is released before arriving at a police station. I agree with the Government on the time limit for detention. I emphasise that the bill provides a valuable extension of the right of access to a solicitor to all suspects held in custody. I welcome also the Government’s commitment to discuss with relevant stakeholders how post-charge questioning will operate.

We as a committee welcomed the proposed administrative and procedural changes to solemn procedure in the sheriff court, which I think are largely uncontroversial.

This is a substantial bill, which ought now to proceed.

15:57

John Finnie (Highlands and Islands) (Ind): I thank the convener of the Justice Committee for the way in which she has chaired the committee and for her delivery of the report today—it must have been a challenging position for her.

Someone talked early on in the debate about putting party differences aside. Sadly, we have not heard that on either side of the debate. This debate should not be about personalities; it should be about the merits of the case. We should all accept that we can have different views and hold them in good faith.

Having said that, I remain absolutely resolute in my belief that a case has not been made that supports the abolition of corroboration. Corroboration is a fundamental building block of Scots law.

The cabinet secretary said that the group would be balanced and effective.

The group has wide terms of reference, but I am disappointed that the status quo has been ruled out; it seems to me that the Government is limiting the scope of the group, which is not helpful.

Having said that, I think that the group is comprised of very good folk. I am grateful to my colleague Rhoda Grant for raising that. If the group could be broadened to include the likes of Rape Crisis Scotland, it would be all the richer for that.

However, I have some disquiet about the parliamentary process; I do not think that this is how we should transact business.

In the committee, Lord Gill told us:

“If there is a good solid ... case for abolishing corroboration, there should be no need for any safeguards. The moment we say that there have to be safeguards, we are conceding that the change creates a risk of miscarriage of justice, which, in my view, it will.” — [Official Report, Justice Committee, 20 November 2013; c 3727.]

That is a very powerful source of evidence.

What we heard in evidence from the Scottish Human Rights Commission is that corroboration—

Sandra White: I know that it has mentioned miscarriages of justice, but is there not a miscarriage of justice for victims who cannot get heard at all and cannot get access to justice?

John Finnie: If there is one phrase that has characterised the debate and which has just become meaningless, it is “access to justice”. I want everyone—the accused and victims—to have access to justice. That is very important. Characterising the debate in any other terms is extremely unhelpful.

The Scottish Human Rights Commission told us that corroboration is a form of protection. Other forms of protection are available. I will certainly welcome the Bonomy review and read with interest what it comes up with. However, I stress again that this is not the way in which we should go about business.

Some protections have been offered, but they, of course, relate to solemn procedure, which represents only 10 per cent of the cases that are tried. That makes it clear that the 90 per cent of summary cases do not have those protections. This is a time when we have a record number of police officers and there have been great advances in technology. We have heard about some of the advances. Many advances in technology that are often cited as frustrating police operations actually enhance them, too. I say to my colleague Sandra White that a person can be a
victim one day and an accused another day. We want the highest standards to apply for everyone.

It is certainly the case that the failure to prosecute is not always down to corroboration. There is a public interest to be served and the interests of the complainer have to be served. I had some disquiet—I have shared this information with the cabinet secretary—about some of the examples that we were given; there were very emotive cases. We cannot understand the minutiae of a case in two sentences. Some of the representation was less than helpful.

I want to move on to other aspects of the bill. I am not convinced that there is a need to change the terms of detention and arrest. If we do so, arrest should have a definition. That is not only my view; it is a view that is shared with Lord Carloway and the Scottish Human Rights Commission. We have heard about the legal debates that will take place. We can be assured that there will be plenty around that in stated cases, notwithstanding the cabinet secretary’s assurances that the process will be streamlined.

I thought that the suggestion in the Scottish Government’s response that providing a definition would

“jeopardise the employment of ... alternatives to court proceedings”

was very peculiar and strange. The idea that defining “arrest” would somehow impact on the issuing of parking tickets seems to me to be way off the mark. I welcome the word “de-arrest” not being used.

I am delighted that the letter of rights is on a statutory footing. Given what we know about the communication and literacy skills of people who find themselves in custody, it should be read out to people.

I am not convinced about the call for an extension of detention time by the police, and welcome the abolition of the 24 hours. I speak as a former police officer and the reality is that if the police were offered 48 hours’ detention, they would bid to get 72 hours’ detention. Again, I support the Scottish Human Rights Commission’s position that there should be six hours, with extension only in exceptional circumstances and only to facilitate rights under article 6 of the European convention on human rights, on the provision of a lawyer or interpreter.

Depriving someone of their liberty is a very important issue. As has been said, doing so must be based on evidence, not anecdote.

The idea of keeping a child in custody for more than six hours is from the dark ages. We need to look at that and issues to do with the age of criminal responsibility.

We are told in the Scottish Government’s response on the detention provisions that it is “creating a mandatory custody review, performed by a senior officer not directly involved in the investigation”.

Good grief. Is that not happening already? If it is not, it certainly should be.

Investigative liberation cannot be summed up in 10 seconds, but it will be very problematic in rural areas, and I think that there are many challenges to come from that.

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Investigative liberation cannot be summed up in 10 seconds, but it will be very problematic in rural areas, and I think that there are many challenges to come from that.

16:03

Linda Fabiani (East Kilbride) (SNP): Although I have been a member of the Scottish Parliament for a long time, I have never been a member of the Justice Committee or had anything to do with any of the justice portfolios. I am not a lawyer and have never served in the police force or anything like that. Therefore, I come at the issue entirely from a layperson’s view, which is the way in which the vast majority of people in this country come at it.

I will start on the corroboration issue, because that is what all the fuss has been about. I went out of my way to look at the issue, and to try to study and understand it.

It strikes me that an awful lot of nonsense is being talked about the issue, and I have heard some of that this afternoon. It is in the phraseology too: I keep hearing that we are abolishing corroboration, but when I look at what is in the bill, I see that we are actually abolishing the requirement for corroboration that is mandatory to get a case to court.

John Finnie: You talk about needing to explain things in layman’s terms, which is clearly shorthand for what the layman understands. You are just playing about with words.

Linda Fabiani: No, and you should not insult the layman—that is an appalling thing to say. I tell you what: I read the bill and it was fairly straightforward. I understood it, and most people could read the truth if it was given to them.

There is a big difference between saying that the Government is abolishing corroboration and saying that it is abolishing the requirement for corroboration. If there is corroborating evidence, it will be used. It seems to me that the requirement for corroboration is preventing a lot of people from gaining access to justice.

Linda Fabiani: No, and you should not insult the layman—that is an appalling thing to say. I tell you what: I read the bill and it was fairly straightforward. I understood it, and most people could read the truth if it was given to them.

There is a big difference between saying that the Government is abolishing corroboration and saying that it is abolishing the requirement for corroboration. If there is corroborating evidence, it will be used. It seems to me that the requirement for corroboration is preventing a lot of people from gaining access to justice.

I have read many of the differing views that have been expressed. The Lord Advocate, for whom I have huge respect, said:
“We heard a little bit there are other issues that are important to people back here mentioned some of those issues, but we are ignoring an awful lot of other things that are important to people trafficking.

That applies not only in sexual cases. Age Scotland says that “Elder abuse can take place behind closed doors”, which of course it does, and that “sometimes there may be little or no supporting evidence. In many cases this involves ‘hidden harms’ such as mental or emotional abuse, making threats or withholding food or medicine. Changing the corroboration rule for these cases might help to make prosecutions possible.”

As a layperson, that last part sounds like a heck of a good thing to me. I fail to see why there should be a problem, unless we take the terribly old-fashioned view that the law on corroboration is sacrosanct and should not be changed.

Of course the law should be changed when it is no longer fit for purpose, and I do not believe that the law on this particular issue is fit for purpose.

Patrick Harvie: Even if I was to accept that the law should be changed if it is not fit for purpose, should we not know what we are changing it to before we change it?

Linda Fabiani: I will speak again as a layperson. It seems to me that we are looking at doing away with the mandatory need for corroboration before a case can be taken to court and we can have it properly judged by a sheriff, judge or jury. That seems to be fairly straightforward.

As a result of the big argument on corroboration, we are ignoring an awful lot of other things that are in the bill. Rod Campbell raised some of those issues as a lawyer—I do not know if it is all right to call an advocate a lawyer, is it?

Roderick Campbell: Yes, it is okay.

Linda Fabiani: Okay. Well, our advocate at the back here mentioned some of those issues, but there are other issues that are important to people that are not being mentioned. We heard a little bit about people trafficking.

The need to reduce inconvenience for witnesses is a major issue, given the number of people I hear talking about the ridiculous nonsense that sometimes go on when they go to local courts as witnesses or to give evidence. Provisions for witnesses need to be upgraded, and I am glad that the issue is addressed in the bill.

Another issue that has not been mentioned is sentencing. Part 4 of the bill increases the maximum sentences for handling offensive weapons to ensure that courts have appropriate powers to sentence effectively persons who commit possession offences with knives or other offensive weapons.

Not that long ago in Parliament we heard Opposition members screaming at the cabinet secretary that he was not doing anything to stop knife crime and that he was not being hard enough. After successful campaigns to reduce the carrying of knives, we have before us a bill that says that there should be powers to increase the sentence for carrying an offensive weapon. Therefore, that part of the bill is certainly worthy of note.

On child suspects—

The Deputy Presiding Officer (John Scott): You are in your last 10 seconds.

Linda Fabiani: —the fact is that the rights of those under 16 cannot be waived, but 16 and 17-year-olds have a degree of autonomy, so theirs can be waived unless a person is considered vulnerable.

There is an awful lot in the bill, and I have a real worry that some of it—

The Deputy Presiding Officer: You must close now, please.

Linda Fabiani: —is being sidelined. Let us not do that.

16:10

Margaret McCulloch (Central Scotland) (Lab): Parliament will divide when we vote later this evening, and when we do many of us will be thinking about the requirement for corroboration and how many changes arising from the bill could shape our criminal justice system for years to come. As we have heard, the bill includes welcome measures on human trafficking and a more efficient appeals process, but its proposals on corroboration are controversial. Corroboration is a central tenet of Scots law. It is a unique and historic feature of our legal system, which those who defend it say prevents miscarriages of justice. Critics, however, say that it is an abnormality and that focusing on the quantity of evidence over quality is a barrier to justice.
Like others, I have concerns about whether the requirement for corroboration prevents victims of particular offences not just from having their day in court but ultimately from getting justice. That case has been made by Scottish Women’s Aid and Rape Crisis Scotland, which are speaking up for women affected by rape, sex crimes and domestic violence.

I stood on a manifesto that sought to give greater emphasis to the rights of victims in our justice system. We said that there should be a charter of victims’ rights, setting out what victims can expect from the law before, during and after their time in court. We said that there should be an independent victims commissioner to defend that charter. We said that it was wrong that rape conviction rates here are among the lowest in the western world, and that we wanted a renewed focus on improving the treatment of victims of rape in the justice system. Crucially, we said that the time has come to review corroboration in rape cases and that we would consider the findings of the Carloway review. We considered the Carloway review recommendations and, while we remain sceptical about blanket changes without corresponding safeguards, we feel that there is still a case for reform.

What does it say about the way in which the bill has been handled when a proposal that has found some measure of support, at least, in the two largest parties in the Parliament is about to go to a knife-edge vote that the Government might lose? What does it say about this Government when it has to announce a last-minute review—potentially a year long—of a bill just weeks before the stage 1 debate but still expects Parliament to vote for it?

Lord Bonomy’s review is undoubtedly welcome, even if many of us believe that its scope is still too limited. Its recommendations could well set out how confidence in the justice system is sustained if the Scottish Parliament does indeed abolish the general rule of corroboration. The review’s findings might well determine the future shape of the Government’s legal reforms. However, we are still being asked to vote on the bill tonight without having any idea of what Lord Bonomy’s conclusions will be, and then deal with the matters of primary importance at a later date through secondary legislation. As James Wolfe, the new dean of the Faculty of Advocates, has said, “It’s a pig in a poke.”

There are people in the chamber with an open mind about the abolition of corroboration in rape cases who will vote this evening to remove the provision from the bill because the Government has failed to get the basics right. The Scottish Government must provide clarity about the implications of abolishing the requirement for corroboration now, not after the stage 1 vote; it must go further by satisfying the Parliament that victims will not just get their day in court, but will be supported through the whole process.

Given the Government’s failure to find consensus, I believe that the section on corroboration should be removed from the bill and that we should return to corroboration when the case on it has been made and we have a thought-through proposal to vote on.

16:14

Gil Paterson (Clydebank and Milngavie) (SNP): Before I make my main contribution to the debate, I want to put two thoughts to the chamber—I, too, speak as a layperson and not as a lawyer. First, corroboration has been in place in Scotland for centuries and those who support it claim that it is essential for preventing miscarriages of justice, so why has no other country adopted it? Secondly, are all those who defend corroboration saying to other jurisdictions that do not use this practice that their jails are filled with innocent people?

John Finnie: Will the member give way?

Gil Paterson: I apologise to John Finnie and, indeed, the rest of the chamber but although I would like to take an intervention I really want to finish this speech. To be quite honest, I might get a bit emotional and might not be able to finish it.

I was, until recently, a board member of Central Scotland Rape Crisis & Sexual Abuse Centre—indeed, I had that position for more than 10 years—but I want to make it clear that I am not speaking on its behalf this afternoon. However, I would like to pay tribute to that organisation and the countless other women’s organisations who, to a person, are in favour of scrapping corroboration. In fact, if we look at the history of those groups, we will see that one of the main drivers for their formation was the consequences of corroboration; now, ironically, they have to deal with the aftermath of its failures on a daily basis.

I want to dedicate my speech to a woman called Jean by telling her story—and I should tell the chamber that Jean is not her real name. Her story will in many ways be familiar to those in women’s groups who have had similar experiences and who have to deal with the wreckage when personal tragedy strikes.

Jean was overpowered and raped by a person she knew. The incident was very quickly reported to and acted on by the police. They did not collect the evidence at that time; they did even better than that by using their valuable training and escorting Jean to a hospital where a forensic surgeon immediately examined her and expertly collected the evidence. While the examination was taking
place, the surgeon was quietly counselling Jean and offering advice about where she could find and who could offer the vital early services that could support her over what the surgeon knew would be a protracted and traumatic period. Jean was supported through this time by her husband and assisted by Rape Crisis, and she was also sympathetically dealt with by the police while at the same time questioned in detail by them.

The process lasted months and months. The fiscal service was extremely sympathetic to Jean’s situation, but the time that it took to reach a conclusion about whether a trial would proceed took its toll. The second worst day of Jean’s life happened when the fiscal service declared that it could not proceed to trial. The word “corroboration” was never used but, as matters unfolded, it became clear that the case had failed because of the lack of corroboration.

The day that Jean was raped, her life changed but she had others’ support to help her meet the challenges that arose. Sadly, when it was announced that the case would not be brought to court, Jean’s life as she had known it came to an abrupt end. Although her husband had been supportive throughout, he could not get over the fact that after the attack on Jean and the subsequent thorough investigation there would be no trial. For him, no trial meant no rape. The accusations and mistrust started; the fights became frequent as the blame was put on Jean; and then the marriage ended.

The depression that had started shortly after the rape deepened into chronic depression as Jean turned to alcohol for comfort. Soon after, her child was taken from her. She became so low and so full of self-loathing that she attempted suicide. In just a few short but horrendous years, Jean had lost everything in her life and although, thankfully, she and her daughter were reunited she wonders what might have been had she lived in another jurisdiction. She had early and excellent forensic evidence; her story was believed entirely by the police; the fiscal service supported her claims; and she was supported through this time by her husband and offering advice about where she could find and who could offer the vital early services that could support her over what the surgeon knew would be a protracted and traumatic period. Jean was supported through this time by her husband and assisted by Rape Crisis, and she was also sympathetically dealt with by the police while at the same time questioned in detail by them.

Jean, if you are listening, I know that you were not heard in your time of need but I pray that, today, this Parliament hears your voice. I urge all members to think of Jean and all the other Jeans and support the Government’s bill.

16:20

Patrick Harvie (Glasgow) (Green): I suspect that the speech that we have just heard will have had an effect on every member in the chamber, whatever position they take tonight on the motion and amendment that are before us; on the detail of the legislation that the Government is working on; and on the prospect of recommendations from the Bonomy review.

The fact that such a speech can have that effect on members who take different views on the matter needs to be recognised. The debate has benefited from some calm, reflective but passionate speeches on both sides. It does not benefit from anyone claiming a monopoly of concern—few have done that in this debate, but, sadly, not none. There is no monopoly of concern in relation either to the specific instance that Mr Paterson has raised, very articulately, or to the wider issue.

Those of us who have concerns about the prospect of miscarriages of justice or of trials coming to court that have no prospect of safe conviction do not claim that we have a monopoly on that concern. I am certain that Rape Crisis and the other organisations that campaign on these issues and work in this area every day do not want an increase in convictions for the sake of it. They want an increase in safe convictions, not in wrongful convictions, which benefit nobody.

Christian Allard: I want the member to realise that the debate is about an increase in prosecutions, not convictions.

Patrick Harvie: I am sorry, but an increase in prosecutions without an increase in convictions would worry me very much, in terms of the expectations that that would raise and the stress that it would cause the accused persons and the victims without justice coming out of it. We all want an increase in justice. We want safe convictions, not wrongful convictions.

As I said, we do not claim a monopoly of concern on the issue. I ask members who support the Government’s position, similarly, not to claim a monopoly of concern about the impact of the offences and the lack of access to justice that, undoubtedly, exists. I say that as someone who is not yet convinced that we should remove the requirement for corroboration but who will be open to the arguments once I see what the Government proposes in its place.
I like the cabinet secretary and admire his position on a number of issues, but I am sorry to say that his demeanour on the front bench today, openly laughing at the arguments of Opposition members, does him no credit.

The cabinet secretary says, “Out with the old and in with the new.” I can only ask myself why Parliament may not vote on both matters on the same day. Why can the Parliament not take evidence on both matters at the same time and reach its decision once we know what the proposals will be?

The cabinet secretary and the Government accept that a new system of safeguards will be required. If we are to move from a position that places greater emphasis on the quality of evidence than the quantity, I am open to those arguments. However, those arguments have not yet been laid out in detail, and I think that it is unreasonable for the Parliament to be asked to pass legislation on that basis, especially given that the change is not specific to rape and sexual offences but applies to the whole of our criminal justice system. That approach—to put it mildly—is not a safe basis on which to pass such substantial legislation.

The cabinet secretary argues that if we defer—if we wait until we know what is proposed in place of the requirement for corroboration—that will cause too much delay in the implementation. However, if we pass the bill without knowing what is to come or when the provisions on the requirement for corroboration will be introduced, implementation can still be only tentative implementation of a hypothetical change. Those who are preparing the way will still not know if or when the Parliament will finally pass secondary legislation to make the change come about. If tentative preparation for a hypothetical change is what is about to happen, there is no reason for our not saying that we will take both decisions at the end of the process, once we know what the proposals are.

I will vote for the amendment in the name of Margaret Mitchell, which bears my name in support, but I am open to arguments in the future about what will be proposed. If Scottish law in this area is going to evolve, into what will it evolve? I want to be able to judge that, see the detail of it and hear the evidence of those on whom it will impact and who will work with the consequences of our decision. I want to know all that before we make our decision, and that is why I will support the amendment this evening.

16:26

Sandra White (Glasgow Kelvin) (SNP): I thank all the members who have spoken previously, particularly Gil Paterson, whose speech was very moving. I also thank Linda Fabiani for her measured, down-to-earth contribution, which was a breath of fresh air. I would be more than happy to welcome her to the Justice Committee.

Many of the measures in the bill have been welcomed by every party—the arguments have been well rehearsed—but there is one that has not been welcomed by every party, and it is to that issue that I turn. The reform of corroboration has generated more heat and discussion than any other aspect of the bill, although in my mind it is long overdue not only for the victims of rape and sexual assault—whose case was put so powerfully by my colleague Christina McKelvie—but for the elderly, as Linda Fabiani mentioned, and other vulnerable groups.

Many members who have spoken against the reform of corroboration cite miscarriages of justice and the need for justice for all. However, as I asked John Finnie earlier, what about the victims who see it as a miscarriage of justice that they do not have access to justice? It is disparaging of John Finnie to treat access to justice as though it should not be spoken about and does not exist. It exists in the minds of victims, and access to justice is what it is to them. We have also heard the phrase “having their day in court” bandied about, but this is nothing to do with people having their day in court; it is to do with people having access to justice. Victims do not like the phrase “having their day in court” and I think that people should stop using it. Members should think before they say such things.

John Finnie: Will the member take an intervention?

Sandra White: I am sorry, but I do not have time.

There has also been talk about members changing their minds, and a number of members who are in the chamber have changed their minds. I will give a couple of examples. The 2011 Labour Party election manifesto stated:

“We believe that the time has come to consider the arguments for reforming the need for corroboration in rape cases and will consider the recommendations of the Carloway Review.”

Elaine Murray (Dumfriesshire) (Lab): Will the member take an intervention?

Sandra White: Please let me go on.

On 1 December 2011, in a debate on the Carloway review, James Kelly said:

“Lord Carloway’s report sets out the history of why corroboration was incorporated into Scots law. It is important to remember that it was incorporated at a time when the legal system and the country were very different ... There have been many advances since that time, not only in technology but in the skill and expertise of prosecutors and defence agents. Times have moved on ...
Labour has previously made its position clear on rape cases, in relation to which we feel that corroboration should be abolished.”—[Official Report, 1 December 2011; c 4250.]

What are you waiting for?

Elaine Murray: Will the member take an intervention on that point?

Sandra White: No, I am sorry. In your 2011 manifesto you spoke about the Carloway review and when you saw the evidence you said, “corroboration should be abolished”; yet you still say that you do not have enough information. I really cannot understand that at all.

Graeme Pearson said:

“the requirement for corroboration goes back so far that it is difficult to remember why and how it all began ... We should also bear in mind that, although the recommendation is to abolish the requirement for corroboration, it is not to ban corroboration.”—[Official Report, 1 December 2011; c 4258-59.]

Please get this right.

Then we have Claudia Beamish who, only a couple of weeks ago on 7 February, on “Brian Taylor’s Big Debate”, said:

“I respect the fact that there is now the Bonomy Review”.

Scottish Labour is

“supportive of the review and I think we have to see what that review does ... I do understand the concerns of women’s groups at the moment that this must not be kicked into the long grass”.

That is exactly what will happen if you vote for the amendment—it will be kicked into the long grass. Annabelle Ewing and the cabinet secretary very eloquently made that point in their speeches.

Let us look at why the reform of corroboration would be kicked into the long grass. If we have to wait for Lord Bonomy’s report to bring forward primary legislation, we run the very great risk that we will be unable to bring this matter before Parliament before the 2016 elections. I ask everyone, including Patrick Harvie, to understand that that is why we cannot support the amendment. I am not saying that everyone who says that they do not support the issue at stage 1 and supports the amendment does not support the abolition—or the moderation—of corroboration; I am saying that they are very misled. That is particularly true of the Labour Party. The quotes that I have cited make clear that you support the abolition of corroboration yet you are prepared to vote with the Tories and the Lib Dems and kick this into the long grass. You should think again, because this will not be progressed any quicker if you vote for the amendment. Think of all the victims who will not get access to justice while we sit and deliberate even further down the line.

Let us vote for the motion and reject the amendment because otherwise you would be rejecting the opportunity for the thousands of people out there who are denied justice and who would be denied it in the future.

The Deputy Presiding Officer: We move to closing speeches. I invite members to speak through the chair when they can, please.

16:32

Murdo Fraser (Mid Scotland and Fife) (Con): It has been an excellent debate, with some very good speeches. In particular, I single out those made by Alison McInnes, John Finnie, Gil Paterson and Patrick Harvie. As Margaret Mitchell said, the bill is wide ranging, with much in it that we welcome. It contains measures to reduce unnecessary delays in progressing cases, a proposal to increase the maximum custodial sentence for knife crime from four to five years, a fairly minor but nevertheless welcome change to automatic early release—it affects 2 per cent of offenders—and other worthy provisions.

The major controversy is the proposal to abolish the rule of corroboration. As we have heard, concerns have been raised about that proposal by the Law Society—I declare an interest as a member—every senior judge, apart from Lord Carloway, including Lord Gill, the Lord President and every single living previous Lord President; the Faculty of Advocates; the Scottish Human Rights Commission; the cross-party group on adult survivors of childhood sexual abuse; Lord Carloway’s own expert reference group; Justice Scotland; and many other experts and academics.

I struggle to understand from the cabinet secretary and his colleagues on the SNP benches why the change is required. The case seems to be that more victims would get their day in court. However, it would not be the case that the change would increase the rate of conviction, because in England and Wales the conviction rate for sexual offences, despite the lack of a corroboration rule, is almost identical to that in Scotland. The Lord Advocate in evidence to the Justice Committee made the point that there would not necessarily be an increase in convictions. Indeed, in this very debate, Mr Allard made precisely that point.

Christian Allard: I am not sure that the member listened to my speech. The issue is not about the rate of conviction—that will come later. Rather, it is about the rate of prosecution and access to justice. We need cases to be prosecuted. No miscarriages of justice are taking place at the moment because cases are not being prosecuted.

Murdo Fraser: I thank Mr Allard for confirming that what I said about his earlier intervention was entirely correct. If abolishing the requirement for
corroboration does not increase the rate of conviction, I cannot see what it does for victims of crime. They want to see those who they claim have assaulted them being convicted. Surely that is the point.

Lord Carloway and the Cabinet Secretary for Justice both described the rule of corroboration as “archaic”. It is certainly an ancient rule of law. So, of course, is the presumption of innocence. I dare say that there are prosecutors and people in the police who would be quite happy to scrap what they would describe as the archaic law of the presumption of innocence and I dare say that that would increase convictions. There is no doubt about that.

However, our role in Parliament is not to do everything that the police and prosecutors ask for. As Alison McInnes said in an excellent speech, our role is to strike a balance—sometimes, it is a difficult balance—to ensure that the innocent are protected. Scrapping the requirement for corroboration tips the balance too far, in my opinion.

I will say something about the Justice Committee. Those of us who are involved in committees in the Parliament know how unusual it is, since 2011, for SNP-dominated committees to say anything critical of a measure that the SNP Government proposes. We have all sat there and seen lines that are in any way critical of anything that the Government is doing being excised by SNP members.

What makes the Justice Committee’s report remarkable is that it is the first instance that I can think of in the past three years in which an SNP-dominated committee has disagreed with a proposal from the Scottish Government. The cabinet secretary should take note of that. In particular, he should take note of the views of the committee convener, Christine Grahame. She is a well-regarded convener and a lawyer like me. When she decides that what the Government is doing is not correct, the cabinet secretary, the Government and Parliament should listen to that.

Even the cabinet secretary himself has concerns. We know that because he has conceded a review under Lord Bonomy. It is an extraordinary approach to say that we should pass the measure into law and thereafter have the review. That is the wrong way round. We should not be asked to pass a law until we have full scrutiny of the proposal and have the review first.

Let us make an offer to the cabinet secretary. We will not be unreasonable on the issue. We are happy to consider the case for scrapping the general corroboration rule as part of a wider review of the laws of evidence. That is precisely what Lord Gill proposed to the Justice Committee.

The cabinet secretary can take that away, take the measure out of the bill and bring back fresh primary legislation following the review. It will get proper parliamentary scrutiny and he will get support from us if he does that job properly.

The cabinet secretary has a simple choice. He is a fair-minded man and I have a lot of respect for him as Cabinet Secretary for Justice. He can either do the right thing, listen to the Justice Committee, its esteemed convener, all the Opposition parties in the Parliament and all the various outside bodies that have raised concerns about abolition and take the provision out of the bill, rethink it, review it and bring it back to Parliament for proper consideration; or he can railroad it through on a tightly whipped vote with, inevitably, a narrow majority at best and show contempt for the view of the Justice Committee. This is his chance to show his mettle. I hope that he will not disappoint me or the people of Scotland.

16:38

Elaine Murray (Dumfriesshire) (Lab): There are several parts of the bill that Scottish Labour members agree with and want to proceed. We support the reduction of the number of hours for which a person can be kept in custody to 12. There is, perhaps, a case for occasionally allowing that to be extended beyond 12 hours in exceptional and difficult cases.

We welcome the focus on knife crime, which increases the maximum sentence for carrying a knife from four years to five. Scottish Labour has taken knife crime extremely seriously for many years. Indeed, in office, we took action to strengthen sanctions on the carrying of knives.

We agree that the appeals process should be speeded up and we are also pleased to see Sheriff Bowen’s recommendations—in particular, the requirement for effective communication between the prosecution and defence in sheriff and jury cases—being reflected in legislation.

We welcome sections 83 and 84, which create two statutory aggravations relating to people trafficking. Of course, we hope that that will be followed by Government support for Jenny Marra’s member’s bill. Indeed, it is disappointing that the SNP is the only party that has failed to have one single MSP sign in support of the bill being heard—a bill that has been described as world leading and which has attracted the backing of more than 50,000 members of the public.

We have concerns about some proposals. As Christine Grahame said, the use of the term “arrest” to cover questioning by the police without charge could lead to a misunderstanding of people’s status, and the term “person not officially
accused” might be difficult to introduce into common parlance. If those changes are to be introduced, focused efforts will need to be made to ensure that the media and the public understand them. It is important that they understand that the fact that someone has been arrested will no longer indicate that the police have sufficient evidence to press charges against them.

We agree that the police should be able to release a suspect for a period of investigative liberation before any charges are pressed, but consideration needs to be given to how that may be interpreted by the person’s employers and by members of the public, and the effect that it may have on the suspect’s private life. I also have much sympathy with the view that the complainer—particularly in the case of person-to-person crimes—should be advised of the period of investigative liberation and any conditions that are attached. We can pursue that at stage 2.

As others have said, the most contentious issue is the abolition of the requirement for corroboration, which, unsurprisingly, has dominated the debate. I make it quite clear that I do not oppose its abolition out of any desire to give the Government a kicking. The question whether one of the cornerstones of Scots law should be abolished is far too serious to be used for transitory political gain. Indeed, it was with deep regret that I concluded—having listened to the 11 evidence sessions to which the convener referred and read the 57 pieces of written evidence and the 11 pieces of supplementary evidence—that the cabinet secretary has not yet made the case for the abolition of the requirement for corroboration. I wanted him to convince me that it would make a difference to the lives of victims of person-to-person crimes such as rape, sexual assault and domestic abuse without compromising the civil liberties of those suspected of other crimes but, unfortunately, he has failed to do so.

Sandra White: I am a wee bit confused by what the member has said about corroboration. How come James Kelly said, when he had read the Carloway report, that Labour supported the abolition of corroboration? How can a party change its mind quite so quickly?

Elaine Murray: I had never made up my mind on that, and I do not think that Sandra White has given a correct account of what James Kelly said. I would like to continue, especially as Sandra White did not take an intervention from me.

We understand the frustration of organisations that represent the victims of such crimes, such as Women’s Aid, Victim Support and Rape Crisis, about the difficulty of getting cases to court but, as Murdo Fraser said, there is no evidence from systems in which corroboration is not required, such as the English system, that the rate of successful conviction for sexual crimes is any higher than it is in Scotland. Unfortunately, there is evidence from England that, across the system as a whole, the miscarriage of justice rate is higher.

As Alison McInnes said, if the requirement for corroboration is abolished, it might be easier to get a case to court but, once that happens, it will be one person’s word against another’s and the victim is likely to be subjected to very robust examination by the defence counsel, and juries or sheriffs may be reluctant to convict on the basis of one person’s word against another’s. The experience of an unsuccessful trial could be horrific for a victim and could leave her exposed and, indeed, endangered if the accused is not convicted.

All Labour members agree with Rhoda Grant, Sandra White and others that domestic and sexual violence must be taken extremely seriously, but the problem of achieving justice for victims goes far wider than the prosecution system. The terrible case that Gil Paterson described shows how bad the whole justice system is and indicates that the whole system, and the attitudes of society, need to be reviewed, not just corroboration.

I turn to the effect of the abolition of corroboration on people who are accused of other crimes. What about the trade unionist on the picket line, the protestor at a demonstration or the youngster who is accused of shoplifting? What will protect them if their face does not fit, the cause that they support is not popular with the establishment or they have already had a brush with the police? Who will protect them if corroboration is removed?

The cabinet secretary has made some concessions. He and the Lord Advocate have stated that no case will be taken to court without supporting evidence. It could be a way forward to put that on the face of the bill, but I am not sure that that is not corroboration by another name.

Margaret McCulloch, John Finnie, John Pentland and Patrick Harvie all mentioned the fact that the cabinet secretary has convened a review group under Lord Bonomy to look at additional safeguards. That is an admission that the cabinet secretary did not do his homework before introducing the bill. As all those members said, enacting the recommendations through secondary legislation is the wrong way to put the situation right.

Scottish Labour’s plea to the cabinet secretary and others in the chamber is this: please withdraw from the bill the provisions to abolish the corroboration requirement; widen the reference group’s scope so that it can consider the range of problems that face victims of person-to-person
crime; widen the group’s membership to include representatives of those victims; look at removing the corroboration requirement, or at defining corroboration or putting a definition of supporting evidence in a bill; and look at the additional safeguards that might be required to protect civil liberties.

When all that has been done and the process is concluded, I ask the Government to bring back robust and well-evidenced legislation to the Parliament. By all means set a timescale for the process—it does not need to be kicked into the long grass and it can be achieved in a defined timescale—but let us pass the legislation properly.

If the cabinet secretary does what I have proposed, he and his Government will have the full support of Labour members and, I think, members across the chamber, because we all want to make a difference to victims who do not get justice at the moment, but we do not want to do that at the expense of the civil liberties of other vulnerable people in our society.

The Presiding Officer (Tricia Marwick): I call Kenny MacAskill to wind up the debate. I would be obliged if he continued until 4.59.

16:46

Kenny MacAskill: I put on record my gratitude to all who have taken part in the debate and especially to those whose comments extended beyond corroboration. It is important to deal with those other aspects, which I will also comment on. We will reflect on the many points that have been made, and we will seek to work with the Justice Committee, groups and individuals to address those points. I am grateful to them for that work.

We have heard outstanding speeches, such as those from Annabelle Ewing and Gil Paterson. I think that Patrick Harvie was eloquent, as ever, although I disagreed with the points that he made.

I again thank Lord Carloway for his comprehensive report, which took him approximately a year to produce. I am grateful for all his efforts and studies. We should also thank Sheriff Principal Bowen, who did considerable work that parts of the bill are based on and which will improve justice for Scotland. I am also grateful to all the members of the Justice Committee, the Delegated Powers and Law Reform Committee and the Finance Committee for their work.

I will deal with matters that have been raised. The charge is being dealt with by the Conservative Party, which is supported by its helpers—as is becoming the norm—in the Labour Party and the Liberal Democrats. We know that the better together campaign extends beyond the constitutional remit to other aspects.

John Finnie rose—

Patrick Harvie: Would the cabinet secretary like to take an intervention?

Kenny MacAskill: Not at the moment.

Let me say that Margaret Mitchell said—[Interruption.]

The Presiding Officer: Order.

Kenny MacAskill: Margaret Mitchell said that corroboration is not about non-essential aspects, that the position does not need to be beefed up and that it is all to do with important aspects. I will give her examples of aspects that require corroboration.

Two police officers are required for the taking of mouth swabs from alleged offenders. The taking of intimate swabs from a complainer in a rape case must be corroborated; that might involve a child and injuries to sexual parts. In child pornography cases, the Crown must corroborate that children are under 16. Two witnesses are required to prove that a child is a child; a birth certificate is inadequate. It is not simply a waste of police resources—

Margaret Mitchell: Will the cabinet secretary take an intervention?

Kenny MacAskill: Let me finish, and then I will give way.

It is not simply a waste of police resources—

Margaret Mitchell: Will the cabinet secretary take an intervention?

The Presiding Officer: Ms Mitchell—

Margaret Mitchell: I did not hear the cabinet secretary’s reply.

The Presiding Officer: Ms Mitchell, sit down.

Kenny MacAskill: It is not simply a waste of police resources but an infringement of the civil liberties of the child or the rape victim that two people must be present for something that is so intimate, harsh and personal when they have been traumatised. Perhaps Ms Mitchell would like to clarify why that should be the case.

Margaret Mitchell: What I would like to do is say that the cabinet secretary has just made a point that explains why corroboration should be taken out of the bill and looked at, to see how situations such as that are working in practice.

Kenny MacAskill: What that proves is that the cabinet secretary has just made a point that explains why corroboration should be taken out of the bill and looked at, to see how situations such as that are working in practice.

We expected that from the Tory Party: it is the Conservative and Unionist Party; that is what we expect from it. We did not expect that from those who have had a lifetime of experience. Mr
Pearson was a very lengthy police officer for many years. [Laughter.] To be fair, he served with distinction and I worked with him. His position has changed. His position now is not the position that he had when he was a police officer. He stands now full square against not just Police Scotland but the Scottish Police Federation and the Association of Scottish Police Superintendents.

Graeme Pearson rose—

Kenny MacAskill: I will take Graeme Pearson in a minute.

I do not know what has changed other than Mr Pearson’s taking on the mantle for Labour, but I defer to Mr Pearson.

Graeme Pearson: I am saddened that the cabinet secretary is making this a political issue, instead of considering victims. Let me confirm for him that my concern is that we are putting victims on a footing that is no better than the footing that they are on currently. If he would just take time, as I implored him to earlier, to allow the whole of the avenue to be looked at properly and a comprehensive proposal to be brought back, I would be glad to support him.

Kenny MacAskill: I would take that with more credibility if the member—and other members in this chamber—had not received communications from Victim Support Scotland, Rape Crisis Scotland and Scottish Women’s Aid. They are clear and they are unequivocal: they are saying not to support the Tory amendment lodged by Margaret Mitchell. There is no equivocation there; the equivocation comes from Mr Pearson.

We know that Labour members take their cue from Cameron and Osborne. [Interruption.]

Murdo Fraser: Unworthy.

The Presiding Officer: Order.

Kenny MacAskill: I did not think that they took their view from Richard Keen. It seems that it does not matter whether it is a minimum price for alcohol or free school meals—[Interruption.]

The Presiding Officer: Order!

Kenny MacAskill: If Labour has a policy, if Labour knows that it benefits the community—[Interruption.]

The Presiding Officer: Cabinet secretary, will you sit down?

I will not have speakers being barracked in the chamber.

Members: Oh!

The Presiding Officer: I recognise that this is a very heated debate, but people are watching the debate and members are not doing the Scottish Parliament any favours by their behaviour.

Kenny MacAskill: There are aspects where Labour had clear, principled positions, which now seem to have been stood on their head.

I accept that Patrick Harvie has a different view, and I am prepared to discuss and engage with him. I think that he does not believe that the case against corroboration has been made; I believe that it has. The important thing is that the Labour Party believed that the case against corroboration had been made.

Patrick Harvie: Will the cabinet secretary give way on that point?

Kenny MacAskill: Not at the moment. I have to deal with Labour.

That is why the Labour Party manifesto was clear that Labour wished to consider the issue with regard to rape.

Elaine Murray: Will the cabinet secretary give way?

Kenny MacAskill: No—let me deal with the position before. On 1 December 2011, James Kelly, who is whipping Labour at the moment, was a justice spokesman. He said:

‘Labour has previously made its position clear on rape cases, in relation to which we feel that corroboration should be abolished.’—[Official Report, 1 December 2011; c 4250.]

On 25 September 2012, in a parliamentary debate on Carloway, Mary Fee, who I have the greatest admiration and respect for, said:

‘I agree with Lord Carloway that corroboration should be abolished. Corroboration is an ancient and archaic law that is preventing justice from being served in some of the most heinous crimes, such as rape and serious assault.’—[Official Report, 25 September 2012; c 11848.]

We have heard today from Rhoda Grant. When she addressed my colleague Fergus Ewing, who was then the community safety minister, she made it clear that, in cases of domestic abuse,

‘there are no corroborating witnesses to the crime—it happens within the home. That is what makes domestic abuse different from any other crime.’—[Official Report, Justice Committee, 9 November 2010; c 3744.]

What has changed since Rhoda Grant had that position, Mary Fee spoke and the Labour Party stood on that manifesto? What information have they received? They have received the information that has been forthcoming.

Elaine Murray: For clarification, the manifesto said that we would consider the removal of the requirement for corroboration in rape cases. I pursued the matter with Lord Gill and with Scottish Women’s Aid and Rape Crisis Scotland during evidence taking, and no one was interested in
removing the requirement only in relation to certain crimes. All said that it should be done across the board or not at all.

Kenny MacAskill: That is what the Government is seeking to do, because we recognise that the issue does not affect only the victims of rape or other sexual offences. As Rhoda Grant knows better than anyone, and as Lily Greenan said in evidence, the issue affects victims of domestic abuse. We know that it affects the elderly, as Age Scotland said and as members have said today.

Rhoda Grant: Will the cabinet secretary take an intervention?

Kenny MacAskill: I do not have time, I am afraid.

We know that it affects children. We have heard how children suffer behind closed doors.

Evidence has come in since Labour made its manifesto commitment. We heard the testimony of Colette Barrie and Mary Ann Davidson. We have heard the victims of Lee Cyrus speak out—in that respect, Mr Fraser seems to ignore points that he has taken before. He has been told by the Solicitor General for Scotland that the decision in the Lee Cyrus case was down to corroboration, but he wants the status quo to continue, which creates situations such as the one he has been correct to complain about.

Murdo Fraser: The cabinet secretary knows perfectly well, because I have corresponded with the First Minister and the Solicitor General on the case, that my concern was the lack of application of the Moorov doctrine and had nothing to do with the general rule of law on corroboration. The cabinet secretary should know that.

Kenny MacAskill: I take the view of the Solicitor General on the matter much more than I take Murdo Fraser's view. The impediment to access to justice in that case was the law of corroboration, as it has been in 170 rape cases over the past two years and as it is in 3,000 cases annually.

At new year I watched Jonathan Watson's parody of Johann Lamont—[ Interruption.] I never thought that I would see Johann Lamont play Jonathan Watson. “Mibbees aye, mibbees naw” appears to be Labour's position on corroboration, despite its manifesto commitment and despite Labour members going on record—[ Interruption.]

The Presiding Officer: Order. [ Interruption.] Order!

Kenny MacAskill: Thank you, Presiding Officer.

The burden of proof remains: beyond reasonable doubt is the standard that has to be proven by the Crown.

The evidence is clear. It is clear in the court of public opinion. It has been put forward in the Parliament by organisations that have represented victims of crime for years and years, by the people who have to wipe away the tears and mop up the blood, by the people who are involved in policing and prosecution and—I reiterate, in letters to every member—by Scottish Women's Aid, Rape Crisis Scotland and Victim Support Scotland. Those people have given us clear, unambiguous advice that we should ensure that the law of corroboration, which has harmed access to justice, is dealt with.

I said that there seemed to be a parody in terms of Labour's position with regard to—[ Interruption]—Labour's position on corroboration. Let us be clear: it is only an excuse for Labour, which is selling out on its principles. We accept that that is the norm for the Conservative Party, but for years the Labour Party, especially under Johann Lamont, prided itself on tackling domestic abuse and addressing issues to do with sexual offences. Labour has sold its soul and is in danger of selling out the victims of crime. I commend the motion in my name.

The Presiding Officer: That concludes the debate. I ask all members in the chamber to reflect on their behaviour this afternoon. [ Interruption.] I ask all members to reflect on their behaviour this afternoon, which, quite frankly, was unacceptable.
Criminal Justice (Scotland) Bill: Financial Resolution

16:59

The Presiding Officer (Tricia Marwick): The next item of business is consideration of motion S4M-09149, in the name of John Swinney, on the financial resolution for the Criminal Justice (Scotland) Bill.

Motion moved,

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Criminal Justice (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b) of the Parliament's Standing Orders arising in consequence of the Act.—[John Swinney.]

The Presiding Officer: The question on the motion will be put at decision time.
Decision Time

17:00

The Presiding Officer (Tricia Marwick): There are five questions to be put as a result of today’s business. The first question is, that amendment S4M-09160.1, in the name of Margaret Mitchell, which seeks to amend motion S4M-09160, in the name of Kenny MacAskill, on the Criminal Justice (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffith, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Hum, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ethtrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marr, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McManus, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milton, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Rowley, Alex (Cowdenbeath) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Gairness, Sutherland and Ross) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeeneshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmund, Alex (Aberdeenshire East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swiney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine)
The Presiding Officer: The result of the division is: For 61, Against 64, Abstentions 1.

Amendment disagreed to.

The Presiding Officer: The next question is, that motion S4M-09160, in the name of Kenny MacAskill, on the Criminal Justice (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
G grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Caru (Dunfermline) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)

Against

Hume, Jim (South Scotland) (LD)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Rennie, Willie (Mid Scotland and Fife) (SNP)
Scott, Tavish (Shetland Islands) (LD)

Abstentions

Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Ferguson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Caru (Dunfermline) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
 Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
The Presiding Officer: The result of the division is: For 64, Against 5, Abstentions 57.

Motion agreed to,

That the Parliament agrees to the general principles of the Criminal Justice (Scotland) Bill.

The Presiding Officer: The next question is, that motion S4M-09149, in the name of John Swinney, on the financial resolution for the Criminal Justice (Scotland) Bill, be agreed to.

Motion agreed to,

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Criminal Justice (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b) of the Parliament's Standing Orders arising in consequence of the Act.
Criminal Justice (Scotland) Bill

4. Annabel Goldie (West Scotland) (Con): To ask the Scottish Government what steps it is taking to address the reported criticism of the Criminal Justice (Scotland) Bill. (S4O-03119)

The Cabinet Secretary for Justice (Kenny MacAskill): The Scottish Government remains firmly committed to all aspects of the Criminal Justice (Scotland) Bill, including our proposals to abolish the requirement for corroboration, which—as I have said time and again—is a barrier to justice for too many victims of crimes that are committed behind closed doors, such as rape and domestic abuse.

When we announced the creation of Lord Bonomy’s review group in February, there were calls—including from the Law Society of Scotland and the Faculty of Advocates—for us to remove the corroboration reform from the bill and to introduce a separate bill later in the session once Lord Bonomy had reported. That was not acceptable, because it is one of the key reforms in the bill and is vital to improvement of the criminal justice system for vulnerable victims.

However, we have also made clear our willingness to listen to constructive proposals in relation to this key legislation. That is why we gave careful consideration to—and, in the spirit of cooperation, have accepted—the suggestion from Opposition members that stage 2 commence after Lord Bonomy’s review has been completed.

As the majority of the bill’s provisions were already due for implementation in 2015-2016, today’s move will have minimal impact on the overall timetable for the legislation, while allowing detailed and full scrutiny of the bill in its entirety and enabling any changes that are agreed in the light of Lord Bonomy’s recommendations to be included.

Most important, I hope that the move will allow the whole Parliament to get behind the progressive reforms in the bill, including the modernising of police powers, enhancement of the rights of people in police custody and removal of the corroboration requirement.

Annabel Goldie: I do not know whether it is the spring sunshine, the Easter recess or my question, but this is certainly a very welcome change of position by the Scottish Government. It has made the right decision to allow more opportunity for informed opinion to be extended on the bill’s provisions. I thank the cabinet secretary for reflecting a degree of political courage in making that decision and for adopting that changed position.

Can I tempt the cabinet secretary further down the path of righteousness? The Scottish Government is to amend the bill at stage 2 to address the nonsense of automatic early release. We have waited seven years for that: better late than never.

However, the proposed changes will affect only a minuscule proportion of prisoners—2 per cent. That is not change—it is glacial progress. Given the manifestation of the benevolent mood that the cabinet secretary appears to be in at the moment, I ask him to consider extending abolition of automatic early release to a broader range of prisoners than just that 2 per cent.

Kenny MacAskill: I thank Annabel Goldie for her kind comments. I am grateful for the suggestion that came from her and other political parties regarding the innovative procedure that we are using. I very much welcome it.

On the specific matter of automatic early release, we require primary legislation to make the necessary changes. This Administration will consider whether that should be delayed or whether it can be dealt with in other legislation that is in train. With regard to the principal aspects, we believe that the changes will deal with the most serious offenders—those who are given sentences that reflect the courts’ concerns—and will take on board our concerns about automatic early release of sexual offenders being at a significantly lower level in order to ensure the protection of the public.

I am happy, given the spirit of generosity in which Miss Goldie asked her question, to reflect on her points as we consider the best method of
proceeding, in order to ensure that we make long-overdue changes to automatic unconditional early release.

The Presiding Officer: Given the statement that the cabinet secretary has made, and given the importance that I attach to such important statements being made first to the Parliament, I intend to allow sufficient time to call supplementary questions from each of the political parties.

Neil Findlay (Lothian) (Lab): On a point of order, Presiding Officer. Given the significance of what the cabinet secretary has said, would not it have been more relevant for him to come and make a statement to Parliament?

The Presiding Officer: I have to say, Mr Findlay, that that is precisely what the cabinet secretary has done; this is one of the methods that we encourage the Scottish Government to use to make announcements to Parliament. My point is that I appreciate that an important statement has been made to Parliament and fully intend, as I said, to ensure that all the political parties have an opportunity to ask supplementary questions of the cabinet secretary.

I call Alison McInnes.

Alison McInnes (North East Scotland) (LD): Thank you, Presiding Officer. I also thank the cabinet secretary for responding so positively to the suggestion from the Opposition business managers on a sensible way to legislate on an important part of our criminal justice system. The stage 1 debate was, to be fair, a low point for the whole Parliament, because it demonstrated that we had lost sight of how we should legislate. The appointment of Lord Bonomy’s review panel meant that the cabinet secretary knew that the bill as drafted was deficient, although at that point he was unable to say that we ought to stop and take stock, so I am grateful that he now recognises that we need to wait for Lord Bonomy to report before we consider in detail all the matters in the round.

Kenny MacAskill: I am grateful for the suggestion and I welcome the input from Alison McInnes. We were not always going to wait for Lord Bonomy’s review, but what has been proposed is a welcome and innovative procedure. I thank Alison McInnes, as I did Annabel Goldie.

Elaine Murray (Dumfriesshire) (Lab): I express pleasure that the cabinet secretary has listened to the Opposition. We do not always expect the Government to do that, but in this case it has done so. It would have been inappropriate to pass legislation without seeing how it was to be amended, and I am pleased that we are not going to be expected to do that now. Can he give us further information about the timescale in which he expects Lord Bonomy to report to him, and therefore the timescale for the commencement of stage 2?

Kenny MacAskill: First, allow me to record my gratitude to Lord Bonomy. I welcome his actions in extending the membership of the review group. I will be seeking a meeting with Lord Bonomy to update him in due course. I understand that the first meeting of the group has taken place. We anticipate that Lord Bonomy will report in April next year, which he thinks is a timetable that is perfectly deliverable, based on previous discussions. As I have said, that is a matter that we will factor in with the Parliamentary Bureau and with Elaine Murray’s colleagues.

Margaret Mitchell (Central Scotland) (Con): I welcome the announcement that stage 2 is to be postponed, which takes cognisance of real concerns throughout Scotland—that is not to overstate the case—about the proposal to abolish the requirement for corroboration. However, I feel that there is nothing for the Government now to fear in including in Lord Bonomy’s review consideration of whether to abolish it or not. In fact, I consider it to be crucial that that be done, so I would very much appreciate the cabinet secretary’s confirming that he is willing to include that in the Bonomy remit.

Kenny MacAskill: I welcomed Annabel Goldie’s comments and I am grateful that the Tories, along with Labour and the Liberal Democrats, came up with the proposal, which the Government is happy to accept. However, I have to record that there will be no change to the remit for Lord Bonomy’s review. We have met him to discuss the remit, and he has signed up to it, as has everyone who will serve with him on his group.

As far as the Government is concerned—and as Parliament made clear at stage 1—the case against the requirement for corroboration has been made. It is failing victims throughout Scotland, so it has to go. On that basis, we are prepared to allow greater scrutiny of some matters so that Parliament can have more clarity about them, but the principle of removal of the requirement for corroboration remains.
Justice Committee

Proposals to end the automatic early release of certain categories of prisoner

Letter from the Cabinet Secretary for Justice to the Convener

Thank you for your letter of 23 April in relation to the Scottish Government’s intention to bring forward legislative changes to end the automatic early release of certain categories of prisoner.

I can advise that it is our intention to bring forward a Bill shortly that will contain provision on this issue. Subject to the normal process of pre-legislative scrutiny, I would expect the Bill to be introduced into Parliament in August 2014. It is likely the Bill will also include provision on release dates relating to helping ensure appropriate access to support services can take place for prisoners leaving custody.

I hope this is helpful.

Kenny MacAskill
Cabinet Secretary for Justice
27 May 2014
Justice Committee

Criminal Justice (Scotland) Bill

Letter from the Scottish Government to the Convener

Thank you for your letter of 30 April on behalf of the Justice Committee seeking an update in light of the announcement on the new timing for Stage 2 of the Criminal Justice (Scotland) Bill.

I can confirm that the Scottish Government’s intention is that nearly all of the provisions currently in the Bill will still be taken forward by this legislation.

We do, however, intend to lift the people trafficking provisions from the Criminal Justice Bill and to take them forward instead in the planned Human Trafficking Bill. We therefore intend to remove these provisions from the Criminal Justice Bill at Stage 2.

With regard to your specific question on the Police Negotiating Board for Scotland (PNBS), transitional arrangements were already in place to allow for different commencement dates for the abolition of the Police Negotiating Board (PNB), through the Anti-social Behaviour, Crime and Policing Act 2014, and the formation of the PNBS, through the Criminal Justice Bill. We are working with the Home Office to ensure that the commencement provisions, set out in the Anti-social Behaviour, Crime and Policing Act 2014, will enable the PNB to function appropriately with only its Scottish members, until the PNBS is set up.

Letter of Rights

The Bill was also originally going to transpose provisions relating to the Letter of Rights provided to suspects in police custody, which is a requirement of the EU Directive on the Right to Information in Criminal Proceedings. These provisions were discussed at the Justice Committee Meeting on 7 January 2014. Following the rescheduling of Stage 2 of the Bill, I now intend to transpose these provisions by a SSI until the Bill comes into force. The SSI will also transpose Articles 7(1) and 7(5) of the Directive, with which Scotland is already operationally compliant. I wanted to highlight this particular issue, as regulations will be laid imminently, in order to transpose these obligations as quickly as possible.

The Letter of Rights was also a recommendation of the Carloway Review. It conveys information about the right of access to a lawyer, and is provided to every suspect who is in a police station. In July 2013, a non-statutory Letter of Rights was introduced, available in 34 languages. This will be placed on a statutory basis by the regulations.

At the January meeting, I undertook to update the Committee on progress in improving and developing the Letter of Rights. In March two stakeholder meetings were held to discuss enhancing the Letters of Rights to ensure that it meets the needs of children and people with learning disabilities. The groups provided input on content and presentation of the Letters to best meet the needs of the relevant
groups. A separate operational delivery meeting was held with the Law Society, Police and SLAB, to get a view on how the Letter is working in practice. Officials are now considering whether amendments should be made to further improve the Letter of Rights, in light of comments from all these groups. This may require developing alternative versions of the Letter. The text of the Letter will also be updated to reflect the EU Directive on the Right to Information in Criminal Proceedings.

I will keep the Justice Committee updated on further progress, and will provide you with updated copies of the Letter of Rights.

**Stage 2 Amendments**

As you are aware, the Scottish Government had been planning to propose amendments to the Bill at Stage 2 in relation to automatic early release. I have written to you separately to explain our plans to end automatic early release for certain prisoners.

It had also been the Government’s intention to bring forward Stage 2 amendments to the Criminal Justice Bill designed to ensure transposition of the following two EU Framework Decisions by 1 December 2014:

a) Council Framework Decision on the Mutual Recognition of Decisions on Supervision Measures 2009/829/JHA (generally referred to as the ‘European Supervision Order’ Framework Decision); and


Alternative implementation routes for both of these measures are being considered and I will further update the Committee on this.

Kenny MacAskill
Cabinet Secretary for Justice
4 June 2014
Justice Committee

Criminal Justice (Scotland) Bill

Letter from the Cabinet Secretary for Justice to the Convener

As you know, Lord Bonomy has been leading the Post-corroboration Safeguards Review since February 2014. Lord Bonomy and his Reference Group have now completed their review, and published the full report with recommendations on the review’s website: http://www.gov.scot/Resource/0047/00475400.pdf

This is a substantial piece of work, with significant commitment not just from Lord Bonomy, but also from his 18-strong Reference Group, which is made up of respected figures from across the justice system. You will be aware that there has been public consultation and a detailed academic study undertaken as part of the review.

This afternoon I made a statement to Parliament in light of the review’s publication, and I wanted to ensure that the Justice Committee is aware of impact on the Criminal Justice (Scotland) Bill.

Lord Bonomy’s recommendations are substantial and complex, and I want to take the time to consider them fully. I also recognise that we have not achieved a consensus on whether the corroboration requirement is the best way to improve access to justice for victims, and I have considered the Justice Committee’s comments in the Stage 1 report on this.

I intend to look at Lord Bonomy’s detailed recommendations as a package, alongside the corroboration requirement itself, and form a view on the best way forward. I do not believe there is sufficient time to complete this work before the Criminal Justice (Scotland) Bill resumes its Parliamentary passage. Therefore the Government is now proposing, subject to Stage 2 consideration, that Bill should therefore proceed without the provisions abolishing the corroboration requirement, and without the related increase in the jury majority required for conviction.

I will consider whether any of the Review’s recommendations could be taken forward this Parliamentary session, as I am aware that some of the recommendations are relevant to Part 1 of the Bill. If we are intending to take forward any changes in the Bill, I will ensure we give the Committee as much notice as possible of any amendments. However, I believe that the majority of Lord Bonomy’s recommendations will require longer consideration.

Michael Matheson
Cabinet Secretary for Justice
21 April 2015
Ar faidhle/Our ref: KM/CJBill

25 August 2015

Dear Christine,

CRIMINAL JUSTICE (SCOTLAND) BILL

Parliamentary scrutiny of the Criminal Justice (Scotland) Bill will re-commence in September and I am writing to provide an update to the Committee on the Bill, given the period of time which has elapsed since Stage 1.

Overview of the Bill’s content

As set out in the Policy Memorandum, the Criminal Justice (Scotland) Bill is the legislative vehicle to take forward the next stage of essential reforms to the Scottish criminal justice system. The Bill achieves this by taking forward and further developing the majority of the recommendations of two independent reviews of key aspects of the criminal justice system. The Bill also includes a number of other key provisions which the Scottish Government considers also assist in meeting its overall objectives of ensuring a Safer and Stronger Scotland in which public services are high quality, continually improving, effective and responsive to local people's needs.
The Bill comprises three elements:

- Provisions which have been developed from the recommendations of Lord Carloway’s Review of Scottish Criminal Law and Practice (these reforms would modernise arrest, custody and questioning procedures, enhance protections for the accused);
- Provisions which have been developed from the recommendations of Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure (to enable and promote the efficient and effective management of sheriff and jury cases including enabling earlier communication between the prosecution and defence and help active judicial case management); and
- A number of additional relevant provisions which take forward a range of key justice priorities.

The additional provisions which are being taken forward by the Bill are intended to complement the reforms which are based on Lord Carloway and Sheriff Principal Bowen’s recommendations by implementing a key range of justice priorities or efficiency measures. On introduction the additional provisions contained in the Bill were:

- Raising the maximum custodial sentences available to courts for handling offensive weapons offences, including knife possession, from four to five years;
- Making clearer the law on court powers to impose sentences on offenders who commit offences while on early release;
- Introducing a people trafficking criminal aggravation when sentencing for other crimes with a connection to people trafficking (this has now been superceded by the recent Human Trafficking and Exploitation (Scotland) Bill);
- Enabling increased use of live TV links;
- Changing the method of juror citation; and
- Retaining a collective bargaining mechanism in Scotland for the negotiation of police officer pay, following the Home Secretary’s decision to abolish the UK Police Negotiating Board.

**Parliamentary Process to date**

The Bill was introduced to Parliament on 20 June 2013. Your Committee took evidence on the Bill over the course of 11 sessions, and on 6 February 2014 published its report on the Bill. I note that the Committee’s Stage 1 Report supported the general principles of the Bill, with the exception of the corroboration reform, where a majority of the Committee recommended these provisions be removed. The Bill was then debated on 27 February 2014, and Parliament approved its general principles.

As you will recall alongside the Stage 1 consideration of this Bill, on 6 February 2014 Kenny MacAskill, the former Cabinet Secretary for Justice, announced that Lord Bonyon would head an independent reference group to consider what additional safeguards and changes to law and practice may be needed to Scotland’s criminal justice system following the then planned abolition of the corroboration requirement in the Criminal Justice (Scotland) Bill. Lord Bonyon published his final report in April 2015 and this is available on the Scottish Government website.
The Scottish Government proposed abolishing the corroboration requirement to improve access to justice for victims of crimes committed in private, including domestic abuse and sexual offences. Following completion of Lord Bonomy’s Post-corroboration Safeguards Review, it was clear that substantial additional changes would be required alongside abolition. Given this, and the lack of consensus on this reform, I announced to Parliament on 21 April 2015 that the Scottish Government accepted that abolition should not go forward in the Criminal Justice (Scotland) Bill, and I would instead consider and work with stakeholders towards a greater degree of consensus on a package of reforms. This work will begin later this year and will include consideration of Lord Bonomy’s recommendations alongside the corroboration requirement itself.

I will now move on to address the parts of the Bill in order and provide an update to the Committee on the Scottish Government’s position on the points raised in your Stage 1 report and advise on the amendments which I intend to lodge for the Committee’s consideration at Stage 2.

Part 1 – Police powers

Part 1 of the Bill creates a new regime for arrest, custody and questioning of suspects. The underlying purpose of the changes is to:

- modernise and clarify the system of arrest, custody and questioning to ensure the rights of accused persons and the victims of crime remain appropriately balanced;
- simplify and clarify the process of arrest;
- ensure people are not unnecessarily or disproportionately held in custody;
- create flexibility to manage criminal investigations, balancing the needs of the enquiry, public safety and the fundamental human rights of suspects;
- set out clearly when a person’s right to access a solicitor arises, how it is communicated and when these rights can be waived;
- provide powers to question a person after they have been officially accused of an offence;
- provide the highest standard of protection for children involved in the formal criminal justice process; and
- ensure vulnerable adult suspects are not disadvantaged during police procedures

Implementation – Training and i6

The Committee raised concerns at Stage 1 about the burden Part 1 of the Bill could place on Police Scotland, particularly alongside the implementation and roll-out of i6.

The Scottish Government continues to work closely with Police Scotland and the Scottish Police Authority on the practicalities and financial impact of implementing the Bill and its interaction with the i6 programme to ensure the timetable for implementation is achievable.

Implementation had previously been planned for April 2016. Work is already well under way on developing the Police Scotland training programme. Taking into account the scale of the training exercise required – alongside the training requirements for the i6 roll-out, which is commencing this year – the Scottish Government believes it would be more appropriate to work towards implementation in autumn 2016.
Chapter 1 – Arrest

Terminology

In its Stage 1 report, the Committee accepted the benefit of simplifying the powers of arrest but commented that the new terminology could be confusing. In particular, the Committee said the public and the media may not be able to distinguish between a person who has been arrested but not “officially accused” and a person who has been arrested and has been “officially accused”. Concerns were also expressed about the term “de-arrest” in relation to proposals to allow the police to release a person when the grounds for arrest no longer exist.

We continue to believe the terminology used is clear. The presumption of innocence remains after someone is arrested and whether a person is guilty, of course, is a matter for the courts. The Government agrees with Lord Carloway that having a single process – arrest – for taking a suspect into custody makes for a clearer system. The term “de-arrest” is not used in the Bill and the Government does not intend to take this forward in the amendments planned for Stage 2.

Suspect anonymity
The Committee recognised that the issue of suspect anonymity is problematic but considered it merits further consideration and every effort should be made to ensure the reputation of the accused is not detrimentally affected by the provisions in the Bill.

The Scottish Government remains confident the police will make every effort to avoid disclosure of a suspect’s identity to the media. The principle of innocent until proven guilty is well understood. There are no current plans to make changes to the current position.

Defining arrest
The Committee noted there was no consensus from witnesses on whether to define arrest but decided on balance they would rather have a definition in the Bill, and I am aware John Pentland has lodged an amendment which would define arrest.

The Scottish Government remains convinced that attempting to define arrest in the Bill is unnecessary. The Scottish Government believes leaving the term to take its natural meaning within the context of the Bill will allow the new system to operate smoothly and alongside other legislation which makes provision about arrest.

Arrest for attempts/conspiracy
In its Stage 1 report, the Committee highlighted the differing viewpoints of the police and the Scottish Human Rights Commission on scope for the police to arrest people who have done nothing wrong and called on the Scottish Government to further consider this issue.

We have continued to engage with stakeholders on this. The Bill as introduced only allows a police officer to arrest a person if they have reasonable grounds for suspecting that person has committed or is committing an offence. This would be sufficient to arrest a person on suspicion that they have attempted or are conspiring to commit an offence because attempts and conspiracies to commit offences are criminal offences in their own right.

There is nothing in the Bill which will permit the police to arrest a person without grounds for suspecting that person has committed an offence.
Release from arrest
The Committee wanted to ensure “de-arrest” does not lead to a situation where people are arrested without a proper assessment on whether arrest was appropriate.

The Scottish Government is persuaded that it should be possible for the police to release an arrested person, prior to arrival at a police station in certain circumstances. I intend to lodge amendments at Stage 2 to make provision for this. The amendment will allow a person to be released prior to arriving at a police station only if there are no longer reasonable grounds to suspect the person of committing the offence for which they were arrested or an offence arising from the same circumstances. The amendments will include a requirement to record the reasons why an arrestee is released before arriving at a police station.

The police have an equivalent power at present in relation to people they detain under section 14 of the Criminal Procedure (Scotland) Act 1995 and its use is very limited. On this basis, I would not expect the power to release an arrestee before arriving at a police station to be used often in practice.

It will continue to be possible to release a suspect where a constable charges the person with an offence and having done so decides that the persons presence at the police station will not be required.

Letter of rights
The Committee, in their Stage 1 report asked the Scottish Government to respond to the suggestion of some witnesses that information to be given to suspects as police stations should be provided both verbally and in writing with a view to ensuring that they clearly understand their rights.

Section 5 of the Bill places, on a statutory footing, that such information required to satisfy the EU Directive on the Right of Information in Criminal Proceedings, must be provided verbally or in writing as soon as reasonably practicable.

Since July 2013, a letter of rights, conveying information about the right of access to a lawyer has been provided to every suspect who is in a police station. The letter of rights was consulted on ahead of its introduction in July 2013. It was also welcomed by the Justice Committee at Stage One. This letter has been drafted in accessible language and is also available translated into 34 languages. In order to strengthen and simplify the advice that is given to all suspects, and to ensure compliance with the Directive, the Scottish Government worked with key stakeholders since 2013 to improve the letter of rights, and to also create separate versions designed to be accessible for children and those with learning difficulties and disabilities. Copies of all the letters can be found on the Scottish Government website.

In the course of discussions with stakeholders, various representatives made clear their opposition to requiring the police to verbally read the letter to all suspects. Police Scotland have indicated that they already endeavour to ensure all suspects understand their rights, reading the letter to suspects where necessary. However, they have estimated that reading the letter to all c.200,000 suspects processed each year would equate to an additional 16,666 hours of police time per annum.

I consider that the key issue is that individuals are provided with an effective and appropriately drafted letter of rights and given the opportunity to read and absorb the information.
An officer having to read through the whole letter, may add to what is already a confusing and stressful situation. My view is that having the letter read out to all suspects would not represent an additional safeguard. However, as part of the development of 16, Police Scotland have now built in an additional question which they will ask suspects during the booking in process. Suspects will be asked whether or not they wish the letter of rights to be read out to them. In my view, this is a proportionate way to address the understandable concerns that has been raised of the need to ensure all suspects fully understand their rights.

Given the above, I am convinced that the Bill offers the necessary safeguards and retains the flexibility to enable officers to read the letter of rights to suspects who wish them to do so.

Chapter 2 – Custody

Detention limits
The Bill as introduced allows a person to be kept in custody for a maximum of 12 hours. During Stage 1, the Scottish Government made a commitment to consider extending that in exceptional circumstances.

The Committee noted there were mixed views among members on whether detention beyond six hours is necessary. It recognised, however, there may also be situations where it could be necessary to consider extending beyond the 12 hour limit and sought further information on the exceptional circumstances in which such an extension might be granted, how often such extensions are likely to be granted and how the Scottish Government intends to ensure that extensions do not become the norm.

The Scottish Government listened to the evidence at Stage 1 and has continued to consider the appropriate detention limits. The purpose of the custody provisions is to strike an appropriate balance, ensuring no one is held unnecessarily or disproportionately, protecting the rights of suspects and victims while giving flexibility to carry out effective investigations. When the custody provisions are considered as a package, I believe it is clear the detention limit is not a target but the absolute maximum and the system is designed to ensure unnecessarily prolonged detentions cannot become the norm.

There are several safeguards built into the process. These include requirements for the initial custody authorisation to be given by a police officer who has not been involved in the investigation and for a mandatory custody review by an Inspector after six hours. In both cases, custody can only be authorised if the statutory test in section 10 of the Bill is satisfied. The provisions should also be read with the general duty on the police in section 41 to take every precaution to ensure a person is not unreasonably or unnecessarily held in police custody.

As the Committee noted in the Stage 1 report, statistics from June 2013 show the 80.4 per cent of people detained under the current legislation are held for up to six hours. 19.2 per cent of persons were detained for between six and 12 hours. Only 0.4 per cent of detainees (13 people in the month of June 2013) were held for a further period of up to 12 hours. Those 0.4 per cent of cases are the exceptional cases under the current legislation. The Stage 1 written evidence from Police Scotland includes detailed case studies of when such extensions are needed (see Appendix B of the written evidence submitted by Police Scotland in August 2013).

The Bill will create the new option of releasing a person on investigative liberation part way through the 12 hour custody period and arresting them again at a later stage. Investigative
liberation will provide vital flexibility in investigations, allowing time for complex and technical examinations of documents, telephones and computers to take place. In order to balance the interests of justice and protect the public, investigative liberation will be limited to taking place over a 28 day period, and a person may be released subject to conditions.

Police Scotland have made the case that several factors can combine to create exceptional cases where extensions to the 12 hour period may be required. These factors tend to affect the timing of when interviews can start, rather than the length of the interviews required. Police Scotland have also provided assurances that the purpose of extensions is to ensure interviews are conducted in circumstances fair to suspects – and victims – and to allow the police to conclude enquiries properly and gather sufficient evidence in order to charge a suspect. Some possible factors include:

- Suspects and victims may be too exhausted, traumatised, drunk or under the influence of drugs to be interviewed immediately after an arrest takes place and the suspect is brought to a police station. This is more likely when people are arrested late at night. In such cases, best practice in the public interest – and the interest of fairness – is to allow people a period to sober up or rest before interview.

- Urgent work may be needed to interview victims, trace witnesses and conduct other investigations – for example, examine a crime scene – before or at the same time as interviewing a suspect. It may not be in the interests of public safety to release a person suspected of a serious and violent offence on investigative liberation while such investigations take place.

- In some cases, it is considered best practice to examine a crime scene during daylight hours, even if an initial arrest took place at night. This may apply, for example, to examination of bed clothes at a rape scene. Releasing a suspect on investigative liberation in these circumstances, immediately after a suspected murder or rape may not be safe for the victim or the suspect.

- Forensic medical examinations may be required before interviews can take place. In areas of rural Scotland, victims and suspects may need to travel to specialist police medical suites or for examination by a Police Casualty Surgeon. These examinations and the travel times involved may reduce the time remaining for conducting interviews within the 12 hour detention limit.

- Other people – for example, interpreters and appropriate adults – may be required before interviews can commence. It is in the interests of justice and human rights that such people are present at interviews but it may take time to assess what support is required for an individual suspect and then arrange for the specialists to attend. Delays are possible if a suspect’s needs are not immediately evident because they are also drunk or on drugs. These factors can reduce the time available for conducting interviews and, in complex cases extending the detention period beyond 12 hours may become necessary.

It is possible to extend detention periods by a further 12 hours under the current legislation, but not under the Bill as introduced. Suspects in serious and complex cases affected by the factors I have set out above would therefore have to be released under the Bill if the 12 hour period expired before the police had obtained sufficient evidence to charge them with an offence.
This is a complex issue and one where, as the Committee has noted, there is a range of views amongst stakeholders. I am therefore giving further consideration to the approach the Government wishes to take at Stage 2.

**Investigative liberation – impact on private life**

The Committee sought assurances that investigative liberation will not have an unnecessary impact on a suspect's private life.

The Scottish Government has considered this matter further. In addition to the existing safeguards in the Bill, I plan to lodge amendments to ensure investigation liberation conditions can only be imposed for 28 consecutive days and cannot include curfews.

**Investigative liberation – notification of victims**

The Committee asked the Scottish Government to work with COPFS to ensure that, where they may be at risk, complainers are always informed timeously of the suspect's release on investigative liberation and of any conditions applied.

The Scottish Government continues to discuss with stakeholders the processes which will be required as a result of the Bill, including the process of notifying complainers where a suspect is released on investigative liberation.

**Investigative liberation – resource implications**

The Committee noted there were resource implications relating to investigative liberation.

The Scottish Government will continue to work closely with Police Scotland in relation to implementation of the Bill to ensure Police Scotland has adequate resources to deal with investigative liberation.

**Custody cases – times in custody/court sitting times**

The Committee was not convinced that specifying time-limits for periods in custody was not necessary at this Stage in light of the Police Scotland led working Group that has been set up to consider the issue. This working group continues to report regularly to the Justice Board and is now developing possible options, involving a limited number of courts being open seven days a week supplemented by video conferencing for some first appearances, for possible piloting. I will of course keep the Committee informed once any final decision is taken with regard to these potential options.

**Chapter 4 - Police interview**

The Committee welcomed the extension of the right to access to a solicitor to all suspects held in police custody. As Committee members will be aware, Lord Bonomy's Post-corroboration Safeguards Review Final Report recommended that “Scottish Ministers should forthwith abolish the requirement for some suspects to pay a contribution towards the cost of legal advice and assistance provided to them while they are in a police office”. I have considered this recommendation and will bring forward regulations which will remove the requirement for suspects to pay a contribution towards the advice they receive at a police station.

I also intend to lodge an amendment to section 23 of the Bill. Section 3 of the Bill deals with information to be given on arrest. This is that a person must be informed that the person is under arrest; the reason for the arrest; that the person is under no obligation to say anything other than to give the information specified in section 26(3) (outlined above); that they have a
right to have intimation sent to a solicitor under section 35 and access to a solicitor under section 36. Section 3 however also provides that a person must be informed of the general nature of the offence in respect of which the person is arrested. Section 23 as currently drafted does not contain the requirement to tell a suspect what offence they are suspected of committing. It is proposed therefore that an amendment be brought forward to section 23 to provide for this. The amendment will ensure consistency with section 3 and will act as an additional safeguard for suspects.

Post Charge Questioning
I remain of the view that, as recommended by Lord Carloway, post-charge questioning has an important role to play in the investigation of crime. I intend to introduce amendments to put beyond doubt that the suspect in this position is entitled to the same rights and protections as the suspect who is being questioned before charge; and, on top of that, to provide that the suspect must be informed of any conditions attached by the court to its authorisation of post-charge questioning (such as restrictions on the nature of the questions, or a time limit).

Chapter 5 - Child Suspects

In its Stage 1 report, the Committee noted that the Victims and Witnesses (Scotland) Bill defines a child as a person up to the age of 18 and asked the Scottish Government to explain why there appears to be inconsistency between the protections for under-18s in this Bill compared with this recent legislation. In our response we said:

"While it might appear attractive to treat all individuals under 18 years consistently, the age-based laws which allow for 17 year olds to be living independently and marry reflect the quite different contexts and degrees of self-determination that can exist between a 10 and a 17 year old. The Scottish Government prefers an approach which would allow children aged 16 and 17 years to make their own decisions with safeguards in place to support them in this."

After further consideration following discussions with Police Scotland and the Scottish Children's Reporter Administration, we now believe amendments are required to improve the protections afforded to children in custody as the current Bill provisions are inconsistent with existing requirements set out in the Criminal Procedure (Scotland) Act 1995. Amendments will therefore be lodged at Stage 2 and relate to:

- young people aged 16 and 17 years of age who are subject to a Compulsory Supervision Order (or Interim Compulsory Supervisions Order) under the Children's Hearings (Scotland) Act 2011. It has been proposed the Bill should specifically set out that all children who are subject to such Orders, and specifically those aged 16 and 17 years of age, should be treated in the same way as those aged under 16 years of age. Most significantly, this will remove their right to waive access to a solicitor.

- the need for the Bill to make specific provisions for the protection of child suspects whilst in police custody. The inclusion of those provisions will necessitate the repeal of certain provisions currently set out in the 1995 Act, specifically in relation to children being held in a place of safety pending their appearance at court. The new provisions propose to retain the use of places of safety with the continued provision of the rights of access to a parent, guardian or responsible person and access to a solicitor.
Chapter 5 – vulnerable persons

The Bill makes provision relating to the support arrangements for certain vulnerable persons in police custody, at section 33. This was intended to reflect Lord Carloway’s recommendations in relation to vulnerable adult suspects and, as he defined those under 18 as children, this section currently applies only to those over that age.

At Stage 1, however, it was suggested by organisations including Police Scotland and the Scottish Appropriate Adult Network that this provision be extended to include 16 and 17 year olds, to reflect current practice whereby appropriate adult support is available to vulnerable suspects aged 16 and over.

As the Bill already makes important distinctions between those under 16 years of age and those aged 16 and 17, and to avoid creating a potential disparity between the support provided for vulnerable suspects over 16 and those over 18, I consider that this safeguard should be extended. Amendments to apply section 33 to those over the age of 16 will be lodged at Stage 2.

Part 2 – Corroboration

As mentioned above, at this time, the Scottish Government accepts a consensus has not yet been reached about removing the requirement for corroboration in criminal cases. I am mindful members of your Committee have previously expressed concerns about this reform going ahead in this Bill and Margaret Mitchell has lodged amendments to remove the relevant sections from the Bill. The consideration of these amendments is, of course, now a matter for the Committee but I can confirm the Government is supportive of removing the reform from this Bill. We also plan to lodge an amendment to remove the increase to the jury majority provision from the Bill as we consider this reform to be linked to the abolition of the corroboration reform. As I mentioned in my statement to Parliament in April, we will, however, begin further work on creating a wider package of reforms and Lord Bony’s recommendations and the corroboration rule will be considered in this context.

In the meantime, I have considered whether any of the other suggestions made by Lord Bony can be taken forward at this stage. One of Lord Bony’s recommendations was that the prosecutorial test – the criteria applied by prosecutors when deciding whether or not to initiate proceedings – should be published by the Lord Advocate. It seems reasonable to me that it should, and I am therefore considering whether to bring forward an appropriate amendment at stage 2.

Part 3 – Solemn Procedure

The Bill as introduced places a duty on the prosecution and the defence to prepare joint written record, advising on the state of preparedness of a case. This joint written record must be submitted to the court no less than two days before the first diet by the Procurator Fiscal. The purpose of the written record is to ensure cases proceed to trial in an orderly fashion with such matters as can be agreed in advance having been resolved.

There were concerns from a number of stakeholders that separate written records should instead be lodged by both the defence and the Procurator Fiscal. The Committee in their Stage 1 report commented: “The Committee welcomes the Cabinet Secretary’s commitment to review whether the Bill could usefully be amended to allow individual written records on the state of preparedness of cases to be submitted by the defence and prosecution.”
Since Stage 1, there have been ongoing discussions with Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service on this issue. As a result of these discussions, the Scottish Government plans to bring forward amendments to the Bill to allow for a written record to be lodged separately by the Procurator Fiscal and the defence. I also intend to lodge amendments to provide the Criminal Courts Rules Council with the power to enable a joint written record to be a requirement in the future should that become necessary in light of experience with the separate written record.

Part 4 – Sentencing

The Bill includes provisions relating to the maximum penalties for handling offensive weapons and the sentencing of prisoners who commit new offences while on early release from existing sentences. These provisions were generally welcomed during Stage 1 scrutiny and no Scottish Government amendments are planned in this area at Stage 2.

Part 5 – Appeals and SCCRC

The Bill has a policy objective of speeding up appeals and it proposes that, when deciding whether to allow an appeal late, the test the High Court should apply is to ask itself whether there are exceptional circumstances for doing so.

The Committee noted concerns that, in applying a higher test for allowing late appeals, cases with merit may not be heard unless they meet an exceptional circumstances test. The Committee asked the Scottish Government to consider the Law Society of Scotland’s recommendation that sections 76 and 77 be redrafted with an emphasis on the interests of justice.

The Scottish Government has considered these recommendations but remains of the view an “interests of justice” test would fail to get across that an appeal should be allowed to proceed in breach of the time limits in exceptional circumstances.

This part of the Bill also includes provisions relating to the powers of the High Court when considering appeal cases that originate by way of a reference from the Scottish Criminal Cases Review Commission (SCCRC). We note the Stage 1 report recommendation in this area to change the provisions so that the High Court would no longer consider ‘interests of justice’ when deciding SCCRC referred appeal cases.

Part 6 – Miscellaneous

Human trafficking

I intend to lodge amendments to remove Chapter 1 of Part 6 as these have now been superceded by provisions contained in the Human Trafficking and Exploitation (Scotland) Bill, which is currently before Parliament.

Police Negotiating Board for Scotland

This legislation will establish the Police Negotiating Board for Scotland, which will retain collective bargaining for police officer terms and conditions in Scotland, which has been abolished in the rest of the UK. In addition to the amendments I intend to lodge relating to the general operation and administration of the new body, I will also lodge amendments to enable arbitration on matters under the remit of the PNBS, to be binding on the Scottish Ministers. This will be under specific circumstances as set out
in regulations and in the PNBS constitution (the constitution will also be brought in to effect by regulations and therefore subject to Parliamentary scrutiny).

**TV links and electronic signatures**

The Bill includes provisions intended to allow for the greater use of TV links in court proceedings. Since stage 1, the Scottish Government has launched its Digital Strategy for Justice, which provides a framework for the greater use of digital technology throughout the justice system. So as well as minor amendments in respect of the provisions on TV links, I intend to lodge amendments to permit more widespread use of electronic signatures in criminal proceedings, which will assist in ensuring that organisations can realise the full benefits of conducting business electronically.

**Other Issues**

The Committee asked to be kept updated on work in relation to the possibility of raising the minimum age of criminal responsibility. We note that Alison McInnes has lodged an amendment which would raise the age from eight to 12.

I can advise that policy in relation to the minimum age of criminal responsibility remains under active consideration and the underlying issues - including disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence - are complex. It is our view therefore that it is not appropriate to add such a substantial, complex and potentially controversial issue to the Bill without properly assessing these important underlying issues which are not addressed at all through Alison McInnes’ amendment. Stage 2 of the Bill is also not the appropriate vehicle to address the issues.

We therefore intend to oppose the amendment on the basis that the underlying issues need to be fully worked through and there is a strong argument for further consultation before any change is committed to.

**Police Investigation Review Commissioner (PIRC)**

I also intend to rectify an omission in legislation to extend certain provisions under the Police Act 1997 to apply to directly employed staff rather than only "staff officers" of the Police Investigations and Review Commissioner. The definition of "staff officers" is a police officer seconded from the police service. The omission creates a problem for property interference authorisations by the PIRC under that legislation as the Commissioner does not have any seconded staff from the police service.

**Stop and Search**

An independent Advisory Group, chaired by John Scott QC, is examining the use of stop and search powers in Scotland, in particular whether consensual stop and search should continue, whether the practice overall should be subject to a code of practice and whether any additional steps require to be taken, including any consequent legislation or change in practice that may be necessary. The group will make its recommendations by the end of August.

Alison McInnes has already lodged amendments which would end consensual stop and search and introduce a statutory code of practice.
Once I have considered the Advisory Group's report and recommendations, I intend to lodge any appropriate amendments at Stage 2. As the Advisory Group is not due to report until the end of August, it would be helpful if the Committee could take this into account when scheduling its consideration of Stop and Search.

I hope this detailed update on the Bill is helpful to you and members of the Committee.

With Best Wishes,

[Signature]

MICHAEL MATHESON
Present:
Christian Allard  Jayne Baxter
Roderick Campbell  John Finnie
Christine Grahame (Convener)  Margaret Mitchell
Elaine Murray (Deputy Convener)  Gil Paterson

Apologies were received from Alison McInnes.

Criminal Justice (Scotland) Bill: Christine Grahame (Convener) moved—

S4M-14094--That the Justice Committee considers the Criminal Justice (Scotland) Bill at Stage 2 in the following order: Part 2 (with schedule 2 being taken after section 61), Parts 3 to 5, Part 6 (with schedule 3 being taken after section 87), Part 1 (with schedule 1 being taken after section 52), Part 7 and the long title (with any amendment inserting a new Part before or after an existing Part being taken before or after the existing Part in accordance with this order).

The motion was agreed to.
Ar fàidhle/Our ref:

2nd September 2015

Dear Christine,

STOP AND SEARCH ADVISORY GROUP REPORT - CRIMINAL JUSTICE (SCOTLAND) BILL

In my letter to you of 25 August I provided the Committee with an update on the Criminal Justice Bill. I said that an independent Advisory Group, chaired by John Scott QC, was examining the use of stop and search powers in Scotland and that the group would make its recommendations by the end of August. I said that once I had considered the Advisory Group’s report and recommendations, I intended to lodge any appropriate amendments at Stage 2.

I thank the Committee for taking the timing of this report into account when scheduling its consideration of Stop and Search.

The Advisory Group has now reported to me, and I wish to give the Committee advance notice that I intend laying this report in Parliament at 10am on Thursday 3 September. A copy of the report will also be sent to Committee members and all MSPs.
As expected, the report has made recommendations that will require amendments to the Criminal Justice Bill. For example, it recommends that there should be a statutory code of practice, and that a draft code of practice should be consulted on before implementation. I therefore intend lodging the necessary amendments to give effect to the report's recommendations at Stage 2 of the Bill.

I hope this letter is helpful to you and members of the Committee.

Best wishes,

MICHAEL MATHESON
Criminal Justice (Scotland) Bill

1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

- Sections 57 to 61 Schedule 2
- Sections 62 to 87 Schedule 3
- Sections 1 to 52 Schedule 1
- Sections 53 to 56 Sections 88 to 91
- Long Title

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

Before section 57

Graeme Pearson

9* Before section 57, insert—

<PART

SCOTTISH CRIMINAL EVIDENCE AND PROCEDURE COMMISSION

Scottish Criminal Evidence and Procedure Commission

(1) There is established a body to be known as the Scottish Criminal Evidence and Procedure Commission ("the Commission").

(2) The purpose of the Commission is to report to the Scottish Parliament by 31 December 2015 on the matters specified in subsection (3).

(3) The matters referred to in subsection (2) are—

(a) to review the law relating to evidence and procedure in criminal cases in Scotland,
(b) to consider the need for the requirement for corroboration in criminal proceedings, and
(c) to consider changes to the law relating to evidence and procedure in criminal cases that would be required if the requirement for corroboration is removed.

(4) The Commission—

(a) is not a servant or agent of the Crown, and
(b) has no status, immunity or privilege of the Crown.

(5) Any property held by the Commission is not property of, or property held on behalf of, the Crown.

(6) The Commission is to consist of not fewer than 5 members.

(7) Members of the Commission are to be appointed by Her Majesty on the recommendation of the First Minister, following approval by the Scottish Parliament of the proposed nomination.

(8) At least one third of the members must be persons who are—
(a) members of the Faculty of Advocates, or
(b) solicitors who are enrolled in the roll of solicitors kept under section 7 of the
Solicitors (Scotland) Act 1980,
of at least 10 years’ standing.

(9) At least one third of the members must be persons who appear to the First Minister to
have practical knowledge of the rights of, and support for, victims and witnesses in
criminal proceedings.

(10) One of the members mentioned in subsection (9) is to be appointed by Her Majesty, on
the recommendation of the First Minister, to chair the Commission.

Section 57
Margaret Mitchell
Supported by: Alison McInnes
1 Leave out section 57

Section 58
Margaret Mitchell
Supported by: Alison McInnes
2 Leave out section 58

Section 59
Margaret Mitchell
Supported by: Alison McInnes
3 Leave out section 59

Section 60
Margaret Mitchell
Supported by: Alison McInnes
4 Leave out section 60

Section 61
Margaret Mitchell
Supported by: Alison McInnes
5 Leave out section 61

Schedule 2
Margaret Mitchell
Supported by: Alison McInnes
6 Leave out schedule 2
Section 62

Michael Matheson
66 Move section 62 to after section 85

After section 62

Alison McInnes
54 After section 62, insert—

<PART

AGE OF CRIMINAL RESPONSIBILITY

Age of criminal responsibility
In section 41 (age of criminal responsibility) of the 1995 Act, for the word “eight” there is substituted “12”.>

Michael McMahon
102 After section 62, insert—

<PART

REMOVAL OF THE NOT PROVEN VERDICT

Removal of the not proven verdict
After section 292 of the 1995 Act insert—

“Available verdicts

292A Available verdicts
There are only two verdicts available in criminal proceedings, guilty and not guilty.”>

Section 66

Michael Matheson
67 In section 66, page 28, leave out lines 22 to 25

Section 70

Michael McMahon
103 In section 70, page 31, line 38, leave out from <the> to end of line and insert <for “subsection (2)” substitute “section 90ZA”,>

Michael McMahon
104 In section 70, page 32, line 11, leave out from <is> to end of line 16 and insert <must return a verdict of not guilty if it is unable to return a verdict of guilty.”>

Michael Matheson
68 Leave out section 70
After section 71

Margaret Mitchell

After section 71, insert—

Commission to review prisoner release arrangements

(1) The Scottish Ministers are to establish a commission for the purpose of reviewing the rules governing the release of offenders from prison (in particular any arrangements under which prisoners are automatically released at a particular point in, or after serving a specified proportion of, their sentence).

(2) The commission to be established under subsection (1) is to consist of no fewer than six members, who are to have such experience in relation to the criminal justice system and matters to do with offenders and offending (and reoffending) behaviour as the Scottish Ministers consider appropriate.

(3) The commission to be established under subsection (1) is to make a final report to the Scottish Parliament no later than 31 December 2016.

After section 72

Margaret Mitchell

After section 72, insert—

Release of prisoners other than life prisoners

For section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 there is substituted—

“1 Release of prisoners other than life prisoners

(1) This section applies to all prisoners other than life prisoners.

(2) As soon as a prisoner has served the term of imprisonment specified in the prisoner’s sentence, the Scottish Ministers must, unless the prisoner has already been released under subsection (3) or section 3(1), release the prisoner unconditionally.

(3) As soon as a prisoner has served five-sixths of the term of imprisonment specified in the prisoner’s sentence, the Scottish Ministers must, if recommended to do so by the Parole Board, release the prisoner on licence.”

Section 82

Christine Grahame

In section 82, page 37, line 18, leave out from <for> to end of line 27 and insert <the words “, subject to section 194DA of this Act,” are repealed.>

Christine Grahame

In section 82, page 37, line 28, at end insert—

( ) In section 194C, subsection (2) is repealed.
After section 82

Mary Fee

107 After section 82, insert—

<PART

CHILDREN AFFECTED BY PARENTAL IMPRISONMENT

National strategy on the impact of sentencing on children affected by parental imprisonment

(1) The Scottish Ministers must, before the end of the period of one year beginning with the day of Royal Assent, lay before the Parliament draft regulations making provision for the development and implementation of a national strategy focusing on—

(a) the use of child and family impact assessments,

(b) the types of custodial and non-custodial sentences which should be considered by the courts where a person who is responsible for a child has been convicted of an offence,

(c) the appropriateness and effectiveness of different types of custodial and non-custodial sentences which could be imposed where a person who is responsible for a child has been convicted of an offence, and

(d) the impact of custodial sentences on children affected by parental imprisonment.

(2) Regulations under subsection (1) are subject to the affirmative procedure.

(3) Before laying draft regulations before the Parliament, the Scottish Ministers must consult—

(a) local authorities,

(b) the Scottish Police Authority,

(c) Health Boards,

(d) children and families affected by parental imprisonment,

(e) organisations working for and on behalf of children,

(f) organisations working for and on behalf of—

(i) prisoners,

(ii) children and families affected by parental imprisonment, and

(g) such other persons as they consider appropriate.

(4) For the purposes of such a consultation, the Scottish Ministers must—

(a) lay a copy of the proposed draft regulations before the Parliament,

(b) publish in such manner as the Scottish Ministers consider appropriate a copy of the proposed draft regulations, and

(c) have regard to any representations about the proposed draft regulations that are made to them within 60 days of the date on which the copy of the proposed draft regulations is laid before the Parliament.

(5) In calculating any period of 60 days for the purposes of subsection (4)(c), no account is to be taken of any time during which the Parliament is dissolved or is in recess for more than 4 days.
(6) When laying regulations before the Parliament under subsection (1), the Scottish Ministers must also lay before the Parliament an explanatory document giving details of—

(a) the consultation carried out under subsection (3),

(b) any representations received as a result of the consultation, and

(c) the changes (if any) made to the proposed draft regulations as a result of those representations.

(7) In this Part—

“child” means a person who has not attained the age of 18 years,

“Health Board” means a board constituted by an order under section 2(1)(a) of the National Health Service (Scotland) Act 1978.

(8) In this Part—

(a) references to children affected by parental imprisonment are references to children, a person with responsibility for whom has been—

(i) remanded in custody awaiting trial,

(ii) found by a court to have committed an offence punishable with imprisonment and has been remanded in custody awaiting sentence, or

(iii) sentenced to a term of imprisonment or other detention,

(b) references to a person with responsibility for a child are references to—

(i) a person who has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to a child,

(ii) a person who—

(A) is otherwise legally liable to maintain a child, or

(B) has care of a child.

Mary Fee

108 After section 82, insert—

Annual report: sentencing and the impact of parental imprisonment

(1) The Scottish Ministers must, as soon as practicable after the end of each reporting period, lay before the Parliament a report outlining, in respect of the reporting year to which it relates—

(a) the total number of people who have responsibility for a child who have been remanded in custody or sentenced to a term of imprisonment or other detention,

(b) the total number of people who have responsibility for a child who have been convicted of an offence and sentenced to a non-custodial sentence,

(c) the total number of child and family impact assessments undertaken where people who have responsibility for a child have been remanded in custody or were sentenced to a term of imprisonment or other detention, and

(d) confirmation of the total number of children who, following a child and family impact assessment being undertaken, required a child’s plan under section 33 of the Children and Young People (Scotland) Act 2014.
(2) The Scottish Ministers must, as soon as practicable after laying a report under subsection (1) before the Parliament, publish the report in such manner as they consider appropriate.

(3) In this section, “reporting year” means each period of one year beginning on 1 April, with the first such period beginning on the 1 April first occurring after Royal Assent.

Mary Fee

109 After section 82, insert—

Duty to undertake a child and family impact assessment

(1) Subsection (2) applies where a person who has responsibility for a child—

(a) has been remanded in custody awaiting trial,

(b) has been found by a court to have committed an offence punishable with imprisonment and has been remanded in custody awaiting sentence, or

(c) has been sentenced to a term of imprisonment or other detention.

(2) The court must ensure that an assessment (a “child and family impact assessment”) is carried out to determine the likely impact of the imprisonment or other detention on the wellbeing of the child, and to identify any support and assistance which will be necessary to meet the child’s wellbeing needs.

(3) A child and family impact assessment must be undertaken as soon as reasonably practicable after the period of imprisonment or other detention has been imposed on the person.

(4) A child and family impact assessment must—

(a) consider how the imprisonment or other detention is likely to affect the wellbeing of any child for whom the person is responsible,

(b) identify the wellbeing needs of any child arising from the imprisonment or other detention,

(c) confirm any actions to be taken, as a result of the child and family impact assessment, to ensure that the child’s wellbeing needs are met,

(d) confirm who is to be responsible for taking those actions,

(e) provide advice and information about what can best be done to address the wellbeing needs of the child, and

(f) specify arrangements for a future review of the child and family impact assessment.

(5) The Scottish Ministers may by regulations make provision requiring such persons (or descriptions of persons) as may be prescribed in the regulations to undertake a child and family impact assessment under subsection (2).

(6) Regulations under subsection (5) are subject to the affirmative procedure.

Before section 83

Michael Matheson

69 Before section 83, insert—
CHAPTER

Publication of prosecutorial test

(1) The Lord Advocate must make available to the public a statement setting out in general terms the matters about which a prosecutor requires to be satisfied in order to initiate, and continue with, criminal proceedings in respect of any offence.

(2) The reference in subsection (1) to a prosecutor is to one within the Crown Office and Procurator Fiscal Service.

Section 83
Michael Matheson
70 Leave out section 83

Section 84
Michael Matheson
71 Leave out section 84

Section 85
Michael Matheson
72 Leave out section 85

Section 86
Michael Matheson
73 In section 86, page 39, line 24, leave out <, a detained person is to participate in a specified> and insert <at any time before or at a specified hearing, a detained person is to participate in the>

Michael Matheson
74 In section 86, page 39, line 32, leave out <an ad hoc hearing held> and insert <any proceedings at a specified hearing or otherwise in the case>

Michael Matheson
75 In section 86, page 39, line 35, leave out <a specified hearing or such an ad hoc hearing> and insert <any specified hearing or other proceedings>

Michael Matheson
76 In section 86, page 39, line 37, after <hearing> insert <or other proceedings>

Michael Matheson
77 In section 86, page 40, line 1, after <hearing> insert <or other proceedings>

Michael Matheson
78 In section 86, page 40, line 6, leave out <a specified hearing> insert <any specified hearing or other proceedings>
In section 86, page 40, line 9, after <charge> insert <on any complaint or indictment>

Michael Matheson
80 In section 86, page 40, line 16, leave out from beginning to <where> in line 21 and insert—

<(3) The court may postpone a specified hearing to a later day if>

Michael Matheson
81 In section 86, page 40, leave out lines 26 to 28

Michael Matheson
82 In section 86, page 40, line 28, at end insert—

<Effect of postponement

(1) Except where a postponement under section 288I(3) is while section 18(2) of the Criminal Justice (Scotland) Act 2015 applies to a detained person, the following do not count towards any time limit arising in such a person’s case if such a postponement in the case is to the next day on which the court is sitting—

(a) that next day,

(b) any intervening Saturday, Sunday or court holiday.

(2) Even while section 18(2) of the Criminal Justice (Scotland) Act 2015 applies to a detained person, that section does not prevent a postponement under section 288I(3) in the person’s case.

(3) In section 288I and this section, “postpone” includes adjourn.>

After section 86

Michael Matheson
83 After section 86, insert—

<Electronic proceedings

(1) In section 305 (Acts of Adjournal) of the 1995 Act, after subsection (1) there is inserted—

“(1A) Subsection (1) above extends to making provision by Act of Adjournal for something to be done in electronic form or by electronic means.”.

(2) These provisions of the 1995 Act are repealed—

(a) in section 141—

(i) subsection (3A),

(ii) in subsection (5), the words “(including a legible version of an electronic communication)”,

(iii) subsection (5ZA),

(iv) in subsection (5A), paragraph (b) together with the word “or” immediately preceding it,
(v) subsections (6A), (7A) and (7B),
(b) section 303B together with the italic heading immediately preceding it,
(c) section 308A.

(3) In the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, section 42 is repealed.

Michael Matheson

84 After section 86, insert—

<CHAPTER

AUTHORISATION UNDER PART III OF THE POLICE ACT 1997

Authorisation of persons other than constables

In section 108 (interpretation of Part III) of the Police Act 1997, after subsection (1) there is inserted—

“(1A) A reference in this Part to a staff officer of the Police Investigations and Review Commissioner is to any person who—

(a) is a member of the Commissioner’s staff appointed under paragraph 7A of schedule 4 to the Police, Public Order and Criminal Justice (Scotland) Act 2006, or

(b) is a member of the Commissioner’s staff appointed under paragraph 7 of that schedule to whom paragraph 7B(2) of that schedule applies.”.

Margaret Mitchell

105 After section 86, insert—

<CHAPTER

EVIDENCE RELATING TO SEXUAL OFFENCES: LEGAL REPRESENTATION

Evidence relating to sexual offences: legal representation

In section 275 (exception to restrictions under section 274) of the 1995 Act, after subsection (5), insert—

“(5A) Where an application under subsection (1) is made, the complainer must in respect of that application—

(a) be informed of the right of the complainer—

(i) to seek legal advice,
(ii) to appoint a legal representative,

(b) be given the opportunity—

(i) to seek such advice,
(ii) to appoint such a representative.

(5B) Where the complainer appoints a legal representative—

(a) a copy of the application must be sent to the legal representative, and
(b) the legal representative must be given an opportunity to—

(i) submit written evidence on the matters set out in the application in accordance with subsection (3),
(ii) represent the complainer at any hearing in relation to the application.

(5C) The Scottish Ministers must by regulations make provision for fees incurred by a legal representative appointed under subsection (5B) to be paid out of the Scottish Legal Aid Fund.”.

**Section 87**

Michael Matheson

85 In section 87, page 42, line 12, leave out <a time period> and insert <or extend a time limit>

Michael Matheson

86 In section 87, page 42, leave out line 18

Michael Matheson

87 In section 87, page 42, line 27, at end insert—

**<55CA Steps following arbitration**

(1) If representations under section 55B(1) are made in terms settled through arbitration in accordance with the PNBS’s constitution, the Scottish Ministers must take all reasonable steps appearing to them to be necessary for giving effect to those representations.

(2) However, this—

(a) requires the Scottish Ministers to take such steps only in qualifying cases (see paragraph 4C(2) of schedule 2A),

(b) does not require the Scottish Ministers—

(i) to take such steps in relation to representations that are no longer being pursued by the PNBS, or

(ii) where such steps would comprise or include the making of regulations under section 48, to make regulations under that section more than once with respect to the same representations.>

Michael Matheson

88 In section 87, page 42, line 34, leave out from <subsection> to end of line and insert <this Chapter, “reporting year” is as defined in the PNBS’s constitution.”.>

Michael Matheson

89 In section 87, page 43, line 3, at end insert—

<( ) In section 125 (subordinate legislation) of the Police and Fire Reform (Scotland) Act 2012, after subsection (3) there is inserted—

“(3A) Regulations under paragraph 4(6) of schedule 2A are subject to the affirmative procedure if they include provisions of the kind mentioned in paragraph 4B(2) or 4C(2) of that schedule.”.>
Schedule 3

Michael Matheson

91 In schedule 3, page 50, leave out line 6

Michael Matheson

92 In schedule 3, page 50, line 12, leave out <and deputy chairperson>

Michael Matheson

93 In schedule 3, page 50, line 18, leave out <or deputy chairperson>

Michael Matheson

94 In schedule 3, page 50, line 21, at end insert—

<Temporary chairperson>

(1) The PNBS may have a temporary chairperson if (for the time being)—

(a) there is no chairperson, or

(b) the chairperson is unavailable to act.

(2) A reference in this Chapter to the chairperson is to be read, where appropriate to do so by virtue of sub-paragraph (1), as meaning or including (as the context requires) the temporary chairperson.>

Michael Matheson

95 In schedule 3, page 50, line 24, leave out <chairperson or deputy chairperson> and insert <the chairperson>

Michael Matheson

96 In schedule 3, page 50, line 34, leave out from second <the> to end of line 35 and insert <consensus to be reached among the members of the PNBS on the terms of representations to be made under section 55B(1) or 55C(1).>

Michael Matheson

97 In schedule 3, page 51, leave out lines 1 and 2 and insert—

<( ) The constitution—

(a) may require a dispute on representations to be made under section 55B(1) to be submitted to arbitration by agreement among the members to do so, and must not prevent such a dispute from being submitted to arbitration on such agreement (except prevention by way of limitation as allowed below),

(b) may—

(i) authorise the chairperson to submit such a dispute to arbitration without such agreement,

(ii) limit how often within a reporting year such a dispute can be submitted to arbitration (including limitation framed by reference to particular matters or circumstances).>
Michael Matheson

98 In schedule 3, page 51, line 18, at end insert—

\(\text{(6) The constitution, or any revision of it, has effect only when brought into effect by the Scottish Ministers by regulations.}\)

Michael Matheson

99 In schedule 3, page 51, line 18, at end insert—

\(<\text{Process of arbitration}\)

4A(1) Sub-paragraph (2) applies where—

(a) a dispute is submitted to arbitration in accordance with the constitution, and

(b) no arbitration agreement relating to the dispute is in place.

(2) A document submitting the dispute to arbitration is deemed to be an arbitration agreement.

(3) For the application of the Arbitration (Scotland) Act 2010, a reference in this paragraph to an arbitration agreement is to such an agreement as defined by section 4 of that Act.

4B(1) Sub-paragraph (2) applies for the purpose of arbitration in accordance with the constitution (whether such arbitration arises by reason of a real or deemed arbitration agreement).

(2) Regulations under paragraph 4(6) may include provisions disapplying or modifying the mandatory rules in schedule 1 to the Arbitration (Scotland) Act 2010.

4C(1) Sub-paragraph (2) applies for the purpose of the operation of section 55CA.

(2) Regulations under paragraph 4(6) may include provisions specifying, by reference to particular matters or circumstances, what are qualifying cases.

Michael Matheson

100 In schedule 3, page 51, line 21, leave out <and deputy chairperson>

After section 87

Michael Matheson

90 After section 87, insert—

\(<\text{Consequential and transitional}\)

(1) In connection with section 87—

(a) in schedule 1 to the Freedom of Information (Scotland) Act 2002, after paragraph 50A there is inserted—

“50B The Police Negotiating Board for Scotland.”,

(b) in schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003, at the appropriate place under the heading referring to offices there is inserted—

“Chairperson of the Police Negotiating Board for Scotland”.

13
(2) On the coming into force of section 87—

(a) a person then holding office as the chairman of the Police Negotiating Board for the United Kingdom by virtue of section 61(2) of the Police Act 1996 is to be regarded as if appointed as the chairperson of the Police Negotiating Board for Scotland under paragraph 2(2) of schedule 2A to the Police and Fire Reform (Scotland) Act 2012,

(b) any agreements then extant within or involving the Police Negotiating Board for the United Kingdom (so far as relating to the Police Service of Scotland) of the kind for which Chapter 8A of Part 1 of the Police and Fire Reform (Scotland) Act 2012 includes provision are to be regarded as if made as agreements within or involving the Police Negotiating Board for Scotland by virtue of that Chapter.

Before section 1

Alison McInnes

50 Before section 1, insert—

<PART
SEARCH BY POLICE OF PERSON NOT ARRESTED

Police powers of search where person not arrested

(1) A constable must not search—

(a) a person,

(b) a vehicle, or

(c) anything which is in or on a vehicle,

without a warrant, unless subsection (3) applies.

(2) It is immaterial whether the person consents to being the subject of a search.

(3) This subsection applies where the search is conducted in accordance with—

(a) a power conferred by an enactment, and

(b) the terms of a code of practice issued by the Scottish Ministers under section (Police powers of search where person not arrested: code of practice).

(4) This Part applies to a vessel, aircraft or hovercraft as it applies to a vehicle.

(5) For the purposes of subsection (4), “vessel” includes any ship, boat, raft or other apparatus constructed or adapted for floating on water.

Alison McInnes

51 Before section 1, insert—

<POLICE POWERS OF SEARCH WHERE PERSON NOT ARRESTED: CODE OF PRACTICE

(1) The Scottish Ministers must, by regulations, set out a code of practice in connection with the exercise by constables of powers under any enactment to search a person who has not been arrested in connection with an offence.

(2) The code of practice must set out—

(a) the circumstances in which any such power may be exercised,

(b) the procedure to be followed in the exercise of any such power.
(c) the record to be kept, and the right of any person to receive a copy of the record, of the exercise of any such power, and
(d) such other matters as the Scottish Ministers consider appropriate.

(3) Regulations for the first code of practice under subsection (1) must be laid before the Parliament no later than the end of the period of one year beginning with the day of Royal Assent.

(4) The Scottish Ministers must—
(a) keep the code of practice under review, and
(b) lay regulations for a revised code of practice before the Parliament no later than 4 years after the day on which regulations for the previous code of practice are laid.

(5) Before making regulations under subsection (1) setting out the first or a revised code of practice, the Scottish Ministers must consult—
(a) the chief constable,
(b) the Scottish Police Authority,
(c) the Scottish Human Rights Commission,
(d) Scotland’s Commissioner for Children and Young People, and
(e) such other persons as they consider appropriate, on a draft of the code of practice.

(6) Regulations under subsection (1) are subject to the affirmative procedure.

Alison McInnes

52

Before section 1, insert—

<Police powers of search: annual reporting
In subsection (3) of section 39 (the Scottish Police Authority’s annual report) of the Police and Fire Reform (Scotland) Act 2012—
(a) the word “and” at the end of paragraph (a) is repealed, and
(b) after paragraph (b) there is inserted “and
(c) a record of the number of searches without a warrant of persons not arrested carried out by the Police Service during the reporting year, including in particular and where practicable a record of—
(i) the number of instances where an individual has been searched on more than one occasion,
(ii) the profile, as regards age, gender and ethnic or national origin, of those searched,
(iii) the proportion of searches that resulted in anything being found,
(iv) the proportion of searches that resulted in a matter being reported to the procurator fiscal, and
(v) the number of complaints made to the Police Service about the conduct of searches.”.>
Section 5

John Finnie

10 In section 5, page 2, line 28, leave out <(verbally or in writing)>

John Finnie

11 In section 5, page 2, line 30, at end insert <(and, regardless of whether those Articles allow or require information to be provided in writing only, the person must be provided with all such information both verbally and in writing).>

Section 7

John Finnie

12 In section 7, page 4, line 13, after <who> insert—

< ( ) is of the rank of sergeant or above, and ( )>

Section 8

John Pentland

13 In section 8, page 4, line 23, at end insert <, and

( ) the circumstances in which the 12 hour limit may be extended to 24 hours under section (Extension of 12 hour limit to 24 hours in exceptional circumstances).>

Section 10

Mary Fee

39 In section 10, page 5, line 12, at end insert—

< ( ) the effect of keeping the person in custody on a child for whom the person has responsibility,>

Section 11

John Pentland

14 In section 11, page 5, line 21, at beginning insert <Subject to section (Extension of 12 hour limit to 24 hours in exceptional circumstances).>

After section 11

John Pentland

15 After section 11, insert—

<Extension of 12 hour limit to 24 hours in exceptional circumstances

(1) Section 11(2) does not apply if the conditions in subsection (2) are met.

(2) The conditions are that a constable who is of the rank of inspector or above is satisfied—

(a) that the test in section 10 is met, and>
(b) that there are exceptional circumstances that justify continuing to hold the person in police custody.

(3) A person may continue to be held in police custody by virtue of subsection (2) for more than a continuous period of 24 hours only if a constable charges the person with an offence.

(4) Without prejudice to the generality of subsection (2)(b), “exceptional circumstances” includes circumstances—

(a) where a doctor certifies that the person is, whether due to the influence of alcohol or drugs or for some other reason, not fit to be interviewed before the end of the 12 hour period mentioned in section 11,

(b) where the constable mentioned in subsection (2) considers that—

(i) access to another person in accordance with section 32, or

(ii) support from another person in accordance with section 33,

cannot be provided in sufficient time before the end of the 12 hour period,

(c) where the constable mentioned in subsection (2) considers that continuing to hold the person in police custody is essential to ensure the safety of the person or another person.

(5) The Scottish Ministers may, by regulations subject to the affirmative procedure, modify subsection (4) to further define, add to, remove or otherwise modify circumstances that may constitute “exceptional circumstances” for the purposes of subsection (2)(b).

Section 12

John Pentland

16 In section 12, page 5, line 33, after <11> insert <, and as the case may be the 24 hour period mentioned in section (Extension of 12 hour limit to 24 hours in exceptional circumstances),>

Section 13

John Pentland

17 In section 13, page 6, line 17, at end insert <and as the case may be the 24 hour period mentioned in section (Extension of 12 hour limit to 24 hours in exceptional circumstances).>

Section 14

John Finnie

18 In section 14, page 6, line 32, leave out from <and> to end of line 33

Elaine Murray

47 In section 14, page 6, line 35, leave out from <ensuring> to end of line 36 and insert <securing—

(a) that the person surrenders to custody if required to do so,

(b) that the person does not commit an offence while released,

(c) that the person does not interfere with a witness or otherwise obstruct the course of the investigation into a relevant offence,

(d) the protection of the person, or
(e) if the person is under 18 years of age, the welfare or interests of the person.

John Finnie

19 In section 14, page 6, line 36, at end insert—

(2A) When imposing a condition under subsection (2), the constable is to specify the period for which the condition is to apply.

(2B) The period specified under subsection (2A) is to be such period, not exceeding 28 days, as the appropriate constable considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence.

(2C) In any case where a person has previously been subject to a condition imposed under subsection (2) in connection with a relevant offence, the reference in subsection (2B) to 28 days is to be read as a reference to 28 days minus the number of days on which the person was so subject.

John Finnie

20 In section 14, page 6, line 39, leave out from <(1)(c)> to end of line 3 on page 7 and insert <(2C)>

Section 15

John Finnie

21 In section 15, page 7, line 15, leave out <28 day period described in section 14(4)> and insert <period specified under section 14(2A)>

Section 17

John Finnie

22 In section 17, page 8, line 17, at end insert <, ( ) to have the period for which the condition applies reduced.>

John Finnie

23 In section 17, page 8, line 20, after <condition> insert <or, as the case may be, the period specified under section 14(2A)>

John Finnie

24 In section 17, page 8, line 21, after <imposed> insert <or, as the case may be, specified>

John Finnie

25 In section 17, page 8, line 23, after <condition> insert <or, as the case may be, specify an alternative period>

John Finnie

26 In section 17, page 8, line 25, after <imposed> insert <or period specified>

John Finnie

27 In section 17, page 8, line 26, at end insert <or, as the case may be, specified under section 14(2A)>.>
Section 18

Michael Matheson

101 In section 18, page 9, line 6, at end insert <(by virtue of a determination by the court that the person is to do so by such means)>.

Section 20

Elaine Murray

48 In section 20, page 9, line 32, leave out from <ensuring> to end of line 33 and insert <securing—>

(i) that the person surrenders to custody if required to do so,

(ii) that the person does not interfere with a witness or otherwise obstruct the course of the investigation into the offence in connection with which the person is in police custody,

(iii) the protection of the person, or

(iv) if the person is under 18 years of age, the welfare or interests of the person.>

Section 23

John Finnie

28 In section 23, page 11, line 10, after <committing> insert <and again immediately before the interview commences>.

Section 24

John Finnie

29 In section 24, page 12, line 2, leave out from <if> to end of line 5.

Section 25

Elaine Murray

55 In section 25, page 12, line 15, leave out <Subsections (2) and (3) apply> and insert <Subsection (2) applies>.

Elaine Murray

Supported by: Alison McInnes

56 In section 25, page 12, line 17, leave out <16> and insert <18>.

Elaine Murray

Supported by: Alison McInnes

57 In section 25, page 12, line 18, leave out <16> and insert <18>.

John Finnie

30 In section 25, page 12, line 18, leave out <, owing to mental disorder,>.
Elaine Murray 
58  In section 25, page 12, line 22, leave out subsections (3) to (5)

John Finnie 
31  In section 25, page 12, leave out lines 36 and 37

Section 30 

Elaine Murray 
59  In section 30, page 16, line 9, leave out <16> and insert <18>

Elaine Murray 
60  In section 30, page 16, line 13, leave out <16> and insert <18>

Section 31 

Elaine Murray 
61  In section 31, page 17, line 2, leave out from second <or> to end of line 5

Section 32 

Elaine Murray 
62  In section 32, page 17, line 17, leave out <16> and insert <18>

Elaine Murray 
63  In section 32, page 17, line 23, leave out subsection (2)

Elaine Murray 
64  In section 32, page 17, line 28, leave out <or (2)>

Section 33 

John Pentland 
38  In section 33, page 18, line 1, leave out from beginning to <over,>

Elaine Murray 
32  In section 33, page 18, line 1, leave out <18> and insert <16>

John Finnie 
33  In section 33, page 18, line 2, leave out <owing to mental disorder,>

John Finnie 
34  In section 33, page 18, leave out lines 17 and 18
After section 34

Mary Fee

40 After section 34, insert—

<Persons with responsibility for a child

Duty to contact named person: persons with responsibility for a child

(1) This section applies where a constable believes that a person in police custody has responsibility for a child.

(2) With a view to facilitating the provision of care and support to the child while the person is in police custody, the constable must send intimation of the matters specified in subsection (3) to an individual identified in relation to the child under section 20 or 21 of the Children and Young People (Scotland) Act 2014.

(3) The matters are—

(a) the fact that the person is in custody,
(b) the place where the person is in custody,
(c) the time limits for keeping the person in custody that apply under Chapter 2 of this Part.>

Mary Fee

110 After section 34, insert—

<Persons with responsibility for a child

Duty to contact named person: persons with responsibility for a child

(1) This section applies where a constable believes that a person in police custody has responsibility for a child.

(2) With a view to ensuring the wellbeing of the child, the constable must send information of the type specified in subsection (3) to an individual identified in relation to the child under section 20 or 21 of the Children and Young People (Scotland) Act 2014.

(3) The information to be sent is to contain details of any matters relevant to the child’s wellbeing, and to the child’s wellbeing needs.

(4) Information falls within subsection (3) if the constable considers that—

(a) it is likely to be relevant to the exercise of the named person functions in relation to the child or young person,
(b) it is necessary or expedient for the purposes of the exercise of any of the named person functions,
(c) it ought to be provided for that purpose, and
(d) the provision of the information would not prejudice the conduct of any criminal investigation or the prosecution of any offence.

(5) In considering for the purpose of subsection (4)(c) whether information ought to be provided, the constable is, so far as reasonably practicable, to ascertain and have regard to the views of the child.

(6) In having regard to the views of a child under subsection (5), the constable is to take account of the child’s age and maturity.
(7) For the purpose of subsection (4)(c) the information ought to be provided only if the likely benefit to the wellbeing of the child arising in consequence of doing so outweighs any likely adverse effect on that wellbeing arising from doing so.

(8) The Scottish Ministers may by regulations make further provision relating to the sending of information under subsection (2) above.

(9) Regulations under subsection (8) are subject to the affirmative procedure.

Section 42

Alison McInnes
53 In section 42, page 20, line 18, at end insert—
<( ) search a child,>

Mary Fee
41 In section 42, page 20, line 19, after <child> insert <or person who has responsibility for a child>

Mary Fee
42 In section 42, page 20, line 20, after <child> insert <or person who has responsibility for a child>

Mary Fee
43 In section 42, page 20, line 21, after <child> insert <or person who has responsibility for a child>

Mary Fee
44 In section 42, page 20, line 22, after <child> insert <or person>

Mary Fee
45 In section 42, page 20, line 23, after <child> insert <or person who has responsibility for a child>

Elaine Murray
65 In section 42, page 20, line 25, leave out <well-being> and insert <best interests>

After section 42

Elaine Murray
35 After section 42, insert—

<Duty not to disclose information relating to person not officially accused>

(1) Subject to section (Disclosure of information: person released under section 14), a constable must not without reasonable cause release the information specified in subsection (2) to any person other than an authorised person.

(2) The information is information relating to a person not officially accused of an offence which—

(a) identifies that person, or

(b) is likely to be sufficient to allow that person to be identified, as having been arrested in connection with an offence.
(3) For the purposes of subsection (1), an “authorised person” means—
   (a) a constable,
   (b) a person to whom intimation must or may be sent under Chapter 5 of this Part,
   (c) a person other than a constable to whom the information must be disclosed for the
       purpose of ensuring the proper conduct of the investigation into the offence.

(4) For the purposes of subsection (1), a determination that there is reasonable cause to
    disclose information must be made—
    (a) only if it is in the public interest to do so, and
    (b) by a constable who is of the rank of inspector or above.

Elaine Murray

36 After section 42, insert—

<Disclosure of information: person released under section 14

(1) Without prejudice to the generality of section (Duty not to disclose information relating
to person not officially accused), a constable may disclose qualifying information
relating to an alleged offence to a person mentioned in subsection (2) where the
conditions in subsection (3) are met.

(2) The persons are—
   (a) a person—
       (i) against whom, or
       (ii) against whose property,
           the acts which constituted the alleged offence were directed,
   (b) in the case where the death of a person mentioned in paragraph (a) was (or
       appears to have been) caused by the alleged offence, a prescribed relative of the
       person,
   (c) a person who is likely to give evidence in criminal proceedings which are likely to
       be instituted against a person in respect of the alleged offence,
   (d) a person who has given a statement in relation to the alleged offence to a
       constable.

(3) The conditions are that disclosure of the information —
   (a) is in the public interest or is otherwise likely to promote the safety and wellbeing
       of a person mentioned in subsection (2), and
   (b) is authorised by a constable who is of the rank of inspector or above.

(4) In this section—
    “prescribed” means prescribed by the Scottish Ministers by order subject to the
    negative procedure,
    “qualifying information” means information that—
    (a) identifies a person as having been arrested in connection with an alleged
        offence and subsequently released under section 14, and
(b) sets out such information relating to any conditions imposed on the person under section 14(2) as the constable authorising the disclosure considers appropriate.

(5) The Scottish Ministers may, by order subject to the negative procedure, modify the definition of “qualifying information” in subsection (4).>

**Before section 54**

John Pentland

37 Before section 54, insert—

<**Meaning of arrest**

In this Part, “arrest” means—

(a) depriving a person of liberty of movement for the purpose of the purported investigation or prevention of crime, and

(b) taking the person to a police station in accordance with section 4.>

**After section 56**

Mary Fee

46 After section 56, insert—

<**Meaning of responsibility for a child**

(1) In this Part, “child” means a person who has not attained the age of 18 years.

(2) In this Part, references to a person who has responsibility for a child are references to—

(a) a person who is a parent or guardian having parental responsibilities or parental rights under any enactment in relation to a child,

(b) a person who—

(i) is otherwise legally liable to maintain a child, or

(ii) has care of a child.>
Criminal Justice (Scotland) Bill

1st 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 on the first day of 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

**Corroboration**
9, 1, 2, 3, 4, 5, 6, 66, 68

**Age of criminal responsibility**
54

**Removal of not proven verdict (and jury verdicts)**
102, 103, 104

**Written record of state of preparation**
67

**Automatic early release of prisoners**
106, 49

**References by SCCRC to High Court: test for quashing convictions**
7, 8

**Detention or imprisonment of person with responsibility for a child**
107, 108, 109

**Publication of prosecutorial test**
69

**Aggravations as to people trafficking**
70, 71, 72

**Participation of detained person in proceedings through TV link**
73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 101
Electronic proceedings
83

Authorisation under Part III of Police Act 1997
84

Evidence relating to sexual offence: legal representation
105

Police Negotiating Board for Scotland
85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 90

Police powers to stop and search
50, 51, 52, 53

Provision of information on rights to suspects
10, 11, 28

Authorisation to keep person in police custody
12

Extension of 12 hour limit to 24 hours in exceptional circumstances
13, 14, 15, 16, 17

Arrest and custody of person with responsibility for a child
39, 40, 110, 41, 42, 43, 44, 45, 46

Release on conditions: power to specify period for which conditions to apply
18, 19, 20, 21, 22, 23, 24, 25, 26, 27

Release on conditions or on undertaking: purposes for which conditions may be imposed
47, 48

Circumstances in which interview may take place without solicitor present
29

Rights of persons aged under 18
55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 38, 32

Notes on amendments in this group
Amendment 38 pre-empts amendment 32

Persons unable to understand what is happening or communicate effectively
30, 31, 33, 34

Duty to consider child’s best interests
65

Disclosure of information relating to person not officially accused
35, 36
Meaning of “arrest”
Present:

Christian Allard
Roderick Campbell
Christine Grahame (Convener)
Alison McInnes
Elaine Murray (Deputy Convener)

Gavin Brown (Committee Substitute) (item 9)
John Finnie
Margaret McDougall
Margaret Mitchell
Gil Paterson

Also present: Michael Matheson, Cabinet Secretary for Justice, Mary Fee and Michael McMahon (item 7).

Criminal Justice (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 1).

The following amendments were agreed to (without division): 66, 67, 68 and 8.

The following amendments were agreed to (by division)—
   1 (For 8, Against 0, Abstentions 1)
   2 (For 8, Against 0, Abstentions 1)
   3 (For 8, Against 0, Abstentions 1)
   4 (For 8, Against 0, Abstentions 1)
   5 (For 8, Against 0, Abstentions 1)
   6 (For 8, Against 0, Abstentions 1)
   7 (For 5, Against 3, Abstentions 1)
   109 (For 5, Against 4, Abstentions 0).

The following amendments were disagreed to (by division)—
   54 (For 4, Against 4, Abstentions 1; amendment disagreed to on casting vote)
   107 (For 4, Against 4, Abstentions 1; amendment disagreed to on casting vote)
   108 (For 3, Against 4, Abstentions 2).

The following amendments were moved and, no member having objected, withdrawn: 102 and 106.

The following amendments were not moved: 9, 103, 104 and 49.

The following provisions were agreed to without amendment: sections 62, 63, 64, 65, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80 and 81.

The following provisions were agreed to as amended: sections 66 and 82.
The Committee ended consideration of the Bill for the day amendment 109 having been disposed of.

Margaret McDougall declared an interest as a member of the Cross-Party Group on Families Affected by Imprisonment. Gil Paterson declared an interest as a member of Rape Crisis Scotland.
On resuming—

Criminal Justice (Scotland) Bill: Stage 2

The Convener: I move on to item 8.

I welcome Michael Matheson, the Cabinet Secretary for Justice. I also welcome the officials who are here to support the cabinet secretary, but who are not permitted to participate in stage 2. I understand that officials may change over as we progress through the bill. When that happens, I will briefly suspend the meeting.

Members should have their copies of the bill, the marshalled list and groupings of amendments for today’s consideration. The committee agreed on 1 September to change the order of stage 2 consideration of the bill. We will begin consideration at part 2 and go no further than part 6 today. As I have indicated, we will consider part 1 at a later date. We move straight to the marshalled list.

Before Section 57

The Convener: We start with the group on corroboration, which consists of amendments 9, 1 to 6, 66 and 68. Amendment 9 is in the name of Graeme Pearson, who I know does not intend to move that amendment today. I take it that no other member wishes to move that amendment.

Members indicated agreement.

The Convener: Thank you.

Amendment 9 not moved.

Section 57—Corroboration not required

The Convener: I therefore call amendment 1, which is grouped with amendments 2 to 6, 66 and 68. I call Margaret Mitchell to move amendment 1 and to speak to the other amendments in the group.

Margaret Mitchell: Section 57 provides for the abolition of the requirement for corroboration—a provision that triggered a storm of controversy that was aggravated by the intransigence of the then Cabinet Secretary for Justice and the confused and, at times, contradictory responses from him to the concerns that were raised during scrutiny of the provision and the debate that followed.

It was, to be frank, a travesty that the concerns that were raised by various stakeholders—including High Court judges, senators of the College of Justice, the Law Society of Scotland, the Faculty of Advocates, the Scottish Human Rights Commission, the cross-party working group on adult survivors of childhood sexual abuse, and learned academics—were consistently misrepresented by the former justice secretary as a polarised argument between the legal profession and victims.

Let us be quite clear: the attempt to trivialise that crucial debate and to bulldoze the provision through Parliament undermined the fundamental right to a fair trial that every individual who comes into contact with Scotland’s criminal justice system has a right to expect.

As Lord Gill stated, “The rule of corroboration is not some archaic legal relic from antiquity” but is, in fact, one of our law’s “finest features”—[Official Report, Justice Committee, 20 November 2013; c 3730.]

Others went further and pointed out that if the requirement for corroboration were to be abolished without any additional safeguards being put in place, that would lead to “many more wrongful convictions” and would create a “new category of victims”. It is totally unacceptable that a decision of this magnitude was crammed into the miscellaneous provisions of the Criminal Justice (Scotland) Bill, based on the fatally flawed recommendation of the Carloway commission, which failed to consider that, rather than there being just two options available—namely, the retention or abolition of the requirement for corroboration—there was also a third way, which would include examination of the requirement for corroboration within a wider review of the law of evidence.

I believe that it will remain a stain on this majority Government’s tenure in office that, in the face of opposition from all the other parties, from independent members and from the aforementioned stakeholders, at stage 1 it whipped its members into supporting the abolition of the requirement for corroboration, and later decided that although there would be a review under Lord Bonomy, retention was not to be an option in the review’s remit and abolition would still go ahead—a move that struck at the democratic competence of this devolved Parliament.

Without doubt, the new cabinet secretary’s announcement earlier this year, following Lord Bonomy’s review, that the decision to abolish the requirement for corroboration would be reversed was widely welcomed, not least by the majority of members of this committee and by the aforementioned stakeholders.

Today, I am relieved and gratified that the Scottish Government has expressed a willingness to support my amendments 1 to 6, which will
remove from the bill the provisions that would abolish the requirement for corroboration.

I move amendment 1.

The Cabinet Secretary for Justice (Michael Matheson): Good morning, convener. Not only has it been quite some time since the Justice Committee last considered the bill, but there have been significant developments in the intervening period. It is perhaps appropriate that this stage 2 debate is starting with an issue that has been the subject of much debate over the past few years: reform of the requirement for corroboration.

When I took up post as Cabinet Secretary for Justice last November, I said that I would await the outcome of Lord Bonomy’s review before reaching any decision on how to proceed. I was at that time very much aware of concerns that had been raised by members of this committee, among others, on whether the reform should proceed under the Criminal Justice (Scotland) Bill in advance of consideration of what other safeguards may be needed for our system. The Government has continued to be concerned about the practical effect that the requirement-for-corroboration rule can have on victims of crimes that are committed in private, many of whom are among the most vulnerable citizens in our society.

I undertook to listen to views on the reform and to take account of Lord Bonomy’s recommendations before I made a decision, which is what I have done. As I said to Parliament on 21 April, Lord Bonomy’s recommendations are substantial and complex, and taking all of them forward will have a major impact on the justice system. Given the timing for the bill’s consideration by Parliament and the fact that we have not yet achieved a consensus in favour of the reform, I took the view that it should no longer go forward in the bill. On that basis, I support Margaret Mitchell’s amendments to remove the provisions from the bill.

Although I understand why some people may question why the Government did not reach this decision sooner, I consider that rushing to a judgment without awaiting Lord Bonomy’s report would not have been appropriate. As I have mentioned previously, I am very grateful to him and his expert group for the considered and collaborative approach that they undertook in the review. I needed to await their recommendations in order to ascertain whether it would be feasible, within the proposed legislation’s timetable, to take forward the reform alongside the report’s proposals. As it has turned out, that has not been possible. I hope that members understand why the Government considered awaiting Lord Bonomy’s report to be the most appropriate course of action.

I also want to pay tribute to the committee’s detailed stage 1 scrutiny of the reform, among the other provisions in the bill. The Government’s decision to progress the safeguards review was very much informed by the further evidence that the committee elicited during its stage 1 consideration. Although this meeting may bring to an end the reform of the requirement for corroboration that was proposed under the bill, I hope that a platform will have been created on which to build future reforms to our evidence and procedure laws.

As I mentioned when I made my statement to Parliament in April, we will in due course start to consider Lord Bonomy’s recommendations, the reform of the requirement for corroboration and any other relevant issues, with the aim of creating a balanced and cohesive package of reforms.

Throughout the course of the debate on abolition of the requirement for corroboration, we have all heard powerful testimony from organisations that represent victims. Now may not be the time for this reform, but I am sure that none of us is complacent and believes that our system should stay the same forever.

I will now move on to discuss amendment 66 in my name, which proposes moving section 62 to the start of part 6 of the bill. Amendment 66 is a consequential and technical amendment that has been prompted by the removal of all the other provisions in part 2. Section 62 is being moved to a better home among the provisions found in part 6.

Finally, the Government’s amendment 68 provides for the deletion from the bill of the jury-majority provisions. That reform is very much related to the reform of the requirement for corroboration, as it was intended to provide a further additional safeguard if the requirement-for-corroboration rule was abolished.

Lord Bonomy’s review group, as members will be aware, has recommended that jury research should take place to ensure that
decisions about what, if any, changes to jury size, majority and verdicts may be appropriate are made on an informed basis”.

I have decided that it is appropriate for that recommendation to be taken forward. It should provide a very important evidence base for any future changes to jury size and verdicts. The Scottish Government will now consider the exact remit and the methodology for such research. In that work, my officials will continue to engage with justice sector partners, organisations and academics.

Lord Bonomy’s reference group specifically recommended research on the effects of jury sizes of 12 and 15, on the verdicts of not proven and not
guilty, and on the effect of requiring unanimity. I want consideration of the remit to start with those issues, and to add others as is considered necessary. I hope that the research will commence before the end of this parliamentary session. I will keep the committee informed of progress.

I consider that it is preferable to retain the current jury system until the jury research has been completed. Amendment 68, if agreed to, will mean that Scotland will continue with the present system of a simple majority being required for a guilty verdict. Alongside the jury research, we will consider holistically all of Lord Bonomy’s proposed reforms, the requirement-for-corroboration rule and the other relevant reforms, and we will take our time in developing a future package of reforms, which I hope can attract a general consensus.

Gil Paterson (Clydebank and Milngavie) (SNP): I intended to come here today and not say too much. I am a reluctant participant, cabinet secretary. However, I am forced to speak. First, I need to declare to the committee that I am a former board member of Rape Crisis Scotland, where I served for 12 years. I want to speak on behalf of the people on whom today’s decision will have an impact. People should not, to be frank, be crowing too loudly today, because others will definitely be affected by the decision.

Some women, in particular—and sometimes children—are denied access to justice because they cannot even get their case past the procurator fiscal because of the lack of corroboration. Things happen in private; in those circumstances, no one can come forward and stand up for those people. People who work in the area often know when people are lying and how it affects them. For me, the sooner the requirement for corroboration goes, the better. It is wrong that people are treated so badly and that the system has no answer for them.

10:45

I believe that we have the only justice system in the world in which there is such a barrier for people who have been raped or seriously sexually assaulted. Therefore, we should be silent and not make big statements on how it affects the legal profession, who have been guarding the requirement for corroboration as if it were holy, when no other jurisdiction in the world has such a method.

I hope, cabinet secretary, that at some point very soon the Government will be in a position to bring another proposal back to Parliament, so that people—women and children—can get their day in court and be judged by their peers, rather than by the requirement for corroboration.

Roderick Campbell: I will make a few brief points. Despite the negativity of Margaret Mitchell’s comments, we ought to pay tribute to Lord Bonomy’s reference group for the sterling work that it has done, and we should also recognise the swift way in which the cabinet secretary responded to that. I think that that is positive, not negative.

I echo the eloquent comments that Gil Paterson made about some victims. There is clearly an access to justice issue that will remain until we can advance the issue further.

Finally, jury research is novel in Scotland: we await the findings with great interest. The cabinet secretary’s amendments on that subject are sensible.

Alison McInnes: There is no doubt that the proposal to remove the requirement for corroboration was the most contentious element of the bill. As it was drafted—and is still drafted this morning—it risked bringing our legal system into disrepute through miscarriages of justice and wrongful convictions.

Lord Bonomy’s recommendations have made it clear that there is no doubt that removing the requirement for corroboration would have had profound implications for our justice system. As the cabinet secretary said, Lord Bonomy proposes substantial and complex changes that are all interrelated. It is worth remembering that Kenny MacAskill, the previous Cabinet Secretary for Justice, wanted to press ahead even after he recognised that he needed to ask Lord Bonomy to look at the issues, and he asked us to somehow do that and deal with the issues afterwards. Michael Matheson’s comments this morning on how substantial and complex the issues are underline what a reckless plan that was.

We need to reflect that it is only the unprecedented suspension of the bill for 18 months that has allowed us to get to a point where we can address the matter in a much more measured and sensible way, and indeed in the way that the committee recommended in its stage 1 report. That was secured following, not least, my comments this morning on Michael Matheson’s c
that I have not changed my mind. The bill is not just about corroboration but, like my colleague Gil Paterson, I want the absolute requirement for corroboration to be removed from the justice system as soon as possible.

**John Finnie:** I will support Margaret Mitchell’s amendments, although I do not support many of her comments or the personal comments that have been made. This is about process and not about individuals, as I see it.

I think that this proves that our system works. There is scrutiny and people listen, and we should reflect positively on that. There has been a lot of good debate but also a lot of ill-informed and intemperate debate. As someone who supports corroboration, I find the notion that, in so doing, I have a disregard for victims deeply offensive.

**Elaine Murray:** I, too, will support Margaret Mitchell’s amendments. A lot of things were said, particularly in the stage 1 debate, that would have been better not said. I was personally offended by some of the things that were said. However, that has to be forgiven, I suppose, because we have now made progress, and we need to look to the future.

I welcome what has been said about jury research because, during the stage 1 consideration, the point was made that we need to have some way of doing jury research, although there are difficulties with it. We welcome that, because we need to understand the way in which juries come to decisions if we are to understand how best to address some of the issues around victims.

**The Convener:** Unusually, I, too, want to speak. The cabinet secretary knows of my long-standing opposition to and concern about the abolition of the requirement for corroboration. That has not been easy, in the face of my party, and I continue to have reservations about the abolition, so I welcome Margaret Mitchell’s amendments. I say to Gil Paterson that that does not mean that I do not have concerns, which John Finnie shares, for the victims of rape or sexual assault. It may be that people say that they just want their day in court, but my concern is that, actually, they want their day in court and a conviction. If we simply have advice that the process will not be quick. It will...
take a considerable period of time to carry out that research in a thorough and detailed way. Obviously, there are some legal issues that we have to navigate around, as well, in order to undertake that more fully.

I intend to commission the research in the terms that have been set out by Lord Bonomy in the independent review group’s recommendation, but, as that progresses, I am content to consider whether there are further areas that it can explore and move into. My mind is not closed to the possibility of further research into aspects of the reasoning that goes on in juries in deliberating, but its principal aim at the outset will be to fulfil the recommendation that was made by the review group that was chaired by Lord Bonomy.

Margaret Mitchell: There was no intention to crow in my opening comments, but it was important to set out the situation that brought us to the point at which we almost had the abolition of corroboration de facto by default and it was being pushed through the Parliament. It is important to highlight that if we are to learn from those mistakes.

I reiterate that corroboration is far from archaic, and I concur with the cabinet secretary that the rule of corroboration will continue to evolve in conjunction with the rules of evidence and other measures to ensure access to justice for all. That includes addressing the vexing problem of the low conviction rates for rapes and sexual assaults, which Gil Paterson has rightly raised. I hope that it will give him some comfort that another amendment that has been lodged—I hope that we will get to it today—seeks to address that very issue and has the support of organisations that deal with rape victims.

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Abstentions
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 1 agreed to.

Section 58—Effect of other enactments
Amendment 2 moved—[Margaret Mitchell].

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

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Abstentions
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 2 agreed to.

Section 59—Relevant day for application
Amendment 3 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Abstentions
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 3 agreed to.

Section 60—Deeming as regards offence
Amendment 4 moved—[Margaret Mitchell].

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

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 6 agreed to.

Section 62—Statements by accused

Amendment 66 moved—[Michael Matheson]—and agreed to.

After section 62

Alison McInnes: Amendment 54 would raise the age of criminal responsibility from eight to 12, which would bring it in line with the age of criminal prosecution. That was raised to 12 in 2010 to reflect the extensive body of evidence that children should not come into contact with the justice system at a young age. However, we are left with an anomaly with regard to criminal responsibility. The law is out of touch with our understanding of children’s maturity and their capacity to make decisions and understand the consequences of their actions.

Statistics that I have secured from the Scottish Children’s Reporter Administration using freedom of information legislation show that around 1,500 children between the age of eight and 11 were referred to children’s panels on offence grounds during the past four years. Almost all of them automatically received a criminal record because they accepted those grounds of referral.

The children’s hearings system will no doubt subsequently help most of the children to address their offending behaviour and they will mature into responsible adults. After all, that is what we want to achieve. Surely it is perverse to subsequently further punish and disadvantage them as they move into adult life by branding them as criminals? Their childhood convictions will need to be declared for decades or even the rest of their lives. How can that be right? How can we allow a child’s opportunities to be curbed so severely at such a young age? Handing criminal records to eight or nine-year-olds is a destructive, inappropriate response to their offending. I want the law to change.

When very young children display troubling or criminal behaviour it is most often because they are themselves deeply troubled and vulnerable. Many such children will have experienced trauma or neglect or have been victims of abuse. They are first and foremost in need of protection.

Scotland has the lowest age of criminal responsibility in Europe—it trails painfully behind international best practice. The United Nations...
Committee on the Rights of the Child has stated that it expects 12 to be the “absolute minimum” age of criminal responsibility. Tam Baillie, Scotland’s Commissioner for Children and Young People, was right to say that criminalising children as young as eight has “long tarnished” our international reputation.

Yesterday, members received a joint letter in support of the amendment from 17 organisations, including Barnardo’s, the Aberlour Child Care Trust, Together Scottish Alliance for Children’s Rights, and the Scottish Youth Parliament. The Law Society of Scotland has also backed the amendment. I hope that all members will join me in ensuring that Scotland upholds the human rights of some of the most vulnerable children in our society.

I move amendment 54.

**Elaine Murray:** I support amendment 54. I see no reason why, when we do not prosecute children under 12, we should be dishing out a criminal record to them. Scotland is behind much of the rest of the world on the issue.

I have seen the Scottish Government’s letter to the convener. I do not understand the argument against the amendment. It says that a lot of “the underlying issues—including disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence—are complex.”

I cannot understand why increasing the age of criminal responsibility would create all those difficulties, particularly as children under 12 are not being prosecuted anyway. I do not understand that argument.

I appreciate that, at one time, this was a very controversial issue. However, times have moved on and I do not think that this change is as controversial as it once was years ago. It is certainly my intention to support amendment 54.

**John Finnie:** I commend Alison McInnes for her speech and for her extensive work on the subject. I made several notes. I noted that there is an extensive body of evidence—that is unequivocal. I also noted that we are out of kilter with the UN and with the children’s commissioner, who is the very person we charge with looking after the wellbeing and human rights of children. This is a fundamentally straightforward issue. I will certainly be aligning my support with Alison McInnes.

**Roderick Campbell:** Alison McInnes has referred to the Criminal Justice and Licensing (Scotland) Act 2010. She said that no one under the age of 12 can be prosecuted. I am mindful that a large number of children’s organisations basically suggest that the fact that the age of criminal responsibility has not been raised is unfinished business. The question is whether amending this bill is the right method to do that. How complex would that be to do? We have heard from an academic, Professor Leverick, who thinks that this bill is not the right place to make the change. Clearly, there are disclosure issues. There is also a need for a consultation.

When the previous Cabinet Secretary for Justice gave evidence in January 2014, he said that it is not possible to have too many consultations running at the same time. That may or may not have been a good argument, but we need a consultation. I recognise that we must get on with the issue; it will not go away. I look to the cabinet secretary for reassurance on a timetable for dealing with the issue.

**Margaret Mitchell:** I have a huge amount of sympathy with the intent behind the amendment and with what Alison McInnes has said. However, I am a little wary of the law of unintended consequences, and I am aware of the fact that we have not taken detailed evidence on the issue. I therefore wait with interest to hear what the cabinet secretary has to say. I am not convinced that this is necessarily the right place to properly scrutinise and debate such a change.

**Christian Allard:** I just wanted to add my sympathy for the amendment. However, Rod Campbell put it in one word: consultation. Consultation is what we need and that debate has to happen and cannot happen only at a committee. We need to have a good consultation to ensure that the people of Scotland can give their views on what should happen.

**The Convener:** I agree with Margaret Mitchell. I have huge sympathy for the amendment, but it would be a major change in the law and I would have great concern if we were to proceed with it without testing the evidence that is before us. A consultation may very well make the case even more compelling, and that would be a good thing, but to make a major change in law without a consultation by the Government and without this committee even testing the evidence in front of us would be a mistake and it might, as Margaret Mitchell says, have unintended consequences. For that reason, although I am sympathetic to Alison McInnes’s intent, I will not be supporting the amendment.

**Michael Matheson:** The minimum age of criminal responsibility is a substantial and complex issue. We remain open to change being made in this area. However, we have serious concerns that amendment 54 does not address the policy, legislative and procedural implications of change, or offer the requisite safeguards. There are significant underlying issues on the disclosure of criminal records, use of forensic samples, police investigatory powers and the rights of victims.
There is, rightly, particular sensitivity where serious violent or sexual behaviour is involved.

We have a strong track record in promoting and safeguarding children’s rights. In 2010, the Government changed the law so that no one under the age of 12 can be prosecuted in the criminal courts. Children aged between eight and 11 facing allegations of having committed an offence can be dealt with by the children’s hearings system, which takes an approach that is centred on the child’s welfare and best interests.

In 2014, via the Children and Young People (Scotland) Act 2014, we introduced a duty on ministers to consider ways to give better effect in Scotland to the United Nations Convention on the Rights of the Child. The children’s hearings system is internationally recognised for its child-centred, needs-based approach to children in conflict with the law. The hearings system can be said to provide the “special protective measures” to which the UNCRC refers.

We share concerns about young children potentially having a criminal record that can impact on their life chances as a result of childhood behaviour. I understand that that is one the main reasons why Alison McInnes has brought forward the amendment. Offence grounds established through the children’s hearings system have implications for disclosure. The established policy is that serious violent and serious sexual offences should continue to be disclosed, while reducing the impact on life chances of low-level offending in childhood.

Although such cases are mercifully small in number, serious offending and real harm involving children under the age of 12 does occur. It is vital that police have appropriate powers to establish the facts, including when there is no co-operation from parents. It is important that we have a clear way forward for addressing such issues.

I can therefore advise the committee that an independent advisory group is being established. The group will address the underlying issues in respect of disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence taking account of the minimum age of prosecution, the role of the children’s hearings system, and UNCRC compliance. The group is expected to meet in the next six weeks and will bring forward recommendations for consultation by early 2016.

I believe that that approach provides a way of allowing us to deal with the complex legal issues in a considered way. I therefore ask Alison McInnes to withdraw amendment 54.

**Alison McInnes:** I have listened to what the cabinet secretary has explained today and I read what he said in his recent letter to the committee. We have been told over and over again that the issue is under active consideration. I raised the issue with the former Cabinet Secretary for Justice when we took evidence at stage 1, and I was assured yet again that it was under active consideration, but it seems continually to be put off.

The convener said that my amendment would introduce a major change, but I do not believe that it would. A major change happened when the age of criminal prosecution was changed and it seems that we need to follow through and tidy up this anomaly, which leaves children carrying a criminal record and does not seem at all fair.

If there are outstanding issues to do with disclosure of criminal records, forensic samples and police investigatory powers, the cabinet secretary has not adequately explained them to us and I see no reason why they could not be resolved at stage 3, if we agree the principle today. We have an opportunity today to approve the principle once and for all. It seems disproportionate to say that we need to kick the issue into the long grass for another year or so before we can begin to consider it. I do not doubt that the Government could craft an amendment for stage 3 that could allow it to address some of the practicalities via secondary legislation and ensure that the provision in the amendment was implemented after guidelines had been issued.

I will press amendment 54 and I urge the cabinet secretary and all committee members to seize this opportunity.

**The Convener:** The question is, that amendment 54 be agreed to. Are we agreed?

**Members:** No.

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

**For**
- Finnie, John (Highlands and Islands) (Ind)
- McDougall, Margaret (Central Scotland) (Lab)
- McInnes, Alison (North East Scotland) (Lab)
- Murray, Elaine (Dumfriesshire) (Lab)

**Against**
- Allard, Christian (North East Scotland) (SNP)
- Campbell, Roderick (North East Fife) (SNP)
- Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
- Paterson, Gill (Clydebank and Milngavie) (SNP)

**Abstentions**
- Mitchell, Margaret (Central Scotland) (Con)

**The Convener:** The result of the division is: For 4, Against 4, Abstentions 1.

I keep to what I said before. I am using my casting vote against the amendment.

**Amendment 54 disagreed to.**
However, given the Government's proposed look forward to giving evidence to you at stage 1. than remove it, as the Government proposes. retain section 70, with minor modifications, rather proven verdict, I will also try to persuade you to if I can persuade the committee to remove the not minister in the debate on the first group. However, to increase a jury majority, as you heard from the proposal in this bill, it no longer sees a need corroboration. Now that it is no longer pursuing proposal to remove the requirement for majority was a safeguard in the context of its reasons. For the Government, an increased jury Criminal Justice (Scotland) Bill, but for different proposals are inextricably linked.

I introduced my bill because I have long been convinced that the three-verdict system is no longer defensible in a modern justice system. It causes confusion and uncertainty for victims of crime and the accused person. The principle that all accused persons are innocent until proved guilty entitles them to a straightforward acquittal in every case where the prosecution case against them cannot be established beyond reasonable doubt. Reform is necessary in order to maintain confidence in the judicial system. In effect, a not proven verdict represents another form of acquittal and continues to at best cause confusion and at worst bring the judicial system into complete disrepute.

In addition, as a not proven verdict does not convey the same clarity as a guilty or not guilty verdict, it can leave an accused person stigmatised, particularly as they have no right to a retrial or appeal to clear their name.

Should the not proven verdict be removed, there is a small chance that the number of guilty verdicts could increase. To ensure that such convictions are safe, I propose to increase the majority that is required to convict. As it happens, the Scottish Government made a similar proposal in the Criminal Justice (Scotland) Bill, but for different reasons. For the Government, an increased jury majority was a safeguard in the context of its proposal to remove the requirement for corroboration. Now that it is no longer pursuing that proposal in this bill, it no longer sees a need to increase a jury majority, as you heard from the minister in the debate on the first group. However, if I can persuade the committee to remove the not proven verdict, I will also try to persuade you to retain section 70, with minor modifications, rather than remove it, as the Government proposes.

My bill has been referred to this committee and I look forward to giving evidence to you at stage 1. However, given the Government's proposed amendments to the Criminal Justice (Scotland) Bill in relation to the jury majority, it was prudent for me to lodge my own amendment. Today's debate provides a useful opportunity for an initial discussion on these important issues. It is for those reasons that I move my amendment.

I move amendment 102.

Roderick Campbell: I have some sympathy for Mr McMahon, because, in the debate that has included so many other issues in the bill, his argument has not been addressed as fully as it might have been. However, I am conscious of the fact that jury research is about to be embarked on, and, if we are to take a proper view on the question of whether we should retain the not proven verdict, we should come back to the issue after that research has been completed.

11:15

Michael Matheson: I am grateful to Mr McMahon for setting out his reasons for wishing to see a change in the jury system. I know that he has been pursuing the issue for some time, seeking legislative change in the area. I am also aware that there has been support for a change to the verdict system—in particular, for the abolition of the not proven verdict—and I am not unsympathetic to Mr McMahon’s position. However, recent developments must have a significant impact on any reform in the area.

Amendment 68, which we have already debated, would delete the provisions that increase the jury majority that Mr McMahon seeks to amend. As I said when I spoke to amendment 68, I am acting on Lord Bonomy’s recommendation that jury research should take place. Although we are still considering the final remit, I agree with Lord Bonomy’s recommendation that that work should include research on the verdicts that are available to the jury, as well as research on jury majorities and size. In the light of that work, I consider it preferable to retain the current jury system until the research has been completed, when we will have more detailed evidence on which to base any future reform.

I intend to move amendment 68 and, on that basis, I ask Mr McMahon not to press amendment 102.

Michael McMahon: I say to Roderick Campbell that jury research is welcome. Of course, we want to establish what people think when they make their decisions. However, I have consulted on the bill on three occasions and have taken on board the issues that have been brought to my attention by those who have responded. In all circumstances, the link between the size of a jury and the majority required to make a decision has been brought to my attention because of one
major factor. In all cases, the purpose of the trial is to prove beyond reasonable doubt whether the case brought by the prosecution has been proved, and someone must be confidently found to be either guilty or not guilty. If, regardless of the severity of the crime that is being tested, one individual’s changing their mind can mean the difference between someone being found guilty and their being acquitted on a verdict of either not proven or not guilty, that hardly suggests that the case has been proved beyond reasonable doubt. A majority of 8:7 would mean that seven people had serious doubt about the case that had been brought by the prosecution.

We know—and the legal profession knows—that a simple majority of a jury of 15 people is not sustainable, and no amount of kicking the issue into the long grass will change that. The evidence that I have received in the consultations that I have had before makes it absolutely clear that a simple majority is not sustainable. Although I respect Lord Bonomy and have huge regard for the legal profession, I also know that the legal profession has a tendency to look for the long grass whenever it is possible to find it. It has already been suggested, in the consideration of the bill, that we find the long grass for a number of major issues that need to be addressed.

I have consulted on the matter extensively, and there is already a lot of work out there on the concerns about the size of a majority. To use my own analogy, the case has already been proved. There is nothing not proven about the size of a majority; the case has been established and it is beyond reasonable doubt that we need to move to two-thirds majorities. Nevertheless, having spoken to those involved in sheriff court procedure, we propose amendment 67 to remove the obligation upon the prosecution to lodge the written record. Rules about how and when written records are to be lodged will be left to court rules. That is to allow the prosecution and defence to lodge their respective parts of the joint written record separately. That will mirror current practice in the High Court and is supported by the Crown Office and the Scottish Courts and Tribunals Service.

I move amendment 67.

Margaret Mitchell: I seek clarification, cabinet secretary. Preparing a joint record suggests that there has been some agreement by both parties, but if the parts are lodged separately, are we creating room for disagreement? I ask that question merely for information.

The Convener: I will let the cabinet secretary answer that point after Roddy Campbell has asked his question.

Roderick Campbell: It is sensible to make each party responsible for providing its own record. That will enable the court to see where the fault line lies if there are problems.

Michael Matheson: The principal change that amendment 67 will make is that, rather than the prosecution being responsible for making the final submission of the joint record to the court—both the part from the Crown Office and Procurator Fiscal Service side and that from the defence agent—it will be the responsibility of each side to submit its own part. The two parts will make up one document for the court—the presiding sheriff or judge—to consider.

That approach will facilitate flexibility to allow the defence to lodge its part of the written record and to allow the prosecutor to lodge its part. The parts will then become a single report, which will be considered by the court.

Amendment 67 agreed to.
Section 66, as amended, agreed to.
Sections 67 to 69 agreed to.

Amendments 103 and 104 not moved.

Amendment 68 moved—[Michael Matheson]—and agreed to.

Section 71 agreed to.
I sincerely hope that the cabinet secretary will support amendment 106, with the aim of getting the new approach to automatic early release right. Individuals with expertise would provide unrivalled insight into our criminal justice system and that aspect of sentencing.

I move amendment 106.

Elaine Murray: I am pleased that Margaret Mitchell does not intend to move amendment 49, which puzzled me because it seemed to propose taking us back to a system of cold release. I am pleased that we will not consider that amendment.

With respect, amendment 106 also seems to be slightly behind the times, because the Prisoners (Control of Release) (Scotland) Act 2015 has been passed, despite my having reservations about aspects of it. Margaret Mitchell cited Professor Tata, but he and Professor McNeill—and others, I think—said that prisoner release should be considered in the wider context of sentencing policy. A commission to review only prisoner release arrangements would not be sufficient to tackle the entire issue; I would prefer there to be a review of sentencing, alternatives to imprisonment and all the rest of it.

Roderick Campbell: I will be brief, because Elaine Murray has made most of the points that I was going to make. It seems a little as though Margaret Mitchell is rehearsing the arguments that we heard in relation to the 2015 act, which we just passed. One thing that is missing is the cost of her proposed little exercise, which we should bear in mind.

Michael Matheson: Amendment 106 proposes a commission to look at early release of prisoners. The committee will recall that this Government established exactly such a commission when we took office: it was called the McLeish commission, which submitted an excellent report in 2008.

We remain committed to the independent McLeish commission report, which was clear that long-term reform to the system of early release was needed but that such reform could be taken forward only when prisoner numbers were at a long-term lower sustainable level. I am keen to progress policy to help meet the aspirations of the McLeish report on how we use our prisons. That is why I took through the reforms to automatic early release that this committee scrutinised earlier this year, and I will continue to seek to progress policies that will help achieve fundamental reform of our penal policy.

I listened to Margaret Mitchell’s earlier explanation with some interest, although a large part of it appears to be based on rehearsing

Meeting suspended.

On resuming—

After section 71

The Convener: Amendment 106, in the name of Margaret Mitchell, is grouped with amendment 49.

Margaret Mitchell: Automatic early release is a complex issue, as was highlighted in the evidence that the committee took from various academics during scrutiny of the Prisoners (Control of Release) (Scotland) Bill. A significant body of evidence correctly identified the issue of cold release as problematic. It is essential that we get the release of offenders from prison absolutely right.

That is why I do not intend to move amendment 49, which was prepared last year, before the issue of cold release was raised. It is also why the Scottish Government should be prepared to reconsider the provisions in the Prisoners (Control of Release) (Scotland) Act 2015.

The 2015 act does not deal effectively with prisoner release. Rather than end automatic early release, it simply changed the timing of automatic early release from the two-thirds point to the final six months of the sentence. Professor Cyrus Tata got to the nub of the problem at stage 2 of the bill, when he pointed out that the bill would not end automatic early release:

“It is the short-term end where there is much more to criticise—where people are released nominally on supervision but do not get supervision or the kind of support that they need.”—[Official Report, Justice Committee, 27 May 2015; c 5.]

The Law Society of Scotland also described shortcomings in the procedure surrounding the bill:

“To propose such a radical change to penal policy, as that contained within section 1 of the Bill, without the prior consideration of a large body of expert evidence, and to amend proposals significantly when a Bill is already before the Justice Committee is of significant concern.”

The Law Society continued:

“We would further suggest the creation of a body of experts with power to hear evidence from persons with professional knowledge in the field before this Bill progresses.”

I regret that the cabinet secretary did not act on the Law Society’s advice. Amendment 106 would provide for the establishment of a dedicated commission, to examine the rules governing the release of offenders across the board, including short-term and long-term prisoners, and to look at the rules governing post-release supervision.

I am pleased that Margaret Mitchell’s earlier explanation with some interest, although a large part of it appears to be based on rehearsing
arguments that were debated during the course of the Prisoners (Control of Release) (Scotland) Bill, which has since been passed by Parliament.

I am aware that Margaret Mitchell has also stated that she no longer intends to move amendment 49. However, it is worth bearing in mind that, if amendment 49 was passed by the committee, what it proposes would be likely to cost in the region of £100 million per year to implement. We estimate that ending all automatic early release and severely curtailing even the possibility of discretionary early release in the manner provided for would result in an increase in the prison population of around 3,100, which would be approximately a 40 per cent increase in Scotland’s already high prison population.

If the approach proposed by amendment 49 were to be taken—and it is Margaret Mitchell’s view that it should be taken—it is unclear to me where the additional £100 million per year would be found and where the 3,100 additional prisoners would be placed.

I believe that amendments 49 and 106 are unnecessary. The issue to which they refer was considered in great detail by the committee when considering the Prisoners (Control of Release) (Scotland) Bill earlier this year. On that basis, I would ask the committee to reject amendments 106 and 49.

Margaret Mitchell: The main point is that the Prisoners (Control of Release) (Scotland) Bill has been passed but will not come into effect for a number of years. Given that it does not abolish automatic early release, there is room to look at the issue again. Clearly, abolishing automatic early release would have cost implications, which is why a commission should be set up to consider all such aspects in an effort to get automatic early release correct.

I will reflect on what has been said on amendments 106 and 49 and might come back with further amendments at stage 3.

The Convener: You need to withdraw from the committee—sorry, not withdraw from the committee but withdraw amendment 106. That was a Freudian slip.

Margaret Mitchell: I seek leave to withdraw amendment 106.

Amendment 106, by agreement, withdrawn.

Section 72 agreed to.

After section 72

Amendment 49 not moved.

Sections 73 to 81 agreed to.
this referral in the interests of finality and certainty.”

It seems to be that before 2010 when the SCCRC was independent and away from politicians and the High Court—we should remember that High Court judges also sit in the appeal court—we were able to say that a case should have another crack of the whip by going to the High Court. Now we say that such a case must pass the test of finality and certainty at the SCCRC and, even if it does, it has to pass another test of finality and certainty at the High Court and the High Court can reject it.

I do not think that that is right. I am asking the committee and the cabinet secretary to consider going back to the situation before the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

The 2010 act changed the position because we thought that there would be a flood of applications to the appeal court following Cadder, but there were not. I have the figures here. Between 1999 and 2014, the SCCRC received a total of 1,844 cases, it completed reviews of 1,804 cases, and it referred 122 cases to the High Court. The procedure is tough. If someone makes an application to the SCCRC, it is not an easy path to getting their case heard again. Many cases have been successful in court because the tests that the SCCRC applies are very firm.

I am asking members to ask themselves why we changed the position in 2010. I think it was for political expediency at the time. We should go back to where we were in 1995 and leave the SCCRC with the power to look at cases and say which should be referred to the High Court in the interests of justice but not allow the High Court to refuse to accept those cases. Let us get rid of the test of finality and certainty because it is unjust and let us not leave the High Court with the right to refuse a referral that has already gone through the tests.

I move amendment 7.

John Finnie: Convener, I support your amendment and commend you on your explanation of it. It is a complicated area about the relationship between the various bodies and the High Court’s gate-keeping role around its own workload. I fully support your proposals.

Roderick Campbell: Convener, I have just checked the bill because I was not sure that I agreed with your definition of what the bill seeks to do. We have moved on from the 2010 act. Even though the High Court would no longer have a gate-keeping role, it would still be able to use an interests of justice test and thereby have an ultimate review function.

On the one side we have an array of people who support the great work of the SCCRC, not least of which are the Law Society and the Faculty of Advocates. Against that, we have the comments from the Crown and from Lord Carloway that not having the provision would mean that, if new evidence came to light, they would be powerless to do anything. I am also conscious that, when we took evidence, it was accepted that only those SCCRC appeals have an interests of justice test while normal appeals to the High Court do not, so the arguments are very finely balanced.

I will oppose Christine Grahame’s amendment, but I hope that those finely balanced arguments will prove to be largely academic. If a situation arose in which there had been a reference from the SCCRC on an interests of justice test that was subsequently overturned because the appeal court took the view that the interests of justice should prevent the appeal from proceeding, that would cause public disquiet. Although I accept the provisions, I hope that the debate will prove to be more academic than anything else.

Michael Matheson: The effect of amendments 7 and 8 would be to make changes to how the SCCRC decides whether to refer cases to the appeal court and how the appeal court considers such appeals.

The commission has an important part to play as one of the checks and balances in our system of justice. It has a mix of one third legal members and two thirds lay members with experience of the criminal justice system to ensure that its members can apply a suitable balance of expertise and knowledge to the cases that it considers. It has a special power to refer cases to the appeal court when the normal appeal process has been exhausted, where it considers a miscarriage of justice may have occurred and it is in the interests of justice to have the case considered by the appeal court.

However, the final decision as to whether a miscarriage of justice has occurred is made by the appeal court. That is to ensure that the final decision on the rights of an individual in any case is made by an independent and impartial tribunal, as required under the European convention on human rights.

Given the role of the appeal court in those cases, it would be inappropriate to remove the ability of the appeal court to consider the interests of justice when considering appeals based on a commission referral. It is key to its role as final decision maker that it considers where the interests of justice lie in each and every case. I therefore invite the committee to reject amendment 7.
Amendment 8 seeks to remove the requirement for the SCCRC to consider the need for finality and certainty in criminal proceedings when deciding whether to refer a case to the appeal court.

The commission took the need for finality and certainty into account as part of the interests of justice test even before the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 came into force. Indeed, it is another ECHR concept that requires to be taken into account when cases are dealt with in our justice system.

It has been noted that the commission does its job very well. To allow it to continue to do its job well, it is important that the commission continues to take the need for finality and certainty into account when reaching a decision on whether to refer a case to the appeal court. I therefore invite the committee to reject amendment 8.

The Convener: I thank you for your comments, cabinet secretary. I wholly disagree with them, and none of that was said in the debate on the emergency legislation that brought in the current provisions. In fact, there was scant information—nobody really knew what I was talking about at the time—so I think that the provision came in very quickly without very much consideration.

I remind my colleague Rod Campbell that the law now in force under the 1995 act, as amended by the 2010 act, states:

“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.”

That means that the High Court can overturn a decision on the interests of justice test by the SCCRC. The 1995 act then goes on to say in section 194DA(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.”

That makes the High Court judge and jury of its own case and gives it a gate-keeping role that should have been the role of the SCCRC.

As the cabinet secretary said, prior to that amendment being made to the 1995 act, it was the SCCRC that considered finality and certainty in the interests of justice. The 2010 amendment was put in as a more heavy handed way of simply preventing some cases from going forward because of Cadder. That is my concern. We have already passed legislation in haste and there have been unintended consequences, and I think that this bill will have unintended consequences. I know that, when the 2010 act was considered, the SCCRC was unhappy that it was being hamstrung. Therefore, I will press amendment 7.

11:45

Michael Matheson: Convener, can I respond to some of the points that you have made?

The Convener: Yes, you may.

Michael Matheson: Based on a recommendation that was made by Lord Carloway, the bill will change the provisions in the 2010 act to push the gate-keeping process that the convener referred to from the beginning of the consideration of an appeal to the end. Under the bill, the appeal court will not be able to refuse to accept a referral from the Scottish Criminal Cases Review Commission on the basis of that being in the interests of justice until it has actually considered the appeal. The matter of the interests of justice will then be considered after the appeal has been heard before the court.

Therefore, under the bill, the gate-keeping to which the member refers in the 2010 act is shifted from the beginning of the process to the end. It is only right that the appeal court has the power to consider the interests of justice at that particular point, having heard the matter.

The Convener: That does not give me any comfort, because it could mean that someone succeeds at appeal, but the High Court sitting as an appeal court then says, “However, we don’t think that it is in the interests of justice and finality to grant this.” I actually think that that is worse in some respects.

I regret to say that, as you know cabinet secretary, I remain a difficult customer. This is another bee in my bonnet—it is a big bonnet with lots of bees in it. I will press my amendment 7.

The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mclnnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)

Abstentions

Mitchell, Margaret (Central Scotland) (Con)
The Convener: The result of the division is: For 5, Against 3, Abstentions 1.

Amendment 7 agreed to.

Amendment 8 moved—[Christine Grahame]—and agreed to.

Section 82, as amended, agreed to.

After section 82

The Convener: We will deal with Mary Fee’s amendments, because she is here, and we will stop after them.

Amendment 107, in the name of Mary Fee, is grouped with amendments 108 and 109.

Mary Fee (West Scotland) (Lab): Amendments 107 to 109, in my name, are designed to ensure that children and young people are provided with the necessary support and protection should their parent or carer be sent to prison. Evidence shows that children and young people who are affected by the imprisonment of a parent are particularly at risk of negative outcomes such as stigma, bullying, trauma and mental health problems. The issue has been raised in previous sessions of Parliament and has received cross-party support.

An estimated 27,000 children in Scotland have a parent in prison. Until we can accurately identify those children and the numbers who are affected, their particular needs that arise from parental imprisonment will not be taken into account by local authorities and other public bodies as part of their children’s services planning process. In short, those children will continue to slip through the net. As such, I have included amendments on developing a national strategy and on reporting requirements for ministers.

Amendment 107 would require the Scottish ministers to introduce through subordinate legislation a national strategy on the impact of sentencing on children who are affected by parental imprisonment. A robust system is needed that ensures stronger links between the justice system, statutory services and voluntary organisations that work with children and families who are affected by imprisonment. A national strategy is necessary to ensure that a more strategic, co-ordinated and multi-agency approach is taken by the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service, Police Scotland, the Scottish Prison Service, local authorities, national health service boards and the voluntary sector to identify the wellbeing needs of children who are affected by parental imprisonment and to provide support and assistance to meet those needs.

Amendment 108 would require the Scottish ministers to prepare an annual report on sentencing and the impact of parental imprisonment. As I have stated previously, the impact on children of sentencing and parental imprisonment is often overlooked. Those children are often unseen and their wellbeing needs that have been created by the imprisonment of a parent are overlooked or simply not picked up as part of getting it right for every child. An annual report would support the development of a national strategy, as well as acting as part of the monitoring of the effectiveness of child and family impact assessments, which I will come on to shortly.

The details to be provided would include the total number of people who have responsibility for a child who have been remanded in custody or sentenced to a term of imprisonment or other detention, the total number of people who have responsibility for a child who have been convicted of an offence and sentenced, the total number of child and family impact assessments undertaken when people who have responsibility for a child have been remanded in custody or sentenced to a term of imprisonment, and confirmation of the total number of children who, following an impact assessment, require a child’s plan under section 33 of the Children and Young People (Scotland) Act 2014.

Requiring the Scottish ministers to produce an annual report that focuses on children who are affected by imprisonment would increase the focus on those issues. It would also improve the evidence base by ensuring that key agencies had to provide the Scottish ministers with a wide range of information.

Amendment 109 would ensure that a child and family impact assessment was undertaken when a person was remanded in custody to await trial or sentencing or when a person was sentenced to a period of imprisonment. A child and family impact assessment is vital to ensure that processes are put in place to assess the likely impact on the wellbeing of the person’s dependent child or children in the family. Such assessments will help to identify support and assistance that may be necessary to meet the dependent child’s wellbeing needs that arise from those circumstances, as well as those of the remaining family.

Child and family impact assessments have been recommended by Scotland’s Commissioner for Children and Young People since 2007, by the UN Committee on the Rights of the Child in 2011 and by Barnardo’s Scotland and the National Society for the Prevention of Cruelty to Children in their report “An unfair sentence—All Babies Count: Spotlight on the Criminal Justice System”, which has been endorsed by Together Scotland, the SCCYP and Families Outside. The assessments have also been widely supported in responses to the consultation on my proposed member’s bill—
the support for children (impact of parental imprisonment) (Scotland) bill.

My member’s bill consultation highlighted the fact that current procedures and processes are not working for such children, as key justice services are not under GIRFEC duties, so the children often remain hidden and unsupported. No robust form of identification or assessment is in place for that group. Criminal justice social work reports are not always requested or conducted and, when they are, they do not touch on the child and family; their intention is to establish what the family can do for the offender to reduce reoffending, not what statutory services can do to support the family. Children’s voices are lost in the justice system, and child and family impact assessments are needed as a trigger to ensure that children who are affected by parental imprisonment are recognised and supported through GIRFEC.

I move amendment 107.

Roderick Campbell: My principal objection to the group of amendments is that the committee has not considered the matters in detail. There may also be an overlap with the Children and Young People (Scotland) Act 2014. In opposition to some of the comments that children’s organisations have made, I remind the committee of evidence that Dame Elish Angiolini gave us in June 2012, when she said that her commission on women offenders

“took some excellent evidence from Dr Nancy Loucks on the impact that family and child impact statements could have. We gave careful consideration to the matter, but I do not believe that any judge who sentenced without reference to the fact that someone had children and the impact that imprisonment would have would be doing their job appropriately.”

Nevertheless, she took the view that

“We must move away from creating more bureaucracy—more reports—and look at what would make a difference to the sentencing process. Consideration of children should be critical to that process, but I believe that such issues should arise out of the professionals’ training—it should be their bread and butter. That is how social workers, defence solicitors and judges should approach the matter.”—[Official Report, Justice Committee, 26 June 2012; c 1582.]

That is in opposition to the pro-assessment lobby, but my main objection is that the committee has not considered the matter in detail, so it would be inappropriate to support the amendments at this stage.

Alison McInnes: Rod Campbell might well be right that things should operate in the way that he described, but it is clear from what Mary Fee and many agencies over the years have said that that is not what happens. There is clear evidence of the impact of parental imprisonment. As Mary Fee said, 27,000 children around the country have a parent in prison, and they are being let down. There is no doubt that they have particular needs. I commend Mary Fee’s enlightened approach and support her amendments.

Margaret McDougall: I should declare that I am a member of the cross-party group on families affected by imprisonment.

I support Mary Fee’s amendments because there is a lack of consistency in how the children of parents who have been taken into custody or imprisoned are dealt with across the country. Impact assessments should be consistent across the country, and a national strategy should be put in place with regular reporting to the Government.

The Convener: John Finnie will be followed by Margaret McDougall—I mean Margaret Mitchell. I knew that I would get my Margarets muddled up.

John Finnie: Like Alison McInnes, I was somewhat surprised by Rod Campbell’s comments. The word “should” was used. I thought from what he outlined that he was making the case in support of Mary Fee’s amendments.

Roderick Campbell: I was quoting—

The Convener: Rod Campbell can come back in with a supplementary later if he wants to.

John Finnie: Mary Fee used the phrase “slip through the net”. The net catches some, and it is not being suggested that there is a complete disregard for the wellbeing of children. I know that a lot of good work takes place in many parts of the country with the active involvement of and a lot of collaboration between the authorities but, as has been highlighted, it is clear that the reports to the sheriff prior to sentencing are not picking up on crucial aspects. I am not necessarily enthusiastic about more annual reports, but I fully support the principle of addressing the obvious gaps that have been highlighted.

Margaret Mitchell: I, too, have a lot of sympathy with amendment 109. I seek clarification—although I think that Mary Fee has given this—that the assessments would kick in at the point of custody and after sentencing. Although the judge should have all the facts, we know that, in practice, they do not. I support the amendment on that basis.

The Convener: I am quite sympathetic to what has been proposed, but I would like to hear what the cabinet secretary has to say. There appears to be a gap in how families and children are taken into account when so much can impact on them. Sometimes children end up on a criminal path because of the way that the parents have been. I would like to hear what the cabinet secretary has to say first.

Michael Matheson: The majority of the amendments in the group focus on the needs of
children who are affected by parental imprisonment. I thank Mary Fee for raising those matters, but we believe that a person-centred approach should be taken for all children and young people up to the age of 18 that recognises their differing needs, so we do not believe that the amendments are necessary.

The existing provisions in the Children and Young People (Scotland) Act 2014 provide appropriate coverage for all vulnerable children, and the law places a duty on local authorities and health boards to make services available. Amendment 107, which seeks to put in place secondary legislation to create a national strategy on the impact of sentencing on children who are affected by parental imprisonment, is not necessary. The 2014 act already contains provision to provide support as appropriate to meet a child’s wellbeing needs. That includes a requirement on services and agencies to work together in a co-ordinated way. A child whose wellbeing is affected by parental imprisonment will receive the support that they need through the implementation of parts 4 and 5 of that act.

Our national parenting strategy recognises the needs of this group of vulnerable families. The strategy sets out a commitment to work with the Scottish Prison Service to encourage involvement between parents in custody and their children. We are also committed to providing targeted support for parents in prison to aid their reintegration and to help them to deter their own children from offending behaviour. In addition, the Scottish Prison Service has recently produced minimum standards for working with the children and families of prisoners, and the Scottish Government is providing support via a number of public-social partnerships.

12:00

Amendment 108 would place a duty on the Scottish ministers to provide an annual report to Parliament on the number of parents who have been remanded or sentenced, the number of convictions, the types of sentences and the number of impact assessments that have been carried out. Part 3 of the Children and Young People (Scotland) Act 2014 places a duty on each local authority and the relevant health board to jointly prepare a three-year children’s services plan for the local authority’s area. Those plans will be required to provide for children’s services—both universal and targeted—as well as taking into account related services, of which the Scottish Prison Service is one.

In addition, the Scottish Prison Service is examining options to gather information relating to parents in custody. Any formal recording of such information will safeguard the children’s rights and ensure that the relevant and appropriate data collection protocols are met.

Amendment 108 seeks confirmation of the total number of children affected by parental imprisonment who require a child’s plan under section 33 of the 2014 act. I do not consider that collecting and reporting on the number of those plans for such children would be useful or necessary. Rather, we propose that health boards and local authorities should consider whether a child who is affected by a parent’s imprisonment requires a child’s plan to be put in place.

Amendment 109 calls for the introduction of child impact assessments. However, the named person service is for every child and is intended to ensure that concerns are picked up early and that no one, including the vulnerable, is left without support. As Rod Campbell said, the commission on women offenders, which Dame Elish Angiolini chaired, concluded in 2012 that the current arrangements for court social work reports adequately cover any consideration of the impact of imprisonment on children and that an additional report would add to the many reports and papers that a court has to consider.

The existing arrangements already provide for the accused’s parenting or other caring responsibilities to be brought to the court’s attention before they are sentenced, and the defendant’s solicitor can also explain their circumstances in mitigation. The introduction of such an assessment would have a considerable impact on the court and on criminal justice social work processes.

I therefore ask the committee to reject amendments 107 to 109.

Mary Fee: I note the cabinet secretary’s comments, and I am grateful for the committee’s supportive comments. Margaret Mitchell asked when an impact assessment would be carried out. Amendment 109 would require a child and family impact assessment to be undertaken when a person was remanded in custody to await trial or sentencing or when a person had been sentenced. It would take place after that point, not prior to it.

As John Finnie rightly said—to a degree, Rod Campbell picked up the point as well—there is already good practice. However, that good practice is not mirrored across the country. Key justice services are not under GIRFEC duties, so children often remain hidden and unsupported and, too often, children’s voices are not heard. My amendments would allow their voices to be heard and the correct support to be given.

My member’s bill consultation highlighted significant gaps in service provision in practice. Although there is some good practice in working with children, there is no consistent approach—it
depends on which part of the country people are in.

I therefore press amendment 107 and I will move my other amendments.

**The Convener:** The question is, that amendment 107 be agreed to. Are we agreed?

**Members:** No.

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

**For**
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)

**Against**
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

**Abstentions**
Mitchell, Margaret (Central Scotland) (Con)

**The Convener:** The result of the division is: For 4, Against 4, Abstentions 1.

I am in the position that I was in before. I hope that the cabinet secretary has taken on board everything that Mary Fee said. I will not support the amendment, but I think that she has brought some essential points to the table.

Amendment 107 disagreed to.

Amendment 108 moved—[Mary Fee].

**The Convener:** The question is, that amendment 108 be agreed to. Are we agreed?

**Members:** No.

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

**For**
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)

**Against**
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

**Abstentions**
Finnie, John (Highlands and Islands) (Ind)
Mitchell, Margaret (Central Scotland) (Con)

**The Convener:** The result of the division is: For 3, Against 4, Abstentions 0.

Amendment 108 agreed to.

**The Convener:** That concludes our stage 2 consideration for today. I thank Mary Fee for her attendance and I also thank the cabinet secretary and his officials.
Criminal Justice (Scotland) Bill

2nd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

- Sections 57 to 61 Schedule 2
- Sections 62 to 87 Schedule 3
- Sections 1 to 52 Schedule 1
- Sections 53 to 56 Sections 88 to 91
- Long Title

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

Before section 83

Michael Matheson

69 Before section 83, insert—

CHAPTER

PUBLICATION OF PROSECUTORIAL TEST

Publication of prosecutorial test

(1) The Lord Advocate must make available to the public a statement setting out in general terms the matters about which a prosecutor requires to be satisfied in order to initiate, and continue with, criminal proceedings in respect of any offence.

(2) The reference in subsection (1) to a prosecutor is to one within the Crown Office and Procurator Fiscal Service.>

Section 83

Michael Matheson

70 Leave out section 83

Section 84

Michael Matheson

71 Leave out section 84

Section 85

Michael Matheson

72 Leave out section 85
Section 86

Michael Matheson
73 In section 86, page 39, line 24, leave out <, a detained person is to participate in a specified> and insert <at any time before or at a specified hearing, a detained person is to participate in the>

Michael Matheson
74 In section 86, page 39, line 32, leave out <an ad hoc hearing held> and insert <any proceedings at a specified hearing or otherwise in the case>

Michael Matheson
75 In section 86, page 39, line 35, leave out <a specified hearing or such an ad hoc hearing> and insert <any specified hearing or other proceedings>

Michael Matheson
76 In section 86, page 39, line 37, after <hearing> insert <or other proceedings>

Michael Matheson
77 In section 86, page 40, line 1, after <hearing> insert <or other proceedings>

Michael Matheson
78 In section 86, page 40, line 6, leave out <a specified hearing> insert <any specified hearing or other proceedings>

Michael Matheson
79 In section 86, page 40, line 9, after <charge> insert <on any complaint or indictment>

Michael Matheson
80 In section 86, page 40, line 16, leave out from beginning to <where> in line 21 and insert—
<(3) The court may postpone a specified hearing to a later day if>

Michael Matheson
81 In section 86, page 40, leave out lines 26 to 28

Michael Matheson
82 In section 86, page 40, line 28, at end insert—
<Effect of postponement>

(1) Except where a postponement under section 288I(3) is while section 18(2) of the Criminal Justice (Scotland) Act 2015 applies to a detained person, the following do not count towards any time limit arising in such a person’s case if such a postponement in the case is to the next day on which the court is sitting—
(a) that next day,
(b) any intervening Saturday, Sunday or court holiday.

(2) Even while section 18(2) of the Criminal Justice (Scotland) Act 2015 applies to
a detained person, that section does not prevent a postponement under section
288I(3) in the person’s case.

(3) In section 288I and this section, “postpone” includes adjourn.

After section 86

Michael Matheson

83 After section 86, insert—

<Electronic proceedings

(1) In section 305 (Acts of Adjournal) of the 1995 Act, after subsection (1) there is
inserted—

“(1A) Subsection (1) above extends to making provision by Act of Adjournal for
something to be done in electronic form or by electronic means.”.

(2) These provisions of the 1995 Act are repealed—

(a) in section 141—

(i) subsection (3A),
(ii) in subsection (5), the words “(including a legible version of an electronic
communication)”,
(iii) subsection (5ZA),
(iv) in subsection (5A), paragraph (b) together with the word “or” immediately
preceding it,
(v) subsections (6A), (7A) and (7B),
(b) section 303B together with the italic heading immediately preceding it,
(c) section 308A.

(3) In the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, section 42 is repealed.

Michael Matheson

84 After section 86, insert—

<Chapter

Authorisation under Part III of the Police Act 1997

Authorisation of persons other than constables

In section 108 (interpretation of Part III) of the Police Act 1997, after subsection (1)
there is inserted—

“(1A) A reference in this Part to a staff officer of the Police Investigations and
Review Commissioner is to any person who—
(a) is a member of the Commissioner’s staff appointed under paragraph 7A of schedule 4 to the Police, Public Order and Criminal Justice (Scotland) Act 2006, or

(b) is a member of the Commissioner’s staff appointed under paragraph 7 of that schedule to whom paragraph 7B(2) of that schedule applies.”.

Margaret Mitchell

105 After section 86, insert—

<CAPITALISED>

EVIDENCE RELATING TO SEXUAL OFFENCES: LEGAL REPRESENTATION

Evidence relating to sexual offences: legal representation

In section 275 (exception to restrictions under section 274) of the 1995 Act, after subsection (5), insert—

“(5A) Where an application under subsection (1) is made, the complainer must in respect of that application—

(a) be informed of the right of the complainer—

(i) to seek legal advice,

(ii) to appoint a legal representative,

(b) be given the opportunity—

(i) to seek such advice,

(ii) to appoint such a representative.

(5B) Where the complainer appoints a legal representative—

(a) a copy of the application must be sent to the legal representative, and

(b) the legal representative must be given an opportunity to—

(i) submit written evidence on the matters set out in the application in accordance with subsection (3),

(ii) represent the complainer at any hearing in relation to the application.

(5C) The Scottish Ministers must by regulations make provision for fees incurred by a legal representative appointed under subsection (5B) to be paid out of the Scottish Legal Aid Fund.”.

Section 87

Michael Matheson

85 In section 87, page 42, line 12, leave out <a time period> and insert <or extend a time limit>

Michael Matheson

86 In section 87, page 42, leave out line 18
Michael Matheson

87 In section 87, page 42, line 27, at end insert—

<55CA Steps following arbitration

(1) If representations under section 55B(1) are made in terms settled through arbitration in accordance with the PNBS’s constitution, the Scottish Ministers must take all reasonable steps appearing to them to be necessary for giving effect to those representations.

(2) However, this—

(a) requires the Scottish Ministers to take such steps only in qualifying cases (see paragraph 4C(2) of schedule 2A),

(b) does not require the Scottish Ministers—

(i) to take such steps in relation to representations that are no longer being pursued by the PNBS, or

(ii) where such steps would comprise or include the making of regulations under section 48, to make regulations under that section more than once with respect to the same representations.>

Michael Matheson

88 In section 87, page 42, line 34, leave out from <subsection> to end of line and insert <this Chapter, “reporting year” is as defined in the PNBS’s constitution.”.>

Michael Matheson

89 In section 87, page 43, line 3, at end insert—

<( ) In section 125 (subordinate legislation) of the Police and Fire Reform (Scotland) Act 2012, after subsection (3) there is inserted—

“(3A) Regulations under paragraph 4(6) of schedule 2A are subject to the affirmative procedure if they include provisions of the kind mentioned in paragraph 4B(2) or 4C(2) of that schedule.”.>

Schedule 3

Michael Matheson

91 In schedule 3, page 50, leave out line 6

Michael Matheson

92 In schedule 3, page 50, line 12, leave out <and deputy chairperson>

Michael Matheson

93 In schedule 3, page 50, line 18, leave out <or deputy chairperson>

Michael Matheson

94 In schedule 3, page 50, line 21, at end insert—
Temporary chairperson

(1) The PNBS may have a temporary chairperson if (for the time being)—
   (a) there is no chairperson, or
   (b) the chairperson is unavailable to act.

(2) A reference in this Chapter to the chairperson is to be read, where appropriate to do so by virtue of sub-paragraph (1), as meaning or including (as the context requires) the temporary chairperson.

Michael Matheson
95 In schedule 3, page 50, line 24, leave out <chairperson or deputy chairperson> and insert <the chairperson>

Michael Matheson
96 In schedule 3, page 50, line 34, leave out from second <the> to end of line 35 and insert <consensus to be reached among the members of the PNBS on the terms of representations to be made under section 55B(1) or 55C(1).>

Michael Matheson
97 In schedule 3, page 51, leave out lines 1 and 2 and insert—

<(  ) The constitution—
   (a) may require a dispute on representations to be made under section 55B(1) to be submitted to arbitration by agreement among the members to do so, and must not prevent such a dispute from being submitted to arbitration on such agreement (except prevention by way of limitation as allowed below),
   (b) may—
      (i) authorise the chairperson to submit such a dispute to arbitration without such agreement,
      (ii) limit how often within a reporting year such a dispute can be submitted to arbitration (including limitation framed by reference to particular matters or circumstances).>

Michael Matheson
98 In schedule 3, page 51, line 18, at end insert—

<(6) The constitution, or any revision of it, has effect only when brought into effect by the Scottish Ministers by regulations.>

Michael Matheson
99 In schedule 3, page 51, line 18, at end insert—

<Process of arbitration

4A(1) Sub-paragraph (2) applies where—>
(a) a dispute is submitted to arbitration in accordance with the constitution, and
(b) no arbitration agreement relating to the dispute is in place.

(2) A document submitting the dispute to arbitration is deemed to be an arbitration agreement.

(3) For the application of the Arbitration (Scotland) Act 2010, a reference in this paragraph to an arbitration agreement is to such an agreement as defined by section 4 of that Act.

4B(1) Sub-paragraph (2) applies for the purpose of arbitration in accordance with the constitution (whether such arbitration arises by reason of a real or deemed arbitration agreement).

(2) Regulations under paragraph 4(6) may include provisions disapplying or modifying the mandatory rules in schedule 1 to the Arbitration (Scotland) Act 2010.

4C(1) Sub-paragraph (2) applies for the purpose of the operation of section 55CA.

(2) Regulations under paragraph 4(6) may include provisions specifying, by reference to particular matters or circumstances, what are qualifying cases.

Michael Matheson

100 In schedule 3, page 51, line 21, leave out <and deputy chairperson>

After section 87

Michael Matheson

90 After section 87, insert—

<Consequential and transitional

(1) In connection with section 87—

(a) in schedule 1 to the Freedom of Information (Scotland) Act 2002, after paragraph 50A there is inserted—

“50B The Police Negotiating Board for Scotland.”,

(b) in schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003, at the appropriate place under the heading referring to offices there is inserted—

“Chairperson of the Police Negotiating Board for Scotland”.

(2) On the coming into force of section 87—

(a) a person then holding office as the chairman of the Police Negotiating Board for the United Kingdom by virtue of section 61(2) of the Police Act 1996 is to be regarded as if appointed as the chairperson of the Police Negotiating Board for Scotland under paragraph 2(2) of schedule 2A to the Police and Fire Reform (Scotland) Act 2012,
(b) any agreements then extant within or involving the Police Negotiating Board for the United Kingdom (so far as relating to the Police Service of Scotland) of the kind for which Chapter 8A of Part 1 of the Police and Fire Reform (Scotland) Act 2012 includes provision are to be regarded as if made as agreements within or involving the Police Negotiating Board for Scotland by virtue of that Chapter.

Before section 1

Alison McInnes

50 Before section 1, insert—

<PART
SEARCH BY POLICE OF PERSON NOT ARRESTED

Police powers of search where person not arrested

(1) A constable must not search—
   (a) a person,
   (b) a vehicle, or
   (c) anything which is in or on a vehicle,
without a warrant, unless subsection (3) applies.

(2) It is immaterial whether the person consents to being the subject of a search.

(3) This subsection applies where the search is conducted in accordance with—
   (a) a power conferred by an enactment, and
   (b) the terms of a code of practice issued by the Scottish Ministers under section (Police powers of search where person not arrested: code of practice).

(4) This Part applies to a vessel, aircraft or hovercraft as it applies to a vehicle.

(5) For the purposes of subsection (4), “vessel” includes any ship, boat, raft or other apparatus constructed or adapted for floating on water.

Alison McInnes

51 Before section 1, insert—

<Police powers of search where person not arrested: code of practice

(1) The Scottish Ministers must, by regulations, set out a code of practice in connection with the exercise by constables of powers under any enactment to search a person who has not been arrested in connection with an offence.

(2) The code of practice must set out—
   (a) the circumstances in which any such power may be exercised,
   (b) the procedure to be followed in the exercise of any such power,
   (c) the record to be kept, and the right of any person to receive a copy of the record, of the exercise of any such power, and
   (d) such other matters as the Scottish Ministers consider appropriate.
(3) Regulations for the first code of practice under subsection (1) must be laid before the Parliament no later than the end of the period of one year beginning with the day of Royal Assent.

(4) The Scottish Ministers must—
   (a) keep the code of practice under review, and
   (b) lay regulations for a revised code of practice before the Parliament no later than 4 years after the day on which regulations for the previous code of practice are laid.

(5) Before making regulations under subsection (1) setting out the first or a revised code of practice, the Scottish Ministers must consult—
   (a) the chief constable,
   (b) the Scottish Police Authority,
   (c) the Scottish Human Rights Commission,
   (d) Scotland’s Commissioner for Children and Young People, and
   (e) such other persons as they consider appropriate,

   on a draft of the code of practice.

(6) Regulations under subsection (1) are subject to the affirmative procedure.

Alison McInnes

52 Before section 1, insert—

   <Police powers of search: annual reporting

   In subsection (3) of section 39 (the Scottish Police Authority’s annual report) of the Police and Fire Reform (Scotland) Act 2012—
   (a) the word “and” at the end of paragraph (a) is repealed, and
   (b) after paragraph (b) there is inserted “and

   (c) a record of the number of searches without a warrant of persons not arrested carried out by the Police Service during the reporting year, including in particular and where practicable a record of—

   (i) the number of instances where an individual has been searched on more than one occasion,
   (ii) the profile, as regards age, gender and ethnic or national origin, of those searched,
   (iii) the proportion of searches that resulted in anything being found,
   (iv) the proportion of searches that resulted in a matter being reported to the procurator fiscal, and
   (v) the number of complaints made to the Police Service about the conduct of searches.”.>

Section 1

Michael Matheson

111 In section 1, page 1, leave out lines 18 to 20 and insert—
<( ) continue committing the offence, or
( ) obstruct the course of justice in any way, including by—
    (i) seeking to avoid arrest, or
    (ii) interfering with witnesses or evidence.>

Michael Matheson

112 In section 1, page 1, line 20, at end insert—
<( ) For the avoidance of doubt, an offence is to be regarded as not punishable by imprisonment for the purpose of subsection (2) only if no person convicted of the offence can be sentenced to imprisonment in respect of it.>

Section 2

Michael Matheson

113 In section 2, page 1, line 25, at end insert—
<( ) Where—
    (a) a constable who is not in uniform arrests a person under section 1, and
    (b) the person asks to see the constable’s identification,
the constable must show identification to the person as soon as reasonably practicable.>

Section 3

Michael Matheson

114 In section 3, page 2, line 9, at end insert <, and
<( ) of the person’s right to have—
    (i) intimation sent to a solicitor under section 35, and
    (ii) access to a solicitor under section 36.>

Section 4

Michael Matheson

115 In section 4, page 2, line 12, at end insert—
<(2) Subsection (1) ceases to apply, and the person must be released from police custody immediately, if—
    (a) the person has been arrested without a warrant,
    (b) the person has not yet arrived at a police station in accordance with this section, and
    (c) in the opinion of a constable there are no reasonable grounds for suspecting that the person has committed—
        (i) the offence in respect of which the person was arrested, or
(ii) an offence arising from the same circumstances as that offence.

(3) For the avoidance of doubt, subsection (1) ceases to apply if, before arriving at a police station in accordance with this section, the person is released from custody under section 19(2).>

Section 5

John Finnie

10 In section 5, page 2, line 28, leave out <(verbally or in writing)>

John Finnie

11 In section 5, page 2, line 30, at end insert <(and, regardless of whether those Articles allow or require information to be provided in writing only, the person must be provided with all such information both verbally and in writing).>

Section 6

Michael Matheson

116 In section 6, page 2, line 32, at end insert <by a constable>

Michael Matheson

117 In section 6, page 3, line 5, at end insert—

<(  ) the time at which the person ceases to be in police custody.>

Michael Matheson

118 In section 6, page 3, line 5, at end insert—

<(  ) Where relevant, there must be recorded in relation to an arrest by a constable—

(a) the reason that the constable who released the person from custody under subsection (2) of section 4 formed the opinion mentioned in paragraph (c) of that subsection,>

Michael Matheson

119 In section 6, page 3, line 9, at end insert—

<(  ) the time at which, and the identity of the person by whom, the person is informed of the matters mentioned in section (Information to be given if sexual offence),>

Michael Matheson

120 In section 6, page 3, line 14, at end insert—

<(  ) section (Social work involvement in relation to under 18s),>

Michael Matheson

121 In section 6, page 3, leave out lines 17 to 21
In section 6, page 3, line 27, after <any> insert <custody>

In section 6, page 3, line 29, at end insert—

If a constable considers whether to give authorisation under section (Authorisation for keeping in custody beyond 12 hour limit) there must be recorded—

(a) whether a reasonable opportunity to make representations has been afforded in accordance with subsection (4)(a) of that section,

(b) if the opportunity referred to in paragraph (a) has not been afforded, the reason for that,

(c) the time, place and outcome of the constable’s decision, and

(d) if the constable’s decision is to give the authorisation—

(i) the grounds on which it is given,

(ii) the time at which, and the identity of the person by whom, the person is informed and reminded of things in accordance with section (Information to be given on authorisation under section (Authorisation for keeping in custody beyond 12 hour limit)), and

(iii) the time at which the person requests that intimation be sent under section (Information to be given on authorisation under section (Authorisation for keeping in custody beyond 12 hour limit))(3)(a) and the time at which it is sent.

Where a person is held in police custody by virtue of authorisation given under section (Authorisation for keeping in custody beyond 12 hour limit) there must be recorded—

(a) the time, place and outcome of any custody review under section 9,

(b) the time at which any interview in the circumstances described in section 13(6) begins and the time at which it ends.

In section 7, page 4, line 13, after <who> insert

is of the rank of sergeant or above, and

Section 7

John Finnie

In section 7, page 4, line 13, after <who> insert—

is of the rank of sergeant or above, and

Section 8

Michael Matheson

In section 8, page 4, line 22, after <reason> insert <that>
In section 8, page 4, line 23, at end insert <and the fact that the person may be kept in custody for a further 12 hours under section (Authorisation for keeping in custody beyond 12 hour limit).>

In section 8, page 4, line 23, at end insert <, and the circumstances in which the 12 hour limit may be extended to 24 hours under section (Extension of 12 hour limit to 24 hours in exceptional circumstances).>

In section 9, page 4, line 25, leave out from beginning to <consider> in line 29 and insert—

(1) A custody review must be carried out—
(a) when a person has been held in police custody for a continuous period of 6 hours by virtue of authorisation given under section 7, and
(b) again, if authorisation to keep the person in police custody is given under section (Authorisation for keeping in custody beyond 12 hour limit), when the person has been held in custody for a continuous period of 6 hours by virtue of that authorisation.

(2) A custody review entails the consideration by a constable of—

In section 9, page 4, line 31, leave out <The constable mentioned in subsection (2) must be> and insert <A custody review must be carried out by>.

Move section 9 to after section 12.

In section 10, page 5, line 2, after <7(4)> insert <, (Authorisation for keeping in custody beyond 12 hour limit)(3)(b)>

In section 10, page 5, line 12, at end insert <fully>.

In section 10, page 5, line 12, at end insert—

<( ) the effect of keeping the person in custody on a child for whom the person has responsibility,>
Section 11

Michael Matheson
131 Move section 10 to after section 12

Section 11

Michael Matheson
132 In section 11, page 5, line 17, leave out from <a> to <(a)> in line 18 and insert—

<a> a person

Michael Matheson
133 In section 11, page 5, line 20, leave out <time> and insert <period>

John Pentland
14 In section 11, page 5, line 21, at beginning insert <Subject to section (Extension of 12 hour limit to 24 hours in exceptional circumstances),>

Michael Matheson
134 In section 11, page 5, line 22, at end insert <, or

( ) authorisation to keep the person in custody has been given under section (Authorisation for keeping in custody beyond 12 hour limit)>

After section 11

John Pentland
15 After section 11, insert—

<Extension of 12 hour limit to 24 hours in exceptional circumstances

(1) Section 11(2) does not apply if the conditions in subsection (2) are met.

(2) The conditions are that a constable who is of the rank of inspector or above is satisfied—

(a) that the test in section 10 is met, and

(b) that there are exceptional circumstances that justify continuing to hold the person in police custody.

(3) A person may continue to be held in police custody by virtue of subsection (2) for more than a continuous period of 24 hours only if a constable charges the person with an offence.

(4) Without prejudice to the generality of subsection (2)(b), “exceptional circumstances” includes circumstances—

(a) where a doctor certifies that the person is, whether due to the influence of alcohol or drugs or for some other reason, not fit to be interviewed before the end of the 12 hour period mentioned in section 11,

(b) where the constable mentioned in subsection (2) considers that—
(i) access to another person in accordance with section 32, or
(ii) support from another person in accordance with section 33,
cannot be provided in sufficient time before the end of the 12 hour period,
(c) where the constable mentioned in subsection (2) considers that continuing to hold
the person in police custody is essential to ensure the safety of the person or
another person.

(5) The Scottish Ministers may, by regulations subject to the affirmative procedure, modify
subsection (4) to further define, add to, remove or otherwise modify circumstances that
may constitute “exceptional circumstances” for the purposes of subsection (2)(b).

Section 12

John Pentland

16 In section 12, page 5, line 33, after <11> insert <, and as the case may be the 24 hour period
mentioned in section (Extension of 12 hour limit to 24 hours in exceptional circumstances),>

After section 12

Michael Matheson

135 After section 12, insert—

<Authorisation for keeping in custody beyond 12 hour limit

(1) A constable may give authorisation for a person who is in police custody to be kept in
custody for a continuous period of 12 hours, beginning when the 12 hour period
mentioned in section 11 ends.

(2) Authorisation may be given only by a constable who—

(a) is of the rank of inspector or above, and
(b) has not been involved in the investigation in connection with which the person is
in police custody.

(3) Authorisation may be given only if—

(a) the person has not been held in police custody by virtue of authorisation given
under this section in connection with—

(i) the offence in connection with which the person is in police custody, or
(ii) an offence arising from the same circumstances as that offence, and

(b) the constable is satisfied that—

(i) the test in section 10 will be met when the 12 hour period mentioned in
section 11 ends,
(ii) the offence in connection with which the person is in police custody is an
indictable offence, and
(iii) the investigation is being conducted diligently and expeditiously.

(4) Before deciding whether or not to give authorisation the constable must—
(a) where practicable afford a reasonable opportunity to make verbal or written representations to—
   (i) the person, or
   (ii) if the person so chooses, the person’s solicitor, and
(b) have regard to any representations made.

(5) If authorisation is given, it is deemed to be withdrawn if the person is released from police custody before the 12 hour period mentioned in section 11 ends.

(6) Subsection (7) applies when—
   (a) by virtue of authorisation given under this section, a person has been held in police custody for a continuous period of 12 hours (beginning with the time at which the 12 hour period mentioned in section 11 ended), and
   (b) during that period the person has not been charged with an offence by a constable.

(7) The person may continue to be held in police custody only if a constable charges the person with an offence.

Michael Matheson

136 After section 12, insert—

<Information to be given on authorisation under section (Authorisation for keeping in custody beyond 12 hour limit)

(1) This section applies when authorisation to keep a person in custody is given under section (Authorisation for keeping in custody beyond 12 hour limit).

(2) The person must be informed—
   (a) that the authorisation has been given, and
   (b) of the grounds on which it has been given.

(3) The person—
   (a) has the right to have the information mentioned in subsection (2) intimated to a solicitor, and
   (b) must be informed of that right.

(4) The person must be reminded about any right which the person has under Chapter 5.

(5) Subsection (4) does not require that a person be reminded about a right to have intimation sent under either of the following sections if the person has exercised the right already—
   (a) section 30,
   (b) section 35.

(6) Information to be given under subsections (2), (3)(b) and (4) must be given to the person as soon as reasonably practicable after the authorisation is given.

(7) Where the person requests that intimation be sent under subsection (3)(a), the intimation must be sent as soon as reasonably practicable.>
Section 13

Michael Matheson

137 In section 13, page 6, line 17, leave out <section 11> and insert <sections 11 and (Authorisation for keeping in custody beyond 12 hour limit)>

John Pentland

17 In section 13, page 6, line 17, at end insert <and as the case may be the 24 hour period mentioned in section (Extension of 12 hour limit to 24 hours in exceptional circumstances).>

Michael Matheson

138 In section 13, page 6, line 18, leave out <time> and insert <period>

Michael Matheson

139 In section 13, page 6, line 21, leave out <to a hospital for that purpose> and insert <as quickly as is reasonably practicable—
(i) to a hospital for the purpose of receiving medical treatment, or
(ii) to a police station from a hospital to which the person was taken for the purpose of receiving medical treatment.>

Michael Matheson

140 In section 13, page 6, line 22, leave out <time> and insert <period>

Michael Matheson

141 In section 13, page 6, line 23 after <to> insert <or from>

Section 14

John Finnie

18 In section 14, page 6, line 32, leave out from <and> to end of line 33

Michael Matheson

142 In section 14, page 6, leave out line 33 and insert—
<( )> either—
(i) the person has not been subject to a condition imposed under subsection (2) in connection with a relevant offence, or
(ii) it has not been more than 28 days since the first occasion on which a condition was imposed on the person under subsection (2) in connection with a relevant offence.>

Elaine Murray

47 In section 14, page 6, line 35, leave out from <ensuring> to end of line 36 and insert <securing—>
(a) that the person surrenders to custody if required to do so,
(b) that the person does not commit an offence while released,
(c) that the person does not interfere with a witness or otherwise obstruct the course of the investigation into a relevant offence,
(d) the protection of the person, or
(e) if the person is under 18 years of age, the welfare or interests of the person.>

Michael Matheson

143 In section 14, page 6, line 36, at end insert—

< ( ) A condition under subsection (2)—

(a) may not require the person to be in a specified place at a specified time,

(b) may require the person—

(i) not to be in a specified place, or category of place, at a specified time, and

(ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period.>

John Finnie

19 In section 14, page 6, line 36, at end insert—

<(2A) When imposing a condition under subsection (2), the constable is to specify the period for which the condition is to apply.

(2B) The period specified under subsection (2A) is to be such period, not exceeding 28 days, as the appropriate constable considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence.

(2C) In any case where a person has previously been subject to a condition imposed under subsection (2) in connection with a relevant offence, the reference in subsection (2B) to 28 days is to be read as a reference to 28 days minus the number of days on which the person was so subject.>

Michael Matheson

144 In section 14, page 6, line 38, leave out <Chapter 7> and insert <schedule (Breach of liberation condition)>

Michael Matheson

145 In section 14, page 6, line 39, leave out subsection (4)

John Finnie

20 In section 14, page 6, line 39, leave out from <(1)(c)> to end of line 3 on page 7 and insert <(2C)>

Michael Matheson

146 In section 14, page 7, line 7, leave out <inspector> and insert <sergeant>
Section 15

Michael Matheson
147 In section 15, page 7, line 15, leave out from \(<last>\) to \(<14(4)>\) and insert \(<\text{day falling 28 days after the first occasion on which a condition was imposed on the person under section 14(2) in connection with a relevant offence}>\)

John Finnie
21 In section 15, page 7, line 15, leave out \(<28 \text{ day period described in section 14(4)>}\) and insert \(<\text{period specified under section 14(2A)>}\)

Section 17

John Finnie
22 In section 17, page 8, line 17, at end insert \(<,\)
( ) to have the period for which the condition applies reduced.>

John Finnie
23 In section 17, page 8, line 20, after \(<\text{condition}>\) insert \(<\text{or, as the case may be, the period specified under section 14(2A)>}\)

John Finnie
24 In section 17, page 8, line 21, after \(<\text{imposed}>\) insert \(<\text{or, as the case may be, specified}>\)

John Finnie
25 In section 17, page 8, line 23, after \(<\text{condition}>\) insert \(<\text{or, as the case may be, specify an alternative period}>\)

John Finnie
26 In section 17, page 8, line 25, after \(<\text{imposed}>\) insert \(<\text{or period specified}>\)

John Finnie
27 In section 17, page 8, line 26, at end insert \(<\text{or, as the case may be, specified under section 14(2A)>}\)

Before section 18

Michael Matheson
148 Before section 18, insert—

<Information to be given if sexual offence>

(1) Subsection (2) applies when—
(a) a person is in police custody having been arrested under a warrant in respect of a
sexual offence to which section 288C of the 1995 Act applies, or
(b) a person—
   (i) is in police custody having been arrested without a warrant, and
   (ii) since being arrested, the person has been charged by a constable with a
sexual offence to which section 288C of the 1995 Act applies.
(2) The person must be informed as soon as reasonably practicable—
   (a) that the person’s case at, or for the purposes of, any relevant hearing (within the
meaning of section 288C(1A) of the 1995 Act) in the course of the proceedings
may be conducted only by a lawyer,
   (b) that it is, therefore, in the person’s interests to get the professional assistance of a
solicitor, and
   (c) that if the person does not engage a solicitor for the purposes of the conduct of the
person’s case at or for the purposes of the hearing, the court will do so.

Section 18

Michael Matheson
149 In section 18, page 9, line 1, leave out subsection (2) and insert—
(2) The person must be brought before a court (unless released from custody under section
19)—
(a) if practicable, before the end of the first day on which the court is sitting after the
day on which this subsection began to apply to the person, or
(b) as soon as practicable after that.

Michael Matheson
101 In section 18, page 9, line 6, at end insert <(by virtue of a determination by the court that the
person is to do so by such means)>

After section 18

Michael Matheson
150 After section 18, insert—
<Under 18s to be kept in place of safety prior to court
(1) Subsection (2) applies when—
   (a) a person is to be brought before a court in accordance with section 18(2), and
   (b) either—
      (i) a constable believes the person is under 16 years of age, or
      (ii) the person is subject to a compulsory supervision order, or an interim
compulsory supervision order, made under the Children’s Hearings
(Scotland) Act 2011.
(2) The person must (unless released from custody under section 19) be kept in a place of safety until the person can be brought before the court.

(3) The place of safety in which the person is kept must not be a police station unless an appropriate constable certifies that keeping the person in a place of safety other than a police station would be—
   (a) impracticable,
   (b) unsafe, or
   (c) inadvisable due to the person’s state of health (physical or mental).

(4) A certificate under subsection (3) must be produced to the court when the person is brought before it.

(5) In this section—
   “an appropriate constable” means a constable of the rank of inspector or above,
   “place of safety” has the meaning given in section 202(1) of the Children’s Hearings (Scotland) Act 2011.

Michael Matheson

151 After section 18, insert—

<Notice to parent that under 18 to be brought before court>

(1) Subsection (2) applies when a person who is 16 years of age or over and subject to a supervision order or under 16 years of age—
   (a) is to be brought before a court in accordance with section 18(2), or
   (b) is released from police custody on an undertaking given under section 19(2)(a).

(2) A parent of the person mentioned in subsection (1) (if one can be found) must be informed of the following matters—
   (a) the court before which the person is to be brought,
   (b) the date on which the person is to be brought before the court,
   (c) the general nature of the offence which the person has been officially accused of committing, and
   (d) that the parent’s attendance at the court may be required under section 42 of the 1995 Act.

(3) Subsection (2) does not require any information to be given to a parent if a constable has grounds to believe that giving the parent the information mentioned in that subsection may be detrimental to the wellbeing of the person mentioned in subsection (1).

(4) In this section—
   “parent” includes guardian and any person who has the care of the person mentioned in subsection (1),
   “supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

Michael Matheson

152 After section 18, insert—
Notice to local authority that under 18 to be brought before court

(1) The appropriate local authority must be informed of the matters mentioned in subsection (4) when—

(a) a person to whom either subsection (2) or (3) applies is to be brought before a court in accordance with section 18(2), or

(b) a person to whom subsection (2) applies is released from police custody on an undertaking given under section 19(2)(a).

(2) This subsection applies to—

(a) a person who is under 16 years of age,

(b) a person who is—

(i) 16 or 17 years of age, and

(ii) subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

(3) This subsection applies to a person if—

(a) a constable believes the person is 16 or 17 years of age,

(b) since being arrested, the person has not exercised the right to have intimation sent under section 30, and

(c) on being informed or reminded of the right to have intimation sent under that section after being officially accused, the person has declined to exercise the right.

(4) The matters referred to in subsection (1) are—

(a) the court before which the person mentioned in paragraph (a) or (as the case may be) (b) of that subsection is to be brought,

(b) the date on which the person is to be brought before the court, and

(c) the general nature of the offence which the person has been officially accused of committing.

(5) For the purpose of subsection (1), the appropriate local authority is the local authority in whose area the court referred to in subsection (4)(a) sits.

Section 19

Michael Matheson

153 In section 19, page 9, line 20, at end insert—

<( ) Where a person is in custody as mentioned in subsection (1)(a), the person may not be released from custody under subsection (2)(b).>

Section 20

Michael Matheson

154 In section 20, page 9, line 28, at end insert <while subject to the undertaking>
Michael Matheson

155 In section 20, page 9, line 30, leave out from <commit> to end of line 33 and insert—

(i) commit an offence,
(ii) interfere with witnesses or evidence, or otherwise obstruct the course of justice,
(iii) behave in a manner which causes, or is likely to cause, alarm or distress to witnesses,

(b) any further condition that a constable considers necessary and proportionate for the purpose of ensuring that any conditions imposed under paragraph (a) are observed.>

Elaine Murray

48 In section 20, page 9, line 32, leave out from <ensuring> to end of line 33 and insert <securing—

(i) that the person surrenders to custody if required to do so,
(ii) that the person does not interfere with a witness or otherwise obstruct the course of the investigation into the offence in connection with which the person is in police custody,
(iii) the protection of the person, or
(iv) if the person is under 18 years of age, the welfare or interests of the person.>

Michael Matheson

156 In section 20, page 9, line 34, leave out <a curfew> and insert—

(a) a condition requiring the person—
(i) to be in a specified place at a specified time, and
(ii) to remain there for a specified period,

(b) a condition requiring the person—
(i) not to be in a specified place, or category of place, at a specified time, and
(ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period>

Michael Matheson

157 In section 20, page 9, line 35, leave out subsection (5) and insert—

(5) For the imposition of a condition under subsection (3)(b)—

(a) if it is of the kind described in subsection (4)(a), the authority of a constable of the rank of inspector or above is required,
(b) if it is of any other kind, the authority of a constable of the rank of sergeant is required.>
Offence of breaching condition

1 (1) A person commits an offence if, without reasonable excuse, the person breaches a liberation condition by reason of—
   (a) failing to comply with an investigative liberation condition,
   (b) failing to appear at court as required by the terms of an undertaking, or
   (c) failing to comply with the terms of an undertaking, other than the requirement to appear at court.

(2) Sub-paragraph (1) does not apply where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (in which case see paragraph 3).

(3) It is competent to amend a complaint to include an additional charge of an offence under sub-paragraph (1) at any time before the trial of a person in summary proceedings for—
   (a) the original offence, or
   (b) an offence arising from the same circumstances as the original offence.

(4) In sub-paragraph (3), “the original offence” is the offence in connection with which—
   (a) an investigative liberation condition was imposed, or
   (b) an undertaking was given.

Sentencing for the offence

2 (1) A person who commits an offence under paragraph 1(1) is liable on summary conviction to—
   (a) a fine not exceeding level 3 on the standard scale, or
   (b) imprisonment for a period—
      (i) where conviction is in the justice of the peace court, not exceeding 60 days,
      (ii) where conviction is in the sheriff court, not exceeding 12 months.

(2) A penalty under sub-paragraph (1) may be imposed in addition to any other penalty which it is competent for the court to impose, even if the total of penalties imposed exceeds the maximum penalty which it is competent to impose in respect of the original offence.

(3) The reference in sub-paragraph (2) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—
(a) where the sentences are imposed at the same time (whether or not in relation to the same complaint), framing the sentences so that they have effect consecutively,
(b) where the sentences are imposed at different times, framing the sentence imposed later so that (if the earlier sentence has not been served) the later sentence has effect consecutive to the earlier sentence.

(4) Sub-paragraph (3)(b) is subject to section 204A (restriction on consecutive sentences for released prisoners) of the 1995 Act.

(5) Where a person is to be sentenced in respect of an offence under paragraph 1(1), the court may remit the person for sentence in respect of it to any court which is considering the original offence.

(6) In sub-paragraphs (2) and (5), “the original offence” is the offence in connection with which—
(a) the investigative liberation condition was imposed, or
(b) the undertaking was given.

**Breach by committing offence**

3 (1) This paragraph applies—
(a) where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (“offence O”), but
(b) only if the fact that offence O was committed while the person was subject to the liberation condition is specified in the complaint or indictment.

(2) In determining the penalty for offence O, the court must have regard—
(a) to the fact that offence O was committed in breach of a liberation condition,
(b) if the breach is by reason of the person’s failure to comply with the terms of an investigative liberation condition, to the matters mentioned in paragraph 4(1),
(c) if the breach is by reason of the person’s failure to comply with the terms of an undertaking other than the requirement to appear at court, to the matters mentioned in paragraph 5(1).

(3) Where the maximum penalty in respect of offence O is specified by (or by virtue of) an enactment, the maximum penalty is increased—
(a) where it is a fine, by the amount equivalent to level 3 on the standard scale,
(b) where it is a period of imprisonment—
   (i) as respects conviction in the justice of the peace court, by 60 days,
   (ii) as respects conviction in the sheriff court or the High Court, by 6 months.

(4) The maximum penalty is increased by sub-paragraph (3) even if the penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(5) In imposing a penalty in respect of offence O, the court must state—
(a) where the penalty is different from that which the court would have imposed had sub-paragraph (2) not applied, the extent of and the reasons for that difference,
(b) otherwise, the reasons for there being no such difference.
Matters for paragraph 3(2)(b)

4 (1) For the purpose of paragraph 3(2)(b), the matters are—

(a) the number of offences in connection with which the person was subject to investigative liberation conditions when offence O was committed,

(b) any previous conviction the person has for an offence under paragraph 1(1)(a),

(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of paragraph 3(2), from that which the court would have imposed but for that paragraph.

(2) In sub-paragraph (1)—

(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under paragraph 1(1)(a),

(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this sub-paragraph, as references to any provision that is equivalent to paragraph 3(2).

(3) Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to determine.

Matters for paragraph 3(2)(c)

5 (1) For the purpose of paragraph 3(2)(c), the matters are—

(a) the number of undertakings to which the person was subject when offence O was committed,

(b) any previous conviction the person has for an offence under paragraph 1(1)(c),

(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of paragraph 3(2), from that which the court would have imposed but for that paragraph.

(2) In sub-paragraph (1)—

(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under paragraph 1(1)(c),

(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this sub-paragraph, as references to any provision that is equivalent to paragraph 3(2).

(3) Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to determine.

Evidential presumptions

6 (1) In any proceedings in relation to an offence under paragraph 1(1), the facts mentioned in sub-paragraph (2) are to be held as admitted unless challenged by preliminary objection before the person’s plea is recorded.
(2) The facts are—
   (a) that the person breached an undertaking by reason of failing to appear at court as required by the terms of the undertaking,
   (b) that the person was subject to a particular—
      (i) investigative liberation condition, or
      (ii) condition under the terms of an undertaking.

(3) In proceedings to which sub-paragraph (4) applies—
   (a) something in writing, purporting to impose investigative liberation conditions and bearing to be signed by a constable, is sufficient evidence of the terms of the investigative liberation conditions imposed under section 14(2),
   (b) something in writing, purporting to be an undertaking and bearing to be signed by the person said to have given it, is sufficient evidence of the terms of the undertaking at the time that it was given,
   (c) a document purporting to be a notice (or a copy of a notice) under section 16 or 21, is sufficient evidence of the terms of the notice.

(4) This sub-paragraph applies to proceedings—
   (a) in relation to an offence under paragraph 1(1), or
   (b) in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment.

(5) In proceedings in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment, that fact is to be held as admitted unless challenged—
   (a) in summary proceedings, by preliminary objection before the person’s plea is recorded, or
   (b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the 1995 Act.

Interpretation

7 In this schedule—
   (a) references to an investigative liberation condition are to a condition imposed under section 14(2) or 17(3)(b) subject to any modification by notice under section 16(1) or (5)(a),
   (b) references to an undertaking are to an undertaking given under section 19(2)(a),
   (c) references to the terms of an undertaking are to the terms of an undertaking subject to any modification by—
      (i) notice under section 21(1), or
      (ii) the sheriff under section 22(3)(b).>

Section 21

Michael Matheson

160 In section 21, page 10, line 11, leave out subsection (3)
After section 21

163 After section 21, insert—

<Rescission of undertaking>

(1) The procurator fiscal may by notice rescind an undertaking given under section 19(2)(a) (whether or not the person who gave it is to be prosecuted).

(2) The rescission of an undertaking by virtue of subsection (1) takes effect at the end of the day on which the notice is sent.

(3) Notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.

(4) A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person is likely to fail to comply with the terms of an undertaking given under section 19(2)(a).

(5) Where a person is arrested under subsection (4) or subsection (6) applies—

(a) the undertaking referred to in subsection (4) or (as the case may be) (6) is rescinded, and

(b) this Part applies as if the person, since being most recently arrested, has been charged with the offence in connection with which the person was in police custody when the undertaking was given.

(6) This subsection applies where—

(a) a person who is subject to an undertaking given under section 19(2)(a) is in police custody (otherwise than as a result of having been arrested under subsection (4)), and

(b) a constable has reasonable grounds for suspecting that the person has failed, or (if liberated) is likely to fail, to comply with the terms of the undertaking.

(7) The references in subsections (4) and (6)(b) to the terms of the undertaking are to the terms of the undertaking subject to any modification by—

(a) notice under section 21(1), or

(b) the sheriff under section 22(3)(b).

<Expiry of undertaking>

(1) An undertaking given under section 19(2)(a) expires—
(a) at the end of the day on which the person who gave it is required by its terms to appear at a court, or
(b) if subsection (2) applies, at the end of the day on which the person who gave it is brought before a court having been arrested under the warrant mentioned in that subsection.

(2) This subsection applies where—

(a) a person fails to appear at court as required by the terms of an undertaking given under section 19(2)(a), and

(b) on account of that failure, a warrant for the person’s arrest is granted.

(3) The references in subsections (1)(a) and (2)(a) to the terms of the undertaking are to the terms of the undertaking subject to any modification by notice under section 21(1).

Section 23

John Finnie
28 In section 23, page 11, line 10, after <committing> insert <and again immediately before the interview commences>

Michael Matheson
165 In section 23, page 11, line 11, at end insert—

< ( ) of the general nature of that offence,>

Michael Matheson
166 In section 23, page 11, line 24, at end insert—

< ( ) Where a person is to be interviewed by virtue of authorisation granted under section 27, before the interview begins the person must be informed of what was specified by the court under subsection (6) of that section.>

Section 24

John Finnie
29 In section 24, page 12, line 2, leave out from <if> to end of line 5

Section 25

Elaine Murray
55 In section 25, page 12, line 15, leave out <Subsections (2) and (3) apply> and insert <Subsection (2) applies>

Elaine Murray
Supported by: Alison McInnes
56 In section 25, page 12, line 17, leave out <16> and insert <18>
Michael Matheson
167 In section 25, page 12, line 17, after <age,> insert—
<(aa) the person is 16 or 17 years of age and subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011,>

Elaine Murray
Supported by: Alison McInnes
57 In section 25, page 12, line 18, leave out <16> and insert <18>

John Finnie
30 In section 25, page 12, line 18, leave out <, owing to mental disorder,>

Elaine Murray
58 In section 25, page 12, line 22, leave out subsections (3) to (5)

Michael Matheson
168 In section 25, page 12, line 27, leave out <(2)(b)> and insert <(2)(aa) or (b)>

John Finnie
31 In section 25, page 12, leave out lines 36 and 37

Michael Matheson
169 In section 25, page 12, line 36, leave out <328(1)> and insert <328>

Section 30

Elaine Murray
59 In section 30, page 16, line 9, leave out <16> and insert <18>

Elaine Murray
60 In section 30, page 16, line 13, leave out <16> and insert <18>

Michael Matheson
170 In section 30, page 16, line 22, at end insert <, or
  (c) safeguarding and promoting the wellbeing of the person in custody, where a constable believes that person to be under 18 years of age.>

Michael Matheson
171 In section 30, page 16, line 22, at end insert—
<(  ) The sending of intimation may be delayed by virtue of subsection (5)(c) only for so long as is necessary to ascertain whether a local authority will arrange for someone to visit the person in custody under section (Social work involvement in relation to under 18s)(2).>

Michael Matheson

172 In section 30, page 16, line 25, leave out <a person> and insert <the person in custody>

Section 31

Michael Matheson

173 In section 31, page 16, line 31, at end insert—

<(  ) Subsection (2) does not apply if—

(a) a constable believes that the person in custody is 16 or 17 years of age, and

(b) the person in custody requests that the person to whom intimation is to be sent under section 30(1) is not asked to attend at the place where the person in custody is being held.>

Michael Matheson

174 In section 31, page 16, line 32, leave out <Subsection (4) applies> and insert <Subsections (3A) and (4) apply>

Michael Matheson

175 In section 31, page 16, leave out lines 35 and 36 and insert—

<(b) the person to whom intimation is sent by virtue of section 30(3), if asked to attend at the place where the person in custody is being held, claims to be unable or unwilling to attend within a reasonable time.>

Michael Matheson

176 In section 31, page 16, line 36, at end insert—

<(  ) a local authority, acting under section (Social work involvement in relation to under 18s)(8)(a), has advised against sending intimation to the person to whom intimation is to be sent by virtue of section 30(3).>

Michael Matheson

177 In section 31, page 16, line 36, at end insert—

<(3A) Section 30(3) ceases to have effect.>

Michael Matheson

178 In section 31, page 16, line 37, after <intimation> insert <to an appropriate person>
Elaine Murray
61  In section 31, page 17, line 2, leave out from second <or> to end of line 5

Michael Matheson
179 In section 31, page 17, line 6, leave out <(4)(a)> and insert <(4)>

Michael Matheson
180 In section 31, page 17, line 12, leave out <30(4)(b)> and insert <30(5)(a) or (b)>

Michael Matheson
181 In section 31, page 17, line 14, leave out <30(4)(b)> and insert <30(5)(a) or (b)>

Section 32

Elaine Murray
62  In section 32, page 17, line 17, leave out <16> and insert <18>

Michael Matheson
182 In section 32, page 17, line 20, leave out <at least one> and insert <a>

Michael Matheson
183 In section 32, page 17, line 21, leave out from <who> to end of line 22

Elaine Murray
63  In section 32, page 17, line 23, leave out subsection (2)

Michael Matheson
184 In section 32, page 17, line 24, leave out <at least one> and insert <a>

Michael Matheson
185 In section 32, page 17, leave out line 26

Michael Matheson
186 In section 32, page 17, line 27, at end insert—
<(  ) Access to a person in custody under subsection (1) or (2) need not be permitted to more than one person at the same time.>

Elaine Murray
64  In section 32, page 17, line 28, leave out <or (2)>
In section 32, page 17, line 34, leave out <a person> and insert <the person in custody>

After section 32

After section 32, insert—

Social work involvement in relation to under 18s

(1) Intimation of the fact that a person is in police custody and the place where the person is in custody must be sent to a local authority as soon as reasonably practicable if—
   (a) a constable believes that the person may be subject to a supervision order, or
   (b) by virtue of subsection (5)(c) of section 30, a constable has delayed sending intimation in respect of the person under subsection (1) of that section.

(2) A local authority sent intimation under subsection (1) may arrange for someone to visit the person in custody if—
   (a) the person is subject to a supervision order, or
   (b) the local authority—
      (i) believes the person to be under 16 years of age, and
      (ii) has grounds to believe that its arranging someone to visit the person would best safeguard and promote the person’s wellbeing (having regard to the effect of subsection (4)(a)).

(3) Before undertaking to arrange someone to visit the person in custody under subsection (2), the local authority must be satisfied that anyone it arranges to visit the person in custody will be able to make the visit within a reasonable time.

(4) Where a local authority arranges for someone to visit the person in custody under subsection (2)—
   (a) sections 30 and 32 cease to have effect, and
   (b) the person who the local authority has arranged to visit the person in custody must be permitted access to the person in custody.

(5) In exceptional circumstances, access under subsection (4)(b) may be refused or restricted so far as the refusal or restriction is necessary—
   (a) in the interests of—
      (i) the investigation or prevention of crime, or
      (ii) the apprehension of offenders, or
   (b) for the wellbeing of the person in custody.

(6) Where a local authority sent intimation under subsection (1) confirms that the person in custody is—
   (a) over 16 years of age, and
   (b) subject to a supervision order,
sections 30 to 32 are to be applied in respect of the person as if a constable believes the person to be under 16 years of age.
Subsection (8) applies where a local authority might have arranged for someone to visit a person in custody under subsection (2) but—
  (a) chose not to do so, or
  (b) was precluded from doing so by subsection (3).

The local authority may—
  (a) advise a constable that the person to whom intimation is to be sent by virtue of section 30(3) should not be sent intimation if the local authority has grounds to believe that sending intimation to that person may be detrimental to the wellbeing of the person in custody, and
  (b) give advice as to who might be an appropriate person to a constable considering that matter under section 31(5) (and the constable must have regard to any such advice).

In this section, “supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

Section 33

John Pentland
38 In section 33, page 18, line 1, leave out from beginning to <over,>

Elaine Murray
32 In section 33, page 18, line 1, leave out <18> and insert <16>

John Finnie
33 In section 33, page 18, line 2, leave out <owing to mental disorder,>

Michael Matheson
189 In section 33, page 18, line 3, leave out <to> and insert—
  <( )>

John Finnie
34 In section 33, page 18, leave out lines 17 and 18

Michael Matheson
190 In section 33, page 18, line 17, leave out <328(1)> and insert <328>

Section 34

Michael Matheson
191 Leave out section 34
After section 34

Mary Fee

40 After section 34, insert—

<Persons with responsibility for a child

Duty to contact named person: persons with responsibility for a child

(1) This section applies where a constable believes that a person in police custody has responsibility for a child.

(2) With a view to facilitating the provision of care and support to the child while the person is in police custody, the constable must send intimation of the matters specified in subsection (3) to an individual identified in relation to the child under section 20 or 21 of the Children and Young People (Scotland) Act 2014.

(3) The matters are—
   (a) the fact that the person is in custody,
   (b) the place where the person is in custody,
   (c) the time limits for keeping the person in custody that apply under Chapter 2 of this Part.

Mary Fee

110 After section 34, insert—

<Persons with responsibility for a child

Duty to contact named person: persons with responsibility for a child

(1) This section applies where a constable believes that a person in police custody has responsibility for a child.

(2) With a view to ensuring the wellbeing of the child, the constable must send information of the type specified in subsection (3) to an individual identified in relation to the child under section 20 or 21 of the Children and Young People (Scotland) Act 2014.

(3) The information to be sent is to contain details of any matters relevant to the child’s wellbeing, and to the child’s wellbeing needs.

(4) Information falls within subsection (3) if the constable considers that—
   (a) it is likely to be relevant to the exercise of the named person functions in relation to the child or young person,
   (b) it is necessary or expedient for the purposes of the exercise of any of the named person functions,
   (c) it ought to be provided for that purpose, and
   (d) the provision of the information would not prejudice the conduct of any criminal investigation or the prosecution of any offence.

(5) In considering for the purpose of subsection (4)(c) whether information ought to be provided, the constable is, so far as reasonably practicable, to ascertain and have regard to the views of the child.
(6) In having regard to the views of a child under subsection (5), the constable is to take account of the child’s age and maturity.

(7) For the purpose of subsection (4)(c) the information ought to be provided only if the likely benefit to the wellbeing of the child arising in consequence of doing so outweighs any likely adverse effect on that wellbeing arising from doing so.

(8) The Scottish Ministers may by regulations make further provision relating to the sending of information under subsection (2) above.

(9) Regulations under subsection (8) are subject to the affirmative procedure.

**Section 36**

Michael Matheson

192 In section 36, page 19, line 16, leave out second <means> and insert <method>

Michael Matheson

193 In section 36, page 19, line 17, leave out <means of>

**Section 39**

Michael Matheson

194 In section 39, page 20, leave out line 2 and insert—

<(  ) cause the person to participate in an identification procedure.>

**After section 40**

Michael Matheson

195 After section 40, insert—

<Care of drunken persons

Taking drunk persons to designated place

(1) Where—

(a) a person is liable to be arrested in respect of an offence by a constable without a warrant, and

(b) the constable is of the opinion that the person is drunk,

the constable may take the person to a designated place (and do so instead of arresting the person).

(2) Nothing done under subsection (1)—

(a) makes a person liable to be held unwillingly at a designated place, or

(b) prevents a constable from arresting the person in respect of the offence referred to in that subsection.

(3) In this section, “designated place” is any place designated by the Scottish Ministers for the purpose of this section as a place suitable for the care of drunken persons.>
Section 42

Alison McInnes
53 In section 42, page 20, line 18, at end insert—

\(<(\ )\ search\ a\ child,>\)

Mary Fee
41 In section 42, page 20, line 19, after <child> insert <or person who has responsibility for a child>

Mary Fee
42 In section 42, page 20, line 20, after <child> insert <or person who has responsibility for a child>

Mary Fee
43 In section 42, page 20, line 21, after <child> insert <or person who has responsibility for a child>

Mary Fee
44 In section 42, page 20, line 22, after <child> insert <or person>

Mary Fee
45 In section 42, page 20, line 23, after <child> insert <or person who has responsibility for a child>

Elaine Murray
65 In section 42, page 20, line 25, leave out <well-being> and insert <best interests>

After section 42

Michael Matheson
196 After section 42, insert—

\(<\textit{Duties in relation to children in custody}\>

(1) A child who is in police custody at a police station is, so far as practicable, to be prevented from associating with any adult who is officially accused of committing an offence other than an adult to whom subsection (2) applies.

(2) This subsection applies to an adult if a constable believes that it may be detrimental to the wellbeing of the child mentioned in subsection (1) to prevent the child and adult from associating with one another.

(3) For the purposes of this section—

“child” means person who is under 18 years of age,

“adult” means person who is 18 years of age or over.

Michael Matheson
197 After section 42, insert—
Duty to inform Principal Reporter if child not being prosecuted

(1) Subsections (2) and (3) apply if—
   (a) a person is being kept in a place of safety in accordance with section (Under 18s to be kept in place of safety prior to court) (2) when it is decided not to prosecute the person for any relevant offence, and
   (b) a constable has reasonable grounds for suspecting that the person has committed a relevant offence.

(2) The Principal Reporter must be informed, as soon as reasonably practicable, that the person is being kept in a place of safety under subsection (3).

(3) The person must be kept in a place of safety under this subsection until the Principal Reporter makes a direction under section 65(2) of the Children’s Hearings (Scotland) Act 2011.

(4) An offence is a “relevant offence” for the purpose of subsection (1) if—
   (a) it is the offence with which the person was officially accused, leading to the person being kept in the place of safety in accordance with section (Under 18s to be kept in place of safety prior to court) (2), or
   (b) it is an offence arising from the same circumstances as the offence mentioned in paragraph (a).

(5) In this section, “place of safety” has the meaning given in section 202(1) of the Children’s Hearings (Scotland) Act 2011.

Elaine Murray

After section 42, insert—

Duty not to disclose information relating to person not officially accused

(1) Subject to section (Disclosure of information: person released under section 14), a constable must not without reasonable cause release the information specified in subsection (2) to any person other than an authorised person.

(2) The information is information relating to a person not officially accused of an offence which—
   (a) identifies that person, or
   (b) is likely to be sufficient to allow that person to be identified, as having been arrested in connection with an offence.

(3) For the purposes of subsection (1), an “authorised person” means—
   (a) a constable,
   (b) a person to whom intimation must or may be sent under Chapter 5 of this Part,
   (c) a person other than a constable to whom the information must be disclosed for the purpose of ensuring the proper conduct of the investigation into the offence.

(4) For the purposes of subsection (1), a determination that there is reasonable cause to disclose information must be made—
   (a) only if it is in the public interest to do so, and
   (b) by a constable who is of the rank of inspector or above.
Elaine Murray

36  After section 42, insert—

<Disclosure of information: person released under section 14

(1) Without prejudice to the generality of section (Duty not to disclose information relating to person not officially accused), a constable may disclose qualifying information relating to an alleged offence to a person mentioned in subsection (2) where the conditions in subsection (3) are met.

(2) The persons are—

(a) a person—

(i) against whom, or

(ii) against whose property,

the acts which constituted the alleged offence were directed,

(b) in the case where the death of a person mentioned in paragraph (a) was (or appears to have been) caused by the alleged offence, a prescribed relative of the person,

(c) a person who is likely to give evidence in criminal proceedings which are likely to be instituted against a person in respect of the alleged offence,

(d) a person who has given a statement in relation to the alleged offence to a constable.

(3) The conditions are that disclosure of the information —

(a) is in the public interest or is otherwise likely to promote the safety and wellbeing of a person mentioned in subsection (2), and

(b) is authorised by a constable who is of the rank of inspector or above.

(4) In this section—

“prescribed” means prescribed by the Scottish Ministers by order subject to the negative procedure,

“qualifying information” means information that—

(a) identifies a person as having been arrested in connection with an alleged offence and subsequently released under section 14, and

(b) sets out such information relating to any conditions imposed on the person under section 14(2) as the constable authorising the disclosure considers appropriate.

(5) The Scottish Ministers may, by order subject to the negative procedure, modify the definition of “qualifying information” in subsection (4).>

Section 43

Michael Matheson

198  Leave out section 43
Section 44

Michael Matheson
199 Leave out section 44

Section 45

Michael Matheson
200 Leave out section 45

Section 46

Michael Matheson
201 Leave out section 46

Section 47

Michael Matheson
202 Leave out section 47

Section 48

Michael Matheson
203 Leave out section 48

Section 49

Michael Matheson
204 Leave out section 49

Section 50

Michael Matheson
205 In section 50, page 24, line 27, leave out <relation to> and insert <respect of>

Schedule 1

Michael Matheson
206 In schedule 1, page 44, line 28, at end insert—

<( ) in subsection (3), for the words “he can be delivered into the custody” there is substituted “the arrival”).>
207 In schedule 1, page 45, line 30, at end insert—

<In each of sections 169(2) and 170(2) of the Children’s Hearings (Scotland) Act 2011, the words “arrested without warrant and” are repealed.>

208 In schedule 1, page 46, line 2, leave out from <15A> to end of line 3 and insert <17A,>

209 In schedule 1, page 46, line 4, leave out <cross-heading> and insert <heading>

210 In schedule 1, page 46, line 5, at end insert—

<( ) section 43,>

211 In schedule 1, page 46, line 6, at end insert—

<(1) In section 18—

(a) in subsection (1), the words “or is detained under section 14(1) of this Act” are repealed,

(b) in subsection (2), the words “or detained” are repealed.

(2) In subsection (2)(a) of section 18B, for the words “under arrest or being detained” there is substituted “in custody”.

(3) In section 18D—

(a) in subsection (2)(a), the words “or detained” are repealed,

(b) in subsection (2)(b), for the words “under arrest or being detained” there is substituted “in custody”.

(4) In subsection (8)(b) of section 19AA, the words “or detention under section 14(1) of this Act” are repealed.>

212 In schedule 1, page 46, line 6, at end insert—

<In section 42—

(a) subsection (3) is repealed,

(b) subsection (7) is repealed,

(c) in subsection (8), for the words “subsection (7) above” there is substituted “section (Notice to local authority that under 18 to be brought before court) of the Criminal Justice (Scotland) Act 2015”,

(d) in subsection (9), the words “detained in a police station, or” are repealed,

(e) subsection (10) is repealed.>
Michael Matheson

213 In schedule 1, page 46, line 31, at end insert—

<In section 6D of the Road Traffic Act 1988, for subsection (2A) there is substituted—

“(2A) Instead of, or before, arresting a person under this section, a constable may detain the person at or near the place where the preliminary test was, or would have been, administered with a view to imposing on the person there a requirement under section 7.”.>

Michael Matheson

214 In schedule 1, page 46, line 31, at end insert—

<In Schedule 8 to the Terrorism Act 2000—

(a) in paragraph 18—

(i) in sub-paragraph (2), for the words from “and” at the end of paragraph (a) to the end of the sub-paragraph there is substituted—

“(ab) intimation is to be made under paragraph 16(1) whether the person detained requests that it be made or not, and

(ac) section 32 (right of under 18s to have access to other person) of the Criminal Justice (Scotland) Act 2015 applies as if the detained person were a person in police custody for the purposes of that section.”,

(ii) after sub-paragraph (3) there is inserted—

“(4) For the purposes of sub-paragraph (2)—

“child” means a person under 16 years of age,

“parent” includes guardian and any person who has the care of the child mentioned in sub-paragraph (2).”,

(b) in paragraph 20(1), the words “or a person detained under section 14 of that Act” are repealed,

(c) in paragraph 27—

(i) in sub-paragraph (4), paragraph (a) is repealed,

(ii) sub-paragraph (5) is repealed.>

Michael Matheson

215 In schedule 1, page 46, line 31, at end insert—

<In the schedule to the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, paragraph 2 is repealed.>

Michael Matheson

216 In schedule 1, page 46, line 33, at end insert—

<In the Children’s Hearings (Scotland) Act 2011—

(a) in section 65—

(i) for subsection (1) there is substituted—
“(1) Subsection (2) applies where the Principal Reporter is informed under subsection (2) of section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015 that a child is being kept in a place of safety under subsection (3) of that section.”,

(ii) in subsection (2), for the words “in the” there is substituted “in a”,

(b) in section 66(1), for sub-paragraph (vii) there is substituted—

“(vii) information under section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015, or”,

(c) in section 68(4)(e)(vi), for the words “section 43(5) of the Criminal Procedure (Scotland) Act 1995 (c.46)” there is substituted “section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015”,

(d) in section 69, for subsection (3) there is substituted—

“(3) If—

(a) the determination under section 66(2) is made following the Principal Reporter receiving information under section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015, and

(b) at the time the determination is made the child is being kept in a place of safety,

the children’s hearing must be arranged to take place no later than the third day after the Principal Reporter receives the information mentioned in paragraph (a).”,

(e) in section 72(2)(b), for the words “in the” there is substituted “in a”.>
After section 53

Michael Matheson

219 After section 53, insert—

<Powers to modify Part

Further provision about application of Part

(1) The Scottish Ministers may by regulations modify this Part to provide that some or all of it—

(a) applies in relation to persons to whom it would otherwise not apply because of—

(i) section (Disapplication in relation to service offences), or

(ii) section 53,

(b) does not apply in relation to persons arrested otherwise than in respect of an offence.

(2) The Scottish Ministers may by regulations make such modifications to this Part as seem to them necessary or expedient in relation to its application to persons mentioned in subsection (1).

(3) Regulations under this section may make different provision for different purposes.

(4) Regulations under this section are subject to the affirmative procedure.>

Michael Matheson

220 After section 53, insert—

<Further provision about vulnerable persons

(1) The Scottish Ministers may by regulations—

(a) amend subsections (2)(b) and (6) of section 25,

(b) amend subsections (1)(c), (3) and (5) of section 33,

(c) specify descriptions of persons who may for the purposes of subsection (2) of section 33 be considered suitable to provide support of the sort mentioned in subsection (3) of that section (including as to training, qualifications and experience).

(2) Regulations under subsection (1) are subject to the affirmative procedure.>

Before section 54

John Pentland

37 Before section 54, insert—

<Meaning of arrest

In this Part, “arrest” means—

(a) depriving a person of liberty of movement for the purpose of the purported investigation or prevention of crime, and

(b) taking the person to a police station in accordance with section 4.>
Section 54

Michael Matheson

221 In section 54, page 25, line 7, leave out <99> and insert <99(1)>

Section 56

Michael Matheson

222 In section 56, page 25, line 15, leave out from <if> to end of line 18 and insert <from the time the person is arrested by a constable until any one of the events mentioned in subsection (2) occurs.>

(2) The events are—

(a) the person is released from custody,
(b) the person is brought before a court in accordance with section 18(2),
(c) the Principal Reporter makes a direction under section 65(2)(b) of the Children’s Hearings (Scotland) Act 2011 that the person continue to be kept in a place of safety.>

After section 56

Mary Fee

46 After section 56, insert—

<Meaning of responsibility for a child>

(1) In this Part, “child” means a person who has not attained the age of 18 years.
(2) In this Part, references to a person who has responsibility for a child are references to—

(a) a person who is a parent or guardian having parental responsibilities or parental rights under any enactment in relation to a child,
(b) a person who—

(i) is otherwise legally liable to maintain a child, or
(ii) has care of a child.>
2nd 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 on the second day of 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**

**Publication of prosecutorial test**
69

**Aggravations as to people trafficking**
70, 71, 72

**Participation of detained person in proceedings through TV link**
73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 101

**Electronic proceedings**
83

**Authorisation under Part III of Police Act 1997**
84

**Evidence relating to sexual offence: legal representation**
105

**Police Negotiating Board for Scotland**
85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 90

**Police powers to stop and search**
50, 51, 52, 53

**Power to arrest without warrant: “offences not punishable by imprisonment” and “not in interests of justice”**
111, 112

**Provision of information to arrested person**
113, 114, 10, 11
Release from police custody prior to arrival at police station
115, 118

Drafting and other minor amendments
116, 117, 121, 192, 193, 194, 205, 221

Information to be given if sexual offence
119, 148

Requirements in relation to and rights of under 18s
120, 150, 151, 152, 55, 56, 167, 57, 58, 168, 59, 60, 170, 171, 172, 173, 174, 175, 176, 177, 178, 61, 179, 180, 181, 62, 182, 183, 63, 184, 185, 186, 64, 187, 188, 38, 32, 65, 196, 197, 222

Notes on amendments in this group
Amendment 58 pre-empts amendment 168
Amendment 63 pre-empts amendments 184 and 185
Amendment 38 pre-empts amendment 32

Keeping person in custody: period, authorisation, review etc.
122, 123, 12, 124, 125, 13, 126, 127, 128, 129, 130, 131, 132, 133, 14, 134, 15, 16, 135, 136, 137, 17, 138, 139, 140, 141

Arrest and custody of person with responsibility for child
39, 40, 110, 41, 42, 43, 44, 45, 46

Release on conditions or on undertaking: when and for how long conditions may be imposed
18, 142, 19, 145, 20, 147, 21, 22, 23, 24, 25, 26, 27, 154, 160, 161, 162, 163, 164

Notes on amendments in this group
Amendment 18 pre-empts amendment 142
Amendment 145 pre-empts amendment 20
Amendment 147 pre-empts amendment 21

Release on conditions or on undertaking: purposes for which conditions may be imposed and nature of conditions etc.
47, 143, 146, 155, 48, 156, 157

Notes on amendments in this group
Amendment 155 pre-empts amendment 48

Breach of liberation condition
144, 158, 159, 198, 199, 200, 201, 202, 203, 204

Time at which officially accused person to be brought before court
149

Circumstances where person may not be released without undertaking
153
Provision of information prior to interview
28, 165, 166

Circumstances in which interview may take place without solicitor present
29

Persons unable to understand what is happening or communicate effectively (including powers to make further provision)
30, 31, 169, 33, 189, 34, 190, 191, 220

Notes on amendments in this group
Amendment 31 pre-empts amendment 169
Amendment 34 pre-empts amendment 190

Care of drunken persons
195

Disclosure of information relating to person not officially accused
35, 36

Modification of enactments in connection with Part 1
206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216

Power to apply Part 1
217, 218, 219

Meaning of arrest
37
Present:

Christian Allard
John Finnie
Margaret McDougall
Margaret Mitchell
Michael Russell (Committee Substitute)

Roderick Campbell
Christine Grahame (Convener)
Alison McInnes
Elaine Murray (Deputy Convener)

Apologies were received from Gil Paterson.

**Criminal Justice (Scotland) Bill:** The Committee considered the Bill at Stage 2 (Day 2).

The following amendments were agreed to (without division): 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100 and 90.

Amendment 105 was disagreed to (by division: For 2, Against 7, Abstentions 0).

The following provisions were agreed to as amended: sections 86 and 87, and schedule 3.

The Committee ended consideration of the Bill for the day, amendment 90 having been disposed of.
The Convener: We move on to day 2 of stage 2 of the bill. I welcome Michael Matheson, the Cabinet Secretary for Justice. I also welcome the officials who are here to support the minister, although they are not permitted to participate in the proceedings.

Members should have copies of the bill, the marshalled list and groupings of amendments for consideration. We will not go beyond part 6 and schedule 3 today.

Before section 63

The Convener: Amendment 69, in the name of the cabinet secretary, is in a group on its own.

The Cabinet Secretary for Justice (Michael Matheson): Amendment 69 will insert a new section into the bill that will place an obligation on the Lord Advocate to publish what is sometimes known as the prosecutorial test.

When Lord Bonomy published his review, I undertook to consider whether any of the recommendations could be implemented during the current parliamentary session. After consulting the Lord Advocate, I am of the view that this is one such recommendation.

Amendment 69 would require the Lord Advocate to publish the prosecutorial test—the matters that prosecutors must take into account when deciding whether to commence and thereafter continue with criminal proceedings. The Crown Office already voluntarily publishes its “Prosecution Code”, which includes its current prosecutorial test. The amendment would place the voluntary arrangement on a statutory basis. Lord Bonomy was of the view that that would assist in ensuring transparency and consistency of decision making in criminal proceedings, and I agree.

The independence of the Lord Advocate is also, however, of vital importance, and I therefore want to stress that the wording of the test will remain entirely a matter for him.

I move amendment 69.

Elaine Murray: I have a question; I am not opposed to the amendment in any way. When we discussed the publication of the prosecutorial test, it was in connection with the abolition of the requirement for corroboration and whether some reassurance would be necessary under those circumstances. Given that that part of the bill has been dropped, why is publication still required?

Alison McInnes: I also have a question. I support the amendment as far as it goes. The public has a real appetite for more transparency in how the Crown Office and Procurator Fiscal Service reaches its decisions, but the cabinet secretary has chosen not to adopt Lord Bonomy’s recommendation in full. The draft legislation set out in the post-corroboration safeguards review also included provisions on regularly reviewing the test and consulting publicly on that. Will the minister say why he has not picked up on those two points?

Roderick Campbell: I support amendment 69. The key thing is to emphasise the distinction between putting the prosecutorial test in the statute and there being a requirement to publish it. I favour the latter. If the test was in the statute, it would be prescriptive. We are moving in the right direction.

Margaret Mitchell: I seek some clarification. As well as looking at initiating and continuing criminal proceedings, will there be an explanation of why a prosecution would not proceed?

Michael Matheson: On why we are placing the publication of the test in statute, the arrangement is voluntary at the moment but Lord Bonomy recommended that it should be put on a statutory footing. The reason behind lodging the amendment is that it will put a legal obligation on the Lord Advocate to publish the prosecutorial test.

We have not chosen to implement the recommendation about consultation for the test because we believe that the test itself should be left to the Lord Advocate to determine. There are important constitutional issues in the role and independence of the Lord Advocate when determining these matters. To provide for a consultation process would be to fetter or to seek to influence the Lord Advocate’s role to a degree. That is why we have not pursued the issue of consultation.

On Roderick Campbell’s point, the amendment will help to improve transparency and accountability in the process that is being put in place for decisions made by the Crown Office to be more open.

Margaret Mitchell will be aware that, earlier this year, new provisions in the Victims and Witnesses (Scotland) Act 2014 came into force that place a requirement on the Crown Office and Procurator Fiscal Service that, when a victim of a crime wishes to understand a decision not to pursue a case for a particular reason, they have the right to be provided with that information by the Crown and the prosecution.
Amendment 69 agreed to.

Section 83—General aggravation of offence

The Convener: Amendment 70, in the name of Michael Matheson, is grouped with amendments 71 and 72.

Michael Matheson: Amendments 70 to 72 seek to remove sections 83 to 85 in their entirety from the Criminal Justice (Scotland) Bill. Members will recall that part 6 of the bill as introduced included provisions in relation to people trafficking. Given that those provisions have now been included in the Human Trafficking and Exploitation (Scotland) Bill, I am seeking to remove the people trafficking provisions from this bill, as they are obviously no longer needed.

I move amendment 70.
Amendment 70 agreed to.

Section 84—Aggravation involving public official

Amendment 71 moved—[Michael Matheson]—and agreed to.

Section 85—Expressions in sections 83 and 84

Amendment 72 moved—[Michael Matheson]—and agreed to.

Section 86—Use of live television link

The Convener: Amendment 73, in the name of Michael Matheson, is grouped with amendments 74 to 82 and 101.

Michael Matheson: Section 86 of the bill as introduced makes provision in respect of the use of television links for the accused in criminal court cases. An important feature of the provisions is that, even when a case is of a nature that can be dealt with in this way, the court is required to consider whether it is in the interests of justice to do so. That ensures that the rights of the accused are fully protected in each individual case.

The group of amendments is largely technical. It arises as a result of consideration of the way in which the provisions were originally drafted and of further discussion with stakeholders.

Amendment 73 takes account of concerns expressed by stakeholders about the practical implications of convening ad hoc hearings—as distinct from the substantive hearing of a case—for the purpose of allowing the court to determine whether the substantive hearing of a case is to be dealt with using a TV link. The amendment makes it clear that the court can take the decision about the use of TV links before or during the substantive hearing of a case without the need to convene a separate ad hoc hearing.

Amendment 74 is consequential to amendment 73 and it reaffirms that the accused person can be required to participate, by TV link, in the part of the process that determines whether the substantive hearing is to take place by TV link, whether that part of the process occurs before or during a substantive hearing.

Amendments 75 to 78 follow on from amendments 73 and 74, remove the term “ad hoc hearing” from the bill, and make it clear that the provisions of the bill in respect of TV links apply during a substantive hearing of a case “or other proceedings”, which would include the part at which a decision on the use of TV links is taken.

Amendment 79 amends a provision in the bill as introduced that provides that the leading of evidence “as to a charge” is prohibited when the accused is participating by TV link. The effect of the amendment will be to specify that the prohibition applies only when the charge is on any indictment or complaint.

As a result of the amendment, there would be no absolute prohibition against the leading of evidence in other kinds of hearing—for example, one dealing with a breach of a community payback order—at which the person concerned is appearing by TV link. However, as in every other case, the court would still have to be satisfied, on a case-by-case basis, whether it is contrary to the interests of justice for evidence to be led while the accused is appearing by TV link.

Amendments 80 to 82 and 101 deal with the possible consequences of situations in which the court decides not to proceed to deal with the case before it using a TV link. It is anticipated that applications to have the accused appear by TV link will mostly be dealt with immediately before the calling of the substantive case. However, the court could refuse the application, and it will retain a power to revoke an application that it has previously granted. That might happen if, for instance, a technical issue arises with the TV link, or when further information comes to light during the substantive hearing that, in the view of the court, makes it no longer appropriate to proceed with a TV link.

It can be seen that practical difficulties might arise when the court decides not to proceed with the appearance of the accused by TV link. The accused may well need to be brought to court, which might not be readily achievable on the same day, so the postponement of the hearing could be necessary. When the accused is appearing from custody, any difficulty has to be balanced against the accused’s right to be brought promptly before the court. Amendment 80 therefore makes a
general provision that, when a court has refused an application to deal with a case by TV link, it may postpone the substantive hearing to a later day, rather than necessarily the next day. The bill as introduced could have been read as providing that the court could postpone a hearing only until the next court day when an application was refused or revoked.

Amendment 81 will remove a now redundant provision from the bill.

Amendment 82 deals with the effect of postponement. When the accused is not in police custody and the postponement is until the next day, that day and any days on which the court is not sitting will not count towards any time limits in the case. However, the provision will not apply when the accused is in police custody and awaiting a court appearance.

The effect of that approach is that, when a postponement is necessary for an accused in custody, the accused still has a right to argue that the requirements—under section 18 of the bill and the European convention on human rights—to be brought promptly to court have not been complied with. For example, if an accused has to spend an extra night in custody solely because an unsuccessful attempt was made to present him for appearance by TV link and there was no back-up plan to bring him to court, it remains open to the accused to argue that it would in fact have been practicable to have brought him before the court in time. It would then be up to the court to decide whether the circumstances provide sufficient justification for the delay.

Amendment 101 amends section 18, which gives effect to the convention right to be brought promptly before a court on arrest for suspicion of having committed an offence. The section provides that an accused who appears from custody by TV link is to be regarded as having been “brought before”—to use the term in the bill—a court by the end of the court’s first sitting day after the arrest. The effect of amendment 101 will be to ensure that someone who appears from custody by TV link is to be regarded as having been “brought before” the court only when the court has made a determination that the substantive hearing is to be dealt with in that way. Therefore, if the court decides that it would not be appropriate to deal with a custody case by TV link, the obligation to bring the accused promptly before the court remains in place, which will generally mean that the accused will be physically brought to court. Together with amendment 82, that ensures that the rights of the accused in custody to a prompt hearing are protected.

I move amendment 73.

Amendment 73 agreed to.
for the purpose of prevention or detection of serious crime. That includes entering or interfering with property or wireless telegraphy. Authorisations may be granted on the application of a staff officer of the commissioner, and the commissioner may also designate a staff officer to grant property interference authorisations in her absence in cases of urgency.

The 1997 act does not, however, contain a definition of a staff officer, and there is therefore a degree of uncertainty as to who may apply for those authorisations or grant them in the commissioner’s absence in urgent cases. The Scottish Government’s intention is that any member of the commissioner’s investigations staff should be capable of applying for property interference or surveillance authorisations and of being designated, if the commissioner considers it appropriate, to grant those authorisations, if they are urgent, in her absence.

The necessary provision was made in respect of surveillance authorisations under the Regulation of Investigatory Powers (Scotland) Act 2000, but unfortunately no such provision was made in respect of property interference authorisations.

Accordingly, amendment 84 is a clarifying amendment that inserts a definition of “staff officer” in part 3 of the Police Act 1997 for the purposes of property interference authorisations. That will ensure that members of staff who are directly employed by the commissioner and those who are seconded from police forces may apply for property interference authorisations or be designated by the commissioner to grant those authorisations in urgent cases where the commissioner is absent.

I move amendment 84.

John Finnie: As a tidying-up exercise, the change is welcome, as I believe the public want reassurance that the Police Investigations and Review Commissioner has the full range of powers and can act impartially and thoroughly.

Amendment 84 agreed to.

The Convener: I suspend the meeting again briefly for another change of officials.

11:34

Meeting suspended.

11:34

On resuming—

The Convener: Amendment 105, in the name of Margaret Mitchell, is in a group on its own.

Margaret Mitchell: I originally lodged amendments to the Victims and Witnesses (Scotland) Bill that would have had an effect similar to that of amendment 105. It is encouraging that the policy intention of those previous amendments gained support from other committee members during stage 2 of that bill.

Amendment 105 would require that independent legal advice be provided to victims of sexual offences at the point of a request for medical information and/or other personal details. Such legal advice would provide victims with information on their rights and would explicitly make them aware that they are able to refuse such requests. I know from the expressions of support for the amendment that have come from victims that the proposal is welcomed.

In some instances, legal aid would be required to be extended to cover such legal representation, although it could also be provided on a pro bono basis. Access to independent legal advice is a routine entitlement across European jurisdictions including France, Belgium, Austria, Finland, Greece, Spain and Sweden. In Ireland, which has an adversarial legal system, sexual offence complainers have a right to independent legal representation if the defence makes an application to the judge to introduce sexual-history evidence.

It is worth noting that, earlier this year, the reference group of the Bonomy review was supportive of provision through legal aid of independent legal representation for victims of crime in relation to issues affecting their rights, including their privacy. It is stipulated that ILR would relate to legal aid funding for legal advice and representation for victims who are not usually legally represented in criminal proceedings, and about whom documentary evidence may be sought by the defence either pre-trial or during the trial process. Representation would be confined to procedural issues and would not involve representation at the trial.

The proposed changes are, therefore, a practical way in which to help rape victims to avoid unnecessary distress during the court process. Currently, they have little opportunity to challenge the legality of use of private personal information in court. Furthermore, I understand that ministers may recently have made a determination that legal aid should not be made available to sexual offence complainers in circumstances in which their private records are being sought. If that is the case, that seems to me to be a great injustice. I would be grateful if the cabinet secretary could address that point.

It is important to stress that the experience of victim support groups is that the Crown is not robust enough in challenging applications under sections 274 and 275 of the 1995 act—a reason that was advanced previously for not supporting such an amendment. However, the real and most
vexing issue is that that type of evidence, including medical records and sensitive information, is routinely being used to discredit witnesses and to play to the prejudices and myths that are known to prevail around sexual offences. It is hoped that my amendment 105 would help, in no small measure, to address that issue and consequently to improve the chances of a successful conviction. The amendment is supported by the Law Society of Scotland.

I move amendment 105.

Roderick Campbell: I oppose amendment 105 for a number of reasons. First, we did not deal with the matter in any detail at stage 1, although it is an important issue. I think that we would need to have dealt with it in some detail if we were to agree to the amendment today. Secondly, the amendment would have wide ramifications beyond sexual history. In some jurisdictions—Denmark, for example—the provision was initially restricted to sexual offences but is now applied much more widely, so there is a floodgates issue.

I have some sympathy with the general principle of amendment 105. I recognise all too keenly that many complainers are mystified by the judicial system and do not quite understand that the Crown represents the public interest and not the complainer’s personal interest. I also recognise that there are occasions on which complainers may need legal advice. However, we have moved on a bit since Margaret Mitchell lodged her amendments to the Victims and Witnesses (Scotland) Bill, and funding is now being made available—I think that the figure is £215,000—from the Scottish Legal Aid Board to the Scottish women’s rights centre, for provision of legal advice on gender-based violence.

There are wider ramifications. Margaret Mitchell referred to the Bonomy report. It is fair to say that the report said that, as a general principle, it favoured independent legal representation, but it also favoured more work being done on the matter. Evidence on the effectiveness of sections 274 and 275 of the 1995 act has not been looked at since about 2007. If we are concerned about the principle, it seems to me that the effectiveness of those sections needs to be reviewed before we can go down the path of supporting Margaret Mitchell’s amendment 105.

Elaine Murray: We resisted a similar amendment to the Victims and Witnesses (Scotland) Bill and I am not yet convinced by the proposal, although Margaret Mitchell has clarified some aspects. There had been a feeling that there might be three different lots of legal representation in court, but Margaret Mitchell has clarified the intention.

Despite also having heard from the Law Society of Scotland on the issue, I am still not convinced that legal advice is what is most important for victims of sexual offences. For example, I heard last week about additional resources being made available to Rape Crisis Scotland and Scottish Women’s Aid to help them to support witnesses throughout the legal process. My feeling is that, when it comes to expenditure from the public purse, more holistic support might be more helpful to victims than additional legal advice at a particular point in the process. I am not yet convinced that the proposal in amendment 105 is the best way of supporting victims.

Alison McInnes: I commend Margaret Mitchell for the work that she has done on amendment 105 and for how she has developed the proposal. There is currently a significant imbalance in the system in relation to rape victims. The release of medical evidence, in particular, can have huge ramifications for the future health of the witness. It should not fall only on the voluntary sector to deal with the problem. There is a real issue that needs to be addressed, and I hope that the Government can do so by either supporting Margaret Mitchell’s amendment 105 or by bringing forward its own proposals. I will support Margaret Mitchell’s amendment.

Michael Matheson: The committee will recall that similar amendments were lodged during its consideration of the Victims and Witnesses (Scotland) Bill. Our concerns—then and now—about such amendments have never been about lack of sympathy with the intention behind them; I have every sympathy with the attempt to support alleged victims and to protect them from unnecessary distress.

The reasons for being unable to support the proposed reform remain the same as they were two years ago. Amendment 105 would represent a major innovation in our criminal law by introducing the complainer into the process as a third party separate from the Crown. In addition, giving complainers such rights in cases of one category of offence but not in others would be inconsistent. The committee has rightly, when it has scrutinised other proposed reforms, been very careful to consider practical implications and potential unintended consequences. Although I am sure that many members are as sympathetic as I am to the intentions behind the reform, I also consider that such a substantial change to Scots law and practice requires a great deal of further thought and consideration.

I have a suggested way forward on this important issue for the committee to consider, but before I elaborate on that, it may be helpful to explain the background to the current legal position.
It remains the case—as it was two years ago—that the protection that section 274 of the Criminal Procedure (Scotland) Act 1995 gives to a complainer in a sexual offence case is comprehensive. The provisions in section 275 of the 1995 act, which allow exemptions to that protection, require the court to consider the appropriate protection of the complainer’s dignity and privacy. Furthermore, the court must have regard to rights under the European convention on human rights that are relevant to the application. They include the complainer’s right under article 8 of ECHR; a court will balance appropriately the rights of the accused with the complainer’s rights to respect for private life. To my knowledge, no evidence has been provided that that is not done properly and that, instead, complainers should submit to further procedure, questioning and delays.

11:45
What has changed in the past two years—I place great emphasis on this—is the level of support that the Government has given to victims of sexual offences and complainers in such trials. The committee will recall that, as a result of debate during the passage of the Victims and Witnesses (Scotland) Bill and subsequently, grant funding was made available through the Scottish Legal Aid Board to support the establishment of the Scottish women’s rights centre to provide legal assistance to women who are affected by gender-based violence. That centre was established earlier this year. It provides a legal helpline that is staffed by volunteers from the University of Strathclyde law centre, and which gives information and signposts people to support services and other sources of advice. It has a full-time solicitor who supervises and undertakes the casework and representation of clients. It is also developing advice surgeries, which will eventually be held around Scotland and staffed by the project solicitor or local solicitors.

In a further clear demonstration of the Government’s commitment to making improvements for victims and to providing direct and sensitive support for access to justice for them, on 10 September I announced record funding for Rape Crisis Scotland. That was part of the unprecedented additional £20 million support package that was announced in March to tackle domestic abuse and sexual violence and to provide better support for victims. Some £1.85 million of additional resource is now being provided over three years to support victims of sex crimes across Scotland. The funding will open the first ever rape crisis services in Orkney and Shetland, in partnership with Scottish Women’s Aid.

The Government will also provide 80 per cent extra funding to each rape crisis centre until 2018. That will ensure consistency of provision across the country for victims. It will support those who have made the decision to report the crime to police as well as those who may be considering reporting. The additional funding will provide vital support for victims at the time when they most need it, and recognises that that support might be needed well beyond their experience of court.

That unprecedented package was announced after Margaret Mitchell had lodged amendment 105. The difficulties with independent legal representation have been debated before. The new package and the provision that is already in place for access to legal advice and other support give in a concrete fashion the kind of support that amendment 105 seeks to provide.

I have mentioned that there is a lack of evidence for such a major reform. However, I want to ensure that existing arrangements are operating as effectively as possible. I therefore propose a review of whether there is any cause for concern about the way that the courts deal with recovery and disclosure of confidential information relating to complainers. It would be timely to undertake that work alongside consideration of the effects in practice of the package of reforms that I mentioned earlier.

During a previous stage 2 meeting I referred to our plans to develop a holistic and balanced package of future reforms. That would cover consideration of Lord Bonomy’s recommendations, the requirement for corroboration reform and any other relevant issues. I consider the proposed review of disclosure of confidential information to be one of the relevant issues that should be included.

In the interests of clarity, it is important to recognise that Lord Bonomy’s review group did not make a recommendation on independent legal representation in this particular area.

I also reassure members that we intend to work closely with stakeholders when we undertake the work, in order to achieve consensus on future reforms. As I have mentioned, that work will begin later this year. I will, of course, keep this committee informed about its progress.

In the new circumstances that I have described, and with the possibility of gathering real evidence, I hope that I have been able to provide reassurance that amendment 105 is neither necessary nor appropriate at this time. I therefore ask Margaret Mitchell not to press it.

Margaret Mitchell: I will address a few of the points that have been made. The cabinet secretary, along with other members, referred to the £1.85 million for support for sexual offence
victims which, he pointed out, will be used partly to fund dedicated advocacy workers. However, Rape Crisis Scotland has confirmed that advocacy workers will not be lawyers and will not provide legal assistance. That is a totally separate issue, which amendment 105 would address.

On whether Lord Bonomy has addressed the specific issue that amendment 105 concerns, he has spoken about legal representation in relation to issues that affect a complainer’s privacy, which covers the point that I have raised.

In response to the concern about setting a rule or giving complainants in this area rights that would not be available to others, I note that that is surely how the law develops. We look at case law, and at where it is falling down and not working as fairly as it should do for victims of rape and sexual assault, who still routinely experience information being used to discredit them and to play to the prejudices of a jury. It is clear—as victim support groups will tell the committee clearly—that the Crown is not robust enough in challenging the so-called protections that are currently in place under sections 274 and 275 of the 1995 act.

Rather than defer the issue again, we could do something now to help those victims. If the Government is sincere in asserting that it wants to improve the conviction rates for rape and sexual assault, who still routinely experience information being used to discredit them and to play to the prejudices of a jury. It is clear—as victim support groups will tell the committee clearly—that the Crown is not robust enough in challenging the so-called protections that are currently in place under sections 274 and 275 of the 1995 act.

The Convener: The question is, that amendment 105 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 105 disagreed to.

Section 87—Establishment and functions

The Convener: Amendment 85, in the name of the cabinet secretary, is grouped with amendments 86 to 89, 91 to 100 and 90.

Michael Matheson: The amendments in this group relate to the establishment of a police negotiating board for Scotland. The body will negotiate pay and conditions of service for police officers in the Police Service of Scotland.

Unlike the Westminster Government, which abolished the Police Negotiating Board covering the United Kingdom in favour of a pay review body, I believe that police officers in Scotland should have the opportunity to negotiate their terms and conditions directly with those who manage and fund the service. The aim in establishing the PNBS is to create a modern negotiating body in which consensus on matters under its remit is the norm. Arbitration should be used only where all other options are exhausted and when both sides agree to it.

Following consultation with stakeholders, I propose Government amendments to the bill that relate to the functions and procedures of the PNBS in order to ensure that it can operate effectively. Amendments 87, 89, 96, 97 and 99 represent the most significant changes. They will deliver a commitment that was made by my predecessor to make arbitration on police pay legally binding on ministers. Together, those amendments provide a framework to ensure that, when the PNBS makes representations to ministers based on an arbitration award, ministers will be bound to take all reasonable steps to give effect to those representations.

However, I propose that binding arbitration should apply to pay and all pay-related matters under the remit of the PNBS. The detail of that will be set out in regulations subject to affirmative procedure. Essentially, there will be a maximum of two referrals to binding arbitration within a reporting year, one of which must automatically include the main annual pay award. My officials have discussed and agreed that approach with the official and staff sides of the PNBS.

Amendments 91 to 93, 95 and 100 remove the post of deputy chair, but amendment 94 allows for a temporary chair to be appointed if that is ever necessary.

Amendment 88 allows the constitution to define the PNBS’s reporting year in a way that suits its purposes, and amendment 98 ensures that regulations are required to bring the constitution into effect. I am sure that the committee will welcome the parliamentary scrutiny that amendment 98 provides for.

Amendment 85 will allow greater flexibility when ministers have required the PNBS to make representations, and amendment 86 removes police clothing and accoutrements from the remit of the PNBS in line with stakeholders’ wishes.
Finally, amendment 90 sets out the consequential and transitional provisions for the PNBS. The PNBS will come under the provisions of the Freedom of Information (Scotland) Act 2002, and its chairperson will be regulated under the Public Appointments and Public Bodies etc (Scotland) Act 2003. To allow the seamless transition from a UK body to a Scotland-only body, we are making provision for the recently appointed independent chair of the PNB to be chair of the PNBS and to ensure that all previous agreements made by the PNB UK are regarded as agreements within or involving the PNBS.

I move amendment 85.

The Convener: John Finnie, Margaret Mitchell and Roderick Campbell wish to comment on the amendment.

John Finnie: I will be brief, convener. Members will not be surprised to hear that I strongly welcome this development.

Roderick Campbell: I, too, strongly welcome it, and I think that it strikes an appropriate balance. I should, however, emphasise that arbitration should be the last resort, and that it is hoped that negotiation and conciliation will prevent any need for it from arising.

Margaret Mitchell: I seek some information from the cabinet secretary, who referred to the abolition of the Police Negotiating Board in England and Wales. That was a result of the Winsor report, and it happened because it was found that, when police pay moved from being index linked to another system, there was a failure to reach agreement. Is police pay at the moment index linked or is there another method of remuneration in place?

Secondly—picking up on what Rod Campbell said—I believe that arbitration was supposed to be the last resort, but the failure to reach agreement led to its becoming the norm. The Police Negotiating Board was therefore viewed as time consuming, costly and not in the best interests of either the police or the public. Can the cabinet secretary reassure me that he has looked at the issue and that he is quite confident that the same thing will not happen here in Scotland?

The Convener: I think that the issue went further than just the negotiating board, but do you wish to respond, cabinet secretary?

Michael Matheson: On the latter question, it would be fair to say that, from our discussions with the police, it is clear that they are very keen on having this type of provision facilitated in Scotland, and I detect no concern from them about the system being unduly bureaucratic or not being an effective way of dealing with these issues. I cannot speak for police officers in England and Wales, but I recall that significant concerns were expressed when the UK Government indicated that it wanted to move to a pay review system.

As for your first question, police pay is not index linked but negotiated with officials.

Amendment 85 agreed to.

Amendments 86 to 89 moved—[Michael Matheson] and agreed to.

Section 87, as amended, agreed to.

Schedule 3—Police Negotiating Board for Scotland

Amendments 91 to 100 moved—[Michael Matheson] and agreed to.

Schedule 3, as amended, agreed to.

After section 87

Amendment 90 moved—[Michael Matheson] and agreed to.

The Convener: Members will be delighted to hear that that ends consideration of amendments for today. I thank the cabinet secretary and his officials for their attendance and I suspend the meeting for a couple of minutes to allow them to clear the room.

11:59

Meeting suspended.
Criminal Justice (Scotland) Bill

3rd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

- Sections 57 to 61 Schedule 2
- Sections 62 to 87 Schedule 3
- Sections 1 to 52 Schedule 1
- Sections 53 to 56 Sections 88 to 91
- Long Title

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

Before section 1

Michael Matheson

223 Before section 1, insert—

<PART
POLICE PROCEDURES
CHAPTER 1
SEARCH OF PERSON NOT IN POLICE CUSTODY
Lawfulness of search by constable

Limitation on what enables search

(1) This section applies in relation to a person who is not in police custody.

(2) It is unlawful for a constable to search the person otherwise than—

(a) in accordance with a power of search conferred in express terms by an enactment, or

(b) under the authority of a warrant expressly conferring a power of search.>

Michael Matheson

224 Before section 1, insert—

<Cases involving removal of person

(1) A person who is not in police custody may be searched by a constable while the person is to be, or is being, taken to or from any place by virtue of any enactment, warrant or court order requiring or permitting the constable to do so.

(2) A search under this section is to be carried out for the purpose of ensuring that the person is not in, or does not remain in, possession of any item or substance that could cause harm to the person or someone else.
(3) Anything seized by a constable in the course of a search carried out under this section may be retained by the constable.>

Michael Matheson

225 Before section 1, insert—

<Duty to consider child’s best interests

(1) Subsection (2) applies when a constable is deciding whether to search a child who is not in police custody.

(2) In taking the decision, the constable must treat the need to safeguard and promote the wellbeing of the child as a primary consideration.

(3) For the purposes of this section, a child is a person who is under 18 years of age.>

Michael Matheson

226 Before section 1, insert—

<Miscellaneous and definitions

Provisions about possession of alcohol

(1) The Scottish Ministers may by regulations amend section 61 (confiscation of alcohol from persons under 18) of the Crime and Punishment (Scotland) Act 1997 so as to confer on a constable a power, exercisable in addition to the power in subsection (1) or (2) of that section—

(a) to search a person for alcoholic liquor,

(b) to dispose of anything found in the person’s possession that the constable believes to be such liquor.

(2) Prior to laying before the Scottish Parliament a draft of an instrument containing regulations under this section, the Scottish Ministers must consult publicly on the regulations that they are proposing to make.

(3) Regulations under this section are subject to the affirmative procedure.>

Michael Matheson

227 Before section 1, insert—

<Matters as to effect of sections (Limitation on what enables search), (Cases involving removal of person) and (Provisions about possession of alcohol)

(1) The day appointed for the coming into force of sections (Limitation on what enables search) and (Cases involving removal of person) is to be the same as the day from which a code of practice required by section (Contents of code of practice)(1) has effect by virtue of the first regulations made under section (Bringing code of practice into effect).

(2) If no regulations under section (Provisions about possession of alcohol) are made before the end of the 2 years beginning with the day from which a code of practice required by section (Contents of code of practice)(1) has effect by virtue of the first regulations made under section (Bringing code of practice into effect), section (Provisions about possession of alcohol) is to be regarded as repealed at the end of that period.>
Michael Matheson

228 Before section 1, insert—

<Meaning of constable etc.

In this Chapter—

“constable” has the meaning given by section 99(1) of the Police and Fire Reform (Scotland) Act 2012,

“police custody” has the same meaning as given for the purposes of Part 1 (see section 56).>

Michael Matheson

229 Before section 1, insert—

<Chapter 2

Code of practice

Making and status of code

Contents of code of practice

(1) The Scottish Ministers must make a code of practice about the carrying out of a search of a person who is not in police custody.

(2) A code of practice is to apply to the functions exercisable by a constable.

(3) In this section—

“constable” has the meaning given by section 99(1) of the Police and Fire Reform (Scotland) Act 2012,

“police custody” has the same meaning as given for the purposes of Part 1 (see section 56).

(4) In this Chapter, a reference to a code of practice means one required by subsection (1) (but see also section (Review of code of practice)(4)).>

Alison McInnes

Supported by: Margaret Mitchell

229A* As an amendment to amendment 229, line 7, at end insert—

< A code of practice must set out—

(a) the circumstances in which such a search may be carried out,

(b) the procedure to be followed in carrying out such a search,

(c) the record to be kept, and the right of any person to receive a copy of the record, of such a search,

(d) such other matters as the Scottish Ministers consider appropriate.>

Michael Matheson

230 Before section 1, insert—
Review of code of practice

(1) The Scottish Ministers may revise a code of practice in light of a review conducted under subsection (2).

(2) The Scottish Ministers must conduct a review of a code of practice as follows—
   (a) a review is to begin no later than 2 years after the code comes into effect,
   (b) subsequently, a review is to begin no later than 4 years after—
       (i) if the code is revised in light of the previous review under this subsection,
           the coming into effect of the revised code, or
       (ii) otherwise, the completion of the previous review under this subsection.

(3) In deciding when to conduct a review in accordance with subsection (2), the Scottish Ministers must have regard to representations put to them on the matter by—
   (a) the Scottish Police Authority,
   (b) the Chief Constable of the Police Service of Scotland, or
   (c) Her Majesty’s Inspectors of Constabulary in Scotland.

(4) For the purposes of—
   (a) section (Contents of code of practice)(2) and this section (except subsection (2)(a)), and
   (b) sections (Legal status of code of practice) to (Bringing code of practice into effect),

a reference to a code of practice includes a revised code as allowed by subsection (1).

Alison McInnes
Supported by: Margaret Mitchell

230A As an amendment to amendment 230, line 10, at end insert—

<( ) Each review conducted under subsection (2) must be completed within 6 months of the day it begins.>

Michael Matheson

231 Before section 1, insert—

<Legal status of code of practice

(1) A court or tribunal in civil or criminal proceedings must take a code of practice into account when determining any question arising in the proceedings to which the code is relevant.

(2) Breach of a code of practice does not of itself give rise to grounds for any legal claim whatsoever.>

Michael Matheson

232 Before section 1, insert—
<Procedure applying to code

Consultation on code of practice

(1) Prior to making a code of practice, the Scottish Ministers must consult publicly on a draft of the code.

(2) When preparing a draft of a code of practice for public consultation, the Scottish Ministers must consult—

(a) the Lord Justice General,
(b) the Faculty of Advocates,
(c) the Law Society of Scotland,
(d) the Scottish Police Authority,
(e) the Chief Constable of the Police Service of Scotland,
(f) the Scottish Human Rights Commission,
(g) the Commissioner for Children and Young People in Scotland, and
(h) such other persons as the Scottish Ministers consider appropriate.>

John Finnie

232A As an amendment to amendment 232, line 14, after <Scotland,> insert—

< ( ) the Police Investigations and Review Commissioner,>

Michael Matheson

233 Before section 1, insert—

<Bringing code of practice into effect

(1) A code of practice has no effect until a day appointed by regulations made by the Scottish Ministers.

(2) When laying before the Scottish Parliament a draft of an instrument containing regulations bringing a code of practice into effect, the Scottish Ministers must also lay a copy of the code.

(3) Regulations under this section are subject to the affirmative procedure.>

Alison McInnes
Supported by: Margaret Mitchell

233A As an amendment to amendment 233, line 4, at end insert—

<( ) As soon as practicable after the completion of each review under subsection (2) of section (Review of code of practice) the Scottish Ministers must appoint a day by regulations for the coming into effect of a revised code of practice (whether or not the code of practice has been revised in light of the review).>

Alison McInnes
Supported by: Margaret Mitchell

233B As an amendment to amendment 233, line 7, at end insert—
A draft of an instrument containing regulations bringing the first code of practice into effect must be laid before the Scottish Parliament no later than one year after the day of Royal Assent.

Alison McInnes
Supported by: John Finnie

50 Before section 1, insert—

<PART
SEARCH BY POLICE OF PERSON NOT ARRESTED

Police powers of search where person not arrested

(1) A constable must not search—

(a) a person,
(b) a vehicle, or
(c) anything which is in or on a vehicle,
without a warrant, unless subsection (3) applies.

(2) It is immaterial whether the person consents to being the subject of a search.

(3) This subsection applies where the search is conducted in accordance with—

(a) a power conferred by an enactment, and
(b) the terms of a code of practice issued by the Scottish Ministers under section (Police powers of search where person not arrested: code of practice).

(4) This Part applies to a vessel, aircraft or hovercraft as it applies to a vehicle.

(5) For the purposes of subsection (4), “vessel” includes any ship, boat, raft or other apparatus constructed or adapted for floating on water.

Alison McInnes
Supported by: John Finnie

51* Before section 1, insert—

<Police powers of search where person not arrested: code of practice

(1) The Scottish Ministers must, by regulations, set out a code of practice in connection with the exercise by constables of powers under any enactment to search a person who has not been arrested in connection with an offence.

(2) The code of practice must set out—

(a) the circumstances in which any such power may be exercised,
(b) the procedure to be followed in the exercise of any such power,
(c) the record to be kept, and the right of any person to receive a copy of the record, of the exercise of any such power, and
(d) such other matters as the Scottish Ministers consider appropriate.

(3) Regulations for the first code of practice under subsection (1) must be laid before the Parliament no later than the end of the period of one year beginning with the day of Royal Assent.
(4) The Scottish Ministers must—
   (a) keep the code of practice under review, and
   (b) lay regulations for a revised code of practice before the Parliament no later than 4
       years after the day on which regulations for the previous code of practice are laid.

(5) Before making regulations under subsection (1) setting out the first or a revised code of
     practice, the Scottish Ministers must consult—
     (a) the chief constable,
     (b) the Scottish Police Authority,
     (c) the Scottish Human Rights Commission,
     (d) the Commissioner for Children and Young People in Scotland, and
     (e) such other persons as they consider appropriate,
     on a draft of the code of practice.

(6) Regulations under subsection (1) are subject to the affirmative procedure.

John Finnie

51A* As an amendment to amendment 51, line 24, after <Scotland,> insert—
   <( ) the Police Investigations and Review Commissioner,>

Alison McInnes
Supported by: John Finnie

52 Before section 1, insert—
   <Police powers of search: annual reporting
   In subsection (3) of section 39 (the Scottish Police Authority’s annual report) of the
   Police and Fire Reform (Scotland) Act 2012—
   (a) the word “and” at the end of paragraph (a) is repealed, and
   (b) after paragraph (b) there is inserted “and
         (c) a record of the number of searches without a warrant of persons not
             arrested carried out by the Police Service during the reporting year,
             including in particular and where practicable a record of—
             (i) the number of instances where an individual has been searched on
                 more than one occasion,
             (ii) the profile, as regards age, gender and ethnic or national origin, of
                 those searched,
             (iii) the proportion of searches that resulted in anything being found,
             (iv) the proportion of searches that resulted in a matter being reported
                 to the procurator fiscal, and
             (v) the number of complaints made to the Police Service about the
                 conduct of searches.”.>
Section 1

Michael Matheson

111 In section 1, page 1, leave out lines 18 to 20 and insert—

<(  ) continue committing the offence, or
(  ) obstruct the course of justice in any way, including by—
    (i) seeking to avoid arrest, or
    (ii) interfering with witnesses or evidence.>

Michael Matheson

112 In section 1, page 1, line 20, at end insert—

<(  ) For the avoidance of doubt, an offence is to be regarded as not punishable by imprisonment for the purpose of subsection (2) only if no person convicted of the offence can be sentenced to imprisonment in respect of it.>

Margaret Mitchell

234 Leave out section 1

Section 2

Michael Matheson

113 In section 2, page 1, line 25, at end insert—

<(  ) Where—
    (a) a constable who is not in uniform arrests a person under section 1, and
    (b) the person asks to see the constable’s identification,
    the constable must show identification to the person as soon as reasonably practicable.>

Margaret Mitchell

235 Leave out section 2

Section 3

Michael Matheson

114 In section 3, page 2, line 9, at end insert <, and

(  ) of the person’s right to have—
    (i) intimation sent to a solicitor under section 35, and
    (ii) access to a solicitor under section 36.>

Margaret Mitchell

236 Leave out section 3
Section 4

Michael Matheson

115 In section 4, page 2, line 12, at end insert—

<(2) Subsection (1) ceases to apply, and the person must be released from police custody immediately, if—

(a) the person has been arrested without a warrant,
(b) the person has not yet arrived at a police station in accordance with this section, and
(c) in the opinion of a constable there are no reasonable grounds for suspecting that the person has committed—

(i) the offence in respect of which the person was arrested, or
(ii) an offence arising from the same circumstances as that offence.

(3) For the avoidance of doubt, subsection (1) ceases to apply if, before arriving at a police station in accordance with this section, the person is released from custody under section 19(2).>

Margaret Mitchell

237 Leave out section 4

Section 5

Alison McInnes

238 In section 5, page 2, line 22, at end insert—

<( ) section 24,>

Alison McInnes

239 In section 5, page 2, line 24, at end insert—

<( ) section 33,>

John Finnie

10 In section 5, page 2, line 28, leave out <(verbally or in writing)>

John Finnie

11 In section 5, page 2, line 30, at end insert <(and, regardless of whether those Articles allow or require information to be provided in writing only, the person must be provided with all such information both verbally and in writing).>

Margaret Mitchell

240 Leave out section 5
Section 6

Michael Matheson

116 In section 6, page 2, line 32, at end insert <by a constable>

Michael Matheson

117 In section 6, page 3, line 5, at end insert—

<( ) the time at which the person ceases to be in police custody.>

Michael Matheson

118 In section 6, page 3, line 5, at end insert—

<( ) Where relevant, there must be recorded in relation to an arrest by a constable—

(a) the reason that the constable who released the person from custody under subsection (2) of section 4 formed the opinion mentioned in paragraph (c) of that subsection,>

Michael Matheson

119 In section 6, page 3, line 9, at end insert—

<( ) the time at which, and the identity of the person by whom, the person is informed of the matters mentioned in section (Information to be given if sexual offence),>

Michael Matheson

120 In section 6, page 3, line 14, at end insert—

<( ) section (Social work involvement in relation to under 18s),>

Michael Matheson

121 In section 6, page 3, leave out lines 17 to 21

Michael Matheson

122 In section 6, page 3, line 27, after <any> insert <custody>

Michael Matheson

123 In section 6, page 3, line 29, at end insert—

<( ) If a constable considers whether to give authorisation under section (Authorisation for keeping in custody beyond 12 hour limit) there must be recorded—

(a) whether a reasonable opportunity to make representations has been afforded in accordance with subsection (4)(a) of that section,

(b) if the opportunity referred to in paragraph (a) has not been afforded, the reason for that,

(c) the time, place and outcome of the constable’s decision, and

(d) if the constable’s decision is to give the authorisation—
(i) the grounds on which it is given,

(ii) the time at which, and the identity of the person by whom, the person is informed and reminded of things in accordance with section (Information to be given on authorisation under section (Authorisation for keeping in custody beyond 12 hour limit)), and

(iii) the time at which the person requests that intimation be sent under section (Information to be given on authorisation under section (Authorisation for keeping in custody beyond 12 hour limit))(3)(a) and the time at which it is sent.

( ) Where a person is held in police custody by virtue of authorisation given under section (Authorisation for keeping in custody beyond 12 hour limit) there must be recorded—

(a) the time, place and outcome of any custody review under section 9,

(b) the time at which any interview in the circumstances described in section 13(6) begins and the time at which it ends.

Margaret Mitchell

241 Leave out section 6

Section 7

John Finnie

12 In section 7, page 4, line 13, after <who> insert—

< ( ) is of the rank of sergeant or above, and

( )>

After section 7

Alison McInnes

242 After section 7, insert—

<Time limit for keeping in custody: children and vulnerable adults

(1) Subsection (2) applies where authorisation has been given under section 7 to keep in custody—

(a) a person under 18 years of age, or

(b) a person 18 years of age or over who appears to a constable to have a mental disorder.

(2) A person to whom this subsection applies may not be held in police custody for a continuous period of more than 6 hours.

(3) In subsection (1)(b), “mental disorder” has the meaning given in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.>
Section 8

Michael Matheson
124 In section 8, page 4, line 22, after <reason> insert <that>

Michael Matheson
125 In section 8, page 4, line 23, at end insert <and the fact that the person may be kept in custody for a further 12 hours under section (Authorisation for keeping in custody beyond 12 hour limit)>

John Pentland
13 In section 8, page 4, line 23, at end insert <, and
   ( ) the circumstances in which the 12 hour limit may be extended to 24 hours under section (Extension of 12 hour limit to 24 hours in exceptional circumstances)>

Section 9

Michael Matheson
126 In section 9, page 4, line 25, leave out from beginning to <consider> in line 29 and insert—
   <(1) A custody review must be carried out—
      (a) when a person has been held in police custody for a continuous period of 6 hours by virtue of authorisation given under section 7, and
      (b) again, if authorisation to keep the person in police custody is given under section (Authorisation for keeping in custody beyond 12 hour limit), when the person has been held in custody for a continuous period of 6 hours by virtue of that authorisation.
   (2) A custody review entails the consideration by a constable of>

Michael Matheson
127 In section 9, page 4, line 31, leave out <The constable mentioned in subsection (2) must be> and insert <A custody review must be carried out by>

Michael Matheson
128 Move section 9 to after section 12

Section 10

Michael Matheson
129 In section 10, page 5, line 2, after <7(4)> insert <, (Authorisation for keeping in custody beyond 12 hour limit)(3)(b)>

Michael Matheson
130 In section 10, page 5, line 12, at end insert <fully>
Mary Fee

39* In section 10, page 5, line 12, at end insert—

<( ) the effect of keeping the person in custody on the wellbeing of a child for whom the person has responsibility,>

Michael Matheson

131 Move section 10 to after section 12

Section 11

Michael Matheson

132 In section 11, page 5, line 17, leave out from <a> to <(a)> in line 18 and insert—

<(a) a person>

Michael Matheson

133 In section 11, page 5, line 20, leave out <time> and insert <period>

John Pentland

14 In section 11, page 5, line 21, at beginning insert <Subject to section (Extension of 12 hour limit to 24 hours in exceptional circumstances),>

Michael Matheson

134 In section 11, page 5, line 22, at end insert <, or

( ) authorisation to keep the person in custody has been given under section (Authorisation for keeping in custody beyond 12 hour limit)>

After section 11

John Pentland

15 After section 11, insert—

<Extension of 12 hour limit to 24 hours in exceptional circumstances

(1) Section 11(2) does not apply if the conditions in subsection (2) are met.

(2) The conditions are that a constable who is of the rank of inspector or above is satisfied—

(a) that the test in section 10 is met, and

(b) that there are exceptional circumstances that justify continuing to hold the person in police custody.

(3) A person may continue to be held in police custody by virtue of subsection (2) for more than a continuous period of 24 hours only if a constable charges the person with an offence.>
(4) Without prejudice to the generality of subsection (2)(b), “exceptional circumstances” includes circumstances—

(a) where a doctor certifies that the person is, whether due to the influence of alcohol or drugs or for some other reason, not fit to be interviewed before the end of the 12 hour period mentioned in section 11,

(b) where the constable mentioned in subsection (2) considers that—

(i) access to another person in accordance with section 32, or

(ii) support from another person in accordance with section 33, cannot be provided in sufficient time before the end of the 12 hour period,

(c) where the constable mentioned in subsection (2) considers that continuing to hold the person in police custody is essential to ensure the safety of the person or another person.

(5) The Scottish Ministers may, by regulations subject to the affirmative procedure, modify subsection (4) to further define, add to, remove or otherwise modify circumstances that may constitute “exceptional circumstances” for the purposes of subsection (2)(b).>

Section 12

John Pentland

16 In section 12, page 5, line 33, after <11> insert <, and as the case may be the 24 hour period mentioned in section (Extension of 12 hour limit to 24 hours in exceptional circumstances),>

After section 12

Michael Matheson

135 After section 12, insert—

<Authorisation for keeping in custody beyond 12 hour limit

(1) A constable may give authorisation for a person who is in police custody to be kept in custody for a continuous period of 12 hours, beginning when the 12 hour period mentioned in section 11 ends.

(2) Authorisation may be given only by a constable who—

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

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

(3) Authorisation may be given only if—

(a) the person has not been held in police custody by virtue of authorisation given under this section in connection with—

(i) the offence in connection with which the person is in police custody, or

(ii) an offence arising from the same circumstances as that offence, and

(b) the constable is satisfied that—

(i) the test in section 10 will be met when the 12 hour period mentioned in section 11 ends,
(ii) the offence in connection with which the person is in police custody is an indictable offence, and
(iii) the investigation is being conducted diligently and expeditiously.

(4) Before deciding whether or not to give authorisation the constable must—
   (a) where practicable afford a reasonable opportunity to make verbal or written representations to—
      (i) the person, or
      (ii) if the person so chooses, the person’s solicitor, and
   (b) have regard to any representations made.

(5) If authorisation is given, it is deemed to be withdrawn if the person is released from police custody before the 12 hour period mentioned in section 11 ends.

(6) Subsection (7) applies when—
   (a) by virtue of authorisation given under this section, a person has been held in police custody for a continuous period of 12 hours (beginning with the time at which the 12 hour period mentioned in section 11 ended), and
   (b) during that period the person has not been charged with an offence by a constable.

(7) The person may continue to be held in police custody only if a constable charges the person with an offence.

Michael Matheson

136 After section 12, insert—

<Information to be given on authorisation under section (Authorisation for keeping in custody beyond 12 hour limit)

(1) This section applies when authorisation to keep a person in custody is given under section (Authorisation for keeping in custody beyond 12 hour limit).

(2) The person must be informed—
   (a) that the authorisation has been given, and
   (b) of the grounds on which it has been given.

(3) The person—
   (a) has the right to have the information mentioned in subsection (2) intimated to a solicitor, and
   (b) must be informed of that right.

(4) The person must be reminded about any right which the person has under Chapter 5.

(5) Subsection (4) does not require that a person be reminded about a right to have intimation sent under either of the following sections if the person has exercised the right already—
   (a) section 30,
   (b) section 35.

(6) Information to be given under subsections (2), (3)(b) and (4) must be given to the person as soon as reasonably practicable after the authorisation is given.
(7) Where the person requests that intimation be sent under subsection (3)(a), the intimation must be sent as soon as reasonably practicable.

Section 13

Michael Matheson

137 In section 13, page 6, line 17, leave out <section 11> and insert <sections 11 and (Authorisation for keeping in custody beyond 12 hour limit)>

John Pentland

17 In section 13, page 6, line 17, at end insert <and as the case may be the 24 hour period mentioned in section (Extension of 12 hour limit to 24 hours in exceptional circumstances).>

Michael Matheson

138 In section 13, page 6, line 18, leave out <time> and insert <period>

Michael Matheson

139 In section 13, page 6, line 21, leave out <to a hospital for that purpose> and insert <as quickly as is reasonably practicable—

(i) to a hospital for the purpose of receiving medical treatment, or

(ii) to a police station from a hospital to which the person was taken for the purpose of receiving medical treatment.>

Michael Matheson

140 In section 13, page 6, line 22, leave out <time> and insert <period>

Michael Matheson

141 In section 13, page 6, line 23, after <to> insert <or from>

Section 14

John Finnie

18 In section 14, page 6, line 32, leave out from <and> to end of line 33

Michael Matheson

142 In section 14, page 6, leave out line 33 and insert—

<( ) either—

(i) the person has not been subject to a condition imposed under subsection (2) in connection with a relevant offence, or

(ii) it has not been more than 28 days since the first occasion on which a condition was imposed on the person under subsection (2) in connection with a relevant offence.>
Elaine Murray

47 In section 14, page 6, line 35, leave out from <ensuring> to end of line 36 and insert <securing—

(a) that the person surrenders to custody if required to do so,
(b) that the person does not commit an offence while released,
(c) that the person does not interfere with a witness or otherwise obstruct the course of the investigation into a relevant offence,
(d) the protection of the person, or
(e) if the person is under 18 years of age, the welfare or interests of the person.>

Michael Matheson

143 In section 14, page 6, line 36, at end insert—

<(  ) A condition under subsection (2)—

(a) may not require the person to be in a specified place at a specified time,
(b) may require the person—

(i) not to be in a specified place, or category of place, at a specified time, and
(ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period.>

John Finnie

19 In section 14, page 6, line 36, at end insert—

<(2A) When imposing a condition under subsection (2), the constable is to specify the period for which the condition is to apply.

(2B) The period specified under subsection (2A) is to be such period, not exceeding 28 days, as the appropriate constable considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence.

(2C) In any case where a person has previously been subject to a condition imposed under subsection (2) in connection with a relevant offence, the reference in subsection (2B) to 28 days is to be read as a reference to 28 days minus the number of days on which the person was so subject.>

Michael Matheson

144 In section 14, page 6, line 38, leave out <Chapter 7> and insert <schedule (Breach of liberation condition)>

Michael Matheson

145 In section 14, page 6, line 39, leave out subsection (4)

John Finnie

20 In section 14, page 6, line 39, leave out from <(1)(c)> to end of line 3 on page 7 and insert <(2C)>
Michael Matheson
146 In section 14, page 7, line 7, leave out <inspector> and insert <sergeant>

Section 15

Michael Matheson
147 In section 15, page 7, line 15, leave out from <last> to <14(4)> and insert <day falling 28 days after the first occasion on which a condition was imposed on the person under section 14(2) in connection with a relevant offence>

John Finnie
21 In section 15, page 7, line 15, leave out <28 day period described in section 14(4)> and insert <period specified under section 14(2A)>

Section 17

John Finnie
22 In section 17, page 8, line 17, at end insert <, ( ) to have the period for which the condition applies reduced.>

John Finnie
23 In section 17, page 8, line 20, after <condition> insert <or, as the case may be, the period specified under section 14(2A)>

John Finnie
24 In section 17, page 8, line 21, after <imposed> insert <or, as the case may be, specified>

John Finnie
25 In section 17, page 8, line 23, after <condition> insert <or, as the case may be, specify an alternative period>

John Finnie
26 In section 17, page 8, line 25, after <imposed> insert <or period specified>

John Finnie
27 In section 17, page 8, line 26, at end insert <or, as the case may be, specified under section 14(2A).>

Before section 18

Michael Matheson
148 Before section 18, insert—
<Information to be given if sexual offence>

(1) Subsection (2) applies when—

(a) a person is in police custody having been arrested under a warrant in respect of a sexual offence to which section 288C of the 1995 Act applies, or

(b) a person—

(i) is in police custody having been arrested without a warrant, and

(ii) since being arrested, the person has been charged by a constable with a sexual offence to which section 288C of the 1995 Act applies.

(2) The person must be informed as soon as reasonably practicable—

(a) that the person’s case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A) of the 1995 Act) in the course of the proceedings may be conducted only by a lawyer,

(b) that it is, therefore, in the person’s interests to get the professional assistance of a solicitor, and

(c) that if the person does not engage a solicitor for the purposes of the conduct of the person’s case at or for the purposes of the hearing, the court will do so.>

Section 18

Michael Matheson

149 In section 18, page 9, line 1, leave out subsection (2) and insert—

<(2) The person must be brought before a court (unless released from custody under section 19)—

(a) if practicable, before the end of the first day on which the court is sitting after the day on which this subsection began to apply to the person, or

(b) as soon as practicable after that.>

Michael Matheson

101 In section 18, page 9, line 6, at end insert <(by virtue of a determination by the court that the person is to do so by such means)>

After section 18

Michael Matheson

150 After section 18, insert—

<Under 18s to be kept in place of safety prior to court>

(1) Subsection (2) applies when—

(a) a person is to be brought before a court in accordance with section 18(2), and

(b) either—

(i) a constable believes the person is under 16 years of age, or
(ii) the person is subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

10 (2) The person must (unless released from custody under section 19) be kept in a place of safety until the person can be brought before the court.

(3) The place of safety in which the person is kept must not be a police station unless an appropriate constable certifies that keeping the person in a place of safety other than a police station would be—

(a) impracticable,

(b) unsafe, or

(c) inadvisable due to the person’s state of health (physical or mental).

(4) A certificate under subsection (3) must be produced to the court when the person is brought before it.

15 (5) In this section—

“an appropriate constable” means a constable of the rank of inspector or above,

“place of safety” has the meaning given in section 202(1) of the Children’s Hearings (Scotland) Act 2011.>

John Finnie

150A As an amendment to amendment 150, line 21, leave out <inspector> and insert <superintendent>.

Michael Matheson

151 After section 18, insert—

<Notice to parent that under 18 to be brought before court>

(1) Subsection (2) applies when a person who is 16 years of age or over and subject to a supervision order or under 16 years of age—

(a) is to be brought before a court in accordance with section 18(2), or

(b) is released from police custody on an undertaking given under section 19(2)(a).

(2) A parent of the person mentioned in subsection (1) (if one can be found) must be informed of the following matters—

(a) the court before which the person is to be brought,

(b) the date on which the person is to be brought before the court,

(c) the general nature of the offence which the person has been officially accused of committing, and

(d) that the parent’s attendance at the court may be required under section 42 of the 1995 Act.

(3) Subsection (2) does not require any information to be given to a parent if a constable has grounds to believe that giving the parent the information mentioned in that subsection may be detrimental to the wellbeing of the person mentioned in subsection (1).

(4) In this section—
“parent” includes guardian and any person who has the care of the person mentioned in subsection (1),
“supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

Michael Matheson

152 After section 18, insert—

Notice to local authority that under 18 to be brought before court

(1) The appropriate local authority must be informed of the matters mentioned in subsection (4) when—

(a) a person to whom either subsection (2) or (3) applies is to be brought before a court in accordance with section 18(2), or

(b) a person to whom subsection (2) applies is released from police custody on an undertaking given under section 19(2)(a).

(2) This subsection applies to—

(a) a person who is under 16 years of age,

(b) a person who is—

(i) 16 or 17 years of age, and

(ii) subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

(3) This subsection applies to a person if—

(a) a constable believes the person is 16 or 17 years of age,

(b) since being arrested, the person has not exercised the right to have intimation sent under section 30, and

(c) on being informed or reminded of the right to have intimation sent under that section after being officially accused, the person has declined to exercise the right.

(4) The matters referred to in subsection (1) are—

(a) the court before which the person mentioned in paragraph (a) or (as the case may be) (b) of that subsection is to be brought,

(b) the date on which the person is to be brought before the court, and

(c) the general nature of the offence which the person has been officially accused of committing.

(5) For the purpose of subsection (1), the appropriate local authority is the local authority in whose area the court referred to in subsection (4)(a) sits.

Section 19

Michael Matheson

153 In section 19, page 9, line 20, at end insert—
Where a person is in custody as mentioned in subsection (1)(a), the person may not be released from custody under subsection (2)(b).

**Section 20**

Michael Matheson

154 In section 20, page 9, line 28, at end insert 'while subject to the undertaking'

Michael Matheson

155 In section 20, page 9, line 30, leave out from 'commit' to end of line 33 and insert—

(i) commit an offence,

(ii) interfere with witnesses or evidence, or otherwise obstruct the course of justice,

(iii) behave in a manner which causes, or is likely to cause, alarm or distress to witnesses,

(b) any further condition that a constable considers necessary and proportionate for the purpose of ensuring that any conditions imposed under paragraph (a) are observed.

Elaine Murray

48 In section 20, page 9, line 32, leave out from 'ensuring' to end of line 33 and insert 'securing—

(i) that the person surrenders to custody if required to do so,

(ii) that the person does not interfere with a witness or otherwise obstruct the course of the investigation into the offence in connection with which the person is in police custody,

(iii) the protection of the person, or

(iv) if the person is under 18 years of age, the welfare or interests of the person.

Michael Matheson

156 In section 20, page 9, line 34, leave out '<curfew>' and insert—

(a) a condition requiring the person—

(i) to be in a specified place at a specified time, and

(ii) to remain there for a specified period,

(b) a condition requiring the person—

(i) not to be in a specified place, or category of place, at a specified time, and

(ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period

Michael Matheson

157 In section 20, page 9, line 35, leave out subsection (5) and insert—
<(5) For the imposition of a condition under subsection (3)(b)—
(a) if it is of the kind described in subsection (4)(a), the authority of a constable of the rank of inspector or above is required,
(b) if it is of any other kind, the authority of a constable of the rank of sergeant is required.>

Michael Matheson
158 In section 20, page 9, line 38, leave out <Chapter 7> and insert <schedule (Breach of liberation condition)>

Michael Matheson
159 Before schedule 1, insert—

<SCHEDULE
(introduced by sections 14(3) and 20(6))
BREACH OF LIBERATION CONDITION

Offence of breaching condition

1 (1) A person commits an offence if, without reasonable excuse, the person breaches a liberation condition by reason of—
(a) failing to comply with an investigative liberation condition,
(b) failing to appear at court as required by the terms of an undertaking, or
(c) failing to comply with the terms of an undertaking, other than the requirement to appear at court.

(2) Sub-paragraph (1) does not apply where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (in which case see paragraph 3).

(3) It is competent to amend a complaint to include an additional charge of an offence under sub-paragraph (1) at any time before the trial of a person in summary proceedings for—
(a) the original offence, or
(b) an offence arising from the same circumstances as the original offence.

(4) In sub-paragraph (3), “the original offence” is the offence in connection with which—
(a) an investigative liberation condition was imposed, or
(b) an undertaking was given.

Sentencing for the offence

2 (1) A person who commits an offence under paragraph 1(1) is liable on summary conviction to—
(a) a fine not exceeding level 3 on the standard scale, or
(b) imprisonment for a period—
   (i) where conviction is in the justice of the peace court, not exceeding 60 days,
   (ii) where conviction is in the sheriff court, not exceeding 12 months.
(2) A penalty under sub-paragraph (1) may be imposed in addition to any other penalty which it is competent for the court to impose, even if the total of penalties imposed exceeds the maximum penalty which it is competent to impose in respect of the original offence.

(3) The reference in sub-paragraph (2) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—
   (a) where the sentences are imposed at the same time (whether or not in relation to the same complaint), framing the sentences so that they have effect consecutively,
   (b) where the sentences are imposed at different times, framing the sentence imposed later so that (if the earlier sentence has not been served) the later sentence has effect consecutive to the earlier sentence.

(4) Sub-paragraph (3)(b) is subject to section 204A (restriction on consecutive sentences for released prisoners) of the 1995 Act.

(5) Where a person is to be sentenced in respect of an offence under paragraph 1(1), the court may remit the person for sentence in respect of it to any court which is considering the original offence.

(6) In sub-paragraphs (2) and (5), “the original offence” is the offence in connection with which—
   (a) the investigative liberation condition was imposed, or
   (b) the undertaking was given.

Breach by committing offence

3 (1) This paragraph applies—
   (a) where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (“offence O”), but
   (b) only if the fact that offence O was committed while the person was subject to the liberation condition is specified in the complaint or indictment.

(2) In determining the penalty for offence O, the court must have regard—
   (a) to the fact that offence O was committed in breach of a liberation condition,
   (b) if the breach is by reason of the person’s failure to comply with the terms of an investigative liberation condition, to the matters mentioned in paragraph 4(1),
   (c) if the breach is by reason of the person’s failure to comply with the terms of an undertaking other than the requirement to appear at court, to the matters mentioned in paragraph 5(1).

(3) Where the maximum penalty in respect of offence O is specified by (or by virtue of) an enactment, the maximum penalty is increased—
   (a) where it is a fine, by the amount equivalent to level 3 on the standard scale,
   (b) where it is a period of imprisonment—
      (i) as respects conviction in the justice of the peace court, by 60 days,
      (ii) as respects conviction in the sheriff court or the High Court, by 6 months.
(4) The maximum penalty is increased by sub-paragraph (3) even if the penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(5) In imposing a penalty in respect of offence O, the court must state—
(a) where the penalty is different from that which the court would have imposed had sub-paragraph (2) not applied, the extent of and the reasons for that difference,
(b) otherwise, the reasons for there being no such difference.

Matters for paragraph 3(2)(b)
4 (1) For the purpose of paragraph 3(2)(b), the matters are—
(a) the number of offences in connection with which the person was subject to investigative liberation conditions when offence O was committed,
(b) any previous conviction the person has for an offence under paragraph 1(1)(a),
(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of paragraph 3(2), from that which the court would have imposed but for that paragraph.

(2) In sub-paragraph (1)—
(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under paragraph 1(1)(a),
(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this sub-paragraph, as references to any provision that is equivalent to paragraph 3(2).

(3) Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to determine.

Matters for paragraph 3(2)(c)
5 (1) For the purpose of paragraph 3(2)(c), the matters are—
(a) the number of undertakings to which the person was subject when offence O was committed,
(b) any previous conviction the person has for an offence under paragraph 1(1)(c),
(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of paragraph 3(2), from that which the court would have imposed but for that paragraph.

(2) In sub-paragraph (1)—
(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under paragraph 1(1)(c),
(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this sub-paragraph, as references to any provision that is equivalent to paragraph 3(2).
(3) Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to determine.

**Evidential presumptions**

6 (1) In any proceedings in relation to an offence under paragraph 1(1), the facts mentioned in sub-paragraph (2) are to be held as admitted unless challenged by preliminary objection before the person’s plea is recorded.

(2) The facts are—

(a) that the person breached an undertaking by reason of failing to appear at court as required by the terms of the undertaking,

(b) that the person was subject to a particular—

(i) investigative liberation condition, or

(ii) condition under the terms of an undertaking.

(3) In proceedings to which sub-paragraph (4) applies—

(a) something in writing, purporting to impose investigative liberation conditions and bearing to be signed by a constable, is sufficient evidence of the terms of the investigative liberation conditions imposed under section 14(2),

(b) something in writing, purporting to be an undertaking and bearing to be signed by the person said to have given it, is sufficient evidence of the terms of the undertaking at the time that it was given,

(c) a document purporting to be a notice (or a copy of a notice) under section 16 or 21, is sufficient evidence of the terms of the notice.

(4) This sub-paragraph applies to proceedings—

(a) in relation to an offence under paragraph 1(1), or

(b) in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment.

(5) In proceedings in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment, that fact is to be held as admitted unless challenged—

(a) in summary proceedings, by preliminary objection before the person’s plea is recorded, or

(b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the 1995 Act.

**Interpretation**

7 In this schedule—

(a) references to an investigative liberation condition are to a condition imposed under section 14(2) or 17(3)(b) subject to any modification by notice under section 16(1) or (5)(a),

(b) references to an undertaking are to an undertaking given under section 19(2)(a),

(c) references to the terms of an undertaking are to the terms of an undertaking subject to any modification by—

(i) notice under section 21(1), or
(ii) the sheriff under section 22(3)(b).>

Section 21

Michael Matheson
160 In section 21, page 10, line 11, leave out subsection (3)

Michael Matheson
161 In section 21, page 10, line 13, leave out subsection (4)

Michael Matheson
162 In section 21, page 10, line 22, leave out <or (3)>

After section 21

Michael Matheson
163 After section 21, insert—

<Rescission of undertaking

(1) The procurator fiscal may by notice rescind an undertaking given under section 19(2)(a) (whether or not the person who gave it is to be prosecuted).

(2) The rescission of an undertaking by virtue of subsection (1) takes effect at the end of the day on which the notice is sent.

(3) Notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.

(4) A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person is likely to fail to comply with the terms of an undertaking given under section 19(2)(a).

(5) Where a person is arrested under subsection (4) or subsection (6) applies—

(a) the undertaking referred to in subsection (4) or (as the case may be) (6) is rescinded, and

(b) this Part applies as if the person, since being most recently arrested, has been charged with the offence in connection with which the person was in police custody when the undertaking was given.

(6) This subsection applies where—

(a) a person who is subject to an undertaking given under section 19(2)(a) is in police custody (otherwise than as a result of having been arrested under subsection (4)), and

(b) a constable has reasonable grounds for suspecting that the person has failed, or (if liberated) is likely to fail, to comply with the terms of the undertaking.

(7) The references in subsections (4) and (6)(b) to the terms of the undertaking are to the terms of the undertaking subject to any modification by—

(a) notice under section 21(1), or
(b) the sheriff under section 22(3)(b).>

Michael Matheson

164 After section 21, insert—

<Expiry of undertaking>

(1) An undertaking given under section 19(2)(a) expires—

(a) at the end of the day on which the person who gave it is required by its terms to appear at a court, or

(b) if subsection (2) applies, at the end of the day on which the person who gave it is brought before a court having been arrested under the warrant mentioned in that subsection.

(2) This subsection applies where—

(a) a person fails to appear at court as required by the terms of an undertaking given under section 19(2)(a), and

(b) on account of that failure, a warrant for the person’s arrest is granted.

(3) The references in subsections (1)(a) and (2)(a) to the terms of the undertaking are to the terms of the undertaking subject to any modification by notice under section 21(1).>

Section 23

John Finnie

28 In section 23, page 11, line 10, after <committing> insert <and again immediately before the interview commences>

Michael Matheson

165 In section 23, page 11, line 11, at end insert—

<( ) of the general nature of that offence,>

Michael Matheson

166 In section 23, page 11, line 24, at end insert—

<( ) Where a person is to be interviewed by virtue of authorisation granted under section 27, before the interview begins the person must be informed of what was specified by the court under subsection (6) of that section.>

Section 24

John Finnie

29 In section 24, page 12, line 2, leave out from <if> to end of line 5

Alison McInnes

243 In section 24, page 12, line 2, leave out second <the> and insert <an appropriate>
In section 24, page 12, line 3, leave out from <in> to end of line 5 and insert <as a result of an urgent need to prevent—
(a) interference with evidence in connection with the offence under consideration, or
(b) interference with or physical harm to a person.>

In section 24, page 12, line 13, at end insert—

( ) In this section, “appropriate constable” means a constable who—
(a) is of the rank of superintendent or above, and
(b) has not been involved in the investigation in connection with which the person is in police custody.

Section 25

In section 25, page 12, line 15, leave out <Subsections (2) and (3) apply> and insert <Subsection (2) applies>

Supported by: Alison McInnes

In section 25, page 12, line 17, leave out <16> and insert <18>

Supported by: Alison McInnes

In section 25, page 12, line 18, after <age,> insert—

(aa) the person is 16 or 17 years of age and subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011,

Supported by: Alison McInnes

In section 25, page 12, line 18, leave out <16> and insert <18>

Supported by: Alison McInnes

In section 25, page 12, line 18, leave out <, owing to mental disorder,>

Supported by: Alison McInnes

In section 25, page 12, line 22, leave out subsections (3) to (5)

In section 25, page 12, line 27, leave out <(2)(b)> and insert <(2)(aa) or (b)>
John Finnie
31 In section 25, page 12, leave out lines 36 and 37

Michael Matheson
169 In section 25, page 12, line 36, leave out <328(1)> and insert <328>

Section 30

Elaine Murray
59 In section 30, page 16, line 9, leave out <16> and insert <18>

Elaine Murray
60 In section 30, page 16, line 13, leave out <16> and insert <18>

Alison McInnes
246 In section 30, page 16, line 19, leave out <a> and insert <an appropriate>

Michael Matheson
170 In section 30, page 16, line 22, at end insert <, or
   (c) safeguarding and promoting the wellbeing of the person in custody, where a
      constable believes that person to be under 18 years of age.>

Michael Matheson
171 In section 30, page 16, line 22, at end insert—
   <( ) The sending of intimation may be delayed by virtue of subsection (5)(c) only for so long
      as is necessary to ascertain whether a local authority will arrange for someone to visit
      the person in custody under section (Social work involvement in relation to under
      18s)(2).>

Alison McInnes
247 In section 30, page 16, line 22, at end insert—
   <( ) In this section and section 32, “appropriate constable” means a constable who—
      (a) is of the rank of inspector or above, and
      (b) has not been involved in the investigation in connection with which the person is
         in police custody.>

Michael Matheson
172 In section 30, page 16, line 25, leave out <a person> and insert <the person in custody>
Section 31

Michael Matheson

173 In section 31, page 16, line 31, at end insert—

<( ) Subsection (2) does not apply if—

(a) a constable believes that the person in custody is 16 or 17 years of age, and

(b) the person in custody requests that the person to whom intimation is to be sent under section 30(1) is not asked to attend at the place where the person in custody is being held.>

Michael Matheson

174 In section 31, page 16, line 32, leave out <Subsection (4) applies> and insert <Subsections (3A) and (4) apply>

Michael Matheson

175 In section 31, page 16, leave out lines 35 and 36 and insert—

<(b) the person to whom intimation is sent by virtue of section 30(3), if asked to attend at the place where the person in custody is being held, claims to be unable or unwilling to attend within a reasonable time.>

Michael Matheson

176 In section 31, page 16, line 36, at end insert—

<( ) a local authority, acting under section (Social work involvement in relation to under 18s)(8)(a), has advised against sending intimation to the person to whom intimation is to be sent by virtue of section 30(3).>

Michael Matheson

177 In section 31, page 16, line 36, at end insert—

<(3A) Section 30(3) ceases to have effect.>

Michael Matheson

178 In section 31, page 16, line 37, after <intimation> insert <to an appropriate person>

Elaine Murray

61 In section 31, page 17, line 2, leave out from second <or> to end of line 5

Michael Matheson

179 In section 31, page 17, line 6, leave out <(4)(a)> and insert <(4)>

Michael Matheson

180 In section 31, page 17, line 12, leave out <30(4)(b)> and insert <30(5)(a) or (b)>
In section 31, page 17, line 14, leave out <30(4)(b)> and insert <30(5)(a) or (b)>

Section 32

In section 32, page 17, line 17, leave out <16> and insert <18>

In section 32, page 17, line 20, leave out <at least one> and insert <a>

In section 32, page 17, line 21, leave out from <who> to end of line 22

In section 32, page 17, line 23, leave out subsection (2)

In section 32, page 17, line 24, leave out <at least one> and insert <a>

In section 32, page 17, leave out line 26

In section 32, page 17, line 27, at end insert—

<(  ) Access to a person in custody under subsection (1) or (2) need not be permitted to more
than one person at the same time.>

In section 32, page 17, line 28, leave out <or (2)>

In section 32, page 17, line 29, after <as> insert <an appropriate constable considers that>

In section 32, page 17, line 34, leave out <a person> and insert <the person in custody>

After section 32

After section 32, insert—
Social work involvement in relation to under 18s

(1) Intimation of the fact that a person is in police custody and the place where the person is in custody must be sent to a local authority as soon as reasonably practicable if—
   (a) a constable believes that the person may be subject to a supervision order, or
   (b) by virtue of subsection (5)(c) of section 30, a constable has delayed sending intimation in respect of the person under subsection (1) of that section.

(2) A local authority sent intimation under subsection (1) may arrange for someone to visit the person in custody if—
   (a) the person is subject to a supervision order, or
   (b) the local authority—
      (i) believes the person to be under 16 years of age, and
      (ii) has grounds to believe that its arranging someone to visit the person would best safeguard and promote the person’s wellbeing (having regard to the effect of subsection (4)(a)).

(3) Before undertaking to arrange someone to visit the person in custody under subsection (2), the local authority must be satisfied that anyone it arranges to visit the person in custody will be able to make the visit within a reasonable time.

(4) Where a local authority arranges for someone to visit the person in custody under subsection (2)—
   (a) sections 30 and 32 cease to have effect, and
   (b) the person who the local authority has arranged to visit the person in custody must be permitted access to the person in custody.

(5) In exceptional circumstances, access under subsection (4)(b) may be refused or restricted so far as the refusal or restriction is necessary—
   (a) in the interests of—
      (i) the investigation or prevention of crime, or
      (ii) the apprehension of offenders, or
   (b) for the wellbeing of the person in custody.

(6) Where a local authority sent intimation under subsection (1) confirms that the person in custody is—
   (a) over 16 years of age, and
   (b) subject to a supervision order,
sections 30 to 32 are to be applied in respect of the person as if a constable believes the person to be under 16 years of age.

(7) Subsection (8) applies where a local authority might have arranged for someone to visit a person in custody under subsection (2) but—
   (a) chose not to do so, or
   (b) was precluded from doing so by subsection (3).

(8) The local authority may—
(a) advise a constable that the person to whom intimation is to be sent by virtue of section 30(3) should not be sent intimation if the local authority has grounds to believe that sending intimation to that person may be detrimental to the wellbeing of the person in custody, and

(b) give advice as to who might be an appropriate person to a constable considering that matter under section 31(5) (and the constable must have regard to any such advice).

(9) In this section, “supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

Section 33

John Pentland

38 In section 33, page 18, line 1, leave out from beginning to <over,>

Elaine Murray

32 In section 33, page 18, line 1, leave out <18> and insert <16>

John Finnie

33 In section 33, page 18, line 2, leave out <owing to mental disorder,>

Michael Matheson

189 In section 33, page 18, line 3, leave out <to> and insert—

<( )>

John Finnie

34 In section 33, page 18, leave out lines 17 and 18

Michael Matheson

190 In section 33, page 18, line 17, leave out <328(1)> and insert <328>

Section 34

Alison McInnes

249 Leave out section 34 and insert—

<Provision of appropriate adults

Each local authority must ensure the provision of persons who may for the purposes of subsection (2) of section 33 be considered suitable to provide support of the sort mentioned in subsection 3 of that section (including as to training, qualifications and experience).>
Duty to contact named person: persons with responsibility for a child

(1) This section applies where a constable believes that a person in police custody has responsibility for a child.

(2) With a view to ensuring the wellbeing of the child, the constable must send information of the type specified in subsection (3) to an individual identified in relation to the child under section 20 or 21 of the Children and Young People (Scotland) Act 2014.

(3) The information to be sent is to contain details of any matters relevant to the child’s wellbeing, and to the child’s wellbeing needs.

(4) Information falls within subsection (3) if the constable considers that—
   (a) it is likely to be relevant to the exercise of the named person functions in relation to the child or young person,
   (b) it is necessary or expedient for the purposes of the exercise of any of the named person functions,
   (c) it ought to be provided for that purpose, and
   (d) the provision of the information would not prejudice the conduct of any criminal investigation or the prosecution of any offence.

(5) In considering for the purpose of subsection (4)(c) whether information ought to be provided, the constable is, so far as reasonably practicable, to ascertain and have regard to the views of the child.

(6) In having regard to the views of a child under subsection (5), the constable is to take account of the child’s age and maturity.

(7) For the purpose of subsection (4)(c) the information ought to be provided only if the likely benefit to the wellbeing of the child arising in consequence of doing so outweighs any likely adverse effect on that wellbeing arising from doing so.

(8) The Scottish Ministers may by regulations make further provision relating to the sending of information under subsection (2) above.

(9) Regulations under subsection (8) are subject to the affirmative procedure.>
Alison McInnes

251 In section 36, page 19, line 13, leave out from <in> to end of line 15 and insert <as a result of an urgent need to prevent—
   (a) interference with evidence in connection with the offence under consideration, or
   (b) interference with, or physical harm to, a person.>

Alison McInnes

252 In section 36, page 19, line 16, leave out from second <consultation> to <example)> in line 17 and insert <, except in exceptional circumstances, consultation in person but may include initial>

Michael Matheson

192 In section 36, page 19, line 16, leave out second <means> and insert <method>

Michael Matheson

193 In section 36, page 19, line 17, leave out <means of>

Alison McInnes

253 In section 36, page 19, line 18, at end insert—
   <( ) In subsection (2), “appropriate constable” means a constable who—
   (a) is of the rank of superintendent or above, and
   (b) has not been involved in the investigation in connection with which the person is in police custody.>

Section 39

Michael Matheson

194 In section 39, page 20, leave out line 2 and insert—
   <( ) cause the person to participate in an identification procedure.>

After section 40

Alison McInnes

254 After section 40, insert—
   <Powers in relation to biometric information
   (1) Section 18 (prints, samples etc. in criminal investigations) of the 1995 Act is amended as follows.
   (2) After subsection (7A)(d) there is inserted—
      “(e) other biometric information.”.
   (3) After subsection (7B) there is inserted—>
“(7C) In subsection (7A)(e) “biometric information” means any information (in any form and produced and stored by any method) about a person’s physical or behavioural characteristics or features which—

(a) is capable of being used in order to establish or verify the identity of the person, and

(b) is obtained or recorded with the intention that it be used for the purposes of a biometric recognition system.

(7D) Biometric information may, in particular, include images or recordings of or information about—

(a) the features of an iris or any other part of the eye,

(b) the features of any other part of the face,

(c) a person’s voice, handwriting or gait.

(7E) In subsection (7C) “biometric recognition system” means a system which, by means of equipment operating automatically—

(a) obtains or records information about a person’s physical or behavioural characteristics or features, and

(b) compares the information with stored information that has previously been so obtained or recorded, or otherwise processes the information, for the purpose of establishing or verifying the identity of the person, or otherwise determining whether the person is recognised by the system.

(7F) The Scottish Ministers may by regulations subject to the affirmative procedure modify subsection (7D) by—

(a) adding a physical or behavioural characteristic or feature to, or removing such a characteristic or feature from, that subsection, or

(b) modifying the description of a physical or behavioural characteristic for the time being included in that subsection.”.

Michael Matheson

195 After section 40, insert—

"<Care of drunken persons

Taking drunk persons to designated place

(1) Where—

(a) a person is liable to be arrested in respect of an offence by a constable without a warrant, and

(b) the constable is of the opinion that the person is drunk,

the constable may take the person to a designated place (and do so instead of arresting the person).

(2) Nothing done under subsection (1)—

(a) makes a person liable to be held unwillingly at a designated place, or

(b) prevents a constable from arresting the person in respect of the offence referred to in that subsection."
(3) In this section, “designated place” is any place designated by the Scottish Ministers for the purpose of this section as a place suitable for the care of drunken persons.

Section 42

Alison McInnes
53 In section 42, page 20, line 18, at end insert—
   <(  ) search a child.>

Mary Fee
41 In section 42, page 20, line 19, at end insert <or person who has responsibility for a child>

Mary Fee
42 In section 42, page 20, line 20, after <child> insert <or person who has responsibility for a child>

Mary Fee
43 In section 42, page 20, line 21, after <child> insert <or person who has responsibility for a child>

Mary Fee
44 In section 42, page 20, line 22, after <child> insert <or person>

Mary Fee
45 In section 42, page 20, line 23, after <child> insert <or person who has responsibility for a child>

Elaine Murray
65 In section 42, page 20, line 25, leave out <well-being> and insert <best interests>

Alison McInnes
255 In section 42, page 20, line 25, at end insert—
   <(  ) A decision under subsection (1)(b) or (c) must be exercised for the shortest possible period of time.>

After section 42

Michael Matheson
196 After section 42, insert—
   <Duties in relation to children in custody
   
   (1) A child who is in police custody at a police station is, so far as practicable, to be prevented from associating with any adult who is officially accused of committing an offence other than an adult to whom subsection (2) applies.
(2) This subsection applies to an adult if a constable believes that it may be detrimental to the wellbeing of the child mentioned in subsection (1) to prevent the child and adult from associating with one another.

(3) For the purposes of this section—

“child” means person who is under 18 years of age,

“adult” means person who is 18 years of age or over.

Michael Matheson

197 After section 42, insert—

<Duty to inform Principal Reporter if child not being prosecuted

(1) Subsections (2) and (3) apply if—

(a) a person is being kept in a place of safety in accordance with section (Under 18s to be kept in place of safety prior to court)(2) when it is decided not to prosecute the person for any relevant offence, and

(b) a constable has reasonable grounds for suspecting that the person has committed a relevant offence.

(2) The Principal Reporter must be informed, as soon as reasonably practicable, that the person is being kept in a place of safety under subsection (3).

(3) The person must be kept in a place of safety under this subsection until the Principal Reporter makes a direction under section 65(2) of the Children’s Hearings (Scotland) Act 2011.

(4) An offence is a “relevant offence” for the purpose of subsection (1) if—

(a) it is the offence with which the person was officially accused, leading to the person being kept in the place of safety in accordance with section (Under 18s to be kept in place of safety prior to court)(2), or

(b) it is an offence arising from the same circumstances as the offence mentioned in paragraph (a).

(5) In this section, “place of safety” has the meaning given in section 202(1) of the Children’s Hearings (Scotland) Act 2011.

Elaine Murray

35 After section 42, insert—

<Duty not to disclose information relating to person not officially accused

(1) Subject to section (Disclosure of information: person released under section 14), a constable must not without reasonable cause release the information specified in subsection (2) to any person other than an authorised person.

(2) The information is information relating to a person not officially accused of an offence which—

(a) identifies that person, or

(b) is likely to be sufficient to allow that person to be identified, as having been arrested in connection with an offence.
(3) For the purposes of subsection (1), an “authorised person” means—
   (a) a constable,
   (b) a person to whom intimation must or may be sent under Chapter 5 of this Part,
   (c) a person other than a constable to whom the information must be disclosed for the purpose of ensuring the proper conduct of the investigation into the offence.

(4) For the purposes of subsection (1), a determination that there is reasonable cause to disclose information must be made—
   (a) only if it is in the public interest to do so, and
   (b) by a constable who is of the rank of inspector or above.

Elaine Murray

36 After section 42, insert—

<Disclosure of information: person released under section 14>

(1) Without prejudice to the generality of section (Duty not to disclose information relating to person not officially accused), a constable may disclose qualifying information relating to an alleged offence to a person mentioned in subsection (2) where the conditions in subsection (3) are met.

(2) The persons are—
   (a) a person—
      (i) against whom, or
      (ii) against whose property,
           the acts which constituted the alleged offence were directed,
   (b) in the case where the death of a person mentioned in paragraph (a) was (or appears to have been) caused by the alleged offence, a prescribed relative of the person,
   (c) a person who is likely to give evidence in criminal proceedings which are likely to be instituted against a person in respect of the alleged offence,
   (d) a person who has given a statement in relation to the alleged offence to a constable.

(3) The conditions are that disclosure of the information—
   (a) is in the public interest or is otherwise likely to promote the safety and wellbeing of a person mentioned in subsection (2), and
   (b) is authorised by a constable who is of the rank of inspector or above.

(4) In this section—
   “prescribed” means prescribed by the Scottish Ministers by order subject to the negative procedure,
   “qualifying information” means information that—
   (a) identifies a person as having been arrested in connection with an alleged offence and subsequently released under section 14,
(b) sets out such information relating to any conditions imposed on the person under section 14(2) as the constable authorising the disclosure considers appropriate.

(5) The Scottish Ministers may, by order subject to the negative procedure, modify the definition of “qualifying information” in subsection (4).>
Section 50

Michael Matheson

205 In section 50, page 24, line 27, leave out <relation to> and insert <respect of>

Margaret Mitchell

256 Leave out section 50

Section 51

Margaret Mitchell

257 Leave out section 51

Schedule 1

Michael Matheson

206 In schedule 1, page 44, line 28, at end insert—

<( ) in subsection (3), for the words “he can be delivered into the custody” there is substituted “the arrival”>,

Michael Matheson

207 In schedule 1, page 45, line 30, at end insert—

<In each of sections 169(2) and 170(2) of the Children’s Hearings (Scotland) Act 2011, the words “arrested without warrant and” are repealed.>

Margaret Mitchell

259 In schedule 1, page 46, line 2, leave out <14> and insert <15>

Michael Matheson

208 In schedule 1, page 46, line 2, leave out from <15A> to end of line 3 and insert <17A,>

Michael Matheson

209 In schedule 1, page 46, line 4, leave out <cross-heading> and insert <heading>

Michael Matheson

210 In schedule 1, page 46, line 5, at end insert—

<( ) section 43,>

Michael Matheson

211 In schedule 1, page 46, line 6, at end insert—

<(1) In section 18—>
(a) in subsection (1), the words “or is detained under section 14(1) of this Act” are repealed,
(b) in subsection (2), the words “or detained” are repealed.

(2) In subsection (2)(a) of section 18B, for the words “under arrest or being detained” there is substituted “in custody”.

(3) In section 18D—
(a) in subsection (2)(a), the words “or detained” are repealed,
(b) in subsection (2)(b), for the words “under arrest or being detained” there is substituted “in custody”.

(4) In subsection (8)(b) of section 19AA, the words “or detention under section 14(1) of this Act” are repealed.

Michael Matheson

212 In schedule 1, page 46, line 6, at end insert—

<In section 42—
(a) subsection (3) is repealed,
(b) subsection (7) is repealed,
(c) in subsection (8), for the words “subsection (7) above” there is substituted “section (Notice to local authority that under 18 to be brought before court) of the Criminal Justice (Scotland) Act 2015”,
(d) in subsection (9), the words “detained in a police station, or” are repealed,
(e) subsection (10) is repealed.>

Michael Matheson

213 In schedule 1, page 46, line 31, at end insert—

<In section 6D of the Road Traffic Act 1988, for subsection (2A) there is substituted—
“(2A) Instead of, or before, arresting a person under this section, a constable may detain the person at or near the place where the preliminary test was, or would have been, administered with a view to imposing on the person there a requirement under section 7.”.>

Michael Matheson

214 In schedule 1, page 46, line 31, at end insert—

<In Schedule 8 to the Terrorism Act 2000—
(a) in paragraph 18—
(i) in sub-paragraph (2), for the words from “and” at the end of paragraph (a) to the end of the sub-paragraph there is substituted—
“(ab) intimation is to be made under paragraph 16(1) whether the person detained requests that it be made or not, and
(ac) section 32 (right of under 18s to have access to other person) of the Criminal Justice (Scotland) Act 2015 applies as if the detained person were a person in police custody for the purposes of that section.”,

(ii) after sub-paragraph (3) there is inserted—

“(4) For the purposes of sub-paragraph (2)—

“child” means a person under 16 years of age,

“parent” includes guardian and any person who has the care of the child mentioned in sub-paragraph (2).”,

(b) in paragraph 20(1), the words “or a person detained under section 14 of that Act” are repealed,

(c) in paragraph 27—

(i) in sub-paragraph (4), paragraph (a) is repealed,

(ii) sub-paragraph (5) is repealed.

Michael Matheson

215 In schedule 1, page 46, line 31, at end insert—

<In the schedule to the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, paragraph 2 is repealed.>

Michael Matheson

216 In schedule 1, page 46, line 33, at end insert—

<In the Children’s Hearings (Scotland) Act 2011—

(a) in section 65—

(i) for subsection (1) there is substituted—

“(1) Subsection (2) applies where the Principal Reporter is informed under subsection (2) of section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015 that a child is being kept in a place of safety under subsection (3) of that section.”,

(ii) in subsection (2), for the words “in the” there is substituted “in a”,

(b) in section 66(1), for sub-paragraph (vii) there is substituted—

“(vii) information under section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015, or”,

(c) in section 68(4)(e)(vi), for the words “section 43(5) of the Criminal Procedure (Scotland) Act 1995 (c.46)” there is substituted “section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015”,

(d) in section 69, for subsection (3) there is substituted—

“(3) If—
(a) the determination under section 66(2) is made following the Principal Reporter receiving information under section (\textit{Duty to inform Principal Reporter if child not being prosecuted}) of the Criminal Justice (Scotland) Act 2015, and

(b) at the time the determination is made the child is being kept in a place of safety,

the children’s hearing must be arranged to take place no later than the third day after the Principal Reporter receives the information mentioned in paragraph (a).”,

(c) in section 72(2)(b), for the words “in the” there is substituted “in a”.

\textbf{After section 52}

\textbf{Alison McInnes}

258 After section 52, insert—

\textit{<Code of practice about investigative functions>}

\textbf{Code of practice about investigative functions}

(1) The Lord Advocate must issue a code of practice on—

(a) the questioning, and recording of questioning, of persons suspected of committing offences, and

(b) the conduct of identification procedures involving such persons.

(2) The Lord Advocate—

(a) must keep the code of practice issued under subsection (1) under review,

(b) may from time to time revise the code of practice.

(3) The code of practice is to apply to the functions exercisable by or on behalf of—

(a) the Police Service of Scotland,

(b) such other bodies as are specified in the code (being bodies responsible for reporting offences to the procurator fiscal).

(4) Before issuing the code of practice, the Lord Advocate must consult publicly on a draft of the code.

(5) When preparing a draft of the code of practice for public consultation, the Lord Advocate must consult—

(a) the Lord Justice General,

(b) the Faculty of Advocates,

(c) the Law Society of Scotland,

(d) the Scottish Police Authority,

(e) the chief constable of the Police Service of Scotland,

(f) the Scottish Human Rights Commission,

(g) the Commissioner for Children and Young People in Scotland, and

(h) such other persons as the Lord Advocate considers appropriate.
(6) The Lord Advocate must lay before the Scottish Parliament a copy of the code of practice issued under this section.

(7) Where a court determines in criminal proceedings that evidence has been obtained in breach of the code of practice, the evidence is inadmissible in the proceedings unless the court is satisfied that admitting the evidence would not result in unfairness in the proceedings.

(8) Breach of the code of practice does not of itself give rise to grounds for any legal claim whatsoever.

(9) Subsections (3) to (8) apply to a revised code of practice under subsection (2)(b) as they apply to the code of practice issued under subsection (1).

**Before section 53**

Michael Matheson

217 **Before section 53, insert—**

<Disapplication in relation to service offences>

(1) References in this Part to an offence do not include a service offence.

(2) Nothing in this Part applies in relation to a person who is arrested in respect of a service offence.

(3) In this section, “service offence” has the meaning given by section 50(2) of the Armed Forces Act 2006.

**Section 53**

Michael Matheson

218 **In section 53, page 25, line 4, at end insert—**

<(  ) Subsection (1) is subject to paragraph 18 of Schedule 8 to the Terrorism Act 2000.>

**After section 53**

Michael Matheson

219 **After section 53, insert—**

Powers to modify Part

Further provision about application of Part

(1) The Scottish Ministers may by regulations modify this Part to provide that some or all of it—

(a) applies in relation to persons to whom it would otherwise not apply because of—

(i) section (Disapplication in relation to service offences), or

(ii) section 53,

(b) does not apply in relation to persons arrested otherwise than in respect of an offence.
(2) The Scottish Ministers may by regulations make such modifications to this Part as seem to them necessary or expedient in relation to its application to persons mentioned in subsection (1).

(3) Regulations under this section may make different provision for different purposes.

(4) Regulations under this section are subject to the affirmative procedure.

Michael Matheson

220 After section 53, insert—

<Further provision about vulnerable persons>

(1) The Scottish Ministers may by regulations—

(a) amend subsections (2)(b) and (6) of section 25,
(b) amend subsections (1)(c), (3) and (5) of section 33,
(c) specify descriptions of persons who may for the purposes of subsection (2) of section 33 be considered suitable to provide support of the sort mentioned in subsection (3) of that section (including as to training, qualifications and experience).

(2) Regulations under subsection (1) are subject to the affirmative procedure.

Before section 54

John Pentland

37 Before section 54, insert—

<Meaning of arrest>

In this Part, “arrest” means—

(a) depriving a person of liberty of movement for the purpose of the purported investigation or prevention of crime, and
(b) taking the person to a police station in accordance with section 4.

Section 54

Michael Matheson

221 In section 54, page 25, line 7, leave out <99> and insert <99(1)>

Section 56

Michael Matheson

222 In section 56, page 25, line 15, leave out from <if> to end of line 18 and insert <from the time the person is arrested by a constable until any one of the events mentioned in subsection (2) occurs.

(2) The events are—

(a) the person is released from custody,
(b) the person is brought before a court in accordance with section 18(2),
(c) the Principal Reporter makes a direction under section 65(2)(b) of the Children’s Hearings (Scotland) Act 2011 that the person continue to be kept in a place of safety.

After section 56

Mary Fee

260 After section 56, insert—

<Meaning of responsibility for a child

(1) In this Part, “child” means a person who has not attained the age of 18 years.

(2) In this Part, references to a person who has responsibility for a child include references to any person who—

(a) is liable to maintain, or has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, the child, or

(b) has care of the child.>
Criminal Justice (Scotland) Bill

3rd 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;
- a list of any amendments already debated;
- the text of amendments to be debated on the third day of 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

**Police powers of search**

**Power to arrest without warrant and meaning of arrest**
111, 112, 37

**Replacement of common law power of arrest without warrant, statutory power to detain etc. by section 1 power of arrest**
234, 235, 236, 237, 240, 241, 256, 257, 259

**Provision of information to arrested person**
113, 114, 238, 239, 10, 11

**Release from police custody prior to arrival at police station**
115, 118

**Minor and drafting amendments**
116, 117, 121, 124, 132, 133, 138, 140, 194, 205, 221

**Information to be given if sexual offence**
119, 148

**Social work involvement in relation to under 18s in police custody**
120, 170, 171, 176, 180, 181, 188

**Keeping person not officially accused in custody: period, authorisation, review, etc.**
122, 123, 12, 125, 13, 126, 127, 128, 129, 130, 131, 14, 134, 15, 16, 135, 136, 137, 17, 139, 141
Period for which child or vulnerable adult may be kept in custody without being officially accused
242

Arrest and custody of person with responsibility for child
39, 110, 41, 42, 43, 44, 45, 260

Investigative liberation: release on conditions
18, 142, 47, 143, 19, 145, 20, 146, 147, 21, 22, 23, 24, 25, 26, 27

Notes on amendments in this group
Amendment 18 pre-empts amendment 142
Amendments 145 pre-empts amendment 20
Amendment 147 pre-empts amendment 121

Breach of liberation condition
144, 158, 159, 198, 199, 200, 201, 202, 203, 204

Requirement to bring officially accused person before court as soon as practicable
149

Duties of police in relation to under 18s
150, 150A, 151, 152, 65, 255, 196, 197, 222

Release on undertaking
153, 154, 155, 48, 156, 157, 160, 161, 162, 163, 164

Notes on amendments in this group
Amendment 155 pre-empts amendment 48

Provision of information prior to interview
28, 165, 166

Circumstances in which interview may take place without solicitor present or in which sending of intimation or consultation with solicitor may be delayed
29, 243, 244, 245, 246, 247, 248, 250, 251, 253

Notes on amendments in this group
Amendment 29 pre-empts amendments 243 and 244

Rights of under 18s: consent to interview without solicitor present, sending of intimation and access to other person, other support
55, 56, 167, 57, 58, 168, 59, 60, 173, 61, 62, 63, 64, 38, 32

Notes on amendments in this group
Amendment 58 pre-empts amendment 168
Amendment 63 in this group pre-empts amendments 184 and 185 in the group “Rights of under 18s: minor amendments”
Amendment 38 pre-empts amendment 32
Vulnerable persons: consent to interview without solicitor present, support etc.
30, 31, 169, 33, 189, 34, 190, 249, 191, 220

Notes on amendments in this group
Amendment 31 pre-empts amendment 169
Amendment 34 pre-empts amendment 190

Rights of under 18s: minor amendments
172, 174, 175, 177, 178, 179, 182, 183, 184, 185, 186, 187

Notes on amendments in this group
Amendments 184 and 185 in this group are pre-empted by amendment 63 in the group “Rights of under 18s: consent to interview without solicitor present, sending of intimation and access to other person, other support”

Means of consultation with solicitor
252, 192, 193

Notes on amendments in this group
Amendment 252 pre-empts amendment 192

Powers in relation to biometric information
254

Care of drunken persons
195

Disclosure of information relating to persons not officially accused
35, 36

Modification of enactments in connection with Part 1
206, 207, 208, 209, 210, 211, 212, 213, 215, 216

Application of Part 1 in relation to arrests under other enactments
214, 217, 218, 219

Code of practice about investigative functions
258

Amendments already debated

Participation of detained person in proceedings through TV link
With 73 (on Day 2) – 101
Present:

Christian Allard
John Finnie
Margaret McDougall
Margaret Mitchell
Gil Paterson
Roderick Campbell
Christine Grahame (Convener)
Alison McInnes
Elaine Murray (Deputy Convener)

Also present: Michael Matheson, Cabinet Secretary for Justice and Mary Fee (item 1).

Criminal Justice (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 3).


The following amendments were agreed to (by division) —

- 226 (For 8, Against 1, Abstentions 0)
- 229A (For 5, Against 4, Abstentions 0)
- 52 (For 5, Against 4, Abstentions 0)
- 123 (For 7, Against 0, Abstentions 2)
- 12 (For 5, Against 4, Abstentions 0)
- 125 (For 7, Against 0, Abstentions 2)
- 126 (For 7, Against 0, Abstentions 2)
- 129 (For 7, Against 0, Abstentions 2)
- 134 (For 7, Against 0, Abstentions 2)
- 135 (For 7, Against 0, Abstentions 2).

Amendment 242 was disagreed to (by division: For 2, Against 7, Abstentions 0).

The following amendments were moved and, no member having objected, withdrawn: 234 and 39.

The following amendments were not moved: 233A, 50, 51 (and, as a consequence, 51A), 235, 236, 237, 238, 239, 10, 11, 240, 241, 13, 14, 15, 16 and 17.

The following provisions were agreed to without amendment: sections 5 and 12.
The following provisions were agreed to as amended: sections 1, 2, 3, 4, 6, 7, 8, 9, 10, 11 and 13.

The Committee ended consideration of the Bill for the day, section 13 having been agreed to.

Alison McInnes declared an interest as a member of Justice Scotland.
Scottish Parliament
Justice Committee

Tuesday 29 September 2015

Criminal Justice (Scotland) Bill:
Stage 2

10:03

The Convener: Agenda item 2 is day 3 of stage 2 proceedings on the Criminal Justice (Scotland) Bill. I welcome to the meeting the Cabinet Secretary for Justice, Michael Matheson, and the Scottish Government officials who are here to support him. As members are aware, they are not able to take part in the proceedings.

Members should have with them their copy of the bill, the marshalled list and the groupings of amendments for consideration. I aim to get as far as we can by around 11.40, as we have other items of business to consider. As members are aware, we will not get through all the amendments today, but we can get on with the remainder next week. I know that members are looking forward to continuing stage 2 of the bill.

Before section 1


The Cabinet Secretary for Justice (Michael Matheson): Good morning. I thank the committee for altering the normal order of consideration of amendments. As members know, the advisory group on stop and search was not due to report to me until 31 August, so the committee’s scheduling has been extremely helpful in allowing us to debate the matter in light of the advisory group’s recommendations.

I have given a commitment to implement the advisory group’s recommendations, and it is important to look at this group of amendments in that context. My aim is to use the amendments to make the legislative change that we need in order to implement the advisory group’s recommendations in full.

I asked the advisory group to consider whether consensual stop and search should end and whether any additional steps would be required, including any consequential legislation or changes in practice. I also asked it to develop a draft code of practice to underpin the use of stop and search in Scotland.

The advisory group had a broad membership that included Police Scotland, the Scottish Police Authority, the Crown Office and Procurator Fiscal Service, academics, representatives from Scotland’s Commissioner for Children and Young People, and Anne Houston, who is chair of the
I asked the advisory group to report to a tight timescale to match the progress of the Criminal Justice (Scotland) Bill. I am grateful to the group, and in particular to John Scott, who led it, for delivering the report to last month’s deadline. I am sure that the committee will agree that the report is comprehensive, balanced and considered, and that it makes clear and well-reasoned recommendations.

In the summer, I indicated that I would seek an early opportunity to legislate, and that is what we are doing now. I hope that that reassures the committee that we are serious about implementing all the advisory group’s recommendations swiftly and delivering the new code of practice as soon as we practically can.

I thank Alison McInnes for her contribution to the stop-and-search debate over recent months, and for lodging amendments 50 to 53. As she knows from our recent discussions, it has not been possible to blend her amendments with those of the Government. In my view, implementation of the recommendations requires a co-ordinated set of amendments that are more detailed than amendments 50 to 53. We looked at the matter carefully, but amendments 50 to 53 simply do not lend themselves to being changed in the way that would be required. My conclusion was that the most effective way to ensure proper implementation of the advisory group’s recommendations was to draft a new set of co-ordinated amendments as a single package, which is what we have done.

Amendments 223 to 233, in my name, form a set that hangs together. They form a new part of the bill that is divided into two chapters. The amendments will insert the new part, section by section.

Amendment 223 ends consensual stop and search of persons who are not in police custody. Its effect will be that police officers will be able to search such a person only when they are explicitly permitted to do so by an enactment or warrant. That is what has become known as statutory search.

Amendments 229, 232 and 233 require a code of practice to be implemented, after a period of consultation. The consultation, which is to be both public and with specific stakeholders, will be followed by a requirement for parliamentary approval, under the affirmative procedure. A copy of the code of practice is also to be laid before Parliament.

Amendment 230 provides for the code of practice to be kept under regular review thereafter. The original code will require to be reviewed within two years of coming into effect, and thereafter a review will be required no later than every four years.

Together, amendments 223, 229, 232 and 233 implement advisory group recommendations 1 to 4, and they follow the advisory group’s recommendations in relation to making, publishing and consulting on the code of practice.

Amendment 231 gives the code the appropriate legal status. A court or tribunal in civil or criminal proceedings will have to take the code of practice into account when determining any questions arising in the proceedings to which the code is relevant.

Amendment 227 ensures that consensual stop and search will end under amendment 223 at the point at which the original code of practice comes into effect. Proposed subsection (1) of the new section to be inserted by amendment 227 achieves that by stating that the provision in amendment 223 is to commence on the same day as the original code of practice takes effect under the provisions in amendment 233. That implements advisory group recommendation 8.

Advisory group recommendation 6 is that the Scottish Government should hold an early consultation on whether to legislate to create a specific power for police officers to search children under the age of 18 for alcohol. I have said that we will carry out a consultation on that. The advisory group was unable to form a concluded view as to whether such a power was necessary or desirable, which is why it recommended that there should be a consultation. I will decide whether such a power is necessary after the consultation.

If, after consultation, I decide that such a power is necessary, I would wish to seek the Parliament’s consent to introduce that power in a timely manner. Amendment 226 contains an enabling provision that would facilitate that. It would allow an affirmative Scottish statutory instrument to be made to provide a power to stop children under 18 and search them for alcohol. The amendment would also allow the SSI to provide a power to search a person who is over 18 where that person is hiding a child’s alcohol in order to prevent it from being found. However, unlike consensual stop and search, such powers will only ever be able to be exercised where the police have reasonable grounds for suspecting that the person has alcohol in their possession. As I said, decisions on whether to make such an SSI will depend not only on the consultation outcome but, ultimately, on that SSI being approved by the Parliament.

The provision is also subject to the sunset clause in proposed subsection (2) of the new section that will be inserted by amendment 227.
The result is that, if no regulations are made within two years of the original code of practice coming into effect, the provision will cease to have effect.

Amendment 224 addresses the potential but limited gaps in statutory powers that we have identified. There is a possible lack of clarity in the current law and a risk that the complete abolition of consensual stop and search under amendment 223 might mean that the police lack the powers that they need to search persons in certain circumstances—in particular, persons who have not been arrested but who are nevertheless in the hands or safekeeping of the police under some other legal authority.

We have identified several circumstances in which the police have statutory power to hold and/or transport a person from one place to another to safeguard that person’s safety and wellbeing. In order to look after that person and also to protect the police officers looking after them, the police need to be able to search them before holding and/or transporting them. In particular, there is currently no express power of search when the police take a drunk person to a designated place under section 16 of the Criminal Procedure (Scotland) Act 1995. There is no express power of search when detaining a person under the Mental Health (Care and Treatment) (Scotland) Act 2003 or under part 6 of the Criminal Procedure (Scotland) Act 1995, or when detaining a child for their own welfare under section 56 of the Children’s Hearings (Scotland) Act 2011. As I am sure the committee will understand, the gaps that we have identified cannot be left unfilled.

Amendment 224 addresses those gaps. It contains a general provision that would allow constables to search a person in the circumstances that I have mentioned—that is, when the person is to be held or transported by the police under specific authority of an enactment, warrant or court order. It should be noted that the power of search is expressly limited to not just specific circumstances but a specific purpose, namely to ensure that the person who is in the hands of the police is not in possession of something that could be harmful. That power was not included in the advisory group’s recommendations, no doubt because the circumstances that I have outlined were not within the group’s remit. However, I believe that those powers are necessary for the narrow purposes of prevention of harm to self and others in the limited circumstances in question. The amendment will create a new power of statutory search in those limited circumstances whereby the new power falls within the authority for statutory search referred to in amendment 223. The committee may wish to know that John Scott is aware that we propose to introduce the new power and that he considers it to be a sensible proposal.

10:15

Amendment 225 imposes a duty on a constable, when deciding whether to search a child, to treat the wellbeing of the child as a primary consideration. That replicates the effect of section 42 in the context of stop and search. The amendment delivers the intention behind advisory group recommendation 7 and amendment 53, in the name of Alison McInnes. I shall return to that point later, when I talk about the non-Government amendments in the group.

Amendment 228 provides a definition of “constable” and “police custody” for the purposes of the proposed new chapter.

In summary, amendments 223 to 233, if accepted as a package, will deliver all the legislative changes required to implement advisory group recommendations 1, 2, 3, 4, 6, 7 and 8 in full.

For the sake of completeness, the committee will wish to know that implementation of advisory group recommendations 5, 9 and 10 does not require legislative change. Recommendation 5 concerns a transfer of information from Police Scotland to the Scottish Police Authority and the publication of that information. Recommendation 9 concerns the need for a detailed implementation programme, and recommendation 10 is that there should be discussions about the most appropriate way of dealing with children and vulnerable adults who come to notice during stop-and-search situations.

I turn to the non-Government amendments. For the reasons that I have outlined, I consider that the intentions behind amendments 50 and 51, in the name of Alison McInnes, are more effectively delivered by the fuller package of provisions contained in amendments 223, 229, 230, 232 and 233. I therefore ask Alison McInnes not to move amendments 50 and 51.

I also encourage Alison McInnes not to move amendment 52, which has been superseded by advisory group recommendation 5, which covers the transfer of information from Police Scotland to the Scottish Police Authority and the publication of that information. Although I support the principle of publishing information on stop and search, I do not consider that it is appropriate to include such a requirement in primary legislation. There are other, more appropriate ways to publish that information, as recommended by the advisory group.

Amendment 53, in the name of Alison McInnes, concerns the wellbeing of the child and mirrors advisory group recommendation 7. My initial instinct was to support amendment 53. However, on closer inspection, neither amendment 53 nor advisory group recommendation 7 would quite achieve what they seek to achieve, because of
their wording and the provision’s proposed placing in the bill. Because of the provision’s proposed position in section 42, and the fact that it is not restricted to children who are not in police custody, amendment 53 goes too far, because it targets all searches in all circumstances. That means that it would unnecessarily and inappropriately affect the power to search people who are being dealt with by the police under the regime for arrest, custody and questioning in part 1. Such people are already protected by section 42. Amendment 53 would also go further than advisory group recommendation 7, which is explicitly limited to children who are not in police custody. As I said, amendment 225 imposes a duty on constables, when deciding whether to search a child, to treat the wellbeing of the child as a primary consideration. That exactly delivers the intention behind amendment 53 and advisory group recommendation 7. I therefore ask Alison McInnes not to move amendment 53.

Amendment 229A, in the name of Alison McInnes, would have the effect of specifying the information that the code of practice must contain. As I said, my intention is to implement the advisory group’s recommendations in full. The advisory group looked at the matter closely, and deliberately decided not to be prescriptive about what the code should contain. It provided a draft code and recommended that we carry out a consultation on the draft. That is what I intend to do, and I have asked John Scott and the advisory group to help us to develop the code of practice in light of the consultation responses. Parliament will have the opportunity to debate and vote on the code before it is finalised. The process for the code of practice is designed to ensure that the code contains everything that it should. I therefore encourage Alison McInnes not to move amendment 229A.

Amendment 233B, in the name of Alison McInnes, would provide that regulation to bring into effect the first code of practice must be laid within one year of the bill receiving royal assent. I agree that that is a reasonable time period and I thank Alison McInnes for lodging the amendment. I am content to support amendment 233B, but we may seek to refine the provision at stage 3 if that appears to be necessary on looking at it again when it appears in the bill. I undertake to work with Alison McInnes on the matter.

Amendments 230A and 233A, in the name of Alison McInnes, are about reviews of the code of practice. Amendment 230A seeks to ensure that each review of the code of practice is completed within six months of the review’s start date. I agree with the intention behind ensuring that reviews are carried out as quickly as possible and would certainly agree that any review should be carried out within six months. I am therefore content to support amendment 230A and I thank Alison McInnes for lodging it. Again, we may seek to refine the provision at stage 3 if that appears to be necessary on looking at it again when it appears in the bill. Of course, we will work with Alison McInnes on the matter.

The effect of amendment 233A would be that, after each review of the code of practice, regulations would have to be laid for a new code to come into effect, whether or not the code had been changed. I agree with the principle that reviews of the code should be kept under scrutiny. However, I consider that amendment 233A would create an odd result, because it would require a revised code of practice to be brought into effect even when the earlier version of the code had not been revised.

In addition, amendment 233A would go beyond the advisory group’s recommendation, which was that any revision to the code should be subject to parliamentary approval. Amendment 230, in conjunction with amendment 233, will ensure that that happens. Any revised code will not take effect until Parliament has had the opportunity to debate and vote on the matter. I therefore encourage Alison McInnes not to move amendment 233A.

Amendment 232A, in the name of John Finnie, would add the Police Investigations and Review Commissioner to the list of organisations that should be consulted when the draft code of practice is prepared. The PIRC would be covered by proposed new subsection (2)(h) of the new section that amendment 232 will insert, which refers to

"such other persons as the Scottish Ministers consider appropriate."

However, I have no objection to the PIRC being specifically included. I am therefore content to support amendment 232A, although we may seek to move the provision to a different place in the list at stage 3, for technical reasons.

I can summarise as follows. Amendments 223 to 233, if accepted as a package, will deliver all the legislative changes required to implement the recommendations of John Scott’s advisory group. I am content to support amendments 230A, 232A and 233B, but I encourage Alison McInnes not to move amendments 50, 51, 52, 53, 229A and 233A.

I hope that it is clear to the committee that I have taken great care over how to approach stop and search and that I have taken into account suggestions made by Alison McInnes, John Finnie and other members on the amendments. I will continue to do so between now and stage 3, to build as much consensus on the issue as possible.

I move amendment 223.
The Convener: I thank the cabinet secretary for a very comprehensive trip round all the amendments. I think that members received some explanatory notes in advance, which was helpful, because the issue is complex. It would have been difficult if the information had just been put in front of everyone today.

Alison McInnes (North East Scotland) (LD): I will speak to most of the amendments in the group, if you will bear with me, convener.

For 18 months, I was repeatedly told by the Scottish Government that stop and search was an operational matter. Ministers insisted that they were comfortable with so-called consensual stop and search, despite it occurring on an industrial scale and targeting young and vulnerable people—even children.

My campaign to abolish so-called consensual stop and search and introduce a code of practice won the backing of dozens of charities, academics, the Scottish Human Rights Commission and Scotland’s Commissioner for Children and Young People. As members will be aware, the Government has finally decided to adopt my plans after they were effectively endorsed by the independent advisory group that is chaired by John Scott QC. I have been pleased to work with the Government since that review was published, and I have reflected on the 11 amendments that the cabinet secretary has lodged, which benefit from the additional evidence that has emerged since I lodged mine in February. I am willing, if John Finnie will agree, not to move amendments 50, 51 and 53. However, it is essential that the Government’s amendments are strengthened in a number of respects to ensure that there is no room for ministers to backtrack.

As the minister said, amendment 229A would specify the information that must as a minimum be included in the code of practice, namely the circumstances in which searches take place; the procedure to be followed; what records must be taken; and the rights of the subject to access those records. Those provisions are not onerous by any means and provide ministers with a great deal of flexibility to develop the code. However, they will establish what this Parliament expects, and I intend to press that amendment.

Amendment 230A specifies that reviews of the code should be completed in six months, again ensuring that reviews cannot just get stalled. I thank the Government for its support on that.

Amendment 233A is intended to reflect my belief that every time the code is reviewed, the Parliament should have an opportunity to reaffirm its support for the code or, if it wishes, initiate changes, even if the minister does not believe that change is necessary. However, having listened to what the cabinet secretary has said this morning, I will not move the amendment.

Amendment 233B is a significant one. It addresses an omission in the Government’s amendment and requires the introduction of the code of practice and the abolition of so-called consensual stop and search to occur within one year of royal assent. With Police Scotland still conducting hundreds of thousands of these unregulated searches, we should not allow the code of practice to slip. I am grateful that the minister has agreed to support that amendment.

I am minded to move amendment 52, which requires the SPA to produce an account of the use of stop and search in its annual report to Parliament. That will encourage transparency and improved data collection methods. The committee will remember the difficulties with the figures that were being bandied about.

Scotland’s Commissioner for Children and Young People warns us that amendment 226, which involves powers to search for alcohol, is premature. Children 1st indicates that it is concerned about the possibility that such a power could lead to unintended consequences for children, such as criminalisation and a higher rate of statutory stopping and searching for young people. I note that John Scott QC’s review group reported:

“We have not been able to form a concluded view on whether a gap in powers exists that could not be dealt with by existing powers, and also on whether a power to search children for alcohol would be desirable. We therefore recommend that there should be a public consultation that involves children and young people.”

The review group went on to say:

“We therefore recommend that this should be considered separately, subject to wider consultation, specifically involving children and young people.”

I agree that there is no need to have this provision in the bill.

Dr Kath Murray’s groundbreaking research into the prevalence of unregulated stop and search and the effects of the encounters in Scotland shone a bright light on something that needs to be challenged. For a long time, I was a lone voice in Parliament raising that challenge, but I am delighted that the evidence has vindicated that approach and that the committee is now on the verge of ensuring that every stop and search that is conducted by the police has a robust legal basis.

We are on the verge of ensuring that every search is justified, regulated and accountable. These changes to the bill will be the start of rebuilding community relations with the groups that have been disproportionately targeted by this thoroughly discredited tactic. However, there is
one more hurdle, and I hope that members will join me in ensuring that there is no room for delay or for future Governments to slide back. I hope that the committee will back my amendments.

John Finnie (Highlands and Islands) (Ind): Stop and search did not use to be a problem. There were all the statutes that could be invoked on stop and search and there was a lot of statutory guidance and case law on the matter. It then became a problem, and I am certainly very grateful to the cabinet secretary for setting up the review committee under John Scott, as it sent a very clear signal that the issues had been responded to. I think that we have heard a lot to suggest that that continues to be the case, and I will not repeat much of what my colleague Alison—ah—[Interruption.] Sorry—I mean Alison McInnes.

The Convener: It is still early and already you are falling apart.

John Finnie: I know. Forgive me, convener.

I will not repeat much of what my colleague Alison McInnes has said, but I am certainly grateful for the movement that has been made. I am therefore happy not to move my amendments.

10:30

Elaine Murray (Dumfriesshire) (Lab): Labour members also welcome the progress that has been made on stop and search and the move to putting it on to a statutory basis. However, I invite the cabinet secretary to make clear his views on amendment 226 and the concern that has been raised by Tam Baillie, Scotland’s Commissioner for Children and Young People, about the use of the affirmative procedure, which he thinks is unlikely to allow for sufficient parliamentary scrutiny of a matter that is likely to have wide-reaching effects for children and young people across Scotland. I appreciate that amendment 227 contains the fall-back position of a sunset clause, which will be invoked if nothing comes forward, but is the Government prepared to consider putting in place a super-affirmative procedure to give Parliament the chance for additional scrutiny?

Margaret Mitchell (Central Scotland) (Con): I am happy to support the cabinet secretary’s amendment on stop and search, which reflects the recommendation of the review committee chaired by John Scott. I also pay tribute to Alison McInnes, who has been relentless in her scrutiny of the matter and her campaigning against the undoubted abuses of the consensual stop and search procedure. I think that today is a victory for her, too.

I support amendment 229A, in the name of Alison McInnes, but I note that the cabinet secretary is not minded to support it, because he does not want to be too prescriptive. However, the amendment simply says “should include”; the content itself is not definitive. In any case, I think that it is eminently sensible for the circumstances of a search to be looked at and, crucially, for a record to be kept. How else are we to determine how many searches are taking place? Despite being a supporter of it, I am also happy that Alison McInnes is not seeking to move amendment 233A.

I am minded to support amendment 52, which seems to me to be sensible. It simply tightens up the provisions and makes them as effective as possible by ensuring that a record of the stop and search is included in the Scottish Police Authority’s annual report.

Finally, I think that John Finnie’s amendments make sense.

Roderick Campbell (North East Fife) (SNP): I have heard the point that has been made about amendment 229A being prescriptive but, for me, the important point is that Parliament will have the opportunity to debate and vote on the code of practice before it is finalised. It is therefore not something that will not come back to Parliament.

With regard to amendment 226, I recognise that the area is likely to be controversial. As far as I am concerned, as long as the Parliament has a proper opportunity in some shape or form to consider the outcome of the consultation, I have no particular problem with the Government’s proposal.

Michael Matheson: I am grateful for the comments that various committee members have made.

The intention behind amendment 226 is not to pre-empt anything. Instead, it creates an enabling power to ensure that if, following the consultation as recommended by the advisory group, it is felt to be necessary to create the statutory provision for searching those under 18 for alcohol, the Parliament will have an opportunity to address the matter. The inherent danger and risk in not agreeing to this amendment and not taking forward the provision is that if, as a result of the consultation, a gap is identified and it is not agreeing to this amendment and not taking forward the provision is that if, as a result of the consultation, a gap is identified and it is recommended that we have something to deal with it, we will have no legislative vehicle for pursuing that.

I am open to the idea of exploring, between now and stage 3, whether there is a way in which the provision could be further reinforced. For example, Elaine Murray has suggested that the provision should be subject to a super-affirmative procedure and, if the committee is minded that it should be, I am more than content to explore that idea further between now and stage 3. That would give the Parliament additional oversight before any such power could be introduced.
Nevertheless, I have serious concern about the possibility that we will conduct a consultation, as recommended by the advisory group, find that it identifies a legislative gap but then have no legislative vehicle with which to address that deficit in the law. If, during the course of the consultation, nothing is identified that would justify having such a statutory provision, we have the amendments that would create a sunset clause to remove the provision from the bill.

We decided not to accept amendment 229A primarily because of the recommendations of the advisory group, which considered the issue closely and decided not to be prescriptive about what the code should contain. It provided a draft code with the recommendation that we should have a consultation on that draft code, and that is what we intend to do. To assist that process, the advisory group will remain in place, with John Scott heading it up and other members supporting the consultation exercise and the drafting of the code, which will eventually be brought before Parliament for its consideration. The key point is that, as Rod Campbell said, the code of practice must be laid before Parliament and Parliament will have the ultimate say over whether its content is correct.

We have decided to reject amendment 52 because of the findings of the advisory group on the matter. In its report, the group highlights that the approach that Police Scotland currently takes on data has improved and, in recommendation 5, recommends that practical measures be taken on a regular basis by the SPA and Police Scotland to ensure that there is adequate openness and transparency. That recommendation will be fully implemented along with the other recommendations in the report. There is, therefore, no need to put anything in the bill to achieve that.

Amendment 223 agreed to.

Amendments 224 and 225 moved—[Michael Matheson]—and agreed to.

Amendment 226 moved—[Michael Matheson].

The Convener: The question is, that amendment 226 be agreed to. Are we agreed?

Alison McInnes: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 8, Against 1, Abstentions 0.

Amendment 226 agreed to.

Amendments 227 and 228 moved—[Michael Matheson]—and agreed to.

Amendment 229 moved—[Michael Matheson].

Amendment 229A moved—[Alison McInnes].

The Convener: The question is, that amendment 229A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 229A agreed to.

Amendment 229, as amended, agreed to.

Amendment 230 moved—[Michael Matheson].

Amendment 230A moved—[Alison McInnes]—and agreed to.

Amendment 230, as amended, agreed to.

Amendment 231 moved—[Michael Matheson]—and agreed to.

Amendment 232 moved—[Michael Matheson].

Amendment 232A moved—[John Finnie]—and agreed to.

Amendment 232, as amended, agreed to.

Amendment 233 moved—[Michael Matheson].

Amendment 233A not moved.

Amendment 233B moved—[Alison McInnes]—and agreed to.

Amendment 233, as amended, agreed to.

Amendments 50 and 51 not moved.

Amendment 52 moved—[Alison McInnes].

The Convener: The question is, that amendment 52 be agreed to. Are we agreed?
The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 52 agreed to.

Section 1—Power of a constable

The Convener: Amendment 111, in the name of the cabinet secretary, is grouped with amendments 112 and 37.

Michael Matheson: I will deal first with amendments 111 and 112, both of which are relatively minor, before turning to amendment 37 and the proposed definition of arrest.

Amendment 111 aims to improve readability.

Amendment 112 clarifies the meaning of an offence not punishable by imprisonment. Section 1(2) sets out an extra test that has to be met before a constable can arrest someone without a warrant if the offence that the person is suspected of committing is

“not punishable by imprisonment”.

The phrase is meant to capture minor offences for which nobody would ever be sent to prison. On its own, however, the phrase could be taken to mean that the suspect whom the constable intended to arrest would not be liable to be imprisoned. Children, for example, are never liable to be imprisoned. Amendment 112 makes it clear that, in deciding whether section 1(2) applies, it is the nature of the offence that is to be considered, and not the identity of the suspect.

I turn to John Pentland’s amendment 37, which would add a new section to provide a definition of arrest for the purposes of part 1.

I am not persuaded that amendment 37 would do any good; indeed, it could have the opposite effect. Definitions are there to clarify the meaning of the words and expressions used in the bill. The proposed definition of arrest would not make the meaning of part 1 more certain.

The proposed definition is in two parts. The first part refers to

“depriving a person of liberty of movement.”

That phrase is open to interpretation and challenge. For example, would it cover those who were released on investigative liberation or on an undertaking or bail with conditions as to the places where they were permitted to go?

The second part of the proposed definition is that arrest means

“taking the person to a police station in accordance with section 4”,

which might imply that nobody can be arrested at a police station. That proposed definition of arrest is circular: a person is under arrest within the meaning of the proposed definition if he or she is to be taken to a police station in accordance with section 4. Who is to be taken to a police station in accordance with section 4? Section 4 applies in relation to a person who has been arrested, so, the definition effectively states that a person is arrested if the person has been arrested.

The Convener: So far so good.

Michael Matheson: Part 1 is, in a sense, an extended definition of arrest. It sets out who can exercise the power of arrest, the grounds for doing so, the rights of the person who has been arrested and what is to happen following arrest. Picking out one element of that extended definition and saying that that is what arrest means for the purposes of the bill does not add anything.

There are many other statutes that use the word “arrest” without a definition and which work well without one. As Police Scotland indicated in its evidence, the bill as introduced will allow the police to work with the current legal understanding and definition of arrest, which is well understood by police officers and others in the justice system.

Although the practitioners understand the legal meaning, I acknowledge that there might be some misunderstanding among the general public of what arrest means, but defining the word in the bill will not help with that. As I said, the purpose of defining words and expressions in legislation is to inform the interpretation of the legislation in question. There is an onus on everyone who works in the criminal justice system to find ways to make the system more understandable and accessible.

I urge Elaine Murray not to move amendment 37 for the reasons that I have outlined.

I move amendment 111.

The Convener: I call Elaine Murray to speak to amendment 37, in the name of John Pentland.
Elaine Murray: I just want to say a few words regarding amendment 37, in the name of my colleague John Pentland. I should point out that, despite the hilarity over the wording of the amendment, it was actually drafted by the legislation team, not by Mr Pentland himself. If there is criticism there—

The Convener: I think that that is deuce.

Elaine Murray: It was drafted by people who know what they are doing.

However, as the cabinet secretary implied in his remarks, the reason why John Pentland lodged the amendment was to address the very issue that the meaning of arrest will change in Scotland. In Scotland we have a particular view of what arrest means. We think that people are arrested once they have been charged with an offence, not when they are helping the police with their inquiries and so on. John Pentland lodged the amendment to see whether there is a method by which we can clarify that in the public mind and, in particular, in the mind of the media.

When we took evidence on the bill many moons ago—it was probably about two years ago—we were advised that in England and Wales there have been quite high-profile instances of people having been arrested for a very serious crime and having been questioned, with the media then treating them as if they were suspects when in fact they were never charged.

If the bill is passed and the meaning of arrest in Scotland changes, it is important that efforts are made to ensure that people who are what would have been termed “helping police with their inquiries” are not necessarily considered to have been charged. I will come back to that issue later. I have other amendments to be discussed much later on—probably next week—that look at some of those issues.

That was John Pentland’s intention with amendment 37, but I know that he is quite content for it not to be moved.

Roderick Campbell: I heard what Elaine Murray said. I am not sure that the reference to “helping police with their inquiries” is helping us in our discussions this morning.

I remind the committee of the comments made two years ago by Professor Chalmers, a distinguished professor from the University of Glasgow. He said:

“the general term ‘arrest’ has been used successfully for quite some time, despite the fact that nobody can state exactly what the law in that area is.”—[Official Report, Justice Committee, 8 October 2013; c 3353.]

I think that the main thing is to remove an artificial distinction between detention and arrest. If at some later stage somebody wants to attempt to define arrest, so be it—but not in the bill.

The Convener: I am no clearer after what has been said—I am probably more confused.

Michael Matheson: As I outlined in my earlier comments, the circular nature of John Pentland’s amendment 37 means that it would not deliver what it was intended to. I should quickly add that it was the Parliament’s legislation team who assisted in drafting of the amendment.

The Convener: I could see shock and horror on your colleagues’ faces when Elaine Murray commented on the drafting.

Michael Matheson: No doubt Elaine Murray will wish to consider further before stage 3 the definition of “arrest”. However, the point that Rod Campbell outlined and the evidence that the committee received previously on the matter indicate that any attempt to define “arrest” would create a lot of unintended consequences, with the danger that that would create further confusion and make it difficult to interpret the bill’s provisions, which set out in part 1 what is almost an extended definition of “arrest” anyway.

Amendment 111 agreed to.

Amendment 112 moved—[Michael Matheson]—and agreed to.

The Convener: After we have dealt with the next group, we will have a little break.

Amendment 234, in the name of Margaret Mitchell, is grouped with amendments 235 to 237, 240, 241, 256, 257 and 259.

Margaret Mitchell: It is now two years since the Justice Committee took evidence on part 1 of the Criminal Justice (Scotland) Bill, on arrest and custody. This is a very important part of the bill that proposes changes to the police’s current power to detain, arrest and charge.

Two years ago, the debate on and scrutiny of the bill focused on the particularly contentious proposal to abolish corroboration. There is now very real concern that the committee, whose composition has changed over the past two years—we also have a new Cabinet Secretary for Justice—has the opportunity to scrutinise properly what by any standards will be a very substantial and significant change to the traditional method by which the police carry out one of their basic functions in protecting the public, namely the power to detain, arrest and charge.

The terms “detain”, “arrest” and “charge” are understood at present. The general public know that when someone is detained for questioning, they will either be released without charge or be arrested and charged. The committee pointed out in its stage 1 report that there is not the same
stigma attached to someone who is detained for questioning and who is helping police with their inquiries as there is to someone who has been arrested.

When we took evidence at stage 1, the convener stated that the public

“know that detention is different from arrest. They may not
know the technical things that lawyers know, but they know
that it is different from being arrested.”—[Official Report, Justice Committee, 8 October 2013; c 3354.]

Sandra White, who was then a member of the Justice Committee, noted:

“The perception is that if someone is arrested, as opposed to being detained, they are suspected of being guilty of a crime.” —[Official Report, Justice Committee, 1 October 2013; c 3294.]

However, Elaine Murray said:

“The problem is that, although the words may mean the same thing, the public think that, when someone has been arrested, the police have sufficient evidence that they may have committed a crime.”—[Official Report, Justice Committee, 8 October, c 3354.]

The concerns about the proposed changes do not stop there. Crucially, as the Scottish Police Federation pointed out, if the proposed changes are agreed to, it will result in police officers having to be retrained. That, in turn, will have the adverse consequence of taking up precious police hours at a time when Police Scotland and its loyal and hard-working rank-and-file officers are already operating under immense pressure, and it will have adverse financial implications for Police Scotland’s already strained budget.

As the Law Society of Scotland pointed out:

“the current system is working well and there is no requirement to move to a system of arrest on the basis that a constable has reasonable grounds for suspecting that the person has committed or is committing an offence.”

Further, Calum Steele of the Scottish Police Federation said:

“I am not entirely convinced that”

the need for change

“has been demonstrated”—[Official Report, Justice Committee, 1 October 2013; c 3286.] or that the proposed wording would be “more easily understood”.

My amendments are probing amendments that I fully accept have technical flaws. However, they propose the retention of the status quo in an effort to allow us to have a much-needed discussion about why the proposals for the new terminology are necessary and can be justified, given the implications for Police Scotland, both in practical terms and financially. I will move amendment 234 to allow that discussion to take place.

I move amendment 234.

John Finnie: I listened intently to what Margaret Mitchell said, and I hope to allay her concerns. For example, on police training, earlier in our discussions, we unanimously agreed a package of measures that have implications for training. That is part and parcel of how the police respond to the democratic process. Laws are passed in the Parliament, and the police pick up on them. I would not be concerned about that at all.

I understand the traditional view of arrest and detention, to which I saw changes over 30 years. If an individual is wheeched away and put in a police van, it does not matter to them what we call that—it has the same effect. It is the protections that those individuals are afforded that are important to me. I am sure that we can get it right and that the Police Service will respond appropriately to whatever we decide in the committee.


Roderick Campbell: I accept that we had a lot of evidence sessions on the matter two years ago, and that some members of the committee had the view that detention is different from arrest in some way. I am also mindful that Lord Carloway was fairly clear that we needed to do away with the distinction, which was increasingly blurred. I think that that was Professor Chalmers’s view as well. Professor Chalmers was fairly clear that the public knew that there was a difference between being detained and being charged. Therefore, I am not sure Margaret Mitchell’s amendment 234 is really helpful. I urge the committee to reject it.

The Convener: I think that Margaret Mitchell is probing, but we will get to that.

Elaine Murray: It is helpful that Margaret Mitchell lodged the amendments, even if we do not necessarily agree with them. She referred to the fact that the public have a different view of arrest. That is what I was trying to get at when we were talking about John Pentland’s amendment 37. That is an issue, but I do not particularly recollect many people saying two years ago, “We shouldn’t be doing this at all,” or that part 1 of the bill should be thrown out.

I agree that we have to be careful about the way in which issues around arrest are transmitted to the public—people become aware of the fact that there is a difference—but I do not think that sections need to be taken out of the bill. I fail to see why it would be such a burden on the police to have just a slight difference in terminology, as they will not do anything terribly different. It will just be called something different. I am not convinced that there will be a huge burden on Police Scotland.

Michael Matheson: Margaret Mitchell’s amendments 234 to 237, 240, 241, 256, 257 and 259 would remove all of chapter 1 of part 1 of the
The bill as introduced, together with the related amendments on arrest. That would have the effect of retaining the current detention arrangements that are provided for in section 14 of the Criminal Procedure (Scotland) Act 1995, together with existing common-law and statutory powers of arrest. I believe that that would be a backward step when we should be moving forward and modernising our justice system.

The Criminal Justice (Scotland) Bill resulted from an independent review that was carried out by a respected senior member of the Scottish judiciary and from the responses to the Scottish Government's consultation on the thoughtful recommendations that Lord Carloway made in his report.

The report recommended that section 14 of the 1995 act, on detention, should be abolished and that the only general power to take a suspect into custody should be the power of arrest. The bill is the legislative vehicle with which we are implementing Carloway and taking forward the next stage in reforming the Scottish criminal justice system. It will ensure that rights are protected, while ensuring effective access to justice for victims of crime. The bill achieves those policy objectives and reflects Lord Carloway's carefully balanced suggestions in relation to police powers.

11:00

In its stage 1 report, the committee accepted that there might be benefit in simplifying the powers of arrest along the lines proposed in part 1. That is what I think we should be working to achieve. The bill will modernise and clarify the system of arrest, custody and questioning, and I believe that it will keep our communities safe while ensuring that the police continue to act with the consent of the communities that they serve. The common-law power of arrest for offences will be repealed and replaced with a power of arrest on suspicion of having committed an offence. All other common-law powers remain. Statutory powers to arrest suspects for specific offences, which are currently scattered across the statute book, will also be replaced by the single clear power of arrest, as set out in part 1.

I believe that the terminology used in the bill is clear and accurately describes the new regime. The term “arrest” does not imply guilt. Whether a person is guilty of committing an offence is a matter for our courts. The presumption of innocence remains. The terms “not officially accused” and “officially accused” have been used to differentiate between two distinct categories of persons: those who are suspected of an offence but who have not been charged are “not officially accused”; and those who have been formally charged with an offence, including accused on petition, indictment or complaint, are “officially accused”.

It is also worth keeping in mind that the Carloway review concluded that the distinction between arrest and detention had been eroded to such an extent that there was little purpose in continuing with the two different states. Lord Carloway recommended that section 14 of the 1995 act, on detention, should be abolished and that the only general power to take a suspect into custody should be the power of arrest. Chapter 1 of part 1 of the bill as introduced implements that recommendation. I therefore urge Margaret Mitchell not to press her amendments.

Margaret Mitchell: It seems that the common-law power of arrest is to be abolished. When something is put into statute that was previously covered by the common law, with all the flexibility that that contains, there is always the possibility of unintended consequences. We are already seeing some of that when we look at whether the provisions include the power for someone to be arrested for their own safety. I do not know whether that has been or will be addressed.

The cabinet secretary has made much of Lord Carloway’s recommendation simplifying the law. It seems to me that, if someone can be arrested and then not arrested, or “not officially accused” and then “officially accused”, the provision does anything but simplify the law. It might make sense to academics and those steeped in the legal profession but it will not necessarily make sense to the ordinary man in the street, whom the powers will affect.

There also seems to be a justification for the change in Lord Carloway’s recommendation to bring in two distinct means of taking a person into custody under Scots law in order to make matters more clearly in tune with the European convention on human rights. However, in practice, as the Law Society pointed out, the system, as changed in the light of Cadder, seems to have bedded in well. It is working well, without all these changes. I appreciate that many of the amendments that will follow today are aimed at improving the new terminology and I will consider them on their merits on that basis. However, I am not convinced that the new terminology—as opposed to the status quo—is the best way to progress.

I will not press my amendments but I urge the Scottish Government to look again at section 1, for there is most certainly a case to be made for taking the proposed changes to detention, arrest and charge out of the bill to ensure that they are given the necessary scrutiny and would in fact improve the current system.

Amendment 234, by agreement, withdrawn.
Section 1, as amended, agreed to.

11:05
Meeting suspended.

11:10
On resuming—

Section 2—Exercise of the power

The Convener: Amendment 113, in the name of the cabinet secretary, is grouped with amendments 114, 238, 239, 10 and 11.

Michael Matheson: This group of amendments deals with the information that suspects will be given after they are arrested. I am sure that we all agree that that is an important issue, given that for many people, particularly those who have not previously been in trouble with the police, being arrested might be a distressing and potentially confusing experience.

I am aware that at stage 1 the committee very much welcomed the added protections that the bill will give people when they are arrested. Amendments 113 and 114 extend the information that suspects will be entitled to following an arrest. Amendment 113 seeks to give a person arrested by a police officer who is not in uniform the right to see that officer’s identification, while amendment 114 seeks to amend section 3 to add to the information that a police officer will be required to give a person who has been arrested. Specifically, the officer will be required to inform the person that they have the right to a lawyer, that they are in police custody and that they have the right to have a private consultation with a lawyer at any time while in such custody. Those rights are laid out in sections 35 and 36. The provisions will ensure that suspects are aware of those important rights from the earliest possible time after their arrest. Of course, section 5 already provides that they will be told about them when they arrive at the police station.

I appreciate that amendments 238 and 239 in the name of Alison McInnes and amendments 10 and 11 in the name of John Finnie are motivated by the same desire to ensure that suspects are fully informed of their rights. However, I am afraid to say that I cannot support Alison McInnes’s amendments, which seek to amend section 5 to require the police to tell a suspect on arrival at a police station about the right to have a solicitor present during an interview under section 24 and the right for vulnerable adults to receive support from an appropriate adult under section 33. However, the fact is that not all suspects who are detained at a police station will be questioned and, in such circumstances, those rights will not be engaged. Section 23(2) already requires that suspects who are interviewed are told about their rights to have a lawyer present. Furthermore, section 5 already ensures that every suspect who is detained at a police station is told about their rights to have intimation sent to and a private consultation with a lawyer. As I have explained, amendment 114 will ensure that suspects are told about those rights even earlier in the process—that is, at the point of arrest.

Similarly, not all suspects who are detained at a police station have a right to support from an appropriate adult. The rights in section 5 that the police are required to tell suspects about are those which, in general, the suspect has some choice over whether to exercise, and the right to support from an appropriate adult is not that sort of right. If the suspect is assessed as needing such support, an appropriate adult will be provided. There is no point in having the police tell a suspect that they have a right to support from an appropriate adult if the appropriate adult is already there or en route. If the suspect has been assessed as not requiring support from an appropriate adult, the suspect will have no right under section 33 to be told about. I am afraid to say that, for those reasons, I cannot support amendments 238 and 239.

11:15
Amendments 10 and 11 in the name of John Finnie relate to letters of rights. Section 5 currently states that every suspect is to be given, “verbally or in writing”, the information required by articles 3 and 4 of European directive 2012/13/EU on the right to information in criminal proceedings.

Since July 2013, it has been the practice throughout Scotland to provide suspects with that information in the form of a written letter of rights. The letter of rights is available in 34 languages, and from the start of this year a special easy-to-read version of the letter has been available to help children and suspects with learning difficulties to understand their rights fully. The Government is committed to keeping that letter under review so that it continues to be fit for purpose.

Amendments 10 and 11 would make it a requirement for the information always to be given both in writing and verbally to every suspect. I understand that the committee and the Lord Bonomy review group have been sympathetic to that requirement. The Government has therefore given careful consideration to the practical workability of the proposal. Unfortunately, it has become clear that such a change would have a significant impact on police resource, which the Government considers would be disproportionate to the benefit that suspects would get from the change in practice.
Around 200,000 suspects pass through police stations each year. Police Scotland estimates that the amount of police time that would be taken up each year to read the whole letter of rights to every suspect would be approximately 16,500 hours. That assumes that every suspect has a good grasp of English. Locating an interpreter to read out the letter of rights for those suspects who cannot follow it in English would be likely to cause considerable delay and to add to the time that the person spends in custody, deprived of their liberty.

Of course, I recognise that even the easy-to-read version of the letter of rights that I mentioned earlier will not be suitable for every suspect. For suspects who have difficulty with reading, officers will read out the letter of rights. It is precisely to allow flexibility in such circumstances that the bill says “verbally or in writing”.

As I mentioned in my letter to the committee in August, Police Scotland is going to include in its new custody software a prompt to ask suspects whether they would like the letter of rights to be read out to them. I hope that committee members, and John Finnie himself, will agree that a more proportionate way to meet the good intentions behind his amendments is to have police officers read the letter to those suspects who need that, instead of having a huge amount of police time expended reading it out to suspects who are perfectly well able to read it for themselves.

Before leaving that subject, I would like to offer further reassurance to members of the committee and to John Finnie in particular. During my statement to Parliament on the report of Lord Bonomy’s review group, John Finnie endorsed the group’s recommendation that legal aid contributions for legal advice at police stations should be waived. I appreciate that there have been concerns that suspects, even when they know about their rights to legal advice, may waive them because they are worried about the potential cost implications.

The Government has previously confirmed that it plans to abolish legal aid contributions in all those circumstances. I can now confirm to the committee that the Government will lay regulations to do that before the end of this year. All suspects will be entitled to free legal advice while they are detained. That is a significant step and I believe that it demonstrates the progress and commitment that are being made to safeguard the rights of suspects and detained persons.

I hope that that provides further reassurance to members that steps continue to be taken to encourage the greater uptake of legal advice at police stations. We will monitor how the changes affect the number of suspects taking legal advice in custody and, as always, I will keep the committee informed of the results.

I therefore urge John Finnie not to move his amendments, which would pose significant resource problems for Police Scotland and give suspects no additional protection in the light of other steps that are being taken.

I move amendment 113.

Alison McInnes: Section 5 requires that persons in police custody must be informed “as soon as reasonably practicable” of their key rights. Those currently include the right to have intimation sent to another person, the right of children to access a parent or guardian and the right to remain silent. My amendments 238 and 239 would extend that list in two respects and ensure that persons in custody are also informed of their rights under sections 24 and 33, respectively.

Section 24 sets out the right to have a solicitor present while being interviewed. In response to a recent parliamentary question, the Scottish Government confirmed that approximately 75 per cent of those in police custody waive their option to consult or have present a solicitor. I consider that a troubling statistic.

The bill rightly ensures that people in custody are told of the right to have intimation sent to a solicitor and the right to a consultation with their solicitor at any time. However, unless people are also always told that the solicitor can assist them during the police interview, they may not choose to exercise their right to a consultation.

My amendment 239 would ensure that people are told of the rights that are listed in section 33 regarding the support available to vulnerable adults. I have listened to what the cabinet secretary had to say about that, but the bill currently places the onus squarely on a constable to decide whether someone is unable to understand sufficiently what is happening or to communicate effectively. If we inform everyone who enters police custody of the right to support in such circumstances, we will perhaps increase the chance of any individual who does need assistance volunteering that fact. It would provide a safeguard and increase the likelihood of needs being identified as early as possible.

My amendments 238 and 239 are supported by Justice Scotland, which has argued that both those key rights should be on the face of the bill.

Turning to the other amendments in the group, I welcome the cabinet secretary’s amendments 113 and 114, which provide suspects with additional information on their arrest. I am sympathetic to John Finnie’s amendments 10 and 11, and I will listen to his response to the cabinet secretary’s concerns.
John Finnie: Amendments 10 and 11 relate to the information to be given at the police station and the request that it be given both verbally and in writing. Concerns raised by the Law Society highlighted some factors in relation to that issue that the committee already knows about and frequently comes across, namely the level of literacy among people who find themselves in custody, the fact that people in custody often are under the influence of alcohol or drugs and, as has been touched on, the level of brain injury among young people who find themselves in custody.

Amendments 10 and 11 are intended to ensure not simply that the letter of rights is in 34 languages and an easy-to-read version—I do not know whether an easy-to-read version is available in 34 languages—but that people are left in no doubt about their rights. The one message that we want this committee to give is that the legislation is robust and thoroughly scrutinised.

I have to say that I am bemused that Police Scotland says that advising people of their rights would have a significant impact on police resources. That someone has even costed out the hours is a misuse of police time.

The cabinet secretary talked about ensuring that every suspect has a grasp of English. The background to that is, of course, that we know that a lot of people do not have a grasp of English and that communication skills are another factor.

Another term used by the cabinet secretary that gave me no reassurance whatsoever was “flexibility” with regard to rights. There can be no flexibility on rights. Rather than there being a prompt in custody software, I want the prompt to be in the police mindset.

That said, I was very reassured by the cabinet secretary’s finishing remarks about suspects receiving free legal advice. For that reason, I seek permission to withdraw amendments 10 and 11.

The Convener: They have not been moved yet.

Alison McInnes: Before we go to the vote, I remind committee members of my registered interest in and membership of Justice Scotland.

Christian Allard (North East Scotland) (SNP): On what John Finnie said about the misuse of police time, for people for whom English is not a first language, a written letter might be easier to understand than a verbal reading. To a certain extent, I can understand Police Scotland when it says that imposing a requirement for an oral reading of the letter of rights for everybody might be a misuse of its time. A lot of people might prefer to have the letter in writing.

The Convener: I wonder whether one of the available languages is French. You never know.

Gil Paterson (Clydebank and Milngavie) (SNP): I can see where John Finnie is coming from, but I know from my experience in the motor industry of dealing not with the police but with people over the counter how excited they can be when they present even with a simple accident to their car and how that can make them forget things. It is commendable to look after people who need help, who may be illiterate, and I support that idea, but I do not support the suggestion that we should do the same everywhere. It would be much better if the information was written down so that people could absorb it better. That way, they can look at what is available to them and decide what is important. I suspect that, when information is being read out, they are so excited and so worried about things that it would just pass them by, but if they had time to look at it and absorb it, things would be somewhat different.

However, I take on board what John Finnie is saying. If someone cannot read and does not understand what the bit of paper is about, obviously we need to find a way of reaching them.

I support him not moving the amendments.

The Convener: Does John Finnie want to say anything?

John Finnie: I simply want to say that the issue has been overtaken by events. The best advice will come from the mouth of a professional, rather than being read out by a police officer or being on a bit of paper.

Michael Matheson: I have listened with interest to the points that have been made by both John Finnie and Alison McInnes. I set out the reasons why we cannot support Alison McInnes’s amendments at this stage. I understand the intention behind them, but I do not believe that the way in which they are presently framed would deliver their intent in an effective, proportionate and appropriate way. However, I would be more than happy to explore that further with Alison McInnes between now and stage 3 to see whether there is a way in which that can be achieved more effectively than would be the case with the amendments that we are considering now.

I turn to John Finnie’s amendments. Notwithstanding his decision not to move the amendments, we should be aware of the level of police time that would be taken up in reading out the letter of rights, which is a five-page document, if officers had to read out all five pages in each individual case. It is not a question of having flexibility in rights—the rights are always there. It is a question of having flexibility in whether they are given verbally or in writing. If I was arrested, I would have no difficulty in reading the letter for myself.
The Convener: If you were arrested, it would be on the front page of the Daily Record.

Michael Matheson: More than the Record, I suspect.

My point is that we need to allow officers that flexibility so that, where they think it appropriate to read out the letter of rights, it can be read out for people. However, once members recognise that the letter is five pages long, they will acknowledge that a significant amount of time and police resource would be taken up to read it out for every single individual, irrespective of whether they require it to be read out.

Amendment 113 agreed to.
Amendment 235 not moved.
Section 2, as amended, agreed to.

Section 3—Information to be given on arrest
Amendment 114 moved—[Michael Matheson]—and agreed to.
Amendment 236 not moved.
Section 3, as amended, agreed to.

Section 4—Arrested person to be taken to police station
The Convener: Amendment 115, in the name of the cabinet secretary, is grouped with amendment 118.

Michael Matheson: Amendment 115 will amend section 4 to require the police to release an arrested person before reaching a police station, if the person is no longer suspected of an offence. The bill would currently require the police, where an arrest has taken place outwith a police station, to take every arrested person to a police station, even if they were no longer suspected of an offence. The amendment will ensure that people who are no longer suspects need not be held in custody unnecessarily in order to transport them to a police station. Information about all arrests must still be recorded under section 6. It will not be the case, therefore, that the power of release will encourage misuse of the system and an “Arrest first, ask questions later” approach by the police.

11:30
Amendment 118 is consequential on amendment 115 and will require the police to record the reasons for deciding that a person is no longer a suspect and releasing them before their arrival at a police station. The recording of such decision making will give further reassurance that arrest and subsequent release can be assessed and scrutinised.

I move amendment 115.
Amendment 115 agreed to.
Amendment 237 not moved.
Section 4, as amended, agreed to.

Section 5—Information to be given at police station
The Convener: Amendment 238, in the name of Alison McInnes, has been debated with amendment 113.

Alison McInnes: As the cabinet secretary has indicated a willingness to work with me on the intention behind amendment 238 in advance of stage 3, I will not move it.

Amendments 238, 239, 10, 11 and 240 not moved.
Section 5 agreed to.

Section 6—Information to be recorded by police
The Convener: Amendment 116, in the name of the cabinet secretary, is grouped with amendments 117, 121, 124, 132, 133, 138, 140, 194, 205 and 221.

Michael Matheson: The group consists of miscellaneous minor technical amendments that are intended primarily to maintain consistency in the drafting of the bill. Amendment 116 is the most substantive of them and will amend section 6(1), which specifies the information that must be recorded when a person is arrested. The amendment makes it clear that the recording requirements in section 6 relate only to arrest by the police, and not to arrest by a citizen, for example.

Amendments 117, 121, 124, 132, 133, 138, 140, 205 and 221 are technical amendments to sections 6, 8, 11, 36, 50 and 54. They will ensure consistency in terminology and easier reading of the provisions.

Amendment 194 is a technical amendment to section 39, which preserves the common-law powers of the police in relation to people who have been arrested. Those include the power to have the person take part in identification parades. The amendment replaces the reference to “identification parade” with a reference to “identification procedure”, which will make it clear that the police retain common-law powers in relation to all identification procedures, including identification parades and more modern video identification procedures.

I move amendment 116.
Amendment 116 agreed to.
Amendments 117 and 118 moved—[Michael Matheson]—and agreed to.

The Convener: Amendment 119, in the name of the cabinet secretary, is grouped with amendment 148.

Michael Matheson: People who are accused of certain sexual offences, including rape and sexual assault, are prohibited from conducting their own defence. That protects victims and witnesses from the potential trauma of being cross-examined by the accused. Amendments 119 and 148 restate the existing law, which requires that suspects who are arrested under a warrant in connection with those offences, or who are charged with those sexual offences, be informed that they cannot conduct their own defence and must, instead, engage the services of a lawyer, failing which the court will do so. The amendments will not change the law but will update the approach and terminology to ensure consistency with part 1.

Amendment 119 will require the police to record the details of their compliance with the requirements that are set out in amendment 148. Amendment 148 is the principal amendment and restates the existing law in section 17A of the Criminal Procedure (Scotland) Act 1995. Amendment 119 is consequential and auxiliary.

I move amendment 119.

Amendment 119 agreed to.

The Convener: Amendment 120, in the name of the cabinet secretary, is grouped with amendments 170, 171, 176, 180, 181 and 188.

Michael Matheson: The amendments, in conjunction with related amendments in the two groups on rights of under 18s—the first is on “consent to interview without solicitor present, sending of intimation and access to other person, other support” and the second is on “minor amendments”—make additional provision for the protection of under 18s in police custody. The amendments have specific regard to child protection and wellbeing issues.

Amendment 120 will require the police to record the time at which intimation was sent to a local authority to establish whether or not there are likely to be child protection issues that would prevent intimation from being sent, under section 30 of the bill, that the person was in custody. The amendment is dependent on amendment 188.

Amendments 170 and 171 will allow the police to delay for a child suspect, on safeguarding and wellbeing grounds, the sending of intimation under section 30, but only for as long as is necessary to consult the local authority on whether it will arrange for someone to visit the child in custody. It is expected that the process will, in practice, be used when the police believe that some form of child protection consideration may exist.

Amendments 180 and 181 are technical amendments that are designed to improve the drafting of the bill. The amendments in the group are also associated with amendments in group 21 on “Rights of under 18s: minor amendments”. The amendments will ensure that when it is not practical for the police to contact the person that they have been asked to contact, when the person who has been contacted refuses to attend, or when the local authority advises against contacting the person, the police do not have to contact the person or continue to try to contact them, as may be the case. In that case, the police must send intimation to an appropriate person, as defined in section 31(5) of the bill.

On intimation and access arrangements in respect of persons who are under 18 years of age who are being held in custody, amendment 188 will ensure that the police take cognisance of compulsory supervision orders that have been set by a children’s hearing or a sheriff court. The effect of the amendment will be to ensure that the police will, when they believe that a person is subject to such an order, contact the relevant local authority for advice on how to apply, in compliance with the terms of the order, the intimation and access rights that are set out in sections 30 and 32.

Furthermore, the obligation to involve the local authority goes wider than compulsory supervision order cases to capture circumstances in which a supervision order may not exist but the police have concerns about the child’s wellbeing. The concerns may be significant child protection concerns or there might be other forms of statutory restriction in place in respect of the child—for example, a court-issued child protection order or a compulsory supervision order that restricts contact or directs that no contact takes place, which would both mean that the usual steps of contacting a child’s parent or guardian may not be appropriate. Amendment 188 will in such cases require the police to contact the local authority for advice on who should, under section 30, be sent intimation and be permitted access to the person in custody.

Amendment 176 provides that when a local authority, acting under the provision that will be inserted by amendment 188, has advised against sending intimation in accordance with section 30, intimation must be sent—in accordance—to an appropriate person, as defined in section 31(4). I ask the committee to support the amendments.

I move amendment 120.

Amendment 120 agreed to.

Amendment 121 moved—[Michael Matheson]—and agreed to.
The Convener: Amendment 122, in the name of the cabinet secretary, is grouped with amendments 123, 12, 125, 13, 126 to 131, 14, 134, 15, 16, 135 to 137, 17, 139 and 141.

Michael Matheson: Although the amendments all relate to keeping a person in custody under chapter 2 of part 1 of the bill, they address four distinct issues. Most of my amendments, and amendments 13 to 17 in the name of John Pentland, deal with the proposal to allow the maximum detention period to be extended from 12 to 24 hours. I will address that issue first before moving on to amendment 12, in the name of John Finnie, which relates to the rank at which decisions on whether to keep a person in custody should be made. I will then speak to amendment 130, which will make a minor adjustment to the test for whether a person can be kept in custody. Finally, I will cover amendments 139 and 141, which relate to the time spent travelling from hospital to the police station.

A key purpose of the custody provisions in chapter 2 is to strike an appropriate balance and ensure that no one is held unnecessarily or disproportionately and that the rights of suspects and victims are protected while the police have the flexibility to carry out effective investigations. The bill allows a person to be kept in custody for a maximum of 12 hours. That is a 12-hour reduction from the current detention period, which allows extensions to 24 hours. The system is designed to ensure that suspects are detained for only as long as is absolutely necessary, and the detention limit is not a target but an absolute maximum.

Strong safeguards are built into the system. The initial custody decision must be made by a police officer who has not been involved in the investigation, and a mandatory custody review must be carried out by an inspector after six hours. Keeping someone in custody can be authorised only if there are reasonable grounds for suspecting that they have committed an offence and if keeping them in custody is necessary and proportionate, with account being taken of the nature and seriousness of the offence, the need to enable the offence to be investigated and the likelihood of interference with witnesses and evidence. Section 41 also places a general duty on every constable to

“take every precaution to ensure that a person is not unreasonably or unnecessarily held”
in custody.

Conflicting views were expressed at stage 1 on the detention time limits, and the Scottish Government made a commitment to considering an extension of the detention time limit to 24 hours in exceptional circumstances. Having considered the arguments further, I believe that it is necessary to allow the extension from 12 to 24 hours. I am satisfied that the bill contains appropriate safeguards to ensure that the power will be used properly and that such extensions will not become commonplace.

It is possible to extend detention periods up to a maximum of 24 hours under the current legislation, but not under the bill as introduced, so the police would have to release suspects in some serious and complex cases if the 12-hour period were to expire before they had obtained sufficient evidence to charge the suspects with an offence. That would not prevent suspects from being arrested and charged later, but releasing them could endanger public safety or interfere with the proper investigation of offences.

The current power to extend detention periods to 24 hours is used in only a very small number—less than 0.5 per cent—of cases, which demonstrates that the police make appropriate and proportionate use of the power and that it is used only in exceptional cases. The power to extend is necessary in those cases, many of which involve serious and complex offences.

Various factors can contribute to creating exceptional circumstances in which an extension might be required. The factors that could combine to require an extension to 24 hours tend to involve the timing of the start of interviews rather than the length of those interviews, and the purpose of an extension would be to ensure that interviews are conducted in circumstances that are fair to the suspect and the victims and which allow the police to conclude inquiries properly and gather sufficient evidence in order to charge a suspect. Suspects and victims might be too exhausted, traumatised, drunk or under the influence of drugs to be interviewed immediately after a suspect is arrested and brought to a police station.

11:45

Urgent work might be needed to interview victims, to trace witnesses and to conduct other investigations. It might not be in the interest of public safety or the safety of the victim or suspects to release a person who is suspected of a serious and violent offence on investigative liberation while such investigations take place.

In some cases, it is considered best practice to examine a crime scene during daylight hours, even if an initial arrest took place at night. That may apply, for example, to the examination of bedclothes at a rape scene. Forensic medical examination may be required before interviews can take place. In areas of rural Scotland, victims and suspects may need to travel to specialist police medical suites or for examination by a police casualty surgeon. If a 12-hour detention
limit was applied, the examinations and the travel times involved might reduce the time that remained for conducting interviews.

Other people, such as interpreters and appropriate adults, may be required before interviews can commence. It is in the interests of justice and human rights that such people are present at interviews, but it may take time to assess what support is required for a suspect and to arrange for a specialist to attend. Delays are possible if a suspect’s needs are not immediately identified because they were drunk or on drugs.

Those factors can reduce the available time for conducting interviews. In complex cases, extending the detention period beyond 12 hours may become necessary to conduct an effective investigation. I have therefore lodged amendments 122, 123, 125 to 129, 131, 134 and 135 to 137 to make provision for extending detention limits from 12 to 24 hours. Amendments 13 to 17, which John Pentland lodged, would make similar provision. I propose to deal with my amendments before moving on to consider his amendments.

Amendment 135 is the primary amendment to allow the detention limit to be extended to 24 hours. The power to extend is limited to serious offences, and it will be subject to safeguards to ensure that it is used only when absolutely necessary. The safeguards include a requirement for authorisation at inspector level and provision for the suspect to make representations. The existing safeguards in the bill will also apply, including the statutory test for keeping people in custody, mandatory custody reviews at six hours and the general duty under section 41 not to detain people unreasonably or unnecessarily.

The safeguards will ensure that extensions to detention periods can be authorised only in exceptional circumstances. Extensions are tempered by the safeguard of regular review, as recommended by the Carloway report.

My other amendments are all intended to ensure that the new powers to authorise extension are appropriately woven into the existing provisions about providing and recording information and conducting custody reviews. That includes the reorganisation of sections and adjustments to terminology.

Amendments 122 and 123 deal with recording information. Information about the authorisation process and the rationale for extending the period must be recorded. When initial authorisation is given to keep a person in custody under section 7, amendment 125 will require them to be told that their detention period may be extended.

Amendments 126 and 127 amend section 9. Amendment 126 will ensure that a custody review is carried out after the first six hours of an extension. Amendment 127 makes drafting adjustments. Amendment 129 amends section 10 to ensure that the test of necessity and proportionality must be met when deciding whether to keep someone in custody beyond the initial 12-hour period. Amendments 128 and 131 move sections 9 and 10 to after section 12. Amendment 134 amends section 11 to require the police to charge or release someone once any extension to 24 hours has expired. Amendment 136 requires the police to give a person certain information when authorisation has been given to extend the detention period beyond the 12-hour point. Amendment 137 is a technical amendment to allow time that is spent travelling to or from hospital or at hospital to be deducted from the extension period.

Amendments 13 to 17 were lodged by John Pentland. I wholly support the principle of allowing the detention period to be extended from 12 to 24 hours in exceptional circumstances, so I welcome the intention behind his amendments. However, I do not believe that they would offer the same protection to suspects as the amendments that I just outlined would. I therefore ask Elaine Murray not to move amendments 13 to 17.

John Pentland’s amendment 15 would permit an extension up to 24 hours when both the current custody test under section 10 and the additional test of exceptional circumstances were met. Amendments 12 to 14, 16 and 17 are consequential on amendment 15.

My amendments will offer suspects greater protection than amendment 15 would. In particular, my amendments will ensure that an extension can be granted only in relation to serious offences. They will ensure that suspects can make representations about a proposed extension. They will require a custody review by an inspector after six hours and will set out a much more detailed requirement for recording and providing information.

I do not believe that the exceptional circumstances test is necessary. I am satisfied that the existing power to extend the detention period is used only in exceptional circumstances and that the safeguards that are set out in the bill will continue to ensure that that is the case. Setting out an exceptional circumstances test would further complicate the statutory test and create a risk of preventing extensions in cases in which they were genuinely needed.

Amendment 12, in John Finnie’s name, would provide that, when a person was arrested without a warrant and was not charged with an offence, authorisation to keep them in custody could be given only by an officer of the rank of sergeant or above. In many of the more rural custody stations, the duty custody officer may be a constable. There
has to be a justifiable reason for continued detention, which has to be authorised by an officer who is not connected with the case. That provides an independent overview of the initial arrest and the continued detention.

Custody officers are trained in custody procedures and prisoner welfare. The authorisation to keep a person in custody also starts the 12-hour period for someone who is not officially accused. A duty custody officer of the rank of constable is perfectly able to carry out that function and afford people their rights. Amendment 12 proposes an unnecessary restriction on current practice that would lead to an increase in the requirement for sergeants across Scotland, even if authorisation were given remotely. The amendment would also lead to delays in the start of the 12-hour period as a result of waiting for an officer of a suitable rank to become available. For that reason, I cannot support the amendment and I ask John Finnie not to move it.

Amendment 130 makes a small clarification to the key test in section 10 for whether a person can be kept in custody. The test applies to the initial decision to keep someone in custody following their arrest. It also applies when the inspectors conduct custody reviews after someone has been in custody for six hours.

The police officer who decides to keep someone in custody must be satisfied that there are reasonable grounds for suspecting that they have committed an offence and that keeping them in custody is necessary and proportionate for the purposes of bringing them before a court or otherwise dealing with them in accordance with the law. Several factors may be taken into account in deciding what is necessary and proportionate. One of those is whether the person’s presence is reasonably required to enable the offence to be investigated.

Amendment 130 will clarify that, when deciding whether to keep someone in custody, the police may consider whether the person’s presence is required to enable the offence to be investigated fully. That has always been the intended effect of section 10. The amendment makes it absolutely clear that police have the ability to undertake a full investigation of an offence while a suspect is held in custody, subject to continued custody being necessary and proportionate for the purposes of bringing the suspect before a court or otherwise dealing with them in accordance with the law.

It is also important to note that section 41 will still apply, to ensure that police “must take every precaution to ensure that a person is not unreasonably or unnecessarily held” in custody. Amendment 130 will protect the balance between the public interest in ensuring a thorough and effective investigation and the rights of suspects, as recommended by Lord Carloway and reflected throughout part 1.

I turn to amendments 139 and 141. The bill already provides that the time that is taken to escort a person to a hospital for medical treatment and any time that is spent in hospital are not to be deducted from the 12-hour detention period, but it does not take account of the time that the return journey takes. In more remote areas of the country, a return journey from hospital could take a considerable time, so amendment 139 provides that the time that is taken to transport an individual back from hospital will not be deducted from the 12-hour detention period. That will ensure that there is still sufficient time to interview suspects effectively once they arrive at the police station.

Amendment 141 will protect suspects by ensuring that, should a suspect be interviewed while travelling from hospital to a police station, the time that is spent interviewing them will count towards the 12-hour limit.

I move amendment 122.

The Convener: Thank you, cabinet secretary. You will be glad to have a rest after that.

John Finnie: I am always keen to ensure that all our legislation is rural proofed.

The Convener: We know that, John.

John Finnie: I am acutely aware of the fact that the number of locations where people can be taken into custody in rural areas is diminishing.

Amendment 12 seeks to change the rank of the police officer who may authorise keeping someone in custody from constable to sergeant. Many, including the Law Society of Scotland, welcome Lord Carloway’s recommendation that the maximum time for which a suspect can be held without being charged or advised that he or she is to be reported to the procurator fiscal should be 12 hours.

Elsewhere in legislation, the appropriate constable is someone above the rank of inspector. I do not accept the idea that authorisation cannot be given remotely or the idea that there can be an independent overview but it cannot be exercised by someone of a supervisory rank. It is anomalous to have a constable authorising a peer’s decision making in relation to the deprivation of liberty. That is a retrograde step rather than an advance, so I certainly intend to move and press amendment 12.

Elaine Murray: John Pentland’s amendments 13 to 17 were intended to address the issue that, in exceptional circumstances, the police might have to extend the period of custody from 12 hours up to 24 hours. His amendments specify circumstances in which that might be the case,
such as when the person is under the influence of drugs or alcohol and is therefore unfit to be interviewed, when support for the person cannot be accessed before the end of the 12-hour period or when it is essential for their or another person’s safety that the person remains in custody. A decision to extend the period in custody could be taken only by a constable of the rank of inspector or above.

As the cabinet secretary said, the Government’s amendments in the group fulfil the same policy intention but are more technically competent as they apply to sections of the bill that are not covered in John Pentland’s amendments. Today, the cabinet secretary is supported by an army of Government officials, whereas members who are not in the party of the Scottish Government are reliant on the efforts of the Parliament’s legislation team. While those efforts are sterling, they are made by only two or three people, who have to deal with several bills at the same time. For that reason, I am prepared to admit that the Scottish Government’s amendments are possibly more technically correct, so I am happy not to move John Pentland’s amendments and will support the cabinet secretary’s amendments.

I am very sympathetic to the intention of John Finnie’s amendment 12. Like him, I have every interest in ensuring that people who are kept in custody in rural areas are dealt with appropriately, and I cannot see why it would not be possible for a sergeant to be available remotely, rather than a sergeant having to be available in the custody area. I am therefore inclined to support amendment 12.

**Alison McInnes:** The cabinet secretary’s amendments in this group seek to extend the length of time for which anyone can be kept in custody to 24 hours in some circumstances. The evidence that the committee received on the issue at stage 1 was mixed, so we should be extremely cautious about departing from Lord Carloway’s view. The cabinet secretary has set out a reasonable case, but I remain concerned about the situation of children and vulnerable young people.

Without wishing to get ahead of myself, I think that my support for the Government’s amendments will be contingent on the Government backing my amendment 242 in the next group, which limits to six hours the length of time for which children and vulnerable adults can be held in custody. In conscience, I could not countenance extending the limit to 24 hours without additional provision being made for safeguards for children and vulnerable adults.

12:00

**The Convener:** You are getting ahead of yourself. We will come to that. I call Margaret Mitchell, to be followed by Roddy Campbell.

**Margaret Mitchell:** I speak in favour of John Finnie’s amendment 12, which is sensible. I see no reason why authorisation could not be given remotely, and the amendment gives added protection to people in rural areas as well as those in urban settings.

**Roderick Campbell:** I want to comment briefly on the key amendment 135. It provides, in addition to the provisions under section 41 on not detaining people unreasonably or unnecessarily, that authorisation has to be given by an inspector, and it applies only to serious or indictable offences. Another bit of the amendment, which has not been mentioned, is that the inspector who gives authorisation has to satisfy himself that “the investigation is being conducted diligently and expeditiously”, so it is not a laggard’s charter. These should be rare occurrences.

**Michael Matheson:** The reasons that I outlined for not supporting John Finnie’s amendment 12 stand, notwithstanding the points that Mr Finnie made with regard to the issue.

It is worth reflecting that the issue is about the quality of the decision making in a particular instance with regard to retaining someone in custody, and I am not convinced that higher rank will always lead to better decision making in these matters. A significant level of training is provided to constables, particularly those who have custodial responsibilities.

**John Finnie:** Will the cabinet secretary take an intervention?

**The Convener:** Let the cabinet secretary continue, then you can come in.

**Michael Matheson:** There is a growing level of specialism, with many policing responsibilities being made role specific as opposed to rank specific. Constables of whatever rank who fulfil specialist roles have a greater knowledge and understanding of a specific issue than those who do not deal with those matters on a day-to-day basis, who may be of a higher rank. Custody division is now a specialist role area due to the intensive training that is given to those officers on prisoner welfare and custody-related procedures, including the various pieces of guidance issued by the Lord Advocate.

We remain of the view that the decision making should be held at the position of constable.
The Convener: Before you go on, cabinet secretary, John Finnie wants in to say something about that.

John Finnie: I am not absolutely certain how custody division is configured, but I refer to what you said about the nature of rural areas, cabinet secretary. I am not casting any aspersions on the role of constable. I was one for 30 years and I absolutely acknowledge that it is the front-line, pivotal role. Constables will stand and fall by the decisions that they take on depriving someone of their liberty. My suggestion is that that would be enhanced by independent oversight. Custody division would not be there in a remote location, anyway, and the idea that people could phone and not get a sergeant anywhere in Scotland seems peculiar, to say the least.

Michael Matheson: The key here is not the rank but having someone with the appropriate knowledge and skills. Given that, it might be a constable who is contacted remotely for the purpose of getting a period of custody extended. It is about making sure that the officer has the necessary knowledge and skills to make the decision.

The committee will come to a decision on whether it believes that sergeant or constable is the appropriate rank for making those decisions. I welcome Elaine Murray’s decision not to move John Pentland’s amendments.

Amendment 122 agreed to.

Amendment 123 moved—[Michael Matheson].

The Convener: The question is, that amendment 123 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Pentland, John (South of Scotland) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 7, Against 0, Abstentions 2.

Amendment 123 agreed to.

Section 7 agreed to.

Section 7—Authorisation for keeping in custody

Amendment 12 moved—[John Finnie].

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 12 agreed to.

Section 7, as amended, agreed to.

After section 7

The Convener: Amendment 242, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: The bill states that anyone can be held in custody for up to 12 hours. Members will recall that there were mixed views among witnesses on whether that length of time is appropriate. Some advocated the reintroduction of the six-hour limit while others favoured extending the limit to 24 hours in exceptional cases.

Shelagh McCall of the Scottish Human Rights Commission told the committee:

“Parliament should think carefully about whether it is ever appropriate to hold a child or a vulnerable adult for more than six hours.”—[Official Report, Justice Committee, 8 October 2013; c 3356.]

Scotland’s Commissioner for Children and Young People, Tam Baillie, also drew attention to the need for stringent safeguards. The bill does not include any exceptions or variations, but there is a strong argument for reducing the 12 or 24-hour limit to six hours for children and vulnerable adults. That would recognise their unique vulnerability and the additional impact that being held in custody for long periods could have on them.

Amendment 242 would also encourage the police to deal with children and young people’s cases as priorities and help to ensure that they are in custody for the shortest possible time. If further investigations are required after the six-hour
period in custody has expired, there would be the option of an investigative liberation.

I move amendment 242.

Elaine Murray: I admit that there were differences of opinion on the issue, but I do not agree that the limit should be six hours. That would cover some people who were under investigation for fairly serious offences. If the amendment was redrafted to say that a child or vulnerable adult could not be kept in detention for more than 12 hours, I might be inclined to support it, but six hours is too short a time.

Roderick Campbell: I agree with Elaine Murray on that point. I hope that the number of children affected would be very small.

John Finnie: A number of years ago, prior to external events affecting the police service, six hours was more than adequate.

Michael Matheson: Amendment 242 would prevent children and vulnerable adult suspects from being kept in custody for more than six hours. I strongly believe that we need to protect the rights of children and vulnerable adult suspects within the justice system, but the amendment would undermine one of the fundamental purposes of the bill and prevent serious crime from being properly investigated.

It is vital that all offences can be properly investigated in the interests of justice. In doing that, it is also vital to protect the rights of suspects. The fundamental purpose that underlies the bill is to balance those sometimes competing interests. That involves providing additional support and protections to ensure that children and vulnerable suspects are not disadvantaged in the justice process.

The Carloway review considered those issues in great detail, and the bill already reflects the delicate balance between the interests that the review identified. It provides strong protection to ensure that no one is held unnecessarily or disproportionately. That includes the test of necessity and proportionality under section 10, the requirement for custody reviews after six hours and the general duty on all constables to “take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody” under section 41.

When a child is involved, the police will have to treat their wellbeing as a primary consideration in any decision to keep them in custody. When a person has been held in custody for six hours, section 9 of the bill requires a custody review to be carried out by an inspector who has not been involved in the investigation, and the person must be released if it is no longer necessary and proportionate for them to be kept in custody. That important process ensures that any period that is spent in custody is tempered by the safeguard of regular review, as recommended in the Carloway report.

In relation to vulnerable adult suspects, the bill already strengthens the protection that is available, placing a duty on the police to seek support to ensure that such individuals understand what is happening and are able to communicate effectively, and preventing vulnerable persons from consenting to be interviewed without a solicitor being present. As is currently the case, the police will continue to balance the interests of justice with the particular circumstances, needs and vulnerabilities of the person who is being interviewed.

The bill also provides additional protection for children that includes the requirement to safeguard and promote the child’s wellbeing as a primary consideration when custody decisions are made. Where custody is necessary and proportionate, the child must be kept in a place of safety rather than a police station, and protections are incorporated in the bill with regard to intimation to and attendance of parents or other persons at the custody centre.

In operational practice, Police Scotland attempts to ensure that children and young people are kept in custody for as short a time as possible. When very minor crimes are committed by children, it is common for them not to be taken to a custody centre but, rather, to be taken home and, if it is deemed necessary, cautioned or charged in front of their parents or carers. When children are in custody, the police’s standard operating procedure states that, if they are to be detained for more than four hours, a custody inspector must review the case.

Currently, most people are released after six hours, but that period is not adequate in all cases. Police Scotland has provided assurances that children and vulnerable adults will be held past six hours only in a small number of cases and that it will ensure that robust operational guidance and monitoring are in place in relation to that power.

Before part 1 of the bill is brought into force, Police Scotland will update its standard operating procedures in relation to custody to ensure that they are in line with the new arrest and custody regime, and that process will include updating existing guidance documents on dealing with children and vulnerable adults in the custody system. Police Scotland will work with stakeholder groups to ensure that the guidance documents ensure that appropriate protection is provided to children and vulnerable adults in custody.
However, there will be cases where it is necessary to hold a child or a vulnerable adult for more than six hours. Children and vulnerable adults can be suspected of very serious or complex offences, and the interests of justice demand that such offences be fully investigated. It would not be in the interests of justice to require certain suspects to be released after six hours regardless of whether the offence has been properly investigated and whether it would otherwise be necessary and proportionate to hold them. I therefore cannot support amendment 242, and I ask Alison McInnes to consider withdrawing it.

Alison McInnes: Elaine Murray said that, if I had lodged an amendment that changed the period to 12 hours, she might have been able to support it, but when I lodged amendment 242, we had not seen the minister’s amendment that changes the period in the bill from 12 hours to 24 hours.

The minister spoke about the delicate balance that Lord Carloway had regard to in relation to the rights of suspects and the responsibility to investigate crime, but the minister’s amendment affects that delicate balance. It is therefore all the more important that children’s and vulnerable adults’ rights are protected, so I press amendment 242.

The Convener: The question is, that amendment 242 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)

Abstentions

The Convener: The result of the division is: For 7, Against 0, Abstentions 2.

Amendment 125 agreed to.

Amendment 13 not moved.

Section 8, as amended, agreed to.

Section 9—Review after 6 hours

Amendment 126 moved—[Michael Matheson].

The Convener: The question is, that amendment 126 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (Liberal Democrats)

Abstentions

The Convener: The result of the division is: For 7, Against 0, Abstentions 2.

Amendment 126 agreed to.

Amendment 127 moved—[Michael Matheson]—and agreed to.

Section 9, as amended, agreed to.

Amendment 128 moved—[Michael Matheson]—and agreed to.

Section 10—Test for sections 7 and 9

Amendment 129 moved—[Michael Matheson].

The Convener: The question is, that amendment 129 be agreed to. Are we agreed?

Members: No.
The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Graha, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)

Abstentions
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 7, Against 0, Abstentions 2.

Amendment 129 agreed to.

Amendment 130 moved—[Michael Matheson]—and agreed to.

12:15
The Convener: At last we get to Mary Fee. She has been sitting here for a long time.

Amendment 39, in the name of Mary Fee, is grouped with amendments 110, 41 to 45 and 260.

Mary Fee (West Scotland) (Lab): My amendments are designed to ensure that the issues that are faced by children and young people who are affected by their parents' involvement in the justice system are flagged up as part of early intervention and prevention procedures.

As the committee will know from the meeting on 8 September, I wish to see at all stages of the justice process more recognition of children and young people who are affected by their parents' offending behaviour, starting from the point of arrest. We need a more joined-up approach to supporting those children, which should include a raft of agencies, including the police. If the amendments are not accepted, I hope to receive reassurances from the cabinet secretary that the intentions behind them can be addressed in other, non-legislative ways.

More needs to be done to encourage the police to consider the impact of arresting a parent on their dependent children. There is undoubtedly a role for the named person to play. I would welcome the cabinet secretary's comments on how that can be done more effectively.

Amendment 39 would ensure that the factors to be met as part of the test in section 10 for keeping a person in custody under section 7(4) and for reviewing continuation of custody after six hours under section 9(2) would include the impact on the person's dependent child or children.

Section 10(2)(a) provides that one of the factors that the police may consider as part of that test is “whether the person’s presence is reasonably required to enable the offence to be investigated”.

That recognises that the police can investigate an offence without necessarily requiring the person to be kept in custody. The amendment would extend that recognition to ensure that the police, in deciding whether to keep the person in custody, should also consider the impact of keeping the person in custody on the person's dependent child or children. That factor must be taken into account in cases in which it might not be necessary for the police to keep the person in custody in order to investigate the offence. That is particularly important where the person is the primary or sole carer for any dependent child or children.

Amendment 110 outlines the procedures to be followed by the police when a person with a dependent child or children is arrested for a serious offence or is a repeat offender and the police consider that that behaviour may have an impact on the wellbeing of any dependent children, they must share that information with the named person.

The Scottish Government's own guidance on the named person states:

“Practitioners should not wait until a situation has reached crisis point before sharing information. They should also share when there are smaller changes. This allows patterns to emerge—and these can often point to more serious concerns, allowing appropriate help to be offered at an early stage.”

Amendment 110 is necessary because, although a child's own offending behaviour is an obvious and visible wellbeing concern, children who are affected by their parents' offending will not always be present or visible to the police, so there needs to be a trigger. The amendment would ensure that the police are always thinking about any dependent children whom a suspected offender may have and are consistently asking the question and considering at what point the behaviour of the suspected offender may start to have an effect on the wellbeing of any dependent children.

Amendments 41 to 45 are fairly minor amendments that provide clarification. They would extend the duty in section 42 to ensure that the best interests of any dependent children are taken...
into account when arresting, holding, interviewing or charging a person with responsibility for a child. In 2012, the UK, with the Scottish Government’s support, accepted a recommendation made in the course of the UK’s human rights peer review at the UN Human Rights Council that asked the UK to ensure that the best interests of the child are taken into account when arresting, detaining, sentencing or considering early release for a sole or primary carer of a child. My amendments are consistent with that recommendation. Section 42 of the bill seeks to integrate the United Nations Convention on the Rights of the Child into Scottish criminal justice legislation. That is to be welcomed.

The focus on the best interests and wellbeing of the child as paramount is a positive step forward in ensuring that children and young people are treated appropriately within the criminal justice system. However, children and young people can also be indirectly drawn into the criminal justice system through the offending behaviour of their parents or primary care givers. My amendments would require a constable to consider the best interests of an offender’s dependent children, from point of arrest through to being charged. That will help to ensure that the needs of those often forgotten children are met and that their wellbeing is considered a priority during what is often a trying period of their care givers’ time in the criminal justice system. The more opportunities that there are, the more likely that a suspect will disclose that information. Only with the right information can statutory services link up and ensure that the right care and support is provided to children and young people affected by their parents’ offending behaviour.

I move amendment 39.

Michael Matheson: Children can be seriously affected by parental arrest, custody and imprisonment. While there are already areas of good practice, I agree that we need to ensure a consistent multi-agency approach to addressing the impact on children when a parent is arrested or held in custody. That requires strong links between the justice system, statutory services and the voluntary organisations that work with children and families affected by imprisonment.

I have taken on board what Mary Fee has said regarding the interests and wellbeing of children during initial arrest. Mary Fee has met the Minister for Children and Young People on the matter, which I hope has gone some way to reassure her of our commitment to work with her to ensure that the intent behind her amendments is given effect.

I can reassure Mary Fee that the Scottish Government will take steps to address her concerns through implementation of the legislation and through guidance and practice material, under the Children and Young People (Scotland) Act 2014, to the police and other relevant agencies to ensure that the interests of children are properly protected. My officials are already engaged with stakeholders to ensure that that happens.

I support and commend the intention behind Mary Fee’s amendments, but I believe that there are more effective ways to achieve the desired outcome of keeping children safe. As drafted, the amendments would alter the carefully balanced decision-making process for arresting, holding and charging adult suspects.

The bill is designed to deliver a balance between the rights of suspects and the powers of the police in order to serve the interests of justice. That was what was envisaged in the independent Carloway review. Police will be alert to the interests of the child while carrying out their duties under the bill. The police would never act in a way that would leave a child open to danger. While the member’s amendments pursue the aims of protecting children affected by parental arrest and custody, that aim can be better achieved through the implementation of the Children and Young People (Scotland) Act 2014.

Amendment 39 would add to the test already contained in section 10 of the bill regarding custody decisions. That is a key test under the bill. It is used at various stages to decide whether a suspect can be kept in custody. It balances the needs of the police to manage a criminal investigation and the rights of the suspect, taking into consideration the needs of inquiry and public safety.

Amendments 39 and 42 would require the police to treat suspects with responsibility for children differently. In such cases, the effect on the child of keeping the person in custody would have to be a primary concern in making the decision on custody. As we know, children are affected by the arrest of their parents, but making that a primary concern when deciding whether to take someone into or keep someone in custody would be out of balance with the already finely balanced test contained in section 10. The interests of justice and public safety must remain primary considerations when making decisions about whether it is in the interests of justice and proportionate to deprive a person of their liberty.

Making custody decisions on that basis does not prevent the police from working to ensure that the immediate care and support needs of affected children are also met; in fact, that is part of their daily business. The police maintain a duty of care over the arrested person, and that duty naturally extends to any dependent children who have been left exposed by that arrest. It must be remembered that part of their core role is to keep all people safe. If the police become aware of concerns about any child’s wellbeing, they will take
immediate steps to ensure the child’s safety, be that tracing another parent or relative, engaging social work or bringing the child into a safe environment, and such work is often done through a close working relationship with social work partners. I believe that a case-specific approach is both preferable and more practicable than the catch-all approach that has been suggested in Mary Fee’s amendments.

Amendment 110 seeks to ensure that when a person with parental responsibilities for a child is arrested the police contact the child’s named person as identified in part 4 of the Children and Young People (Scotland) Act 2014. It would never be the case that, once the police were made aware of a wellbeing concern, they would leave a child to fend for themselves without taking action to ensure that the child’s welfare needs were addressed. Under the 2014 act, the police have a duty to share relevant information relating to a child’s wellbeing with the named person service when appropriate.

Amendments 41 to 45 seek to add to the test already contained in section 42 for child suspects. The current test set out in that section requires the police to take account of the wellbeing of the child before arresting, holding or charging them, and it seeks to ensure that, whatever the circumstances, children are arrested, held or charged appropriately and proportionately. The amendments would extend the test to cover all people with “responsibility for a child”. In effect, before the police decided to arrest someone, hold them in custody, question or charge them, they would have to consider the wellbeing of any children for whom they might have responsibility. That would be out of step with the test already contained in the bill, which is intended to strike a balance between the public interest in investigating crime and protecting public safety and the rights of suspects.

Under amendment 260, which has been substituted for amendment 46, the scope of the definition of “responsibility for a child” is very wide and covers many people who might have legal responsibilities for children but who are not responsible for their care and support on a day-to-day basis. It is important to acknowledge that the police already take steps to identify any childcare issues of persons who are arrested and take necessary steps to ensure the wellbeing of children who are cared for in partnership with social work colleagues. The police also play a significant role in their localities in protecting children. Amendment 260, as drafted, could make the assessment that they currently undertake more about wellbeing than about the wellbeing and child protection that they assess at the moment. We do not want to lower the level of or lose the current practice that the police already carry out.

My colleague Aileen Campbell would be happy to meet Mary Fee ahead of stage 3 to update her on the progress with the development of practice material for children who are affected by parental detention and how that can better address their needs.

I therefore ask the member not to press amendment 39.

Mary Fee: I will be brief as I am conscious of the time. I thank the cabinet secretary for his mostly supportive comments. He was right to say that I have met the Minister for Children and Young People, and I am glad that he acknowledges that more work can be done on these matters. I am keen that we find a way to support this really vulnerable group of children and young people.

Given the comments that the cabinet secretary has made and his commitment to work with both me and other stakeholders, I am happy not to move my amendment 39.

12:30
The Convener: You have moved it. Do you wish to withdraw it?

Mary Fee: Sorry—yes.

Amendment 39, by agreement, withdrawn.

Section 10, as amended, agreed to.

Amendment 131 moved—[Michael Matheson]—and agreed to.

The Convener: I advise members that I am going to press on for a little so that we can get to the end of section 13, because most of the amendments have already been debated.

Section 11—12 hour limit: general rule

Amendments 132 and 133 moved—[Michael Matheson]—and agreed to.

Amendment 14 not moved.

Amendment 134 moved—[Michael Matheson].

The Convener: The question is, that amendment 134 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)

Abstentions
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 7, Against 0, Abstentions 2.
Amendment 134 agreed to.
Section 11, as amended, agreed to.

After section 11
Amendment 15 not moved.

Section 12—12 hour limit: previous period
Amendment 16 not moved.
Section 12 agreed to.

After section 12
Amendment 135 moved—[Michael Matheson].

The Convener: The question is, that amendment 135 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)

Abstentions
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 7, Against 0, Abstentions 2.
Amendment 135 agreed to.
Amendment 136 moved—[Michael Matheson]—and agreed to.

Section 13—Medical treatment
Amendment 137 moved—[Michael Matheson]—and agreed to.
Amendment 17 not moved.
Amendments 138 to 141 moved—[Michael Matheson]—and agreed to.
Section 13, as amended, agreed to.

The Convener: That concludes the amendment process for today, but we will return to amendments next week. I hope that you have the stamina, cabinet secretary, because I think that it is going to be an even longer session.

I will suspend the meeting for a couple of minutes.

12:33
Meeting suspended.
Criminal Justice (Scotland) Bill

4th Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 57 to 61 Schedule 2
Sections 62 to 87 Schedule 3
Sections 1 to 52 Schedule 1
Sections 53 to 56 Sections 88 to 91
Long Title

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

Section 14

John Finnie
18 In section 14, page 6, line 32, leave out from <and> to end of line 33

Michael Matheson
142 In section 14, page 6, leave out line 33 and insert—

< ( ) either—

(i) the person has not been subject to a condition imposed under subsection (2) in connection with a relevant offence, or

(ii) it has not been more than 28 days since the first occasion on which a condition was imposed on the person under subsection (2) in connection with a relevant offence.>

Elaine Murray
47 In section 14, page 6, line 35, leave out from <ensuring> to end of line 36 and insert <securing—

(a) that the person surrenders to custody if required to do so,
(b) that the person does not commit an offence while released,
(c) that the person does not interfere with a witness or otherwise obstruct the course of the investigation into a relevant offence,
(d) the protection of the person, or
(e) if the person is under 18 years of age, the welfare or interests of the person.>

Michael Matheson
143 In section 14, page 6, line 36, at end insert—

<( ) A condition under subsection (2)—

(a) may not require the person to be in a specified place at a specified time,
(b) may require the person—

(i) not to be in a specified place, or category of place, at a specified time, and

(ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period.

John Finnie

19 In section 14, page 6, line 36, at end insert—

<(2A) When imposing a condition under subsection (2), the constable is to specify the period for which the condition is to apply.

(2B) The period specified under subsection (2A) is to be such period, not exceeding 28 days, as the appropriate constable considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence.

(2C) In any case where a person has previously been subject to a condition imposed under subsection (2) in connection with a relevant offence, the reference in subsection (2B) to 28 days is to be read as a reference to 28 days minus the number of days on which the person was so subject.>

Michael Matheson

144 In section 14, page 6, line 38, leave out <Chapter 7> and insert <schedule (Breach of liberation condition)>

Michael Matheson

145 In section 14, page 6, line 39, leave out subsection (4)

John Finnie

20 In section 14, page 6, line 39, leave out from <(1)(c)> to end of line 3 on page 7 and insert <(2C)>

Michael Matheson

146 In section 14, page 7, line 7, leave out <inspector> and insert <sergeant>

Section 15

Michael Matheson

147 In section 15, page 7, line 15, leave out from <last> to <14(4)> and insert <day falling 28 days after the first occasion on which a condition was imposed on the person under section 14(2) in connection with a relevant offence>

John Finnie

21 In section 15, page 7, line 15, leave out <28 day period described in section 14(4)> and insert <period specified under section 14(2A)>
Section 17

John Finnie

22 In section 17, page 8, line 17, at end insert <, ( ) to have the period for which the condition applies reduced.>

John Finnie

23 In section 17, page 8, line 20, after <condition> insert <or, as the case may be, the period specified under section 14(2A)>

John Finnie

24 In section 17, page 8, line 21, after <imposed> insert <or, as the case may be, specified>

John Finnie

25 In section 17, page 8, line 23, after <condition> insert <or, as the case may be, specify an alternative period>

John Finnie

26 In section 17, page 8, line 25, after <imposed> insert <or period specified>

John Finnie

27 In section 17, page 8, line 26, at end insert <or, as the case may be, specified under section 14(2A).>

Before section 18

Michael Matheson

148 Before section 18, insert—

<Information to be given if sexual offence>

(1) Subsection (2) applies when—

(a) a person is in police custody having been arrested under a warrant in respect of a sexual offence to which section 288C of the 1995 Act applies, or

(b) a person—

(i) is in police custody having been arrested without a warrant, and

(ii) since being arrested, the person has been charged by a constable with a sexual offence to which section 288C of the 1995 Act applies.

(2) The person must be informed as soon as reasonably practicable—

(a) that the person’s case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A) of the 1995 Act) in the course of the proceedings may be conducted only by a lawyer,

(b) that it is, therefore, in the person’s interests to get the professional assistance of a solicitor, and

(c) that if the person does not engage a solicitor for the purposes of the conduct of the person’s case at or for the purposes of the hearing, the court will do so.>
Section 18

Michael Matheson

149 In section 18, page 9, line 1, leave out subsection (2) and insert—

<(2) The person must be brought before a court (unless released from custody under section 19)—

(a) if practicable, before the end of the first day on which the court is sitting after the day on which this subsection began to apply to the person, or

(b) as soon as practicable after that.>

Michael Matheson

101 In section 18, page 9, line 6, at end insert <(by virtue of a determination by the court that the person is to do so by such means)>

After section 18

Michael Matheson

150 After section 18, insert—

<Under 18s to be kept in place of safety prior to court

(1) Subsection (2) applies when—

(a) a person is to be brought before a court in accordance with section 18(2), and

(b) either—

(i) a constable believes the person is under 16 years of age, or

(ii) the person is subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

(2) The person must (unless released from custody under section 19) be kept in a place of safety until the person can be brought before the court.

(3) The place of safety in which the person is kept must not be a police station unless an appropriate constable certifies that keeping the person in a place of safety other than a police station would be—

(a) impracticable,

(b) unsafe, or

(c) inadvisable due to the person’s state of health (physical or mental).

(4) A certificate under subsection (3) must be produced to the court when the person is brought before it.

(5) In this section—

“an appropriate constable” means a constable of the rank of inspector or above, “place of safety” has the meaning given in section 202(1) of the Children’s Hearings (Scotland) Act 2011.>
John Finnie

150A As an amendment to amendment 150, line 21, leave out <inspector> and insert <superintendent>.

Michael Matheson

151 After section 18, insert—

<Notice to parent that under 18 to be brought before court>

(1) Subsection (2) applies when a person who is 16 years of age or over and subject to a supervision order or under 16 years of age—

(a) is to be brought before a court in accordance with section 18(2), or
(b) is released from police custody on an undertaking given under section 19(2)(a).

(2) A parent of the person mentioned in subsection (1) (if one can be found) must be informed of the following matters—

(a) the court before which the person is to be brought,
(b) the date on which the person is to be brought before the court,
(c) the general nature of the offence which the person has been officially accused of committing, and
(d) that the parent’s attendance at the court may be required under section 42 of the 1995 Act.

(3) Subsection (2) does not require any information to be given to a parent if a constable has grounds to believe that giving the parent the information mentioned in that subsection may be detrimental to the wellbeing of the person mentioned in subsection (1).

(4) In this section—

“parent” includes guardian and any person who has the care of the person mentioned in subsection (1),
“supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

Michael Matheson

152 After section 18, insert—

<Notice to local authority that under 18 to be brought before court>

(1) The appropriate local authority must be informed of the matters mentioned in subsection (4) when—

(a) a person to whom either subsection (2) or (3) applies is to be brought before a court in accordance with section 18(2), or
(b) a person to whom subsection (2) applies is released from police custody on an undertaking given under section 19(2)(a).

(2) This subsection applies to—

(a) a person who is under 16 years of age,
(b) a person who is—

(i) 16 or 17 years of age, and
(ii) subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

(3) This subsection applies to a person if—
   (a) a constable believes the person is 16 or 17 years of age,
   (b) since being arrested, the person has not exercised the right to have intimation sent under section 30, and
   (c) on being informed or reminded of the right to have intimation sent under that section after being officially accused, the person has declined to exercise the right.

(4) The matters referred to in subsection (1) are—
   (a) the court before which the person mentioned in paragraph (a) or (as the case may be) (b) of that subsection is to be brought,
   (b) the date on which the person is to be brought before the court, and
   (c) the general nature of the offence which the person has been officially accused of committing.

(5) For the purpose of subsection (1), the appropriate local authority is the local authority in whose area the court referred to in subsection (4)(a) sits.

Section 19

Michael Matheson

153 In section 19, page 9, line 20, at end insert—

<( ) Where a person is in custody as mentioned in subsection (1)(a), the person may not be released from custody under subsection (2)(b).>

Section 20

Michael Matheson

154 In section 20, page 9, line 28, at end insert <while subject to the undertaking>

Michael Matheson

155 In section 20, page 9, line 30, leave out from <commit> to end of line 33 and insert—

<(i) commit an offence,
(ii) interfere with witnesses or evidence, or otherwise obstruct the course of justice,
(iii) behave in a manner which causes, or is likely to cause, alarm or distress to witnesses,
(b) any further condition that a constable considers necessary and proportionate for the purpose of ensuring that any conditions imposed under paragraph (a) are observed.>

Elaine Murray

48 In section 20, page 9, line 32, leave out from <ensuring> to end of line 33 and insert <securing—

(i) that the person surrenders to custody if required to do so,
(ii) that the person does not interfere with a witness or otherwise obstruct the course of the investigation into the offence in connection with which the person is in police custody,

(iii) the protection of the person, or

(iv) if the person is under 18 years of age, the welfare or interests of the person.

Michael Matheson

156 In section 20, page 9, line 34, leave out <a curfew> and insert—

<(a) a condition requiring the person—

(i) to be in a specified place at a specified time, and

(ii) to remain there for a specified period,

(b) a condition requiring the person—

(i) not to be in a specified place, or category of place, at a specified time, and

(ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period>
(2) Sub-paragraph (1) does not apply where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (in which case see paragraph 3).

(3) It is competent to amend a complaint to include an additional charge of an offence under sub-paragraph (1) at any time before the trial of a person in summary proceedings for—
(a) the original offence, or
(b) an offence arising from the same circumstances as the original offence.

(4) In sub-paragraph (3), “the original offence” is the offence in connection with which—
(a) an investigative liberation condition was imposed, or
(b) an undertaking was given.

Sentencing for the offence

2 (1) A person who commits an offence under paragraph 1(1) is liable on summary conviction to—
(a) a fine not exceeding level 3 on the standard scale, or
(b) imprisonment for a period—
(i) where conviction is in the justice of the peace court, not exceeding 60 days,
(ii) where conviction is in the sheriff court, not exceeding 12 months.

(2) A penalty under sub-paragraph (1) may be imposed in addition to any other penalty which it is competent for the court to impose, even if the total of penalties imposed exceeds the maximum penalty which it is competent to impose in respect of the original offence.

(3) The reference in sub-paragraph (2) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—
(a) where the sentences are imposed at the same time (whether or not in relation to the same complaint), framing the sentences so that they have effect consecutively,
(b) where the sentences are imposed at different times, framing the sentence imposed later so that (if the earlier sentence has not been served) the later sentence has effect consecutive to the earlier sentence.

(4) Sub-paragraph (3)(b) is subject to section 204A (restriction on consecutive sentences for released prisoners) of the 1995 Act.

(5) Where a person is to be sentenced in respect of an offence under paragraph 1(1), the court may remit the person for sentence in respect of it to any court which is considering the original offence.

(6) In sub-paragraphs (2) and (5), “the original offence” is the offence in connection with which—
(a) the investigative liberation condition was imposed, or
(b) the undertaking was given.

Breach by committing offence

3 (1) This paragraph applies—
(a) where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (“offence O”), but
(b) only if the fact that offence O was committed while the person was subject to the liberation condition is specified in the complaint or indictment.

(2) In determining the penalty for offence O, the court must have regard—
(a) to the fact that offence O was committed in breach of a liberation condition,
(b) if the breach is by reason of the person’s failure to comply with the terms of an investigative liberation condition, to the matters mentioned in paragraph 4(1),
(c) if the breach is by reason of the person’s failure to comply with the terms of an undertaking other than the requirement to appear at court, to the matters mentioned in paragraph 5(1).

(3) Where the maximum penalty in respect of offence O is specified by (or by virtue of) an enactment, the maximum penalty is increased—
(a) where it is a fine, by the amount equivalent to level 3 on the standard scale,
(b) where it is a period of imprisonment—
   (i) as respects conviction in the justice of the peace court, by 60 days,
   (ii) as respects conviction in the sheriff court or the High Court, by 6 months.

(4) The maximum penalty is increased by sub-paragraph (3) even if the penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(5) In imposing a penalty in respect of offence O, the court must state—
(a) where the penalty is different from that which the court would have imposed had sub-paragraph (2) not applied, the extent of and the reasons for that difference,
(b) otherwise, the reasons for there being no such difference.

Matters for paragraph 3(2)(b)

4 (1) For the purpose of paragraph 3(2)(b), the matters are—
(a) the number of offences in connection with which the person was subject to investigative liberation conditions when offence O was committed,
(b) any previous conviction the person has for an offence under paragraph 1(1)(a),
(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of paragraph 3(2), from that which the court would have imposed but for that paragraph.

(2) In sub-paragraph (1)—
(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under paragraph 1(1)(a),
(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this sub-paragraph, as references to any provision that is equivalent to paragraph 3(2).
(3) Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to determine.

Matters for paragraph 3(2)(c)

5 (1) For the purpose of paragraph 3(2)(c), the matters are—

(a) the number of undertakings to which the person was subject when offence O was committed,

(b) any previous conviction the person has for an offence under paragraph 1(1)(c),

(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of paragraph 3(2), from that which the court would have imposed but for that paragraph.

(2) In sub-paragraph (1)—

(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under paragraph 1(1)(c),

(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this sub-paragraph, as references to any provision that is equivalent to paragraph 3(2).

(3) Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to determine.

Evidential presumptions

6 (1) In any proceedings in relation to an offence under paragraph 1(1), the facts mentioned in sub-paragraph (2) are to be held as admitted unless challenged by preliminary objection before the person’s plea is recorded.

(2) The facts are—

(a) that the person breached an undertaking by reason of failing to appear at court as required by the terms of the undertaking,

(b) that the person was subject to a particular—

(i) investigative liberation condition, or

(ii) condition under the terms of an undertaking.

(3) In proceedings to which sub-paragraph (4) applies—

(a) something in writing, purporting to impose investigative liberation conditions and bearing to be signed by a constable, is sufficient evidence of the terms of the investigative liberation conditions imposed under section 14(2),

(b) something in writing, purporting to be an undertaking and bearing to be signed by the person said to have given it, is sufficient evidence of the terms of the undertaking at the time that it was given,

(c) a document purporting to be a notice (or a copy of a notice) under section 16 or 21, is sufficient evidence of the terms of the notice.

(4) This sub-paragraph applies to proceedings—
(a) in relation to an offence under paragraph 1(1), or
(b) in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment.

(5) In proceedings in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment, that fact is to be held as admitted unless challenged—

(a) in summary proceedings, by preliminary objection before the person’s plea is recorded, or

(b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the 1995 Act.

Interpretation

7 In this schedule—

(a) references to an investigative liberation condition are to a condition imposed under section 14(2) or 17(3)(b) subject to any modification by notice under section 16(1) or (5)(a),

(b) references to an undertaking are to an undertaking given under section 19(2)(a),

(c) references to the terms of an undertaking are to the terms of an undertaking subject to any modification by—

(i) notice under section 21(1), or

(ii) the sheriff under section 22(3)(b).>

Section 21

Michael Matheson

160 In section 21, page 10, line 11, leave out subsection (3)

Michael Matheson

161 In section 21, page 10, line 13, leave out subsection (4)

Michael Matheson

162 In section 21, page 10, line 22, leave out <or (3)>

After section 21

Michael Matheson

163 After section 21, insert—

<Rescission of undertaking

(1) The procurator fiscal may by notice rescind an undertaking given under section 19(2)(a) (whether or not the person who gave it is to be prosecuted).

(2) The rescission of an undertaking by virtue of subsection (1) takes effect at the end of the day on which the notice is sent.

(3) Notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.

11
(4) A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person is likely to fail to comply with the terms of an undertaking given under section 19(2)(a).

(5) Where a person is arrested under subsection (4) or subsection (6) applies—
   (a) the undertaking referred to in subsection (4) or (as the case may be) (6) is rescinded, and
   (b) this Part applies as if the person, since being most recently arrested, has been charged with the offence in connection with which the person was in police custody when the undertaking was given.

(6) This subsection applies where—
   (a) a person who is subject to an undertaking given under section 19(2)(a) is in police custody (otherwise than as a result of having been arrested under subsection (4)), and
   (b) a constable has reasonable grounds for suspecting that the person has failed, or (if liberated) is likely to fail, to comply with the terms of the undertaking.

(7) The references in subsections (4) and (6)(b) to the terms of the undertaking are to the terms of the undertaking subject to any modification by—
   (a) notice under section 21(1), or
   (b) the sheriff under section 22(3)(b).

Michael Matheson

164 After section 21, insert—

<Expiry of undertaking>

(1) An undertaking given under section 19(2)(a) expires—
   (a) at the end of the day on which the person who gave it is required by its terms to appear at a court, or
   (b) if subsection (2) applies, at the end of the day on which the person who gave it is brought before a court having been arrested under the warrant mentioned in that subsection.

(2) This subsection applies where—
   (a) a person fails to appear at court as required by the terms of an undertaking given under section 19(2)(a), and
   (b) on account of that failure, a warrant for the person’s arrest is granted.

(3) The references in subsections (1)(a) and (2)(a) to the terms of the undertaking are to the terms of the undertaking subject to any modification by notice under section 21(1).

Section 23

John Finnie

28 In section 23, page 11, line 10, after <committing> insert <and again immediately before the interview commences>
Michael Matheson

165 In section 23, page 11, line 11, at end insert—
<( ) of the general nature of that offence,>

Michael Matheson

166 In section 23, page 11, line 24, at end insert—
<( ) Where a person is to be interviewed by virtue of authorisation granted under section 27, before the interview begins the person must be informed of what was specified by the court under subsection (6) of that section.>

Section 24

John Finnie

29 In section 24, page 12, line 2, leave out from <if> to end of line 5

Alison McInnes

243 In section 24, page 12, line 2, leave out second <the> and insert <an appropriate>

Alison McInnes

244 In section 24, page 12, line 3, leave out from <in> to end of line 5 and insert <as a result of an urgent need to prevent—>
(a) interference with evidence in connection with the offence under consideration, or
(b) interference with or physical harm to a person.>

Alison McInnes

245 In section 24, page 12, line 13, at end insert—
<( ) In this section, “appropriate constable” means a constable who—>
(a) is of the rank of superintendent or above, and
(b) has not been involved in the investigation in connection with which the person is in police custody.>

Section 25

Elaine Murray

55 In section 25, page 12, line 15, leave out <Subsections (2) and (3) apply> and insert <Subsection (2) applies>

Elaine Murray

Supported by: Alison McInnes

56 In section 25, page 12, line 17, leave out <16> and insert <18>
Michael Matheson
167 In section 25, page 12, line 17, after <age,> insert—
   
   <(aa) the person is 16 or 17 years of age and subject to a compulsory supervision order,
   or an interim compulsory supervision order, made under the Children’s Hearings
   (Scotland) Act 2011,>

Elaine Murray
Supported by: Alison McInnes
57 In section 25, page 12, line 18, leave out <16> and insert <18>

John Finnie
30 In section 25, page 12, line 18, leave out <, owing to mental disorder,>

Elaine Murray
58 In section 25, page 12, line 22, leave out subsections (3) to (5)

Michael Matheson
168 In section 25, page 12, line 27, leave out <(2)(b)> and insert <(2)(aa) or (b)>

John Finnie
31 In section 25, page 12, leave out lines 36 and 37

Michael Matheson
169 In section 25, page 12, line 36, leave out <328(1)> and insert <328>

Section 30

Elaine Murray
59 In section 30, page 16, line 9, leave out <16> and insert <18>

Elaine Murray
60 In section 30, page 16, line 13, leave out <16> and insert <18>

Alison McInnes
246 In section 30, page 16, line 19, leave out <a> and insert <an appropriate>

Michael Matheson
170 In section 30, page 16, line 22, at end insert <, or
   
   (c) safeguarding and promoting the wellbeing of the person in custody, where a
   constable believes that person to be under 18 years of age.>
Michael Matheson

171 In section 30, page 16, line 22, at end insert—

<(  ) The sending of intimation may be delayed by virtue of subsection (5)(c) only for so long as is necessary to ascertain whether a local authority will arrange for someone to visit the person in custody under section (Social work involvement in relation to under 18s)(2).>

Alison McInnes

247 In section 30, page 16, line 22, at end insert—

<(  ) In this section and section 32, “appropriate constable” means a constable who—

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

(b) has not been involved in the investigation in connection with which the person is in police custody.>

Michael Matheson

172 In section 30, page 16, line 25, leave out <a person> and insert <the person in custody>

**Section 31**

Michael Matheson

173 In section 31, page 16, line 31, at end insert—

<(  ) Subsection (2) does not apply if—

(a) a constable believes that the person in custody is 16 or 17 years of age, and

(b) the person in custody requests that the person to whom intimation is to be sent under section 30(1) is not asked to attend at the place where the person in custody is being held.>

Michael Matheson

174 In section 31, page 16, line 32, leave out <Subsection (4) applies> and insert <Subsections (3A) and (4) apply>

Michael Matheson

175 In section 31, page 16, leave out lines 35 and 36 and insert—

<(b) the person to whom intimation is sent by virtue of section 30(3), if asked to attend at the place where the person in custody is being held, claims to be unable or unwilling to attend within a reasonable time.>

Michael Matheson

176 In section 31, page 16, line 36, at end insert—

<(  ) a local authority, acting under section (Social work involvement in relation to under 18s)(8)(a), has advised against sending intimation to the person to whom intimation is to be sent by virtue of section 30(3).>
Michael Matheson
177 In section 31, page 16, line 36, at end insert—
  <(3A) Section 30(3) ceases to have effect.>

Michael Matheson
178 In section 31, page 16, line 37, after <intimation> insert <to an appropriate person>

Elaine Murray
61 In section 31, page 17, line 2, leave out from second <or> to end of line 5

Michael Matheson
179 In section 31, page 17, line 6, leave out <(4)(a)> and insert <(4)>

Michael Matheson
180 In section 31, page 17, line 12, leave out <30(4)(b)> and insert <30(5)(a) or (b)>

Michael Matheson
181 In section 31, page 17, line 14, leave out <30(4)(b)> and insert <30(5)(a) or (b)>

Section 32

Elaine Murray
62 In section 32, page 17, line 17, leave out <16> and insert <18>

Michael Matheson
182 In section 32, page 17, line 20, leave out <at least one> and insert <a>

Michael Matheson
183 In section 32, page 17, line 21, leave out from <who> to end of line 22

Elaine Murray
63 In section 32, page 17, line 23, leave out subsection (2)

Michael Matheson
184 In section 32, page 17, line 24, leave out <at least one> and insert <a>

Michael Matheson
185 In section 32, page 17, leave out line 26

Michael Matheson
186 In section 32, page 17, line 27, at end insert—
  <( ) Access to a person in custody under subsection (1) or (2) need not be permitted to more
  than one person at the same time.>
Elaine Murray

64 In section 32, page 17, line 28, leave out <or (2)>

Alison McInnes

248 In section 32, page 17, line 29, after <as> insert <an appropriate constable considers that>

Michael Matheson

187 In section 32, page 17, line 34, leave out <a person> and insert <the person in custody>

After section 32

Michael Matheson

188 After section 32, insert—

<Social work involvement in relation to under 18s>

(1) Intimation of the fact that a person is in police custody and the place where the person is in custody must be sent to a local authority as soon as reasonably practicable if—

(a) a constable believes that the person may be subject to a supervision order, or
(b) by virtue of subsection (5)(c) of section 30, a constable has delayed sending intimation in respect of the person under subsection (1) of that section.

(2) A local authority sent intimation under subsection (1) may arrange for someone to visit the person in custody if—

(a) the person is subject to a supervision order, or
(b) the local authority—

(i) believes the person to be under 16 years of age, and
(ii) has grounds to believe that its arranging someone to visit the person would best safeguard and promote the person’s wellbeing (having regard to the effect of subsection (4)(a)).

(3) Before undertaking to arrange someone to visit the person in custody under subsection (2), the local authority must be satisfied that anyone it arranges to visit the person in custody will be able to make the visit within a reasonable time.

(4) Where a local authority arranges for someone to visit the person in custody under subsection (2)—

(a) sections 30 and 32 cease to have effect, and
(b) the person who the local authority has arranged to visit the person in custody must be permitted access to the person in custody.

(5) In exceptional circumstances, access under subsection (4)(b) may be refused or restricted so far as the refusal or restriction is necessary—

(a) in the interests of—

(i) the investigation or prevention of crime, or
(ii) the apprehension of offenders, or
(b) for the wellbeing of the person in custody.
(6) Where a local authority sent intimation under subsection (1) confirms that the person in custody is—
   (a) over 16 years of age, and
   (b) subject to a supervision order,
sections 30 to 32 are to be applied in respect of the person as if a constable believes the person to be under 16 years of age.

(7) Subsection (8) applies where a local authority might have arranged for someone to visit a person in custody under subsection (2) but—
   (a) chose not to do so, or
   (b) was precluded from doing so by subsection (3).

(8) The local authority may—
   (a) advise a constable that the person to whom intimation is to be sent by virtue of section 30(3) should not be sent intimation if the local authority has grounds to believe that sending intimation to that person may be detrimental to the wellbeing of the person in custody, and
   (b) give advice as to who might be an appropriate person to a constable considering that matter under section 31(5) (and the constable must have regard to any such advice).

(9) In this section, “supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

Section 33

John Pentland
38 In section 33, page 18, line 1, leave out from beginning to <over,>

Elaine Murray
32 In section 33, page 18, line 1, leave out <18> and insert <16>

John Finnie
33 In section 33, page 18, line 2, leave out <owing to mental disorder,>

Michael Matheson
189 In section 33, page 18, line 3, leave out <to> and insert—
   <( )>

John Finnie
34 In section 33, page 18, leave out lines 17 and 18

Michael Matheson
190 In section 33, page 18, line 17, leave out <328(1)> and insert <328>
Section 34

Alison McInnes

249 Leave out section 34 and insert—

<Provision of appropriate adults>

Each local authority must ensure the provision of persons who may for the purposes of subsection (2) of section 33 be considered suitable to provide support of the sort mentioned in subsection 3 of that section (including as to training, qualifications and experience).>

Michael Matheson

191 Leave out section 34

After section 34

Mary Fee

110 After section 34, insert—

<Persons with responsibility for a child>

Duty to contact named person: persons with responsibility for a child

(1) This section applies where a constable believes that a person in police custody has responsibility for a child.

(2) With a view to ensuring the wellbeing of the child, the constable must send information of the type specified in subsection (3) to an individual identified in relation to the child under section 20 or 21 of the Children and Young People (Scotland) Act 2014.

(3) The information to be sent is to contain details of any matters relevant to the child’s wellbeing, and to the child’s wellbeing needs.

(4) Information falls within subsection (3) if the constable considers that—

(a) it is likely to be relevant to the exercise of the named person functions in relation to the child or young person,

(b) it is necessary or expedient for the purposes of the exercise of any of the named person functions,

(c) it ought to be provided for that purpose, and

(d) the provision of the information would not prejudice the conduct of any criminal investigation or the prosecution of any offence.

(5) In considering for the purpose of subsection (4)(c) whether information ought to be provided, the constable is, so far as reasonably practicable, to ascertain and have regard to the views of the child.

(6) In having regard to the views of a child under subsection (5), the constable is to take account of the child’s age and maturity.

(7) For the purpose of subsection (4)(c) the information ought to be provided only if the likely benefit to the wellbeing of the child arising in consequence of doing so outweighs any likely adverse effect on that wellbeing arising from doing so.

(8) The Scottish Ministers may by regulations make further provision relating to the sending of information under subsection (2) above.
(9) Regulations under subsection (8) are subject to the affirmative procedure.

Section 36

Alison McInnes
250 In section 36, page 19, line 12, leave out <a> and insert <an appropriate>

Alison McInnes
251 In section 36, page 19, line 13, leave out from <in> to end of line 15 and insert <as a result of an urgent need to prevent —
   (a) interference with evidence in connection with the offence under consideration, or
   (b) interference with, or physical harm to, a person.>

Alison McInnes
252 In section 36, page 19, line 16, leave out from second <consultation> to <example> in line 17 and insert <, except in exceptional circumstances, consultation in person but may include initial>

Michael Matheson
192 In section 36, page 19, line 16, leave out second <means> and insert <method>

Michael Matheson
193 In section 36, page 19, line 17, leave out <means of>

Alison McInnes
253 In section 36, page 19, line 18, at end insert —
   <( ) In subsection (2), “appropriate constable” means a constable who—
      (a) is of the rank of superintendent or above, and
      (b) has not been involved in the investigation in connection with which the person is in police custody.>

Section 39

Michael Matheson
194 In section 39, page 20, leave out line 2 and insert —
   <( ) cause the person to participate in an identification procedure.>

After section 40

Alison McInnes
254 After section 40, insert —

<Powers in relation to biometric information
   (1) Section 18 (prints, samples etc. in criminal investigations) of the 1995 Act is amended as follows.
   (2) After subsection (7A)(d) there is inserted —
      “(e) other biometric information.”.
(3) After subsection (7B) there is inserted—

“(7C) In subsection (7A)(e) “biometric information” means any information (in any form and produced and stored by any method) about a person’s physical or behavioural characteristics or features which—

(a) is capable of being used in order to establish or verify the identity of the person, and

(b) is obtained or recorded with the intention that it be used for the purposes of a biometric recognition system.

(7D) Biometric information may, in particular, include images or recordings of or information about—

(a) the features of an iris or any other part of the eye,

(b) the features of any other part of the face,

(c) a person’s voice, handwriting or gait.

(7E) In subsection (7C) “biometric recognition system” means a system which, by means of equipment operating automatically—

(a) obtains or records information about a person’s physical or behavioural characteristics or features, and

(b) compares the information with stored information that has previously been so obtained or recorded, or otherwise processes the information, for the purpose of establishing or verifying the identity of the person, or otherwise determining whether the person is recognised by the system.

(7F) The Scottish Ministers may by regulations subject to the affirmative procedure modify subsection (7D) by—

(a) adding a physical or behavioural characteristic or feature to, or removing such a characteristic or feature from, that subsection, or

(b) modifying the description of a physical or behavioural characteristic for the time being included in that subsection.”.

Michael Matheson

195 After section 40, insert—

<Care of drunken persons

Taking drunk persons to designated place

(1) Where—

(a) a person is liable to be arrested in respect of an offence by a constable without a warrant, and

(b) the constable is of the opinion that the person is drunk,

the constable may take the person to a designated place (and do so instead of arresting the person).

(2) Nothing done under subsection (1)—

(a) makes a person liable to be held unwillingly at a designated place, or

(b) prevents a constable from arresting the person in respect of the offence referred to in that subsection.
(3) In this section, “designated place” is any place designated by the Scottish Ministers for the purpose of this section as a place suitable for the care of drunken persons.

Section 42

Alison McInnes

53 In section 42, page 20, line 18, at end insert—

<( ) search a child,>

Mary Fee

41 In section 42, page 20, line 19, at end insert <or person who has responsibility for a child>

Mary Fee

42 In section 42, page 20, line 20, after <child> insert <or person who has responsibility for a child>

Mary Fee

43 In section 42, page 20, line 21, after <child> insert <or person who has responsibility for a child>

Mary Fee

44 In section 42, page 20, line 22, after <child> insert <or person>

Mary Fee

45 In section 42, page 20, line 23, after <child> insert <or person who has responsibility for a child>

Elaine Murray

65 In section 42, page 20, line 25, leave out <well-being> and insert <best interests>

Alison McInnes

255 In section 42, page 20, line 25, at end insert—

<( ) A decision under subsection (1)(b) or (c) must be exercised for the shortest possible period of time.>

After section 42

Michael Matheson

196 After section 42, insert—

< Duties in relation to children in custody

(1) A child who is in police custody at a police station is, so far as practicable, to be prevented from associating with any adult who is officially accused of committing an offence other than an adult to whom subsection (2) applies.

(2) This subsection applies to an adult if a constable believes that it may be detrimental to the wellbeing of the child mentioned in subsection (1) to prevent the child and adult from associating with one another.

(3) For the purposes of this section—

“child” means person who is under 18 years of age,
“adult” means person who is 18 years of age or over.

Michael Matheson

197 After section 42, insert—

<Duty to inform Principal Reporter if child not being prosecuted>

(1) Subsections (2) and (3) apply if—

(a) a person is being kept in a place of safety in accordance with section *(Under 18s to be kept in place of safety prior to court)* when it is decided not to prosecute the person for any relevant offence, and

(b) a constable has reasonable grounds for suspecting that the person has committed a relevant offence.

(2) The Principal Reporter must be informed, as soon as reasonably practicable, that the person is being kept in a place of safety under subsection (3).

(3) The person must be kept in a place of safety under this subsection until the Principal Reporter makes a direction under section 65(2) of the Children’s Hearings (Scotland) Act 2011.

(4) An offence is a “relevant offence” for the purpose of subsection (1) if—

(a) it is the offence with which the person was officially accused, leading to the person being kept in the place of safety in accordance with section *(Under 18s to be kept in place of safety prior to court)*, or

(b) it is an offence arising from the same circumstances as the offence mentioned in paragraph (a).

(5) In this section, “place of safety” has the meaning given in section 202(1) of the Children’s Hearings (Scotland) Act 2011.

Elaine Murray

35 After section 42, insert—

<Duty not to disclose information relating to person not officially accused>

(1) Subject to section *(Disclosure of information: person released under section 14)*, a constable must not without reasonable cause release the information specified in subsection (2) to any person other than an authorised person.

(2) The information is information relating to a person not officially accused of an offence which—

(a) identifies that person, or

(b) is likely to be sufficient to allow that person to be identified, as having been arrested in connection with an offence.

(3) For the purposes of subsection (1), an “authorised person” means—

(a) a constable,

(b) a person to whom intimation must or may be sent under Chapter 5 of this Part,

(c) a person other than a constable to whom the information must be disclosed for the purpose of ensuring the proper conduct of the investigation into the offence.
(4) For the purposes of subsection (1), a determination that there is reasonable cause to disclose information must be made—
   (a) only if it is in the public interest to do so, and
   (b) by a constable who is of the rank of inspector or above.

Elaine Murray

36 After section 42, insert—

<Disclosure of information: person released under section 14

(1) Without prejudice to the generality of section (Duty not to disclose information relating to person not officially accused), a constable may disclose qualifying information relating to an alleged offence to a person mentioned in subsection (2) where the conditions in subsection (3) are met.

(2) The persons are—
   (a) a person—
      (i) against whom, or
      (ii) against whose property,
      the acts which constituted the alleged offence were directed,
   (b) in the case where the death of a person mentioned in paragraph (a) was (or appears to have been) caused by the alleged offence, a prescribed relative of the person,
   (c) a person who is likely to give evidence in criminal proceedings which are likely to be instituted against a person in respect of the alleged offence,
   (d) a person who has given a statement in relation to the alleged offence to a constable.

(3) The conditions are that disclosure of the information —
   (a) is in the public interest or is otherwise likely to promote the safety and wellbeing of a person mentioned in subsection (2), and
   (b) is authorised by a constable who is of the rank of inspector or above.

(4) In this section—
   “prescribed” means prescribed by the Scottish Ministers by order subject to the negative procedure,
   “qualifying information” means information that—
   (a) identifies a person as having been arrested in connection with an alleged offence and subsequently released under section 14, and
   (b) sets out such information relating to any conditions imposed on the person under section 14(2) as the constable authorising the disclosure considers appropriate.

(5) The Scottish Ministers may, by order subject to the negative procedure, modify the definition of “qualifying information” in subsection (4).>
Section 43
Michael Matheson
198 Leave out section 43

Section 44
Michael Matheson
199 Leave out section 44

Section 45
Michael Matheson
200 Leave out section 45

Section 46
Michael Matheson
201 Leave out section 46

Section 47
Michael Matheson
202 Leave out section 47

Section 48
Michael Matheson
203 Leave out section 48

Section 49
Michael Matheson
204 Leave out section 49

Section 50
Michael Matheson
205 In section 50, page 24, line 27, leave out <relation to> and insert <respect of>
Margaret Mitchell
256 Leave out section 50

Section 51
Margaret Mitchell
257 Leave out section 51
Schedule 1

Michael Matheson

206 In schedule 1, page 44, line 28, at end insert—

<( ) in subsection (3), for the words “he can be delivered into the custody” there is substituted “the arrival” ,>

Michael Matheson

207 In schedule 1, page 45, line 30, at end insert—

<In each of sections 169(2) and 170(2) of the Children’s Hearings (Scotland) Act 2011, the words “arrested without warrant and” are repealed.>

Margaret Mitchell

259 In schedule 1, page 46, line 2, leave out <14> and insert <15>

Michael Matheson

208 In schedule 1, page 46, line 2, leave out from <15A> to end of line 3 and insert <17A,>

Michael Matheson

209 In schedule 1, page 46, line 4, leave out <cross-heading> and insert <heading>

Michael Matheson

210 In schedule 1, page 46, line 5, at end insert—

<( ) section 43,>

Michael Matheson

211 In schedule 1, page 46, line 6, at end insert—

<(1) In section 18—

(a) in subsection (1), the words “or is detained under section 14(1) of this Act” are repealed,

(b) in subsection (2), the words “or detained” are repealed.

(2) In subsection (2)(a) of section 18B, for the words “under arrest or being detained” there is substituted “in custody”.

(3) In section 18D—

(a) in subsection (2)(a), the words “or detained” are repealed,

(b) in subsection (2)(b), for the words “under arrest or being detained” there is substituted “in custody”.

(4) In subsection (8)(b) of section 19AA, the words “or detention under section 14(1) of this Act” are repealed.>
Michael Matheson

212 In schedule 1, page 46, line 6, at end insert—

<In section 42—

(a) subsection (3) is repealed,
(b) subsection (7) is repealed,
(c) in subsection (8), for the words “subsection (7) above” there is substituted “section (Notice to local authority that under 18 to be brought before court) of the Criminal Justice (Scotland) Act 2015”,
(d) in subsection (9), the words “detained in a police station, or” are repealed,
(e) subsection (10) is repealed.>

Michael Matheson

213 In schedule 1, page 46, line 31, at end insert—

<In section 6D of the Road Traffic Act 1988, for subsection (2A) there is substituted—

“(2A) Instead of, or before, arresting a person under this section, a constable may detain the person at or near the place where the preliminary test was, or would have been, administered with a view to imposing on the person there a requirement under section 7.”.>

Michael Matheson

214 In schedule 1, page 46, line 31, at end insert—

<In Schedule 8 to the Terrorism Act 2000—

(a) in paragraph 18—

(i) in sub-paragraph (2), for the words from “and” at the end of paragraph (a) to the end of the sub-paragraph there is substituted—

“(ab) intimation is to be made under paragraph 16(1) whether the person detained requests that it be made or not, and
(ac) section 32 (right of under 18s to have access to other person) of the Criminal Justice (Scotland) Act 2015 applies as if the detained person were a person in police custody for the purposes of that section.”,

(ii) after sub-paragraph (3) there is inserted—

“(4) For the purposes of sub-paragraph (2)—

“child” means a person under 16 years of age,
“parent” includes guardian and any person who has the care of the child mentioned in sub-paragraph (2).”,

(b) in paragraph 20(1), the words “or a person detained under section 14 of that Act” are repealed,

(c) in paragraph 27—

(i) in sub-paragraph (4), paragraph (a) is repealed,

(ii) sub-paragraph (5) is repealed.>
Michael Matheson

215 In schedule 1, page 46, line 31, at end insert—

<In the schedule to the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, paragraph 2 is repealed.>

Michael Matheson

216 In schedule 1, page 46, line 33, at end insert—

<In the Children’s Hearings (Scotland) Act 2011—

(a) in section 65—

(i) for subsection (1) there is substituted—

“(1) Subsection (2) applies where the Principal Reporter is informed under subsection (2) of section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015 that a child is being kept in a place of safety under subsection (3) of that section.”,

(ii) in subsection (2), for the words “in the” there is substituted “in a”,

(b) in section 66(1), for sub-paragraph (vii) there is substituted—

“(vii) information under section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015, or”,

(c) in section 68(4)(e)(vi), for the words “section 43(5) of the Criminal Procedure (Scotland) Act 1995 (c.46)” there is substituted “section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015”,

(d) in section 69, for subsection (3) there is substituted—

“(3) If—

(a) the determination under section 66(2) is made following the Principal Reporter receiving information under section (Duty to inform Principal Reporter if child not being prosecuted) of the Criminal Justice (Scotland) Act 2015, and

(b) at the time the determination is made the child is being kept in a place of safety,

the children’s hearing must be arranged to take place no later than the third day after the Principal Reporter receives the information mentioned in paragraph (a).”,

(e) in section 72(2)(b), for the words “in the” there is substituted “in a”.

After section 52

Alison McInnes

258 After section 52, insert—

<Code of practice about investigative functions

Code of practice about investigative functions

(1) The Lord Advocate must issue a code of practice on—

28
(a) the questioning, and recording of questioning, of persons suspected of committing offences, and
(b) the conduct of identification procedures involving such persons.

(2) The Lord Advocate—
(a) must keep the code of practice issued under subsection (1) under review,
(b) may from time to time revise the code of practice.

(3) The code of practice is to apply to the functions exercisable by or on behalf of—
(a) the Police Service of Scotland,
(b) such other bodies as are specified in the code (being bodies responsible for reporting offences to the procurator fiscal).

(4) Before issuing the code of practice, the Lord Advocate must consult publicly on a draft of the code.

(5) When preparing a draft of the code of practice for public consultation, the Lord Advocate must consult—
(a) the Lord Justice General,
(b) the Faculty of Advocates,
(c) the Law Society of Scotland,
(d) the Scottish Police Authority,
(e) the chief constable of the Police Service of Scotland,
(f) the Scottish Human Rights Commission,
(g) the Commissioner for Children and Young People in Scotland, and
(h) such other persons as the Lord Advocate considers appropriate.

(6) The Lord Advocate must lay before the Scottish Parliament a copy of the code of practice issued under this section.

(7) Where a court determines in criminal proceedings that evidence has been obtained in breach of the code of practice, the evidence is inadmissible in the proceedings unless the court is satisfied that admitting the evidence would not result in unfairness in the proceedings.

(8) Breach of the code of practice does not of itself give rise to grounds for any legal claim whatsoever.

(9) Subsections (3) to (8) apply to a revised code of practice under subsection (2)(b) as they apply to the code of practice issued under subsection (1).>

Before section 53

Michael Matheson

217 Before section 53, insert—

<Disapplication in relation to service offences
(1) References in this Part to an offence do not include a service offence.
(2) Nothing in this Part applies in relation to a person who is arrested in respect of a service offence.
(3) In this section, “service offence” has the meaning given by section 50(2) of the Armed Forces Act 2006.

Section 53

Michael Matheson

218 In section 53, page 25, line 4, at end insert—
<( ) Subsection (1) is subject to paragraph 18 of Schedule 8 to the Terrorism Act 2000.>

After section 53

Michael Matheson

219 After section 53, insert—

<Powers to modify Part

Further provision about application of Part

(1) The Scottish Ministers may by regulations modify this Part to provide that some or all of it—
   (a) applies in relation to persons to whom it would otherwise not apply because of—
      (i) section (Disapplication in relation to service offences), or
      (ii) section 53,
   (b) does not apply in relation to persons arrested otherwise than in respect of an offence.

(2) The Scottish Ministers may by regulations make such modifications to this Part as seem to them necessary or expedient in relation to its application to persons mentioned in subsection (1).

(3) Regulations under this section may make different provision for different purposes.

(4) Regulations under this section are subject to the affirmative procedure.>

Michael Matheson

220 After section 53, insert—

<Further provision about vulnerable persons

(1) The Scottish Ministers may by regulations—
   (a) amend subsections (2)(b) and (6) of section 25,
   (b) amend subsections (1)(c), (3) and (5) of section 33,
   (c) specify descriptions of persons who may for the purposes of subsection (2) of section 33 be considered suitable to provide support of the sort mentioned in subsection (3) of that section (including as to training, qualifications and experience).

(2) Regulations under subsection (1) are subject to the affirmative procedure.>
Before section 54

John Pentland

37 Before section 54, insert—

<Meaning of arrest

In this Part, “arrest” means—

(a) depriving a person of liberty of movement for the purpose of the purported investigation or prevention of crime, and

(b) taking the person to a police station in accordance with section 4.>

Section 54

Michael Matheson

221 In section 54, page 25, line 7, leave out <99> and insert <99(1)>

Section 56

Michael Matheson

222 In section 56, page 25, line 15, leave out from <if> to end of line 18 and insert <from the time the person is arrested by a constable until any one of the events mentioned in subsection (2) occurs.>

(2) The events are—

(a) the person is released from custody,

(b) the person is brought before a court in accordance with section 18(2),

(c) the Principal Reporter makes a direction under section 65(2)(b) of the Children’s Hearings (Scotland) Act 2011 that the person continue to be kept in a place of safety.>

After section 56

Mary Fee

260 After section 56, insert—

<Meaning of responsibility for a child

(1) In this Part, “child” means a person who has not attained the age of 18 years.

(2) In this Part, references to a person who has responsibility for a child include references to any person who—

(a) is liable to maintain, or has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, the child, or

(b) has care of the child.>
Criminal Justice (Scotland) Bill

4th 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;
- a list of any amendments already debated;
- the text of amendments to be debated on the fourth day of 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

**Investigative liberation: release on conditions**
18, 142, 47, 143, 19, 145, 20, 146, 147, 21, 22, 23, 24, 25, 26, 27

*Notes on amendments in this group*
Amendment 18 pre-empts amendment 142
Amendments 145 pre-empts amendment 20
Amendment 147 pre-empts amendment 21

**Breach of liberation condition**
144, 158, 159, 198, 199, 200, 201, 202, 203, 204

**Requirement to bring officially accused person before court as soon as practicable**
149

**Duties of police in relation to under 18s**
150, 150A, 151, 152, 65, 255, 196, 197, 222

**Release on undertaking**
153, 154, 155, 48, 156, 157, 160, 161, 162, 163, 164

*Notes on amendments in this group*
Amendment 155 pre-empts amendment 48

**Provision of information prior to interview**
28, 165, 166
Circumstances in which interview may take place without solicitor present or in which sending of intimation or consultation with solicitor may be delayed
29, 243, 244, 245, 246, 247, 248, 250, 251, 253

Notes on amendments in this group
Amendment 29 pre-empts amendments 243 and 244

Rights of under 18s: consent to interview without solicitor present, sending of intimation and access to other person, other support
55, 56, 167, 57, 58, 168, 59, 60, 173, 61, 62, 63, 64, 38, 32

Notes on amendments in this group
Amendment 58 pre-empts amendment 168
Amendment 63 in this group pre-empts amendments 184 and 185 in the group “Rights of under 18s: minor amendments”
Amendment 38 pre-empts amendment 32

Vulnerable persons: consent to interview without solicitor present, support etc.
30, 31, 169, 33, 189, 34, 190, 249, 191, 220

Notes on amendments in this group
Amendment 31 pre-empts amendment 169
Amendment 34 pre-empts amendment 190

Rights of under 18s: minor amendments
172, 174, 175, 177, 178, 179, 182, 183, 184, 185, 186, 187

Notes on amendments in this group
Amendments 184 and 185 in this group are pre-empted by amendment 63 in the group “Rights of under 18s: consent to interview without solicitor present, sending of intimation and access to other person, other support”

Means of consultation with solicitor
252, 192, 193

Notes on amendments in this group
Amendment 252 pre-empts amendment 192

Powers in relation to biometric information
254

Care of drunken persons
195

Disclosure of information relating to persons not officially accused
35, 36

Modification of enactments in connection with Part 1
206, 207, 208, 209, 210, 211, 212, 213, 215, 216
Application of Part 1 in relation to arrests under other enactments
214, 217, 218, 219

Code of practice about investigative functions
258

Amendments already debated

Participation of detained person in proceedings through TV link
With 73 (on Day 2) – 101

Police powers of search
With 223 (on Day 3) – 53

Power to arrest without warrant and meaning of arrest
With 111 (on Day 3) – 37

Replacement of common law power of arrest without warrant, statutory power to detain etc. by section 1 power of arrest
With 234 (on Day 3) – 256, 257, 259

Minor and drafting amendments
With 116 (on Day 3) – 194, 205, 221

Information to be given if sexual offence
With 119 (on Day 3) – 148

Social work involvement in relation to under 18s in police custody
With 120 (on Day 3) – 170, 171, 176, 180, 181, 188

Arrest and custody of person with responsibility for child
With 39 (on Day 3) – 110, 41, 42, 43, 44, 45, 260
Present:

Christian Allard  Roderick Campbell
John Finnie    Christine Grahame (Convener)
Margaret McDougall  Alison McInnes
Margaret Mitchell    Elaine Murray (Deputy Convener)
Michael Russell (Committee Substitute)

Also present: Michael Matheson, Cabinet Secretary for Justice (item 2).

Apologies were received from Gil Paterson.

Criminal Justice (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 4).


The following amendments were agreed to (by division)—

- 142 (For 8, Against 1, Abstentions 0)
- 145 (For 8, Against 1, Abstentions 0)
- 146 (For 7, Against 2, Abstentions 0)
- 147 (For 8, Against 1, Abstentions 0)
- 258 (For 5, Against 4, Abstentions 0).

The following amendments were disagreed to (by division)—

- 18 (For 3, Against 6, Abstentions 0)
- 150A (For 4, Against 5, Abstentions 0)
- 28 (For 2, Against 7, Abstentions 0)
- 243 (For 2, Against 7, Abstentions 0)
- 244 (For 2, Against 7, Abstentions 0)
- 55 (For 4, Against 5, Abstentions 0)
- 56 (For 4, Against 5, Abstentions 0)
- 30 (For 4, Against 4, Abstentions 1; amendment disagreed to on casting vote)
- 59 (For 4, Against 5, Abstentions 0)
- 60 (For 4, Against 5, Abstentions 0)
246 (For 3, Against 6, Abstentions 0)
61 (For 4, Against 5, Abstentions 0)
62 (For 4, Against 5, Abstentions 0)
252 (For 2, Against 7, Abstentions 0)
35 (For 4, Against 5, Abstentions 0).

The following amendments were moved and, no member having objected, withdrawn: 29 and 254.

The following amendments were pre-empted: 20, 21 and 48.

The following amendments were not moved: 47, 19, 22, 23, 24, 25, 26, 27, 245, 57, 58, 31, 247, 63, 64, 248, 38, 33, 34, 249, 110, 250, 251, 253, 53, 41, 42, 43, 44, 45, 65, 255, 36, 256, 257, 259, 37 and 260.

The following provisions were agreed to without amendment: sections 16, 17, 22, 24, 26, 27, 28, 29, 35, 37, 38, 40, 41, 42, 51, 52, 55, 88, 89, 90 and 91 and the Long Title.

The following provisions were agreed to as amended: sections 14, 15, 18, 19, 20, 21, 23, 25, 30, 31, 32, 33, 36, 39 and 50, schedule 1 and sections 53, 54 and 56.

The Committee completed Stage 2 consideration of the Bill.

Roderick Campbell declared an interest as a member of the Faculty of Advocates and Alison McInnes declared an interest as a member of Justice Scotland.
On resuming—

Criminal Justice (Scotland) Bill: Stage 2

The Convener: Item 2 is day 4 of stage 2 proceedings on the Criminal Justice (Scotland) Bill. I welcome to the meeting the Cabinet Secretary for Justice, Michael Matheson, and Scottish Government officials, who are supporting the cabinet secretary but will not take part in the proceedings. As far as we are concerned—but not, I should say, the cabinet secretary—they must remain silent.

Members should have their copies of the bill, the marshalled list and the groupings of amendments for today’s consideration. They might also find the purpose-and-effect notes that the Government sent for last week’s amendments useful for this session.

I aim to complete all the amendments today, so you are nailed to your chairs. If necessary, however, we will have a little break after an hour or so if I see anyone faltering.

Before we move to the consideration of amendments, there are two declarations of interest to be made.

Alison McInnes: I draw members’ attention to my entry in the register of interests, particularly my membership of Justice Scotland.

Roderick Campbell: I want to draw members’ attention to my entry in the register of interests as a member of the Faculty of Advocates.

Section 14—Release on conditions

The Convener: Amendment 18, in the name of John Finnie, is grouped with amendments 142, 47, 143, 19, 145, 20, 146, 147 and 21 to 27. I must point out the various pre-emptions in this group. If amendment 18 is agreed to, I cannot call amendment 142; if amendment 145 is agreed to, I cannot call amendment 20; and if amendment 147 is agreed to, I cannot call amendment 21. I do not expect members to commit all that to memory, so I will repeat those pre-emptions as we go along.

John Finnie: Amendment 18 and, indeed, the other amendments in this group relate to investigative liberation and release on conditions. My amendments would allow for a period during which a suspect can be released from custody to be up to a maximum of 28 days. That differs from the blanket 28-day period that is set out in section 14(1). Indeed, Lord Carloway recommended that the period during which a suspect could be subject to investigative liberation should not exceed 28 days. The Law Society of Scotland supports the amendment, believing that one advantage of having a shorter period in which a person can be released from custody is that it is more likely that conditions imposed by a constable under section 14(2) will be accepted by an individual who is subject to investigative liberation if it is for a shorter period.

The provision in the bill is a major change, and it does not follow Lord Carloway’s proposal. There is a question of proportionality attached to it. In the Government’s amendment 146, we once again see a diminution of the authority exercised from inspector to sergeant. When we previously debated the matter, we heard what seemed to be Police Scotland’s view on it, which is that there should be equal access to facilities across Scotland. I therefore think it entirely reasonable for the inspector to keep doing this sort of thing.

Amendments 22 to 27 would allow a sheriff to review not only a condition of interim liberation under section 14 but the time period that had been imposed. We know that the bill facilitates a review of terms, but why does it not allow for a review of duration? As I have said, Lord Carloway never intended a blanket 28-day period.

I move amendment 18.

The Cabinet Secretary for Justice (Michael Matheson): The amendments in this group relate to investigative liberation, which is a new process for the police. At present, if the police want to liberate a suspect subject to conditions such as requiring them not to approach victims or witnesses, they must charge that person. Lord Carloway recommended that the police should be able to release a suspect subject to conditions, even though the suspect has not been charged, but that the conditions should apply only for a limited period.

That recommendation recognises that in some of today’s complex police investigations the police might need to break off an interview while they wait for, say, laboratory results or mobile phone records. Imposing conditions on a suspect for a limited period means that they can leave the suspect at liberty while other aspects of the investigation are progressed. However, the police can also take the suspect straight back into custody if they attempt to interfere with victims or witnesses or otherwise compromise the investigation.

My amendments in this group, which I will speak to in a moment, are aimed at ensuring that the investigative liberation process works fairly and proportionately. Although I agree that it is important to ensure that investigative liberation conditions do not have an unnecessary impact on a suspect’s private life, I regret to say that the
Government cannot support the amendments in the names of John Finnie and Elaine Murray.

On amendments 18 to 27, in the name of John Finnie, I entirely agree that it would not be appropriate for every suspect released on investigative liberation to be subject to conditions for a full 28 days. However, the bill already ensures that that will not happen. As drafted, the bill does not impose a blanket 28-day investigative liberation period; instead, it provides that any investigative liberation conditions that have not been lifted before then fall away automatically after 28 days. That reflects Lord Carloway’s recommendation that 28 days is the appropriate maximum period for investigative liberation.

Section 15 sets out that conditions must end after 28 days and can end sooner, while sections 16 and 17 set out how conditions can be modified or removed before the end of the 28-day period. In particular, section 16 provides that an inspector must keep under review whether there are still reasonable grounds to suspect that the person subject to the conditions committed an offence and whether the conditions imposed continue to satisfy the demanding test of being necessary and proportionate to ensure the proper conduct of the investigation. If the inspector is not satisfied that those tests are met, either more proportionate conditions can be imposed or the conditions must be lifted altogether. Moreover, if a suspect is not satisfied with the police’s review of the appropriateness of the conditions, section 17 allows the suspect to challenge the conditions before a sheriff, who will also have the power to modify the conditions or to remove them completely.

Investigative liberation is all about the conditions that are imposed, and the bill makes it clear that those conditions can be removed after review by an inspector or a sheriff. That can happen at any time, and there is no requirement for them to be in place for 28 days. The bill states that, as soon as conditions stop being both necessary and proportionate, they must be removed or modified. In other words, the 28 days is a backstop. The decision on when it is no longer appropriate to keep a person subject to investigative liberation will be made on a day-to-day basis as the investigation into the offence unfolds.

The amendments in the name of John Finnie would cause investigative liberation conditions imposed on the suspect to fall away after a number of days not exceeding 28 days, which the police are to specify at the time of releasing the suspect. It might be possible in some cases for the police to do what amendment 19 would require them to do, which is to estimate and specify at the time of release the period of time required to carry out further investigations. Where the police are able to do so, they could set a shorter period at the outset, but that would only ever be an estimate. Investigations are not always predictable.

The purpose of imposing investigative liberation conditions is to protect the interests of justice and to help to protect victims and witnesses. If the police guessed wrongly by a day or two, and underestimated how long would be required to carry out the investigation, that would mean that the investigative liberation conditions would cease to apply at a time when they were still needed to protect alleged victims.

Amendment 22 would allow a sheriff to review not only the investigative liberation conditions imposed on a suspect but the period specified by the police during which the conditions would run. In other words, amendment 22 presupposes that the other amendments in this group in the name of John Finnie will be supported. I do not think that it is feasible or in the interests of justice to require constables to specify a period for investigative liberation to run, and it follows that there is no reason for giving sheriffs the power to review any period specified. I therefore urge John Finnie not to press amendments 18 to 27.

Amendment 47, in the name of Elaine Murray, would change the purpose for which investigative liberation conditions may be imposed. Conditions would still have to be necessary and proportionate but would have to be for the purposes of securing specific things, rather than for the broad purpose of ensuring the proper conduct of the investigation. I am concerned that the list of purposes for which conditions could be imposed could be unnecessarily restrictive and may suggest that the detailed purposes should be linked to standard conditions. Investigative liberation conditions need to be tailored to the needs of the particular investigation. Standard conditions could be too restrictive in some circumstances and insufficient in others.

The thrust of any condition imposed under investigative liberation is that it should be necessary and proportionate. Some of the purposes listed in amendment 47 appear inconsistent with that general principle. There is no requirement for a person to surrender themselves to custody, as the police already have the power to arrest during the period of investigative liberation. Although it might seem pertinent for the police to take into account a person’s protection and wellbeing when setting conditions, that could lead to conditions being set that would not be proportionate, or indeed necessary, for a person not charged with an offence. I therefore invite Elaine Murray not to move amendment 47, but I
will undertake to consider before stage 3 whether an amendment is necessary to expand or to illustrate what the general purpose of “ensuring the proper conduct of the investigation” under section 14 might cover.

I turn to the amendments in my name. The bill as introduced allowed a suspect to be subject to a number of periods of investigative liberation, provided that the total of the periods did not exceed 28 days. Amendments 142, 145 and 147 change the position so that investigative liberation conditions can be imposed on a suspect only for a maximum period of 28 consecutive days in relation to a particular investigation. It will not be possible to impose investigative liberation conditions over a number of shorter periods adding up to a total of 28 days. These amendments deal with the concern that was raised by some at stage 1 that the police would be able to subject a person to repeated arrests and periods subject to investigative liberation conditions.

Amendment 143 sets out certain types of condition that can and cannot be imposed when releasing a person on investigative liberation. Requiring a person to be in a particular place at a particular time—for example, a home detention curfew—would significantly disrupt most people’s lives. In the Government’s view, that would be too severe an intrusion into the liberty of someone who has not been and may never be charged with an offence, so the amendment provides that conditions that impose curfews will not be permitted. It will, however, be possible to impose conditions banning a suspect from being in a particular place at a particular time, in order to protect victims and witnesses and prevent interference with evidence.

Amendment 146 will allow investigative liberation conditions to be authorised by a police officer of sergeant rank or above. At present, the bill provides that conditions must be authorised by a constable of inspector rank or above, but in most cases custody sergeants will make the initial decision on whether it is necessary or proportionate to keep a person in custody. Like all constables, custody sergeants will be under an ongoing general duty to take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody. Having taken the initial decision to keep a person in custody, they will need to keep under consideration whether it remains necessary to hold that person. At present, the bill would not allow a custody sergeant to release a person subject to investigative liberation conditions, but amendment 146 will allow that specialist officer to release the person, subject to conditions.

Custody sergeants are under the command of Police Scotland’s custody division, which sits separately from the territorial policing divisions. It deals with the safety and wellbeing of those in police custody. It has its own management and governance structure, which is independent of the territorial divisions and is commanded by a chief superintendent who is accountable directly to an assistant chief constable who is a member of the force executive. That ensures better oversight and management of persons in custody, and better decision making on custody matters.

The independence and increased professionalisation of custody division removes the need for decisions on liberation to be taken at inspector level. The officer best placed to make decisions on a person’s liberation and, by extension, any conditions that are to be attached to that liberation will in most cases be the sergeant in charge of the custody centre.

I consider that the arrangements for the management and governance of custody facilities, coupled with the procedural safeguards that are built into the bill, mean that it is appropriate for most investigative liberation conditions to be set by a custody sergeant.

A custody sergeant will be independent from the investigation, so they will need to consult the senior investigating officer to determine what conditions are necessary for the interests of the investigation and for the protection of victims. The process will ensure that conditions are tailored to the investigation and that the final decision on what is proportionate and necessary will be made by an officer with the right knowledge and expertise in dealing with custody matters.

The bill sets a minimum authorisation rank for investigative liberation decisions. I believe that that rank should be sergeant, but investigative liberation decisions could also be made by more senior officers. The bill provides the detailed framework and sets a minimum rank required to ensure good decision making on investigative liberation. The provisions must be flexible enough to cover relatively minor offences, complex technical investigations and very serious offences.

It will be for the police to ensure that the new option of investigative liberation is used appropriately and proportionately in each case. The bill provides the legal framework, but day-to-day decision making will be supported by detailed guidance. The police guidance in the standard operating procedures for custody will be revised to take account of the bill. There will be scope for the police to develop more finely grained authorisation processes for investigative liberation conditions in different circumstances. Higher authorisation requirements could be set before a suspect could be released on investigative liberation for
particular offences, for example domestic violence; for particular types of suspect, for example children; or when unusual conditions are set. Those are practical operational matters for Police Scotland and it would be unnecessarily restrictive to set out the detail on them in the bill.

There will still be a requirement for any conditions set to be kept under review by an inspector. That inspector could modify any conditions set by a sergeant that the inspector did not agree were necessary and proportionate. Authorisation to release on investigative liberation will be given during the initial 12-hour detention period and I believe that custody sergeants are best placed to make such decisions. However, the requirement to keep conditions under review will ensure that all conditions are subject to detailed oversight by inspectors.

The amendments in my name in this group are designed to ensure that, in all cases, correct and fully informed decisions are made, that the proper conduct of the investigation is assured and that the rights of the individual are protected.

I invite the committee to support the amendments in my name.

Elaine Murray: Amendment 47, in my name, amends section 14 by replacing the conditions that are being imposed

"for the purpose of ensuring the proper conduct of the investigation into a relevant offence"

with a series of conditions required of the person. The reason for that is that, if someone is released on certain conditions, it seems more appropriate that the conditions should relate to their behaviour on release, rather than the way in which the police are conducting the inquiry. That issue was raised with us at stage 1.

The comments that the cabinet secretary made in the previous discussion are helpful and I will bear them in mind. Amendment 48, in my name, which will be discussed later, is on a similar topic and I note that amendment 155, in the name of the cabinet secretary, is similar to amendment 48, so I wonder whether he will consider a similar amendment to amendment 47 at stage 3, if amendment 47 is considered to be too restrictive. It is important that the conditions for release relate to the way the person behaves when they are on investigative liberation.

I am very supportive of the intention behind John Finnie’s amendments and again I think that the cabinet secretary’s comments were helpful. I am interested to hear how John Finnie reacts to those comments when he sums up.

I am very supportive of amendment 143, which no longer permits a curfew.

Roderick Campbell: I have some sympathy with the suggestion behind amendment 47, but I also bear in mind what the cabinet secretary has said this morning.

In relation to his amendments, John Finnie should reflect further on the detailed provisions in sections 15, 16 and 17, in which 28 days is specified as a long-stop period and the detention period might be a great deal less. There are safeguards in there and we should reflect on that. I disagree with the idea that there should be an additional test before a sheriff to determine the length of detention.

Margaret Mitchell: It is good that John Finnie has raised the point, but amendment 142, in the name of the minister, allays our concerns about the provision and explains what would happen more fully.

The idea behind amendment 47 is good, but the amendment is not flexible enough to suit every situation. I welcome the minister’s offer to reconsider the issue at stage 3.

The minister’s amendments to section 14 make improvements that will help the bill in general.

John Finnie: I have noted everything that has been said. I should stress that Lord Carloway never intended there to be a blanket 28 days. I reiterate the point that the Law Society of Scotland supports amendment 18. The cabinet secretary said that it is a new process and he is right about that in respect of release subject to conditions. However, we have heard again that some investigations are complex. Some of us can recall when the introduction of a six-hour detention was seen as hugely draconian; we have moved through various phases since then and are now being told that 28 days is required.

Language is very important and the portrayal of anyone who is not supportive of such measures as being somehow less supportive of victims of crime is unfortunate and entirely inaccurate. For example, the cabinet secretary talked about the implications that restricting detention would have for attempts to interfere with witnesses, but if someone attempts to interfere with a witness at the moment, that is a crime in common law of attempting to pervert the course of justice, and they would be arrested without warrant. That is the right way to treat such a crime and the bill would have no impact on that.

The cabinet secretary assures us that an inspector will keep the 28-day period under review, yet it will be a sergeant who will authorise the detention, and the same information is put out about custody division. Police Scotland may believe that that is an important use of terminology. However, people place a lot of store in the decisions that are made in the supervisory
role about detention. I point out that every constable has an obligation to ensure that no one is disproportionately retained in custody.

The question is one of proportionality, and it is my view that the backstop remains excessive. For that reason I will press amendment 18.

11:00

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 18 disagreed to.

Amendment 142 moved—[Michael Matheson].

The Convener: The question is, that amendment 142 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)

The Convener: The result of the division is: For 8, Against 1, Abstentions 0.

Amendment 142 agreed to.

Amendment 47 not moved.

Amendment 143 moved—[Michael Matheson]—and agreed to.

Amendment 19 not moved.

The Convener: Amendment 144, in the name of the cabinet secretary, is grouped with amendments 158, 159 and 198 to 204.

Michael Matheson: Amendments 144, 158, 159 and 198 to 204 make no change to the substance of the bill. They simply improve its structure.

The amendments move what is presently chapter 7 of part 1 into a schedule. Chapter 7 sets out the consequences for someone who fails to comply with conditions imposed on them when they are released from police custody either on investigative liberation or on undertaking. In essence, the consequences are that they have committed an offence.

Part 1 is mainly concerned with setting down the rules according to which the police are to deal with suspects, and the part flows better if those rules are not interrupted by a chapter dealing with what the courts are to do in the event that a suspect breaches a condition imposed on him or her by the police.

I move amendment 144.

Amendment 144 agreed to.

The Convener: I remind members that if amendment 145, in the name of the cabinet secretary, is agreed to, amendment 20 will be pre-empted.

Amendment 145 moved—[Michael Matheson].

The Convener: The question is, that amendment 145 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)

The Convener: The result of the division is: For 8, Against 1, Abstentions 0.

Amendment 145 agreed to.

Amendment 146 moved—[Michael Matheson].

The Convener: The question is, that amendment 146 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)

The Convener: The result of the division is: For 8, Against 1, Abstentions 0.

Amendment 145 agreed to.

Amendment 146 moved—[Michael Matheson].

The Convener: The question is, that amendment 146 be agreed to. Are we agreed?

Members: No.
The Convener: Amendment 146 agreed to.

Section 14, as amended, agreed to.

Section 15—Conditions ceasing to apply

The Convener: I remind members that if amendment 147 is agreed to, amendment 21 is pre-empted.

Amendment 147 moved—[Michael Matheson].

The Convener: The question is, that amendment 147 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)
Mclnnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 7, Against 2, Abstentions 0.

Amendment 147 agreed to.

Section 14, as amended, agreed to.

Amendment 147 agreed to.

Section 15—Conditions ceasing to apply

The Convener: I remind members that if amendment 147 is agreed to, amendment 21 is pre-empted.

Amendment 147 moved—[Michael Matheson].

The Convener: The question is, that amendment 147 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

Against
Finnie, John (Highlands and Islands) (Ind)
Mclnnes, Alison (North East Scotland) (LD)

The Convener: The result of the division is: For 8, Against 1, Abstentions 0.

Amendment 147 agreed to.

Section 15, as amended, agreed to.

Section 16 agreed to.

Section 17—Review of conditions

Amendments 22 to 27 not moved.

Section 17 agreed to.

Before section 18

Amendment 148 moved—[Michael Matheson]—and agreed to.
more appropriate than a place of safety as meaning a constable of the rank of inspector or above. Amendment 150A would omit “inspector” and insert “superintendent”, meaning that certification would have to be by an officer of the rank of superintendent or above. Currently, certification may be by an officer of the rank of inspector or above, or by the officer in charge of the police station to which the child is brought.

It is important that decisions are made in a timely, efficient and proportionate way that makes the best use of inspectors’ knowledge, skills, experience and training, while ensuring that they are supported in decision making if needed. Such an approach is in the interests of children and young people.

There are a limited number of superintendents, and requiring a superintendent to make the decision may not be in the interests of the child, as a superintendent will not necessarily be at the station, and a delay may be to the detriment of the child.

Requiring certification by an officer of the rank of superintendent or above would constrain the police’s operational flexibility and would not make best use of the skills, knowledge and capabilities of appropriate officers of the rank of inspector or chief inspector. It is important that we support effective decision making at the appropriate level of seniority. For the reasons that I have given, I ask Mr Finnie not to move his amendment.

Amendment 151 replaces section 42(3) of the Criminal Procedure (Scotland) Act 1995. The amendment requires the police to notify at least one parent or guardian, if they can be found, of the court where the child is to appear, the date on which they are to be brought before the court, that the attendance of the parent or guardian at court may be required and, in supplement to existing law, the general nature of the offence with which the child has been charged. The police may withhold such notification if they have grounds to believe that notifying the parent or guardian would be detrimental to the child's wellbeing.

Amendment 152 replaces section 42(7) of the Criminal Procedure (Scotland) Act 1995. The amendment requires the police to notify the relevant local authority of where the child is to appear, the date on which they are to be brought before the court, and the general nature of the offence with which they have been charged, the relevant local authority being the authority for the area where the court sits. In line with other provisions of the bill, that protection has been extended to 16 and 17-year-olds who are subject to supervision.

I turn now to section 42 of the bill. It is a progressive and significant provision that requires a constable to treat the need to safeguard and promote the wellbeing of the child as a primary consideration. With reference to amendment 65, in the name of Elaine Murray, the term "wellbeing" is consistent with language used in the Children and Young People (Scotland) Act 2014, and is understood by the police.

The term “wellbeing” was given full consideration by Parliament in the context of the scrutiny of the Children and Young People (Scotland) Bill, and there was strong support from children’s groups for its use. Wellbeing is at the heart of the getting it right for every child approach, which itself is rooted in the United Nations Convention on the Rights of the Child. The principles of the UNCRC are the foundation for any assessment of the wellbeing of a child or young person.

Our approach is consistent with a wider assessment of children’s needs. It is that wider assessment that the bill requires the police to make a primary consideration as they decide whether to arrest, detain, interview or charge a child. The factors that they will consider will be dictated by the circumstances of the investigation that they are dealing with.

It is right that the wellbeing of the child should be a primary consideration in all those circumstances. Any assessment of wellbeing must seek to identify all the factors in the life of the child or young person that may be benefiting or adversely affecting their wellbeing. That can potentially help to further children’s rights, as it is more inclusive. Consistency is important in this area, and the forthcoming statutory guidance on wellbeing in respect of the Children and Young People (Scotland) Act 2014 reinforces the value of alignment with the 2014 act on the issue. There is a danger in creating confusion around terminology, and both the 2014 act and the bill provide consistency and clarity around expectations.

The committee highlighted concerns regarding the lack of consistency in use of the terms “welfare”, “best interests” and “well-being” of the child in this and other legislation. As demonstrated in amendments 151, 170, 188 and 196, I have taken that on board to ensure consistency. If the phrase “best interests” was brought into section 42 by amendment 65, that inconsistency would be reintroduced. Taking account of those points, I therefore ask Elaine Murray to not to move amendment 65.

Amendment 196 replaces the protections in section 42(9) of the Criminal Procedure (Scotland) Act 1995, ensuring that, where it is practicable and not detrimental to the wellbeing of a child who is officially accused of committing an offence, that
child should not associate with an adult when in custody.

Amendment 197 replaces section 43(5) of the Criminal Procedure (Scotland) Act 1995 and continues to ensure that the principal reporter is notified of cases where the procurator fiscal has decided, for whatever reason, not to proceed with a prosecution against a child. The purpose of the amendment is to enable the principal reporter to consider whether other appropriate action should be taken. In particular, the amendment makes it clear that, despite the decision not to prosecute, where a constable reasonably suspects that the child has committed the offence that led to their detention, they may be kept in a place of safety, in accordance with the provisions of the Children's Hearings (Scotland) Act 2011, until the principal reporter has decided whether it is necessary to make a compulsory supervision order in respect of the child. The effect of the provision largely reflects the status quo.

11:15

Amendment 222 adjusts the meaning of police custody as a consequence of amendment 197. The effect will be that a person who is not being prosecuted will no longer be in “police custody” within the meaning of part 1 of the bill. It would apply if the principal reporter has directed that the person should remain in a place of safety under section 65 of the Children’s Hearings (Scotland) Act 2011 pending a decision on whether to make a compulsory supervision order in respect of that person.

Amendment 255, in the name of Alison McInnes, seeks to amend section 42 of the bill, which relates to safeguarding and promoting the wellbeing of the child as a primary consideration. The amendment would add a subsection that states:

“A decision”

...to hold a child in custody or interview a child about an offence

“must be exercised for the shortest possible period of time.”

I am not entirely sure what exercising a decision means, but I take the general point about ensuring that children are not kept in custody or interviewed for longer than necessary.

However, there is already a general duty under section 41 of the bill to ensure that people are not held unnecessarily that has the intended effect. Importantly, that duty relates to the test of necessity, whereas the phrase “shortest time possible” has no such test and could lead to an inappropriate release.

Section 10 also sets a carefully balanced test that must be considered before anyone is held in custody. In deciding whether that test is met in relation to a child, the police will have the wellbeing of the child as a primary consideration, as provided for by section 42. Amendment 255 therefore adds nothing to the bill and does not work in terms of ordinary language. I invite Alison McInnes not to move it.

I move amendment 150.

John Finnie: I welcome amendment 150. I am sure that most police officers will acknowledge that dealing with young people in such circumstances is one of the most challenging things that they do, and therefore the background is very important. It may seem that amendment 150A makes a change for change’s sake, given that I fully support everything that is already there, but my thinking is that the decision is of such importance that it should be taken by someone who is detached from the operational experience.

The cabinet secretary says that there will not be a superintendent at every station. I sincerely hope that that will not be—if there were, it would mean that there were far too many superintendents. However, likewise, there will not be an inspector at every station. I am quite sure that the cabinet secretary is not trying to say that a superintendent would not be available to make timely decisions, not least because a duty superintendent has to make timely decisions on very sensitive matters that we need not go into here. To my mind, there is nothing more sensitive than a decision to formally detain a child.

I move amendment 150A.

Elaine Murray: The cabinet secretary said that Children 1st supports his amendments, but it did not support them originally. It did not support them because it looked as though the amendments would be discussed with other amendments on the rights of under-18s that will be discussed later on, and because the amendments do not go far enough as they would protect only a very small number of 16 and 17 year-olds who are under compulsory supervision orders and would not protect other 16 and 17-year-olds.

As a result of the way in which the amendments fall in our discussions, I will support them at this point. However, I think that the provisions will require further amendment at stage 3 in order to give greater protection to 16 and 17-year-olds.

My amendment 65 would amend section 42, which has as its title “Duty to consider child’s best interests”. If my amendment’s proposed introduction of the concept of “best interests” into the text of section 42 is inconsistent or confusing, I cannot see how having “best interests” in the section title is any less so. The meaning of “best interests” has been determined by a body of case law and is nationally and internationally...
recognised. It has been used since 1959 and is in accordance with the United Nations Convention on the Rights of the Child. As I said, “best interests” is used in the section title but not in its text, which is inconsistent.

“Well-being” is a relatively new term, and although it appears in previous legislation it is not as well defined as “best interests”. It could be difficult to define in the context of section 42 and therefore difficult to implement. The use of the phrase “best interests” of a child is in line with international human rights obligations.

I listened to what John Finnie had to say on amendment 150A, and he has convinced me that it is appropriate.

Alison McInnes: As we have heard, section 42 places a duty on a constable to consider a child’s best interests in the early stages of the criminal justice process. It currently states that, when taking decisions on arrest, custody, interviews and charge, the constable

“must treat the need to safeguard and promote the well-being of the child as a primary consideration.”

My amendment 255 would require the constable to exercise their power to hold a child in police custody and interview them

“for the shortest possible period of time.”

The amendment would make it explicit that that would have to be a consideration.

Amendment 255 is supported by Justice Scotland, and its intention is somewhat obvious: it is to ensure that when constables make decisions they bear in mind the unique vulnerability of children and the potentially damaging impact of their being held in custody or interviewed for long periods of time. The amendment is even more important given the committee’s agreement last week to an amendment that allows children to be held for up to 24 hours, which I opposed. The purpose of my amendment is to emphasise the need not to use up all that time. I will press my amendment, and I support Elaine Murray’s amendment 65.

The Convener: You have not moved your amendment yet—you are just speaking to it.

Does anyone else want to come in?

Margaret Mitchell: I understand the intention behind John Finnie’s amendment 150A. The decision to hold a child in custody is a serious one and possibly should be taken by a high-ranking officer. However, I wonder whether John Finnie has considered the unintended consequence of his amendment. As amendment 150 currently stands, an inspector, if they happened to be present, could decide that it was not appropriate to keep the child in custody. That would mean that the decision would be made more quickly than if people had to wait for a superintendent. We are widening the scope of the bill by including inspectors, who could be more readily available to take such important decisions more timeously. That is something to consider. I was persuaded that the minister had the provision more or less right in his amendment 150.

On Elaine Murray’s amendment 65, there is an issue about the terminology, especially if “best interests” is used in the section title. However, the cabinet secretary is sure that the phrase “well-being” is more appropriate. That could be a drafting issue, or there might be a more fundamental issue. However, I think that the cabinet secretary has looked at the issue.

The sentiment behind Alison McInnes’s amendment 255 is absolutely right: children should be held in custody for “the shortest possible ... time”. However, how does one define that? Can some test be devised? Is the phrase relative and therefore vague? Does it add anything? I am uncertain about that and will be interested to hear the cabinet secretary’s comments.

Roderick Campbell: John Finnie’s amendment 150A would introduce a requirement for the decision to be taken by a superintendent, which would be unnecessarily restrictive and not necessarily in the child’s best interests.

I have some sympathy with Elaine Murray’s amendment 65. We are struggling a wee bit with consistency. The cabinet secretary persuaded me that the bill is at least consistent with the 2014 act, but I still cannot quite understand what consideration might have been given when the 2014 act was drafted to the use of “well-being” and its implications for the Children (Scotland) Act 1995, which refers to “best interests”. It would be helpful to have further clarification of the point before stage 3.

Michael Matheson: It may be helpful if I deal first with the issue about the title of section 42. That has already been changed within the bill. It is not a matter of amendment; it is a matter that is dealt with through printing. It has been changed from “best interests” to “wellbeing” to ensure consistency. I hope that that addresses the concern that members had regarding the section title.

The Convener: Just to clarify, we thought that there would be a reprint.

Michael Matheson: It is a matter of printing, yes; it is not a matter of an amendment to the bill. The bill will be reprinted before stage 3.

The Convener: You are saying that the title has not been changed yet but that it will be changed,
with the permission of the parliamentary authorities. Is that correct?

**Michael Matheson:** Yes. There is a technical process that it goes through for that.

**The Convener:** I just wanted to clarify that for the record.

**Michael Matheson:** The title will say “wellbeing” rather than “best interests”. I hope that that clarifies the point.

However, that point aside, a number of the amendments that I have lodged try to achieve that consistency and read-across with other children’s legislation. It is important to ensure that the police and other organisations have a consistent understanding of the terminology.

I turn now to the issue that John Finnie raised in amendment 150A on the rank of the officer taking decisions in relation to a detained child. Last week, I made the point that “the issue is about the quality of the decision making”. — [Official Report, Justice Committee, 29 September 2015; c 40.]

The decision is best taken by the individual who is best able to make an informed decision at that particular time. Operationally, I believe that the decision can best be made at the rank of inspector or chief inspector. Clearly, it could be made by an officer of a higher rank, if necessary, but I think that the rank of inspector or chief inspector should be the minimum at which a decision of such a nature should be made. There is no need to move up to the rank of superintendent. Of course, superintendents operate on an on-call basis for operational matters, but there is an issue to do with the speed at which decisions can be made in such instances. I believe that it is appropriate that the decision should be made as quickly as possible, and having decisions made at the rank of inspector or chief inspector will allow us to maximise the speed at which that can happen.

Returning to the issue that Elaine Murray raised, I am happy to have a dialogue with her between now and stage 3 if there are areas where she feels that further changes need to be made, and to consider what those are.

On amendment 255, in the name of Alison McInnes, I have already outlined how issues of language and definition mean that how what it proposes would be applied in particular circumstances is unclear. Legally, the amendment adds no protections to the bill, so it does not fit well within the bill. I understand the general thrust of what Alison McInnes is trying to achieve through the amendment, and I am happy to explore that with her between now and stage 3, to see whether there is a way of addressing the issue, or even whether there is a need for it to be addressed. However, as it stands at present, the language in and the drafting of the amendment do not add anything to the bill and do not sit well with the terms that are used in the bill.

**John Finnie:** I certainly did not in any way mean to be disparaging about the federated ranks. Amendment 150A is about the importance that is attached to the treatment of young people. In practical terms, in the area that I represent, for example, it just means phoning someone; indeed, an inspector will not be on duty in the vast majority of places. I am sure that the cabinet secretary does not wish to give the impression that a superintendent is not instantly available to answer a phone to deal with the many challenges that the modern police service faces outwith routine office hours—not that that is how the service works. I think that the amendment demonstrates the significance of the decision to detain a child by having it taken at the higher rank.

I press amendment 150A.

**The Convener:** The question is, that amendment 150A be agreed to. Are we agreed?

**Members:** No.

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

**For**
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)

**Against**
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

**The Convener:** The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 150A disagreed to.
Amendment 150 agreed to.
Amendments 151 and 152 moved—[Michael Matheson]—and agreed to.

**Section 19—Liberation by police**

**The Convener:** Amendment 153, in the name of the cabinet secretary, is grouped with amendments 154, 155, 48, 156, 157 and 160 to 164. If amendment 155 is agreed to, I cannot call amendment 48, as it will be pre-empted.

11:30

**Michael Matheson:** The amendments in this group relate to police powers to release people on undertaking.
Amendment 156 makes it clear that the sort of undertaking conditions that can be imposed include requirements to be in a specified place at a specified time, or to refrain from entering a specified place or type of place for a particular period. Those are curfew-type conditions. The bill as introduced stated that curfews could be imposed as undertaking conditions. Amendment 156 simply rewords the non-curfew conditions as they can be applied in undertakings for consistency with their counterparts for investigative liberation, as amended by amendment 143, which was debated earlier.

Amendment 157 provides that undertaking conditions can generally be authorised by a constable of the rank of sergeant or above but that curfew conditions requiring a suspect to be in a specified place at a specified time must be authorised by an officer of the rank of inspector or above.

I consider that the arrangements for the management and governance of custody facilities, coupled with the safeguards provided in the bill, mean that it is appropriate for most undertaking conditions to be set by a custody sergeant. The arguments for allowing sergeants to set undertaking conditions are similar to those that I made for investigative liberation conditions, although the context here is different.

Once a person has been charged, the police need to consider whether it is necessary to keep that person in custody until they can be brought before a court under section 18 of the bill or whether they can be released, either with or without an undertaking. The assessment of release options should be made by a specialist custody officer in consultation with the senior investigating officer and in accordance with the Lord Advocate’s guidelines on liberation by the police. That process will ensure that any special conditions are tailored to the particular case but that the final decision on what is proportionate and necessary will be made by an officer with the right knowledge and expertise in dealing with custody matters.

The bill already allows a specialist custody sergeant to decide to keep a person in custody or to release them without undertaking. Amendment 157 would allow that custody sergeant to release a person subject to undertaking conditions. The independence and increased professionalisation of custody division removes the need for decisions on liberation conditions to be taken at inspector level. The officer best placed to make decisions on whether a person should be released subject to undertaking conditions will, in most cases, be the sergeant in charge of the custody centre.

I believe that a higher level of authorisation is justified when imposing curfew conditions. There
may be cases where it is necessary and proportionate to impose a curfew on a suspect, but it is important to recognise that doing so would place very significant restrictions on the suspect’s liberty. My amendment 157 therefore requires curfew conditions to be authorised by an inspector.

The provisions have to be flexible enough to cover the full spectrum of criminal offences, but there is scope for the Lord Advocate and the police to set out in guidance more finely grained authorisation processes for undertaking conditions in different circumstances. I believe that those are matters for the Lord Advocate and Police Scotland and that it would be unnecessarily restrictive to set out that detail on the face of the bill.

I believe that amendments 153 to 157 reinforce the robust and comprehensive system for police liberation set out in the bill.

I now come to amendments 160 to 164, which are also in my name. Those amendments restructure the provisions that are already in the bill on the procurator fiscal’s power to rescind or modify an undertaking and on the expiry of undertakings.

Amendments 160, 161, 162 and 164 are primarily drafting improvements that clarify the powers of the procurator fiscal and restructure the provisions on the rescission and expiry of undertakings in order to make the provisions easier to navigate.

Amendment 163 is more substantial. In addition to restating provisions about rescission of undertakings, it gives a new power to the police to arrest people who are reasonably suspected of being likely to breach an undertaking. It is based on an existing power that the police have to arrest suspects in anticipation of their breaching bail conditions.

Amendment 163 will ensure that people who are likely to breach an undertaking can be arrested in the same circumstances as people who are likely to breach bail conditions. The power could be used if, for example, the police consider it likely that the person will interfere with witnesses. Actual breach of undertaking is already an offence in respect of which the person can be arrested.

I will now respond to Elaine Murray’s amendment 48, which sets out the purposes against which the necessity and proportionality of conditions can be tested. It restricts those purposes to securing that the person surrenders to custody if required to do so, that the person does not interfere with a witness or otherwise obstruct the course of the investigation into the offence in connection with which the person is in police custody, the protection of the person or, if the person is under 18 years of age, the welfare or interests of the person.

As I explained earlier, amendment 155 will provide more flexibility to prevent interference with witnesses and evidence. Therefore I would ask Elaine Murray not press her amendment.

I believe that, taken together, the provisions in the bill on release on undertaking and the amendments in my name provide clarity and help to balance the interests of justice with individuals’ rights, and I invite the committee to support them.

I move amendment 153.

The Convener: I am waning a little, so we will go on to the end of the group of amendments on release and undertaking before taking a five-minute break. I call Elaine Murray to speak to amendment 48 and others in the group.

Elaine Murray: As the cabinet secretary said, amendment 48 refers to standard conditions and is similar to amendment 155 in the name of the cabinet secretary, which I agree is probably more flexible. However, I believe that the protection of a person or the welfare and interests of a person under 18 are important enough to appear on the face of the bill. Although I am prepared to support amendment 155, which will supersede amendment 48 if it is agreed to, there may still be a case for further amendments at stage 3 to include the protection of the person and the best interests of someone who is under 18.

Michael Matheson: If amendment 155 is agreed by the committee and becomes part of the bill, I will be more than happy to explore the issue further with Elaine Murray after the stage 2 process.

Amendment 153 agreed to.

Section 19, as amended, agreed to.

Section 20—Release on undertaking

Amendment 154 moved—[Michael Matheson]—and agreed to.

The Convener: I call amendment 155 in the name of the cabinet secretary. I remind members that, if amendment 155 is agreed to, I cannot call amendment 48, which would be pre-empted.

Amendment 155 moved—[Michael Matheson]—and agreed to.

Amendments 156 to 158 moved—[Michael Matheson]—and agreed to.

Section 20, as amended, agreed to.

Amendment 159 moved—[Michael Matheson]—and agreed to.
Section 21—Modification of undertaking

Amendments 160 to 162 moved—[Michael Matheson]—and agreed to.

Section 21, as amended, agreed to.

After section 21

Amendments 163 and 164 moved—[Michael Matheson]—and agreed to.

Section 22 agreed to.

The Convener: Members will be delighted to know that I am suspending the meeting for a five-minute break.

11:43

Meeting suspended.

11:48

On resuming—

Section 23—Information to be given before interview

The Convener: Amendment 28, in the name of John Finnie, is grouped with amendments 165 and 166.

John Finnie: Amendment 28 would oblige a constable not only to caution a person not more than one hour before an interview, but to repeat the caution “immediately before” the constable interviews the person about an offence.

A long time ago, when I was learning about the law, the importance of timely cautions was constantly reinforced: it forms a significant part of case law. One hour is a long time for someone who is a suspect, and we know that many people who find themselves in police stations as suspects have challenging conditions. There should always be an overriding consideration of fairness and there should be the opportunity for the person to get their rights straight away. I imagine that most constables do that anyway. The amendment would disadvantage no one, but would simply reinforce people’s rights. I hope that members will support amendment 28.

I move amendment 28.

Michael Matheson: The bill provides for and will enhance the rights of individuals who are to be interviewed by the police by conferring upon them the right, if they so choose, not to say anything other than to give basic information, the right to have a solicitor present and the right to have another person or a solicitor informed that they are in custody. Those are fundamental rights and it is only correct that the bill will ensure fully that suspects are given such information in a timely and clear way.

I understand the reasons that John Finnie has set out in speaking to amendment 28, and I am sure that we all agree that the intention behind the relevant provisions in the bill is to ensure that anyone who is arrested or who is attending voluntarily at a police station is clearly informed about their rights. The question is whether amendment 28 would achieve that aim proportionately; it could require that the person who is to be interviewed be informed of their rights twice in the space of the hour prior to the interview. Although I am fully supportive of the principle that individuals should fully understand their rights, I do not believe that it is necessary for them to be informed of them twice in so short a time.

There are, in the bill, other safeguards of individuals’ rights. A person must be told on arrest, and on arrival at the police station, that they are under no obligation to provide any information to the police other than their name, address, nationality and their date and place of birth. In addition to that, the letter of rights includes information about the right to remain silent and states that any information will be recorded and may be given in evidence if the matter proceeds to trial. Therefore, I ask John Finnie not to press amendment 28.

I hope that the Government’s amendments in the group will provide further reassurance to John Finnie and the committee. We are fully supportive of the aim to ensure that suspects and accused persons are regularly advised of their rights and of relevant information. In that respect, amendment 165 will add to the information that a person must be told before they are interviewed: it will require a police officer to inform a suspect “of the general nature of” the offence that they are suspected of committing. Under section 3 of the bill, that information will already be given when a person is initially arrested. For consistency, however, we consider it appropriate that that information be stated again prior to the interview. I consider that to be a particularly important change for suspects who attend a police station voluntarily, because such persons may not already have been given that information. Amendment 165 will ensure that they are given it.

Amendment 166 will enhance protection of persons who are to be interviewed under the post-charge questioning procedure. The power to allow the police to question an accused person about an offence after he or she has been charged with that offence is included in the bill, as recommended by Lord Carloway in his review. An application to
carry out questioning after charge has to go before a court. Where the court grants such an application, it must specify the length of time for which questioning is permitted, and can add other conditions to ensure that the questioning is not unfair—for example, to limit the scope of the questioning. Amendment 166 will ensure that a person who is being interviewed by the police in such a situation will be told of the time limit for the questioning and of any other conditions that have been imposed by the court. It is, therefore, an additional protection of the rights of the accused.

As I have already said, I hope that the Government’s amendments 165 and 166 will, by adding to the information given to suspects, be sufficient to satisfy members that amendment 28 is unnecessary.

The Convener: John Finnie will wind up and say whether he will press or seek to withdraw amendment 28.

John Finnie: It is my intention to press amendment 28, which enjoys the support of the Law Society of Scotland. It would be a modest provision under the sections governing “Rights of suspects”. It would oblige a constable not only to caution a person one hour before the interview, but to caution them immediately in advance of it. That is simply to reinforce the point that a person is not obliged to say anything. It would not be an onerous task, so it would be entirely proportionate to support the amendment. I hope that members will do so.

The Convener: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 28 disagreed to.

Amendments 165 and 166 moved—[Michael Matheson]—and agreed to.

Section 23, as amended, agreed to.

Section 24—Right to have solicitor present

The Convener: Amendment 29, in the name of John Finnie, is grouped with amendments 243 to 248, 250, 251 and 253. If amendment 29 is agreed to, I cannot call amendments 243 and 244, because they will have been pre-empted.

John Finnie: I concur with a number of representations that I have received that say that the proposed threshold in paragraphs (a) and (b) of section 24(4) is inappropriate. Section 24(4) currently says that

“a constable may, in exceptional circumstances, proceed to interview the person without a solicitor being present if the constable is satisfied that it is necessary to interview the person without delay in the interests of—

(a) the investigation or the prevention of crime, or
(b) the apprehension of offenders.”

That wording could, and likely would, be used legitimately to cover a huge percentage of instances. Amendment 29 would ensure that a person would be interviewed without a solicitor being present only in the most exceptional circumstances. I consider that to be a fair and balanced approach.

I move amendment 29.

Alison McInnes: John Finnie and I are concerned about the same things, but we have taken a different tack to try to address them. All my amendments in the group seek to strengthen the rules around the ability of the police to interfere with the fundamental rights of both adult and child suspects. I am talking about the right to be assisted by a solicitor during interview, the right to a consultation with a solicitor, the right of adults to have an intimation sent to another person, and the right of children to have access to their parent or guardian.

Section 24 states that a

“constable may, in exceptional circumstances, proceed to interview the person without a solicitor being present if the constable”

believes that it is necessary to proceed in

“the interests of—

(a) the investigation or the prevention of crime, or
(b) the apprehension of offenders.”

The section grants the right to override a suspect’s request for legal assistance. Section 36 establishes that constables may delay a person’s right to a private consultation with a solicitor on the same basis.

I firmly believe that referring to the prevention or detection of crime and “the apprehension of offenders” is far too broad a basis on which to deny someone their right to be assisted by a solicitor. That is why my amendments 243 to 245,
250, 251 and 253 would create a switch to an interference-based definition of need that stresses that restriction of those rights must be to prevent “interference with evidence” or another person, and would elevate the making of such decisions from constable to superintendent level.

Members will note—as the convener has already indicated—that my amendments 243 and 244 would be pre-empted by agreement to amendment 29, which is in the name of my colleague John Finnie. His amendment contrasts with mine: it would allow a constable to proceed to interview the person without a solicitor being present only in exceptional circumstances. Amendment 29 does not specify what those circumstances may be, nor does it mention sign-off up the ranks. It would still grant the police too much leeway, although it is obviously better than what is in the bill.

The bill suggests that denial of those fundamental rights could become routine. My amendments highlight the significance of those decisions and would ensure that proper safeguards are in place to discourage misuse of the powers.

Elaine Murray: I agree that there is a need for the police not to routinely abuse their powers, but I do not believe that the bill encourages that, because it makes it quite clear that it is talking about “in exceptional circumstances”. Obviously, with things such as the prevention of crime, there are important circumstances in which it may be necessary to act very quickly.

I do not disagree with what Alison McInnes says about “interference with evidence in connection with the offence” and so on, but I think that those things are, to an extent, encompassed. There might be an argument for expansion at stage 3 to include some of them, but I am not very sure about that.

On amendment 245, which is on the “appropriate constable” being a superintendent who “has not been involved in the investigation” of the offence, I do not see how somebody who has not been involved in that investigation could judge whether an exceptional case has arisen. Therefore, I would also resist amendment 245.

Roderick Campbell: I do not have anything to add to what Elaine Murray has said, other than that I support it.

12:00

Michael Matheson: The amendments in the group relate to authorisations for interviewing suspects without a solicitor being present, to delaying intimation of the fact someone is in custody and to delaying consultations with solicitors.

I appreciate that the intention behind the amendments is to protect suspects. That is a key purpose of part 1, which aims to strike the right balance between protecting the rights of suspects and ensuring effective investigation of crime. In order to do this, chapters 4 and 5 of part 1 confer crucial rights on suspects, including the right to have a solicitor present during interview, the right to have someone else informed that they are in custody and the right to a private consultation with a solicitor at any time. There will be exceptional circumstances in which these rights cannot be delivered, but we should set a high bar for when that can happen.

Amendments 29 and 244 would amend section 24(4), which deals with circumstances in which a person could be interviewed without a solicitor. Section 24(4) permits such an interview only “in exceptional circumstances” but does not define those circumstances. That reflects the recommendation in the Carloway report that interviewing a suspect without a solicitor, against the suspect’s wishes, should be possible only in exceptional circumstances. Lord Carloway recommended that “exceptional circumstances” should not be defined because case law has made it clear that it means in very rare cases:

“for example where an immediate interview is required in order to protect persons or property from serious harm.”

Section 24(4) also includes an additional test so that before proceeding to interview where there are exceptional circumstances, police must also be “satisfied that it is necessary to interview ... without delay in the interests of—

(a) the investigation or the prevention of crime, or
(b) the apprehension of offenders.”

John Finnie’s amendment 29 would remove that additional test of necessity. In doing so, it would remove protections for suspects and reduce transparency in decision making—although I appreciate that that was probably not the intention.

Alison McInnes’ amendment 244 would leave the “exceptional circumstances” element of the test in place but would narrow the parameters of the necessity test. The effect of that would be, for example, to prevent the police from deciding that it was necessary to interview in exceptional circumstances in cases where there was an additional suspect on the run. Amendment 251 would substitute the same narrower test into section 36(2), which deals with circumstances in which a suspect’s exercise of their right to a
private consultation with a solicitor could be delayed.

Amendments 243, 245 to 248, 250 and 253 all seek to require that decisions to interview without a solicitor or to delay intimation or consultations be made by constables of senior rank. The assumption underlying the amendments seems to be that requiring that particular decisions be made by very senior officers is necessary to ensure good decision making.

All constables go through professional training throughout their careers to ensure that they are fully able to carry out whatever role they have to undertake. All custody facilities across Scotland now come under the command of the custody division, and there is a corporate approach to dealing with people in custody, with a national standard operating procedure and training for all officers who work in those facilities.

The Justice Committee agreed last week that sergeants should make the initial decisions to keep people in custody. It would be during that initial authorisation procedure that any requests would be made to delay notifications to solicitors or named persons and, potentially, to interview without a solicitor being present. The person who makes that initial custody decision would be best placed to consider the other rights-based decisions. The decisions that would be covered by the amendments relate to rights that are afforded to people who are being held in custody. I believe that such decisions are best made by specialist custody officers within the custody division—as is the case at present.

The decisions that would be affected by the amendments may also need to be made in exceptional circumstances in which time is of the essence. One example might be a kidnap scenario: requiring authorisation from a superintendent before interviewing a suspect could endanger life by creating delay in a situation in which time is critical. There is a relatively small number of superintendents in Scotland: although there will always be a superintendent on call, that superintendent may not be instantly available to make such a decision.

I appreciate that we are talking about important decisions to withhold or delay the delivery of crucial rights to suspects. The bill already sets high tests to ensure that the powers can be used only when absolutely necessary. However, I have listened to the arguments that have been put forward by Alison McInnes and I agree that authorisation by a police constable may not be appropriate in all cases. Therefore, I urge John Finnie not to press amendment 29 and Alison McInnes not to move her amendments, and I will undertake to consider the matter further and to lodge amendments at stage 3 to ensure that the decisions are made by constable of the most appropriate rank.

The Convener: John Finnie’s body language seems to show that he is not persuaded, so I do not know whether that has done it, cabinet secretary.

John Finnie: No, convener—I am grateful to the cabinet secretary for his comments. He says that the bill does not define “exceptional circumstances” and he rightly alluded to Lord Carloway’s recommendations and the fact that there is ample case law. I suppose that that is the challenge when we are trying to make statute and to make reference to case law but not make the statute voluminous every time. Likewise, there is no definition of what a constable’s “satisfaction” is or what constitutes “necessity” with regard to interviewing a person. However, I acknowledge that the cabinet secretary has seen that there are problems, so I am happy to wait to see what he comes back with at stage 3. I will not press amendment 29: I seek permission to withdraw it.

Amendment 29, by agreement, withdrawn.

The Convener: Amendment 243, in the name of Alison McInnes, has already been debated with amendment 29.

Alison McInnes: I will move amendment 243. I understand that the cabinet secretary has asked me not to move amendment 245.

The Convener: We are all getting a bit battle weary—I can hear it in your voice.

Amendment 243 moved—[Alison McInnes].

The Convener: The question is, that amendment 243 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfries and Galloway) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 243 disagreed to.

Amendment 244 moved—[Alison McInnes].

The Convener: The question is, that amendment 244 be agreed to. Are we agreed?
Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 244 disagreed to.
Amendment 245 not moved.
Section 24 agreed to.

Section 25—Consent to interview without solicitor

The Convener: Amendment 55, in the name of Elaine Murray, is grouped with amendments 56, 167, 57, 58, 168, 59, 60, 173, 61 to 64, 38 and 32.

I take a deep breath here, because I must point out that there are various pre-emptions in the group—you will be tested on this immediately after I have read it out. If amendment 58 is agreed to, I cannot call amendment 168. If amendment 63 is agreed to, I cannot call amendments 184 and 185 in the group “Rights of under 18s: minor amendments”. If amendment 38 is agreed to, I cannot call amendment 32. By the looks on your faces, I am guessing that you all took that in.

Elaine Murray: I will try to get through this as quickly as possible, as I have several amendments in the group. My amendments aim to afford the same protection to 16 and 17-year-old children as the bill gives to children under the age of 16.

My amendments 55 and 56 apply to section 25, which is on the ability to consent to interview without a solicitor present. The bill treats older children aged 16 and 17 differently from children who are under 16, despite the fact that it defines a child as someone under the age of 18. That is the case in much of the legislation that we have passed, such as the Victims and Witnesses (Scotland) Act 2014, the Children and Young People (Scotland) Act 2014 and the Human Trafficking and Exploitation (Scotland) Bill, which we passed last week.

We know that young people who have contact with the criminal justice system are often vulnerable in different ways. Many young offenders have poor literacy and numeracy skills and some may have chaotic home lives. Recent research by the British Psychological Society indicates that many have neurological conditions or acquired brain injury, and some will have taken legal or illegal substances that render them less risk averse than normal.

Apart from that, a young person who is under arrest with the prospect of interview by the police may be frightened, worried that their parents, school or employers are going to find out and distressed. That in itself could lead to panicked rather than rational behaviour. Access to calm and informed legal advice from a solicitor is particularly necessary when a young person is vulnerable or not thinking clearly.

My amendments 55 and 56 would protect older children aged 16 and 17 from making the wrong decision to consent to interview without a solicitor being present, by ensuring that no one under the age of 18 can give such consent. The amendments are compliant with the United Nations Convention on the Rights of the Child, which states that children who are accused of breaking the law have the right to legal help and fair treatment.

In addition, amendments 57 and 58 would remove children under 18 from the provisions that exclude from consenting to interview without a solicitor persons who appear to a constable to have a mental disorder or who cannot communicate effectively with the police or understand what is happening. Those provisions will not be necessary if amendments 55 and 56 are agreed to.

In my view, amendments 167 and 168 are inadequate, as they offer the additional protection only to young people aged 16 and 17 who are on a compulsory supervision order. The vast majority of children on CSOs are under the age of 16, so the number who would be protected by the amendments is very small. I agree that those young people need protection, but they will receive it if my amendments are agreed to.

In my view, amendments 167 and 168 are inadequate, as they offer the additional protection only to young people aged 16 and 17 who are on a compulsory supervision order. The vast majority of children on CSOs are under the age of 16, so the number who would be protected by the amendments is very small. I agree that those young people need protection, but they will receive it if my amendments are agreed to.

Amendments 59 and 60, which are to section 30, are similar and would ensure that all children under the age of 18, rather than 16, have the right to have intimation sent to another person that they are in custody. The child’s parent or another adult named by the child will receive intimation as quickly as practicable. The arguments for amendments 55 and 56 regarding the vulnerability of under-18s are the same. An appropriate adult should be aware that a child has been taken into custody.

Amendment 61 would prevent 16 and 17-year-olds from requesting that no intimation be sent to their parent or other named adult. Exactly the
same arguments can be made regarding the varied vulnerabilities of older children as were made for amendments 55 and 56. Amendment 61 would ensure compatibility with the rest of the bill and with recent legislation, as I stated.

Amendment 62 would give a parent or other adult who has been sent intimation that a child who is under 18 is in police custody the right of access to the child. That would change the age to which that right applies from 16 to 18.

Amendment 63 would remove section 32(2), which refers to 16 and 17-year-olds, as that section will not be necessary if amendment 62 is agreed to. Amendment 64 is consequential on amendment 63.

Amendment 38, in the name of John Pentland, would remove any reference to age in the section on support for vulnerable persons, so that all persons would have equal rights to support should a constable believe them to be suffering from a mental disorder—although that condition would be removed by John Finnie’s amendments, which, incidentally, we also support—or if a person is unable to communicate sufficiently with the police.

My amendment 32 is an alternative. It would change the age of 18 in section 33(1)(b) to 16. That is a back-up in case my other amendments and John Pentland’s amendment 38 are not agreed to. It would provide vulnerable 16 and 17-year-olds with support.

I move amendment 55.

Michael Matheson: In Scots law, there are a number of definitions of a child, and those are put in place for different purposes. Under the Children and Young People (Scotland) Act 2014, the term “child” generally means a person who has not attained the age of 18. However, under the Children’s Hearings (Scotland) Act 2011 and the Criminal Procedure (Scotland) Act 1995, “child” generally means a person who is under 16, although the definition is extended to 16 and 17-year-olds who are subject to a compulsory supervision order.

For the purposes of arrest, detention and questioning, the bill defines a child as a person who is under the age of 18. Everyone of any age has the right of access to a solicitor in the context of part 1. However, the bill reflects the self-evident fact that 16 and 17-year-olds have greater capacity, maturity and autonomy than younger children, and that is commonly reflected in other rights and responsibilities. The age-based laws that allow for 17-year-olds to live independently, vote, work and marry reflect the extent of self-determination that can exist at 16 years of age and beyond. With that greater right of self-determination should come the right for older young people to have a bigger say in the major issues and incidents in their lives.

This bill seeks to respect, reflect and act on young people’s individual views in a meaningful yet responsible way. Currently, the bill provides that a child under 16 cannot consent to an interview without a solicitor being present. The bill further provides that anyone aged 16 or 17 can decide to be interviewed without a solicitor, but there is a safeguard: in order to do so, they must have the agreement of a relevant person.

12:15

While I sympathise with the underlying intention, the effect of Elaine Murray’s amendments 55 to 58 would be to remove the right of any 16 or 17-year-old to consent to be interviewed without a solicitor.

The Scottish Government prefers an approach which would allow young people aged 16 and over to make their own decision, with safeguards in place to support them in that.

That is consistent with Lord Carloway’s recommendations and takes account of article 12 of the United Nations Convention on the Rights of the Child—the right to an opinion and for that to be listened to and taken seriously.

Crucially, the effect of Elaine Murray’s amendments would be to remove the obligation on those young people to take on a solicitor. While those young people could not be lawfully interviewed without a solicitor, they could still be charged, released or released on investigative liberation.

On balance, it is preferable to allow for the greater level of self-determination of 16 and 17-year-olds, while also providing additional protection for those subject to compulsory supervision.

I assure the committee that we plan to have further dialogue with partners, including children’s organisations, on those issues before stage 3. The wider needs of 16 and 17-year-olds who may be vulnerable but are not subject to compulsory supervision will also have to be reflected in guidance and practice requirements, which will have to be fully implemented on the ground.

I ask Elaine Murray not to press her amendments 55 to 58.

We also take seriously the fact that some 16 and 17-year-olds are more mature than others. After further discussions with Police Scotland and the Scottish Children’s Reporter Administration, we are persuaded that amendments are required to improve the protections afforded to 16 and 17-year-olds in custody who are perhaps more vulnerable.
I have therefore lodged amendments 167 and 168, which relate to young persons aged 16 and 17 who are subject to a compulsory supervision order under the Children’s Hearings (Scotland) Act 2011. Our amendments provide that all who are subject to such orders, and specifically those aged 16 and 17, should be treated in the same way as those aged under 16. Most significantly, that will remove the right of those young people to waive access to a solicitor.

The Scottish Government amendments are a positive and proportionate change. I believe that they strike an appropriate balance between respecting individual autonomy and affording protection to the most vulnerable youngsters.

Section 30 of the bill sets out the right of a person in police custody to have another person told that they are in custody. Section 32 sets out the right of those under 18 in custody to access the person sent intimation under section 30.

The bill as introduced did not allow a 16 or 17-year-old to notify a responsible person that they were in police custody, without requiring that person to come to where the young person was being held. Amendment 173 allows those young people to intimate without requiring the relevant adult to attend at the police office.

I recognise and acknowledge Elaine Murray’s amendments 59 to 64, which also seek to deliver a raising of the relevant age in sections 30 and 32, but this time to include all those under 18. However, as I have said before, I do not believe that such a blanket approach is appropriate in respect of 16 and 17-year-olds.

I ask Elaine Murray to consider the package of Government amendments that I have lodged and not to press amendments 59 to 64.

Amendments 38 and 32, in the names of John Pentland and Elaine Murray respectively, relate to the age at which the vulnerable persons provisions in section 33 apply.

Section 33 places a duty on the police to seek support for vulnerable adult suspects who, as a result of a mental disorder, are unable to understand what is happening or to communicate effectively with the police.

That is intended to reflect Lord Carloway’s recommendations in relation to vulnerable adult suspects. As he defined a child as someone under the age of 18, it followed that adults should be those aged 18 or over, which is the approach that the section currently takes.

In their written evidence, however, the Scottish appropriate adult network, Police Scotland and the Scottish Association for Mental Health suggested that the definition of vulnerable person should be expanded to include 16 and 17-year-olds. They noted that that would reflect current practice whereby appropriate adults provide support to vulnerable suspects aged 16 and over.

The bill already makes important distinctions between those under 16 years of age and those aged 16 and 17. On reflection, therefore, I am now persuaded that the bill should provide an additional safeguard by including vulnerable child suspects aged 16 and 17 in the vulnerable persons provisions in section 33.

Amendment 32, in the name of Elaine Murray, achieves that and I am happy to support it. However, I am unable to support amendment 38, in the name of John Pentland. That amendment would remove the age criteria from section 33 entirely, resulting in support being sought in relation to children younger than 16.

Although I completely understand the desire to ensure support for all vulnerable persons in custody, section 33 is aimed specifically at those vulnerable adult suspects who are currently supported by appropriate adults, to put that support on a statutory basis. Those support arrangements are simply not designed to cater for the specific needs of children—needs that are met through other means.

The bill strengthens support for children and young people, with a range of provisions in relation to intimation, access and support. For example, children under 16 would always have support from a relevant person and a solicitor, even in cases where they did not have particular communication difficulties. There are also protections for 16 and 17-year-olds, some of which are specific to children subject to compulsory supervision.

Given that the particular support needs of children are addressed elsewhere, I consider that the focus of section 33 should remain on those aged over 16, so I ask Elaine Murray to consider not moving amendment 38, in John Pentland’s name.

Margaret Mitchell: The cabinet secretary makes a strong case. He refers to 16 and 17-year-olds being more mature and refers to both the Children’s Hearings (Scotland) Act 2011 and the Criminal Procedure (Scotland) Act 1995. I welcome his amendments that look at vulnerable 16 and 17-year-olds. I think that they strike the right balance, as does Elaine Murray’s amendment 32.

Elaine Murray: I am grateful to the cabinet secretary for accepting amendment 32. However, he has not persuaded me that my earlier amendments are not necessary. As I said, other legislation such as the Victims and Witnesses (Scotland) Act 2014 and the Human Trafficking and Exploitation (Scotland) Bill recognise the
vulnerability of people under the age of 18. Although we have age-based laws, maturity is not necessarily the same as age. Somebody aged 14 could be more mature than somebody aged 17 given their life experience and so on.

I remain of the opinion that children under 18 who are being interviewed by the police are going to be vulnerable for a whole variety of reasons, not least the circumstances in which they find themselves. Children who come to the attention of the criminal justice system are often vulnerable in a number of ways that are not absolutely obvious on first inspection, so I press amendment 55.

**The Convener:** The question is, that amendment 55 be agreed to. Are we agreed?

**Members:** No.

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

**For**
- Finnie, John (Highlands and Islands) (Ind)
- McDougall, Margaret (Central Scotland) (Lab)
- McInnes, Alison (North East Scotland) (LD)
- Murray, Elaine (Dumfriesshire) (Lab)

**Against**
- Allard, Christian (North East Scotland) (SNP)
- Campbell, Roderick (North East Fife) (SNP)
- Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
- Mitchell, Margaret (Central Scotland) (Con)
- Russell, Michael (Argyll and Bute) (SNP)

**The Convener:** The result of the division is: For 4, Against 5, Abstentions 0.

**Amendment 56 moved—[Elaine Murray].**

**The Convener:** The question is, that amendment 56 be agreed to. Are we agreed?

**Members:** No.

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

**For**
- Finnie, John (Highlands and Islands) (Ind)
- McDougall, Margaret (Central Scotland) (Lab)
- McInnes, Alison (North East Scotland) (LD)
- Murray, Elaine (Dumfriesshire) (Lab)

**Against**
- Allard, Christian (North East Scotland) (SNP)
- Campbell, Roderick (North East Fife) (SNP)
- Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
- Mitchell, Margaret (Central Scotland) (Con)
- Russell, Michael (Argyll and Bute) (SNP)

**The Convener:** The result of the division is: For 4, Against 5, Abstentions 0.

**Amendment 56 disagreed to.**

**Amendment 57 not moved.**

**The Convener:** Amendment 30, in the name of John Finnie, is grouped with amendments 31, 169, 33, 189, 34, 190, 249, 191 and 220. I know that you love pre-emptions, so I point out that if amendment 31 is agreed to I cannot call amendment 169 and that if amendment 34 is agreed to I cannot call amendment 190.

**John Finnie:** Amendment 30 relates to section 25, which is on consent to interview without a solicitor. The amendment removes the mental disorder requirement when it appears to a constable that a person over 16 years of age is "unable to ... understand sufficiently what is happening, or communicate effectively with the police" for the purpose of that person not being entitled to waive their right to be interviewed without having a solicitor present.

The Law Society and others believe that it is difficult for a police officer to assess whether a person is suffering from a mental disorder—indeed, it is a challenge for many people. The support of a solicitor should not be restricted as it is presently. Indeed, anyone unable to understand sufficiently what is happening or unable to communicate effectively with the police should not be interviewed without a solicitor present.

I move amendment 30.

**Michael Matheson:** In its stage 1 report the Justice Committee highlighted concerns that the definition of vulnerable person in the bill may not capture all those needing additional support when in custody and asked that the Scottish Government give that further consideration.

A particular concern raised during stage 1 was about the use of the term "mental disorder" as part of the definition of a vulnerable person in sections 25 and 33 of the bill. There were suggestions that that term should be removed and that the only criteria for identifying a vulnerable person in custody should be that they are unable to understand sufficiently what is happening or to communicate effectively with the police. Amendments 30, 31, 33 and 34, in the name of John Finnie, seek to do that.

Although I appreciate those concerns and the desire to ensure that all those who require support to communicate with the police receive it, it is worth revisiting the intention behind sections 25 and 33 and the underlying recommendations by Lord Carloway.

When discussing the support needs of vulnerable suspects, Lord Carloway’s report noted that individuals who are intoxicated through alcohol consumption or drug use or who are experiencing short-term illness may be unable to
communicate effectively but that such difficulties will be cured through the passage of time. It also noted that some individuals may not be able to understand what is happening as a result of language or hearing difficulties but that that could be resolved through the use of an interpreter or by other means.

A deliberate—and crucial—distinction was made between those scenarios and cases in which an individual has a permanent or semi-permanent condition that results in their being particularly vulnerable and requiring additional support to ensure that they understand what is happening and can communicate with the police. It is at those cases that the relevant provisions in sections 25 and 33 are aimed.

That is why, as part of the definition of a vulnerable person, the term “mental disorder” was used. That term encompasses mental illnesses, personality disorders and learning disabilities, and it reflects the current basis on which support from appropriate adult services is offered.

The police already have considerable experience in identifying those at risk and arranging for support where necessary. Equally, they have experience in dealing with those who, for the reasons that I have mentioned, may be experiencing communication difficulties of a more temporary nature.

If the reference to “mental disorder” is removed, the requirements of sections 25 and 33 would apply in relation to those who are temporarily intoxicated or who simply require an interpreter or other assistance. That would result in communication support being sought where it is simply not required, with potentially significant practical and financial implications for current providers of appropriate adult services. It may also have an impact on the legal profession as a result of an increase in the number of adults unable to consent to be interviewed without a solicitor present.

12:30

I consider that a requirement that communication difficulties be linked to permanent or semi-permanent conditions is vital in order to identify those who genuinely require the support and protection offered by sections 25 and 33. For that reason, I am not persuaded that the term “mental disorder” should be removed. However, for the reasons given by John Finnie and others at stage 1, we intend to keep the provisions under review as part of wider on-going work to examine the remit and provision of appropriate adults. The criteria for support under section 33 can be changed by subordinate legislation, if that is considered desirable in future. On that basis, I ask John Finnie to consider withdrawing amendment 30 and not moving amendments 31, 33 and 34.

Amendments 169 and 190, in my name, will make minor changes to the definition of “mental disorder” in sections 25 and 33. The term is currently defined by reference to section 328(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003, but subsection (2) of that section contains further context to the definition—in particular, it sets out characteristics that do not of themselves signify mental disorder. To ensure consistency with the 2003 act, it is desirable to refer to the definition of “mental disorder” in its entirety.

Amendment 189 is a minor technical amendment to ensure stylistic consistency between sections 25(2)(b) and 33(1)(c), which are worded in similar terms.

Amendments 191 and 220 relate to the regulation-making power in section 34. They will remove that section from the bill and replicate it after section 53, with a number of changes. As the bill stands, the powers in section 34 would allow the Scottish ministers to amend part of the definition of a vulnerable person in section 33, which currently provides that such persons are those who, “owing to mental disorder”, seem to be “unable to understand sufficiently what is happening or to communicate effectively.”

Section 25(2)(b), which describes persons who may not consent to being interviewed without having a solicitor present, also uses the definition, but there is no means of altering it by subordinate legislation. I consider that such a power should be added, to ensure that any changes made to section 33 can, if appropriate, be replicated at section 25.

I also consider it prudent to further extend the regulation-making power to allow the Scottish ministers to amend the definitions relating to mental disorder and the police at sections 25(6) and 33(5). The terms are also used in sections 25(2)(b) and 33(1)(c), which themselves can be amended by regulation, so consequential changes may be required if those powers are ever used.

Amendment 249, in the name of Alison McInnes, relates to concerns that were raised at stage 1, including in the committee’s report, that although section 33 will place a duty on the police to request support it does not identify where the responsibility lies for ensuring the availability and adequate provision of suitably trained persons.

The committee will be aware that, more recently, Lord Bonomy recommended that the bill
should identify a body with responsibility for ensuring the adequate provision of appropriate adult services. Amendment 249 would place such a duty on local authorities, which currently provide such services.

When the bill was introduced, it was considered that the appropriate adult system was working well and that a light-touch approach should be adopted—in essence, placing the referral process on a statutory basis but going no further. However, further evidence, including evidence submitted at stage 1, has persuaded me that the current model for appropriate adult services is not sustainable over the longer term. Concerns have been expressed about the accessibility and consistency of service provision, the exact remit of appropriate adults and funding for the service, all of which warrant further consideration.

I therefore appreciate the intention behind amendment 249 and agree that action is required. However, if we are to put in place an effective and sustainable appropriate adult service, it is vital that we get the model right. To that end, we are leading work with local authorities, the health service, Police Scotland, the Mental Welfare Commission for Scotland and other interested parties to identify the best way to provide a sustainable service, taking account of Lord Bonomy’s recommendation.

Workshops have been undertaken this year with key interests at national and local level, which have informed the development of potential service delivery options. We recently sought comments on those options, including from those who deliver the service on the ground. Over the coming weeks and months more detailed analysis, including consideration of financial implications, will be undertaken.

Although I am sympathetic to the issues raised by the committee and others, it is important not to allocate responsibility for the appropriate adult service without completing the work under way and reaching a consensus with those who deliver and use the service.

I expect to be in a position by stage 3 to set out our preferred approach for the sustainable delivery of appropriate adult services across Scotland and, on that basis, I ask Alison McInnes to consider not moving her amendment 249.

Alison McInnes: As we have just heard, Lord Bonomy’s post-corroboration safeguards review recommended

"that the Bill be amended to identify a body or organisation with responsibility for ensuring adequate provision of persons with appropriate skills or qualifications to provide support for vulnerable persons in custody."

He said that that is "a vital safeguard for a vulnerable suspect."

I welcome the cabinet secretary’s recognition of the need for that.

My amendment 249, which is intended to give effect to Lord Bonomy’s recommendation, is supported by the Law Society. It proposes that we specifically enlist local authorities to provide that support. As we know, provision is patchy, there is little co-ordination and we do not necessarily know where to turn to in order to get it.

I am grateful for the cabinet secretary’s response. Amendment 249 is, without a doubt, a probing amendment. It has done its job. If, by stage 3, we can have an answer on the way forward, I will be more than happy.

Elaine Murray: I do not quite follow the cabinet secretary’s arguments on John Finnie’s amendment 30.

First, I make clear that I do not like the term "mental disorder". I appreciate that that is defined in statute, but it is a slightly derogatory term for people who have mental health issues or learning difficulties. Under the bill, the only reason that a constable can decide that a person cannot be interviewed without a solicitor will be because they do not understand what is happening or cannot communicate effectively as they have a mental disorder. However, there are other circumstances when someone may not be able to do that. I am not just talking about someone being drunk or under the influence of drugs. For example, someone may not be able to speak English well and may have difficulty communicating, particularly under such stressful circumstances.

If John Finnie wants to press amendment 30, I am quite inclined to continue to support it.

John Finnie: I note what the cabinet secretary said about subsequent subordinate legislation. It is appropriate that we keep all legislation under revision. However, with regard to this specific issue, the problems are well known and documented. I have dealt with a number of cases and the police have dealt with the responsible adults very well.

The cabinet secretary talked about additional support to help people to communicate. We want informed decision making. That would legitimise the information that is obtained. There is ample case law to say that information obtained under duress is inadmissible.

I return to the wording in the Law Society’s submission. Anyone unable to understand sufficiently what is happening or unable to communicate effectively with the police

"should not be interviewed without having a solicitor present."

The Convener: The question is, that amendment 30 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

Abstentions
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 4, Against 4, Abstentions 1.

In that case, I use my casting vote against the amendment. I heard what the cabinet secretary said about the matter, and I hope that there will be developments in that area.

Amendment 30 disagreed to.

The Convener: I remind members that, if amendment 58 is agreed to, I cannot call amendment 168 under the pre-emption rule.

Amendment 58 not moved.

Amendment 168 moved—[Michael Matheson]—and agreed to.

The Convener: I remind members that, if amendment 31 is agreed to, I cannot call amendment 169 under the pre-emption rule.

Amendment 31 not moved.

Amendment 169 moved—[Michael Matheson]—and agreed to.

Section 25, as amended, agreed to.

Sections 26 to 29 agreed to.

Section 30—Right to have intimation sent to other person

Amendment 59 moved—[Elaine Murray].

The Convener: The question is, that amendment 59 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 59 disagreed to.

Amendment 60 moved—[Elaine Murray].

The Convener: The question is, that amendment 60 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 60 disagreed to.

Amendment 246 moved—[Alison McInnes].

The Convener: The question is, that amendment 246 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
Mitchell, Margaret (Central Scotland) (Con)
McInnes, Alison (North East Scotland) (LD)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 246 disagreed to.
Amendments 170 and 171 moved—[Michael Matheson]—and agreed to.

Amendment 247 not moved.

The Convener: Amendment 172, in the name of the cabinet secretary, is grouped with amendments 174, 175, 177 to 179 and 182 to 187. I remind members that amendments 184 and 185 are pre-empted by amendment 63.

Michael Matheson: These are minor amendments in relation to under-18s, which follow from the earlier consideration that the committee has given to the two groups of amendments on social work involvement in relation to under-18s in police custody and the rights of under-18s with reference to consent to interview without a solicitor present, the sending of intimation and the access to other persons and other support. The amendments complement and help give effect to the bill’s provisions for the protection of child suspects while in police custody.

Amendment 172 is a minor technical amendment that clarifies that the person being referred to in section 30 is “the person in custody”.

The effect of amendments 174, 175, 177 and 179, as well as being minor amendments as part of the group on social work involvement in relation to under-18s, is to add to the circumstances in which alternative arrangements to contacting the person requested may apply. Those are: where it is not practicable for the police to contact the person that they have been asked to contact; or, where the local authority advises against contacting the person.

When any of those circumstances occur, the police do not have to contact the person or continue to try to contact the person, as the case may be. In such cases, intimation must be sent by the police to an “appropriate person” as defined in section 31(5). Minor amendments in the group of amendments on social work involvement in relation to under-18s—in particular, amendments 176, 180 and 181—are associated with that.

Section 30 sets out the right of a person in police custody to have another person told that they are in custody. Section 32 sets out the right of under-18s in custody to access the person sent intimation under section 30. It is possible that more than one person might be sent intimation under section 30. In that event, amendments 182 to 184 and 186 to 187 make it clear that the police must give only one person so intimated access to the child suspect at a time, though they may in their discretion give access to more than one at a time. The approach strikes an appropriate balance between facilitating support and not being unduly burdensome on the police to manage.

Amendment 185 provides that the issue of whether the person contacted can attend at the person in custody within a reasonable time does not prevent the person being contacted by the police.

I ask the committee to support the amendments.

I move amendment 172.

Amendment 172 agreed to.

Section 30, as amended, agreed to.

12:45

Section 31—Right to have intimation sent: under 18s

Amendments 173 to 178 moved—[Michael Matheson]—and agreed to.

Amendment 61 moved—[Elaine Murray].

The Convener: The question is, that amendment 61 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 61 disagreed to.

Amendments 179 to 181 moved—[Michael Matheson]—and agreed to.

Section 31, as amended, agreed to.

Section 32—Right of under 18s to have access to other person

Amendment 62 moved—[Elaine Murray].

The Convener: The question is, that amendment 62 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 62 disagreed to.

Amendment 182 and 183 moved—[Michael Matheson]—and agreed to.

The Convener: I remind members that, if amendment 63 is agreed to, I cannot call amendments 184 and 185 under the pre-emption rule.

Amendment 63 not moved.

Amendments 184 to 186 moved—[Michael Matheson]—and agreed to.

Amendments 64 and 248 not moved.

Amendment 187 moved—[Michael Matheson]—and agreed to.

Section 32, as amended, agreed to.

After section 32

Amendment 188 moved—[Michael Matheson]—and agreed to.

Section 33—Support for vulnerable persons

The Convener: I remind members that, if amendment 38 is agreed to, I cannot call amendment 32, under the pre-emption rule.

Amendment 38 not moved.

Amendment 32 moved—[Elaine Murray]—and agreed to.

The Convener: Elaine Murray has won one—she will be celebrating. The cake is on her at 3 o’clock.

Amendment 33 not moved.

Amendment 189 moved—[Michael Matheson]—and agreed to.

The Convener: I remind members that, if amendment 34 is agreed to, I cannot call amendment 190, under the pre-emption rule.

Amendment 34 not moved.

Amendment 190 moved—[Michael Matheson]—and agreed to.

Section 33, as amended, agreed to.

Section 34—Power to make further provision

Amendment 249 not moved.
was to be interviewed, except in exceptional circumstances. It is not clear from the amendment what should be considered exceptional circumstances.

The Scottish Government has given extensive consideration to the appropriate means by which access to a solicitor should be provided to a person while at the police station, to enable advice and assistance to be delivered in an efficient and effective way. Lord Carloway recommended that “subject to what can reasonably be funded by the Scottish Legal Aid Board or the suspect himself, it is ultimately for the suspect to decide whether the advice from the solicitor should be provided by telephone or in person.”

Furthermore, Lord Carloway explained that, initially, the person would be expected to speak to a solicitor in private over the telephone, which would enable the solicitor to give immediate initial advice and to discuss whether the solicitor’s attendance at the police station was necessary or desirable.

As members are aware, the current means by which suspects can secure legal advice is through the solicitor contact line. The contact line is administered by the Scottish Legal Aid Board, and legal advice to suspects is provided through a mixture of solicitors employed by SLAB and private practice solicitors. The line operates 24 hours a day, seven days a week. Suspects can receive legal advice either over the telephone or in person, if so required.

Not every suspect will want or require personal attendance by a solicitor. Solicitors are likely to want to consider what is in the best interests of their client—whether that is advice by phone or a personal attendance. The Scottish Government favours provisions that allow for the most appropriate means of securing legal advice and for the preferences and requirements of the particular suspect. A telephone consultation will be appropriate for some individuals and in some circumstances. However, it is acknowledged that it may not be suitable for everyone, which is why the Government has chosen the most flexible, cost-effective and efficient means for suspects to secure legal advice. As I have just explained, the choice of personal attendance lies with the suspect, in conjunction with the solicitor. I consider that to be a proportionate and fair approach.

Amendments 192 and 193 are technical, drafting adjustments to avoid the slight awkwardness of expressions in relation to consultation with a solicitor prior to interview.

As I said, the bill extends the right of access to a solicitor to all suspects who are held in police custody, regardless of whether the police intend to question the suspect. I consider that to be a significant step, demonstrating the progress and the commitment that is being made to safeguard the rights of suspects and detained persons.

I consider that there should be time for the new provisions in the bill to bed in before we make what could be unnecessary or potentially inappropriate changes. For the reasons that I have explained, I ask Alison McInnes not to press amendment 252.

Roderick Campbell: I emphasise what the cabinet secretary has just said: the choice really ought to be for the suspect, in conjunction with his solicitor. Furthermore, we have not heard anything from Alison McInnes about the cost of her proposals, but I suspect that it would be significant.

John Finnie: There is a cost associated with not having the highest standards of justice applied to people. If Mr Campbell, for instance, was given the choice of phoning someone or meeting them face to face and assessing the entire set of circumstances as laid out by my colleague, I know which option he would be likely to choose.

Of course there will be challenges associated with the proposals but, with the new legislation, we should start off with the best possible standards. For that reason, I will support Alison McInnes’s amendment 252.

Alison McInnes: Amendment 252 does not specify what the exceptional circumstances would be. That is quite right, cabinet secretary. However, the term is used elsewhere in the bill without definition, so one must presume that the phrase is well known and can readily be interpreted.

Justice Scotland’s briefing suggests that, without amendment 252, we would be “condoning the provision of inadequate advice.”

I have a great deal of sympathy with that argument.

As I noted in committee last week, a 2013 study by Police Scotland and an analysis of interviews conducted in the autumn of 2013 have both shown that 75 per cent of suspects waive their rights to a solicitor. We should all be very worried indeed by that. Amendment 252 would help to address that imbalance in the system. It is important that interviews are not only conducted fairly but are seen to be conducted fairly.

The Convener: The question is, that amendment 252 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.
For
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 252 disagreed to.

Amendment 192 moved—[Michael Matheson]—and agreed to.

The Convener: I hear groans coming from Mike Russell.

Amendment 193 moved—[Michael Matheson].

The Convener: The question is, that amendment 193 be agreed to. Are we—

Members: Yes.

The Convener: You are saying yes before I have even asked the question. Calm down, now.

Amendment 193 agreed to.

Amendment 253 not moved.

Section 36, as amended, agreed to.

Sections 37 and 38 agreed to.

Section 39—Common law power of search etc
Amendment 194 moved—[Michael Matheson]—and agreed to.

Section 39, as amended, agreed to.

Section 40 agreed to.

After section 40

The Convener: Amendment 254, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: Amendment 254 seeks to update the definition of biometric information and to improve how the use of samples is regulated.

Members will recall my concerns about the use of facial recognition technology by Police Scotland, in conjunction with other forces around the United Kingdom. The effect of my amendment would be to ensure that the retention of individuals’ images by the police is subject to the same law as the retention of DNA and fingerprints.

My amendment draws on the arguably more up-to-date definition of biometrics in the previous UK Government’s Protection of Freedoms Act 2012 and extends the regulatory regime to a wider array of relevant physical data.

The law that governs the use of DNA was introduced in 2006 by the Scottish Liberal Democrats and it was extended to cover fingerprints in 2010, but new biometric technologies are being developed more quickly than primary legislation can keep up with. For example, gait and ear recognition software may soon be a real possibility.

13:00

The Convener: Did you say “ear”?

Alison McInnes: Yes.

The Convener: I did not realise that our ears could be recognised, but there we are.

Alison McInnes: Indeed. Amendment 254 is future proof, as much as it can be, because it provides that any new collection and use of biometric information and technology by the police must be subject to the Parliament’s agreement through the affirmative procedure.

In England and Wales, the Biometrics Commissioner recently stated:

“proper consideration should now be given to the civil liberties and other issues that arise as regards those newer technologies and urgent steps should now be taken to ensure that they are governed by an appropriate regulatory regime. In the absence of such steps there must be a real risk that the considerable benefits that could be derived from the use of these new technologies will be counterbalanced by a lack of public confidence in the way in which they are operated by the police and/or by challenges as to their lawfulness.”

I am not aware of any evidence that Scotland is further forward than the rest of the UK in regulating the use of emerging biometric technologies. Those technologies could be a useful part of the police’s toolkit, but they must be properly regulated to ensure that civil liberties and privacy are protected.

I move amendment 254.

Roderick Campbell: I do not remember this issue being discussed in the long-distant time when we considered the bill at stage 1, but it is important and I would be grateful to hear the cabinet secretary comment on it.

Margaret Mitchell: What Alison McInnes says makes sense. It is important that we keep pace with new technologies and that the proper protections are in place.

Michael Matheson: As Alison McInnes explained, amendment 254 provides for how biometric information is used, retained and destroyed. I support the intention behind it, but the
effects would be significantly wider than that. It would add significantly to the list of physical data that a constable can take from a person who has been arrested or detained by adding “other biometric information” to the list of physical data in section 18 of the Criminal Procedure (Scotland) Act 1995. The amendment’s wide definition of “biometric information” includes “any information ... about a person’s physical or behavioural characteristics or features” that could be used to identify someone. That would be a significant change and the implications could be far reaching. I am also conscious that we have carried out no formal consultation on the matter.

Amendment 254 covers the type of physical personal data that the police can take, the way it is used and the way it is disposed of. As always with such issues, we need to strike the right balance between the need to prevent and detect crime and the need to protect civil liberties. I believe that we have the right balance and that introducing the changes in amendment 254 without the necessary consultation and consideration could have the unintended consequence of altering that balance.

Alison McInnes will appreciate that we have had little time to consult stakeholders or consider the implications of her amendment. However, the limited discussions that we have been able to undertake have already raised a number of issues. I believe that we need to look at biometrics in the round to ensure that we have the right balance and that the necessary safeguards and oversight are in place.

As Alison McInnes is aware, I asked Her Majesty’s inspectorate of constabulary in Scotland to consider including scrutiny of Police Scotland’s use of facial recognition technology in its work programme. It is carrying out that review, and I expect it to publish its report in the next few months. The remit of the review goes beyond facial recognition and considers the wider policing and societal opportunities and threats that arise from the police’s use of new and emerging biometric technologies.

I suggest to Alison McInnes and the committee that it is sensible to wait for that report. Once we have seen the recommendations, we will consider the options and we can look at the wider biometrics issues in the round. At that point, there might be a need, for example, for a full public consultation. I will be happy to discuss that with the committee once HMICS has published its report.

In summary, I support the intention that lies behind amendment 254, but I believe that its effects could be far reaching, that there is a high risk of unintended consequences, and that it would not be appropriate to embark on such a major change without full consultation. I ask Alison McInnes not to press amendment 254.

**Alison McInnes: **As the cabinet secretary said, HMICS is conducting an independent inquiry to look at biometric images. That was commissioned at the urging of the Scottish Liberal Democrats, of course, and I look forward to reading its findings.

We led the way in Scotland in governing the use of DNA, although the law was extended belatedly to cover fingerprints. We always seem to be playing catch-up, and I am anxious that we should not do that.

I am glad to have been able to air the issues and to have heard the cabinet secretary’s views, but I will not press amendment 254.

**Amendment 254, by agreement, withdrawn.**

**The Convener:** Amendment 195, in the name of the cabinet secretary, is in a group on its own.

**Michael Matheson:** Amendment 195 will insert a new section into the bill, under which the police will be able to take drunk people who are suspected of having committed offences to a designated place where they can receive help to recover from the effects of their alcohol intake and their on-going alcohol issues can be addressed. That replaces a power that the police already have under section 16 of the Criminal Procedure (Scotland) Act 1995, which will be repealed through the effect of amendment 208.

I move amendment 195.

**Amendment 195 agreed to.**

Section 41 agreed to.

**Section 42—Duty to consider child’s best interests**

Amendments 53, 41 to 45, 65 and 255 not moved.

**Section 42 agreed to.**

**After section 42**

Amendments 196 and 197 moved—[Michael Matheson]—and agreed to.

**The Convener:** Amendment 35, in the name of Elaine Murray, is grouped with amendment 36.

**Elaine Murray:** Amendments 35 and 36 relate to the change in meaning of the word “arrested” and how that might affect persons who are being questioned by the police but who have not been officially accused. Currently, such individuals would not be described as having been arrested, but once the bill is enacted they will be described as such.
As we discussed before, the public may not understand the new meaning. It will take some time for the change in the use of the word “arrested” to be understood by the general public and, indeed, the media. People are used to the word being applied to those who have been charged and are therefore suspected of having committed a crime. Any arrested person should be assumed to be innocent until they are proved guilty, even if charged, of course. However, reporting in the media about persons in England who have been arrested but not charged—some of those persons are quite high profile—suggests that it is sometimes assumed that a person who has been arrested is guilty, or at the very least is a suspicious individual.

Amendment 35 would require a constable not to disclose information that might allow a person who has been arrested but not officially accused to be identified, other than if that would be in the public interest. Any decision to disclose information would be made by a constable of the rank of inspector or above.

Amendment 36 would allow a constable to disclose information regarding the release of a person who has not been officially accused to victims and witnesses if that is in the public interest or if it promotes the safety and wellbeing of the victim or witness. Such information would be released by a constable of the rank of inspector or above.

I move amendment 35.

Michael Matheson: The purpose of amendment 35 is to protect the privacy and reputation of suspects during an investigation. I sympathise with the intention behind amendment 35, but I consider that such provision is unnecessary. The committee previously accepted Police Scotland’s assurances that it does not and would not release a suspect’s name to the media when they have not been formally charged with an offence. I have seen no evidence that runs counter to that and, like the committee, I am reassured by Police Scotland’s approach on this subject.

In addition, we have always had a very strict contempt of court regime that applies after charge to cases that are progressing through the courts and prevents the release of information to the media. That regime will apply in relation to suspects who have been arrested and will continue to apply during the entire time of investigative liberation. The protection of the Contempt of Court Act 1981 is statutorily afforded to the accused from the time of arrest. No one will be released on investigative liberation unless he or she is in police custody after being arrested for an offence, at which point the protection of the 1981 act is in full effect. The same protections will apply in the case of someone liberated on a police undertaking, since they, too, will have been arrested.

Amendment 36 seeks to ensure the safety of alleged victims when a suspect is released on investigative liberation. Again, I am sympathetic to the intention behind the amendment. Upholding the rights of alleged victims and ensuring their safety is crucial to ensuring a fair criminal justice system. That includes ensuring that, where they might be at risk, alleged victims are informed of a suspect’s release on investigative liberation and of any other conditions. However, amendment 36’s proposal has to be considered in the context of existing measures to notify victims of the release of accused persons by the court on bail, which were recently put in place as part of work to implement the European protection order directive and the Lord Advocate’s guidelines to the police on liberation. We are currently considering how investigative liberation will fit into that landscape and are discussing that with stakeholders to ensure that a consistent and proportionate approach to victim notification is put in place, taking into account the risk to and safety of such individuals.

I ask Elaine Murray not to press amendment 35 and not to move amendment 36. I would be more than happy to meet her to discuss the issues involved in more detail and to provide an update on our proposals as we approach the stage 3 process.

Elaine Murray: With respect to amendment 35, I appreciate that Police Scotland has given assurances, but assurances are no good if somebody actually releases information. Assurances do not help a person whose name might be besmirched by information being out there that they have been arrested, although they have never officially been charged. I am inclined to press amendment 35.

I appreciate that what amendment 36 proposes might overlap with provisions in the Victims and Witnesses (Scotland) Act 2014, so I will not move amendment 36. However, I hope that there will be some discussion prior to stage 3 on the issues that the amendment raises to clarify what is happening.

The Convener: The question is, that amendment 35 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Amendment 256 not moved.

Section 50, as amended, agreed to.

Section 51—Abolition of requirement for constable to charge
Amendment 257 not moved.

Section 51 agreed to.

Section 52 agreed to.

Schedule 1—Modifications in connection with Part 1

The Convener: Amendment 206, in the name of the cabinet secretary, is grouped with amendments 207 to 213, 215 and 216.

Michael Matheson: The amendments in the group deal with consequential amendments to other acts to ensure that they work consistently with the bill’s provisions.

Amendment 206 will amend a special statutory form of citizen’s arrest that is found in section 59 of the Civic Government (Scotland) Act 1982. It talks about a person who has been arrested by a member of the public under that power being delivered into the custody of a constable. The new general power for constables to arrest without warrant under section 1 of the bill means that there is no longer a need for the 1982 act to make that provision, so amendment 206 provides for repeal of that unnecessary provision.

Amendments 207 and 213 will amend respectively the Children’s Hearings (Scotland) Act 2011 and the Road Traffic Act 1988 to remove from them certain references to arrest. The types of arrest in question are quite different in nature from the types of arrest that part 1 is intended to deal with. The word “arrest” will therefore be removed from the provisions in question so that the consequences of arrest that are provided for in the bill are not attracted by those provisions.

Amendments 208 and 215 are consequential on previously debated amendments that will move into the bill the rules about giving information to suspects in sexual offence cases from the Criminal Procedure (Scotland) Act 1995. Amendment 209 is a minor amendment to ensure consistency within the bill.

Amendments 210 and 212 provide for the repeal of provisions in the Criminal Procedure (Scotland) Act 1995 relating to the police’s duties in relation to child suspects. That is in consequence of previously debated amendments that will move the rules about child suspects into the bill, so they are no longer required in the 1995 act.

Amendment 216 deals with the other side of the coin. It will amend the Children’s Hearings (Scotland) Act 2011 to update its cross-references to procedures under the 1995 act so that they instead cross-refer to the equivalent provisions in the bill.

Amendment 211 is a set of consequential amendments to sections 18, 18D and 19AA of the Criminal Procedure (Scotland) Act 1995, which give powers to a constable to take samples and
prints. The amendment will remove references in those sections to “detention” because, as members know, the concept of detention under section 14 of the 1995 act is being dispensed with.

I move amendment 206.

Amendment 206 agreed to.

Amendment 207 moved—[Michael Matheson] and agreed to.

Amendment 259 not moved.

Amendments 208 to 213 moved—[Michael Matheson] and agreed to.

The Convener: Amendment 214, in the name of the cabinet secretary, is grouped with amendments 217 to 219.

Michael Matheson: The amendments in the group deal with the interaction between the provisions in part 1 and arrests that can be made under other enactments.

Generally, part 1 will not apply to people who are arrested under the Terrorism Act 2000. That is provided for by section 53. However, schedule 8 to the Terrorism Act 2000 cross-refers to the Criminal Procedure (Scotland) Act 1995 in order to apply certain protections under that act. Amendment 214 will update references in schedule 8 to the Terrorism Act 2000 to refer to the bill and its concepts instead of to the 1995 act. Amendment 218 is in consequence of amendment 214, and will put beyond doubt that disapplication of part 1 in relation to people who are arrested under the Terrorism Act 2000 does not mean that part 1 does not apply to the extent that was expressly provided for by schedule 8 to that act.

Amendment 217 provides that part 1 will not apply to people who are arrested for service offences under the Armed Forces Act 2006. That act sets out its own rules for treatment of suspects who are arrested for service offences.

Amendment 192 provides ministers with the power to use subordinate legislation to apply some or all of part 1 to arrests under the Terrorism Act 2000 and for service offences under the Armed Forces Act 2006 and, conversely, to disapply some or all of part 1 so that it does not operate in relation to people who have been arrested otherwise than in connection with an offence.

The Terrorism Act 2000 and the Armed Forces Act 2006 set out their own rules for people who are arrested under them; generally, the bill does not impinge on those rules. It may, however, be appropriate to apply some aspects of part 1 if arrests are not already covered by the procedures in those other acts. For example, for service offences under the Armed Forces Act 2006, it may be desirable to ensure that provisions relating to access to a third party or those relating to information to be recorded at the time of arrest apply for the short period that someone who is suspected of a service offence is in the custody of Police Scotland, before being transferred to the custody of the Royal Military Police.

Amendment 119 would also allow ministers to disapply some or all of part 1 using secondary legislation for arrests that are not in relation to offences. Many powers of arrest do not relate to a person being suspected of committing an offence. For example, under the Adult Support and Protection (Scotland) Act 2007 powers of arrest stem from the ability of a court to grant a banning order against a subject, prohibiting them from doing a variety of things, including being in specific places. There are other examples and it may not be appropriate in every case for part 1 to apply in its entirety. The addition of the power will allow the interaction between the bill and other legislation to be specifically tailored as is most appropriate.

I move amendment 214.

The Convener: I am glad to see that you are wearying, too. I think that you said amendment 192 and amendment 119 when you meant amendment 219, so I think that Official Report will be suitably amended. We forgive you; we understand.

Amendment 214 agreed to.

Amendments 215 and 216 moved—[Michael Matheson]—and agreed to.

Schedule 1, as amended, agreed to.

After section 52

The Convener: Amendment 258, in the name of Alison McInnes, is in a group on its own.

Alison McInnes: I know that members are tired, but I hope that they will bear with me while I speak to my final amendment.

Amendment 258 would introduce a code of practice in connection with identification procedures and interviewing of suspects, similar to that which was established by the Police and Criminal Evidence Act 1984 in England and Wales.

The post-corroboration safeguards review stated that the evidence “points persuasively towards the inclusion in the Bill of a statutory requirement that there should be Codes of Practice relating to the interviewing of suspects and identification procedures.”

The review went on to say that further regulation, through the introduction of codes, “should be introduced regardless of the abolition of the corroboration requirement.”
Amendment 258 would implement the draft provisions in the review. It would require the Lord Advocate to issue a code of practice on the questioning and recording of questioning of suspects, and the conduct of identification procedures. It would require the Lord Advocate regularly to review the code and to consult and lay a revised code before Parliament. In the event of a breach, the current common-law fairness test would apply in respect of admissibility of evidence.

The Lord Advocate last published guidance on the conduct of visual identification procedures in 2007. There are no such guidelines in relation to suspect interviews. Lord Bonomy observed that the standard operating procedures and practices that each of the legacy forces implemented were "not uniform" and that regional differences persist in Police Scotland. His review highlighted that practices are inconsistent, which is worrying, given how critical such aspects of an investigation are. ID procedures and interviews often provide crucial incriminating evidence.

Amendment 258 will ensure that interview and ID operating procedures across the country are predictable and consistent, as the public expect them to be, and it would improve standards.

I move amendment 258.

Michael Matheson: As Alison McInnes explained, amendment 258 is based on recommendations in Lord Bonomy's post-corroboration safeguards review. When Lord Bonomy's report was published, I said that we would consider whether any of its proposals could be progressed in this parliamentary session. On the whole, however, our preference was to take time to consider all the recommendations in detail and to carry out a more holistic review of the recommendations, alongside other reforms.

I have therefore advised the committee that we will this year take forward only a small number of Lord Bonomy's recommendations—for example, we have an amendment that will require the Lord Advocate to publish the prosecutorial test. I still consider that there is great value in many of the other recommendations. However, such substantive and important changes to our justice system require to be looked at in the round and alongside other potential reforms. For example, as members are aware, the Scottish Courts and Tribunal Service is currently conducting an evidence and procedure review. In my view, the work that we will start later this year should take account of recommendations from both reviews, to ensure that a future package of reforms is comprehensive and strikes an appropriate and fair balance.

I do not consider that there is a significant gap in the law while that wider package of reforms is being looked at. I understand that the Lord Advocate already issues guidance to the police in relation to identification procedures, and that the guidance is available to the public. The police produce guidance to officers for interviewing suspects and witnesses, with numerous safeguards built in to ensure that human rights legislation is adhered to. The interviewing of suspects already receives significant scrutiny during the judicial process, and police procedures are constantly updated on the basis of stated cases in the courts.

The police are in the process of collating an investigations standard operating procedures document, which will bring together various legacy documents on interviews and other matters that relate to investigations. The guidance will include specific guidance on interviewing children and vulnerable persons. Police Scotland's intention is that the guidance document will, when it is complete, become publicly available, subject to redaction for technical or security reasons.

The recording of interviews is a matter that requires careful examination in order to establish what measures are deemed to be appropriate and necessary. A recommendation of an increase in audio and video recording would lead to significant financial costs for upgrading infrastructure, for training and for retention facilities. Such issues should not be looked at separately but as part of the wider set of recommendations that Lord Bonomy made, alongside other relevant reform work.

Therefore, although I understand the good intentions behind amendment 258, I hope that members understand why at this time I do not think it appropriate to require that a code of practice be published. That substantive issue should be considered alongside the other outstanding Bonomy recommendations, as part of the wider criminal justice review project that is due to start later this year. It will also be considered in the context of the justice digital strategy.

I therefore ask Alison McInnes not to press amendment 258.

13:30

Alison McInnes: I am disappointed by what the cabinet secretary has said on amendment 258. He said that the Lord Advocate already publishes guidance on the conduct of ID procedures. That guidance has not been updated for eight years, so it is clearly not operating appropriately. The conduct of interviews and the conduct of ID parades are fundamental issues and are of a different order to many of the other things that Lord Bonomy recommended and which the
cabinet secretary said he will take together holistically.

Therefore, I think that the committee should agree to amendment 258, which sets out that there must be full consultation ahead of the code of practice coming into place. We have seen during the stop-and-search debate the importance of statutory codes of practice and the benefits that they can bring in terms of consistency, transparency and accountability. I believe that there is considerable scope for having interviewing codes governing how other procedures should occur without risking interfering in operational matters.

It is essential for the interests of justice that interviews and ID procedures are conducted fairly and in a uniform manner. There is evidence that that is not the case at present. Therefore, I will press amendment 258.

The Convener: The question is, that amendment 258 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against
Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Russell, Michael (Argyll and Bute) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 258 agreed to.

Before section 53
Amendment 217 moved—[Michael Matheson]—and agreed to.

Section 53—Disapplication to terrorism offences
Amendment 218 moved—[Michael Matheson]—and agreed to.

Section 53, as amended, agreed to.

After section 53
Amendments 219 and 220 moved—[Michael Matheson]—and agreed to.

Before section 54
Amendment 37 not moved.
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Criminal Justice (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about criminal justice including as to police powers and rights of suspects and as to criminal evidence, procedure and sentencing; to establish the Police Negotiating Board for Scotland; and for connected purposes.

PART A1

POLICE PROCEDURES

CHAPTER 1

SEARCH OF PERSON NOT IN POLICE CUSTODY

Lawfulness of search by constable

A1 Limitation on what enables search

(1) This section applies in relation to a person who is not in police custody.

(2) It is unlawful for a constable to search the person otherwise than—

(a) in accordance with a power of search conferred in express terms by an enactment, or

(b) under the authority of a warrant expressly conferring a power of search.

B1 Cases involving removal of person

(1) A person who is not in police custody may be searched by a constable while the person is to be, or is being, taken to or from any place by virtue of any enactment, warrant or court order requiring or permitting the constable to do so.

(2) A search under this section is to be carried out for the purpose of ensuring that the person is not in, or does not remain in, possession of any item or substance that could cause harm to the person or someone else.

(3) Anything seized by a constable in the course of a search carried out under this section may be retained by the constable.
C1 Duty to consider child’s best interests

(1) Subsection (2) applies when a constable is deciding whether to search a child who is not in police custody.

(2) In taking the decision, the constable must treat the need to safeguard and promote the wellbeing of the child as a primary consideration.

(3) For the purposes of this section, a child is a person who is under 18 years of age.

D1 Provisions about possession of alcohol

(1) The Scottish Ministers may by regulations amend section 61 (confiscation of alcohol from persons under 18) of the Crime and Punishment (Scotland) Act 1997 so as to confer on a constable a power, exercisable in addition to the power in subsection (1) or (2) of that section—

(a) to search a person for alcoholic liquor,

(b) to dispose of anything found in the person’s possession that the constable believes to be such liquor.

(2) Prior to laying before the Scottish Parliament a draft of an instrument containing regulations under this section, the Scottish Ministers must consult publicly on the regulations that they are proposing to make.

(3) Regulations under this section are subject to the affirmative procedure.

E1 Matters as to effect of sections A1, B1 and D1

(1) The day appointed for the coming into force of sections A1 and B1 is to be the same as the day from which a code of practice required by section G1(1) has effect by virtue of the first regulations made under section K1.

(2) If no regulations under section D1 are made before the end of the 2 years beginning with the day from which a code of practice required by section G1(1) has effect by virtue of the first regulations made under section K1, section D1 is to be regarded as repealed at the end of that period.

F1 Meaning of constable etc.

In this Chapter—

“constable” has the meaning given by section 99(1) of the Police and Fire Reform (Scotland) Act 2012,

“police custody” has the same meaning as given for the purposes of Part 1 (see section 56).
CHAPTER 2

CODE OF PRACTICE

Making and status of code

G1 Contents of code of practice

(1) The Scottish Ministers must make a code of practice about the carrying out of a search of a person who is not in police custody.

(1A) A code of practice must set out—

(a) the circumstances in which such a search may be carried out,
(b) the procedure to be followed in carrying out such a search,
(c) the record to be kept, and the right of any person to receive a copy of the record, of such a search,
(d) such other matters as the Scottish Ministers consider appropriate.

(2) A code of practice is to apply to the functions exercisable by a constable.

(3) In this section—

“constable” has the meaning given by section 99(1) of the Police and Fire Reform (Scotland) Act 2012,
“police custody” has the same meaning as given for the purposes of Part 1 (see section 56).

(4) In this Chapter, a reference to a code of practice means one required by subsection (1) (but see also section H1(4)).

H1 Review of code of practice

(1) The Scottish Ministers may revise a code of practice in light of a review conducted under subsection (2).

(2) The Scottish Ministers must conduct a review of a code of practice as follows—

(a) a review is to begin no later than 2 years after the code comes into effect,
(b) subsequently, a review is to begin no later than 4 years after—

(i) if the code is revised in light of the previous review under this subsection, the coming into effect of the revised code, or
(ii) otherwise, the completion of the previous review under this subsection.

(2A) Each review conducted under subsection (2) must be completed within 6 months of the day it begins.

(3) In deciding when to conduct a review in accordance with subsection (2), the Scottish Ministers must have regard to representations put to them on the matter by—

(a) the Scottish Police Authority,
(b) the Chief Constable of the Police Service of Scotland, or
(c) Her Majesty’s Inspectors of Constabulary in Scotland.

(4) For the purposes of—
(a) section G1(2) and this section (except subsection (2)(a)), and
(b) sections I1 to K1,
a reference to a code of practice includes a revised code as allowed by subsection (1).

I1 Legal status of code of practice

1 A court or tribunal in civil or criminal proceedings must take a code of practice into
account when determining any question arising in the proceedings to which the code is
relevant.

2 Breach of a code of practice does not of itself give rise to grounds for any legal claim
whatsoever.

Procedure applying to code

J1 Consultation on code of practice

1 Prior to making a code of practice, the Scottish Ministers must consult publicly on a
draft of the code.

2 When preparing a draft of a code of practice for public consultation, the Scottish
Ministers must consult—
(a) the Lord Justice General,
(b) the Faculty of Advocates,
(c) the Law Society of Scotland,
(d) the Scottish Police Authority,
(e) the Chief Constable of the Police Service of Scotland,
(f) the Scottish Human Rights Commission,
(g) the Commissioner for Children and Young People in Scotland,
(ga) the Police Investigations and Review Commissioner, and
(h) such other persons as the Scottish Ministers consider appropriate.

K1 Bringing code of practice into effect

1 A code of practice has no effect until a day appointed by regulations made by the
Scottish Ministers.

2 When laying before the Scottish Parliament a draft of an instrument containing
regulations bringing a code of practice into effect, the Scottish Ministers must also so
lay a copy of the code.

2A A draft of an instrument containing regulations bringing the first code of practice into
effect must be laid before the Scottish Parliament no later than one year after the day of
Royal Assent.

3 Regulations under this section are subject to the affirmative procedure.
L1 Police powers of search: annual reporting

In subsection (3) of section 39 (the Scottish Police Authority’s annual report) of the Police and Fire Reform (Scotland) Act 2012—

(a) the word “and” at the end of paragraph (a) is repealed, and

(b) after paragraph (b) there is inserted “and

(c) a record of the number of searches without a warrant of persons not arrested carried out by the Police Service during the reporting year, including in particular and where practicable a record of—

(i) the number of instances where an individual has been searched on more than one occasion,

(ii) the profile, as regards age, gender and ethnic or national origin, of those searched,

(iii) the proportion of searches that resulted in anything being found,

(iv) the proportion of searches that resulted in a matter being reported to the procurator fiscal, and

(v) the number of complaints made to the Police Service about the conduct of searches.”.

PART 1
ARREST AND CUSTODY

CHAPTER 1
ARREST BY POLICE

Arrest without warrant

1 Power of a constable

(1) A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person has committed or is committing an offence.

(2) In relation to an offence not punishable by imprisonment, a constable may arrest a person under subsection (1) only if the constable is satisfied that it would not be in the interests of justice to delay the arrest in order to seek a warrant for the person’s arrest.

(3) Without prejudice to the generality of subsection (2), it would not be in the interests of justice to delay an arrest in order to seek a warrant if the constable reasonably believes that unless the person is arrested without delay the person will—

(d) continue committing the offence, or

(e) obstruct the course of justice in any way, including by—

(i) seeking to avoid arrest, or

(ii) interfering with witnesses or evidence.

(4) For the avoidance of doubt, an offence is to be regarded as not punishable by imprisonment for the purpose of subsection (2) only if no person convicted of the offence can be sentenced to imprisonment in respect of it.
2 Exercise of the power

(1) A person may be arrested under section 1 more than once in respect of the same offence.

(2) A person may not be arrested under section 1 in respect of an offence if the person has been officially accused of committing the offence or an offence arising from the same circumstances as the offence.

(3) Where—
   (a) a constable who is not in uniform arrests a person under section 1, and
   (b) the person asks to see the constable’s identification,

the constable must show identification to the person as soon as reasonably practicable.

3 Information to be given on arrest

When a constable arrests a person (or as soon afterwards as is reasonably practicable), a constable must inform the person—

(a) that the person is under arrest,

(b) of the general nature of the offence in respect of which the person is arrested,

(c) of the reason for the arrest,

(d) that the person is under no obligation to say anything, other than to give the information specified in section 26(3), and

(e) of the person’s right to have—
   (i) intimation sent to a solicitor under section 35, and
   (ii) access to a solicitor under section 36.

4 Arrested person to be taken to police station

(1) Where a person is arrested by a constable outwith a police station, a constable must take the person as quickly as is reasonably practicable to a police station.

(2) Subsection (1) ceases to apply, and the person must be released from police custody immediately, if—
   (a) the person has been arrested without a warrant,
   (b) the person has not yet arrived at a police station in accordance with this section, and
   (c) in the opinion of a constable there are no reasonable grounds for suspecting that the person has committed—
      (i) the offence in respect of which the person was arrested, or
      (ii) an offence arising from the same circumstances as that offence.

(3) For the avoidance of doubt, subsection (1) ceases to apply if, before arriving at a police station in accordance with this section, the person is released from custody under section 19(2).
5 Information to be given at police station

(1) Subsections (2) and (3) apply when—
   (a) a person is in police custody having been arrested at a police station, or
   (b) a person is in police custody and has been taken to a police station in accordance with section 4.

(2) The person must be informed as soon as reasonably practicable—
   (a) that the person is under no obligation to say anything, other than to give the information specified in section 26(3),
   (b) of any right the person has to have intimation sent and to have access to certain persons under—
      (i) section 30,
      (ii) section 32,
      (iii) section 35,
      (iv) section 36.

(3) The person must be provided as soon as reasonably practicable with such information (verbally or in writing) as is necessary to satisfy the requirements of Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings.

6 Information to be recorded by police

(1) There must be recorded in relation to any arrest by a constable—
   (a) the time and place of arrest,
   (b) the general nature of the offence in respect of which the person is arrested,
   (c) if the person is taken from one place to another while in police custody (including to a police station in accordance with section 4)—
      (i) the place from which, and time at which, the person is taken, and
      (ii) the place to which the person is taken and the time at which the person arrives there,
   (d) the time at which, and the identity of the constable by whom, the person is informed of the matters mentioned in section 3,
   (da) the time at which the person ceases to be in police custody.

(1A) Where relevant, there must be recorded in relation to an arrest by a constable—
   (a) the reason that the constable who released the person from custody under subsection (2) of section 4 formed the opinion mentioned in paragraph (c) of that subsection,
   (e) the time at which, and the identity of the person by whom, the person is—
      (i) informed of the matters mentioned in subsection (2) of section 5, and
      (ii) provided with information in accordance with subsection (3) of that section,
(ea) the time at which, and the identity of the person by whom, the person is informed of the matters mentioned in section 17A,

(f) the time at which the person requests that intimation be sent under—
   (i) section 30,
   (ii) section 35,

(g) the time at which intimation is sent under—
   (i) section 30,
   (ia) section 32A,
   (ii) section 33,
   (iii) section 35.

(2) Where a person is in police custody and not officially accused of committing an offence, there must be recorded the time, place and outcome of any decision under section 7.

(3) Where a person is held in police custody by virtue of authorisation given under section 7 there must be recorded—

   (a) the time at which the person is informed of the matters mentioned in section 8,
   (b) the time, place and outcome of any custody review under section 9,
   (c) the time at which any interview in the circumstances described in section 13(6) begins and the time at which it ends.

(3A) If a constable considers whether to give authorisation under section 12A there must be recorded—

   (a) whether a reasonable opportunity to make representations has been afforded in accordance with subsection (4)(a) of that section,
   (b) if the opportunity referred to in paragraph (a) has not been afforded, the reason for that,
   (c) the time, place and outcome of the constable’s decision, and
   (d) if the constable’s decision is to give the authorisation—
      (i) the grounds on which it is given,
      (ii) the time at which, and the identity of the person by whom, the person is informed and reminded of things in accordance with section 12B, and
      (iii) the time at which the person requests that intimation be sent under section 12B(3)(a) and the time at which it is sent.

(3B) Where a person is held in police custody by virtue of authorisation given under section 12A there must be recorded—

   (a) the time, place and outcome of any custody review under section 9,
   (b) the time at which any interview in the circumstances described in section 13(6) begins and the time at which it ends.

(4) If a person is released from police custody on conditions under section 14, there must be recorded—

   (a) details of the conditions imposed,
(b) the identity of the constable who imposed them.

(5) If a person is charged with an offence by a constable while in police custody, there must be recorded the time at which the person is charged.

CHAPTER 2

CUSTODY: PERSON NOT OFFICIALLY ACCUSED

Keeping person in custody

7 Authorisation for keeping in custody

(1) Subsection (2) applies where—

(a) a person is in police custody having been arrested without a warrant, and

(b) since being arrested, the person has not been charged with an offence by a constable.

(2) Authorisation to keep the person in custody must be sought as soon as reasonably practicable after the person—

(a) is arrested at a police station, or

(b) arrives at a police station, having been taken there in accordance with section 4.

(3) Authorisation may be given only by a constable who—

(a) is of the rank of sergeant or above, and

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

(4) Authorisation may be given only if that constable is satisfied that the test in section 10 is met.

(5) If authorisation is refused, the person may continue to be held in police custody only if a constable charges the person with an offence.

8 Information to be given on authorisation

At the time when authorisation to keep a person in custody is given under section 7, the person must be informed of—

(a) the reason that the person is being kept in custody, and

(b) the 12 hour limit arising by virtue of section 11 and the fact that the person may be kept in custody for a further 12 hours under section 12A.

11 12 hour limit: general rule

(1) Subsection (2) applies when—

(a) a person has been held in police custody for a continuous period of 12 hours, beginning with the time at which authorisation was given under section 7, and

(b) during that period the person has not been charged with an offence by a constable.

(2) The person may continue to be held in police custody only if—

(a) a constable charges the person with an offence, or
(b) authorisation to keep the person in custody has been given under section 12A.

12 12 hour limit: previous period

(1) Subsection (2) applies where—

(a) a person is being held in police custody by virtue of authorisation given under section 7,

(b) authorisation has been given under that section to hold the person in police custody on a previous occasion, and

(c) the offence in connection with which the authorisation mentioned in paragraph (a) has been given is the same offence or arises from the same circumstances as the offence in connection with which the authorisation mentioned in paragraph (b) was given.

(2) The 12 hour period mentioned in section 11 is reduced by the length of the period during which the person was held in police custody by virtue of the authorisation mentioned in subsection (1)(b).

(3) Subsections (5) and (6) of section 13 apply for the purpose of calculating the length of the period during which the person was held in police custody by virtue of the authorisation mentioned in subsection (1)(b).

12A Authorisation for keeping in custody beyond 12 hour limit

(1) A constable may give authorisation for a person who is in police custody to be kept in custody for a continuous period of 12 hours, beginning when the 12 hour period mentioned in section 11 ends.

(2) Authorisation may be given only by a constable who—

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

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

(3) Authorisation may be given only if—

(a) the person has not been held in police custody by virtue of authorisation given under this section in connection with—

(i) the offence in connection with which the person is in police custody, or

(ii) an offence arising from the same circumstances as that offence, and

(b) the constable is satisfied that—

(i) the test in section 10 will be met when the 12 hour period mentioned in section 11 ends,

(ii) the offence in connection with which the person is in police custody is an indictable offence, and

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

(4) Before deciding whether or not to give authorisation the constable must—

(a) where practicable afford a reasonable opportunity to make verbal or written representations to—
(i) the person, or
(ii) if the person so chooses, the person’s solicitor, and
(b) have regard to any representations made.

(5) If authorisation is given, it is deemed to be withdrawn if the person is released from police custody before the 12 hour period mentioned in section 11 ends.

(6) Subsection (7) applies when—
(a) by virtue of authorisation given under this section, a person has been held in police custody for a continuous period of 12 hours (beginning with the time at which the 12 hour period mentioned in section 11 ended), and
(b) during that period the person has not been charged with an offence by a constable.

(7) The person may continue to be held in police custody only if a constable charges the person with an offence.

12B Information to be given on authorisation under section 12A

(1) This section applies when authorisation to keep a person in custody is given under section 12A.

(2) The person must be informed—
(a) that the authorisation has been given, and
(b) of the grounds on which it has been given.

(3) The person—
(a) has the right to have the information mentioned in subsection (2) intimated to a solicitor, and
(b) must be informed of that right.

(4) The person must be reminded about any right which the person has under Chapter 5.

(5) Subsection (4) does not require that a person be reminded about a right to have intimation sent under either of the following sections if the person has exercised the right already—
(a) section 30,
(b) section 35.

(6) Information to be given under subsections (2), (3)(b) and (4) must be given to the person as soon as reasonably practicable after the authorisation is given.

(7) Where the person requests that intimation be sent under subsection (3)(a), the intimation must be sent as soon as reasonably practicable.

9 Custody review

(1) A custody review must be carried out—
(a) when a person has been held in police custody for a continuous period of 6 hours by virtue of authorisation given under section 7, and
(b) again, if authorisation to keep the person in police custody is given under section 12A, when the person has been held in custody for a continuous period of 6 hours by virtue of that authorisation.

(2) A custody review entails the consideration by a constable of whether the test in section 10 is met.

(3) A custody review must be carried out by a constable who—
   (a) is of the rank of inspector or above, and
   (b) has not been involved in the investigation in connection with which the person is in police custody.

(4) If the constable is not satisfied that the test in section 10 is met, the person may continue to be held in police custody only if a constable charges the person with an offence.

**Test for sections 7, 12A and 9**

(1) For the purposes of sections 7(4), 12A(3)(b) and 9(2), the test is that—
   (a) there are reasonable grounds for suspecting that the person has committed an offence, and
   (b) keeping the person in custody is necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with the person in accordance with the law.

(2) Without prejudice to the generality of subsection (1)(b), in considering what is necessary and proportionate for the purpose mentioned in that subsection regard may be had to—
   (a) whether the person’s presence is reasonably required to enable the offence to be investigated fully,
   (b) whether the person (if liberated) would be likely to interfere with witnesses or evidence, or otherwise obstruct the course of justice,
   (c) the nature and seriousness of the offence.

**Medical treatment**

(1) Subsection (2) applies when—
   (a) a person is in police custody having been arrested without a warrant,
   (b) since being arrested, the person has not been charged with an offence by a constable, and
   (c) the person is at a hospital for the purpose of receiving medical treatment.

(2) If authorisation to keep the person in custody has not been given under section 7, that section has effect as if—
   (a) each reference in subsection (2) of that section to a police station were a reference to the hospital, and
   (b) the words after the reference to a police station in paragraph (b) of that subsection were omitted.
(3) Where authorisation is given under section 7 when a person is at a hospital, authorisation under that section need not be sought again if, while still in custody, the person is taken to a police station in accordance with section 4.

(4) Subsections (5) and (6) apply for the purpose of calculating the 12 hours mentioned in sections 11 and 12A.

(5) Except as provided for in subsection (6), no account is to be taken of any period during which a person is—

(a) at a hospital for the purpose of receiving medical treatment, or  
(b) being taken as quickly as is reasonably practicable—

(i) to a hospital for the purpose of receiving medical treatment, or  
(ii) to a police station from a hospital to which the person was taken for the purpose of receiving medical treatment.

(6) Account is to be taken of any period during which a person is both—

(a) at a hospital, or being taken to or from one, and  
(b) being interviewed by a constable in relation to an offence which the constable has reasonable grounds to suspect the person of committing.

Investigative liberation

14 Release on conditions

(1) Subsection (2) applies where—

(a) a person is being held in police custody by virtue of authorisation given under section 7,  
(b) a constable has reasonable grounds for suspecting that the person has committed a relevant offence, and  
(d) either—

(i) the person has not been subject to a condition imposed under subsection (2) in connection with a relevant offence, or  
(ii) it has not been more than 28 days since the first occasion on which a condition was imposed on the person under subsection (2) in connection with a relevant offence.

(2) If releasing the person from custody, a constable may impose any condition that an appropriate constable considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence.

(2A) A condition under subsection (2)—

(a) may not require the person to be in a specified place at a specified time,  
(b) may require the person—

(i) not to be in a specified place, or category of place, at a specified time, and  
(ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period.
(3) A condition imposed under subsection (2) is a liberation condition for the purposes of schedule A1.

(5) In subsection (2), “an appropriate constable” means a constable of the rank of sergeant or above.

(6) In this section, “a relevant offence” means—
   (a) the offence in connection with which the authorisation under section 7 has been given, or
   (b) an offence arising from the same circumstances as that offence.

15 Conditions ceasing to apply

(1) A condition imposed on a person under section 14(2) ceases to apply—
   (a) at the end of the day falling 28 days after the first occasion on which a condition
       was imposed on the person under section 14(2) in connection with a relevant
       offence, or
   (b) before then, if—
       (i) the condition is removed by a notice under section 16,
       (ii) the person is arrested in connection with a relevant offence,
       (iii) the person is officially accused of committing a relevant offence, or
       (iv) the condition is removed by the sheriff under section 17.

(2) In subsection (1), “a relevant offence” means—
   (a) the offence in connection with which the condition was imposed, or
   (b) an offence arising from the same circumstances as that offence.

16 Modification or removal of conditions

(1) A constable may by notice modify or remove a condition imposed under section 14(2).

(2) A notice under subsection (1)—
   (a) is to be given in writing to the person who is subject to the condition,
   (b) must specify the time from which the condition is modified or removed.

(3) A constable of the rank of inspector or above must keep under review whether or not—
   (a) there are reasonable grounds for suspecting that a person who is subject to a
       condition imposed under section 14(2) has committed a relevant offence, and
   (b) the condition imposed remains necessary and proportionate for the purpose of
       ensuring the proper conduct of the investigation into a relevant offence.

(4) Where the constable referred to in subsection (3) is no longer satisfied as to the matter
    mentioned in paragraph (a) of that subsection, a constable must give notice to the person
    removing any condition imposed in connection with a relevant offence.

(5) Where the constable referred to in subsection (3) is no longer satisfied as to the matter
    mentioned in paragraph (b) of that subsection, a constable must give notice to the person—
(a) modifying the condition in question, or
(b) removing it.

(6) Where a duty to give notice to a person arises under subsection (4) or (5), the notice—
(a) is to be given in writing to the person as soon as practicable, and
(b) must specify, as the time from which the condition is modified or removed, the time at which the duty to give the notice arose.

(7) The modification or removal of a condition under subsection (1), (4) or (5) requires the authority of a constable of the rank of inspector or above.

(8) In this section, “a relevant offence” means—
(a) the offence in connection with which the condition was imposed, or
(b) an offence arising from the same circumstances as that offence.

17 Review of conditions

(1) A person who is subject to a condition imposed under section 14(2) may apply to the sheriff to have the condition reviewed.

(2) Before disposing of an application under this section, the sheriff must give the procurator fiscal an opportunity to make representations.

(3) If the sheriff is not satisfied that the condition is necessary and proportionate for the purpose for which it was imposed, the sheriff may—
(a) remove the condition, or
(b) impose an alternative condition that the sheriff considers to be necessary and proportionate for that purpose.

(4) For the purposes of sections 15 and 16, a condition imposed by the sheriff under subsection (3)(b) is to be regarded as having been imposed under section 14(2).

CHAPTER 3

CUSTODY: PERSON OFFICIALLY ACCUSED

Person to be brought before court

17A Information to be given if sexual offence

(1) Subsection (2) applies when—
(a) a person is in police custody having been arrested under a warrant in respect of a sexual offence to which section 288C of the 1995 Act applies, or
(b) a person—
(i) is in police custody having been arrested without a warrant, and
(ii) since being arrested, the person has been charged by a constable with a sexual offence to which section 288C of the 1995 Act applies.

(2) The person must be informed as soon as reasonably practicable—
(a) that the person’s case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A) of the 1995 Act) in the course of the proceedings may be conducted only by a lawyer,

(b) that it is, therefore, in the person’s interests to get the professional assistance of a solicitor, and

(c) that if the person does not engage a solicitor for the purposes of the conduct of the person’s case at or for the purposes of the hearing, the court will do so.

18 Person to be brought before court

(1) Subsection (2) applies to a person when—

(a) the person is in police custody having been arrested under a warrant (other than a warrant granted under section 29(1)), or

(b) the person—

(i) is in police custody having been arrested without a warrant, and

(ii) since being arrested, the person has been charged with an offence by a constable.

(2) The person must be brought before a court (unless released from custody under section 19)—

(a) if practicable, before the end of the first day on which the court is sitting after the day on which this subsection began to apply to the person, or

(b) as soon as practicable after that.

(3) A person is deemed to be brought before a court in accordance with subsection (2) if the person appears before it by means of a live television link (by virtue of a determination by the court that the person is to do so by such means).

18A Under 18s to be kept in place of safety prior to court

(1) Subsection (2) applies when—

(a) a person is to be brought before a court in accordance with section 18(2), and

(b) either—

(i) a constable believes the person is under 16 years of age, or

(ii) the person is subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

(2) The person must (unless released from custody under section 19) be kept in a place of safety until the person can be brought before the court.

(3) The place of safety in which the person is kept must not be a police station unless an appropriate constable certifies that keeping the person in a place of safety other than a police station would be—

(a) impracticable,

(b) unsafe, or

(c) inadvisable due to the person’s state of health (physical or mental).
(4) A certificate under subsection (3) must be produced to the court when the person is brought before it.

(5) In this section—

“an appropriate constable” means a constable of the rank of inspector or above,
“place of safety” has the meaning given in section 202(1) of the Children’s Hearings (Scotland) Act 2011.

18B  Notice to parent that under 18 to be brought before court

(1) Subsection (2) applies when a person who is 16 years of age or over and subject to a supervision order or under 16 years of age—

(a) is to be brought before a court in accordance with section 18(2), or
(b) is released from police custody on an undertaking given under section 19(2)(a).

(2) A parent of the person mentioned in subsection (1) (if one can be found) must be informed of the following matters—

(a) the court before which the person is to be brought,
(b) the date on which the person is to be brought before the court,
(c) the general nature of the offence which the person has been officially accused of committing, and
(d) that the parent’s attendance at the court may be required under section 42 of the 1995 Act.

(3) Subsection (2) does not require any information to be given to a parent if a constable has grounds to believe that giving the parent the information mentioned in that subsection may be detrimental to the wellbeing of the person mentioned in subsection (1).

(4) In this section—

“parent” includes guardian and any person who has the care of the person mentioned in subsection (1),

“supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

18C  Notice to local authority that under 18 to be brought before court

(1) The appropriate local authority must be informed of the matters mentioned in subsection (4) when—

(a) a person to whom either subsection (2) or (3) applies is to be brought before a court in accordance with section 18(2), or
(b) a person to whom subsection (2) applies is released from police custody on an undertaking given under section 19(2)(a).

(2) This subsection applies to—

(a) a person who is under 16 years of age,
(b) a person who is—

(i) 16 or 17 years of age, and
(ii) subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

(3) This subsection applies to a person if—

(a) a constable believes the person is 16 or 17 years of age,

(b) since being arrested, the person has not exercised the right to have intimation sent under section 30, and

(c) on being informed or reminded of the right to have intimation sent under that section after being officially accused, the person has declined to exercise the right.

(4) The matters referred to in subsection (1) are—

(a) the court before which the person mentioned in paragraph (a) or (as the case may be) (b) of that subsection is to be brought,

(b) the date on which the person is to be brought before the court, and

(c) the general nature of the offence which the person has been officially accused of committing.

(5) For the purpose of subsection (1), the appropriate local authority is the local authority in whose area the court referred to in subsection (4)(a) sits.

19 Liberation by police

(1) Subsection (2) applies when—

(a) a person is in police custody having been arrested under a warrant (other than a warrant granted under section 29(1)), or

(b) a person—

(i) is in police custody having been arrested without a warrant, and

(ii) since being arrested, the person has been charged with an offence by a constable.

(2) A constable may—

(a) if the person gives an undertaking in accordance with section 20, release the person from custody,

(b) release the person from custody without such an undertaking,

(c) refuse to release the person from custody.

(2A) Where a person is in custody as mentioned in subsection (1)(a), the person may not be released from custody under subsection (2)(b).

(3) A constable is not to be subject to any claim whatsoever by reason of having refused to release a person from custody under subsection (2)(c).

20 Release on undertaking

(1) A person may be released from police custody on an undertaking given under section 19(2)(a) only if the person signs the undertaking.
(2) The terms of an undertaking are that the person undertakes to—
   (a) appear at a specified court at a specified time, and
   (b) comply with any conditions imposed under subsection (3) while subject to the
       undertaking.

(3) The conditions which may be imposed under this subsection are—
   (a) that the person does not—
       (i) commit an offence,
       (ii) interfere with witnesses or evidence, or otherwise obstruct the course of
            justice,
       (iii) behave in a manner which causes, or is likely to cause, alarm or distress to
            witnesses,
   (b) any further condition that a constable considers necessary and proportionate for
       the purpose of ensuring that any conditions imposed under paragraph (a) are
       observed.

(4) Conditions which may be imposed under subsection (3)(b) include—
   (a) a condition requiring the person—
       (i) to be in a specified place at a specified time, and
       (ii) to remain there for a specified period,
   (b) a condition requiring the person—
       (i) not to be in a specified place, or category of place, at a specified time, and
       (ii) to remain outwith that place, or any place falling within the specified
            category (if any), for a specified period.

(5) For the imposition of a condition under subsection (3)(b)—
   (a) if it is of the kind described in subsection (4)(a), the authority of a constable of the
       rank of inspector or above is required,
   (b) if it is of any other kind, the authority of a constable of the rank of sergeant is
       required.

(6) The requirements imposed by an undertaking to attend at a court and comply with
    conditions are liberation conditions for the purposes of schedule A1.

21 Modification of undertaking

(1) The procurator fiscal may by notice modify the terms of an undertaking given under
    section 19(2)(a) by—
    (a) changing the court specified as the court at which the person is to appear,
    (b) changing the time specified as the time at which the person is to appear at the
        court,
    (c) removing or altering any condition imposed under section 20(3).

(2) A condition may not be altered under subsection (1)(c) so as to forbid or require
    something not forbidden or required by the terms of the condition when the person gave
    the undertaking.
(3) Notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.

21A Rescission of undertaking

(1) The procurator fiscal may by notice rescind an undertaking given under section 19(2)(a) (whether or not the person who gave it is to be prosecuted).

(2) The rescission of an undertaking by virtue of subsection (1) takes effect at the end of the day on which the notice is sent.

(3) Notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.

(4) A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person is likely to fail to comply with the terms of an undertaking given under section 19(2)(a).

(5) Where a person is arrested under subsection (4) or subsection (6) applies—

(a) the undertaking referred to in subsection (4) or (as the case may be) (6) is rescinded, and

(b) this Part applies as if the person, since being most recently arrested, has been charged with the offence in connection with which the person was in police custody when the undertaking was given.

(6) This subsection applies where—

(a) a person who is subject to an undertaking given under section 19(2)(a) is in police custody (otherwise than as a result of having been arrested under subsection (4)), and

(b) a constable has reasonable grounds for suspecting that the person has failed, or (if liberated) is likely to fail, to comply with the terms of the undertaking.

(7) The references in subsections (4) and (6)(b) to the terms of the undertaking are to the terms of the undertaking subject to any modification by—

(a) notice under section 21(1), or

(b) the sheriff under section 22(3)(b).

21B Expiry of undertaking

(1) An undertaking given under section 19(2)(a) expires—

(a) at the end of the day on which the person who gave it is required by its terms to appear at a court, or

(b) if subsection (2) applies, at the end of the day on which the person who gave it is brought before a court having been arrested under the warrant mentioned in that subsection.

(2) This subsection applies where—

(a) a person fails to appear at court as required by the terms of an undertaking given under section 19(2)(a), and

(b) on account of that failure, a warrant for the person’s arrest is granted.
(3) The references in subsections (1)(a) and (2)(a) to the terms of the undertaking are to the terms of the undertaking subject to any modification by notice under section 21(1).

22 Review of undertaking

(1) A person who is subject to an undertaking containing a condition imposed under section 20(3)(b) may apply to the sheriff to have the condition reviewed.

(2) Before disposing of an application under this section, the sheriff must give the procurator fiscal an opportunity to make representations.

(3) If the sheriff is not satisfied that the condition is necessary and proportionate for the purpose for which it was imposed, the sheriff may modify the terms of the undertaking by—

(a) removing the condition, or
(b) imposing an alternative condition that the sheriff considers to be necessary and proportionate for that purpose.

CHAPTER 4

POLICE INTERVIEW

Rights of suspects

23 Information to be given before interview

(1) Subsection (2) applies to a person who—

(a) is in police custody, or
(b) is attending at a police station or other place voluntarily for the purpose of being interviewed by a constable.

(2) Not more than one hour before a constable interviews the person about an offence which the constable has reasonable grounds to suspect the person of committing, the person must be informed—

(za) of the general nature of that offence,
(a) that the person is under no obligation to say anything other than to give the information specified in section 26(3),
(b) about the right under section 24 to have a solicitor present during the interview, and
(c) if the person is in police custody, about any right which the person has under Chapter 5.

(3) A person need not be informed under subsection (2)(c) about a right to have intimation sent under either of the following sections if the person has exercised the right already—

(a) section 30,
(b) section 35.

(4) For the purpose of subsection (2), a constable is not to be regarded as interviewing a person about an offence merely by asking the person for the information specified in section 26(3).
(5) Where a person is to be interviewed by virtue of authorisation granted under section 27, before the interview begins the person must be informed of what was specified by the court under subsection (6) of that section.

24 **Right to have solicitor present**

(1) Subsections (2) and (3) apply to a person who—

(a) is in police custody, or
(b) is attending at a police station or other place voluntarily for the purpose of being interviewed by a constable.

(2) The person has the right to have a solicitor present while being interviewed by a constable about an offence which the constable has reasonable grounds to suspect the person of committing.

(3) Accordingly—

(a) unless the person consents to being interviewed without having a solicitor present, a constable must not begin to interview the person about the offence until the person’s solicitor is present, and
(b) the person’s solicitor must not be denied access to the person at any time while a constable is interviewing the person about the offence.

(4) Despite subsection (3)(a) a constable may, in exceptional circumstances, proceed to interview the person without a solicitor being present if the constable is satisfied that it is necessary to interview the person without delay in the interests of—

(a) the investigation or the prevention of crime, or
(b) the apprehension of offenders.

(5) For the purposes of subsections (2) and (3), a constable is not to be regarded as interviewing a person about an offence merely by asking the person for the information specified in section 26(3).

(6) Where a person consents to being interviewed without having a solicitor present, there must be recorded—

(a) the time at which the person consented, and
(b) any reason given by the person at that time for waiving the right to have a solicitor present.

25 **Consent to interview without solicitor**

(1) Subsections (2) and (3) apply for the purpose of section 24(3)(a).

(2) A person may not consent to being interviewed without having a solicitor present if—

(a) the person is under 16 years of age

(aa) the person is 16 or 17 years of age and subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011, or

(b) the person is 16 years of age or over and, owing to mental disorder, appears to a constable to be unable to—
(i) understand sufficiently what is happening, or
(ii) communicate effectively with the police.

(3) A person to whom this subsection applies (referred to in subsection (5) as “person A”) may consent to being interviewed without having a solicitor present only with the agreement of a relevant person.

(4) Subsection (3) applies to a person who is—
(a) 16 or 17 years of age, and
(b) not precluded by subsection (2)(aa) or (b) from consenting to being interviewed without having a solicitor present.

(5) For the purpose of subsection (3), “a relevant person” means—
(a) if person A is in police custody, any person who is entitled to access to person A by virtue of section 32(2),
(b) if person A is not in police custody, a person who is—
(i) at least 18 years of age, and
(ii) reasonably named by person A.

(6) In subsection (2)(b)—
(a) “mental disorder” has the meaning given in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003,
(b) the reference to the police is to any—
(i) constable, or
(ii) person appointed as a member of police staff under section 26(1) of the Police and Fire Reform (Scotland) Act 2012.

Person not officially accused

Questioning following arrest

(1) Subsections (2) and (3) apply where—
(a) a person is in police custody in relation to an offence, and
(b) the person has not been officially accused of committing the offence or an offence arising from the same circumstances as the offence.

(2) A constable may put questions to the person in relation to the offence.

(3) The person is under no obligation to answer any question, other than to give the following information—
(a) the person’s name,
(b) the person’s address,
(c) the person’s date of birth,
(d) the person’s place of birth (in such detail as a constable considers necessary or expedient for the purpose of establishing the person’s identity), and
(e) the person’s nationality.
(4) Subsection (2) is without prejudice to any rule of law as regards the admissibility in evidence of any answer given.

Person officially accused

27 Authorisation for questioning

5 (1) The court may authorise a constable to question a person about an offence after the person has been officially accused of committing the offence.

(2) The court may grant authorisation only if it is satisfied that allowing the person to be questioned about the offence is necessary in the interests of justice.

(3) In deciding whether to grant authorisation, the court must take into account—

(a) the seriousness of the offence,
(b) the extent to which the person could have been questioned earlier in relation to the information which the applicant believes may be elicited by the proposed questioning,
(c) where the person could have been questioned earlier in relation to that information, whether it could reasonably have been foreseen at that time that the information might be important to proving or disproving that the person has committed an offence.

(4) Where subsection (5) applies, the court must give the person an opportunity to make representations before deciding whether to grant authorisation.

(5) This subsection applies where—

(a) a warrant has been granted to arrest the person in respect of the offence, or
(b) the person has appeared before a court in relation to the offence.

(6) Where granting authorisation, the court—

(a) must specify the period for which questioning is authorised, and
(b) may specify such other conditions as the court considers necessary to ensure that allowing the proposed questioning is not unfair to the person.

(7) A decision of the court—

(a) to grant or refuse authorisation, or
(b) to specify, or not to specify, conditions under subsection (6)(b), is final.

(8) In this section, “the court” means—

(a) where an indictment has been served on the person in respect of the High Court, a single judge of that court,
(b) in any other case, the sheriff.

28 Authorisation: further provision

(1) An application for authorisation may be made—

(a) where section 27(5) applies, by the prosecutor, or
(b) in any other case, by a constable.

(2) In subsection (1)(a), “the prosecutor” means—

(a) where an indictment has been served on the person in respect of the High Court, Crown Counsel, or

(b) in any other case, the procurator fiscal.

(3) Where an application for authorisation is made in writing (rather than orally) it must—

(a) be made in such form as may be prescribed by act of adjournal (or as nearly as may be in such form), and

(b) state whether another application has been made for authorisation to question the person about the offence or an offence arising from the same circumstances as the offence.

(4) Authorisation ceases to apply as soon as either—

(a) the period specified under section 27(6)(a) expires, or

(b) the person’s trial in respect of the offence, or an offence arising from the same circumstances as the offence, begins.

(5) For the purpose of subsection (4)(b), a trial begins—

(a) in proceedings on indictment, when the jury is sworn,

(b) in summary proceedings, when the first witness for the prosecution is sworn.

(6) In this section—

“authorisation” means authorisation under section 27,

“the offence” means the offence referred to in section 27(1).

29 Arrest to facilitate questioning

(1) On granting authorisation under section 27, the court may also grant a warrant for the person’s arrest if it seems to the court expedient to do so.

(2) The court must specify in a warrant granted under subsection (1) the maximum period for which the person may be detained under it.

(3) The person’s detention under a warrant granted under subsection (1) must end as soon as—

(a) the period of the person’s detention under the warrant becomes equal to the maximum period specified under subsection (2),

(b) the authorisation ceases to apply (see section 28(4)), or

(c) in the opinion of the constable responsible for the investigation into the offence referred to in section 27(1), there are no longer reasonable grounds for suspecting that the person has committed—

(i) that offence, or

(ii) an offence arising from the same circumstances as that offence.

(4) For the purpose of subsection (3)(a), the period of the person’s detention under the warrant begins when the person—
(a) is arrested at a police station, or
(b) arrives at a police station, having been taken there in accordance with section 4.

(5) For the avoidance of doubt—
(a) if the person is on bail when a warrant under subsection (1) is granted, the order
admitting the person to bail is not impliedly recalled by the granting of the
warrant,
(b) if the person is on bail when arrested under a warrant granted under subsection
(1)—
   (i) despite being in custody by virtue of the warrant the person remains on bail
for the purpose of section 24(5)(b) of the 1995 Act,
   (ii) when the person’s detention under the warrant ends, the bail order
continues to apply as it did immediately before the person’s arrest,
(c) if the person is subject to an undertaking given under section 19(2)(a), the person
remains subject to the undertaking despite—
   (i) the granting of a warrant under subsection (1),
   (ii) the person’s arrest and detention under it.

CHAPTER 5
RIGHTS OF SUSPECTS IN POLICE CUSTODY

Intimation and access to another person

30 Right to have intimation sent to other person

(1) A person in police custody has the right to have intimation sent to another person of—
   (a) the fact that the person is in custody,
   (b) the place where the person is in custody.

(2) Intimation under subsection (1) must be sent—
   (a) where a constable believes that the person in custody is under 16 years of age,
       regardless of whether the person requests that it be sent,
   (b) in any other case, if the person requests that it be sent.

(3) The person to whom intimation is to be sent under subsection (1) is—
   (a) where a constable believes that the person in custody is under 16 years of age, a
       parent of the person,
   (b) in any other case, an adult reasonably named by the person in custody.

(4) Intimation under subsection (1) must be sent—
   (a) as soon as reasonably practicable, or
   (b) if subsection (5) applies, with no more delay than is necessary.

(5) This subsection applies where a constable considers some delay to be necessary in the
interests of—
   (a) the investigation or prevention of crime,
(b) the apprehension of offenders, or
(c) safeguarding and promoting the wellbeing of the person in custody, where a
constable believes that person to be under 18 years of age.

(5A) The sending of intimation may be delayed by virtue of subsection (5)(c) only for so long
as is necessary to ascertain whether a local authority will arrange for someone to visit
the person in custody under section 32A(2).

(6) In this section and section 31—
“adult” means person who is at least 18 years of age,
“parent” includes guardian and any person who has the care of the person in
custody.

31 Right to have intimation sent: under 18s

(1) This section applies where a constable believes that a person in police custody is under
18 years of age.

(2) At the time of sending intimation to a person under section 30(1), that person must be
asked to attend at the police station or other place where the person in custody is being
held.

(2A) Subsection (2) does not apply if—
(a) a constable believes that the person in custody is 16 or 17 years of age, and
(b) the person in custody requests that the person to whom intimation is to be sent
under section 30(1) is not asked to attend at the place where the person in custody
is being held.

(3) Subsections (3A) and (4) apply where—
(a) it is not practicable or possible to contact, within a reasonable time, the person to
whom intimation is to be sent by virtue of section 30(3),
(b) the person to whom intimation is sent by virtue of section 30(3), if asked to attend
at the place where the person in custody is being held, claims to be unable or
unwilling to attend within a reasonable time, or
(c) a local authority, acting under section 32A(8)(a), has advised against sending
intimation to the person to whom intimation is to be sent by virtue of section
30(3).

(3A) Section 30(3) ceases to have effect.

(4) Attempts to send intimation to an appropriate person under section 30(1) must continue
to be made until—
(a) an appropriate person is contacted and agrees to attend, within a reasonable time,
at the police station or other place where the person in custody is being held, or
(b) if a constable believes that the person in custody is 16 or 17 years of age, the
person requests that (for the time being) no further attempt to send intimation is
made.

(5) In subsection (4), “an appropriate person” means—
(a) if a constable believes that the person in custody is under 16 years of age, a person
the constable considers appropriate having regard to the views of the person in
custody,

(b) if a constable believes that the person in custody is 16 or 17 years of age, an adult
who is named by the person in custody and to whom a constable is willing to send
intimation without a delay by virtue of section 30(5)(a) or (b).

(6) The reference in subsection (3)(a) to its not being possible to contact a person within a
reasonable time includes the case where, by virtue of section 30(5)(a) or (b), a constable
delays sending intimation to the person.

32 Right of under 18s to have access to other person

(1) Access to a person in police custody who a constable believes is under 16 years of age
must be permitted to—

(a) a parent of the person,

(b) where a parent is not available, a person sent intimation under section 30 in
respect of the person in custody.

(2) Access to a person in police custody who a constable believes is 16 or 17 years of age
must be permitted to a person sent intimation under section 30 in respect of the person in
custody where the person in custody wishes to have access to the person sent intimation.

(2A) Access to a person in custody under subsection (1) or (2) need not be permitted to more
than one person at the same time.

(3) In exceptional circumstances, access under subsection (1) or (2) may be refused or
restricted so far as the refusal or restriction is necessary—

(a) in the interests of—

(i) the investigation or prevention of crime, or

(ii) the apprehension of offenders, or

(b) for the wellbeing of the person in custody.

(4) In this section, “parent” includes guardian and any person who has the care of the person
in custody.

32A Social work involvement in relation to under 18s

(1) Intimation of the fact that a person is in police custody and the place where the person is
in custody must be sent to a local authority as soon as reasonably practicable if—

(a) a constable believes that the person may be subject to a supervision order, or

(b) by virtue of subsection (5)(c) of section 30, a constable has delayed sending
intimation in respect of the person under subsection (1) of that section.

(2) A local authority sent intimation under subsection (1) may arrange for someone to visit
the person in custody if—

(a) the person is subject to a supervision order, or

(b) the local authority—

(i) believes the person to be under 16 years of age, and
(ii) has grounds to believe that its arranging someone to visit the person would best safeguard and promote the person’s wellbeing (having regard to the effect of subsection (4)(a)).

(3) Before undertaking to arrange someone to visit the person in custody under subsection (2), the local authority must be satisfied that anyone it arranges to visit the person in custody will be able to make the visit within a reasonable time.

(4) Where a local authority arranges for someone to visit the person in custody under subsection (2)—

(a) sections 30 and 32 cease to have effect, and

(b) the person who the local authority has arranged to visit the person in custody must be permitted access to the person in custody.

(5) In exceptional circumstances, access under subsection (4)(b) may be refused or restricted so far as the refusal or restriction is necessary—

(a) in the interests of—

(i) the investigation or prevention of crime, or

(ii) the apprehension of offenders, or

(b) for the wellbeing of the person in custody.

(6) Where a local authority sent intimation under subsection (1) confirms that the person in custody is—

(a) over 16 years of age, and

(b) subject to a supervision order,

sections 30 to 32 are to be applied in respect of the person as if a constable believes the person to be under 16 years of age.

(7) Subsection (8) applies where a local authority might have arranged for someone to visit a person in custody under subsection (2) but—

(a) chose not to do so, or

(b) was precluded from doing so by subsection (3).

(8) The local authority may—

(a) advise a constable that the person to whom intimation is to be sent by virtue of section 30(3) should not be sent intimation if the local authority has grounds to believe that sending intimation to that person may be detrimental to the wellbeing of the person in custody, and

(b) give advice as to who might be an appropriate person to a constable considering that matter under section 31(5) (and the constable must have regard to any such advice).

(9) In this section, “supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.
Support for vulnerable persons

(1) Subsection (2) applies where—
   (a) a person is in police custody,
   (b) a constable believes that the person is 16 years of age or over, and
   (c) owing to mental disorder, the person appears to the constable to be unable to—
      (i) understand sufficiently what is happening, or
      (ii) communicate effectively with the police.

(2) With a view to facilitating the provision of support of the sort mentioned in subsection (3) to the person as soon as reasonably practicable, the constable must ensure that intimation of the matters mentioned in subsection (4) is sent to a person who the constable considers is suitable to provide the support.

(3) That is, support to—
   (a) help the person in custody to understand what is happening, and
   (b) facilitate effective communication between the person and the police.

(4) Those matters are—
   (a) the place where the person is in custody, and
   (b) that support of the sort mentioned in subsection (3) is, in the view of the constable, required by the person.

(5) In this section—
   (a) “mental disorder” has the meaning given by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003,
   (b) the references to the police are to any—
      (i) constable, or
      (ii) person appointed as a member of police staff under section 26(1) of the Police and Fire Reform (Scotland) Act 2012.

Right to have intimation sent to solicitor

(1) A person who is in police custody has the right to have intimation sent to a solicitor of any or all of the following—
   (a) the fact that the person is in custody,
   (b) the place where the person is in custody,
   (c) that the solicitor’s professional assistance is required by the person,
   (d) if the person has been officially accused of an offence—
      (i) whether the person is to be released from custody, and
(ii) where the person is not to be released, the court before which the person is to be brought in accordance with section 18(2) and the date on which the person is to be brought before that court.

(2) Where the person requests that intimation be sent under subsection (1), the intimation must be sent as soon as reasonably practicable.

36 Right to consultation with solicitor

(1) A person who is in police custody has the right to have a private consultation with a solicitor at any time.

(2) In exceptional circumstances, a constable may delay the person’s exercise of the right under subsection (1) so far as it is necessary in the interests of—
   (a) the investigation or the prevention of crime, or
   (b) the apprehension of offenders.

(3) In subsection (1), “consultation” means consultation by such method as may be appropriate in the circumstances and includes (for example) consultation by telephone.

CHAPTER 6
POLICE POWERS AND DUTIES

Powers of police

37 Use of reasonable force

A constable may use reasonable force—
   (a) to effect an arrest,
   (b) when taking a person who is in police custody to any place.

38 Common law power of entry

Nothing in this Part affects any rule of law concerning the powers of a constable to enter any premises for any purpose.

39 Common law power of search etc.

(1) Nothing in this Part affects any rule of law by virtue of which a constable may exercise a power of the type described in subsection (2).

(2) The type of power is a power that a constable may exercise in relation to a person by reason of the person’s having been arrested and charged with an offence by a constable.

(3) Powers of the type described in subsection (2) include the power to—
   (a) search the person,
   (b) seize any item in the person’s possession,
   (d) cause the person to participate in an identification procedure.
40 Power of search etc. on arrest

(1) A constable may exercise in relation to a person to whom subsection (2) applies any power of the type described in section 39(2) which the constable would be able to exercise by virtue of a rule of law if the person had been charged with the relevant offence by a constable.

(2) This subsection applies to a person who—
   (a) is in police custody having been arrested without a warrant, and
   (b) has not, since being arrested, been charged with an offence by a constable.

(3) In subsection (1), “the relevant offence” means the offence in connection with which the person is in police custody.

Care of drunken persons

40A Taking drunk persons to designated place

(1) Where—
   (a) a person is liable to be arrested in respect of an offence by a constable without a warrant, and
   (b) the constable is of the opinion that the person is drunk,
the constable may take the person to a designated place (and do so instead of arresting the person).

(2) Nothing done under subsection (1)—
   (a) makes a person liable to be held unwillingly at a designated place, or
   (b) prevents a constable from arresting the person in respect of the offence referred to in that subsection.

(3) In this section, “designated place” is any place designated by the Scottish Ministers for the purpose of this section as a place suitable for the care of drunken persons.

Duties of police

41 Duty not to detain unnecessarily

A constable must take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody.

42 Duty to consider child’s wellbeing

(1) Subsection (2) applies when a constable is deciding whether to—
   (a) arrest a child,
   (b) hold a child in police custody,
   (c) interview a child about an offence which the constable has reasonable grounds to suspect the child of committing, or
   (d) charge a child with committing an offence.
(2) In taking the decision, the constable must treat the need to safeguard and promote the wellbeing of the child as a primary consideration.

(3) For the purposes of this section, a child is a person who is under 18 years of age.

42A Duties in relation to children in custody

(1) A child who is in police custody at a police station is, so far as practicable, to be prevented from associating with any adult who is officially accused of committing an offence other than an adult to whom subsection (2) applies.

(2) This subsection applies to an adult if a constable believes that it may be detrimental to the wellbeing of the child mentioned in subsection (1) to prevent the child and adult from associating with one another.

(3) For the purposes of this section—

“child” means person who is under 18 years of age,

“adult” means person who is 18 years of age or over.

42B Duty to inform Principal Reporter if child not being prosecuted

(1) Subsections (2) and (3) apply if—

(a) a person is being kept in a place of safety in accordance with section 18A(2) when it is decided not to prosecute the person for any relevant offence, and

(b) a constable has reasonable grounds for suspecting that the person has committed a relevant offence.

(2) The Principal Reporter must be informed, as soon as reasonably practicable, that the person is being kept in a place of safety under subsection (3).

(3) The person must be kept in a place of safety under this subsection until the Principal Reporter makes a direction under section 65(2) of the Children’s Hearings (Scotland) Act 2011.

(4) An offence is a “relevant offence” for the purpose of subsection (1) if—

(a) it is the offence with which the person was officially accused, leading to the person being kept in the place of safety in accordance with section 18A(2), or

(b) it is an offence arising from the same circumstances as the offence mentioned in paragraph (a).

(5) In this section, “place of safety” has the meaning given in section 202(1) of the Children’s Hearings (Scotland) Act 2011.

CHAPTER 8

GENERAL

Common law and enactments

50 Abolition of pre-enactment powers of arrest

A constable has no power to arrest a person without a warrant in respect of an offence that has been or is being committed other than—
(a) the power of arrest conferred by section 1,
(b) the power of arrest conferred by section 41(1) of the Terrorism Act 2000.

51 Abolition of requirement for constable to charge

Any rule of law that requires a constable to charge a person with an offence in particular circumstances is abolished.

52 Consequential modification

Schedule 1 contains repeals and other provisions consequential on this Part.

Code of practice about investigative functions

52A Code of practice about investigative functions

10 (1) The Lord Advocate must issue a code of practice on—
(a) the questioning, and recording of questioning, of persons suspected of committing offences, and
(b) the conduct of identification procedures involving such persons.

(2) The Lord Advocate—
(a) must keep the code of practice issued under subsection (1) under review,
(b) may from time to time revise the code of practice.

(3) The code of practice is to apply to the functions exercisable by or on behalf of—
(a) the Police Service of Scotland,
(b) such other bodies as are specified in the code (being bodies responsible for reporting offences to the procurator fiscal).

(4) Before issuing the code of practice, the Lord Advocate must consult publicly on a draft of the code.

(5) When preparing a draft of the code of practice for public consultation, the Lord Advocate must consult—
(a) the Lord Justice General,
(b) the Faculty of Advocates,
(c) the Law Society of Scotland,
(d) the Scottish Police Authority,
(e) the chief constable of the Police Service of Scotland,
(f) the Scottish Human Rights Commission,
(g) the Commissioner for Children and Young People in Scotland, and
(h) such other persons as the Lord Advocate considers appropriate.

(6) The Lord Advocate must lay before the Scottish Parliament a copy of the code of practice issued under this section.
(7) Where a court determines in criminal proceedings that evidence has been obtained in breach of the code of practice, the evidence is inadmissible in the proceedings unless the court is satisfied that admitting the evidence would not result in unfairness in the proceedings.

(8) Breach of the code of practice does not of itself give rise to grounds for any legal claim whatsoever.

(9) Subsections (3) to (8) apply to a revised code of practice under subsection (2)(b) as they apply to the code of practice issued under subsection (1).

**Disapplication of Part**

### 52B Disapplication in relation to service offences

(1) References in this Part to an offence do not include a service offence.

(2) Nothing in this Part applies in relation to a person who is arrested in respect of a service offence.

(3) In this section, “service offence” has the meaning given by section 50(2) of the Armed Forces Act 2006.

### 53 Disapplication to terrorism offences

(1) Nothing in this Part applies in relation to a person who is arrested under section 41(1) of the Terrorism Act 2000.

(2) Subsection (1) is subject to paragraph 18 of Schedule 8 to the Terrorism Act 2000.

**Powers to modify Part**

### 53A Further provision about application of Part

(1) The Scottish Ministers may by regulations modify this Part to provide that some or all of it—

(a) applies in relation to persons to whom it would otherwise not apply because of—

(i) section 52B, or

(ii) section 53,

(b) does not apply in relation to persons arrested otherwise than in respect of an offence.

(2) The Scottish Ministers may by regulations make such modifications to this Part as seem to them necessary or expedient in relation to its application to persons mentioned in subsection (1).

(3) Regulations under this section may make different provision for different purposes.

(4) Regulations under this section are subject to the affirmative procedure.

### 53B Further provision about vulnerable persons

(1) The Scottish Ministers may by regulations—

(a) amend subsections (2)(b) and (6) of section 25,
(b) amend subsections (1)(c), (3) and (5) of section 33,

(c) specify descriptions of persons who may for the purposes of subsection (2) of section 33 be considered suitable to provide support of the sort mentioned in subsection (3) of that section (including as to training, qualifications and experience).

(2) Regulations under subsection (1) are subject to the affirmative procedure.

Interpretation of Part

54 Meaning of constable

In this Part, “constable” has the meaning given by section 99(1) of the Police and Fire Reform (Scotland) Act 2012.

55 Meaning of officially accused

For the purposes of this Part, a person is officially accused of committing an offence if—

(a) a constable charges the person with the offence, or

(b) the prosecutor initiates proceedings against the person in respect of the offence.

56 Meaning of police custody

(1) For the purposes of this Part, a person is in police custody from the time the person is arrested by a constable until any one of the events mentioned in subsection (2) occurs.

(2) The events are—

(a) the person is released from custody,

(b) the person is brought before a court in accordance with section 18(2),

(c) the Principal Reporter makes a direction under section 65(2)(b) of the Children’s Hearings (Scotland) Act 2011 that the person continue to be kept in a place of safety.

PART 3

SOLEMN PROCEDURE

63 Proceedings on petition

(1) In section 35 (judicial examination) of the 1995 Act, after subsection (6) there is inserted—

“(6A) In proceedings before the sheriff in examination or further examination, the accused is not to be given an opportunity to make a declaration in respect of any charge.”.

(2) The following provisions of the 1995 Act are repealed—

(a) in section 35, subsections (3), (4) and (5),

(b) sections 36, 37 and 38,

(c) in section 68, subsection (1),

(d) in section 79, paragraph (b)(iii) of subsection (2),
64 Citation of jurors

In subsection (4) of section 85 (citation of jurors) of the 1995 Act, the words “by registered post or recorded delivery” are repealed.

65 Pre-trial time limits

(1) The 1995 Act is amended as follows.

(2) In section 65 (prevention of delay in trials)—

(a) in subsection (1), after paragraph (a) there is inserted—

“(aa) where an indictment has been served on the accused in respect of the sheriff court, a first diet is commenced within the period of 11 months;”,

(b) in subsection (1A), after the word “applies)” there is inserted “, the first diet (where subsection (1)(aa) above applies),”;

(c) in subsection (4)(b), for the words “110 days” there is substituted—

“(i) 110 days, unless a first diet in respect of the case is commenced within that period, which failing he shall be entitled to be admitted to bail; or

(ii) 140 days”,

(d) in subsection (9)—

(i) the word “and” immediately following paragraph (b) is repealed,

(ii) after paragraph (b) there is inserted—

“(ba) a first diet shall be taken to commence when it is called;”.

(3) In section 66 (service and lodging of indictment, etc.), for sub-paragraphs (i) and (ii) of paragraph (a) of subsection (6) there is substituted “at a first diet not less than 29 clear days after the service of the indictment,”.

(4) In section 72C (procedure where preliminary hearing does not proceed), for paragraph (b) of subsection (4) there is substituted—

“(b) where the charge is one that can lawfully be tried in the sheriff court, at a first diet in that court not less than 29 clear days after the service of the notice.”.

66 Duty of parties to communicate

(1) The 1995 Act is amended as follows.

(2) In section 71 (first diet), after subsection (1) there is inserted—

“(1ZA)If a written record has been lodged in accordance with section 71C, the court must have regard to the written record when ascertaining the state of preparation of the parties.”.

(3) Before section 72 there is inserted—

“71C Written record of state of preparation: sheriff court

(1) Subsection (2) applies where—”
(a) the accused is indicted to the sheriff court, and
(b) a solicitor—
   (i) has notified the court under section 72F(1) that the solicitor has been engaged by the accused for the purposes of conducting the accused’s defence, and
   (ii) has not subsequently been dismissed by the accused or withdrawn.

(2) The prosecutor and the accused’s legal representative must, within the period described in subsection (3), communicate with each other and jointly prepare a written record of their state of preparation with respect to their cases (referred to in this section as “the written record”).

(3) The period referred to in subsection (2) begins on the day the accused is served with an indictment and expires at the end of the day falling 14 days later.

(6) The written record must—
   (a) be in such form, or as nearly as may be in such form,
   (b) contain such information, and
   (c) be lodged in such manner,
   as may be prescribed by act of adjournal.

(7) The written record must state the manner in which the communication required by subsection (2) was conducted (for example, by telephone, email or a meeting in person).

(8) In subsection (2), “the accused’s legal representative” means—
   (a) the solicitor referred to in subsection (1), or
   (b) where the solicitor has instructed counsel for the purposes of the conduct of the accused’s case, either the solicitor or that counsel, or both of them.

(9) In subsection (8)(b), “counsel” includes a solicitor who has a right of audience in the High Court of Justiciary under section 25A of the Solicitors (Scotland) Act 1980.”.

(4) In section 75 (computation of certain periods), after the words “67(3),” there is inserted “71C(3)”. 

67 First diets

(1) The 1995 Act is amended as follows.

(2) In section 66 (service and lodging of indictment, etc.)—
   (a) after subsection (6AA) there is inserted—
      “(6AB) A notice affixed under subsection (4)(b) or served under subsection (6), where the indictment is in respect of the sheriff court, must contain intimation to the accused that the first diet may proceed and a trial diet may be appointed in the accused’s absence.”,
   (b) in subsection (6B), for the words “or (6AA)” there is substituted “, (6AA) or (6AB)”. 

(3) In section 71 (first diet)—
Part 3—Solemn procedure

(a) in subsection (1), the words from “whether” to “particular” are repealed,

(b) in subsection (5), after the word “proceed” there is inserted “, and a trial diet may be appointed,”,

(c) in subsection (6), for the words from the beginning to “required” there is substituted “Where the accused appears at the first diet, the accused is to be required at that diet”,

(d) subsection (7) is repealed,

(e) in subsection (9), after the word “section” there is inserted “and section 71B”.

(4) After section 71 there is inserted—

“71B First diet: appointment of trial diet

(1) At a first diet, unless a plea of guilty is tendered and accepted, the court must—

(a) after complying with section 71, and

(b) subject to subsections (3) to (7),

appoint a trial diet.

(2) Where a trial diet is appointed at a first diet, the accused must appear at the trial diet and answer the indictment.

(3) In appointing a trial diet under subsection (1), in any case in which the 12 month period applies (whether or not the 140 day period also applies in the case)—

(a) if the court considers that the case would be likely to be ready to proceed to trial within that period, it must, subject to subsections (5) to (7), appoint a trial diet for a date within that period, or

(b) if the court considers that the case would not be likely to be so ready, it must give the prosecutor an opportunity to make an application to the court under section 65(3) for an extension of the 12 month period.

(4) Where paragraph (b) of subsection (3) applies—

(a) if such an application as is mentioned in that paragraph is made and granted, the court must, subject to subsections (5) to (7), appoint a trial diet for a date within the 12 month period as extended, or

(b) if no such application is made or if one is made but is refused by the court—

(i) the court may desert the first diet simpliciter or pro loco et tempore, and

(ii) where the accused is committed until liberated in due course of law, the accused must be liberated forthwith.

(5) Subsection (6) applies in any case in which—

(a) the 140 day period as well as the 12 month period applies, and

(b) the court is required, by virtue of subsection (3)(a) or (4)(a) to appoint a trial diet within the 12 month period.

(6) In such a case—
(a) if the court considers that the case would be likely to be ready to proceed to trial within the 140 day period, it must appoint a trial diet for a date within that period as well as within the 12 month period, or

(b) if the court considers that the case would not be likely to be so ready, it must give the prosecutor an opportunity to make an application under section 65(5) for an extension of the 140 day period.

(7) Where paragraph (b) of subsection (6) applies—

(a) if such an application as is mentioned in that paragraph is made and granted, the court must appoint a trial diet for a date within the 140 day period as extended as well as within the 12 month period,

(b) if no such application is made or if one is made but is refused by the court—

(i) the court must proceed under subsection (3)(a) or (as the case may be) (4)(a) to appoint a trial diet for a date within the 12 month period, and

(ii) the accused is then entitled to be admitted to bail.

(8) Where an accused is, by virtue of subsection (7)(b)(ii), entitled to be admitted to bail, the court must, before admitting the accused to bail, give the prosecutor an opportunity to be heard.

(9) On appointing a trial diet under this section in a case where the accused has been admitted to bail (otherwise than by virtue of subsection (7)(b)(ii)), the court, after giving the parties an opportunity to be heard—

(a) must review the conditions imposed on the accused's bail, and

(b) having done so, may, if it considers it appropriate to do so, fix bail on different conditions.

(10) In this section—

“the 12 month period” means the period specified in subsection (1)(b) of section 65 and, in any case in which that period has been extended under subsection (3) of that section, includes that period as so extended,

“the 140 day period” means the period specified in subsection (4)(b)(ii) of section 65 and, in any case in which that period has been extended under subsection (5) of that section, includes that period as so extended.”.

(5) In subsection (3) of section 76 (procedure where accused desires to plead guilty), for the words from “or, where” to “Court,” there is substituted “, the first diet or (as the case may be)”. 

(6) After section 83A there is inserted—

“83B Continuation of trial diet in the sheriff court

(1) In the sheriff court a trial diet and, if it is adjourned, the adjourned diet, may, without having been commenced, be continued from sitting day to sitting day—

(a) by minute, in such form as may be prescribed by act of adjournal, signed by the sheriff clerk,
(b) up to such maximum number of sitting days after the day originally appointed for the trial diet as may be so prescribed.

(2) The indictment falls if a trial diet, or adjourned diet, is not commenced by the end of the last sitting day to which it may be continued by virtue of subsection (1).

(3) For the purposes of this section, a trial diet or adjourned trial diet is to be taken to commence when it is called.

(4) In this section, “sitting day” means any day on which the court is sitting but does not include any Saturday or Sunday or any day which is a court holiday.”.

(7) The italic cross-heading immediately preceding section 83A becomes “Continuation of trial diet”.

68 Preliminary hearings

In section 72A (preliminary hearing: appointment of trial diet) of the 1995 Act—

(a) in subsection (1), for the words from the beginning to “section” there is substituted “In any case in which subsection (6) of section 72”,

(b) subsection (1A) is repealed.

69 Plea of guilty

In the 1995 Act—

(a) in section 70 (proceedings against organisations), subsection (7) is repealed,

(b) in subsection (1) of section 77 (plea of guilty), the words from “and, subject” to the end are repealed.

PART 4

SENTENCING

Maximum term for weapons offences

71 Maximum term for weapons offences

(1) The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.

(2) In subsection (1)(b) of section 47 (prohibition of the carrying of offensive weapons), for the word “four” there is substituted “5”.

(3) In subsection (1)(b) of section 49 (offence of having in public place article with blade or point), for the word “four” there is substituted “5”.

(4) In subsection (5) of section 49A (offence of having article with blade or point (or offensive weapon) on school premises)—

(a) in paragraph (a)(ii), for the word “four” there is substituted “5”,

(b) in paragraph (b)(ii), for the word “four” there is substituted “5”.

(5) In subsection (6)(b) of section 49C (offence of having offensive weapon etc. in prison), for the word “4” there is substituted “5”.
Prisoners on early release

72 Sentencing under the 1995 Act

After section 200 of the 1995 Act there is inserted—

“200A Sentencing prisoners on early release

(1) Before sentencing or otherwise dealing with a person who has been found by the court to have committed an offence punishable with imprisonment (other than an offence in respect of which life imprisonment is mandatory), the court must so far as is reasonably practicable ascertain whether the person was on early release at the time the offence was committed.

(2) Where the court ascertains that the person was on early release at the time the offence was committed, the court must consider making an order, or as the case may be a reference, under section 16(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

(3) For the purposes of this section a person is on early release if, by virtue of one of the following enactments, the person is not in custody—

(a) Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993,

(b) Part II of the Criminal Justice Act 1991, or

(c) Part 12 of the Criminal Justice Act 2003.”.

73 Sentencing under the 1993 Act

(1) Section 16 (commission of offence by released prisoner) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is amended as follows.

(2) In subsection (1), for the words “or Part II of the Criminal Justice Act 1991” there is substituted “, Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003”.

(3) In subsection (2)—

(a) in paragraph (a), for the words from “other” to “below” there is substituted “to which subsection (2A) does not apply”,

(b) in paragraph (b), for the words from “where” to “subsection (1)(a)” there is substituted “to which subsection (2A) applies”.

(4) After subsection (2) there is inserted—

“(2A) This subsection applies to a case if—

(a) the court mentioned in subsection (1)(b) is inferior to the court which imposed the original sentence, and

(b) the whole of the period described in subsection (2)(a) exceeds—

(i) if the court mentioned in subsection (1)(b) is a justice of the peace court not constituted by a stipendiary magistrate, 60 days,

(ii) if the court is a justice of the peace court constituted by a stipendiary magistrate or the sheriff sitting summarily, 12 months,

(iii) if the court is the sheriff sitting as a court of solemn jurisdiction, 5 years.”.
PART 5

APPEALS AND SCCRC

Appeals

74 Preliminary pleas in summary cases

(1) Section 174 (appeals relating to preliminary pleas) of the 1995 Act is amended as follows.

(2) In subsection (1)—
   (a) the words from “with the leave” to “and” are repealed,
   (b) for the words “this subsection” there is substituted “subsection (1A)(b)”.

(3) After subsection (1) there is inserted—

“(1A) An appeal under subsection (1) may be taken—
   (a) in the case of a decision to dismiss the complaint or any part of it, by the prosecutor without the leave of the court,
   (b) in any other case, only with the leave of the court of first instance (granted on the motion of a party or ex proprio motu).”.

(4) After subsection (2) there is inserted—

“(2A) Subsection (3) applies where—
   (a) the court grants leave to appeal under subsection (1), or
   (b) the prosecutor—
      (i) indicates an intention to appeal under subsection (1), and
      (ii) by virtue of subsection (1A)(a), does not require the leave of the court.”.

(5) In subsection (3), for the words from the beginning to “it” there is substituted “Where this subsection applies, the court of first instance”.

75 Preliminary diets in solemn cases

In section 74 (appeals in connection with preliminary diets) of the 1995 Act—

(a) in subsection (1), for the words from “to—” to “motu)” there is substituted “to any right of appeal under section 106 or 108 a party may,”,

(b) after subsection (2) there is inserted—

“(2A) An appeal under subsection (1) may be taken—

(a) in the case of a decision to dismiss the indictment or any part of it, by the prosecutor without the leave of the court,
(b) in any other case, only with the leave of the court of first instance (granted on the motion of a party or ex proprio motu).”.

76 Extending certain time limits: summary

(1) Section 181 (stated case: directions by High Court) of the 1995 Act is amended as follows.
(2) After subsection (1) there is inserted—

“(1A) Where an application for a direction under subsection (1)—

(a) is made by the person convicted, and

(b) relates to the requirements of section 176(1),

the High Court may make a direction only if it is satisfied that doing so is justified by exceptional circumstances.

(1B) In considering whether there are exceptional circumstances for the purpose of subsection (1A), the High Court must have regard to—

(a) the length of time that has elapsed between the expiry of the period mentioned in section 176(1)(a) and the making of the application,

(b) the reasons stated in accordance with subsection (2A)(a)(i),

(c) the proposed grounds of appeal.”.

(3) Subsection (2C) is repealed.

(4) In paragraph (a) of subsection (3), the words from “(unless” to the end are repealed.

(5) At the end of the section there is inserted—

“(5) If the High Court makes a direction under subsection (1) it must—

(a) give reasons for the decision in writing, and

(b) give the reasons in ordinary language.”.

77 Extending certain time limits: solemn

(1) In section 105 (appeal against refusal of application) of the 1995 Act, after subsection (3) there is inserted—

“(3A) Subsection (3) does not entitle an applicant to be present at the hearing and determination of an application under section 111(2) unless the High Court has made a direction under section 111(4)(b).”.

(2) Section 111 (provisions supplementary to sections 109 and 110) of the 1995 Act is amended as follows.

(3) After subsection (2) there is inserted—

“(2ZA) Where an application under subsection (2) is received after the period to which it relates has expired, the High Court may extend the period only if it is satisfied that doing so is justified by exceptional circumstances.

(2ZB) In considering whether there are exceptional circumstances for the purpose of subsection (2ZA), the High Court must have regard to—

(a) the length of time that has elapsed between the expiry of the period and the making of the application,

(b) the reasons stated in accordance with subsection (2A)(a)(i),

(c) the proposed grounds of appeal.”.

(4) In subsection (2A)—

(a) the words “seeking extension of the period mentioned in section 109(1) of this Act” are repealed,
(b) in paragraph (a)(i)—

(i) after “failed” there is inserted “, or expects to fail,”,

(ii) the words “in section 109(1)” are repealed.

(5) Subsection (2C) is repealed.

(6) At the end of the section there is inserted—

“(4) An application under subsection (2) is to be dealt with by the High Court—

(a) in chambers, and

(b) unless the Court directs otherwise, without the parties being present.

(5) If the High Court extends a period under subsection (2) it must—

(a) give reasons for the decision in writing, and

(b) give the reasons in ordinary language.”.

78 Certain lateness not excusable

In section 300A (power of court to excuse procedural irregularities) of the 1995 Act, after subsection (7) there is inserted—

“(7A) Subsection (1) does not authorise a court to excuse a failure to do any of the following things timeously—

(a) lodge written intimation of intention to appeal in accordance with section 109(1),

(b) lodge a note of appeal in accordance with section 110(1)(a),

(c) make an application for a stated case under section 176(1),

(d) lodge a note of appeal in accordance with section 186(2)(a).”.

79 Advocation in solemn proceedings

After section 130 of the 1995 Act there is inserted—

“130A Bill of advocation not competent in respect of certain decisions

It is not competent to bring under review of the High Court by way of bill of advocation a decision taken at a first diet or a preliminary hearing.”.

80 Advocation in summary proceedings

After section 191A of the 1995 Act there is inserted—

“191B Bill of advocation not competent in respect of certain decisions

It is not competent to bring under review of the High Court by way of bill of advocation a decision of the court of first instance that relates to such objection or denial as is mentioned in section 144(4).”.

81 Finality of appeal proceedings

(1) In subsection (2) of section 124 (finality of proceedings) of the 1995 Act—

(a) for the words “sections 288ZB and 288AA” there is substituted “section 288AA”,
(b) the words “a reference under section 288ZB or” are repealed.

(2) After section 194 of the 1995 Act there is inserted—

“194ZA Finality of proceedings

(1) Every interlocutor and sentence (including disposal or order) pronounced by the High Court when disposing of an appeal relating to summary proceedings is final and conclusive and not subject to review by any court whatsoever.

(2) Subsection (1) is subject to—

(a) Part XA and section 288AA of this Act, and

(b) paragraph 13(a) of Schedule 6 to the Scotland Act 1998.

(3) It is incompetent to stay or suspend any execution or diligence issuing from the High Court under this Part, except for the purposes of an appeal under—

(a) section 288AA of this Act, or

(b) paragraph 13(a) of Schedule 6 to the Scotland Act 1998.”.

SCCRC

15 82 References by SCCRC

(1) The 1995 Act is amended as follows.

(2) In section 194B in subsection (1), the words “, subject to section 194DA of this Act,” are repealed.

(3) The title of section 194B becomes “References by the Commission”.

(3A) In section 194C, subsection (2) is repealed.

(4) Section 194DA is repealed.

PART 5A

CHILDREN AFFECTED BY PARENTAL IMPRISONMENT

82A Duty to undertake a child and family impact assessment

(1) Subsection (2) applies where a person who has responsibility for a child—

(a) has been remanded in custody awaiting trial,

(b) has been found by a court to have committed an offence punishable with imprisonment and has been remanded in custody awaiting sentence, or

(c) has been sentenced to a term of imprisonment or other detention.

(2) The court must ensure that an assessment (a “child and family impact assessment”) is carried out to determine the likely impact of the imprisonment or other detention on the wellbeing of the child, and to identify any support and assistance which will be necessary to meet the child’s wellbeing needs.

(3) A child and family impact assessment must be undertaken as soon as reasonably practicable after the period of imprisonment or other detention has been imposed on the person.
(4) A child and family impact assessment must—

(a) consider how the imprisonment or other detention is likely to affect the wellbeing of any child for whom the person is responsible,

(b) identify the wellbeing needs of any child arising from the imprisonment or other detention,

(c) confirm any actions to be taken, as a result of the child and family impact assessment, to ensure that the child’s wellbeing needs are met,

(d) confirm who is to be responsible for taking those actions,

(e) provide advice and information about what can best be done to address the wellbeing needs of the child, and

(f) specify arrangements for a future review of the child and family impact assessment.

(5) The Scottish Ministers may by regulations make provision requiring such persons (or descriptions of persons) as may be prescribed in the regulations to undertake a child and family impact assessment under subsection (2).

(6) Regulations under subsection (5) are subject to the affirmative procedure.

**PART 6**

**MISCELLANEOUS**

**CHAPTER A1**

**PUBLICATION OF PROSECUTORIAL TEST**

**82B Publication of prosecutorial test**

(1) The Lord Advocate must make available to the public a statement setting out in general terms the matters about which a prosecutor requires to be satisfied in order to initiate, and continue with, criminal proceedings in respect of any offence.

(2) The reference in subsection (1) to a prosecutor is to one within the Crown Office and Procurator Fiscal Service.

**CHAPTER 1**

**STATEMENTS AND PROCEDURE**

**Statements by accused**

(1) After section 261 of the 1995 Act there is inserted—

“261ZA Statements by accused

(1) Evidence of a statement to which this subsection applies is not inadmissible as evidence of any fact contained in the statement on account of the evidence’s being hearsay.”
(2) Subsection (1) applies to a statement made by the accused in the course of the accused’s being questioned (whether as a suspect or not) by a constable, or another official, investigating an offence.

(3) Subsection (1) does not affect the issue of whether evidence of a statement made by one accused is admissible as evidence in relation to another accused.”.

(2) The title of section 261 of the 1995 Act becomes “Statements by co-accused”.

Use of technology

86 Live television links

(1) After section 288G of the 1995 Act there is inserted—

“Use of live television link

288H Participation through live television link

(1) Where the court so determines at any time before or at a specified hearing, a detained person is to participate in the hearing by means of a live television link.

(2) The court—

(a) must give the parties in the case an opportunity to make representations before making a determination under subsection (1),

(b) may make such a determination only if it considers that to do so is not contrary to the interests of justice.

(3) The court may require a detained person to participate by means of a live television link in any proceedings at a specified hearing or otherwise in the case for the sole purpose of considering whether to make a determination under subsection (1) with respect to a specified hearing.

(4) Where a detained person participates in any specified hearing or other proceedings by means of a live television link—

(a) a place of detention is, for the purposes of the hearing or other proceedings, deemed to be part of the court-room, and

(b) accordingly, the hearing or other proceedings is deemed to take place in the presence of the detained person.

(5) In this section—

“court-room” includes chambers,

“live television link” means live television link between a place of detention and the court-room in which any specified hearing or other proceedings is or (as the case may be) is to be held.

288I Evidence and personal appearance

(1) No evidence as to a charge on any complaint or indictment may be led or presented at a specified hearing in respect of which there is a determination under section 288H(1).

(2) The court—
(a) may, at any time before or at a specified hearing, revoke a determination under section 288H(1),

(b) must do so in relation to a detained person if it considers that it is in the interests of justice for the detained person to appear in person.

(3) The court may postpone a specified hearing to a later day if, on the day on which a specified hearing takes place or is due to take place—

(a) the court decides not to make a determination under section 288H(1) with respect to the hearing, or

(b) the court revokes such a determination under subsection (2).

288IA Effect of postponement

(1) Except where a postponement under section 288I(3) is while section 18(2) of the Criminal Justice (Scotland) Act 2015 applies to a detained person, the following do not count towards any time limit arising in such a person’s case if such a postponement in the case is to the next day on which the court is sitting—

(a) that next day,

(b) any intervening Saturday, Sunday or court holiday.

(2) Even while section 18(2) of the Criminal Justice (Scotland) Act 2015 applies to a detained person, that section does not prevent a postponement under section 288I(3) in the person’s case.

(3) In section 288I and this section, “postpone” includes adjourn.

288J Specified hearings

(1) The Lord Justice General may by directions specify types of hearing at the High Court, sheriff court and JP court in which a detained person may participate in accordance with section 288H(1).

(2) Directions under subsection (1) may specify types of hearing by reference to—

(a) the venues at which they take place,

(b) particular places of detention,

(c) categories of cases or proceedings to which they relate.

(3) Directions under subsection (1) may—

(a) vary or revoke earlier such directions,

(b) make different provision for different purposes.

(4) The validity of any proceedings is not affected by the participation of a detained person by means of a live television link in a hearing that is not a specified hearing.

(5) In this section, “hearing” includes any diet or hearing in criminal proceedings which may be held in the presence of an accused, a convicted person or an appellant in the proceedings.
288K Defined terms

For the purpose of sections 288H to 288J—

“detained person” means person who is—

(a) an accused, a convicted person or an appellant in the case to which a specified hearing relates, and

(b) imprisoned or otherwise lawfully detained (whether or not in connection with an offence) at any place in Scotland,

“place of detention” means place in which a detained person is imprisoned or detained,

“specified hearing” means hearing of a type specified in directions having effect for the time being under section 288J.”.

(2) In addition—

(a) in section 117 (presence of appellant or applicant at hearing) of the 1995 Act—

(i) subsection (6) is repealed,

(ii) in subsection (7), for the word “(6)” there is substituted “(5)”,

(b) section 80 of the Criminal Justice (Scotland) Act 2003 is repealed.

86A Electronic proceedings

(1) In section 305 (Acts of Adjournal) of the 1995 Act, after subsection (1) there is inserted—

“(1A) Subsection (1) above extends to making provision by Act of Adjournal for something to be done in electronic form or by electronic means.”.

(2) These provisions of the 1995 Act are repealed—

(a) in section 141—

(i) subsection (3A),

(ii) in subsection (5), the words “(including a legible version of an electronic communication)”,

(iii) subsection (5ZA),

(iv) in subsection (5A), paragraph (b) together with the word “or” immediately preceding it,

(v) subsections (6A), (7A) and (7B),

(b) section 303B together with the italic heading immediately preceding it,

(c) section 308A.

(3) In the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, section 42 is repealed.
CHAPTER 1A

AUTHORISATION UNDER PART III OF THE POLICE ACT 1997

86B Authorisation of persons other than constables

In section 108 (interpretation of Part III) of the Police Act 1997, after subsection (1) there is inserted—

“(1A) A reference in this Part to a staff officer of the Police Investigations and Review Commissioner is to any person who—

(a) is a member of the Commissioner’s staff appointed under paragraph 7A of schedule 4 to the Police, Public Order and Criminal Justice (Scotland) Act 2006, or

(b) is a member of the Commissioner’s staff appointed under paragraph 7 of that schedule to whom paragraph 7B(2) of that schedule applies.”.

CHAPTER 2

POLICE NEGOTIATING BOARD FOR SCOTLAND

87 Establishment and functions

(1) After section 55 of the Police and Fire Reform (Scotland) Act 2012 there is inserted—

“CHAPTER 8A

POLICE NEGOTIATING BOARD FOR SCOTLAND

55A Establishment of the PNBS

(1) There is established a body to be known as the Police Negotiating Board for Scotland.

(2) Schedule 2A makes further provision about the Police Negotiating Board for Scotland.

(3) In this Chapter, the references to the PNBS are to the Police Negotiating Board for Scotland.

55B Representations about pay etc.

(1) The PNBS may make representations to the Scottish Ministers about—

(a) any draft regulations shared with it under section 54(1)(a),

(b) any draft determination of a kind mentioned in subsection (2),

(c) the matters mentioned in subsection (4) generally.

(2) The draft determination referred to in subsection (1)(b) is a draft of a determination to be made by the Scottish Ministers—

(a) in relation to a matter mentioned in subsection (4), and

(b) by virtue of regulations made under section 48.

(3) The Scottish Ministers may, after consulting the chairperson of the PNBS—

(a) require the PNBS to make representations under subsection (1),
(b) set or extend a time limit within which it must do so.

(4) The matters referred to in subsections (1)(c) and (2)(a) are the following matters in relation to constables (other than special constables) and police cadets—

(a) pay, allowances and expenses,

(b) public holidays and leave,

(d) hours of duty.

55C Representations on other matters

(1) The PNBS may make representations to the Scottish Ministers about—

(a) any draft regulations shared with it under section 54(2),

(b) the matters mentioned in subsection (2) generally.

(2) The matters referred to in subsection (1)(b) are matters relating to the governance, administration and conditions of service of constables (other than special constables) and police cadets.

(3) But those matters do not include the matters mentioned in section 55B(4).

55CA Steps following arbitration

(1) If representations under section 55B(1) are made in terms settled through arbitration in accordance with the PNBS’s constitution, the Scottish Ministers must take all reasonable steps appearing to them to be necessary for giving effect to those representations.

(2) However, this—

(a) requires the Scottish Ministers to take such steps only in qualifying cases (see paragraph 4C(2) of schedule 2A),

(b) does not require the Scottish Ministers—

(i) to take such steps in relation to representations that are no longer being pursued by the PNBS, or

(ii) where such steps would comprise or include the making of regulations under section 48, to make regulations under that section more than once with respect to the same representations.

55D Reporting by the PNBS

(1) The PNBS must, as soon as practicable after the end of each reporting year, prepare a report on how it has carried out its functions during that year.

(2) The PNBS must—

(a) give a copy of each report to the Scottish Ministers,

(b) publish each report in such manner as it considers appropriate.

(3) In this Chapter, “reporting year” is as defined in the PNBS’s constitution.”.
(2) In section 54 (consultation on regulations) of the Police and Fire Reform (Scotland) Act 2012, in subsection (1)—
   (a) for the words from “61(1)” to “pensions)” there is substituted “55B(4)”,
   (b) in paragraph (a), for the words “the United Kingdom” there is substituted “Scotland”.

(2A) In section 125 (subordinate legislation) of the Police and Fire Reform (Scotland) Act 2012, after subsection (3) there is inserted—
   “(3A) Regulations under paragraph 4(6) of schedule 2A are subject to the affirmative procedure if they include provisions of the kind mentioned in paragraph 4B(2) or 4C(2) of that schedule.”.

(3) After schedule 2 to the Police and Fire Reform (Scotland) Act 2012 there is inserted (as schedule 2A to that Act) the schedule set out in schedule 3.

87A Consequential and transitional

(1) In connection with section 87—
   (a) in schedule 1 to the Freedom of Information (Scotland) Act 2002, after paragraph 50A there is inserted—
      “50B The Police Negotiating Board for Scotland.”,
   (b) in schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003, at the appropriate place under the heading referring to offices there is inserted—
      “Chairperson of the Police Negotiating Board for Scotland”.

(2) On the coming into force of section 87—
   (a) a person then holding office as the chairman of the Police Negotiating Board for the United Kingdom by virtue of section 61(2) of the Police Act 1996 is to be regarded as if appointed as the chairperson of the Police Negotiating Board for Scotland under paragraph 2(2) of schedule 2A to the Police and Fire Reform (Scotland) Act 2012,
   (b) any agreements then extant within or involving the Police Negotiating Board for the United Kingdom (so far as relating to the Police Service of Scotland) of the kind for which Chapter 8A of Part 1 of the Police and Fire Reform (Scotland) Act 2012 includes provision are to be regarded as if made as agreements within or involving the Police Negotiating Board for Scotland by virtue of that Chapter.

PART 7
FINAL PROVISIONS

Ancillary and definition

88 Ancillary regulations

(1) The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) Regulations under this section—
(a) are subject to the affirmative procedure if they add to, replace or omit any part of 
the text of an Act (including this Act),
(b) otherwise, are subject to the negative procedure.

89 Meaning of “the 1995 Act”

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

Commencement and short title

90 Commencement

(1) This Part comes into force on the day after Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers 
may by order appoint.
(3) An order under subsection (2) may include transitional, transitory or saving provision.

91 Short title

The short title of this Act is the Criminal Justice (Scotland) Act 2015.
SCHEDULE A1
(introduced by sections 14(3) and 20(6))

BREACH OF LIBERATION CONDITION

Offence of breaching condition

1 (1) A person commits an offence if, without reasonable excuse, the person breaches a liberation condition by reason of—
   (a) failing to comply with an investigative liberation condition,
   (b) failing to appear at court as required by the terms of an undertaking, or
   (c) failing to comply with the terms of an undertaking, other than the requirement to
       appear at court.

2 (2) Sub-paragraph (1) does not apply where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (in which case see paragraph 3).

3 (3) It is competent to amend a complaint to include an additional charge of an offence under sub-paragraph (1) at any time before the trial of a person in summary proceedings for—
   (a) the original offence, or
   (b) an offence arising from the same circumstances as the original offence.

4 (4) In sub-paragraph (3), “the original offence” is the offence in connection with which—
   (a) an investigative liberation condition was imposed, or
   (b) an undertaking was given.

Sentencing for the offence

2 (1) A person who commits an offence under paragraph 1(1) is liable on summary conviction to—
   (a) a fine not exceeding level 3 on the standard scale, or
   (b) imprisonment for a period—
       (i) where conviction is in the justice of the peace court, not exceeding 60 days,
       (ii) where conviction is in the sheriff court, not exceeding 12 months.

3 (2) A penalty under sub-paragraph (1) may be imposed in addition to any other penalty which it is competent for the court to impose, even if the total of penalties imposed exceeds the maximum penalty which it is competent to impose in respect of the original offence.

3 (3) The reference in sub-paragraph (2) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—
   (a) where the sentences are imposed at the same time (whether or not in relation to
       the same complaint), framing the sentences so that they have effect consecutively,
   (b) where the sentences are imposed at different times, framing the sentence imposed
       later so that (if the earlier sentence has not been served) the later sentence has
       effect consecutive to the earlier sentence.
(4) Sub-paragraph (3)(b) is subject to section 204A (restriction on consecutive sentences for released prisoners) of the 1995 Act.

(5) Where a person is to be sentenced in respect of an offence under paragraph 1(1), the court may remit the person for sentence in respect of it to any court which is considering the original offence.

(6) In sub-paragraphs (2) and (5), “the original offence” is the offence in connection with which—
(a) the investigative liberation condition was imposed, or
(b) the undertaking was given.

Breach by committing offence

3 (1) This paragraph applies—
(a) where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (“offence O”), but
(b) only if the fact that offence O was committed while the person was subject to the liberation condition is specified in the complaint or indictment.

(2) In determining the penalty for offence O, the court must have regard—
(a) to the fact that offence O was committed in breach of a liberation condition,
(b) if the breach is by reason of the person’s failure to comply with the terms of an investigative liberation condition, to the matters mentioned in paragraph 4(1),
(c) if the breach is by reason of the person’s failure to comply with the terms of an undertaking other than the requirement to appear at court, to the matters mentioned in paragraph 5(1).

(3) Where the maximum penalty in respect of offence O is specified by (or by virtue of) an enactment, the maximum penalty is increased—
(a) where it is a fine, by the amount equivalent to level 3 on the standard scale,
(b) where it is a period of imprisonment—
(i) as respects conviction in the justice of the peace court, by 60 days,
(ii) as respects conviction in the sheriff court or the High Court, by 6 months.

(4) The maximum penalty is increased by sub-paragraph (3) even if the penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(5) In imposing a penalty in respect of offence O, the court must state—
(a) where the penalty is different from that which the court would have imposed had sub-paragraph (2) not applied, the extent of and the reasons for that difference,
(b) otherwise, the reasons for there being no such difference.

Matters for paragraph 3(2)(b)

4 (1) For the purpose of paragraph 3(2)(b), the matters are—
(a) the number of offences in connection with which the person was subject to investigative liberation conditions when offence O was committed,
(b) any previous conviction the person has for an offence under paragraph 1(1)(a),
(c) the extent to which the sentence or disposal in respect of any previous conviction
differed, by virtue of paragraph 3(2), from that which the court would have
imposed but for that paragraph.

5 (2) In sub-paragraph (1)—
(a) in paragraph (b), the reference to any previous conviction includes any previous
conviction by a court in England and Wales, Northern Ireland or a member State
of the European Union (other than the United Kingdom) for an offence that is
equivalent to an offence under paragraph 1(1)(a),
(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a
previous conviction by a court referred to in paragraph (a) of this sub-paragraph,
as references to any provision that is equivalent to paragraph 3(2).

3 Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to
determine.

15 Matters for paragraph 3(2)(c)
5 (1) For the purpose of paragraph 3(2)(c), the matters are—
(a) the number of undertakings to which the person was subject when offence O was
committed,
(b) any previous conviction the person has for an offence under paragraph 1(1)(c),
(c) the extent to which the sentence or disposal in respect of any previous conviction
differed, by virtue of paragraph 3(2), from that which the court would have
imposed but for that paragraph.

5 (2) In sub-paragraph (1)—
(a) in paragraph (b), the reference to any previous conviction includes any previous
conviction by a court in England and Wales, Northern Ireland or a member State
of the European Union (other than the United Kingdom) for an offence that is
equivalent to an offence under paragraph 1(1)(c),
(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a
previous conviction by a court referred to in paragraph (a) of this sub-paragraph,
as references to any provision that is equivalent to paragraph 3(2).

3 Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to
determine.

Evidential presumptions
6 (1) In any proceedings in relation to an offence under paragraph 1(1), the facts mentioned in
sub-paragraph (2) are to be held as admitted unless challenged by preliminary objection
before the person’s plea is recorded.

3 The facts are—
(a) that the person breached an undertaking by reason of failing to appear at court as
required by the terms of the undertaking,

(b) that the person was subject to a particular—
(i) investigative liberation condition, or
(ii) condition under the terms of an undertaking.

(3) In proceedings to which sub-paragraph (4) applies—

(a) something in writing, purporting to impose investigative liberation conditions and bearing to be signed by a constable, is sufficient evidence of the terms of the investigative liberation conditions imposed under section 14(2),

(b) something in writing, purporting to be an undertaking and bearing to be signed by the person said to have given it, is sufficient evidence of the terms of the undertaking at the time that it was given,

(c) a document purporting to be a notice (or a copy of a notice) under section 16 or 21, is sufficient evidence of the terms of the notice.

(4) This sub-paragraph applies to proceedings—

(a) in relation to an offence under paragraph 1(1), or

(b) in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment.

(5) In proceedings in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment, that fact is to be held as admitted unless challenged—

(a) in summary proceedings, by preliminary objection before the person’s plea is recorded, or

(b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the 1995 Act.

Interpretation

7 In this schedule—

(a) references to an investigative liberation condition are to a condition imposed under section 14(2) or 17(3)(b) subject to any modification by notice under section 16(1) or (5)(a),

(b) references to an undertaking are to an undertaking given under section 19(2)(a),

(c) references to the terms of an undertaking are to the terms of an undertaking subject to any modification by—

(i) notice under section 21(1), or

(ii) the sheriff under section 22(3)(b).

SCHEDULE 1

(introduced by section 52)

MODIFICATIONS IN CONNECTION WITH PART 1

PART 1

PROVISIONS AS TO ARREST

Criminal Procedure (Scotland) Act 1995

The 1995 Act is amended as follows.
Criminal Justice (Scotland) Bill

Schedule 1—Modifications in connection with Part 1

Part 1—Provisions as to arrest

2 These provisions are repealed—
   (a) in section 13, subsection (7),
   (b) section 21.

3 In section 28—
   (a) in subsection (1), for the words “has broken, is breaking, or is likely to break” there is substituted “is likely to breach”,
   (b) in subsection (1A), for the words “has breached, or is likely to breach,” there is substituted “is likely to breach”.

4 (1) In section 234A, subsections (4A) and (4B) are repealed.
   (2) In subsection (11) of section 234AA, for the words from the beginning to “those sections apply” there is substituted “Section 9 (breach of orders) of the Antisocial Behaviour etc. (Scotland) Act 2004 applies in relation to antisocial behaviour orders made under this section as that section applies”.

Miscellaneous enactments

5 In section 4 of the Trespass (Scotland) Act 1865, for the words from the beginning to “every” in the last place where it occurs there is substituted “A”.

6 In subsection (3) of section 1 of the Public Meeting Act 1908, the words from “, and if he refuses” to the end are repealed.

7 In the Firearms Act 1968, section 50 is repealed.

8 In the Civic Government (Scotland) Act 1982—
   (a) in section 59, subsections (1), (2) and (5) are repealed,
   (aa) in subsection (3), for the words “he can be delivered into the custody” there is substituted “the arrival”,
   (b) in section 65, subsections (4) and (5) are repealed,
   (c) in subsection (1) of section 80, for the words from “and taken” to the end there is substituted “by a constable”.

9 In the Child Abduction Act 1984, section 7 is repealed.

10 In section 11 of the Protection of Badgers Act 1992, paragraph (c) of subsection (1) is repealed.

11 In the Criminal Justice and Public Order Act 1994, section 60B is repealed.

12 In section 8B of the Olympic Symbol etc. (Protection) Act 1995, subsections (2) and (3) are repealed.

13 In the Criminal Law (Consolidation) (Scotland) Act 1995—
   (a) in section 7, subsection (4) is repealed,
   (b) in section 47, subsection (3) is repealed,
   (c) in section 48, subsection (3) is repealed,
   (d) in section 50, subsections (3) and (5) are repealed.

14 In the Deer (Scotland) Act 1996, section 28 is repealed.
In section 61 of the Crime and Punishment (Scotland) Act 1997, subsection (5) is repealed.

In section 7 of the Protection of Wild Mammals (Scotland) Act 2002, paragraph (a) of subsection (1) is repealed.

In the Fireworks Act 2003—
(a) in section 11A, subsection (6) is repealed,
(b) section 11B is repealed.

In section 307 of the Criminal Justice Act 2003, subsection (4) is repealed.

In the Antisocial Behaviour etc. (Scotland) Act 2004—
(a) section 11 is repealed,
(b) in section 22, subsections (3) and (4) are repealed,
(c) section 38 is repealed.

In section 130 of the Serious Organised Crime and Police Act 2005, subsection (3) is repealed.

In section 13 of the Animal Health and Welfare (Scotland) Act 2006, in schedule 1—
(a) paragraph 16 is repealed,
(b) in paragraph 18(b)(i), the words “except paragraph 16” are repealed.

In the Prostitution (Public Places) (Scotland) Act 2007, section 2 is repealed.

In section 32 of the Glasgow Commonwealth Games Act 2008, subsections (3) and (4) are repealed.

In section 7 of the Tobacco and Primary Medical Services (Scotland) Act 2010, subsection (4) is repealed.

In each of sections 169(2) and 170(2) of the Children’s Hearings (Scotland) Act 2011, the words “arrested without warrant and” are repealed.

In section 9 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, subsections (2) and (3) are repealed.

**PART 2**

**FURTHER MODIFICATIONS**

The 1995 Act

The 1995 Act is amended as follows.

These provisions are repealed—
(a) sections 14 to 17A,
(c) sections 22 to 22ZB (together with the italic heading immediately preceding section 22),
(c) section 43,
(d) in section 135, subsection (3).

In section 18—
(a) in subsection (1), the words “or is detained under section 14(1) of this Act” are repealed,
(b) in subsection (2), the words “or detained” are repealed.

(2) In subsection (2)(a) of section 18B, for the words “under arrest or being detained” there is substituted “in custody”.

(3) In section 18D—
(a) in subsection (2)(a), the words “or detained” are repealed,
(b) in subsection (2)(b), for the words “under arrest or being detained” there is substituted “in custody”.

(4) In subsection (8)(b) of section 19AA, the words “or detention under section 14(1) of this Act” are repealed.

27B In section 42—
(a) subsection (3) is repealed,
(b) subsection (7) is repealed,
(c) in subsection (8), for the words “subsection (7) above” there is substituted “section 18C of the Criminal Justice (Scotland) Act 2015”,
(d) in subsection (9), the words “detained in a police station, or” are repealed,
(e) subsection (10) is repealed.

28 In section 74, after paragraph (a) of subsection (2) there is inserted—
“(aza)may not be taken against a decision taken by virtue of section 27 of the Criminal Justice (Scotland) Act 2015;”.

29 In section 79—
(a) for subsection (2)(b)(ii) there is substituted—
“(ii) a preliminary objection under any of the provisions listed in subsection (3A);”;
(b) after subsection (3) there is inserted—
“(3A) For the purpose of subsection (2)(b)(ii), the provisions are—
(a) section 27(4A)(a) or (4B), 90C(2A), 255 or 255A of this Act,
(b) section 9(6) of the Antisocial Behaviour etc. (Scotland) Act 2004 or that section as applied by section 234AA(11) of this Act,
(c) section 48(5)(b) of the Criminal Justice (Scotland) Act 2015.”.

30 Before section 261A there is inserted—
“Statements made after charge

261ZB Exception to rule on inadmissibility

Evidence of a statement made by a person in response to questioning carried out in accordance with authorisation granted under section 27 of the Criminal Justice (Scotland) Act 2015 is not inadmissible on account of the statement’s being made after the person has been charged with an offence.”.
Other enactments

31 In subsection (2)(a) of section 8A of the Legal Aid (Scotland) Act 1986, for the words “section 15A of the Criminal Procedure (Scotland) Act 1995 (right of suspects to have access to a solicitor)” there is substituted “section 24 (right to have solicitor present) of the Criminal Justice (Scotland) Act 2015”.

31A In section 6D of the Road Traffic Act 1988, for subsection (2A) there is substituted—

“(2A) Instead of, or before, arresting a person under this section, a constable may detain the person at or near the place where the preliminary test was, or would have been, administered with a view to imposing on the person there a requirement under section 7.”.

31B In Schedule 8 to the Terrorism Act 2000—

(a) in paragraph 18—

(i) in sub-paragraph (2), for the words from “and” at the end of paragraph (a) to the end of the sub-paragraph there is substituted—

“(ab) intimation is to be made under paragraph 16(1) whether the person detained requests that it be made or not, and

(ac) section 32 (right of under 18s to have access to other person) of the Criminal Justice (Scotland) Act 2015 applies as if the detained person were a person in police custody for the purposes of that section.”,

(ii) after sub-paragraph (3) there is inserted—

“(4) For the purposes of sub-paragraph (2)—

“child” means a person under 16 years of age,

“parent” includes guardian and any person who has the care of the child mentioned in sub-paragraph (2).”;

(b) in paragraph 20(1), the words “or a person detained under section 14 of that Act” are repealed,

(c) in paragraph 27—

(i) in sub-paragraph (4), paragraph (a) is repealed,

(ii) sub-paragraph (5) is repealed.

31C In the schedule to the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, paragraph 2 is repealed.

32 In the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, sections 1, 3 and 4 are repealed.

32A In the Children’s Hearings (Scotland) Act 2011—

(a) in section 65—

(i) for subsection (1) there is substituted—

“(1) Subsection (2) applies where the Principal Reporter is informed under subsection (2) of section 42B of the Criminal Justice (Scotland) Act 2015 that a child is being kept in a place of safety under subsection (3) of that section.”,

(ii) in subsection (2), for the words “in the” there is substituted “in a”,

32B In Schedule 2 to the Scottish Fire and Rescue Service Act 2012, paragraph 41 is repealed.
(b) in section 66(1), for sub-paragraph (vii) there is substituted—

“(vii) information under section 42B of the Criminal Justice (Scotland) Act 2015, or”;

(c) in section 68(4)(e)(vi), for the words “section 43(5) of the Criminal Procedure (Scotland) Act 1995 (c.46)” there is substituted “section 42B of the Criminal Justice (Scotland) Act 2015”,

(d) in section 69, for subsection (3) there is substituted—

“(3) If—

(a) the determination under section 66(2) is made following the Principal Reporter receiving information under section 42B of the Criminal Justice (Scotland) Act 2015, and

(b) at the time the determination is made the child is being kept in a place of safety,

the children’s hearing must be arranged to take place no later than the third day after the Principal Reporter receives the information mentioned in paragraph (a).”,

(e) in section 72(2)(b), for the words “in the” there is substituted “in a”.

In section 20 of the Police and Fire Reform (Scotland) Act 2012, subsections (2) and (3) are repealed.

SCHEDULE 3
(introduced by section 87)

POLICE NEGOTIATING BOARD FOR SCOTLAND

“SCHEDULE 2A
(introduced by section 55A)

POLICE NEGOTIATING BOARD FOR SCOTLAND

Status of the PNBS

1 (1) The PNBS—

(a) is not a servant or agent of the Crown, and

(b) has no status, immunity or privilege of the Crown.

(2) The property of the PNBS is not property of, or property held on behalf of, the Crown.

Chairing and membership

2 (1) The PNBS is to consist of—

(a) a chairperson,

(c) other persons representing the interests of each of—

(i) the Authority,

(ii) the chief constable,
(iii) constables (other than special constables) and police cadets,
(iv) the Scottish Ministers.

(2) It is for the Scottish Ministers to appoint the chairperson.

(3) Other members are to be appointed in accordance with the constitution prepared under paragraph 4.

(4) A member of the PNBS holds and vacates office in accordance with the terms of the member’s appointment.

(5) The chairperson may—
   (a) resign from office by giving notice in writing to the Scottish Ministers,
   (b) be removed from office if, in the opinion of the Scottish Ministers, the person is unable, unfit or unwilling to perform the functions of the office.

Temporary chairperson

2A(1) The PNBS may have a temporary chairperson if (for the time being)—
   (a) there is no chairperson, or
   (b) the chairperson is unavailable to act.

(2) A reference in this Chapter to the chairperson is to be read, where appropriate to do so by virtue of sub-paragraph (1), as meaning or including (as the context requires) the temporary chairperson.

Disqualification from chairing

3 A person is disqualified from appointment, and from holding office, as the chairperson of the PNBS if the person is or becomes—
   (a) a member of the House of Commons,
   (b) a member of the Scottish Parliament,
   (c) a member of the European Parliament,
   (d) a Minister of the Crown,
   (e) a member of the Scottish Government,
   (f) a civil servant.

Constitution and procedure etc.

4 (1) It is for the Scottish Ministers to prepare the constitution for the PNBS.

(2) The constitution must regulate the procedure for consensus to be reached among the members of the PNBS on the terms of representations to be made under section 55B(1) or 55C(1).

(2A) The constitution—
   (a) may require a dispute on representations to be made under section 55B(1) to be submitted to arbitration by agreement among the members to do so, and must not prevent such a dispute from being submitted to arbitration on such agreement (except prevention by way of limitation as allowed below),
(b) may—

(i) authorise the chairperson to submit such a dispute to arbitration without such agreement,

(ii) limit how often within a reporting year such a dispute can be submitted to arbitration (including limitation framed by reference to particular matters or circumstances).

(3) The constitution may contain provision about—

(a) membership (including number of members to represent each of the interests mentioned in paragraph 2(1)(c)),

(b) internal organisation (for example, committees and office-holders),

(c) procedures to be followed (including conduct of meetings),

(d) the content of a report required by section 55D,

(e) such other matters as the Scottish Ministers consider appropriate.

(4) The Scottish Ministers—

(a) must keep the constitution under review,

(b) may revise it from time to time.

(5) Before preparing or revising the constitution, the Scottish Ministers must consult—

(a) the Authority,

(b) the chief constable, and

(c) persons representing the interests of constables (other than special constables) and police cadets.

(6) The constitution, or any revision of it, has effect only when brought into effect by the Scottish Ministers by regulations.

**Process of arbitration**

4A(1) Sub-paragraph (2) applies where—

(a) a dispute is submitted to arbitration in accordance with the constitution, and

(b) no arbitration agreement relating to the dispute is in place.

(2) A document submitting the dispute to arbitration is deemed to be an arbitration agreement.

(3) For the application of the Arbitration (Scotland) Act 2010, a reference in this paragraph to an arbitration agreement is to such an agreement as defined by section 4 of that Act.

4B(1) Sub-paragraph (2) applies for the purpose of arbitration in accordance with the constitution (whether such arbitration arises by reason of a real or deemed arbitration agreement).

(2) Regulations under paragraph 4(6) may include provisions disapplying or modifying the mandatory rules in schedule 1 to the Arbitration (Scotland) Act 2010.
4C(1) Sub-paragraph (2) applies for the purpose of the operation of section 55CA.

(2) Regulations under paragraph 4(6) may include provisions specifying, by reference to particular matters or circumstances, what are qualifying cases.

Remuneration and expenses

5 (1) The Scottish Ministers may pay—

(a) such remuneration to the chairperson of the PNBS as they think fit,

(b) such expenses of the members of the PNBS as they think fit.

(2) The Scottish Ministers must pay such expenses as they consider are reasonably required to be incurred to enable the PNBS to carry out its functions.”.
Criminal Justice (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about criminal justice including as to police powers and rights of suspects and as to criminal evidence, procedure and sentencing; to establish the Police Negotiating Board for Scotland; and for connected purposes.

Introduced by: Kenny MacAskill
On: 20 June 2013
Bill type: Government Bill
INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Criminal Justice (Scotland) Bill (introduced in the Scottish Parliament on 20 June 2013) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

2. These revised 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.

3. 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.

OVERVIEW OF THE BILL

4. The Bill seeks to support the aims set out in the Policy Memorandum by introducing reforms to modernise and enhance the efficiency of the Scottish criminal justice system. The provisions in the Bill take forward a range of the Scottish Government’s key justice priorities. Some of these provisions have been developed from the recommendations of two independent reviews: Lord Carloway’s review of criminal law and practice ¹ and Sheriff Principal Bowen’s review of sheriff and jury procedure ². The Scottish Government sought views on Lord Carloway’s ³ and Sheriff Principal Bowen’s ⁴ recommendations in two separate consultations. A further consultation was also carried out on whether additional safeguards ⁵ may be required if the requirement for corroboration is removed. The provisions in the Bill that would have abolished the requirement for corroboration were removed from the Bill at Stage 2. Further information on these consultations can be found in the Policy Memorandum.

¹http://www.scotland.gov.uk/About/Review/CarlowayReview
²http://www.scotland.gov.uk/Publications/2010/06/10093251/0
³http://www.scotland.gov.uk/Publications/2012/07/4794
⁴http://www.scotland.gov.uk/Publications/2012/12/8141/0
⁵http://www.scotland.gov.uk/Publications/2012/12/4628
5. The Bill is in eight Parts.

6. Part A1 (Police procedures) includes provisions about searches of persons not in police custody. It includes limitations on when such a search can be carried out, and makes provision for there to be a code of practice about such searches. It also makes provision for police to have the power to search a person before the person is being taken from one place to another. This part also makes provisions that allow regulations to be laid that will give the police the power to search children for alcohol, should this power be considered necessary after a public consultation.

7. Part 1 (Arrest and custody) includes provisions on the powers of the police to arrest, hold in custody and question a person who is suspected of committing an offence. This part also provides for the rights of such persons in custody and makes specific provision for vulnerable adults and children.

8. Part 3 (Solemn procedure) makes a number of amendments to the solemn procedure set out in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). These include imposing a duty on parties in criminal proceedings to communicate and increasing the length of time for which an accused person can be remanded before having to be brought to trial from 110 to 140 days.

9. Part 4 (Sentencing) increases the maximum sentence for handling offensive weapons offences, places a specific duty on the court to consider whether it is appropriate to punish an offender for committing an offence while on early release, and increases the flexibility for different levels of court to consider imposing a punishment on such offenders.

10. Part 5 (Appeals and SCCRC) amends the 1995 Act to make changes to appeal procedures in the High Court and adjusts how the Appeal Court will consider Scottish Criminal Case Review Commission referrals.

11. Part 5A (Children affected by parental imprisonment) places a duty on courts which have authorised the detention of a person who has responsibility for a child to undertake a child and family impact assessment.

12. Part 6 (Miscellaneous) requires the Lord Advocate to publish details of the test used by prosecutors to decide whether to bring a prosecution, makes provision to enable the use of TV links by courts; makes an amendment to the Police Act 1997 and establishes and sets out the functions for a Police Negotiating Board for Scotland.

13. Part 7 contains general and ancillary provisions.
PART A1 – POLICE PROCEDURES

CHAPTER 1 – SEARCH OF A PERSON NOT IN POLICE CUSTODY

Section 1 – Power of a constable

14. Section A1 provides that, where a person is not in police custody, it is unlawful for a search to be carried out without express statutory authority, or without express authority conferred by a warrant. This provision will have the effect of ending the practice of ‘consensual’ stop and search.

15. Section B1 provides express authority for constables to search a person in the circumstances where the police have a power to transport a person from one place to another under specific authority of an enactment, warrant or court order. The search is for the purpose of safeguarding that person’s, or any other person’s, safety and well-being.

16. Section C1 imposes a duty on a constable, when deciding whether to search a child who is not in police custody, to treat the well-being of the child as a primary consideration.

17. Section D1 allows regulations to be laid that would provide a power for the police to search children under 18 for alcohol and to search a person who is over 18 where that person is hiding a child’s alcohol in order to stop it being found. Before laying regulations, the Scottish Ministers must carry out a public consultation. The regulations would be subject to affirmative procedure. This section is subject to the sunset clause in section E1.

18. Section E1 provides commencement provisions. The provisions in section A1 and B1 are required to commence on the same date that the code of practice required by section G1 first comes into effect. If no regulations are laid under the provisions in section D1 within two years of the date that the code of practice first comes into effect, the power to make regulations in section D1 will lapse.

Chapter 2 – Code of practice

19. Section G1 provides that Scottish Ministers must make a code of practice about the carrying out of stop and search and what the code must set out. The code of practice will only apply to the functions exercisable by police constables.

20. Section H1 contains provisions regarding subsequent reviews and revision of the code of practice. It allows Ministers to revise the code in light of a review. The Scottish Ministers must review the code within two years of it first coming into effect. Thereafter the code must be reviewed at least every four years. When deciding when to conduct a review, Ministers must have regard to representations made by the Scottish Police Authority, the Chief Constable, or Her Majesty’s Inspectorate of Constabulary in Scotland (HMICS).

21. Section I1 provides for the legal status of the code of practice. Any court or tribunal in civil or criminal proceedings must take into account the code of practice (including, therefore, any breach of the code) when determining any questions arising in the proceedings to which the code is relevant.
22. Section J1 makes provisions about consultation on the code of practice. Before making a code of practice, the Scottish Ministers must consult publicly on a draft code. Subsection (2) names a number of persons or organisations that Ministers must consult when preparing a draft for public consultation.

23. Section K1 makes provision for bringing the code of practice into effect. A code of practice or any revised code of practice will be brought into effect on a date to be appointed by regulations. The regulations will be subject to affirmative procedure, and the code to which the regulations relate must be laid before the parliament at the same time.

24. Section L1 amends the Police and Fire Reform (Scotland) Act 2012 to provide that the Scottish Police Authority must publish specified stop and search data in its annual report.

PART 1 – ARREST AND CUSTODY

Chapter 1 – Arrest by police

Section 1 – Power of a constable

25. Section 1 sets out new powers of a police constable to arrest, without a warrant, a person suspected of having committed or to be committing an offence in Scotland. (Note, however, that the arrest regime under the Terrorism Act 2000 is unaffected by the Bill (see sections 50(b) and 53)).

26. Section 1(1) provides that a constable (defined in section 54) who has reasonable grounds to suspect that a person has committed or is committing an offence may arrest that person without a warrant.

27. Section 1(2) qualifies the power of a constable to arrest a person without warrant for having committed an offence which is not punishable by imprisonment. Not only must a constable have reasonable grounds for suspecting the person, the constable must also be satisfied that the “interests of justice” would not be met if the person was not immediately arrested for the offence. Section 1(3) sets out factors that may be relevant in applying the “interests of justice” test referred to in section 1(2).

28. Section 1(4) provides clarity that an offence is only to be considered as not punishable by imprisonment in terms of subsection (2) if, as a matter of general application, a person, when convicted, cannot be sentenced to imprisonment. This means that the power operates even where the particular person arrested may not be imprisoned (due, most likely, to the person’s age).

Section 2 – Exercise of the power

29. Section 2 sets out how the power of arrest set out in section 1 can be exercised.

30. Section 2(1) provides that a person may be arrested under section 1 multiple times for the same offence (e.g. a person may be arrested, questioned and released and subsequently arrested again if, for example, further evidence comes to light).
31. Section 2(2) clarifies that the power to arrest again does not apply to persons who have been “officially accused” (defined in section 55) of having committed the offence or an offence arising from the same circumstances. For example, the police cannot use the power of arrest to arrest a person without a warrant if they have a warrant to arrest the person.

32. Section 2(3) creates a requirement that a constable who is not in uniform must show his or her identification, as soon as reasonably practicable, when requested to do so by a person being arrested.

**Procedure following arrest**

**Section 3 – Information to be given on arrest**

33. Section 3 specifies the information which must be provided by a constable, as soon as is reasonably practicable, to an arrested person. The information will normally be provided immediately upon arrest.

**Section 4 – Arrested person to be taken to police station**

34. Section 4 sets out the requirement on a constable to take an arrested person to a police station as soon as is reasonably practicable after arrest (if not arrested there). By virtue of section 37 a constable may use reasonable force when doing so.

35. Section 4(2) provides circumstances as to when the duty to take the person to the police station can cease to apply prior to arrival at a police station. It further provides that the person must in those circumstances be released from custody.

36. Section 4(3) also clarifies that the requirement to take the person to the police station will also cease to apply if, before arriving at a police station, that person is released under the provisions contained within section 19(2).

**Section 5 – Information to be given at police station**

37. Section 5 sets out the information that must be provided to a person taken to a police station under arrest and to those arrested whilst at a police station.

38. In particular, section 5(2) and (3) set out various matters that the arrested person must be informed of, as soon as reasonably practicable, e.g. their right not to say anything other than to provide information relating to their name, address etc.; their rights to have intimation sent, and to have access, to solicitors and, where appropriate, persons such as parents or other persons capable of giving support; and their rights under Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council, including, for example, a letter of rights which contains basic information to assist persons in understanding their rights.

**Section 6 – Information to be recorded by police**

39. Section 6 details the information which must be recorded by a constable when a person is arrested under section 1.
40. Section 6(1) provides a list of the information to be recorded in respect of all arrests.

41. Section 6(1A) requires a constable who has released a person from custody under section 4(2) to record the reasons for the initial arrest. Section 6(2) to (5) specifies the information that must be recorded in relation to a person arrested and held in police custody (defined in section 56) but not officially charged with an offence e.g. the timing and outcome of a police decision on whether to authorise their continued custody; the time and outcome of any review of continued custody; the time a person is released from custody on conditions or charged.

Chapter 2 – Custody: person not officially accused

Keeping person in custody

Section 7 – Authorisation for keeping in custody

42. Section 7(1) sets out the procedure for keeping a person in custody where the person has not been arrested under a warrant or charged with an offence by a constable.

43. Section 7(2) provides that authorisation to keep the person in custody must be sought as soon as reasonably practicable after the person is arrested at a police station or arrives at a police station following arrest.

44. Section 7(3) and (4) provide that authorisation to keep a person in custody may only be given by a constable of the rank of sergeant or above who has not been involved in the investigation in connection with which the person is in custody and if the test set out in section 10 is met. Section 7(5) provides that if authorisation is refused then the person can continue to be held in custody only if charged with an offence.

Section 8 – Information to be given on authorisation

45. Section 8 provides that at the time when authorisation is given to keep a person in custody under section 7, the person must be informed of the reason they are being kept in custody and that they may only be kept in custody without charge for a period of 12 hours. That person must also be informed when authorisation is given under section 7 that a further extension of 12 hours may be authorised under section 12A.

Section 11 – 12 hour limit: general rule

46. Section 11 provides that a person may not continue to be held in custody after a continuous period of 12 hours unless that person is then charged with an offence by a constable or authorisation has been given to extend that arrest for a further 12 hours under section 12A. The period of 12 hours begins at the point when authorisation to keep a person in custody is given by a constable in accordance with section 7. After the expiry of 12 hours if the person is not charged, they must be released, perhaps conditionally, if appropriate (see section 14).
Section 12 – 12 hour limit: previous period

47. Where a person is held in custody on more than one occasion for the same or a related offence, section 12 provides that the 12 hour maximum period of custody (set out in section 11) is reduced by any earlier period during which the person was held in custody for that offence.

Section 12A – Authorisation for keeping in custody beyond 12 hour limit

48. Section 12A(1) contains provisions to allow for an extension of the time in which a person may be kept in police custody for a further 12 hours after the initial 12 hours ends.

49. Section 12A(2) provides that the authorisation to extend that custody must be given by a constable of the rank of inspector or above who has not been involved in the investigation in connection with which the person is in custody and if the tests set out in section 12A(3)(a) and (b) are met.

50. Section 12A(3) contains the tests which must be met before authorisation to extend the arrest for a further 12 hours can be authorised.

51. Section 12A(4) places a duty on the authorising constable to, where practicable, allow the person or if the person wishes, the person’s solicitor, to make representations either orally or in writing, and to have regard to any such representations.

52. Section 12A(5) clarifies that any authorisation to extend beyond the initial 12 hours is deemed to have been withdrawn if the person is released prior to those initial 12 hours elapsing.

53. Section 12A(6) provides that after the expiry of the further 12 hours the person can only continue to be held in police custody if charged.

Section 12B – Information to be given on authorisation under section 12A

54. Section 12B specifies the information which must be provided by a constable to an arrested person when authorisation to extend the arrest under section 12A is granted. This information will be given as soon as reasonably practicable after authorisation is given.

Section 9 – Custody review

55. Section 9(1) and (2) provide that where a person has been held in police custody for a continuous period of six hours and has not been charged with an offence, a decision must be made on whether to continue to keep that person in custody. That decision must be made as soon as reasonably practicable after the expiry of the period of six hours which started when the authorisation under section 7 was given. In making that decision, the test set out in section 10 is applied (referred to below). Under section 9(3) the decision must be made by a constable of the rank of inspector or above, who has not been involved in the investigation in connection with which the person is in custody. If the test set out in section 10 is not met, the person may continue to be held in custody only if they are charged with an offence. This section also provides that where an arrest has been extended under 12A, and if the person remains in custody, that there must be a further 6 hour review after this extension period has begun.
Section 10 – Test for sections 7, 12A and 9

56. Section 10 sets out the test for keeping a person in custody under section 7(4), 12A and reviewing continuation of that period of custody after six hours under section 9(2).

57. Section 10(1) provides that the test is that there are reasonable grounds for suspecting that the person has committed an offence and keeping the person in custody is necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with the person under the law. In considering what is “necessary and proportionate” regard may be had to (among others) the factors detailed in section 10(2).

Section 13 – Medical treatment

58. Section 13(1) and (2) apply to a person who is taken into police custody having been arrested without a warrant, has not been charged with an offence and is at a hospital for the purpose of receiving medical treatment. They provide that authority to keep a person in custody may be given as though section 7 applies in the hospital as it does in a police station. For the purpose of calculating the 12 hour maximum period of custody set out in section 11, account will be taken of any time during which a person is at a hospital or travelling to or from one and is being questioned by a constable (section 13(4) to (6)). The same rules apply in calculating any previous period of custody (section 12(3)).

Investigative liberation

Section 14 – Release on conditions

59. Section 14 applies where: a person is in police custody by virtue of the authorisation under section 7 (that is, where a person has been arrested without warrant and not charged, including a case where authorisation has been reviewed and continued under section 9), a constable has reasonable grounds to suspect that the person has committed a relevant offence and the period of 28 days calculated in accordance with section 15(1)(a) has not expired. As explained further below, the effect of section 14 is to enable the police to release such persons from police custody on conditions which may be applied for a maximum period of 28 days following the conditions being imposed. It follows, that a person could not be released again on investigative liberation if arrested again after those 28 days have expired. The meaning of “relevant offence” is given in subsection (6).

60. Subsection (2) provides that a constable of the rank of sergeant or above (subsection (5)) may authorise the release of a person from custody on any condition which is necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence. The meaning of “relevant offence” is given in subsection (6).

61. Section 14(3) ensures that any condition imposed is treated as a liberation condition for the purposes of Chapter 7. This means that a breach of any condition may be penalised by a fine or a prison sentence as outlined in Chapter 7 and, a breach which would be an offence were the person not subject to liberation conditions may be taken into account in sentencing for that offence.
Section 15 – Conditions ceasing to apply

62. Section 15 provides when conditions imposed on a person under section 14(2) cease to apply: namely, (under section 16) if the condition is removed by the police by notice, if the person is arrested in connection with a relevant offence (“relevant offence” as defined by section 15(2)), if the person is officially accused of committing a relevant offence, at the end of the 28 day period (described in section 14(4)) or (under section 17) if the condition is removed as a result of an application for review made to a sheriff against the conditions.

Section 16 – Modification or removal of conditions

63. Section 16 enables a constable, by notice, to modify or remove any condition imposed by the police under section 14(2). A modified condition may be more or less onerous than the condition originally set. Under section 16(2) a notice about the modification or removal of a condition must be given in writing to the person who is subject to it and must specify the time from which the condition is modified or removed. Any modification or removal of a condition requires to be approved by a constable of the rank of an inspector or above. This power gives the police the flexibility to adjust conditions in light of changed circumstances.

64. Section 16(3) provides that a constable of the rank of inspector or above must keep under review whether or not there are reasonable grounds for suspecting that a person who is subject to a condition imposed under section 14(2) has committed a relevant offence (as defined in section 16(8)), and whether the condition imposed remains necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence. If the inspector is no longer satisfied that there are reasonable grounds for suspecting that a person who is subject to a condition has committed a relevant offence, the person must be given notice of the removal of the condition. If no longer satisfied that a condition is necessary and proportionate, again the person must be given notice that the condition is being modified or removed.

65. Section 16(6) provides that any such notice must be given in writing to the person as soon as practicable and it must specify as the time from which the condition is modified or removed, the time at which the duty to give the notice arose i.e. the time at which the decision is made by an appropriate constable, to remove or modify the condition.

Section 17 – Review of conditions

66. Section 17(1) provides that a person who is subject to a condition imposed under section 14(2) may make an application for review to a sheriff.

67. Section 17(2) requires the sheriff to give the procurator fiscal an opportunity to make representations before the review is determined.

68. Section 17(3) provides that where the sheriff is not satisfied that the condition imposed is necessary and proportionate, the sheriff may remove it or impose an alternative condition which the sheriff considers to be necessary and proportionate for that purpose.

69. Section 17(4) provides that a condition imposed on review by the sheriff under section 17(3) is to be regarded as having been imposed by a constable under section 14(2).
provides that in effect, the conditions set by the sheriff have the same effect and are to be taken as having taken effect when set by the police, i.e. the 28 day period is calculated from the date on which the police conditions were set. Conditions imposed by the sheriff can be modified or removed under section 16(1) in the same manner as police conditions.

Chapter 3 – Custody: person officially accused

Person to be brought before court

Section 17A – Information to be given if sexual offence

70. Section 17A(1) contains the criteria that are to be applied to establish whether a person falls within this section. The person must have been arrested in respect of a warrant for a sexual offence to which section 288C of the 1995 Act applies or, if arrested without warrant and since being arrested, have been charged by a constable for a sexual offence to which section 288C of the 1995 Act applies.

71. Section 17(2) contains the information that a person who falls within the criteria contained within subsection (1) must be given. The person must be informed that certain hearings in the course of their case may only be conducted by a lawyer. The person must also be given notice that it is in their interests to engage the professional assistance of a solicitor at, or for the purposes of those hearings and if the person does not engage the assistance of a solicitor then the court will do so.

Section 18 – Person to be brought before court

72. Section 18(1) and (2) provide that, wherever practicable, persons kept in custody after being arrested under a warrant or arrested without a warrant and subsequently charged with an offence by a constable, must be brought before a court by the end of the next court day. For example, a person arrested at 11pm on a Tuesday and charged with an offence at 2am on the Wednesday would be due in court not later than the end of the court’s sitting on the Thursday.

73. Section 18(3) provides for persons to be considered to be brought before a court if appearing by television link.

Section 18A – Under 18s to be kept in a place of safety prior to court

74. Section 18A provides that persons under 16 and those aged 16 and 17 subject to compulsory supervision orders who are being brought to court in accordance with section 18(2) are only kept in a police station in the circumstances prescribed in subsection (3) and a constable of the rank of inspector or above has certified accordingly.

Section 18B – Notice to parent that under 18 to be brought before court

75. Section 18B makes provision for circumstances where a person who is under 16 or is aged 16 or over and subject to a supervision order is to be brought before a court in accordance with section 18(2) or released from police custody on an undertaking given under section 19(2)(a). It provides that a parent of that person (if one can be found) must be informed (a) of the court before which the person is to be brought, (b) of the date on which the person is to be
brought before the court, (c) of the general nature of the offence which the person has been officially accused of committing and (d) that the parent’s attendance at the court may be required under section 42 of the 1995 Act. The requirement to give such information may be dispensed with if a constable believes that it would be detrimental to the wellbeing of the person being brought before the court or released on undertaking (subsection(3)).

Section 18C – Notice to local authority that under 18 to be brought before court

76. Section 18C sets out the circumstances when a local authority has to be advised of the following information: the court before which the person is to be brought, the date the person is to be brought before the court and the general nature of the offence which the person has been officially accused of committing. There are two sets of circumstances which require the local authority to be notified. Firstly, where a person who is (i) under 16 years, (ii) 16 or 17 years of age and subject to either a compulsory supervision order or an interim compulsory supervision order or (iii) believed to be 16 or 17 years of age and has declined the right to have intimation sent under section 30 is brought before a court in accordance with section 18(2). Secondly, where a person is under 16 or 17 years and subject to compulsory supervision is released from police custody on an undertaking given under section 19(2)(a).

77. The information to be provided is (a) the court before which the person is to be brought, (b) the date on which the person is to be brought before the court and (c) the general nature of the offence which the person has been officially accused of committing. Subsection (5) defines “appropriate local authority” as the local authority in the area where the court sits.

Police liberation

Section 19 – Liberation by police

78. Section 19(1) and (2) provide that where a person is in custody having been charged with an offence, the police may: release that person on an undertaking under section 20, release the person without an undertaking or refuse to release. (Note the provisions do not apply where a person is in custody by virtue of a warrant granted under section 29(1)). It is also relevant to note that under section 41 a constable must take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody.

79. Section 19(2A) provides that where a person is in police custody on a warrant as contained within sub-section (1)(b), the person will not be allowed to be released without an undertaking as provided for in sub-section (2)(b).

80. Section 19(3) provides that a constable will not be liable to any claim because of a refusal to release a person from custody.

Section 20 – Release on undertaking

81. Again, in considering whether to release a person on an undertaking the police will be mindful of their obligations under section 41 of the Bill (duty not to detain unnecessarily). Section 20(1) provides for a person to be released from police custody on an undertaking given under section 19(2)(a) only if they sign that undertaking.
82. Section 20(2) specifies the terms of an undertaking and section 20(3) provides for the conditions and the further conditions which may be imposed. With regard to those further conditions, these are illustrated by subsection (4), with paragraph (a) setting out the type of further conditions that only a constable of the rank of inspector or above may impose. Any other condition may be imposed by a constable of the rank of sergeant or above.

83. Section 20(6) provides that the requirement imposed by an undertaking to attend at court and comply with conditions are to be taken to be liberation conditions for the purposes of schedule A1 on breach of liberation conditions. This means that a breach of any condition may be penalised by a fine or a prison sentence as outlined in schedule A1 and a breach which would be an offence were the person not subject to liberation conditions may be taken into account in sentencing for that offence.

Section 21 – Modification of undertaking

84. Section 21(1) enables the procurator fiscal by notice (effected as set out in section 21(5)) to modify an undertaking given under section 19(2)(a), either by changing the time or place of the court hearing or removing or altering a condition in the undertaking. The manner of citation may be effected, for example, by delivering the notice personally or leaving it at the person’s home.

Section 21A – Rescission of undertaking

85. Section 21A(1) enables the procurator fiscal to rescind an undertaking under section 19(2)(a) regardless of whether the person who gave it is to be prosecuted.

86. Section 21A(2) clarifies that the rescission takes effect at the end of the day the notice is sent to the person who gave the undertaking.

87. Section 21A(3) provides that notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.

88. Section 21A(4) provides a constable with a power of arrest to if the constable has reasonable grounds for believing that the person is likely to fail to comply with the terms of an undertaking as contained within section 19(2)(a).

89. Section 21A(5) provides that, when a person is arrested under subsection (4) or is arrested otherwise than in accordance with the undertaking, as in subsection (6), the undertaking is rescinded and the person is deemed to be in custody, as if charged with the original offence for which an undertaking was given.

90. Section 21A(7) provides that reference contained within subsections (4) and (6)(b) regarding the terms of the undertaking also refer to any undertaking modified by notice made under section 21(1) or by a sheriff under section 22(3)(b).
21B – Expiry of Undertaking

91. Section 21B(1) provides that an undertaking under section 19(2) is deemed to have expired in two circumstances: either at the end of the day when the person was required to have appeared at court, or at the end of the day when a person appears at court having been arrested on a warrant for failing to appear as required by the terms of the undertaking.

92. Section 21(2) provides that any alteration to a condition in an undertaking should not make a condition more onerous on the person.

93. Section 21(3) provides for the procurator fiscal to rescind an undertaking. This would be appropriate, for example, if a decision is made not to prosecute. Section 21(4) provides for the circumstances in which an undertaking will expire.

Section 22 – Review of undertaking

94. Section 22(1) enables a person subject to an undertaking to apply to the sheriff for review.

95. Section 22(2) provides that the sheriff must provide the procurator fiscal with an opportunity to make representations with regard to the review. Section 22(3) provides that the sheriff may either remove a condition or impose any alternative condition that the sheriff considers to be necessary and proportionate.

Chapter 4 – Police interview

Rights of suspects

Section 23 – Information to be given before interview

96. Section 23 applies to a person who is either in police custody (defined in section 56) or has voluntarily attended a police station, or other place, for the purpose of being interviewed by the police.

97. It requires a constable to inform a person suspected of committing an offence of their rights at the most one hour before any interview commences. These rights are:

- the right to be informed of the general nature of that offence,
- the right not to say anything other than to provide the person’s name, address, date of birth, place of birth and nationality;
- the right to have a solicitor present during any interview; and
- if the person is being held in police custody, the rights detailed in Chapter 5, namely: the right to have another person informed that the person is in custody, the right to have a solicitor informed that the person is in custody and the person’s right of access to a solicitor whilst in custody.
98. Subsection (3) provides that if a person has already exercised their right to have another person or solicitor informed of their custody, then the police are not required to inform the person of these rights a second time.

99. For the purpose of this section, a constable is not to be regarded as interviewing a person about an offence merely by asking for the person’s name, address, date of birth, place of birth and nationality. As such, a constable does not have to inform the person of their rights, as detailed at subsection (2), before asking the person for these details.

100. Subsection (5) provides that, if a person is being interviewed as authorised by section 27 of the Bill (which permits the court to authorise a constable to question someone who has been officially accused of an offence), the person must be told before the start of the interview about any conditions attached by the court when authorising the questioning. This will always include a specified period of time for which questioning is authorised, and may also include conditions imposed by the court to ensure that allowing the questioning is not unfair.

Section 24 – Right to have solicitor present

101. This section provides for the right of a person reasonably suspected of committing an offence to have a solicitor present during police interview. It applies to a person who is either in police custody or has voluntarily attended a police station, or other place, for the purpose of being interviewed by a constable.

102. Section 24(3) provides that unless a person has consented to be interviewed without a solicitor present, a constable must not start to interview the person about the alleged offence until a solicitor is present and must not deny the solicitor access to the person at any time during interview.

103. Under subsection (4), a constable may start to interview the person without a solicitor present if satisfied it is necessary to interview the person without delay in the interests of the investigation or prevention of crime, or the apprehension of offenders. This is a high test. If a solicitor becomes available during such time as the police are interviewing a person, the solicitor must be allowed access to that person.

104. For the purpose of this section, a constable is not to be regarded as interviewing a person about an offence merely by asking for the person’s name, address, date of birth, place of birth and nationality. As such, a constable does not have to wait for a solicitor to be present before asking a person for these details.

105. Subsection (6)(a) and (b) provides for a record to be made of the time at which a person consents to be interviewed without a solicitor present and any reason the person gives for waiving the right to have a solicitor present. A person may revoke their consent at any time and in such a case the police must record the time at which a person requests that intimation is sent to a solicitor and the time that intimation is sent (section 6(1)(f) and (g)).
Section 25 – Consent to interview without solicitor

106. Subsection (2)(a) provides that a person under 16 years of age may not consent to be interviewed without a solicitor present.

107. Subsection (2)(aa) provides that a person aged 16 or 17 and subject to a compulsory supervision order or an interim compulsory supervision order made under the Children’s Hearings (Scotland) Act 2011 may not consent to be interviewed without a solicitor present.

108. Subsection (2)(b) provides that a person aged 16 years and over and, owing to a mental disorder (as defined in subsection (6)(a)), is considered by a constable to be unable to understand sufficiently what is happening or to communicate effectively with the police, may not consent to be interviewed without a solicitor present.

109. Subsections (3), (4) and (5) provide that a person who is 16 or 17 years of age and not subject to a compulsory supervision order or interim compulsory supervision order or suffering from a mental disorder may consent to be interviewed without a solicitor present with the agreement of a “relevant person”. If the person aged 16 or 17 years is in police custody, a “relevant person” means any person who could by virtue of section 32(2) visit the person. If the person aged 16 or 17 is not in police custody, a “relevant person” means a person who is at least 18 years of age and is reasonably named by the 16 or 17 year old.

Person not officially accused

Section 26 – Questioning following arrest

110. Section 26 enables a constable to question a person following arrest provided the person has not been officially accused of the offence (i.e. charged with the offence by the police or where a prosecutor has started proceedings in relation to the offence), or an offence arising from the same circumstances. The person has the right, however, not to answer any questions but must provide the police with their name, address, date of birth, place of birth and nationality.

111. Under subsection (3), the use, in evidence, of any answers given by a person during questioning is subject to the laws on admissibility. In general terms, this means that any questioning must be fair.

Person officially accused

Section 27 – Authorisation for questioning

112. Section 27 introduces a regime to allow the court to authorise a constable to question an accused person after the person has been officially accused of an offence or offences.

113. Subsection (1) confirms that the court may authorise a constable to carry out questioning once this stage has been reached. There is no provision for any other person, such as a prosecutor, to be so authorised.
114. Subsections (2) and (3) set out the circumstances in which the court can allow this questioning to take place. These provisions are designed to ensure that this power is exercised proportionately, having regard both to the rights of the accused person and to the public interest in gathering evidence in respect of an alleged criminal offence.

115. Thus subsection (2) provides that the court needs to be satisfied that the proposed questioning is in the interests of justice.

116. Subsection (3) sets out further factors which the court must take into account when deciding whether or not to authorise an application for questioning.

117. Subsection (5) applies where a court has granted an application to authorise questioning after the case has called in court, either having been commenced by means of a warrant, or where the accused has appeared in court. In those circumstances, subsection (4) gives the accused person the right to be heard by the court before any decision on the application is made. The person can be represented by a solicitor for these purposes, if the person wishes. It follows that the person has no similar right to be heard in respect of an application about a case which has not yet called in court.

118. Subsection (6) applies where the court has decided to grant the application and authorise questioning. In that event, subsection (6)(a) provides that the court must specify the length of time during which a constable may question the accused person. Subsection (6)(b) allows, but does not require, a court to place other conditions on the questioning to ensure that it is not unfair to the accused person. This might, for example, mean a restriction on the subject matter about which the accused person can properly be questioned.

119. Subsection (7) provides that there is no right of appeal against the decision of a court either to grant or refuse authorisation, or against any conditions imposed by the court under subsection (6)(b).

120. Subsection (8) defines the word “court” for the purposes of this section.

Section 28 – Authorisation: further provision

121. Section 28 makes further provision in respect of questioning after a person has been officially accused of an offence.

122. Subsection (1) sets out who may make an application for authorisation. Where the case against the accused person has called in court in terms of section 27(5), subsection (1)(a) provides that the application must be made by a prosecutor; otherwise the application should be made by a constable (subsection (1)(b)). In the former case, though, even if the application is granted, the questioning will be carried out by a constable, in terms of section 27(1); the prosecutor’s limited right to question an accused person at the inception of solemn proceedings only (generally known as “judicial examination”) is abolished by section 63 of this Bill.

123. Subsection (2) defines “prosecutor” for the purposes of subsection (1).
124. Subsection (3)(a) gives the High Court of Justiciary the power to prescribe, in an Act of Adjournal, the form in which a written application seeking authorisation must be made; and a written application should closely follow that form. Subsection (3)(b), by requiring an applicant to include details of any previous applications for authorisation to question the accused person, either about the same offence, or about another offence arising out of the same circumstances, will ensure that the court has information about any such previous applications.

125. Subsection (4) sets out when authorisation to question the accused person comes to an end: either when the period stipulated by the court under section 27(6)(a) expires; or, when the trial of the accused person starts. Subsection (5) defines when a trial is deemed to have started for this section.

126. Subsection (6) defines “authorisation” and “offence” for the purposes of this section.

Section 29 – Arrest to facilitate questioning

127. Where the police wish to question someone who has been officially accused of an offence, but is at liberty, section 29 provides that it will be open to the court to grant a warrant for the arrest of the accused person so the person can be detained for the purposes of questioning.

128. Subsection (1) provides that, when granting authorisation for questioning, a court can grant a warrant for the accused person’s arrest if it is expedient to do so.

129. Subsection (2) protects the accused person from indefinite detention, by requiring that if the court grants an application for a warrant it must put a time limit on the period for which the person can be detained to be questioned. Subsection (3) makes provision as to when the accused person’s detention, under a warrant granted in terms of this section, must come to an end.

130. Subsection (4) clarifies when an accused person’s detention under a warrant granted in terms of this section starts, making it possible to determine when the period specified in section 29(3)(a) has expired.

131. Subsections (5)(a) and (b) put it beyond doubt that a warrant under this section does not operate to recall or affect the operation of any bail order that the accused person might be on, whether in the same proceedings or not. While the accused person is in custody, having been detained and arrested on the warrant, subsection 24(5)(b) of the Criminal Procedure (Scotland) Act 1995, which makes it a condition of bail that the accused does not commit an offence while on bail, remains in force. This means that if the person commits an offence while detained in custody under a warrant granted in terms of this section, it would be a breach of that condition of bail. Once the accused person’s detention ends, the bail order applies in full, including any conditions attached to that order.

132. Similarly, subsection (5)(c) makes it clear that, where an accused person has been liberated on an undertaking in terms of section 19 of this Bill, the terms and conditions of the undertaking remain in force where a warrant is granted for the accused person, and continue in force after arrest and detention on that warrant.
Chapter 5 – Rights of suspects in police custody

Intimation and access to another person

Section 30 – Right to have intimation sent to other person

133. Section 30 affords a person in police custody the right to have someone else informed that the person is in police custody and where they are being held in custody.

134. This intimation must be sent as soon as reasonably practicable after the person arrives at a police station unless a delay is considered necessary in the interests of the investigation or prevention of crime, the apprehension of offenders or safeguarding and promoting the wellbeing of the person (subsection (5)). Where such a delay is required, it should be for no longer than necessary (subsection (4)(b)) or until it has been ascertained whether a local authority will arrange for someone to visit the person in custody under section 32A(2) (subsection(5A)).

135. If a constable believes that the person in police custody is under 16 years of age, under subsections (2)(a) and (3)(a), a parent must be informed, regardless of whether the person requests that intimation be sent. The definition of a parent for this section and section 31 includes a guardian and any other person who has the care of the person (subsection (6)).

Section 31 – Right to have intimation sent: under 18s

136. Under this section, if a constable believes that a person in police custody is under 18 years of age, the person sent intimation under section 30 must be asked to attend at the police station or other place where the person is being held (subsection (2)). For those under 16 years this means a parent of the person and for those aged 16 and 17 years, an adult named by them (section 30(3)). The requirement in subsection (2) does not apply if a constable believes that the person in police custody is 16 or 17 years of age and has requested that the person notified under section 30 should not be asked to attend (subsection (2A)).

137. If a constable believes that a person in police custody is under 18 years of age and finds that the person to whom intimation is to be sent is not contactable within a reasonable time or claims to be unable or unwilling to attend in a reasonable time, or a local authority has advised against sending intimation to that person, then intimation must be sent to another appropriate person. An “appropriate person” for these purposes might be a parent or guardian or carer or, a duty social worker from the local authority.

138. Where the person in police custody is believed to be under 16, attempts to send intimation must continue until an “appropriate person” is contacted and agrees to attend at the police station or other place the person is being held within a reasonable time. For these purposes, an “appropriate person” means a person the police consider appropriate having regard to the views of the person in police custody.

139. Where the person in police custody is believed to be 16 or 17 years of age, attempts to send intimation must continue until an “appropriate person” is contacted and agrees to attend at the police station or other place the person is being held within a reasonable time or the person in custody requests that, for the time being, no further attempts be made. For these purposes an
“appropriate person” means an adult who is named by the person in custody and to whom a constable is willing to send intimation without delay.

140. Subsection (6) provides that, where the police delay sending intimation by virtue of section 30(5)(a) or (b) (which allows the police to delay sending intimation where the person to be contacted is someone the police fear will compromise the investigation or the apprehension of offenders), they must endeavour to contact another appropriate person in accordance with subsection (4).

Section 32 – Right of under 18s to have access to other person

141. Section 32 provides for children under 18 years of age in police custody to have access to another person.

142. Under subsection (1) all children under 16 years of age in police custody must have access, in the first instance, to any parent (defined in subsection (4) to include guardians and carers) to provide support. Subsection (1)(b) ensures that where a parent is not available, the child has access to another appropriate adult sent intimation under section 30, subject to the caveats in section 32(3).

143. Subsection (2) provides similar rights of access for those aged 16 or 17 years. However, in this case the adult granted access to the 16 or 17 year old does not have to be their parent (in line with section 30, which allows this age group to request that intimation be sent under that section to an adult other than their parent). As explained in section 31, intimation may be sent to more than one person. Subsection (2A) provides that access need not be permitted to more than one person, subject to the caveats in section 32(3).

Section 32A – Social work involvement in relation to under 18s

144. Section 32A makes provision for a local authority to be notified of the fact that a person is in police custody (and where the person is being held), where a constable believes that the person may be subject to a supervision order or has delayed intimation by virtue of section 30(5)(c). Following intimation under subsection (1), a local authority may arrange for someone to visit the person in custody if that person is subject to a supervision order or the local authority believes the person to be under 16 years of age and arranging a visit would best safeguard and promote the person’s wellbeing. The local authority must be satisfied the visit will be made within a reasonable time before arranging the visit (subsection (3)).

145. Where a local authority arranges for someone to visit the person in custody, sections 30 and 32 cease to have effect (subsection(4)(a)) until such time as the local authority confirms that the person in custody is over 16 years and subject to a supervision order. Sections 30 and 32 will then apply as if a constable believes the person to be under 16 years of age (subsection (6)). The person who the local authority arranges to visit the person in custody must be permitted access to that person (subsection (4)(b)) unless, in exceptional circumstances, such access would affect the investigation or prevention of crime, the apprehension of offenders or the wellbeing of the person in custody (subsection (5)).
Vulnerable persons

Section 33 – Support for vulnerable persons

147. Section 33 makes provision to identify vulnerable adults in police custody and to provide them with support to assist communication between them and the police. In practice, this support is provided by an Appropriate Adult though this term is not used in the Bill.

148. To ensure support is provided as soon as is reasonably practicable, subsections (1), (2) and (4) provide that, where a police constable (who may have been advised that a person is vulnerable following an initial assessment by the police custody and security officer, who is a uniformed non-warranted officer, whose duties include attending to the wellbeing of a person in their custody) considers that a person in police custody is age 16 or over and is unable, because of a mental disorder, to understand what is happening or to communicate effectively, they must make sure that an Appropriate Adult is told where the person is being held (this is not always at the police station and could be, for example, at a hospital) and that they require the support of an Appropriate Adult.

149. Subsection (3) provides that the role of the Appropriate Adult is to assist a vulnerable person to understand what is happening and to facilitate effective communication between the vulnerable person and the police.

150. Subsection (5) explains that “mental disorder” is as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (i.e. “any mental illness, personality disorder, learning disability however caused or manifested”). It also explains that references to the police are to constables or members of police staff as provided for in section 99 of the Police and Fire Reform (Scotland) Act 2012. This ensures that a constable can delegate certain tasks, such as intimation to an Appropriate Adult, to a civilian member of police staff.

Intimation and access to a solicitor

Section 35 – Right to have intimation sent to solicitor

151. Section 35 affords a person in police custody the right to have a solicitor informed, as soon as reasonably practicable after a request is made by the person in police custody, that the person is being held in police custody, where they are being held and that the professional assistance of a solicitor is required. If the person has been officially accused of an offence (i.e. charged with the offence by the police or where a prosecutor has started proceedings in relation to the offence), the person has the right to have a solicitor informed whether they are to be released from custody or, if not, of the court before which the person is to be brought and the day on which the person will be brought before court.
Section 36 – Right to consultation with solicitor

152. Section 36 provides for the right of a person in police custody to have a private consultation with a solicitor at any time. For the purposes of this section, a consultation is defined by subsection (3) as a consultation by such means as considered appropriate, for example, by telephone.

153. Under subsection (2) the police can delay the exercise of this right only so far as necessary in the interest of the investigation or prevention of crime, or the apprehension of offenders.

Chapter 6 – Police powers and duties

Powers of police

Section 37 – Use of reasonable force

154. Section 37 enables a constable to use reasonable force to effect an arrest and when taking a person in custody to any place.

Section 38 – Common law power of entry

155. Section 38 makes clear that any existing powers of a constable to enter any premises for any purposes are not affected by this Bill. Those powers remain.

Section 39 – Common law power of search etc.

156. Section 39(1) similarly preserves any existing powers of a constable in relation to a person arrested and charged, for example, to search them, seize items in their possession and place them in an identification parade (this list is not exhaustive).

Section 40 – Power of search etc. on arrest

157. Section 40 makes clear that the powers described in section 39(2) which can be exercised by a constable in relation to a person after arrest and charge can also be exercised between a person’s arrest and the person being charged.

Care of drunken persons

Section 40A – Taking drunk persons to designated place

158. Section 40A(1) allows the police to take a person who is deemed to be drunk to a designated place (as designated by the Scottish Ministers) to be cared for instead of arresting the person for an offence. By using this power it does not, however, require the person to remain unwillingly at such a place nor does it prevent a constable from subsequently arresting the person.
Duties of police

Section 41 – Duty not to detain unnecessarily

159. Section 41 provides that a constable must ensure that a person is not unreasonably or unnecessarily held in police custody.

Section 42 – Duty to consider child’s best interests

160. Section 42 states that in making decisions to arrest a child (defined for this section in subsection (3) as a person under 18 years of age), hold a child in police custody, interview a child about an offence which the child is suspected of committing, or charge a child with an offence, a constable must treat the need to safeguard and promote the well-being of the child as a primary consideration. This does not mean that the interests of the child are the only consideration or that they are, in all cases, the most important consideration. For example, the need to protect others may prevail.

Section 42A – Duties in relation to children in custody

161. Section 42 states that a child who is in police custody at a police station should, so far as practicable, be prevented from associating with any adult who is officially accused of committing an offence unless a constable believes it would be detrimental to the child’s wellbeing to prevent them from associating with that particular adult (subsection (2)).

Section 42B – Duty to inform Principal Reporter if child not being prosecuted

162. Section 42B applies where a person is being kept in a place of safety (as defined in subsection (5)) in accordance with section 18A(2) when it has been decided not to prosecute the person for any relevant offence (as defined in subsection (4)) but a constable has reasonable grounds for suspecting that the person has committed a relevant offence. The Principal Reporter must be informed as soon as reasonably practicable that the person is being kept in a place of safety until the Principal Reporter makes a direction under section 65(2) of the Children’s Hearings (Scotland) Act 2011.

Chapter 8 – General

Common law and enactments

Section 50 – Abolition of pre-enactment powers of arrest

163. Section 50 provides that the only power of arrest which the police have to bring a person into police custody comes from Section 1 of this Bill and Section 41(1) of the Terrorism Act 2000.

Section 51 – Abolition of requirement for constable to charge

164. Section 51 provides that a constable does not have to charge a suspect with a crime at any time and abolishes any rule of law that requires such a charge to be made.
Section 52 – Consequential modification

165. Section 52 introduces schedule 1 to the Bill which contains details of changes to existing legislation as a consequence of Part 1. Paragraph 290 provides further detail in regard to Schedule 1.

Section 52A – Code of practice about investigative functions

166. Section 52A requires the Lord Advocate to issue a code of practice on the matters set out in subsection (1) and to keep such a code of practice under review.

167. Section 52A(3) sets out that the code will apply to the Police Service of Scotland and such other bodies specified in the code who report offences to the procurator fiscal.

168. Section 52A(4) contains a requirement for the Lord Advocate to publicly consult on the code and subsection (5) identifies the persons or groups that the Lord Advocate is required to consult when preparing the code.

169. Section 52A(6) obliges the Lord Advocate to lay a copy of the code of practice before the Scottish Parliament.

170. Section 52A(7) and (8) contain provisions relating to the legal status of the code and the effect of a breach of the code of practice.

Disapplication of Part

Section 52B – Disapplication in relation to service offences

171. Section 52B clarifies that service offences are not included in this Part. Service offences are those offences committed by service personnel under the Armed Forces Act 2006.

Section 53 – Disapplication to terrorism offences

172. Section 53 provides that Part 1 of the Bill, dealing with arrest and custody, does not apply to persons arrested under the Terrorism Act 2000.

Powers to modify Part

Section 53A- Further provision about application of Part

173. Section 53A provides that the Scottish Ministers may by regulations modify Part 1 to either provide that some or all of it applies to persons to whom it otherwise does not apply because of sections 52B and 53, or to dis-apply some or all of it so that it does not operate in relation to people who have been arrested otherwise that in respect of an offence.
Section 53B—Further provision about vulnerable persons

174. Section 53B allows the Scottish Ministers to modify, by regulations, the provisions which provide that those aged over 16 and who have a mental disorder are unable to consent to being interviewed without a solicitor being present.

175. Section 53B allows the modification of the description of vulnerable persons in relation to whom support is to be sought, and allows modification of the definition of the type of support to be sought for vulnerable persons as currently set out under section 33. The Scottish Ministers will also be able to specify, for the purposes of section 33, those persons to be considered suitable for providing the support mentioned in section 33, including by reference to training, qualifications and experience.

176. Section 52B also enables the Scottish Ministers to modify those provisions in sections 25 and 33 which provide definitions of certain relevant terms, in particular references to the police and the term “mental disorder”.

177. The effect of Section 53B is to allow the Scottish Ministers to alter the conditions under which section 25 and 33 apply and the nature of the support referred to in section 33, and to make further provisions about that support.

Interpretation of Part

Section 54—Meaning of constable

178. Section 54 defines the meaning of constable for the purposes of this Part.

Section 55—Meaning of officially accused

179. Section 55 defines the meaning of the term “officially accused” for the purposes of this Part.

Section 56—Meaning of police custody

180. Section 56 defines the meaning of police custody for the purposes of this Part.

PART 3—SOLEMN PROCEDURE

Section 63—Proceedings on petition

181. Section 63 changes the procedure to be followed at what are usually the first court appearances of a person being prosecuted under solemn procedure, when the person appears on petition.

182. The purpose of these provisions is to abolish the procedure, commonly known as judicial examination, whereby the prosecutor can, at the commencement of a case being prosecuted under solemn procedure, question the accused in the presence of the sheriff. In addition, the section 63 removes the rarely-used option for the accused to make a declaration – broadly, a
statement of his or her position in respect of the charge or charges on the petition – at that stage in proceedings.

183. Subsection (1) inserts a provision into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which removes the accused’s common-law right to be given the opportunity to make a declaration at the commencement of a case being prosecuted under solemn procedure.

184. Subsection (2) both removes from statute various provisions which relate to declarations, and abolishes the procedure known as judicial examination.

185. Subsection (2)(a) removes, from the 1995 Act, provisions which govern the making of declarations, and the right of the prosecutor to question the accused on extra-judicial confessions.

186. Subsection (2)(b) removes from the 1995 Act three sections which enable and regulate procedure at judicial examinations. By so doing, it abolishes the procedure.

187. Subsections (2)(c), (2)(d), and (2)(e) remove from the 1995 Act various provisions in respect of any records made of a judicial examination. These changes are consequential to the abolition of the judicial examination procedure by subsection (2)(b).

Section 65 – Pre-trial time limits

188. Sections 65 to 67 make changes to the procedure followed in proceedings on indictment in the sheriff court.

189. Section 66 introduces a requirement on the prosecution and the defence to communicate and to lodge a written record of their state of preparation in advance of the first diet.

190. Section 67 provides that the arrangement by which a sheriff court indictment assigns dates for both the first diet and the trial ceases to have effect. Instead the court will appoint a trial diet at the first diet, or at a continuation of it, having ascertained the parties’ state of preparation.

191. Section 65 makes changes to the time limits prescribed in section 65 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which are intended to allow time for the procedure set out in section 66. In particular the period during which the accused can be remanded in custody pending a first diet and trial are brought in line with the corresponding High Court limits to reflect the altered pre-trial procedure.

192. Subsection (2) amends section 65 of the 1995 Act to set out revised time limits for various procedural steps in proceedings on indictment in the sheriff court.

193. The amendments made by subsection (2)(a) and (b) prevent the accused being tried on indictment in the sheriff court where the first diet is not commenced within 11 months of the first appearance on petition. That period can be extended by the court under section 65(3) of the 1995 Act. The 12-month period within which the trial must be commenced, as specified in section
65(1)(b) of the 1995 Act is unaffected. The amended provisions mirror the equivalent arrangements for proceedings in the High Court.

194. Subsection (2)(c) amends the provisions in section 65(4) of the 1995 Act concerning the periods during which the accused person who is committed until liberated in due course of law (i.e. imprisoned to await the outcome of a trial) can be detained by virtue of that committal where an indictment has been served in respect of the sheriff court. The effect of the amendment is that the accused person must be liberated after 110 days, if no first diet has been held, and 140 days if such a diet has been held, unless the trial begins within that period. These periods can be extended by the court under section 65(5) of the 1995 Act. Again, the amended provisions mirror High Court procedure. To assist in the calculation of the time period, subsection (2)(d) amends section 65(9) of the 1995 Act to provide that the first diet in the sheriff and jury court shall be taken to commence when it is called.

195. Subsection (3) amends section 66(6) of the 1995 Act to replace the arrangements whereby an accused person is to be tried on indictment in the sheriff court is given notice of the first diet and trial diet at the same time as being served with the indictment. Instead, the accused will be given notice only of the first diet and the date of the trial diet will be fixed at the first diet. The period within which the first diet must take place will be increased from 15 clear days from the service of the indictment to 29 clear days; this change makes the sheriff court practice consistent with High Court practice.

196. Subsection (4) amends section 72C(4) of the 1995 Act for consistency with the amendment made by subsection (3). Section 72C(4) is a provision in similar terms to section 66(6), it deals with the situation where a fresh indictment has to be served on an accused because a preliminary hearing before the High Court either did not take place when it was supposed to, or was deserted for the time being without another hearing being appointed.

Section 66 – Duty of parties to communicate

197. Section 66 amends the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to impose a duty on the prosecution and the defence, in cases indicted to the sheriff court, to communicate and to prepare a written record of their state of preparation.

198. Subsection (2) amends section 71 of the 1995 Act by inserting a new subsection (1ZA) which requires the court to have regard to the written record when ascertaining the parties’ state of preparation at the first diet.

199. Subsection (3) inserts a new section 71C into the 1995 Act. Subsection (2) of this new section requires the prosecutor and the accused’s legal representative (as defined in subsections (8) and (9)) to communicate and jointly prepare a written record of the state of preparation of their respective cases. The requirement arises where the accused is indicted to the sheriff court and is represented by a solicitor (new section 71C(1)).

200. Subsection (3) of the new section 71C provides that the period within which the communication must take place, and within which the written record of the state of preparation must be prepared is the period beginning with the service of the indictment and ending 14 days later.
201. Subsection (6) of the new section 71C provides for the form, content, and arrangements for lodging of the written record, to be prescribed under an Act of Adjournal. Subsection (7) provides that the record must include a statement of how the communication required by this new section took place. Subsection (7) gives examples of the means by which the communication may take place, but the examples are not exhaustive of the means that might be employed.

202. Section 66(4) of the Bill amends section 75 of the 1995 Act to include a reference to the period mentioned in section 71C. This ensures that, where the 14 day period referred to in section 71C(3) ends on a weekend or on a court holiday, it is extended to include the next day that is not a Saturday, Sunday or court holiday.

Section 67 – First diets

203. Section 67 deals with the procedure at first diets in proceedings on indictment in the sheriff court.

204. Subsection (2) amends section 66 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Subsection (2)(a) requires the notice served on the accused with the indictment to include a warning to the accused that the first diet may proceed in his or her absence and that a trial diet may be fixed in his or her absence. This is distinct from the intimation that requires to be given by virtue of section 66(6AA) where the accused is a body corporate. However, even if the notice does not contain this warning, the amendment to section 66(6B) of the 1995 Act made by subsection (2)(b) ensures that the validity of the notice, and other procedure against the accused, is not invalidated by the omission.

205. Subsection (3) amends section 71 of the 1995 Act. The amendments provided for in subsection (3)(a), (b) and (d) are consequential on the new arrangements whereby the trial diet is appointed at the first diet (see discussion below of new section 71B). Subsection (3)(c) ensures that the requirement in section 71(6) that the accused should be called upon to plead at the first diet does not prevent the first diet proceeding in the absence of the accused. Subsection (3)(e) extends to the new section 71B discussed below the definition of the word “court” in section 71 of the 1995 Act, so that in the new section 71B references to the court will be understood as references to the sheriff court only.

206. Subsection (4) inserts a new section 71B into the 1995 Act, to deal with appointment of a trial diet at the first diet.

207. Subsection (1) of the new section 71B provides that, having taken the steps and examined the issues required at the first diet, the court only then goes on to appoint a trial. The appointing of a trial has to be in accordance with subsections (3) to (7), which are discussed below. Subsection (2) requires the accused to appear at the trial diet.

208. Subsections (3) and (4) of the new section 71B apply when a case is subject to the requirement that the trial must commence within 12 months of the accused’s first appearance on petition. If the court considers that the case would be likely to be ready to proceed to trial within the 12 months (which may not be 12 months from the petition appearance, because the period can be extended under section 65(3) of the 1995 Act) the court must, subject to subsections (5) to
(7) appoint a trial within the 12 month period. If the court does not think the case will be ready to proceed within the 12 months, the prosecutor must be given an opportunity to seek an extension of the 12 month period. If an extension is granted the court must, again subject to subsections (5) to (7), appoint a trial within the 12 month period as extended. If the period is not extended the court may desert the first diet (either permanently or for the time being only) and if the accused is being held in custody pending trial, the accused must be liberated.

209. Subsections (5) to (7) of the new section 71B apply where, in addition to the court being required to appoint a trial diet within the 12 month period under subsection (3) or (4), the accused has been committed until liberated in due course of law (i.e. imprisoned to await the outcome of a trial) and cannot be detained by reason of that committal for more than 140 days without being put on trial. In that event, as well as appointing a trial diet within the 12 month period, the court must appoint a trial within the 140 day period if it is satisfied that the case will be ready to go to trial within that period. If the court is not satisfied about that, the prosecutor must be given an opportunity to apply for an extension of the 140 day period. If an extension is granted the court must appoint a trial for a date within the 140 day period as extended (as well as within the 12 month period). If the period is not extended the accused is entitled to be admitted to bail. In that event, subsection (8) requires the court to give the prosecutor an opportunity to be heard before admitting the accused to bail.

210. Where the court has appointed a trial diet for an accused on bail (other than in the circumstances where the accused has been bailed as described in the previous paragraph) subsection (9) of the new section 71B requires that the court must review the accused’s bail conditions and empowers it, if it considers it appropriate, to set different conditions.

211. Subsection (10) of the new section 71B defines the 12 month and 140 day time limits with reference to the applicable provisions of section 65 of the 1995 Act.

212. Subsection (5) of section 67 amends section 76(3) the 1995 Act which makes provision for the situation where a diet fixed as a result of an intimation given by the accused under section 76(1) (that he intends to plead guilty) does not result in pleas being accepted in respect of all charges. The amendment allows the court to postpone a first diet where a case has been indicted to the sheriff court on the same basis as the power to postpone a preliminary hearing where the case has been indicted to the High Court.

213. Subsection (6) inserts a new section 83B into the 1995 Act applying to jury trials in the sheriff court. The section allows trials that have not yet been commenced to be continued from sitting day to sitting day, up to a maximum number of sitting days after the day originally appointed for the trial, the maximum being set by Act of Adjournal. Failure to commence the trial by the end of the last sitting day permitted results in the indictment falling and proceedings against the accused coming to an end.

**Section 68 – Preliminary hearings**

214. Section 68 reverses the effect of amendments to section 72A of the Criminal Procedure (Scotland) Act 1995 effected by section 7(3) of the Vulnerable Witnesses (Scotland) Act 2004. The amendments, which relate to proceedings in the High Court, were mistakenly applied after
the section to which they related was repealed by the Criminal Procedure (Amendment) (Scotland) Act 2004, and replaced with another section with the same number.

Section 69 – Plea of guilty

215. Section 69 repeals that part of section 77(1) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which requires that the accused pleading guilty to an indictment should sign a copy of the plea. Section 70(7) of the 1995 Act, which provides for an exception to the signing requirement where the accused pleading guilty is an organisation, is thereby rendered obsolete and is also repealed.

PART 4 – SENTENCING

Maximum term for weapons offences

Section 71 – Maximum term for weapons offences

216. The Criminal Law (Consolidation) (Scotland) Act 1995 provides for the following offences:

- carrying an offensive weapon in a public place (section 47);
- possessing an article with a blade or point in a public place (section 49);
- possessing an article with a blade or point (or weapons) on school premises (section 49A);
- having an offensive weapon etc. in prison (section 49C).

217. Section 71 of the Bill increases the maximum penalty for each of those offences from 4 to 5 years.

Prisoners on early release

Section 72 – Sentencing under the 1995 Act

218. Section 72 of the Bill inserts a new section 200A into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). New section 200A(1) of the 1995 Act provides that when the court is dealing with a person who has been found to have committed an offence that is capable of being punishable with imprisonment (except where the offence is such that the court is required to impose a life sentence), the court must so far as is reasonably practicable ascertain whether the person was on early release from a previous sentence at the time the offence was committed.

219. Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”), Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003 provide for the operation of release from custody of a prisoner prior to the end of a prisoner’s sentence. The operation of these provisions is commonly known as “early release” arrangements. For the purposes of new section 200A, new section 200A(3) provides that a person is on early release if they are not in custody as a result of the operation of Part I of the 1993 Act, Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003.
Section 16 of the 1993 Act provides the court with a power to be able to punish a person who commits an offence while on early release. This power is separate and additional to the normal powers of the court to sentence the person for having committed the offence. These powers are commonly known as section 16 orders and can be seen as a punishment on a person for having abused the trust placed in them by committing an offence while on early release.

New section 200A(2) provides that where the court has determined under new section 200A(1) that a person was on early release at the time the offence was committed, the court must consider making a section 16 order.

New section 200A(2) also provides that in the case where the court dealing with the offence is inferior to the court which imposed the previous sentence from which the person was released early, an inferior court must consider making a reference to the court which imposed the previous sentence so that they can consider making a section 16 order. This is subject to the new powers being given to inferior courts to make section 16 orders contained in section 73(4) of the Bill.

Section 73 – Sentencing under the 1993 Act

Where an offence (“the new offence”) has been committed while a person was on early release, section 16(2) of the 1993 Act provides that a Scottish court may, instead of or in addition to imposing a sentence for plea or finding of guilt, order that a person may be returned to prison for a period of time. This period can be up to a maximum length equal to the period of time between the date on which the new offence was committed and the date of the expiry of their previous sentence. Section 16(2)(b) of the 1993 Act provides that where the court dealing with the new offence is inferior to the court which imposed the sentence from which the person was released early, the inferior court cannot directly impose a section 16 order and can only refer the case to the higher court for consideration to be given as to whether a section 16 order should be imposed.

Section 73(2) of the Bill adjusts section 16(1) of the 1993 Act so that prisoners released early under Part 12 of the Criminal Justice Act 2003 can have section 16 orders imposed upon them.

Section 73(4) of the Bill inserts new section 16(2A) into the 1993 Act. New section 16(2A) provides new discretion for courts dealing with persons who have committed offences while on early release from a previous sentence imposed by a higher court. The effect of the new discretion is that inferior courts will be able to consider making a section 16 order in such cases.

The powers of inferior courts to impose section 16 orders are restricted to those cases where the maximum length of a section 16 order does not exceed the sentencing powers of the court in respect of common law offences. Section 7(6) of the 1995 Act provides that a Justice of the Peace court can impose a custodial sentence for common law offences of up to 60 days. Section 5(2) of the 1995 Act provides a sheriff summary court, including when constituted by a stipendiary magistrate (by virtue of section 7(5) of the 1995 Act), can impose a custodial sentence for a common law offence of up to 12 months. Section 3(3) of the 1995 Act provides a sheriff solemn court can impose a custodial sentence for a common law offence of up to 5 years.
227. New section 16(2A)(b)(i) provides that a Justice of the Peace court, except when constituted by a stipendiary magistrate, will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 60 days.

228. New section 16(2A)(b)(ii) provides that a Justice of the Peace court constituted by a stipendiary magistrate or a sheriff sitting summarily (i.e. without a jury) will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 12 months.

229. New section 16(2A)(b)(iii) provides that a sheriff sitting as a court of solemn jurisdiction (i.e. with a jury) will be able to impose a section 16 order in cases where the maximum length of a section 16 order does not exceed 5 years.

230. Section 73(3) makes consequential changes to section 16(2) reflecting the insertion of new section 16(2A) into the 1993 Act.

PART 5 – APPEALS AND SCCRC

Appeals

Section 74 – Preliminary pleas in summary cases

231. Section 174 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) allows for decisions disposing of certain objections and denials in summary proceedings, including objections to the competency and relevancy of the complaint, to be appealed to the High Court where the first instance court gives permission for the appeal. Section 74 of the Bill amends section 174 of the 1995 Act by removing the requirement to obtain permission for an appeal by the prosecutor against a decision that has resulted in the dismissal of the complaint, or any part of it.

Section 75 – Preliminary diets in solemn cases

232. Section 74 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act) allows for decisions taken at first diets and preliminary hearings to be appealed to the High Court where the first instance court gives permission for the appeal. Section 75 of the Bill amends section 74 of the 1995 Act by removing the requirement to obtain permission for an appeal by the prosecutor against a decision that has resulted in the dismissal of the indictment, or any part of it.

Section 76 – Extending certain time limits: summary

233. Section 76 amends section 181 of the Criminal Procedure (Scotland) Act 1995 Act (“the 1995 Act”) so as to make further provision concerning applications to extend certain time limits that apply in relation to appeals from summary proceedings.

234. Subsection (2) inserts provisions prescribing the test to be applied by the High Court when determining an application to extend the period within which a convicted person may apply for a stated case. Subsections (3) and (4) omit the provisions under which the respondent in relation to an application under section 181(1) of the 1995 Act may insist on a hearing.
Subsection (5) inserts section 181(5) which requires the court to give reasons in writing for a decision to extend a period on an application under section 181(1).

By virtue of section 186(8) of the 1995 Act, the amendments effected by section 76 of the Bill also have effect in relation to certain applications to extend the period allowed for the lodging of a note of appeal under section 186.

**Section 77 – Extending certain time limits: solemn**

Section 77 makes provision concerning applications to the High Court under section 111(2) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) applications to extend the period within which a convicted person may lodge intimation of intention to appeal, or a note of appeal.

Subsections (3) to (6) amend section 111. Subsection (3) inserts provisions prescribing the test to be applied by the High Court when determining an application under section 111(2) when it is received after the expiry of the period to which it relates. Subsection (4) amends section 111(2A) so as to extend to every application under section 111(2) the requirement on the applicant to state reasons for the failure to comply with the applicable time limit and to state the proposed grounds of appeal. Subsection (6) inserts section 111(4) which provides that applications under section 111(2) are to be dealt with in chambers and, unless the court otherwise directs, without parties being present. Subsections (1) and (5) contain amendments that are consequential on this change. Subsection (6) also inserts section 111(5) which requires the court to give reasons in writing for a decision to extend a period.

**Section 78 – Certain lateness not excusable**

Section 78 amends section 300A of the Criminal Procedure (Scotland) Act 1995 by inserting a new subsection (7A). Section 300A gives courts a general power to excuse failures to comply with procedural requirements. The amendment precludes a failure to timeously lodge certain documents from being excused under section 300A. The documents in question are those which the High Court can permit being lodged late by applying the tests that are to be amended by sections 76 and 77 of the Bill (i.e. documents used to initiate appeals from, respectively, summary and solemn proceedings).

**Section 79 – Advocation in solemn proceedings**

Section 79 inserts section 130A into the Criminal Procedure (Scotland) Act 1995, which provides that it is not competent for a decision taken at a first diet or preliminary hearing to be appealed to the High Court by bill of advocation. The provision excludes bill of advocation as a competent method of appealing a decision that could be appealed under the procedure provided for in section 74 of the 1995 Act.

**Section 80 – Advocation in summary proceedings**

Section 80 inserts section 191B into the Criminal Procedure (Scotland) Act 1995. The new section applies to decisions disposing of certain objections and denials which require to be stated before a plea is tendered in summary proceedings, including objections to the competency or relevancy of a complaint. Such decisions can be appealed to the High Court under the
procedure provided for in section 174 of the 1995 Act. The new section provides that such decisions cannot also be competently appealed by way of bill of advocation.

Section 81 – Finality of appeal proceedings


242. Section 81(2) inserts a new section 194ZA into the 1995 Act. Subject to the exceptions specified, the new section provides that decisions of the High Court when disposing of an appeal related to summary proceedings are final and conclusive and not subject to review by any court whatsoever. The new section is in similar terms to the corresponding provision in section 124(2) of the 1995 Act, which relates to decisions of the High Court when disposing of appeals from solemn proceedings.

SCCRC

Section 82 – References by SCCRC

243. Section 82 of the Bill amends the Criminal Procedure (Scotland) Act 1995 to adjust how the High Court considers cases referred to it by the Scottish Criminal Cases Review Commission (“the SCCRC”) and to adjust the definition of the ‘interests of justice’ test applied by the SCCRC in deciding whether to refer a case to the High Court.

244. Section 82(3A) of the Bill repeals section 194C(2) of the 1995 Act so that the SCCRC are no longer required to explicitly consider the need for finality and certainty in criminal proceedings as part of how they assess ‘interests of justice’ when deciding whether to refer a case to the High Court.

245. Section 82(4) of the Bill repeals section 194DA of the 1995 Act so that the High Court will no longer have the power to reject a SCCRC reference on the basis of applying an interests of justice test. Section 82(2) of the Bill makes a consequential change to section 194B of the 1995 Act.

PART 5A – CHILDREN AFFECTED BY PARENTAL IMPRISONMENT

246. Section 82A places a duty on the court to ensure that a child and family impact assessment is undertaken where a person who has responsibility for a child has (a) been remanded in custody awaiting trial, (b) been found by a court to have committed an offence punishable with imprisonment and has been remanded in custody awaiting sentence, or (c) been sentenced to a term of imprisonment or other detention.
PART 6 – MISCELLANEOUS

Chapter A1 – Publication of prosecutorial test

Section 82B – Publication of prosecutorial test

247. This section obliges the Lord Advocate to publish the matters which are considered by a prosecutor when deciding whether to commence, and thereafter continue with, criminal proceedings. This is sometimes known as the prosecutorial test.

Chapter 1 – Statements and procedure

Statements by accused

Section 62 – Statements by accused

248. Section 62 inserts new section 261ZA into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). New section 261ZA will modify the common-law rule on the admissibility of hearsay evidence in criminal proceedings, as it applies to certain types of statement made by an accused.

249. Section 261ZA(1) and (2) provide that evidence of a statement made by an accused in certain circumstances is not inadmissible as evidence of a fact contained in the statement on account of the evidence being hearsay. The provision applies to a statement made by the accused in the course of being questioned (whether as a suspect or not) by a constable or another official investigating an offence.

250. The provision modifies the law relating to hearsay. As explained by the High Court of Justiciary in Morrison v HM Advocate 1991 SLT 57, “The general rule is that hearsay, that is evidence of what another person has said, is inadmissible as evidence of the facts contained in the statement”. That general rule is subject to exceptions. The existing common-law exceptions (discussed in McCutcheon v HM Advocate 2002 SLT 27) allow for a statement made by the accused to be admitted as evidence of a fact contained in the statement if it is inculpatory of the accused (e.g. a confession) or “mixed” (e.g. a statement in which the accused puts himself or herself at the locus at the time the offence was committed, but does so in the context of proffering an innocent explanation for why the accused was there). The common-law does not, however, allow evidence of a statement made by the accused to be admitted as evidence of a fact asserted in the statement if the statement is purely exculpatory of the accused.

251. Subject to subsection (3), section 261ZA extends the exceptions by dispensing with the distinctions between inculpatory, exculpatory and mixed statements. The effect is that any statement made by an accused person to a constable or another official investigating an offence is excepted from the general rule that hearsay evidence is not admissible as evidence of a fact contained in the statement, regardless of whether it is inculpatory, exculpatory or “mixed”.

252. By virtue of subsection (3), section 261ZA does not affect the admissibility of evidence of a statement made by an accused as evidence in relation to a co-accused. Section 261 of the 1995 Act lays down special rules which apply before hearsay evidence of a statement by one accused can be admitted in evidence in relation to another accused. Those rules will continue to apply before evidence of a statement made by accused A can be treated as evidence of fact in the case for or against accused B.
253. New section 261ZA is restricted in its effect to superseding objections to the admissibility of evidence based on its hearsay quality. The provision does not override any other objections to the admissibility of evidence of a statement, such as objections to its admissibility based on the fairness of the circumstances in which the statement was made, or based on the content of the statement (for example, section 274 of the 1995 Act, which concerns the admissibility of evidence relating to the sexual history or character of a complainer in a sexual offence case, will still apply).

Use of live television link

Section 86 – Use of live television link

254. Subsection (1) of section 86 inserts sections 288H to 288K into the Criminal Procedure (Scotland) Act 1995. The new sections (discussed in greater detail in the following paragraphs) make provision for the participation of detained persons in hearings by means of live television link from the place of detention.

255. Subsection (2) repeals enactments in consequence of the new sections of the 1995 Act inserted by subsection (1). Specifically, paragraph (a) repeals section 117(6) of the 1995 Act, which requires an appellant in an appeal from solemn proceedings to appear before the court in ordinary civilian clothes. Paragraph (b) repeals section 80 of the Criminal Justice (Scotland) Act 2003, which allowed certain court appearances to be conducted by means of live television link and is rendered obsolete by the wider reaching new sections inserted by section 86 of the Bill.

Inserted section 288H – Participation through live television link

256. Subsection (1) requires a detained person to participate in a “specified hearing” (defined by inserted section 288J) by means of live TV link where the court has determined that the hearing should proceed in that manner. Before so determining, subsection (2) requires the court to give the parties an opportunity to make representations on the use of the TV link in the hearing. The court can only allow the hearing to proceed by TV link if satisfied that it is not contrary to the interests of justice to do so.

257. Subsection (3) gives the court the power to require a detained person to appear by TV link from the place where the person is in custody for the sole purpose of considering whether to make a determination on the use of TV links in the specified hearing itself.

258. Where a detained person participates in a hearing by means of a TV link, the effect of subsection (4) is that the place of detention is deemed part of the court room, so that the hearing is deemed to take place in the presence of the detained person.

Inserted section 288I – Evidence and personal appearance

259. Subsection (1) precludes evidence as to a charge against the detained person on a complaint or indictment being led at a hearing in which the detained person is participating by means of a TV link. It would therefore not be possible for a trial in which evidence is being led to proceed with the accused participating by TV link.
260. Subsection (2) gives the court the power to revoke, before or during a hearing, a
determination (under section 288H(1)) that the accused is to participate at the hearing by TV link
and subsection (2)(b) requires that the court exercise the power to revoke the determination if it
considers that it is in the interests of justice for the detained person to appear in person. The
court might consider revocation of its previous determination if, for example, a technical issue
arises with the link itself, or when further information comes to light during the substantive
hearing which, in the view of the court, makes it no longer appropriate to proceed by way of TV
link.

261. In the event that the court decides not to proceed with the appearance of the accused by
TV link, or revokes an earlier determination to allow proceedings via TV link, practical
difficulties might arise – the accused may well need to be brought to court, which might not be
readily achievable on the same day, so postponement of the hearing could be necessary.
Subsection (3) allows the court, in these circumstances, to postpone the hearing to a later day.
The effect of a postponement under this section is detailed in inserted section 288IA.

Inserted section 288IA of the 1995 Act – Effect of a postponement

262. Subsection (1) provides that, where a case is postponed to the next day under section
288I, that day and any intervening weekend days or court holidays do not count towards any
time limits – such as, for example, those for detaining a person in custody pending a first diet or
preliminary hearing in the case. However, this provision does not apply where the accused is in
police custody under section 18(2) of this Act, which requires an accused, if practicable, to be
brought before a court before the end of the first day on which the court is sitting following the
accused’s arrest; or as soon as practicable thereafter.

263. The effect of this is that when a postponement is regarded as necessary for an accused in
police custody, the accused still has a right to argue that the section 18 requirements have not
been complied with, even if the postponement had become unavoidable by the time it was
granted. It would then be up to the court to decide if the circumstances provide sufficient
justification for the delay. Nonetheless, a postponement in such a situation remains competent,
as subsection (2) makes clear.

Inserted section 288J – Specified hearings

264. Subsection (1) confers on the Lord Justice General the function of specifying the
categories of hearings, such as the first appearance, at which a detained person may participate
by live television link. Hearings may be specified by reference to the venues at which hearings
take place (subsection (2)(a)), particular places of detention (subsection (2)(b)), or the types of
cases or proceedings in which TV links can be used (subsection (2)(c)). Under subsection (3)(a)
the Lord Justice General can vary or revoke any earlier directions and make different provision
for different purposes (subsection (3)(b)).

Inserted section 288K – Defined terms

265. This section defines certain terms used within sections 288H to 288J. The expression
“detained person” is defined so that the person imprisoned or lawfully detained at a location in
Scotland. The concept of lawful detention is a broad one, it includes detention at a police station
pending first appearance at court, detention in hospital by virtue of an assessment order or a
This document relates to the Criminal Justice (Scotland) Bill as amended at Stage 2 (SP Bill 35A)

treatment order imposed under the 1995 Act, detention in hospital under the Mental Health (Care and Treatment) (Scotland) Act 2003, or a young person’s detention in local authority secure accommodation.

Section 86A – Electronic proceedings

266. Section 86A inserts subsection 305(1A) into the 1995 Act. It provides that the power of the High Court to regulate criminal procedure through Acts of Adjournal includes the power to make provision in respect of electronic proceedings. This might include, for example, constituting or keeping any document (or copy), serving or conveying any document (or copy) or signing or otherwise authenticating any document (or copy).

Chapter 1A – Authorisation under Part III of the Police Act 1997

267. Section 86B allows directly employed staff of the Police Investigations and Review Commissioner, who have been designated by the Commissioner to take charge or assist in investigations, to make property interference applications to the Commissioner for authorisation under Part III of the Police Act 1997. It also allows the Commissioner to designate a member of directly employed staff to authorise property interference in the Commissioner’s absence if the matter is urgent.

Chapter 2 – Police Negotiating Board for Scotland

Section 87 – Establishment and functions

268. Section 87(1) inserts a new Chapter 8A into the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”) to provide for a Police Negotiating Board for Scotland (“PNBS”).

269. New section 55A provides for the PNBS to be established, and introduces a new schedule 2A to make further provision about it. New schedule 2A is set out in schedule 3 to the Bill (see paragraphs 291 and 292 for further discussion).

270. New section 55B provides that the PNBS may make representations to the Scottish Ministers about pay, allowances and expenses, public holidays and leave, the issue, use and return of police clothing and equipment, and hours of duty, in relation to constables (other than special constables) and cadets. Such representations may be made about draft regulations or draft determinations on these issues, or generally. The Scottish Ministers may, after consultation with the chairperson, require the PNBS to make representations about these matters within a set time period which may be extended by the Scottish Ministers.

271. New section 55C provides that the PNBS may also make representations to the Scottish Ministers about other matters relating to the governance, administration and conditions of service of constables (other than special constables) and police cadets including draft regulations on such matters.

272. New section 55CA creates a mechanism for the Scottish Ministers to be required to take all reasonable steps appearing to them to be necessary for giving effect to representations in certain circumstances. The circumstances are that the representations are made under new
section 55B(1), and that they are in terms settled through arbitration in accordance with the PNBS constitution and that they concern a “qualifying case”, to be specified by the Scottish Ministers in regulations made under new schedule 2A, paragraphs 4(6) and 4C.

273. New section 55D requires the PNBS to produce an annual report on how it has carried out its functions which is to be given to the Scottish Ministers and published. The reporting year for the annual report will be defined in the PNBS’s constitution.

274. Section 87(2) amends section 54 of the 2012 Act to require the Scottish Ministers to consult the PNBS before making regulations about the matters mentioned in new section 55B(4).

275. Section 87(2A) amends section 125 of the 2012 Act to provide that certain regulations made under new Chapter 8A (see paragraph 268) will be scrutinised by the Scottish Parliament in accordance with affirmative procedure.

**Section 87A – Consequential and transitional**

276. Section 87A makes consequential provision in connection with the establishment of the PNBS. The Freedom of Information (Scotland) Act 2002 will apply to the PNBS and the appointment of the chairperson of the PNBS will be in accordance with the Public Appointments and Public Bodies etc. (Scotland) Act 2003. Section 87A also makes transitional provision. When the PNBS provisions come into force the chairman of the PNBS’s predecessor body, the Police Negotiating Board for the United Kingdom (“PNBUK”), will become the chairperson of the PNBS, and any current agreements involving the PNBUK will be regarded as agreements of the PNBS.

**SCHEDULE A1 – BREACH OF LIBERATION CONDITIONS**

**Paragraph 1 – Offence where condition breached**

277. Paragraph 1(1) sets out the circumstances in which a person breaches a liberation condition and thereby commits an offence. A “liberation condition” includes investigative liberation conditions imposed before charge under section 14(2) or requirements imposed by an undertaking given after charge under section 19(2).

278. Paragraph 1(2) provides that paragraph 1(1) does not apply when a person breaches a liberation condition by reason of committing an offence. Such breaches are dealt with in accordance with paragraph 3. An example of a breach of condition which may, of itself, not constitute a separate offence is a condition not to enter a particular street. If the person subject to the condition is subsequently found in that street, then a breach of liberation has occurred, but not a separate offence. If the condition was that the person was not to approach a particular witness in the case and the person does contact the witness then not only has a breach of condition occurred, but a more serious offence (attempting to defeat the ends of justice) may have taken place.

279. Paragraph 1(3) provides that a complaint may be amended to add an additional charge of an offence of breaching a liberation condition at any time before the trial of an accused for either...
the original offence (see paragraph 1(4)) or an offence arising from the same circumstances as that offence.

**Paragraph 2 – Sentencing for the offence**

280. Paragraph 2(1) sets out the penalties applicable to a person convicted of an offence of breaching a liberation condition under paragraph 1.

281. Sub-paragraphs 2(2) and (3) provide that such a penalty may be imposed in addition to any other penalty that may be imposed, even if the total exceeds the maximum penalty for the original offence. The penalties may run consecutively, subject to section 204A of the Criminal Procedure (Scotland) Act 1995 Act which concerns restriction on consecutive sentences for released prisoners. The provisions put beyond doubt that the penalty imposed for breach of the condition can be imposed on top of the penalty for original offence, even where the penalty imposed for the original offence represents the maximum penalty applicable in the circumstances.

282. Sub-paragraphs (5) and (6) provide that where a court finds a person guilty of breaching a liberation condition, or the person pleads guilty to that offence, the person may be sent for sentence at any court which is considering the original offence (as defined in subsection (7).

**Paragraph 3 – Breach by committing offence**

283. Paragraph 3 applies where a person breaches a liberation condition by committing an offence and the fact that the offence was committed whilst the person was subject to a liberation condition is specified in the complaint or indictment. This is distinct from failing to comply with a condition and applies where the person is being prosecuted for the offence committed while on liberation conditions.

284. Paragraph 3(2) requires the court, in determining the penalty for the offence, which constituted the breach of condition, to have regard to the matters specified.

285. Paragraph 3(3) and (4) enable the court to increase the maximum penalty otherwise specified for the offence. This provision effectively displaces the maximum penalty, allowing the court to add to the penalty to take account of the fact that a breach of conditions has occurred as a consequence of the commission of an offence.

286. Paragraph 3(5) requires the court to explain the reasons for the penalty imposed for the offence, whether it imposes an increased penalty or not.

**Paragraph 4 – Matters for section 3(2)(b)**

287. Where a person breaches an investigative liberation condition, by committing an offence, the court must have regard to the matters specified in paragraph 4 in determining the penalty.
Paragraph 5 – Matters for paragraph 3(2)(c)

288. Where a person breaches the terms of an undertaking, as defined in paragraph 7©, (other than the requirement to appear to court), by committing an offence, the court must have regard to the matters specified in paragraph 5 in determining the penalty.

Paragraph 6 – Evidential presumptions

289. In proceedings relating to an offence under paragraph 1(breach of liberation conditions), the evidential presumptions set out in paragraph 6 apply.

Schedule 1 – Modifications in connection with Part 1

290. Schedule 1 makes amendments to existing legislation as a consequence of specific elements of the Bill. Part 1 makes provision for the repeal of various enactments conferring a power to arrest without warrant, which are affected by the new power of arrest for the police set out in section 1 of the Bill. Part 2 makes provision for the repeal of enactments affected by the new arrangements for police custody and access to legal advice set out in Part 1 of the Bill.

Schedule 3 – Police Negotiating Board for Scotland

291. Schedule 3 inserts schedule 2A into the Police and Fire Reform (Scotland) Act 2012. Paragraph 1 establishes that the PNBS is not a Crown servant and has no Crown status, immunity or privilege. Paragraph 2 sets out the membership of the PNBS. It is to consist of a chair and deputy chair appointed by the Scottish Ministers, and other persons representing the Scottish Ministers, the Scottish Police Authority, the chief constable, constables (other than special constables) and police cadets. Paragraph 2A allows a temporary chairperson to be appointed if the chairperson is unavailable. Under paragraph 3, MPs, MSPs, MEPs, government Ministers and civil servants will be disqualified from being the chair or deputy chair of the PNBS to ensure that the chair and deputy chair are independent.

292. Paragraph 4 provides that the Scottish Ministers are to prepare the constitution for the PNBS, after consulting the other persons to be represented on it. They must keep the constitution under review and may from time to time revise it. The constitution or any revision of it must be brought into effect by regulations. This paragraph also sets out what the constitution may include. It must regulate the procedure by which the PNBS reaches agreement on representations to the Scottish Ministers, and if the PNBS is in dispute about what representations are to be made to the Scottish Ministers under section 55B(1) the constitution may provide for the dispute to be submitted to arbitration either by agreement within the PNBS or on the authority of the chairperson where there is no such agreement. The constitution may limit how often within a reporting year and in what circumstances a dispute on representations may be submitted to arbitration. Paragraphs 4A and 4B provide for the application of the Arbitration (Scotland) Act 2010 (“the 2010 Act”) to PNBS arbitrations, including a power to disapply or modify the mandatory arbitration rules set out in the 2010 Act. Paragraph 4C enables regulations giving effect to the PNBS constitution to specify, for the purposes of section 55CA, “qualifying cases” where the Scottish Ministers will be required to take all reasonable steps appearing to them to be necessary to give effect to section 55B(1) representations in terms settled through arbitration in accordance with the PNBS constitution.
Paragraph 5 provides that the Scottish Ministers may pay remuneration to the chairperson of the PNBS, and expenses to its members. They must also pay such expenses as are necessary to enable the PNBS to carry out its functions.
CRIMINAL JUSTICE (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

SUPPLEMENTARY FINANCIAL MEMORANDUM

INTRODUCTION

1. As required under Rule 9.7.8B of the Parliament’s Standing Orders, this Supplementary Financial Memorandum is published to accompany the Criminal Justice (Scotland) Bill (introduced in the Scottish Parliament on 20 June 2013) as amended at Stage 2.

2. The Memorandum has been prepared by the Scottish Government. It does not form part of the Bill and has not been endorsed by the Parliament. It should be read in conjunction with the original Financial Memorandum published to accompany the Bill as introduced.

3. This Supplementary Financial Memorandum addresses the financial impact of Stage 2 amendments. The majority of the amendments do not substantially alter any of the costs in the original Financial Memorandum. This document, therefore, only addresses those Stage 2 amendments with anticipated or potential cost implications.

4. Four areas have been identified where there are expected to be additional costs arising from stage 2 amendments. These are as follows:
   - Search of person not in police custody (“stop and search”) (paras 6 – 11)
   - Keeping person not officially accused in police custody (paras 12 – 22)
   - Code of practice about investigative functions (paras 23 – 35)
   - Detention of person with responsibility for a child (paras 36 – 51).

5. In addition, two areas have been identified where it is anticipated that costs outlined in the original Financial Memorandum will no longer be incurred as a consequence of stage 2 amendments. These are as follows:
   - Investigative liberation – release on conditions (paras 52 – 54)
   - Corroboration (paras 55 – 62).
STAGE 2 AMENDMENTS WHICH WILL RESULT IN ADDITIONAL COSTS

Search of person not in police custody

6. A number of amendments agreed by the Justice Committee at stage 2 introduced new provisions into the Bill about the search of a person who is not in police custody at the time of the search (sometimes known as the “stop and search” provisions).

7. The provisions put, on the face of legislation, a limitation on the power of police officers to search persons who are not in police custody.

8. They also require the Scottish Ministers to issue a code of practice about the carrying out of searches of such people. A draft of the code must be the subject of public consultation, and has to be reviewed at intervals stipulated by the legislation.

9. A draft code of practice has already been prepared by the independent advisory group on “stop and search”. But there will be additional costs to the Scottish Government associated with public consultation on the terms of the code. The cost of this will vary depending on the number and length of responses received to the consultation, and whether there is ultimately thought to be a need to engage external analysts to consider the responses. Drawing on previous experience of similar consultations, the costs are estimated as being between £0 – 12,000.

10. These provisions will also result in costs for the SPA related to the training of police officers. As well as the terms of the code once it has been finalised, the legislation contains an important clarification of the limits of police powers in this area. The circumstances in which officers search individuals, particularly those not in police custody, is a significant operational matter, and an issue of considerable public interest.

11. That being so, Police Scotland’s assessment is that all officers up to and including the rank of inspector will require one full day’s training. The cost of this is £3,852,637. However, this cost evaluates the time of police officers, and the intention is to provide this training over a period of time to ensure that the delivery of operational police functions is not impaired, and that there will be no need to backfill posts during the training. The cost will therefore be met from within existing resources. And it will not be a recurring cost, as the training of new recruits will be updated to cover the changes.

<table>
<thead>
<tr>
<th>Table 1: Summary of additional costs arising from amendments in respect of searches of persons not in police custody</th>
</tr>
</thead>
<tbody>
<tr>
<td>Costs to be met from within existing resources</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>SPA – training requirements</td>
</tr>
<tr>
<td>Scottish Government – public consultation</td>
</tr>
<tr>
<td>Totals</td>
</tr>
</tbody>
</table>
Keeping person not officially accused in custody

12. There are two amendments in this area which have an impact on the Financial Memorandum, and will result in increased costs for the Scottish Police Authority (SPA).

13. Firstly, the Bill as introduced provided that, where a person has not been officially accused of an offence but is in police custody, authorisation to keep the person in custody may be given by a police constable of any rank who has not been involved in the relevant investigation (subsection 7(3)). An amendment agreed by the Justice Committee at stage 2 altered the position so that authorisation to keep the person in custody can only be given by an officer of the rank of sergeant or above.

14. Police Scotland based the estimates in the Financial Memorandum on figures from the financial year 2011/12. During that period there were 32,400 people processed at a custody facility after detention under section 14 of the Criminal Procedure (Scotland) Act 1995. 91% of those people had their detention authorised by a sergeant at a sergeant-led custody facility. The remaining 9% - 2880 people - were authorised by a constable at a constable-led custody facility.

15. Taking these estimates as a starting point, the effect of the amendment is that in the region of 2880 additional authorisations will require to be made by a sergeant or above, instead of by a constable as before. However, these authorisations may be carried out remotely by telephone, so there will not be a need to provide additional sergeants at every constable-led facility. Each authorisation will vary in time depending on the complexity of the case, and for the purposes of estimation it has been assumed that the process will fall into a range between 10 and 20 minutes.

16. The costs of authorisation by a constable are as follows:
   • 2,880 arrest authorisations by constable taking 10 minutes, at £22.76 per hour = £10,925
   • 2,880 arrest authorisations by constable taking 20 minutes, at £22.76 per hour = £21,849.

17. And the costs of having these authorisations carried out by a sergeant are as follows:
   • 2,880 additional arrest authorisations by sergeant taking 10 minutes, at £26.97 an hour = £12,946
   • 2,880 additional arrest authorisations by sergeant taking 20 minutes, at £26.97 per hour = £25,891.

18. This provides a cost range between £2021 (for ten-minute authorisations) and £4042 (for twenty-minute authorisations) for the additional authorisations to be carried out by an officer of the rank of sergeant, this being the difference between the present cost and the cost under this provision. This cost will be met from within existing resources.

19. Secondly, the Bill as introduced provided that a person who has not been officially accused of an offence could be held in police custody for a maximum of twelve hours without
being charged. Amendments agreed by the Justice Committee at stage 2 provide, in section 12A, that the period of twelve hours can be extended by a further twelve hours if authorised by an officer of the rank of inspector or above; and that, where someone is in that position, there should be a review, no more than six hours after the start of the extended period, of whether the suspect requires to be kept in custody.

20. The amendment which gives an inspector the power to extend a period of detention by a further twelve hours reinstates current procedure and, therefore, will not result in additional costs. However, the amendment which requires a review of the extended period after no more than six hours is new, and has some costs associated with it.

21. Figures available to Police Scotland suggest that around 129 suspects per year have their detention extended past the 12 hour mark. It is unlikely that all of these suspects will be kept in custody for 18 hours or more, so the following calculations represent an upper limit on possible costs, as it may be that not all of these suspects will require a review. However, if each of these suspects were to require their detention to be reviewed, by an inspector, after 18 hours in custody, assuming that each review will take between 10 and 30 minutes, this gives a potential range of costs as follows:

- 129 additional extension authorisations by inspector taking 10 minutes, at £33.86 an hour = £728
- 129 additional extension authorisations by inspector taking 30 minutes, at £33.86 per hour = £2,183.

22. This provides a cost range between £728 and £2,183 per annum. This cost will be met from within existing resources.

Table 2: Summary of additional costs of amendments in respect of keeping a person not officially accused in police custody

<table>
<thead>
<tr>
<th>Description</th>
<th>Lower estimate</th>
<th>Higher estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authorisation to keep person in custody from sergeant or above (annually)</td>
<td>£2021</td>
<td>£4042</td>
</tr>
<tr>
<td>Authorisation to keep person in custody past eighteen hours (annually)</td>
<td>£728</td>
<td>£2183</td>
</tr>
<tr>
<td>Total (to be met from within existing resources)</td>
<td>£2749</td>
<td>£6225</td>
</tr>
</tbody>
</table>

Code of practice about investigative functions

23. An amendment agreed by the Justice Committee at stage 2 introduced a new section 52A into the Bill. This provision requires the Lord Advocate to issue a code of practice on the questioning, and recording of questioning, of persons suspected of committing an offence; and the conduct of identification procedures involving such persons. In the course of drafting and issuing the code the Lord Advocate is obliged to consult publicly on a draft of the code, must thereafter keep it under review, and may revise it.
24. This provision has financial implications for the Crown Office and Procurator Fiscal Service (COPFS) and for the SPA. The obligation to issue the code rests on the Lord Advocate, who will be assisted in that by staff from within COPFS. In assessing the likely costs, COPFS has had regard to the fact that a considerable amount of work will be involved. There are extant Lord Advocate’s Guidelines on identification procedures, but these were issued in 2007 and have not been revised since. There are presently no guidelines on interviewing.

25. The code also needs to be drafted with care, as a failure to comply with its terms could have an effect on the admissibility or value, in subsequent court proceedings, of any evidence obtained by police officers.

26. Taking that into account, COPFS’s estimate is that preparation of the code will take approximately 12 months to complete. Two members of COPFS staff will be required on a permanent basis: one principal procurator fiscal depute, and one member of administrative staff. The costs are £82,333 and £23,124 respectively, including National Insurance and pension contributions: a total of £105,457.

27. COPFS may be able to achieve this by transferring staff from other duties, and meeting the cost from within existing resources. However, COPFS cannot rule out the possibility that, depending on operational requirements when the code is being prepared, the posts vacated will need to be backfilled, and that additional recruitment would then be required.

28. COPFS anticipates that, to assist in preparation of the code, it will need the practical expertise of an experienced police officer to advise on current practices, and to provide input on proposals arising from public consultation and discussion with COPFS. The officer will also be able to liaise with Police Scotland and utilise contacts with other police forces for comparative purposes. COPFS therefore considers that it will require a seconded officer from Police Scotland at either Inspector or Chief Inspector rank, with costs, including National Insurance and pension contributions, estimated at £71,505 for an Inspector or £75,970 for a Chief Inspector.

29. COPFS will also require to consult publicly on the terms of the code. The cost of this will depend on a number of factors which at this stage are not known: the length of the code, the level of detail thought necessary in any consultation document, the number of responses to the consultation, and whether external analysts require to be engaged to consider the responses received. The cost of consultation is estimated as being in the range £0-12,000.

30. The total cost to COPFS is therefore estimated as being between £176,962 and £193,427.

31. There may also be a training cost for the SPA following publication of the code. This will depend on the contents of the code, which are entirely within the discretion of the Lord Advocate.

32. If the code requires no change to current operational practices, no or minimal training will be required. At the other end of the scale, if the code requires that all operational police officers be trained to the required standard to carry out formal investigative interviews – a level
of training presently restricted to specialist roles including the CID – the potential cost becomes more significant.

33. In that event, Police Scotland estimates that around 12,900 officers, up to and including the rank of sergeant, would be required to complete the national five day investigative interview training course at a cost of £10,575,298. This would take in excess of one year to deliver following publication of the code.

34. However, this cost does not arise as a direct result of the Bill; it may arise after the code has been issued, and the extent to which training is required will of course depend on the terms of the code. The figure provided should therefore be regarded as being at the upper end of a range of possibilities following publication of the code; assessment of what – if anything – will require to change in police practice; and the consequent training requirements, if any.

35. In addition, this cost evaluates the time of police officers, and the intention is to provide this training over a period of time to ensure that the delivery of operational police functions is not impaired, and that there will be no need to backfill posts during the training. The cost will therefore be met from within existing resources.

**Table 3a: Summary of additional costs arising from amendments in respect of the code of practice of investigative functions**

<table>
<thead>
<tr>
<th>Description</th>
<th>Lower estimate</th>
<th>Higher estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>COPFS – internal staff redeployment</td>
<td>£105,457</td>
<td>£105,457</td>
</tr>
<tr>
<td>COPFS – costs of seconded police officer</td>
<td>£71,505</td>
<td>£75,970</td>
</tr>
<tr>
<td>COPFS – public consultation</td>
<td>£0</td>
<td>£12,000</td>
</tr>
<tr>
<td><strong>Total costs</strong></td>
<td><strong>£176,962</strong></td>
<td><strong>£193,427</strong></td>
</tr>
</tbody>
</table>

**Table 3b: Summary of additional costs arising from police training requirements as a consequence of the code of practice of investigative functions**

<table>
<thead>
<tr>
<th>Description</th>
<th>Year 1 Lower estimate</th>
<th>Year 1 Higher estimate</th>
<th>Year 2 Lower estimate</th>
<th>Year 2 Higher estimate</th>
<th>Total (to be met from within existing resources)</th>
</tr>
</thead>
<tbody>
<tr>
<td>SPA – costs of training officers on code</td>
<td>£0</td>
<td>£5,287,649</td>
<td>£0</td>
<td>£5,287,649</td>
<td><strong>£10,575,298</strong></td>
</tr>
</tbody>
</table>

**Detention of person with responsibility for a child**

36. An amendment agreed by the Justice Committee at stage 2 introduced a new section 82A into the Bill. This provision places an obligation on the court to ensure that a child and family impact assessment (“CFIA”) is carried out when a person who has responsibility for a child has been remanded in custody awaiting trial; has been convicted of an offence punishable by
imprisonment and has been remanded in custody pending sentence; or has been sentenced to a term of imprisonment or other detention.

37. The purpose of the CFIA is to determine the likely impact of the imprisonment on the wellbeing of the child, and to identify any support and assistance which will be necessary to meet the child’s wellbeing needs.

38. The amendment does not specify who is to carry out the CFIA; it gives power to the Scottish Ministers to make provision, by regulations, to require persons to undertake them.

39. As the court is required to “ensure” that the CFIA is carried out, in terms of the provision, the burden of requesting and administering the CFIA will fall on the Scottish Courts and Tribunals Service (SCTS). For SCTS, it is considered that the requirement for the court to ensure that a CFIA is carried out in these circumstances will have significant cost implications.

40. SCTS’s estimate of costs is based on the following assumptions. There are, annually, an estimated 23,000 remands in custody, and 15,000 sentences of imprisonment or other detention. Office of National Statistics figures show that there is an average of 1.7 children per family.

41. It is assumed that an assessment will be requested for each dependent child for whom the individual has responsibility. This is on the basis that the effect on each child will differ and some individuals will have responsibility for multiple children, who may live at different addresses.

42. It is also assumed that an assessment will be required for each period of remand or imprisonment/detention, given the wording of the provision.

43. This gives a total of 64,600 requests per year (23000 + 15000, multiplied by 1.7).

44. It is unlikely to be known by the court, particularly at the point of remand awaiting trial/sentence, whether a person has responsibility for a dependent child. This may be contained in a Criminal Justice Social Work Report. However, these are not produced for periods of remand and are not always required, or requested, pre-sentence.

45. Accordingly, it has been estimated that an average additional two minutes of court time will be required per case, in order for the court to obtain details of whether the individual has responsibility for a child, and to obtain any required details (e.g. the name and address of the child or children).

46. SCTS estimates the costs of this provision, therefore, as being as follows:
   - Judicial costs: £390,830
   - SCTS staff cost in court, for one clerk of court and one court officer: £118,864

• SCTS staff cost to prepare and send request for assessment: £160,208
• SCTS postage costs. Given the sensitive nature of the information being conveyed, and the fact that SCTS does not know at this stage who will be responsible for the preparation of the assessments, and may not have a secure email link with them, SCTS has estimated this cost on the basis of first class recorded delivery at £1.73 per item: £111,758.

47. This gives an annual cost of £781,660.

48. In addition, the Bill provision requires the court to “ensure” that an assessment is carried out. Simply requesting the assessment does not necessarily meet this requirement. It is expected that SCTS would need to receive some form of confirmation that the assessment has been completed. Assuming that no judicial involvement is required, SCTS expects that to administer receipt of such notifications would involve more staff time: to receive confirmation, locate court papers, and update the IT system. This cost is estimated at £160,208.

49. Finally, SCTS has indicated that, as this is a novel procedure, an update to its IT systems would be required. The cost of this is estimated as being in the region of £10,000.

50. This gives a total financial cost to SCTS of around £941,868 per annum, with an additional one-off cost of £10,000 for IT. This represents a significant cost for SCTS, and its position is that this could not be met from within existing resources.

51. It should be noted that the provision contains no requirement for the judiciary to consider the terms of a CFIA once prepared, so no costs have been estimated in that regard. And if the court, in some cases, requires to obtain detailed and sensitive personal information about the children of the accused, necessitating the closing of the court, the given estimate of the amount of court time required for each case would, in all likelihood, be conservative.

Table 4a: Summary of additional annual costs of amendments in respect of courts requiring the preparation of a child and family impact assessment

<table>
<thead>
<tr>
<th>Cost Description</th>
<th>Cost (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial costs</td>
<td>£390,830</td>
</tr>
<tr>
<td>SCTS staff in court costs</td>
<td>£118,864</td>
</tr>
<tr>
<td>SCTS staff out of court costs, to request assessments</td>
<td>£160,208</td>
</tr>
<tr>
<td>SCTS postage costs</td>
<td>£111,758</td>
</tr>
<tr>
<td>SCTS staff costs, ensuring report has been prepared</td>
<td>£160,208</td>
</tr>
<tr>
<td><strong>Total annual costs</strong></td>
<td><strong>£941,868</strong></td>
</tr>
</tbody>
</table>

Table 4b: Summary of additional one-off costs of amendments in respect of courts requiring the preparation of a child and family impact assessment

<table>
<thead>
<tr>
<th>Cost Description</th>
<th>Cost (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>SCTS costs to upgrade IT systems</td>
<td>£10,000</td>
</tr>
<tr>
<td><strong>Total one-off costs</strong></td>
<td><strong>£10,000</strong></td>
</tr>
</tbody>
</table>
STAGE 2 AMENDMENTS WHICH WILL RESULT IN ANTICIPATED COSTS NOT BEING INCURRED

Investigative liberation – release on conditions

52. The Bill as introduced requires that, where a suspect is released on investigative liberation, a police officer of the rank of inspector or above may impose such conditions as s/he considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation. An amendment agreed by the Justice Committee at stage 2 provides that an officer of the rank of sergeant or above can impose these conditions.

53. The Financial Memorandum estimated the costs of the provision in the Bill as introduced as £27,427 annually. The basis of this estimate was that 1620 suspects would be liberated with conditions requiring the authorisation of an inspector, taking an average of 30 minutes, per case, at a cost of £33.86 per hour.

54. Taking, as the starting point, the same estimate of the number of suspects to whom this applies, and the average length of time to consider each case, and the cost of a sergeant’s time as £26.97 per hour, this gives a new cost of £21,847, equating to a saving of £5,580 per annum. The cost of this provision in the Bill as introduced was categorised as an “opportunity cost”, to be met from within existing resources, and this represents a reduction in expected costs.

Table 5: summary of costs not incurred arising from amendments in respect of suspects being released on investigative liberation with conditions

<table>
<thead>
<tr>
<th>SPA – annual cost not incurred</th>
<th>£5,580</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total costs not incurred</td>
<td>£5,580</td>
</tr>
</tbody>
</table>

Corroboration

55. The Bill, as introduced, proposed the abolition of the general requirement for corroboration in criminal cases. Amendments agreed by the Justice Committee removed these provisions from the Bill.

56. The Financial Memorandum anticipated that the Bill’s provisions would result in increases in the number of cases reported by the police to COPFS, and in the number of cases prosecuted by COPFS, with potential cost implications for SPA, COPFS, the Scottish Legal Aid Board (SLAB), SCTS, local authorities, and the Scottish Prison Service (SPS).

57. It was anticipated that most of these costs would be absorbed as part of general staff workloads, and could be met from within the budget and existing resources of the relevant organisations, by measures such as full use of existing resources, prioritisation of functions, and increased operational efficiency. These were referred to in the Financial Memorandum as “opportunity costs”.

58. However, for some of the costs a specific need for additional staff or resources had been identified. These were referred to in the Financial Memorandum as “financial costs”. These
figures were based on estimates provided by Police Scotland and COPFS, suggesting that there were likely to be increases in the number of cases reported by the police to COPFS, and in the number of cases prosecuted by COPFS.

Table 6a: costs of the abolition of the corroboration requirement, as given in the Financial Memorandum

<table>
<thead>
<tr>
<th></th>
<th>2015/16</th>
<th>2016/17</th>
<th>2017/18</th>
<th>2018/19</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opportunity costs (£ ‘000)</td>
<td>14,974</td>
<td>22,724</td>
<td>26,774</td>
<td>30,874</td>
</tr>
<tr>
<td>Financial costs (£ ‘000)</td>
<td>4,032</td>
<td>4,032</td>
<td>4,032</td>
<td>4,032</td>
</tr>
</tbody>
</table>

59. The anticipated costs of £4,032,000 were to be incurred by SPA and SLAB.

60. Police Scotland estimated an annual cost of £132,000 per annum, in respect of overtime costs for police officers being required to attend court as witnesses. This assumed a 3.03% rise in court overtime payments.

61. SLAB estimated an annual cost of £3,900,000, following the expected increase in prosecutions at all court levels. This relied on a best estimate of an additional 7.6% prosecutions at solemn level, split between High Court and sheriff and jury courts; and an additional 2.5% prosecutions at summary level, split between sheriff courts and JP courts.

62. With the removal of these provisions from the Bill, these costs will no longer be incurred.

Table 6b and 6c: summary of costs, as provided in the Financial Memorandum, which will not be incurred as a consequence of amendments in respect of the abolition of the corroboration requirement

<table>
<thead>
<tr>
<th></th>
<th>Reduction in expected costs identified in Financial Memorandum as being met from within existing resources</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2015/16</td>
</tr>
<tr>
<td>SPA</td>
<td>£3,965,000</td>
</tr>
<tr>
<td>COPFS</td>
<td>£3,250,000*</td>
</tr>
<tr>
<td>SLAB</td>
<td>£0</td>
</tr>
<tr>
<td>SCTS</td>
<td>£2,500,000*</td>
</tr>
<tr>
<td>SPS</td>
<td>£4,100,000*</td>
</tr>
<tr>
<td>Local authorities</td>
<td>£1,160,000*</td>
</tr>
<tr>
<td>Total</td>
<td>£14,975,000</td>
</tr>
</tbody>
</table>
This document relates to the Criminal Justice (Scotland) Bill as amended at Stage 2 (SP Bill 35A)

Reduction in expected costs identified in Financial Memorandum as requiring additional resources (annual)

<table>
<thead>
<tr>
<th></th>
<th>SCTS</th>
<th>SLAB</th>
<th>SPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>SPA</td>
<td>£132,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SLAB</td>
<td></td>
<td>£3,900,000</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>£4,032,000</td>
</tr>
</tbody>
</table>

*best estimate from given range

SUMMARY

Table 7a: summary of additional annual financial costs, and costs not incurred, arising as a result of stage 2 amendments

<table>
<thead>
<tr>
<th></th>
<th>SCTS</th>
<th>SLAB</th>
<th>SPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child and family impact assessment</td>
<td>£941,868</td>
<td>(£3,900,000)</td>
<td>(£132,000)</td>
</tr>
<tr>
<td>Corroboration</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Totals per organisation</strong></td>
<td>£941,868</td>
<td>(£3,900,000)</td>
<td>(£132,000)</td>
</tr>
</tbody>
</table>

Table 7b: summary of additional one-off costs arising as a result of stage 2 amendments

<table>
<thead>
<tr>
<th></th>
<th>SCTS</th>
<th>COPFS</th>
<th>SG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Child and family impact assessment</td>
<td>£10,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Code of practice about investigative functions</td>
<td>£176,962 - £193,427</td>
<td></td>
<td></td>
</tr>
<tr>
<td>“Stop and search”</td>
<td></td>
<td></td>
<td>£12,000</td>
</tr>
<tr>
<td><strong>Totals per organisation</strong></td>
<td>£10,000</td>
<td>£176,962 - £193,427</td>
<td>£12,000</td>
</tr>
</tbody>
</table>

Table 7c: summary of additional financial costs, and costs not incurred, arising as a result of stage 2 amendments, on costs identified in the Financial Memorandum as being met from within existing resources

<table>
<thead>
<tr>
<th></th>
<th>2015/16</th>
<th>2016/17</th>
<th>2017/18</th>
<th>2018/19</th>
</tr>
</thead>
<tbody>
<tr>
<td>SPA</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Keeping person in custody</td>
<td>£2,749 - £6,225</td>
<td>£2,749 - £6,225</td>
<td>£2,749 - £6,225</td>
<td>£2,749 - £6,225</td>
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<tr>
<td>“Stop and search”</td>
<td>£3,852,637</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corroboration</td>
<td>(£3,965,000)</td>
<td>(£3,965,000)</td>
<td>(£3,965,000)</td>
<td>(£3,965,000)</td>
</tr>
<tr>
<td>Investigative liberation</td>
<td>(£5,580)</td>
<td>(£5,580)</td>
<td>(£5,580)</td>
<td>(£5,580)</td>
</tr>
<tr>
<td><strong>Total for SPA</strong></td>
<td>£5,175,931 - (£115,194)</td>
<td>£1,323,294 - (£3,967,831)</td>
<td>(£3,964,355) - (£3,967,831)</td>
<td>(£3,964,355) - (£3,967,831)</td>
</tr>
</tbody>
</table>
This document relates to the Criminal Justice (Scotland) Bill as amended at Stage 2 (SP Bill 35A)

<table>
<thead>
<tr>
<th>Authority</th>
<th>Ownerships</th>
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<th>(£3,250,000)</th>
<th>(£3,250,000)</th>
<th>(£3,250,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>COPFS</td>
<td>Corroboration</td>
<td>(£2,500,000)</td>
<td>(£2,500,000)</td>
<td>(£2,500,000)</td>
<td>(£2,500,000)</td>
</tr>
<tr>
<td>SCTS</td>
<td>Corroboration</td>
<td>(£1,160,000)</td>
<td>(£1,160,000)</td>
<td>(£1,160,000)</td>
<td>(£1,160,000)</td>
</tr>
<tr>
<td>SPS</td>
<td>Corroboration</td>
<td>(£4,100,000)</td>
<td>(£11,850,000)</td>
<td>(£15,900,000)</td>
<td>(£20,000,000)</td>
</tr>
<tr>
<td>Local authorities</td>
<td>Corroboration</td>
<td>(£5,834,069)</td>
<td>(£17,436,706)</td>
<td>(£26,774,355)</td>
<td>(£30,874,355)</td>
</tr>
<tr>
<td>Total cost per year</td>
<td>Corroboration</td>
<td>(£5,834,069)</td>
<td>(£17,436,706)</td>
<td>(£26,774,355)</td>
<td>(£30,874,355)</td>
</tr>
</tbody>
</table>
CRIMINAL JUSTICE (SCOTLAND) BILL  
[AS AMENDED AT STAGE 2]

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Criminal Justice (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

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

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

3. The amended or new delegated powers provisions in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

Section D1 — Provisions about possession of alcohol

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>affirmative procedure</td>
</tr>
</tbody>
</table>

Provision

4. Provision Section D1 was inserted at Stage 2 and provides the Scottish Ministers with a new power to amend section 61 of the Crime and Punishment (Scotland) Act 1997. Section 61 of the 1997 Act relates to confiscation of alcohol from persons under 18. The new power in section D1 would allow the Scottish Ministers to confer powers on a constable to search a person under 18 for alcohol and to dispose of any alcohol found.

5. The use of the power is subject to the Scottish Ministers duty to consult being fulfilled. Section D1(2) provides that Scottish Ministers must publicly consult on the regulations prior to laying a draft of them before the Scottish Parliament.
6. The power is subject to a sunset clause under section E1(2), meaning that section D1 will be regarded as repealed if no regulations are made under section D1 within 2 years of the coming into effect of the first code of practice on stop and search.

*Reason for taking this power*

7. This new power is required in consequence of the abolition of “consensual stop and search” under section A1 of the Bill. It originates with a recommendation by the independent advisory group on stop and search, which was chaired by John Scott QC. The group identified a potential gap in the law, which means that while the police have powers to confiscate alcohol from children, they do not have a statutory power to search them for alcohol and have instead been relying on consensual searches as a means of doing so. The Advisory Group were not able to form a concluded view on whether such a power was necessary or desirable. The Group therefore recommended that the Scottish Government should hold an early consultation on whether to legislate to create a specific power for police officers to search children under the age of 18 for alcohol.

8. It was considered appropriate to include an enabling power in the Bill to ensure that the power to search children for alcohol can be introduced by regulations. The potential need for a power to search for alcohol arises from the abolition of consensual stop and search and the introduction of a code of practice about the carrying out of searches. This regulation making power would only be used if it were to be confirmed, following a public consultation that the abolition of consensual stop and search, which is currently relied on, would mean that searches in such circumstances require to be able to continue, meaning that it would be it should be considered necessary and appropriate to create a bespoke new power. It is considered appropriate to allow for a new power of search to be introduced in secondary legislation, to ensure that, if it is required, the power to search for alcohol can be put in place at the same time as consensual stop and search is abolished, rather than leaving a gap in the law while waiting for the opportunity to make the change in primary legislation. The regulations will be subject to statutory consultation requirements and affirmative procedure. The sunset clause will ensure that the enabling power will only be used if the consultation demonstrates that it is necessary to do so following the abolition of consensual search.

*Choice of procedure*

9. Police powers to search children raise important considerations, not least because the exercise of those powers will involve interference with the rights of children who are searched. The Parliament has a strong interest in stop and search and the rights of children. It is therefore considered appropriate that regulations under section D1 should be subject to the level of scrutiny afforded by affirmative procedure. The Cabinet Secretary stated at Stage 2 that consideration would be given at Stage 3 as to whether an enhanced form of affirmative procedure would be appropriate here.
Section K1 — Bringing code of practice into effect

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Provision

10. Section K1 provides the Scottish Ministers with a new power to appoint a day on which a code of practice about the carrying out of searches is to come into effect. A copy of the proposed code must be laid at the same time as the draft regulations and that code must have been subject to consultation under section J1 (consultation on code of practice). The first set of draft regulations under this power must be laid no later than 1 year after the Bill receives Royal Assent.

Reason for taking this power

11. This new power is required in consequence of recommendations made by the independent advisory group on stop and search, which was chaired by John Scott QC. The group made a number of recommendations including the creation of a Code of Practice on stop and search and that this Code of Practice should be the subject of public consultation.

12. The recommendations of the independent advisory group were published only a very short period before Stage 2 consideration of the Bill began. Due to the requirement for public consultation on the Code of Practice it was deemed appropriate that the Bill contain an enabling power to allow Scottish Ministers to implement the code only after it had been consulted on and the Scottish Parliament given an opportunity to consider its terms.

Choice of procedure

13. The Parliament has shown a keen interest in stop and search provisions, not least because the exercise of those powers will involve interference with the rights of those persons being searched. The provisions for introduction of the code are similar to models used elsewhere, (notably in section 24 of the Regulation of Investigatory Powers (Scotland) Act 2001 (asp 11) and section 67 of the Police and Criminal Evidence Act 1984 (c.60)). It gives Parliamentary control over the introduction of the code and also recognises that, while the code will have legal effect (in the sense that a court must have regard to it), it is unlikely to be drafted in the formal legislative language or format required of secondary legislation. It is therefore considered appropriate that the Parliament is able to exercise control over that code by choosing to affirm the regulations bringing the code into effect.
Section 53A — Further provision about application of Part 1

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Provision

14. Part 1 of the Bill deals with arrests, custody and questioning of suspects. It replaces most existing powers to arrest in respect of offences with a single power of arrest. It also sets out the procedures and consequences of arrest including information to be recorded by the police, the rights of people arrested and duties to take arrested people to a police station. These general provisions about arrest will apply to all arrests (not just those under the Bill or in relation to offences), with the exception of arrests under the Terrorism Act 2000 (“the 2000 Act”) and arrests for service offences.

15. Section 53A provides Scottish Ministers with a new power to make regulations to apply some or all of Part 1 of the Bill to arrests under the 2000 Act and service offences under the Armed Forces Act 2006 (“the 2006 Act”) and, conversely, to disapply some or all of the Part so that it does not operate in relation to people who have been arrested otherwise than in connection with an offence.

Reason for taking this power

16. The 2000 Act and the 2006 Act set out their own rules for people arrested under them and generally the Bill does not impinge on those rules. The 2000 Act for example sets different time periods for keeping people in custody. There may, however, be some aspects of Part 1 that it would be appropriate to apply if they are not already covered by the procedures in those other Acts. For example, for service offences under the 2006 Act, it may be desirable to ensure that provisions relating to access to a third party or information to be recorded at the time of arrest do apply for the short period that someone suspected of a service offence is in the custody of Police Scotland, before being transferred to the custody of the military police. The power in section 53A would allow this provision to be made in regulations. The power to apply the Bill provisions to arrests under the 2000 Act or to service offences under the 2006 Act is unlikely to be used to apply large parts of the Bill to such arrests. It would provide flexibility and future proofing. The Bill is intended to streamline and modernise the law on arresting and keeping people in custody. The exact nature of the provisions required under this power will depend on the extent to which people arrested under the 2000 Act or 2006 Act are dealt with by specific rules under those Acts and the extent to which they are dealt with under standard police procedures. Where the 2000 and 2006 Acts do not make separate provision then this regulation making power could be used to ensure that the modernised and streamlined police powers and procedures set out under the Bill could be applied to arrests under the 2000 Act and 2006 Act. It could, for example, be used to apply section 6 of the Bill in order to require the police to record information about arrests under the 2000 Act.

17. Section 53A would also allow Ministers to disapply some or all of Part 1 using secondary legislation for arrests that aren’t in relation to offences. There are many powers of arrest that do not relate to a person being suspected of committing an offence. For example, under the Adult
Support and Protection (Scotland) Act 2007 there are powers of arrest stemming from the ability of a court to grant a banning order against a ‘subject’ prohibiting them from doing a variety of things – including prohibiting them from being in a specific place.

18. There are other examples and it may not be appropriate in every case for Part 1 of the Bill to apply in its entirety. For example, courts can issue arrest warrants to apprehend witnesses who do not attend court. The purpose of such an arrest is to ensure the witness attends court. It would be appropriate for some information about the arrest to be recorded under section 6. But the person arrested may not need to be provided with the same information as a criminal suspect under section 3. Depending on the timing of the arrest, the police may also need to take the witness straight to court and the section 4 requirement to take them to a police station would not be helpful in these circumstances. The addition of this power will allow the interaction between this Bill and each individual piece of legislation to be specifically tailored as is most appropriate.

19. It is considered most appropriate to adapt the provisions of Part 1 using secondary legislation as that will allow the flexibility to make sure that each piece of amending legislation is accounted for and will also allow for future changes without the need for further primary legislation. The main purpose of Part 1 of the Bill is to deal with the system of arrest and custody of people who are suspected of offences. Modernising and clarifying the law on arrest requires consequential changes to be made in relation to non-offending arrests. But the appropriate place to do that is in separate regulations where they can be given the detailed scrutiny afforded by affirmative procedure. The need for changes in relation to non-offending arrests and arrests under the 2000 and 2006 Acts will arise in consequence of this Bill, which makes comprehensive changes to the statutory framework for arresting and holding people in custody. The enabling power will allow appropriate provision to be put in place before Part 1 of the Bill is brought into force.

Choice of procedure

20. Regulations under section 53A would modify the application of primary legislation dealing with the rights of people who are arrested or held in custody by the police. It is therefore considered appropriate for the power to be subject to affirmative procedure.

Section 82A — Duty to undertake a child and family impact assessment

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

Provision

21. Section 82A(5) provides that the Scottish Ministers may by regulations make provision requiring such persons as they may prescribe to undertake a child and family impact assessment in accordance with section 82A(2). Section 82A(2) requires a court to ensure that such an assessment is carried out in order to determine the likely impact of the imprisonment or other detention of a person with responsibility for a child, on the wellbeing of the child, and to identify any support and assistance which will be necessary to meet the child’s wellbeing needs.
Reason for taking this power

22. This power was inserted as part of a non-Government amendment at Stage 2. The amendment was put forward by Mary Fee, MSP and places a duty on the court to ensure that a child and family impact assessment is carried out for the purpose noted above. The intention behind section 82A is to determine the likely impact of parental imprisonment on any child and identify support and assistance for that child. The duty applies where a person who has responsibility for a child has been remanded in custody awaiting trial, has been found by a court to have committed an offence punishable with imprisonment and has been remanded in custody awaiting sentence, or has been sentenced to a term of imprisonment or other detention. The regulation-making power given to Ministers under section 82A(5) is to specify who should actually undertake the assessment which it is the court’s duty to ensure is carried out and which takes forward the purpose of section 82A.

Choice of procedure

23. This regulation-making power is to allow Ministers to specify who should undertake child and family impact assessments as provided for in section 82A. As this would place a duty on particular organisations to resource and undertake such assessments, it is considered appropriate for the power to be subject to affirmative procedure so that an appropriate level of parliamentary scrutiny can be undertaken.

Section 86A: (new subsection 305(1A) of the 1995 Act) – Electronic proceedings

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the High Court of Justiciary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>act of adjournal</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>laid, no procedure</td>
</tr>
</tbody>
</table>

Provision

24. Section 305 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) provides that the High Court, through Acts of Adjournal, can regulate practice and procedure in relation to criminal procedure; and, in connection with that, can modify, amend or repeal any enactment in so far as that enactment relates to matters with respect to which an Act of Adjournal may be made.

25. Section 86A introduces a new subsection (1A) into section 305. The new subsection provides that the scope of section 305 includes the power to make provision for something to be done in electronic form or by electronic means.

Reason for taking this power

26. Criminal procedure, both in the 1995 Act and generally, requires the use of many different types of documentation, most of which are presently produced in paper form. These documents may require to be signed or otherwise authenticated, and may also require to be served on or delivered to other parties in the case.
This document relates to the Criminal Justice (Scotland) Bill as amended at Stage 2
(SP Bill 35A)

27. This amendment allows the High Court, through Acts of Adjournal, to make such changes as it sees fit to criminal procedure to allow the greater use of electronic documents, signature, and service. The High Court is assisted in its use of Acts of Adjournal by the Criminal Court Rules Council, and it is better placed than the Scottish Ministers to assess and then make provision for when it is appropriate for a particular document, signature, or service requirement to take place electronically.

28. It would also be inappropriate and unnecessary to do this through primary legislation: it would be a poor use of the Parliament’s time to deal with this level of administrative detail, particularly given the number of occasions on which legislative change would be required – the 1995 Act alone, for example, contains numerous instances where signature or another form of authorisation is required. Further, court rules allow the court the required flexibility to make modification to their practice and procedure rules in order to ensure their continued effectiveness, without requiring primary legislation in every instance.

Choice of procedure

29. Such administrative matters can appropriately be dealt with, in terms of section 305 of the 1995 Act (as amended by this provision), by the High Court by Act of Adjournal rather than being subject to any parliamentary procedure. The power is subject only to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Schedule 3: (new schedule 2A to the Police and Fire Reform (Scotland) Act 2012) — Police Negotiating Board for Scotland

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative when using paragraph 4(6) only or affirmative procedure when using paragraph 4(6) combined with paragraphs 4B or 4C

Provision

30. Schedule 3 inserts a new schedule 2A into the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”). Paragraph 4(6) of schedule 2A provides for the constitution of the Police Negotiating Board for Scotland (“PNBS”), or any revision of it, to be given effect by regulations. Paragraph 4B of schedule 2A provides that regulations under paragraph 4(6) may include provisions disapplying or modifying the mandatory rules in schedule 1 to the Arbitration (Scotland) Act 2010 in relation to arbitrations taking place in accordance with the PNBS constitution. Paragraph 4C of schedule 2A provides that regulations under paragraph 4(6) may include provisions specifying, by reference to particular matters or circumstances, what are qualifying cases for the purposes of new section 55CA of the 2012 Act (inserted by section 87 of the Bill). Section 55CA(1) requires the Scottish Ministers to take all reasonable steps as appear to them necessary to give effect to PNBS representations under section 55B(1) which are based on arbitration, but only in qualifying cases. Section 55B(1) representations would relate to police pay, allowances and expenses, public holidays and leave, and hours of duty.
Reason for taking this power

31. The role of PNBS is to consider and make representations to the Scottish Government on police matters, in particular on the pay and conditions of constables. The PNBS constitution will set out in detail how the PNBS will operate, including its membership, procedures and organisation. The constitution will be a document of an administrative nature and it will need to be changed from time to time to enable the PNBS to adapt and change its structures as necessary to fulfil its role; this makes it unsuitable for primary legislation. The Bill as introduced to the Parliament did not provide for any parliamentary scrutiny over the making of the constitution. Paragraph 4(6), inserted by way of a Stage 2 amendment, will provide an opportunity for the Scottish Parliament to scrutinise the constitution and any changes to it, enhancing the fairness and transparency of the constitution-making process.

32. The PNBS constitution will set out procedures for disputes within PNBS to be referred to an arbitration process which would be subject to the Arbitration (Scotland) Act 2010 (“the 2010 Act”). The mandatory arbitration rules in the 2010 Act are designed primarily for commercial arbitrations and some rules may be unsuitable for this statutory arbitration. For example the rules, which are set out in schedule 1 to the 2010 Act, refer throughout to “the parties”, “the referring party”, “the other party”, whereas in a PNBS arbitration there will be only one party (the PNBS) referring a matter of internal dispute to arbitration. Paragraph 4B enables the Scottish Ministers to disapply or modify the 2010 Act rules as appropriate for PNBS arbitrations. Paragraph 4B is in similar terms to the order-making power at section 17 of the 2010 Act (which is subject to affirmative procedure by virtue of section 33(3) of the 2010 Act).

33. The Scottish Government wishes in certain circumstances (“qualifying cases”) to be bound to give effect to section 55B(1) representations made by PNBS where those representations are based on an arbitration decision. The Scottish Government intends to consult further on the detail of what will be a qualifying case; it is envisaged that this will be limited to arbitration decisions on certain matters, for example the main police pay award, and only so many times a year. Paragraph 4C enables the Scottish Ministers to set out the qualifying cases in regulations and there will be corresponding provision in the PNBS constitution made under paragraph 4(6).

Choice of procedure

34. Section 87(2A) of the Bill amends section 125 of the 2012 Act in respect of the procedure which will apply to this regulation-making power. Accordingly, negative procedure will apply to regulations which only give effect to the PNBS constitution under paragraph 4(6); however, affirmative procedure will apply in relation to regulations which also make provision of the type referred to in paragraphs 4B or 4C. The Scottish Government considers this is appropriate to allow the Scottish Parliament to give a high level of scrutiny to provisions disapplying or modifying primary legislation in the Arbitration (Scotland) Act 2010 or expanding on the application of section 55CA of the 2012 Act by setting out qualifying cases. In contrast the PNBS constitution is essentially a procedural and administrative document and scrutiny in accordance with negative procedure is appropriate.
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<th>Section</th>
<th>Page</th>
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</thead>
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<td>Introduction</td>
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</tr>
<tr>
<td>Delegated Powers Provisions</td>
<td>2</td>
</tr>
<tr>
<td>Annexe</td>
<td>5</td>
</tr>
</tbody>
</table>
Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.
### Committee Membership

<table>
<thead>
<tr>
<th>Convener</th>
<th>Deputy Convener</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nigel Don Scottish National Party</td>
<td>John Mason Scottish National Party</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Richard Baker Scottish Labour</th>
<th>John Scott Scottish Conservative and Unionist Party</th>
</tr>
</thead>
</table>

| Stewart Stevenson Scottish National Party |
Introduction

1. At its meeting on 8 December 2015, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Criminal Justice (Scotland) Bill as amended at Stage 2 (“the Bill”)\(^1\). The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Bill was introduced on 20 June 2013 by the former Cabinet Secretary for Justice. It seeks to make provision about criminal justice including as to police powers and rights of suspects and as to criminal evidence, procedure and sentencing; to establish the Police Negotiating Board for Scotland; and for connected purposes.

3. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM”)\(^2\).

4. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its 53rd report of 2013\(^3\). 

Delegated Powers Provisions

5. The Committee considered each of the new, removed or substantially amended delegated powers provisions in the Bill after Stage 2.

6. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the substantially amended or new delegated powers provisions listed below, and that it is content with the parliamentary procedure to which they are subject:
   - Section D1 – Provisions about possession of alcohol
   - Section G1 – Contents of code of practice
   - Section K1 – Bringing code of practice into effect
   - Section 53A – Further provision about application of Part 1
   - Section 53B – Further provision about vulnerable persons
   - Section 82A – Duty to undertake a child and family impact assessment
   - Section 86A – inserting new section 305(1A) into the Criminal Procedure (Scotland) 1995 Act – Electronic proceedings
   - Schedule 3 – inserting new schedule 2A to the Police and Fire Reform (Scotland) Act 2012 – Police Negotiating Board for Scotland

7. The Committee therefore reports that it is content with the provisions in the Bill which have been amended at Stage 2 to insert or substantially alter provisions conferring powers to make subordinate legislation.

8. The Committee also considered Stage 3 amendments, introducing five new delegated powers, contained within a new Chapter of the Bill “Support for vulnerable persons”. The Scottish Government wrote to advise the Committee of these proposed changes in advance of formally lodging the amendments. This correspondence is reproduced at the Annexe.

9. The Committee reports that it does not need to draw the attention of the Parliament to the new delegated powers provisions listed below, and that it is content with the parliamentary procedure to which they are subject:
   - Amendment 65 – After Section 82B, subsection 1 – Meaning of appropriate adult support
   - Amendment 65 – After Section 82B, subsection 4 – Meaning of appropriate adult support
• Amendment 66 – After Section 82B – Responsibility for ensuring availability of appropriate adults

• Amendment 67 – After Section 82B – Assessment of quality of appropriate adult support

• Amendment 68 – After Section 82B – Training for appropriate adults
1 Criminal Justice (Scotland) Bill as amended at Stage 2 is available at the following website: 

2 Criminal Justice (Scotland) Bill as amended at Stage 2, Supplementary Delegated Powers Memorandum is available at the following website: 

3 Delegated Powers and Law Reform Committee. 53rd Report, 2013 (Session 4) Criminal Justice (Scotland) Bill at Stage 1 (SP Paper 411) is available at the following website: 
Correspondence from the Scottish Government

On 26 November 2015 the Cabinet Secretary for Justice wrote to the Convener as follows:

I am writing to give you advance notice of Stage 3 amendments which the Government intends to lodge in relation to the Criminal Justice (Scotland) Bill ("the Bill") that will give Ministers new subordinate legislation making powers.

The amendment, or amendments, the Government means to lodge will empower Ministers to make regulations conferring on a body the duty to ensure that support is available for vulnerable persons at certain points in a criminal investigation or criminal proceedings. The sort of support in question is that provided by people generally known as appropriate adults.

The proposal to take this power at this late stage in the Bill process is a result of concerns expressed by members (in particular Alison McInnes) during Stage 2 consideration of the Bill. During the Justice Committee’s stage 2 deliberations, I said this (SP OR J 6 October 2015, col 67):

"When the Bill was introduced, it was considered that the appropriate adult system was working well and that a light-touch approach should be adopted — in essence placing the referral process on a statutory basis but going no further. However, further evidence … has persuaded me that the current model for appropriate adult services is not sustainable over the longer term. Concerns have been expressed about the accessibility and consistency of service provision, the exact remit of appropriate adults and funding for the service, all of which warrant further consideration.

The limited time available between Stages 2 and 3 of the Bill is insufficient to give these important matters the careful consideration which they warrant, especially when a number of stakeholders including Police Scotland, local authorities and the appropriate adult network all need to be involved in developing the new model for the delivery of appropriate adult services to ensure that it is sustainable in the long term.

The power the Government proposes to take will be restricted so as to be exercisable only after Scottish Ministers have carried out a public consultation, and any regulations made under it will be subject to the affirmative procedure so that Parliament is given a proper opportunity to consider what is proposed.

A copy of this letter is being sent to the Convener of the Justice Committee.

I hope this is helpful.
In discussing the matter of Independent Legal Representation (ILR) for complainers in relation to sexual offences during Stage 2 of the Criminal Justice Bill, I advised the Committee that I considered a better understanding of the current use of related legislation was required (sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995).

While I remain unconvinced that ILR is a necessary step, I believe it is important that any discussion about such significant changes to Scots law are based on a thorough understanding of how the system operates at present. Unfortunately, in relation to sections 274 and 275, justice organisations do not specifically record the number of applications made nor their disposals. We therefore do not have an understanding of how often these provisions are used, and how often they are granted.

To help gain such an understanding, I confirm that a small research project will be taken forward to review the usage of these provisions. I have requested COPFS and SCTS to undertake a short monitoring exercise which will initially last around 3 months. Once sufficient information is available we will develop our consideration of any further analysis required with interested parties, both from the legal system and from victims’ organisations.

As I mentioned at Committee, it will be timely to undertake this work now so it can be considered alongside the wider criminal justice reform project. This wider work will also give consideration to Lord Bonomy’s recommendations, the requirement for corroboration reform and any other relevant issues.
Following this exercise, we will have gained a greater evidence base of the volumes and disposals of cases involved. It will then of course be a matter for the Scottish Government elected in May to consider what additional research, if any, may be appropriate to ascertain how sections 274 and 275 are being applied by the courts and how this relates to the wider criminal justice reform project.

I hope the above information is helpful to the Committee.

Best wishes,

MICHAEL MATHESON
Criminal Justice (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections A1 to 91  Schedules A1 to 3
Long Title

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

Section A1

Michael Matheson

5  Move section A1 to after section 56

Section B1

Michael Matheson

83  In section B1, page 1, line 17, after <place> insert—

<(  )>

Michael Matheson

6  In section B1, page 1, line 18, at end insert <, or

(  ) in circumstances in which the constable believes that it is necessary to do so with
respect to the care or protection of the person.>

Michael Matheson

7  Move section B1 to after section 56

After section B1

Michael Matheson

8  After section B1, insert—

<Public safety at premises or events

(1) A person who is not in police custody may be searched by a constable if—

(a) the person—

(i) is seeking to enter, or has entered, relevant premises, or

(ii) is seeking to attend, or is attending, a relevant event, and

(b) the further criteria are met.
(2) Premises are or an event is relevant if—
   (a) the premises may be entered, or the event may be attended, by members of the public (including where dependent on possession of a ticket or on payment of a charge), and
   (b) the entry or the attendance is controlled, at the time of the entry or the attendance, by or on behalf of the occupier of the premises or the organiser of the event.

(3) The further criteria to be met are that—
   (a) the entry or the attendance is subject to a condition, imposed by the occupier of the premises or the organiser of the event, that the person consents to being searched, and
   (b) the person informs the constable that the person consents to being searched by the constable.

(4) A search under this section is to be carried out for the purpose of ensuring the health, safety or security of people on the premises or at the event.

(5) Anything seized by a constable in the course of a search carried out under this section may be retained by the constable.

Section C1

Michael Matheson

9 Move section C1 to after section 56

Before section D1

Michael Matheson

10 Before section D1, insert—

<Publication of information by police

(1) The Police Service of Scotland must ensure that, as soon as practicable after the end of each reporting year, information is published on how many times during the reporting year a search was carried out by a constable—
   (a) of a person not in police custody, and
   (b) otherwise than under the authority of a warrant expressly conferring a power of search.

(2) So far as practicable, the information is to disclose (in addition)—
   (a) how many persons were searched on two or more occasions,
   (b) the age and gender, and the ethnic and national origin, of the persons searched,
   (c) the proportion of searches that resulted in—
      (i) something being seized by a constable,
      (ii) a case being reported to the procurator fiscal,
   (d) the number of complaints made to the Police Service of Scotland about the carrying out of searches (or the manner in which they were carried out).
(3) In this section, “reporting year” means a yearly period ending on 31 March.

Section D1

Elaine Murray

11 In section D1, page 2, line 18, at end insert—

   <( ) send a copy of the proposed regulations to—
   (i) the Chief Constable of the Police Service of Scotland,
   (ii) the Scottish Human Rights Commission,
   (iii) the Commissioner for Children and Young People in Scotland, and
   (iv) such other persons as the Scottish Ministers consider appropriate.>

Elaine Murray

12 In section D1, page 2, line 18, at end insert—

   <( ) When laying before the Scottish Parliament a draft of an instrument containing
   regulations under this section, the Scottish Ministers must also so lay a statement—
   (a) giving reasons for wishing to make the regulations as currently framed (and
       confirming whether the regulations will amend the relevant enactment in the same
       way as shown in the proposed regulations),
   (b) summarising—
       (i) the responses received by them to the public consultation on the proposed
           regulations,
       (ii) the representations made to them by the persons to whom a copy of the
           proposed regulations was sent.>

Alison McInnes

84 In section D1, page 2, line 18, at end insert—

   <(2A) For the purposes of a consultation under subsection (2), the Scottish Ministers must—
   (a) lay a copy of the proposed regulations before the Scottish Parliament,
   (b) publish in such manner as they consider appropriate a copy of the proposed
       regulations, and
   (c) have regard to the matters mentioned in subsection (2B).

(2B) The matters are—

   (a) any resolution of the Parliament made,
   (b) any report of any committee of the Parliament published,
   (c) any representations to the Scottish Ministers made,

in relation to the proposed regulations within 60 days of the day on which the copy of
the proposed regulations is laid before the Parliament.
(2C) In calculating any period of 60 days for the purposes of subsection (2B), no account is to be taken of any time during which the Scottish Parliament is dissolved or in recess for more than 4 days.

(2D) When laying a draft of an instrument containing regulations under this section before the Scottish Parliament, the Scottish Ministers must also lay before the Parliament an explanatory document giving details of—

(a) the consultation carried out under subsection (2),

(b) any representations received as a result of the consultation, and

(c) the changes (if any) made to the proposed regulations as a result of those representations.

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Alison McInnes

1 Leave out section D1

Michael Matheson

13 Move section D1 to after section 56

Section E1

Alison McInnes

2 In section E1, page 2, line 24, leave out subsection (2)

Michael Matheson

14 Move section E1 to after section 56

Section F1

Michael Matheson

15 Move section F1 to after section 56

Section G1

Michael Matheson

16 In section G1, page 3, line 7, after <out> insert <(in particular)>

Michael Matheson

17 In section G1 page 3, line 8, leave out <such a search> and insert <a search of such a person>

Michael Matheson

18 In section G1, page 3, leave out lines 10 and 11 and insert—

<(c) in relation to such a search—>
(i) the record to be kept,
(ii) the right of someone to receive a copy of the record.

Michael Matheson

19 In section G1, page 3, leave out line 12

Michael Matheson

20 Move section G1 to after section 56

Section H1

Michael Matheson

21 In section H1, page 3, line 30, leave out subsection (2A) and insert—

<(2A) So far as practicable, a review conducted under subsection (2) must be completed within 6 months of the day on which the review begins.>

Michael Matheson

22 In section H1, page 4, line 2, leave out <to K1> and insert <, J1 (except subsection (3)) and K1 (except subsection (2A))>

Michael Matheson

23 Move section H1 to after section 56

Section I1

Michael Matheson

24 Move section I1 to after section 56

Section J1

Michael Matheson

25 In section J1, page 4, line 20, at end insert—

<( ) the Police Investigations and Review Commissioner,>

Michael Matheson

26 In section J1, page 4, leave out line 23
In section J1, page 4, line 24, at end insert—

<(3) Subsection (1) or (2) is complied with in relation to a code of practice having (or to have) effect for the first time even if the consultation has been initiated before the day on which this section comes into force.>

Move section J1 to after section 56

Section K1

In section K1, page 4, line 26, leave out <a day appointed> and insert <the day appointed for the code>

In section K1, page 4, line 31, leave out subsection (2A) and insert—

<(2A) No later than at the end of the 12 months beginning with the day on which this section comes into force, there must be so laid a draft of an instrument containing regulations bringing a code of practice into effect.>

Move section K1 to after section 56

Section L1

Leave out section L1

Section 4

In section 4, page 6, line 36, after <19(2)> insert <, or

( ) section 28(3A) of the 1995 Act>

Section 7

In section 7, page 9, line 23, after <offence> insert <, or

( ) the person is detained under section 28(1A) of the 1995 Act (which allows for detention in connection with a breach of bail conditions)>
Section 11

Michael Matheson

35 In section 11, page 10, line 1, after <12A> insert <, or

( ) the person is detained under section 28(1A) of the 1995 Act (which allows for detention in connection with a breach of bail conditions)>

Section 12A

Alison McInnes

3 In section 12A, page 10, line 21, at end insert—

<(1A) Subsection (1) does not apply where—

(a) a constable believes that the person who is in police custody is under 18 years of age, or

(b) owing to mental disorder, the person who is in police custody appears to a constable to be unable to—

(i) understand sufficiently what is happening, or

(ii) communicate effectively with the police.

(1B) It is irrelevant for the purposes of subsection (1A)(b) whether the person is or is not in receipt of support of the type mentioned in section 33(3).>

Michael Matheson

36 In section 12A, page 10, leave out line 23 and insert—

<(  ) is of, or above, the rank of—

(i) inspector, if a constable believes the person to be 18 years of age or over,

(ii) chief inspector, if a constable believes the person to be under 18 years of age, and>

Michael Matheson

37 In section 12A, page 11, line 12, after <offence> insert <, or

( ) the person is detained under section 28(1A) of the 1995 Act (which allows for detention in connection with a breach of bail conditions)>

Alison McInnes

4 In section 12A, page 11, line 12, at end insert—

<(  ) In subsection (1A)(b)—

(a) “mental disorder” has the meaning given in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003,

(b) the reference to the police is to any—

(i) constable, or
(ii) person appointed as a member of police staff under section 26(1) of the Police and Fire Reform (Scotland) Act 2012.

Section 9

Michael Matheson

38 In section 9, page 12, line 11, after <offence> insert <, or

( ) the person is detained under section 28(1A) of the 1995 Act (which allows for detention in connection with a breach of bail conditions).

Section 14

Elaine Murray

39 In section 14, page 13, line 32, after <offence> insert <(including, for example, a condition aimed at securing that the person does not interfere with witnesses or evidence).

After section 17

Elaine Murray

85 After section 17, insert—

<Disclosure of information: person released under section 14>

(1) A constable may disclose qualifying information relating to an alleged offence to a person mentioned in subsection (2) where the conditions in subsection (3) are met.

(2) The persons are—

(a) a person—

(i) against whom, or

(ii) against whose property,

the acts which constituted the alleged offence were directed,

(b) in the case where the death of a person mentioned in paragraph (a) was (or appears to have been) caused by the alleged offence, a prescribed relative of the person,

(c) a person who is likely to give evidence in criminal proceedings which are likely to be instituted against a person in respect of the alleged offence,

(d) a person who has given a statement in relation to the alleged offence to a constable.

(3) The conditions are that disclosure of the information —

(a) is in the public interest or is otherwise likely to promote the safety and wellbeing of a person mentioned in subsection (2), and

(b) is authorised by a constable who is of the rank of inspector or above.

(4) In this section—
“prescribed” means prescribed by the Scottish Ministers by regulations subject to the negative procedure,

“qualifying information” means information that—

(a) identifies a person as having been arrested in connection with an alleged offence and subsequently released under section 14, and

(b) sets out such information relating to any conditions imposed on the person under section 14(2) as the constable authorising the disclosure considers appropriate.

(5) The Scottish Ministers may, by regulations subject to the negative procedure, modify the definition of “qualifying information” in subsection (4).

Section 20

Michael Matheson

40 In section 20, page 19, line 26, after <sergeant> insert <or above>

Section 24

Michael Matheson

41 In section 24, page 22, line 19, leave out <the constable is satisfied that>

Michael Matheson

42 In section 24, page 22, line 22, at end insert—

<(  ) A decision to allow the person to be interviewed without a solicitor present by virtue of subsection (4) may be taken only by a constable who—

(a) is of the rank of sergeant or above, and

(b) has not been involved in investigating the offence about which the person is to be interviewed.>

Section 25

Michael Matheson

43 In section 25, page 23, line 17, leave out <in> and insert <by>

Section 26

Michael Matheson

44 In section 26, page 23, line 29, at end insert—

<(  ) For the avoidance of doubt, nothing in this section is to be taken to mean that a constable cannot put questions to the person in relation to any other matter.>
Section 30

Michael Matheson

45 In section 30, page 26, line 35, leave out <a> and insert <an appropriate>.

Michael Matheson

46 In section 30, page 27, line 3, at end insert—

<( ) In subsection (5), “an appropriate constable” means a constable who—

(a) is of the rank of sergeant or above, and

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

Section 32

Michael Matheson

47 In section 32, page 28, line 26, at end insert—

<( ) A decision to refuse or restrict access to a person in custody under subsection (1) or (2) may be taken only by a constable who—

(a) is of the rank of sergeant or above, and

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

Section 32A

Michael Matheson

48 In section 32A, page 29, line 17, at end insert—

<( ) A decision to refuse or restrict access to a person in custody under subsection (4)(b) may be taken only by a constable who—

(a) is of the rank of sergeant or above, and

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

Section 36

Michael Matheson

49 In section 36, page 31, line 9, leave out from <a> to <it> in line 10 and insert <the person’s exercise of the right under subsection (1) may be delayed so far as that>.
Michael Matheson

50 In section 36, page 31, line 12, at end insert—

< ( ) A decision to delay the person’s exercise of the right under subsection (1) may be taken only by a constable who—

(a) is of the rank of sergeant or above, and

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

Section 52A

Michael Matheson

51 In section 52A, page 35, line 1, leave out subsection (7) and insert—

< (7) A court or tribunal in civil or criminal proceedings must take the code of practice into account when determining any question arising in the proceedings to which the code is relevant.>

Section 53A

Michael Matheson

52 In section 53A, page 35, line 27, leave out from second <in> to end of line 28 and insert <under section 1.>

Section 56

Michael Matheson

53 In section 56, page 36, line 21, at end insert—

< ( ) the person is brought before a court under section 28(2) or (3) of the 1995 Act,>

After section 56

Alison McInnes

86 After section 56, insert—

<PART

AGE OF CRIMINAL RESPONSIBILITY

Age of criminal responsibility

In section 41 (age of criminal responsibility) of the 1995 Act, for the word “eight” there is substituted “12”.

>
Section 64

Michael Matheson

54 Leave out section 64

Section 67

Michael Matheson

55 In section 67, page 41, line 10, leave out <cross-heading> and insert <heading>

Section 73

Michael Matheson

56 In section 73, page 42, line 36, leave out <not constituted by a stipendiary magistrate> and insert <(however constituted)>

Michael Matheson

57 In section 73, page 42, line 37, leave out leave out from first <a> to <summarily> in line 38 and insert <the sheriff court sitting in summary proceedings>

Michael Matheson

58 In section 73, page 42, line 39, leave out leave out <sitting as a court of solemn jurisdiction> and insert <court sitting in solemn proceedings>

Section 76

Michael Matheson

59 In section 76, page 44, line 5, leave out <High Court> and insert <Sheriff Appeal Court>

Michael Matheson

60 In section 76, page 44, line 8, leave out <High Court> and insert <Sheriff Appeal Court>

Michael Matheson

61 In section 76, page 44, line 16, leave out <High Court> and insert <Sheriff Appeal Court>

Section 80

Michael Matheson

62 In section 80, page 45, line 30, leave out <High Court> and insert <Sheriff Appeal Court>
Section 81

Michael Matheson

63 In section 81, page 46, line 2, leave out subsection (2)

After section 81

Michael Matheson

64 After section 81, insert—

<Courts reform: spent provisions>

In schedule 3 to the Courts Reform (Scotland) Act 2014, the following provisions are repealed—

(a) in paragraph 10, sub-paragraphs (4), (5) and (8),
(b) paragraph 22,
(c) paragraph 25.>

Section 82A

Mary Fee

87 Leave out section 82A

After section 82B

Michael Matheson

65 After section 82B, insert—

<Chapter>

Support for vulnerable persons

Meaning of appropriate adult support

(1) For the purposes of this Chapter, “appropriate adult support” means—

(a) support of the sort mentioned in subsection (3) of section 33 that is provided to a person about whom intimation has been sent under subsection (2) of that section, and
(b) such other support for vulnerable persons in connection with a criminal investigation or criminal proceedings as the Scottish Ministers specify by regulations.

(2) In regulations under subsection (1)(b), the Scottish Ministers may, in particular, specify support by reference to—

(a) the purpose it is to serve,
(b) the description of vulnerable persons to whom it is to be available, and
(c) the circumstances in which it is to be available.
(3) For the purposes of this section—

“vulnerable person” means a person who, owing to mental disorder, is—

(a) unable to understand sufficiently what is happening, or
(b) communicate effectively,
in the context of a criminal investigation or criminal proceedings,

“mental disorder” has the meaning given by section 328 of the Mental Health
(Care and Treatment) (Scotland) Act 2003.

(4) The Scottish Ministers may by regulations amend the definitions of “vulnerable person”
and “mental disorder” in subsection (3) for the purpose of making them consistent with
(respectively) subsections (1)(c) and (5)(a) of section 33.

Michael Matheson

66 After section 82B, insert—

<Responsibility for ensuring availability of appropriate adults

The Scottish Ministers may by regulations—

(a) confer on a person the function of ensuring that people are available to provide
appropriate adult support—

(i) throughout Scotland, or

(ii) in a particular part of Scotland, and

(b) make provision about how that function may or must be discharged.

Michael Matheson

67 After section 82B, insert—

<Assessment of quality of appropriate adult support

The Scottish Ministers may by regulations—

(a) confer on a person the functions of—

(i) assessing the quality of whatever arrangements may be in place to ensure
that people are available to provide appropriate adult support, and

(ii) assessing the quality of any appropriate adult support that is provided, and

(b) make provision about how those functions may or must be discharged.

Michael Matheson

68 After section 82B, insert—

<Training for appropriate adults

The Scottish Ministers may by regulations—

(a) confer on a person the function of—

(i) giving to people who provide, or wish to provide, appropriate adult support
training in how to provide that support,
(ii) giving to other people specified by the Scottish Ministers in the regulations training in how to deal with people who need appropriate adult support, and

(b) make provision about how that function may or must be discharged.

Michael Matheson

69 After section 82B, insert—

<Recommendations from quality assessor and training provider

(1) A person upon whom a function has been conferred by virtue of section (Assessment of quality of appropriate adult support) or (Training for appropriate adults) may—

(a) make to a provider of appropriate adult support recommendations about the way that appropriate adult support is provided,

(b) make to the Scottish Ministers recommendations about the exercise of their powers under section 53B and the provisions of this Chapter.

(2) A provider of appropriate adult support must have regard to any recommendation made to it under subsection (1)(a).

(3) The Scottish Ministers must have regard to any recommendation made under subsection (1)(b).

(4) In this section, “a provider of appropriate adult support” means a person upon whom the function of ensuring that people are available to provide appropriate adult support has been conferred by virtue of section (Responsibility for ensuring availability of appropriate adults).

Michael Matheson

70 After section 82B, insert—

<Duty to ensure quality assessment takes place

If, by virtue of regulations under section (Responsibility for ensuring availability of appropriate adults), a person has the function of ensuring that people are available to provide appropriate adult support, it is the Scottish Ministers’ duty to ensure that there is a person discharging the functions mentioned in section (Assessment of quality of appropriate adult support)(a).

Michael Matheson

71 After section 82B, insert—

<Elaboration of regulation-making powers under this Chapter

(1) A power under this Chapter to confer a function on a person by regulations may be exercised so as to confer the function, or aspects of the function, on more than one person.

(2) A power under this Chapter to make provision by regulations about how a function may or must be discharged may, in particular, be exercised so as to—

(a) require or allow the person discharging the function to enter into a contract with another person,
(b) require the person discharging the function to have regard to any guidance about the discharge of the function issued by the Scottish Ministers.

(3) The powers under this Chapter to make regulations may be exercised so as to—

(a) make such provision as the Scottish Ministers consider necessary or expedient in consequence of, or for the purpose of giving full effect to, any regulations made in exercise of a power under this Chapter,

(b) modify any enactment (including this Act),

(c) make different provision for different purposes.

Michael Matheson

72 After section 82B, insert—

<Procedure for making regulations under this Chapter>

(1) Regulations under this Chapter are subject to the affirmative procedure.

(2) Prior to laying a draft Scottish statutory instrument containing regulations under this Chapter before the Scottish Parliament for approval by resolution, the Scottish Ministers must consult publicly.

Michael Matheson

73 After section 82B, insert—

<Other powers of Ministers unaffected>

Nothing in this Chapter is to be taken to imply that the powers it gives to the Scottish Ministers to confer functions are the only powers that they have to confer those (or similar) functions.

Mary Fee

88 After section 82B, insert—

<Chapter>

NOTIFICATION IF PARENT OF UNDER-18 IMPRISONED

Child’s named person to be notified

(1) This section applies where a person is admitted to any penal institution for imprisonment or detention arising from—

(a) anything done by a court of criminal jurisdiction (including the imposition of a sentence, the making of an order or the issuing of a warrant),

(b) anything done under section 17 or 17A of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (as to the recall of a prisoner),

(c) anything done by virtue of the Extradition Act 2003 (particularly section 9(2) or 77(2) of that Act), or

(d) the operation of any other enactment concerning criminal matters (including penal matters).

(2) The Scottish Ministers must ensure that the person is asked—

(a) whether the person is a parent of a child, and
(b) if the person claims to be a parent of a child, to—
   (i) state the identity of the child, and
   (ii) give information enabling the identity of the service provider in relation to the child to be ascertained.

(3) If the identity of the service provider can be ascertained by or on behalf of the Scottish Ministers without undue difficulty in light of anything disclosed by the person, they must ensure that the service provider is notified of—
   (a) the fact of the person’s admission to the penal institution,
   (b) what has been stated by the person about the identity of the child, and
   (c) such other matters disclosed by the person as appear to them to be relevant for the purpose of the exercise of the named person functions with respect to the child.

(4) In addition, the Scottish Ministers must ensure that the service provider is notified of anything disclosed by the person about the identity of any other child—
   (a) of whom the person claims to be a parent, and
   (b) the service provider in relation to whom is unknown to them.

(5) No requirement is imposed by subsection (2) if the person’s admission to the penal institution is on—
   (a) returning after—
      (i) any unauthorised absence, or
      (ii) any temporary release in accordance with prison rules, or
   (b) being transferred from—
      (i) any other penal institution,
      (ii) any secure accommodation in which the person has been kept, or
      (iii) any hospital in which the person has been detained, so as to be given medical treatment for a mental disorder, by virtue of Part VI of the 1995 Act or the Mental Health (Care and Treatment) (Scotland) Act 2003.

(6) Each of the requirements imposed by subsections (2) to (4) is to be fulfilled without unnecessary delay.

(7) The references in subsections (2) to (4) to the Scottish Ministers are to them in their exercise of functions in connection with the person’s imprisonment or detention in the penal institution.

(8) The references in subsections (3) and (4) to disclosure by the person are to such disclosure in response to something asked under subsection (2).

Mary Fee

89 After section 82B, insert—

<Definition of certain expressions>

In this Chapter—

“child” means a person who is under 18 years of age,

“named person functions” has the meaning given by section 32 of the Children and Young People (Scotland) Act 2014,
“parent” includes any person who—
(a) is a guardian of a child,
(b) is liable to maintain, or has care of, a child, or
(c) has parental responsibilities in relation to a child (as construed by reference to section 1(1) to (3) of the Children (Scotland) Act 1995),

“penal institution” means—
(a) any prison, other than—
   (i) a naval, military or air force prison, or
   (ii) any legalised police cells (within the meaning of section 14(1) of the Prisons (Scotland) Act 1989),
(b) any remand centre (within the meaning of section 19(1)(a) of the Prisons (Scotland) Act 1989), or
(c) any young offenders institution (within the meaning of section 19(1)(b) of the Prisons (Scotland) Act 1989),

“prison rules” means rules made under section 39 of the Prisons (Scotland) Act 1989,

“secure accommodation” means accommodation provided in a residential establishment, approved in accordance with regulations made under section 78(2) of the Public Services Reform (Scotland) Act 2010, for the purpose of restricting the liberty of children,

“service provider” in relation to a child has the meaning given by section 32 of the Children and Young People (Scotland) Act 2014.

Section 86

Michael Matheson
74 In section 86, page 48, line 28, leave out <or other proceedings is> and insert <is or other proceedings are>

Michael Matheson
75 In section 86, page 48, line 33, leave out from <or> to second <be> in line 34 and insert <is or other proceedings are to be held or (as the case may be) any specified hearing is or other proceedings are being>

Michael Matheson
76 In section 86, page 49, line 13, leave out <such a person’s case if such a> and insert <the person’s case if the>
After section 86A

Margaret Mitchell
Supported by: Alison McInnes

90 After section 86A, insert—

CHAPTER

RECOVERY OF DOCUMENTS IN SEXUAL OFFENCE CASES: LEGAL REPRESENTATION

Recovery of certain documents in sexual offence cases: legal representation
In section 301A (recovery of documents) of the 1995 Act, after subsection (4), insert—
“(4A) Subsection (4B) applies where the application for an order under subsection (1)—
(a) is made in connection with the trial of a person charged with an offence to which section 288C of this Act applies, and
(b) seeks the recovery of any psychiatric, psychological or medical records of the complainer.

(4B) Before such an order is granted, the court must ensure that the complainer—
(a) is informed of the right of the complainer—
(i) to seek legal advice,
(ii) to appoint a legal representative, and
(b) is given the opportunity—
(i) to seek such advice,
(ii) to appoint such a representative.

(4C) Where the complainer appoints a legal representative—
(a) a copy of the application must be sent to the legal representative, and
(b) the legal representative must be given an opportunity to—
(i) submit written evidence on the matters set out in the application,
(ii) represent the complainer at any hearing in relation to the application.

(4D) The Scottish Ministers must by regulations make provision for fees incurred by a legal representative appointed under subsection (4B) to be paid out of the Scottish Legal Aid Fund.

(4E) In subsections (4A) to (4C), “complainer” means the person against whom the offence which is the subject of the criminal proceedings to which the application for an order under subsection (1) relates is alleged to have been committed.”.
Section 90

Michael Matheson

77 In section 90, page 54, line 8, leave out subsection (1) and insert—

<(1) The following provisions come into force on the day after Royal Assent—
   (a) sections E1 and G1 to K1,
       (b) this Part.>“

Alison McInnes

91 In section 90, page 54, line 8, at end insert—

<( ) Section (Age of criminal responsibility) comes into force on the day 18 months after Royal Assent.>“

Schedule A1

Michael Matheson

78 In schedule A1, page 58, line 9, leave out <or 21> and insert <, 21 or 21A>“

Schedule 1

Michael Matheson

79 In schedule 1, page 59, leave out lines 4 to 8“

Michael Matheson

80 In schedule 1, page 61, line 11, at end insert—

<In section 28—
   (a) after subsection (1) there is inserted—
       “(1ZA)Where—
           (a) a constable who is not in uniform arrests a person under subsection (1),
               and
           (b) the person asks to see the constable’s identification,
               the constable must show identification to the person as soon as reasonably practicable.’;
       (b) after subsection (3) there is inserted—
           “(3A) If—
               (a) a person is in custody only by virtue of subsection (1) or (1A), and
               (b) in the opinion of a constable there are no reasonable grounds for suspecting that the person has broken, or is likely to break, a condition imposed on the person’s bail,
               the person must be released from custody immediately.">“
(3B) An accused is deemed to be brought before a court under subsection (2) or (3) if the accused appears before it by means of a live television link (by virtue of a determination by the court that the person is to do so by such means).”.

Michael Matheson

81 In schedule 1, page 61, line 11, at end insert—

<After section 28 there is inserted—

“28A Application of the Criminal Justice (Scotland) Act 2015 to persons arrested and detained under section 28

(1) Section 7(2) of the Criminal Justice (Scotland) Act 2015 (“the 2015 Act”) does not apply to an accused who has been arrested under section 28(1) of this Act.

(2) The following provisions of the 2015 Act apply in relation to a person who is to be brought before a court under section 28(2) or (3) of this Act as they apply in relation to a person who is to be brought before a court in accordance with section 18(2) of the 2015 Act—

(a) section 18A,

(b) section 18B,

(c) section 18C.

(3) In relation to a person who is to be brought before a court under section 28(2) or (3) of this Act, the 2015 Act applies as though—

(a) in section 18B(2)—

(i) for paragraph (c) there were substituted—

“(c) that the person is to be brought before the court under section 28 of the 1995 Act in order for the person’s bail to be considered.”, and

(ii) paragraph (d) were omitted,

(b) in section 18C—

(i) in subsection (3)(c), for the words “after being officially accused” there were substituted “after being informed that the person is to be brought before a court under section 28(2) or (3) of the 1995 Act”, and

(ii) in subsection (4), for paragraph (c) there were substituted—

“(c) that the person is to be brought before the court under section 28 of the 1995 Act in order for the person’s bail to be considered.”;

(c) in section 35(1), for paragraph (d) there were substituted—

“(d) the court before which the person is to be brought under section 28(2) or (3) of the 1995 Act and the date on which the person is to be brought before that court.”.”.

>
Michael Matheson

82 In schedule 1, page 61, line 31, leave out <section 48(5)(b) of> and insert <paragraph 6(5)(b) of schedule A1 to>
Groupings of Amendments for Stage 3

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 on the day of Stage 3 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

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

**Group 1: Move Part A1**

5, 7, 9, 13, 14, 15, 20, 23, 24, 28, 31

**Group 2: Search of person not in police custody: lawfulness of search by constable**

83, 6, 8

**Group 3: Search of person not in police custody: publication of information by police**

10, 32

**Group 4: Search of person not in police custody: provisions about possession of alcohol**

11, 12, 84, 1, 2

Debate to end no later than 35 minutes after proceedings begin

**Group 5: Code of practice**

16, 17, 18, 19, 21, 22, 25, 26, 27, 29, 30, 77

**Group 6: Arrest and detention in connection with bail breaches**

33, 34, 35, 37, 38, 53, 79, 80, 81
Group 7: Extension of period of custody without charge from 12 to 24 hours
3, 36, 4

Group 8: Investigative liberation: release on conditions
39, 85

Debate to end no later than 1 hour 30 minutes after proceedings begin

Group 9: Rank and independence of constable required to take certain decisions
40, 41, 42, 45, 46, 47, 48, 49, 50

Group 10: Minor, consequential and drafting amendments
43, 51, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 74, 75, 76, 78, 82

Group 11: Questioning following arrest
44

Group 12: Power to modify application of Part 1
52

Debate to end no later than 2 hours after proceedings begin

Group 13: Age of criminal responsibility
86, 91

Group 14: Children affected by parental imprisonment
87, 88, 89

Group 15: Support for vulnerable persons: appropriate adult services
65, 66, 67, 68, 69, 70, 71, 72, 73

Group 16: Recovery of documents in sexual offences cases: legal representation
90

Debate to end no later than 2 hours 40 minutes after proceedings begin
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 5, No. 58 Session 4

Meeting of the Parliament

Tuesday 8 December 2015

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Joe FitzPatrick, on behalf of the Parliamentary Bureau, moved S4M-15086—That the Parliament agrees that, during stage 3 of the Criminal Justice (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1 to 4: 35 minutes
Groups 5 to 8: 1 hour 30 minutes
Groups 9 to 12: 2 hours
Groups 13 to 16: 2 hours 40 minutes.

The motion was agreed to.

Criminal Justice (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 5, 83, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 87, 65, 66, 67, 68, 69, 70, 71, 72, 73, 88, 89, 74, 75, 76, 77, 78, 79, 80, 81 and 82.

The following amendments were disagreed to (by division)—

1 (For 3, Against 103, Abstentions 4)
3 (For 6, Against 103, Abstentions 0)
86 (For 40, Against 75, Abstentions 0)
90 (For 50, Against 61, Abstentions 4).

The following amendments were not moved: 84, 2, 4, 85 and 91.

Criminal Justice (Scotland) Bill: The Cabinet Secretary for Justice (Michael Matheson) moved S4M-15087—That the Parliament agrees that the Criminal Justice (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
Criminal Justice (Scotland) Bill:  
Stage 3

15:05

The Deputy Presiding Officer (John Scott):  
The next item of business is stage 3 proceedings  
on the Criminal Justice (Scotland) Bill. In dealing  
with the amendments, members should have the  
bill as amended at stage 2, the marshalled list and  
the groupings. The division bell will sound and  
proceedings will be suspended for five minutes for  
the first division of the 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.  
Members who wish to speak on any group of  
amendments should press their request-to-speak  
buttons as soon as possible after I call the group.

Section A1—Limitation on what enables  
search

The Deputy Presiding Officer: We start with  
group 1. Amendment 5, in the name of the Cabinet  
Secretary for Justice, is grouped with amendments  
7, 9, 13 to 15, 20, 23, 24, 28 and 31.

The Cabinet Secretary for Justice (Michael  
Matheson): Amendments 5, 7, 9, 13 to 15, 20, 23,  
24, 28 and 31 move part A1 from its place at the  
start of the bill to after section 56. That reflects the  
importance of part 1 of the bill and, in particular,  
the new single power of arrest in section 1.  

Moving part A1 will also help to avoid any  
possible confusion that could arise if part 1 was  
renumbered. Section 1 contains the new power of  
arrest, which replaces the current power to detain  
suspects under section 14 of the Criminal  
Procedure (Scotland) Act 1995 and a mixture of  
common law and statutory powers to arrest  
people. If part A1 was not moved, section 1 would  
be renumbered as section 14. That would create  
scope for unnecessary confusion with the old  
power of detention under the 1995 act, which the  
bill will repeal.

The new arrest and custody regime that is set  
out in part 1 represents a very significant change  
in police powers. Every police officer in Scotland  
will receive extensive training before the bill comes  
into force. That will help to ensure a smooth  
transition to the new system. However, there is  
bound to be a period where police officers and  
others working in the criminal justice system will  
take time to get used to the new legislation.  
Moving part A1 to later in the bill will also reduce  
the possibility of confusion. It will ensure that the  
ew new single power of arrest will continue to be  
contained in section 1 of the bill.

The Deputy Presiding Officer: We move to  
group 2. Amendment 83, in the name of the  
cabinet secretary, is grouped with amendments 6  
and 8.

Michael Matheson: Amendments were passed  
at stage 2 to implement the recommendations of  
the independent advisory group on stop and  
search, which was chaired by John Scott QC. The  
bill will introduce a new code of practice after a  
period of consultation. When that code of practice  
comes into effect, the current practice of non-  
statutory, or consensual, stop and search will end.  
From that point on, searches by the police of  
people not in police custody will be carried out  
only where there is a statutory authority or a  
warrant to do so.

I have been keen to build consensus on this  
important issue, and since stage 2 I have  
continued to engage with members of the Justice  
Committee. I thank members for the constructive  
way in which they have approached our  
discussions and I look forward to continuing that  
engagement as we consult on the draft code of  
practice.

To complement the provisions that were added  
at stage 2, I have lodged amendments to address  
two potential gaps in powers. Section B1 gives  
police the power to search a person before that  
person is transported under a statutory power or  
under warrant from one place to another. That  
search must be only for the purpose of making  
sure that the person does not have anything on  
them that could cause harm to that person or to  
any other person.

However, there are occasions on which a  
person may be transported voluntarily from one  
place to another. There is currently no statutory  
power to search such a person. Amendment 6 will  
therefore allow the police to search a person in  
very limited circumstances. Accordingly, as long  
as the person is to be or is being transported, and  
that transport is necessary with respect to that  
person’s care and protection, the police will have a  
limited power of search. The power of search is  
limited so that it can be used only for the purpose  
of making sure that the person does not have any  
item on them that could cause harm to themselves  
or to another. The power could be used, for  
example, in transporting a person with mental  
health issues from their home or from any other  
non-public place to a hospital.

Amendment 6 has been narrowly drafted to  
ensure that only those who are being genuinely
transported for the purpose of ensuring their care can be searched, and even then only in circumstances to ensure their own safety and that of others.

Amendment 83 is a technical amendment. Amendment 8 addresses another potential gap in statutory search powers. Police officers are often involved in carrying out searches as a condition of entry to sports grounds and other premises or events. The bill as it stands would make that unlawful. Amendment 8 therefore allows the police to search people as a condition of entry at relevant premises and events. Again, that is limited, and it is only for the purposes of ensuring the health, safety or security of people there. That is subject to specific conditions so that the power to search is not too general.

The premises or event must be open to members of the public; entrance must be controlled by the occupier or organiser; the occupier or organiser must have imposed a condition of entry that the person consents to being searched; and the person must inform the constable that they consent to being searched.

I move amendment 83.

Alison McInnes (North East Scotland) (LD): When I first read amendment 6, I was concerned that it seemed to be cast quite widely. I am therefore grateful for the cabinet secretary's reassurances this afternoon. However, if someone is being voluntarily transported to hospital, they can surely voluntarily undergo a search. Amendment 6 could perhaps be more precise to make it absolutely clear that it relates to a very small set of specific circumstances.

On amendment 8, when I consulted experts at stage 2 there were mixed views as to whether an amendment would be required to provide for searches to be undertaken at the entrance to events and venues. I note that the equivalent provisions in the PACE—Police and Criminal Evidence Act 1984—codes in England and Wales are arguably tighter, specifying that an exception to the rules on consensual searches can be made where it

“applies to searches of persons entering sports grounds or other premises carried out with their consent given as a condition of entry”.

How often are the police currently involved in those activities? Would the cabinet secretary expect these powers to be used sparingly—for example, in the provision of the robust security that is required for high-profile events such as the Commonwealth games and the Ryder cup?

Does the cabinet secretary expect that the powers that are set out in amendment 8 would be used regularly at a local level—for example, for those who are entering pubs or nightclubs? After all, in Aberdeen we have seen the police undertake unannounced drugs tests at the doors of nightclubs against the wishes of some owners. Will that become the norm under amendment 8?

We need assurances that the code of practice will be set out when those powers should be used and that event organisers will always have the final say on whether the police turn up to conduct those searches.

Finally, will the use of searches at those events and venues be included in the figures that are reported by Police Scotland or the Scottish Police Authority so that the public can understand when those powers are being deployed and can be assured that they are being used responsibly?

Alex Salmond (Aberdeenshire East) (SNP): It is admirable that the cabinet secretary is looking for consensus but I would like to hear a bit more about whether he feels that the powers and amendments will be sufficient to keep the public safe from harm.

I am particularly concerned about knife crime. During my early years as First Minister, there was an epidemic of knife crime in Scotland and far too many young people ended up as victims to that epidemic. Members might remember that it was a significant issue in the 2011 Scottish elections. As various people around the chamber tried in good faith to tackle that issue, they found themselves driven into more and more extreme positions on the penalties that might be proposed as a deterrent to knife crime. One of the turning points of the election was when the Labour policy was portrayed as wanting a long custodial sentence for anyone who was caught in the possession of any instrument whatsoever, even if it was a garden implement. I well remember that point in the election campaign.

My concern is that there is in my mind a strong correlation between the decline in knife crime in Scotland, and therefore the casualties and deaths resulting from knife crime, and the police’s use of stop and search powers.

In the report of the advisory group on stop and search, John Carnochan, a police officer who does nothing other than look for a range of ways to tackle the fundamental evils in society and who has elicited praise from all sides of the chamber on many occasions because of the various pioneering efforts that he has been engaged in, notes that non-statutory stop and search was appropriate for the time in which it was being deployed.

My question to the cabinet secretary follows. I would have liked to see the advisory group do far more analysis of the impact of stop and search on
knife crime. Knife crime is mentioned three times in the advisory group’s report. In contrast, alcohol and drink is mentioned 16 times and it has an entire subsection to itself. I am concerned about the problems of underage drinking, drinking in society generally, and the various measures that have been brought forward to deal with that. I would love to see minimum pricing come in in this country to tackle that fundamental evil. However, I am really concerned to know whether stop and search powers have been effective in reducing knife crime and the number of deaths of young people in this country.

When the cabinet secretary is closing, I would like him to say whether he is absolutely satisfied that nothing in the change of powers will change the downward trajectory of knife crime in Scotland. We have seen much less use of stop and search in England in recent times and we are now seeing a rising level of knife crime in England and Wales. I want to be absolutely certain that everything that is being done is being done with that as the principal motivation.

Of course, members will be concerned about all sorts of other matters, but I am sure that no member will want to do anything other than make absolutely sure that the powers that will be available to the police will be the maximum necessary to ensure that knife crime continues to decline in Scotland. It is a great social evil, which consumed members’ attention so recently, and rightly so, because of the damage that it inflicted on communities and families across this country. We need the police to have the powers that will enable them to make certain that safety is uppermost.

My final point—

The Deputy Presiding Officer: I must hurry you, Mr Salmond.

Alex Salmond: In that case, I will sit down.

John Finnie (Highlands and Islands) (Ind): I have a brief comment to lend the cabinet secretary my support for amendment 6. The amendment is a proportionate suggestion that will provide protection to the individual, to officers and to the wider public. Most important, it will be on a statutory footing and that is how I want to see all searches being undertaken.

Elaine Murray (Dumfriesshire) (Lab): At the beginning of Mr Salmond’s speech, I was a bit concerned to find myself agreeing with him. He managed to break the consensus after a while, so I got back to my normal position. I agree that it is important to be able to keep the public and police officers safe. Recently, we have seen some appalling incidents internationally, and there are circumstances in which powers have to be in place to keep the public safe. We will therefore support the Government on the matter.

Michael Matheson: First, I will deal with the points that Alison McInnes made. Amendment 6 is an attempt to address the matter in a proportionate way and protect the safety of the individual, police officers and members of the public, and it has been drafted in a specific way in order to fulfil that function. It will also be regulated by the code of practice that will be in operation, so there is an additional safeguard in how the provision will operate.

Alison McInnes also mentioned the matter that is covered by amendment 8. Part of the issue is that, as she identified, there are mixed views on the matter. We are making the statutory provision to ensure that there is absolute clarity in the area and that there can be no grey areas in the powers that the police have.

On how it will be included in the calculation of the detail that is held on stop and search, it should be kept in mind that the vast majority of searches at events and venues are conducted by people who are not police officers, such as event security officers. The aim is to ensure that, where the police are responsible for entrance to particular events, they have the power. As things stand, they would potentially not have the power in such circumstances.

Again, that area will be regulated by the code of practice when it is operated by the police, and we will look to see how it can be captured in the data that is to be taken forward overall in regulating stop and search.

I turn to the number of important points that Alex Salmond raised. I fully endorse his view about the need to ensure that the police have the necessary statutory powers to be able to undertake action that can help to reduce things such as knife crime. There is absolutely no doubt that, since 2006-07, there has been a dramatic reduction in the level of knife crime in Scotland overall. In particular, there has been a significant reduction in the west of Scotland, which has a correlation in that it has resulted in a significant reduction in the number of homicides.

Over the past few years, there has been a significant reduction in the amount of stop and search that Police Scotland has undertaken on a consensual, non-statutory basis. The statistics show that. There has been a significant drop-off over the past three years, and during that time knife crime has continued to decline. The key thing is to ensure that the police have the right statutory powers to intervene as and when they think it is appropriate to search someone, and to ensure that they are using the right type of intelligence for that purpose.
I am confident that, given the code of practice and the consideration that the advisory group gave to the matter, the police will have the necessary powers to allow them to continue that work, and to continue to ensure that we drive down knife crime and the problems that are associated with it.

I add that tackling knife crime goes much wider than stop and search. The no knives, better lives programme has been instrumental in our schools and local communities in changing attitudes around such crime, and the mentors in violence prevention programme has also been crucial in helping to change young people's attitudes to carrying sharp weapons and other offensive weapons.

I am confident that the combination of different factors, through the statutory powers that the police will have and those additional measures, will allow us to continue to see a reduction in knife crime overall.

Alex Salmond: I accept that point, which is why I praised John Carnochan. However, one of the key aspects of reducing knife crime is preventing youngsters from carrying knives for protection because they believe that other youngsters will have them. Stop and search was extremely influential in giving people—almost—a guarantee that there would not be widespread carrying of knives because of the extensive use of stop and search. Perhaps the cabinet secretary will address that point.

Michael Matheson: I agree. A big part of the challenge in dealing with the issue around the stop and search provisions was tackling the issue of gang culture. That particularly pervaded parts of west central Scotland, where there was a culture that a person was part of a gang and it was expected that they should carry a weapon.

There is no doubt that some of the approaches that have been used around stop and search have assisted in helping to deal with that issue and reduce its incidence. However, the statutory powers that the police will have for searching people in those circumstances will allow them to continue to undertake that type of work on the basis of intelligence. The police will still have the scope to be able to do that, but they will do so on a statutory footing. Given the advisory group’s consideration of the issue and the fact that we have seen over the past three years a significant reduction in consensual, non-statutory stop and search being undertaken by the police, I am confident that we will continue to see a marked reduction in knife crime and in homicide in Scotland overall.

We want to ensure that the police have the necessary statutory powers to continue that work. I believe that the combination of the provisions that we are making for the police—the statutory powers and the code of practice, which will also be consulted on and which the Parliament will have an opportunity to consider—will allow us to ensure that the police continue to have the necessary powers.

Amendment 83 agreed to.

Amendments 6 and 7 moved—[Michael Matheson]—and agreed to.

After section B1
Amendment 8 moved—[Michael Matheson]—and agreed to.

Section C1—Duty to consider child’s best interests
Amendment 9 moved—[Michael Matheson]—and agreed to.

Before section D1
The Deputy Presiding Officer: Before we move to group 3, I point out that we are very tight for time today.

Amendment 10, in the name of the cabinet secretary, is grouped with amendment 32.

Michael Matheson: At stage 2, an amendment was passed that would oblige the Scottish Police Authority to include stop and search data in its annual report. I agree that that information should be published, but I consider it more appropriate for there to be an obligation on Police Scotland to publish it than on the SPA. Amendment 10 will therefore impose a duty on Police Scotland to publish stop and search data annually, and amendment 32 will remove the provision that would place that duty on the SPA.

I move amendment 10.

Alison McInnes: As the cabinet secretary said, amendments 10 and 32 build on one of my successful stage 2 amendments. The bill as amended at stage 2 will require the SPA to provide an account of the use of stop and search in its annual report to Parliament. The cabinet secretary’s amendment 10 will break that link, and it will mean that the figures will not be reported directly to Parliament or even to the SPA; rather, the data will simply be published.

There have, of course, been numerous scandals surrounding data on stop and search—not least, the so-called consensual searches of under-12s. The national force told the BBC that more than 200 children had been searched in the six months after the instruction went out. Police chiefs subsequently revised that number down to 18, but then it went back up to 83, according to Her Majesty’s inspector of constabulary in Scotland.
The police reviewed and recategorised stop and search figures again and again, but still could not get them straight for either Parliament or the SPA, and that has caused police inspectors to declare that they have no confidence in the data. Given that record, does not the cabinet secretary think that there is merit in an accountability framework that encourages the SPA to scrutinise the figures before they are reported in turn to Parliament?

Michael Matheson: I have listened carefully to what Alison McInnes has had to say on this issue. I would, of course, expect the data that are published by Police Scotland to be fully considered before being placed in the public domain. However, it is appropriate that the body that is responsible for collating the data is the body that actually reports the information and makes it publicly available. There is absolutely no doubt that the SPA will want to scrutinise the information and might want to consider its accuracy, and I have no doubt that Parliament will also want to consider the information.

I am very conscious that if Police Scotland were to publish data that were then passed to the SPA, and the SPA subsequently changed the data, there would be members in here—as tends to be the case when it comes to debating issues around policing in Scotland—accusing the SPA of manipulating the data that Police Scotland had published. I therefore think that it is important that we ensure that the data that the police publish are as accurate as possible. I have no doubt that the SPA will want to scrutinise the data, and to consider how accurate the information is and how it is used by the police to inform decisions that they make about future policy in such areas.

Amendment 10 agreed to.

Section D1—Provisions about possession of alcohol

The Deputy Presiding Officer: We move to group 4. Amendment 11, in the name of Dr Elaine Murray, is grouped with amendments 12, 84, 1 and 2. I point out that if amendment 1 is agreed to, I cannot, because it would be pre-empted, call amendment 13, which has already been debated with group 1.

15:30

Elaine Murray: Queen’s counsel John Scott’s review of stop search by Police Scotland has largely been implemented by amendments at stage 2, as we have heard. However, Mr Scott felt that there needed to be further consultation on whether Police Scotland should have a statutory power to stop and search young people under 18 who may be in possession of alcohol. Therefore, the bill will enable Scottish ministers to make regulations to give police officers the statutory power to search under-18s for possession of alcohol if the consultation suggests that that would be desirable. The ability of ministers to make such regulations will lapse in two years if it is not used.

Some concern about the provision was expressed at stage 2: the Children and Young People’s Commissioner Scotland in particular was concerned that ministers were prejudging the consultation results and that any such regulations might inadvertently criminalise under-18s who are caught in possession of alcohol and result in inappropriately high numbers of under-18s being subjected to statutory stop and search. At stage 2, I suggested that a way around those concerns might be to make changes in the regulations on stop and search of under-18s for possession of alcohol subject to the super-affirmative procedure.

Amendments 11 and 12 have been drafted for me by the Government’s bill team, for which I thank the cabinet secretary. Amendment 11 specifies that, in addition to the public consultation, the chief constable, the Scottish Human Rights Commission and the Children and Young People’s Commissioner Scotland must receive a copy of proposed regulations, as should any other person whom the Government considers to be appropriate.

Amendment 12 requires that the Scottish Government, on laying any draft instrument before Parliament, must also make available its reasons for wanting to make regulations, as well as a summary of responses to the public consultation and the representations that have been made by the specified people to which a copy of the regulations were sent. That will ensure that Parliament is fully informed of any concerns about potential regulations on statutory stop and search for possession of alcohol before deciding whether to agree to them.

Alison McInnes’s amendment 84 is similar to my amendment. However, she does not specify that the Scottish Human Rights Commission and the Children and Young People’s Commissioner Scotland must receive a copy of the draft regulations. In that respect, my amendments are more robust. Her amendment would also require ministers to have regard to resolutions of Parliament and to committee reports made within 60 days of the instruments’ being laid. That is unnecessary, because ministers would be unable to pass the regulations without the recommendation of the Justice Committee—or appropriate committee—and Parliament’s agreement.

Amendment 1, in the name of Alison McInnes, would remove section D1, which will empower ministers to make regulations on stop and search of young people for the possession of alcohol.
Therefore, if the consultation results were such that the police ought to have the power to stop and search young people and children for alcohol, primary legislation would be required to implement the consultation recommendations.

All the other recommendations of the Scott review are being implemented through legislation, so it seems to be sensible to provide in this bill the power to introduce regulations that might be suggested by further consultation.

**Alison McInnes**: Elaine Murray has made reference to the Scott review recommendations. Does she agree that it did not recommend that provision?

**Elaine Murray**: The Scott review did not recommend the provision, but it recommended consultation. Amendment 11 is a mechanism for taking forward the results of that consultation, if the results of the consultation come out in favour of stop and search for possession of alcohol.

I am afraid that we will not be supporting Alison McInnes’s amendments. Her amendment 2 is consequential on agreement to her amendment 1.

I move amendment 11.

**The Deputy Presiding Officer**: I call Alison McInnes to speak to amendment 84 and the other amendments in the group.

**Alison McInnes**: As the cabinet secretary will be aware, although it is not an offence for children to be in possession of alcohol, officers have the power to confiscate it. Why, then, is the Government intent on paving the way for the creation of a search power in relation to an activity that is not illegal? That is a reckless and, to be frank, dangerous precedent for Parliament to set, and it risks a return to legitimising and normalising stop and search, which has been entirely discredited.

The case for creating search powers for alcohol has not yet been made. According to Dr Kath Murray, between June and August 2015, 90 per cent of underage alcohol detections resulted from statutory powers of search—powers that are available to the police. Just 7 per cent resulted from non-statutory searches.

John Scott QC’s review group did not request the provision. The majority of the group concluded that there is no gap. The Children and Young People’s Commissioner Scotland says that the approach is premature; Children 1st said that it could lead to the criminalisation of children.

Today, I am presenting members with two options. My preference is for members to back amendments 1 and 2, which would remove section D1 entirely. Secondary legislation should be used to establish comparatively minor details, but the creation of potentially sweeping police search powers is anything but minor, so it is no way to legislate for something so important. Despite the justice secretary’s assurances, every member should know that an order-making power leaves no real scope for proper parliamentary scrutiny and, as it stands, the creation of the new power of search for alcohol would be at the behest of just a few committee members.

Given our constituents’ experience of stop and search during the past two and a half years, members must surely recognise the need for both evidence and caution. The creation of new search powers must be the subject of in-depth consultation, keen democratic scrutiny and rigorous debate. That is why I ask members, if they do not back amendments 1 and 2, at least to support amendment 84, which would make the introduction of new search powers subject to the super-affirmative procedure.

If section D1 is unamended, there is a real risk that Parliament will allow our young people once again to be disproportionately targeted. They might once again be the subject of intrusive mass searches that contravene their human rights. If it is unamended, the section could allow the return by the back door of the discredited so-called consensual searches.

**Michael Matheson**: I am content to support amendments 11 and 12, which were lodged by Elaine Murray, and I thank her for lodging them. The amendments require that, as part of the existing requirement for consultation on any regulations allowing the search of children for alcohol, key stakeholders including the Commissioner for Children and Young People Scotland and the Scottish Human Rights Commission will be sent copies of draft regulations. In addition, they will require ministers, when laying such regulations in Parliament, to lay a statement that summarises the responses to the consultation and gives the reasons for making the regulations. Amendments 11 and 12 will ensure that the role of key stakeholders in the consultation process is enhanced, and that Parliament is fully informed of the consultation that we carry out, the responses that we receive and our reasons for laying the regulations. The regulations are, of course, already subject to affirmative procedure. I believe that the provisions in the amendments will further enhance their necessary parliamentary scrutiny.

Amendments 1 and 2, which were lodged by Alison McInnes, would delete section D1; that would remove the provisions that allow regulations to be laid. I cannot support those amendments. Section D1 does not pre-empt our consultation on whether there should be a power to search children for alcohol. I assure members that the
purpose of the consultation will be to gather views on whether there is a need to legislate at all. We will also seek views on whether such a power would have any detrimental effects on children and/or their relationship with the police.

We will consult stakeholders, including John Scott QC and organisations that represent children’s interests, when we draft the consultation paper. If, after consultation, it was decided that such a power is necessary, I would wish to seek Parliament’s consent to introduce that power in a timely manner. The effect of amendments 1 and 2 would be that we would, if the consultation identified a gap in powers, have no legislative vehicle to address that. I therefore urge Alison McInnes not to move amendments 1 and 2.

Amendment 84, which was also lodged by Alison McInnes, overlaps Elaine Murray’s amendments 11 and 12 and duplicates several of their provisions. It also duplicates provisions that are already in the bill, regarding publication of proposed regulations. Amendment 84 could therefore result in unclear and potentially confusing legislation because of the way it overlaps with and duplicates existing provisions. In addition, it requires that a consultation on proposed regulations must last for 60 parliamentary sitting days, which would take to 100 the total number of sitting days that would be applicable to the regulations. That could result in a significant delay in our ability to act in abolishing consensual stop and search, should the consultation identify a gap in powers that needs to be filled before that can take place. I therefore urge Alison McInnes not to move amendment 84.

Elaine Murray: I will wind up very briefly on the issue of criminalising children. If it is considered after the consultation that regulations should be made, their purpose would not be to criminalise children. The criminals are the people who supply alcohol to children, not the children themselves.

My amendments provide the necessary degree of consultation and democratic accountability. I hope that Parliament will accept them.

Amendment 11 agreed to.

Amendment 12 moved—[Elaine Murray]—and agreed to.

Amendment 84 not moved.

Amendment 1 moved—[Alison McInnes].

The Deputy Presiding Officer: I remind members that, if amendment 1 is agreed to, amendment 13 will be pre-empted.

The question is, that amendment 1 be agreed to. Are we all agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. I suspend the proceedings for five minutes to allow the division bell to rung and members to return to the chamber.

15:41
Meeting suspended.

15:46
On resuming—

The Deputy Presiding Officer: We move to the division on amendment 1.

For
Hume, Jim (South Scotland) (LD)
McInnes, Alison (North East Scotland) (LD)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Adamson, Clara (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Bibby, Neil (West Scotland) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glascow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
FitzPatrick, Joe (Dun dee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Goldie, Annabel (West Scotland) (Con)
Graha, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, lain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
The Deputy Presiding Officer: That takes us to group 5. Amendment 16, in the name of the cabinet secretary, is grouped with amendments 17 to 19, 21, 22, 25 to 27, 29, 30 and 77.

Michael Matheson: This group comprises minor and technical amendments.

Amendments 16 to 19 are minor technical amendments to provisions that relate to the contents of the code of practice.

Amendments 21 and 22 are minor technical amendments to provisions that relate to reviews of the code of practice.

Amendments 25 and 26 make technical changes to the provision in the bill that adds the Police Investigations and Review Commissioner to the list of organisations that are to be consulted on the draft code of practice.

Amendment 27 is a minor amendment to provisions about consultation on the draft code of practice to allow consultation to begin as soon as possible.

Amendments 29 and 30 are minor technical amendments to the provisions that bring the code into effect.

Amendment 77 provides for technical reasons why the sections of the bill that relate to the code of practice will commence on the day after the bill receives royal assent.

I move amendment 16.

Amendment 16 agreed to.

Amendments 17 to 20 moved—[Michael Matheson]—and agreed to.

Section H1—Review of code of practice

Amendments 21 to 23 moved—[Michael Matheson]—and agreed to.

Section I1—Legal status of code of practice

Amendment 24 moved—[Michael Matheson]—and agreed to.
Section J1—Consultation on code of practice
Amendments 25 to 28 moved—[Michael Matheson]—and agreed to.

Section K1—Bringing code of practice into effect
Amendments 29 to 31 moved—[Michael Matheson]—and agreed to.

Section L1—Police powers of search: annual reporting
Amendment 32 moved—[Michael Matheson]—and agreed to.

Section 4—Arrested person to be taken to police station
The Deputy Presiding Officer: We move to group 6. Amendment 33, in the name of the cabinet secretary, is grouped with amendments 34, 35, 37, 38, 53 and 79 to 81.

Michael Matheson: This group of amendments deals with the process by which the police can bring someone who is on bail back to court to have the person’s bail reviewed when the police suspect that they have broken or may break a bail condition.

Section 28 of the Criminal Procedure (Scotland) Act 1995 gives the police a power to arrest someone on suspicion that the person has broken or may break a bail condition. It also gives the police a power to continue the detention of someone whom they have arrested on some other basis if they come to suspect that the person has broken or may break a bail condition. In either case, section 28 of the 1995 act goes on to require the police to bring the person before a court for a bail review.

The Government’s intention now is that section 28 of the 1995 act should continue to operate as it presently does once the bill is passed and is in force. The approach that is being taken is slightly different from that which was set out in the bill as introduced. Therefore, amendment 79 removes the amendments that schedule 1 of the bill would have made to section 28 of the 1995 act, and amendments 80 and 81 put other amendments in their place.

Amendment 80 makes a series of amendments to the powers of arrest and detention under section 28 of the 1995 act to ensure consistency with the bill. New subsection (1ZA) will require officers who are not in uniform to produce identification when they arrest someone for breach of bail, just as section 2 of the bill will do in relation to arrests under section 1. New subsection (3A) of section 28 of the 1995 act will require a person who has been arrested for breach of bail to be released when they are no longer suspected of breaching bail, and proposed section 28(3B) of the 1995 act allows a person to be brought before a court for a bail review by television link.

Amendment 81 inserts a new section 28A into the 1995 act. That applies the protections in part 1 of the bill with modifications to people who have been arrested for breach of bail. It ensures the right to have intimation sent to a solicitor, and the protections in relation to child suspects will also apply to people who have been arrested for a breach of bail.

The other amendments in the group are minor changes to part 1 of the bill to explain its interaction with the section 28 process.

Amendment 33 would disapply the section 4 requirement to take an arrested person to a police station where the person was arrested for breach of bail but was then released under proposed section 28(3A) of the 1995 act because they were no longer suspected of breaching bail.

Amendments 34, 38, 35 and 37 are amendments to sections 7, 9, 11 and 12A of the bill to highlight the possibility of a suspect’s detention being continued under section 28(1A) of the 1995 act for the sake of bringing him before a court to have his bail reviewed.

Amendment 53 is a technical amendment to section 56 to recognise that section 28 of the 1995 act provides an alternative to section 18 of the bill as a statutory basis on which a person who has been arrested might be brought before a court.

I move amendment 33.

John Finnie: I am very happy to support the cabinet secretary’s amendments in group 6. Only last week in the Justice Committee, we heard a harrowing tale from someone about the effects of an offender who continually breached bail. What can the cabinet secretary do to ensure that, if we agree to the amendments, the courts will take breaches of bail more seriously?

Michael Matheson: It is, of course, important for the courts to be able to consider those matters at those particular times. One of the most important issues is that, when someone is in breach of bail, they are brought before the court quickly in order for it to come to a determination on the issues. However, I am sure that the member also respects the fact that it is a matter for the independent judiciary and sheriffs to determine what decisions they then make on the basis of the information that has been presented before them at a bail review hearing.

Amendment 33 agreed to.
Section 7—Authorisation for keeping in custody

Amendment 34 moved—[Michael Matheson]—and agreed to.

Section 11—12 hour limit: general rule

Amendment 35 moved—[Michael Matheson]—and agreed to.

Section 12A—Authorisation for keeping in custody beyond 12 hour limit

The Deputy Presiding Officer: We move to group 7. Amendment 3, in the name of Alison McInnes, is grouped with amendments 36 and 4.

Alison McInnes: Amendment 36, in the cabinet secretary’s name, is a step in the right direction, but it does not go anywhere near far enough to protect children, nor does it make exceptions for other vulnerable people.

At stage 2, the cabinet secretary, presenting almost no evidence to the committee, extended the length of time for which someone could be kept in custody from 12 hours to 24 hours in certain circumstances. Amendments 3 and 4 in my name would ensure that children and vulnerable adults could not be held in custody for more than 12 hours.

When the committee took evidence at stage 1 it heard from the Children and Young People’s Commissioner Scotland and the Scottish Human Rights Commission about the need for safeguards and the dangers of what at that stage was a 12-hour limit. I wrote to our witnesses after the cabinet secretary increased the limit to 24 hours and Tam Baillie replied, describing the change as excessive.

The Scottish Human Rights Commission told me that it is not aware of concrete evidence that a 24-hour detention period is necessary and described the lack of exemptions for vulnerable people as disappointing. Professor Alan Miller stressed that to comply with the European convention on human rights, “justification must be on the basis of evidence, not anecdote.”

He said:

“The Commission is unaware of any evidence which suggested that prior to”

the introduction of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which quadrupled maximum detention periods,

“the police were systematically hampered in their efforts to investigate crime by the limits of the 6 hour detention period.”

If the Government opposes amendments 3 and 4 it will defy the Scottish Human Rights Commission and the children’s commissioner. It will also defy Lord Carloway’s recommendations, on which the bill is founded. It will deny the evidence; more important, it will deny the rights of children and vulnerable adults to be protected from heavy-handed police procedures.

I move amendment 3.

Michael Matheson: Amendments 3 and 4 would prevent any vulnerable adult or child suspect from being kept in custody for more than 12 hours. The Government is clear that the rights of such suspects must be protected and there are many measures in the bill to ensure that such people are not disadvantaged in the justice process.

However, setting a lower detention limit for children and vulnerable adults could prevent serious offences from being properly investigated and could place the public and vulnerable suspects at greater risk. Amendment 36, in my name, would instead increase the safeguards that must be in place before detention extensions can be granted for children.

It is vital that all offences can be properly investigated in the interests of justice, while protecting the rights of suspects. All constables will have a general duty to take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody. A test of necessity and proportionality must be satisfied whenever a sergeant makes an initial decision to keep a person in custody, an inspector carries out a six-hour custody review and an inspector decides whether to extend the detention limit from 12 to 24 hours. Those decision makers must be independent of the investigation.

The detention limit can be extended only if the investigation is being conducted diligently and expeditiously and relates to a serious, indictable offence. The safeguards will ensure that the initial 12-hour detention period and any 12-hour extension period cannot operate as blanket detention periods for any suspect.

More than 80 per cent of people are released within the first six hours. It has therefore been argued that the detention limit should be six hours, but Lord Carloway recognised that

“any timescales set must be sufficient to accommodate the effective investigation and prosecution of crime”,

and concluded:

“There is therefore little, if any, doubt that a six hour maximum is unrealistic in many ... cases.”
16:00

It is necessary to hold some people beyond six hours. In a very small proportion of cases, it is also necessary to extend detention from 12 to 24 hours. Twenty-four hours is a low detention limit compared with many other jurisdictions, but I am satisfied that it is sufficient to ensure, for example, that vital interviews need not take place in the middle of the night and that police are able to examine certain crime scenes during daylight hours.

The bill recognises that children have needs that adults do not. It provides specific rights and support for children and creates an overarching duty on every constable to treat the need to safeguard and promote the wellbeing of the child as a primary consideration. That new duty ensures that the wellbeing of the child suspect will be a primary consideration in any decision to keep them in custody.

Police standard operating procedures further protect the rights of children and vulnerable adults who are in custody. They will be updated before the bill is implemented.

It is standard policy that children should be brought into custody at a police station only when it is unavoidable and that they should be kept in custody for as short a time as possible. Children are held past six hours only in a small number of cases.

Vulnerable adult suspects are also entitled to additional support to ensure that they can understand and communicate effectively with the police. The definition of “mental disorder” covers a very wide spectrum, but the vast majority of individuals with mental disorders are fit to remain in police custody and are fit to be interviewed. In urgent situations and after psychiatric assessment, there are mechanisms to remove an individual from police custody if it is necessary. The majority of vulnerable adult suspects will be released within six hours.

It is unfortunately the case that under-18s and vulnerable adults are sometimes suspected of very serious offences, including murder and rape. Police Scotland figures indicate that 27 children have been detained for murder and culpable homicide since June 2010. The interests of justice require that such offences should be fully investigated before it is decided whether to charge or release a suspect. There is nothing to suggest that serious offences that involve child or vulnerable adult suspects can be properly investigated in a shorter period than offences that involve other suspects.

A child suspect could be too exhausted, traumatised or drunk to be interviewed immediately. Some types of crime scene need to be examined during daylight hours, even if an initial arrest took place at night. Other people, such as an appropriate adult, may need to attend interviews. It may take time to assess what support is required for a suspect.

Alison McInnes’s amendments would mean that under-18s and vulnerable adult suspects in serious cases would have to be released after 12 hours, regardless of whether the offence had been fully investigated. Compressing such investigations into a shorter period would not be in the interests of justice, the victims or the suspects themselves.

An absolute 12-hour limit would create pressure to carry out interviews during the 12-hour period in circumstances that might not be wholly fair to the suspect, for example, late at night. That could place the suspect’s human rights at risk and lead to prosecutions failing in serious cases because evidence had been unfairly obtained.

We need to provide the right protections for children and vulnerable adults without jeopardising investigations that are necessary to protect the public. I believe that the bill already provides sufficient protection for vulnerable adult suspects.

I recognise the Children and Young People’s Commissioner’s views and his suggestion that the detention limit for under-18s should be 12 hours. Having considered the types of complex cases involved and the additional protections for under-18s, I am firmly of the view that the Scottish Government’s amendment 36 provides an appropriate balance. It will require at least a chief inspector to authorise custody extensions for under-18s. Occasionally, it will be necessary to extend custody periods for children, but I believe that that power needs very close scrutiny before it is used. Children’s organisations, including the Children and Young People’s Commissioner’s office, will have the opportunity to inform the guidance during the implementation of that provision.

Elaine Murray: I am afraid that I disagree with Alison McInnes that there was little evidence that a 24-hour detention period is necessary in some cases. We heard evidence from Police Scotland illustrating that, although that period is not required on many occasions, it is required occasionally. My colleague John Pentland submitted amendments at stage 2 that were similar to the Government’s amendment 36.

It is unfortunate that my colleague Graeme Pearson is not able to be here as he has commitments to a constituent. However, I discussed the issue with him, as he has 30-odd years’ experience in the police. He agreed with many of the points that the cabinet secretary has made. On occasion, a young person or vulnerable
necessary safeguards to protect children under the age of 18 in the rare circumstances in which they might be detained for in excess of 12 hours.

Alison McInnes: I remind members that, just a few years ago, the police managed with six hours of detention and that the fourfold increase is significant. It is pretty rich of the cabinet secretary to quote Lord Carloway, because he maintains that 12 hours is sufficient.

Members should also remember that the bill allows for investigative liberation, which seems to me to be a more appropriate way in which to deal with young people under difficult circumstances. I repeat that the Scottish Human Rights Commission and the Children and Young People’s Commissioner endorsed amendments 3 and 4. I am disappointed that the cabinet secretary has once again chosen to dismiss not only my arguments but their reasoned and principled pleas to protect children and vulnerable adults from intrusive and illiberal police custody procedures. He has once again chosen to reject a vital safeguard. I will press amendment 3.

The Deputy Presiding Officer (Elaine Smith): The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Finnie, John (Highlands and Islands) (Ind)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
McInnes, Alison (North East Scotland) (LD)
Wilson, John (Central Scotland) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Hayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Amendment 3 disagreed to.

Amendments 36 and 37 moved—[Michael Matheson]—and agreed to.

Amendment 4 not moved.

Section 9—Custody review

Amendment 38 moved—[Michael Matheson]—and agreed to.

Section 14—Release on conditions

The Deputy Presiding Officer: Group 8 is on investigative liberation: release on conditions. Amendment 39, in the name of Elaine Murray, is grouped with amendment 85.

Elaine Murray: Amendments 39 and 85 relate to the conditions that are imposed when a suspect is released while further investigation is carried out by the police. As introduced, the bill read as if those conditions related to how the further investigation was to be carried out rather than to the behaviour of the suspect during that period. At stage 2, I proposed amendments that would delete that reference and instead refer to the behaviour of the suspect during that period. At stage 2, I proposed amendments that would delete that reference and instead refer to the behaviour of the suspect during that period. At stage 2, I proposed amendments that would delete that reference and instead refer to the behaviour of the suspect during that period. At stage 2, I proposed amendments that would delete that reference and instead refer to the behaviour of the suspect during that period. At stage 2, I proposed amendments that would delete that reference and instead refer to the behaviour of the suspect during that period. At stage 2, I proposed amendments that would delete that reference and instead refer to the behaviour of the suspect during that period. At stage 2, I proposed amendments that would delete that reference and instead refer to the behaviour of the suspect during that period. At stage 2, I proposed amendments that would delete that reference and instead refer to the behaviour of the suspect during that period. At stage 2, I proposed amendments that would delete that reference and instead refer to the behaviour of the suspect during that period.

The bill changes the point at which a person is described in Scots law as being arrested. Arrest will occur when the person is held by the police under investigation rather than when they are charged with an offence. That will bring Scots law into line with the law in the rest of the United Kingdom. I and other members of the Justice Committee had expressed concerns that the public and the media would not be aware of the changes, and that there would be a perception that, if someone was arrested, they had been charged. Of course, everyone is presumed innocent under the law until proved otherwise but, unfortunately, that does not stop some of the mud sticking.
At stage 2, I proposed an amendment that would have prohibited the police from releasing the names of persons who had been arrested but not charged, but it turns out that, because persons who are held by the police under investigation are now termed as having been arrested, the release of their names is now covered by the Contempt of Court Act 1981. Therefore, that amendment was unnecessary.

However, I also wanted to ensure that complainers and potential victims can be informed that the person who may have committed an offence against them has been released on investigative liberation. Amendment 85 would enable a police officer to disclose information relating to an alleged offence to persons against whom the alleged offence has been perpetrated or, in the case of a person who has been killed, to their family. Amendment 85 is a probing amendment, as such circumstances might already be covered. However, in light of the fact that an arrested person who has been released on investigative liberation is subject to the Contempt of Court Act 1981, I seek the cabinet secretary’s assurance that that would not prevent alleged victims from being informed that the person who may have committed an offence against them has been released on investigative liberation.

I move amendment 39.

Michael Matheson: I am happy to support Elaine Murray’s amendment 39. It is important that investigative liberation conditions are tailored to meet the needs of the particular investigation. Any condition should be both necessary and proportionate for the purposes of ensuring the proper conduct of that investigation.

Investigative liberation will be used when an offence is still under investigation and a person has not been and may never be officially accused. Therefore, it is particularly important to ensure that any condition that is imposed is necessary for the investigation and does not unduly impact on the individual’s private life. Elaine Murray’s amendment 39 preserves that important link to the needs of the investigation while also making it clear that investigative liberation conditions can be intended to prevent interference with witnesses or with evidence. I am grateful to her for lodging the amendment and I am happy to support it.

16:15

Amendment 85 seeks to ensure the safety of alleged victims when a suspect is released on investigative liberation. I am sympathetic to the intention behind the amendment. Upholding the rights of alleged victims and ensuring their safety is crucial to ensuring a fair criminal justice system. That includes ensuring that, where they may be at risk, alleged victims are informed of a suspect’s release on investigative liberation and any relevant conditions.

Since stage 2, Scottish Government officials have met Police Scotland, the Crown Office, Scottish Women’s Aid and the advice, support, safety and information services together, or ASSIST, project in order to discuss the various aspects of victim notification that are required for undertakings and investigative liberation. The Crown Office and Police Scotland have provided reassurance that operational guidance will be produced regarding victim notification in those areas.

The Scottish Government has also set up an implementation group for part 1 of the bill. The group will include Police Scotland, the Crown Office, the Scottish Legal Aid Board and the Scottish Courts and Tribunals Service, with the first meeting due to take place on 16 December. The group will consider various aspects of the bill’s implementation, from staff training to updating guidance documents as a result of the bill. The Scottish Government also intends to invite other interested groups, including Scottish Women’s Aid, the ASSIST project, Barnardo’s Scotland, Children 1st and other stakeholders, to feed into the group with information and advice to assist the formulation of the guidance.

At stage 2, I was able to provide reassurance that Police Scotland would be updating its standard operating procedures to take account of the new provisions in the bill. The amendment that was agreed to at stage 2 that requires the Lord Advocate to produce a code of practice on investigative functions will also shape guidance in this area.

Consideration of how to adopt a consistent and proportionate approach to notification, bearing in mind existing arrangements that relate to the provision of information to alleged victims, will continue as part of the work to implement the provisions in the bill. I am content that amendment 85 is not required in order to ensure that appropriate information can be provided to those who may be at risk.

I ask Elaine Murray not to move amendment 85, but I am happy to support amendment 39.

Elaine Murray: I intend to press amendment 39. However, I am satisfied with the reassurances that we now have on the record with regard to the information that is provided to alleged victims, so I will not move amendment 85.

Amendment 39 agreed to.

After section 17

Amendment 85 not moved.
Section 20—Release on undertaking

The Deputy Presiding Officer: Group 9 concerns the rank and independence of a constable required to take certain decisions. Amendment 40, in the name of the cabinet secretary, is grouped with amendments 41, 42 and 45 to 50.

Michael Matheson: Amendments 41, 42 and 45 to 50 will ensure that important decisions to withhold or delay rights must be made by a constable who is of the rank of sergeant or above and who is independent of the investigation.

Chapters 4 and 5 of part 1 confer crucial rights on suspects, including, among others, the right to have a solicitor present during interview, the right to have someone else informed that they are in custody and the right to a private consultation with a solicitor at any time. There are also key provisions about access to persons under 18 who are held in police custody. There will be exceptional circumstances in which those rights cannot be delivered or need to be delayed. The bill already sets very demanding tests before that can happen.

I said at stage 2 that I would also consider raising the rank of constable required to make those decisions. I consider that raising the rank to at least that of sergeant will ensure that those decisions are made by constables with suitable rank, knowledge and expertise in custody-related matters. It will also be consistent with the role of sergeants in making initial decisions to keep people in custody. It would usually be during that initial authorisation process that any requests would be made to delay notifying solicitors or named persons, to interview without a solicitor being present or to restrict access to a person under 18 years of age.

The custody sergeant who makes the initial custody authorisation will be independent not only of the investigation but of the local policing division. I therefore consider that they would generally be best placed to consider those other rights-based decisions. The amendments set the minimum rank for those decisions. It will be open to Police Scotland to make more tailored provision in its standard operating procedures and to require officers of higher rank to make decisions in particular circumstances.

The code of practice on investigative functions to be issued by the Lord Advocate could also be used to provide the police with guidance relating to the interviewing of suspects, including the rare circumstances in which it may be permissible to interview without a solicitor present.

Amendment 40 is a minor drafting amendment to allow undertaking conditions to be set by a constable who is more senior than a sergeant. Currently, section 20 allows that to be done only by a sergeant and not by a constable of a higher rank.

I move amendment 40.

Amendment 40 agreed to.

Section 24—Right to have solicitor present

Amendments 41 and 42 moved—[Michael Matheson]—and agreed to.

Section 25—Consent to interview without solicitor

The Deputy Presiding Officer: Group 10 is on minor consequential and drafting amendments. Amendment 43, in the name of the cabinet secretary, is grouped with amendments 51, 54 to 64, 74 to 76, 78 and 82.

Michael Matheson: Amendment 43 and the amendments with which it is grouped are minor and technical in nature. I will run through them briefly.

Amendment 43 changes the word “in” to “by” in section 25 for consistency with section 33.

Amendment 51 aligns the wording used in section 52A to describe the consequences of breaches of the code of practice on investigative functions with the wording in section 11 used in relation to breaches of the code of practice on searches.

In both cases, a court or tribunal in civil or criminal proceedings will be required to take into account any breach of the code when determining any question arising in the proceedings to which the code is relevant. The wording used to explain that in section 11 was carefully considered by John Scott’s independent advisory group on stop and search, and it is appropriate to take the same approach in relation to the code of practice on investigations.

Amendment 54 removes section 64 from the bill. Its job has now been done by the Courts Reform (Scotland) Act 2014.

Amendment 55 substitutes the word “heading” for “cross-heading”.

Amendments 56 and 57 remove references to stipendiary magistrates. That office will be abolished on 1 April next year when the relevant provisions in the Courts Reform (Scotland) Act 2014 come into force.

Amendment 58 adjusts the way in which a solemn court is described, for consistency with the approach elsewhere.

Amendments 59 to 64 make changes in consequence of the Courts Reform (Scotland) Act...
2014, in particular by replacing references to the High Court that should now be references to the new Sheriff Appeal Court.

Amendments 74 to 76 cure some grammatical and stylistic errors in section 86, which were inadvertently introduced by amendments at stage 2.

Amendments 78 and 82 fix some cross-references in consequence of the moving of some provisions at stage 2.

I move amendment 43.

Amendment 43 agreed to.

Section 26—Questioning following arrest

The Deputy Presiding Officer: Group 11 is on questioning following arrest. Amendment 44, in the name of the cabinet secretary, is the only amendment in the group.

Michael Matheson: Amendment 44 is a technical amendment to clarify the position of questioning following arrest in section 26.

Section 26(2) provides that, where a person who has not been officially accused is in police custody, a constable may put questions to them in relation to the offence for which they are in custody. There is currently a common-law rule that limits police powers to interview a suspect about the offence for which they have been arrested.

At present, suspects are questioned while detained under section 14 of the Criminal Procedure (Scotland) Act 1995—section 14 detention—and are only arrested at the point of charge. Section 26(2) is intended to make it clear that, once section 14 detention is abolished and replaced with arrest under section 1 of the bill, it will still be possible for the police to interview someone who has not yet been charged. There was never any intention that section 26(2) would limit the power of the police to question a suspect in other circumstances or about other offences while in police custody.

Amendment 44 is intended to make it absolutely clear that section 26(2) removes only the common-law rule about interviewing people who have been arrested and does not otherwise limit the ability of the police to interview people. The police are already under a duty to ensure that all interviews are carried out in accordance with the protections in the bill, meet the common-law test of fairness and are also compliant with human rights obligations. Those rules ensure that interviews will not be unnecessarily long or oppressive in nature.

I move amendment 44.

Amendment 44 agreed to.

Section 30—Right to have intimation sent to other person

Amendments 45 and 46 moved—[Michael Matheson]—and agreed to.

Section 32—Right of under 18s to have access to other person

Amendment 47 moved—[Michael Matheson]—and agreed to.

Section 32A—Social work involvement in relation to under 18s

Amendment 48 moved—[Michael Matheson]—and agreed to.

Section 36—Right to consultation with solicitor

Amendments 49 and 50 moved—[Michael Matheson]—and agreed to.

Section 52A—Code of practice about investigative functions

Amendment 51 moved—[Michael Matheson]—and agreed to.

Section 53A—Further provision about application of Part

The Deputy Presiding Officer: Group 12 is on power to modify application of part 1. Amendment 52, in the name of the cabinet secretary, is the only amendment in the group.

Michael Matheson: Amendment 52 is a technical amendment to a power added to the bill at stage 2. It will allow the provisions in part 1 to be disapplied or to be modified as they apply to persons who are arrested on a basis other than section 1 of the bill.

Section 1 creates a new single power for the police to arrest a person without a warrant on suspicion that the person has committed an offence. It will replace a mixture of common-law and specific statutory powers to arrest on suspicion of an offence without a warrant. The rest of part 1 of the bill goes on to set out the procedures and consequences when someone is arrested.

The police also have powers to arrest in other circumstances. They can, for instance, arrest people under the authority of a warrant, and they also have some statutory powers to arrest without a warrant that do not relate to suspected offences.

Most of the part 1 provisions apply to all arrests, not just to arrests under section 1. The power in section 53A, which was added to the bill at stage 2, allows ministers to tailor the application of part 1
to cases in which a person has been arrested for a reason that does not relate to an offence.

16:30

The point is that some of what part 1 says may need to be adjusted to make the bill work properly in those contexts. In some cases, it may be more appropriate to disapply it altogether. For example, if a witness is arrested under a warrant so that he or she can be brought to court, it would not make sense to have section 4 of the bill apply so that, instead of being taken straight to court, he or she is taken to the police station.

Section 53A, as added at stage 2, would allow part 1 to be disapplied or modified only in relation to people who are arrested otherwise than in relation to an offence. That may be too narrow. Amendment 52 will widen the power to cover other arrests that may be related to an offence but in relation to which it would not be appropriate to have the full set of part 1 provisions apply without some modification. One example might be where the court issues an arrest warrant solely to allow the police to take samples from an accused.

The amendment creates the flexibility to cater for such arrests and to disapply part 1 arrest provisions or to apply them with modifications.

I move amendment 52.

Amendment 52 agreed to.

Section 56—Meaning of police custody

Amendment 53 moved—[Michael Matheson]—and agreed to.

After section 56

The Deputy Presiding Officer: Group 13 is on the age of criminal responsibility. Amendment 86, in the name of Alison McInnes, is grouped with amendment 91.

Alison McInnes: My amendment 86 would raise the age of criminal responsibility from eight to 12. My amendment 91 specifies that that would occur only at least 18 months after royal assent. That would provide ministers with time to make any additional changes that the current advisory group, which was set up following my amendment at stage 2, recommends through secondary or even primary legislation.

Increasing the age of criminal responsibility to 12 would bring it into line with the age of criminal prosecution and would reflect the wealth of evidence that children should not come into contact with the justice system any earlier. To suggest that children as young as eight can be deemed responsible for their actions is completely out of touch with our understanding of their capacity and maturity.

Children can still receive convictions that require to be declared for decades or even for the rest of their lives. How is curtailing their life chances in that way getting it right for every child? The law must change and prevent that destructive response. Instead, we must address the source of children’s disturbing behaviour, whether that is trauma, neglect, maltreatment or abuse.

Scotland has the lowest age of criminal responsibility in Europe. Tam Baillie, the Children and Young People’s Commissioner, was right to say that criminalising children as young as eight has “long tarnished” our international reputation. It has also led to Scotland being reported to the United Nations.

The UN Committee on the Rights of the Child has stated that 12 is the “absolute minimum” that it expects. The Scottish Government told the UN committee that it would “do the right thing” and increase the age in the current session of Parliament. The fact that we are still trailing so far behind international best practice should shame and embarrass each one of us.

The fact that the Scottish National Party Government is picking and choosing which human rights to uphold sends a dreadful message, and the fact that it is not using the powers that it has at Holyrood to prevent violations of international law undermines its bid to block the UK Government’s attempt to abolish the Human Rights Act 1998.

The Scottish Parliament is not just free to do things better; it is bound by its founding documents to act in accordance with human rights legislation.

The cabinet secretary will no doubt seek to persuade Parliament to oppose my amendments, citing the group that he has set up. That is too timid, and I urge him to confirm today that it is inconceivable that he or his advisory group would suggest an age lower than 12 for criminal responsibility. If he does not want to support my amendments today, he needs to set out a clear legislative timetable for ending this national disgrace.

I move amendment 86.

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I sympathise with my Justice Committee colleague’s arguments. She rightly refers to the expert group that is considering the matter and is due to report in 2016. To clarify, under the age of eight, there is no legal capacity to commit a crime. Between the ages of eight and 12, a person cannot be prosecuted in the criminal courts.
There is an issue to be addressed here, but the Justice Committee did not take any evidence on it and it is far too substantial to deal with by way of amendment. Following the review, I hope that the Government will take cognisance and perhaps consider coming more into line with what we expect of other European countries.

As the member knows, my casting vote was against the amendment at stage 2 because there was insufficient evidence to support it. If there is sufficient evidence, I will be content to support it another time.

Elaine Murray: The thing I cannot understand is why in Scotland we have not already done this. We do not prosecute children who are under the age of 12 so why do we continue to consider children who are between the ages of 8 and 11 to be criminally responsible? As Alison McInnes said, Scots law is lagging behind much other good international practice.

Christine Grahame rightly said that the matter was not in the bill but this has been an issue for years and there is plenty evidence out there. It is time that we acted on that evidence and all that we have heard over the years. I urge members to support Alison McInnes.

John Finnie: I rise to support Alison McInnes. We do not need sympathy; we need action. We are told that we do not have evidence but, of course, we do have evidence in the advice of the children’s commissioner and the position of the UN.

The bill can be the vehicle for bringing us into line with everyone else and the 18 months that amendment 91 would afford would certainly give an opportunity to address all the other issues that would arise.

Roderick Campbell: I have every sympathy with Alison McInnes’s intention but I do not think that the bill is the right way to go about it. We heard evidence in the committee from Professor Leverick and Tam Baillie, the children’s commissioner, that the bill is not the right place to do it. I am grateful that the cabinet secretary has set up a working group. There are important issues still to be considered, such as the interrelation with children’s hearings. It is unfinished business and we need to get on with it.

Neil Findlay (Lothian) (Lab): We have just heard classic Christine Grahame there. As she did with the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill and court closures she shows great sympathy but will slavishly follow the whips when they tell her what to do.

Michael Matheson: I welcome the opportunity to make a statement about a change to the minimum age of criminal responsibility. I thank Alison McInnes for lodging amendment 86.

Alison McInnes’s amendment was closely debated at stage 2. I make it clear that we are open to future change to the minimum age of criminal responsibility. Scotland has a proud record of promoting children’s rights, and it was this Government that raised the minimum age of prosecution to 12 years.

I acknowledge that the headline minimum age of criminal responsibility is damaging our standing as well as impacting on the life chances of young children. Amendment 86, however, does not address the policy or legislative and procedural implications of change, or offer any additional safeguards that might be required to respond to serious sexual or violent behaviour.

The advisory group, which I committed to establishing at stage 2, is up and running. Intensive work, focusing on disclosure, risk management, police powers, children’s hearings and victims’ issues, is under way. The issues are complex and the group is working at pace. The group meets next week and I expect to get an update before Christmas.

I understand that there is a strong commitment from all partners to addressing the underlying issues and the implications that would arise from a change. The plan is to make recommendations for consultation in early 2016.

This is a priority area and senior representatives from organisations that are responsible for children and how they interact with Scotland’s justice system are fully engaged in the process. They include the Children and Young People’s Commissioner Scotland, Together—Scotland’s alliance for children’s rights, Police Scotland and Victim Support Scotland. The terms of reference for the group and details of the membership have been published.

The responsible view to take here is that no change should be made to the minimum age of criminal responsibility without the implications of any proposed approach being properly co-produced, consulted on and scrutinised. The Children and Young People’s Commissioner for Scotland, Tam Baillie, has provided to all MSPs a briefing that confirms that, although he supports the sentiment behind Alison McInnes’s amendments, they run the risk of pre-empting the findings of the expert group and should not be supported.

Our intention is to publish a consultation in early 2016, once the advisory group’s report has been completed. The group is expected to report to ministers shortly after its meeting on 11 February. A change of this nature should be undertaken with full parliamentary involvement and scrutiny.
throughout all stages of primary legislation. I would strongly resist the temptation to support any amendment in respect of a change to the minimum age of criminal responsibility without having allowed the advisory group to complete its work.

Alison McInnes: Are you really telling the Parliament that it is possible that you, as justice secretary, would come back to the chamber and suggest that the age should be nine, 10 or 11? Really?

The Deputy Presiding Officer: Could members speak through the chair, please?

Michael Matheson: We have set up an independent advisory group to come back to us with key recommendations on what the age should be so that we can then take the matter forward. The member will recall that we were the Government that raised the prosecution age to 12 years. It is right that, having set up the independent advisory group, we allow it to complete its work and provide a report. A full public consultation can then be undertaken. I urge the Parliament to ensure that we take the matter forward in that way, and to reject the amendments.

Alison McInnes: The cabinet secretary said that Scotland has a proud record on human rights—well, it does not on this subject.

It is interesting that an approach that the cabinet secretary endorsed earlier—relating to a suspended introduction to do with stop and search for alcohol—is suddenly not appropriate here.

I am grateful for the support of other members in the chamber this afternoon and, indeed, of Aberlour Child Care Trust. I acknowledge the deliberations of the working group and its examination of the practicalities, but they should not prevent us from making good on the minister’s promises to the UN.

Bruce Crawford (Stirling) (SNP): I want to get to the bottom of this, so I wonder whether Alison McInnes could outline for me what consultation on the proposal has taken place and how we can make it cohesive with the rest of Government policy. That would help me to make up my mind. [Laughter.]

The Deputy Presiding Officer: Order, please.

Alison McInnes: I have lost count of the number of times that this Parliament has discussed the subject and taken evidence on it. The SNP’s timidity on this is astonishing. [Interruption.]

The Deputy Presiding Officer: Order, please. Order!

Alison McInnes: The cabinet secretary’s rhetoric seeks to conceal the fact that the SNP has been in power for eight years now and two major criminal justice bills have come and gone. It could have introduced dedicated primary legislation at any time to end the systematic violations of internationally recognised human rights. It has not been devoid of chances; it has been devoid of political will. If it had not been for my amendment at stage 2, there would not even be an advisory group.

The Government is failing to meet the demands of the UN Human Rights Committee but, more important, it is failing some of Scotland’s most vulnerable children. This is the last chance to change that in the current session of Parliament, and that is why I press amendment 86 and challenge the Government to finally put its efforts into ending this national shame.

The Deputy Presiding Officer: The question is, that amendment 86 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rowley, Alex (Cowdenbeath) (Lab)
Scott, Tavish (Shetland Islands) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Wilson, John (Central Scotland) (Ind)
Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Cunninghame North) (SNP)
MacDougall, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeen East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 40, Against 75, Abstentions 0.

Amendment 86 disagreed to.

Section 64—Citation of jurors
Amendment 54 moved—[Michael Matheson]—and agreed to.

16:45

Section 67—First diets
Amendment 55 moved—[Michael Matheson]—and agreed to.

Section 73—Sentencing under the 1993 Act
Amendments 56 to 58 moved—[Michael Matheson]—and agreed to.

Section 76—Extending certain time limits: summary
Amendments 59 to 61 moved—[Michael Matheson]—and agreed to.

Section 80—Advocation in summary proceedings
Amendment 62 moved—[Michael Matheson]—and agreed to.

Section 81—Finality of appeal proceedings
Amendment 63 moved—[Michael Matheson]—and agreed to.

After section 81
Amendment 64 moved—[Michael Matheson]—and agreed to.

Section 82A—Duty to undertake a child and family impact assessment
The Deputy Presiding Officer: We move to group 14 amendments, on children affected by parental imprisonment Amendment 87, in the name of Mary Fee, is grouped with amendments 88 and 89.

Mary Fee (West Scotland) (Lab): I start by thanking the Justice Committee for supporting my original amendment at stage 2 of the bill process. I also thank the Cabinet Secretary for Justice, the Minister for Children and Young People and their
officials for the very constructive dialogue that has enabled us to reach the stage that we are at today.

Evidence shows that children and young people affected by the imprisonment of a parent are particularly at risk of negative outcomes such as stigma, bullying, trauma and mental health problems. That issue has been raised previously in Parliament and addressing it has received cross-party support. There are an estimated 27,000 children in Scotland with a parent in prison, but an estimate is the best that we can do at the moment, as we have no way of systematically collecting or recording information about those children. Until we can accurately identify them and the impact on them of a parent being imprisoned, their needs will not be properly taken into account by local authorities and other public bodies, and they will continue to slip through the net.

Amendment 88, in my name, would place a duty on Scottish ministers to ensure that all individuals sent to custody are asked to provide information about dependent children. If children were identified during that process, information would be passed to the child’s named person. There would be a presumption that having a parent in prison was a potential wellbeing concern, and the named person would ensure that such children had a wellbeing assessment. That would lead to any necessary support being provided, as appropriate, under the provisions in the Children and Young People (Scotland) Act 2014.

Amendment 88 sets out proposed links between the child wellbeing provisions in the Children and Young People (Scotland) Act 2014 and the needs of children affected by parental imprisonment. The intention of amendment 88 is to ensure that Scottish ministers start to identify and collect data on the number of children affected by parental imprisonment. Again, that is one of the key issues that we need to address in order to provide appropriate support to such children.

Amendment 89 sets out the definitions that underpin amendment 88, including clarifying that “penal institution” means any prison—other than a military prison or police cell—any remand centre or any young offenders institution.

Amendment 87 would remove my previous amendment, which would be redundant.

Too often, the voices of children are lost in a justice system geared towards adult offenders; and too often, those children will end up in the justice system. Amendment 88 would make huge progress towards ensuring that those children are identified, their voices are heard and their needs are met. Scotland has the chance to be world leading in recognising and acknowledging the children affected by parental imprisonment—the silent victims of crime.

Through the cross-party group on families affected by imprisonment, of which I am the convener, we have sought to raise awareness of those children’s needs. We have had useful meetings with ministers, professionals and Scottish Prison Service representatives; we have also heard from affected families. That has all helped to build a cross-party consensus that we must do more to support these children; they cannot remain, as Barnardo’s Scotland puts it, the hidden victims of crime. My amendments are an important step on that journey. I would urge all members to support them.

I move amendment 87.

Christine Grahame: I rise in support of amendment 87. I congratulate Mary Fee on not just her thorough submission to the Justice Committee, which I am sure persuaded the cabinet secretary to change his mind about certain things, but her support for families affected by imprisonment. The member has made a huge inroad into that area. I also congratulate her on making strong the link between the Children and Young People (Scotland) Act 2014 and this bill. I know that, at one time, the Government was relying on that act. The member’s amendments would ensure that the link is embedded in the legislation. I have huge regard for her for doing that and I support her amendments.

Alison McInnes: I, too, commend Mary Fee for her work in this area. The Scottish Liberal Democrats welcome her amendments, which would encourage the identification of the 27,000 children who experience parental imprisonment in Scotland and, where necessary, the provision of co-ordinated support. Nonetheless, I would be grateful if the cabinet secretary could tell me whether the process would include an assessment of the impact of imprisonment on any dependent children, because it would be important that this does not simply become a box-ticking exercise. Would there be robust guidance? For example, would there be a code of practice for all the professionals involved? Would the framework also include training for staff in prisons?

Michael Matheson: I thank Mary Fee for bringing to light this very important subject at stage 2. I thank her again for her patience as we have worked to find a solution to ensure that children who may be affected by the imprisonment of their parent are appropriately supported.

The amendments in group 14 seek to remove the original amendment lodged at committee and to replace it with a version that we know would deliver improved outcomes for any child whose parent is sent to prison.
Amendments 88 and 89 complement the existing provisions on named persons in part 4 of the Children and Young People (Scotland) Act 2014. The amendments seek to ensure that, when a person is imprisoned, information that they disclose about any child they parent can be shared with the child’s named person service provider.

The amendments will ensure that information provided will include the fact that the child’s parent is in prison, and any other information that may be relevant to the named person’s functions. That in turn will ensure that any wellbeing needs of a child with a parent in prison are properly assessed and that the child’s named person has the opportunity to consider whether any advice, information, support or services are necessary to help to promote, support and safeguard their wellbeing. That is consistent with the named person’s role under the 2014 act.

The amendments set out clearly how and when information should be passed and where the responsibility for that lies. I hope that members agree that, by working together, we have found an appropriate way forward that is in the best interests of children, and I hope that they will support the amendments.

The Deputy Presiding Officer: I invite Mary Fee to wind up and indicate whether she intends to press or withdraw her amendment.

Mary Fee: I will be brief. I thank again the members of the Justice Committee who supported me at stage 2 and allowed me to progress my amendments to this stage: Alison McInnes, John Finnie, Margaret Mitchell and Margaret McDougall. In addition, it would be remiss of me not to acknowledge the tremendous work that Nicki Wray from Barnardo’s has done to progress us to this point. Without her tenacity we would not be here today.

I am grateful for the supportive comments of members across the chamber today. I am happy to continue the very constructive dialogue with the cabinet secretary and his ministerial team as we progress the provision in the amendments and work on the guidance and how we roll it out.

Amendment 87 agreed to.

After section 82B

The Deputy Presiding Officer: Group 15 is on support for vulnerable persons: appropriate adult services. Amendment 65, in the name of the cabinet secretary, is grouped with amendments 66 to 73.

Michael Matheson: Section 33 places a duty on the police to request support for vulnerable suspects in police custody in order to enable such individuals to understand what is happening and to communicate effectively. In practice, that support is delivered by people who are known as appropriate adults, who are specifically recruited for their communication skills, expertise and experience of working in the field of mental health. They are often social workers or health professionals.

The bill does not identify where responsibility for providing appropriate adults lies. When the bill was introduced, it was considered that the appropriate adult system was working well and that a light-touch approach should be adopted. However, the Justice Committee and various stakeholders have raised concerns about that, and about the accessibility and consistency of service provision, the exact remit of appropriate adults, and the funding for the service.

As I said at stage 2, I am sympathetic to the various issues that have been raised, which warrant serious and careful consideration. It is vital that we protect the interests of vulnerable persons, and it is clear to me that we need a new model to afford that protection to those who require it, and that the model must be sustainable over the long term.

At stage 2, I undertook to set out our proposed approach to addressing those issues at stage 3. Over the past two months, significant work has been undertaken, and in that time I have met Alison McInnes, who has a particular interest in the area, to discuss the progress that we have made to date.

A high-level options paper was issued on 24 September to those with a key interest at a national and local level, including Police Scotland, local authorities, the Mental Welfare Commission for Scotland and Social Work Scotland, to inform the development of options for appropriate adult service provision. The paper sought views on viable options for a new model in relation to service delivery, training, support and guidance, inspection and oversight.

Constructive meetings have taken place with Police Scotland, the Mental Welfare Commission, the Care Inspectorate and the Convention of Scottish Local Authorities, and consensus is developing around the key delivery and oversight functions for any new model. However, it is clear that further work and engagement is required to ensure that any model that is put in place is truly effective and sustainable.

Our position on the provision of appropriate adult services in Scotland is very clear. We want to resolve the issues that have been raised and put in place a sustainable model, and we understand that that work must take place promptly. However, getting the model right is
Absolutely vital, and it simply has not been possible to resolve all of the issues by stage 3. In particular, further discussions are required to fully address how the developing model will work in practice, what body or bodies are best placed to deliver the service, and how much it will cost.

It is crucial that we work collaboratively with those who deliver and utilise appropriate adult services, such as COSLA and Police Scotland, and I am determined to seek consensus if significant changes are to be made. To that end, the amendments in this group are designed to provide the flexibility that is required to put in place a new model once that vital work is complete.

Amendments 65 to 73 insert a package of regulation-making powers that will enable the Scottish ministers to place a duty on a person or persons to ensure adequate provision of appropriate adults; to provide robust oversight of any service, including assessing quality and making recommendations; and to provide effective training for those who actually deliver the service. The amendments also allow the scope of appropriate adult services to be revisited in the future, should that be necessary.

The regulation-making powers are broad, but I consider that that is necessary in order to provide the flexibility for us to act once a new model for appropriate adult services has been developed and agreed. Reflecting the significance of the proposed powers, a public consultation will be required before any regulations are made, and they will be subject to the affirmative procedure so that Parliament is given a proper opportunity to consider the proposed model.

The issues that have been raised in this area have not been straightforward, and I am grateful for the constructive input from Police Scotland, the Scottish appropriate adult network, the Convention of Scottish Local Authorities, local authorities, the Law Society of Scotland, the Justice Committee and many others throughout the bill process. I have listened carefully to the concerns that have been raised, and I believe that the amendments that are being proposed today will allow us to take the necessary steps to put in place a sustainable model for the long-term delivery of appropriate adult services in Scotland.

I move amendment 65.

Alison McInnes: I raised the matter in a probing amendment at stage 2, and I am grateful that the cabinet secretary has engaged with me on the issue and has sought to address the concerns that I raised.
It is important to stress that such records are confidential between the medical profession and the patient and that it is well established that all patients have a right to privacy in relation to their records under article 8 of the European convention on human rights. There is a hearing to determine the application and, if the complainant or the haver of the documents wishes to oppose the application for recovery of the confidential records, the next stage is to instruct legal representation to represent their interests before the court at the hearing. That recognises that complainants have a right to be heard.

Although it is competent to take that approach in Scotland, it is not the usual practice for the victim in a criminal case to be legally represented at such application hearings. Rape Crisis Scotland, Scottish Women’s Aid and other support groups for victims of sexual crime and domestic abuse state that the reason for that is the lack of legal aid. I ask members to compare that with the situation in England and Wales, where legal aid is available to complainants on the basis that, were it not, the complainant’s right to privacy under article 8 could be infringed.

In England and Wales, the right to be heard has developed through case law and can be found in the Crown Prosecution Service’s guidelines. In Scotland, the argument has been advanced that the Crown Office will take into account the complainant’s situation and look out for his or her interests. However, as Roddy Campbell stated in committee at stage 2, the Crown represents the public interest, not the complainant’s personal interest. That is an important point and is why it is essential that legal aid be made available in such cases to allow the complainant to be represented. It is surely totally unacceptable that rape victims in Scotland whose case proceeds to prosecution will not have their right to be heard through legal representation protected unless they have the means to provide for that, whereas their counterparts in England and Wales have such a right.

The amendment would not require a change in the law; it would exact what already happens in practice. Crucially, it would allow access to justice and ensure that complainants in rape and violent sexual assault cases could enforce the right that they already have under article 8 of the ECHR. If the cabinet secretary and the Parliament genuinely want to improve conviction rates in such vexing serious sexual assault and rape cases, they will support the amendment.

I move amendment 90.

Roderick Campbell: I declare an interest as a member of the Faculty of Advocates.

Margaret Mitchell referred to my comments at stage 2. Her comments about the distinction between the public interest and the complainant’s personal interest are right. However, this is a matter of principle and something that we need to get right.

At stage 2, we rejected an amendment that dealt with sexual history—for want of a better term—in relation to section 275 of the 1995 act, and amendment 90 is a kind of reformulation of that. Amendment 90 is important. I understand that the cabinet secretary has moved on since the Bonomy report, in so far as one of the matters that are being investigated is the history of such applications in practice. That research could certainly influence our view. It is also important to remember that Lord Bonomy made no recommendation on independent legal representation, so the matter is still in the air.

There is one point that the amendment does not really deal with. Margaret Mitchell referred to rape cases. The proposed amendment is to section 301A of the 1995 act, which simply refers to cases in the sheriff court, be they solemn or summary. That would not include rape cases, which can be heard only in the High Court. Therefore, the Government should not be happy to support the amendment.

Finally, there is the important issue of where the money would come from for all this, particularly at a time of considerable challenge to the legal aid budget and other demands on public resources.

Elaine Murray: In the past, I have resisted similar amendments—to the Victims and Witnesses (Scotland) Bill and to the Criminal Justice (Scotland) Bill at stage 2. To be honest, when I read the previous amendments, I was never quite certain how things would work in practice and whether we were talking about legal representation in court. The situation would become quite difficult if there was a legal representative of the victim in court, plus the Crown representing the public interest and somebody representing the defence.

Amendment 90 is a lot clearer than the previous amendments were about how it would operate. It is more explicit and a lot tighter in the matters that it deals with. The Government has written to committee members about research on sections 274 and 275 of the 1995 act, but the amendment is specifically about access to medical records that ought to be confidential to a victim who has been a patient. I know that the amendment has a lot of support from victims groups and Justice Scotland, which probably has a fair handle on the legal issues that are involved.

I am therefore inclined to support the amendment. We need to make progress on how
we support victims of such offences and on addressing how their privacy is infringed or can be infringed at times. Enabling them to have legal advice on what may and may not be released could well be beneficial. After considerable discussion with many people over the past few days, we are inclined to support the amendment.

Alison McInnes: I support Margaret Mitchell’s amendment 90 and commend her for the sterling work that she has done to promote the needs of victims in such cases. I welcome the fact that, since stage 2, the Government has taken a tiny step forward on applications under sections 274 and 275. I appreciate that move, but it is not to be confused with what amendment 90 seeks to do. The amendment focuses on a clear anomaly, which has been addressed in England and Wales.

Like Margaret Mitchell, I am keen to right the situation that prevails, whereby a complainer in a rape or serious sexual assault case often has no voice in opposing an application for the release of their medical records. I stress that that is a pre-trial process, as Elaine Murray has acknowledged. The release of those records is of huge concern to women, as it is often used against them in an attempt to discredit their testimony, and I have no doubt that it is an inhibiting factor in people’s reluctance to come forward in the first place.

Our medical records are the most sensitive of private data, so a victim has a clear and unequivocal right to be heard. That right is bestowed by article 8 of the ECHR, and there is a right to be heard before the determination is made on whether to release the records.

As Margaret Mitchell said, the approach is competent in Scotland, but it does not happen in practice. That is only because legal aid is not available.

In this instance, the Crown does not and could not represent the victim’s interests. The Crown Office and Procurator Fiscal Service balances responsibility for a number of interests at that point, including the public interest, the complainer’s interest and the accused’s interest in a fair trial. The complainer cannot instruct the Crown to make their case and prosecute it properly for them.

I am disappointed to have heard Roddy Campbell ask where the money will come from. This is a human rights issue. Yet again, the Government talks a good game on human rights but fails to take action.

There is an opportunity to give justice to those who currently cannot afford it. The proposal is a small step and is perfectly competent. The locus is there, and I urge the cabinet secretary to support Margaret Mitchell.

17:15

Michael Matheson: Like all other members, I very much agree with supporting complainers in sexual offences cases. I am grateful to Margaret Mitchell for giving us the opportunity to consider the best way of doing so.

At stage 2, Margaret Mitchell sought to introduce a requirement for complainers to have access to legal advice and representation in sexual offences cases. I could not agree to such a major innovation in our criminal law, which at the time appeared untested. My concern was shared by the majority of members of the Justice Committee and Margaret Mitchell’s amendment was not agreed to.

Amendment 90 would provide for legal representation at an earlier stage, when medical and similar documentation was being sought, but it would have the same effect of introducing a third party into the court’s proceedings. That is still a major change. The High Court recently described “the absence of any right of a victim, or relative of a deceased victim, to participate directly in the criminal process” as a “central tenet of criminal proceedings”.

I would be very concerned about sweeping away a central tenet of criminal proceedings at stage 3 of a bill, given that no evidence on such a significant change was taken at stage 1—or through any public consultation.

During his review, Lord Bonomy considered independent legal representation for complainers. Having done so, he did not recommend the introduction of such an approach in his final report, which had the support of his entire reference group, including Rape Crisis Scotland.

I recognise the need for more information. I recently advised the Justice Committee that we will take forward a research project on the use of the provisions that permit character and history evidence to be led, in restricted circumstances, in sexual offences trials.

I make it entirely clear that amendment 90 would add significantly to the costs of the legal aid fund. I am not convinced that paying to have more lawyers involved is the right answer; instead, the Government is strongly committed to providing the support that is needed directly and sensitively to victims.

In March, the First Minister announced an unprecedented additional £20 million to deliver a comprehensive package of measures to tackle and eradicate violence against women and girls. That will enhance support for victims of domestic abuse and sexual violence.
The funding is being targeted to areas that need it most. We have allocated £2.4 million each year over three years to reducing waiting times for domestic abuse and sexual offences cases. That will reduce the stress and inconvenience that witnesses experience as they wait for their cases to be called.

Alison McInnes: That is all very welcome, but is the cabinet secretary saying that women’s article 8 rights are not important?

Michael Matheson: No—I am not saying that. I am emphasising that we are undertaking a range of work to support victims of the crimes that we are talking about.

In September, I announced £1.85 million of additional resource to support victims of sex crimes across Scotland. That money means that Rape Crisis Scotland, in partnership with Scottish Women’s Aid and the Highland centre, can develop services to enable victims in Orkney and Shetland to access the specialist support that they need, which is not currently available. It will also almost double the current funding for each rape crisis centre in Scotland until 2018 and provide a dedicated advocacy worker in West Lothian.

The funding will ensure consistent provision of specialist services across the country. It will ensure that support is provided to the brave individuals who report crimes to the police, as well as those who might be considering reporting or who have been through the court process. We have allocated funding to the Edinburgh domestic abuse court service, to ASSIST—the advice, support, safety and information services together project—to Medics against Violence and to the mentors in violence prevention programme, and we have contributed to the advertising campaign for Police Scotland’s disclosure scheme for domestic abuse.

Work has started on focused action plans to address the structural inequalities in our society that are both a cause and a consequence of violence against women. The Government is absolutely committed to that agenda. I hope that that reassures members that we will continue to support complainers and victims in the sensitive cases that we are talking about.

However, it is important that we accept that relevant evidence should be put before a court. Our current laws set out a clear process for that. The compatibility of those arrangements with the European convention on human rights was recently considered by the courts. As recently as 24 November, a High Court judgment confirmed:

“we do not agree that the absence of any formal mechanism to place the views of a complainer before the court creates any incompatibility with her convention rights.”

The potential denial of evidence to an accused has not been examined in that way. We would have to consider the rights of accused persons carefully before reducing access to evidence that might properly exculpate them. The courts undertake that consideration and they are best placed to do so. We must not lose sight of the fact that the courts already have an obligation to prevent malicious and irrelevant use of character or history evidence.

Before making significant changes, we want evidence of what actually happens in court. I recently wrote to the Justice Committee to confirm that an exercise to monitor applications to lead character or history evidence will begin in the new year. Following that exercise, the Government that is elected in May can consider what additional research might be needed. That could include examining whether and why documents that were recovered under section 301A of the 1995 act were used in those applications. I consider that approach to be a better way forward than rushing today into a substantial reform that might have many unintended potential consequences.

I give the warning that amendment 90 would not achieve its basic aims. Among the problems that need to be addressed is the fundamental one that it would not apply to rape cases. Section 301A refers to proceedings in the sheriff and justice of the peace courts, but rape cases must be indicted in the High Court, so the amendment would not affect those cases at all.

I understand and sympathise with Margaret Mitchell’s intentions. However, her amendment would represent a major departure that has not been fully considered and which could have unhelpful consequences, so I ask her not to press her amendment.

Margaret Mitchell: Well, there we have it—now it is laid completely bare, Presiding Officer. By providing legal aid for such victims to be heard, we have an opportunity today to address gender issues, which the First Minister has made an absolute priority. The First Minister, the cabinet secretary and the whole Parliament must know that such medical records are damaging in these cases, but they are depriving the affected individuals of the right to be legally represented in order to have their view heard—that is not happening at present.

The cabinet secretary talked about the rights of the accused, which are for the court to decide. However, if amendment 90 was agreed to, at least victims of serious sexual assault would have the right to be heard—a fundamental right under article 8 of the European convention on human rights and one that is available in England and Wales.
Opposing the amendment makes a complete sham of all the rhetoric that we have heard in the Parliament about the Scottish Government, the First Minister and the justice secretary wanting to protect the rights of those victims of serious sexual crimes. It is laid bare today that the reason for the Government’s opposition to the amendment is nothing to do with third-party rights or any fundamental change that would be insurmountable; its opposition is about money. The Government is not prepared to put in money to support such victims.

I press amendment 90.

The Deputy Presiding Officer: The question is—[Interruption.] Order, please.

The question is, that amendment 90 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Eretrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rowley, Alex (Cowdenbeath) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeen West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeen Central) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kircaldy) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Yousaf, Humza (Glasgow) (SNP)
Abstentions
Finnie, John (Highlands and Islands) (Ind)
Harvie, Patrick (Glasgow) (Green)
Johnstone, Alison (Lothian) (Green)
Wilson, John (Central Scotland) (Ind)

The Deputy Presiding Officer: The result of the division is: For 50, Against 61, Abstentions 4.
Amendment 90 disagreed to.

Section 90—Commencement
Amendment 77 moved—[Michael Matheson]—and agreed to.
Amendment 91 not moved.

Schedule A1—Breach of liberation condition
Amendment 78 moved—[Michael Matheson]—and agreed to.

Schedule 1—Modifications in connection with Part 1
Amendments 79 to 82 moved—[Michael Matheson]—and agreed to.

The Deputy Presiding Officer: That ends consideration of amendments.

Criminal Justice (Scotland) Bill

The Deputy Presiding Officer (Elaine Smith): The next item of business is a debate on motion S4M-15087, in the name of Michael Matheson, on the Criminal Justice (Scotland) Bill.

Elaine Murray (Dumfriesshire) (Lab): On a point of order, Presiding Officer. Given that the consideration of amendments has finished a lot sooner than expected, I wonder whether there is a possibility of bringing forward decision time to liberate members so that they can carry out their other duties thereafter.

The Deputy Presiding Officer: Thank you. That matter is being considered and members will be advised in due course.

Members who wish to speak in the debate should press their request-to-speak buttons now.

17:27

The Cabinet Secretary for Justice (Michael Matheson): I am delighted to open the stage 3 debate on the Criminal Justice (Scotland) Bill. As members are aware, the bill has had a unique passage through Parliament since it was introduced in June 2013. It was quite rightly subject to thorough scrutiny by the Justice Committee at stage 1. The committee undertook detailed and challenging evidence sessions and it is clear that its hard work has greatly helped to shape the content of the bill that is before us today. I extend my thanks to the clerks and all members of the committee, past and present, for their thoughtful examination of these important reforms. In addition, I thank the clerks and members of the Finance Committee and the Delegated Powers and Law Reform Committee for their knowledge and expertise in examining the relevant effects and provisions of the bill for those interests. I also pass on my thanks to my predecessor, Kenny MacAskill, whose passion and belief in bringing forward these significant reforms is to be commended.

The current content of the bill also owes a great deal to the work of four independent review groups. First, I thank Lord Carloway for his review of criminal law and practice. Many of the provisions in the bill have been developed from his recommendations. In particular, there are the reforms to modernise arrest and custody procedures.

It would be remiss of me not to mention the one important recommendation that we are no longer taking forward in the bill: the corroboration reforms. As I previously advised the Parliament, given the substantial and important nature of Lord Bonomy’s recommendations, the Scottish
Government accepted that it was not appropriate for the reform to continue at this time. That was one of the key areas in which the Justice Committee significantly influenced the proposed legislation.

Although I realise that the Government has been criticised over how it handled the reform, I believe that our actions show that we listened to the committee and the evidence of the stakeholders at stage 1. That led to the decision to take forward Lord Bonomy’s post-corroboration additional safeguards review and, ultimately, to the postponing of the bill until that review reported.

Christian Allard (North East Scotland) (SNP): As a member of the Justice Committee, I think that the abolition of the absolute requirement for corroboration had a place in the bill and I am sorry that it has not been taken forward. However, I look forward to the proposal returning in the next parliamentary session.

Michael Matheson: I recognise Christian Allard’s particular interest in the matter. It is not the first time that he has expressed concern about the removal of the corroboration provisions from the bill. However, I will set out the Government’s intention, which I hope will give him some confidence in our continued commitment in that area.

I again thank Lord Bonomy. We are continuing to consider his recommendations alongside other relevant reforms. The bill already includes a number of his recommendations: it places the prosecutorial test on a statutory footing and it requires codes of conduct to be issued to the police on the interviewing and identification of suspects. My initial view was that the latter provisions would be better considered as part of the wider consideration of Lord Bonomy’s review, but I have been persuaded in the interim that the addition of that requirement to the bill is helpful, and I thank Alison McInnes for lodging her amendment on that at stage 2.

Before I move on, I wish to make some further comments on the reform of corroboration. Although it was not possible to build a general consensus for the abolition of the corroboration rule at this time, I still consider that concerns about that rule—and, in particular, the very detrimental effect that it can have on people when the crime is committed in private—remain. On this day, we should not forget about the victims who have been affected by that legal requirement.

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I am sure that the cabinet secretary would accept that most crimes are committed in private and that it would be impossible to select certain categories of crime in which one could abolish corroboration.

Michael Matheson: I am not disputing that point; I recognise the point that the member makes.

I understand that many members who opposed the reform of corroboration did not do so out of a lack of concern for such individuals. Indeed, as a Parliament we have shown that we are often united in standing up for the most vulnerable in society and leading the way on key issues. I hope that the work that we undertake in considering the Bonomy recommendations and other reforms will enable a future Parliament to consider and, I hope, find consensus for such an important change in our law.

The third review that led to a number of provisions in the bill was Sheriff Principal Bowen’s review of sheriff and jury procedure. The provisions in the bill that have been developed from his review will make improvements to the effective management of such cases, so I extend my thanks to Sheriff Principal Bowen for his work in that important area.

Finally, there was the most recent review of the use of stop and search. John Scott QC and his advisory group worked tirelessly to produce a thorough and balanced report. I again pass on my gratitude to John Scott and all the members of his group for their hard work, as it has enabled us to include detailed provisions in the bill.

I realise that I have been talking about the past and the extensive work that has brought us to this point, but it is equally important that we look to the future and the real and positive changes that the bill can bring about. The stop and search reforms complement the provisions that were already in part 1 of the bill. Part 1 clarifies powers of arrest by creating a new single power to arrest someone on suspicion of having committed an offence. It replaces a complicated mixture of common-law and statutory powers of arrest. The reforms bring greater clarity to the process of arresting and holding suspects in custody while ensuring that the police have the necessary powers to carry out their role in investigating and detecting crime.

I am always proud to pay tribute to the hard work of our police officers who are committed to protecting our communities and our country on a daily basis. The new legal framework will support them in continuing to do their job as effectively as possible. The bill also enhances the rights of suspects to legal advice. It is only fair that those individuals who are brought into police custody are fully informed about their legal rights, and all suspects will now have a right of access to a lawyer, regardless of whether they are to be interviewed. We will also shortly bring forward regulations to seek to remove legal aid contributions for police station advice.
However, it is clear that some people in police custody require even more protection to ensure that they are fairly and appropriately treated according to their needs. That is why the bill, building on the Carloway recommendations, includes specific provisions for vulnerable adult and child suspects. The bill includes, for example, the vital safeguard that where a person who is aged 16 or over is assessed as vulnerable owing to a mental disorder, they cannot be interviewed without a solicitor being present. The bill will also ensure that appropriate adult support is sought by the police to facilitate effective communication with such individuals. The bill strikes an appropriate balance in introducing additional protections for children while recognising the greater level of self-determination of 16 and 17-year-olds.

I want to recognise Mary Fee’s work on highlighting the important issue of children who are affected by parental imprisonment. Although the Government was unable to support her previous amendment at stage 2, we understood the positive intentions behind the proposed change. Our concerns were more specifically about how workable the exact amendment might be in practice. Since stage 2, we have given the matter serious consideration and I am delighted that we were able to support the revised provisions that Mary Fee brought forward today. I consider the change to be a constructive and positive step.

Part 2 and onwards contain a number of equally important and modernising reforms that should greatly benefit our justice system. I mentioned earlier that reforms in the bill take forward recommendations from Lord Carloway and Sheriff Principal Bowen to enhance efficiency for appeal procedures and sheriff court solemn cases. I consider that those reforms will have a positive effect on our court practices and procedures.

There are many other important reforms in the bill. Members will be aware of specific and devastating cases in which Scots have lost their lives because of knife crimes. Much progress has been made in recent years, with offences of handling offensive weapons down 67 per cent since 2006-07. However, we must continue to do all that we can to discourage individuals from carrying offensive weapons. That includes ensuring that our courts have sufficient powers to deal with individuals who continue to carry such weapons in public, despite being aware of the terrible consequences. I am pleased that Parliament supports our policy, expressed in the bill, to increase the maximum custodial term for carrying such offensive weapons, including knives, from four to five years.

If we are to continue to have a justice system to be proud of, we must ensure that our justice sector partners are not prevented from using the most appropriate technology. The provisions in the bill will assist in that aim, first by opening the door to the greater use of television links in our courts, including for people appearing from police custody, and secondly by giving our courts the power to make rules on the greater use of technology in criminal procedure.

The bill represents a significant step forward in ensuring that our criminal justice system continues to be modern and efficient and strikes the right balance.

I move,

That the Parliament agrees that the Criminal Justice (Scotland) Bill be passed.

17:38

Elaine Murray (Dumfriesshire) (Lab): As we have heard, the bill was introduced almost two and a half years ago, in June 2013. It has gone through a number of transformations in that period. It was brought to Parliament to implement many of the recommendations of Lord Carloway’s review of Scottish criminal law and practice, which was set up in 2010, following the Cadder case. As members know, after the Cadder case, emergency legislation had to be introduced in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

Lord Carloway’s review group made 76 recommendations, including recommendations on a new system of arrest and detention, avoiding unnecessarily long periods of detention and liberation subject to conditions while the police carry out further investigation. Recommendations were also made regarding suspects’ right to legal advice, the nature of police questioning and safeguards for children under 18 and vulnerable adults. Most controversially, the bill as drafted would have ended the requirement for corroboration in Scots law. That was accompanied by proposed changes in jury composition and jury majority. I think that some of that will be revisited with Michael McMahon’s bill—the Criminal Verdicts (Scotland) Bill—when it comes before the Justice Committee shortly.

The proposal to end the corroboration requirement caused many of us much deliberation in weighing up the potential benefits to victims of one-on-one crimes such as rape and domestic abuse, as more cases would be likely to be prosecuted, with other concerns, such as whether successful prosecution was any more likely, and the possibility of miscarriages of justice for individuals accused of other crimes on only one piece of evidence.

The bill was suspended after stage 1, which it narrowly passed, for Lord Bonomy to undertake a
review of additional safeguards required if and when the requirement for corroboration was removed. While the current cabinet secretary understands the concerns that many of us had, I am afraid that his predecessor castigated us roundly for them at the end of the stage 1 debate. Although the present Cabinet Secretary for Justice probably disappointed some on his own side, he was correct to remove the parts of the bill relating to the removal of the requirement for corroboration to enable the remainder of the bill to continue its passage through Parliament.

The original bill contained other proposals that have since been taken forward by alternative means. Sections 83 and 84 of the original bill created two statutory aggravations relating to people trafficking. However, the issue of human trafficking was addressed through a much more robust, stand-alone human trafficking bill, the Human Trafficking and Exploitation (Scotland) Bill, which was based on a member’s bill proposed by my colleague Jenny Marra.

The original bill did not contain measures to change the terms of release of long-term prisoners, but the intention had been to introduce those as stage 2 amendments. When the bill’s progress was suspended after stage 1, the proposals were progressed through the Prisoners (Control of Release) (Scotland) Bill, which turned out to be much more controversial than had been expected. It is fortunate that the measures were not introduced as amendments at stage 2 and were subject to full scrutiny at stage 1 of the subsequent bill. That was an advantage of suspending the passage of the bill.

Despite those deletions, many of Lord Carloway’s recommendations remain in the bill as we considered it during its final stage today. On first consideration, committee members had concerns about the change in the use of the term “arrest” from what we were used to in Scotland, complex as that might have been. Instead of meaning that a suspect is charged with an offence, it means that a suspect will be arrested when they are questioned on suspicion by the police in connection with the offence.

We had concerns that the general public and the media would not be aware of the change in the use of the term and that persons who had been arrested would be assumed to have been charged. Although, in our legal system, everyone is innocent until proved guilty, some suspicion is unfortunately commonly still attached to individuals who have been arrested, as that term is commonly understood. It will be necessary to educate both the public and the media on what the change in use of the term means. In England and Wales where the term “arrest” has been used, I am afraid that I have often assumed that the person has been charged.

I was at my mother-in-law’s home one Christmas when there had been a terrible murder down south and an individual was arrested for questioning. The assumption seemed to be that the poor guy had been charged. He turned out to be innocent and was not charged; someone else had done it. In changing the use of the term “arrest”, we need to ensure that everybody understands what the term “arrest” means, so that suspicions are not cast on people who have not done anything.

Many concerns have been expressed recently about stop and search, and it is to be welcomed that most of the recommendations from John Scott’s review have been included in the bill.

At stage 2, Mary Fee was successful in introducing an amendment to ensure that a child and family impact assessment will be undertaken when a person is remanded in custody or imprisoned. That assessment will determine the likely impact of detention or imprisonment on dependent children and identify any support and assistance necessary for their wellbeing. The amendment is extremely welcome.

Committee convener Christine Grahame also introduced a stage 2 amendment, which has survived in the final form of the bill. She was concerned about changes that were brought about in the emergency legislation in 2010 that related to the relative powers of the Scottish Criminal Cases Review Commission and the High Court and which enabled the High Court to overrule decisions of the SCCRC and not accept cases referred to it.

A requirement on the Lord Advocate to publish the prosecutorial test—a statement on the general criteria that a prosecutor requires to be satisfied in order to proceed with criminal proceedings—was originally proposed as a safeguard if the requirement for corroboration was abolished. Despite the latter being dropped from the bill, the prosecutorial test was introduced nevertheless and I believe that it will provide a welcome understanding regarding how decisions to take a criminal case to court are made.

Lord Carloway also proposed that anyone under the age of 18 should be considered to be a child for the purposes of arrest, detention and questioning. That would accord with much of the legislation that we have recently passed. At stage 2, I lodged a number of amendments that would have introduced parity for anyone below the age of 18; some parts of the bill treat 16 and 17-year-olds differently from younger children, which is probably right. Children 1st was concerned about the fact that we had not changed every reference...
to 16-year-olds to 18-year-olds. Having heard the reasons for that, given the other legislation that has been passed, Children 1st, like me, is content that some things have to be introduced more gradually. The general intention to treat people aged under 18 as children has been accepted; indeed, it applies in much of the bill.

Children 1st was also concerned about the use of the term “wellbeing” of a child in the bill, which it considers to be less well understood than the more-often-used phrase “best interests”. However, I believe that it was less concerned on learning that there will be training for police officers and other professionals around the Children and Young People (Scotland) Act 2014 and this bill, to which it has offered to contribute.

The bill has travelled a long and rocky road and Scottish Labour members have expressed concerns about it and suggested improvements to it. Most of our concerns have been addressed and some of our suggestions have made it through to the bill’s final form, which we are very happy about. Unlike at stage 1, we will support the bill tonight.

17:46

Margaret Mitchell (Central Scotland) (Con):
This stage 3 debate on the Criminal Justice (Scotland) Bill presents the final opportunity to thank the many witnesses and stakeholders whose contributions have helped to shape the bill and to pay tribute to the work that the Justice Committee clerks have undertaken, together with members of the committee and the convener, at the various stages of the bill.

The bill before us this evening has taken over two years to reach its conclusion, having been introduced to the Parliament in the summer of 2013. It sought to implement recommendations from two expert reviews: Sheriff Principal Bowen’s review on sheriff and jury procedure and Lord Carloway’s review on criminal law and practice.

Since then, some of the original provisions relating to automatic early release and corroboration have been removed. It is fair to say that the debate on corroboration dominated the stage 1 proceedings and ultimately resulted in the postponement of the legislative process until the Bonomy review reported many months later. Although that delay was welcome, it undoubtedly came at the expense of effective scrutiny of the bill, given the huge time lapse between stage 1, stage 2 and today’s stage 3 proceedings.

However, among a number of reasonable and sensible provisions in the bill are changes to solemn procedure, the statutory requirement for out-of-court discussion between the prosecution and the defence and the increase in the maximum custodial sentence for handling offensive weapons from four to five years. The bill also allows for greater use of live television links between prisons and the courts and includes provisions to mitigate delays in progressing appeals. Those are practical provisions that have received cross-party support from the outset.

However, at stage 1, the Justice Committee expressed concern about the change in terminology to use the term “arrested” to describe suspects who are taken into custody for questioning but who are not charged, which risks unfairly stigmatising people who may simply be assisting the police with their inquiries. The terms “detained”, “arrested” and “charged” are well understood by the public, who, as the Justice Committee’s convener pointed out at stage 2, know that being detained is different from being arrested, even if they do not fully understand the procedural and legal distinctions between the two.

Furthermore, in its submission to the Justice Committee on the 2016-17 budget, Police Scotland highlighted the cost implications of the bill for the forthcoming year.

I am glad that the cabinet secretary has listened to some of the concerns that have been expressed, but I remain unconvinced about some of the proposals.

I turn to the subsequent additions to the bill at stage 2, in particular the provisions relating to stop and search, which have codified what became a controversial tactic employed by Police Scotland. Together with the associated public consultation, that will help to restore the public’s confidence in Scotland’s policing. It is only right to acknowledge Alison McInnes’s considerable efforts to put those changes on a statutory footing.

Mary Fee’s amendment at stage 2 was withdrawn and lodged again today to make reference to the named person. For the avoidance of doubt, the Conservatives, although we voted for that amendment, remain opposed to the universal application of the named person policy. However, we recognise that, if the named person policy goes ahead, it should be targeted at vulnerable children such as the children of people in custody or in prison. The amendment has the potential to make a significant difference to the unacceptably high number of children of prisoners who go on to offend and I congratulate Mary Fee on lodging it.

However, I rather fear that the bill will be remembered for all the wrong reasons: not just for the debacle over corroboration, but most decidedly for the opportunity that has been missed today to provide legal aid for a complainer in cases of serious sexual assault in Scotland to ensure that they are able to oppose an application for the release of their psychiatric, psychological and
medical records. That amendment would have represented a small but hugely significant step for victims in sexual offence cases. The amendment would have addressed many injustices. It would have put victims in Scotland on an equal footing with victims in England and Wales; it would have addressed the age-long issue of medical records being misused to discredit victims; and it would have upheld those courageous individuals' basic human right to privacy under article 8 of the European convention on human rights. The victims of rape and sexual assault bravely subject themselves to what is often a traumatic process and it is a travesty that an opportunity to help them to see justice served has been lost.

The Scottish Conservatives recognise that the bill has not had an easy passage and that it has posed a lot of difficulties for the Scottish Government. We voted against it at stage 1, but the subsequent changes and concessions that have been made since then—notwithstanding my huge disappointment and dismay at the failure of the legal representation and legal aid amendment—mean that my party will support the bill at decision time.

17:53

Roderick Campbell (North East Fife) (SNP):
The final words of the introductory music to the Scandinavian crime noir, “The Bridge”, which is currently showing on BBC Four, are:

“everything goes back to the beginning.”

If we go back to the beginning of this process, we find a bill that sought to build on the Carloway report. Part 1 of the bill tackles the somewhat confusing statutory issues of detention and arrest, and Lord Carloway sought to create a modern approach to powers of arrest that initially confused the members of the Justice Committee. However, we finally got to grips with it, and that part of the bill now contains important provisions for suspects to have a right to legal advice at police stations. Rather importantly, it will also provide for the removal of legal aid contributions for that advice.

We touched earlier on issues relating to the length of time for which suspects can be held for questioning. We have indeed gone further than Lord Carloway recommended in his report. In our committee there were differing views, but in my view the position that we have now agreed strikes a reasonable balance. I say to Alison McInnes that I hope that the use of the powers to extend beyond 12 hours interrogation in the investigation of crimes involving children will indeed be very limited. Investigative liberation was recommended by Lord Carloway. It is a somewhat ungainly term for a new system of continuing an investigation. I suspect that it will quickly come to be used and the 28-day maximum period seems to be a reasonable balance.

Issues in relation to child and other vulnerable suspects occupied the committee for quite some time. There were understandable concerns about a proper balance between the right to investigate crime and the rights of children and vulnerable people. Whatever else, we must hope that the safeguards that are provided by the legislation are properly adhered to. While child impact assessments were a controversial amendment at stage 2, I am glad to hear that discussions between the Government, Mary Fee and children’s organisations have borne fruit and we were able to agree the amendments earlier this afternoon.

No discussion of the bill would be complete without referring to the C-word: corroboration. Lord Carloway’s initial recommendation to abolish the requirement for corroboration was and remains controversial. It evoked strong emotions from the committee members, in the chamber and throughout civic Scotland. The problem remains as to how to create a system that balances the rights of the accused with the victim’s rights and access to justice. That conundrum will remain for the new parliamentary session and we await the results of the further work that was carried out following Lord Bonomy’s recommendations. In particular, what will the results of jury research reveal? Will it impact on the views on jury majorities, for example? We are, however, embarking on the publication of a prosecutorial test and a code of practice in connection with the identification and interviewing of suspects.

The current cabinet secretary responded quickly to concerns about consensual stop and search. We were perhaps slow to follow the example of our southern neighbours in putting these matters on a formal basis, but they operate it in a slightly different culture. I am also mindful of the former First Minister’s earlier comments about knife crime. I do not quite understand the current position with regard to section 60 of the Criminal Justice and Public Order Act 1994, under which, when there is a reasonable belief that persons are carrying dangerous instruments or offensive weapons, the police can organise a search. That is to be covered by the code of practice; we await that with interest.

We also debated provisions for children’s possession of alcohol and consensual searching. Now that the Parliament has voted on that, we need to move on and accept the cabinet secretary’s assurances. We should also remember that the bill contains recommendations on sheriff and jury cases from Sheriff Bowen. They might be dry but they are nevertheless important.

The Deputy Presiding Officer (John Scott):
You should draw to a close please.
Roderick Campbell: I will leave the question of the Scottish Criminal Cases Review Commission and the interests of justice to my colleague Christine Grahame.

This important bill modernises Scotland’s criminal justice system, but it is certainly not the final word on the subject.

17:57

Mary Fee (West Scotland) (Lab): I am delighted to be able to take part in the stage 3 debate on the Criminal Justice (Scotland) Bill. I reiterate my thanks to Barnardo’s Scotland for its support and encouragement on the amendments that I lodged at stage 2, for bringing them through to today and seeing them passed at stage 3. I particularly thank Nicki Wray for her tireless work in progressing this important issue. I also offer my gratitude to the Scottish Government for working with me ahead of today’s debate to bring about what will be a substantial change for the children of imprisoned parents.

It will come as no surprise to members that I intend to focus my speech on the children and families who are affected by imprisonment. The amendments in my name that we agreed are a turning point for children and families who are affected by imprisonment in Scotland.

Children are often the forgotten victims of crime. Many witness the arrest and, in some cases, the crime that leads to the arrest. The children of prisoners face stigma, poorer educational outcomes, mental health problems and behavioural problems. Research shows that children who have a parent in prison are more likely than their peers to become incarcerated as adults. With the right support, we can prevent today’s children becoming the prisoners of the future.

The Scottish Government has a number of initiatives to reduce reoffending. In my view, my amendments are a step towards preventing offending.

I mentioned the stigma that is attached to imprisonment, and the Children and Young People’s Commissioner, Tam Baillie, in supporting what I seek to achieve through the amendments that we have agreed to, also referenced that. Research in the “Not Seen, Not Heard, Not Guilty” report by the commissioner shows that many children of prisoners find it difficult to ask for help.

Ahead of today’s stage 3 debate, I visited Perth prison, where I met a number of fathers who have been working with a parenting programme that is run in the prison by the thrive project. Funded by the Scottish Government, it is an excellent programme that needs to be rolled out across Scotland’s prison estate. The project, which is run by Barnardo’s and Enable, aims to identify families that are in need of support, create greater engagement with them and respond to the needs of both the adults and the children. The fathers spoke of the positive benefits that they see from the parenting programme, the positive effect that it can have on their children and the importance of the bonds that they want to have with their children when they are released.

One father spoke about how he never thought of his children when he was offending and said that he did not understand the impact that it could have on them until he was sentenced and the children started to visit. The father, who is working with the thrive project and the parenting programme, told me how hard it is for him to watch his young daughter cry as she leaves the visiting room, and he said that he never wants that to happen to him or his child again once he is released.

I am grateful to the fathers that I met for being so open and honest in the short time that I spent with them. Promoting positive family relationships is essential in criminal justice. It is a route out of prison and a tool to reduce reoffending, and it can help to tackle the inequality that we see in society.

Once the Criminal Justice (Scotland) Bill has been passed, I will be happy to work with the Scottish Government further to ensure that my amendments do what they are designed to do. We will soon know how many children in Scotland have a parent in prison, and with that information we can get it right for every child. I look forward to the day when children are no longer the forgotten victims of crime.

18:02

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): The Criminal Justice (Scotland) Bill is a wide-ranging and substantial bill. We need only to read its purposes to determine that. As others have said, it has had a long and tortuous journey. It was introduced to the Parliament in 2013 and, following the stage 1 debate in 2014, the Government narrowly won a majority to proceed, including on abolition of the requirement for corroboration.

I have long opposed that abolition, not because I wish the accused to be let off with a sexual assault or a rape or those who are accused of those crimes in particular to escape conviction, but to ensure that victims, with the requirement for corroboration, have enhanced prospects of a successful prosecution and conviction. It is not about people having their day in court; it is about people having their day in court and the accused being convicted and sentenced.
I note that we may return to the subject—perhaps in the next session of Parliament, depending on who is in government—and I hope that, at that time, we will take in a comprehensive review of other issues, such as the size of the jury, the jury majority and the three verdicts that are currently available, in the High Court in particular.

The second issue on which I was in disagreement with the Government is not the stuff of headlines, but it is of considerable relevance to the Scottish justice system. It is the role of the Scottish Criminal Cases Review Commission, which colleagues throughout the chamber have mentioned today.

Following the decision in the case of Cadder v Her Majesty’s Advocate in 2010, the Scottish Government introduced by way of emergency legislation the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. All three stages took place on one day, which is not a good way to legislate. The act reduced the power of the Scottish Criminal Cases Review Commission and increased the power of the High Court sitting as the court of appeal when the SCCRC referred cases to it.

Let me explain. Before the 2010 act, a referral from the SCCRC had to be accepted by the High Court, and if the appeal was successful, it had to grant the appeal. The 2010 act changed all that and made two radical changes. First, although the SCCRC will always have considered the interests of justice and whether there might have been a miscarriage of justice, the 2010 act endowed the High Court with the power to reject a referral, even before it heard any evidence, if in its view the referral was not in the interest of justice. Secondly, even if a referral passed that second test, the High Court still had the power, notwithstanding a successful appeal, not to grant the referral if it considered that it was not in the interests of justice.

Therefore, the High Court had a gatekeeping role over its own appellate procedures, and the 2010 act created two categories of appeal: those coming straight from the High Court to the appeal court, if successful, were successful, but if they came from the SCCRC, they might be successful but then not permitted or allowed. It is simply wrong to have two categories of appeal.

At stage 2, I moved an amendment successfully, by a majority against the Government, to take us back to pre-2010 rules and I am delighted that the Government has accepted the reasons behind that amendment. I think that order has been restored.

Therefore, I am personally delighted by what has happened regarding corroboration and the role of the SCCRC. It is a pity that Mr Findlay is not present in the chamber to hear that, as he boorishly accused me of somewhat falling to the Government’s whip. I put this quite simply for him: put that in your pipe and smoke it, Mr Findlay.

18:06

Alison McInnes (North East Scotland) (LD):

What a difference a couple of years makes. No other Government bill has taken this long to get through Parliament and no bill has undergone such a dramatic and crucial transformation.

At the stage 1 debate, the then Cabinet Secretary for Justice won the vote but lost the plot, attacking opponents of abolishing corroboration as a unionist cabal intent on “selling out the victims of crime.”—[Official Report, 27 February 2014, c 28376.]

More worrying than that was that the justice secretary revealed his contempt for this Parliament by recklessly promoting what he knew by then to be seriously defective legislation. We know that he knew that, because he had belatedly and hurriedly appointed a 17-strong panel of distinguished minds who were expected to patch things up after the bill was passed. The newly appointed dean of the Faculty of Advocates described that approach as asking MSPs “to buy a pig in a poke.”

Let us not forget that 64 MSPs in this chamber, including the current Cabinet Secretary for Justice and the current First Minister, were happy to do just that. I think that that was a low point for this chamber and the Parliament because, whatever members’ views about corroboration, it became a matter of how Parliament legislates. As a business manager, I believed that our Parliament’s credibility was at stake.

In the absence of any willingness to remove the offending section of the bill, I took a different tack and urged the Government to put the whole bill on ice. Thankfully, at the 11th hour, the Government agreed to my request to suspend the bill, allowing time for Lord Bonomy’s corroboration review. His report not only vindicated that approach; his findings exposed the willingness of ministers to jeopardise the integrity of Scotland’s justice system on the basis of scant evidence and blithe assurances to this chamber.

As I said, what a difference two years makes: there is now cross-party support for the bill. Perhaps there is a wider lesson here for us on how our unicameral legislature operates, as more time between stage 1 and stage 2 for reflection and mature discussion can radically improve the quality of legislation. There is now a great deal to welcome in the bill. It will help to ensure that arrest and custody procedures are fairer, more transparent and compliant with the European
convention on human rights. My successful stage 2 amendment means the introduction of codes of practice governing how the police identify suspects and conduct interviews, which is akin to the Police and Criminal Evidence Act 1984—PACE—codes that have existed in England and Wales for decades.

For months, ministers told Willie Rennie and me that they were comfortable with so-called consensual stop and search. I am therefore, of course, delighted that the Scottish Liberal Democrats’ campaign for its abolition will conclude today and that that discredited, intrusive and, frankly, illegal tactic will cease. It is a tactic that has damaged the relations between the police and the communities and young people they targeted; and it is a tactic that was dogged by scandal and deployed hundreds of thousands of times a year without justification.

I hope that the whole chamber will join me in thanking those who offered expert opinion and thoughtful, evidenced interventions on the issue, not least John Scott and Dr Kath Murray. However, it remains galling that the Scottish National Party Government’s reaction to Dr Murray’s landmark stop and search findings was to engineer a delay in their publication in an effort to pre-empt and discredit her research.

It is similarly worrying that the Parliament has paved the way for the creation of a search power for something that is not illegal—the possession of alcohol. Elsewhere in the bill, ministers have failed to protect children by permitting their being held in custody for 24 hours and shelving plans—for a third time—to raise the age of criminal responsibility. This Government speaks a lot about human rights, but its actions are timid.

Speaking of unfinished business, what next for corroboration? Irrespective the future of corroboration, Parliament must continually strive to improve reporting and conviction rates, particularly for sexual offences and other crimes that occur behind closed doors. Therefore, I am disappointed that the Government did not support amendment 90 in Margaret Mitchell’s name. The cabinet secretary is obstinate on the matter, but I can only conclude that he has been ill advised. There is no doubt that an individual has a locus on the narrow point, and the amendment was not about banning access to any medical records but merely about giving victims a voice at the time when those records are sought.

Lord Bonomy provides a starting point on measures that are worth while regardless of the future for corroboration. As I said, it is disappointing that we have not taken the opportunity to allow people to be represented in court.

The Deputy Presiding Officer (Elaine Smith): Could you draw to a close, please?

Alison McInnes: Nevertheless, the Scottish Liberal Democrats will support the bill at decision time. We are proud to have been pivotal to the bill’s success by ensuring that the law better protects us all from miscarriages of justice and illegal police intrusions and that the integrity of our justice system remains intact.

The Deputy Presiding Officer: Thank you. I ask that our next two members keep to their four minutes, please. I call Alex Salmond.

18:11

Alex Salmond (Aberdeenshire East) (SNP): I welcome the opportunity to contribute, not least to defend Kenny MacAskill, who was a fine justice secretary. I say not just to Alison McInnes but to the whole chamber that the impact of the Salduz and Cadder rulings has brought into serious examination the issue of corroboration and whether it can be sustained, particularly in the matter of sexual offences. Of course, it is a subject to which this Parliament will have to return. To believe, as Alison McInnes seems to, that there is outstanding wisdom on the matter is entirely wrong. The issue will have to occupy this Parliament again. I am just commenting on the certainty with which Alison McInnes put forward her remarks.

I congratulate the current Cabinet Secretary for Justice. Even over a two-year period, it is no inconsiderable achievement to bring a criminal justice bill to a point of almost success, as he has done.

I hesitated to intrude into this reunion of the Justice Committee by making a speech, but I want to return to the subject of knife crime, not least because I want to make a point about John Carnochan, who I respect enormously. He is not an opponent but a supporter of moving stop and search from a non-statutory to a statutory basis. However, he has pointed out that non-statutory stop and search played a considerable role in the diminution and breaking of the knife culture, which had infected many parts of our communities in many areas of Scotland. It is to that issue that I want to devote some examination.

Alison McInnes said that the stop and search statistics were a scandal. The statistic keeping on stop and search was perhaps mistaken, unfortunate and inadequate, but it was not the scandal. The scandal was the level of knife crime, which resulted in the tragedies and deaths of young people. The achievement—what we should take pride in—through a range of initiatives, many of which John Carnochan was connected with, should be understood.
We have seen a situation where the total figures on the handling of an offensive weapon have reduced from 10,110 in 2006-07 to 3,795 in 2013-14. That is a spectacular reduction—not an elimination—of knife crime and other offensive weapons offences. That huge reduction is a massive achievement. People such as John Carnochan, his colleague Karyn McCluskey, and others from the Scottish violence reduction unit, as well as those from the no knives, better lives campaign—indeed, from the whole range of initiatives—deserve our thanks and congratulation. A part of that achievement was the stop and search tactic employed by the Scottish police service.

We should remember that, in England, over the past few years, there has been a substantial decline in stop and search statistics, both under section 1 of the Police and Criminal Evidence Act 1984 and section 60 of the Criminal Justice and Public Order Act 1994. However, in the past year, there has been a rise—of no less than 13 per cent—in the key statistic of knife crime. We should be extremely careful in dismissing whether there might not be a connection between those two changes.

We would make a fatal bargain if, in pursuit of finding an absolute certainty of how we conduct our operations, we did not acknowledge that our primary duty is to make absolutely sure, whatever else we do as far as the relevant part of the bill is concerned, that the decline in knife crime and therefore the decline in fatality and tragedy as a result of that crime is not in any way impeded. I am certain that this justice secretary will have that uppermost in his mind as he pursues the new statutory base for the policy.

The Deputy Presiding Officer: I remind members that they should not turn their backs to the chair.

18:15

John Finnie (Highlands and Islands) (Ind): Section 1 of the bill is about the power of a constable and section 2 is about exercise of that power, which has been a key part of what we have discussed in the course of looking at the bill.

If I noted him correctly, the cabinet secretary talked about the complicated mixture of statutory and common law that the bill will address. One power that I fear may have been lost of those that surround stop and search is the power of discretion—indeed, there is a suggestion that discretion is not being exercised at all.

Some additional powers are being given. I was happy to support amendments 6 and 8 on transport of individuals and sports grounds respectively. I supported them because they were proportionate and have put searches on a statutory basis. I am very pleased that a code of practice will be put in place, and I am happy that the Police Investigations and Review Commissioner will be included in the list of people who will be consulted on that. That is important, because PIRC is one of the organisations that deal with complaints that arise from misuse of the powers. I hope that there will not be any such complaints.

Members have referred to the work of John Scott QC and his committee. The cabinet secretary described his report as "thorough and balanced"; I concur with that view. I also concur with my colleague Alison McInnes's comments on Kath Murray's excellent work. When I met Mr Scott, I was aware of the tensions that remain in the police service regarding uncertainty among junior officers. Those officers have used so-called—I still struggle with the term—consensual non-statutory stop and search. Lots of members have commented on the powers that constables have; they have common-law powers and statutory powers, but I was not aware that they have non-statutory consensual powers. That is the challenge. I acknowledge what Alex Salmond said, but there have always been common-law search powers. We should recognise that having everything on a more formal basis is perhaps the way ahead.

When I met Mr Scott, we talked about human rights. I am delighted that, as a result of an amendment that I lodged when we considered the bill that introduced the single police service, human rights is now part of the police oath. Mr Scott said—I think that he said it in his report; I hope that I quote him correctly—that police officers are the front-line defenders of the public's human rights. That is important; the police should defend human rights with pride. It is also very important that the police recognise the power that they have to impact on individuals' rights.

We have talked in the debate about the rights of children and young people. I share the disappointment that the advice of the Scottish Human Rights Commission and the Children and Young People's Commissioner Scotland has not been taken on board.

I welcome some of the changes that have been made, particularly on supervisory oversight and the important decisions that are made about individuals' liberty. Police Scotland will, of course, have its standard operating procedures, which I hope will accurately reflect the intent of the bill. The change regarding access to a lawyer is a very important development.

There is a lot to be said, but in the few minutes that I have left I want to quote the policy objectives, which say that the bill contains the
“next stage of essential reforms to the Scottish criminal justice system to enhance efficiency and bring the appropriate balance to the justice system so that rights are protected whilst ensuring effective access to justice for victims of crime.”

If we get individuals’ rights and victims’ rights correct, we will be doing no bad.

The Deputy Presiding Officer: I am afraid that members have gone slightly over the time that has been allocated for the debate, so I would appreciate it if closing speakers could keep to their time or use slightly less.

18:19

Gavin Brown (Lothian) (Con): The bill has indeed—to quote the justice secretary—“had a unique passage”. One point that is worth making at the outset is that, despite a number of controversies, huge swathes of the bill—large parts of the 100 or so sections—have gone through the process without any real change or controversy, and with all parties signing up to them at the first available opportunity.

The sections through which solemn procedure will be improved by facilitation of better preparation of sheriff and jury cases are to be welcomed. Also welcome are the sentencing aspects that have been touched on—in particular, the increase in the maximum sentence for carrying a knife or offensive weapon, and the provisions covering people who offend while on early release—and the appeals section, which addresses delays in determining a number of types of appeal. Those are large parts of the bill that have gone through the process fairly easily, so I am glad to see them go through today.

The biggest controversy—the subject that dominated stage 1—was the section that would have removed the general requirement for corroboration. It was certainly wrong at the time, but criticism of the Government can be levelled mostly because of the fact that, at that time, the Government appeared to be unwilling to listen to expert evidence and to opposition parties. The demeanour of a number of members of the Government and the governing party towards those who opposed them was deeply unwise. I therefore commend the current justice secretary for his very different approach and for, ultimately, deciding to delete that section at stage 2.

The proposal was probably a genuine attempt to address a weakness in the law, but the Justice Committee received weighty submissions that suggested that removing the requirement for corroboration would not increase the number of safe convictions, so it would not solve the problem that the Government wanted it to solve. At the same time, there were credible fears that its removal could lead to an increase in the number of miscarriages of justice. It would not have solved the problem that it was intended to solve and it could have created a new problem.

If the Government decides to reconsider the matter, it ought to be careful, because the complexities of removing the requirement for corroboration are enormous. The Bonyon review made it clear that if we were to do that—it had to assume that it was going to happen—we would need to make at least four changes in respect of suspect interviews, at least three changes in respect of the evidence of identification, three changes in respect of the code of practice, two changes to the prosecutorial test and four changes to the way in which juries operate. Probably most important—even though the review was told to assume that corroboration would no longer exist—is that it made the firm recommendation that the requirement for corroboration should be retained in relation to hearsay evidence and confession evidence.

In my final minute, I return to Margaret Mitchell’s amendment 90. Parliament and the Government ultimately rejected the amendment, as is their right, but the Government expressed some sympathy for it. There is a loophole whereby legal aid is not available to complainers who want to oppose applications to access their medical records. I say to the cabinet secretary—who will, I presume, close for the Government—that the Government has expressed sympathy for amendment 90 even though it rejected it. What, therefore, does the Government intend to do to right that injustice? Groups all around the country will be disappointed that the amendment was not agreed to, but they will be extremely keen to hear what the Government intends to do. Perhaps they will hear that in early course.

18:23

Elaine Murray: I assume that decision time will be brought forward. That is pleasing because after two or more years of considering the bill, I think that I might be running out of things to say about it. I will, however, do my best to fill the time.

I closed the stage 1 debate for Labour in February 2014, when my colleagues and I were told that we were selling out our principles and, indeed, that we had sold our souls. I am glad that today’s debate has been much more constructive, even when there has not been agreement.

One issue that has concerned members is the need to improve access to justice for victims of one-on-one crimes—in particular, crimes of sexual and domestic abuse. Much of the consideration of the requirement for corroboration concerned that issue. Today, Margaret Mitchell and Alison McInnes argued passionately in favour of
introducing the right to legal representation for victims of sexual abuse when application is made to access their medical records. I know that both Justice Scotland and representatives of women’s organisations were supportive of the proposal, but the amendment was not agreed to. Nevertheless, I have recently become aware that the right is available to rape victims in England and Wales, so I think that we need to address the matter here.

I am pleased that the Government is doing research on sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 but, as I said in the recent debate on violence against women and girls, I hope that Parliament will, in the next session, return to gender-based violence with more comprehensive legislation.

Similarly, I am in favour of increasing the age of criminal responsibility from eight to 12 and hope that, in the next session of Parliament, that measure will be in a bill from its start so that it cannot just be glossed over.

Much as I respect our children’s commissioner, Tam Baillie, I am not able to agree with him on the powers in the bill to introduce stop and search of under 18s for alcohol. Those powers may not be used if the consultation suggests that they should not be. Even if they are used, the people who will be criminalised are the people over 18 who supply alcohol to young people. I hope that the children’s commissioner’s concerns will be discounted. It might be that the consultation will come out against stop and search in those circumstances, so we need to wait to see what will happen on that.

Mary Fee lodged important amendments on children and families who are affected by imprisonment, on which she is to be congratulated. As she said, children are often the forgotten victims of crime. She told us about how the stigma and related problems that young people can have result in it being more likely that they will become involved in the justice system themselves and perpetuate the cycle. I was interested in what she said about Perth prison and the thrive parenting programme for male offenders. It was also interesting to hear about the impact of a parent’s imprisonment on children and how it affects the offender. I can think of little that might be more valuable in the prevention of reoffending than making a parent aware of the effect that their offending has on their child.

Christine Grahame expressed the concerns that many of us had when it came to abolition of the requirement for corroboration and how and whether that issue will come back to us. That issue will not go away and extensive consultation on it will be required in the future.

I congratulate Christine Grahame on noticing the issues with the emergency legislation on the Cadder case. The High Court used to have to accept cases that the Scottish Criminal Cases Review Commission referred to it, but changes made through emergency legislation meant that the High Court might not accept successful cases. It is important that that situation has now been reversed.

Alison McInnes also referred to the corroboration debate and reminded us that the majority of the committee members had asked for the section on corroboration to be removed. She made an important point that lessons need to be learned from the passage of the bill. The way in which it has been improved through its extended passage perhaps provides us with some lessons that we could learn for future legislation.

Alex Salmond also referred to corroboration, but made an important point about knife crime, John Carnochan and the role of the violence reduction unit. Before any of us become too sanctimonious about it, we need to remember that it was my good friend Cathy Jamieson who implemented some of the measures that have been mentioned. They have resulted in a reduction in knife crime, so it is a question of not throwing the baby out with the bath water when good work has been done. We have been concerned about many of the effects of the increased use of stop and search, but that does not mean to say that stop and search never has a role or has no value.

It is important that John Finnie reminded us that there always were common-law powers of stop and search. Sometimes, there is great value in people who have police experience being members of Parliament, because they can remind us of such factors; I am grateful to him for doing that.

I thank the clerks and the witnesses for all their hard work with the committee at all stages of the bill over the extended period—two and a half years—that it has been going through Parliament.

18:29

Michael Matheson: I listened with interest to all the comments that were made and views that were expressed during the debate. I am conscious that a number of members who spoke have been involved with the process from its beginnings back in June 2013. The bill has probably been in the parliamentary process for the longest period of any bill in the Parliament’s history.

I will pick up on a few issues that members have raised. As she did at stage 2, Elaine Murray raised the important issue of the reporting on those who may be on investigative liberation, how that will be presented and how it can be portrayed. I
recognise the concerns and anxieties that she expressed about how that might be presented as if someone had been arrested and charged. Someone who was on investigative liberation might not be or would never be charged with an offence. There is a piece of work to be done on education and promoting understanding of the difference that the bill will create among those in the media and in stakeholder groups that have an interest in the matter.

With the good will of the Parliament in passing the bill, the implementation group that has been established will be responsible for looking at specific media and press matters and at how the media and the press can help to promote understanding of the bill’s provisions. I expect the implementation group to consider what I recognise is an important issue that Elaine Murray has raised.

I turn briefly to the issue that Margaret Mitchell raised in her amendment 90, which was on legal representation for those in the court process and related to personal and detailed information. On several occasions, she has referred to provision in England and Wales that is not available in Scotland. I presume that she was referring to a particular High Court judgment on such an issue in England and Wales. That judgment was in a case that was brought by a complainer who sought legal aid to take action to prevent the disclosure of her confidential counselling records. Although the High Court correctly found in her favour, that was only on the extent to which her rights to exceptional public funding had not been properly considered by the director of legal aid casework.

The Legal Aid (Scotland) Act 1986 allows exceptional cases to be provided for in the same way as applied in the case that I presume that the member was referring to, which appears to be the only one on record in England and Wales in which a judgment was made in favour of the complainer. However, there is no requirement in either jurisdiction that makes legal aid provision necessary. The difference in Scotland is that we have not had a judgment on that. In England and Wales, there was a judgment, which said that the case had not been properly considered. That is different, but that is not to say that there is provision in England and Wales that is not available in Scotland.

Exceptional cases can be considered in Scotland in exactly the same way as in England and Wales. For accuracy, it is important that we do not get ourselves locked into the idea that there is a provision somewhere else in the United Kingdom that is being denied in Scotland, when the legal case that I referred to is clearly not as Margaret Mitchell presented it.

On the important issue of the imprisonment of parents, which Mary Fee raised, we have been able to get to a point of agreement in a constructive way. One of the main challenges for us as a country is putting the right provisions in place to support children who might be affected by their parents being imprisoned, but we as a country also have to face up to the fact that we have the second-highest prison population level per head in western Europe, which includes the rate for females. That is because we as a country have failed to implement much more progressive and effective means of achieving desistance from committing offences.

If we are serious about the matter, we should not be closing stable doors once the horse has bolted; we must have a serious debate and dialogue about how we can use our prison system so that, while those who have to go to prison go there for public safety and punishment, we are also serious about and committed to taking forward policies that assist us in dealing with those who can be more effectively dealt with by alternative means.

If we get that right, we will do more for children in Scotland than an amendment to the bill would do—I mean no disrespect when I say that. We will demonstrate that we are big enough to be progressive in our penal policy rather than continue with a model that has remained largely unchanged in almost 200 years.

Let me turn to the issue that has also—[Interruption.] My microphone appears to be off. I do not know whether that is an indication that you want me to stop speaking, Presiding Officer.

The Presiding Officer (Tricia Marwick): I promise you that I did not touch the switch for your microphone.

Michael Matheson: Okay—I believe you, of course.

Alex Salmond raised the issue of tackling the knife culture. There is no doubt that there has been a massive reduction in knife crime in Scotland since 2006-07. In parts of west central Scotland, there have been massive reductions of more than 50 per cent in that period. A huge amount of that has come about through policing, engagement programmes such as the no knives, better lives programme, and the violence reduction unit—the tremendous work of John Carnochan and Karyn McCluskey has changed perceptions and communities.

The report of the advisory group on stop and search quotes John Carnochan as saying:

“I believe now is the time to Police our communities a little differently. When the medication works and the patient’s condition is stabilised or even improves we don’t usually increase the dosage; that would be a waste of time,
energy and resource and it often makes the patient worse. Now is the time for all agencies, including the Police, to engage with the communities, particularly the young people in our poorest areas in a positive way to help prevent violence. It was these young people who received by far the largest dose of the stop search medicine. It is them who have shown most improvement on this course of treatment. They now need help to stay healthy and violence free. Good community policing can help that happen.”

John Carnochan got that right.

Our provisions on stop and search will not prevent the police from stopping individuals whom they think might be carrying offensive weapons in order to search those people. The police will still be able to target the approach; the only thing that is ending is the non-statutory provision for that. I want knife crime to continue to decrease in this country, as I am sure that all members do. I am confident that we will achieve that.

When I came into post, I was conscious that it would be challenging to get a consensus in the Parliament on the bill. I hope that all members agree that the bill is balanced and effective in addressing the need for improvement in our criminal justice system and that it will help to deliver a modernised approach to various elements of the system. I call on all members to take the opportunity to support this important bill and continue the modernisation of our criminal justice system.
Decision Time

18:38

The Presiding Officer (Tricia Marwick): There is one question to be put as a result of today’s business. The question is, that motion S4M-15087, in the name of Michael Matheson, on the Criminal Justice (Scotland) Bill, be agreed to.

Motion agreed to,

That the Parliament agrees that the Criminal Justice (Scotland) Bill be passed.
Criminal Justice (Scotland) Bill

[AS PASSED]

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Criminal Justice (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision about criminal justice including as to police powers and rights of suspects and as to criminal evidence, procedure and sentencing; to establish the Police Negotiating Board for Scotland; and for connected purposes.

PART 1

ARREST AND CUSTODY

CHAPTER 1

ARREST BY POLICE

Arrest without warrant

1. **Power of a constable**

10. (1) A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person has committed or is committing an offence.

(2) In relation to an offence not punishable by imprisonment, a constable may arrest a person under subsection (1) only if the constable is satisfied that it would not be in the interests of justice to delay the arrest in order to seek a warrant for the person’s arrest.

15. (3) Without prejudice to the generality of subsection (2), it would not be in the interests of justice to delay an arrest in order to seek a warrant if the constable reasonably believes that unless the person is arrested without delay the person will—

   (d) continue committing the offence, or

   (e) obstruct the course of justice in any way, including by—

   (i) seeking to avoid arrest, or

   (ii) interfering with witnesses or evidence.

20. (4) For the avoidance of doubt, an offence is to be regarded as not punishable by imprisonment for the purpose of subsection (2) only if no person convicted of the offence can be sentenced to imprisonment in respect of it.

25. **Exercise of the power**

(1) A person may be arrested under section 1 more than once in respect of the same offence.
A person may not be arrested under section 1 in respect of an offence if the person has been officially accused of committing the offence or an offence arising from the same circumstances as the offence.

(3) Where—

(a) a constable who is not in uniform arrests a person under section 1, and
(b) the person asks to see the constable’s identification,
the constable must show identification to the person as soon as reasonably practicable.

Procedure following arrest

Information to be given on arrest

When a constable arrests a person (or as soon afterwards as is reasonably practicable), a constable must inform the person—

(a) that the person is under arrest,
(b) of the general nature of the offence in respect of which the person is arrested,
(c) of the reason for the arrest,
(d) that the person is under no obligation to say anything, other than to give the information specified in section 26(3), and
(e) of the person’s right to have—

(i) intimation sent to a solicitor under section 35, and
(ii) access to a solicitor under section 36.

Arrested person to be taken to police station

(1) Where a person is arrested by a constable outwith a police station, a constable must take the person as quickly as is reasonably practicable to a police station.

(2) Subsection (1) ceases to apply, and the person must be released from police custody immediately, if—

(a) the person has been arrested without a warrant,
(b) the person has not yet arrived at a police station in accordance with this section, and
(c) in the opinion of a constable there are no reasonable grounds for suspecting that the person has committed—

(i) the offence in respect of which the person was arrested, or
(ii) an offence arising from the same circumstances as that offence.

(3) For the avoidance of doubt, subsection (1) ceases to apply if, before arriving at a police station in accordance with this section, the person is released from custody under—

(a) section 19(2), or
(b) section 28(3A) of the 1995 Act.
5 Information to be given at police station

(1) Subsections (2) and (3) apply when—

(a) a person is in police custody having been arrested at a police station, or
(b) a person is in police custody and has been taken to a police station in accordance with section 4.

(2) The person must be informed as soon as reasonably practicable—

(a) that the person is under no obligation to say anything, other than to give the information specified in section 26(3),
(b) of any right the person has to have intimation sent and to have access to certain persons under—

(i) section 30,
(ii) section 32,
(iii) section 35,
(iv) section 36.

(3) The person must be provided as soon as reasonably practicable with such information (verbally or in writing) as is necessary to satisfy the requirements of Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings.

6 Information to be recorded by police

(1) There must be recorded in relation to any arrest by a constable—

(a) the time and place of arrest,
(b) the general nature of the offence in respect of which the person is arrested,
(c) if the person is taken from one place to another while in police custody (including to a police station in accordance with section 4)—

(i) the place from which, and time at which, the person is taken, and
(ii) the place to which the person is taken and the time at which the person arrives there,
(d) the time at which, and the identity of the constable by whom, the person is informed of the matters mentioned in section 3,
(da) the time at which the person ceases to be in police custody.

(1A) Where relevant, there must be recorded in relation to an arrest by a constable—

(a) the reason that the constable who released the person from custody under subsection (2) of section 4 formed the opinion mentioned in paragraph (c) of that subsection,
(e) the time at which, and the identity of the person by whom, the person is—

(i) informed of the matters mentioned in subsection (2) of section 5, and
(ii) provided with information in accordance with subsection (3) of that section,
(ea) the time at which, and the identity of the person by whom, the person is informed of the matters mentioned in section 17A,

(f) the time at which the person requests that intimation be sent under—

(i) section 30,

(ii) section 35,

(g) the time at which intimation is sent under—

(i) section 30,

(ii) section 32A,

(iii) section 33,

(iv) section 35.

(2) Where a person is in police custody and not officially accused of committing an offence, there must be recorded the time, place and outcome of any decision under section 7.

(3) Where a person is held in police custody by virtue of authorisation given under section 7 there must be recorded—

(a) the time at which the person is informed of the matters mentioned in section 8,

(b) the time, place and outcome of any custody review under section 9,

(c) the time at which any interview in the circumstances described in section 13(6) begins and the time at which it ends.

(3A) If a constable considers whether to give authorisation under section 12A there must be recorded—

(a) whether a reasonable opportunity to make representations has been afforded in accordance with subsection (4)(a) of that section,

(b) if the opportunity referred to in paragraph (a) has not been afforded, the reason for that,

(c) the time, place and outcome of the constable’s decision, and

(d) if the constable’s decision is to give the authorisation—

(i) the grounds on which it is given,

(ii) the time at which, and the identity of the person by whom, the person is informed and reminded of things in accordance with section 12B, and

(iii) the time at which the person requests that intimation be sent under section 12B(3)(a) and the time at which it is sent.

(3B) Where a person is held in police custody by virtue of authorisation given under section 12A there must be recorded—

(a) the time, place and outcome of any custody review under section 9,

(b) the time at which any interview in the circumstances described in section 13(6) begins and the time at which it ends.

(4) If a person is released from police custody on conditions under section 14, there must be recorded—

(a) details of the conditions imposed, and
(b) the identity of the constable who imposed them.

(5) If a person is charged with an offence by a constable while in police custody, there must be recorded the time at which the person is charged.

**Chapter 2**

**Custody: person not officially accused**

**Keeping person in custody**

7 **Authorisation for keeping in custody**

(1) Subsection (2) applies where—

(a) a person is in police custody having been arrested without a warrant, and

(b) since being arrested, the person has not been charged with an offence by a constable.

(2) Authorisation to keep the person in custody must be sought as soon as reasonably practicable after the person—

(a) is arrested at a police station, or

(b) arrives at a police station, having been taken there in accordance with section 4.

(3) Authorisation may be given only by a constable who—

(a) is of the rank of sergeant or above, and

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

(4) Authorisation may be given only if that constable is satisfied that the test in section 10 is met.

(5) If authorisation is refused, the person may continue to be held in police custody only if—

(a) a constable charges the person with an offence, or

(b) the person is detained under section 28(1A) of the 1995 Act (which allows for detention in connection with a breach of bail conditions).

8 **Information to be given on authorisation**

At the time when authorisation to keep a person in custody is given under section 7, the person must be informed of—

(a) the reason that the person is being kept in custody, and

(b) the 12 hour limit arising by virtue of section 11 and the fact that the person may be kept in custody for a further 12 hours under section 12A.

11 **12 hour limit: general rule**

(1) Subsection (2) applies when—

(a) a person has been held in police custody for a continuous period of 12 hours, beginning with the time at which authorisation was given under section 7, and
(b) during that period the person has not been charged with an offence by a constable.

(2) The person may continue to be held in police custody only if—
   (a) a constable charges the person with an offence,
   (b) authorisation to keep the person in custody has been given under section 12A, or
   (c) the person is detained under section 28(1A) of the 1995 Act (which allows for detention in connection with a breach of bail conditions).

12 hour limit: previous period

(1) Subsection (2) applies where—
   (a) a person is being held in police custody by virtue of authorisation given under section 7,
   (b) authorisation has been given under that section to hold the person in police custody on a previous occasion, and
   (c) the offence in connection with which the authorisation mentioned in paragraph (a) has been given is the same offence or arises from the same circumstances as the offence in connection with which the authorisation mentioned in paragraph (b) was given.

(2) The 12 hour period mentioned in section 11 is reduced by the length of the period during which the person was held in police custody by virtue of the authorisation mentioned in subsection (1)(b).

(3) Subsections (5) and (6) of section 13 apply for the purpose of calculating the length of the period during which the person was held in police custody by virtue of the authorisation mentioned in subsection (1)(b).

12A Authorisation for keeping in custody beyond 12 hour limit

(1) A constable may give authorisation for a person who is in police custody to be kept in custody for a continuous period of 12 hours, beginning when the 12 hour period mentioned in section 11 ends.

(2) Authorisation may be given only by a constable who—
   (aa) is of, or above, the rank of—
      (i) inspector, if a constable believes the person to be 18 years of age or over,
      (ii) chief inspector, if a constable believes the person to be under 18 years of age, and
   (b) has not been involved in the investigation in connection with which the person is in police custody.

(3) Authorisation may be given only if—
   (a) the person has not been held in police custody by virtue of authorisation given under this section in connection with—
      (i) the offence in connection with which the person is in police custody, or
      (ii) an offence arising from the same circumstances as that offence, and
   (b) the constable is satisfied that—
(i) the test in section 10 will be met when the 12 hour period mentioned in section 11 ends,
(ii) the offence in connection with which the person is in police custody is an indictable offence, and
(iii) the investigation is being conducted diligently and expeditiously.

(4) Before deciding whether or not to give authorisation the constable must—
(a) where practicable afford a reasonable opportunity to make verbal or written representations to—
(i) the person, or
(ii) if the person so chooses, the person’s solicitor, and
(b) have regard to any representations made.

(5) If authorisation is given, it is deemed to be withdrawn if the person is released from police custody before the 12 hour period mentioned in section 11 ends.

(6) Subsection (7) applies when—
(a) by virtue of authorisation given under this section, a person has been held in police custody for a continuous period of 12 hours (beginning with the time at which the 12 hour period mentioned in section 11 ended), and
(b) during that period the person has not been charged with an offence by a constable.

(7) The person may continue to be held in police custody only if—
(a) a constable charges the person with an offence, or
(b) the person is detained under section 28(1A) of the 1995 Act (which allows for detention in connection with a breach of bail conditions).

12B Information to be given on authorisation under section 12A

(1) This section applies when authorisation to keep a person in custody is given under section 12A.

(2) The person must be informed—
(a) that the authorisation has been given, and
(b) of the grounds on which it has been given.

(3) The person—
(a) has the right to have the information mentioned in subsection (2) intimated to a solicitor, and
(b) must be informed of that right.

(4) The person must be reminded about any right which the person has under Chapter 5.

(5) Subsection (4) does not require that a person be reminded about a right to have intimation sent under either of the following sections if the person has exercised the right already—
(a) section 30,
(b) section 35.
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(6) Information to be given under subsections (2), (3)(b) and (4) must be given to the person as soon as reasonably practicable after the authorisation is given.

(7) Where the person requests that intimation be sent under subsection (3)(a), the intimation must be sent as soon as reasonably practicable.

9 Custody review

(1) A custody review must be carried out—
(a) when a person has been held in police custody for a continuous period of 6 hours by virtue of authorisation given under section 7, and
(b) again, if authorisation to keep the person in police custody is given under section 12A, when the person has been held in custody for a continuous period of 6 hours by virtue of that authorisation.

(2) A custody review entails the consideration by a constable of whether the test in section 10 is met.

(3) A custody review must be carried out by a constable who—
(a) is of the rank of inspector or above, and
(b) has not been involved in the investigation in connection with which the person is in police custody.

(4) If the constable is not satisfied that the test in section 10 is met, the person may continue to be held in police custody only if—
(a) a constable charges the person with an offence, or
(b) the person is detained under section 28(1A) of the 1995 Act (which allows for detention in connection with a breach of bail conditions).

10 Test for sections 7, 12A and 9

(1) For the purposes of sections 7(4), 12A(3)(b) and 9(2), the test is that—
(a) there are reasonable grounds for suspecting that the person has committed an offence, and
(b) keeping the person in custody is necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with the person in accordance with the law.

(2) Without prejudice to the generality of subsection (1)(b), in considering what is necessary and proportionate for the purpose mentioned in that subsection regard may be had to—
(a) whether the person’s presence is reasonably required to enable the offence to be investigated fully,
(b) whether the person (if liberated) would be likely to interfere with witnesses or evidence, or otherwise obstruct the course of justice,
(c) the nature and seriousness of the offence.
13 Medical treatment

(1) Subsection (2) applies when—
   (a) a person is in police custody having been arrested without a warrant,
   (b) since being arrested, the person has not been charged with an offence by a constable, and
   (c) the person is at a hospital for the purpose of receiving medical treatment.

(2) If authorisation to keep the person in custody has not been given under section 7, that section has effect as if—
   (a) each reference in subsection (2) of that section to a police station were a reference to the hospital, and
   (b) the words after the reference to a police station in paragraph (b) of that subsection were omitted.

(3) Where authorisation is given under section 7 when a person is at a hospital, authorisation under that section need not be sought again if, while still in custody, the person is taken to a police station in accordance with section 4.

(4) Subsections (5) and (6) apply for the purpose of calculating the 12 hours mentioned in sections 11 and 12A.

(5) Except as provided for in subsection (6), no account is to be taken of any period during which a person is—
   (a) at a hospital for the purpose of receiving medical treatment, or
   (b) being taken as quickly as is reasonably practicable—
      (i) to a hospital for the purpose of receiving medical treatment, or
      (ii) to a police station from a hospital to which the person was taken for the purpose of receiving medical treatment.

(6) Account is to be taken of any period during which a person is both—
   (a) at a hospital, or being taken to or from one, and
   (b) being interviewed by a constable in relation to an offence which the constable has reasonable grounds to suspect the person of committing.

Investigative liberation

14 Release on conditions

(1) Subsection (2) applies where—
   (a) a person is being held in police custody by virtue of authorisation given under section 7,
   (b) a constable has reasonable grounds for suspecting that the person has committed a relevant offence, and
   (d) either—
      (i) the person has not been subject to a condition imposed under subsection (2) in connection with a relevant offence, or
(ii) it has not been more than 28 days since the first occasion on which a condition was imposed on the person under subsection (2) in connection with a relevant offence.

(2) If releasing the person from custody, a constable may impose any condition that an appropriate constable considers necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence (including, for example, a condition aimed at securing that the person does not interfere with witnesses or evidence).

(2A) A condition under subsection (2)—

(a) may not require the person to be in a specified place at a specified time,

(b) may require the person—

(i) not to be in a specified place, or category of place, at a specified time, and

(ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period.

(3) A condition imposed under subsection (2) is a liberation condition for the purposes of schedule A1.

(5) In subsection (2), “an appropriate constable” means a constable of the rank of sergeant or above.

(6) In this section, “a relevant offence” means—

(a) the offence in connection with which the authorisation under section 7 has been given, or

(b) an offence arising from the same circumstances as that offence.

15 Conditions ceasing to apply

(1) A condition imposed on a person under section 14(2) ceases to apply—

(a) at the end of the day falling 28 days after the first occasion on which a condition was imposed on the person under section 14(2) in connection with a relevant offence, or

(b) before then, if—

(i) the condition is removed by a notice under section 16,

(ii) the person is arrested in connection with a relevant offence,

(iii) the person is officially accused of committing a relevant offence, or

(iv) the condition is removed by the sheriff under section 17.

(2) In subsection (1), “a relevant offence” means—

(a) the offence in connection with which the condition was imposed, or

(b) an offence arising from the same circumstances as that offence.

16 Modification or removal of conditions

(1) A constable may by notice modify or remove a condition imposed under section 14(2).

(2) A notice under subsection (1)—
(a) is to be given in writing to the person who is subject to the condition,
(b) must specify the time from which the condition is modified or removed.

(3) A constable of the rank of inspector or above must keep under review whether or not—
(a) there are reasonable grounds for suspecting that a person who is subject to a condition imposed under section 14(2) has committed a relevant offence, and
(b) the condition imposed remains necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence.

(4) Where the constable referred to in subsection (3) is no longer satisfied as to the matter mentioned in paragraph (a) of that subsection, a constable must give notice to the person removing any condition imposed in connection with a relevant offence.

(5) Where the constable referred to in subsection (3) is no longer satisfied as to the matter mentioned in paragraph (b) of that subsection, a constable must give notice to the person—
(a) modifying the condition in question, or
(b) removing it.

(6) Where a duty to give notice to a person arises under subsection (4) or (5), the notice—
(a) is to be given in writing to the person as soon as practicable, and
(b) must specify, as the time from which the condition is modified or removed, the time at which the duty to give the notice arose.

(7) The modification or removal of a condition under subsection (1), (4) or (5) requires the authority of a constable of the rank of inspector or above.

(8) In this section, “a relevant offence” means—
(a) the offence in connection with which the condition was imposed, or
(b) an offence arising from the same circumstances as that offence.

17 Review of conditions

(1) A person who is subject to a condition imposed under section 14(2) may apply to the sheriff to have the condition reviewed.

(2) Before disposing of an application under this section, the sheriff must give the procurator fiscal an opportunity to make representations.

(3) If the sheriff is not satisfied that the condition is necessary and proportionate for the purpose for which it was imposed, the sheriff may—
(a) remove the condition, or
(b) impose an alternative condition that the sheriff considers to be necessary and proportionate for that purpose.

(4) For the purposes of sections 15 and 16, a condition imposed by the sheriff under subsection (3)(b) is to be regarded as having been imposed under section 14(2).
CHAPTER 3
CUSTODY: PERSON OFFICIALLY ACCUSED

Person to be brought before court

17A Information to be given if sexual offence

(1) Subsection (2) applies when—
(a) a person is in police custody having been arrested under a warrant in respect of a sexual offence to which section 288C of the 1995 Act applies, or
(b) a person—
   (i) is in police custody having been arrested without a warrant, and
   (ii) since being arrested, the person has been charged by a constable with a sexual offence to which section 288C of the 1995 Act applies.

(2) The person must be informed as soon as reasonably practicable—
(a) that the person’s case at, or for the purposes of, any relevant hearing (within the meaning of section 288C(1A) of the 1995 Act) in the course of the proceedings may be conducted only by a lawyer,
(b) that it is, therefore, in the person’s interests to get the professional assistance of a solicitor, and
(c) that if the person does not engage a solicitor for the purposes of the conduct of the person’s case at or for the purposes of the hearing, the court will do so.

18 Person to be brought before court

(1) Subsection (2) applies to a person when—
(a) the person is in police custody having been arrested under a warrant (other than a warrant granted under section 29(1)), or
(b) the person—
   (i) is in police custody having been arrested without a warrant, and
   (ii) since being arrested, the person has been charged with an offence by a constable.

(2) The person must be brought before a court (unless released from custody under section 19)—
(a) if practicable, before the end of the first day on which the court is sitting after the day on which this subsection began to apply to the person, or
(b) as soon as practicable after that.

(3) A person is deemed to be brought before a court in accordance with subsection (2) if the person appears before it by means of a live television link (by virtue of a determination by the court that the person is to do so by such means).

18A Under 18s to be kept in place of safety prior to court

(1) Subsection (2) applies when—
(a) a person is to be brought before a court in accordance with section 18(2), and
(b) either—
   (i) a constable believes the person is under 16 years of age, or
   (ii) the person is subject to a compulsory supervision order, or an interim
       compulsory supervision order, made under the Children’s Hearings
       (Scotland) Act 2011.

(2) The person must (unless released from custody under section 19) be kept in a place of
safety until the person can be brought before the court.

(3) The place of safety in which the person is kept must not be a police station unless an
appropriate constable certifies that keeping the person in a place of safety other than a
police station would be—
   (a) impracticable,
   (b) unsafe, or
   (c) inadvisable due to the person’s state of health (physical or mental).

(4) A certificate under subsection (3) must be produced to the court when the person is
brought before it.

(5) In this section—
   “an appropriate constable” means a constable of the rank of inspector or above,
   “place of safety” has the meaning given in section 202(1) of the Children’s
   Hearings (Scotland) Act 2011.

18B Notice to parent that under 18 to be brought before court

(1) Subsection (2) applies when a person who is 16 years of age or over and subject to a
supervision order or under 16 years of age—
   (a) is to be brought before a court in accordance with section 18(2), or
   (b) is released from police custody on an undertaking given under section 19(2)(a).

(2) A parent of the person mentioned in subsection (1) (if one can be found) must be
informed of the following matters—
   (a) the court before which the person is to be brought,
   (b) the date on which the person is to be brought before the court,
   (c) the general nature of the offence which the person has been officially accused of
      committing, and
   (d) that the parent’s attendance at the court may be required under section 42 of the

(3) Subsection (2) does not require any information to be given to a parent if a constable has
grounds to believe that giving the parent the information mentioned in that subsection
may be detrimental to the wellbeing of the person mentioned in subsection (1).

(4) In this section—
   “parent” includes guardian and any person who has the care of the person
mentioned in subsection (1),
“supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

18C Notice to local authority that under 18 to be brought before court

(1) The appropriate local authority must be informed of the matters mentioned in subsection (4) when—

(a) a person to whom either subsection (2) or (3) applies is to be brought before a court in accordance with section 18(2), or

(b) a person to whom subsection (2) applies is released from police custody on an undertaking given under section 19(2)(a).

(2) This subsection applies to—

(a) a person who is under 16 years of age,

(b) a person who is—

(i) 16 or 17 years of age, and

(ii) subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.

(3) This subsection applies to a person if—

(a) a constable believes the person is 16 or 17 years of age,

(b) since being arrested, the person has not exercised the right to have intimation sent under section 30, and

(c) on being informed or reminded of the right to have intimation sent under that section after being officially accused, the person has declined to exercise the right.

(4) The matters referred to in subsection (1) are—

(a) the court before which the person mentioned in paragraph (a) or (as the case may be) (b) of that subsection is to be brought,

(b) the date on which the person is to be brought before the court, and

(c) the general nature of the offence which the person has been officially accused of committing.

(5) For the purpose of subsection (1), the appropriate local authority is the local authority in whose area the court referred to in subsection (4)(a) sits.

Liberation by police

(1) Subsection (2) applies when—

(a) a person is in police custody having been arrested under a warrant (other than a warrant granted under section 29(1)), or

(b) a person—

(i) is in police custody having been arrested without a warrant, and
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(ii) since being arrested, the person has been charged with an offence by a constable.

(2) A constable may—

(a) if the person gives an undertaking in accordance with section 20, release the person from custody,

(b) release the person from custody without such an undertaking,

(c) refuse to release the person from custody.

(2A) Where a person is in custody as mentioned in subsection (1)(a), the person may not be released from custody under subsection (2)(b).

(3) A constable is not to be subject to any claim whatsoever by reason of having refused to release a person from custody under subsection (2)(c).

20 Release on undertaking

(1) A person may be released from police custody on an undertaking given under section 19(2)(a) only if the person signs the undertaking.

(2) The terms of an undertaking are that the person undertakes to—

(a) appear at a specified court at a specified time, and

(b) comply with any conditions imposed under subsection (3) while subject to the undertaking.

(3) The conditions which may be imposed under this subsection are—

(a) that the person does not—

(i) commit an offence,

(ii) interfere with witnesses or evidence, or otherwise obstruct the course of justice,

(iii) behave in a manner which causes, or is likely to cause, alarm or distress to witnesses,

(b) any further condition that a constable considers necessary and proportionate for the purpose of ensuring that any conditions imposed under paragraph (a) are observed.

(4) Conditions which may be imposed under subsection (3)(b) include—

(a) a condition requiring the person—

(i) to be in a specified place at a specified time, and

(ii) to remain there for a specified period,

(b) a condition requiring the person—

(i) not to be in a specified place, or category of place, at a specified time, and

(ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period.

(5) For the imposition of a condition under subsection (3)(b)—
(a) if it is of the kind described in subsection (4)(a), the authority of a constable of the rank of inspector or above is required,

(b) if it is of any other kind, the authority of a constable of the rank of sergeant or above is required.

(6) The requirements imposed by an undertaking to attend at a court and comply with conditions are liberation conditions for the purposes of schedule A1.

### 21 Modification of undertaking

(1) The procurator fiscal may by notice modify the terms of an undertaking given under section 19(2)(a) by—

(a) changing the court specified as the court at which the person is to appear,

(b) changing the time specified as the time at which the person is to appear at the court,

(c) removing or altering any condition imposed under section 20(3).

(2) A condition may not be altered under subsection (1)(c) so as to forbid or require something not forbidden or required by the terms of the condition when the person gave the undertaking.

(3) Notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.

### 21A Rescission of undertaking

(1) The procurator fiscal may by notice rescind an undertaking given under section 19(2)(a) (whether or not the person who gave it is to be prosecuted).

(2) The rescission of an undertaking by virtue of subsection (1) takes effect at the end of the day on which the notice is sent.

(3) Notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.

(4) A constable may arrest a person without a warrant if the constable has reasonable grounds for suspecting that the person is likely to fail to comply with the terms of an undertaking given under section 19(2)(a).

(5) Where a person is arrested under subsection (4) or subsection (6) applies—

(a) the undertaking referred to in subsection (4) or (as the case may be) (6) is rescinded, and

(b) this Part applies as if the person, since being most recently arrested, has been charged with the offence in connection with which the person was in police custody when the undertaking was given.

(6) This subsection applies where—

(a) a person who is subject to an undertaking given under section 19(2)(a) is in police custody (otherwise than as a result of having been arrested under subsection (4)), and

(b) a constable has reasonable grounds for suspecting that the person has failed, or (if liberated) is likely to fail, to comply with the terms of the undertaking.
(7) The references in subsections (4) and (6)(b) to the terms of the undertaking are to the terms of the undertaking subject to any modification by—

(a) notice under section 21(1), or

(b) the sheriff under section 22(3)(b).

21B Expiry of undertaking

(1) An undertaking given under section 19(2)(a) expires—

(a) at the end of the day on which the person who gave it is required by its terms to appear at a court, or

(b) if subsection (2) applies, at the end of the day on which the person who gave it is brought before a court having been arrested under the warrant mentioned in that subsection.

(2) This subsection applies where—

(a) a person fails to appear at court as required by the terms of an undertaking given under section 19(2)(a), and

(b) on account of that failure, a warrant for the person’s arrest is granted.

(3) The references in subsections (1)(a) and (2)(a) to the terms of the undertaking are to the terms of the undertaking subject to any modification by notice under section 21(1).

22 Review of undertaking

(1) A person who is subject to an undertaking containing a condition imposed under section 20(3)(b) may apply to the sheriff to have the condition reviewed.

(2) Before disposing of an application under this section, the sheriff must give the procurator fiscal an opportunity to make representations.

(3) If the sheriff is not satisfied that the condition is necessary and proportionate for the purpose for which it was imposed, the sheriff may modify the terms of the undertaking by—

(a) removing the condition, or

(b) imposing an alternative condition that the sheriff considers to be necessary and proportionate for that purpose.

Chapter 4

Police interview

Rights of suspects

23 Information to be given before interview

(1) Subsection (2) applies to a person who—

(a) is in police custody, or

(b) is attending at a police station or other place voluntarily for the purpose of being interviewed by a constable.
(2) Not more than one hour before a constable interviews the person about an offence which
the constable has reasonable grounds to suspect the person of committing, the person
must be informed—
   (za) of the general nature of that offence,
   (a) that the person is under no obligation to say anything other than to give the
       information specified in section 26(3),
   (b) about the right under section 24 to have a solicitor present during the interview,
       and
   (c) if the person is in police custody, about any right which the person has under
       Chapter 5.

(3) A person need not be informed under subsection (2)(c) about a right to have intimation
sent under either of the following sections if the person has exercised the right already—
   (a) section 30,
   (b) section 35.

(4) For the purpose of subsection (2), a constable is not to be regarded as interviewing a
person about an offence merely by asking the person for the information specified in
section 26(3).

(5) Where a person is to be interviewed by virtue of authorisation granted under section 27,
before the interview begins the person must be informed of what was specified by the
court under subsection (6) of that section.

24 Right to have solicitor present

(1) Subsections (2) and (3) apply to a person who—
   (a) is in police custody, or
   (b) is attending at a police station or other place voluntarily for the purpose of being
       interviewed by a constable.

(2) The person has the right to have a solicitor present while being interviewed by a
constable about an offence which the constable has reasonable grounds to suspect the
person of committing.

(3) Accordingly—
   (a) unless the person consents to being interviewed without having a solicitor present,
       a constable must not begin to interview the person about the offence until the
       person’s solicitor is present, and
   (b) the person’s solicitor must not be denied access to the person at any time while a
       constable is interviewing the person about the offence.

(4) Despite subsection (3)(a) a constable may, in exceptional circumstances, proceed to
interview the person without a solicitor being present if it is necessary to interview the
person without delay in the interests of—
   (a) the investigation or the prevention of crime, or
   (b) the apprehension of offenders.
(4A) A decision to allow the person to be interviewed without a solicitor present by virtue of subsection (4) may be taken only by a constable who—

(a) is of the rank of sergeant or above, and

(b) has not been involved in investigating the offence about which the person is to be interviewed.

(5) For the purposes of subsections (2) and (3), a constable is not to be regarded as interviewing a person about an offence merely by asking the person for the information specified in section 26(3).

(6) Where a person consents to being interviewed without having a solicitor present, there must be recorded—

(a) the time at which the person consented, and

(b) any reason given by the person at that time for waiving the right to have a solicitor present.

Consent to interview without solicitor

(1) Subsections (2) and (3) apply for the purpose of section 24(3)(a).

(2) A person may not consent to being interviewed without having a solicitor present if—

(a) the person is under 16 years of age

(aa) the person is 16 or 17 years of age and subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011, or

(b) the person is 16 years of age or over and, owing to mental disorder, appears to a constable to be unable to—

(i) understand sufficiently what is happening, or

(ii) communicate effectively with the police.

(3) A person to whom this subsection applies (referred to in subsection (5) as “person A”) may consent to being interviewed without having a solicitor present only with the agreement of a relevant person.

(4) Subsection (3) applies to a person who is—

(a) 16 or 17 years of age, and

(b) not precluded by subsection (2)(aa) or (b) from consenting to being interviewed without having a solicitor present.

(5) For the purpose of subsection (3), “a relevant person” means—

(a) if person A is in police custody, any person who is entitled to access to person A by virtue of section 32(2),

(b) if person A is not in police custody, a person who is—

(i) at least 18 years of age, and

(ii) reasonably named by person A.

(6) In subsection (2)(b)—
(a) “mental disorder” has the meaning given by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003,

(b) the reference to the police is to any—
   (i) constable, or
   (ii) person appointed as a member of police staff under section 26(1) of the Police and Fire Reform (Scotland) Act 2012.

Person not officially accused

26 Questioning following arrest

(1) Subsections (2) and (3) apply where—
    (a) a person is in police custody in relation to an offence, and
    (b) the person has not been officially accused of committing the offence or an offence arising from the same circumstances as the offence.

(2) A constable may put questions to the person in relation to the offence.

(2A) For the avoidance of doubt, nothing in this section is to be taken to mean that a constable cannot put questions to the person in relation to any other matter.

(3) The person is under no obligation to answer any question, other than to give the following information—
   (a) the person’s name,
   (b) the person’s address,
   (c) the person’s date of birth,
   (d) the person’s place of birth (in such detail as a constable considers necessary or expedient for the purpose of establishing the person’s identity), and
   (e) the person’s nationality.

(4) Subsection (2) is without prejudice to any rule of law as regards the admissibility in evidence of any answer given.

Person officially accused

27 Authorisation for questioning

(1) The court may authorise a constable to question a person about an offence after the person has been officially accused of committing the offence.

(2) The court may grant authorisation only if it is satisfied that allowing the person to be questioned about the offence is necessary in the interests of justice.

(3) In deciding whether to grant authorisation, the court must take into account—
   (a) the seriousness of the offence,
   (b) the extent to which the person could have been questioned earlier in relation to the information which the applicant believes may be elicited by the proposed questioning,
(c) where the person could have been questioned earlier in relation to that information, whether it could reasonably have been foreseen at that time that the information might be important to proving or disproving that the person has committed an offence.

(4) Where subsection (5) applies, the court must give the person an opportunity to make representations before deciding whether to grant authorisation.

(5) This subsection applies where—

(a) a warrant has been granted to arrest the person in respect of the offence, or
(b) the person has appeared before a court in relation to the offence.

(6) Where granting authorisation, the court—

(a) must specify the period for which questioning is authorised, and
(b) may specify such other conditions as the court considers necessary to ensure that allowing the proposed questioning is not unfair to the person.

(7) A decision of the court—

(a) to grant or refuse authorisation, or
(b) to specify, or not to specify, conditions under subsection (6)(b), is final.

(8) In this section, “the court” means—

(a) where an indictment has been served on the person in respect of the High Court, a single judge of that court,
(b) in any other case, the sheriff.

28 Authorisation: further provision

(1) An application for authorisation may be made—

(a) where section 27(5) applies, by the prosecutor, or
(b) in any other case, by a constable.

(2) In subsection (1)(a), “the prosecutor” means—

(a) where an indictment has been served on the person in respect of the High Court, Crown Counsel, or
(b) in any other case, the procurator fiscal.

(3) Where an application for authorisation is made in writing (rather than orally) it must—

(a) be made in such form as may be prescribed by act of adjournal (or as nearly as may be in such form), and
(b) state whether another application has been made for authorisation to question the person about the offence or an offence arising from the same circumstances as the offence.

(4) Authorisation ceases to apply as soon as either—

(a) the period specified under section 27(6)(a) expires, or
(b) the person’s trial in respect of the offence, or an offence arising from the same circumstances as the offence, begins.

(5) For the purpose of subsection (4)(b), a trial begins—
(a) in proceedings on indictment, when the jury is sworn,
(b) in summary proceedings, when the first witness for the prosecution is sworn.

(6) In this section—
“authorisation” means authorisation under section 27,
“the offence” means the offence referred to in section 27(1).

29 Arrest to facilitate questioning

(1) On granting authorisation under section 27, the court may also grant a warrant for the person’s arrest if it seems to the court expedient to do so.

(2) The court must specify in a warrant granted under subsection (1) the maximum period for which the person may be detained under it.

(3) The person’s detention under a warrant granted under subsection (1) must end as soon as—
(a) the period of the person’s detention under the warrant becomes equal to the maximum period specified under subsection (2),
(b) the authorisation ceases to apply (see section 28(4)), or
(c) in the opinion of the constable responsible for the investigation into the offence referred to in section 27(1), there are no longer reasonable grounds for suspecting that the person has committed—
(i) that offence, or
(ii) an offence arising from the same circumstances as that offence.

(4) For the purpose of subsection (3)(a), the period of the person’s detention under the warrant begins when the person—
(a) is arrested at a police station, or
(b) arrives at a police station, having been taken there in accordance with section 4.

(5) For the avoidance of doubt—
(a) if the person is on bail when a warrant under subsection (1) is granted, the order admitting the person to bail is not impliedly recalled by the granting of the warrant,
(b) if the person is on bail when arrested under a warrant granted under subsection (1)—
(i) despite being in custody by virtue of the warrant the person remains on bail for the purpose of section 24(5)(b) of the 1995 Act,
(ii) when the person’s detention under the warrant ends, the bail order continues to apply as it did immediately before the person’s arrest,
(c) if the person is subject to an undertaking given under section 19(2)(a), the person remains subject to the undertaking despite—
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(i) the granting of a warrant under subsection (1),
(ii) the person’s arrest and detention under it.

CHAPTER 5

RIGHTS OF SUSPECTS IN POLICE CUSTODY

5

Intimation and access to another person

30 Right to have intimation sent to other person

(1) A person in police custody has the right to have intimation sent to another person of—

(a) the fact that the person is in custody,
(b) the place where the person is in custody.

(2) Intimation under subsection (1) must be sent—

(a) where a constable believes that the person in custody is under 16 years of age, regardless of whether the person requests that it be sent,
(b) in any other case, if the person requests that it be sent.

(3) The person to whom intimation is to be sent under subsection (1) is—

(a) where a constable believes that the person in custody is under 16 years of age, a parent of the person,
(b) in any other case, an adult reasonably named by the person in custody.

(4) Intimation under subsection (1) must be sent—

(a) as soon as reasonably practicable, or
(b) if subsection (5) applies, with no more delay than is necessary.

(5) This subsection applies where an appropriate constable considers some delay to be necessary in the interests of—

(a) the investigation or prevention of crime,
(b) the apprehension of offenders, or
(c) safeguarding and promoting the wellbeing of the person in custody, where a constable believes that person to be under 18 years of age.

(5ZA) In subsection (5), “an appropriate constable” means a constable who—

(a) is of the rank of sergeant or above, and
(b) has not been involved in the investigation in connection with which the person is in custody.

(5A) The sending of intimation may be delayed by virtue of subsection (5)(c) only for so long as is necessary to ascertain whether a local authority will arrange for someone to visit the person in custody under section 32A(2).

(6) In this section and section 31—

“adult” means person who is at least 18 years of age,
“parent” includes guardian and any person who has the care of the person in custody.
31 Right to have intimation sent: under 18s

(1) This section applies where a constable believes that a person in police custody is under 18 years of age.

(2) At the time of sending intimation to a person under section 30(1), that person must be asked to attend at the police station or other place where the person in custody is being held.

(2A) Subsection (2) does not apply if—

(a) a constable believes that the person in custody is 16 or 17 years of age, and

(b) the person in custody requests that the person to whom intimation is to be sent under section 30(1) is not asked to attend at the place where the person in custody is being held.

(3) Subsections (3A) and (4) apply where—

(a) it is not practicable or possible to contact, within a reasonable time, the person to whom intimation is to be sent by virtue of section 30(3),

(b) the person to whom intimation is sent by virtue of section 30(3), if asked to attend at the place where the person in custody is being held, claims to be unable or unwilling to attend within a reasonable time, or

(c) a local authority, acting under section 32A(8)(a), has advised against sending intimation to the person to whom intimation is to be sent by virtue of section 30(3).

(3A) Section 30(3) ceases to have effect.

(4) Attempts to send intimation to an appropriate person under section 30(1) must continue to be made until—

(a) an appropriate person is contacted and agrees to attend, within a reasonable time, at the police station or other place where the person in custody is being held, or

(b) if a constable believes that the person in custody is 16 or 17 years of age, the person requests that (for the time being) no further attempt to send intimation is made.

(5) In subsection (4), “an appropriate person” means—

(a) if a constable believes that the person in custody is under 16 years of age, a person the constable considers appropriate having regard to the views of the person in custody,

(b) if a constable believes that the person in custody is 16 or 17 years of age, an adult who is named by the person in custody and to whom a constable is willing to send intimation without a delay by virtue of section 30(5)(a) or (b).

(6) The reference in subsection (3)(a) to its not being possible to contact a person within a reasonable time includes the case where, by virtue of section 30(5)(a) or (b), a constable delays sending intimation to the person.
32  Right of under 18s to have access to other person

(1) Access to a person in police custody who a constable believes is under 16 years of age must be permitted to—
   (a) a parent of the person,
   (b) where a parent is not available, a person sent intimation under section 30 in respect of the person in custody.

(2) Access to a person in police custody who a constable believes is 16 or 17 years of age must be permitted to a person sent intimation under section 30 in respect of the person in custody where the person in custody wishes to have access to the person sent intimation.

(2A) Access to a person in custody under subsection (1) or (2) need not be permitted to more than one person at the same time.

(3) In exceptional circumstances, access under subsection (1) or (2) may be refused or restricted so far as the refusal or restriction is necessary—
   (a) in the interests of—
      (i) the investigation or prevention of crime, or
      (ii) the apprehension of offenders, or
   (b) for the wellbeing of the person in custody.

(3A) A decision to refuse or restrict access to a person in custody under subsection (1) or (2) may be taken only by a constable who—
   (a) is of the rank of sergeant or above, and
   (b) has not been involved in the investigation in connection with which the person is in custody.

(4) In this section, “parent” includes guardian and any person who has the care of the person in custody.

32A  Social work involvement in relation to under 18s

(1) Intimation of the fact that a person is in police custody and the place where the person is in custody must be sent to a local authority as soon as reasonably practicable if—
   (a) a constable believes that the person may be subject to a supervision order, or
   (b) by virtue of subsection (5)(c) of section 30, a constable has delayed sending intimation in respect of the person under subsection (1) of that section.

(2) A local authority sent intimation under subsection (1) may arrange for someone to visit the person in custody if—
   (a) the person is subject to a supervision order, or
   (b) the local authority—
      (i) believes the person to be under 16 years of age, and
      (ii) has grounds to believe that its arranging someone to visit the person would best safeguard and promote the person’s wellbeing (having regard to the effect of subsection (4)(a)).
(3) Before undertaking to arrange someone to visit the person in custody under subsection (2), the local authority must be satisfied that anyone it arranges to visit the person in custody will be able to make the visit within a reasonable time.

(4) Where a local authority arranges for someone to visit the person in custody under subsection (2)—

(a) sections 30 and 32 cease to have effect, and

(b) the person who the local authority has arranged to visit the person in custody must be permitted access to the person in custody.

(5) In exceptional circumstances, access under subsection (4)(b) may be refused or restricted so far as the refusal or restriction is necessary—

(a) in the interests of—

(i) the investigation or prevention of crime, or

(ii) the apprehension of offenders, or

(b) for the wellbeing of the person in custody.

(5A) A decision to refuse or restrict access to a person in custody under subsection (4)(b) may be taken only by a constable who—

(a) is of the rank of sergeant or above, and

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

(6) Where a local authority sent intimation under subsection (1) confirms that the person in custody is—

(a) over 16 years of age, and

(b) subject to a supervision order,

sections 30 to 32 are to be applied in respect of the person as if a constable believes the person to be under 16 years of age.

(7) Subsection (8) applies where a local authority might have arranged for someone to visit a person in custody under subsection (2) but—

(a) chose not to do so, or

(b) was precluded from doing so by subsection (3).

(8) The local authority may—

(a) advise a constable that the person to whom intimation is to be sent by virtue of section 30(3) should not be sent intimation if the local authority has grounds to believe that sending intimation to that person may be detrimental to the wellbeing of the person in custody, and

(b) give advice as to who might be an appropriate person to a constable considering that matter under section 31(5) (and the constable must have regard to any such advice).

(9) In this section, “supervision order” means compulsory supervision order, or interim compulsory supervision order, made under the Children’s Hearings (Scotland) Act 2011.
Vulnerable persons

33 **Support for vulnerable persons**

(1) Subsection (2) applies where—

(a) a person is in police custody,

(b) a constable believes that the person is 16 years of age or over, and

(c) owing to mental disorder, the person appears to the constable to be unable to—

(i) understand sufficiently what is happening, or

(ii) communicate effectively with the police.

(2) With a view to facilitating the provision of support of the sort mentioned in subsection (3) to the person as soon as reasonably practicable, the constable must ensure that intimation of the matters mentioned in subsection (4) is sent to a person who the constable considers is suitable to provide the support.

(3) That is, support to—

(a) help the person in custody to understand what is happening, and

(b) facilitate effective communication between the person and the police.

(4) Those matters are—

(a) the place where the person is in custody, and

(b) that support of the sort mentioned in subsection (3) is, in the view of the constable, required by the person.

(5) In this section—

(a) “mental disorder” has the meaning given by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003,

(b) the references to the police are to any—

(i) constable, or

(ii) person appointed as a member of police staff under section 26(1) of the Police and Fire Reform (Scotland) Act 2012.

Intimation and access to a solicitor

35 **Right to have intimation sent to solicitor**

(1) A person who is in police custody has the right to have intimation sent to a solicitor of any or all of the following—

(a) the fact that the person is in custody,

(b) the place where the person is in custody,

(c) that the solicitor’s professional assistance is required by the person,

(d) if the person has been officially accused of an offence—

(i) whether the person is to be released from custody, and
(ii) where the person is not to be released, the court before which the person is to be brought in accordance with section 18(2) and the date on which the person is to be brought before that court.

(2) Where the person requests that intimation be sent under subsection (1), the intimation must be sent as soon as reasonably practicable.

36 Right to consultation with solicitor

(1) A person who is in police custody has the right to have a private consultation with a solicitor at any time.

(2) In exceptional circumstances, the person’s exercise of the right under subsection (1) may be delayed so far as that is necessary in the interests of—

(a) the investigation or the prevention of crime, or

(b) the apprehension of offenders.

(2A) A decision to delay the person’s exercise of the right under subsection (1) may be taken only by a constable who—

(a) is of the rank of sergeant or above, and

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

(3) In subsection (1), “consultation” means consultation by such method as may be appropriate in the circumstances and includes (for example) consultation by telephone.

Chapter 6

Police powers and duties

37 Use of reasonable force

A constable may use reasonable force—

(a) to effect an arrest,

(b) when taking a person who is in police custody to any place.

38 Common law power of entry

Nothing in this Part affects any rule of law concerning the powers of a constable to enter any premises for any purpose.

39 Common law power of search etc.

(1) Nothing in this Part affects any rule of law by virtue of which a constable may exercise a power of the type described in subsection (2).

(2) The type of power is a power that a constable may exercise in relation to a person by reason of the person’s having been arrested and charged with an offence by a constable.

(3) Powers of the type described in subsection (2) include the power to—

(a) search the person,
(b) seize any item in the person’s possession,
(d) cause the person to participate in an identification procedure.

40  **Power of search etc. on arrest**

(1) A constable may exercise in relation to a person to whom subsection (2) applies any power of the type described in section 39(2) which the constable would be able to exercise by virtue of a rule of law if the person had been charged with the relevant offence by a constable.

(2) This subsection applies to a person who—

(a) is in police custody having been arrested without a warrant, and
(b) has not, since being arrested, been charged with an offence by a constable.

(3) In subsection (1), “the relevant offence” means the offence in connection with which the person is in police custody.

**Care of drunken persons**

40A  **Taking drunk persons to designated place**

(1) Where—

(a) a person is liable to be arrested in respect of an offence by a constable without a warrant, and
(b) the constable is of the opinion that the person is drunk,

the constable may take the person to a designated place (and do so instead of arresting the person).

(2) Nothing done under subsection (1)—

(a) makes a person liable to be held unwillingly at a designated place, or
(b) prevents a constable from arresting the person in respect of the offence referred to in that subsection.

(3) In this section, “designated place” is any place designated by the Scottish Ministers for the purpose of this section as a place suitable for the care of drunken persons.

**Duties of police**

41  **Duty not to detain unnecessarily**

A constable must take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody.

42  **Duty to consider child’s wellbeing**

(1) Subsection (2) applies when a constable is deciding whether to—

(a) arrest a child,
(b) hold a child in police custody,
(c) interview a child about an offence which the constable has reasonable grounds to suspect the child of committing, or

(d) charge a child with committing an offence.

(2) In taking the decision, the constable must treat the need to safeguard and promote the wellbeing of the child as a primary consideration.

(3) For the purposes of this section, a child is a person who is under 18 years of age.

42A Duties in relation to children in custody

(1) A child who is in police custody at a police station is, so far as practicable, to be prevented from associating with any adult who is officially accused of committing an offence other than an adult to whom subsection (2) applies.

(2) This subsection applies to an adult if a constable believes that it may be detrimental to the wellbeing of the child mentioned in subsection (1) to prevent the child and adult from associating with one another.

(3) For the purposes of this section—

“child” means person who is under 18 years of age,

“adult” means person who is 18 years of age or over.

42B Duty to inform Principal Reporter if child not being prosecuted

(1) Subsections (2) and (3) apply if—

(a) a person is being kept in a place of safety in accordance with section 18A(2) when it is decided not to prosecute the person for any relevant offence, and

(b) a constable has reasonable grounds for suspecting that the person has committed a relevant offence.

(2) The Principal Reporter must be informed, as soon as reasonably practicable, that the person is being kept in a place of safety under subsection (3).

(3) The person must be kept in a place of safety under this subsection until the Principal Reporter makes a direction under section 65(2) of the Children’s Hearings (Scotland) Act 2011.

(4) An offence is a “relevant offence” for the purpose of subsection (1) if—

(a) it is the offence with which the person was officially accused, leading to the person being kept in the place of safety in accordance with section 18A(2), or

(b) it is an offence arising from the same circumstances as the offence mentioned in paragraph (a).

(5) In this section, “place of safety” has the meaning given in section 202(1) of the Children’s Hearings (Scotland) Act 2011.
CHAPTER 8

GENERAL

Common law and enactments

50 Abolition of pre-enactment powers of arrest

A constable has no power to arrest a person without a warrant in respect of an offence that has been or is being committed other than—

(a) the power of arrest conferred by section 1,
(b) the power of arrest conferred by section 41(1) of the Terrorism Act 2000.

51 Abolition of requirement for constable to charge

Any rule of law that requires a constable to charge a person with an offence in particular circumstances is abolished.

52 Consequential modification

Schedule 1 contains repeals and other provisions consequential on this Part.

Code of practice about investigative functions

52A Code of practice about investigative functions

(1) The Lord Advocate must issue a code of practice on—

(a) the questioning, and recording of questioning, of persons suspected of committing offences, and
(b) the conduct of identification procedures involving such persons.

(2) The Lord Advocate—

(a) must keep the code of practice issued under subsection (1) under review,
(b) may from time to time revise the code of practice.

(3) The code of practice is to apply to the functions exercisable by or on behalf of—

(a) the Police Service of Scotland,
(b) such other bodies as are specified in the code (being bodies responsible for reporting offences to the procurator fiscal).

(4) Before issuing the code of practice, the Lord Advocate must consult publicly on a draft of the code.

(5) When preparing a draft of the code of practice for public consultation, the Lord Advocate must consult—

(a) the Lord Justice General,
(b) the Faculty of Advocates,
(c) the Law Society of Scotland,
(d) the Scottish Police Authority,
(e) the chief constable of the Police Service of Scotland,
(f) the Scottish Human Rights Commission,
(g) the Commissioner for Children and Young People in Scotland, and
(h) such other persons as the Lord Advocate considers appropriate.

(6) The Lord Advocate must lay before the Scottish Parliament a copy of the code of practice issued under this section.

(7) A court or tribunal in civil or criminal proceedings must take the code of practice into account when determining any question arising in the proceedings to which the code is relevant.

(8) Breach of the code of practice does not of itself give rise to grounds for any legal claim whatsoever.

(9) Subsections (3) to (8) apply to a revised code of practice under subsection (2)(b) as they apply to the code of practice issued under subsection (1).

Disapplication of Part

52B Disapplication in relation to service offences

(1) References in this Part to an offence do not include a service offence.

(2) Nothing in this Part applies in relation to a person who is arrested in respect of a service offence.

(3) In this section, “service offence” has the meaning given by section 50(2) of the Armed Forces Act 2006.

53 Disapplication in relation to terrorism offences

(1) Nothing in this Part applies in relation to a person who is arrested under section 41(1) of the Terrorism Act 2000.

(2) Subsection (1) is subject to paragraph 18 of Schedule 8 to the Terrorism Act 2000.

Powers to modify Part

53A Further provision about application of Part

(1) The Scottish Ministers may by regulations modify this Part to provide that some or all of it—

(a) applies in relation to persons to whom it would otherwise not apply because of—

(i) section 52B, or

(ii) section 53,

(b) does not apply in relation to persons arrested otherwise than under section 1.

(2) The Scottish Ministers may by regulations make such modifications to this Part as seem to them necessary or expedient in relation to its application to persons mentioned in subsection (1).

(3) Regulations under this section may make different provision for different purposes.

(4) Regulations under this section are subject to the affirmative procedure.
53B Further provision about vulnerable persons

(1) The Scottish Ministers may by regulations—
   (a) amend subsections (2)(b) and (6) of section 25,
   (b) amend subsections (1)(c), (3) and (5) of section 33,
   (c) specify descriptions of persons who may for the purposes of subsection (2) of section 33 be considered suitable to provide support of the sort mentioned in subsection (3) of that section (including as to training, qualifications and experience).

(2) Regulations under subsection (1) are subject to the affirmative procedure.

Interpretation of Part

54 Meaning of constable
In this Part, “constable” has the meaning given by section 99(1) of the Police and Fire Reform (Scotland) Act 2012.

55 Meaning of officially accused
For the purposes of this Part, a person is officially accused of committing an offence if—
   (a) a constable charges the person with the offence, or
   (b) the prosecutor initiates proceedings against the person in respect of the offence.

56 Meaning of police custody

(1) For the purposes of this Part, a person is in police custody from the time the person is arrested by a constable until any one of the events mentioned in subsection (2) occurs.

(2) The events are—
   (a) the person is released from custody,
   (b) the person is brought before a court in accordance with section 18(2),
   (ba) the person is brought before a court under section 28(2) or (3) of the 1995 Act,
   (c) the Principal Reporter makes a direction under section 65(2)(b) of the Children’s Hearings (Scotland) Act 2011 that the person continue to be kept in a place of safety.
PART A1

POLICE PROCEDURES

CHAPTER 1

SEARCH OF PERSON NOT IN POLICE CUSTODY

5

Lawfulness of search by constable

A1 Limitation on what enables search

(1) This section applies in relation to a person who is not in police custody.

(2) It is unlawful for a constable to search the person otherwise than—

(a) in accordance with a power of search conferred in express terms by an enactment,

(b) under the authority of a warrant expressly conferring a power of search.

B1 Cases involving removal of person

(1) A person who is not in police custody may be searched by a constable while the person is to be, or is being, taken to or from any place—

(a) by virtue of any enactment, warrant or court order requiring or permitting the constable to do so, or

(b) in circumstances in which the constable believes that it is necessary to do so with respect to the care or protection of the person.

(2) A search under this section is to be carried out for the purpose of ensuring that the person is not in, or does not remain in, possession of any item or substance that could cause harm to the person or someone else.

(3) Anything seized by a constable in the course of a search carried out under this section may be retained by the constable.

B2 Public safety at premises or events

(1) A person who is not in police custody may be searched by a constable if—

(a) the person—

(i) is seeking to enter, or has entered, relevant premises, or

(ii) is seeking to attend, or is attending, a relevant event, and

(b) the further criteria are met.

(2) Premises are or an event is relevant if—

(a) the premises may be entered, or the event may be attended, by members of the public (including where dependent on possession of a ticket or on payment of a charge), and

(b) the entry or the attendance is controlled, at the time of the entry or the attendance, by or on behalf of the occupier of the premises or the organiser of the event.

(3) The further criteria to be met are that—
C1 Duty to consider child’s best interests

(1) Subsection (2) applies when a constable is deciding whether to search a child who is not in police custody.

(2) In taking the decision, the constable must treat the need to safeguard and promote the wellbeing of the child as a primary consideration.

(3) For the purposes of this section, a child is a person who is under 18 years of age.

Miscellaneous and definitions

C2 Publication of information by police

(1) The Police Service of Scotland must ensure that, as soon as practicable after the end of each reporting year, information is published on how many times during the reporting year a search was carried out by a constable—

(a) of a person not in police custody, and

(b) otherwise than under the authority of a warrant expressly conferring a power of search.

(2) So far as practicable, the information is to disclose (in addition)—

(a) how many persons were searched on two or more occasions,

(b) the age and gender, and the ethnic and national origin, of the persons searched,

(c) the proportion of searches that resulted in—

(i) something being seized by a constable,

(ii) a case being reported to the procurator fiscal,

(d) the number of complaints made to the Police Service of Scotland about the carrying out of searches (or the manner in which they were carried out).

(3) In this section, “reporting year” means a yearly period ending on 31 March.

D1 Provisions about possession of alcohol

(1) The Scottish Ministers may by regulations amend section 61 (confiscation of alcohol from persons under 18) of the Crime and Punishment (Scotland) Act 1997 so as to confer on a constable a power, exercisable in addition to the power in subsection (1) or (2) of that section—
(a) to search a person for alcoholic liquor,
(b) to dispose of anything found in the person’s possession that the constable believes to be such liquor.

(2) Prior to laying before the Scottish Parliament a draft of an instrument containing regulations under this section, the Scottish Ministers must—
(a) consult publicly on the regulations that they are proposing to make,
(b) send a copy of the proposed regulations to—
   (i) the Chief Constable of the Police Service of Scotland,
   (ii) the Scottish Human Rights Commission,
   (iii) the Commissioner for Children and Young People in Scotland, and
   (iv) such other persons as the Scottish Ministers consider appropriate.

(2A) When laying before the Scottish Parliament a draft of an instrument containing regulations under this section, the Scottish Ministers must also so lay a statement—
(a) giving reasons for wishing to make the regulations as currently framed (and confirming whether the regulations will amend the relevant enactment in the same way as shown in the proposed regulations),
(b) summarising—
   (i) the responses received by them to the public consultation on the proposed regulations,
   (ii) the representations made to them by the persons to whom a copy of the proposed regulations was sent.

(3) Regulations under this section are subject to the affirmative procedure.

E1 **Matters as to effect of sections A1, B1 and D1**

(1) The day appointed for the coming into force of sections A1 and B1 is to be the same as the day from which a code of practice required by section G1(1) has effect by virtue of the first regulations made under section K1.

(2) If no regulations under section D1 are made before the end of the 2 years beginning with the day from which a code of practice required by section G1(1) has effect by virtue of the first regulations made under section K1, section D1 is to be regarded as repealed at the end of that period.

F1 **Meaning of constable etc.**

In this Chapter—

“constable” has the meaning given by section 99(1) of the Police and Fire Reform (Scotland) Act 2012,

“police custody” has the same meaning as given for the purposes of Part 1 (see section 56).
CHAPTER 2

CODE OF PRACTICE

Making and status of code

G1 Contents of code of practice

1 The Scottish Ministers must make a code of practice about the carrying out of a search of a person who is not in police custody.

1A A code of practice must set out (in particular)—
   (a) the circumstances in which a search of such a person may be carried out,
   (b) the procedure to be followed in carrying out such a search,
   (c) in relation to such a search—
      (i) the record to be kept,
      (ii) the right of someone to receive a copy of the record.

2 A code of practice is to apply to the functions exercisable by a constable.

3 In this section—
   “constable” has the meaning given by section 99(1) of the Police and Fire Reform (Scotland) Act 2012,
   “police custody” has the same meaning as given for the purposes of Part 1 (see section 56).

4 In this Chapter, a reference to a code of practice means one required by subsection (1) (but see also section H1(4)).

H1 Review of code of practice

1 The Scottish Ministers may revise a code of practice in light of a review conducted under subsection (2).

2 The Scottish Ministers must conduct a review of a code of practice as follows—
   (a) a review is to begin no later than 2 years after the code comes into effect,
   (b) subsequently, a review is to begin no later than 4 years after—
      (i) if the code is revised in light of the previous review under this subsection,
      the coming into effect of the revised code, or
      (ii) otherwise, the completion of the previous review under this subsection.

2A So far as practicable, a review conducted under subsection (2) must be completed within 6 months of the day on which the review begins.

3 In deciding when to conduct a review in accordance with subsection (2), the Scottish Ministers must have regard to representations put to them on the matter by—
   (a) the Scottish Police Authority,
   (b) the Chief Constable of the Police Service of Scotland, or
   (c) Her Majesty’s Inspectors of Constabulary in Scotland.

4 For the purposes of—
(a) section G1(2) and this section (except subsection (2)(a)), and
(b) sections I1, J1 (except subsection (3)) and K1 (except subsection (2A)),
a reference to a code of practice includes a revised code as allowed by subsection (1).

I

Legal status of code of practice

(1) A court or tribunal in civil or criminal proceedings must take a code of practice into account when determining any question arising in the proceedings to which the code is relevant.

(2) Breach of a code of practice does not of itself give rise to grounds for any legal claim whatsoever.

J

Consultation on code of practice

(1) Prior to making a code of practice, the Scottish Ministers must consult publicly on a draft of the code.

(2) When preparing a draft of a code of practice for public consultation, the Scottish Ministers must consult—

(a) the Lord Justice General,
(b) the Faculty of Advocates,
(c) the Law Society of Scotland,
(d) the Scottish Police Authority,
(e) the Chief Constable of the Police Service of Scotland,
(f) the Police Investigations and Review Commissioner,
(g) the Commissioner for Children and Young People in Scotland, and
(h) such other persons as the Scottish Ministers consider appropriate.

(3) Subsection (1) or (2) is complied with in relation to a code of practice having (or to have) effect for the first time even if the consultation has been initiated before the day on which this section comes into force.

K

Bringing code of practice into effect

(1) A code of practice has no effect until the day appointed for the code by regulations made by the Scottish Ministers.

(2) When laying before the Scottish Parliament a draft of an instrument containing regulations bringing a code of practice into effect, the Scottish Ministers must also so lay a copy of the code.

(2A) No later than at the end of the 12 months beginning with the day on which this section comes into force, there must be so laid a draft of an instrument containing regulations bringing a code of practice into effect.

(3) Regulations under this section are subject to the affirmative procedure.
PART 3
SOLEMN PROCEDURE

63 Proceedings on petition

(1) In section 35 (judicial examination) of the 1995 Act, after subsection (6) there is inserted—

“(6A) In proceedings before the sheriff in examination or further examination, the accused is not to be given an opportunity to make a declaration in respect of any charge.”.

(2) The following provisions of the 1995 Act are repealed—

(a) in section 35, subsections (3), (4) and (5),
(b) sections 36, 37 and 38,
(c) in section 68, subsection (1),
(d) in section 79, paragraph (b)(iii) of subsection (2),
(e) section 278.

65 Pre-trial time limits

(1) The 1995 Act is amended as follows.

(2) In section 65 (prevention of delay in trials)—

(a) in subsection (1), after paragraph (a) there is inserted—

“(aa) where an indictment has been served on the accused in respect of the sheriff court, a first diet is commenced within the period of 11 months;”,

(b) in subsection (1A), after the word “applies)” there is inserted “, the first diet (where subsection (1)(aa) above applies),”,

(c) in subsection (4)(b), for the words “110 days” there is substituted—

“(i) 110 days, unless a first diet in respect of the case is commenced within that period, which failing he shall be entitled to be admitted to bail; or

(ii) 140 days”,

(d) in subsection (9)—

(i) the word “and” immediately following paragraph (b) is repealed,

(ii) after paragraph (b) there is inserted—

“(ba) a first diet shall be taken to commence when it is called;”.

(3) In section 66 (service and lodging of indictment, etc.), for sub-paragraphs (i) and (ii) of paragraph (a) of subsection (6) there is substituted “at a first diet not less than 29 clear days after the service of the indictment,”.

(4) In section 72C (procedure where preliminary hearing does not proceed), for paragraph (b) of subsection (4) there is substituted—

“(b) where the charge is one that can lawfully be tried in the sheriff court, at a first diet in that court not less than 29 clear days after the service of the notice.”.
Duty of parties to communicate

(1) The 1995 Act is amended as follows.

(2) In section 71 (first diet), after subsection (1) there is inserted—

“(1ZA) If a written record has been lodged in accordance with section 71C, the court must have regard to the written record when ascertaining the state of preparation of the parties.”.

(3) Before section 72 there is inserted—

“71C Written record of state of preparation: sheriff court

(1) Subsection (2) applies where—

(a) the accused is indicted to the sheriff court, and

(b) a solicitor—

(i) has notified the court under section 72F(1) that the solicitor has been engaged by the accused for the purposes of conducting the accused’s defence, and

(ii) has not subsequently been dismissed by the accused or withdrawn.

(2) The prosecutor and the accused’s legal representative must, within the period described in subsection (3), communicate with each other and jointly prepare a written record of their state of preparation with respect to their cases (referred to in this section as “the written record”).

(3) The period referred to in subsection (2) begins on the day the accused is served with an indictment and expires at the end of the day falling 14 days later.

(6) The written record must—

(a) be in such form, or as nearly as may be in such form,

(b) contain such information, and

(c) be lodged in such manner,

as may be prescribed by act of adjournal.

(7) The written record must state the manner in which the communication required by subsection (2) was conducted (for example, by telephone, email or a meeting in person).

(8) In subsection (2), “the accused’s legal representative” means—

(a) the solicitor referred to in subsection (1), or

(b) where the solicitor has instructed counsel for the purposes of the conduct of the accused’s case, either the solicitor or that counsel, or both of them.

(9) In subsection (8)(b), “counsel” includes a solicitor who has a right of audience in the High Court of Justiciary under section 25A of the Solicitors (Scotland) Act 1980.”.

(4) In section 75 (computation of certain periods), after the words “67(3),” there is inserted “71C(3)”. 
First diets

(1) The 1995 Act is amended as follows.

(2) In section 66 (service and lodging of indictment, etc.)—

(a) after subsection (6AA) there is inserted—

“(6AB) A notice affixed under subsection (4)(b) or served under subsection (6) where the indictment is in respect of the sheriff court, must contain intimation to the accused that the first diet may proceed and a trial diet may be appointed in the accused’s absence.”,

(b) in subsection (6B), for the words “or (6AA)” there is substituted “, (6AA) or (6AB)”.

(3) In section 71 (first diet)—

(a) in subsection (1), the words from “whether” to “particular” are repealed,

(b) in subsection (5), after the word “proceed” there is inserted “, and a trial diet may be appointed,”,

(c) in subsection (6), for the words from the beginning to “required” there is substituted “Where the accused appears at the first diet, the accused is to be required at that diet”,

(d) subsection (7) is repealed,

(e) in subsection (9), after the word “section” there is inserted “and section 71B”.

(4) After section 71 there is inserted—

“71B First diet: appointment of trial diet

(1) At a first diet, unless a plea of guilty is tendered and accepted, the court must—

(a) after complying with section 71, and

(b) subject to subsections (3) to (7),

appoint a trial diet.

(2) Where a trial diet is appointed at a first diet, the accused must appear at the trial diet and answer the indictment.

(3) In appointing a trial diet under subsection (1), in any case in which the 12 month period applies (whether or not the 140 day period also applies in the case)—

(a) if the court considers that the case would be likely to be ready to proceed to trial within that period, it must, subject to subsections (5) to (7), appoint a trial diet for a date within that period, or

(b) if the court considers that the case would not be likely to be so ready, it must give the prosecutor an opportunity to make an application to the court under section 65(3) for an extension of the 12 month period.

(4) Where paragraph (b) of subsection (3) applies—

(a) if such an application as is mentioned in that paragraph is made and granted, the court must, subject to subsections (5) to (7), appoint a trial diet for a date within the 12 month period as extended, or
(b) if no such application is made or if one is made but is refused by the court—

(i) the court may desert the first diet simpliciter or pro loco et tempore, and

(ii) where the accused is committed until liberated in due course of law, the accused must be liberated forthwith.

(5) Subsection (6) applies in any case in which—

(a) the 140 day period as well as the 12 month period applies, and

(b) the court is required, by virtue of subsection (3)(a) or (4)(a) to appoint a trial diet within the 12 month period.

(6) In such a case—

(a) if the court considers that the case would be likely to be ready to proceed to trial within the 140 day period, it must appoint a trial diet for a date within that period as well as within the 12 month period, or

(b) if the court considers that the case would not be likely to be so ready, it must give the prosecutor an opportunity to make an application under section 65(5) for an extension of the 140 day period.

(7) Where paragraph (b) of subsection (6) applies—

(a) if such an application as is mentioned in that paragraph is made and granted, the court must appoint a trial diet for a date within the 140 day period as extended as well as within the 12 month period,

(b) if no such application is made or if one is made but is refused by the court—

(i) the court must proceed under subsection (3)(a) or (as the case may be) (4)(a) to appoint a trial diet for a date within the 12 month period, and

(ii) the accused is then entitled to be admitted to bail.

(8) Where an accused is, by virtue of subsection (7)(b)(ii), entitled to be admitted to bail, the court must, before admitting the accused to bail, give the prosecutor an opportunity to be heard.

(9) On appointing a trial diet under this section in a case where the accused has been admitted to bail (otherwise than by virtue of subsection (7)(b)(ii)), the court, after giving the parties an opportunity to be heard—

(a) must review the conditions imposed on the accused's bail, and

(b) having done so, may, if it considers it appropriate to do so, fix bail on different conditions.

(10) In this section—

“the 12 month period” means the period specified in subsection (1)(b) of section 65 and, in any case in which that period has been extended under subsection (3) of that section, includes that period as so extended,
Part 3—Solemn procedure

“the 140 day period” means the period specified in subsection (4)(b)(ii) of section 65 and, in any case in which that period has been extended under subsection (5) of that section, includes that period as so extended.”.

(5) In subsection (3) of section 76 (procedure where accused desires to plead guilty), for the words from “or, where” to “Court,” there is substituted “, the first diet or (as the case may be)”.

(6) After section 83A there is inserted—

“83B Continuation of trial diet in the sheriff court

(1) In the sheriff court a trial diet and, if it is adjourned, the adjourned diet, may, without having been commenced, be continued from sitting day to sitting day—

(a) by minute, in such form as may be prescribed by act of adjournal, signed by the sheriff clerk,

(b) up to such maximum number of sitting days after the day originally appointed for the trial diet as may be so prescribed.

(2) The indictment falls if a trial diet, or adjourned diet, is not commenced by the end of the last sitting day to which it may be continued by virtue of subsection (1).

(3) For the purposes of this section, a trial diet or adjourned trial diet is to be taken to commence when it is called.

(4) In this section, “sitting day” means any day on which the court is sitting but does not include any Saturday or Sunday or any day which is a court holiday.”.

(7) The italic heading immediately preceding section 83A becomes “Continuation of trial diet”.

68 Preliminary hearings

In section 72A (preliminary hearing: appointment of trial diet) of the 1995 Act—

(a) in subsection (1), for the words from the beginning to “section” there is substituted “In any case in which subsection (6) of section 72”,

(b) subsection (1A) is repealed.

69 Plea of guilty

In the 1995 Act—

(a) in section 70 (proceedings against organisations), subsection (7) is repealed,

(b) in subsection (1) of section 77 (plea of guilty), the words from “and, subject” to the end are repealed.
PART 4

SENTENCING

Maximum term for weapons offences

71 Maximum term for weapons offences

5 (1) The Criminal Law (Consolidation) (Scotland) Act 1995 is amended as follows.

(2) In subsection (1)(b) of section 47 (prohibition of the carrying of offensive weapons), for the word “four” there is substituted “5”.

(3) In subsection (1)(b) of section 49 (offence of having in public place article with blade or point), for the word “four” there is substituted “5”.

10 (4) In subsection (5) of section 49A (offence of having article with blade or point (or offensive weapon) on school premises)—

(a) in paragraph (a)(ii), for the word “four” there is substituted “5”;

(b) in paragraph (b)(ii), for the word “four” there is substituted “5”.

(5) In subsection (6)(b) of section 49C (offence of having offensive weapon etc. in prison), for the word “4” there is substituted “5”.

Prisoners on early release

72 Sentencing under the 1995 Act

After section 200 of the 1995 Act there is inserted—

“200A Sentencing prisoners on early release

20 (1) Before sentencing or otherwise dealing with a person who has been found by the court to have committed an offence punishable with imprisonment (other than an offence in respect of which life imprisonment is mandatory), the court must so far as is reasonably practicable ascertain whether the person was on early release at the time the offence was committed.

25 (2) Where the court ascertains that the person was on early release at the time the offence was committed, the court must consider making an order, or as the case may be a reference, under section 16(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

30 (3) For the purposes of this section a person is on early release if, by virtue of one of the following enactments, the person is not in custody—

(a) Part I of the Prisoners and Criminal Proceedings (Scotland) Act 1993,

(b) Part II of the Criminal Justice Act 1991, or

(c) Part 12 of the Criminal Justice Act 2003.”.

73 Sentencing under the 1993 Act

35 (1) Section 16 (commission of offence by released prisoner) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is amended as follows.

(2) In subsection (1), for the words “or Part II of the Criminal Justice Act 1991” there is substituted “, Part II of the Criminal Justice Act 1991 or Part 12 of the Criminal Justice Act 2003”.

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(3) In subsection (2)—
(a) in paragraph (a), for the words from “other” to “below” there is substituted “to which subsection (2A) does not apply”,
(b) in paragraph (b), for the words from “where” to “subsection (1)(a)” there is substituted “to which subsection (2A) applies”.

(4) After subsection (2) there is inserted—
“(2A) This subsection applies to a case if—
(a) the court mentioned in subsection (1)(b) is inferior to the court which imposed the original sentence, and
(b) the whole of the period described in subsection (2)(a) exceeds—
(i) if the court mentioned in subsection (1)(b) is a justice of the peace court (however constituted), 60 days,
(ii) if the court is the sheriff court sitting in summary proceedings, 12 months,
(iii) if the court is the sheriff court sitting in solemn proceedings, 5 years.”.

PART 5
APPEALS AND SCCRC

APPEALS
(5) In subsection (3), for the words from the beginning to “it” there is substituted “Where this subsection applies, the court of first instance”.

75 Preliminary diets in solemn cases

In section 74 (appeals in connection with preliminary diets) of the 1995 Act—

(a) in subsection (1), for the words from “to—” to “motu)” there is substituted “to any right of appeal under section 106 or 108 a party may,”,

(b) after subsection (2) there is inserted—

“(2A) An appeal under subsection (1) may be taken—

(a) in the case of a decision to dismiss the indictment or any part of it, by the prosecutor without the leave of the court,

(b) in any other case, only with the leave of the court of first instance (granted on the motion of a party or ex proprio motu).”.

76 Extending certain time limits: summary

(1) Section 181 (stated case: directions by High Court) of the 1995 Act is amended as follows.

(2) After subsection (1) there is inserted—

“(1A) Where an application for a direction under subsection (1)—

(a) is made by the person convicted, and

(b) relates to the requirements of section 176(1),

the Sheriff Appeal Court may make a direction only if it is satisfied that doing so is justified by exceptional circumstances.

(1B) In considering whether there are exceptional circumstances for the purpose of subsection (1A), the Sheriff Appeal Court must have regard to—

(a) the length of time that has elapsed between the expiry of the period mentioned in section 176(1)(a) and the making of the application,

(b) the reasons stated in accordance with subsection (2A)(a)(i),

(c) the proposed grounds of appeal.”.

(3) Subsection (2C) is repealed.

(4) In paragraph (a) of subsection (3), the words from “(unless” to the end are repealed.

(5) At the end of the section there is inserted—

“(5) If the Sheriff Appeal Court makes a direction under subsection (1) it must—

(a) give reasons for the decision in writing, and

(b) give the reasons in ordinary language.”.

77 Extending certain time limits: solemn

(1) In section 105 (appeal against refusal of application) of the 1995 Act, after subsection (3) there is inserted—
“(3A) Subsection (3) does not entitle an applicant to be present at the hearing and determination of an application under section 111(2) unless the High Court has made a direction under section 111(4)(b).”.

(2) Section 111 (provisions supplementary to sections 109 and 110) of the 1995 Act is amended as follows.

(3) After subsection (2) there is inserted—

“(2ZA) Where an application under subsection (2) is received after the period to which it relates has expired, the High Court may extend the period only if it is satisfied that doing so is justified by exceptional circumstances.

(2ZB) In considering whether there are exceptional circumstances for the purpose of subsection (2ZA), the High Court must have regard to—

(a) the length of time that has elapsed between the expiry of the period and the making of the application,

(b) the reasons stated in accordance with subsection (2A)(a)(i),

(c) the proposed grounds of appeal.”.

(4) In subsection (2A)—

(a) the words “seeking extension of the period mentioned in section 109(1) of this Act” are repealed,

(b) in paragraph (a)(i)—

(i) after “failed” there is inserted “, or expects to fail,”,

(ii) the words “in section 109(1)” are repealed.

(5) Subsection (2C) is repealed.

(6) At the end of the section there is inserted—

“(4) An application under subsection (2) is to be dealt with by the High Court—

(a) in chambers, and

(b) unless the Court directs otherwise, without the parties being present.

(5) If the High Court extends a period under subsection (2) it must—

(a) give reasons for the decision in writing, and

(b) give the reasons in ordinary language.”.

78 Certain lateness not excusable

In section 300A (power of court to excuse procedural irregularities) of the 1995 Act, after subsection (7) there is inserted—

“(7A) Subsection (1) does not authorise a court to excuse a failure to do any of the following things timeously—

(a) lodge written intimation of intention to appeal in accordance with section 109(1),

(b) lodge a note of appeal in accordance with section 110(1)(a),

(c) make an application for a stated case under section 176(1),

(d) lodge a note of appeal in accordance with section 186(2)(a).”.
Advocation in solemn proceedings

After section 130 of the 1995 Act there is inserted—

“130A Bill of advocation not competent in respect of certain decisions

It is not competent to bring under review of the High Court by way of bill of advocation a decision taken at a first diet or a preliminary hearing.”.

Advocation in summary proceedings

After section 191A of the 1995 Act there is inserted—

“191B Bill of advocation not competent in respect of certain decisions

It is not competent to bring under review of the Sheriff Appeal Court by way of bill of advocation a decision of the court of first instance that relates to such objection or denial as is mentioned in section 144(4).”.

Finality of appeal proceedings

In subsection (2) of section 124 (finality of proceedings) of the 1995 Act—

(a) for the words “sections 288ZB and 288AA” there is substituted “section 288AA”,

(b) the words “a reference under section 288ZB or” are repealed.

Courts reform: spent provisions

In schedule 3 to the Courts Reform (Scotland) Act 2014, the following provisions are repealed—

(a) in paragraph 10, sub-paragraphs (4), (5) and (8),

(b) paragraph 22,

(c) paragraph 25.

References by SCCRC

(1) The 1995 Act is amended as follows.

(2) In section 194B in subsection (1), the words “, subject to section 194DA of this Act,” are repealed.

(3) The title of section 194B becomes “References by the Commission”.

(3A) In section 194C, subsection (2) is repealed.

(4) Section 194DA is repealed.
PART 6
MISCELLANEOUS
CHAPTER A1

PUBLICATION OF PROSECUTORIAL TEST

82B Publication of prosecutorial test

(1) The Lord Advocate must make available to the public a statement setting out in general terms the matters about which a prosecutor requires to be satisfied in order to initiate, and continue with, criminal proceedings in respect of any offence.

(2) The reference in subsection (1) to a prosecutor is to one within the Crown Office and Procurator Fiscal Service.

CHAPTER B1

SUPPORT FOR VULNERABLE PERSONS

82C Meaning of appropriate adult support

(1) For the purposes of this Chapter, “appropriate adult support” means—

(a) support of the sort mentioned in subsection (3) of section 33 that is provided to a person about whom intimation has been sent under subsection (2) of that section, and

(b) such other support for vulnerable persons in connection with a criminal investigation or criminal proceedings as the Scottish Ministers specify by regulations.

(2) In regulations under subsection (1)(b), the Scottish Ministers may, in particular, specify support by reference to—

(a) the purpose it is to serve,

(b) the description of vulnerable persons to whom it is to be available, and

(c) the circumstances in which it is to be available.

(3) For the purposes of this section—

“vulnerable person” means a person who, owing to mental disorder, is—

(a) unable to understand sufficiently what is happening, or

(b) communicate effectively,

in the context of a criminal investigation or criminal proceedings,

“mental disorder” has the meaning given by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

(4) The Scottish Ministers may by regulations amend the definitions of “vulnerable person” and “mental disorder” in subsection (3) for the purpose of making them consistent with (respectively) subsections (1)(c) and (5)(a) of section 33.

82D Responsibility for ensuring availability of appropriate adults

The Scottish Ministers may by regulations—
(a) confer on a person the function of ensuring that people are available to provide appropriate adult support—
   (i) throughout Scotland, or
   (ii) in a particular part of Scotland, and
(b) make provision about how that function may or must be discharged.

82E  **Assessment of quality of appropriate adult support**

The Scottish Ministers may by regulations—
(a) confer on a person the functions of—
   (i) assessing the quality of whatever arrangements may be in place to ensure that people are available to provide appropriate adult support, and
   (ii) assessing the quality of any appropriate adult support that is provided, and
(b) make provision about how those functions may or must be discharged.

82F  **Training for appropriate adults**

The Scottish Ministers may by regulations—
(a) confer on a person the function of—
   (i) giving to people who provide, or wish to provide, appropriate adult support training in how to provide that support,
   (ii) giving to other people specified by the Scottish Ministers in the regulations training in how to deal with people who need appropriate adult support, and
(b) make provision about how that function may or must be discharged.

82G  **Recommendations from quality assessor and training provider**

(1) A person upon whom a function has been conferred by virtue of section 82E or 82F may—
   (a) make to a provider of appropriate adult support recommendations about the way that appropriate adult support is provided,
   (b) make to the Scottish Ministers recommendations about the exercise of their powers under section 53B and the provisions of this Chapter.

(2) A provider of appropriate adult support must have regard to any recommendation made to it under subsection (1)(a).

(3) The Scottish Ministers must have regard to any recommendation made under subsection (1)(b).

(4) In this section, “a provider of appropriate adult support” means a person upon whom the function of ensuring that people are available to provide appropriate adult support has been conferred by virtue of section 82D.
82H Duty to ensure quality assessment takes place
If, by virtue of regulations under section 82D, a person has the function of ensuring that people are available to provide appropriate adult support, it is the Scottish Ministers’ duty to ensure that there is a person discharging the functions mentioned in section 82E(a).

82I Elaboration of regulation-making powers under this Chapter
(1) A power under this Chapter to confer a function on a person by regulations may be exercised so as to confer the function, or aspects of the function, on more than one person.

(2) A power under this Chapter to make provision by regulations about how a function may or must be discharged may, in particular, be exercised so as to—
(a) require or allow the person discharging the function to enter into a contract with another person,
(b) require the person discharging the function to have regard to any guidance about the discharge of the function issued by the Scottish Ministers.

(3) The powers under this Chapter to make regulations may be exercised so as to—
(a) make such provision as the Scottish Ministers consider necessary or expedient in consequence of, or for the purpose of giving full effect to, any regulations made in exercise of a power under this Chapter,
(b) modify any enactment (including this Act),
(c) make different provision for different purposes.

82J Procedure for making regulations under this Chapter
(1) Regulations under this Chapter are subject to the affirmative procedure.

(2) Prior to laying a draft Scottish statutory instrument containing regulations under this Chapter before the Scottish Parliament for approval by resolution, the Scottish Ministers must consult publicly.

82K Other powers of Ministers unaffected
Nothing in this Chapter is to be taken to imply that the powers it gives to the Scottish Ministers to confer functions are the only powers that they have to confer those (or similar) functions.

CHAPTER C1
NOTIFICATION IF PARENT OF UNDER-18 IMPRISONED

82L Child’s named person to be notified
(1) This section applies where a person is admitted to any penal institution for imprisonment or detention arising from—
(a) anything done by a court of criminal jurisdiction (including the imposition of a sentence, the making of an order or the issuing of a warrant),
(b) anything done under section 17 or 17A of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (as to the recall of a prisoner),

c) anything done by virtue of the Extradition Act 2003 (particularly section 9(2) or 77(2) of that Act), or

d) the operation of any other enactment concerning criminal matters (including penal matters).

(2) The Scottish Ministers must ensure that the person is asked—

(a) whether the person is a parent of a child, and

(b) if the person claims to be a parent of a child, to—

(i) state the identity of the child, and

(ii) give information enabling the identity of the service provider in relation to the child to be ascertained.

(3) If the identity of the service provider can be ascertained by or on behalf of the Scottish Ministers without undue difficulty in light of anything disclosed by the person, they must ensure that the service provider is notified of—

(a) the fact of the person’s admission to the penal institution,

(b) what has been stated by the person about the identity of the child, and

(c) such other matters disclosed by the person as appear to them to be relevant for the purpose of the exercise of the named person functions with respect to the child.

(4) In addition, the Scottish Ministers must ensure that the service provider is notified of anything disclosed by the person about the identity of any other child—

(a) of whom the person claims to be a parent, and

(b) the service provider in relation to whom is unknown to them.

(5) No requirement is imposed by subsection (2) if the person’s admission to the penal institution is on—

(a) returning after—

(i) any unauthorised absence, or

(ii) any temporary release in accordance with prison rules, or

(b) being transferred from—

(i) any other penal institution,

(ii) any secure accommodation in which the person has been kept, or

(iii) any hospital in which the person has been detained, so as to be given medical treatment for a mental disorder, by virtue of Part VI of the 1995 Act or the Mental Health (Care and Treatment) (Scotland) Act 2003.

(6) Each of the requirements imposed by subsections (2) to (4) is to be fulfilled without unnecessary delay.

(7) The references in subsections (2) to (4) to the Scottish Ministers are to them in their exercise of functions in connection with the person’s imprisonment or detention in the penal institution.
(8) The references in subsections (3) and (4) to disclosure by the person are to such disclosure in response to something asked under subsection (2).

82M Definition of certain expressions

In this Chapter—

“child” means a person who is under 18 years of age,

“named person functions” has the meaning given by section 32 of the Children and Young People (Scotland) Act 2014,

“parent” includes any person who—

(a) is a guardian of a child,

(b) is liable to maintain, or has care of, a child, or

(c) has parental responsibilities in relation to a child (as construed by reference to section 1(1) to (3) of the Children (Scotland) Act 1995),

“penal institution” means—

(a) any prison, other than—

   (i) a naval, military or air force prison, or

   (ii) any legalised police cells (within the meaning of section 14(1) of the Prisons (Scotland) Act 1989),

(b) any remand centre (within the meaning of section 19(1)(a) of the Prisons (Scotland) Act 1989), or

(c) any young offenders institution (within the meaning of section 19(1)(b) of the Prisons (Scotland) Act 1989),

“prison rules” means rules made under section 39 of the Prisons (Scotland) Act 1989,

“secure accommodation” means accommodation provided in a residential establishment, approved in accordance with regulations made under section 78(2) of the Public Services Reform (Scotland) Act 2010, for the purpose of restricting the liberty of children,

“service provider” in relation to a child has the meaning given by section 32 of the Children and Young People (Scotland) Act 2014.

CHAPTER 1

STATEMENTS AND PROCEDURE

Statements by accused

62 Statements by accused

(1) After section 261 of the 1995 Act there is inserted—

“261ZA Statements by accused

(1) Evidence of a statement to which this subsection applies is not inadmissible as evidence of any fact contained in the statement on account of the evidence’s being hearsay.
(2) Subsection (1) applies to a statement made by the accused in the course of the accused’s being questioned (whether as a suspect or not) by a constable, or another official, investigating an offence.

(3) Subsection (1) does not affect the issue of whether evidence of a statement made by one accused is admissible as evidence in relation to another accused.”.

The title of section 261 of the 1995 Act becomes “Statements by co-accused”.

Use of technology

86 Live television links

(1) After section 288G of the 1995 Act there is inserted—

“Use of live television link

288H Participation through live television link

(1) Where the court so determines at any time before or at a specified hearing, a detained person is to participate in the hearing by means of a live television link.

(2) The court—

(a) must give the parties in the case an opportunity to make representations before making a determination under subsection (1),

(b) may make such a determination only if it considers that to do so is not contrary to the interests of justice.

(3) The court may require a detained person to participate by means of a live television link in any proceedings at a specified hearing or otherwise in the case for the sole purpose of considering whether to make a determination under subsection (1) with respect to a specified hearing.

(4) Where a detained person participates in any specified hearing or other proceedings by means of a live television link—

(a) a place of detention is, for the purposes of the hearing or other proceedings, deemed to be part of the court-room, and

(b) accordingly, the hearing is or other proceedings are deemed to take place in the presence of the detained person.

(5) In this section—

“court-room” includes chambers,

“live television link” means live television link between a place of detention and the court-room in which any specified hearing is or other proceedings are to be held or (as the case may be) any specified hearing is or other proceedings are being held.

288I Evidence and personal appearance

(1) No evidence as to a charge on any complaint or indictment may be led or presented at a specified hearing in respect of which there is a determination under section 288H(1).
(2) The court—
   (a) may, at any time before or at a specified hearing, revoke a determination under section 288H(1),
   (b) must do so in relation to a detained person if it considers that it is in the interests of justice for the detained person to appear in person.

(3) The court may postpone a specified hearing to a later day if, on the day on which a specified hearing takes place or is due to take place—
   (a) the court decides not to make a determination under section 288H(1) with respect to the hearing, or
   (b) the court revokes such a determination under subsection (2).

288IA Effect of postponement

(1) Except where a postponement under section 288I(3) is while section 18(2) of the Criminal Justice (Scotland) Act 2015 applies to a detained person, the following do not count towards any time limit arising in the person’s case if the postponement in the case is to the next day on which the court is sitting—
   (a) that next day,
   (b) any intervening Saturday, Sunday or court holiday.

(2) Even while section 18(2) of the Criminal Justice (Scotland) Act 2015 applies to a detained person, that section does not prevent a postponement under section 288I(3) in the person’s case.

(3) In section 288I and this section, “postpone” includes adjourn.

288J Specified hearings

(1) The Lord Justice General may by directions specify types of hearing at the High Court, sheriff court and JP court in which a detained person may participate in accordance with section 288H(1).

(2) Directions under subsection (1) may specify types of hearing by reference to—
   (a) the venues at which they take place,
   (b) particular places of detention,
   (c) categories of cases or proceedings to which they relate.

(3) Directions under subsection (1) may—
   (a) vary or revoke earlier such directions,
   (b) make different provision for different purposes.

(4) The validity of any proceedings is not affected by the participation of a detained person by means of a live television link in a hearing that is not a specified hearing.

(5) In this section, “hearing” includes any diet or hearing in criminal proceedings which may be held in the presence of an accused, a convicted person or an appellant in the proceedings.
288K Defined terms

For the purpose of sections 288H to 288J—

“detained person” means person who is—

(a) an accused, a convicted person or an appellant in the case to which a specified hearing relates, and

(b) imprisoned or otherwise lawfully detained (whether or not in connection with an offence) at any place in Scotland,

“place of detention” means place in which a detained person is imprisoned or detained,

“specified hearing” means hearing of a type specified in directions having effect for the time being under section 288J.”.

(2) In addition—

(a) in section 117 (presence of appellant or applicant at hearing) of the 1995 Act—

(i) subsection (6) is repealed,

(ii) in subsection (7), for the word “(6)” there is substituted “(5)”,

(b) section 80 of the Criminal Justice (Scotland) Act 2003 is repealed.

86A Electronic proceedings

(1) In section 305 (Acts of Adjournal) of the 1995 Act, after subsection (1 ) there is inserted—

“(1A) Subsection (1) above extends to making provision by Act of Adjournal for something to be done in electronic form or by electronic means.”.

(2) These provisions of the 1995 Act are repealed—

(a) in section 141—

(i) subsection (3A),

(ii) in subsection (5), the words “(including a legible version of an electronic communication)”,

(iii) subsection (5ZA),

(iv) in subsection (5A), paragraph (b) together with the word “or” immediately preceding it,

(v) subsections (6A), (7A) and (7B),

(b) section 303B together with the italic heading immediately preceding it,

(c) section 308A.

(3) In the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, section 42 is repealed.
Chapter 1A

Authorisation under Part III of the Police Act 1997

86B Authorisation of persons other than constables

In section 108 (interpretation of Part III) of the Police Act 1997, after subsection (1) there is inserted—

“(1A) A reference in this Part to a staff officer of the Police Investigations and Review Commissioner is to any person who—

(a) is a member of the Commissioner’s staff appointed under paragraph 7A of schedule 4 to the Police, Public Order and Criminal Justice (Scotland) Act 2006, or

(b) is a member of the Commissioner’s staff appointed under paragraph 7 of that schedule to whom paragraph 7B(2) of that schedule applies.”.

Chapter 2

Police Negotiating Board for Scotland

87 Establishment and functions

(1) After section 55 of the Police and Fire Reform (Scotland) Act 2012 there is inserted—

“Chapter 8A

Police Negotiating Board for Scotland

55A Establishment of the PNBS

(1) There is established a body to be known as the Police Negotiating Board for Scotland.

(2) Schedule 2A makes further provision about the Police Negotiating Board for Scotland.

(3) In this Chapter, the references to the PNBS are to the Police Negotiating Board for Scotland.

55B Representations about pay etc.

(1) The PNBS may make representations to the Scottish Ministers about—

(a) any draft regulations shared with it under section 54(1)(a),

(b) any draft determination of a kind mentioned in subsection (2),

(c) the matters mentioned in subsection (4) generally.

(2) The draft determination referred to in subsection (1)(b) is a draft of a determination to be made by the Scottish Ministers—

(a) in relation to a matter mentioned in subsection (4), and

(b) by virtue of regulations made under section 48.

(3) The Scottish Ministers may, after consulting the chairperson of the PNBS—

(a) require the PNBS to make representations under subsection (1),
(b) set or extend a time limit within which it must do so.

(4) The matters referred to in subsections (1)(c) and (2)(a) are the following matters in relation to constables (other than special constables) and police cadets—

(a) pay, allowances and expenses,
(b) public holidays and leave,
(d) hours of duty.

55C Representations on other matters

(1) The PNBS may make representations to the Scottish Ministers about—

(a) any draft regulations shared with it under section 54(2),
(b) the matters mentioned in subsection (2) generally.

(2) The matters referred to in subsection (1)(b) are matters relating to the governance, administration and conditions of service of constables (other than special constables) and police cadets.

(3) But those matters do not include the matters mentioned in section 55B(4).

55CA Steps following arbitration

(1) If representations under section 55B(1) are made in terms settled through arbitration in accordance with the PNBS’s constitution, the Scottish Ministers must take all reasonable steps appearing to them to be necessary for giving effect to those representations.

(2) However, this—

(a) requires the Scottish Ministers to take such steps only in qualifying cases (see paragraph 4C(2) of schedule 2A),
(b) does not require the Scottish Ministers—

(i) to take such steps in relation to representations that are no longer being pursued by the PNBS, or
(ii) where such steps would comprise or include the making of regulations under section 48, to make regulations under that section more than once with respect to the same representations.

55D Reporting by the PNBS

(1) The PNBS must, as soon as practicable after the end of each reporting year, prepare a report on how it has carried out its functions during that year.

(2) The PNBS must—

(a) give a copy of each report to the Scottish Ministers,
(b) publish each report in such manner as it considers appropriate.

(3) In this Chapter, “reporting year” is as defined in the PNBS’s constitution.”.
(2) In section 54 (consultation on regulations) of the Police and Fire Reform (Scotland) Act 2012, in subsection (1)—
   (a) for the words from “61(1)” to “pensions)” there is substituted “55B(4)
   (b) in paragraph (a), for the words “the United Kingdom” there is substituted “Scotland”.

(2A) In section 125 (subordinate legislation) of the Police and Fire Reform (Scotland) Act 2012, after subsection (3) there is inserted—

   “(3A) Regulations under paragraph 4(6) of schedule 2A are subject to the affirmative procedure if they include provisions of the kind mentioned in paragraph 4B(2) or 4C(2) of that schedule.”.

(3) After schedule 2 to the Police and Fire Reform (Scotland) Act 2012 there is inserted (as schedule 2A to that Act) the schedule set out in schedule 3.

87A Consequential and transitional

(1) In connection with section 87—
   (a) in schedule 1 to the Freedom of Information (Scotland) Act 2002, after paragraph 50A there is inserted—
   “50B The Police Negotiating Board for Scotland.
   (b) in schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003, at the appropriate place under the heading referring to offices there is inserted—
   “Chairperson of the Police Negotiating Board for Scotland”.

(2) On the coming into force of section 87—
   (a) a person then holding office as the chairman of the Police Negotiating Board for the United Kingdom by virtue of section 61(2) of the Police Act 1996 is to be regarded as if appointed as the chairperson of the Police Negotiating Board for Scotland under paragraph 2(2) of schedule 2A to the Police and Fire Reform (Scotland) Act 2012,
   (b) any agreements then extant within or involving the Police Negotiating Board for the United Kingdom (so far as relating to the Police Service of Scotland) of the kind for which Chapter 8A of Part 1 of the Police and Fire Reform (Scotland) Act 2012 includes provision are to be regarded as if made as agreements within or involving the Police Negotiating Board for Scotland by virtue of that Chapter.

PART 7
FINAL PROVISIONS

Ancillary and definition

88 Ancillary regulations

(1) The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) Regulations under this section—
89 Meaning of “the 1995 Act”

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

Commencement and short title

90 Commencement

(1) The following provisions come into force on the day after Royal Assent—

(a) sections E1 and G1 to K1,

(b) this Part.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

91 Short title

The short title of this Act is the Criminal Justice (Scotland) Act 2015.
SCHEDULE A1
(introduced by sections 14(3) and 20(6))

BREACH OF LIBERATION CONDITION

Offence of breaching condition

1 (1) A person commits an offence if, without reasonable excuse, the person breaches a liberation condition by reason of—
   (a) failing to comply with an investigative liberation condition,
   (b) failing to appear at court as required by the terms of an undertaking, or
   (c) failing to comply with the terms of an undertaking, other than the requirement to appear at court.

(2) Sub-paragraph (1) does not apply where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (in which case see paragraph 3).

(3) It is competent to amend a complaint to include an additional charge of an offence under sub-paragraph (1) at any time before the trial of a person in summary proceedings for—
   (a) the original offence, or
   (b) an offence arising from the same circumstances as the original offence.

(4) In sub-paragraph (3), “the original offence” is the offence in connection with which—
   (a) an investigative liberation condition was imposed, or
   (b) an undertaking was given.

Sentencing for the offence

2 (1) A person who commits an offence under paragraph 1(1) is liable on summary conviction to—
   (a) a fine not exceeding level 3 on the standard scale, or
   (b) imprisonment for a period—
      (i) where conviction is in the justice of the peace court, not exceeding 60 days,
      (ii) where conviction is in the sheriff court, not exceeding 12 months.

(2) A penalty under sub-paragraph (1) may be imposed in addition to any other penalty which it is competent for the court to impose, even if the total of penalties imposed exceeds the maximum penalty which it is competent to impose in respect of the original offence.

(3) The reference in sub-paragraph (2) to a penalty being imposed in addition to another penalty means, in the case of sentences of imprisonment or detention—
   (a) where the sentences are imposed at the same time (whether or not in relation to the same complaint), framing the sentences so that they have effect consecutively,
   (b) where the sentences are imposed at different times, framing the sentence imposed later so that (if the earlier sentence has not been served) the later sentence has effect consecutive to the earlier sentence.
(4) Sub-paragraph (3)(b) is subject to section 204A (restriction on consecutive sentences for released prisoners) of the 1995 Act.

(5) Where a person is to be sentenced in respect of an offence under paragraph 1(1), the court may remit the person for sentence in respect of it to any court which is considering the original offence.

(6) In sub-paragraphs (2) and (5), “the original offence” is the offence in connection with which—
   (a) the investigative liberation condition was imposed, or
   (b) the undertaking was given.

Breach by committing offence

3 (1) This paragraph applies—
   (a) where (and to the extent that) a person breaches a liberation condition by reason of committing an offence (“offence O”), but
   (b) only if the fact that offence O was committed while the person was subject to the liberation condition is specified in the complaint or indictment.

(2) In determining the penalty for offence O, the court must have regard—
   (a) to the fact that offence O was committed in breach of a liberation condition,
   (b) if the breach is by reason of the person’s failure to comply with the terms of an investigative liberation condition, to the matters mentioned in paragraph 4(1),
   (c) if the breach is by reason of the person’s failure to comply with the terms of an undertaking other than the requirement to appear at court, to the matters mentioned in paragraph 5(1).

(3) Where the maximum penalty in respect of offence O is specified by (or by virtue of) an enactment, the maximum penalty is increased—
   (a) where it is a fine, by the amount equivalent to level 3 on the standard scale,
   (b) where it is a period of imprisonment—
       (i) as respects conviction in the justice of the peace court, by 60 days,
       (ii) as respects conviction in the sheriff court or the High Court, by 6 months.

(4) The maximum penalty is increased by sub-paragraph (3) even if the penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(5) In imposing a penalty in respect of offence O, the court must state—
   (a) where the penalty is different from that which the court would have imposed had sub-paragraph (2) not applied, the extent of and the reasons for that difference,
   (b) otherwise, the reasons for there being no such difference.

Matters for paragraph 3(2)(b)

4 (1) For the purpose of paragraph 3(2)(b), the matters are—
   (a) the number of offences in connection with which the person was subject to investigative liberation conditions when offence O was committed,
(b) any previous conviction the person has for an offence under paragraph 1(1)(a),
(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of paragraph 3(2), from that which the court would have imposed but for that paragraph.

(2) In sub-paragraph (1)—
(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under paragraph 1(1)(a),
(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this sub-paragraph, as references to any provision that is equivalent to paragraph 3(2).

(3) Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to determine.

Matters for paragraph 3(2)(c)

(1) For the purpose of paragraph 3(2)(c), the matters are—
(a) the number of undertakings to which the person was subject when offence O was committed,
(b) any previous conviction the person has for an offence under paragraph 1(1)(c),
(c) the extent to which the sentence or disposal in respect of any previous conviction differed, by virtue of paragraph 3(2), from that which the court would have imposed but for that paragraph.

(2) In sub-paragraph (1)—
(a) in paragraph (b), the reference to any previous conviction includes any previous conviction by a court in England and Wales, Northern Ireland or a member State of the European Union (other than the United Kingdom) for an offence that is equivalent to an offence under paragraph 1(1)(c),
(b) in paragraph (c), the references to paragraph 3(2) are to be read, in relation to a previous conviction by a court referred to in paragraph (a) of this sub-paragraph, as references to any provision that is equivalent to paragraph 3(2).

(3) Any issue of equivalence arising under sub-paragraph (2)(a) or (b) is for the court to determine.

Evidential presumptions

(1) In any proceedings in relation to an offence under paragraph 1(1), the facts mentioned in sub-paragraph (2) are to be held as admitted unless challenged by preliminary objection before the person’s plea is recorded.

(2) The facts are—
(a) that the person breached an undertaking by reason of failing to appear at court as required by the terms of the undertaking,
(b) that the person was subject to a particular—
(i) investigative liberation condition, or
Criminal Justice (Scotland) Bill

Schedule 1—Modifications in connection with Part 1

Part 1—Provisions as to arrest

(ii) condition under the terms of an undertaking.

(3) In proceedings to which sub-paragraph (4) applies—

(a) something in writing, purporting to impose investigative liberation conditions and bearing to be signed by a constable, is sufficient evidence of the terms of the investigative liberation conditions imposed under section 14(2),

(b) something in writing, purporting to be an undertaking and bearing to be signed by the person said to have given it, is sufficient evidence of the terms of the undertaking at the time that it was given,

(c) a document purporting to be a notice (or a copy of a notice) under section 16, 21 or 21A, is sufficient evidence of the terms of the notice.

(4) This sub-paragraph applies to proceedings—

(a) in relation to an offence under paragraph 1(1), or

(b) in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment.

(5) In proceedings in which the fact mentioned in paragraph 3(1)(b) is specified in the complaint or indictment, that fact is to be held as admitted unless challenged—

(a) in summary proceedings, by preliminary objection before the person’s plea is recorded, or

(b) in the case of proceedings on indictment, by giving notice of a preliminary objection in accordance with section 71(2) or 72(6)(b)(i) of the 1995 Act.

Interpretation

7 In this schedule—

(a) references to an investigative liberation condition are to a condition imposed under section 14(2) or 17(3)(b) subject to any modification by notice under section 16(1) or (5)(a),

(b) references to an undertaking are to an undertaking given under section 19(2)(a),

(c) references to the terms of an undertaking are to the terms of an undertaking subject to any modification by—

(i) notice under section 21(1), or

(ii) the sheriff under section 22(3)(b).

SCHEDULE 1

(introduced by section 52)

MODIFICATIONS IN CONNECTION WITH PART 1

PART 1

PROVISIONS AS TO ARREST

Criminal Procedure (Scotland) Act 1995

1 The 1995 Act is amended as follows.
These provisions are repealed—
   (a) in section 13, subsection (7),
   (b) section 21.

(1) In section 234A, subsections (4A) and (4B) are repealed.

(2) In subsection (11) of section 234AA, for the words from the beginning to “those sections apply” there is substituted “Section 9 (breach of orders) of the Antisocial Behaviour etc. (Scotland) Act 2004 applies in relation to antisocial behaviour orders made under this section as that section applies”.

Miscellaneous enactments

In section 4 of the Trespass (Scotland) Act 1865, for the words from the beginning to “every” in the last place where it occurs there is substituted “A”.

In subsection (3) of section 1 of the Public Meeting Act 1908, the words from “and if he refuses” to the end are repealed.

In the Firearms Act 1968, section 50 is repealed.

In the Civic Government (Scotland) Act 1982—
   (a) in section 59, subsections (1), (2) and (5) are repealed,
   (aa) in subsection (3), for the words “he can be delivered into the custody” there is substituted “the arrival”,
   (b) in section 65, subsections (4) and (5) are repealed,
   (c) in subsection (1) of section 80, for the words from “and taken” to the end there is substituted “by a constable”.

In the Child Abduction Act 1984, section 7 is repealed.

In section 11 of the Protection of Badgers Act 1992, paragraph (c) of subsection (1) is repealed.

In the Criminal Justice and Public Order Act 1994, section 60B is repealed.

In section 8B of the Olympic Symbol etc. (Protection) Act 1995, subsections (2) and (3) are repealed.

In the Criminal Law (Consolidation) (Scotland) Act 1995—
   (a) in section 7, subsection (4) is repealed,
   (b) in section 47, subsection (3) is repealed,
   (c) in section 48, subsection (3) is repealed,
   (d) in section 50, subsections (3) and (5) are repealed.

In the Deer (Scotland) Act 1996, section 28 is repealed.

In section 61 of the Crime and Punishment (Scotland) Act 1997, subsection (5) is repealed.

In section 7 of the Protection of Wild Mammals (Scotland) Act 2002, paragraph (a) of subsection (1) is repealed.

In the Fireworks Act 2003—
(a) in section 11A, subsection (6) is repealed,
(b) section 11B is repealed.

18 In section 307 of the Criminal Justice Act 2003, subsection (4) is repealed.
19 In the Antisocial Behaviour etc. (Scotland) Act 2004—

5 (a) section 11 is repealed,
(b) in section 22, subsections (3) and (4) are repealed,
(c) section 38 is repealed.

20 In section 130 of the Serious Organised Crime and Police Act 2005, subsection (3) is repealed.
21 In section 307 of the Criminal Justice Act 2003, subsection (4) is repealed.
22 In the Antisocial Behaviour etc. (Scotland) Act 2004—
23 In the Animal Health and Welfare (Scotland) Act 2006, in schedule 1—

(a) paragraph 16 is repealed,
(b) in paragraph 18(b)(i), the words “except paragraph 16” are repealed.

24 In section 130 of the Serious Organised Crime and Police Act 2005, subsection (3) is repealed.
25 In section 130 of the Serious Organised Crime and Police Act 2005, subsection (3) is repealed.

PART 2
FURTHER MODIFICATIONS

The 1995 Act

25 The 1995 Act is amended as follows.

26 These provisions are repealed—

(a) sections 14 to 17A,
(b) sections 22 to 22ZB (together with the italic heading immediately preceding section 22),
(c) section 43,
(d) in section 135, subsection (3).

27(1) In section 18—

(a) in subsection (1), the words “or is detained under section 14(1) of this Act” are repealed,
(b) in subsection (2), the words “or detained” are repealed.

(2) In subsection (2)(a) of section 18B, for the words “under arrest or being detained” there is substituted “in custody”.

28 In each of sections 169(2) and 170(2) of the Children’s Hearings (Scotland) Act 2001, the words “arrested without warrant and” are repealed.
(3) In section 18D—
   (a) in subsection (2)(a), the words “or detained” are repealed,
   (b) in subsection (2)(b), for the words “under arrest or being detained” there is substituted “in custody”.

(4) In subsection (8)(b) of section 19AA, the words “or detention under section 14(1) of this Act” are repealed.

27AA In section 28—
   (a) after subsection (1) there is inserted—
      “(1ZA)Where—
      (a) a constable who is not in uniform arrests a person under subsection (1), and
      (b) the person asks to see the constable’s identification,
      the constable must show identification to the person as soon as reasonably practicable.”,
   (b) after subsection (3) there is inserted—
      “(3A) If—
      (a) a person is in custody only by virtue of subsection (1) or (1A), and
      (b) in the opinion of a constable there are no reasonable grounds for suspecting that the person has broken, or is likely to break, a condition imposed on the person’s bail,
      the person must be released from custody immediately.
   (3B) An accused is deemed to be brought before a court under subsection (2) or (3) if the accused appears before it by means of a live television link (by virtue of a determination by the court that the person is to do so by such means).”.

27AB After section 28 there is inserted—
“28A Application of the Criminal Justice (Scotland) Act 2015 to persons arrested and detained under section 28
   (1) Section 7(2) of the Criminal Justice (Scotland) Act 2015 (“the 2015 Act”) does not apply to an accused who has been arrested under section 28(1) of this Act.
   (2) The following provisions of the 2015 Act apply in relation to a person who is to be brought before a court under section 28(2) or (3) of this Act as they apply in relation to a person who is to be brought before a court in accordance with section 18(2) of the 2015 Act—
      (a) section 18A,
      (b) section 18B,
      (c) section 18C.
   (3) In relation to a person who is to be brought before a court under section 28(2) or (3) of this Act, the 2015 Act applies as though—
      (a) in section 18B(2)—

“(c) that the person is to be brought before the court under section 28 of the 1995 Act in order for the person’s bail to be considered.”, and

(ii) paragraph (d) were omitted,

(b) in section 18C—

(i) in subsection (3)(c), for the words “after being officially accused” there were substituted “after being informed that the person is to be brought before a court under section 28(2) or (3) of the 1995 Act”, and

(ii) in subsection (4), for paragraph (c) there were substituted—

“(c) that the person is to be brought before the court under section 28 of the 1995 Act in order for the person’s bail to be considered.”,

(c) in section 35(1), for paragraph (d) there were substituted—

“(d) the court before which the person is to be brought under section 28(2) or (3) of the 1995 Act and the date on which the person is to be brought before that court.”.

27B In section 42—

(a) subsection (3) is repealed,

(b) subsection (7) is repealed,

(c) in subsection (8), for the words “subsection (7) above” there is substituted “section 18C of the Criminal Justice (Scotland) Act 2015”;

(d) in subsection (9), the words “detained in a police station, or” are repealed,

(e) subsection (10) is repealed.

28 In section 74, after paragraph (a) of subsection (2) there is inserted—

“(aza) may not be taken against a decision taken by virtue of section 27 of the Criminal Justice (Scotland) Act 2015;”.

29 In section 79—

(a) for subsection (2)(b)(ii) there is substituted—

“(ii) a preliminary objection under any of the provisions listed in subsection (3A);”;

(b) after subsection (3) there is inserted—

“(3A) For the purpose of subsection (2)(b)(ii), the provisions are—

(a) section 27(4A)(a) or (4B), 90C(2A), 255 or 255A of this Act,

(b) section 9(6) of the Antisocial Behaviour etc. (Scotland) Act 2004 or that section as applied by section 234AA(11) of this Act,

(c) paragraph 6(5)(b) of schedule A1 to the Criminal Justice (Scotland) Act 2015.”. 
261ZB *Exception to rule on inadmissibility*

Evidence of a statement made by a person in response to questioning carried out in accordance with authorisation granted under section 27 of the Criminal Justice (Scotland) Act 2015 is not inadmissible on account of the statement’s being made after the person has been charged with an offence.”.

*Other enactments*

31 In subsection (2)(a) of section 8A of the Legal Aid (Scotland) Act 1986, for the words “section 15A of the Criminal Procedure (Scotland) Act 1995 (right of suspects to have access to a solicitor)” there is substituted “section 24 (right to have solicitor present) of the Criminal Justice (Scotland) Act 2015”.

31A In section 6D of the Road Traffic Act 1988, for subsection (2A) there is substituted—

“(2A) Instead of, or before, arresting a person under this section, a constable may detain the person at or near the place where the preliminary test was, or would have been, administered with a view to imposing on the person there a requirement under section 7.”.

31B In Schedule 8 to the Terrorism Act 2000—

(a) in paragraph 18—

(i) in sub-paragraph (2), for the words from “and” at the end of paragraph (a) to the end of the sub-paragraph there is substituted—

“(ab) intimation is to be made under paragraph 16(1) whether the person detained requests that it be made or not, and (ac) section 32 (right of under 18s to have access to other person) of the Criminal Justice (Scotland) Act 2015 applies as if the detained person were a person in police custody for the purposes of that section.”;

(ii) after sub-paragraph (3) there is inserted—

“(4) For the purposes of sub-paragraph (2)—

“child” means a person under 16 years of age, “parent” includes guardian and any person who has the care of the child mentioned in sub-paragraph (2).”,

(b) in paragraph 20(1), the words “or a person detained under section 14 of that Act” are repealed,

(c) in paragraph 27—

(i) in sub-paragraph (4), paragraph (a) is repealed,

(ii) sub-paragraph (5) is repealed.

31C In the schedule to the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, paragraph 2 is repealed.

32 In the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, sections 1, 3 and 4 are repealed.

32A In the Children’s Hearings (Scotland) Act 2011—
(a) in section 65—
   (i) for subsection (1) there is substituted—
   “(1) Subsection (2) applies where the Principal Reporter is informed under
sub-section (2) of section 42B of the Criminal Justice (Scotland) Act 2015 that a
child is being kept in a place of safety under subsection (3) of that section.”,
   (ii) in subsection (2), for the words “in the” there is substituted “in a”,

(b) in section 66(1), for sub-paragraph (vii) there is substituted—
   “(vii) information under section 42B of the Criminal Justice (Scotland)
   Act 2015, or”,

(c) in section 68(4)(e)(vi), for the words “section 43(5) of the Criminal Procedure
   (Scotland) Act 1995 (c.46)” there is substituted “section 42B of the Criminal
   Justice (Scotland) Act 2015”,

(d) in section 69, for subsection (3) there is substituted—
   “(3) If—
   (a) the determination under section 66(2) is made following the Principal
   Reporter receiving information under section 42B of the Criminal Justice
   (Scotland) Act 2015, and
   (b) at the time the determination is made the child is being kept in a place of
   safety,
   the children’s hearing must be arranged to take place no later than the third day
   after the Principal Reporter receives the information mentioned in paragraph
   (a).”,

(e) in section 72(2)(b), for the words “in the” there is substituted “in a”.

In section 20 of the Police and Fire Reform (Scotland) Act 2012, subsections (2) and (3)
are repealed.

SCHEDULE 3
(introduced by section 87)

POLICE NEGOTIATING BOARD FOR SCOTLAND

“SCHEDULE 2A
(introduced by section 55A)

POLICE NEGOTIATING BOARD FOR SCOTLAND

Status of the PNBS
1 (1) The PNBS—
   (a) is not a servant or agent of the Crown, and
   (b) has no status, immunity or privilege of the Crown.

(2) The property of the PNBS is not property of, or property held on behalf of, the
Crown.
Chairing and membership

2 (1) The PNBS is to consist of—
   (a) a chairperson,
   (c) other persons representing the interests of each of—
       (i) the Authority,
       (ii) the chief constable,
       (iii) constables (other than special constables) and police cadets,
       (iv) the Scottish Ministers.

(2) It is for the Scottish Ministers to appoint the chairperson.

(3) Other members are to be appointed in accordance with the constitution prepared under paragraph 4.

(4) A member of the PNBS holds and vacates office in accordance with the terms of the member’s appointment.

(5) The chairperson may—
   (a) resign from office by giving notice in writing to the Scottish Ministers,
   (b) be removed from office if, in the opinion of the Scottish Ministers, the person is unable, unfit or unwilling to perform the functions of the office.

Temporary chairperson

2A(1) The PNBS may have a temporary chairperson if (for the time being)—
   (a) there is no chairperson, or
   (b) the chairperson is unavailable to act.

(2) A reference in this Chapter to the chairperson is to be read, where appropriate to do so by virtue of sub-paragraph (1), as meaning or including (as the context requires) the temporary chairperson.

Disqualification from chairing

3 A person is disqualified from appointment, and from holding office, as the chairperson of the PNBS if the person is or becomes—
   (a) a member of the House of Commons,
   (b) a member of the Scottish Parliament,
   (c) a member of the European Parliament,
   (d) a Minister of the Crown,
   (e) a member of the Scottish Government,
   (f) a civil servant.

Constitution and procedure etc.

4 (1) It is for the Scottish Ministers to prepare the constitution for the PNBS.
(2) The constitution must regulate the procedure for consensus to be reached among the members of the PNBS on the terms of representations to be made under section 55B(1) or 55C(1).

(2A) The constitution—

(a) may require a dispute on representations to be made under section 55B(1) to be submitted to arbitration by agreement among the members to do so, and must not prevent such a dispute from being submitted to arbitration on such agreement (except prevention by way of limitation as allowed below),

(b) may—

(i) authorise the chairperson to submit such a dispute to arbitration without such agreement,

(ii) limit how often within a reporting year such a dispute can be submitted to arbitration (including limitation framed by reference to particular matters or circumstances).

(3) The constitution may contain provision about—

(a) membership (including number of members to represent each of the interests mentioned in paragraph 2(1)(c)),

(b) internal organisation (for example, committees and office-holders),

(c) procedures to be followed (including conduct of meetings),

(d) the content of a report required by section 55D,

(e) such other matters as the Scottish Ministers consider appropriate.

(4) The Scottish Ministers—

(a) must keep the constitution under review,

(b) may revise it from time to time.

(5) Before preparing or revising the constitution, the Scottish Ministers must consult—

(a) the Authority,

(b) the chief constable, and

(c) persons representing the interests of constables (other than special constables) and police cadets.

(6) The constitution, or any revision of it, has effect only when brought into effect by the Scottish Ministers by regulations.

Process of arbitration

4A(1) Sub-paragraph (2) applies where—

(a) a dispute is submitted to arbitration in accordance with the constitution, and

(b) no arbitration agreement relating to the dispute is in place.

(2) A document submitting the dispute to arbitration is deemed to be an arbitration agreement.
(3) For the application of the Arbitration (Scotland) Act 2010, a reference in this paragraph to an arbitration agreement is to such an agreement as defined by section 4 of that Act.

4B(1) Sub-paragraph (2) applies for the purpose of arbitration in accordance with the constitution (whether such arbitration arises by reason of a real or deemed arbitration agreement).

(2) Regulations under paragraph 4(6) may include provisions disapplying or modifying the mandatory rules in schedule 1 to the Arbitration (Scotland) Act 2010.

4C(1) Sub-paragraph (2) applies for the purpose of the operation of section 55CA.

(2) Regulations under paragraph 4(6) may include provisions specifying, by reference to particular matters or circumstances, what are qualifying cases.

Remuneration and expenses

5 (1) The Scottish Ministers may pay—

(a) such remuneration to the chairperson of the PNBS as they think fit,

(b) such expenses of the members of the PNBS as they think fit.

(2) The Scottish Ministers must pay such expenses as they consider are reasonably required to be incurred to enable the PNBS to carry out its functions.”.
Criminal Justice (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to make provision about criminal justice including as to police powers and rights of suspects and as to criminal evidence, procedure and sentencing; to establish the Police Negotiating Board for Scotland; and for connected purposes.

Introduced by:  Kenny MacAskill
On:  20 June 2013
Bill type:  Government Bill