

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

¹ <http://www.scotland.gov.uk/About/Review/CarlowayReview>

- 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;

² <http://www.scotland.gov.uk/Publications/2010/06/10093251/0>

³ [2010] UKSC 43 http://www.supremecourt.gov.uk/docs/UKSC_2010_0022_Judgment.pdf

- 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

⁴ <http://www.scotland.gov.uk/About/Review/CarlowayReview>

- 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.

⁵ Paragraph 1.2, The Independent Review of Sheriff and Jury Practice, Sheriff Principal Bowen (2010)

⁶ <http://www.scotland.gov.uk/Publications/2010/06/10093251/0>

⁷ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=5630&mode=pdf>

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 D⁸ and E⁹ of the Carloway Report.

20. The Scottish Government listened closely to the comment and discussion following the publication of the Carloway Report. This included evidence sessions¹⁰ held by the Justice Committee in November and December 2011 and a Parliamentary Debate in the Scottish Parliament on 25 September 2012¹¹. 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 responses¹³ along with an independent analysis¹⁴. 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

⁸ <http://www.scotland.gov.uk/About/Review/CarlowayReview/AnnexB>

⁹ <http://www.scotland.gov.uk/About/Review/CarlowayReview/AnnexC>

¹⁰ <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/45421.aspx>

¹¹ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8012&mode=pdf>

¹² <http://www.scotland.gov.uk/Publications/2012/07/4794>

¹³ <http://www.scotland.gov.uk/Publications/2012/12/4338/0>

¹⁴ <http://www.scotland.gov.uk/Topics/Justice/legal/criminalprocedure/CarlowayReportConsultation/consultationanalysis>

recommendation. 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*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*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.

¹⁵ <http://www.scotland.gov.uk/Publications/2012/12/4628/0>

¹⁶ <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 B*¹⁷ 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.

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 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

circumstances. 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.

107. 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.

108. 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.

109. 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

110. Questions regarding Lord Carloway's recommendations on child suspects were contained in the Scottish Government's main consultation exercise.

111. 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.

112. 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

113. 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.

114. 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 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’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 suspects 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 corroborative 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 safeguards¹⁹ 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.

KNIFE POSSESSION SENTENCING - COMPARISONS BETWEEN SCOTLAND AND ENGLAND/WALES²⁰				
Offence	% given immediate custody		Average sentence length (days)	
	Eng/Wal (Q4 2012)	Scot (2011-12)	Eng/Wal (Q4 2012)	Scot (2011-12)
Possession of a sharp instrument/blade	29%	44%	199	338

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 announced²¹ 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 reported²² 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 Lives²³ (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.

²⁰Statistical bulletin: Criminal Proceedings in Scotland 2011-12, published 27 November 2012 compared to Knife Possession Sentencing Quarterly Brief (data for Q4 2012), published by the Ministry of Justice, 7 March 2013

²¹<http://www.crownoffice.gov.uk/media-site/media-releases/180-zero-tolerance-for-town-and-city-centre-knife-crime-offenders-to-continue-says-lord-advocate>

²²<http://www.crownoffice.gov.uk/media-site/media-releases/89-significant-28-decrease-in-knife-crime-offences-reported-to-crown-during-festive-period>

²³<http://www.noknivesbetterlives.com/>

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 offences²⁴ 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

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 public²⁵.

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

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 review²⁶, 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

²⁶ <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

²⁷<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6788&i=61596&c=0&s=29> November 2011

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)²⁸ 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 2011²⁹. 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.

²⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32011L0036:EN:NOT>

²⁹ <http://www.equalityhumanrights.com/scotland/human-rights-in-scotland/inquiry-into-human-trafficking-in-scotland/>

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 Scottish Government is committed to modernising the justice system and, in 2010, initiated a multi-agency programme called the Making Justice Work: Cross Justice System Video Conferencing Project ("the Video Conferencing Project"), aimed at linking courts, prisons, and solicitors through technology such as video conferencing. This project is contributing towards modernising the justice system in Scotland, making it more efficient and accessible through the use of modern technology.

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 custody³⁰.

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.

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>.

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 data 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

This document relates to the Criminal Justice (Scotland) Bill (SP Bill 35) as introduced in the Scottish Parliament on 20 June 2013

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.

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CRIMINAL JUSTICE (SCOTLAND) BILL

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS
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ISBN 978-1-78351-443-4