

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Faculty of Advocates

INTRODUCTION

1. On 26 June 2013 the Scottish Parliament's Justice Committee issued a call for written evidence on the Criminal Justice (Scotland) Bill. The call sought views on the general principles of the Bill.

2. The Faculty of Advocates is the independent bar in Scotland. Its members include advocates who have considerable experience of the criminal justice system, both as defence counsel and as prosecutors. The Faculty's written evidence is in the form of an executive summary followed by a more detailed response in respect of each part of the Act.

EXECUTIVE SUMMARY

3. The Faculty welcomes the simplification, clarification and modernisation of the law of arrest and detention. Although the Faculty has comments on certain specific features of Part I (and these are set out below), generally speaking the Faculty welcomes the thrust of the reforms set out in Part I of the Bill. The one point which the Faculty would wish to highlight is the importance of the review provided for in section 17. If this is to be an effective safeguard, the police should be under an obligation of disclosure, and funding arrangements will require to be in place.

4. The Faculty does not support the proposal in Part 2 of the Bill to abolish corroboration. The following are the Faculty's principal reasons:

- (i) The requirement of corroboration is central to the administration of criminal justice in Scotland at all stages. It cannot be removed without considering (and responding to) the ramifications for all stages of the criminal justice system.
- (ii) There is no clarity as to what will be put in its place. We do not know what test prosecutors will apply in deciding whether or not to prosecute a case. Without knowing what will substitute for corroboration, it is difficult to make a meaningful assessment of the effects of removal.
- (iii) Corroboration is a safeguard against miscarriages of justice. The only counterbalance proposed in the trial process, in light of the abolition of corroboration, is the increase of the jury majority from a bare majority to two thirds (10 out of 15). The consequence – that an accused may be convicted on the uncorroborated evidence of a single witness whom five out of fifteen jurors disbelieve – leaves the safeguards against wrongful conviction at an unacceptably low level.

- (iv) There is no evidence to support the contention that the abolition of the requirement of corroboration will result in an increase in the proportion of sexual offence cases which result in a conviction. At present, the only cases which proceed to trial are those in which there is corroboration. The proportion of those cases which result in an acquittal reflects the fact that, even with a requirement of corroboration, such cases may present difficulties. It is a fallacy to believe that, by prosecuting cases even where there is no corroboration, the proportion of successful cases will increase. The reverse is more likely to be true.
- (v) At the same time, the abolition of corroboration may disadvantage victims of crime. Cases may be prosecuted where there is, in fact, no strong likelihood of success, putting complainers through a trial process only to see the accused being acquitted. At the same time, if there is no legal requirement for corroboration, there is at least a risk that the police will not investigate with a view to finding corroborative evidence if it exists. This could mean that cases which currently result in a conviction will, following the change, result in acquittal - because it may be the corroborative evidence which persuades the jury to believe the complainer's account, or to prefer the complainer's account to that of the accused.
- (vi) In the current environment, the resource implications of abolition cannot be ignored. The analysis in the Financial Memorandum is open to criticism for all the reasons set out in the Faculty's draft response to the Finance Committee's call for evidence (which is attached as an Annex). Perhaps most seriously, the Financial Memorandum assumes that the additional resources required can largely, if not entirely, be absorbed through efficiency savings. In relation at least to the COPFS and the Court Service, this seems to the Faculty to be unrealistic.

5. The Faculty's position is elaborated in more detail below.

6. The Faculty does not consider that the proposal in Part 3 of the Bill to increase the majority required for a guilty verdict from eight to ten out of fifteen goes far enough. To convict an accused where five out of fifteen jurors are not convinced of his guilt is not consistent with the requirement of proof beyond reasonable doubt. The Faculty would take this view even if corroboration were not being abolished. In the context of the abolition of corroboration, this change is insufficient to secure a trial process which provides reasonable assurance against miscarriages of justice.

7. The Faculty offers some specific comments on other parts of the Bill as set out below.

PART 1 ARREST AND CUSTODY

Chapter 1 Arrest by police

8. The Faculty supports the simplification, clarification and modernisation of the law of arrest and detention in light of the European Convention. As the Faculty pointed out in its previous response to the Scottish Government, one of the key features of

such a system is that an individual should not have his liberty restricted without good reason.

9. The Bill introduces a new police power to re-arrest a suspect on the same grounds and to hold the suspect in custody for the unexpired balance of the 12 hour period. The Faculty suggests that there should be a statutory obligation on the police to inform a suspect upon release that (i) he may be re-arrested and (ii) then held for the unexpired balance of the 12 hour period. Such a provision could be added to section 11.

Section 5

10. The Faculty understands that as of 1 July 2013, all people held in police custody are given a letter informing them of their seven key legal rights. The Faculty submits that the letter must be given to the person at the earliest opportunity and that the rights must also be read out to the person to assist their comprehension. Accordingly, subsection (3) should be amended to state that the information must be provided 'verbally and in writing'.

Chapter 2 Custody: Persons not officially accused

11. In respect of individual sections of the Bill, the Faculty wishes to make the following observations and suggestions:

Section 7

12. The Faculty believes that authorisation for keeping a person in custody should be by an officer of the rank of sergeant or above rather than the rank of constable. The Faculty notes that section 9 requires the review after 6 hours to be carried by a police inspector or above.

Section 9

13. The Faculty believes that there should be a statutory requirement that a record of the review of detention after 6 hours is maintained. This is an important safeguard against individuals being detained for longer than is necessary and proportionate.

Section 11

14. The Faculty believes that the section should make clear that upon expiry of the 12 hour period the person shall be informed immediately that the period has expired and that he should be released immediately from custody.

Section 12

15. There should be a statutory requirement upon arrest and upon arrival at the police station to inform a re-arrested person of the maximum period he may be held for, namely the 12 hour period less the period spent in custody previously.

Section 13

16. Subsection (6) envisages the questioning of a suspect at hospital. Suspects are not regularly taken to hospital for treatment; suspects are usually examined within a police station by a casualty surgeon. In circumstances where the police feel that it would be appropriate to take a suspect to a hospital for treatment, the Faculty believes that it would be inappropriate to question such a suspect until he is taken back to the police station.

Section 14

17. The Faculty notes that this provision bears a similarity to the existing power of the police to release a person on an undertaking in terms of section 22 of the Criminal Procedure (Scotland) Act 1995 and in terms of sections 19 and 20 of the Bill. However, important requirements of section 22 of the 1995 Act are missing. Section 22 of the 1995 Act requires that the person agrees to provide the undertaking and that he signs the undertaking. If not, then the police may either liberate him without an undertaking or refuse to liberate him. The Faculty believes that section 14 of the Bill should be amended to include these requirements.

18. In addition, the Faculty believes that upon release under section 14 of the Bill the person should be provided with a copy release document. Furthermore, the copy release document should include a section informing the person of his right to apply to a sheriff to have the conditions of his release reviewed under section 17.

Section 17

19. As indicated in our evidence in respect of section 15, the Faculty believes that the copy release document provided to the person upon release should include a section informing him of his rights under section 17.

20. The section does not specify that the length of the period of the investigative liberation as something which can be reviewed by the court. The Faculty believes that this should be capable of review.

21. In the absence of a requirement to provide the person with a summary of evidence (which is now routinely provided by COPFS to persons appearing in court), it is difficult to see how meaningful representations can be made on the appropriateness and proportionality of the conditions. For the same reason, it is difficult to see how a sheriff could carry out a meaningful review.

22. The section is silent on important procedural matters. Would there be a hearing on the application or would the application simply be dealt with in chambers? Would there be a time limit fixed by statute within which the application must be heard? Would the person have notice of, or an opportunity to comment on, the procurator fiscal's representations? Would legal assistance be available? If so, how would it be funded? What impact would the processing of these applications have on the police, COPFS and the courts?

23. In order for a review to be practically effective, the Faculty believes that there would need to be: (i) a disclosure protocol in respect of the information which apparently led to the imposition of the conditions (ii) a procedural structure and (iii) funding for legal advice.

Chapter 3 Custody: Persons not officially accused

Section 19

24. The Faculty notes that liberation of a person on an undertaking requires the person to give an undertaking. However, the section does not require that the undertaking is in writing nor does the section require that it is signed by the person. The existing police power to release on an undertaking contains these requirements. The breach of an undertaking is an offence. The Faculty believes the section should mirror the existing legislation: it should contain specific requirements that a person released on an undertaking signs it and is provided with a copy of it.

25. In addition, the Faculty believes that the copy undertaking should include a section informing the person of his right to apply to a sheriff to have the conditions reviewed under section 22.

Section 20

26. The Faculty recognises that giving the police the power to release a person on conditions may often be in the interests of that person. It allows him to be released sooner; if the police did not have this power, then the person would need to be held in custody until his court appearance when the same conditions might be imposed by the court.

27. The imposition of a curfew on a person who has not been officially accused of committing a crime is a significant restriction on that person's liberty: it effectively places a person under house arrest for a period of up to 12 hours in any 24 hour period. The Faculty believes that if the police feel that a curfew is appropriate then an application should be made to the court.

Section 22

28. As indicated in our evidence in respect of section 19, the Faculty believes that the copy undertaking provided to the person upon release should include a section informing him of his rights under section 22.

29. In the absence of a requirement to provide the person with a summary of evidence (which is now routinely provided by COPFS to persons appearing in court), it is difficult to see how meaningful representations can be made on the appropriateness and proportionality of the conditions. For the same reason, it is difficult to see how a sheriff could carry out a meaningful review.

30. The section is silent on important procedural matters. Would there be a hearing on the application or would the application simply be dealt with in chambers? Would there be a time limit fixed by statute within which the application must be heard?

Would the person have notice of, or an opportunity to comment on, the procurator fiscal's representations? Would legal assistance be available? If so, how would it be funded? What impact would processing these applications have on the police, COPFS and the courts?

31. In order for a review to be practically effective there would need to be: (i) a disclosure protocol in respect of the information which apparently led to the imposition of the conditions (ii) a procedural structure and (iii) funding for legal advice.

Chapter 4: Police interview

Section 23

32. The Faculty believes that subsection (2) should require that the specified information is given at the start of the interview as well as being given not more than one hour before the interview.

Section 24

33. Subsection (4) would enable the police to interview a person without a solicitor "in the interests of the investigation". The Faculty believes that this is far too low a threshold. The existing provision in section 15A(8) of the Criminal Procedure (Scotland) Act 1995 provides the higher threshold of "in exceptional circumstances". Furthermore, the recently proposed European Directive on Rights of Access to a Lawyer provides for a similarly high threshold. The Faculty firmly believes the police should not be allowed to interview a person without a solicitor unless such a higher threshold is met. The Explanatory Notes to the Bill fail to mention the existing statutory provision.

Section 25

34. The Faculty believes that the words "owing to mental disorder" where they appear in subsection (2)(b) should be deleted. It may be very difficult for a police officer, without medical training and without any assistance from a police casualty surgeon, to assess whether or not a person is suffering from a mental disorder. The Faculty believes that any person who appears unable to understand sufficiently what is happening or communicate effectively with the police should be provided with support. Furthermore, it is highly unlikely that such an interview, if challenged, would be regarded as admissible. If the words are deleted, subsection (6) should be deleted as a consequential amendment.

Section 29

35. The Faculty believes that maximum length of time a person may be held in custody for post charge questioning under subsection (2) should be fixed by statute rather than left completely to the discretion of the court. This period of detention should include the period between arrest and arrival at the police station.

Chapter 5: Rights of suspects in police custody

Section 33

36. The Faculty believes that the words “owing to mental disorder” where they appear in subsection (1)(c) should be deleted. It may be very difficult for a police officer, without medical training and without any assistance from a police casualty surgeon, to assess whether or not a person is suffering from a mental disorder. The Faculty believes that any person unable to understand sufficiently what is happening or communicate effectively with the police should be provided with support. As we indicated earlier in our comments in respect of section 25, it is highly unlikely that such an interview, if challenged, would be regarded as admissible. If the words are deleted, subsection (5)(a) should be deleted as a consequential amendment.

Chapter 6: Police powers and duties

37. The Faculty has no comment to make on this chapter.

Chapter 7: Breach of liberation conditions

38. The Faculty has no comment to make on this chapter.

Chapter 8: General

39. The Faculty has no comment to make on this chapter.

PART 2: CORROBORATION AND STATEMENTS

Section 57

40. The Faculty does not support the proposal in the Bill to abolish the requirement of corroboration. The following are the Faculty’s principal reasons:

(i) The requirement of corroboration is central to the administration of criminal justice in Scotland at all stages. It cannot be removed without considering (and responding to) the ramifications for all stages of the criminal justice system. Yet there is no clarity as to what will be put in its place. We do not know what test prosecutors will apply in deciding whether or not to prosecute a case. Without knowing what will substitute for corroboration, it is difficult to make a meaningful assessment of the effects of removal.

(ii) Corroboration is a safeguard against miscarriages of justice. The only counterbalance proposed in the trial process, in light of the abolition of corroboration, is the increase of the jury majority from a bare majority to two thirds (10 out of 15). The consequence – that an accused may be convicted on the uncorroborated evidence of a single witness whom five out of fifteen jurors disbelieve – leaves the safeguards against wrongful conviction at an unacceptably low level.

(iii) At the same time, the abolition of corroboration may not benefit victims of crime. Cases may be prosecuted where there is no reasonable prospect of success,

putting complainers through a trial process without the satisfaction of a guilty verdict at the end of it. It is often the corroborative evidence which convinces the jury that the complainer's account is to be preferred to that of the accused. If there is no requirement for corroboration, there is a real risk that the police will not investigate with a view to finding corroborative evidence if it exists, and prosecutors may prosecute without insisting on corroboration.

(iv) In the current environment, the resource implications of abolition cannot be ignored. The analysis in the Financial Memorandum is open to criticism for all the reasons set out in the Faculty's draft response to the Finance Committee's call for evidence. Perhaps most seriously, the Financial Memorandum assumes that the additional resources required can largely, if not entirely, be absorbed through efficiency savings. In relation at least to the COPFS and the Court Service, this seems to the Faculty to be unrealistic.

41. In its response to the Scottish Government's Consultation on Lord Carloway's Report, the Faculty emphasised that:

(i) the matters raised are of fundamental importance to the administration of justice in Scotland;

(ii) given the centrality of corroboration to the system of criminal justice in Scotland, any review of corroboration should be undertaken as part of a review of the Scottish criminal justice system as a whole and having regard to distinctive Scottish features such as the routine reliance on dock identification;

(iii) if the requirement of corroboration were to be abolished then an accused person could be convicted of the most serious crime on the basis of the uncorroborated evidence of a single witness whom seven out of fifteen jurors do not believe; such a proposition is unacceptable in any modern justice system.

(iv) in the absence of corroboration, the criterion to be applied by prosecutors should be made known and articulated in statute.

42. In respect of Point 3, Lord Carloway did not consider an alteration to the majority necessary for a conviction as "either necessary or desirable" [Carloway Report, para 1.0.20]. The Scottish Government has rejected Lord Carloway's position and the Bill now seeks to increase the majority in a jury of 15 from 8 to 10 jurors. The Faculty maintains the position set out in its response to the Scottish Government's Additional Safeguards consultation. Many comparable systems with a jury of 12 require a majority of at least 10 jurors for a conviction. The Faculty questions why the Scottish criminal justice system should require proportionately fewer jurors to be convinced of the guilt of the accused. The Faculty would favour a reduction of the jury to 12, with a requirement of at least 10 for a guilty verdict.

43. In respect of Points 1, 2 and 4, the Faculty maintains its position. The Faculty remains concerned that fundamental reforms of the Scottish criminal justice system are being considered in a piecemeal fashion. Support for the Faculty's position can be found in Lord Carloway's evidence to the Justice Committee (on 29 November 2011) which illustrated the complexity and interdependence of the issues involved: "if

we go down the route of examining majority verdicts, we must examine the not proven verdict. If I had gone down that road, there would have been another 150 pages in the report.” Notwithstanding this evidence, the Scottish Government now proposes to alter of the size of the majority verdict but not to examine the not proven verdict; instead, it intends to refer the not proven verdict to the Scottish Law Commission.

44. The Faculty would not wish to be understood as opposing any re-assessment of the place of corroboration in the criminal justice system. The Faculty recognises the real concerns that, in some cases, the requirement can result in crimes going unpunished. But if corroboration is to be abolished, this should only be done following an assessment of its place in the criminal justice system as a whole, that it be done only in conjunction with measures designed to ensure that miscarriages of justice do not occur, and that it be done with eyes wide open to the potential resource implications of the change.

The effect of removing the requirement of corroboration

45. The requirement of corroboration permeates the criminal justice system at every stage. The abolition of this safeguard would, if no other changes were made, create a system which would look quite different at every stage.

(i) The police would presumably report cases to the fiscal on the basis that there was a single piece of evidence supporting each of the two essential facts: a crime had been committed and the accused was the person or one of the persons who committed it.

(ii) Assuming a single piece of evidence to support the two essential facts, the only question for the prosecutor in deciding whether or not to prosecute the case, would (if no other change was made to the criterion to be applied by prosecutors in marking cases for prosecution) be whether the public interest favoured prosecution.

(iii) On the assumption that there is at least a single piece of evidence supporting each of the essential facts, there would be no basis upon which the trial judge could withdraw a charge from the jury no matter how unsatisfactory the evidence.

(iv) Juries would be directed that they could convict on the basis of a single piece of evidence acceptable to them which established the two essential facts.

(v) An accused could be convicted on the uncorroborated testimony of a single witness or a single piece of evidence, even if (on the proposals in this Bill as regards majority verdicts) five out of the fifteen jurors found that single witness or single piece of evidence incredible or unreliable.

(vi) On appeal, again assuming a single piece of evidence supporting the two essential facts, the only basis upon which the appeal court could review the case by reference to the quality or sufficiency of the evidence would be the “no reasonable jury” test.

46. The proposal to abolish the safeguard of corroboration invites at least the following questions, the answers to which would be relevant to any decision as to whether it is a wise or appropriate step:-

(i) What safeguards or guarantees are there, against a backdrop of significant and sustained pressures in funding, that the police will not short-circuit the investigation of individual cases?

(ii) What criterion are prosecutors to apply when deciding whether or not to prosecute cases?

(iii) On the assumption that prosecutors are to be required to apply some criterion in deciding whether or not to prosecute, should the trial judge not have power to withdraw the case from the jury if, in fact, the evidence at trial does not meet that criterion?

(iv) Separately, should trial judges be given the power – or indeed the duty in all or certain classes of case – to warn the jury of the dangers of convicting on the basis of uncorroborated evidence?

(v) Is it acceptable that an accused could be convicted on the basis of one uncorroborated item of evidence even if five out of the fifteen jurors do not accept that evidence or do not find it a sufficient basis for conviction?

Investigation of crime

47. There is a legitimate concern that if corroboration is not required as a matter of law, the police will not carry out exhaustive enquiries directed to finding corroborative evidence if it exists. This is a real concern in the current climate where there are significant pressures on resources (and where it is recognised that the abolition of corroboration will result in additional cases being prosecuted). This could easily have the effect of causing, rather than preventing, miscarriages of justice for complainers as well as for accused persons. Often, it is the apparently minor piece of corroborative evidence that makes rather than breaks a case. For example, in an allegation of sexual assault through nerves, vulnerability or for some other reason a complainer may not appear to be a convincing witness and on his, or her, testimony alone the jury would not be satisfied beyond a reasonable doubt. However, further police or forensic investigations may reveal a piece of evidence, which not only provides the technical corroboration but confirms the complainer's evidence and satisfies the jury to the required standard. In a justice system where corroboration is not required, there is a risk that, in such a case, the corroborative evidence will not be found, and the complainer's evidence alone will not convince the jury of the guilt of the accused.

Decisions to prosecute

48. Corroboration is not just a technical requirement. If there is corroborated evidence that the accused committed the alleged crime, this provides a reasonable assurance that the case is one which has reasonable prospects of success. If the requirement of corroboration were to be abolished without substituting any other

criterion upon which prosecutors are to proceed when marking cases for prosecution, there would be pressure on COPFS to prosecute any case where some evidence exists regardless of the quality of that evidence. Cases would be pursued and complainers subjected to the trial process where there is, in fact, no realistic prospect of conviction. Such a situation would be unfair both to complainers and to accused persons and would involve a waste of public resources.

49. It seems to be accepted or acknowledged that, if the safeguard of corroboration were to be abolished, prosecutorial marking decisions would not simply be based on a test of sufficiency (plus public interest), but would be based on some qualitative assessment of the evidence as a whole. The comparative exercise carried out as part of Lord Carlway's review used a "reasonable prospect of conviction" test. Slightly different formulations of the test could, at least in theory, have a significant effect on the type and number of cases which would be prosecuted. Are prosecutors, for example, to prosecute any case where there is some evidence unless there is no reasonable prospect of conviction? Or are they to prosecute a case only if there is a reasonable prospect of conviction?

In the Faculty's view, the question of what test should be applied by prosecutors in the event of the abolition of corroboration is a question which cannot be avoided if corroboration is abolished – indeed is intrinsic to the question of whether or not corroboration should be abolished. The effects of abolition cannot meaningfully be assessed without knowing what criterion is to be put in its place. That question is one of great public interest. It should be the subject of explicit, informed and public debate, and any test should be prescribed by law.

50. The application of a qualitative test of this sort would depend significantly on individual judgment. Further, prosecutors mark cases on the basis of the papers. They rely on the statements which have been taken by the police. Precognition by a member of the COPFS staff is, today, unusual. In these circumstances, the prosecutor's ability to make a realistic assessment of the quality of a witness' evidence is limited. Take, for example, a case where a complainer alleges sexual assault. Without seeing the witness, how is the prosecutor to form a view as to the prospects of success?

The role of the trial judge

51. If prosecutors are to apply a "reasonable prospect of conviction" test, or indeed, some other qualitative test, in deciding whether or not to mark a case for prosecution, what is to happen if the evidence as it in fact emerges at trial is not of a quality which should properly have been held to meet the test? Surely the prosecutor should then be obliged to withdraw the case from the jury. And if the prosecutor were not do so, the trial judge should have the power to withdraw the case from the jury. It would surely not be acceptable to have a system in which, if the evidence does not come up to the standard which would have justified a prosecution in the first place, the defence could not make a submission to that effect, and the trial judge could not withdraw the case from the jury.

The fact that our system permits the Appeal Court to overturn a conviction on the basis that no reasonable jury would, on the evidence, have convicted implies a

recognition that juries, sometimes, do behave unreasonably. The Appeal Court, in applying that test, recognises and respects the advantages which those present at the trial, who saw the evidence, have over the Appeal Court, which can proceed only on the papers. Why should the trial judge – the one professional independent judge who has seen and heard the evidence – not be entitled to take the view that the case should not be left to the jury if the evidence is not such as would justify a conviction?

52. In any event, if the requirement of corroboration were to be abolished, the question of how the judge should charge the jury would have to be addressed. Judges would presumably, at least, have to direct juries that there must be at least one piece of evidence which the jury accepts and which supports each of the following facts: (i) that a crime has been committed; and (ii) that the accused is guilty of the crime. But should the judge be required to direct the jury on the need to consider all the evidence that they have heard and to consider whether there is evidence which supports, or on the other hand, undermines, the Crown case? If (as our system has hitherto assumed) there are dangers in convicting on the basis of uncorroborated evidence, judges should have the power, if they consider it appropriate to do so in the particular circumstances of the case, to give juries a warning to that effect.

Resource implications

53. Quite apart from these issues of principle, it seems to the Faculty that the resource implications of the proposal require to be addressed. In order to assess the potential impact of the proposal on the resources required by the criminal justice system, it would be necessary to consider at least the following:

(i) What is the likely impact on the number of additional cases reported by the public to the police? It seems reasonable to surmise that a number of crimes go unreported because there is only one witness.

(ii) What is the likely impact on the number of cases reported to the procurator fiscal?

(iii) What is the likely impact on the resources required by COPFS in the precognition and marking of cases?

(iv) What is the likely impact on the number of cases which are prosecuted at a time of court closures?

(v) What is the likely impact on the incidence of convictions?

54. The Faculty has dealt in detail with this in draft evidence to the Finance Committee of the Parliament. Given the significance of the issue, the Faculty appends that evidence to this response also. That evidence is in draft, not least because the Faculty has requested from the Scottish Government sight of two “shadow” exercises which were undertaken and which inform the assessment of the effects of the change. If those were to be provided, the Faculty would wish to consider its evidence on the resource implications of the Bill in light of that material.

Section 59

55. In the event that the safeguard of corroboration is removed, the Faculty agrees that this should not be with retrospective effect. Legal advice is given on a lawyer's understanding of existing law and practice. If the law in respect of corroboration was to be changed with retrospective effect, then an accused may be prejudiced for acting on advice which was sound legal advice at the time it was given but which would not have been given had there not been a requirement for corroboration. In particular, an accused may have been advised to refrain from making either a mixed or an exculpatory statement.

Section 60

56. This section provides that where the period of time during which a continuous offence is committed includes the relevant day, the specified condition is deemed to be met in relation to the whole offence. This effectively means that the abolition of corroboration is to be given retrospective effect in relation to a "continuous offence". The Faculty opposes this proposal. It gives the abolition of corroboration retrospective reach – which the Faculty does not believe is consistent with principle. It would permit, for example, a prosecution to be brought in relation to events long predating the relevant date and continuing until after the relevant date and for a conviction to be brought on the basis of a single uncorroborated piece of evidence even if the whole period after the relevant date was, at trial, deleted from the charge.

Section 62

57. This section effects a significant change in respect of the admissibility of statements made by an accused. For important public policy reasons, exculpatory statements and/or mixed statements (containing incriminating and exculpatory material) led by the defence were not admissible as proof of any fact contained therein. In effect, this meant that an accused could not rely on exculpatory statements which he had previously made and thereby avoid having to give evidence on oath and be subjected to cross-examination at the trial.

If this provision were to be enacted, then an accused person, who made a statement to the police or other official, would be able to have his position e.g. consent to a sexual charge, self-defence to an assault considered by the fact-finder without himself having to give evidence on oath and be subject to cross-examination.

PART 3: SOLEMN PROCEDURE*Section 63*

58. This section deprives the accused of an opportunity to make a declaration in respect of any charge. It is not clear why this change is being made. Why should the accused not be entitled to make a declaration if he wishes to do so?

Sections 65 to 67

59. The Faculty has some concerns that the volume of cases in the sheriff court and the pressure on the COPFS, particularly in Glasgow and Edinburgh will make it a difficult task to transpose, in effect, High Court procedure into the sheriff court.

Section 70

60. This provision amends the size of the majority for a guilty verdict. For the reasons set out above, the Faculty does not consider that the increase in the majority goes far enough. To permit an accused to be convicted when a third of the jurors are not convinced by the case against him does not seem consistent with the principle that an accused should be convicted only if the evidence against him establishes guilt beyond reasonable doubt. The Faculty would take that view even if corroboration were not being abolished. In the context of the abolition of corroboration, this provision is insufficient to secure a trial process which provides reasonable assurance against miscarriages of justice.

PART 4: SENTENCING

61. The Faculty offers no comment on this Part of the Bill

PART 5: APPEALS AND SCCRC*Section 82*

62. The Faculty is concerned about the imposition of additional criteria only in respect of appeals referred by the Scottish Criminal Case Review Commission. The effect of this section would be that a conviction which the Appeal Court was satisfied amounted to a miscarriage of justice might not be set aside. Establishing to the satisfaction of the Appeal Court that there has been a miscarriage of justice is a very high threshold. The Faculty believes that it cannot be in the interests of justice to allow a conviction which the Appeal Court has found to have been based on a miscarriage of justice to stand.

PART 6: MISCELLANEOUS*Section 86*

63. This section provides for the participation of a detained person by means of a live TV link. The Faculty welcomes the appropriate use of technology in courtrooms. It believes, however, that the successful use of technology will depend on the facilities made available. In particular, it will be essential that there is a facility for the accused to speak privately to his legal representative in advance of, or in the course of the hearing, if required.

Faculty of Advocates
6 September 2013