Justice Committee

3rd Report, 2014 (Session 4)

Stage 1 Report on the Criminal Justice (Scotland) Bill

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Justice Committee

Remit and membership

Remit:

To consider and report on:

a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and

b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Christian Allard
Roderick Campbell
John Finnie
Christine Grahame (Convener)
Alison McInnes
Margaret Mitchell
Elaine Murray (Deputy Convener)
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Committee Clerking Team:

Irene Fleming
Joanne Clinton
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Christine Lambourne
The Committee reports to the Parliament as follows—

SUMMARY OF RECOMMENDATIONS

1. The Committee accepts that there might be some benefit in simplifying the powers of arrest along the lines proposed in Part 1 of the Bill. However, we do have concerns regarding the possible consequences of this change and we therefore make a number of recommendations aimed at improving the provisions in Part 1 of the Bill under the relevant sections below.

2. The Committee has concerns that use of the term ‘arrested’ in relation to a suspect who has been taken into police custody for questioning but has not been charged may, amongst members of the public, be more suggestive of guilt than is currently the case for a suspect who is ‘detained’ for questioning. We consider the terminology in the Bill concerning arrest to be somewhat confusing and are not convinced that members of the public, the accused or the media will be able to distinguish between a ‘person officially accused’ and a ‘person not officially accused’. We also have similar concerns relating to the proposal to allow the police to ‘de-arrest’ a person when the grounds for arrest no longer exist (see paragraph 120 of this report).

3. While we accept assurances from the police that, as with the current position, they do not intend to release a suspect’s name to the media until they have been formally charged with an offence, i.e. ‘officially accused’, we consider that every effort should be made to ensure that the reputation of the accused is not detrimentally affected by these provisions. The Committee considers that the issue of suspects’ anonymity is problematic, but merits further and careful consideration.

4. The Committee is concerned that police officer training and adaptations to the new i6 programme required to effectively implement the provisions in Part 1 of the Bill may place a significant burden on an already stretched police service and individual officers. While we accept the Cabinet Secretary’s assurances that sufficient time will be given to Police Scotland to implement a training programme and to update the new ICT system before
giving effect to the Bill, we ask the Scottish Government to ensure that adequate resources are made available to Police Scotland to carry out these tasks without further strain on its shrinking budget.

5. The Committee notes that the Bill does not give effect to Lord Carloway’s recommendation that ‘arrest’ be defined in the Bill. We further note that there was no consensus from witnesses as to whether arrest should be defined and, if so, whether this legislation was the best vehicle to do so. On balance, the Committee is not content with the Scottish Government’s decision to exclude such a definition in the Bill.

6. The Committee notes the Scottish Government’s position that the power of arrest contained in the Bill combined with common law rules would be sufficient in allowing the police to arrest a person attempting or conspiring to commit an offence. However, we heard from the police that they were not yet convinced by the reassurances given, and from the SHRC that it would have serious concerns if the police were able to arrest a person “who has done nothing contrary to the criminal law”\(^1\). We therefore call on the Scottish Government to further engage with both the police and the SHRC with a view to providing adequate reassurances on this matter.

7. The Committee notes the Scottish Government’s intention to bring forward an amendment to allow a person to be quickly released from arrest (‘de-arrested’) when the grounds for arrest no longer exist. While we recognise that there may be situations where de-arrest could be a reasonable option, we have concerns that this should not lead to a situation where people are arrested without a proper assessment by police officers as to whether such action is appropriate. We would therefore welcome further details of the types of situation and expected frequency in which de-arrest would be used. The Committee also has concerns regarding use of the term ‘de-arrest’ and consider the words ‘released’ or ‘liberated’ to be more appropriate.

8. The Committee welcomes the recent introduction of a ‘Letter of Rights’ for those in custody, in accordance with the EU Directive on the Right of Information in Criminal Proceedings. We ask the Scottish Government to respond to the suggestion of some witnesses that information to be given to suspects at a police station should be provided both verbally and in writing with a view to ensuring that they clearly understand their rights.

9. The Committee heard a divergence in views amongst witnesses regarding the appropriate maximum detention limit. However, we note the statistics provided by Police Scotland relating to the period of 4 June to 1 July 2013 which show that, although the majority of persons (80.4%) were detained for up to six hours, a not unsubstantial number (19.2%) were detained for between six and 12 hours. Given these statistics, there are mixed views on the Committee as to whether detention beyond six hours is necessary.

10. We note the Cabinet Secretary’s commitment to consider whether the detention limit should be extended in exceptional circumstances. While we recognise that there may be situations, particularly in relation to complex and serious crimes, where it may be necessary to consider extending the detention limit, we remain to be convinced whether this is really necessary, particularly when, under the Bill, the police would have the option of releasing a person on investigative liberation. We therefore seek further information on the types of ‘exceptional circumstances’ in which the Scottish Government envisages that an extension to the detention limit would be granted, how often they are likely to be applied for, who would approve any extension, and how the Scottish Government intends to ensure that such extensions do not become commonplace over time.

11. The Committee seeks assurances that investigative liberation will not have an unnecessary impact on the suspect’s private life, whilst allowing the police to conduct complex investigations which could not be completed while the person is initially detained. We note that a person may apply to the courts to have any conditions imposed either removed or altered, which we believe is a welcome protection against disproportionate conditions being applied.

12. The Committee also notes suggestions from victims’ groups that the Bill should include a specific requirement for complainers to be notified of a suspect’s release on investigative liberation and of any conditions attached, however, we are unsure as to whether such a requirement needs to be placed on the face of the Bill. We ask the Scottish Government to work with the COPFS to ensure that, where they may be at risk, complainers are always informed timeously of the suspect’s release and of any relevant conditions applied.

13. The Committee notes that there are likely to be resource implications relating to investigative liberation.

14. Like many witnesses, the Committee is concerned that suspects are sometimes held in custody for unacceptably long periods before their first appearance in court. We believe that court sitting times must be extended to reduce such lengthy periods in custody and the backlog of cases. We also recognise that there are implications for police time and resources in holding people in custody.

15. We are not however convinced that specifying time-limits for periods in custody in legislation is necessary at this stage, particularly when a working group is actively considering options for Saturday courts. We recommend that this work be completed in a timeous manner to allow any recommendations of the working group to be implemented as quickly as possible. The Committee welcomes the Cabinet Secretary’s assurances that he will “take a keen interest in the issue” and requests details of the timescale for meetings and completion of the work of the group.

16. The Committee is content that sufficient safeguards are provided in the Bill regarding liberation of those officially accused from custody, in
particular the right to apply to the sheriff to have any conditions imposed by the police reviewed.

17. The Committee notes the different experiences of witnesses from the legal profession in relation to when the caution is given to suspects by the police under current arrangements. We therefore ask the Scottish Government to respond to the specific suggestion made by the Faculty of Advocates that the Bill should specify that the caution, which must take place not more than one hour before any interview, should also be repeated at the commencement of the interview.

18. The Committee welcomes the extension of the right of access to a solicitor to all suspects held in police custody, regardless of whether the police intend to question the suspect, and that suspects are entitled to face-to-face contact with a solicitor. We recognise that there would be difficulties in specifying in the Bill that a suspect should be entitled to receive assistance from a solicitor of their choice, particularly in the more remote areas of Scotland, and we therefore agree with the Scottish Government on this matter.

19. The Committee is content with the procedure specified in the Bill allowing a constable to question a person not officially accused following arrest.

20. The Committee is persuaded that post-charge questioning may be required in certain complex and lengthy investigations. We also note that the majority of witnesses were content that the requirement on the police to apply to the court for approval for post-charge questioning provides sufficient judicial oversight to minimise the risk of miscarriages of justice.

21. However, post-charge questioning should only be used when absolutely necessary. To this end, we ask the Scottish Government to maintain a record of the circumstances and frequency in which post-charge questioning is used, including details of the applications that are refused by the courts. We further seek confirmation from the Scottish Government that existing rules providing that no adverse inference may be drawn from a suspect’s refusal to answer police questions would apply equally to post-charge questioning.

22. The Committee notes that the Victims and Witnesses (Scotland) Bill defines a child as a person up to the age of 18. The Committee asks the Scottish Government to explain why there is inconsistency between the protections for under-18s in this Bill compared with this recent legislation.

23. The Committee has concerns regarding the lack of consistency in use of the terms “welfare”, “best interests” and “well-being” of the child in this and other legislation. While we make no comment on which is the most appropriate term, we ask the Scottish Government to ensure consistency in the language used in section 42 of the Bill.
24. The Committee welcomes the Cabinet Secretary’s undertaking to give consideration to raising the age of criminal responsibility and would welcome regular updates on this work.

25. The Committee has concerns that the definition of vulnerable person in the Bill may not capture all individuals needing additional support when in custody. We also note comments from the police that there are difficulties in identifying vulnerable persons. We therefore ask the Scottish Government to give further consideration to the definition of vulnerable persons in the Bill and to reflect on whether this is consistent with the definition in the Victims and Witnesses (Scotland) Act 2014. We also ask that the Scottish Government ensures that sufficient resources are provided to the police to undergo training in this important area.

26. The Committee asks the Scottish Government to respond to concerns raised by witnesses that its decision not to place the provision of appropriate adult services in the Bill could lead to a lack of funding by local authorities already facing significant financial challenges.

27. The majority of Committee Members are of the view that the case has not been made for abolishing the general requirement for corroboration and recommend that the Scottish Government consider removing the provisions from the Bill.

28. The Committee is convinced that, if the general requirement for corroboration continues to be considered, this should only occur following an independent review\(^2\) of what other reforms may be needed to ensure that the criminal justice system as a whole contains appropriate checks and balances.

29. The majority of Committee Members do not believe, in the event that the requirement for corroboration is abolished, that concerns relating to the need for further reform can be adequately explored during the passage of the Bill. The Cabinet Secretary’s proposal that the commencement of the provisions abolishing the requirement for corroboration be subject to a parliamentary procedure requires further explanation and consideration, which the Committee requires before Stage 2.

30. The Cabinet Secretary’s letter dated 4 February 2014 came in the late stages of consideration of this report, and therefore cannot form part of this report. The Committee calls on the Scottish Government to provide, prior to the Stage 1 debate, further information on any review of additional safeguards (including the proposed remit, who might be involved, likely timescales and options for implementing recommendations).

31. The Committee calls on the Scottish Government to provide more information on how any requirement for supporting evidence would differ from the current need for corroboration.

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\(^2\) Margaret Mitchell, Alison McInnes and John Finnie believe that this review should be undertaken by a Royal Commission or the Scottish Law Commission.
32. The Committee also notes the Cabinet Secretary's willingness to consider placing a revised 'prosecutorial test' on the face of legislation. The Committee accepts that such a step might form part of new checks and balances in response to the proposed abolition of the requirement for corroboration, but recommends that the matter should be included for full consideration in any review process.

33. The Committee is fully aware of continuing concerns relating to how the justice system responds to cases of rape, domestic abuse and other offences which often happen in private. Members note ongoing efforts to improve the situation for victims of such offences and agree that further steps need to be taken, including measures aimed at addressing low prosecution and conviction rates.

34. The Committee calls on the Scottish Government to actively review all evidence relating to how improvements with regard to offences such as rape and domestic abuse may be achieved. This should include consideration of public attitudes as well as the justice system. In relation to the latter, all stages must be included, from initial contact with the police to the giving of evidence in court (e.g. whether victims of such offences should have access to legal advice and support where their personal or medical details may be revealed in court).

35. The Committee agrees that, if the requirement for corroboration is abolished, it should not apply retrospectively.

36. On balance, the Committee considers that there is a case for a review of the role of hearsay evidence in the criminal justice system but that this should be included in any wider review of the law of evidence.

37. On balance, the Committee accepts the need to extend the pre-trial time limits as proposed in the Bill. However, we do have some reservations as to whether the proposal to extend the current 110 day limit within which the trial of an accused person held in custody must commence to 140 days is proportionate. We are therefore pleased that the Scottish Government plans to monitor the implementation of this proposal, in particular to ensure that trials are started as soon as possible and that any extensions to the 140 day limit are rare. We seek updates from the Scottish Government on any findings and outcomes arising from its monitoring of implementation of this pre-trial limit.

38. While the Committee considers that achieving effective communication must, at least in part, be dependent upon the availability of adequate resources (discussed further below), we are persuaded of the potential benefits of this measure, in particular, in reducing the possibility of victims and witnesses having to attend court when their cases are not ready to proceed.

39. The Committee supports the proposals in the Bill for statutory communication between the prosecution and defence to take place after the
indictment is served and for there to be flexibility in the method of communication to be used.

40. The Committee calls on the Scottish Government to work with the COPFS and the Law Society of Scotland in seeking to resolve current difficulties in rolling out the secure email system to all defence solicitors, with a view to resolving such difficulties by the time the Bill comes into force.

41. The Committee welcomes the Cabinet Secretary's commitment to review whether the Bill could usefully be amended to allow individual written records on the state of preparedness of cases to be submitted by the defence and prosecution.

42. The Committee agrees with witnesses that both the prosecution and defence solicitors must be adequately resourced for the duty to communicate to work effectively as planned. We note that the Scottish Government has worked with criminal justice partners to anticipate the costs and savings that may arise from this proposal, but we recommend that the Scottish Government closely monitors the resource implications during implementation to ensure that resources are in place where and when needed.

43. The Committee notes that the Bill does not impose any sanctions if the written record is not submitted timeously.

44. The Committee agrees that the proposal in the Bill for a trial only to be scheduled once the sheriff dealing with the first diet is satisfied that the case is ready to proceed will reduce inconvenience to witnesses, and give certainty to both the prosecution and defence regarding the date of the trial.

45. The Committee welcomes the Scottish Government's continued focus on knife crime and its efforts to change the culture of carrying knives. The Committee is content with the increase in maximum sentences for offences relating to the possession of a knife or offensive weapon from four to five years.

46. The Committee welcomes the provisions in sections 72 and 73 on sentencing offenders on early release.

47. The Committee welcomes the policy objective to speed up appeals and understands that there are practical reasons why appeals ought to be lodged timeously. We note the concerns that, in applying a higher test for allowing late appeals, cases with merit may not be heard unless they meet an exceptional circumstances test. We ask the Scottish Government to consider the Law Society of Scotland's recommendation that sections 76 and 77 be redrafted with an emphasis on the interests of justice. The Committee also notes that Lord Carloway made other recommendations in relation to the speeding up of appeals.
48. The Committee welcomes the removal of the gate-keeping role of the High Court when dealing with referrals from the Scottish Criminal Cases Review Commission (SCCRC).

49. However, we are concerned that the Bill retains the High Court’s interests of justice test, albeit during the determination of an appeal resulting from a referral from the SCCRC. Given that, according to Lord Carloway, despite the occasional lapse, the SCCRC has been a “conspicuous success in discharging its duties conscientiously and responsibly”, we are not convinced that the arguments for the High Court replicating the duties of the SCCRC in this respect have been made. Consequently, we recommend that the High Court should only be able to rule on whether there has been a miscarriage of justice in these cases, and if there has been, the appeal should be allowed.

50. The Committee welcomes the two aggravations with regard to people trafficking proposed in the Bill. The Committee requests that the Scottish Government keeps it updated on progress with the Modern Slavery Bill and its extension to cover Scotland.

51. The Committee welcomes the establishment of a separate Police Negotiating Board for Scotland which will include participation from all ranks of police officers.

52. The Committee supports the general principles of the Bill. However, this is with the exception of proposals regarding the corroboration provisions. Our recommendations on this issue are set out in the main body of this report.

INTRODUCTION

53. The Criminal Justice (Scotland) Bill was introduced in the Scottish Parliament on 20 June 2013 by the Cabinet Secretary for Justice, Kenny MacAskill MSP. The Parliamentary Bureau designated the Justice Committee as lead committee in consideration of the Bill at Stage 1.

54. The Committee considered its approach to the Bill at its meeting on 25 June. It issued a call for written evidence on 26 June and received 54 responses and 11 supplementary submissions. It took evidence on the Bill over 11 meetings between 24 September and 8 October and between 19 November and 14 January from a range of criminal justice bodies, victims’ groups, legal and human rights experts, as well as from Lord Carloway, Sheriff Principal Bowen and from the Cabinet Secretary for Justice.

55. The Finance Committee also issued a call for written evidence on the Financial Memorandum on the Bill. It took oral evidence from the Scottish Government Bill Team on the costs associated with the Bill at its meeting on 20

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3 Carloway Review, page 367.
4 Criminal Justice (Scotland) Bill, as introduced (SP Bill 35, Session 4 (2013)). Available at: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx
November. The Finance Committee reported\(^5\) to the Justice Committee on the Bill on 13 December. The Delegated Powers and Law Reform Committee published its report\(^6\) on the Delegated Powers Memorandum on the Bill on 30 October.

**BACKGROUND TO THE BILL**

**Cadder vs HM Advocate**

56. On 26 October 2010, the UK Supreme Court’s judgement in the case of Cadder vs HM Advocate\(^7\) held that rules under which the police in Scotland could detain and question a suspect without the suspect having a right of access to legal advice breached the right to a fair trial (including the implied privilege against self-incrimination) recognised in Article 6 of the European Convention on Human Rights (ECHR).\(^8\)

57. In response to this ruling, the Scottish Government introduced legislation which was passed by the Scottish Parliament under emergency bill procedure on 27 October 2010. The resulting Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010\(^9\) (“the 2010 Act”) made a number of changes affecting:

- **access to legal advice by suspects** - enshrining a right of access to a solicitor, both before and during police questioning, and providing for related changes to state funded criminal legal assistance;

- **police powers of detention** - extending the maximum period during which the police are able to hold a suspect in custody for the purposes of investigation, prior to arrest, from six hours to 12 hours, with the possibility of extension to 24 hours; and

- **possible appeals** - seeking to restrict any impact which court rulings, such as that in Cadder, may have on already concluded prosecutions (eg providing that the Scottish Criminal Cases Review Commission (SCCRC) must have regard to the need for finality and certainty when considering if it is in the interests of justice to refer a case to the High Court).\(^10\)

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\(^7\) Cadder vs HM Advocate. Available at: [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0022_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0022_Judgment.pdf)

\(^8\) European Convention on Human Rights. Available at: [http://www.echr.coe.int/Documents/Convention_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)


Lord Carloway’s Review of Scottish Criminal Law and Practice

58. Following the case of *Cadder v HMA*, Lord Carloway (a High Court judge) was asked by the Cabinet Secretary for Justice to lead an independent review of criminal law and practice.

59. The Scottish Government considered that such a review was necessary in order to ensure that the Scottish justice system continued to be fit for purpose and that it also met the appropriate balance of protecting the rights of accused persons with victims of crime in light of the changes brought about by the Cadder judgement.¹¹

60. The following terms of reference of the review were agreed between Lord Carloway and the Cabinet Secretary for Justice:

(a) to review the law and practice of questioning suspects in a criminal investigation in Scotland in light of recent decisions by the UK Supreme Court and the European Court of Human Rights, and with reference to law and practice in other jurisdictions;

(b) to consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime;

(c) to consider the criminal law of evidence, insofar as there are implications arising from (b) above, in particular the requirement for corroboration and the suspect’s right to silence;

(d) to consider the extent to which issues raised during the passage of the 2010 Act may need further consideration, and the extent to which the provisions of the Act may need amendment or replacement; and

(e) to make recommendations for further changes to the law and to identify where further guidance is needed, recognising the rights of the suspect, the rights of victims and witnesses and the wider interests of justice while maintaining an efficient and effective system for the investigation and prosecution of crime.¹²

61. A review team was set up in December 2010 which was supported by an expert reference group¹³ consisting of leading practitioners and representatives in relevant fields. The review process involved a range of evidence gathering, research, analysis and consultation. The consultation process ran from 8 April to

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¹¹ Criminal Justice (Scotland) Bill. Policy Memorandum (SP Bill 35-PM, Session 4 (2013)), paragraph 6. Available at: http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd-pm.pdf

¹² Policy Memorandum, paragraph 7.

¹³ A list of members of the reference group is available at: http://www.scotland.gov.uk/About/Review/CarlowayReview/referencegroup/members
3 June 2011 and 51 responses were received. The report of the review was published on 17 November 2011.\footnote{Review of Scottish Criminal Law and Practice (The Carloway Review). Available at: http://www.scotland.gov.uk/About/Review/CarlowayReview}

62. In his report, Lord Carloway set out 76 recommendations in relation to the following areas:

- arrest and detention of suspects - a new system of arrest and detention in police custody; including proposals aimed at avoiding unnecessary or disproportionate detention and police powers to liberate suspects subject to conditions for the purpose of carrying out further investigations;

- legal advice and police questioning of suspects - proposals on suspects’ rights of access to a lawyer and the nature and scope of police questioning, including additional safeguards for children (under 18) and vulnerable adult suspects;

- rules of criminal evidence - including a proposal to abolish the requirement for corroboration in criminal cases, but rejecting any change to current rules preventing adverse inference being drawn at trial from an accused’s failure to answer questions during the police investigation; and

- appeal procedures - proposals to rationalise the current system of criminal appeals, and to achieve a balance between upholding the finality of criminal cases and allowing potential miscarriages of justice to be challenged; including a stricter test for allowing late appeals to proceed and changes to the interests of justice test applied by the High Court in relation to references from the Scottish Criminal Cases Review Commission.\footnote{Reforming Scots Criminal Law and Practice: The Carloway Report. Available at: http://www.scotland.gov.uk/Publications/2012/07/4794}

Justice Committee consideration

63. Following publication of the report, the Justice Committee took evidence from a range of interested professionals, academics and stakeholders to obtain a snapshot of initial reactions to Lord Carloway’s recommendations. At the conclusion of this process, the Committee sent a letter to the Cabinet Secretary for Justice in January 2012 setting out its observations on the main issues highlighted in the evidence.\footnote{Scottish Parliament Justice Committee. Consideration of report of Carloway Review. Available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/45421.aspx}

Scottish Government consultation

64. On 3 July 2012, the Scottish Government published a consultation paper\footnote{SPICE briefing, page 6.} which sought views on the recommendations made by Lord Carloway in his report. The consultation ran until 5 October 2012 and posed 41 questions relating to Lord Carloway’s recommendations.
65. The consultation document stated that the Scottish Government’s broad approach was to recognise Lord Carloway’s Report as a substantial and authoritative piece of work and to accept the broad reasoning as set out in the report. It also stated that the purpose of the consultation was not to revisit the review but instead that it was designed to promote public discussion of the recommendations to assist the Scottish Government in translating the package of reforms proposed into legislation.\(^\text{18}\)

66. The Scottish Government received 56 responses to the consultation. It published the non-confidential responses\(^\text{19}\) along with an independent analysis of these responses\(^\text{20}\) on 19 December 2012. There was a majority in support of almost all of Lord Carloway’s recommendations. The exception to this was the proposal to remove the requirement for corroboration, which attracted the largest number of responses. Although some third sector organisations were in favour of the recommendation, a majority, including some organisations representing the legal profession, favoured its retention. In addition, a large majority of respondents felt that safeguards should be put in place if the requirement for corroboration was abolished.\(^\text{21}\)

67. In light of these responses, the Scottish Government launched a further consultation\(^\text{22}\) on 19 December 2012 which sought views on the need for safeguards following the removal of the requirement for corroboration. In particular, it sought views on two proposals for additional safeguards: increasing the jury majority to return a guilty verdict and widening the trial judge’s power to rule that there is no case to answer. Views were also sought on whether the ‘not proven’ verdict should be retained.

68. The consultation ran until 15 March 2013 and 32 responses were received. The Scottish Government published the responses received\(^\text{23}\) on 21 June 2013. While many of the respondents still disagreed with the proposal to abolish the requirement for corroboration\(^\text{24}\), there was majority support for the additional two safeguards proposed\(^\text{25}\).

\(^{18}\) Reforming Scots Criminal Law and Practice: The Carloway Report, paragraph 1.8.
\(^{19}\) Reforming Scots Criminal Law and Practice: The Carloway Report - publication of non-confidential consultation responses. Available at: [http://www.scotland.gov.uk/Publications/2012/12/4338/0](http://www.scotland.gov.uk/Publications/2012/12/4338/0)
\(^{21}\) Policy Memorandum, paragraph 23.
\(^{22}\) Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration. Available at: [http://www.scotland.gov.uk/Publications/2012/12/4628/0](http://www.scotland.gov.uk/Publications/2012/12/4628/0)
\(^{23}\) Additional Safeguards Following the Removal of the Requirement for Corroboration: Consultation Responses. Available at: [http://www.scotland.gov.uk/Publications/2013/06/7066](http://www.scotland.gov.uk/Publications/2013/06/7066)
Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure

69. In April 2009, the Cabinet Secretary for Justice commissioned Sheriff Principal Bowen QC to conduct an independent review of the practices and procedures relating to solemn sheriff court cases (sheriff and jury cases).

70. The remit of the review was:

“To examine the arrangements for sheriff and jury business, including the procedures and practices of sheriff court and the rules of criminal procedure as they apply to solemn business in the sheriff court; and to make recommendations for the more efficient and cost-effective operation of sheriff and jury business in promoting the interests of justice and reducing inconvenience and stress to the victims and witnesses involved in cases”.

71. Sheriff Principal Bowen carried out his review with the support of a review team seconded from justice organisations. An independent reference group comprising representatives from justice organisations, legal practitioners, the judiciary and academics also supported the review process, which consisted of a range of evidence gathering, research, analysis and observation and monitoring of court proceedings.

72. The report of the review was published on 11 June 2010. It set out 34 recommendations for sheriff and jury cases, not all of which would require legislation. It included proposals in the following areas:

- communication between prosecution and defence - improving out of court discussion between the two parties by establishing compulsory business meetings;
- management of cases - improving the effectiveness of first diets (existing pre-trial court hearings) and the scheduling of trials; including the recommendation that a trial sitting is not allocated until the sheriff dealing with the relevant first diet is satisfied that all outstanding issues have been resolved;
- time limits - providing the parties with more time to prepare cases by bringing time limits more into line with High Court cases; including an extension to the deadline for bringing custody cases to trial; and
- monitoring and evaluation of reforms.

73. In putting forward these proposals, Sheriff Principal Bowen indicated that the success of the proposed reforms would be dependent upon a legal aid structure.

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26 Policy Memorandum, paragraph 13.
27 A list of members of the reference group is available at page 10 of the review document: http://www.scotland.gov.uk/Resource/Doc/314393/0099893.pdf
28 Policy Memorandum, paragraphs 14 and 15.
which is supportive of early resolution, sentence discounting in appropriate cases and effective judicial management. He also noted that—

“This Review has been conducted in the full knowledge of the stringencies likely to be imposed on public sector spending in the foreseeable future. I have made no recommendation which is likely to result in significant public expense; to the contrary I believe that the recommendations of this report, if implemented, will help make better use of resources and result in demonstrable savings in the long term.”

Scottish Government consultation

75. The Scottish Government indicated its broad support for Sheriff Principal Bowen’s recommendations, stating in the consultation document that—

“The new system model will ... be one where the attention of all parties is directed to timeous engagement and early resolution of any issues that are susceptible to agreement. In the new system, actual court time will be dedicated to hearing issues which are genuinely still in dispute. This will result in savings of time and money and spare victims and witnesses inconvenience and distress. The system model will be supported by incentives to parties to play positive roles, and Sheriff Principal Bowen also places a strong emphasis on judicial management.”

76. It published the responses to the consultation along with an analysis of these responses on 21 June 2013.

Provisions in the Bill
77. The Bill comprises provisions which have been developed from recommendations of Lord Carloway’s Review of Scottish Criminal Law and Practice, and from the recommendations of Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure, as well as a number of additional relevant matters which take forward a range of Scottish Government justice priorities.

78. In terms of Lord Carloway’s recommendations, the Bill includes provision in the following broad areas: arrest, period of custody, investigative liberation, legal
advice, questioning, child suspects, vulnerable adult witnesses, corroboration and sufficiency of evidence, exculpatory and mixed statements, appeal procedures, finality and certainty.

79. Although not a recommendation of Lord Carloway, the Bill also makes provision to increase the jury majority to two thirds to return a guilty verdict. The Scottish Government considered this necessary in light of the removal of the requirement for corroboration in criminal cases.\(^{38}\)

80. In terms of Sheriff Principal Bowen’s recommendations, the Bill’s provisions include:

- a requirement for the prosecutor and the defence to engage in advance of the hearing;
- a case will be indicted to a first diet and will only proceed to trial when a sheriff is satisfied that it is ready;
- increasing the time period in which an accused person can be remanded before having been brought to trial from 110 days to 140 days; and
- removal of the requirement for an accused person to sign a guilty plea.\(^{39}\)

81. In addition, the Bill makes provision for matters relating to the sentencing of offenders, people trafficking, the Police Negotiating Board for Scotland (PNBS), the use of live TV links which, according to the Policy Memorandum, are intended to complement the reforms based on the two reviews.\(^{40}\)

82. The main provisions of the Bill are set out in six parts:

- Part 1 (arrest and custody) which deals with police powers to arrest, hold in custody and question suspects as well as protective rights of suspects (restating a number of existing rights and powers as well as providing for a number of important reforms);
- Part 2 (corroboration and statements) which abolishes the current general requirement for corroboration in criminal cases and makes changes to ‘hearsay’ rules in so far as they affect the admissibility in evidence of certain statements made by an accused person;
- Part 3 (solemn procedure) which makes provisions aimed at facilitating the better preparation of sheriff and jury cases, and changing the rules on jury majorities in all solemn procedure cases;
- Part 4 (sentencing) which makes provision for sentencing for possession of a knife or offensive weapon and for people who commit an offence during a period of early release from a custodial sentence;

\(^{38}\) Policy Memorandum, paragraphs 11 and 12.  
\(^{39}\) Policy Memorandum, paragraph 17.  
\(^{40}\) Policy Memorandum, paragraph 5.
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- Part 5 (appeals and the SCCRC) which makes provisions seeking to address delays in determining appeals and makes changes to the way in which the High Court deals with references from the SCCRC; and

- Part 6 (miscellaneous) which makes provisions seeking to create a statutory aggravation relating to people trafficking, allowing for greater use of live television links between prisons (or other places of detention) and the courts, and establishing a Police Negotiating Board for Scotland.\(^{41}\)

PART 1: ARREST AND CUSTODY

**Arrest by police**

*Powers of arrest: overview*

83. Police officers are currently able to take suspects into custody, and hold them for the purposes of investigation or appearance in court, on the basis of:

- common law and statutory powers of arrest; and
- powers of detention under section 14 of the Criminal Procedure (Scotland) Act 1995.\(^{42}\)

84. Common law powers allow a police officer to arrest a suspect without a warrant where this is necessary for the purposes of preventing the suspect from escaping, committing further offences, or hindering the course of justice. This power may be exercised where the officer has a reasonable suspicion that the suspect has committed an offence. In addition, the common law allows an accused to be arrested and held in custody, on the basis of a warrant granted by the court, where necessary to secure the person’s attendance at court.

85. Statutory powers of arrest are attached to a wide range of statutory offences and are generally applicable on the basis of reasonable suspicion that a person has committed an offence.\(^{43}\)

86. Powers of detention set out in section 14 of the 1995 Act, may be exercised where a police officer has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment.\(^{44}\)

87. In his report, Lord Carloway stated that “the distinction [between detention and arrest] has been eroded to such an extent that there is little purpose in continuing with two different states of custody”, therefore “it would be simpler, and more clearly in tune with the ECHR, if there were a single period of custody, once a suspect has been arrested on suspicion”.\(^{45}\) He added that “the existence of two distinct means of taking a person into custody ... is a peculiar, if not unique, feature of modern Scots criminal procedure”\(^{46}\) and he therefore recommended

\(^{41}\) SPICe briefing, page 5.
\(^{42}\) SPICe briefing on the Bill, page 10.
\(^{43}\) SPICe briefing on the Bill, page 10.
\(^{44}\) SPICe briefing on the Bill, page 10.
\(^{45}\) Carloway Review, paragraph 5.0.4.
\(^{46}\) Carloway Review, paragraph 5.1.4.
that the common law and statutory rules on arrest and detention be replaced with a general power of arrest on ‘reasonable suspicion’.  

88. The Bill generally gives effect to Lord Carloway’s recommendations in relation to arrest and custody. The Policy Memorandum on the Bill states that the Scottish Government was “persuaded by the logic of having a single state of custody which simplifies and clarifies the rights and procedures for police and arrested persons alike”. It confirms that “the effect of the provisions is to abolish detention under section 14 of the 1995 Act so that the only general power to take a person into custody is the power of arrest contained in the Bill”. The Policy Memorandum also explains that “the test for the police arresting a person without a warrant is whether they have reasonable grounds for suspecting the person has committed, or is committing, an offence punishable by imprisonment”. A warrant would still be required for non-imprisonable offences “unless obtaining one is not in the interests of justice”.  

89. At present, the arrest of a person on suspicion of having committed an offence is followed by the police charging the suspect. The Bill seeks to remove the necessity for the police to charge a person upon arrest and prior to reporting to the procurator fiscal for prosecution. The Policy Memorandum indicates that, where a suspect is to be reported to the procurator fiscal without being charged, the police must still advise the suspect of this intention. It goes on to state that: “this, in effect, has the same outcome as the current ‘charge’ in that it signifies a change in the person’s status and ends the period in which police can question a person”. The Bill provides that any further questioning must be authorised by judicial sanction, an area which is explored later in this report.  

90. In providing for police powers and rights of suspects, the Bill distinguishes between people who are ‘officially accused’ and those who are ‘not officially accused’ of committing an offence. In many cases this would be the distinction between a suspect who has or has not been charged with an offence. However, given that a suspect may be reported for prosecution without charge, the category of persons who are ‘officially accused’ includes suspects who have not been charged but in relation to whom the prosecutor has initiated proceedings. Procedures relating to these two groups are discussed later in the report.  

Powers of arrest: simplification or needless change?  
91. A large number of witnesses and respondents to the Committee’s call for written evidence supported the provisions in the Bill in relation to arrest and detention. In its written submission, the Crown Office and Procurator Fiscal Service (COPFS) described the proposal “as a welcome simplification of the often complex rules regarding powers of arrest”; while Assistant Chief Constable Malcolm Graham told the Committee that Police Scotland believes that the case  

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47 Carloway Review, paragraph 4.0.8.  
48 Policy Memorandum, paragraph 34.  
49 Policy Memorandum, paragraph 35.  
50 Policy Memorandum, paragraph 35.  
51 Policy Memorandum, paragraph 37.  
52 Criminal Justice (Scotland) Bill, section 55.  
has been well made and that the changes are required. He explained that “the current terminology persistently causes confusion because the term ‘detention’ is used for somebody who is remaining in custody prior to court, rather than for a means of temporary arrest.” Professor James Chalmers of the University of Glasgow said that he did not see any difficulty merging the two concepts, suggesting in fact, that “doing so will give us a much more rational and sensible system than the one that we have.” Professor Fiona Leverick, also from the University of Glasgow, agreed that the provisions in the Bill around arrest and detention were “a vast improvement” in simplifying a particularly confusing system.

92. The Faculty of Advocates also welcomed “the simplification, clarification and modernisation of the law of arrest and detention.” Murdo Macleod QC, representing the Faculty, told the Committee that “the distinction between detention and arrest is almost academic anyway, because people are now entitled to have their solicitor present with them during detention as well as afterwards.”

93. However, the Law Society of Scotland was less convinced, arguing that “the current system is working well and there is no requirement to move to a system of arrest on the basis that a constable has reasonable grounds for suspecting that the person has committed or is committing an offence.” In oral evidence, Grazia Robertson of the Law Society added that “the system, as changed in light of Cadder, seems to have bedded in … and to be working well.”

94. Calum Steele of the Scottish Police Federation (SPF) also said he was “not entirely convinced” that the need for change had been demonstrated or that the proposed wording would be more easily understood. He suggested that “it seems to be unnecessary to create a new set of statutory provisions that are almost identical to an old set of statutory provisions, with just a change in terminology.” David O’Connor of the Association of Scottish Police Superintendents (ASPS) told the Committee that he tended to agree with this position.

95. The Cabinet Secretary for Justice told the Committee that, “at present, detention and arrest blur into each other” and that “the provisions will improve the law and will be easier for the police to apply than those under the current system.” He went on to argue that “it will bring the Scottish system more into line with the European Convention on Human Rights, which refers to … detention as the period of police custody following arrest.”

58 Faculty of Advocates. Written submission, page 1.
60 Law Society of Scotland. Written submission, page 2.
96. The Committee accepts that there might be some benefit in simplifying the powers of arrest along the lines proposed in Part 1 of the Bill. However, we do have concerns regarding the possible consequences of this change and we therefore make a number of recommendations aimed at improving the provisions in Part 1 of the Bill under the relevant sections below.

Powers of arrest: public perception
97. When asked to comment on whether the public perception of a person who is under arrest differs from that of a person who is being detained, ACC Graham accepted that “the term ‘arrest’ has a different feel for the public from ‘detention’”. However, he suggested that “people largely understand that in Scotland ... your guilt or innocence is decided at the point when you go to court, not because the police have either detained or arrested you”. He went on to argue that “there would not be any release of information until somebody was arrested and could be charged under the current system, so I do not see that that would change because we had moved to a position of arrest under suspicion”. He added that “I do not think that would come into the public domain in the way you have described, and it would not change the public perception”. Professor Chalmers said, in any case, that he was “not sure that the distinction between arrest and detention is well understood by the general public; they both involve largely the same thing, which is somebody being taken into custody”.

98. The Cabinet Secretary told the Committee that “although somebody may be arrested by the police, they are presumed innocent until a court case conclusively proves otherwise” and that “everyone in Scotland recognises that point, although, sadly, it sometimes does not appear to be portrayed in that way in the media”. He added that “ordinary citizens in Scotland find it pretty hard to explain the difference between arrest and detention and why some people are arrested straight by the police and others are detained”.

99. The Cabinet Secretary was asked whether he would consider giving suspects in certain sensitive cases anonymity to protect the reputation of those who have been arrested but are not officially accused. He responded that “these are matters on which we do not have a formal policy” but said “we are happy to consider them and engage with the committee, the legal profession and, doubtless, the media and those involved in social media”. He added that this was “a legitimate and understandable point” but that, “as always, the devil is in the detail, especially in relation to social media”.

100. The Committee has concerns that use of the term ‘arrested’ in relation to a suspect who has been taken into police custody for questioning but has
not been charged may, amongst members of the public, be more suggestive of guilt than is currently the case for a suspect who is ‘detained’ for questioning. We consider the terminology in the Bill concerning arrest to be somewhat confusing and are not convinced that members of the public, the accused or the media will be able to distinguish between a ‘person officially accused’ and a ‘person not officially accused’. We also have similar concerns relating to the proposal to allow the police to ‘de-arrest’ a person when the grounds for arrest no longer exist (see paragraph 120 of this report).

101. While we accept assurances from the police that, as with the current position, they do not intend to release a suspect’s name to the media until they have been formally charged with an offence, i.e. ‘officially accused’, we consider that every effort should be made to ensure that the reputation of the accused is not detrimentally affected by these provisions. The Committee considers that the issue of suspects’ anonymity is problematic, but merits further and careful consideration.

Power of arrest: resource implications

102. While noting that the provisions in relation to the general power of arrest in the Bill appeared to be “relatively straightforward”, the SPF suggested that there could be cost implications arising from the provisions, particularly regarding training for police officers and adapting ICT systems “at a time when the service budget is under extreme pressure”.76 Chief Superintendent David O’Connor of ASPS agreed that “the change appears, on the surface, to be relatively simple”, but “there will be significant training issues for Police Scotland in ensuring that everyone fully understands what the change from ‘detention’ to ‘arrest on suspicion’ means”.77 He later added that, although this “is a big ask, it is doable”.78

103. John Gillies of Police Scotland accepted that “the training and re-education of the service in relation to these provisions would be considerable” and said that it was “difficult to put a cost on such training, but it is fair to say that it would be quite a distraction to the service”.79

104. Stevie Diamond of Unison suggested that the i6 ICT programme,80 which is due to come into operation in 2015, could need “rejigging … before it starts, to accommodate the provisions in the Bill”.81 ACC Graham explained that work was “on-going to ensure that the i6 programme can be designed … to encompass as many of the proposals in the Bill as possible”, however, “we cannot design in those proposals with any degree of certainty until the Bill becomes an Act”.82

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76 Scottish Police Federation. Written submission, page 1.
80 i6 is the new ICT programme for Police Scotland which is currently under development. It covers six broad areas: crime, criminal justice, custody, missing persons, vulnerable persons and productions/lost and found property.
105. The Cabinet Secretary told the Committee that “Police Scotland is content and understands the obligations that go with any new legislation”.\(^{83}\) He later added that the Scottish Government has had discussions with the police and advised that “they will take time to ensure that training is given—some of it will be on the job, some of it will be online and some of it might take place at Tulliallan”\(^{84}\). The Financial Memorandum assumes that the Bill provisions will take effect in the financial year 2015-16, which the Cabinet Secretary told the Committee would allow time for the police to undergo the necessary training.\(^{85}\)

106. The Committee is concerned that police officer training and adaptations to the new i6 programme required to effectively implement the provisions in Part 1 of the Bill may place a significant burden on an already stretched police service and individual officers. While we accept the Cabinet Secretary’s assurances that sufficient time will be given to Police Scotland to implement a training programme and to update the new ICT system before giving effect to the Bill, we ask the Scottish Government to ensure that adequate resources are made available to Police Scotland to carry out these tasks without further strain on its shrinking budget.

**Definition of arrest**

107. In his report, Lord Carloway stated that “there would be benefit in stipulating exactly what ‘arrest’ is in statute”. He therefore recommended that, “in line with the concepts expressed in Article 5 of the Convention, arrest should be defined as meaning the restraining of the person and when necessary, taking him or her to a police station”.\(^{86}\) The Bill does not however include a definition of ‘arrest’.

108. ACC Graham told the Committee that “it would be helpful if ‘arrest’ was defined in the Bill in the way that Lord Carloway set out [as] we have great concerns about the absolute requirement in the Bill to take a person to a police station when they have been arrested, and we agree with Lord Carloway that the inclusion of ‘when necessary’ will help to ensure that a person’s liberty is not taken from them unnecessarily”.\(^{87}\)

109. Mr O’Connor of ASPS said that his “understanding of arrest is that the person is no longer free to go about their lawful business, or has not been advised that they are free to do so” and that this definition is “common throughout the services”.\(^{88}\) Mr Steele of the SPF agreed that this definition was “well understood and well applied” and that “it did not appear to cause any confusion”.\(^{89}\)

110. The Committee also heard from Professor Chalmers that “one of the difficulties with defining ‘arrest’ was that existing law is quite unclear on it”. He argued that, as “the Bill does not provide a comprehensive scheme for regulating arrest but simply sets out the circumstances in which that power might be

\(^{86}\) Carloway Review, page 94.
exercised, I am not sure that the Bill is the place to define arrest comprehensively or that the Carloway review gives us a good basis for doing that".  

111. **The Committee notes that the Bill does not give effect to Lord Carloway’s recommendation that ‘arrest’ be defined in the Bill. We further note that there was no consensus from witnesses as to whether arrest should be defined and, if so, whether this legislation was the best vehicle to do so. On balance, the Committee is not content with the Scottish Government’s decision to exclude such a definition in the Bill.**

**Police powers: arrest to prevent crime**

112. In its written submission, ASPS argued that “the proposed powers of arrest should be clear that an arrest can be made to prevent an attempt to commit a crime”.  

Mr O'Connor of ASPS explained that there may be circumstances where an arrest is necessary to take a person who may be a threat to him or herself and to the public to the police station to access the services and care they need. These concerns were shared by Police Scotland. ACC Graham told the Committee that reassurances had been given by Scottish Government officials that common law powers covering such situations would be retained, although he said that this “does not give us huge comfort at the moment”.

113. However, Shelagh McCall told the Committee that the Scottish Human Rights Commission (SHRC) “would be extremely concerned about the idea that the police could arrest someone who had done nothing contrary to the criminal law”. Professor Chalmers agreed that “the idea … is quite disturbing”, adding that “it is not clear why that would be necessary”. Ms McCall and Mr Macleod QC concluded that section 1 of the Bill was probably adequate in enabling the police to arrest a person if he or she had committed or was committing an offence.

114. When asked whether he was satisfied that the new statutory power of arrest would allow an arrest to be made to prevent a crime, the Cabinet Secretary said that “the difficulty arises when people are thinking about offending”. Aileen Bearhop of the Scottish Government confirmed that the common-law offence of attempting to commit a crime and conspiracy would remain.

115. **The Committee notes the Scottish Government’s position that the power of arrest contained in the Bill combined with common law rules would be sufficient in allowing the police to arrest a person attempting or conspiring to commit an offence. However, we heard from the police that they were not yet convinced by the reassurances given, and from the SHRC that it would have serious concerns if the police were able to arrest a person**
“who has done nothing contrary to the criminal law”\(^99\). We therefore call on the Scottish Government to further engage with both the police and the SHRC with a view to providing adequate reassurances on this matter.

**Procedure following arrest**

**Arrested person to be taken to police station**

116. Section 4 of the Bill provides that a person arrested outwith a police station must be taken as quickly as is reasonably practicable to a police station.

117. In relation to this requirement, ACC Graham told the Committee that this “absolute requirement … does not retain sufficient flexibility in the system for circumstances in which we might wish, in effect, to de-arrest somebody”.\(^100\) David Harvie of the COPFS suggested that “in circumstances in which, for example, evidence comes to light prior to getting to the police station that the person in custody may be the wrong individual, the strict terms of the Bill as drafted might mean that the person has to be taken to a police station even though at that stage they are no longer under suspicion”.\(^101\)

118. The Cabinet Secretary for Justice told the Committee that he had listened to the evidence received on this matter and agreed “to make provision for the release of a person from arrest when the grounds for that arrest cease to exist”, which “has been referred to in evidence as ‘de-arrest’”.\(^102\) Aileen Bearhop of the Scottish Government added that “it is recognised that there will be cases in which the grounds for arrest no longer apply and the person should no longer be under arrest, so we will change the Bill to ensure that the arrest can be stopped and the person can be released straight from the street without having first to be taken to a police station only to be sent home”.\(^103\)

119. The Committee notes the Scottish Government's intention to bring forward an amendment to allow a person to be quickly released from arrest (‘de-arrested’) when the grounds for arrest no longer exist. While we recognise that there may be situations where de-arrest could be a reasonable option, we have concerns that this should not lead to a situation where people are arrested without a proper assessment by police officers as to whether such action is appropriate. We would therefore welcome further details of the types of situation and expected frequency in which de-arrest would be used. The Committee also has concerns regarding use of the term ‘de-arrest’ and consider the words ‘released’ or ‘liberated’ to be more appropriate.

**Information to be given at police station**

120. Section 5 of the Bill specifies the information to be given to suspects at a police station. This includes: (a) that the person is under no obligation to say

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anything, other than to give the information specified in section 26(3)\textsuperscript{104} of the Bill; and (b) of any right the person has to have intimation sent and to have access to certain persons under other sections of the Bill. For example, under section 30, children under 16 have the right to have intimation sent to a parent; under section 36, a person in police custody has the right to consultation with a solicitor; and under section 33, vulnerable persons have the right to assistance from an appropriate person.

121. Lord Carloway recommended in his report that suspects held in custody should be provided with a ‘Letter of Rights’\textsuperscript{105}, clearly setting out all of their rights, including access to a solicitor.

122. The UK opted into an EU Directive on the Right of Information in Criminal Proceedings in 2012, requiring Member States to ensure that a Letter of Rights be provided to those held in custody.\textsuperscript{106} In July 2013, the Scottish Government introduced a non-statutory Letter of Rights for those in custody. Section 5(3) of the Bill specifies that a suspect must be provided as soon as reasonably practicable with information (verbally or in writing) as is necessary to satisfy the requirements of the EU Directive.

123. Mr Macleod QC of the Faculty noted that this information could be provided verbally or in writing, and was keen to “state strongly that that information should be given both verbally and in writing”, given that “many arrestees or people who are brought into custody have literacy problems”.\textsuperscript{107} Ann Ritchie of the Glasgow Bar Association (GBA) agreed with this position, arguing that “studies show that information given verbally and in writing is more easily understood”.\textsuperscript{108}

124. Ms Ritchie also had concerns that section 5 of the Bill was “incredibly and unnecessarily complex” for an accused person to follow and suggested that the section needed to be rephrased and set out in clear terms”.\textsuperscript{109} However, Mr Macleod QC said he was “not sure that an accused person would be pouring over section 5 in any event”, suggesting that he or she would be able to obtain the information that they need through the Letter of Rights.\textsuperscript{110} Mr Harvie of COPFS argued that this section “is one of the key foundations that make the Bill Convention compliant” and that it should therefore remain in the Bill.\textsuperscript{111}

125. The Committee welcomes the recent introduction of a ‘Letter of Rights’ for those in custody, in accordance with the EU Directive on the Right of Information in Criminal Proceedings. We ask the Scottish Government to respond to the suggestion of some witnesses that information to be given to suspects at a police station should be provided both verbally and in writing with a view to ensuring that they clearly understand their rights.

\textsuperscript{104} Section 26(3) of the Bill specifies that a person under arrest must give their name, address, date of birth, place of birth (where required), and nationality.
\textsuperscript{105} Carloway Review, paragraph 6.1.24.
\textsuperscript{106} SPICe briefing, page 20.
Custody: person not officially accused

Keeping person in custody

126. Until quite recently, section 14 of the Criminal Procedure (Scotland) Act 1995 provided a maximum period of six hours during which a suspect could be held in custody and questioned by the police. Such a suspect could be questioned without being allowed access to legal advice.

127. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which was enacted in response to the UK Supreme Court’s judgment in Cadder v HM Advocate, extended the maximum period in which a suspect could be detained for questioning from six to 12 hours, with the possibility of an extension to 24 hours. It also provided a right of access to a solicitor for detained suspects, before and during police questioning.\textsuperscript{112} The Policy Memorandum accompanying the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill stated that it was considered necessary to set out access to a solicitor as a specific statutory right “to ensure certainty in the law, and of course, provide a specific and identifiable protection for suspected persons”.\textsuperscript{113} It also explained that, “with the introduction of a system based on solicitor access during detention, six hours is not considered by COPFS, the Scottish Police Services Authority or the Association of Chief Police Officers in Scotland to be an adequate maximum period”.\textsuperscript{114}

128. In his report, Lord Carloway accepted that “there is … little, if any, doubt that a six-hour maximum is unrealistic in many, albeit not most, cases”\textsuperscript{115} and said that “there will continue to be a significant proportion of cases for which six hours will be too restrictive a period to allow proper and effective investigation”.\textsuperscript{116} He argued that “it is important to maintain the central principle that persons suspected of an offence are not unnecessarily or disproportionately kept in custody”\textsuperscript{117}, and therefore suggested that “a period of 12 hours is reasonable” (with no power of extension).\textsuperscript{118}

129. He also recommended that the police should be required to undertake a formal review of a suspect’s detention at or around six hours from the time that he or she is brought into custody, suggesting that this “would not be an unreasonable burden on the police”.\textsuperscript{119} The purpose of this review, he argued, would be “to ensure that the continued detention of the suspect is justified, that any causes for continued detention, such as the suspect’s fitness for interview or delays in contacting a solicitor, were being properly addressed and that their welfare is being taken into account”.\textsuperscript{120}

\textsuperscript{112} SPICe briefing, pages 10-11.
\textsuperscript{113} Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill. Policy Memorandum, paragraph 16.
\textsuperscript{114} Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill. Policy Memorandum, paragraph 19.
\textsuperscript{115} Carloway Review, paragraph 5.2.20.
\textsuperscript{116} Carloway Review, paragraph 5.2.23.
\textsuperscript{117} Carloway Review, paragraph 5.2.33.
\textsuperscript{118} Carloway Review, paragraph 5.2.34.
\textsuperscript{119} Carloway Review, paragraph 5.2.36.
\textsuperscript{120} Carloway Review, paragraph 5.2.36.
130. The Bill’s Policy Memorandum states that the Scottish Government agrees with the 12-hour maximum detention period and six-hour review proposed by Lord Carloway, arguing that it would provide the police with sufficient time to investigate offences thoroughly, while also safeguarding a person’s right to liberty.\textsuperscript{121} Section 11 of the Bill seeks to give effect to these recommendations.

131. In a supplementary written submission to the Committee, Police Scotland provided figures for persons detained under section 14 of the Criminal Procedure (Scotland) Act 1995 during the period between 4 June to 1 July 2013:

- 2693 persons detained for up to a maximum of six hours (80.4%);
- 643 persons detained for between six and 12 hours (19.2%); and
- 13 persons detained beyond 12 hours.\textsuperscript{122}

132. The proposal in the Bill for a 12-hour maximum period in which a person could be held in custody was supported by a number of witnesses, including Murdo Macleod QC of the Faculty of Advocates\textsuperscript{123} and Professor Leverick\textsuperscript{124}.

133. ACC Graham said that Police Scotland supported a 12-hour normal limit, but argued that the Bill should also provide for an extension of up to 24 hours in exceptional circumstances to ensure sufficient time to complete serious and complex investigations. He said that “the number of cases for which we would need to go for an extension beyond 12 hours is very small, but they are the most critical cases—rapes, murders and other complex cases in which … not having that additional time would hamper our ability to keep people safe and could hamper the ends of justice being met”.\textsuperscript{125} Mr Harvie of COPFS agreed that there may be a need to extend the period of custody beyond 12 hours “in the most serious cases involving the most complex investigations”.\textsuperscript{126}

134. Other witnesses suggested that a return to a six-hour limit may be more appropriate. For example, Grazia Robertson told the Committee that the Law Society considered that “six hours is a sufficient and proportionate time for the police to carry out their tasks”, however, it “acknowledges the arguments in favour of 12 hours”.\textsuperscript{127} Ms McCall said that “there is no evidence that a 12-hour period is necessary”\textsuperscript{128} and therefore the SHRC would support reintroduction of the six-hour limit with an extension beyond six hours in exceptional circumstances\textsuperscript{129}. ACC Graham told the Committee however that the previous six-hour limit was “woefully inadequate … even in basic cases at times”.\textsuperscript{130}

135. Ms McCall had particular concerns surrounding the holding of child and vulnerable adult suspects in police custody for any length of time. She suggested

\textsuperscript{121} Policy Memorandum, paragraph 50.
\textsuperscript{122} Police Scotland. Supplementary written submission, page 1.
\textsuperscript{129} Scottish Human Rights Commission. Written submission, page 5.
that “the Parliament should think carefully about whether it is ever appropriate to hold a child or vulnerable adult for more than six hours”. The SHRC therefore recommended in its written submission that “the Bill should state that taking a child into custody is a measure of last resort because it really ought not to happen unless it is absolutely necessary”. 131

136. On a related issue, Police Scotland said that it was not persuaded of the need to include in the Bill the requirement for a review of a person’s detention after six hours as it could “create an additional unnecessary layer of management intervention and associated demand on the service”. 132 ASPS expressed concerns that the six-hour review may place particular pressure on the inspecting ranks.

137. However, the Faculty of Advocates argued that the Bill should include a requirement to maintain a record of the review of detention after six hours to ensure that suspects are not being detained for longer than is necessary and proportionate. 133 The Policy Memorandum on the Bill states that the police will be required to keep a record of all decisions made during the six-hour review. 134

138. The Cabinet Secretary told the Committee that—

“I am … aware of police concerns about the 12-hour limit for keeping persons in custody and the need to consider provisions to allow an extension in exceptional circumstances. I continue to listen to all the arguments for potential extension in exceptional circumstances”. 135

139. The Committee heard a divergence in views amongst witnesses regarding the appropriate maximum detention limit. However, we note the statistics provided by Police Scotland relating to the period of 4 June to 1 July 2013 which show that, although the majority of persons (80.4%) were detained for up to six hours, a not unsubstantial number (19.2%) were detained for between six and 12 hours. Given these statistics, there are mixed views on the Committee as to whether detention beyond six hours is necessary.

140. We note the Cabinet Secretary’s commitment to consider whether the detention limit should be extended in exceptional circumstances. While we recognise that there may be situations, particularly in relation to complex and serious crimes, where it may be necessary to consider extending the detention limit, we remain to be convinced whether this is really necessary, particularly when, under the Bill, the police would have the option of releasing a person on investigative liberation. We therefore seek further information on the types of ‘exceptional circumstances’ in which the Scottish Government envisages that an extension to the detention limit would be granted, how often they are likely to be applied for, who would approve any extension, and how the Scottish Government intends to ensure that such extensions do not become commonplace over time.

131 SHRC. Written submission.
132 Police Scotland. Written submission, paragraph 3.3.
133 Faculty of Advocates. Written submission, page 3.
134 Policy Memorandum, paragraph 48.
Investigative liberation

141. Lord Carloway noted in his report that, “in the modern era, there are a number of steps in a police investigation which can take a considerable time” and so “it may not be practicable for them to be completed within the proposed 12-hour maximum period”. However, he recognised that “it may be neither necessary nor proportionate for a suspect to be detained whilst these steps are being undertaken” and therefore concluded that “liberation, subject to conditions for a limited period whilst the police investigation is completed would seem a sensible alternative to prolonged detention in some cases”.

142. Lord Carloway therefore recommended a new system of investigative liberation under which the police could release an arrested suspect, who had not been charged but was still under investigation, on conditions and with the possibility of further questioning on return to police custody (following re-arrest). The period of custody, prior to charge, would still be limited to a total of 12 hours, whether or not the person was released and then rearrested and returned to police custody. Lord Carloway also proposed that the conditions under which a suspect would be released could include any special conditions as necessary, such as prohibiting the suspect from visiting a particular area, but that the suspect could apply to a sheriff for the review of the release conditions.

143. Lord Carloway recommended that the period during which a suspect could be subject to investigative liberation should not exceed 28 days as “the longer the liberation period, the greater the potential detrimental impact to the suspect” and that “it would seem prudent, therefore, to constrain any period of liberation without charge”. He added that “a balance needs to be struck”.

144. The Bill gives effect to these recommendations. Section 14 allows the police to release suspects from police custody on conditions which may be applied for a maximum of 28 days while they carry out further investigations into a suspected crime. Section 17 provides that the person who is subject to conditions imposed may apply for a review to a sheriff, who may remove them or impose alternative conditions.

145. The Policy Memorandum on the Bill states that “these powers are most likely to be of use in the investigation of serious crimes which often involve complex and technical examination of telephones, computers, etc”. It goes on to suggest that “a person’s rights are safeguarded in that investigative liberation will be limited to

136 Carloway Review, paragraph 5.3.5
137 Carloway Review, paragraph 5.3.5
138 Carloway Review, paragraph 5.3.5
139 SPICe briefing, page 18.
140 SPICe briefing, page 18.
141 SPICe briefing, page 18.
142 Carloway Review, paragraph 5.3.12.
144 Explanatory Notes, paragraph 44.
145 Policy Memorandum, paragraph 58.
28 days (with no power to extend this period) and the person can apply to a sheriff to have any conditions amended and/or terminated.\(^\text{146}\)

146. ACC Graham told the Committee that Police Scotland “welcomes the step to introduce investigative liberation although ... 28 days would potentially be restrictive as an absolute time limit” particularly for longer-running more complex cases.\(^\text{147}\) Mr Steele said that “the practice of investigative liberation is a good thing in its own right ... however, significant resources are required to make it happen smoothly”.\(^\text{148}\) Mr O’Connor agreed that technology would be required to support investigative liberation and track all suspects who were subject to conditions under the process.\(^\text{149}\)

147. Ms McCall of the SHRC argued that a suspect released on investigative liberation should have a right to anonymity given that, at that stage, he or she would not have been officially accused of committing a crime to “ensure proper respect for their rights to private life under Article 8 of ECHR, which include right to reputation”.\(^\text{150}\) She went on to suggest that, where a person is “released on the condition that, for example, they need to come back to the police station at a particular time ... that time may not be convenient for them due to their caring commitments or important work commitments or, indeed, their solicitor’s commitments, so there may be some issues there”. She went on to argue that “the Bill does not build in enough limitations around the reasons why people might be released under such conditions, what the limits of those would be and when those would be appropriate”.\(^\text{151}\)

148. Both Victim Support Scotland and Scottish Women’s Aid argued that there should be a specific requirement in the Bill for the complainer to be notified of the suspect’s release on investigative liberation and of any conditions attached.\(^\text{152}\) ACC Graham told the Committee that he “would be happy if that were the case”,\(^\text{153}\) while Mr Steele said that he had “little hesitation supporting the view that [the complainer] should be made aware when certain conditions apply or cease to apply”\(^\text{154}\).

149. In response to suggestions that the police should be able to apply for a longer period of investigative liberation, the Cabinet Secretary told the Committee that “in the main, 28 days should be enough”. He also dispelled claims that the 28-day period would have significant resource implications for the police, stating “I cannot for the life of me see why it should ... after all, no matter whether the person was remanded or detained; the police would probably be doing the same work anyway”.\(^\text{155}\)

\(^{146}\) Policy Memorandum, paragraph 60.
\(^{152}\) Scottish Women’s Aid. Written submission, page 3.
150. The Cabinet Secretary also said that he would be happy to consider any suggestions made by the Committee of further checks and balances to protect the rights of the accused released under investigative liberation and with conditions imposed. However, he highlighted that it would be for the courts to consider the acceptability of the period and conditions imposed in each individual case.\(^{156}\)

151. The Committee seeks assurances that investigative liberation will not have an unnecessary impact on the suspect’s private life, whilst allowing the police to conduct complex investigations which could not be completed while the person is initially detained. We note that a person may apply to the courts to have any conditions imposed either removed or altered, which we believe is a welcome protection against disproportionate conditions being applied.

152. The Committee also notes suggestions from victims’ groups that the Bill should include a specific requirement for complainers to be notified of a suspect’s release on investigative liberation and of any conditions attached, however, we are unsure as to whether such a requirement needs to be placed on the face of the Bill. We ask the Scottish Government to work with the COPFS to ensure that, where they may be at risk, complainers are always informed timeously of the suspect’s release and of any relevant conditions applied.

153. The Committee notes that there are likely to be resource implications relating to investigative liberation.

Custody: person officially accused

*Person to be brought before court*

154. Lord Carloway’s review examined the length of time that suspects may be held in police custody before their first appearance in court and found that “the current law and practice has the potential to allow a person to be held, in certain circumstances, for a period of four, and perhaps five, days in police custody prior to appearance in court”.\(^{157}\) He argued that “the criminal justice system cannot operate on a part-time basis” and that “in a human rights based system, it cannot simply close down in part over periods of days whilst suspects languish in temporary cells awaiting decisions on their continued detention or liberty”.\(^{158}\)

155. He therefore suggested that “greater practical steps must be taken to ensure that those suspects who are to be reported in custody appear in court with greater promptness than is currently achieved in some sheriffdoms”.\(^ {159}\) He recommended that a suspect being held in police custody should appear in court on the first day after charge and that “unless there is some extraordinary feature preventing it, a person should be appearing in court, at the very latest, within thirty six hours of arrest whatever day of the week that arrest occurs upon”.\(^ {160}\)

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\(^{157}\) Carloway Review, paragraph 5.2.24.

\(^{158}\) Carloway Review, paragraph 5.2.26.

\(^{159}\) Carloway Review, paragraph 5.2.26.

\(^{160}\) Carloway Review, paragraph 5.2.32.
156. Section 18(2) of the Bill provides that, wherever practicable, the suspect must be brought before a court not later than the end of the court’s first sitting day after the day on which they are taken into police custody. 161 The Policy Memorandum states that “the Bill seeks to safeguard a person's right to liberty by providing timescales within which a person should be brought before a court whenever practicable.” 162

157. There was broad agreement amongst witnesses that court sitting times needed to change with a view to minimising the time that suspects are held in custody prior to their appearance in court. For example, Professor Leverick suggested that “we probably need to make some provision for weekend and perhaps holiday court sittings”, although she was unsure as to whether this would need to be addressed through legislation. 163 Ms McCall argued however that the need to extend court sittings beyond the working week had been recognised for a number of years, yet working practices had not changed and therefore legislative intervention was necessary. She added that “Lord Carloway's original recommendation would be an appropriate way in which to solve the problem”. 164

158. The Cabinet Secretary told the Committee that a working group, led by Police Scotland and involving the COPFS and the SCS, had been established to consider options for Saturday courts “because I am aware of the pressures on courts, and on those who do the detaining as well as those who are being detained”. He gave his assurances that he would “take a keen interest in the issue” and committed to providing feedback on how the work progresses. 165

159. Like many witnesses, the Committee is concerned that suspects are sometimes held in custody for unacceptably long periods before their first appearance in court. We believe that court sitting times must be extended to reduce such lengthy periods in custody and the backlog of cases. We also recognise that there are implications for police time and resources in holding people in custody.

160. We are not however convinced that specifying time-limits for periods in custody in legislation is necessary at this stage, particularly when a working group is actively considering options for Saturday courts. We recommend that this work be completed in a timeous manner to allow any recommendations of the working group to be implemented as quickly as possible. The Committee welcomes the Cabinet Secretary’s assurances that he will “take a keen interest in the issue” and request details of the timescale for meetings and completion of the work of the group.

Police liberation

161. The Carloway report notes that “the presumption must be in favour of liberation in all cases and the main reasons for which a suspect will continue to be held in police custody legitimately must … be confined to situations in which

161 Section 18 of the Bill.
162 Policy Memorandum, paragraph 50.
he/she poses some risk, either to an individual, the public or the interests of justice, if at liberty”.166

162. In order to facilitate liberation from custody in as many cases as possible, he recommended, in cases where a suspect has been charged, that the police should be given the power to impose special conditions when releasing the suspect on an undertaking to appear in court on a specified date. Lord Carloway also suggested that the COPFS should have a power to review police decisions on liberation and on any standard or special conditions imposed, and that a suspect may apply to a sheriff for a review of liberation conditions.

163. The Bill would give effect to these recommendations. Section 19(1) and (2) provide that where a person is in custody having been charged with an offence, the police may: release that person on an undertaking under section 20; release the person without an undertaking; or refuse to release. The terms of an undertaking are that the person agrees to appear at a specified court at a specified time and to comply with any conditions imposed. A person may only be released from police custody on an undertaking if he or she sign its terms.

164. Under section 21 of the Bill, the procurator fiscal may modify the terms of an undertaking by changing the court or time specified, or rescind the undertaking altogether. Section 22 provides that a person subject to an undertaking containing conditions may also apply to the sheriff to have the conditions reviewed and the sheriff may remove or alter these conditions.

165. The Committee is content that sufficient safeguards are provided in the Bill regarding liberation of those officially accused from custody, in particular the right to apply to the sheriff to have any conditions imposed by the police reviewed.

Questioning

Rights of suspects

166. Under section 23 of the Bill, the police must inform a person suspected of committing an offence of their rights one hour (at the most) before any interview commences. These rights are:

- the right not to say anything other than to provide the person’s name, address, date of birth, place of birth and nationality;
- the right to have a solicitor present during any interview; and
- if the person is being held in custody, the right to have another person and a solicitor informed that they are in custody, and the right of access to a solicitor while in custody.167

167. As referred to earlier in this report, the Scottish Government has introduced a ‘Letter of Rights’ to be given to every suspect being held in police custody.

166 Carloway Review, paragraph 5.3.1
167 Explanatory Notes, paragraph 59.
168. Mr Macleod QC argued that the Bill should be amended to specify that the caution, which must take place not more than one hour before, should also be repeated at the commencement of the interview.\footnote{168 Scottish Parliament Justice Committee. \textit{Official Report}, 1 October 2013, Col 3327.} While Ms Robertson of the Law Society highlighted that the current approach was working well in practice “for the protection of everyone, including the police officers”.\footnote{169 Scottish Parliament Justice Committee. \textit{Official Report}, 1 October 2013, Col 3327.} Ms Ritchie told the Committee that the “practice varies with different police officers”, and therefore it may be helpful to be enshrined in the Bill.\footnote{170 Carloway Review, paragraph 6.1.5.}

169. The Committee notes the different experiences of witnesses from the legal profession in relation to when the caution is given to suspects by the police under current arrangements. We therefore ask the Scottish Government to respond to the specific suggestion made by the Faculty of Advocates that the Bill should specify that the caution, which must take place not more than one hour before any interview, should also be repeated at the commencement of the interview.

\textit{Right to have a solicitor present}

170. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which followed the UK Supreme Court’s ruling in Cadder v HM Advocate (2010), significantly extended the rights of suspects to obtain legal advice. Under this Act, suspects detained, arrested or attending voluntarily at a police station have a statutory right to a private consultation with a solicitor before questioning. This may be conducted by telephone or in person.

171. In his report, Lord Carloway recommended that the right of access to a solicitor should be extended to all suspects held in police custody, regardless of whether the police intend to question the suspect.\footnote{171 Carloway Review, paragraph 6.1.30.} He stated that “it is estimated that over two-thirds of suspects requesting legal advice name a preferred solicitor, although that does not mean that he/she will have had previous dealings with that solicitor.”\footnote{172 Carloway Review, paragraph 6.1.30.} He noted, however, that it may not be possible to make contact with the nominated solicitor or the solicitor may not be willing or available to provide advice within a reasonable time.\footnote{173 Carloway Review, page 168.} He therefore recommended that “the right of access to a lawyer does not extend to the provision of assistance from a solicitor of the suspect’s choice”, however, “in accordance with current practice, efforts should be made to secure the attendance of that lawyer within reasonable time”.\footnote{174 Policy Memorandum, paragraph 71.}

172. Section 36 of the Bill seeks to give effect to Lord Carloway’s recommendations on the right of access to a solicitor, including where a suspect being questioned is under investigative liberation. The Policy Memorandum confirms that this right does not extend to the provision of assistance from a solicitor of the suspect’s choice, as this may not be achievable in all situations.\footnote{175 Policy Memorandum, paragraph 71.} It also states that “the Scottish Government decided in favour of provisions designed to allow flexibility as the most appropriate means of communication, to allow for
the means to be tailored to the needs of the individual”, therefore allowing telephone consultation where appropriate.\footnote{176}

173. Ms McCall of the SHRC told the Committee that, “under Article 6 of the ECHR, the state ought to respect an individual’s choice of legal representative in so far as possible”, but she acknowledged that this may not always be possible, particularly in rural areas where lengthy travel may be required.\footnote{177} Ms McCall further stated that “the purpose of legal assistance is two-fold: first, it is to protect the right against self-incrimination; and, secondly, it is to provide a check on conditions of detention and to ensure against ill treatment”. She added that, “in that second respect, it is difficult to assess over the telephone someone’s vulnerability when they are in custody”.\footnote{178}

174. When asked to clarify whether the Bill makes it clear to individuals in custody that they have the right to face-to-face contact from a solicitor and not just advice over the telephone, Lesley Bagha, a Scottish Government official, said that “the suspect would be told that they have a right to speak to a lawyer … they would discuss the matter with their lawyer, and their lawyer might choose to come down [to the police station]”. She went on to explain that “the aim is just to keep some flexibility”, adding that “if the suspect is being questioned, there is a right for the solicitor to be present, which is an enhancement from the current position” but “it may be that in many cases a telephone call is sufficient”.\footnote{179}

175. The Committee welcomes the extension of the right of access to a solicitor to all suspects held in police custody, regardless of whether the police intend to question the suspect, and that suspects are entitled to face-to-face contact with a solicitor. We recognise that there would be difficulties in specifying in the Bill that a suspect should be entitled to receive assistance from a solicitor of their choice, particularly in the more remote areas of Scotland, and we therefore agree with the Scottish Government on this matter.

\textit{Person not officially accused: questioning following arrest}

176. The Bill enables a constable to question a person following arrest provided the person has not been officially accused of the offence (i.e. charged or where a prosecutor has started proceedings), or an offence arising from the same circumstances. The person has the right, however, not to answer any questions other than providing the police with their name, address, date of birth, place of birth and nationality.\footnote{180}

177. The Committee is content with the procedure specified in the Bill allowing a constable to question a person not officially accused following arrest.

\footnotesize{176 Policy Memorandum, paragraph 73.  
180 Explanatory Notes, paragraph 70.}
Person officially accused: authorisation for questioning

178. The Policy Memorandum notes that “the position in Scots law has been that, although it is proper for the police to question a person, including one detained under section 14 of the 1995 Act, once the police are in a position to charge the person with the offence(s) under investigation, questioning should cease”. It goes on to state that, “generally, once that point has been reached, it is proper for the police to charge the person with the offence and conclude any questioning” and thereafter “there should be no further questioning at the initiative of the police”.\footnote{181}{Policy Memorandum, paragraph 84.}

179. Lord Carloway recommended that this prohibition on police questioning of a suspect after they have been charged with an offence should be relaxed.\footnote{182}{SPICe briefing, page 22.} He stated that “there should be a process whereby the police, if they feel there is good reason to question a suspect after he/she has been charged or reported to the procurator fiscal but before he/she has appeared in court, can apply to the sheriff for permission to do so”.\footnote{183}{Carloway Review, pages 193-194.}

180. In the Policy Memorandum, the Scottish Government states that it agrees with this recommendation and provides examples of when post-charge questioning might be appropriate, such as a legitimate delay in obtaining access to a solicitor, or where further scientific evidence comes to light.\footnote{184}{Policy Memorandum, paragraph 86.} The Bill therefore provides that a court will have the power, on application, to allow the police to question a person after they have been charged with an offence, however, the court must be satisfied that it is in the interests of justice to allow the questioning.\footnote{185}{Policy Memorandum, paragraph 86.} The Policy Memorandum states that, where an application is granted the court must specify the maximum period for which the person can be questioned and can set any further conditions it considers to be appropriate (for example, limiting the scope of questioning).\footnote{186}{Policy Memorandum, paragraphs 87-89.} The right of access to a solicitor will also apply to post-charge questioning.\footnote{187}{Policy Memorandum, paragraph 89-90.}

181. A number of witnesses said that they were content with the measures proposed. For example, Murdo Macleod QC stated that the Faculty was “relatively relaxed” about the provision to allow post-charge questioning.\footnote{188}{Scottish Parliament Justice Committee. \textit{Official Report}, 1 October 2013, Col 3330.} He went on to suggest that it was “unlikely that there would be any great scope for miscarriages of justice” as safeguards had been built into the Bill, including a requirement to apply to the court for approval for post-charge questioning and that a solicitor must be present during that questioning.\footnote{189}{Scottish Parliament Justice Committee. \textit{Official Report}, 1 October 2013, Col 3330.} Professors Chalmers and Leverick agreed with Mr Macleod that the safeguards in place, in particular the requirement for an application to be made to the court before post-charge questioning takes place, were sufficient.\footnote{190}{Scottish Parliament Justice Committee. \textit{Official Report}, 1 October 2013, Col 3363-64.} Mr Macleod did however suggest that the Bill should set a maximum period for post-charge questioning rather than timings being specified by the court. His preference was for a further six hours (in addition to the original
12-hour limit), to facilitate the questioning to take place, for example, travel time, etc.

182. Mr Harvie of the COPFS said that, “in modern investigations, flexibility is needed to allow us to go back and say ‘We’ve uncovered this information. Do you have anything to say about it?’” ACC Graham told the Committee that there had been occasions where Police Scotland had wanted to undertake such questioning “particularly in serious and complex long-running cases in which the point of charge comes at a stage in the investigation when there is still a large amount of investigative work to do”. He gave assurances that post-charge questioning would be used sparingly and in consultation with the Crown.

183. Others had concerns regarding the proposals. For example, Justice Scotland said that it “considers that the perceived value of post-charge questioning is overstated and is unsure of what value it will add in the Scottish context”. It further stated that “any expansion of post-charge questioning must be accompanied by a legal framework providing safeguards in line with the recommendations of the Joint Committee on Human Rights”.

184. Ms McCall of the SHRC suggested that, although there was no difficulty with the principle, she was “not sure that the protections of judicial oversight are sufficiently robust”. In its written submission, SHRC also stated that the Bill should explicitly state that no adverse inference should be taken from silence during post-charge questioning.

185. Ms Ritchie from the GBA said that she saw “no need for the provision at all” and could not see how it assists either the prosecution or defence. Ms Robertson advised that the Law Society was also opposed to post-charge questioning on a practical level, suggesting that “what is envisaged is cumbersome, will make things somewhat bureaucratic and will result in our being back in a police office with our clients, presumably in a large majority of cases advising them to make no comment”.

186. Lesley Bagha, a Scottish Government official, told the Committee that “the position on post-charge questioning is very much the same as the position on pre-charge questioning, which takes place before somebody is officially accused, in

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185 The Joint Committee on Human Rights recommendations include that: post-charge questioning deals with evidence which has come to light after charges were brought; the total period of post-charge questioning lasts for no more than 5 days in aggregate; the presence of the accused’s lawyer is necessary during any questioning; review of the transcripts from questioning after it has occurred by the same judge who authorised the post-charge questioning to ensure it remained within the prescribed scope of questioning.
186 Justice Scotland. Written submission, paragraph 19.
188 Scottish Human Rights Commission. Written submission.
that there is a right to silence and the person does not have to say anything”. 201
She went on to state that, “rather than the legislation saying that no adverse inference should be made, it is assumed that there is a right to silence”. 202

187. The Committee is persuaded that post-charge questioning may be required in certain complex and lengthy investigations. We also note that the majority of witnesses were content that the requirement on the police to apply to the court for approval for post-charge questioning provides sufficient judicial oversight to minimise the risk of miscarriages of justice.

188. However, post-charge questioning should only be used when absolutely necessary. To this end, we ask the Scottish Government to maintain a record of the circumstances and frequency in which post-charge questioning is used, including details of the applications that are refused by the courts. We further seek confirmation from the Scottish Government that existing rules providing that no adverse inference may be drawn from a suspect’s refusal to answer police questions would apply equally to post-charge questioning.

Child and vulnerable suspects

Child suspects: overview

189. In his report, Lord Carloway argued that, for the purpose of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years, and noted that child suspects require extra protection. He therefore recommended that:

- there should be a general statutory provision that the best interests of the child shall be a primary consideration in taking any decision regarding the arrest, custody, interview and charging of a child;

- all children should have a right of access to a parent or other responsible person if detained by the police and only those children aged 16 or 17 should be able to waive that right; and

- children under the age of 16 should not be able to waive their right of access to a solicitor, but children aged 16 or 17 should be able to waive the right with the agreement of a parent or other responsible person. 203

190. The Bill seeks to give effect to Lord Carloway’s recommendations on child suspects. The Scottish Government states in the Policy Memorandum that it considered making the provision of legal advice mandatory to all under-18s, however, it concluded that “there is a balance sought for children aged 16 and 17 years in order to provide a greater emphasis on their ability to make decisions for themselves and ensure their voice is heard in all parts of the process”. Its

203 SPICe briefing, page 24.
preferred approach therefore is to “allow children aged 16 and 17 years to make their own decisions with safeguards in place to support them in this.”

191. There was general support for the measures proposed in the Bill; however, some witnesses had concerns regarding the ability of 16 and 17 year olds to waive their right of access to a solicitor. Ms Robertson of the Law Society told the Committee that those under 18 should not be allowed to waive this right and Mr Macleod QC said he agreed with the Law Society’s position.

192. Ms Driscoll of the Child Law Centre noted that young people often waive their right to a solicitor because they do not understand the situation they are in, or they assume that having a lawyer may suggest that they are guilty. However, she went on to confirm that she was “not suggesting that there should be no discretion at the ages of 16 and 17, but we need to be satisfied that a young person understands the right that they are waiving.”

193. Mr Harvie of the COPFS explained that, as a result of recent case law, the Lord Advocate had issued guidance indicating that there is to be a strong presumption that 16 and 17 year olds should not be able to waive their right of access to legal advice. He went on to state that “the guidance sets out various requirements that the interviewing officer must take into account” and “as it currently stands, the guidance offers perhaps a greater level of comfort than might be foreseen from the bare terms of the legislation.”

194. Professor Leverick said that the Bill “has got it about right”. She suggested that “imposing legal assistance on all 16 and 17-year olds even if they are adamant that they do not want it and are capable of understanding the implications of that decision may well be disproportionate in respect of the costs involved.” Mr Baillie, Scotland’s Commissioner for Children and Young People, agreed that the Bill “strikes just about the right balance.”

195. The Cabinet Secretary told the Committee that he believed that the Bill strikes the correct balance in allowing 16 and 17 year olds to waive their right to access to a solicitor on the advice of an appropriate person. He explained that “those under 16 clearly are protected but … we recognise that 16 and 17 year olds are in a different position”, adding that “they still have to be protected, but they can marry, pay taxes or join the army”. He further stated that the Bill provides sufficient protection in ensuring that the right cannot be waived without advice from an appropriate person.

196. The Committee notes that the Victims and Witnesses (Scotland) Bill defines a child as a person up to the age of 18. The Committee asks the

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204 Policy Memorandum, paragraph 107.
Scottish Government to explain why there is inconsistency between the protections for under-18s in this Bill compared with this recent legislation.

**Best interests of the child**

197. The Policy Memorandum states that “a key principle enshrined in the Bill is that, in taking any decision regarding the arrest, detention, interview and charging of a child by the police, the best interests of the child shall be a primary consideration”. The section title in section 42 of the Bill refers to the term ‘child’s best interests’, however, in the text of section 42(2) the phrase ‘well-being of the child’ is used.

198. Mr Baillie argued that the Bill should be consistent in referring to the ‘child’s best interests’. In its written submission, Children in Scotland also highlighted this anomaly and sought assurances that use of the word ‘well-being’ in section 42(2) was fully consistent with ‘child’s best interests’ in the section title and the Scottish Government’s intention set out in the Policy Memorandum. Barnardo’s Scotland said that further explanation was required on “why ‘well-being’ is being used rather than ‘welfare’, given the fact that welfare is used in other justice legislation, such as the Children’s Hearings (Scotland) Act 2011”.

199. Mr Baillie told the Committee that case law existed for both ‘best interests of the child’ and ‘welfare’, which he advised was also “well understood”. He also highlighted that the Children and Young People (Scotland) Bill refers to the ‘well-being of children and young people’, while the Children (Scotland) Act 1995 refers to ‘best interests’. He argued that, in light of this confusion “we need to bring some consistency to the application of the phrases that are used” in legislation.

200. The Committee has concerns regarding the lack of consistency in use of the terms “welfare”, “best interests” and “well-being” of the child in this and other legislation. While we make no comment on which is the most appropriate term, we ask the Scottish Government to ensure consistency in the language used in section 42 of the Bill.

**Age of criminal responsibility**

201. In its *Do the Right Thing* Progress Report 2012, the Scottish Government stated that “following the raising of the age of criminal prosecution in the Criminal Justice and Licensing (Scotland) Act 2010, we will give fresh consideration to raising the age of criminal responsibility from 8 to 12 with a view to bringing forward any legislative change in the lifetime of the Parliament”.

202. A number of witnesses told the Committee that the Bill should have included provisions to raise the age of criminal responsibility in line with the Scottish Government’s commitment in the Progress Report 2012. For example, Ms McCall

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214 Children in Scotland. Written submission, page 1.
215 Barnardo’s Scotland. Written submission, page 1.
217 *Do the Right Thing* is the Scottish Government’s response to the 2008 concluding observations from the UN Committee on the Rights of the Child.
told the Committee that this was “a missed opportunity”, 219 while Ms Driscoll said that “it is not a major change, but a leftover change [and] it would stop us having the youngest age of criminal responsibility in Europe, which is something to be ashamed of”. 220

203. Scotland’s Commissioner for Children and Young People agreed that an opportunity had been missed to address this issue in the Bill. He said that, “in the absence of any indication that there will be another criminal justice bill, the matter must at least be raised to get some clarity on how the Scottish Government will give effect to its commitment to raise the age of criminal responsibility, which I welcome”. 221 Mr Ballard of Barnardo’s Scotland told the Committee that “it would seem entirely appropriate for the Scottish Government to do it in the Bill”. 222 Aberlour Child Care Trust stated in written evidence that, “given that this Bill represents an entirely appropriate legislative vehicle for such a change, we were dismayed that no such provision has been made in the Bill, particularly when sections 31-33 deal directly with protecting the rights of child suspects”. 223

204. However, Professor Leverick said she was “not sure that the issue needs to be revisited at all [and] if it does, the Bill is possibly not the right place to do that, given that there is already an awful lot in it”. 224

205. The Cabinet Secretary said that “we are aware of the calls for the minimum age of criminal responsibility to increase” and added “we are happy to see what we can do within the lifetime of this session of Parliament, but I do not think that it would be practical to raise the age in the Bill, especially given that consultation will have to take place and that there are disputes about what that age should be”. 225 He added that “not everything can be included in the Bill” and “there are understandable concerns about the age of criminal responsibility, and we are happy to give an undertaking to work on that”. 226

206. The Committee welcomes the Cabinet Secretary’s undertaking to give consideration to raising the age of criminal responsibility and would welcome regular updates on this work.

Vulnerable adult suspects: overview

207. Lord Carloway recommended a number of additional safeguards for vulnerable adult suspects in police custody. He argued that there should be a statutory definition of a ‘vulnerable suspect’ and that these suspects should be given the right of access to an appropriate adult as soon as possible after they are taken into custody and prior to any questioning. 227 He further recommended that the role of the appropriate adult should be defined and that vulnerable suspects

223 Aberlour Child Care Trust. Written submission, page 1.
227 Carloway Review, paragraph 6.0.7.
should be able to waive their right of access to a lawyer only if the appropriate adult agrees.\textsuperscript{228}

208. The Bill broadly gives effect to these recommendations, including providing a statutory definition of a ‘vulnerable suspect’ and that they should have a right of access to an appropriate adult as soon as possible after they are taken into custody.

209. However, it does not allow vulnerable adults a right to waive their right of access to a solicitor with the agreement of the appropriate adult. The Policy Memorandum on the Bill states that “concerns were raised in relation to a vulnerable person being allowed to waive the right of access to a solicitor with the agreement of an appropriate adult”.\textsuperscript{229} It went on to state that “the Scottish Government noted these concerns and the instruction issued by the Lord Advocate to Chief Constables, that from 1 October 2012, vulnerable suspects should not be allowed to waive their right of access to a solicitor (in response to cases where vulnerable persons had done so, not fully understanding the caution or terms of interview, and the subsequent concerns about the admissibility of statements made during interview)”.\textsuperscript{230} The Scottish Government therefore said that it was “content with the current position as set out in the Lord Advocate’s guidance”.\textsuperscript{231}

210. The Bill defines a vulnerable person, for the purpose of police arrest, detention and questioning, as “a person aged 18 or over who is assessed as vulnerable due to a mental disorder as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003, (i.e. any mental illness, personality disorder, learning disability however caused or manifested)”.\textsuperscript{232} As at present (and recommended by Lord Carloway), it will be for the police to assess whether the person is vulnerable, and for them to try to secure the attendance of an appropriate adult as soon as reasonably practicable after detention and prior to questioning.\textsuperscript{233}

211. The Policy Memorandum states that the current non-statutory role of an appropriate adult is to facilitate communication during police procedures between the police and vulnerable suspects, accused, victims and witnesses (aged 16 or over) who have a mental disorder or learning disability.\textsuperscript{234} It goes on to explain that appropriate adults are independent of the police and are not usually known to the person being interviewed.\textsuperscript{235} They are often social workers or health professionals and are expected to complete national recognised training and follow the Scottish Appropriate Adult Network National Guidance.\textsuperscript{236}

\begin{flushright}
\textsuperscript{228} Carloway Review, paragraph 6.0.7.
\textsuperscript{229} Policy Memorandum, paragraph 127.
\textsuperscript{230} Policy Memorandum, paragraph 127.
\textsuperscript{231} Policy Memorandum, paragraph 127.
\textsuperscript{232} Policy Memorandum, paragraph 120.
\textsuperscript{233} Policy Memorandum, paragraph 121.
\textsuperscript{234} Policy Memorandum, paragraph 118.
\textsuperscript{235} Policy Memorandum, paragraph 118.
\textsuperscript{236} Policy Memorandum, paragraph 118.
\end{flushright}
212. The Bill will give the Scottish Ministers regulation-making powers so that they can specify who may provide appropriate adult services and what training, qualifications and experience are necessary to become an appropriate adult.\textsuperscript{237}

213. The Policy Memorandum states that “the Scottish Government does not intend to make any particular body statutorily responsible for the delivery of appropriate adult services”, following concerns expressed by COSLA and the Association of Directors of Social Work that this responsibility would fall on local authorities.\textsuperscript{238}

\textbf{Vulnerable adult suspects: definition and training}

214. A number of witnesses expressed concern that the definition of a vulnerable adult was too narrow. For example, Mr Macleod QC argued that the term ‘owing to a mental disorder’ should be removed from the Bill, leaving the definition in sections 25 and 33 as “the person appears to the constable to be unable to understand sufficiently what is happening or to communicate effectively with the police”. He suggested that it would be difficult for a police officer to assess whether a person is suffering from a mental disorder, whereas it would be clearer that they were unable to understand what is happening or unable to communicate effectively with the police.\textsuperscript{239}

215. Professor Leverick shared these concerns and suggested that “we do not have to follow slavishly what happens in England and Wales, but the equivalent terminology used in the legislation in England and Wales refers to mentally vulnerable suspects, which does not necessitate any mental disorder as such”.\textsuperscript{240} Mark Ballard of Barnardo’s Scotland argued that “the reliance on mental disorder as the determinant of vulnerability is unhelpful, because there are many more reasons why adults … can be vulnerable and require support specifically to deal with that vulnerability”.\textsuperscript{241}

216. However, Rachel Stewart of the Scottish Association for Mental Health (SAMH) argued that the “mental disorder definition … encompasses quite a wide range of mental health problems, learning disabilities, personality disorders and autistic spectrum disorders”. She suggested that each of these conditions require different responses and therefore “the police need support and training to be able to support people who are in that situation”.\textsuperscript{242}

217. Ms McCall agreed that there was “a real challenge in identifying vulnerable people and the police must be properly trained to do so”.\textsuperscript{243} ACC Graham also acknowledged that there were difficulties in identifying vulnerable people in custody, however, he said that “we have never had more checks and balances at the point when somebody is questioned and detained, to ensure that we do

\textsuperscript{237} Policy Memorandum, paragraph 123.
\textsuperscript{238} Policy Memorandum, paragraph 128.
everything that we can to identify whether we need to call on the services of somebody to offer support and independent advice.\textsuperscript{244}

218. When asked to respond to concerns raised by witnesses regarding the definition of vulnerable persons specified in section 33 of the Bill, the Cabinet Secretary told the Committee that “I tend to think that the term ‘mental disorder’ is perfectly understandable.”\textsuperscript{245} He explained that “a mental disorder is defined as a ‘mental illness’, ‘personality disorder’ or ‘learning disability’, and there is tried and tested practice according to which the police have been assessing the vulnerability of suspects, accused, victims and witnesses for many years”\textsuperscript{246} He added that “we are not asking police officers to act as psychiatrists; we are asking them simply to make an assessment of somebody’s ability”, which “has been routine custom and practice and has worked well”.\textsuperscript{247}

219. The Committee has concerns that the definition of vulnerable person in the Bill may not capture all individuals needing additional support when in custody. We also note comments from the police that there are difficulties in identifying vulnerable persons. We therefore ask the Scottish Government to give further consideration to the definition of vulnerable persons in the Bill and to reflect on whether this is consistent with the definition in the Victims and Witnesses (Scotland) Act 2014. We also ask that the Scottish Government ensures that sufficient resources are provided to the police to undergo training in this important area.

Vulnerable adult suspects: appropriate adults
220. Witnesses, including the SHRC, welcomed the view that vulnerable persons should not be able to waive their right to legal assistance without an appropriate adult being present, as “there must be someone present who is capable of advising properly on decisions made”.\textsuperscript{248}

221. The right of access to an appropriate adult as soon as possible after they are taken into custody was broadly welcomed by witnesses. However, concerns were raised surrounding the funding of appropriate adults. For example, Ms McCall argued that “the state has an obligation to put in place a proper system, so there must be a conversation and a decision about how appropriate adults are going to be paid for” and that training for appropriate adults, which is to be provided for in regulations would be “critical”.\textsuperscript{249}

222. Mr Ballard said he had concerns that the Bill only provides for appropriate adults on a statutory basis for those aged over 18 who are considered to have a mental disorder and therefore local authorities under financial pressures may not be able to support the provision of appropriate adults for 16 and 17-year-old suspects. He went on to argue that “it is not clear that support will be guaranteed unless provision is made statutory in the Bill”.\textsuperscript{250} Aberdeen City Council shared

these concerns. In its written submission, Police Scotland also agreed that “provision of appropriate adult services has not been placed on a statutory basis within the Bill [and] there is therefore some concern based on limited reporting, that funding may not be secured or maintained within the constraints facing the public sector as a whole”.

223. The Committee asks the Scottish Government to respond to concerns raised by witnesses that its decision not to place the provision of appropriate adult services in the Bill could lead to a lack of funding by local authorities already facing significant financial challenges.

PART 2: (CORROBORATION AND STATEMENTS) AND SECTION 70 (GUILTY VERDICT)

Introduction

224. Part 2 of the Bill seeks to abolish the general requirement for corroboration in criminal cases. It also seeks to make changes to ‘hearsay’ rules in so far as they affect the admissibility in evidence of certain statements made by an accused person. Section 70 on jury majority is included in this part of the report as it was considered by the Committee in connection with the proposed abolition of corroboration.

Lord Carloway’s Review of Scottish Criminal Law and Practice

Background

225. The proposal to abolish the requirement for corroboration in criminal cases arose from recommendations made by Lord Carloway in his Review of Scottish Criminal Law and Practice. As part of the remit of the review, Lord Carloway was asked to consider “the criminal law of evidence … in particular the requirement for corroboration and the suspect’s right to silence.” The perceived need for review in this area arose following recent decisions of the appeal court concerning, in particular, the right to access legal advice prior to and during police questioning. The decisions followed the judgement by the UK Supreme Court in Cadder v HM Advocate.

226. In response to this ruling, the Scottish Government introduced legislation which was passed by the Scottish Parliament under the emergency bill procedure on 27 October 2010. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, amongst other things, provided for access to legal advice by suspects. As a consequence of this legislation, it was argued that greater access to legal advice would result in fewer confessions, which in turn could lead to greater difficulties in acquiring corroborative evidence. Lord Carloway was therefore asked to include in his review the requirement for corroboration in criminal cases.

251 Aberdeen City Council. Written submission.
252 Police Scotland. Written submission, paragraph 6.5.
253 Carloway Review, paragraph 7.0.1.
227. In light of this remit, Lord Carloway considered whether the requirement for corroboration continued to serve a useful purpose or whether “it is an artificial construct that actually contributes to miscarriages of justice in the broad, rather than appellate sense”.\(^{254}\) He rejected any change to the current rules preventing adverse inference being drawn at trial from an accused’s failure to answer questions during the police investigation. The Bill therefore does not seek to change the law in this area.

**The requirement for corroboration**

228. According to the Policy Memorandum, the requirement for corroboration requires: (a) that there be at least one source of evidence that points to the guilt of the accused as the perpetrator of the crime; plus (b) corroboration of each “essential” or “crucial” fact by other direct or circumstantial evidence. Generally, the “crucial facts” requiring proof are that a crime was committed and that the accused committed it.\(^{255}\)

229. Following consideration of the relevant issues during his review, Lord Carloway recommended that the requirement for corroboration in criminal cases should be abolished. He reached this conclusion for a number of reasons.

230. Firstly, he addressed the argument that the current requirement for corroboration is a protection against miscarriages of justice (in the sense of preventing wrongful conviction) as no person can be convicted of an offence solely on the basis of testimony of one witness. His principal argument was that he could find no evidence that the requirement served this purpose. Instead he concluded that “the real protection against miscarriages of justice at first instance is the standard of proof required; that the judge or jury must not convict unless convinced of guilt beyond reasonable doubt.”\(^{256}\)

231. Secondly, he stated that the requirement for corroboration could actually cause miscarriages of justice (in the sense of preventing the prosecution of strong cases). He argued that it should be possible to convict on the basis of evidence from a single credible and reliable witness if the judge or jury is satisfied beyond reasonable doubt of the accused’s guilt. He said that he believed that, “in principle, judges or juries ought to be regarded as capable of deciding for themselves what weight to attribute to a witness’s evidence” and the fact that evidence was uncorroborated would be something that the judge or jury could take into account in assessing what weight should be given to a witness’s evidence.\(^{257}\)

232. His third argument was that the requirement for corroboration was frequently misunderstood by everyone, “not least judges”. He considered it to be an “artificial bar” to prosecution and conviction as the system was skewed by “prioritising quantity over quality”\(^{258}\) and that “elaborate legal theories, unique to Scotland,

\(^{254}\) Carloway Review, paragraph 7.2.5.

\(^{255}\) Policy Memorandum, paragraph 131.

\(^{256}\) Carloway Review, paragraph 7.2.41.

\(^{257}\) Carloway Review, paragraph 7.2.42.

\(^{258}\) Carloway Review, paragraph 7.2.44.
have been devised over recent years in an attempt to fit an archaic requirement into today’s reality”. 259

233. He also observed that corroboration was “more likely to exist in relation to some offences than others”, 260 with particular difficulties arising in relation to crimes which tend to be committed in private. This could be a particular barrier to obtaining corroboration for sexual crimes and for domestic abuse, as there could be little evidence in the absence of statements made by suspects at interview. The practical effect of this therefore was that the requirement for corroboration could “deny access to justice for victims of these types of crime”. This could also be the case with certain less serious crimes, such as minor assaults and thefts, where “there may also be little evidence other than that of the complainer but that evidence may be of itself compelling”. 261

234. Finally, Lord Carloway highlighted the impact that the requirement for corroboration has on advice given by solicitors to suspects. He concluded that there is “little doubt that in Scotland it plays a major part in the solicitor’s decision to advise his/her client to say nothing for fear of his/her inadvertently corroborating other evidence and thereby creating a sufficiency, which would otherwise not exist”. 262 Therefore, whether a person is prosecuted for and convicted of an offence “can depend entirely on whether the person elects to respond to questioning by the police”. This in practice could put the person in a difficult position as “it may be felt that a judge or jury would be more likely to accept the person’s account as credible if it were raised at the earliest opportunity” but that the person would “almost always be well advised not to speak, at least in situations where there was no obvious sufficiency of evidence”. 263

235. He concluded that the requirement for corroboration is “an archaic rule that has no place in a modern legal system where judges and juries should be free to consider all relevant evidence and to answer the single question of whether they are satisfied beyond reasonable doubt that the accused person committed the offence libelled”. 264 He therefore recommended that the requirement for corroboration in criminal cases should be abolished.

The provisions in the Bill

236. The Scottish Government accepted Lord Carloway’s arguments for removing the requirement for corroboration. In the Policy Memorandum, the Scottish Government stated that it sees Lord Carloway’s recommendations as a “coherent package” and therefore, failing to implement a significant aspect of the recommendations, ran the risk of “undermining Lord Carloway’s stated aim of ensuring the justice system is appropriately balanced”. 265

259 Carloway Review, paragraph 7.2.45.
260 Carloway Review, paragraph 7.2.49.
261 Policy Memorandum, paragraph 136.
262 Carloway Review, paragraph 7.2.50.
263 Policy Memorandum, paragraph 137.
264 Carloway Review, paragraph 7.2.55
265 Policy Memorandum, paragraph 144.
Sections 57 to 61: Abolition of corroboration rule

237. Sections 57 to 61 of the Bill provide for the abolition of the requirement for corroboration in criminal cases. According to the Explanatory Notes, section 57 provides that (subject to the conditions set out in subsequent sections) where a fact has been established by evidence in any criminal proceedings, the judge and the jury is entitled to find the fact proved by the evidence although the evidence is not corroborated. In effect the section abolishes the requirement in Scots common law that the essential facts of a case be proven by evidence from two different sources (“corroborated evidence”). This proposal applies to almost all criminal cases, not just those crimes often committed in private, such as sexual offences.

238. The Bill excepts from this provision enactments which provide that, in relation to proceedings for a specific offence, a fact requires to be proven by corroborated evidence (the Explanatory Notes cite the example of section 89(2) of the Road Traffic Regulation Act 1984 which provides that a person cannot be convicted of speeding on uncorroborated evidence).

239. Section 59 provides that the abolition of the requirement for corroboration only applies in relation to proceedings for an offence committed on or after the date on which section 57 comes into force.

240. Section 60 provides for the circumstances where an offence is committed over a period of time which includes the date section 57 comes into force. Section 61 makes transitional and consequential provisions.

Section 70: Guilty verdict

241. Section 70 of the Bill seeks to amend the law concerning the size of the majority required for a jury to return a verdict of guilty, in both the High Court and the sheriff court. It provides that a jury of 15 members may return a verdict of guilty only if at least 10 of them are in favour. It also sets out the number of jurors required to return a verdict of guilty where the jury size falls below 15. In each case, a majority of at least two thirds of the jurors is required. Finally, the section provides that a jury is to be regarded as having returned a verdict of “not guilty” if it does not return a verdict of “guilty” and there is no majority in favour of either a “not guilty” or “not proven” verdict.

242. This provision was included in the Bill as an additional safeguard in light of the proposed removal of the requirement for corroboration. However, the change to jury majorities was not proposed by Lord Carloway, who did not envisage the need for any additional safeguards. Instead it arose from the Scottish Government’s consultation on Lord Carloway’s recommendations where a significant number of respondents highlighted the need for safeguards to be put in place should the requirement for corroboration be removed. In its subsequent consultation on safeguards, the Scottish Government sought views on three possible additional safeguards; this is the only one taken forward in the Bill.

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266 Explanatory Notes, paragraphs 137-143.
267 Explanatory Notes, paragraph 139.
268 Explanatory Notes, paragraphs 186-190.
269 A majority of respondents to that consultation said that corroboration should be retained.
General summary of evidence received

243. There were witnesses who supported Lord Carloway's position that abolishing the requirement for corroboration would achieve access to justice for more victims of crime, in particular, cases which are generally committed in private such as rape, sexual abuse and domestic abuse. It was considered that removing the requirement would improve the ability of prosecutors to bring credible cases to court where currently the absence of corroborative evidence prevents them from doing so.

244. The proposal was welcomed mainly by organisations which support victims of crimes\(^{270}\), such as Rape Crisis Scotland and Victim Support Scotland, as well as by Police Scotland, Scottish Police Federation, Association of Scottish Police Superintendents, and the Crown Office and Procurator Fiscal Service. In its submission to the Committee, Rape Crisis Scotland said that “what we do know is that the requirement for corroboration disproportionately affects complainers in sexual offence crimes, the vast majority of which are committed in secrecy and without witnesses”.\(^{271}\) The Committee noted that, during the course of evidence, the Scottish Police Federation changed their position on this issue.

245. The Committee also received evidence in strong opposition to the proposal from a significant number of witnesses, including the Lord President, on behalf of the Senators of the College of Justice (bar one), the Faculty of Advocates, the Law Society of Scotland, Justice Scotland, and the Scottish Human Rights Commission. The main grounds of opposition were that corroboration provides a vital safeguard against wrongful conviction and therefore the requirement for it in criminal cases could not be abolished without further consideration being given to the consequences of doing so.

246. Lord Gill, the Lord President of the Court of Session, considered the proposal to be a matter of constitutional importance, asserting that corroboration was “one of the great legal safeguards in our criminal justice system”.\(^{272}\)

247. The Committee also heard from a number of academics who specialise in criminal law. Although they disagreed as to whether the requirement for corroboration should be abolished, they were all in agreement that, given the potential impact of the changes proposed, the process would benefit from a more holistic review of the checks and balances present within the Scottish criminal justice system.

248. In particular, in considering how this point had been reached, Professor Pamela Ferguson from the University of Dundee described the process as “piecemeal reform” and expressed concern that “no one is stepping back and

\(^{270}\) The Scottish Parliament’s Cross Party Group on Adult Survivors of Childhood Sexual Abuse did not support the proposal but instead recommended that consideration be given to better application of the law on corroboration.

\(^{271}\) Rape Crisis Scotland. Written submission, page 1.

taking a broad view of the criminal process, looking at the checks and balances and doing a proper comparative study with other jurisdictions”. 273

_The case for reconsidering corroboration post-Cadder_

249. The Committee explored with witnesses the perceived requirement to rebalance the criminal justice system as a consequence of the UK Supreme Court ruling in the Cadder v HM Advocate 2010.

250. The Cadder case led to detained suspects being given the right to legal advice where facing police questioning. The Lord Advocate highlighted the impact that this change had in prosecuting rape cases. He stated that it was, prior to the Cadder case, common for a suspect to admit under police questioning that sexual intercourse had taken place, whilst arguing that it was consensual. However, greater access to legal advice post-Cadder had led to fewer admissions of this type and thus increased difficulties in corroborating this element of a rape case. He did not criticise the outcome but noted that “it is just a fact that, in many such cases, we do not have that source of evidence now”. 274

251. The Lord Advocate acknowledged that every criminal justice system is about checks and balances “to ensure that the guilty are convicted and the innocent acquitted”. However, he argued that the right of the accused to have access to a solicitor as a result of the Cadder case had had an impact and that “the system’s delicate balance was disturbed and a rebalancing exercise needed to be carried out”. 275

252. Sandie Barton from Rape Crisis Scotland confirmed her view that the change was required as a result of the Cadder ruling and that the rights of the accused “have continued to increase without any commensurate increase in the rights and protections afforded to victims”. 276

253. ACC Malcolm Graham from Police Scotland agreed that the Cadder decision had shifted the balance in the legal considerations of those cases and that it was therefore right that Lord Carloway should make recommendations “to ensure that there is an equal focus on the rights of everyone who is involved in the justice system”. 277 However, he was not completely convinced that the proposal was made directly as a response to Cadder as “the issues that I am describing were present in police investigations, and had subsequent consequences in the justice system, before the Cadder decision was made”. 278

254. Mark Harrower from the Edinburgh Bar Association acknowledged the change of “landscape” as a result of the Cadder case but was not convinced that the removal of the requirement for corroboration was the right place to look in order to redress this balance. He noted that “if fewer people confess, there will be corroboration in fewer cases from that source, but that does not mean that there will not be corroboration from other sources”. He further noted that advances in

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science meant that methods of sourcing DNA evidence were always improving, and that “we are able to get evidence from other sources in many more cases that we possibly could not have got in days gone by.” 279

255. Shelagh McCall of the Scottish Human Rights Commission (SHRC) told the Committee that—

“One of the misunderstandings of the Cadder decision, as the Commission sees it, was the notion that it gave suspects some added advantage and that, therefore, there required to be some recalibration of the system in favour of victims and witnesses. In fact, Cadder brought Scotland into line with the minimum measures that were necessary to comply with article 6 of the European Convention on Human Rights, on the right to legal assistance”. 280

256. On a related issue, the Policy Memorandum states that it would not be appropriate to remove the provisions in the Bill dealing with corroboration, whilst approving other provisions flowing from the Carloway Report, since the report’s recommendations should be treated as a single coherent package of measures. 281 It further states that, “by failing to implement a significant aspect of the recommendations contained in [Lord Carloway’s] report, there is a very real risk of undermining Lord Carloway’s stated aim of ensuring the justice system is properly balanced”. 282 Witnesses were therefore invited to respond to this in the context of the proposal that the provisions relating to corroboration should be removed from the Bill and referred for further consideration.

257. Professor Peter Duff from the University of Aberdeen argued that reform of corroboration could be considered separately from the current Bill. He noted that the main thrust of the Carloway report and of the Bill was to “cope with Cadder, new arrest procedures, new representation at police station procedures and so on”. He therefore concluded that removing corroboration from the Bill “would make no difference to the rest of the Bill in my view”. 283

258. Professor James Chalmers from the University of Glasgow also pointed out that the Scottish Government had not taken forward all of the evidential recommendations in the Carloway review. He cited the example of Lord Carloway’s recommendations that there should be a new statutory test for the admissibility of evidence, which is not included in the Bill. He therefore concluded that “the suggestion that the corroboration requirement cannot be taken out because it is all or nothing is not one that the committee should be persuaded by”. 284

281 Policy Memorandum, paragraph 144.
282 Policy Memorandum, paragraph 144.
Investigation, prosecution and quality of evidence

Investigation and prosecution

259. As already noted, a principal argument put forward by supporters for abolishing the requirement for corroboration was that doing so would improve access to justice for victims of certain crimes. Lord Carloway concluded that the requirement for corroboration creates “miscarriages of justice in the broader sense, because perfectly legitimate cases that would result in a conviction are not being prosecuted because of the corroboration rule.”

260. This was generally highlighted in relation to crimes which are committed in private, where the testimony of a complainant may be the only source of evidence. This could be “a particular barrier to obtaining corroboration for sexual crimes and for domestic violence as there may be nothing else, or very little, in the absence of statements made by suspects at interview”. The practical effect of the requirement for corroboration could therefore be “to deny access to justice for victims of these types of crimes.”

261. The Lord Advocate said that he supports the proposed abolition, noting that “prosecutors and I see the acute effect of the rule of corroboration in certain areas of criminal offending—particularly sexual offending, including rape, and domestic abuse. As women and children are very much in the majority of victims in those areas of criminality, the effect of the corroboration rule is disproportionate on them.”

262. ACC Graham considered the existence of the rule as an “unfair bar to justice”, in particular, “in the commission of the very offences that perhaps we would most seek to address, there is an intention on the part of the perpetrator to exploit some of the technical rules that prevent proceedings from taking place”.

263. Lily Greenan from Scottish Women’s Aid also welcomed the proposal as it would “provide the opportunity for the kinds of discussions that happen in backrooms at the moment to be heard in court”.

264. Alan McCloskey from Victim Support Scotland indicated that in his view it was also about victims, witnesses and the public having more confidence in the system. He noted that if removing the requirement would allow “more cases to be

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286 Policy Memorandum, paragraph 136.
288 Following the Lord Advocate’s evidence session, the COPFS confirmed in written evidence that a shadow marking exercise was carried out on what was considered to be a statistically relevant sample of these cases (328). Under the proposed new prosecutorial test, it confirmed that action might be taken in an estimated 60% of these cases following the abolition of the requirement for corroboration. (COPFS. Second supplementary submission, page 7).
considered and potentially taken forward on the basis of a reasonable prospect of conviction … that will allow confidence in the system”.292

265. However, not all witnesses were convinced questioned whether ‘access to justice’ would be served by taking such an approach. Indeed, there was a variety of views on exactly what ‘access to justice’ means. A supplementary written submission from the COPFS stated that “it is important to be clear at the outset that the abolition of the requirement for corroboration is not about improving detection or conviction rates … it is about improving access to justice for victims”.293 However, Lord Gill responded to this point by stating that “I think that that is a rather simplistic statement from the Crown”. He went on to state that “if your case is unlikely to succeed, I am not convinced that you are doing the complainer any favours by bringing it; after all, it is an ordeal for them”.294

266. Lord Gill said that that he was also concerned that the removal of the requirement for corroboration would have a deleterious impact on the quality of justice in Scotland. He agreed that there was a concern to ensure that sexual crime and domestic abuse are properly and effectively prosecuted. However, he was concerned that abolishing the requirement for corroboration would result in weak cases with uncorroborated evidence being brought forward. He therefore questioned whether juries would convict on the word of one person with nothing else to support it.295

267. Mr Harrower from the Edinburgh Bar Association considered the removal of the requirement for corroboration to be “a massive step simply to get at crimes that are committed in private”. He said he believed that other options should also be explored, suggesting that “we need to be more imaginative if we want to assist the Crown in finding ways to support complainers’ evidence rather than removing corroboration across the board”.296

268. There was also a general expectation that abolishing the requirement for corroboration would increase the number of cases prosecuted, particularly in the case of sexual abuse, rape and domestic violence.

269. In his review, Lord Carloway referred to research which the Crown Office and Procurator Fiscal Service (COPFS) had been commissioned to carry out to examine the impact that removal of the requirement for corroboration would have on the number of cases brought forward for prosecution. In his report, he highlighted the result of this research, noting that the results suggested that “a substantial proportion of cases, which are currently not prosecuted because they fail the corroboration test, could be prosecuted with the reasonable prospect of securing a conviction”.297 The quality of this research was challenged during evidence.

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297 The Carloway Review, paragraph 7.2.34.
270. The COPFS stated in its written evidence that, in preparing for this Bill, it had, with the police, conducted further research into the impact of the abolition of the requirement on the number of cases that could be brought forward. It reported that the result of the exercises suggested “a 1.5% increase in the number of cases which will be reported to the COPFS by the police; a 1% increase in COPFS summary business; and a 6% increase in COPFS solemn business.” Further details of this exercise are set out in the Financial Memorandum which accompanied the Bill. Again, these projections were challenged during evidence.

271. Raymond McMenamin from the Law Society of Scotland warned that it was “easy for some people to be swayed by the numbers game” and therefore emphasised that the issue should not be approached on this basis, noting the need to “look at each case individually and decide whether it is appropriate to bring a prosecution and whether it is in the public interest.”

272. Professor Duff warned against removing the requirement for corroboration simply to enable more cases to be prosecuted. In his view, this could actually result in an increase in acquittals and therefore more unhappiness on the part of the victims. He therefore concluded that “rather than resolving the problem with a quick fix, the Government would have succeeded in making the problem worse.”

273. Professor Ferguson shared this view, cautioning against taking forward the proposal just to get more people access to court. She acknowledged that, for some, it was about getting the accused into court, however, the vast majority were looking for a conviction. She therefore noted the danger that “expectations will be raised and people will go to the police and say, ‘I know it’s just my word against his, but that’s good enough now because there’s no corroboration requirement’, but it will not be good enough because juries will not convict.”

274. All witnesses shared the view that the conviction rate for cases of sexual offences and domestic abuse was unsatisfactory. However, there were differing views on whether removing the requirement for corroboration would significantly address this.

275. The Lord Advocate told the Committee that “it has been said that the abolition of corroboration is intended to increase the conviction rate for rape or other sexual offending [but] I have never seen that as the purpose and I have never ever said that it was all about increasing the conviction rate.”

276. While Professor John Blackie from the University of Strathclyde agreed that the low conviction rate for sexual offences was of serious concern, he also agreed that abolishing the corroboration requirement would not necessarily change that. He considered the rate of sexual offences to be a concern which required more
serious consideration and was worried “if abolition of corroboration was being seen as a quick fix … to a serious social and justice problem”.

277. James Wolffe QC from the Faculty of Advocates considered there to be uncertainty as to the practical effect of the provisions. He noted that—

“At first flush one might expect the rate of conviction for sexual crimes to decrease, because one is prosecuting crimes with a lesser evidential basis [however] there might be an increase in the conviction rate, not in sexual cases but across the board. Whether that will be so, and what the implications for the system and its resourcing will be, are anyone’s guess.”

278. Ms Barton of Rape Crisis Scotland agreed that removing the requirement for corroboration would not of itself make a difference in improving the conviction rates for offences committed in private but that, although the numbers involved may be small, the cases are significant to the people involved. She also regarded the proposal “as an important step forward” and that “alongside other important measures, it could make the difference.”

279. Professor Duff said that he shared the view that abolishing the requirement for corroboration would not necessarily increase the conviction rate. In addressing this point, he suggested, as a different approach to cases of rape and other sexual assaults, reform that would allow the appointment of a lawyer to safeguard the complainer’s interest during the trial.

280. In response to these points, the Lord Advocate indicated that he did not consider the justice system to be about conviction rates; instead it was about delivering justice. He reiterated his view that enabling greater access to justice was the main objective in bringing forward this change, noting that, in his experience, “people have wished for the opportunity for their version of events and account to be heard in a court of law with the possibility that the jury, with the burden of proof and all the protections, would reach a verdict on that.”

281. The Cabinet Secretary for Justice confirmed his view that corroboration must be abolished “because it is denying access to justice for not tens or hundreds but thousands of people each year”. In terms of the number of convictions, he acknowledged that decisions on guilt and innocence rest with the judiciary and the jury, however, he considered that, by not providing access to justice, “we are not giving victims the opportunity to have closure.”

282. The Cabinet Secretary could not confirm or guarantee that any particular offence prosecuted as a result of abolishing the rule would result in a conviction.

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308 Professor Duff. Written evidence, paragraph 5.
However, he accepted that this was a matter of speculation;\textsuperscript{312} nevertheless, he said he believed that “it is likely that increased access to justice will lead to more convictions”.\textsuperscript{313}

\textbf{Quality of evidence}

283. Some witnesses had concerns regarding the perceived artificial nature of the requirement for corroboration. In particular, it was argued that the requirement for corroboration resulted in a focus on the quantity of evidence, as it needed to come from two separate sources, rather than the quality of evidence. Lord Carloway highlighted this as one of his arguments in favour of abolition.

284. ACC Graham, agreeing with this position, said that, “in some cases, an assessment of the quality and sufficiency of the evidence as a whole is prevented because of a technical barrier in one of the facts of the charge not being corroborated technically in the way that the law is constructed”.\textsuperscript{314}

285. Ms Greenan from Scottish Women’s Aid echoed this view and identified issues in the current application of the requirement which meant that there could be a temptation for investigators and prosecutors to say “we’ve ticked the two boxes—we can put that one forward”. She emphasised that this was not a criticism of how the fiscal service operates as a rule but that it was “just a recognition that, when people are pressured, they do the minimum that they need to do to move on to the next thing on their list”.\textsuperscript{315}

286. However, some witnesses were concerned that the abolition of the rule would have a detrimental impact on the quality of evidence being presented. In particular, it was suggested that there may be a temptation to try to bring more cases forward with less chance of conviction as the bar set by corroboration would no longer apply.

287. Mr Harrower from the Edinburgh Bar Association highlighted the need for good quality evidence, noting that “juries find it difficult to assess cases involving crimes, particularly of a sexual nature, that are committed in private” and that “the case very often boils down to one person’s word against another’s”.\textsuperscript{316} He was therefore concerned that this would become more difficult without the requirement for corroboration, noting that—

"Currently the cases that go to court have that element of additional evidence. What is proposed is that we put cases into court where that additional element is absent. How can we expect juries to be more sure where that evidence is not there?"\textsuperscript{317}

\textbf{Police and Crown investigations}

288. Some witnesses had concerns that, without the legal requirement for corroboration, police officers and prosecutors might come under pressure to do

the minimum required, not always looking for corroborative evidence even if it might be expected to be available.

289. Lord Gill was concerned that, as corroboration was costly in terms of police time and resources, the prosecution might not look for corroboration when it was not required. In particular, at a time when resources were scarce he said he believes that it would be unfortunate if “economies were to be made in that direction”.318

290. Mr Wolfe QC echoed this concern, noting that “significant additional costs” had been identified for criminal justice bodies as a result of provisions of the Bill.319 However, the expectation set out in the Financial Memorandum was that these new costs would be absorbed without any increase in funding. He acknowledged that, if the removal of the requirement was the right thing to do, the means to resource this would have to be found. However, his main concern was that “a system that one might already regard as stretched will become overstretched” and that “any investigation that does not have to be carried out might not be”.320

291. The COPFS emphasised that it was the requirement for corroboration that was being abolished, not the concept of corroboration itself. It confirmed therefore that—

“In many cases corroborative evidence as we currently understand it will be available. In all cases the police and the COPFS will look for evidence which supports the credibility of the allegation of the commission of a crime as it is this supporting evidence which will often be a check and balance against possible injustice.”321

292. The COPFS also indicated that, irrespective of the proposed changes, the standard of proof remained that a charge must be proved beyond reasonable doubt, which was the main safeguard against miscarriages of justice.322

293. The Lord Advocate confirmed that the police and prosecutors are under a number of obligations to properly investigate cases. Police are under a common law duty to investigate a case fully. Under the ECHR, prosecutors and the police are under a duty to “properly and fully investigate cases and bring forward all relevant evidence”.323 Police and prosecutors are also under a duty in their disclosure obligations to ensure that cases are properly investigated and that any evidence in favour of or adverse to an accused person is properly disclosed. Finally, prosecutors are under duties to ensure that trials are conducted fairly.324

294. ACC Graham also refuted the notion that the proposal was resource driven, highlighting that “it is absolutely not the case that our support for the proposed

322 Crown Office and Procurator Fiscal Service. Written submission, paragraph 34
323 Article 6 of the ECHR seeks to protect the right to a fair trial.
changes to the law on corroboration is driven in any sense by financial pressures." He offered further reassurance, stating that—

"With neither hesitation nor qualification, I can say that the standard of investigation across the board would not change, were this law to be brought in as proposed. There is an absolute requirement on the police to undertake investigations, with diligence and rigour, to an evidential standard that is established through case law, which would not change as result of any of the bill’s proposals."

295. This position was supported by Chief Superintendent O’Connor of the Association of Scottish Police Superintendents who noted that “in terms of policing nothing will change, because police officers will continue to go out there and conduct very comprehensive investigations and gather all the evidence” and that “full, detailed and comprehensive investigations will continue in the police service”. He added that he had “absolute confidence that the police service will continue to seek corroboration from whatever source; thereafter, it is a matter for the Crown to look at the veracity, sufficiency and competency of the different strands of evidence”.

296. The Cabinet Secretary said that he had no concerns in this area, noting the view of the Lord Advocate that “the police would always look for additional evidence”. He also highlighted concern at the current draw on resources resulting from application of the rule, which often required duplication of effort by police officers in a number of areas. The Committee however, has concerns that there may be resource implications elsewhere.

New prosecutorial test

297. The Lord Advocate highlighted a proposed new prosecutorial test which would be in different terms to the current test (which he characterised as being largely based on an assessment of the quantity of evidence). As part of the new test, the prosecutor would have to make the following assessments—

(a) a quantitative assessment - is there sufficient evidence of the essential facts that a crime took place and the accused was the perpetrator?

(b) a qualitative assessment - is the available evidence admissible, credible and reliable?

(c) on the basis of the evidence, is there a reasonable prospect of conviction in that it is more likely than not that the court would find the case proved beyond reasonable doubt?

298. The COPFS stated that reform of the evidential part of the prosecutorial test would shift focus onto the credibility of the allegation and the quality of evidence which supports the allegation. It confirmed that only if a case meets the new

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evidential part of the test would the prosecutor consider what, if any, action to take in the public interest (this aspect would not change with public interest considerations remaining as at present).\footnote{Crown Office and Procurator Fiscal Service. Written submission, paragraph 16.}

299. Application of the test would “allow proceedings to be raised in a number of cases where at present the Crown cannot proceed due to a technical lack of corroboration for what are credible allegations where there is compelling supportive evidence”.\footnote{Crown Office and Procurator Fiscal Service. Written submission, paragraph 18.} Finally, the COPFS confirmed that the test would be published as part of the \textit{Prosecution Code} and that further guidance would be provided on the way this test would be applied.\footnote{Crown Office and Procurator Fiscal Service. Written submission, paragraph 18.}

300. The Lord Advocate indicated that, in applying the reasonable prospect of conviction test, it would be “necessary to look at the principal allegation, so the complainer’s version or account is considered” and whether the complainer’s account is “credible and reliable”. He also confirmed that a view would be reached on the “totality of the evidence” and that factors to be assessed would include “whether there is supporting evidence for the complainer’s account, whether it is circumstantial and what evidence there is against that account”.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 20 November 2013 Col 3742.} He added that “I would not – and prosecutors would not – take up a case without any supporting evidence”.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 20 November 2013 Col 3736.}

301. Mr Wolffe QC had some reservations that this was not sufficient to allay fears about prosecutorial decisions should the requirement for corroboration be abolished. He argued that this was a constitutional issue as “the Parliament is looking at the statutory structures within which a trial will take place and the safeguards in that regard” but that the test would not be “enshrined in statute” and so far had been “the subject of relatively little debate”.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 20 November 2013 Col 3742.}

302. In particular, Mr Wolffe QC noted that “Lord Advocates come and go and may change their guidance” and therefore the application of the test and the guidance informing prosecutorial decisions was also subject to change. In particular, he highlighted the example of certain classes of individual identified in the COPFS written submission where it was confirmed that proceedings would not be taken without strong supporting evidence. His concern was that this demonstrated the test would be applied “in different ways to different classes of case” in ways that are “unclear and unknown”. His concerns therefore remain that the prosecutorial test is “not a legislative safeguard, and precisely how the test will be applied remains to be seen”.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 26 November 2013 Col 3801.}

303. Professor Chalmers echoed this concern, noting that “it would be wrong to suggest that [the new prosecutorial test] offered additional safeguards. All it does
is ask the question that the prosecution would have to ask in the absence of the requirement for corroboration.” 337

304. Questions were also raised as to how any requirement for supporting evidence would work in practice. Professor Chalmers highlighted what he saw as the incoherence of a position where there would be no legal requirement for supporting evidence although “without it prosecutions will not go ahead”. 338 Professor Duff concurred with this view, questioning what the requirement for supporting evidence would mean in practice—

“If we do not need corroboration but need supporting evidence, one has to ask what that supporting evidence is. Actually, it is simply corroboration by another name, which is the position in most other jurisdictions”. 339

305. The Cabinet Secretary reiterated the Lord Advocate’s assertion that cases would not be brought forward without supporting evidence. He cited the situation in the Netherlands where to secure a conviction there had to be “additional evidence beyond the principal matter” which is a position he believes the Lord Advocate wishes to move towards in Scotland. In terms of ensuring that such an approach was secured in the future, he indicated that he would be happy to place the new prosecutorial test on the face of legislation and “enshrine what has to be proven before there can be a conviction”. 340

Dilution and complexity of the corroboration rule

306. Lord Carloway argued that the requirement for corroboration is a complex concept which is often misunderstood and misinterpreted. In his report, he stated that the complexities of the current requirement mean that there is difficulty in the rule being understood by people outside the world of criminal practice. He continued this argument further in oral evidence to the Committee where he said that “I do not think that the concept is particularly well understood by many of the legal profession [and this can be seen] by the decisions that continue to come out from the courts from time to time”. 341

307. Professor Duff agreed that the law on corroboration is very complex, noting that “judges have, on occasion, tried to find a way around it so that they can open the way to conviction for those who they think are guilty” and that “the problem is that the law has become so complicated that nobody really understands it properly.” 342

308. ACC Graham noted that the complexity of the rule had developed over time in order to “fit in with developments in society, legal process and evidential availability, and the original concept in very simple terms has perhaps been overtaken by all those changes and developments”. 343 The Lord Advocate

followed up this point, noting that it is not only complex but that the interpretation of corroboration has changed over the years and that “prosecutors have been pretty creative in legal arguments to try to place cases before the court”.  

309. Professor Chalmers accepted that it may well be the case that the rule is complex, however, he argued that any replacement would likely be equally as complex—

“We ought to remember that systems that do not have corroboration will safeguard against wrongful conviction through a wide range of different measures that are designed to prevent it. In the aggregate, those measures might turn out to be as complicated and confusing as corroboration itself. It is not clear that a system without corroboration is necessarily simpler.”

310. Professor Duff emphasised this point, noting that—

“I would not say that corroboration should be abolished because it is complicated; it is complicated, but all evidentiary doctrines are complicated. I am not sure that one can really address it in an atomistic way … without looking at the overall context.”

311. The Cabinet Secretary considered that these difficulties helped to justify the need to abolish the corroboration requirement as, in his experience, “we do not know what corroboration is”. He said that, when “two of our most senior academics” were asked to provide a synopsis of the law of corroboration, they admitted that they could not reach one on which they could agree.

312. His view was that “in the main laws should be understandable not just to lawyers but to the general public” and that “one lawyer will disagree with what another views as corroboration”. He therefore concluded that “when we cannot get the academics or the judiciary to agree on the law of corroboration … we are leaving it to individuals to make a decision … about access to justice, and there is something fundamentally wrong with that.”

**Attitudes to sexual offences and domestic abuse**

313. A more general issue raised during evidence related to the role public attitudes in general, and jury attitudes in particular, play in the low conviction rate for certain types of case, including rape. The Committee noted evidence that, whilst the law restricts research into the basis upon which juries come to decisions, prosecutors face significant difficulties in, for example, explaining why a rape victim may offer little physical resistance to an assailant.

314. Tony Kelly from Justice Scotland concurred that the conviction rate for incidents of violence against women is an issue. He stated that at the root of poor

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conviction rates were “prejudices and attitudes” and that “further consideration and work will be needed before we get anywhere near addressing that”. 350

315. Ms Barton from Rape Crisis Scotland noted that the Scottish Government had commissioned research which highlighted that “a quarter of people still believe that a woman is partly responsible [for any assault] if she has been drinking or if she has been wearing revealing clothing”. 351

316. The Lord Advocate was similarly concerned that public perceptions are an issue in relation to offences, such as rape, for example “that a woman who wears a short skirt is asking for it”. He also highlighted research conducted throughout the world into “jury myths”, including issues such as “delayed reporting, a lack of physical resistance, or the way that a woman is dressed” and how this affected how jurors viewed cases. 352 He noted that it was important to counter such attitudes in the presentation of cases 353 and that “through the national sexual crimes unit, we have been using expert evidence on many of what I call the rape myths to educate the jury as part of the trial process, and that work will continue”. 354

317. Ms Greenan from Scottish Woman’s Aid argued that “attitudes, assumptions and prejudice”, rather than evidence, could be the decisive factors in relation to successfully prosecuting some offences. She added that “the notion that removing the requirement for corroboration will in any way change that situation is false”. 355 She also claimed, however, that it would provide “a greater opportunity to have the discussions and probe the issues in the courtroom” and that “removing the requirement for corroboration would provide the opportunity for the kinds of discussions that happen in backrooms at the moment to be heard in the court”. To her, the important point was that “we will open up discussions about the evidence that really exists about violence against women by having them in the courtroom”. 356

318. Ms Barton agreed with this point. She also noted that this was part of a long-term picture that included access to judicial training, wider prevention work on changing values and attitudes and the introduction of female forensic examiners. This would all contribute towards “changing the culture of the courtroom and affording rights to complainers”. 357

319. When invited to respond to the suggestion that taking forward prosecutions which are more reliant on the evidence of the complainer alone would result in such complainers being subjected to more vigorous questioning in court, Lily Greenan responded that the “court cannot be any harder for victims in rape or sexual violence cases, who get grilled and ripped to shreds in court”. She added that—

“For victims of interpersonal crimes such as domestic abuse, rape and sexual assault, I do not see how it could be worse or how we could get a worse conviction—or failure—rate. I therefore do not accept those arguments as a reason not to consider abolishing the requirement for corroboration.”

320. Ms McCall from the SHRC acknowledged that corroboration is an impediment to certain types of cases getting to court, however she noted that this is not the only issue; “we need a much wider strategy to try to shift those cultural norms, if they are norms”. She indicated that, in terms of changing social attitudes, the SHRC had highlighted the need for “a comprehensive strategy for tackling violence against women, as well as an action plan for how to put that strategy into place”.

321. Professor Fiona Raitt from the University of Dundee highlighted a model she had been working on whereby a complainer in a rape or sexual assault case would receive legal advice during the hearing of their case. She noted that it was generally agreed that women who are aware of their rights relating to access to their medical and sensitive records were in a much stronger position in relation to the evidence they are able to give under cross-examination. She added that such complainers could not always rely on the judge or the Crown to protect their position in court and that this may be even more of an issue if the requirement for corroboration is abolished.

322. Professor Duff suggested that consideration should be given to introducing broader court procedures in considering how to address poor conviction rates in rape and sexual abuse trials. He considered that comparative research could be carried out to examine how such cases are conducted in other jurisdictions.

323. The Cabinet Secretary acknowledged that there are “various factors that we do not know in why juries come to decisions”. However, he said that he believed that the proposed changes would bring about greater confidence in the system which, in turn, would lead to more victims coming forward. His view was that, “if victims believe that the law provides support for them, they are more likely to report crimes and go through all the stages that can be traumatic for them”.

International comparisons

324. During his evidence session with the Committee, Lord Carloway indicated that, in having legal requirement for corroboration, Scotland was out of step with other countries. He noted that it is “the only country in the world that has the rule” and that in this regard “it was different from that in any other country in the civilised western world or the Commonwealth”. 

325. Mr McMenamin took a different view, noting that Scotland is not the only jurisdiction that has a requirement for corroboration. He acknowledged that it was true that “our application of corroboration is more widespread and we rely on it more than any other country, but other countries also apply it”. He noted that the United States of America used corroboration a lot and that “research will show that other jurisdictions think that corroboration must be considered in many cases”. He added that in England “the system contains certain safeguards whereby judges in certain cases can caution juries regarding corroboration and prosecutions based on single-source evidence”. 365

326. Ms McCall emphasised the difficulty in making such comparisons, noting that “other systems have other safeguards to ensure the quality of evidence” and that “the difficulty with looking at other systems and saying that they do just fine without corroboration is that you are comparing apples and pears”. 366

327. Professor Ferguson also countered Lord Carloway’s argument, noting that colleagues from different jurisdictions had confirmed that, despite stating that they had no official requirement for corroboration, it did operate unofficially in other jurisdictions. She noted that “when we probed a bit more deeply, they all said ‘No prosecutor would go ahead without what you call corroboration or two pieces of evidence’ and that judges would not find someone guilty beyond reasonable doubt just on the witness of one complainer”. 367

328. Lord Gill argued that “we should be proud of the fact that we have something that other jurisdictions do not have. It is one of the great hallmarks of Scottish criminal law.” 368

Retrospective application of abolition of requirement for corroboration

329. Section 59 of the Bill provides that abolition of the requirement for corroboration would not apply retrospectively. Thus, corroborated evidence would be required for the prosecution of offences committed before the date of abolition.

330. Petition 1436 in the name of Collette Barrie calls for retrospective application. The Committee agreed to consider the petition alongside its consideration of the Bill on 24 September 2013.

331. Ms Barrie argued that making abolition retrospective would ensure full access to justice for victims of crime and noted that, by doing so, “perpetrators of the most heinous acts [would be] held to account for their actions and prevented from harming others”. 369

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369 Collette Barrie. Written submission, page 5.
332. In its written evidence, Rape Crisis Scotland concluded that to not make this change to the legislation retrospective would in effect mean that “survivors of historic child sexual abuse or rape will continue to face this barrier to justice.”

333. In terms of the appropriateness of the provisions applying retrospectively, Ms Barrie drew a parallel with the Double Jeopardy (Scotland) Act 2011 which allows for retrospective application of its provisions. She noted that, during the passage of that Bill, it was argued that “it is immaterial whether the conviction or, as the case may be, the acquittal was before or after the coming into force of the Act.”

334. However, a number of witnesses argued strongly against retrospective application when questioned on the point during oral evidence. It was described as “unworkable and inappropriate” and “fundamentally unconstitutional” by Mr McMenamin and Mr Wolfe QC. Robin White of the Scottish Justice’s Association said that “there are almost never any justifications for any retrospective criminal legislation”.

335. The Cabinet Secretary said that, although he had sympathy for those who seek to bring in the provision retrospectively, he did not consider such an approach to be possible. He argued that any attempt to remove the need for corroboration in relation to offences committed before commencement of the relevant provisions could cause confusion and “great difficulties for prosecution.”

Requirement for corroboration as a safeguard

336. A principal argument put forward for retaining the requirement for corroboration was its central importance within the Scottish criminal justice system and its importance as a check against miscarriages of justice (in the sense of wrongful convictions).

337. Lord Gill stated that the requirement for corroboration is an important protection that has reduced the number of miscarriages of justice. He therefore emphasised his fear that “there would be many more [miscarriages of justice] if corroboration were to be abolished.”

338. Mr Harrower echoed this position, indicating that the relatively low number of miscarriages of justice in Scotland could be attributed to the high bar set by the requirement for corroboration. He also said he was concerned that miscarriages of justice would increase if the requirement was abolished as “it stands to reason that, if we lower the standards that are required, we will convict more innocent people.” He argued that juries are currently assisted by existence of the

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370 Rape Crisis Scotland. Written submission, paragraph 2.2.
371 Collette Barrie. Written submission, page 5.
corroboration requirement when trying to establish the truth of matter and that it was regarded as "an independent check" for both juries and sheriffs. 376

339. Professor Duff highlighted the pressure on prosecutors in sexual assault and domestic violence cases, noting that "they are under great political pressure to prosecute every case". His concern was that, without the protection of the requirement for corroboration, cases which are reliant on the evidence of a single individual would be prosecuted, thus increasing "the danger of miscarriages of justice". 377

340. Mr Wolfe QC stated that, given the significance of the requirement for corroboration in the overall context of the Scottish criminal justice system, "one must look very hard at what one is putting in its place, and one must ask whether one is getting the right balance between safeguards against miscarriages of justice on the one hand, and a reasonable system for prosecuting crime on the other". 378

341. Mr Kelly of Justice Scotland cautioned that without corroboration and with nothing added to safeguard against wrongful conviction, Scotland may be in breach of article 6 of the European Convention on Human Rights (right to a fair trial). He said that if the requirement for corroboration was taken away, "it is difficult to see what the argument would be when Scotland goes to the European Court of Human Rights to respond to an accused person's complaint that he has not had a fair trial". 379

342. Lord Carloway acknowledged the perception that corroboration is central to the criminal justice system, stating that "more than any other feature of the criminal justice system, it is seen by many as a defining and distinctive characteristic of the Scots law of evidence in criminal cases". 380

343. He also acknowledged that "the necessity of having corroborated evidence has ... lain at the heart of the criminal justice system since time immemorial and has been, and still is, regarded by many as an 'invaluable safeguard' against the occurrence of miscarriages of justice". However, he said that he could find no evidence that the requirement served this purpose, instead concluding that "the real protection against miscarriages of justice at first instance is the standard of proof required; that the judge or jury must not convict unless convinced of guilt beyond reasonable doubt". 381 He backed up this assertion with evidence from his review, confirming that during that process "we were given no material to suggest that there is a difference and that the rule in relation to corroboration reduces the likelihood or incidence of miscarriage of justice in our jurisdiction". 382

344. In the broader sense, Lord Carloway said that the requirement was actually creating miscarriages of justice "because perfectly legitimate cases that would

380 Carloway Review, paragraph 7.2.1.
381 Carloway Review, paragraph 7.2.41
result in a conviction are not being prosecuted because of the corroboration rule.\textsuperscript{383}

345. ACC Graham advised the Committee that he had not heard any credible evidence to support the view that there would be an increase in miscarriages of justice. He was also reassured that sufficient provisions were in place to avoid this happening. In particular, he noted that “the burden of proof, the test of sufficiency of evidence put before the court and all the other measures for carrying out a qualitative assessment of the inadmissibility and so on of the evidence are in place”.\textsuperscript{384} The Lord Advocate echoed this point, noting that the standard of proof remained the same and that it was “a matter for the jury whether, having tested the evidence, they find the case to be proven beyond reasonable doubt”.\textsuperscript{385}

346. Mr McCloskey from Victim Support Scotland stated that—

“There would still need to be a reasonable prospect of conviction, and the jury or the judge will have to consider that the matter is proved beyond reasonable doubt. Those absolute cornerstones of our system will still be there, and they should remain.”\textsuperscript{386}

Sufficiency of protection after abolition

347. Mr Wolffe QC expressed serious concerns about the proposed abolition of the corroboration requirement without having proper safeguards in place to address any change to the balance of justice. He noted that there is a need to examine the issue—

“In the context of the other things that have been done by way of adjusting and compensating in a system that has until now—in ways that cannot be overemphasised—been fundamentally based on that doctrine being at the heart of our criminal justice system”.\textsuperscript{387}

348. Mr Harrower was similarly concerned, noting that—

“Miscarriage of justice cases are very costly for the system in terms of both money and public confidence. Until now, we have managed to avoid them for a reason and, to me, corroboration is the main reason.”\textsuperscript{388}

349. Ms McCall also urged caution in relation to abolishing the corroboration requirement without considering what other measures should be introduced in its place. She noted that access to justice for an accused person includes there being the proper means by which to challenge the quality of evidence against him—

“At present, corroboration serves that function as a means of quality control. If we abolish it without reassessing the system and seeing what other safeguards might be needed, there will be nothing, apart from the ability to

cross-examine, to provide the proper means to challenge the reliability of evidence." 389

350. Ms McCall cited examples of types of evidence where there would be difficulties if the requirement for corroboration were abolished. These included dock identification which the Judicial Committee of the Privy Council had determined was acceptable in conjunction with the requirement for corroboration. The European Court of Human Rights had also expressed concerns about evidence from anonymous witnesses and undercover witnesses "due to the difficulty for the defence to challenge its quality and ensure its integrity." 390 Ms McCall said she was therefore of the view that examples of this type highlighted “the breadth of the implications of abolishing corroboration across the system” and that time therefore needed to be taken “to examine the matter properly.” 391

351. In terms of the possibility of miscarriages of justice, the Cabinet Secretary’s view was that—

"We should recognise that the requirement for corroboration has not avoided miscarriages of justice here, and equally that the lack of corroboration has not resulted in them elsewhere. They occur for a variety of reasons. The fact that we are one of the few countries that have a commission to review criminal cases is a tribute and testimony to the serious view that we take of the matter. That is the position." 392

352. With regard to ECHR compliance, the Cabinet Secretary confirmed that “a victim might choose eventually to go to Europe to challenge the system because they are not getting access to justice” as a result of the barrier presented by the current corroboration requirement. 393

353. In terms of further review, he accepted that issues highlighted, such as dock identification, needed to be examined further in terms of the impact of the abolition of the requirement would have on using such evidence. He also said that he was open to further suggestions of areas that would require review, acknowledging that “we cannot go from the old regime to the new regime without ensuring that we have it right”. 394 He indicated that the Scottish Government was happy to take the time to get it right. 395

354. The Cabinet Secretary confirmed that, although there was urgency to implement the changes as quickly as possible, it had always been the Scottish Government’s intention that the changeover to the new system would not be

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triggered until 2015. This would allow time for the necessary training for “not just police officers but the judiciary and prosecutors”.

Retention of corroboration in certain cases

355. An alternative proposal was to remove the requirement for corroboration only in respect of certain types of cases, such as rape, sexual abuse and domestic abuse.

356. In its submission, the Scottish Parliament’s Cross Party Group on Adult Survivors of Childhood Sexual Abuse suggested that wider definitions of corroboration should be permitted in private cases as it would seem disproportionate “to do away with corroboration for all crimes when it only impedes justice in some cases”.

357. However, Lord Gill did not consider that retaining corroboration only in relation to certain cases to be “a wise approach”, noting that “if you legislated specifically for one type of offence and relaxed the evidential requirements in respect of it, you could create, in a sense, a privileged class of complainers for that type of crime”. He therefore concluded that “the legislation must apply across the board”.

358. Ms Greenan agreed with Lord Gill’s point, stating that “the justice system should be for everyone on an equal basis”. She also highlighted the importance of not complicating matters in solemn cases noting that “technical directions to juries are problematic in terms of what counts and what does not count” and therefore that “anything that makes the process more complicated is going to be harder”.

359. Mr Harrower also noted that cases very often came to court with a number of different charges and so there was potential for confusion, particularly for juries—

“If a complainer has alleged a number of different types of crime against the same person, how do we explain to a jury that charges 1 and 2 do not require corroboration but charges 3 and 4 do? Juries have to absorb a lot of directions in a short space of time, it is sometimes difficult for them to get their heads around them but they do their best. It will make things very complicated if we create certain classes of case in which corroboration is not required.”

360. The Cabinet Secretary confirmed that such an approach had been considered but concluded that the law of evidence “should be, in the main, clear

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across the board‖ and that taking such a step would “cause great difficulties for those who operate the system”.

Additional safeguards

361. Lord Carloway, in his review, did not anticipate the need for additional safeguards in the event that the requirement for corroboration was abolished. He said that he did not think the system needed to be rebalanced as he did not accept the argument that the corroboration requirement is a protection against miscarriages of justice.

362. However, a significant number of responses to the Scottish Government’s consultation on Lord Carloway’s recommendations reached a different conclusion, highlighting the need for additional safeguards to be introduced should the requirement for corroboration be abolished. Given the central role that the requirement for corroboration plays, there was a strong view that additional provisions needed to be put in place to protect against wrongful convictions.

363. Lord Gill stated that—

“If there is a good solid case for abolishing corroboration, there should be no need for any safeguards. The moment that we say that there have to be safeguards, we are conceding that the change creates a risk of miscarriage of justice, which in my view, it will‖.

364. In response to concerns such as these, the Scottish Government launched a second consultation, with a view to providing additional safeguards, seeking views on three additional areas of possible reform: (a) changes to the current system under which a guilty verdict only requires the support of eight out of 15 jurors; (b) giving the judge in a jury trial the power to acquit the accused, without referring the matter to the jury; and (c) removing the ‘not proven’ verdict as an option in criminal cases.

365. While reform in all three areas was generally welcomed, some reservations were expressed at introducing (b) and (c) as safeguards. Therefore, the only additional safeguard included in the Bill relates to the jury majority required in order to reach a guilty verdict (requiring a two-thirds majority of jurors in order to establish guilt).

Guilty verdict

366. The proposed reform to the rules on jury majorities (within the context of the planned abolition of the requirement for corroboration) was not one of the main issues highlighted in evidence to the Committee. It was, however, argued that reform in this area alone would not provide a sufficient additional safeguard, although it might be desirable.

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367. Professor Duff suggested that this provisions in the Bill appeared to be “rather plucked out of thin air” and that there was “no evidence to support whether that would make any difference and no detailed consideration of it”.  

368. Mr McMenamin had similar concerns, querying how the figure of 10 out of 15 had been reached and noting that “no research has been carried out on the matter”. In terms of the adequacy of the provision as a safeguard, he compared it to the English system, where corroboration is not used in such a widespread fashion, but—

“Juries are in the first instance, directed to return unanimous verdicts. Only on the judge’s direction can there be a 10 out of 12 majority verdict for a conviction, which is still a substantially higher standard than 10 out of 15.”

369. Mr Kelly was also not convinced that the change would provide the necessary safeguards. He noted Justice Scotland’s position that there was nothing “particularly significant or scientific about plucking a magic figure out—pushing the majority figure up and then tweaking it in the event of jury members falling out”. He added that there was no reason that this would ensure “proof beyond reasonable doubt” and “in the absence of any research or further work, we thought that that was quite a blunt way to deal with the removal of corroboration.”

370. Ms Barton was not convinced of the need for the safeguard, observing that “it feels as if it is being suggested in response to popular opposition to the removal of corroboration”. Rape Crisis Scotland is, she said, opposed to an increase in the jury majority “because of what we know about prejudicial views, particularly in cases of sexual violence”.

371. However, there was a general view that changing the jury majority requirement in returning a guilty verdict was a positive step in improving confidence in the criminal justice system, even irrespective of the corroboration debate.

372. Michael McMahon MSP gave evidence to the Committee on this Bill in the context of his own Criminal Verdicts (Scotland) Bill, which makes almost identical provision in relation to the majority required for a jury to return a guilty verdict. The proposal to reform the majority rules was advanced as a balance to the proposal to remove the ‘not proven’ verdict, which his Bill also seeks to achieve.

373. In terms of the general need for reform in this area, Mr McMahon highlighted the need for public confidence “that a jury has considered the evidence and found … beyond reasonable doubt”. He also highlighted that there was a general view expressed in response to his consultation that “the fact that very serious cases can be concluded one way or another on a straight majority needs to be looked at”.

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374. Lord Carloway acknowledged that “the increase in the numbers necessary for a verdict of guilty from eight to 10 may result in greater confidence in the criminal justice system at solemn level”. However, he argued that there needed to be greater consideration given to how the majority operated in the context of other systems.\textsuperscript{411}

375. The Cabinet Secretary noted that the provision had been made in response to the consultation as it provides an additional safeguard following the removal of the requirement for corroboration, which he considered to be “a reasonable position to be in”.\textsuperscript{412}

\textit{Power of judge and reasonable jury}

376. As part of its consultation on safeguards, the Scottish Government also sought views on the option of giving the judge in a jury trial the power to acquit an accused on the basis that no reasonable jury could consider the case to have been proved beyond reasonable doubt on the basis of the evidence led.

377. This option is not included in the Bill as introduced. This is on the basis that, despite the majority of respondents supporting the proposal, the majority of the Senators of the College of Justice, who would be responsible for making decisions on whether to remove a case from the jury in High Court trials, were opposed to it. The senators’ response argued that the system was based on the jury being the judges of fact and that such a reform would usurp the function of the jury.\textsuperscript{413}

378. Mr Wolffe QC noted that such a power existed in the appeal process and so “logically, that implies that we recognise that, on occasion, juries bring in verdicts that are unreasonable”. He was therefore of the view that it seemed “odd” that the judge, who was independent and impartial, highly trained and had heard the evidence, should not have the power to withdraw the case from the jury.\textsuperscript{414}

379. Ms McCall noted that, in terms of the Lord Advocate’s intention that cases should not come to court without supporting evidence, there may be circumstances where the supporting evidence brought by the Crown “does not pass muster”. In those circumstances, the judge would have “absolutely no power to do what the prosecutor would have done had he known the situation before the case came to court”.\textsuperscript{415}

380. Ms Greenan was of the view that giving such powers to judges and sheriffs would have to be accompanied by shrivial and judicial education.\textsuperscript{416} Ms Barton suggested that perhaps it should be left up to the jury to decide. She noted that the bar of no reasonable doubt would have to be reached “which is fairly high bar to reach”.\textsuperscript{417}

381. The Cabinet Secretary acknowledged that he could “see some good reasons why it should be within the power of the judge to take a matter away from the jury if he or she believes that there is an insufficient case to go forward with.”

*Not proven* verdict

382. The Committee also received evidence on the third proposed safeguard consulted on by the Scottish Government, i.e. the abolition of the ‘not proven’ verdict.

383. Lord Carloway, in his review, suggested that “if the issue of majority verdicts were to be examined, a review of the three-verdict system would have to follow.” In addition, all of the academic experts on criminal law who gave oral evidence to the Committee did not see any problem with the ‘not proven’ verdict being reviewed.

384. As already noted, Michael McMahon MSP’s Criminal Verdicts (Scotland) Bill seeks to remove the option of the ‘not proven’ verdict. When giving evidence to the Committee, he suggested that the reform is necessary in order to maintain confidence in the judicial system as this second verdict of acquittal currently causes confusion.

385. The majority of respondents to the Scottish Government’s consultation favoured moving to a two-verdict system. However, a significant minority were concerned that time should be given to allow the impact of Lord Carloway’s recommendations to be assessed before making changes to the three-verdict system. The Scottish Government therefore concluded that the ‘not proven’ verdict should be retained for the time being until further consideration could be given to the appropriateness of possible reform in light of the other changes brought about by the Carloway review.

Summary cases

386. In terms of additional safeguards, it was noted that the change to the jury majority requirement would have no impact on summary cases where the sheriff or justice of the peace would determine guilt. In fact, the Committee received evidence that summary procedure accounts for over 90% of all cases that come to court, yet there are no additional safeguards proposed for summary cases.

387. However, some witnesses did not see the absence of any proposal for additional safeguards in relation to summary cases as a particular problem. Professor Ferguson argued that concerns relating to the requirement for corroboration being abolished were not as great in relation to summary cases. She noted that, “although [summary cases] form the bulk of the work of courts, the stakes are not as high as under solemn procedure”. Professor Duff agreed with this suggestion, stating that “decisions about guilt or innocence in [summary]

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419 Carloway Review, paragraph 1.0.20
421 Policy Memorandum, paragraph 181.
cases would be made by sheriffs, who are experienced lawyers and who will ... be well able to see the failures in witness testimony".  

388. In relation to trials presided over by justices of the peace, Professor Blackie suggested that consideration could be given to whether it would be better to have three justices, instead of one, if the requirement for corroboration were abolished.  

389. However, Professor Chalmers urged some caution citing anecdotal evidence of sheriffs hearing cases where the evidence of a prosecution witness had been persuasive but was then shown to be unreliable by the evidence of witness cited to provide corroboration.  

390. Mr Kelly said that he had particular concerns about the safeguards available to the accused in summary cases should the requirement for corroboration be removed. He said that if “we do not have that, and in a summary case, we have nothing else, the irresistible conclusion would seem to be that there will be an unfair trial”.  

391. The Cabinet Secretary said that he considered the issue of safeguards in summary cases to be about “how the system operates in the new landscape” and that some of it would be down to judicial training through the Judicial Institute for Scotland.  

The need for further safeguards

392. A number of witnesses argued that it was not possible to identify a coherent package of checks and balances without more detailed analysis of how a system without the need for corroboration should operate. It was argued that such a review could not take place within the context of scrutinising the Bill. For this reason, witnesses were reluctant to offer more than examples of possible additional safeguards when questioned by the Committee.  

393. Lord Gill described the existing system as “quite coherent and logical”, consisting of “a series of checks and balances that attempt to achieve not just fairness to the defence, but fairness to the prosecution as well”. He did not think that “you could take one brick out of the wall” without considering the consequences of doing so and therefore considered that the proposed changes had to be examined holistically, considering “all the various safeguards in the criminal system in the round”.  

394. Mr McMenamin from the Law Society questioned the adequacy of the provisions, noting that “if the Bill passes into law in its present form we will be in danger of having a system of justice in which the safeguards against wrongful conviction are so minimal as to be capable of being described as basic”. Mr Wolfe QC echoed this point, advising that the proposal to abolish the requirement  

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for corroboration “with the very limited adjustment to the jury majority and no additional safeguards in summary cases is not one that the faculty can support”.  

395. Professor Chalmers suggested that the question of safeguards could not be dealt with adequately during the passage of the Bill as the question was “very complex and would require extensive comparative research”. He therefore did not consider that it could be dealt with by way of amendment to the Bill.

396. Mr Wolfe QC agreed with this view, suggesting that it was important not to look at corroboration in isolation but to look “in the round at all the structures and rules of our criminal justice system”. He noted that, “over the years, a variety of options that form part of the suite of safeguards in other jurisdictions have been looked at in Scotland” but had been rejected on the basis of the “protection of corroboration”. He therefore concluded that, if the requirement for corroboration were abolished, “we have to look again at a variety of the rules that we apply routinely in our courts”.

397. Lord Gill suggested that the sorts of issues that would need to be examined as part of this process include: reconsideration of the admissibility of certain statements; re-examination of the use that can be made of confessions; re-examination of the right of the accused not to testify; and examination of the right of the accused to withhold his defence at the earliest stage of a prosecution.

398. The Cabinet Secretary said that he was not opposed to further work being carried out to consider what further safeguards would be required. He indicated that, although the Scottish Government remained “committed to the removal of the requirement for corroboration, [there was a need to] get the landscape right and we must balance the scales of justice”. He confirmed that the Scottish Government was “open to any suggestions for additional safeguards”.

399. When asked to confirm whether it was his intention that the Bill would contain provision to the effect that the abolition of the requirement for corroboration would not occur until a committee or some other vehicle had proposed safeguards with which the Justice Committee was satisfied, he confirmed, “yes, we are perfectly comfortable with that direction of travel”.

The case for further consideration

400. A general theme running through the evidence received was the need for holistic consideration to be given to the criminal justice system in light of the proposed changes. In addition to consideration being given to the need for further safeguards, some witnesses argued that a holistic review needed to be carried out of the consequences of the abolition of the rule, given its core function within the criminal justice system.

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In oral evidence, Lord Gill emphasised that “the rule is not simply a technical rule of the law of evidence that can be changed as part of a discussion of evidence, it is part of the constitution of this country and one of the great legal safeguards in our criminal justice system”. He therefore argued that “a change of such profound importance … should be made as part of a much wider consideration of criminal evidence and not simply as an ad hoc response to one particular decision of the United Kingdom Supreme Court, which is the situation in which we find ourselves”.

A number of witnesses concurred with this point. Mr Wolffe QC suggested that the issue should be examined by “looking at the whole criminal justice system in the round”. He asserted that “we need to look at the system at large and all its elements so that we can secure a system that strikes the right balance between prosecuting crimes effectively, including those sexual crimes and crimes of domestic abuse that rightly raise public concern, and avoiding miscarriages of justice”.

Mr McMenamin questioned the extent to which the provisions in the Bill had been properly consulted on and noted that the Law Society’s view was that these matters should have been “subject to consideration on a wider scale than has been the case”.

Mr Harrower also warned against removing the requirement for corroboration without giving proper consideration to the consequences of doing so. He cautioned that “we have to make sure that we do not make rash decisions, because once we get rid of corroboration, it will be gone. In my submission, that would be to the detriment of our system unless we have properly thought out checks and balances in its place.”

Mr Kelly from Justice Scotland agreed with these points, noting that “we just do not know what the consequences will be”. He suggested that areas of concern could be highlighted, however, “we do not know what effect removal will have on the overall fairness of trials in relation, not just to victims of sexual crimes, but to victims in general and accused persons in Scotland”.

Professor Duff said that he had been a member of the Carloway reference group which advised the review process. He indicated that the vast majority of experts in the group had wanted the issue of corroboration referred to the Scottish Law Commission. He noted that a range of views were held amongst the experts on corroboration but that they all thought that “if we are to remove corroboration, we have to have a very good think about it and about what all the other safeguards are”.

However, some opposition was expressed to this proposal. ACC Graham argued that Lord Carloway had had sufficient time to consider the issues and
report to the Scottish Government. He also suggested that the time since the report had been published had allowed everyone to consider the matter carefully. Mr O’Connor from the ASPS and Mr Ross from SPF both concurred with this view, indicating that the police service “will do the same as we are doing now irrespective of whether the bill is passed as it is or not”.\footnote{Scottish Parliament Justice Committee. Official Report, 3 December 2013 Col 3880.}

408. The Lord Advocate regarded Lord Carloway’s review as “an extensive piece of work”, noting that “it took a year, there was a review group and a reference group, there were four or five roadshows, there were visits down south and to the continent, the review group spoke to experts and visited the Scottish Criminal Cases Review Commission and Glasgow sheriff court and there were various other matters, all of which are in Lord Carloway’s report”.\footnote{Scottish Parliament Justice Committee. Official Report, 20 November 2013 Col 3736.}

409. Lord Gill suggested that further consideration of the issue could be taken forward as part of the work of the Scottish Law Commission or by a Royal Commission. He noted that “the Government has appointed royal commissions, departmental commissions … to examine such issues” and suggested that such an exercise “would not necessarily take a lot of time or cause a great deal of delay”.\footnote{Scottish Parliament Justice Committee. Official Report, 20 November 2013 Col 3721.}

410. The Cabinet Secretary said that he remained convinced that the case for abolishing the requirement for corroboration had been made. However, he reiterated his position that he was happy for further consideration to be given to the need for additional safeguards. In doing so he acknowledged the need to take steps to ensure that “we do not remove a manifest injustice for those on one side of the equation and replace it with a manifest injustice for those on the other side”.\footnote{Scottish Parliament Justice Committee. Official Report, 14 January 2014 Col 4099.}

**Committee’s conclusions**

411. The proposal to abolish the requirement for corroboration is seen as a controversial reform which has divided opinion on the Committee.

412. The majority of Committee Members are of the view that the case has not been made for abolishing the general requirement for corroboration and recommend that the Scottish Government consider removing the provisions from the Bill. They are concerned that the case for abolition has paid insufficient regard to the importance of this requirement within the Scottish criminal justice system, in ensuring that the system as a whole is properly balanced and gives due weight to the interests of those facing criminal allegations, complainers and society. In addition, they are not convinced that abolition would improve ‘access to justice’ in a meaningful way for victims of crimes, such as rape and domestic abuse, which are often difficult to successfully prosecute. Improving the situation for such victims must involve a lot more than prosecuting more cases without a realistic expectation of a significant increase in convictions.
413. Some Members of the Committee believe that the case for removing the requirement for corroboration has been made. They consider that access to justice will be improved by such a reform, in particular, for victims of crimes which often occur in private.

414. The Committee is convinced that, if the general requirement for corroboration continues to be considered, this should only occur following an independent review of what other reforms may be needed to ensure that the criminal justice system as a whole contains appropriate checks and balances. Any such review should consider the system in a holistic manner, looking at relevant procedures and safeguards during both investigation and prosecution of criminal allegations.

415. The majority of Committee Members do not believe, in the event that the requirement for corroboration is abolished, that concerns relating to the need for further reform can be adequately explored during the passage of the Bill. The Cabinet Secretary's proposal that the commencement of the provisions abolishing the requirement for corroboration be subject to a parliamentary procedure requires further explanation and consideration, which the Committee requires before Stage 2.

416. The Committee acknowledges that, in proposing a review of additional safeguards, the Cabinet Secretary for Justice has, in part, taken into account the concerns of witnesses. However, even at this late point in the Stage 1 process, the Committee has not received clarification from the Scottish Government regarding the timing and nature of any such review. The Cabinet Secretary's letter dated 4 February 2014 came in the late stages of consideration of this report, and therefore cannot form part of this report. The Committee calls on the Scottish Government to provide, prior to the Stage 1 debate, further information on any review of additional safeguards (including the proposed remit, who might be involved, likely timescales and options for implementing recommendations).

417. The Committee notes evidence from the Cabinet Secretary and Lord Advocate relating to a possible requirement for ‘supporting evidence’ in cases where corroboration is not available. Members of the Committee have, however, received only limited evidence on how this might operate in practice. The Committee calls on the Scottish Government to provide more information on how any requirement for supporting evidence would differ from the current need for corroboration.

418. The Committee also notes the Cabinet Secretary’s willingness to consider placing a revised ‘prosecutorial test’ on the face of legislation. The Committee accepts that such a step might form part of new checks and balances in response to the proposed abolition of the requirement for corroboration, but recommends that the matter should be included for full consideration in any review process.

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447 Margaret Mitchell, Alison McInnes and John Finnie believe that this review should be undertaken by a Royal Commission or the Scottish Law Commission.
419. The Committee is fully aware of continuing concerns relating to how the justice system responds to cases of rape, domestic abuse and other offences which often happen in private. Members note ongoing efforts to improve the situation for victims of such offences and agree that further steps need to be taken, including measures aimed at addressing low prosecution and conviction rates.

420. The Committee calls on the Scottish Government to actively review all evidence relating to how improvements with regard to offences such as rape and domestic abuse may be achieved. This should include consideration of public attitudes as well as the justice system. In relation to the latter, all stages must be included, from initial contact with the police to the giving of evidence in court (e.g. whether victims of such offences should have access to legal advice and support where their personal or medical details may be revealed in court).

421. The Committee agrees that, if the requirement for corroboration is abolished, it should not apply retrospectively.

Section 62 - Statements by accused

422. Section 62 seeks to modify rules on the admissibility of hearsay evidence in criminal proceedings as they apply to both exculpatory and mixed statements made by an accused.

423. The section provides that evidence of such statements would no longer be held inadmissible, as evidence of any fact contained therein, on account of the evidence being hearsay. The section only applies to statements made by an accused in the course of being questioned (whether as a suspect or not) by the police or another official investigating an offence.\(^5\)

Hearsay evidence

424. The law of evidence includes various rules restricting the use of hearsay evidence in criminal cases. In a 1995 report on the use of hearsay evidence in criminal proceedings, the Scottish Law Commission noted that:

“The rule against hearsay has been formulated as follows: ‘Any assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted.’

The term ‘hearsay’ is misleading since the rule applies not only to statements made orally but also to statements made in documents and to statements made by means of conduct such as signs or gestures: all are inadmissible as evidence of the truth of the matters stated, unless an exception to the rule applies.”\(^6\)

\(^5\) Explanatory Notes, paragraph 144
\(^6\) ‘Hearsay evidence’ is an out-of-court statement offered to prove the truth of the matter asserted.

425. According to the Policy Memorandum, hearsay evidence is not generally admissible in court as—

“There is perceived to be a problem in an accused person being able to lead evidence at his trial of exculpatory statements as a substitute for giving evidence, not least because it might otherwise be expedient for an accused person to provide a carefully prepared narrative to a credible person shortly before the trial rather than giving evidence in person at court, so potentially avoiding cross-examination by the prosecution”.

426. A number of exceptions rendering hearsay evidence admissible already exist. Exculpatory statements can be admitted as evidence that an accused person’s story is consistent, “where the accused has given evidence and his credibility or reliability is challenged and not as proof of fact.”

427. A ‘mixed statement’ (i.e., one which is partly incriminatory and partly exculpatory) is admissible at the instance of the Crown in relation to proof of fact. However, where such a statement is led by the Crown, “both the incriminatory and exculpatory elements of the statement could be admissible as proof of fact.”

428. A confession made by an accused person is also covered by an exception to the general rule against hearsay evidence and is admissible as evidence of the truth of the things said. This exception has been justified on the basis that a person has less interest in lying where a statement is purely incriminatory.

429. Lord Carloway noted “a perception that there is a problem in an accused being able to lead evidence at his/her trial of exculpatory statements, or even partly exculpatory statements, as a substitute for giving evidence”. However, he argued that it was difficult to justify the exclusion of exculpatory answers given during a police investigation where, in relation to the right to a fair trial under ECHR, a police interview may be regarded as part of the trial process.

430. He further argued that the current rules relating to the admissibility of exculpatory and mixed statements are contrary to the principle of the free assessment of evidence unencumbered by restrictive rules, as well as being unnecessarily complex and confusing.

431. He therefore concluded in his review that—

“The current law on the admissibility of mixed and exculpatory statements made by a person during a police interview is not based on a rational and balanced approach to the relevance of statements. It is highly complex and potentially confusing to juries and others in the criminal justice system. It is at

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451 Exculpatory evidence’ is evidence favourable to the defendant in a criminal trial that exonerates the defendant of guilt.
452 Policy Memorandum, paragraph 150.
453 Policy Memorandum, paragraph 151.
454 Policy Memorandum, paragraph 152.
455 Carloway Review, paragraph 7.4.3.
456 Carloway Review, paragraph 7.0.8.
odds with the principle of the free assessment of evidence unencumbered by restrictive rules; and it fails to take account of the role of the police interview as part of the trial process.\(^\text{458}\)

432. The Scottish Government agreed with this conclusion and the Bill therefore implements Lord Carloway’s recommendations in this area by providing that, where a statement is made by an accused person to a constable or other person investigating an offence, it is not inadmissible as evidence on account of being hearsay.\(^\text{459}\)

**Committee consideration**

433. The evidence received by the Committee was generally supportive of the provision. For example, the Sheriff’s Association said that the current rules are “far too complex and unlikely to be understood by juries however carefully framed the directions given to them are”. It did conclude, however, that the provisions must be “subject to the right of any party, and the judge, to make comment on them as regards the circumstances in which the statements were made, their content and what inferences could legitimately be drawn from the statement”.\(^\text{460}\)

434. On the other hand, the Law Society of Scotland noted that the existing rule was designed to prevent an accused from avoiding giving evidence on oath and being subject to cross-examination. The new provision would, therefore, “allow an accused alleged to have committed a sexual assault to have his position of consent considered without going into the witness box”.\(^\text{461}\)

435. **On balance, the Committee considers that there is a case for a review of the role of hearsay evidence in the criminal justice system but that this should be included in any wider review of the law of evidence.**

**PART 3: SOLEMN PROCEDURE**

**Management of sheriff and jury cases: background**

436. Under current rules, the main stages of a sheriff and jury case (sheriff court cases dealt with under solemn procedure) are:

- initial decision to prosecute under solemn procedure;
- appearance of accused on petition\(^\text{462}\);
- indictment\(^\text{463}\);
- appearance of accused at first diet; and

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\(^{458}\) Carloway Review, paragraph 7.4.19.

\(^{459}\) Policy Memorandum, paragraph 154.

\(^{460}\) Sheriff's Association. Written submission, page 13

\(^{461}\) Law Society of Scotland. Written submission, page 6.

\(^{462}\) The first two stages are common to solemn procedure cases which are ultimately dealt with in both the sheriff courts and the High Court.

\(^{463}\) Following further consideration (including possible discussion with the defence) the COPFS may decide that it is appropriate to proceed with a prosecution under solemn procedure with a view to holding a sheriff and jury trial; where this is the case, the COPFS prepares a document known as the indictment setting out the final charges and notifying the accused of the dates for the first diet and trial sitting.
437. Current time limits for sheriff and jury cases are as follows:\textsuperscript{465}:

- 80 day rule (custody cases) – an accused who has been remanded in custody at the petition stage is entitled to be released on bail if not served with an indictment within 80 days of the warrant committing the accused for trial (the time limit can be extended by the court);
- 110 day rule (custody cases) – an accused who has been detained for more than 110 days without the trial commencing is entitled to be released on bail (the time limit can also be extended by the court); and
- 12 month rule (applicable where accused released on bail) – the trial must commence within 12 months of the accused’s first appearance on petition (the time limit can be extended by the court), with failure resulting in the case falling and the accused no longer facing prosecution.\textsuperscript{466}

438. The Independent Review of Sheriff and Jury Procedure led by Sheriff Principal Bowen, which reported in 2010, made a number of recommendations\textsuperscript{467} aimed at achieving “more efficient and cost effective management of cases which he considered would have the additional benefit of reducing inconvenience and stress to the victims, witnesses and jurors involved”.\textsuperscript{468} The review report noted a range of concerns in relation to how sheriff and jury procedures work in practice, including:

- the need for improved communication between prosecution and defence;
- too many cases in which the parties have not reached the appropriate stage of preparation by the time of the first diet;
- a need for greater consistency in the management of cases by sheriffs;
- problems arising from trial sittings being overloaded with cases on the assumption that most trials will not proceed; and
- evidence of relatively inexperienced prosecutors having to manage a significant administrative burden of trial sittings with large numbers of cases whilst, at the same time, starting a trial.\textsuperscript{469}

Replicating High Court reform

439. The proposals in the Bill generally replicate the Bonomy reforms in the High Court.\textsuperscript{470} Sheriff Principal Bowen told the Committee that “aspects of the High

\textsuperscript{464} SPICe briefing, page 38.
\textsuperscript{465} See section 65 of the Criminal Procedure (Scotland) Act 1995.
\textsuperscript{466} SPICe briefing, pages 38 and 39.
\textsuperscript{467} Not all of the recommendations require legislation.
\textsuperscript{468} Policy Memorandum, paragraph 164.
\textsuperscript{469} SPICe briefing, page 39.
Court model are acknowledged to be a considerable improvement—particularly the fact that trial sittings now proceed".\footnote{Scottish Parliament Justice Committee. *Official Report, 17 December 2013*, Col 4014.}

440. There was some concern amongst witnesses as to whether measures that work effectively in the High Court would also work in relation to the much greater numbers of cases dealt with in the sheriff courts. For example, the Faculty of Advocates stated that “the volume of cases in the sheriff court and the pressure on COPFS, particularly in Glasgow and Edinburgh will make it a difficult task to transpose, in effect, High Court procedure into the sheriff court.”\footnote{Faculty of Advocates. Written submission, paragraph 59.}

441. However, the Cabinet Secretary told the Committee that “the change has worked remarkably well [in the High Court] and that, given the nature of the High Court, it should work reasonably well in sheriff and jury cases.”\footnote{Scottish Parliament Justice Committee. *Official Report, 14 December 2014*, Col 4135.} He did acknowledge that “the challenge is that there are more cases in the sheriff and jury system”, but went on to say that “the principles, such as taking an early focus, minimising what has to be discussed and debated and ensuring that we inconvenience people as little as possible if they do not have to be cited or called, are the same”\footnote{Scottish Parliament Justice Committee. *Official Report, 14 December 2014*, Col 4137.}

442. Those proposals in Sheriff Principal Bowen’s review requiring legislative reform are, in broad terms, taken forward through this Bill and are discussed in turn below.

**Pre-trial time limits**

443. Sheriff Principal Bowen recommended changes to the statutory time limits in sheriff and jury cases aimed at allowing more time for the better preparation of cases and reducing some of the pressures caused by higher levels of business. His report stated that “a high volume of cases, each compressed into a short timescale, results in late pleas and adjournments through lack of time to prepare; it is this which leads to substantial inconvenience to the public and professionals who are drawn into the criminal process”. He added that “it is not possible to resolve these issues without changing the system”.\footnote{Sheriff Principal Bowen (2010). *Independent Review of Sheriff and Jury Procedure*, paragraph 6.3.7. Available at: http://www.scotland.gov.uk/Publications/2010/06/10093251/0} The report therefore recommended that—

- all cases — the minimum period between service of the indictment and holding of the first diet should be extended from 15 to 29 days;
- custody cases — the current 110 day time limit for commencing the trial should be extended to 140 days, with the first diet taking place within 110 days (bringing both into line with High Court time limits);
- bail cases — in addition to the current rule that the trial must commence within 12 months of the accused’s first appearance on petition, statute
should require that the first diet must commence within 11 months of that date (again mirroring High Court procedure)\(^{476}\), and

- monitoring – court sanctioned extensions to the proposed 140 day time limit should be properly recorded and monitored.\(^{477}\)

444. Section 65 of the Bill seeks to make these changes to time limits. The Policy Memorandum states that “in order to accommodate [early communication between the prosecution and defence] the Bill increases the length of time for which an accused person can be remanded before having to be brought to trial from 110 days to 140 days”, adding that “the Scottish Government is satisfied that this is proportionate and it is in accordance with the limit required in the High Court”.\(^{478}\)

445. In evidence to the Committee, Sheriff Principal Bowen stressed that the “provisions [on time limits] are, in the main, consequential on [the statutory requirement for communication between the prosecution and defence discussed later in this section of the report] — in particular, the proposed removal of the 110 day rule and its alteration to 140 days, which might give rise to some issues”.\(^{479}\) He went on to argue that “in the current climate, in which cases are far more complex because of things such as DNA analysis, mobile telephone analysis and closed-circuit television, it is difficult to see how our timescales could be any shorter”, adding that if the 110-day limit was retained, “we would have to reduce the 80-day limit [in which to serve an indictment to a person in custody], which I do not think is possible”.\(^{480}\)

446. Some concerns were raised by witnesses regarding the proposed extension from 110 days to 140 days. In its written submission, Justice Scotland said that it “does not support the proposal to increase the 110-day time limit to 140 days wholesale”, as “the justification for such an increase has not been made”. It went on to argue that, “whilst there has been a rise in the complexity of some cases indicted even in the Sheriff Court, very many are comparatively straightforward and a longer period before the case must be brought to trial may prove counter-productive to the aim of ensuring parties prepare their cases at as early a stage as possible”. It added that “of most significance is the period of time victims must wait for justice to be served and accused persons to be tried, particularly those remanded in custody”.\(^{481}\)

447. The Cabinet Secretary for Justice responded to these concerns, stating that “the requirement of someone on remand to have their indictment served within 80 days … remains sacrosanct and the extension of the time-limit from 110 to 140 days puts solemn procedure in the sheriff and jury system in line with that in the High Court”. He added that “the change simply takes into account the complexities of many cases as a result of forensics and other aspects”.\(^{482}\) He also restated the Scottish Government’s commitment made in its response to Sheriff Principal Bowen (2010). \(^{476}\) SPICe briefing, page 41.
478\) Policy Memorandum, paragraph 166.
481\) Justice Scotland. Written submission, paragraph 42.
Bowen’s review that it intends to monitor implementation of the proposals, highlighting that “with the change to 140 days, the situation will have to be monitored to ensure that any extension is granted only with good cause”.483

448. On balance, the Committee accepts the need to extend the pre-trial time limits as proposed in the Bill. However, we do have some reservations as to whether the proposal to extend the current 110 day limit within which the trial of an accused person held in custody must commence to 140 days is proportionate. We are therefore pleased that the Scottish Government plans to monitor the implementation of this proposal, in particular to ensure that trials are started as soon as possible and that any extensions to the 140 day limit are rare. We seek updates from the Scottish Government on any findings and outcomes arising from its monitoring of implementation of this pre-trial limit.

Duty of parties to communicate

449. Sheriff Principal Bowen recommended the establishment of compulsory business meetings between the prosecution and defence in sheriff and jury cases to take place early in the case preparation process. He stated that this recommendation “mirrors many aspects of best practice already followed in some areas of the country and reflects the views of all parties be it the Crown, defence, sheriffs or clerks that meaningful engagement prior to First Diet removes churn”.484 He added that “currently both the Crown and defence state they are willing to engage in early discussion but this often does not occur or is ineffective” and that “the purpose of making the meeting compulsory is [therefore] to establish as routine a process of effective engagement and discussion”.485

450. Section 66 of the Bill generally seeks to give effect to this recommendation on early communication. The Policy Memorandum states that “the intention is that prompt engagement between the prosecutor and defence will assist in the early identification of issues and, in some cases, earlier pleas of guilty”.486 It further suggests that this provision “should also help to ensure that cases proceed to trial in an orderly fashion with such matters as can be agreed in advance having been agreed”.487

451. Sheriff Principal Bowen said that he had heard from both defence solicitors and procurators fiscal regarding the difficulties in “getting a hold of each other”, particularly as they can often be away from their desks in court or with clients. Therefore, “the clearest possible way forward was to place a statutory duty on both parties to communicate”.488 While he accepted the view that “the volume [of cases in the sheriff court] means that a lot of time will have to be spent at first diets and

486 Policy Memorandum paragraph 165.  
487 Policy Memorandum paragraph 165.  
that will have to be managed, but … it will save a lot of time further down the line". 489  

452. Victim Support Scotland said that it supports this measure as “resolution at an early stage relieves witnesses from having to attend a trial, protecting them from the potentially stressful and traumatic experience of giving evidence". 490 In addition, Grazia Robertson of the Law Society stated that “the suggestion of meeting and attempting to resolve resolvable cases would help the defence solicitors to know which cases to prepare for by way of a trial and give them some knowledge of when that trial might take place". 491  

453. While the Committee considers that achieving effective communication must, at least in part, be dependent upon the availability of adequate resources (discussed further below), we are persuaded of the potential benefits of this measure, in particular, in reducing the possibility of victims and witnesses having to attend court when their cases are not ready to proceed.  

**Timing and method of communication**  

454. While acknowledging that “the timing of the compulsory business meeting has been a matter of considerable debate and reflection on my part”, Sheriff Principal Bowen recommended that the meetings should generally be held prior to the indictment being served as this would ensure early disposal of as many cases as possible. 492 He further recommended that, wherever practicable, compulsory business meetings should involve face-to-face meetings, which he described as “an example of best practice and necessary to satisfy the requirements of the meeting”. 493  

455. However, the Bill provides that the meeting should take place after an indictment is served and does not prescribe the format of the communication. Responses to the Scottish Government’s consultation “suggested that parties would become clear on what matters they had to discuss only after the indictment is served” and that “a requirement to hold face-to-face meetings would be practically difficult, expensive and resource dependent”. 494  

456. The Scottish Government states in the Policy Memorandum that it “was persuaded that delaying the compulsory business meeting until after the indictment, and allowing it to be held by electronic communication, would allow informed discussion in a way which promoted efficiency of time and money”. 495 Furthermore, the Policy Memorandum states that “since Sheriff Principal Bowen

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490 Victim Support Scotland. Written submission, paragraph 59.  
494 Policy Memorandum, paragraph 170.  
495 Policy Memorandum, paragraph 170.
reported, one of the objections to email communication—that it was insecure—had been alleviated by the provision of new, secure systems”.

457. In oral evidence, Sheriff Principal Bowen told the Committee that he understood the reasoning behind this and was content with the Scottish Government’s decision not to reflect his exact recommendations in terms of the timing and method of communication between prosecution and defence.

458. The COPFS said that it supports the approach contained within the Bill requiring communication to take place after the indictment is served but prior to the first diet, as “this is the point at which some form of resolution is most likely to occur”. John Dunn of the COPFS told the Committee during oral evidence that, “as a member of the reference group, I always held the view that the best time for the meeting was after the case had been indicted”. The Law Society also considers the timing suggested in the Bill to be appropriate.

459. The COPFS also agreed with the flexibility provided for in the Bill regarding the method of communication used, stating that “the advent of secure email and secure online disclosure allows for more effective means of communication between the Crown and the defence which in turns allows space to be created for those difficult cases which would benefit from a face-to-face discussion”. However, in oral evidence, John Dunn indicated that roll-out of the criminal justice secure email system to defence solicitors had met with some difficulties including a low take-up rate.

460. The Cabinet Secretary for Justice advised the Committee that “the defence and prosecution both preferred the meeting to be held post service of the indictment because it would give them the opportunity to focus on the matter”, adding that “I understand that when Sheriff Principal Bowen gave evidence to the Committee he indicated that he was happy and content with such an approach”. He further noted that “we face challenges with the IT system at present”, but said he was “confident that Crown prosecutors and everyone else will be able to resolve the issues”.

461. The Committee supports the proposals in the Bill for statutory communication between the prosecution and defence to take place after the indictment is served and for there to be flexibility in the method of communication to be used.

462. The Committee calls on the Scottish Government to work with the COPFS and the Law Society of Scotland in seeking to resolve current difficulties in rolling out the secure email system to all defence solicitors,

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496 Policy Memorandum, paragraph 170.
500 Crown Office and Procurator Fiscal Service. Written submission, paragraph 43.
with a view to resolving such difficulties by the time the Bill comes into force.

Written record

463. Sheriff Principal Bowen recommended that a written record reflecting issues covered during the compulsory communication between prosecution and defence should be lodged with the court prior to the first diet. This record would capture discussions held and any issues remaining to be resolved in order to ensure that the court is fully informed when a case calls for a first diet.  

464. The Bill specifies that details on the form of the written record, the information it should contain and how it must be lodged will be prescribed by act of adjournal. Michael Meehan of the Faculty of Advocates told the Committee that there were advantages to this approach, including that “it can ... be amended as people become used to how it works in practice and find out what works, what does not work, what could be improved, what could be left out and so on”.  

465. The Bill also appears to require the submission of a single record covering the state of preparation of both the prosecution and defence. In written evidence, the Law Society highlighted that “in High Court cases the practice which has developed is for each party to individually prepare and email to the court an electronic record of that party’s preparation” and that “an electronic copy of the record is also emailed to the other parties in the case”.  

466. During oral evidence, witnesses from COPFS and the Law Society argued that the Bill should (if necessary) be amended so that the requirement to prepare a written record is satisfied by the submission of separate reports by prosecution and defence. Michael Meehan of the Faculty of Advocates agreed with this position, suggesting that “there could be practical difficulties involved in getting everybody together to put in one document and, if you cannot get everybody together, no one can move forward”. He added that “it would be easier if the prosecution could prepare its document, submit it to the court and copy other people in, and then each defence party did likewise”.  

467. In its written submission, Justice Scotland stated that “placing the obligation on the procurator fiscal to lodge the complete written record seems unnecessarily burdensome”, highlighting that “current High Court practice, where parties e-mail their own part of the written record to the clerk, seems preferable”.  

468. The Cabinet Secretary told the Committee that the Scottish Government was aware of the concerns surrounding joint submission of the written record and was “happy to review the issue and see how we can resolve it”. Kathleen McInulty, a Scottish Government official, added that “the issue needs to be
considered and given further thought because if there are separate schedules it is likely to take sheriffs longer to assimilate the information". 511

469. The Committee welcomes the Cabinet Secretary's commitment to review whether the Bill could usefully be amended to allow individual written records on the state of preparedness of cases to be submitted by the defence and prosecution.

Resource implications
470. Several witnesses had concerns about the resource implications of the measures in the Bill regarding communication between prosecution and defence. Justice Scotland, for example, argued that, "if the aims of the reforms are to be achieved, it is crucial that adequate resources are made available to the COPFS and Scottish courts" and that defence solicitors receive adequate funding "in relation to the additional (and earlier) work required of them as a result of the proposed reforms". 512

471. The Law Society said that it “remains concerned regarding the resource implications for both Crown and Defence”. 513 Grazia Robertson of the Law Society told the Committee that, “if this is not properly resourced, there could be further delay in the system”. 514 Mr Dunn acknowledged that the COPFS is facing financial pressures, but stated that “we have dragooned ourselves in such a way that we can try to accommodate that pressure”. 515 He added that it was “now organised along lines of federations, or larger groupings of what used to be 11 areas [and] within the federations, we are organised along functional lines so that we do a proportion of business that allows for some specialisation.” 516

472. The Cabinet Secretary agreed that “there will be increased costs through legal aid that we will have to address, but there will also be savings in the systems as a result—it is hoped—of having fewer citations not just for witnesses and jurors but for specialist witnesses”. 517 He told the Committee that anticipated costs are set out in the Financial Memorandum on the Bill, adding that “we know that there are issues to be addressed, but we have quantified the costs and worked with relevant agencies and we believe that we can manage them”. 518

473. The Committee agrees with witnesses that both the prosecution and defence solicitors must be adequately resourced for the duty to communicate to work effectively as planned. We note that the Scottish Government has worked with criminal justice partners to anticipate the costs and savings that may arise from this proposal, but we recommend that the Scottish Government closely monitors the resource implications during implementation to ensure that resources are in place where and when needed.

512 Justice Scotland. Written submission, paragraph 41.
Sanctions
474. Sheriff Principal Bowen told the Committee that “we agonised long and hard over the question of sanctions, both for defence and the fiscal, if the [written record] was not lodged, and we came to the conclusion that it was virtually impossible to come up with an appropriate sanction". 519 He added that “it is very much a matter for sheriffs to take a strong line, making it clear that, if it is not done, not only the court but the public will be inconvenienced”.

475. On the absence of sanctions where the written record was not submitted in time, Mr Dunn of the COPFS highlighted that “the 2005 practice note says that the High Court judge would regard that state of affairs as ‘unacceptable’ … however, the reality is that those provisions have been in place for some eight years now and I am not conscious of there being any occasion when a written record has not been submitted”.

476. The Committee notes that the Bill does not impose any sanctions if the written record is not submitted timeously.

First diets
477. Section 67 of the Bill seeks to give effect to Sheriff Bowen’s recommendation that a trial should only be scheduled and witnesses cited once the sheriff dealing with the first diet is satisfied that outstanding issues have been resolved. His report stated that “implementation of this recommendation will help to ensure that a trial sitting is centred on trials which are proceeding, and not on juggling a number of cases with the prospect of few actually resulting in the leading of evidence”, adding that “this should reduce the administrative burden on the Scottish Court Service and fiscals who are due to conduct trials, and ought to lead to more certainty for defence agents”.

478. The Law Society stated that, “as indicting cases to the first diet will happen every day in Sheriff and Jury courts in both Glasgow and Edinburgh, consideration must be given to the impact that this proposal will have on ‘hub’ jury courts in rural areas and how this will work in practical terms”. The COPFS however supports the proposal which it expects to “reduce the inconvenience to witnesses” in particular.

479. The Committee agrees that the proposal in the Bill for a trial only to be scheduled once the sheriff dealing with the first diet is satisfied that the case is ready to proceed will reduce inconvenience to witnesses, and give certainty to both the prosecution and defence regarding the date of the trial.

Sentencing (weapons offences)

480. Section 71 of the Bill increases the maximum sentence from four to five years for a number of statutory offences relating to the possession of a knife or offensive weapon in a public place, school premises or a prison.525

481. The change forms part of the Scottish Government’s policy in respect to knife crime of “tough enforcement” alongside supporting education and diversion projects.526 The Scottish Government believes that the increase in maximum sentences for knife crime will reinforce the message that carrying knives is a serious offence and will deter people from doing so.527

482. South Lanarkshire Council welcomed the proposals and agreed with the Scottish Government that these changes would reinforce the gravity of the offences in the minds of the public and those who commit knife crime.528

483. Murray Macara QC of the Law Society of Scotland sympathised with the desire to address the problem of knife crime. However, he was unsure whether increasing the maximum sentence would have much of an effect. He suggested that “the answer lies in culture rather than penalty” and that “deterrent sentences can address that culture only so far”.529 Mr Macara also noted that it was likely that the maximum sentences would be used only when someone had a significant record of carrying knives or other violent behaviour.530

484. In his evidence to the Committee, the Cabinet Secretary noted that there has been a marked decrease in the offence of handling a weapon. He added that the “situation is getting better, but we would be remiss if we were complacent”.531

485. The Cabinet Secretary stated his belief that the judiciary should be afforded the flexibility to sentence those convicted of carrying a knife to up to five years. He also made clear his view that sentences are a matter for the judiciary who will do so “on the basis of clear facts and circumstances”.532

486. The Committee welcomes the Scottish Government’s continued focus on knife crime and its efforts to change the culture of carrying knives. The Committee is content with the increase in maximum sentences for offences relating to the possession of a knife or offensive weapon from four to five years.

525 SPICe briefing, page 42.
526 Policy Memorandum, paragraph 193.
527 Policy Memorandum, paragraph 192.
528 South Lanarkshire Council. Written submission, 23 August 2013.
Sentencing (offenders on early release)

487. Under section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, courts are able to order a person who has committed an offence during a period of early release from a custodial sentence to serve part or all of their outstanding sentence. These orders are known as “section 16 orders” and are separate and additional to the normal powers of the court to sentence the offender for the new offence.

488. Sections 72 and 73 seek to ensure that courts consider using section 16 orders in appropriate cases and provide the lower courts with greater flexibility to impose such orders without referring the case to a higher court. The Scottish Government has, however, stated that the proposed reforms “do not substantively change the overall powers of our courts in this area”.

489. The Committee received little evidence on this issue. During oral evidence, both the Crown Office and Procurator Fiscal Service (COPFS) and the Law Society of Scotland did not raise any concerns and agreed that the proposed reforms did not represent a substantial change.

490. The Committee welcomes the provisions in sections 72 and 73 on sentencing offenders on early release.

Appeals

491. Sections 74 to 81 of the Bill make a number of amendments to procedures and rules for appeals. They are:

- the removal of the requirement for prosecutors to gain the leave of the court of first instance when making appeals relating to preliminary pleas or diets;
- the prescription of the test applied by the High Court when considering an application to extend the time limits for lodging an appeal and providing the grounds for the appeal;
- removal of the right for a hearing when the High Court considers applications to extend the time limits for lodging an appeal and providing the grounds for the appeal;
- removal of the possibility of using a bill of advocation to appeal decisions which could be appealed using sections 74 or 174 of the Criminal Procedure (Scotland) Act 1995; and
- ensuring that appeals, arising from summary proceedings, heard by the High Court are final and conclusive.

492. These provisions stem from recommendations in the Carloway Review and aim to improve the efficient and timely management of appeals. The

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533 Policy Memorandum, paragraph 215.
535 Explanatory Notes, paragraphs 206 to 217.
Carloway Review noted that Article 6 of the European Convention on Human Rights, which entitles persons to a fair trial within a reasonable period of time, applies to appeals.\footnote{Carloway Review, pages 352-353.}

493. The Bill does not seek to take forward all of the recommendations of the Carloway Review in this area. Notably the following recommendations are not provided for in the Bill:

- giving the High Court statutory powers to impose sanctions to enforce time limits and its own procedural decisions; and
- abolishing appeals by means of bills of suspension and advocation.

494. In regard to the first of these, the Scottish Government decided not to set out the High Court’s powers in legislation because “stating the sanctions in statute would be excessively rigid, recognising the general right of the courts to regulate their own activities”.\footnote{Policy Memorandum, paragraph 218.}

495. In relation to the second, the Scottish Government noted the difficulty in identifying all of the circumstances in which bills of suspension and advocation are used, and therefore the effects of the complete abolition of these routes of appeal. However, it stated that proscribing the use of a bill of advocation to appeal decisions which could be appealed using sections 74 or 174 of the Criminal Procedure (Scotland) Act 1995 would prevent the circumvention of the requirement for leave to appeal from the first instance court under the statutory routes of appeal.\footnote{Policy Memorandum, paragraph 219.}

496. In its written evidence, Justice Scotland noted that the “primary mischief identified by the Carloway Review related principally to the overall length of time taken to deal with appeals, not the need for appeals to be started on a more timely basis”.\footnote{Policy Memorandum, paragraph 224.} Justice Scotland questioned whether there is any evidence that the current tests for allowing late appeals are too lax and stated that “the discretion to extend time, although already closely guarded, may be key to ensuring justice in an individual case”.\footnote{Policy Memorandum, paragraph 227.} It also argued that the strength of the grounds for an appeal may not be readily identifiable from examining papers in chambers and that the right to a hearing should be retained, before permission to appeal is refused due to lateness.\footnote{Justice Scotland. Written submission, 16 September 2013.}

497. However, the COPFS welcomed the provisions relating to appeals as an “across-the-board tightening of procedures [which] will improve the efficiency and effectiveness of the appeals process generally”.\footnote{Crown and Procurator Fiscal Service. Written submission, 12 September 2013.}
498. During oral evidence, the Committee heard that appeals in Scotland are, on the whole, dealt with efficiently and timeously. Some types of appeals are more likely to take a long time, for example, Scottish Criminal Cases Review Commission (SCCRC) referrals, appeals on the grounds of defective representation and where new evidence is led. Murray Macara QC from the Law Society of Scotland noted that "we have a system that is capable of delivering appeals to a conclusion very quickly [and] what must be remembered are the causes for delay."  

499. Fraser Gibson from the COPFS explained that, for example, delay can "be down to appellants seeking to add new grounds of appeal [or] recover other documents which [can spin] out the legal process to the extent that it takes a number of years". Michael Walker of the SCCRC noted that "sometimes the appellant changes solicitors or legal teams and, each time they do that, the team comes to the case anew".

500. James Wolffe QC from the Faculty of Advocates pointed out that sections 76 and 77 relate to the late notes and grounds of appeal and not the subsequent progress of the appeal. This progress "is left to the courts' case management". Speaking as a council member for Justice Scotland, Mr Wolffe expressed concerns that "narrowing the access to the appeal court … would restrict access to justice" and could result in those rejected appeals being taken to the SCCRC. Mr Macara shared these concerns and argued that it may not be in the interests of justice "that an appellant should be denied the opportunity to appeal simply because of an excessively rigid and fixed timetable". Mr Macara argued that sections 76 and 77 should be toned down, for example with the words "justified by exceptional circumstances" replaced with "in the interests of justice".

501. Mr Gibson from the COPFS laid out the Crown's position that there should be a strict test to justify a late appeal. He stressed the importance of appeals being made quickly to prevent the courts continually revisiting old cases to the detriment of current cases and because evidence and papers cannot be kept forever. Evidence, such as forensics or witnesses' recollections, can also degrade. Mr Gibson summarised by stating that time-limits "are there for a reason".

502. Mr Gibson also argued that the Bill would allow the court flexibility and explained that, when deciding on whether the exceptional circumstances test is met, the court will balance the length of the delay, the reasons for the delay and the merits of the appeal. In doing so, the court will "arrive at an accommodation that serves the interests of justice".

503. The Committee explored with witnesses whether more could be done during appeals to speed up the process, such as taking up Lord Carloway's...
recommendation that the High Court be given power to impose sanctions to enforce time-limits and procedural orders. The Faculty of Advocates had concerns with this proposal. Mr Wolffe explained that, under these proposals, a lawyer could be in a position where they could be penalised for fulfilling their professional responsibility in acting in the best interests of their client (e.g. by advancing a new and late ground for appeal). Furthermore, while the court may be able to exercise discretion in applying a sanction, it would have to make additional and separate inquiries to discover the circumstances around any breach of its orders to do so.

504. The Committee also asked witnesses whether the Bill should have included Lord Carloway’s recommendation to completely abolish bills of suspension and advocation. Mr Gibson agreed with the Scottish Government’s position that it would be difficult to put in place statutory provisions to ensure that there is a mode of redress for all the circumstances where bills of suspension and advocation are used.

505. The Cabinet Secretary said that there should be clarity for both those seeking to appeal and other people who are affected by the process, such as victims. He continued—

“What we are doing here is giving the accused clear intimation of what the timescales are for marking an appeal against sentence or conviction or both. That also makes it clear to victims that if an appeal is not in by a specific time, it will not come in—barring exceptional circumstances.”

506. The Cabinet Secretary said that he did not believe that the proposed ‘exceptional circumstances’ test would be too restrictive. He added that the appeal court would be able to work with the test and that solicitors would be able to “clearly understand” that “exceptional circumstances are beyond something that just did not fit into someone’s schedule.”

507. The Cabinet Secretary reiterated the Scottish Government’s view that case management is a matter for the judiciary.

508. The Committee welcomes the policy objective to speed up appeals and understands that there are practical reasons why appeals ought to be lodged timeously. We note the concerns that, in applying a higher test for allowing late appeals, cases with merit may not be heard unless they meet an exceptional circumstances test. We ask the Scottish Government to consider the Law Society of Scotland’s recommendation that sections 76 and 77 be redrafted with an emphasis on the interests of justice. The Committee also notes that Lord Carloway made other recommendations in relation to the speeding up of appeals.
Scottish Criminal Cases Review Commission

509. The Scottish Criminal Cases Review Commission (SCCRC) is an independent body which reviews cases where it is alleged that a miscarriage of justice may have occurred. Should the SCCRC consider that a case may be a miscarriage of justice and that it is in the interests of justice to do so, the SCCRC can refer the case to the High Court. In most respects, the High Court then deals with the case as if it were a normal appeal.558

510. Following the Cadder judgement, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (“the 2010 Act”) explicitly provided that the SCCRC must consider the needs of finality and certainty when applying its interests of justice test. The 2010 Act also provided that the High Court can decide not to hear an appeal if it determines that it is not in the interests of justice to do so. The rationale for these changes was a concern that the Cadder judgment would result in a large number of applications to the SCCRC.

511. The Carloway Review recommended that the High Court should not have the power to reject a referral on the ground of the interests of justice before hearing the appeal (a ‘gate-keeping’ role). It did however recommend that, when deciding an appeal, the High Court should consider both whether there has been a miscarriage of justice and whether it is in the interests of justice for the appeal to be allowed. Lord Carloway also recommended that the requirement of the SCCRC to consider finality and certainty when reviewing a case be retained.559 The Scottish Government agreed with Lord Carloway and section 82 of the Bill reflects his recommendations.

512. Michael Walker from the SCCRC noted that finality and certainty had, in practice, always formed part of the SCCRC’s decision-making in relation to the interests of justice. The 2010 Act simply stated this element expressly.560

513. Lord Carloway argued that, allowing the High Court to consider the interests of justice during the determination of an appeal resulting from an SCCRC referral would ensure that, if new evidence confirming the guilt of the convicted person came to light between the time the SCCRC decides on the referral and the court decides on the appeal, the High Court could take this into account. He stated that a “retrial is almost never going to be an option in an SCCRC reference, because of the timescales”.561

514. Academics from the University of Glasgow School of Law argued that the example given by Lord Carloway is unlikely and, in any case, the Bill would be inadequate in dealing with this as it “creates no power for the court to hear evidence of the alleged confession and so take it into account”.562

515. Fraser Gibson explained that the COPFS supports the Bill as it is currently drafted for two reasons, “first, it future proofs the system against things like the

558 SPICe briefing, page 46.
559 Carloway Review, page 369.
Cadder case happening again and, secondly, it guards against the possibility of error”. The SCCRC rejected these arguments on the basis that its track-record suggests that it is capable of dealing with cases that redefine the interpretation of law and that there is no evidence of the SCCRC making errors.

516. Mr Walker stated that the SCCRC’s position is “that there should be no veto of a commission reference by the appeal court in the interests of justice at either stage of the appeal”.565

517. The SCCRC made the case that it applies its own tests consistently to a high standard: 67% of referrals to the High Court have led to successful appeals (which contrasts with around 1% of ordinary appeals being successful); since the 2010 Act came into force, 20 of its 21 referrals have proceeded to a full appeal;566 and since the SCCRC was established there have been 29 occasions where the SCCRC has not referred a case to the High Court solely because it would not be in the interests of justice to do so.567

518. Both the Faculty of Advocates and the Law Society of Scotland put forward the view that it cannot be in the interests of justice to allow a conviction which the High Court has found to be a miscarriage of justice to stand.568,569 Murray Macara argued that the SCCRC and the High Court have distinct roles, saying that “the commission should be trusted to continue [applying its own tests prior to referral] and that the High Court, as the appeal court, should concern itself with whether it has been established that there has been a miscarriage of justice”.570

519. Mr Walker also suggested that the “public would have some difficulty coming to terms with a court at the end of the process finding that there had been a miscarriage of justice but saying, for another reason, that it was not in the interests of justice to allow the appeal”.571 Furthermore, the SCCRC argued that such an outcome “would seriously undermine both the independence of the Commission and its role in strengthening public confidence in the ability of the criminal justice system to address miscarriages of justice”.572

520. Mr Walker recalled that the report of the Sutherland Committee, which recommended and led to the establishment of the SCCRC, was clear that the gatekeeping role of determining whether an appeal should be heard should not be given to the High Court, but is the role of the SCCRC. He added, “that is why the commission exists”.573

568 Faculty of Advocates. Written submission, 6 September 2013.
569 Law Society of Scotland. Written submission, 6 September 2013.
572 Scottish Criminal Cases Review Commission. Written submission, 2 September 2013.
521. The Cabinet Secretary said that he believes that the Bill strikes the right balance and, while he values the role of the SCCRC, he said that “it is important that the High Court should consider and take cognisance of whether there has been a miscarriage of justice and … the interests of justice.” The Cabinet Secretary added that he believed that the provisions would be “used or considered sparingly”.

522. He echoed Lord Carloway’s view that, by considering the interests of justice, the High Court would be able to reject appeals where the original trial was not dealt with appropriately but further evidence had come to light since confirming the guilt of the appellant. The Committee noted that when a case is appealed to the High Court under the normal route, the court only determines whether there has been a miscarriage of justice. The Cabinet Secretary argued that having the additional test for appeals arising from SCCRC referrals is justified because those cases “tend to be a lot more historic.”

523. The Committee welcomes the removal of the gate-keeping role of the High Court when dealing with referrals from the Scottish Criminal Cases Review Commission (SCCRC).

524. However, we are concerned that the Bill retains the High Court’s interests of justice test, albeit during the determination of an appeal resulting from a referral from the SCCRC. Given that, according to Lord Carloway, despite the occasional lapse, the SCCRC has been a “conspicuous success in discharging its duties conscientiously and responsibly”, we are not convinced that the arguments for the High Court replicating the duties of the SCCRC in this respect have been made. Consequently, we recommend that the High Court should only be able to rule on whether there has been a miscarriage of justice in these cases, and if there has been, the appeal should be allowed.

People trafficking

525. Sections 83 and 84 of the Bill create two statutory aggravations relating to people trafficking. Section 83 provides that any offence may be aggravated if motivated by the objective of committing or conspiring to commit a people trafficking offence. Section 84 provides for an aggravation of a people trafficking offence where the offender has abused a public position in committing the offence.

526. Section 85 of the Bill defines “a people trafficking offence” as:

- an offence under section 22 of the Criminal Justice (Scotland) Act 2003;
- or
- an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

527. The Equality and Human Rights Commission’s (EHRC) report on an Inquiry into Human Trafficking in Scotland recommended the creation of an aggravation of

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people trafficking. Respondents to the Committee’s call for evidence were supportive of this measure.  

528. The Scottish Government stated that the aggravation of a public official committing the offence of people trafficking meets its obligations under Article 4.3 of the EU Directive on preventing and combating trafficking human beings and protecting its victims.

529. The Committee heard evidence from Alison Di Rollo from the COPFS that she welcomed the aggravation as set out in section 83. She stated that the aggravation would be “another element in the toolkit for prosecutors” and would be used where there is not enough evidence to libel a substantive case of people trafficking but nonetheless enough to present “the court and sentencer a context or background of trafficking that would aggravate the offence and so lead to a more extensive sentence.” She also argued that courts recording offences aggravated by people trafficking will “shine a light on that activity so that statistics are more robust.”

530. Ms Di Rollo made it clear that the COPFS will, if there is enough evidence, always prosecute a substantive charge of people trafficking rather than simply relying on an aggravation of some other offence. She added that “aggravation will not be used as an easy option or a shortcut.”

531. Bronagh Andrew from Community Safety Glasgow (TARA Project) also welcomed the proposals as another tool to combat people trafficking. She noted that victims of human trafficking can be “extremely traumatised and have little information about the human traffickers, so it can be difficult for investigations to progress.”

532. Ms Andrew suggested that it would be helpful for a shared definition of human trafficking to be set out in statute. She noted that Jenny Marra MSP has lodged a consultation on proposed legislation, which defines human trafficking.

533. The Cabinet Secretary said that he recognises that there is a problem with people trafficking in Scotland. He said that the Government believes “that the first necessary step is to bring in a general aggravation, because we are conscious that that will help to raise awareness and allow evidence to be led”.

534. The Cabinet Secretary agreed that more work is required in this area, including possibly a broader legal definition of human trafficking. He said that the

578 Policy Memorandum, paragraph 243.
Scottish Government is in talks with the UK Government about whether provisions in the forthcoming Modern Slavery Bill can be extended to Scotland. 585

535. The Committee welcomes the two aggravations with regard to people trafficking proposed in the Bill. The Committee requests that the Scottish Government keeps it updated on progress with the Modern Slavery Bill and its extension to cover Scotland.

Police Negotiating Board for Scotland

536. The Police Negotiating Board (PNB) established in 1980 provides a forum for negotiating hours of duty; leave; pay and allowances; the issue, use and return of police clothing; personal equipment; and pensions of police officers in the UK. 586 It makes recommendations on these matters to the Home Secretary, Secretary of State for Northern Ireland, and Scottish Ministers, who are responsible for setting out the pay and conditions of police officers through Regulations. The PNB also issues guidance on the interpretation of Regulations.

537. The Policy Memorandum on the Bill explains that “the PNB comprises an Official Side, representing police authorities, chief officers of police and Ministers, and a Staff Side representing police officers through their staff associations”. 587 If the parties disagree on an issue, the matter can be referred to arbitration under the Advisory Conciliation and Arbitration Service.

538. The Independent Review of Police Officer and Staff Remuneration and Conditions, led by Tom Winsor, recommended in its second report of 15 March 2012 that the PNB should be abolished and replaced by a new independent pay review body. In relation to other parts of the UK, this approach is being taken forward in the UK Anti-social Behaviour, Crime and Policing Bill which includes provisions seeking to abolish the PNB and create a pay review body - the Police Remuneration Review Body. The new body would consider the pay and conditions of most police officers in England, Wales and Northern Ireland. In relation to senior police officers, that role would be performed by the existing Senior Salaries Review Body.

539. Although the new pay review body would not make recommendations in relation to areas of policing which have been devolved to Scotland, the proposed abolition of the PNB is one of a number of proposals which gave rise to the need for the legislative consent of the Scottish Parliament. On 8 October 2013, the Scottish Parliament agreed to a Legislative Consent Motion granting the abolition of the PNB, as it affects Scotland.

540. In the Policy Memorandum on this Bill, the Scottish Government indicates that, as a result of initial consultation with Scottish police bodies, it will seek to establish a Police Negotiating Board for Scotland (PNBS) to continue the current collective bargaining approach to police pay and conditions rather than adopting the approach favoured by the UK Government. 588 Section 87 of the Bill provides a

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586 Policy Memorandum, paragraph 262.
587 Policy Memorandum, paragraph 263.
588 Policy Memorandum, paragraph 266.
framework for establishing a PNBS. It is intended that further detail will be set out in a constitution prepared by the Scottish Ministers.\(^{589}\) The Scottish Government published a consultation paper seeking views on this approach and the detailed operation of a PNBS which closed on 27 September 2013.

541. There was broad support amongst police bodies for the proposal to establish a PNBS. John Gillies said that Police Scotland welcomes this proposal, noting that “the PNB operates informally in Scotland, so it is just a case of taking that forward”.\(^{590}\) Calum Steele said that the Scottish Police Federation also welcomed the proposal, however, he indicated that “it remains unclear whether the Scottish Chief Police Officers Staff Association will take the view that it should fall within the ambit of the Review Body on Senior Salaries” rather than the PNBS.\(^{591}\) He warned that “if we lose very senior officers’ buy-in to the view that the negotiating mechanism is the right way of dealing with pay and conditions across the service, we lose a fundamental link in ensuring that there is a common, negotiated and fair approach to terms and conditions”.\(^{592}\)

542. In evidence to the Committee, the Cabinet Secretary confirmed that the Scottish Chief Police Officers Staff Association had indicated its willingness to participate in the new PNBS, adding that “all police officers, from the newest constable to the chief constable, will therefore be dealt with by the board”.\(^{593}\)

543. The Committee welcomes the establishment of a separate Police Negotiating Board for Scotland which will include participation from all ranks of police officers.

POLICY AND FINANCIAL MEMORANDUMS

544. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the Policy Memorandum which accompanies the Bill. The Committee considers that more detail would have been helpful.

545. The same rule also requires the lead committee to report on the Financial Memorandum. The Committee notes that the Finance Committee received a number of written submissions and took evidence from the Scottish Government Bill Team. However, we have made a number of observations relating to the resource implications arising from the Bill and have asked the Scottish Government to monitor costs during implementation.

\(^{589}\) SPICe briefing, page 49.
GENERAL PRINCIPLES OF THE BILL

547. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill.

548. The Committee supports the general principles of the Bill. However, this is with the exception of proposals regarding the corroboration provisions. Our recommendations on this issue are set out in the main body of this report.
ANNEXE A: REPORTS FROM OTHER COMMITTEES

Finance Committee consideration

The Finance Committee agreed to invite written evidence from a number of organisations, seeking a response to specific questions. The call for evidence and the responses received are available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/65990.aspx

The Finance Committee’s Report to the Justice Committee on the Financial Memorandum of the Criminal Justice (Scotland) Bill is available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/71208.aspx

Delegated Powers and Law Reform Committee consideration

The Delegated Powers and Law Reform Committee’s Report on the Criminal Justice (Scotland) Bill is available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69327.aspx
ANNEXE B: EXTRACTS FROM THE MINUTES

21st Meeting, 2013 (Session 4) Tuesday 25 June 2013

Criminal Justice (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed: (a) to issue a call for written evidence; (b) proposed witnesses; (c) to delegate to the Convener authority to approve the final composition of witness panels where necessary; and (d) not to appoint an adviser.

25th Meeting, 2013 (Session 4) Tuesday 24 September 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Rt Hon Lord Carloway, Lord Justice Clerk.

Roderick Campbell indicated that he is a member of the Faculty of Advocates. Alison McInnes indicated that she is a council member of Justice Scotland and a member of the Cross-Party Group on Adult Survivors of Childhood Sexual Abuse. Margaret Mitchell indicated that she is the Convener of the Cross-Party Group on Adult Survivors of Childhood Sexual Abuse.

Criminal Justice (Scotland) Bill (in private): The Committee agreed to defer further consideration of its approach to the scrutiny of the Bill at Stage 1 to its next meeting.

26th Meeting, 2013 (Session 4) Tuesday 1 October 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Assistant Chief Constable Malcolm Graham, and John Gillies, Director HR, Police Scotland;
Chief Superintendent David O’Connor, President, Association of Scottish Police Superintendents;
Calum Steele, General Secretary, Scottish Police Federation;
Stevie Diamond, Police Staff Scotland Branch, Unison;
David Harvie, Director of Serious Casework, Crown Office and Procurator Fiscal Service;
Grazia Robertson, Member of the Law Society Criminal Law Committee, Law Society of Scotland;
Ann Ritchie, President, Glasgow Bar Association;
Murdo Macleod QC, Faculty of Advocates.

Roderick Campbell indicated that he is a member of the Faculty of Advocates. Alison McInnes indicated that she is a member of Justice Scotland.

Criminal Justice (Scotland) Bill (in private): The Committee further considered its approach to the scrutiny of the Bill at Stage 1.

27th Meeting, 2013 (Session 4) Tuesday 8 October 2013
Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Shelagh McCall, Commissioner, Scottish Human Rights Commission;
Professor James Chalmers, and Professor Fiona Leverick, University of Glasgow;
Tam Baillie, Commissioner, Scotland’s Commissioner for Children and Young People;
Mark Ballard, Head of Policy, Barnardo’s Scotland;
Rachel Stewart, Policy and Campaigns Manager, Scottish Association for Mental Health;
Morag Driscoll, Director, Scottish Child Law Centre.

Criminal Justice (Scotland) Bill (in private): The Committee deferred its review of the evidence received to date on the Bill at Stage 1 to a future meeting.

Work programme (in private): The Committee considered its work programme and agreed: (a) the timetable and witnesses for its further scrutiny of the Criminal Justice (Scotland) Bill; [. . . ]

28th Meeting, 2013 (Session 4) Tuesday 29 October 2013

Criminal Justice (Scotland) Bill (in private): The Committee reviewed the evidence received to date on the Bill at Stage 1.

32nd Meeting, 2013 (Session 4) Tuesday 19 November 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Murray Macara QC, Law Society of Scotland;
James Wolffe QC, Vice-Dean, Faculty of Advocates;
Michael Walker, Senior Policy Officer, Scottish Criminal Cases Review Commission;
Fraser Gibson, Head of Appeals Unit, Crown Office and Procurator Fiscal Service;
Alison Di Rollo, Head of National Sexual Crimes Unit, Crown Office and Procurator Fiscal Service;
Bronagh Andrew, Assistant Operations Manager, the TARA Project, Community Safety Glasgow.

33rd Meeting, 2013 (Session 4) Tuesday 20 November 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Rt Hon Lord Gill, Lord President of the Court of Session;
Rt Hon Frank Mulholland QC, Lord Advocate;
Catriona Dalrymple, Head of Policy Division, Crown Office and Procurator Fiscal Service.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.
34th Meeting, 2013 (Session 4) Tuesday 26 November 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Robin White, Vice-Chair, Scottish Justices' Association;
Raymond McMenamin, Solicitor Advocate, member of the Criminal Law Committee, Law Society of Scotland;
James Wolffe QC, Vice-Dean, Faculty of Advocates;
Mark Harrower, President, Edinburgh Bar Association.

Roderick Campbell indicated that he is a member of the Faculty of Advocates. Alison McInnes indicated that she is a member of the JUSTICE Scotland Council.

35th Meeting, 2013 (Session 4) Tuesday 3 December 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Assistant Chief Constable Malcolm Graham, Police Scotland;
Chief Superintendent David O'Connor, President, Association of Scottish Police Superintendents;
David Ross, Vice Chairman, Scottish Police Federation;
Shelagh McCall, Commissioner, Scottish Human Rights Commission;
Tony Kelly, Chair, Justice Scotland;
Alan McCloskey, Acting Deputy Chief Executive, Victim Support Scotland;
Sandie Barton, Helpline Manager and National Co-ordinator, Rape Crisis Scotland;
Lily Greenan, Manager, Scottish Women's Aid.

Roderick Campbell indicated that he is a member of the Faculty of Advocates. Alison McInnes indicated that she is a member of the Justice Scotland Council.

36th Meeting, 2013 (Session 4) Tuesday 10 December 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Professor Peter Duff, University of Aberdeen;
Professor Pamela Ferguson, and Professor Fiona Raitt, University of Dundee;
Professor James Chalmers, University of Glasgow;
Professor John Blackie, University of Strathclyde;
Michael McMahon MSP.

37th Meeting, 2013 (Session 4) Tuesday 17 December 2013

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Sheriff Principal Edward Bowen, and Gerry Bonnar, Secretary, Review of Sheriff and Jury Procedure;
John Dunn, Procurator Fiscal, West of Scotland, Crown Office and Procurator Fiscal Service;
Grazia Robertson, Member of the Law Society Criminal Law Committee, Law Society of Scotland;
Michael Meehan, Faculty of Advocates;
Cliff Binning, Executive Director Field Services, Scottish Court Service.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

1st Meeting, 2014 (Session 4) Tuesday 7 January 2014

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Kenny MacAskill, Cabinet Secretary for Justice, Lesley Bagha, Criminal Justice Bill Team Leader, Aileen Bearhop, Head of Police Powers Team, Jim Devoy, Policy Officer, Youth Justice Team, and Philip Lamont, Head of Criminal Law and Licensing Team, Scottish Government.

2nd Meeting, 2014 (Session 4) Tuesday 14 January 2014

Criminal Justice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Kenny MacAskill, Cabinet Secretary for Justice, Kathleen McInulty, Policy Manager, Criminal Justice Bill Team, Scottish Government.

Roderick Campbell indicated that he is a member of the Faculty of Advocates.

3rd Meeting, 2014 (Session 4) Tuesday 21 January 2014

Criminal Justice (Scotland) Bill (in private): The Committee considered its draft Stage 1 report. Various changes were agreed to and the Committee agreed to continue considering the report at its next meeting.

4th Meeting, 2014 (Session 4) Tuesday 28 January 2014

Criminal Justice (Scotland) Bill (in private): The Committee continued considering a draft Stage 1 report. Various changes were agreed to and the Committee agreed to continue considering the draft report at its next meeting.

5th Meeting, 2014 (Session 4) Tuesday 4 February 2014

Criminal Justice (Scotland) Bill (in private): The Committee considered a revised draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.
ANNEXE C: INDEX OF ORAL EVIDENCE

25th Meeting, 2013 (Session 4) Tuesday 24 September 2013
Rt Hon Lord Carloway, Lord Justice Clerk

26th Meeting, 2013 (Session 4) Tuesday 1 October 2013
Assistant Chief Constable Malcolm Graham, and John Gillies, Director HR, Police Scotland
Chief Superintendent David O'Connor, President, Association of Scottish Police Superintendents
Calum Steele, General Secretary, Scottish Police Federation
Stevie Diamond, Police Staff Scotland Branch, Unison
David Harvie, Director of Serious Casework, Crown Office and Procurator Fiscal Service
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Mark Ballard, Head of Policy, Barnardo’s Scotland
Rachel Stewart, Policy and Campaigns Manager, Scottish Association for Mental Health
Morag Driscoll, Director, Scottish Child Law Centre

32nd Meeting, 2013 (Session 4) Tuesday 19 November 2013
Murray Macara QC, Law Society of Scotland
James Wolfe QC, Vice-Dean, Faculty of Advocates
Michael Walker, Senior Policy Officer, Scottish Criminal Cases Review Commission
Fraser Gibson, Head of Appeals Unit, Crown Office and Procurator Fiscal Service
Alison Di Rollo, Head of National Sexual Crimes Unit, Crown Office and Procurator Fiscal Service
Bronagh Andrew, Assistant Operations Manager, the TARA Project, Community Safety Glasgow

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Rt Hon Frank Mulholland QC, Lord Advocate
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James Wolfe QC, Vice-Dean, Faculty of Advocates
Mark Harrower, President, Edinburgh Bar Association

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David Ross, Vice Chairman, Scottish Police Federation
Shelagh McCall, Commissioner, Scottish Human Rights Commission
Tony Kelly, Chair, Justice Scotland
Alan McCloskey, Acting Deputy Chief Executive, Victim Support Scotland
Sandie Barton, Helpline Manager and National Co-ordinator, Rape Crisis Scotland
Lily Greenan, Manager, Scottish Women's Aid

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Kenny MacAskill, Cabinet Secretary for Justice, Lesley Bagha, Criminal Justice Bill Team Leader, Aileen Bearhop, Head of Police Powers Team, Jim Devoy, Policy Officer, Youth Justice Team, and Philip Lamont, Head of Criminal Law and Licensing Team, Scottish Government.
2nd Meeting, 2014 (Session 4) Tuesday 14 January 2014

Kenny MacAskill, Cabinet Secretary for Justice, Kathleen McInulty, Policy Manager, Criminal Justice Bill Team, Scottish Government.
ANNEXE D: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

Aberdeen City Council Appropriate Adult Service (84KB pdf)
Aberlour Child Care Trust (124KB pdf)
ASSIST (72KB pdf)
Association of Scottish Police Superintendents (187KB pdf)
Auchie, Derek P, University of Aberdeen (231KB pdf)
Barnardo's Scotland (139KB pdf)
Barrie, Colette (112KB pdf)
Barrie, Colette (supplementary submission) (86KB pdf)
Chalmers, Professor James; Farmer, Professor Lindsay; and Leverick, Professor Fiona; University of Glasgow (93KB pdf)
Chalmers, Professor James (supplementary submission) (154KB pdf)
Children in Scotland (105KB pdf)
Children Are Unbeatable! Scotland (156KB pdf)
Community Safety Glasgow (80KB pdf)
Convention of Scottish Local Authorities (103KB pdf)
Crown Office and Procurator Fiscal Service (174KB pdf)
Crown Office and Procurator Fiscal Service (supplementary submission) (212KB pdf)
Crown Office and Procurator Fiscal Service (supplementary submission) (152KB pdf)
Crown Office and Procurator Fiscal Service (supplementary submission) (75KB pdf)
Crown Office and Procurator Fiscal Service (supplementary submission) (12KB pdf)
Duff, Professor Peter, University of Aberdeen (73KB pdf)
Edinburgh Bar Association (76KB pdf)
Equality and Human Rights Commission Scotland (77KB pdf)
Evangelical Alliance (75KB pdf)
Faculty of Advocates (231KB pdf)
False Allegations Support Organisation (172KB pdf)
Families Outside (180KB pdf)
Ferguson, Professor Pamela R, University of Dundee and Davidson, Fraser P, University of Stirling (347KB pdf)
Glasgow Bar Association (72KB pdf)
Green, Hayley; Bremner, Val; and Sharp, Laura; Robert Gordon University (113KB pdf)
Her Majesty's Inspectorate of Constabulary for Scotland (229KB pdf)
Highland Violence Against Women (77KB pdf)
Howard League for Penal Reform in Scotland (173KB pdf)
JUSTICE Scotland (278KB pdf)
Law Society of Scotland (161KB pdf)
Law Society of Scotland (supplementary submission) (69KB pdf)
Mental Welfare Commission for Scotland (62KB pdf)
Petal (174KB pdf)
Police Scotland (289KB pdf)
Police Scotland (supplementary submission) (91KB pdf)
Police Scotland (supplementary submission) (91KB pdf)
Rape Crisis Scotland (157KB pdf)
Salvation Army (84KB pdf)
Scotland's Commissioner for Children and Young People (285KB pdf)
Scottish Appropriate Adult Network (11KB pdf)

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Scottish Association for Mental Health (221KB pdf)
Scottish Child Law Centre (197KB pdf)
Scottish Children’s Reporter Administration (145KB pdf)
Scottish Churches Anti-Human Trafficking Group (64KB pdf)
Scottish Criminal Cases Review Commission (134KB pdf)
Scottish Criminal Cases Review Commission (supplementary submission) (7KB pdf)
Scottish Legal Aid Board (141KB pdf)
Scottish Parliament Cross Party Working Group on Survivors of Child Sexual Abuse (76KB pdf)
Scottish Police Federation (186KB pdf)
Scottish Police Federation (supplementary submission) (73KB pdf)
Scottish Police Federation (supplementary submission) (65KB pdf)
Scottish Women’s Aid (248KB pdf)
Scottish Human Rights Commission (327KB pdf)
Sheriffs’ Association (420KB pdf)
South Lanarkshire Council (93KB pdf)
Survivors Empowering, Educating and Supporting Abused Women (83KB pdf)
Together - Scottish Alliance for Children’s Rights (283KB pdf)
UNISON (67KB pdf)
Victim Support Scotland (247KB pdf)
Wave Trust (212KB pdf)
Wyllie, Robert (86KB pdf)
Zero Tolerance (84KB pdf)

Written submissions are also published (in the order received) on the Committee’s webpage at:
http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66584.asp
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.