

## SPICe Briefing

# Criminal Justice (Scotland) Bill

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The Scottish Government introduced the Criminal Justice (Scotland) Bill in the Parliament on 20 June 2013. It includes provisions:

- setting out police powers to arrest, hold in custody and question suspects
- abolishing the current general requirement for corroboration in criminal cases
- stating that a guilty verdict requires the support of at least two-thirds of a jury
- seeking to improve the preparation and management of sheriff and jury cases

Many of the proposals are based on independent reviews carried out by Lord Carloway and Sheriff Principal Bowen.

This briefing considers the main provisions of the Bill.



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## EXECUTIVE SUMMARY

The development of most of the proposals set out in the Criminal Justice (Scotland) Bill was informed by recommendations flowing from independent reviews carried out by:

- Lord Carloway – looking at criminal law and practice in light of the UK Supreme Court’s judgement in *Cadder v HM Advocate* (2010) and the reforms made by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
- Sheriff Principal Bowen – looking at the practices and procedures in sheriff and jury cases (sheriff court cases dealt with under solemn procedure)

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

- Part 1 (arrest and custody) – dealing with police powers to arrest, hold in custody and question suspects. Including provisions:
  - reforming powers of arrest so as to incorporate the role currently performed by detention under section 14 of the Criminal Procedure (Scotland) 1995
  - reducing to 12 hours the maximum period a suspect can be held in police custody for questioning
  - providing for a process of investigative liberation under which a suspect may be released on conditions from police custody, with the possibility of being taken back into custody and subjected to further police questioning
  - extending the right of access to a solicitor to all suspects held in police custody, regardless of whether the police intend to question the suspect
  - seeking to provide additional safeguards for child and other vulnerable suspects
- Part 2 (corroboration and statements) – abolishing the current general requirement for corroboration in criminal cases; and making 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) – including provisions:
  - aimed at facilitating the better preparation of sheriff and jury cases (eg by providing for compulsory business meetings between the prosecution and defence, and extending to 140 days the current 110 day time limit for commencing a trial where the accused is remanded in custody)
  - changing the rules on jury majorities (in all solemn procedure cases) so that a guilty verdict will require the support of two-thirds of the jury (eg ten jurors where it has a full complement of 15 members) rather than the current requirement for eight jurors finding the accused guilty
- Part 4 (sentencing) – increasing the maximum sentence for various statutory offences relating to the possession of a knife or offensive weapon to five years; and altering the powers the courts already have to order that a person who has committed an offence, during a period of early release from a custodial sentence, should be returned to custody

to serve the period of the whole sentence still outstanding at the point when the new offence was committed

- Part 5 (appeals and SCCRC) – provisions seeking to address delays in determining appeals; and making changes to the way in which the High Court deals with references from the Scottish Criminal Cases Review Commission
- Part 6 (miscellaneous) – 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 to consider police pay and conditions

# INTRODUCTION

The main provisions of the [Criminal Justice \(Scotland\) Bill](#) (the Bill) are set out in six parts:

- Part 1 (arrest and custody) – 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) – abolishing the current general requirement for corroboration in criminal cases and making 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) – including 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) – 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
- Part 5 (appeals and SCCRC) – provisions seeking to address delays in determining appeals and making changes to the way in which the High Court deals with references from the Scottish Criminal Cases Review Commission
- Part 6 (miscellaneous) – 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

The development of most of the proposals set out in the Bill was informed by recommendations flowing from two independent reviews carried out by Lord Carloway and Sheriff Principal Bowen. Information relating to the two reviews is set out below.

A number of other proposals do not flow from the two reviews. These include provisions relating to the sentencing of offenders, people trafficking and the Police Negotiating Board for Scotland.

## Lord Carloway’s Review of Criminal Law and Practice

The UK Supreme Court’s judgement in the case of [Cadder v HM Advocate](#) (26 October 2010) held that the rules under which the police in Scotland could detain and question a suspect, without that 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).

In response to the above 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 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 detain 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

- possible appeals – seeking to restrict any impact which court rulings, such as that in Cadder, may have on already concluded prosecutions (eg by providing that the Scottish Criminal Cases Review Commission 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)

The Scottish Government also established an independent review of criminal law and practice led by Lord Carloway (a High Court judge)<sup>1</sup> – the [Carloway Review](#) – with the following terms of reference:

“(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 Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 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.” (Scottish Government 2010)

Lord Carloway’s [report](#) (published November 2011) 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
- 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

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<sup>1</sup> Lord Carloway was appointed as Lord Justice Clerk (the second most senior judge in Scotland) in August 2012.

In putting forward these proposals Lord Carloway indicated that they sought to revitalise the current system, with robust protection for the human rights of suspected and accused individuals,<sup>2</sup> whilst also recognising the importance of effective investigation and prosecution of crime.

Following publication of the report, the Scottish Parliament's Justice Committee took evidence from a range of interested professionals, academics and stakeholders (as well as from Lord Carloway himself) to obtain a snapshot of initial reactions to its recommendations. In January 2012, the committee sent a [letter](#) to the Cabinet Secretary for Justice setting out its observations on the main issues highlighted in evidence. It noted that the most prominent issue in evidence was the proposal to abolish the requirement for corroboration (with arguments both for and against) and emphasised the importance of taking a holistic and comprehensive approach to reform.

In July 2012, the Scottish Government published the consultation paper [Reforming Scots Criminal Law and Practice: The Carloway Report](#) (2012a).<sup>3</sup> It noted that:

“The Government’s broad approach has been to accept Lord Carloway’s report as a substantial and authoritative piece of work. We have accepted the broad reasoning as set out in the Carloway Report. This consultation paper is therefore not [an] attempt to revisit his review. It is designed to promote public discussion of his recommendations to assist us in translating the package of reforms he has proposed into legislation.” (para 1.8)

This broad acceptance included agreement that the requirement for corroboration in criminal cases should be abolished.

The Scottish Government has also published [responses to the consultation](#) (Scottish Government 2012b) along with an [analysis of the responses](#) (Why Research 2012). The analysis reported that there was “majority support for almost all recommendations detailed in the consultation amongst those responding to each question” (para 1.51). However, on the issue of corroboration, it noted that:

“More respondents disagreed than agreed that the requirement for corroboration should be abolished.

Many more respondents agreed than disagreed that additional changes should be made to the criminal justice system if the requirement for corroboration is removed.” (paras 1.39–1.40)

The consultation did not persuade the Scottish Government that it should change its stance on abolishing the requirement for corroboration. It did, however, lead to the publication of a [second consultation paper](#) (Scottish Government 2012c) in December seeking views on ‘additional safeguards’ aimed at preventing miscarriages of justice following the planned removal of the requirement for corroboration:<sup>4</sup>

- jury majorities – the consultation proposed that the current system under which a guilty verdict only requires the support of eight out of 15 jurors (less than this resulting in an acquittal) should be replaced with one where both convictions and acquittals require the support of at least nine or ten jurors

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<sup>2</sup> In particular the rights to liberty and a fair trial in Articles 5 and 6 of the ECHR.

<sup>3</sup> The consultation closed in October 2012.

<sup>4</sup> The second consultation closed in March 2013. The Scottish Government had originally agreed with Lord Carloway’s position that the abolition of the requirement for corroboration would not require such additional safeguards (Scottish Government 2012a, para 9.26).

- withdrawal of case from jury – the consultation proposed that judges in jury trials should be given the power to acquit accused, without referring the matter to the jury, where they consider that no reasonable jury could convict on the basis of the evidence led
- three verdict system – the consultation sought views (without indicating any government preference) on whether the ‘not proven’ verdict should be abolished

The Scottish Government has also published [responses to the second consultation](#) (Scottish Government 2013a) along with an [analysis of those responses](#) (Why Research 2013).

The Bill does seek to reform the current rules on jury majorities, by providing that a guilty verdict will require the support of at least two-thirds of jurors (any other result leading to an acquittal). This differs from the original proposal and avoids the possibility of hung juries in Scottish criminal trials.

The other two suggested areas of additional reform (giving the trial judge a new power to acquit an accused without referring the matter to the jury and abolishing the not proven verdict) are not taken forward in the Bill.

## **Sheriff Principal Bowen’s Review of Sheriff and Jury Procedure**

Criminal procedure (ie the procedure for the investigation and prosecution of crime) is divided into solemn and summary procedures. Solemn procedure is used in relation to more serious criminal cases and may ultimately lead to a jury trial presided over by a sheriff or, in relation to the most serious cases, a High Court judge. Summary procedure is used for less serious offences and may lead to a trial before a sheriff or a bench of one or more lay justices.<sup>5</sup> Trials under summary procedure are conducted without a jury.

In 2009, following the implementation of significant reforms affecting both High Court and summary cases, the Scottish Government established an independent review of the practices and procedures relating to solemn sheriff court cases – also referred to as ‘sheriff and jury cases’. The review, led by Sheriff Principal Bowen, was given a remit to examine:

“the arrangements for sheriff and jury business, including the procedures and practices of the sheriff court and the rules of criminal procedure as they apply to solemn business in the sheriff court; and to make recommendations for the more efficient and cost-effective operation of sheriff and jury business in promoting the interests of justice and reducing inconvenience and stress to the victims and witnesses involved in cases”. (Scottish Government 2009)

The review [report](#) (Independent Review of Sheriff and Jury Procedure 2010 – hereafter referred to as the Bowen report) set out 34 recommendations for sheriff and jury cases, not all of which would require legislation, including 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

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<sup>5</sup> In Glasgow’s justice of the peace court, cases are also heard by legally qualified stipendiary magistrates.

- 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 (the current 110 day rule for sheriff and jury cases)
- monitoring and evaluation of reforms

In putting forward these proposals Sheriff Principal Bowen indicated that the success of the proposed reforms would be dependent upon a legal aid structure 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.”  
(Independent Review of Sheriff and Jury Procedure 2010, para 1.7)

In 2011, the Scottish Government published a [written response](#) to the review noting its “broad support for both the direction and detail that Sheriff Principal Bowen proposes” (p 5). In December 2012 it published the consultation paper [Reforming Scots Criminal Law and Practice: Reform of Sheriff and Jury Procedure](#) (Scottish Government 2012d),<sup>6</sup> again noting its general support for Sheriff Principal Bowen’s recommendations. It stated 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.” (p 8)

The Scottish Government has also published [responses to the consultation](#) (Scottish Government 2013b) along with an [analysis of the responses](#) (Research Shop 2013).

The policy memorandum states that the Bill “takes forward and develops as a package those of Sheriff Principal Bowen’s recommendations which require primary legislation” (para 17).

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<sup>6</sup> The consultation closed in March 2013.

# ARREST AND POLICE CUSTODY

## Current Powers

Police officers are 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
- powers of detention under section 14 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act)

Common law powers allow an accused person to be arrested and held in custody on the basis of a warrant granted by a court (on the application of the procurator fiscal). This is appropriate where arrest is necessary to secure the person's attendance at court. A police officer may also arrest a suspect without warrant where this is necessary for the purposes of preventing the suspect from escaping, committing further offences, or hindering the course of justice (eg through the destruction of evidence). This power may be exercised where the officer has a reasonable suspicion that the suspect has committed an offence.

Statutory powers of arrest exist in relation to a wide range of statutory offences. Again, these powers are generally applicable on the basis of reasonable suspicion that the suspect has committed an offence.

The Carloway report (2011) noted that:

“In the Scottish legal tradition, the purpose of arrest, whether under warrant or not, is to bring the suspect before a court, usually the sheriff, for examination. Arrest has not been permitted merely to take a suspect into custody for the purposes of further investigation or questioning by the police. Indeed, it is generally, but not universally, thought that questioning after arrest is problematic even where the arrest has proceeded on the grounds of only reasonable suspicion coupled with a risk of escape or destruction of evidence and there is insufficient evidence to charge.” (p 77)

The police can choose to either liberate or hold an arrested person in custody until taken to court. Where not liberated, section 135(3) of the 1995 Act provides that:

“A person apprehended under a warrant or by virtue of power under any enactment or rule of law shall wherever practicable (...) be brought before a court competent to deal with the case not later than in the course of the first day on which the court is sitting after he is taken into custody”.

Given the limitations on using powers of arrest as an investigative tool, the Criminal Justice (Scotland) Act 1980 first gave the police statutory powers to detain and question suspects for a limited period. These powers, now 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.

Until recently, a suspect detained under section 14 of the 1995 Act:

- could be held in custody for a maximum of six hours (after which any further period in custody would have to be on the basis of other powers such as those following arrest)
- could be questioned without being allowed access to legal advice

As noted in the introduction to this briefing, the UK Supreme Court's judgement in *Cadder v HM Advocate* (2010) led to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, with changes affecting the above powers of detention:

- extending the maximum period during which the police are able to detain a suspect for questioning from six to 12 hours, with the possibility of extension to 24 hours
- enshrining a right of access to a solicitor for detained suspects, both before and during police questioning

The above powers of arrest and detention are subject to Article 5(1) of the ECHR, which includes the following:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”.

Within the Scottish context, ‘the competent legal authority’ is a judge. The Carloway report noted that Article 5 “precludes a suspect being taken into police custody solely for investigative purposes” (p 86). However, it went on to state that this does not prevent detention for purposes including questioning, provided that the underlying intention is to bring the suspect before a court should initial reasonable suspicions be confirmed by further investigations.

## **Arrest**

The Carloway report (2011) recommended that powers of detention under section 14 of the 1995 Act should be repealed, with powers of arrest being reformed so as to incorporate the role currently performed by section 14 detention. It argued that:

“The Review considers that the opportunity should be taken to simplify, modernise and clarify the circumstances in which, where an individual is under suspicion of having committed a crime, the lawful deprivation of his/her liberty can take place. The principal reason for having a detention procedure distinct from arrest (...) was that the police could have a period within which they could pursue an investigation by questioning a suspect prior to his/her rights, including that of access to a lawyer, being triggered by charge. This reasoning has been overtaken by *Cadder*. Against that background there is no longer any merit in retaining section 14 detention as distinct from arrest. It is recommended that a new approach is adopted in which the only general power to take a suspect into custody is the power of arrest.” (p 90)

Other specific recommendations in the report included:

- the ground for both arrest and subsequent holding of the person in custody should be defined in statute as reasonable suspicion that the person has committed a crime
- the police should be able to question a suspect and to carry out any other lawful investigative procedures notwithstanding the suspect's arrest (in the same way as under current section 14 powers of detention)
- the reason for arrest and custody should be to bring the suspect before court, by way of continued investigation into the merits of the case and reporting to the procurator fiscal
- a suspect should not be held in custody unless it is necessary and proportionate

- no court warrant ought to be required to arrest and hold a person for imprisonable offences on reasonable suspicion, but for non-imprisonable offences a warrant should be a requirement unless various factors apply (eg that the suspect would be likely to abscond or interfere with the course of justice)

The Bill generally seeks to give effect to the above recommendations (with some points of difference in relation to various details),<sup>7</sup> with the policy memorandum saying that:

“The effect of the provisions in the Bill is to abolish detention under section 14 of the 1995 Act so that the only general power to take a person into custody is the power of arrest contained in the Bill. The test for the police arresting a person without a warrant is whether they have reasonable grounds for suspecting the person has committed, or is committing, an offence punishable by imprisonment. A warrant will be required for non-imprisonable offences unless obtaining one is not in the interests of justice.” (para 35)

In addition to replacing common law powers of arrest without warrant and statutory powers of detention, the new powers of arrest set out in the Bill are intended to replace most existing statutory powers of arrest without warrant.<sup>8</sup> The status of a suspect who has been arrested but not charged with an offence is described in the Bill as a ‘person not officially accused’.<sup>9</sup>

In relation to the proposed replacement of current powers of detention (under section 14 of the 1995 Act) and arrest without warrant, with new statutory powers of arrest, the analysis of responses to the Scottish Government’s consultation (Why Research 2012) reported that:

“The main theme emerging from the responses was one of support for the move to a power of arrest on reasonable suspicion of having committed a crime. The second most common theme was that such a move would be a simplification and would be better understood, for example by the general public.” (para 3.4)

An article by two legal academics described the proposed replacement of section 14 powers of detention as being “uncontroversial” and bringing “Scotland into line with England and Wales” (Chalmers and Leverick 2012, p 841). However, support has not been unanimous, with some (eg the Law Society of Scotland (2012)) questioning whether the need for this change has been demonstrated.

## **Police Custody: Pre-Charge**

The Carloway report (2011) went on to consider what time limits should be placed on holding a person in police custody following arrest. In doing so it drew a distinction between:

- custody prior to a person being charged with an offence – for a limited period during which a suspect can be questioned by the police (akin to the current period of detention under section 14 of the 1995 Act)
- custody subsequent to a person being charged with an offence – for such period as is reasonable in order to arrange for the person’s appearance before court

In relation to custody prior to charge, it recommended a maximum period of 12 hours (with no power of extension) and a formal requirement on the police to review continued custody beyond six hours. In doing so the Carloway report effectively recommended a reduction to the

<sup>7</sup> See (in particular) sections 1, 10 and 26 of the Bill.

<sup>8</sup> See section 50 of the Bill. Powers of arrest under section 41(1) of the Terrorism Act 2000 would be unaffected.

<sup>9</sup> See sections 26 and 55 of the Bill.

maximum period during which a suspect can be held in custody and questioned (down from the current 24 hours under section 14 of the 1995 Act). It stated that its recommendations in this area had been informed by the requirements of modern policing and evidence on the use of current police powers.<sup>10</sup>

The Bill generally seeks to give effect to the Carloway report's recommendations in relation to police custody prior to charge (ie in relation to the custody of a 'person not officially accused'),<sup>11</sup> with the policy memorandum stating that:

"The Scottish Government agrees with Lord Carloway's conclusion and the Bill provides that the maximum time that a person should be detained in police custody without charge on the same ground, or grounds, arising from the same circumstances, is 12 hours cumulatively." (para 47)<sup>12</sup>

Responses to the Scottish Government's (2012a) consultation on the Carloway report highlighted some concerns (especially amongst law enforcement organisations) with regard to proposals for more restrictive time limits on pre-charge custody. For example, a response from the Association of Chief Police Officers in Scotland (2012) noted that:

"ACPOS remain in favour of the status quo, ie a 12 hour detention period, with the potential to extend a further 12 hours after review by a senior officer, if all necessary criteria are satisfied. Currently the role of Custody Review Officer is set at the rank of inspector. In light of Lord Carloway's recommendations and concerns over liberty rights of suspects, it is suggested that this senior officer review, for an extension beyond 12 hours, could be set at the rank of superintendent.

The superintendent rank is one of the most senior within the police service. Officers carrying out this role are often required to command the most operationally challenging of incidents and investigations, for example firearms operations and major crime investigation. In terms of legislative responsibilities, in matters relating to surveillance they are trained and accustomed to taking and rationalising decisions on the basis of legality, proportionality and necessity. ACPOS believes that restricting the power to extend detentions beyond twelve hours (up to a maximum of 24 hours) to officers at superintendent level is commensurate with the rarity and importance of investigations requiring this authority.

Within his report, Lord Carloway (paragraph 5.2.9 on) notes the position in other jurisdictions, particularly in the British Isles. It is significant that in England & Wales, police can detain for 24 hours without charge, with the provision for 12 hour extension on a senior officer's review. A further 36 hours can also be applied for on the suspect's appearance at court.

In Ireland, it is six hours, plus six hours on review (superintendent) with the opportunity for an additional rest period. A chief superintendent could then extend a further 12 hours (ie 24 hours plus possible rest period).

If such local comparisons are accepted, it becomes immediately apparent that investigators in Scotland would be placed at a significant disadvantage in comparison

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<sup>10</sup> The Carloway report did note some use of the current power to extend police detention under section 14 of the 1995 Act beyond 12 hours – stated to be less than 0.5% of detentions (p 109). The potential impact of the report's recommendations in this area should be considered in light of its proposals for 'investigative liberation' (considered below).

<sup>11</sup> See (in particular) sections 9 and 11 of the Bill.

<sup>12</sup> Where a suspect is taken to a hospital for medical treatment, the time travelling to and in hospital for such treatment is, provided the suspect is not subject to police questioning, not included in the 12 hour period (see section 13 of the Bill).

to their counterparts in neighbouring countries in the investigation of major crime if a 12 hour limit were to be applied.” (p 10)

In relation to current use of police powers to extend detention under section 14 of the 1995 Act beyond 12 hours, the above consultation response argued that available evidence indicating a low use of extension powers demonstrates that the police do not take such action lightly. However, it also stated that where there have been extensions these have tended to be in relation to very serious criminal allegations and that extensions form a more significant proportion of such cases – thus indicating the importance of having the power.

Responses supporting the proposed reduction to a maximum of 12 hours, and in some cases, arguing for a greater reduction, included ones from the Law Society of Scotland (2012):

“the Society agrees with Lord Carloway’s recommendation of the maximum time the suspect is to be held in detention should be 12 hours without being charged (...).

The Society believes that the current period of 24 hours under section 14A of the Criminal Procedure (Scotland) Act 1995 was introduced in the erroneous belief that access to legal advice may cause delay that would prejudice the investigation. (...)

The Society does not believe that the 12 hour period should be extended in any circumstances on the basis that what were once exceptional circumstances can become the norm, particularly where there are significant resource restrictions pending.” (p 6-7)

And from the Scottish Human Rights Commission (2012):

“The doubling of detention times under the 2010 Act,<sup>13</sup> it might be suggested, was not intended to allow sufficient time to provide legal assistance, but rather to give the police longer to carry out inquiries. Respondents to this consultation might suggest that extensions be allowed for ‘investigative purposes’. The Commission would be concerned if investigations which could equally be carried out while a suspect is at liberty resulted in extensions of the detention period. That would, in our view, not be justified. The Commission is unaware of any evidence which suggested that prior to October 2010 the police were systematically hampered in their efforts to investigate crime by the limits of the six hour detention period. Unless such evidence is produced, the greater interference with individual’s private lives involved in longer detention periods may not be justified.” (p 3-4)

A number of those responding to the consultation suggested that it should be possible for the police to seek judicial authority (from a sheriff) to extend custody beyond 12 hours (eg responses from the Sheriffs’ Association and the Senators of the College of Justice). However, the Association of Chief Police Officers in Scotland argued that the process of seeking judicial authority would unnecessarily divert resources away from the investigation of the alleged crime.

The Association of Chief Police Officers in Scotland (2012) also argued against the proposed formal requirement on the police to review continued custody beyond six hours:<sup>14</sup>

“In our submission, six hours is also too soon for an informed assessment of the position of enquiries, likely timescales, etc by an officer, external to the enquiry and not part of the custody staff, where a significant proportion of those enquiries have not yet been completed.” (p 12)

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<sup>13</sup> The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

<sup>14</sup> See section 9 of the Bill.

Responses supporting the proposed requirement for review included ones from the Sheriffs' Association and the Law Society of Scotland.

## **Police Custody: Post-Charge**

The Carloway report also looked at the length of time suspects may be held in police custody prior to a first appearance in court. It reported 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. Such lengthy periods may not be typical. Many suspects do appear in court on the day following their arrest. However, it remains the case, as demonstrated by the figures in the snapshot of custody cases described above, that a significant proportion of suspects are held for periods which are at least at the outer limits of what may be regarded as acceptable even under the Convention [ECHR]. More important than that, suspects are being held for periods that are longer than ought to be regarded as acceptable in Scottish human rights terms.” (p 111)

In relation to relevant ECHR requirements, Article 5(3) states that:

“Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”.

The level of work carried forward at weekends (or the lack of it) was identified by the Carloway report as the primary cause of some people being held in police custody for unacceptably long periods. It argued that:

“The criminal justice system cannot operate on a part time basis. 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.” (p 112)

In light of the above, it recommended that:

- where the suspect is held in police custody, the law should be changed to require appearance in court on the first court day after charge
- the period of time during which suspects are kept in police custody should be kept under review by the Crown Office & Procurator Fiscal Service (COPFS) and, if suspects under the new regime are being kept in custody without court appearance for more than thirty-six hours from the time of their arrest, measures (eg Saturday courts) should be introduced to prevent it from occurring

The status of a suspect who has been charged by the police with an offence is described in the Bill as a ‘person officially accused’.<sup>15</sup> In relation to limits on police custody of such suspects, the Bill provides that wherever practicable the suspect must be brought before court not later than the end of the next court sitting day.<sup>16</sup> The words ‘wherever practicable’ appear in the current legislation,<sup>17</sup> as well as in the Bill. Their inclusion in the Bill is intended to allow a limited degree

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<sup>15</sup> See section 55 of the Bill.

<sup>16</sup> See section 18 of the Bill.

<sup>17</sup> See section 135(3) of the 1995 Act.

of flexibility where the circumstances under which a person is taken into police custody make a next day court appearance impractical.<sup>18</sup>

In addition, the Scottish Government's (2012a) consultation on the Carloway report argued that:

“some pragmatism will be required about the timing of fully achieving the 36 hour target for bringing people before a court as this implies major operational changes in court sitting times and by extension major changes for COPFS and defence agents”. (para 3.7)

The analysis of responses to the Scottish Government's consultation (Why Research 2012) noted that the most common themes in response on this topic were:

“support for a maximum 36 hours before court appearance and the need for courts to open at weekends or, more specifically, on Saturdays as well as possibly on public holidays.” (para 4.38)

The analysis also reported “that the main practical difficulties noted in responses, in addition to extending current court operations, are resource issues for all involved” (para 4.39). Relevant consultation responses included:

“We agree entirely with Lord Carloway that no person should be detained in custody beyond 36 hours before appearing before a court. We would stress again that the right to liberty is a fundamental right. In introducing the Scottish Government's legislative programme for 2012-13, the First Minister stated of the Criminal Justice Bill that it ‘will ensure Scotland is at the forefront of human rights practice in relation to suspects and accused persons’. While current ECtHR [European Court of Human Rights] case law may well indicate that a limit of four days is acceptable in terms of Convention compliance, the Convention sets only a minimum standard. Proposing that the Scottish criminal justice system should do only the minimum possible to comply with the ECHR would hardly be compatible with the First Minister's goal.

As for the most effective way of delivering a 36 hour limit, this will clearly need some form of investment in the form of weekend/holiday court sittings. This would bring Scotland in line with England and Wales, where Saturday and Bank Holiday sittings of magistrates courts are required by legislation (see section 46 of the Police and Criminal Evidence Act 1984).” (University of Glasgow School of Law 2012, p 2)

And:

“We believe that the establishment of regular Saturday Courts, whether on a regional basis or not, would impose an unacceptable degree of extra strain and excessive extra costs on an already overburdened criminal justice system which is already suffering major reductions in expenditure and would be quite unnecessary, especially if increased liberation powers are exercised by the Crown and police prior to court appearance.” (Sheriffs' Association 2012, p 3)

## **Liberation from Police Custody**

The Carloway report (2011) noted that:

“Article 5 [of the ECHR] permits the deprivation of liberty only when necessary for certain purposes. It is implicit, therefore, that the suspect must not be detained

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<sup>18</sup> Advice from Scottish Government officials (September 2013).

beyond the point when there ceases to be a need for him/her to be held in custody. The decision to arrest the suspect does not mean that it will be necessary to continue to hold (or 'detain') him/her until his/her appearance in court. (...) 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, as previously outlined, be confined to situations in which he/she poses some risk, either to an individual, the public or the interests of justice, if at liberty." (p 123)

In light of this, the Carloway report put forward a number of proposals intended to facilitate continued police investigations and/or protect the interests of justice, whilst allowing for the release of a suspect from police custody.

The situation where a suspect is still under investigation but the police have yet to charge the suspect is considered below (under the heading of 'investigative liberation').

In relation to cases where a suspect has been charged,<sup>19</sup> recommendations of the Carloway report included:

- that the police should, when releasing such a suspect on an undertaking to appear in court on a specified date, be given the power to impose special release conditions (including a curfew)
- that the COPFS should have an express power to review police decisions on liberation and to liberate on standard or special conditions
- that the exercise of the powers to liberate at any stage prior to appearance in court should be subject to a process under which the suspect may apply to a sheriff for a review of liberation conditions

The Bill generally seeks to give effect to the above recommendations of the Carloway report.<sup>20</sup>

The Scottish Government's (2012a) consultation on the Carloway report did not include any specific questions in relation to these recommendations. This was on the basis that they did not as a whole represent a substantial departure from the current approach. The possibility of a suspect applying to a sheriff for a review of liberation conditions would be new.<sup>21</sup> This review mechanism would also be available in relation to the process of investigative liberation (see below).

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<sup>19</sup> That is, those who have been 'officially accused' to use the terminology of the Bill.

<sup>20</sup> See sections 19 to 22 of the Bill.

<sup>21</sup> See section 22 of the Bill.

## Investigative Liberation

In relation to cases where an arrested suspect has not been charged but is still under investigation, the Carloway report (2011) noted that:

“In the modern era, there are a number of steps in a police investigation which can take a considerable time. It may not be practicable for them to be completed within the proposed twelve hour maximum period. Yet it may be neither necessary nor proportionate for a suspect to be detained whilst these steps are being undertaken. For example, it may take some time to investigate mobile telephone records or to carry out DNA comparisons. Alternatively, in his/her police interview, a suspect may provide an explanation which merits further enquiry.” (p 125)

It went on to say that:

“Even where reasonable suspicion continues, a suspect should not be detained longer than is necessary and proportionate. 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.” (p 128)

The Carloway report recommended a new system of investigative liberation under which the police can release an arrested suspect, who has not been charged but is still under investigation, on conditions and with the possibility of further questioning on return to police custody (following re-arrest). The total allowable period of custody (prior to charge) would still be limited to 12 hours, but the clock could effectively be stopped and then restarted.

It also proposed that the conditions under which a suspect is released could include any special conditions necessary for the proper conduct of the investigation (eg prohibiting the suspect from visiting a particular area). As for release on conditions after charge (discussed above), it stated that the suspect should be able to apply to a sheriff for the review of release conditions.

The Carloway report noted that:

“Investigative liberation pending a decision to charge would, if created, mean that the suspect would still be ‘officially’ under suspicion. This could cause practical problems for suspects. For example, if a person were liberated in relation to a sexual offence, this could lead to him/her being suspended from his/her job. The longer the liberation period, the greater the potential detrimental impact to the suspect, especially if, eventually, he/she were cleared of all suspicion. It would seem prudent, therefore, to constrain any period of liberation without charge. A balance needs to be struck.” (p 129-130)

With this in mind, it recommended that the period during which a suspect is subject to investigative liberation should not exceed 28 days.

The Bill seeks to give effect to the Carloway report’s recommendations in relation to investigative liberation.<sup>22</sup>

The analysis of responses to the Scottish Government’s consultation (Why Research 2012) reported that a significant majority of those responding supported the general principle of introducing investigative liberation. Those expressing doubts included the Law Society of Scotland, which was concerned that it should not become the norm.

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<sup>22</sup> See sections 2, 12 and 14 to 17 of the Bill.

One of the aspects which did attract more debate was the proposal (taken forward in the Bill) that investigative liberation should not exceed 28 days. It may be noted that similar powers in England and Wales, under the Police and Criminal Evidence Act 1984, do not limit the period under which a suspect can be subject to this form of police bail (Carloway report 2011, p 126). This fact has, however, attracted criticism (eg see the 2013 BBC news report [‘Law Society Calls for 28-Day Limit on Police Bail’](#)).

A number of responses to the Scottish Government’s consultation argued that it should be possible to extend the proposed 28 day time limit – on the authority of a senior police officer unconnected with the enquiry (Association of Chief Police Officers in Scotland) or of the court (Sheriffs’ Association). Those arguing against extension included the Senators of the College of Justice (2012):

“A limit of 28 days might be thought by some to be too short in cases of, for example, money laundering, fraud, embezzlement. The reality is that the groundwork in such cases ought to be carried out before a suspect is detained for questioning. Any supplementary investigation which is required before questioning the suspect should be able to be carried out within 28 days. We therefore support the proposal of a limit of 28 days.” (p 8)

## Access to Legal Advice

Following the UK Supreme Court’s ruling in *Cadder v HM Advocate* (2010), the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 significantly extended the rights of suspects to obtain legal advice. As noted in the Carloway report (2011):

“A suspect who is detained, arrested or merely attending voluntarily at a police station now has a statutory right to a private consultation with a solicitor (and not any other legal adviser) before questioning begins and at any other time during questioning. The 2010 Act made it clear that this consultation may be by telephone as well as in person. This right to a consultation, which prior to the 2010 Act applied only to arrested persons before their first court appearance, can only be delayed in exceptional circumstances, which will rarely occur.” (p 142-143)<sup>23</sup>

The report did, however, indicate that the legislation only provided an interim response and that additional changes might be required in light of further consideration, including consideration of:

- developing case law on the requirements imposed by Article 6 of the ECHR (right to a fair trial)
- relevant developments at a European Union level

In relation to the latter, the European Parliament and Council reached a provisional agreement in May of this year on a [Proposal for a Directive on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest](#). It includes the following:

“The suspect or accused person shall have access to a lawyer without undue delay. In any event, the suspect or accused person shall have access to a lawyer as from the following moments in time, whichever is the earliest:

(a) before he is questioned by the police or other law enforcement or judicial authorities;

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<sup>23</sup> The right of access to a solicitor is set out in section 15A of the 1995 Act.

- (b) upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act in accordance with paragraph 3(c);
- (c) without undue delay from the deprivation of liberty;
- (d) in due time before the suspect or accused person, who has been summoned to appear before a court having jurisdiction in criminal matters, appears before that court.” (Article 3(2))

At this stage, the UK has not opted in to the measure, but could do so at any time once it is adopted.

The Carloway report did conclude that additional changes were required, with recommendations in this area including:

- that suspects held in police custody should be provided with a ‘letter of rights’ setting out their rights, including the right of access to legal advice
- 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

In relation to the first point, a 2012 European Union [directive on the right to information in criminal proceedings](#) states that Member States shall ensure that a letter of rights is provided.<sup>24</sup> In July of this year, the Scottish Government (2013c) introduced a [Letter of Rights](#) for people held in police custody. (Some of the information in the letter will have to be changed if relevant proposals in the Bill become law.)

In relation to the second point, section 36 of the Bill seeks to extend the right of access to a solicitor to all suspects held in police custody (regardless of whether the police intend to question the suspect). The analysis of responses to the Scottish Government’s consultation reported that the main theme to arise from responses in this area was “agreement with the recommendation for access to a lawyer to be provided as soon as practicable” (Why Research 2012, para 6.3). In relation to potential costs, the Scottish Legal Aid Board (2012) responded:

“At present, the Board understands that only a minority of suspects who are detained at police stations are actually interviewed and currently have the right to legal advice. If these rights are extended to all suspects, then there is the potential for this to bring significant increases in the cost of providing legal advice to suspects in police stations. However, these costs could be mitigated if suspects are only detained if it is necessary and proportionate having regard to the nature and seriousness of the crime and the probable disposal if convicted. In the Board’s view, this ought to reduce the number of detentions to more serious cases where legal advice would be more appropriate. We will continue to work with colleagues in the Scottish Government and the justice sector to predict how often legal advice is likely to be needed to help us determine the legal aid cost implications of this.” (p 4)

## Police Questioning

The Carloway report (2011) considered the grounds on which statements made by a suspect in response to police questioning may be excluded from evidence at any trial. It stated that:

“There are two possible tests for determining the admissibility of statements by a suspect in response to police questioning: (i) the common law approach, which has developed rules for the protection of a suspect from oppressive conduct on the part

<sup>24</sup> The UK has opted in to the proposal. The directive is to be implemented by June 2014.

of the authorities, balancing the interests of the suspect with those of society and taking into account all the circumstances; and (ii) a Convention approach assessing whether the Article 6 right to a fair trial has been infringed. What is important to realise is that, although, in many cases, the application of either approach may result in the same decision on admissibility, that will not always be the case.” (p 196)

The report concluded that a test such as the common law approach, which involves a balancing of individual and societal rights, has the potential for conflict with ECHR requirements:

“A trial is either fair or not and fairness is not capable of modification to meet perceived societal requirements in any individual case.” (p 198)

It recommended that there should be a new statutory test under which the trial judge would be able to exclude statements and other evidence which would result in the trial as a whole being rendered unfair in terms of Article 6 of the ECHR. Where the defence objects to any evidence, the onus would be on the prosecution to prove, on a balance of probability, that its admission would not render the trial unfair. The report went on to recommend that the common law test should be abolished.

The Bill does not seek to reform the general rules on admissibility of evidence,<sup>25</sup> with the policy memorandum noting:

“The Carloway review suggested that a test drawn from Article 6 (right to a fair trial) of the ECHR should be put on the face of legislation as the test for the admissibility of evidence in the course of a trial, and that consideration should be given to the abolition of existing common law tests of fairness and admissibility. Respondents to the consultation were divided on this and the Scottish Government has concluded that this recommendation should not be included at this time.” (para 101)

Relevant consultation responses included ones from the Association of Chief Police Officers in Scotland (2012):

“The law and associated jurisprudence has been moving towards a European model for a number of years now. This has arguably left Scots law vulnerable in some areas where the ‘fairness test’ is no longer as relevant as was once the case. Lord Carloway proposes a criminal justice system which is fully compliant with the European Convention on Human Rights. The move to an Article 6 test to assess admissibility of statements is therefore appropriate. We do not think that such a move will be detrimental to suspects, but will allow a more rounded approach to the evidence adduced, including evidence obtained by questioning.” (p 25)

And from the University of Glasgow Law School (2012):

“We do not agree with this recommendation. The test of fairness is practical and workable and we are not aware of any evidence that it has caused difficulties in practice. There are two difficulties with the proposal: first, it is wrong in principle and secondly, it will create practical problems. (...)

Article 6 sets a minimum standard. (...) Scots law has not historically adopted a position of minimum compliance with human rights, and it would be a backward step were this to start now. (...)

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<sup>25</sup> The Bill (section 62) does seek to make some particular reforms to ‘hearsay’ rules affecting the admissibility of statements made by an accused person. These are discussed later in this briefing under the heading of ‘corroboration and statements’.

Secondly, we believe that this recommendation would create significant practical problems. Lord Carloway's report did not examine how an Article 6 test might be applied in practice. It must be remembered that Article 6 refers to the proceedings as a whole. Because Article 6 arguments will in most cases involve consideration of the proceedings in the round, they are in practice likely to be more complex to mount and adjudicate on. Arguing either before or during a trial that the admission of a certain piece of evidence will render the proceedings as a whole unfair necessarily involves complex and highly speculative argument." (p 6)

Other recommendations of the Carloway report, in relation to police questioning, included the proposal that the current prohibition on the police questioning a suspect after that suspect has been charged with an offence (not just detained/arrested) should be relaxed.<sup>26</sup> It stated that:

"The Review believes 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/reported to the procurator fiscal but before he/she has appeared in court, can apply to a sheriff for permission to do so." (p 193-194)

As noted earlier in this briefing, the status of a suspect who has been charged by the police with an offence is described in the Bill as a 'person officially accused'. In line with the Carloway report, the Bill seeks to establish procedures under which the police can, with authorisation from a court, question a person who has been officially accused.<sup>27</sup> The policy memorandum published along with the Bill notes that:

"The Scottish Government agrees with Lord Carloway's conclusion that in a human rights based system there is no particular reason why there should be a prohibition on the questioning of a person who has been, or ought to have been, charged with an offence, provided that the person's rights continue to be adequately and effectively protected. Post-charge questioning might take place, for example, where the person could not be questioned for medical or other good reasons, such as a legitimate delay in obtaining access to a solicitor. Another example might be where, after a person has been charged, further evidence has come to light which the person might be able to comment upon. Developments in science, information technology, and investigative methods mean that modern police investigations can take longer and be more thorough. It is envisaged that this power will not be used regularly." (para 86)

The analysis of responses to the Scottish Government's consultation (Why Research 2012, para 7.3) reported that there was "some polarisation of opinions amongst legal organisations" commenting on this proposal. Those in support included the Crown Office & Procurator Fiscal Service (2012):

"The concept that an accused cannot be interviewed after charge is not based on a human rights analysis and is not required in a modern justice system. (...) Indeed, in many cases as a matter of fairness an accused should be given a right to comment on matters which may not have been addressed [when] he/she was initially questioned by the police." (p 6)

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<sup>26</sup> The decision to charge a suspect may be made some time after the person is arrested (eg following a period of questioning in police custody). One of the proposals in the Carloway report was that legislation should make it clear that a suspect who is arrested and held in police custody does not have to be immediately charged with an offence – arrest being justified on the basis of a reasonable suspicion which may not in itself justify charging the suspect.

<sup>27</sup> See (in particular) sections 27 to 29 of the Bill. In light of the proposals for post-charge questioning, the Bill also includes provisions seeking to abolish current procedures under which an accused person may be questioned by the prosecution during a pre-trial stage in solemn cases known as judicial examination (see section 63 of the Bill).

Those arguing against the police being able to question a suspect post-charge included the Senators of the College of Justice (2012):

“the police will have had ample opportunity to question that individual, including an opportunity to release him on investigative liberation for 28 days, and then question him again. Thus to permit the police to continue questioning him after being charged (even with the court’s permission, or subject to certain conditions) would in our opinion violate the rule that a person charged with (and not merely suspected of) a crime should not be questioned by the police such that he might incriminate himself. The police can continue making other investigations, such as questioning witnesses, carrying out searches, conducting scientific tests: but they should not in our view be permitted to continue questioning the person charged.” (p 12-13)

## **Child and Other Vulnerable Suspects**

The Carloway report (2011) stated that “suspects who are vulnerable, whether by age or other reason, require extra protection” (p 203). In relation to existing safeguards, it highlighted that:

- child suspects under the age of 16 must have the fact of their being held in police custody intimated to their parents (or other responsible persons)<sup>28</sup>
- the presence of an appropriate adult should be secured in relation to other vulnerable suspects who are to be interviewed in police custody<sup>29</sup>

However, the report suggested that current provisions do not go far enough:

“Although the fact that a suspect is a child is a factor to be taken into account by a court in determining the fairness of any interview, there are few additional protections, over and above those available to all suspects, which apply to the questioning of child suspects at a police station.” (p 207)

“Where an interview is deemed unfair because of inadequate provision to deal with a person’s vulnerability, evidence of his/her answers will be excluded as inadmissible, if objected to. However, there are few specific statutory rules which make provision for the identification or treatment of the vulnerable suspect at the stage of the police investigation.” (p 231-232)

In light of this, it proposed a number of additional safeguards for child and other vulnerable suspects faced with police custody and/or questioning (outlined below).

The report also considered the definition of vulnerable suspects. Article 1 of the [United Nations Convention on the Rights of the Child](#) (UNCRC) defines a child as someone “below the age of 18 years unless under the law applicable to the child, majority is attained earlier”. Although various elements of Scots law use lower ages (eg 16) when distinguishing between children and adults, the Carloway report (p 216) argued that, given the wording of the UNCRC, it would be “difficult to see what age, other than up to 18 years, would be appropriate to define a child” in the context of vulnerable suspects. As a consequence of defining a child as a person under the age of 18, the report proposed that existing provisions, under which the parents (or other responsible persons) must be advised that a suspect under the age of 16 is being held in police custody, should be extended to those under the age of 18.

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<sup>28</sup> See section 15(4) of the 1995 Act.

<sup>29</sup> Appropriate adults seek to facilitate communication between the police and people with mental disorders (witnesses, victims, suspects and accused persons). Further information is available on the Scottish Government’s website under the heading of [‘Appropriate Adults’](#).

In relation to other suspects affected by vulnerabilities of a permanent or semi-permanent nature,<sup>30</sup> the Carloway report stated that:

“there should be a statutory definition of a ‘vulnerable suspect’. This should be, in broad terms, a person who, in the view of the police officer authorising the suspect’s detention, is not able to understand fully the significance of what is said to him/her, of questions posed or of his/her replies because of an apparent (a) mental illness; (b) personality disorder; or (c) learning disability”. (p 233-234)

Proposals made by the Carloway report for additional safeguards included:

- best interests of the child – there should be a general statutory provision that, in taking any decision regarding the arrest, custody, interview and charging of a child, whether by the police or the procurator fiscal, the best interests of the child shall be a primary consideration
- right of access to a parent (or other responsible person) – all children should have this right if detained by the police and, in any event, in advance of and during any police interview (provided that access can be achieved within a reasonable time); only those children aged 16 or 17 should be able to waive the right
- role of appropriate adult in relation to other vulnerable suspects – statute should provide that such suspects must be provided with the services of an appropriate adult as soon as possible after being taken into custody and prior to any questioning; define the role of an appropriate adult; and set out appropriate qualifications
- right of access to a solicitor where a suspect is held in police custody or is attending a police station on a voluntary basis for questioning – children under the age of 16 should not be able to waive this right; children aged 16 or 17 should be able to waive the right with the agreement of a parent (or other responsible person); other vulnerable suspects should be able to waive the right with the agreement of the appropriate adult

The Bill generally seeks to give effect to the above recommendations (with some points of difference in relation to various details).<sup>31</sup> A notable difference is that the Bill would not allow other vulnerable suspects to waive the right of access to a solicitor with the agreement of an appropriate adult. The policy memorandum published along with 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. 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 suspects had done so, not fully understanding the caution or terms of interview, and the subsequent concerns about the admissibility of statements made during interview). The Scottish Government is content with the current position as set out in the Lord Advocate’s guidance.” (para 127)

In relation to allowing children aged 16 and 17 to waive the right of access to a solicitor (with the agreement of a parent or other responsible person), the analysis of responses to the Scottish Government’s consultation (Why Research 2012) noted that a majority of those responding on the point disagreed with the proposal and/or expressed concerns. The policy memorandum states that:

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<sup>30</sup> In considering possible additional safeguards for vulnerable suspects, the Carloway report was not dealing with suspects who might be unfit for questioning as a result of temporary impairment caused by alcohol, etc.

<sup>31</sup> See sections 25, 30 to 34 and 42 of the Bill.

“The Scottish Government considered making the provision of legal advice mandatory to all under 18s. However, it recognised that it is important to distinguish between the different needs, stages of development and potential circumstances of older and younger children. Thus, while it might appear attractive to treat all individuals under 18 years consistently, the age-based laws which allow for seventeen year olds to be living independently and married reflect the quite different contexts and degrees of self-determination that can exist between a 10 and a 17 year old. The Scottish Government preferred an approach which would allow children aged 16 and 17 years to make their own decisions with safeguards in place to support them in this.” (para 115)

Those arguing that children aged 16 and 17 should not be able waive the right of access to a solicitor included the Sheriffs’ Association, the Scottish Human Rights Commission and the Senators of the College of Justice. One consultation response argued that:

“It is submitted that 16 and 17 year-olds should be afforded the same protection as is proposed for the under-16s (...) by simply not being permitted to waive their right to a lawyer at all. Some parents are intelligent, engage and show sound judgment, while others are lacking in some or all of these qualities. It creates something of a lottery if the legal protection afforded to the young person by having a lawyer present depends on what kind of parent he or she has. Indeed, it may be adding a layer of disadvantage to a young person who has already suffered the effects of poor parenting.” (Sutherland 2012, p 4)

In relation to the proposal for a statutory provision stating that the best interests of the child shall be a primary consideration,<sup>32</sup> the same response noted:

“It can be anticipated that there may be some opposition to this proposal from those who, quite correctly, highlight the plight of the victims of crime or emphasise the myriad goals of the criminal justice system. Their concerns may be assuaged by noting the requirement here is that the best interests of the child would be ‘a primary consideration’ – not ‘the primary consideration’, far less ‘the paramount consideration’. Whole forests have been sacrificed to discussing the distinction between these tests, but it is encapsulated well in the Carloway Report where it explains the effect of making the best interests a primary consideration in the following terms: ‘This does not mean that it is the only consideration or that it is, in all cases, the most important consideration’. (...) Taking such an approach is wholly consistent with the requirements of the relevant international instruments and, in particular, the UN Convention.” (Sutherland 2012, p 2)

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<sup>32</sup> The relevant provision in the Bill (section 42) deals only with the police (not the prosecution).

# CORROBORATION AND STATEMENTS

## Corroboration

Section 57 of the Bill seeks to abolish the current general requirement for corroboration in criminal cases.<sup>33</sup> The Bill goes on to provide that this change will apply to offences committed on or after the day on which section 57 comes into force.

The Carloway report (2011) outlined the current requirement for corroboration in criminal cases:

“According to the requirement, there must first be at least one source of evidence (ie the testimony of one witness) that points to the guilt of the accused as the perpetrator of the crime. That evidence may be direct or circumstantial.<sup>34</sup> Secondly, each ‘essential’ or ‘crucial’ fact, requiring to be proved, must be corroborated by other direct or circumstantial evidence (ie the testimony of at least one other witness).

Generally, there are two crucial facts requiring proof in every crime: (1) that the offence was committed; and (2) that the accused committed it. (...)

There are some limited statutory exceptions to the requirement for evidence to be corroborated. These exceptions, which tend to relate to minor crimes, do not attract any substantial adverse criticism.” (p 257-258)

It also noted 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. Its stated purpose, in criminal cases, is to prevent an accused from being wrongly convicted on the basis of a single witness, who may be either fallible or dishonest.” (p 256)

Nevertheless, the report went on to recommend that the requirement for corroboration should be abolished for all categories of crime. In doing so it:

- rejected the argument that the current requirement provides significant protection against wrongful conviction, instead arguing that the real source of such protection is the standard of proof required in criminal cases (ie that the judge or jury must be convinced of guilt beyond reasonable doubt)
- argued that abolishing the requirement would move the focus away from the quantity of evidence (ie whether or not there is corroboration) to the quality of evidence and, by allowing the prosecution of cases where there is strong evidence of guilt but a lack of corroboration, help to prevent offenders from escaping justice
- argued that the current rules relating to corroboration are complex, frequently misunderstood and artificial

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<sup>33</sup> Section 58 of the Bill provides that this change would not affect any other statute requiring corroborated evidence for the proof of a particular criminal offence. The explanatory notes published along with the Bill highlight the example of speeding, in relation to which section 89 of the Road Traffic Regulation Act 1984 requires corroborated evidence.

<sup>34</sup> Examples of direct evidence include eye witness testimony identifying the accused as the perpetrator of the offence. Examples of circumstantial (or indirect) evidence include witness testimony relating to facts (eg the identification of fingerprints) from which other facts (eg the presence of the accused at the scene of an alleged crime) may be inferred.

These arguments are considered below. It may also be noted that, whilst requirements for corroboration do exist in specific contexts in some other jurisdictions, neither the Carloway report nor relevant consultation responses identified any examples of other jurisdictions having a general requirement for corroboration in criminal cases (as is currently found in Scotland). In addition, Scots law no longer has a general requirement for corroboration in relation to civil cases.

In rejecting the argument that the requirement for corroboration provides significant protection against wrongful conviction, the Carloway report stated that:

“in practice, there is no evidence or even anecdote to support the idea that the formal requirement for corroboration reduces miscarriages of justice. In particular, there is nothing to suggest that Scotland has a lower miscarriage of justice rate than any other jurisdiction in the civilised world.” (p 285)

Those who have argued that the current corroboration requirement does provide protection against wrongful conviction include the Senators of the College of Justice (2012):

“In our view, it is often difficult to assess the true facts on the basis only of the evidence of one witness. A witness may be credible and plausible, yet not be telling the truth (or the whole truth). The Scottish courts have on many occasions been grateful for the requirement of corroboration, which in our view provides a major safeguard against miscarriages of justice.” (p 21-22)

And the Sheriffs’ Association (2012):

“It is worth emphasising (...) the difficulties that do exist in practice in deciding whether a witness is credible and reliable. Skilful liars and the honestly mistaken but apparently convincing witnesses are no strangers to the courts. Those difficulties will not be assisted by removing the corroboration requirement. While the corroboration requirement does not prevent wrongful convictions, it is likely to reduce the risk since the court has support for its assessment of a single piece of evidence.” (p 12)

Even if the current requirement for corroboration does provide significant protection against wrongful conviction within the current framework in which criminal allegations are investigated and prosecuted in Scotland, this does not necessarily mean that a different system without such a requirement could not provide equally robust protection. Arguments for additional protections against wrongful conviction are considered below.

In advancing the argument that removing the requirement for corroboration would help prevent offenders from escaping justice, the Carloway report referred to research which the review commissioned COPFS to carry out. The research involved prosecutors analysing samples of cases, which had not been proceeded with due to insufficient evidence, to estimate the proportion of cases in which there would have been a reasonable prospect of conviction if the requirement for corroboration had not applied.<sup>35</sup> Commenting on the research findings, the Carloway report said that:

“They suggest 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. If that is the case, it is hard to avoid the conclusion that the requirement for corroboration is an impediment to justice, rather than a safeguard, in a significant number of cases.” (p 275)

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<sup>35</sup> The COPFS research is set out at Annex A of the Carloway report.

However, the approach taken in the research has met with some criticism. For example, two legal academics have argued that:

“The research design is at best curious and at worst badly flawed. The use of two prosecutors, rather than one prosecutor and one defence lawyer or a retired judge, is justified by a vague and wholly unsatisfactory reference to confidentiality and data protection requirements. That methodology badly undermines the conclusions of the research, given that it is possible that prosecutors and defence lawyers will differ significantly in their estimates of the strength of a prosecution case.

More fundamentally, the very existence of the corroboration requirement in Scots law means that Scottish prosecutors and defence agents alike are ill-placed to assess whether a case prosecuted on the basis of uncorroborated evidence is likely to succeed.” (Chalmers and Leverick 2012, p 852)

With reference to research carried out in England and Wales,<sup>36</sup> the two academics went on to say that:

“This research suggests that, in practice, the abolition of the corroboration requirement would not lead to a significantly greater number of prosecutions or convictions, at least once Scottish prosecutors become accustomed to evaluating cases in the absence of a corroboration requirement.” (p 853)<sup>37</sup>

Much of the debate on whether the corroboration requirement allows offenders to escape justice has focussed on particular types of offence, such as rape, where it can sometimes be difficult to obtain any evidence of guilt beyond the testimony of the (alleged) victim.<sup>38</sup> For example, the Justice Committee’s 2012 letter (setting out its observations on the main issues highlighted in the evidence it took following publication of the Carloway report) noted that:

“The sufficiency of evidence in relation to domestic abuse and, in particular, sexual offences arose in the course of the Committee’s evidence-taking. Whilst the Committee appreciates that the law of criminal evidence should be consistent in application, we also consider that there is a need at least to consider the very low conviction rates for some sexual offences, and whether this points to an innate failing in the way the system currently handles those cases. One witness drew our attention to a 2009 speech by Lord Hope, in which he queried whether our current rules of evidence put certain crimes effectively beyond the reach of the law. These observations should give us all cause for concern.” (p 3-4)

The issue was also highlighted in a consultation response from a sheriff commenting on the proposed abolition of the requirement for corroboration:

“The change being proposed will be of great benefit to the public interest in crimes such as random street attacks on lone pedestrians, rape, bogus workman activity, handbag thefts from the elderly, crimes against disadvantaged victims, domestic violence, and many areas of criminal activity where individuals deliberately select circumstances where the victim is entirely alone, safe in the knowledge that they can escape the consequences.” (Maciver 2013, p 5)

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<sup>36</sup> Research carried out to inform the work of the Royal Commission on Criminal Justice in relation to the corroboration of confessions (1993, chapter 4, paras 56-75).

<sup>37</sup> However, it is worth noting that, whilst the Royal Commission on Criminal Justice concluded that the research studies “suggest that a supporting evidence requirement would affect only a very small percentage of cases”, it also said that “the absolute numbers would nevertheless be quite high” (1993, chapter 4, para 70).

<sup>38</sup> This is reflected in the support of organisations such as Rape Crisis Scotland and Scottish Women’s Aid for removing the requirement for corroboration.

There are, however, differences of opinion in relation to whether abolishing the requirement for corroboration would have a significant impact on the number of successful prosecutions for such offences. The Justice Committee's 2012 letter went on to say that:

"The Committee appreciates that concerns over conviction rates for certain offences, such as rape, are not new, and that a number of initiatives have been pursued over the years, with varying rates of success. In any country that respects the rule of law and the principle that a conviction should only be secured on the basis of proof beyond reasonable doubt, there is always going to be a fundamental difficulty in successfully prosecuting cases characterised by one witness as being of a 'he said, she said' character. Whilst some witnesses (including Lord Carloway) argued that the abolition of corroboration would allow some cases to go to Court, where previously they would not have been proceeded with, and that this was a good thing, they were also at pains to stress that abolishing the rule should not be seen as leading, on its own, to a radical increase in the number and proportion of convictions secured." (p 4)

As noted above, the Carloway report argued that the current rules relating to corroboration are complex, frequently misunderstood and artificial. The report described a process in which a simple but inflexible requirement for corroboration was made more complex by:

"the law bending in the face of a requirement which, if strictly applied, cannot operate satisfactorily in practical terms in the modern world of criminal justice, since it would result in very few convictions despite the existence of strong circumstantial, or even direct, evidence". (p 259)

This process of development might be seen as weakening any argument for retention based primarily on the long history of the corroboration requirement in Scots law:

"Unlike many, I am not appalled at the idea of removing a rule of evidence that has frequently been re-engineered to enable it to perform its corroborative purpose."  
(Raitt 2012)

However, even if it is accepted that the current rules can be complex, it may be argued that this is not in itself a reason for abolition (eg as opposed to clarification) if the overall practical effect of having a requirement for corroboration is still positive:

"There is no doubt that this area of law is now a highly technical one, and few would claim that it is entirely satisfactory. The question must therefore be whether it serves a useful purpose." (Chalmers and Leverick 2012, p 853-854)

One of the concerns highlighted in relation to the case (as put forward in the Carloway report) for removing the need for corroboration is that it fails to give due weight to a widely held view that more harm is generally caused by convicting an innocent person than by failing to convict a guilty person. For example:

"Most remarkably, Lord Carloway and the Scottish Government are completely silent on the criminal justice system's long-standing commitment to principled asymmetry. (...) the criminal justice system is not meant to treat the risk of injustice caused by wrongful acquittals, let alone wrongful non-prosecutions, as equivalent to the risk of unjust convictions. As we have seen, it is designed to accept a considerable number of unjustified acquittals to prevent even a small number of unjustified convictions."  
(Nicolson and Blackie 2013, p 167)

Another concern expressed in relation to the possibility of ending the current requirement for corroboration is that it could result in the police and prosecution being less diligent in seeking

out and presenting supporting evidence. For example, the Faculty of Advocates (2012) has stated that:

“There is a legitimate concern that if corroboration is not required then, even where it is potentially available, the police will not carry out exhaustive enquiries to discover it and the Crown, in certain circumstances, will simply not lead it. In the current climate where there are significant pressures on resources and pressure by way of time and cost there is a real possibility that only the bare minimum will be done. This could easily have the effect of causing, rather than preventing, miscarriages of justice for complainers as well as for accused persons. Often, it is the apparently minor piece of corroborative evidence that makes rather than breaks a case.” (para 54)

Both the police and prosecution have sought to rebut such concerns:<sup>39</sup>

“Concern has been expressed elsewhere that the removal of the onus of corroboration would lessen the amount of enquiry carried out by the police into the facts of the case. This was rebutted by ACPOS in evidence and remains our position. Under the current requirements of corroboration we continue to investigate cases beyond bare sufficiency and that would remain to be the case, always aiming to present both the best evidence and all available evidence to the Crown.” (Association of Chief Police Officers in Scotland 2012, p 35)

“Whilst COPFS recognise that the abolition for the requirement of corroboration is one of the most controversial of the recommendations, the standard required for the Crown to prove each charge ‘Beyond Reasonable Doubt’ remains a high threshold and an evidential test would be put in place by the Lord Advocate to ensure that there is both a qualitative test and a public interest test which require to be met prior to taking proceedings.” (COPFS 2012, p 4)

As noted earlier, responses to the Scottish Government’s consultation (2012a) on the proposals set out in the Carloway report led to the publication of a second consultation paper (2012c). The additional consultation sought views on a number of possible additional areas of reform, on the basis that they might help to ensure that the planned reform of corroboration does not lead to more wrongful convictions. These and other suggestions for additional reforms are considered below, under the heading of ‘additional safeguards’.

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<sup>39</sup> However, not all police organisations have expressed support for removing the requirement for corroboration (eg see the consultation response from the Police Service, Scottish Police Federation and Association of Scottish Police Superintendents Staff Associations (2012)).

## Admissibility of Statements made by the Accused

Section 62 of the Bill seeks to take forward Lord Carloway's recommendation that exculpatory statements, or mixed statements (partly incriminating and partly exculpatory), made by an accused person to the police (or other officials investigating an offence) should not be held inadmissible on the basis of 'hearsay' rules.

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." (para 3.2)

The justification for having such a rule has been described as follows:

"The rationale for the rule, which operates to exclude evidence that would otherwise be relevant, is largely based upon fear as to truthfulness and accuracy since the court is unable to assess the credibility and reliability of the evidence from the maker of the statement in court, on oath, and subject to cross-examination, and instead is faced with second best evidence from a third party who may not be credible or reliable as to what was overheard or seen. There is also fear that juries are unable to bear these factors in mind when assessing the probative value of the evidence." (Ross and Chalmers 2009, p 126)

The Carloway report (2011) considered this area of law in relation to the admissibility of statements made by an accused person outwith court (eg in response to police questioning).

A confession made by an accused person is covered by an exception to the general rule against hearsay evidence and is, therefore, admissible as evidence of the truth of the things said.<sup>40</sup> This exception has been justified on the basis that a person has less interest in lying where a statement is purely incriminatory.

In relation to statements which are exculpatory or mixed, the Carloway report noted:

There is 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." (p 302)

However, it argued that:

- it is 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
- 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

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<sup>40</sup> Provided that other rules relating to admissibility of evidence do not exclude the confession.

It went on to recommend that:

“the distinction between incriminatory, exculpatory and mixed statements should be clarified so that, so far as statements made to the police or other officials in the course of an investigation are concerned, no distinction is drawn between them in terms of admissibility. All statements made by accused persons to such persons in that context should be admissible in evidence for all generally competent purposes, including proof of fact, in the case against that accused except where the content of a statement would otherwise be objectionable; and

further consideration should, in due course, be given to whether this rule should be applied to all pre-trial statements by accused persons.” (p 313)

The Scottish Government’s consultation (2012a) on the Carloway Report indicated its support for the recommendation on statements made to the police or other officials. It stated that it would consider further the possibility of reviewing the wider law of hearsay.

The analysis of responses to the Scottish Government’s consultation (Why Research 2012) indicated that most of those responding on the point agreed that the rules distinguishing the treatment of incriminatory, exculpatory and mixed statements should be simplified allowing the courts to assess them more freely. It also noted that:

“There was agreement that only statements made to the police or other officials should be allowed as this provides a safeguard against the use in evidence of statements made by the accused to friends or associates.” (para 11.17)

It may be noted that there was some disagreement amongst legal bodies with, for example, the Senators of the College of Justice, Sheriffs’ Association and Faculty of Advocates indicating support for the recommendation in their responses to the consultation, whilst the Law Society of Scotland argued that “no compelling case for change has as yet been made out” (2012, p 24).

## **PROPOSED ‘ADDITIONAL SAFEGUARDS’**

### **Background**

Following its consultation on the recommendations set out in the Carloway report, the Scottish Government published a second consultation paper in which it acknowledged strong support for having additional safeguards against miscarriages of justice if the general requirement for corroboration is removed:

“What emerged clearly from the consultation is that, irrespective of their views on whether the requirement for corroboration should be removed, the great majority of respondents believe that additional safeguards are required if the requirement for corroboration is to be abolished. This further consultation therefore considers the safeguards which are currently in place and puts forward a number of proposals in areas highlighted by respondents.” (Scottish Government 2012c, para 8)

The Justice Committee’s 2012 letter to the Cabinet Secretary for Justice had also noted that a number of witnesses had “highlighted the importance of ensuring that any future work on corroboration should avoid considering that single issue in isolation” (p 3).

The second Scottish Government consultation sought views on three additional areas of possible reform:

- changes to the current system under which a guilty verdict only requires the support of eight out of 15 jurors
- giving the judge in a jury trial the power to acquit the accused, without referring the matter to the jury, where the judge considers that no reasonable jury could convict
- removing the ‘not proven’ verdict as an option in criminal cases

Suggestions for other possible reforms (highlighted in response to the proposal to remove the need for corroboration) are discussed below. More generally, it has been argued that the protection of civil liberties requires:

“a commitment to take seriously principled asymmetry and the overprotection of suspects, as well as more time than Lord Carloway had for such a mammoth task. There is also a need for a wider focus on all elements of the criminal justice system, including many aspects of evidence law (most notably the treatment of confessions and previous convictions), the inability of accused to choose jury trials, police, prosecution and defence counsel behaviour, and duties of disclosure, to name just the most obvious.” (Nicolson and Blackie 2013, p 178)

It has also been argued that:

“If the requirement of corroboration were to be abolished without alternative safeguards being put in place, this could leave the level of protection available against wrongful conviction in Scotland at a dangerously weak level. (...) The onus should be on the Scottish Government to prove that its proposals are a safe way to run a justice system, not on critics to prove that they are unsafe.” (Chalmers and Leverick 2013, p 96)

The only one of the proposed additional safeguards taken forward in the Bill as introduced relates to jury majorities.

## Jury Majorities

Under current rules, a jury returns a verdict of guilty where at least eight of its members support that verdict. This level of support is required whether the jury has a full complement of 15 jurors or is reduced in numbers (eg because one or more jurors have been excused).<sup>41</sup> Where a guilty verdict does not attract the support of at least eight jurors the accused is acquitted. Under these rules, a person may be convicted on the basis of a simple majority (ie eight out of 15) and there is no potential for a hung jury (ie the only possible outcomes are a finding of guilt or an acquittal).

Section 70 of the Bill seeks to introduce a system under which a guilty verdict requires the support of at least two-thirds of the jury (eg ten jurors where it has a full complement of 15 members).<sup>42</sup> Any other result would lead to an acquittal.

The analysis of responses to the consultation on additional safeguards noted that:

“The main theme to emerge was that respondents see a move to a weighted majority as necessary or essential; some believe it is necessary regardless of the removal of the requirement for corroboration. Respondents felt that a qualified majority system would provide a safeguard against an accused person being convicted by a simple majority on testimony from a single witness or piece of evidence.

<sup>41</sup> A criminal jury must retain at least 12 jurors to be properly constituted.

<sup>42</sup> This may be described as a requirement for a ‘weighted’ or ‘qualified’ majority.

Opinions differed over the size of a majority; most of those who specified favoured a majority of 10 or more out of 15 jurors. The main themes to emerge on this issue were: the need to ensure that there is justification for the number that is chosen; and that the majority should be in line with other countries.”<sup>43</sup> (Why Research 2013, paras 1.7-1.8)

Some concerns were expressed in relation to any proposal to reform this area of the law without further research. For example:

“Clearly this is largely unexplored and hitherto unconsidered territory and it would be extremely dangerous to attempt to begin to interfere with the constitution of the jury or the size of any required majority verdict in the absence of careful investigation.” (Maciver 2013, p 9)

However, there was strong support for reform with, for example, the Faculty of Advocates (2013) stating that:

“In the event that the requirement for corroboration is removed, the current simple majority jury system would be unsustainable. In those circumstances, the testimony of a single witness would be sufficient to convict an accused even where seven members of the jury disbelieve that witness.” (p 1)

Arguments for requiring more than a two-thirds majority in favour of guilt included:

“Proof beyond reasonable doubt does not necessarily require unanimity within the jury. Having some dissenters does not always mean that the jury as a collective body has a doubt. The question then becomes one of how many jurors can disagree on the question of guilt of the accused before the overall verdict indicates a collective doubt.

The Government propose that the required majority for a guilty verdict should be 9 or 10.<sup>44</sup> However, these figures would still leave one-third of a jury voting against conviction, a situation which points to a reasonable doubt by the jury collectively. I would suggest a number greater than 10, either 11 or 12.” (Maher 2013, p 3)

The Scottish Government’s (2012c) consultation on additional safeguards had proposed that both convictions and acquittals should require the support of a majority of jurors, with a minimum of nine or ten jurors being suggested. This would have introduced the possibility of hung juries (eg where eight support acquittal and seven support conviction, or vice versa). This approach is not adopted in the Bill. The analysis of responses to the consultation reported that:

“In relation to the need for a majority for acquittal, many respondents felt that failure to convict should automatically result in acquittal.” (Why Research 2013, para 1.9)

Those arguing against the possibility of having hung juries included the Senators of the College of Justice (2013):

“We find it difficult to identify any justification for it. We consider this proposal to be illogical and contrary to the presumption of innocence. An accused person is presumed to be innocent and remains innocent unless and until the jury are satisfied beyond reasonable doubt of his guilt. In our view, once an appropriate qualified majority is identified, failure to reach that majority should result in acquittal. The Crown would have failed to displace the presumption of innocence by satisfying the

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<sup>43</sup> Appendix B of the Scottish Government’s (2012c) consultation on additional safeguards provides relevant information on jury systems in a number of other countries.

<sup>44</sup> Suggested figures in the Scottish Government’s (2012c) consultation on additional safeguards.

jury beyond reasonable doubt of the guilt of the accused. In these circumstances we consider that an acquittal should follow.” (p 4)

And Victim Support Scotland (2013):

“In the interest of victims, trials should not be drawn out due to lengthy jury deliberations and, in worse case scenarios, a retrial due to the jury’s inability to reach a verdict. As such we support retaining the current system where insufficient ‘guilty’ votes from jurors results in an acquittal.” (p 1)

## **Withdrawal of Case from Jury**

As noted above, the Scottish Government’s (2012c) consultation on additional safeguards proposed that the judge in a jury trial should be given the power to acquit an accused, without referring the matter to the jury, where the judge considers that no reasonable jury could convict on the basis of the evidence led.

The analysis of responses to the consultation reported that “far more respondents agreed with this suggestion (20) than disagreed (three)” (Why Research 2013, para 6.4). The proposal is not, however, taken forward in the Bill as introduced. The policy memorandum (para 182) published along with the Bill indicates that the Scottish Government’s decision not to take forward this proposal in the Bill was taken in light of concerns expressed by the judiciary and victims’ groups.

The judiciary had mixed views on the proposal. The consultation response from the Senators of the College of Justice (2013) noted that, whilst a minority of their number were in support of the proposal, the majority were not – fearing that it would involve the judge taking over the function of the jury. The response from the Sheriffs’ Association (2013) stated that:

“We do believe that the introduction of a limited power for the judge to withdraw the case from the jury would be necessary if the corroboration rule were to be abolished. We think that such a long stop power would be necessary to avoid the risk, small though it may be, that a jury might otherwise wrongly convict a person on the basis of manifestly flimsy or unreliable evidence especially where derived from only one source. (...) In so saying, we are mindful that the introduction of such a power might be seen to usurp the role of the jury.” (p 5)

In addition to the question of whether such a power might undermine the role of the jury, some victims’ groups were concerned that arguments over whether the power should be used in a particular case could unnecessarily delay its conclusion.

## **Three Verdict System**

As things stand, three verdicts are available to a judge or jury in a criminal case – ‘guilty’, ‘not guilty’ and ‘not proven’. The implications of a not proven verdict are the same as a not guilty verdict in that the accused is acquitted.

The existence of the not proven verdict has been criticised over the years on various grounds, including that it runs counter to the presumption of innocence (if the prosecution cannot prove its case the accused should be found not guilty) and can cause confusion. It is currently the subject of a proposal from Michael McMahon MSP for a [member’s bill](#), which would seek to introduce reforms moving to a two verdict system and increasing the majority of jurors required for a conviction.

The Scottish Government's (2012c) consultation on additional safeguards also sought views on whether the not proven verdict should be abolished. Considering its abolition in the context of calls for more safeguards against wrongful conviction may seem odd, given that the verdict is sometimes characterised as one such safeguard. For example, the consultation response from the Senators of the College of Justice (2013) said:

“It seems to us that it is not appropriate to address the question of whether the ‘not proven’ verdict should be retained in the context of introducing additional safeguards in the light of the abolition of the requirement for corroboration. (...) The abolition of the not proven verdict may be seen as the removal of an additional safeguard rather than the introduction of one.” (p 7)

However, the Carloway report (2011) had suggested that “if the issue of majority verdicts were to be examined, a review of the three verdict system (ie ‘not proven’) would have to follow” (p 20).

The analysis of responses to the Scottish Government's consultation reported that there “was broad support for the removal of the not proven verdict” (Why Research 2013, para 1.12). Despite this, the Bill as introduced does not seek to change the current three verdict system. The policy memorandum published along with the Bill states that:

“a significant minority of respondents were concerned that time should be given to allow the impact of implementing Lord Carloway's recommendations to be assessed before making changes to the three verdict system. The Scottish Government has therefore determined that the ‘not proven’ verdict should be retained for the time being and further consideration given to whether it remains appropriate in light of the implementation of the other changes proposed following the Carloway review.” (para 181)

The Scottish Government has indicated that it has agreed in principle with the Scottish Law Commission that a review of the not proven verdict should be carried out by the commission.

## Other Possible Safeguards

Various other reforms have been highlighted in response to the proposal to remove the need for corroboration, including:

- greater powers for judges to exclude evidence
- provision for judges to warn juries about the dangers of convicting on uncorroborated evidence
- ending the use of 'dock identification'
- allowing the defence greater freedom to challenge the credibility of the complainer in sexual offence cases

With regard to the exclusion of evidence, the Scottish Human Rights Commission (2013) has argued that:

“The strength of the system of procedural safeguards of a fair trial would be enhanced by the introduction of statutory powers to allow judges to exclude particular pieces of evidence where they consider that to admit them may render the trial unfair (similar to section 78 PACE),<sup>45</sup> and to stop proceedings which are based wholly or partly on evidence that is so unconvincing that, given its significance to the case, the trial would be unfair.” (p 12)

The Sheriffs' Association (2012) has suggested that removing the requirement for corroboration might necessitate warnings to juries about the dangers of convicting on uncorroborated evidence. However, the Senators of the College of Justice (2013) have indicated their support for leaving any such warning to the discretion of the trial judge rather than making it a statutory requirement.

Those who have raised concerns about the continued use of dock identification include the Law Society of Scotland (2013a):

“if the requirement for corroboration is to be abolished then the identification from one witness alone would be sufficient. If that identification is to come from the witness picking out an accused at trial when the accused is sitting between security officers in the dock of the court then there must clearly be a concern that this is the only form of identification in the case assuming that there is no other evidence that the accused was the perpetrator of the crime. This should therefore not be regarded as sufficient identification of the accused.” (p 4)

In relation to the ability of defence lawyers to cross-examine prosecution witnesses, there have been arguments for reform in different directions. For example, the Public Defence Solicitors' Office (2012) has argued for greater freedom to challenge the truthfulness of the complainer in sexual offence cases:

“We are also of the view that if the requirement for corroboration is removed then sexual cases will become only about the credibility and reliability of the complainer. Given this then we are of the view that sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 should be repealed. At present section 274 can prevent a jury from hearing evidence about a prior false allegation of sexual assault that has been made by the complainer even if that evidence meets the relevance test under common law. In a system that has corroboration then this may be acceptable.

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<sup>45</sup> Section 78 of the Police and Criminal Evidence Act 1984 (PACE) extends only to England and Wales.

When a trial becomes only about the veracity of the complainer then to retain section 274 would create an unjust imbalance.” (p 16-17)

However, Scottish Women’s Aid (2013, p 2) have said that there “is a need to change judicial culture to a more interventionist approach in situations where excessively aggressive or intrusive cross-examination is undertaken”.

## SOLEMN PROCEDURE: SHERIFF AND JURY CASES

### Current Procedures

The main stages in a sheriff and jury case (ie one dealt with in a sheriff court under solemn procedure) are:

- initial decision to prosecute under solemn procedure – the COPFS decides whether the allegations are serious enough to justify prosecution under solemn procedure and, if so, prepares a document known as a petition setting out the charges faced by the accused (these charges are subject to change)
- appearance of accused on petition – initial appearance in the sheriff court at which the issue of bail is dealt with<sup>46</sup>
- investigation and discussions – 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
- section 76 indictments<sup>47</sup> – where discussions between the COPFS and defence result in an acceptable plea to some or all of the charges being agreed, the COPFS can indict the case to a special hearing before a sheriff (instead of indicting it to a first diet and trial sitting) at which the accused will be asked to confirm the plea<sup>48</sup>
- appearance of accused at first diet (assuming the accused does not plead guilty under section 76 procedure) – appearance in the sheriff court at a pre-trial procedural hearing during which the sheriff can, amongst other things, enquire into the state of preparation of the COPFS and defence (the equivalent stages in High Court and summary cases are preliminary hearings and intermediate diets)
- trial – a sheriff court trial sitting may be scheduled to last a number of weeks with more than one case being set to call during that period

The following time limits apply to sheriff and jury cases:<sup>49</sup>

- 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

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<sup>46</sup> The first two stages are common to solemn procedure cases which are ultimately dealt with in both the sheriff courts and the High Court.

<sup>47</sup> Named after the relevant statutory provisions in section 76 of the 1995 Act.

<sup>48</sup> Guilty pleas to some or all of the charges faced by an accused may be tendered at other stages of a case (at first diet or trial). However, an early plea under section 76 procedure will generally produce greater savings and reduce inconvenience (eg as a result of not having to cite witnesses), and may attract more of a sentence discount.

<sup>49</sup> See section 65 of the 1995 Act.

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 be extended by the court)
- 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

## **Problem Areas**

The Bowen report (2010) identified a range of problems in how sheriff and jury procedures work in practice, noting that:

“by and large these either contribute to, or are a consequence of, the number of cases which are set down for trial yet do not proceed”. (para 5.4)

Concerns included:

- communication between prosecution and defence – complaints from both sides about difficulties in engaging in meaningful discussions with the other prior to the first diet
- first diets – too many cases in which the parties have not reached the appropriate stage of preparation by the time of the first diet and a need for greater consistency in the management of cases by sheriffs
- trials – problems arising from trial sittings being overloaded with cases on the assumption that most trials will not proceed (eg leading to inconvenience for court users)
- pressure on prosecutors – evidence of relatively inexperienced prosecutors having to manage the significant administrative burden of trial sittings with large numbers of cases whilst, at the same time, starting a trial

Not all of the proposals for reform put forward in the Bowen report required legislation. The main recommendations which would be considered below (together with the response of the Scottish Government and stakeholders).

## **Communication between Prosecution and Defence**

The Bowen report (2010) recommended the establishment of ‘compulsory business meetings’ (CBMs) between the prosecution and defence in sheriff and jury cases. It stated that:

“the introduction of a ‘business meeting’ mirrors best practice already taking place 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. Currently both the Crown and defence state they are willing to engage in early discussion but this often does not occur or is ineffective. The purpose of making the meeting compulsory is to establish as routine a process of effective engagement and discussion. The CBM should nevertheless be seen as only one stage in the communication process. It does not prevent communication happening informally prior to or after the CBM takes place.” (para 6.6)

Specific recommendations in relation to CBMs included that:

- they should generally be held prior to the indictment being served in the case
- they should, wherever practicable, involve a face-to-face meeting
- a written record of any CBM should be lodged with the court prior to the first diet

Section 66 of the Bill generally seeks to give effect to the above recommendations. A notable difference is that the Bill provides for the CBM to take place between service of the indictment and first diet (rather than prior to service of the indictment). In addition, the Bill does not seek to prescribe that the CBM should normally involve a face-to-face meeting.

The policy memorandum published along with the Bill notes that:

“Sheriff Principal Bowen recommended that the compulsory business meeting take place before the indictment, to allow for engagement as early as possible, and that it should be by a face-to-face meeting wherever practicable. The Scottish Government considered this approach, and consulted on doing precisely this.

However, responses to the consultation suggested that parties would become clear on what matters they had to discuss only after the indictment is served. Some respondents to the consultation considered a requirement to hold face-to-face meetings would be practically difficult, be expensive and resource dependent. Since the Sheriff Principal reported, one of the objections to e-mail communication – that it was insecure – had been alleviated by the provision of new, secure systems. The Scottish Government was persuaded that delaying the compulsory business meeting until after the indictment, and allowing it to be held by electronic communication, would allow informed discussion in a way which promoted efficiency of time and money.” (paras 169-170)

## **Scheduling and Management of Cases**

The Bowen report (2010) recommended that sheriff and jury cases should be indicted to a first diet without, at the same time, allocating a trial sitting (thus bringing this element of sheriff and jury procedure into line with High Court procedure). Instead, a trial should only be scheduled once the sheriff is satisfied that all outstanding issues have been resolved. Only at this point would witnesses be cited (thus reducing the numbers of witnesses cited unnecessarily). The report argued 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. This should reduce the administrative burdens on SCS<sup>50</sup> and fiscals who are due to conduct trials, and ought to lead to more certainty for defence agents.” (para 6.2)

The Bowen report also put forward a number of proposals aimed at strengthening the judicial management of cases at first diets (only some of which require legislation). It noted that:

“to make first diets work effectively the court will need to make full enquiries of parties who will need to be in a position to respond to these enquiries. It is important to stress however, that there needs to be a fundamental change of mind set by the Crown and defence so that they appear for first diets as fully prepared as possible and do not continue the current practice of seeking continuations to finalise their preparations.” (para 6.28)

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<sup>50</sup> The Scottish Court Service (SCS) provides administrative support for the courts and judiciary.

Section 67 of the Bill seeks to give effect to the recommendation that a trial should only be scheduled once the sheriff dealing with the first diet is satisfied that outstanding issues have been resolved.

The analysis of responses to the Scottish Government' consultation (Research Shop 2013) reported that:

“Most respondents agreed with the proposal that cases should be indicted to a first diet only. The key benefits were identified as bringing consistency with High Court procedure, and reducing inconvenience and stress to victims and witnesses.” (para 6.10)

However, a response from the Law Society of Scotland (2013b) expressed a note of caution, questioning “whether a system which may work comparatively well in the High Court can be transferred to sheriff and jury” (p 5).

## Time Limits

The Bowen report (2010) proposed some changes to the statutory time limits in sheriff and jury cases. The proposals sought to allow more time for the better preparation of cases and reduce some of the pressures caused by higher levels of business. It reported that:

“This increase in business, particularly with priority cases, has undeniably had a significant impact on the ability of all parties to prepare cases properly within the current available timescales. The fact of the matter is 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. It is not possible to resolve these issues without changing the system. You cannot pack more and more priority cases into the system and require such cases to be prepared more effectively unless there is a significant increase in resources made available to those organisations involved in the court process. You cannot have it both ways. The alternative is that the system has to adjust.” (para 6.37)

In light of this, the report 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)<sup>51</sup>
- 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)

Section 65 of the Bill seeks to make the above changes to time limits.

The analysis of responses to the Scottish Government' consultation (Research Shop 2013) reported that:

“The balance of views was in favour of extending the current time bar (...) from 110 days. Arguments in favour of an extension in principle included facilitating the

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<sup>51</sup> The Bowen report did not recommend any change to the current 80 day rule in custody cases.

proposal to indict to the first diet only; bringing consistency with the High Court; and giving more preparation time for complex cases. However, others felt the proposal to be a disproportionate response for lower end cases, with no strong justification for change.” (para 7.9)

Those arguing against the proposed changes to existing time limits included the Law Society of Scotland (2013b). In addition, a response from Justice Scotland (2013) raised concerns about the willingness of the court to extend the existing 140 day time limit in High Court cases:

“The 140 day time limit for custody trials to commence has been ignored to a significant extent, with extensions granted so frequently as to appear almost routine. The reasons for extensions vary, including, for example, late disclosure of forensic reports requiring further time for the defence to respond and the availability of counsel. It is important that the same laxity does not feature in sheriff and jury cases, such that a slippage of the 140 day time limit occurs here also, were it to be applied.” (para 10)

## SENTENCING

### Weapons Offences

Section 71 of the Bill seeks to increase the maximum sentence for various statutory offences relating to the possession of a knife or offensive weapon in a public place, school premises or a prison.<sup>52</sup> The custodial sentence which may be imposed under solemn procedure would increase from four to five years. This would bring the maximum sentence for these statutory offences into line with the general limit placed on the sentencing powers of a sheriff court dealing with a case under solemn procedure – see section 3(3) of the 1995 Act.

The Bill does not seek to alter the maximum custodial sentence of 12 months which may be imposed under summary procedure for these offences. This period is the same as the general limit placed on the sentencing powers of a sheriff court dealing with a case under summary procedure – see section 5(2) of the 1995 Act

Some of the current maximum sentences outlined above are the result of relatively recent Scottish Parliament legislation. For example:

- possession of a knife in a public place or on school premises – maximum custodial sentence under summary procedure increased from six to 12 months, and under solemn procedure from two to four years, by the Police, Public Order and Criminal Justice (Scotland) Act 2006
- possession of an offensive weapon in a public place or on school premises – maximum custodial sentence under summary procedure increased from six to 12 months by the Criminal Proceedings etc (Reform) (Scotland) Act 2007
- possession of a knife or offensive weapon in a prison – statutory offence created by the Custodial Sentences and Weapons (Scotland) Act 2007

The policy memorandum published along with the Bill notes that:

“The Cabinet Secretary for Justice announced the Scottish Government’s intention to increase the maximum penalties for knife possession and other offensive weapon

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<sup>52</sup> Offences under sections 47, 49, 49A and 49C of the Criminal Law (Consolidation) (Scotland) Act 1995.

possession offences in November 2012. This forms part of longstanding Scottish Government policy on knife crime to ensure there is tough enforcement available under the criminal law coupled with education and diversion activity. There has been no formal consultation on the proposal.” (para 193)

The Scottish Government statistical bulletin [Criminal Proceedings in Scotland, 2011-12](#) (2012e) includes figures for ‘handling an offensive weapon’. For the purposes of these statistics, the category covers the prohibition on the carrying of knives in public places, as well as other offences placing restrictions on knives and offensive weapons. Relevant figures (reproduced in table 1 below) indicate that the courts have, in recent years, been more likely to impose a custodial sentence where a person is convicted of such offences.

**Table 1: Persons convicted for handling an offensive weapon, % receiving custodial sentence**

Year	2002-03	2003-04	2004-05	2005-06	2006-07
Percentage	26	22	22	26	30
Year	2007-08	2008-09	2009-10	2010-11	2011-12
Percentage	29	30	32	31	35

Source: Scottish Government 2012e, table 9

Figures (reproduced in table 2 below) also disclose a large increase in the length of custodial sentences imposed for such offences, with the average length of sentence rising from 116 days in 2002 to 311 days in 2011-12 (an increase of 168%). The 5% in 2011-12 receiving a custodial sentence in excess of two years equates to 43 people.

**Table 2: Persons convicted for handling an offensive weapon, length of custodial sentence**

Year	Percentage of custodial sentences				Average length of sentence (days)
	up to 3 months	over 3 months to 6 months	over 6 months to 2 years	over 2 years	
2002	56	38	5	*	116
2003	59	37	4	*	112
2004-05	56	40	4	*	111
2005-06	54	41	5	*	117
2006-07	45	36	18	1	160
2007-08	33	32	33	2	217
2008-09	22	37	37	4	263
2009-10	16	38	42	4	274
2010-11	13	40	42	5	288
2011-12	8	39	48	5	311

Source: Scottish Government 2012e, table 10(a) (and previous equivalent bulletins)

\* = less than 0.5%

## Prisoners on Early Release

Section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 allows a court to order that a person who has committed an offence, during a period of early release from a custodial sentence, should be returned to custody to serve part or all of the period of the whole sentence still outstanding at the point when the new offence was committed.<sup>53</sup> This power is separate and additional to the normal powers of the court to sentence the person for the new offence. The court may order that this period of return to custody should be served either before or concurrently with any custodial sentence imposed for the new offence.

Sections 72 and 73 of the Bill seek to: (a) ensure that the courts consider the use of their powers under section 16 of the 1993 Act in appropriate cases; and (b) increase the flexibility

<sup>53</sup> Such orders are sometimes referred to as a ‘section 16 order’.

which the lower courts have to use such powers without referring the matter to a higher court. The policy memorandum published along with the Bill states that:

“While the provisions in the Bill adjust the powers of the different levels of court and require the court to always consider whether to impose a section 16 order, they do not substantively change the overall powers of our courts in this area. The Scottish Government has therefore not undertaken any formal consultation, though they have informally consulted the judiciary about the terms of the provision.” (para 215)

## APPEALS AND SCCRC

### Appeals

The Carloway report (2011) set out a number of concerns relating to delays in progressing appeals and the use of what it referred to as ‘archaic forms of appeal’. It noted that:

“Although there are several time limits stipulating periods for the lodging of appeals and related documents, there are no time limits within which the court must hear and determine an appeal. It is not unreasonable to observe that, in recent years, the reputation of the system has been tarnished by the lengths of time which it has taken to progress some appeals.” (p 332)

In light of such concerns, recommendations of the report in this area included:

- sanctions – proposed that the High Court (in its role as a court of appeal) should have statutory powers to impose sanctions with the aim of enforcing time limits and procedural orders relating to appeals (including the power to dismiss an appeal or to order that particular steps should not be paid for out of public funds)
- applications for late appeals – proposals seeking to establish stricter criteria for the consideration by the High Court of applications to submit late appeals
- ‘archaic forms of appeal’ – proposed that the processes of bill of suspension and bill of advocacy should be abolished with certain statutory powers of appeal being extended to cover any gap left by their abolition<sup>54</sup>

The policy memorandum published along with the Bill states that:

“The Scottish Government proposes to adopt an approach to Lord Carloway’s recommendations which observes their spirit, and in many cases their letter, while taking account of arguments for a different approach in particular cases, as set out below. The proposed approach is to ensure that there are changes to the law which support case management by the courts, promotes the progression of cases and address some of the difficult practices which have led to delay in the past.” (para 221)

The Bill does not provide for the additional sanctions proposed in the Carloway report, with the policy memorandum noting that:

“A possible approach would be for a more detailed application of Lord Carloway’s recommendations on sanctions, including specifying sanctions for breach of time limits and procedural requirements in legislation, or at least the granting of a specific

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<sup>54</sup> The Carloway report (p 347-350) provides information on the use of bills of suspension and advocacy to appeal various types of ruling.

power to make such sanctions by act of adjournal. However, the Scottish Government considered that stating sanctions in statute would be excessively rigid, recognising the general right of the courts to regulate their own activities.” (para 224)

In relation to criteria for late appeals, the Bill includes provisions stating that the High Court should grant an application by a convicted person to extend various time limits applying to appeals “only if it is satisfied that doing so is justified by exceptional circumstances”.<sup>55</sup>

In relation to appeals by way of bill of suspension and advocation, the policy memorandum notes that:

“In implementing Lord Carloway’s recommendations on limiting the available procedures, the Scottish Government considered the maximalist approach he advocated of abolishing bills of suspension and advocation entirely. However, given the difficulty of establishing all the circumstances in which such bills might be used – and thus the effects of abolition – the Scottish Government has chosen essentially to abolish their use only where alternative statutory modes of appeal are provided by sections 74 and 174 of the 1995 Act. The key consideration here has been to avoid leaving open an appeal procedure to which no requirement of leave attaches, where the procedures of section 74 and 174 require it.” (para 227)<sup>56</sup>

Relevant consultation responses included ones from the COPFS (2012):

“COPFS is strongly of the view that in order to increase the efficiency of appellate proceedings, and consequently public confidence in such proceedings, it is vitally important that time limits in appeal case should be enforced.” (p 7)

And the Faculty of Advocates (2012):

“The law provides for time limits in a variety of contexts both in civil and in criminal procedure, and in criminal cases both at first instance and on appeal. It goes without saying that such time limits should, as a general rule, be observed. But the law also, generally, recognises that the strict enforcement of time limits, in various contexts, could work injustice, and permits the court to vary such time limits, or to excuse non-compliance, in appropriate circumstances.” (para 74)

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<sup>55</sup> See sections 76 and 77 of the Bill.

<sup>56</sup> Relevant provisions are set out in sections 79 and 80 of the Bill.

## SCCRC

The [Scottish Criminal Cases Review Commission](#) (SCCRC) is an independent public body tasked with reviewing cases where it is alleged that a miscarriage of justice may have occurred. Following a review, the SCCRC can decide to refer a case to the High Court if it decides that: a miscarriage of justice may have occurred; and it is in the interests of justice that a reference should be made. The High Court can then deal with the case as if it were a normal appeal.

Changes made by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, following the judgement in *Cadder v HM Advocate* (2010), included provision that:

- the SCCRC must, in considering whether it is in the interests of justice to refer a case to the High Court, have regard to the need for finality and certainty in the determination of criminal proceedings
- the High Court may reject a reference from the SCCRC on the basis that it is not in the interests of justice that any appeal arising from the reference should proceed, and that in considering this issue the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings

These changes reflected concerns held by some that the decision in the *Cadder* case might lead to a flood of applications to the SCCRC.<sup>57</sup> The Carloway report (2011) noted that the changes relating to the High Court gave it “a gate-keeping role, relative to the interests of justice, which formerly rested only with the SCCRC” (p 360). The report went on to argue that:

- allowing the High Court to reject a reference from the SCCRC (on the basis of the interests of justice) without actually hearing the appeal may damage public confidence in the role played by the SCCRC and thus in the criminal justice system as a whole
- it may be useful if the High Court could consider and rule upon arguments relating to the interests of justice (in addition to whether there has been a miscarriage of justice) when actually determining appeals originating from an SCCRC reference

Given this, the Carloway report recommended that the gate-keeping role of the High Court in relation to references from the SCCRC should be repealed, but that an ‘interests of justice’ element should be added to the test for allowing appeals.

Consultation responses expressing support for the new approach put forward in the Carloway report included ones from the COPFS, the Faculty of Advocates and the Senators of the College of Justice. Responses welcoming the proposed ending of the High Court’s current gate-keeping role, but not the addition of an ‘interests of justice’ element to the test for allowing appeals, included ones from the Law Society of Scotland and the Scottish Human Rights Commission. They also included a response from the SCCRC (2012) which argued that:

“Issues such as the seriousness of the offence, the age of the case, the previous conduct of the applicant during any appeal, the likely benefit to the applicant or the effect on his reputation and the more general public interests are, it is submitted, both appropriate and pertinent considerations for a quasi-judicial body such as the Commission, to consider when it believes that there is a possibility that an applicant has suffered a miscarriage of justice.

However, once the Commission has made a referral, the SCCRC believes the High Court should treat the appeal in the same way as any other appeal. The only matter

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<sup>57</sup> The Carloway report noted that the feared flood of cases had not materialised.

which should concern the High Court is whether the appellant has suffered a miscarriage of justice. Whilst the SCCRC agrees that matters such as finality and certainty, or the rights of the victim of crimes, should be fully addressed in any comprehensive, effective and fair criminal justice system, it does not believe that it is appropriate that, when hearing an appeal, the High Court should carry out some form of balancing exercise in deciding whether that appeal should be allowed.” (p 8)

Section 82 of the Bill seeks to implement the recommendations of the Carloway report in this area.

## MISCELLANEOUS

### People Trafficking

The Bill seeks to create two statutory aggravations relating to people trafficking. As for aggravating factors in general, where it is proven that someone committed an offence in circumstances where one of the statutory aggravations is also established, that aggravation may lead to a higher sentence. The existence of such aggravations can also assist efforts to publicly highlight certain forms of offending as being particularly serious.

The proposed aggravations in the Bill are:

- section 83 – an aggravation of any offence by the fact that the offender was motivated (wholly or partly) by the objective of committing or conspiring to commit a people trafficking offence
- section 84 – an aggravation of a people trafficking offence by the fact that the offender abused a public position in committing the offence

The Bill goes on to state that ‘a people trafficking offence’ is one under section 22 of the Criminal Justice (Scotland) Act 2003 or section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.<sup>58</sup> The former deals with trafficking for the purposes of prostitution and the latter with trafficking people for exploitation.

In relation to the section 83 aggravation, the policy memorandum published along with the Bill notes that the Equality & Human Rights Commission (EHRC) called for this type of statutory aggravation following its [Inquiry into Human Trafficking in Scotland](#). Further information about the EHRC’s views on the legislative response to human trafficking (including plans for a statutory aggravation) is set out in its recent [follow on report](#) (EHRC 2013, p 26-31).

In relation to the section 84 aggravation, the policy memorandum notes that it is required to meet obligations under Article 4.3 of the 2011 European Union [Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims](#).

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<sup>58</sup> For a recent example of someone being convicted for a people trafficking offence see [‘People Trafficker Jailed for Two Years and Three Months’](#) (COPFS 2013a).

## Use of Television Links

Section 86 of the Bill seeks to allow for greater use of live television links between prisons (or other places of detention) and the criminal courts. It would allow people who are held in custody (eg a person who has already been remanded in custody pending trial for one offence and is now being prosecuted for another) to take part in a greater range of criminal court hearings without being transferred to court. In particular, it would allow a first court appearance to take place by way of television link. The current provisions on the use of television links do not allow this.<sup>59</sup>

Another barrier to extending the use of television links in solemn cases is the current requirement for the accused to sign a written copy of a guilty plea.<sup>60</sup> Section 69 of the Bill seeks to remove the requirement.

This way of participating in court proceedings would not be used in any situation where: (a) the court considered it to be contrary to the interests of justice; or (b) the parties are to lead any evidence relating to a charge. Further details of when television links might be used could be set out in directions made by the Lord Justice General.

The policy memorandum published along with the Bill states that:

“The Scottish Government is fully aware that the move to a wider use of TV links is a cultural change and that great care needs to be taken to ensure that any changes do not in any way jeopardise the efficient disposal of court business or, most importantly, the effective participation of a person in any hearing before the court.

That being the case, any use of these expanded provisions will be extensively piloted as part of the Video Conferencing Project. These pilot programmes will be developed in conjunction with all criminal justice partners including the Judiciary and the Law Society. Only once pilots have been successfully concluded will the use of TV links for first appearances become more widely used.” (paras 255-256)

The possibility of making more use of television links was considered in the Bowen report (2010, paras 9.1-9.5), with the subsequent Scottish Government’s consultation (2012d, p 16-17) seeking views on a number of relevant issues. Relevant consultation responses included ones from the COPFS (2013b):

“In principle COPFS would welcome the development. It may simplify the process and reduce the cost of conveying accused from prisons to the courts. This is especially relevant where accused persons are transported long distances to appear at court for a short period of time and are likely to be required to wait within the court cells for lengthy periods.” (p 8)

And Justice Scotland (2013):

“We are very concerned at the prospect of accused persons having to plead guilty by television link. We acknowledge that links reduce the risks of delay in persons being transported from prison to court and the pressure placed on cells in courts. However, this push for expediency should not be to the detriment of an accused receiving a fair hearing. There are inherent risks in live link proceedings that ill-treatment, misconduct by public officials or other issues such as self-harm, illness, fitness to

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<sup>59</sup> See section 80 of the Criminal Justice (Scotland) Act 2003.

<sup>60</sup> See section 77 of the 1995 Act.

plead, etc will not be noted by the court or lawyer and/or that the detainee may feel inhibited from confiding in the court or lawyer as to such matters.” (p 4-5)

## **Police Negotiating Board for Scotland**

Section 87 of the Bill provides a framework for establishing a Police Negotiating Board for Scotland (PNBS), replacing the current Police Negotiating Board (PNB) in relation to the Police Service of Scotland.

The [PNB](#) currently provides a forum for negotiating the pay and conditions of police officers across the UK. The negotiating parties are the ‘official side’ (representatives of relevant government ministers, police authorities and chief police officers) and the ‘staff side’ (representatives of police staff associations). Where they fail to reach agreement issues can be referred to conciliation and, if that fails, to the Police Arbitration Tribunal. Following negotiations, the PNB makes non-binding recommendations on relevant matters to the Home Secretary, the Scottish Ministers and the Department of Justice in Northern Ireland. If accepted by relevant government ministers they may be given effect through subordinate legislation. Different approaches may be taken in different parts of the UK.

The UK Government’s [Anti-social Behaviour, Crime and Policing Bill](#) includes provisions seeking to abolish the PNB and create a new independent 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.<sup>61</sup>

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 give rise to the need for the legislative consent of the Scottish Parliament. Given this fact, the Scottish Government has produced a [legislative consent memorandum](#) (2013d) which is being considered by the Scottish Parliament’s Justice Committee.

The Scottish Government has indicated that, following consultation with relevant Scottish bodies, it will seek to continue the current collective bargaining approach to police pay and conditions by establishing a PNBS, rather than adopting the approach favoured by the UK Government. As noted above, the Bill provides a framework for a new PNBS. It is intended that further details will be set out in a constitution prepared by the Scottish Ministers. The Scottish Government has published a [consultation paper](#) (2013e) seeking views on this approach and the detailed operation of a PNBS (responses sought by 27 September 2013).

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<sup>61</sup> Further information is set out in the House of Common Library research paper [Anti-social Behaviour Crime and Policing Bill](#) (2013, p 69-74).

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