

SPICe Briefing

Criminal Justice (Scotland) Bill: Update

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The Scottish Government introduced the Criminal Justice (Scotland) Bill in June 2013, with provisions covering a range of issues, including: (a) police powers to arrest, hold in custody and question suspects; and (b) the proposed abolition of the current requirement for corroboration in criminal cases.

The Justice Committee was designated as lead committee for parliamentary consideration of the Bill. Its stage 1 report was published in February 2014, with the stage 1 debate taking place later the same month. The general principles of the Bill were agreed to following the debate.

However, in light of concerns about the proposal to abolish the requirement for corroboration, the Scottish Government established an independent review to consider what additional measures might be needed following abolition. Consideration of stage 2 amendments was postponed until after publication of the review report. The report was published in April 2015. On the same day, the Cabinet Secretary for Justice announced that the Scottish Government now considered that the Bill should proceed with amendments to remove provisions on corroboration (and related measures dealing with jury majorities). He added that the Scottish Government still believed there to be a case for abolishing the requirement for corroboration, but that this would be best considered as part of a wider package of measures during the next parliamentary session.

This briefing provides an update on the Bill in advance of stage 2 scrutiny by the Justice Committee.



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EXECUTIVE SUMMARY

The Bill, as introduced in June 2013, includes provisions:

- setting out police powers to arrest, hold in custody and question suspects, and rights of suspects
- abolishing the current general requirement for corroboration in criminal cases and changing the rules on the level of jury majority needed for a guilty verdict
- aimed at facilitating the better preparation of sheriff and jury cases
- seeking to address delays in determining appeals and making changes to the way in which references from the Scottish Criminal Cases Review Commission (SCCRC) are dealt with
- establishing a Police Negotiating Board for Scotland to provide a forum for negotiating the pay and conditions of police officers

The proposal to abolish the requirement for corroboration proved to be the most controversial during stage 1 scrutiny. In light of concerns, the Scottish Government established a review headed by Lord Bonomy to consider what additional measures might be needed following abolition. In addition, the consideration of all stage 2 amendments was postponed until after publication of the review report. The report was published in April 2015. On the same day, the Cabinet Secretary for Justice announced that the Scottish Government now considered that the Bill should proceed with amendments to remove the provisions on corroboration (and related measures dealing with jury majorities).

In relation to other provisions of the Bill, the Justice Committee's stage 1 report included:

- support for various reforms dealing with police powers and the rights of suspects, whilst highlighting areas where the committee had concerns or was seeking further information
- support for measures to improve the preparation of sheriff and jury cases, although noting some reservations about changes to pre-trial time limits
- a recommendation that reforms dealing with SCCRC cases should go further by restricting the role of the High Court to ruling on whether there has been a miscarriage of justice
- support for the proposed Police Negotiating Board for Scotland

INTRODUCTION

The Scottish Government introduced the [Criminal Justice \(Scotland\) Bill](#) in the Parliament on 20 June 2013. The main provisions of the Bill as introduced are set out in six parts:

- Part 1 (arrest and custody) – police powers to arrest, hold in custody and question suspects, plus rights of suspects (restating some existing rights and powers as well as providing for a number of 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 statutory aggravations 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 was informed by recommendations flowing from two independent reviews – one led by Lord Carloway and the other by Sheriff Principal Bowen. Provisions which do not originate from those reviews include ones relating to the sentencing of offenders, people trafficking and the Police Negotiating Board for Scotland. Further information on the Bill as introduced, including the work undertaken to inform its proposals, is set out in an earlier [SPICe briefing](#) (McCallum 2013).

The Parliament's Justice Committee was designated as lead committee for parliamentary consideration of the Bill. It took evidence on the general principles of the Bill during 11 committee meetings (between September 2013 and January 2014). Its [stage 1 report](#), published on 6 February 2014, was followed by a [written response](#) from the Scottish Government later the same month.

The most controversial measures contained in the Bill as introduced relate to the proposal to abolish the current general requirement for corroboration in criminal cases. This was reflected in the conclusions set out in the stage 1 report on the Bill's general principles:

“The Committee supports the general principles of the Bill. However, this is with the exception of proposals regarding the corroboration provisions.” (para 548)

In relation to the corroboration provisions, the stage 1 report noted that:

“The majority of Committee Members are of the view that the case has not been made for abolishing the general requirement for corroboration and recommend that the Scottish Government consider removing the provisions from the Bill.” (para 412)

Strong differences of opinion on corroboration were also reflected in the [stage 1 debate](#) (held on 27 February 2014). Although the general principles of the Bill were agreed to, this followed a

close vote on an amendment in the name of Margaret Mitchell MSP. The amendment sought to qualify the Parliament's support for the general principles of the Bill by calling on the Scottish Government to lodge an amendment at stage 2 to remove the provisions abolishing the general requirement for corroboration. The amendment was defeated by 64 votes to 61, with one abstention.

In light of concerns about abolishing the requirement for corroboration, the Scottish Government established an independent review (the [Post-corroboration Safeguards Review](#) headed by Lord Bonomy) to consider what additional measures may be needed following abolition. In addition, the consideration of all stage 2 amendments was postponed until after publication of the review report. The report was published on 21 April 2015. It is referred to in the rest of this briefing as the [Bonomy report](#).

On the same day as the Bonomy report was published, the Cabinet Secretary for Justice announced that the Scottish Government now considered that the Bill should proceed with amendments to remove provisions on corroboration (and related measures dealing with jury majorities). He added that the Scottish Government still believed there to be a case for abolishing the requirement for corroboration, but that this would be best considered as part of a wider package of measures during the next parliamentary session.

It is also worth noting that, prior to the decision to postpone stage 2 scrutiny, the Scottish Government indicated that it would seek to implement plans for restricting the automatic early release of prisoners by way of amendment to the Bill. However, it subsequently decided to take forward its proposals on this topic as part of the [Prisoners \(Control of Release\) \(Scotland\) Bill](#) (introduced on 14 August 2014).

Stage 2 scrutiny of the Bill by the Justice Committee will take place later this year. In advance of this, the rest of this briefing provides an outline of consideration to date.

ARREST AND POLICE CUSTODY

Various reforms provided for in Part 1 of the Bill, dealing with police powers and the rights of suspects, were welcomed by the Justice Committee in its stage 1 report. However, the report also highlighted a number of areas where the committee had concerns or was seeking further information. Some of the main issues considered during stage 1 parliamentary scrutiny are outlined below.

Police powers of arrest

Police officers are currently able to take suspects into custody on the basis of:

- common law and statutory powers of arrest
- the power of detention under section 14 of the Criminal Procedure (Scotland) Act 1995

The power of detention may be exercised where a police officer has a reasonable suspicion that a suspect has committed an offence punishable by imprisonment. Various powers of arrest can be exercised in a range of circumstances including, but not limited to, situations where the power of detention might also be an option. Although powers of arrest and detention may be used in similar circumstances, they are currently used for different purposes. Powers of arrest allow the police to take a suspect to a police station and, where necessary, hold that suspect until appearance in court. The power of detention is more of an investigative tool, allowing the police to hold a suspect for questioning for a limited period.

The Bill as introduced seeks to simplify current police powers by repealing section 14 detention provisions and reforming arrest so as to incorporate the role currently performed by detention. The Justice Committee's stage 1 report noted that:

“The Committee accepts that there might be some benefit in simplifying the powers of arrest along the lines proposed in Part 1 of the Bill. However, we do have concerns regarding the possible consequences of this change and we therefore make a number of recommendations aimed at improving the provisions in Part 1 of the Bill under the relevant sections below.” (para 96)

Matters highlighted in the Justice Committee's stage 1 report included:

- terminology – use of the term ‘arrested’ in relation to suspects who are taken into custody for the purposes of questioning but might not be subsequently charged with an offence. The committee considered that use of the term ‘detained’ in such situations may be preferable on the basis that it is less suggestive of guilt. In its response to the stage 1 report, the Scottish Government argued that the proposed terminology is clear and that it is the point at which a suspect is charged with an offence which marks the key change in status. It also noted that the presumption of innocence would be unaffected
- resources – availability of adequate resources to effectively implement new police procedures. The committee sought assurances that the police would have the resources needed for relevant training and the development of computer systems. In its response, the Scottish Government stated that it would ensure there are adequate resources to implement the reforms
- procedure following arrest – the Bill as introduced provides that a suspect must, on arrest, be taken “as quickly as is reasonably practicable to a police station”. The provision seeks to limit the scope for delay between arrest and the point at which a suspect is covered by the protections afforded to someone held in a police station. However, some police witnesses raised concerns that the requirement might prevent the prompt release of an arrested suspect where it quickly becomes apparent that the grounds for arrest no longer exist. The committee noted the Scottish Government's intention to bring forward an amendment to allow the police more flexibility in this area and sought assurances that it would not provide scope for abuse. The Scottish Government's response stated that the scope of the amendment would be limited to cases where there are no longer grounds to suspect the person of committing an offence

Police powers to hold a suspect in custody for questioning

Until quite recently, the police were able to detain suspects for investigation and questioning (under section 14 of the Criminal Procedure (Scotland) Act 1995) for a maximum of six hours. 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: (a) extending the maximum period during which the police are able to detain suspects from six to 12 hours with the possibility of extension to 24 hours; and (b) enshrining a right of access to a solicitor for detained suspects.

In relation to police powers to hold a suspect in custody prior to charge,¹ changes recommended by Lord Carloway in his 2011 [report](#) included a time limit 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, he effectively recommended a reduction to the current maximum period during which a suspect can be held in custody and questioned. The Bill as introduced generally seeks to give effect to Lord Carloway's recommendations in this area.

¹ Persons ‘not officially accused’ using the terminology of the Bill.

The Justice Committee noted, in its stage 1 report, that there were differences of views amongst witnesses regarding the appropriate maximum period of custody, and that the Scottish Government was considering the case for amending the Bill to allow the proposed 12-hour limit to be extended. The committee stated that:

“While we recognise that there may be situations, particularly in relation to complex and serious crimes, where it may be necessary to consider extending the detention limit, we remain to be convinced whether this is really necessary”. (para 140)

In its written response to the stage 1 report, the Scottish Government indicated that it was continuing to consider the matter and that:

“The Government would expect that, should the police retain the power to extend the detention period, its use would continue to be rare. Any amendment would include similar safeguards against inappropriate use of the power as presently exist (eg a requirement that the period can only be extended with the authorisation of a senior police officer). This would ensure the same high-level scrutiny of decisions and appropriate protection for those in police custody as presently exists.” (p 5)

Investigative liberation

The Carloway report recommended a new system of investigative liberation under which the police could 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. The report noted that investigative liberation pending a decision to charge would, if created, mean that the suspect would still be officially under suspicion and that this might cause practical problems for suspects (eg in relation to media coverage and the attitude of employers). With this in mind, it recommended that the period during which a suspect could be subject to investigative liberation should not exceed 28 days.

The Bill as introduced seeks to give effect to Lord Carloway’s recommendations on this topic. The Justice Committee, in its stage 1 report, sought:

“assurances that investigative liberation will not have an unnecessary impact on the suspect’s private life, whilst allowing the police to conduct complex investigations which could not be completed while the person is initially detained”. (para 151)

The Scottish Government’s response stated that:

“Investigative liberation will provide an alternative to prolonged detention of suspects in certain cases, and as such is itself a method of reducing an investigation’s impact on the suspect’s private life.

The Bill requires that any conditions set must be ‘necessary and proportionate’ (section 14(2)), thus there is an in-built legal requirement for the conditions not to have an unnecessary impact on the suspect’s private life.” (p 6)

Access to legal advice

As indicated above, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 extended the rights of a suspect to obtain legal advice – enshrining a right of access to a solicitor for detained suspects.

The Carloway report recommended a further extension so that the right of access to a solicitor would apply to any suspects held in police custody, regardless of whether the police intended to question the suspect. The Bill as introduced seeks to make this change. This was welcomed by the Justice Committee in its stage 1 report.

Custody of suspects prior to appearance in court

The Carloway report outlined concerns about the length of time some suspects are held in police custody prior to a first appearance in court. The level of work carried forward at weekends (or the lack of it) was identified in the report as the primary cause of some people being held in police custody for unacceptably long periods. It suggested that measures such as Saturday courts might be needed if the position did not improve.

The Bill as introduced does not seek to make significant changes to the legal requirements in this area. The Justice Committee's stage 1 report noted that:

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

We are not however convinced that specifying time-limits for periods in custody in legislation is necessary at this stage, particularly when a working group is actively considering options for Saturday courts. We recommend that this work be completed in a timeous manner to allow any recommendations of the working group to be implemented as quickly as possible. The Committee welcomes the Cabinet Secretary's assurances that he will 'take a keen interest in the issue' and request details of the timescale for meetings and completion of the work of the group.” (paras 159-160)

The Scottish Government's response to the stage 1 report included the following information:

“The working group is presently meeting on a monthly basis, and reports regularly to the Justice Board. The group is evaluating the nature and scale of what will be required to introduce Saturday or weekend courts. At this stage, however, it seems clear that this will be a significant and complex piece of work involving process and policy changes across all criminal justice organisations, with considerable and ongoing consequences for the resources of those organisations, and implications for the employment terms and conditions of existing staff which will need to be addressed. It is hoped that the group will be able to report its initial conclusions by late summer 2014.” (p 7)

In April 2015, Scottish Government officials advised that the working group has reported and continues to report regularly to the Justice Board. They added that it is now developing a possible option, involving a limited number of courts being open seven days a week supplemented by video conferencing for some first appearances, for possible piloting.²

Child suspects

The Bill as introduced provides for a number of additional safeguards for child (under the age of 18) and other vulnerable suspects. A number of issues highlighted during stage 1 parliamentary scrutiny are considered in this and the next section.

The Bill provides that child suspects under the age of 16 may not consent to be interviewed by the police without a solicitor being present. In relation to children aged 16 or 17, it provides that

² Personal communication with Scottish Government officials.

such consent can only be given with the agreement of a parent (or other responsible person). Witnesses during stage 1 scrutiny expressed a range of views on whether the Bill should differentiate between 16/17 year olds and other children. In the stage 1 report, the Justice Committee questioned this distinction in light of other legislation which treats all children in the same way. In its response, the Scottish Government said that:

“While it might appear attractive to treat all individuals under 18 years consistently, the age-based laws which allow for 17 year olds to be living independently and marry reflect the quite different contexts and degrees of self-determination that can exist between a 10 and a 17 year old. The Scottish Government prefers an approach which would allow children aged 16 and 17 years to make their own decisions with safeguards in place to support them in this.” (p 9)

Vulnerable adult suspects

The Justice Committee, in its stage 1 report, highlighted concerns about:

- the definition of a vulnerable adult suspect
- the provision of services to support such suspects

Both of these issues are also considered in the Bonomy report. It notes that:

“In relation to child and other vulnerable suspects, it is generally accepted that, in addition to a solicitor being present during the course of any [police] interview, another person should be present to support the suspect, and to ensure that the suspect understands what is happening and to facilitate, where necessary, communication between the suspect and the police.” (para 15.15)

In relation to children, it goes on to note that the other person is generally someone who has care of the child (referred to as a ‘responsible person’). With regard to vulnerable adult suspects, the person is likely to be unconnected to the suspect and is referred to as an ‘appropriate adult’.

The Bill as introduced defines vulnerable adult suspects in terms of whether or not, owing to a mental disorder, the suspect appears to a police officer to be unable to: (a) understand sufficiently what is happening; or (b) communicate effectively with the police. The stage 1 report noted that:

“The Committee has concerns that the definition of vulnerable person in the Bill may not capture all individuals needing additional support when in custody. We also note comments from the police that there are difficulties in identifying vulnerable persons.” (para 219)

In its response, the Scottish Government stated that:

“The definition is in line with Lord Carloway’s recommendations which expressly link the definition of ‘vulnerable suspect’ to a person who is not able to understand fully the significance of what is said to them, the questions posed or of their replies because of an apparent mental illness, personality disorder or learning disability. This is consistent with current practice whereby access to an appropriate adult is linked to ‘mental disorder’ (which is defined as mental illness, personality disorder or learning disability), which is a tried and practiced criterion on which police have been assessing the vulnerability of suspects, accused, victims and witnesses for many years. (...)

On the issue of training, police are already familiar with the need to identify whether a person suffers from a ‘mental disorder’ and, where they do, to make arrangements for an

appropriate adult to be present during police procedures. The resource implications of police training as a result of the Bill are covered in the Financial Memorandum, which was developed through consultation with key stakeholders, including Police Scotland. We will continue to work with Police Scotland on implementation and delivery of the Bill's reforms, and will monitor the actual financial impact." (p 10)

On this point, the Bonomy report argues that:

"The inclusion of the phrase 'owing to a mental disorder' imposes on a police officer the responsibility of making a diagnosis that he is not qualified to make. As the Bill progresses, consideration should be given to whether that phrase serves any useful purpose, and whether the real issue is the inability of the person to understand or communicate at the time rather than the reason for that." (para 15.19)

In relation to the provision of appropriate adult services, the Bonomy report notes that:

"The value of the Appropriate Adult system is recognised by the Scottish Government which, in the Criminal Justice (Scotland) Bill, has introduced provisions to Parliament to place the already existing Appropriate Adult system on a statutory footing. However, the Bill does not identify where responsibility for ensuring the availability and adequate provision of suitability trained persons lies." (para 15.16)

The Justice Committee's stage 1 report asked the Scottish Government to respond to concerns raised by witnesses about the decision not to address responsibility for the provision of appropriate adult services within the Bill. The response to the stage 1 report noted that:

"The Scottish Government expects that under the Bill, provision of appropriate adults will continue to operate as at present. It is on this basis that we agreed with COSLA that there are likely to be no additional costs for local authorities as a result of the Bill.

We have made a specific commitment to COSLA to review the impact of the Bill in relation to vulnerable adults after implementation." (p 10)

However, the Bonomy report states that:

"Police Scotland expressed concern that the current provisions do not go far enough in ensuring that the provision of an Appropriate Adult is guaranteed as it does not create a duty on a body or an organisation to lead, organise or fund the provision of Appropriate Adults. Instead, the Bill presumes that the provision of Appropriate Adults will continue in its current format of being provided on an informal basis by different organisations and funded, to differing degrees, by local authorities around the country. As a result the provision is patchy, and frequently unsatisfactory." (para 15.17)

It goes on to recommend that the Bill is amended to "identify a body or organisation with responsibility for ensuring adequate provision of persons with appropriate skills or qualifications to provide support for vulnerable persons in custody" (para 15.20).

CORROBORATION AND RELATED REFORMS

Background to the Bill

Broadly speaking, the current rules on corroboration mean that proof of a criminal offence requires at least two sources of evidence.³ This requirement applies to the 'essential' or 'crucial'

³ There are some limited statutory exceptions to this requirement.

facts of the case (generally that the offence was committed and that the accused committed it). The evidence may be direct or circumstantial.⁴

Section 57 of the Bill as introduced seeks to abolish the general requirement for corroboration in criminal cases. Abolition was one of the reforms recommended by Lord Carloway in his 2011 report.

Whilst accepting the recommendation for abolition, the Scottish Government [consulted](#) (2012) on the possible need for 'additional safeguards' aimed at preventing miscarriages of justice following the planned removal of the requirement for corroboration. The consultation paper identified three potential areas of reform which the Government saw as meriting further consideration:

- jury majority for a verdict – whether the current rules under which a guilty verdict requires the support of only eight out of 15 jurors should be changed
- withdrawal of case from jury – whether judges should be given the power to acquit accused persons, 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 – whether the 'not proven' verdict should be abolished

In relation to the first area of potential reform, section 70 of the Bill as introduced 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). The other two suggested areas of reform were not taken forward.

Proposed abolition of the requirement for corroboration

As indicated earlier in this briefing, the Justice Committee's stage 1 report noted that:

“The majority of Committee Members are of the view that the case has not been made for abolishing the general requirement for corroboration and recommend that the Scottish Government consider removing the provisions from the Bill.” (para 412)

Much of the evidence and debate, during stage 1 scrutiny, focussed on the impact which the current requirement for corroboration may have on the prosecution of offences which tend to occur in private (eg rape and domestic abuse). A principal argument advanced in favour of abolition was that it would allow prosecutions based on the evidence of a credible complainer to proceed, even if the circumstances of the case meant that there was no corroborative evidence. There were, however, differences of opinion in relation to whether abolition would in practice have a significant impact in terms of increasing the number of convictions for such offences. Those in favour of abolition argued that, even if numbers of convictions did not rise, increasing the number of cases which could be taken to court would still amount to a positive improvement in 'access to justice' for the victims of such offences. Those members of the Justice Committee, who considered that the case for abolition had been made, highlighted the potential for improving access to justice. However, the majority of members were:

“not convinced that abolition would improve 'access to justice' in a meaningful way for victims of crimes, such as rape and domestic abuse, which are often difficult to successfully prosecute. Improving the situation for such victims must involve a lot more

⁴ Examples of direct evidence include eye witness testimony identifying the accused as the perpetrator of the offence. Examples of circumstantial (or indirect) evidence include 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.

than prosecuting more cases without a realistic expectation of a significant increase in convictions.” (para 412)

In its written response to the stage 1 report, the Scottish Government stated that:

“The extensive public debate since Lord Carloway reported in 2011 has exposed a system that simply does not operate as we would wish for victims in whole categories of crime. It does not adequately respond to crimes committed in private.” (p 11)

It indicated that it agreed with the minority view expressed within the stage 1 report that access to justice for such victims would be improved by abolition of the requirement for corroboration.

Those raising concerns in relation to the planned abolition highlighted the fact that it would affect the vast majority of offences, not simply those where obtaining corroboration may be particularly difficult.⁵ They also argued that the requirement for corroboration has played a central role in shaping the development of checks and balances within the Scottish criminal justice system. Thus, it was argued that any planned abolition of the requirement should not take place without a full reassessment of other relevant aspects of the justice system. The Justice Committee’s stage 1 report stated that the majority of members were:

“concerned that the case for abolition has paid insufficient regard to the importance of this requirement within the Scottish criminal justice system, in ensuring that the system as a whole is properly balanced and gives due weight to the interests of those facing criminal allegations, complainers and society”. (para 412)

Whilst remaining convinced that the case for abolition had been made, the concerns expressed during stage 1 scrutiny helped to persuade the Scottish Government that abolition should not take effect before there had been a further review to consider whether other reforms might be necessary. The review is considered below.

As noted earlier, an attempt to qualify the Parliament’s support for the general principles of the Bill, by calling on the Scottish Government to lodge an amendment at stage 2 to remove the provisions on corroboration, was defeated in a vote (by 64 votes to 61 with one abstention) following the stage 1 plenary debate.

The reform process

Evidence and debate during stage 1 scrutiny also highlighted differing views on whether Lord Carloway’s review, along with the other work carried out prior to introduction of the Bill, provided an adequate basis for deciding whether or not the requirement for corroboration should be ended. Some witnesses thought that it did, whilst others argued that the matter should be considered further by a body such as the Scottish Law Commission or a Royal Commission established for the specific purpose.

A related issue raised during stage 1 scrutiny was whether more work should be carried out on what other changes might be required to ensure that a criminal justice system without a requirement for corroboration still provides adequate safeguards against miscarriages of justice. Although the Scottish Government had consulted on three potential areas of reform (one of which is included in the Bill as introduced),⁶ various witnesses called for more safeguards. In fact, evidence from both the Lord Advocate and Cabinet Secretary for Justice pointed to the

⁵ Section 58 of the Bill as introduced provides that abolition 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 point to the example of speeding, in relation to which section 89 of the Road Traffic Regulation Act 1984 requires corroborated evidence.

⁶ The proposal that a guilty verdict in a solemn case would require the support of at least two-thirds of the jury.

possibility of further changes, including a requirement for cases to have ‘supporting evidence’.⁷ However, the stage 1 report noted that:

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

In relation to the need for further consideration of possible safeguards, the Justice Committee reached a degree of consensus, with the stage 1 report stating that:

“The Committee is convinced that, if the general requirement for corroboration continues to be considered, this should only occur following an independent review of what other reforms may be needed to ensure that the criminal justice system as a whole contains appropriate checks and balances.” (para 414)

The Scottish Government indicated, in its response to the stage 1 report, that:

The Government has listened to the evidence presented and the views expressed to the Committee. It accepts that many of the issues aired and identified in the Committee’s Report are based on genuine concern about the future operation of our system following abolition of the corroboration requirement. There is universal agreement on the need to ensure any new system does not increase the risk of wrongful conviction.” (p 12)

The Scottish Government’s initial proposal was that:

- the parliamentary passage of the Bill should continue as planned whilst an independent review considers what additional measures may be needed in light of the abolition of the requirement for corroboration
- the provisions dealing with abolition would not be commenced before the Parliament had a chance to consider the findings of the review

Despite the shift in Scottish Government thinking evidenced by its proposal for an independent review, concerns raised during the stage 1 debate included ones relating to:

- the fact that the review was not being tasked with also considering whether a requirement for corroboration might actually be retained (with or without reform)
- the suggested procedures for taking forward any recommendations flowing from the review

In relation to the second point, the Scottish Government subsequently accepted a proposal for delaying the parliamentary passage of the Bill, with the consideration of all stage 2 amendments being postponed until after publication of the review report (see the Scottish Government news release [Criminal Justice Bill](#) (23 April 2014)).

The work and recommendations of the review are considered below.

⁷ A possible requirement for ‘supporting evidence’ was one of the matters which the Post-corroboration Safeguards Review was tasked with considering (see below).

Post-corroboration Safeguards Review

As noted above, the Scottish Government decided to establish an independent review to consider what additional measures may be needed, in light of the planned abolition of the general requirement for corroboration, to protect against miscarriages of justice. The resulting review (the [Post-corroboration Safeguards Review](#)) was headed by Lord Bonomy.

The review report (the [Bonomy report](#)) was published on 21 April 2015. It notes that: “The Review has proceeded throughout on the assumption that the corroboration requirement will be abolished. However, it is a striking feature of a number of the measures recommended that they would enhance our criminal justice system, with or without the corroboration requirement. I mention that because, in the debate around the abolition of the corroboration requirement that will follow the publication of this Report, it would be a pity to lose sight of the wider arguments for, and the benefits that could nevertheless be derived from, the introduction of some of these safeguards.” (para 1.6)

Its main recommendations are reproduced in the appendix to this briefing. They include ones relating to:

- the greater use of audiovisual recording by the police (eg when interviewing suspects)
- ending the use of dock identification (ie the practice during a trial whereby a witness may be asked if the person who committed the crime is present in the courtroom)
- the placing of a statutory duty on the Lord Advocate to issue codes of practice setting out procedures to be followed by the police in connection with the identification and interviewing of suspects
- the retention of a requirement to corroborate both hearsay and confession evidence
- an extension of the grounds upon which the court may uphold a defence submission of no case to answer
- the minimum level of juror support required for a guilty verdict and the need for research into jury decision-making
- the provision of reasons by judges for verdicts in summary cases
- safeguards for vulnerable adult suspects⁸

On the same day as the Bonomy report was published, the Cabinet Secretary for Justice announced that the Scottish Government now considered that the Bill should proceed with amendments to remove the provisions dealing with corroboration and related measures on jury majorities. He explained that the Scottish Government would look in detail at all of the recommendations set out in the Bonomy report, alongside the corroboration requirement itself, and that this would be best considered as part of a wider package of measures during the next parliamentary session. In a letter to the convener of the Justice Committee, he stated that:

“I will consider whether any of the Review’s recommendations could be taken forward this Parliamentary session, as I am aware that some of the recommendations are relevant to Part 1 of the Bill.⁹ If we are intending to take forward any changes in the Bill, I will ensure we give the Committee as much notice as possible of any amendments. However, I believe that the majority of Lord Bonomy’s recommendations will require longer consideration.” (Scottish Government 2015)

⁸ Recommendations of the Bonomy report on vulnerable adult suspects are considered earlier in this briefing.

⁹ Part 1 of the Bill deals with police powers to arrest, hold in custody and question suspects, as well as rights of suspects.

SOLEMN PROCEDURE: SHERIFF AND JURY CASES

Part 3 of the Bill, includes various provisions aimed at facilitating the better preparation of sheriff and jury cases (ie solemn procedure cases dealt with in the sheriff courts). The proposals in this area were developed in response to recommendations of the review carried out by Sheriff Principal Bowen. Its recommendations included ones focussed on:

- communication between prosecution and defence – seeking to improve out of court discussion between the two parties; including compulsory communication requirements
- management of cases – seeking to improve the effectiveness of first diets (existing pre-trial court hearings) and the scheduling of trials
- time limits – providing the parties with additional 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)

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

The provisions of the Bill in this area were broadly supported by the Justice Committee in its stage 1 report. The main issues considered during stage 1 parliamentary scrutiny are outlined below.

Communication between prosecution and defence

In relation to the Bill’s proposals for compulsory communication requirements, the stage 1 report noted that the Justice Committee:

- was “persuaded of the potential benefits” of having a statutory requirement for out of court discussions between prosecution and defence (para 453)
- supported the approach in the Bill under which such discussions would take place after service of the indictment with flexibility in relation to the method of communication (para 461)
- welcomed the Scottish Government’s commitment to consider whether the Bill might be amended to allow the submission of separate written notes by the prosecution and defence on their states of preparation (rather than requiring a single submission covering both) (para 469)
- recommended that the Scottish Government monitors implementation to “ensure that resources are in place where and when needed” to support the duty to communicate (para 473)

The Scottish Government’s response to the stage 1 report included the following in relation to resource issues:

“The Scottish Government has undertaken to monitor the actual impact of the Bill as part of our ongoing management of the implementation of the Bill, and will maintain discussions with delivery bodies. If it becomes clear that there are additional financial costs as a result of the Bill, that will be considered in future funding discussions. The Scottish Government will ensure that delivery bodies have adequate resources to implement these reforms.” (p 16)

Scheduling and management of cases

With regard to proposed reforms affecting the scheduling of trials, the stage 1 report stated that the Justice Committee:

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

Time limits

In relation to pre-trial time limits, the Justice Committee’s stage 1 report indicated that:

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

In its written response to the stage 1 report, the Scottish Government said that it:

“will be setting up monitoring arrangements with justice organisations and will ensure that the Committee is kept updated on the outcome of this process”. (p 15)

SENTENCING

Part 4 of the Bill as introduced sets out provisions relating to sentencing:

- for possession of a knife or offensive weapon – seeking to increase the maximum sentence for various statutory offences from four to five years
- of people who commit a further offence during a period of early release from a custodial sentence – seeking to make some changes to existing statutory provisions under which a court may order an offender to be returned to custody to serve the outstanding custodial sentence

The Justice Committee, in its stage 1 report, indicated that it was “content with the increase in maximum sentences for offences relating to the possession of a knife or offensive weapon” (para 486). It welcomed the provisions relating to offenders on early release.

APPEALS AND SCCRC

Appeals

Part 5 of the Bill as introduced sets out provisions seeking to take forward some (but not all) of a number of recommendations in the Carloway report aimed at addressing delays in determining appeals. The Justice Committee’s stage 1 report stated that:

“The Committee welcomes the policy objective to speed up appeals and understands that there are practical reasons why appeals ought to be lodged timeously. We note the concerns that, in applying a higher test for allowing late appeals, cases with merit may not be heard unless they meet an exceptional circumstances test. We ask the Scottish

Government to consider the Law Society of Scotland's recommendation that sections 76 and 77 be redrafted with an emphasis on the interests of justice. The Committee also notes that Lord Carloway made other recommendations in relation to the speeding up of appeals." (para 508)

The written response to the stage 1 report noted that:

"The Scottish Government proposes that when deciding whether to allow an appeal late the test that the High Court should apply is to ask itself whether there are exceptional circumstances for doing so.

The alternative suggestion of an 'interests of justice' test would fail to get across that it is only exceptionally that an appeal should be allowed to proceed in breach of the time limits. The High Court is already insisting that there must be exceptional circumstances before it will allow an appeal to proceed late (...). The provisions as drafted support the Court's approach to late appeals." (p 17)

SCCRC

Part 5 of the Bill as introduced also sets out provisions seeking to take forward recommendations in the Carloway report relating to the way in which the High Court deals with references from the Scottish Criminal Cases Review Commission (SCCRC).

Following the judgement in *Cadder v HM Advocate* (2010), a number of relevant changes were made by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. These included provision that the High Court may reject a reference from the SCCRC, without considering whether a miscarriage of justice occurred, on the basis that it is not in the interests of justice (including consideration of the need for finality and certainty in the determination of criminal proceedings) that any appeal arising from the reference should proceed. The Carloway report noted that this gave the High Court "a gate-keeping role, relative to the interests of justice, which formerly rested only with the SCCRC" (p 360).

In line with recommendations of the Carloway report, the Bill seeks to remove the gate-keeping role of the High Court in relation to SCCRC references but add an 'interests of justice' element to the test for allowing appeals arising from such references.

The Justice Committee's stage 1 report noted that:

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

However, we are concerned that the Bill retains the High Court's interests of justice test, albeit during the determination of an appeal resulting from a referral from the SCCRC. Given that, according to Lord Carloway, despite the occasional lapse, the SCCRC has been a 'conspicuous success in discharging its duties conscientiously and responsibly', we are not convinced that the arguments for the High Court replicating the duties of the SCCRC in this respect have been made. Consequently, we recommend that the High Court should only be able to rule on whether there has been a miscarriage of justice in these cases, and if there has been, the appeal should be allowed." (paras 523-524)

In its response to the stage 1 report, the Scottish Government stated that it considered it:

"appropriate that the High Court, as the decision maker, should be able to consider interests of justice as part of the test they apply for cases originating from a SCCRC reference, given:

- considerations of interests of justice are accepted as often being relevant in SCCRC referred cases,
- the SCCRC itself has to consider interests of justice, and
- the High Court has a fundamental constitutional role as final decision maker within Scotland's criminal justice system." (p 17-18)

MISCELLANEOUS

Part 6 of the Bill as introduced includes provisions in relation to people trafficking and police pay and conditions.

People trafficking

The Bill provides for two statutory aggravations relating to people trafficking:

- an aggravation of any offence by the fact that the offender was motivated by the objective of committing or conspiring to commit a people trafficking offence
- an aggravation of a people trafficking offence by the fact that the offender abused a public position in committing the offence

As for aggravating factors in general, proof that someone committed an offence in circumstances where one of the statutory aggravations is established may lead to a higher sentence. The Justice Committee's stage 1 report welcomed the proposals in the Bill.

Subsequent to publication of the stage 1 report, the Scottish Government introduced a separate piece of legislation dealing specifically with people trafficking and exploitation – the [Human Trafficking and Exploitation \(Scotland\) Bill](#). The related policy memorandum (para 43) notes that relevant provisions of that legislation cover statutory aggravations and that the Government will, therefore, seek to remove the current people trafficking provisions of the Criminal Justice (Scotland) Bill by way of stage 2 amendment.

Police pay and conditions

The Bill as introduced provides a framework for establishing a Police Negotiating Board for Scotland (PNBS). It is intended, in relation to Police Scotland, to provide a forum for negotiating the pay and conditions of police officers. The Justice Committee's stage 1 report welcomed the proposals.

The proposed functions of the PNBS are currently performed by the Police Negotiating Board for the United Kingdom (PNB). However, the Anti-Social Behaviour, Crime and Policing Act 2014 provides for the abolition of the PNB. Relevant provisions have been brought into force for England, Wales and Northern Ireland, where a new [Police Remuneration Review Body](#) now considers the pay and conditions of most police officers.

In relation to Scotland, the Scottish Government's intention is that the PNB should continue its work until the PNBS is established.

As noted above, the Bill currently provides a framework for a new PNBS. Shortly after introduction of the Bill, the Scottish Government published a [consultation paper](#) (2013) seeking views on the detailed operation of the proposed PNBS. In March 2015, officials advised that the Scottish Government was considering consultation responses and was planning to bring

forward more detailed proposals, following further engagement with key stakeholders, during stage 2 consideration of the Bill.¹⁰

¹⁰ Personal communication with Scottish Government officials.

APPENDIX: BONOMY REPORT RECOMMENDATIONS

Chapter 3 of the Bonomy report includes the following summary of its main recommendations (whilst noting that individual chapters should be consulted for further details and supplementary recommendations):

Chapter 5 – Suspect Interviews

- All formal police interviews with suspects at police offices should be recorded by audiovisual means.
- Informing a suspect of the right to legal assistance and recording the decision whether to exercise the right or waive it should also be recorded by audiovisual means. The suspect's reason for waiving the right, if known, should be noted on the Solicitor Access Recording Form (SARF).
- Police Scotland should give early attention to drawing up a programme to install audiovisual recording equipment in police vehicles.
- The requirement for some suspects to pay a contribution towards the cost of legal advice and assistance provided to them while they are in a police office should be abolished.

Chapter 6 – Evidence of Identification

- The practice of relying on dock identification should be ended.
- Effective case management procedures should be developed in order to ascertain in every case whether identification is in issue and to ensure that it is addressed before the trial.
- Out-of-court identification procedures should be audiovisually recorded, with the recording being made available to the Court if appropriate.

Chapter 7 – Codes of Practice

- The Lord Advocate should be bound by statute to issue Codes of Practice in connection with identification procedures and interviewing of suspects. The Codes of Practice should set out the procedures to be followed by the police, such other matters as the Lord Advocate considers appropriate, and the extent to which they should apply to Specialist Reporting Agencies.
- The Lord Advocate should be bound by statute to regularly review the Codes to reflect changes in law and practice, should be bound to consult widely before issuing or revising a Code, and should lay any resulting Code before Parliament.
- The test to be applied in considering the admissibility of evidence obtained following a breach of a Code of Practice should remain the current common law fairness test. There should be a statutory requirement obliging the Court to take into account any breach of a relevant provision of an applicable Code in determining the admissibility of evidence.

Chapter 8 – Prosecutorial Test

- The Lord Advocate should be bound by statute to publish the terms of the Prosecutorial Test, but the terms of the test itself should be left to the Lord Advocate and the test should be subject to regular review involving public consultation.
- The application of the new Prosecutorial Test in practice should be monitored by the Inspectorate of Prosecution in Scotland, which should report annually to the Lord Advocate.

Chapter 9 – Hearsay Evidence

- The corroboration requirement should be retained for hearsay evidence.

Chapter 10 – Confession Evidence

- The corroboration requirement should be retained in relation to confession evidence.

Chapter 11 – The No Case To Answer Submission

- The basis on which a motion that there is no case to answer may be sustained should be extended to include circumstances where it would not be proper to convict on the evidence presented.

Chapter 12 – Juries: Majority, Size, and the Three Verdict System

- A simple majority system is untenable in a post-corroboration system and a move to increase the majority to 10 out of 15, as currently stated in the Criminal Justice (Scotland) Bill, is acceptable pending further research.
- The case for any further change has not yet been made.
- Research into jury reasoning and decision-making should be undertaken to ensure that changes to several unique aspects of the Scottish jury system are only made on a fully informed basis.

Chapter 13 – Communication with the Jury

- The Judicial Institute, as it further develops the Jury Manual, should note the research produced in the Report of the Academic Expert Group and continue to clarify and simplify the language used in, and delivery of, some aspects of jury directions.

Chapter 14 – Reasons for Verdicts in Summary Proceedings

- It should be mandatory for the Court to deliver orally in open court, and have minuted, brief reasons for the verdict, whether conviction or acquittal, including on the sustaining of a no case to answer submission, in every summary case.

Chapter 15 – Miscellaneous Issues

- The Criminal Justice (Scotland) Bill should be amended to identify a body or organisation with responsibility for ensuring adequate provision of 'Appropriate Adults' for vulnerable persons in custody.

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