

SPICe Briefing

Criminal Justice (Scotland) Bill: Stage 3

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In June 2013, the Scottish Government introduced the Criminal Justice (Scotland) Bill with provisions on a range of criminal justice issues. 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.

Consideration of all stage 2 amendments was postponed in light of concerns about provisions in the Bill to abolish the general requirement for corroboration in criminal cases. During this postponement, an independent review was conducted into what additional measures might be needed in light of the planned abolition of the corroboration requirement.

The Justice Committee returned to its scrutiny of the Bill with consideration of stage 2 amendments in September and October 2015. Stage 3 proceedings on the Bill are scheduled to take place on 8 December 2015.

This briefing considers:

- key recommendations made by the Justice Committee in its stage 1 report
- the Scottish Government's response to those recommendations
- the independent review established in light of the corroboration proposal
- key stage 2 amendments



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EXECUTIVE SUMMARY

The Criminal Justice (Scotland) Bill as introduced included provisions:

- setting out police powers to arrest, hold in custody and question suspects, and the 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
- seeking to facilitate 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 general principles of the Bill were agreed to following the stage 1 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 without the provisions on corroboration. 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.

Provisions of the Bill seeking to abolish the current requirement for corroboration in criminal cases (and related measures dealing with jury majorities) were removed by amendment at stage 2. Other areas of debate during scrutiny of the Bill have included:

- the consideration of amendments adding new provisions (part A1 of the Bill as amended at stage 2) to take forward recommendations of an advisory group established in light of concerns about police use of non-statutory (or 'consensual') stop and search
- detailed scrutiny of the provisions in Part 1 of the Bill dealing with police powers and the rights of suspects
- the age of criminal responsibility
- whether 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
- children affected by parental imprisonment
- legal representation for complainers in sexual offence cases

INTRODUCTION

The Scottish Government introduced the [Criminal Justice \(Scotland\) Bill](#) in the Parliament on 20 June 2013. Its main provisions were 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 above proposals was informed by recommendations flowing from two independent reviews – one led by Lord Carloway and the other by Sheriff Principal Bowen. Provisions which did not originate from those reviews included 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 related 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)

Clear 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 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 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.

As a result of stage 2 amendments, the provisions seeking to abolish the current requirement for corroboration were (along with those on jury majorities) removed. The remaining provisions in Part 2 of the Bill as introduced were moved to later in the Bill, thus allowing for the removal of Part 2 from the Bill as amended.

Other significant amendments during stage 2 included the addition of a new Part A1 dealing with police powers of search. The new provisions seek to take forward recommendations of an independent advisory group which was established earlier this year in light of concerns about the use of non-statutory (or ‘consensual’) stop and search.

Key dates in the Parliament’s consideration of the Bill are set out in the following table.

Bill introduced	20 June 2013
Stage 1: Justice Committee evidence sessions	24 September; 1 and 8 October; 19, 20 and 26 November; 3, 10 and 17 December 2013; and 7 and 14 January 2014
Stage 1: Justice Committee report published	6 February 2014
Stage 1: Plenary debate	27 February 2014
Stage 2: Justice Committee	8, 22 and 29 September; and 6 October 2015

The rest of this briefing considers the main issues raised during both stage 1 and stage 2 consideration of the Bill.

POLICE STOP AND SEARCH

Advisory Group on Stop and Search

In light of concerns about the use of non-statutory, or ‘consensual’, stop and search by the police, the Scottish Government announced in March 2015 that an independent advisory group would be established to examine the use of such powers – the [Advisory Group on Stop and Search](#). In a [news release](#), the Scottish Government (2015a) stated that:

“The new Stop and Search Advisory Group has been established after Police Scotland today issued a report confirming that from now on there will be a presumption against consensual – or non-statutory – stop and search for all age groups. The police report also confirms that children under 12 will not be subject to consensual stop and search.

The new independent advisory group will be asked to make recommendations to Scottish Ministers, including:

- whether the permanent presumption against consensual stop and search for all ages goes far enough;
- whether, further to that, there should be an absolute cessation of the practice;
- any additional steps that require to be taken, including any consequent legislation or change in practice that might be necessary; and
- to develop a draft Code of Practice that will underpin the use of stop and search in Scotland.

The announcement was made by Justice Secretary Michael Matheson in response to two reports published today on stop and search in Scotland – a review by Her Majesty’s Inspectorate of Constabulary in Scotland (HMICS) and the Police Scotland review of its own practices.

The Advisory Group, which will have a broad membership, will make recommendations for Scottish Ministers to consider by August 2015. This timescale would allow any possible legislative changes to be included as part of proposals for the Criminal Justice (Scotland) Bill.”

The review was not concerned with powers to search suspects who are taken into police custody (following arrest or detention).

The [report](#) of the Advisory Group on Stop and Search was published in early September. It noted that:

“Any encounter with the police may have several possible reasons, or none. Community policing, an example often given of policing by consent, routinely involves speaking with the public as an accepted aspect of daily activity. Another reason, of course, is that the officer may have evidence to suspect, or may come to suspect, the commission of an offence and may decide to exercise one of his or her many statutory powers. Another may be an officer picking up intelligence on crimes committed or planned in the local area. Several other possibilities come to mind.

Any such encounter may have several possible outcomes, ranging from the briefest of discussion to arrest. Our Terms of Reference focus on encounters in between those two extremes, usually involving more than just conversation but less than detention or arrest. These encounters do not have to progress to a search although we are concerned with those which do. Searching of an individual by the police inevitably moves to a more intrusive form of police-public interaction that deserves careful attention and is usually best defined and justified by statutory powers.

What we have been looking at in this review are some of those situations where an intrusion is made into the right of the public to go freely about their lawful business in a public place without a basis of reasonable suspicion or evidence of wrongdoing. In particular, it will be seen from our Terms of Reference that what we have been tasked to examine is the police tactic or practice known as ‘consensual stop and search’, in other words where statutory powers do not exist, or are considered inappropriate, and non-statutory arrangements or practices have been used instead.” (paras 36-38)

It went on to state that:

“Stop and search, both statutory and non-statutory, is a tactic that came under the spotlight prior to the establishment of Police Scotland and, since the single force’s inception, has been subject to continued scrutiny, in particular by the SPA and HMICS. It has received significant publicity in the light of on-going concerns following their reviews, particularly during the last year, and even during the short lifespan of this review. A detailed evaluation of the Fife Division (Police Scotland) Stop and Search Pilot, commissioned by Police Scotland, was published in June 2015. Undoubtedly most of the publicity and comment has been negative, raising questions of lawfulness, legitimacy and accountability, and featuring demands for an end to ‘consensual stop and search’ from various quarters, notably the Scottish Human Rights Commission (SHRC). Even the Fife Pilot recommendations suggested that ‘Police Scotland move to a position of using legislative searches only’.

The tactic has been called into question particularly because of the large number of searches involved, of which the majority (around 70%) were non-statutory searches prior to the recent decision by Police Scotland to move to a presumption in favour of using statutory searches. That emphasis on non-statutory stop and search goes back at least to 2005, which marked the start of relevant data being recorded by some forces.” (paras 39-40)

The recommendations made in the report are reproduced in Appendix 1 of this briefing. They included:

- Recommendation 1 – “That there should be a Code of Practice covering Stop and Search of the person in Scotland. The Code should be given effect by statute.”
- Recommendation 2 – “That, ahead of implementation of the Code of Practice, further public consultation should take place on the terms of the Code.”
- Recommendation 6 – “That the Scottish Government should hold an early consultation on whether to legislate to create a specific power for police officers to search children under 18 for alcohol in circumstances where they have reasonable grounds to suspect that they have alcohol in their possession.”
- Recommendation 8 – “That the policing tactic known as ‘consensual’ or non-statutory stop and search of the person in Scotland should end when the Code of Practice comes into effect.”

Stage 2 consideration

During stage 2, the Justice Committee agreed a number of (mainly Scottish Government) amendments seeking to take forward those recommendations of the Advisory Group on Stop and Search requiring legislation. In setting out the purpose of the Scottish Government’s amendments, the Cabinet Secretary stated that:

“I have given a commitment to implement the advisory group’s recommendations, and it is important to look at this group of amendments in that context. My aim is to use the amendments to make the legislative change that we need in order to implement the advisory group’s recommendations in full.” (Scottish Parliament Justice Committee 2015a, col 2)

He also thanked Alison McInnes MSP for her contribution to the debate on police stop and search. During debate, she noted that:

“Dr Kath Murray’s groundbreaking research into the prevalence of unregulated stop and search and the effects of the encounters in Scotland shone a bright light on something that needs to be challenged. For a long time, I was a lone voice in Parliament raising that challenge, but I am delighted that the evidence has vindicated that approach and that the committee is now on the verge of ensuring that every stop and search that is conducted by the police has a robust legal basis.” (col 10)

Consultation

As noted above, the Advisory Group on Stop and Search recommended that there should be consultation on:

- the terms of the proposed stop and search code of practice
- whether the police should have a specific statutory power to search children under 18 for alcohol

At the start of December 2015, Scottish Government officials advised that timescales for relevant consultations are still being finalised, with the aim of conducting them as soon as possible.¹

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 and/or stage 2 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 sought 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

¹ Personal communication with Scottish Government officials.

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

In line with its response to the Justice Committee’s stage 1 report, the Scottish Government lodged two stage 2 amendments providing for the release of an arrested suspect prior to arrival at a police station. The amendments were unanimously agreed to by the Justice Committee.

Also during stage 2, Elaine Murray MSP lodged an amendment seeking to restrict the release of information, by the police, which would allow the identification of a suspect who has been arrested but not charged with an offence (persons ‘not officially accused’ to use the terminology of the Bill). She explained that the amendment reflected the wider meaning of arrest under the provisions of the Bill. In response, the Cabinet Secretary stated that:

“The purpose of amendment 35 is to protect the privacy and reputation of suspects during an investigation. I sympathise with the intention behind amendment 35, but I consider that such provision is unnecessary. The committee previously accepted Police Scotland’s assurances that it does not and would not release a suspect’s name to the media when they have not been formally charged with an offence. I have seen no evidence that runs counter to that and, like the committee, I am reassured by Police Scotland’s approach on this subject.” (Scottish Parliament Justice Committee 2015b, cols 81)

The amendment was rejected by the Justice Committee (for 4, against 5).

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:

- 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
- enshrining a right for suspects to have access to a solicitor before, and during, police questioning

In relation to police powers to hold a suspect in custody prior to charge (ie persons not officially accused), changes recommended by Lord Carloway in his 2011 [report](#) included:

- a time limit of 12 hours with no power of extension
- 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 sought to give effect to Lord Carloway's recommendations in this area.

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)

Stage 2 amendments lodged by the Scottish Government did include ones allowing a police officer (of the rank of inspector or above) to authorise a 12-hour extension to the initial 12-hour time limit – thus allowing the police to hold a suspect in custody for up to 24 hours without charge. The additional 12-hour extension period would (in the same way as the initial 12-hour period) be subject to a formal requirement on the police to review continued custody beyond the first six hours.

In support of the amendments, the Cabinet Secretary noted that:

“Conflicting views were expressed at stage 1 on the detention time limits, and the Scottish Government made a commitment to considering an extension of the detention time limit to 24 hours in exceptional circumstances. Having considered the arguments further, I believe that it is necessary to allow the extension from 12 to 24 hours. I am satisfied that the Bill contains appropriate safeguards to ensure that the power will be used properly and that such extensions will not become commonplace.” (Scottish Parliament Justice Committee 2015a, cols 33-34)

He went on to note that:

“The current power to extend detention periods to 24 hours is used in only a very small number – less than 0.5% – of cases, which demonstrates that the police make appropriate and proportionate use of the power and that it is used only in exceptional cases. The

power to extend is necessary in those cases, many of which involve serious and complex offences.” (col 34)

And stated that:

“Amendment 135 is the primary amendment to allow the detention limit to be extended to 24 hours. The power to extend is limited to serious offences, and it will be subject to safeguards to ensure that it is used only when absolutely necessary. The safeguards include a requirement for authorisation at inspector level and provision for the suspect to make representations. The existing safeguards in the Bill will also apply, including the statutory test for keeping people in custody, mandatory custody reviews at six hours and the general duty under section 41 not to detain people unreasonably or unnecessarily.” (col 35)

Relevant Scottish Government amendments were all agreed by the Justice Committee (what the Cabinet Secretary described as being the primary amendment was agreed with two abstentions).

A stage 2 amendment lodged by Alison McInnes MSP sought to restrict the powers of the police to hold child and vulnerable adult suspects in custody. Instead of the 12 hour period for all suspects provided for in the Bill as introduced (or the possible 24 hour period in the Bill as amended at stage 2), the police would be allowed to hold child and vulnerable adult suspects for up to a maximum of six hours without charge. The amendment was rejected by the Justice Committee (for 2, against 7).

Also at stage 2, Mary Fee MSP lodged a series of amendments seeking to highlight the needs of children where a parent (or other adult who has responsibility for those children) is in police custody. In response, the Cabinet Secretary indicated that he supported the intention behind the amendments but believed that there were other ways in which they could be more effectively achieved (eg through implementation of the Children and Young People (Scotland) Act 2014). In light of his comments, and a willingness to work with her and other stakeholders, Mary Fee did not press her amendments (they were either withdrawn or not moved).

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 that outlined above,² 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 sought to give effect to Lord Carloway’s recommendations on this topic. The Justice Committee, in its stage 1 report, asked for:

“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)

² See discussion under the heading of ‘Police powers to hold a suspect in custody for questioning’.

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)

During stage 2, the Justice Committee agreed a number of Scottish Government amendments. They included ones:

- clarifying that investigative liberation conditions can only be applied for a period of 28 consecutive days
- providing that liberation conditions cannot require a person to be in a particular place at a particular time (eg a home detention curfew) but can prohibit a person from going somewhere for a specified period

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 for suspects to have access to a solicitor before, and during, police questioning

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 sought to make this change. This was welcomed by the Justice Committee in its stage 1 report.

Section 24 of the Bill sets out the right of a suspect to have access to a solicitor whilst being questioned by the police. It covers suspects who are questioned whilst attending a police station on a voluntary basis, as well as those held in police custody. Section 36 sets out a more general right for suspects held in police custody to consult a solicitor (whether or not they are to be questioned by the police). In both cases, the rights are subject to “exceptional circumstances” provisions – allowing the police to interview a suspect without a solicitor being present or to delay consultation with a solicitor.

Relevant amendments lodged during stage 2 included a number seeking to ensure provisions allowing the police to question a suspect without a solicitor being present, or delay consultation with a solicitor, are not used too widely.³ In support of amending the Bill, Alison McInnes MSP argued that:

“The Bill suggests that denial of those fundamental rights could become routine. My amendments highlight the significance of those decisions and would ensure that proper safeguards are in place to discourage misuse of the powers.” (Scottish Parliament Justice Committee 2015b, col 53)

Whilst recognising the importance of access to legal advice, some members were not convinced that the proposed amendments were necessary. For example, Elaine Murray MSP stated that:

“I agree that there is a need for the police not to routinely abuse their powers, but I do not believe that the bill encourages that, because it makes it quite clear that it is talking about ‘in exceptional circumstances’.” (col 53)

³ Amendments lodged by John Finnie MSP and Alison McInnes MSP.

None of the stage 2 amendments on the issue were agreed by the Justice Committee. However, the Cabinet Secretary said that:

“I appreciate that we are talking about important decisions to withhold or delay the delivery of crucial rights to suspects. The Bill already sets high tests to ensure that the powers can be used only when absolutely necessary. However, I have listened to the arguments that have been put forward by Alison McInnes and I agree that authorisation by a police constable may not be appropriate in all cases. Therefore, I urge John Finnie not to press amendment 29 and Alison McInnes not to move her amendments, and I will undertake to consider the matter further and to lodge amendments at stage 3 to ensure that the decisions are made by constables of the most appropriate rank.” (cols 55-56)

In addition, during an earlier meeting of the Justice Committee, the Cabinet Secretary set out plans for changing legal aid arrangements for suspects held in police custody:

“During my statement to Parliament on the report of Lord Bonomy’s review group,⁴ John Finnie endorsed the group’s recommendation that legal aid contributions for legal advice at police stations should be waived. I appreciate that there have been concerns that suspects, even when they know about their rights to legal advice, may waive them because they are worried about the potential cost implications.

The Government has previously confirmed that it plans to abolish legal aid contributions in all those circumstances. I can now confirm to the committee that the Government will lay regulations to do that before the end of this year. All suspects will be entitled to free legal advice while they are detained. That is a significant step and I believe that it demonstrates the progress and commitment that are being made to safeguard the rights of suspects and detained persons.

I hope that that provides further reassurance to members that steps continue to be taken to encourage the greater uptake of legal advice at police stations. We will monitor how the changes affect the number of suspects taking legal advice in custody and, as always, I will keep the committee informed of the results.” (Scottish Parliament Justice Committee 2015a, col 25)

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 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

⁴ The report of the Post-corroboration Safeguards Review headed by Lord Bonomy (referred to in this briefing as the Bonomy report).

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." (p 7)

At the start of December 2015, Scottish Government officials advised that:⁵

- the working group (the Extended Courts Working Group) met a number of times during 2015 and provided updates to the Justice Board
- in light of those updates, it was agreed that further analysis should be undertaken following implementation of provisions within the Criminal Justice (Scotland) Bill (including reforms relating to custody and investigative liberation)
- it was also agreed that consideration of issues raised by the working group should be reflected in on-going work to progress the justice digital strategy

Child suspects

The Bill 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 and stage 2 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.⁶ In relation to children aged 16 or 17, it provides that 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 under the age of 18 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)

The above provisions were the subject of stage 2 amendments lodged by both the Scottish Government and Elaine Murray MSP.

Relevant amendments lodged by Elaine Murray sought to place 16/17 year olds in the same position as children under the age of 16, so that all suspects under the age of 18 would be incapable of consenting to police interview without a solicitor being present. Scottish

⁵ Personal communication with Scottish Government officials.

⁶ See section 25 of the Bill (as introduced and as amended at stage 2).

Government amendments proposed a more limited change, providing that a 16/17 year old who is already subject to a compulsory supervision order (or interim order) would be unable to consent.⁷ The approach put forward by Elaine Murray was supported by three other members of the Justice Committee. However, the more limited amendments lodged by the Scottish Government were agreed. The Cabinet Secretary sought to assure the committee that:

“The wider needs of 16 and 17-year-olds who may be vulnerable but are not subject to compulsory supervision will also have to be reflected in guidance and practice requirements, which will have to be fully implemented on the ground.” (Scottish Parliament Justice Committee 2015b, col 60)

This was not the only area where the justification for treating children aged 16 or 17 differently from other children was debated. For example, during stage 2, the Justice Committee agreed a number of Scottish Government amendments inserting five new sections into the Bill.⁸ The new provisions are intended to replace similar provisions, currently set out in the Criminal Procedure (Scotland) Act 1995, making special provision for child suspects. In relation to the first of the new sections, the Cabinet Secretary indicated that:

“Amendment 150 replaces section 43(4) of the Criminal Procedure (Scotland) Act 1995, which provides that, if a child is to be brought before a court, they should be kept in a place of safety rather than a police station. The amendment will preserve a protection for children when the police decide that they must hold them in custody, which they are likely to do only in the case of the most serious offences. Children 1st has indicated its support for the amendment, which we welcome. We recognise that it has been suggested that consideration should be given to extending that protection to all 16 and 17-year-olds, rather than only those who are subject to a compulsory supervision order, and we would be happy to engage on the implications of that.” (Scottish Parliament Justice Committee 2015b, col 36)

With regard to Scottish Government amendments in this group, Elaine Murray MSP noted that:

“As a result of the way in which the amendments fall in our discussions, I will support them at this point. However, I think that the provisions will require further amendment at stage 3 in order to give greater protection to 16 and 17-year-olds.” (col 40)

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 were also considered in the Bonomy report. It noted 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)

⁷ A children’s hearing can make a compulsory supervision order if the hearing considers it necessary for the protection, guidance, treatment or control of the child. An order makes a named local authority responsible for supporting the child. It will have conditions attached, such as what support the child is to receive, where the child is to live and who the child should have contact with.

⁸ Sections 18A-C and 42A-B of the Bill as amended at stage 2.

In relation to children, it went 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 defined 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." (p 10)

On this point, the Bonomy report argued 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)

During stage 2, John Finnie MSP lodged a series of amendments seeking to remove the reference to mental disorder from the definition of a vulnerable adult suspect. This would extend the protections for such suspects to any adult who appears to a police officer to be unable to: (a) understand sufficiently what is happening; or (b) communicate effectively with the police.

In response to John Finnie's amendments, the Cabinet Secretary outlined the reasons for the Scottish Government preferring the approach in the Bill as introduced:

"When discussing the support needs of vulnerable suspects, Lord Carloway's report noted that individuals who are intoxicated through alcohol consumption or drug use or who are experiencing short-term illness may be unable to communicate effectively but that such difficulties will be cured through the passage of time. It also noted that some individuals may not be able to understand what is happening as a result of language or hearing difficulties but that that could be resolved through the use of an interpreter or by other means.

A deliberate – and crucial – distinction was made between those scenarios and cases in which an individual has a permanent or semi-permanent condition that results in their being particularly vulnerable and requiring additional support to ensure that they understand what is happening and can communicate with the police. It is at those cases that the relevant provisions in sections 25 and 33 are aimed.

That is why, as part of the definition of a vulnerable person, the term ‘mental disorder’ was used. That term encompasses mental illnesses, personality disorders and learning disabilities, and it reflects the current basis on which support from appropriate adult services is offered.” (Scottish Parliament Justice Committee 2015b, col 64)

He did, however, add that the Scottish Government planned to keep the provisions under review and that the criteria for support could, if considered desirable in the future, be changed by subordinate legislation.

The first of John Finnie’s amendments was defeated on the casting vote of the convener. His other amendments on the topic were not moved.

In relation to the provision of appropriate adult services, 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. Concerns were also highlighted in the Bonomy report, which stated 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 went 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).

Alison McInnes MSP lodged a stage 2 amendment seeking to address the above recommendation by placing a duty on local authorities. In response, the Cabinet Secretary advised the Justice Committee that:

“When the Bill was introduced, it was considered that the appropriate adult system was working well and that a light-touch approach should be adopted – in essence, placing the referral process on a statutory basis but going no further. However, further evidence, including evidence submitted at stage 1, has persuaded me that the current model for appropriate adult services is not sustainable over the longer term. Concerns have been expressed about the accessibility and consistency of service provision, the exact remit of appropriate adults and funding for the service, all of which warrant further consideration.

I therefore appreciate the intention behind amendment 249 and I agree that action is required. However, if we are to put in place an effective and sustainable appropriate adult service, it is vital that we get the model right. To that end, we are leading work with local authorities, the health service, Police Scotland, the Mental Welfare Commission for Scotland and other interested parties to identify the best way to provide a sustainable service, taking account of Lord Bonomy’s recommendation.

Workshops have been undertaken this year with key interests at national and local level, which have informed the development of potential service delivery options. We recently sought comments on those options, including from those who deliver the service on the ground. Over the coming weeks and months a more detailed analysis, including consideration of financial implications, will be undertaken.

Although I am sympathetic to the issues raised by the committee and others, it is important not to allocate responsibility for the appropriate adult service without completing the work under way and reaching a consensus with those who deliver and use the service.

I expect to be in a position by stage 3 to set out our preferred approach for the sustainable delivery of appropriate adult services across Scotland and, on that basis, I ask Alison McInnes to consider not moving her amendment 249.” (Scottish Parliament Justice Committee 2015b, col 67)

Alison McInnes welcomed the Cabinet Secretary’s response. Her amendment was not moved.

Code of practice

One of the recommendations set out in the [Bonomy report](#) was that:

“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.” (para 7.28)

During stage 2, Alison McInnes MSP lodged an amendment seeking to implement the above recommendation:

“Lord Bonomy observed that the standard operating procedures and practices that each of the legacy forces implemented were ‘not uniform’ and that regional differences persist in Police Scotland. His review highlighted that practices are inconsistent, which is worrying, given how critical such aspects of an investigation are. ID procedures and interviews often provide crucial incriminating evidence.

Amendment 258 will ensure that interview and ID operating procedures across the country are predictable and consistent, as the public expect them to be, and it would improve standards.” (Scottish Parliament Justice Committee 2015b, col 87)

The Cabinet Secretary outlined the Scottish Government’s reasons for not supporting the amendment:

“When Lord Bonomy’s report was published, I said that we would consider whether any of its proposals could be progressed in this parliamentary session. On the whole, however, our preference was to take time to consider all the recommendations in detail and to carry out a more holistic review of the recommendations, alongside other reforms.

I have therefore advised the committee that we will this year take forward only a small number of Lord Bonomy’s recommendations – for example, we have an amendment that will require the Lord Advocate to publish the prosecutorial test. I still consider that there is great value in many of the other recommendations. However, such substantive and important changes to our justice system require to be looked at in the round and alongside other potential reforms.” (col 87)

The amendment was agreed by the Justice Committee (for 5, against 4).⁹

⁹ See section 52A of the Bill as amended at stage 2.

CORROBORATION AND RELATED REFORMS

Background

Broadly speaking, the current rules on corroboration mean that proof of a criminal offence requires at least two sources of evidence.¹⁰ This requirement applies to the ‘essential’ or ‘crucial’ facts of the case (generally that the offence was committed and that the accused committed it). The evidence may be direct or circumstantial.¹¹

Abolition of the general requirement for corroboration in criminal cases 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

Proposed reforms

Sections 57 to 61 and schedule 2 of the Bill as introduced sought to abolish the general requirement for corroboration.

In relation to additional safeguards against potential miscarriages of justice, section 70 of the Bill as introduced sought 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 areas of potential reform highlighted in the Scottish Government’s 2012 consultation (withdrawal of case from jury and ending of the not proven verdict) were not taken forward.

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.

¹⁰ There are some limited statutory exceptions to this requirement.

¹¹ 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.

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 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.¹² 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

¹² Section 58 of the Bill as introduced provided 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 pointed to the example of speeding, in relation to which section 89 of the Road Traffic Regulation Act 1984 requires corroborated evidence.

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 was included in the Bill as introduced),¹³ various witnesses called for more safeguards. In fact, evidence from both the Lord Advocate and Cabinet Secretary for Justice pointed to the possibility of further changes, including a requirement for cases to have 'supporting evidence'.¹⁴ 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:

- 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
- 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

¹³ The proposal that a guilty verdict in a solemn case would require the support of at least two-thirds of the jury.

¹⁴ A possible requirement for 'supporting evidence' was one of the matters which the Post-corroboration Safeguards Review was tasked with considering (see below).

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.

Post-corroboration Safeguards Review

As noted above, the Scottish Government decided to establish an independent review to consider what additional measures might 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 noted 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 Appendix 2 of this briefing. They included 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 suspects¹⁵

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

¹⁵ Recommendations of the Bonomy report on vulnerable adult suspects are considered earlier in this briefing.

relevant to Part 1 of the Bill.¹⁶ 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 2015b)

Stage 2 consideration

During stage 2, the Scottish Government supported amendments lodged by Margaret Mitchell MSP to remove the provisions of the Bill providing for the abolition of the current general requirement for corroboration in criminal cases.¹⁷ The amendments were agreed by the Justice Committee, with all but one member voting in favour.¹⁸ Despite the level of support for the relevant amendments, the committee remained divided on the case for ending the requirement for corroboration.

In addition, a Scottish Government amendment removing the proposed reforms to jury majorities was agreed unanimously.¹⁹ The Bill as introduced, in providing for a system under which a guilty verdict would require the support of at least two-thirds of the jury, sought to guard against any increased danger of wrongful conviction flowing from the planned abolition of the requirement for corroboration. In setting out the reasoning behind the amendment, the Cabinet Secretary explained that the possibility of jury reform would be considered further:

"Lord Bonomy's review group, as members will be aware, has recommended that jury research should take place to ensure that 'decisions about what, if any, changes to jury size, majority and verdicts may be appropriate are made on an informed basis'.

I have decided that it is appropriate for that recommendation to be taken forward. It should provide a very important evidence base for any future changes to jury size and verdicts. The Scottish Government will now consider the exact remit and the methodology for such research. In that work, my officials will continue to engage with justice sector partners, organisations and academics.

Lord Bonomy's reference group specifically recommended research on the effects of jury sizes of 12 and 15, on the verdicts of not proven and not guilty, and on the effect of requiring unanimity. I want consideration of the remit to start with those issues, and to add others as is considered necessary. I hope that the research will commence before the end of this parliamentary session. I will keep the committee informed of progress.

I consider that it is preferable to retain the current jury system until the jury research has been completed. Amendment 68, if agreed to, will mean that Scotland will continue with the present system of a simple majority being required for a guilty verdict. Alongside the jury research, we will consider holistically all of Lord Bonomy's proposed reforms, the requirement-for-corroboration rule and the other relevant reforms, and we will take our time in developing a future package of reforms, which I hope can attract a general consensus." (Scottish Parliament Justice Committee 2015c, cols 16-17)

¹⁶ Part 1 of the Bill deals with police powers to arrest, hold in custody and question suspects, as well as rights of suspects.

¹⁷ The amendments sought to remove sections 57 to 61 and schedule 2 of the Bill as introduced.

¹⁸ The exception was Gill Paterson MSP, who abstained. Section 62, the remaining section in Part 2 of the Bill as introduced, was (by stage 2 amendment) moved to Part 6 of the Bill. This allowed for the deletion of Part 2 in the Bill as amended at stage 2.

¹⁹ The proposed reforms to jury majorities were set out in section 70 of the Bill as introduced.

NOT PROVEN VERDICT

Three verdicts are available to a judge or jury in a criminal trial – guilty, not guilty and not proven. In legal terms, the implications of a not proven verdict are the same as a not guilty verdict in that the accused is acquitted.

As noted above, the Scottish Government's 2012 consultation on additional safeguards, following the planned removal of the requirement for corroboration, sought views on whether the not proven verdict should be abolished. The Criminal Justice (Scotland) Bill as introduced did not seek to change the current three verdict system.²⁰ However, another bill – the [Criminal Verdicts \(Scotland\) Bill](#) introduced in November 2013 by Michael McMahon MSP – does seek to remove the not proven verdict as an option in criminal trials.

Michael McMahon's bill also seeks to change the rules relating to the number of jurors who must support a guilty verdict before the jury as a whole returns such a verdict, effectively requiring at least two-thirds in favour of a guilty verdict. Thus, there was an overlap between the two bills (as introduced) in relation to jury majorities. The reasons for the inclusion of this reform in the two bills differed. Both were concerned with ensuring that some other reform does not lead to an increased risk of wrongful convictions, but in one case the other reform was abolition of the requirement for corroboration and in the other abolition of the not proven verdict.

Further information on Michael McMahon's bill is set out in a separate [SPICe briefing](#) (McCallum 2014). The Justice Committee was also designated as lead committee for the purposes of scrutinising this second bill. Given the overlap between the two bills, committee scrutiny of Michael McMahon's bill was postponed whilst the Criminal Justice (Scotland) Bill completes its passage through the Parliament.²¹

The Justice Committee did, however, take evidence from Michael McMahon during stage 1 scrutiny of the Criminal Justice (Scotland) Bill. In addition, Michael McMahon lodged a number of stage 2 amendments which, if agreed, would have incorporated into the Criminal Justice (Scotland) Bill the reforms provided for in his own bill. During consideration of the amendments, the Cabinet Secretary indicated that he was "not unsympathetic to Mr McMahon's position" (Scottish Parliament Justice Committee 2015c, col 30). However, he went on to state that his preference was to leave current arrangements in place until the jury research referred to above (in relation to corroboration and related reforms) has been completed. In response, Michael McMahon warned against kicking reform into the long grass, but was persuaded to withdraw (or not move) his amendments to allow the matter to be examined further.

AGE OF CRIMINAL RESPONSIBILITY

A stage 2 amendment lodged by Alison McInnes MSP sought to add a new section to the Bill providing for an increase in the age of criminal responsibility.

The current age of criminal responsibility, in the sense of the age below which a child is deemed to lack the capacity to commit a crime, is eight. Section 41 of the Criminal Procedure (Scotland) Act 1995 provides that: "It shall be conclusively presumed that no child under the age of eight years can be guilty of an offence".

There are further restrictions on when a child may be subject to the adult system of prosecution and punishment. The Criminal Justice and Licensing (Scotland) Act 2010 inserted a new section 41A into the Criminal Procedure (Scotland) Act 1995 providing that no child under the age of 12

²⁰ The Criminal Justice (Scotland) Bill is, in other parts of this briefing, referred to as 'the Bill'.

²¹ The Justice Committee is scheduled to take oral evidence on Michael McMahon's bill in January 2016.

may be prosecuted for an offence. This leaves the possibility of children aged eight or over being referred to the children's hearings system on offence grounds.

The present legal situation may be summarised as follows:

- children under the age of eight – lack the legal capacity to commit an offence, cannot be prosecuted in the criminal courts and can only be referred to the children's hearings system on non-offence grounds
- children aged between eight and 12 – cannot be prosecuted in the criminal courts but can be referred to the children's hearings system on both offence and non-offence grounds
- children aged 12 or more – can be prosecuted in the criminal courts (subject to the guidance of the Lord Advocate) or referred to the children's hearings system on both offence and non-offence grounds

The amendment lodged by Alison McInnes sought to amend section 41 of the Criminal Procedure (Scotland) Act 1995, so that it would be conclusively presumed that no child under the age of 12 could be guilty of an offence. This would prevent children under that age being referred to the children's hearings system on offence grounds.

Although the Bill as introduced did not include any provisions seeking to alter the age of criminal responsibility, the Justice Committee did receive evidence on the matter during stage 1 scrutiny. The stage 1 report noted that:

“The Committee welcomes the Cabinet Secretary's undertaking to give consideration to raising the age of criminal responsibility and would welcome regular updates on this work.” (para 206)

During stage 2 proceedings, Alison McInnes highlighted the impact of children getting a criminal record as a result of the hearings system dealing with them on offence grounds whilst under the age of 12. She argued that:

“Surely it is perverse to subsequently further punish and disadvantage them as they move into adult life by branding them as criminals? Their childhood convictions will need to be declared for decades or even the rest of their lives. How can that be right? How can we allow a child's opportunities to be curbed so severely at such a young age? Handing criminal records to eight or nine-year-olds is a destructive, inappropriate response to their offending.” (Scottish Parliament Justice Committee 2015c, col 24)

In response, the Cabinet Secretary indicated that the Scottish Government was still open to change in the area but argued that more consideration needed to be given to the possible implications of change. He stated that:

“I can therefore advise the Committee that an independent advisory group is being established. The group will address the underlying issues in respect of disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence taking account of the minimum age of prosecution, the role of the children's hearings system, and UNCRC compliance. The group is expected to meet in the next six weeks and will bring forward recommendations for consultation by early 2016.” (Scottish Parliament Justice Committee 2015c, col 27)

The stage 2 amendment was rejected on the convener's casting vote.

SOLEMN PROCEDURE: SHERIFF AND JURY CASES

Part 3 of the Bill as introduced set out 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 stated 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 parliamentary scrutiny (stages 1 and 2) 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)

At stage 2, the Justice Committee agreed a Scottish Government amendment removing the proposed statutory obligation on the prosecution to lodge a note setting out the state of

preparation of both prosecution and defence. The change, in line with evidence received by the Justice Committee, would allow for a practice under which each side would be responsible for lodging its own note.

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 set 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.

No amendments relating to the provisions of Part 4 were lodged at stage 2.

APPEALS AND SCCRC

Appeals

Part 5 (sections 74 to 81) of the Bill as introduced set 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 Scottish Government's 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)

No amendments relating to the above provisions were lodged at stage 2.

SCCRC

Part 5 (section 82) of the Bill as introduced also set 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 2010.²² 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 as introduced sought 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).

²² Parliamentary scrutiny of this legislation was carried out under emergency bill procedure.

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)

At stage 2, Christine Grahame MSP lodged two amendments concerning the work of the SCCRC and the consideration of SCCRC references by the High Court. They included an amendment seeking to remove any interests of justice test from the High Court’s consideration of SCCRC references – effectively reverting to the position prior to relevant changes made by the 2010 Act. It would also bring the law in line with the stage 1 report recommendation outlined above. The amendment was agreed to (for 5, against 3, abstentions 1).

CHILDREN AFFECTED BY PARENTAL IMPRISONMENT

At stage 2, Mary Fee MSP lodged amendments on:

- the remanding in custody and sentencing of parents and other people with responsibility for the care of a child under the age of 18
- the assessment and provision of support for children affected by the imprisonment of such a person

They sought to add three new sections to the Bill providing for:

- a national strategy on the impact of sentencing on children affected by parental imprisonment
- annual reports on sentencing and the impact of parental imprisonment
- a duty to undertake child and family impact assessments

Amendments relating to a national strategy and annual reports were rejected by the Justice Committee. However, the amendment seeking to establish a duty to undertake child and family impact assessments was agreed (for 5, against 4).²³ In relation to that amendment, Mary Fee explained that:

“Amendment 109 would ensure that a child and family impact assessment was undertaken when a person was remanded in custody to await trial or sentencing or when a person was

²³ See section 82A of the Bill as amended at stage 2.

sentenced to a period of imprisonment. A child and family impact assessment is vital to ensure that processes are put in place to assess the likely impact on the wellbeing of the person's dependent child or children in the family. Such assessments will help to identify support and assistance that may be necessary to meet the dependent child's wellbeing needs that arise from those circumstances, as well as those of the remaining family.

Child and family impact assessments have been recommended by Scotland's Commissioner for Children and Young People [SCCYP] since 2007, by the UN Committee on the Rights of the Child in 2011 and by Barnardo's Scotland and the National Society for the Prevention of Cruelty to Children in their report 'An Unfair Sentence – All Babies Count: Spotlight on the Criminal Justice System', which has been endorsed by Together Scotland, the SCCYP and Families Outside. The assessments have also been widely supported in responses to the consultation on my proposed member's bill – the Support for Children (Impact of Parental Imprisonment) (Scotland) Bill." (Scottish Parliament Justice Committee 2015c, cols 42-43)

During the same meeting, the Cabinet Secretary set out the Scottish Government's reasons for not supporting the amendments (including the successful one). With regard to child and family impact assessments, he sought to highlight broader measures being taken to support all vulnerable children, including the development of the named person service:²⁴

"The existing provisions in the Children and Young People (Scotland) Act 2014 provide appropriate coverage for all vulnerable children, and the law places a duty on local authorities and health boards to make services available." (col 45)

"Amendment 109 calls for the introduction of child impact assessments. However, the named person service is for every child and is intended to ensure that concerns are picked up early and that no one, including the vulnerable, is left without support." (col 46)

MISCELLANEOUS

Part 6 of the Bill as introduced contained measures:

- setting out two statutory aggravations relating to people trafficking²⁵
- seeking to allow for greater use of live television links between prisons (or other places of detention) and the criminal courts
- providing a framework for establishing a Police Negotiating Board for Scotland (PNBS)

During stage 2, a number of existing provisions were amended or removed. Other provisions were added (eg relating to the test applied by prosecutors when deciding whether to proceed with criminal court proceedings). Further information on some of the main changes and areas of debate is set out below.

People trafficking

The provisions on people trafficking were removed from the Bill by stage 2 amendment. This was on the basis that relevant provisions were included in the Human Trafficking and Exploitation (Scotland) Bill (introduced into the Scottish Parliament on 11 December 2014 and passed on 1 October 2015).

²⁴ Information on the named person service is provided on the Scottish Government's website under the heading '[The Role of the Named Person](#)'.

²⁵ As for aggravating factors in general, proof that someone committed an offence in circumstances where one of the statutory aggravations was established may have led to the court imposing a higher sentence.

Use of live television links

The provisions relating to the use of live television links seek to allow people, who are held in prison or in police custody, to take part in a greater range of criminal court hearings without being transferred to court. They were the subject of a number of stage 2 amendments lodged by the Scottish Government. The Cabinet Secretary described the amendments as being “largely technical” (Scottish Parliament Justice Committee 2015d, col 27). They were unanimously agreed to by the Justice Committee.

Police pay and conditions

The Bill 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 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 intention is that the PNB should continue its work until the PNBS is established.

The Justice Committee’s stage 1 report welcomed proposals in the Bill, as introduced, to establish a PNBS.

During stage 2, the Scottish Government lodged a number of amendments. The Cabinet Secretary explained that:

“Following consultation with stakeholders, I propose Government amendments to the Bill that relate to the functions and procedures of the PNBS in order to ensure that it can operate effectively.” (Scottish Parliament Justice Committee 2015d, col 38)

He went on to say that the most significant amendments sought to:

“deliver a commitment that was made by my predecessor to make arbitration on police pay legally binding on ministers. Together, those amendments provide a framework to ensure that, when the PNBS makes representations to ministers based on an arbitration award, ministers will be bound to take all reasonable steps to give effect to those representations.” (col 38)

All of the Scottish Government’s amendments were unanimously agreed to by the Justice Committee.

Publication of the prosecutorial test

One of the recommendations of the Bonomy report²⁶ was that:

“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” (para 8.24).

The Crown Office and Procurator Fiscal Service currently publishes relevant information as part of its [Prosecution Code](#). The code notes that it:

“sets out the criteria for decision making and the range of options available to prosecutors dealing with reports of crime. By publishing this information the Crown Office and Procurator Fiscal Service aims to provide a general explanation of the various factors which may influence decisions regarding prosecution or alternative action. It is hoped that the Prosecution Code will provide an improved understanding of the decision making process as well as an indication of its complexity” (p 1).

During stage 2, the Scottish Government lodged an amendment to insert a new section into the Bill, placing a statutory obligation on the Lord Advocate to publish the prosecutorial test. The Cabinet Secretary noted that:

“The amendment would place the voluntary arrangement on a statutory basis. Lord Bonomy was of the view that that would assist in ensuring transparency and consistency of decision making in criminal proceedings, and I agree. The independence of the Lord Advocate is also, however, of vital importance, and I therefore want to stress that the wording of the test will remain entirely a matter for him.” (Scottish Parliament Justice Committee 2015d, col 25)

When questioned why the amendment did not require regular review (involving public consultation) of the prosecutorial test, he stated that:

“We have not chosen to implement the recommendation about consultation for the test because we believe that the test itself should be left to the Lord Advocate to determine. There are important constitutional issues in the role and independence of the Lord Advocate when determining these matters. To provide for a consultation process would be to fetter or to seek to influence the Lord Advocate’s role to a degree. That is why we have not pursued the issue of consultation.” (col 26)

The amendment was unanimously agreed to by the Justice Committee.²⁷

Legal representation for complainers in sexual offence cases

The Criminal Procedure (Scotland) Act 1995 includes provisions restricting the circumstances in which evidence can be led regarding the sexual history or character of complainers in sexual offence trials. The main provisions on the issue are set out in sections 274 and 275 of the 1995 Act (as inserted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002).

In relevant cases, section 274(1) of the 1995 creates a general rule that the court shall not allow questioning which seeks to show that the complainer:

“(a) is not of good character (whether in relation to sexual matters or otherwise);

²⁶ The Bonomy report (published April 2015) is considered earlier in this briefing under the heading of ‘Post-corroboration Safeguards Review’.

²⁷ See section 82B of the Bill as amended at stage 2.

(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;

(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer –

(i) is likely to have consented to those acts; or

(ii) is not a credible or reliable witness; or

(d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.”

Section 275(1) of the 1995 Act provides that a court may allow questioning, which would otherwise be prohibited under the above provisions, if the court is satisfied that:

“(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating –

(i) the complainer’s character; or

(ii) any condition or predisposition to which the complainer is or has been subject;

(b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.”

The party wishing to lead such evidence must apply in writing to the court. Further information on the provisions is set out in the SPICe briefing [Sexual History and Character Evidence](#) (McCallum 2008).

A stage 2 amendment lodged by Margaret Mitchell MSP sought to add a new section to the Bill, amending relevant provisions of the 1995 Act. It would give complainers in sexual offence cases a right to legal representation where there is an application to lead evidence relating to the sexual history or character of the complainer.

In support of her amendment, Margaret Mitchell indicated that it would help complainers challenge the use of personal information in court. She stated that the experience of victim support groups is the the prosecution is not robust enough in challenging defence applications to lead such information.

In response, the Cabinet Secretary noted that the Scottish Government sympathised with the member’s intentions but would not be supporting the amendment. He argued that the proposal sought to introduce major change to criminal procedure which would require “a great deal of further thought and consideration” (Scottish Parliament Justice Committee 2015d, col 34). However, he went on to say that:

“I have mentioned that there is a lack of evidence for such a major reform. However, I want to ensure that existing arrangements are operating as effectively as possible. I therefore propose a review of whether there is any cause for concern about the way that the courts deal with recovery and disclosure of confidential information relating to complainers. (...) During a previous stage 2 meeting I referred to our plans to develop a holistic and balanced package of future reforms. That would cover consideration of Lord Bonyon’s recommendations, the requirement for corroboration reform and any other relevant issues.

I consider the proposed review of disclosure of confidential information to be one of the relevant issues that should be included.” (col 36)

The stage 2 amendment was rejected by the Justice Committee (for 2; against 7).

APPENDIX 1: ADVISORY GROUP ON STOP AND SEARCH – RECOMMENDATIONS

The report (p 15-16) of the Advisory Group on Stop and Search sets out the following recommendations:

1. That there should be a Code of Practice covering Stop and Search of the person in Scotland. The Code should be given effect by statute.
2. That, ahead of implementation of the Code of Practice, further public consultation should take place on the terms of the Code. To assist in this consultation, a draft Code of Practice is included with this Report.
3. That the Code of Practice should be reviewed at regular intervals of not less than every four years, with provision for earlier review being triggered at the request of the Chief Constable of Police Scotland, the Scottish Police Authority or Her Majesty’s Inspector of Constabulary in Scotland. There should be specific provision for post-implementation review to take place two years after the initial Code comes into effect.
4. That the Code of Practice should be issued by the Scottish Ministers, subject to Parliamentary approval as to commencement and, thereafter, on the coming into force of any proposed revision.
5. That Police Scotland should provide regular reports to the Scottish Police Authority about the use of stop and search, including all relevant data on all recorded stops and searches, for the purposes of evaluating and monitoring use of the practice through public scrutiny. These data should also be released publicly on a regular basis by the SPA and by Police Scotland so as to ensure openness and transparency and allow for wider research and monitoring purposes.
6. That the Scottish Government should hold an early consultation on whether to legislate to create a specific power for police officers to search children under 18 for alcohol in circumstances where they have reasonable grounds to suspect that they have alcohol in their possession. Such a power might also extend to searching those suspected of supplying alcohol to those under 18. The Government should ensure that the consultation process engages effectively with children and young people. In introducing any such power care should be taken to ensure that there is no consequent increase in criminalisation of children and young people.
7. That the duty on constables to consider the child’s best interests in s 42 of the Criminal Justice (Scotland) Bill be amended so as to apply to a constable’s decision to search a child (there defined as a person under 18) who is not in custody. (Those in custody are outwith our Terms of Reference).
8. That the policing tactic known as ‘consensual’ or non-statutory stop and search of the person in Scotland should end when the Code of Practice comes into effect. All searches by police officers in Scotland of persons not in custody should be thereafter undertaken on the basis of statutory powers exercised in accordance with the Code of Practice referred to in Recommendation 1.
9. That careful consideration should be given to the implications of implementation of these Recommendations for Police Scotland, the Scottish Police Authority and for other stakeholders. The policy, practice and cultural changes required are extensive and

should be the subject of a formal implementation programme, subject to effective governance and scrutiny arrangements, training and post-implementation review.

10. That discussion should take place between Police Scotland and other partners and stakeholders, including the Scottish Government, regarding the most appropriate methods of dealing with children and vulnerable adults who come to notice for protection and welfare reasons during stop and search situations.

APPENDIX 2: POST-CORROBORATION SAFEGUARDS REVIEW – RECOMMENDATIONS

Chapter 3 of the Bonomy report included 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.

SOURCES

Advisory Group on Stop and Search. (2015) *Report of the Advisory Group on Stop and Search*. Available at:

<http://www.gov.scot/About/Review/stopandsearch/Report?refresh=0.12071063809197169>

[Accessed 1 December 2015]

Cadder v HM Advocate. (2010) UK Supreme Court judgement 26 October 2010. Available at: http://www.supremecourt.uk/decided-cases/docs/UKSC_2010_0022_Judgment.pdf [Accessed 1 December 2015]

Carloway Review. (2011) *The Carloway Review: Report and Recommendations*. Available at: <http://www.scotland.gov.uk/Resource/Doc/925/0122808.pdf> [Accessed 1 December 2015]

Criminal Justice (Scotland) Bill [as introduced] Session 4 (2013). SP Bill 35. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20\(Scotland\)%20Bill/b35s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd.pdf)

Criminal Justice (Scotland) Bill: Explanatory Notes (and other accompanying documents) Session 4 (2013). SP Bill 35-EN. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20\(Scotland\)%20Bill/b35s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd-en.pdf)

Criminal Justice (Scotland) Bill: Policy Memorandum Session 4 (2013). SP Bill 35-PM. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20\(Scotland\)%20Bill/b35s4-introd-pm.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd-pm.pdf)

Criminal Justice (Scotland) Bill [as amended at stage 2] Session 4 (2015). SP Bill 35A. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20\(Scotland\)%20Bill/SPBill35AS042015.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/SPBill35AS042015.pdf)

Criminal Verdicts (Scotland) Bill [as introduced] Session 4 (2013). SP Bill 42. Edinburgh: Scottish Parliament. Available at: Available at: http://www.scottish.parliament.uk/S4_Bills/Criminal%20Verdicts%20Bill/b42s4-introd.pdf.pdf

Crown Office and Procurator Fiscal Service. *Prosecution Code*. Available at: http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412_1.pdf [Accessed 1 December 2015]

McCallum, F. (2008) *Sexual History and Character Evidence*. SPICe Briefing 08/33. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/16806.aspx> [Accessed 1 December 2015]

McCallum, F. (2013) *Criminal Justice (Scotland) Bill*. SPICe Briefing 13/55. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/67015.aspx> [Accessed 1 December 2015]

McCallum, F. (2014) *Criminal Verdicts (Scotland) Bill*. SPICe Briefing 14/47. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/78874.aspx> [Accessed 1 December 2015]

Police Remuneration Review Body. Available at:
<https://www.gov.uk/government/organisations/police-remuneration-review-body/about>
[Accessed 1 December 2015]

Post-corroboration Safeguards Review. (2015) *Final Report* (the Bonomy report). Available at:
<http://www.gov.scot/Resource/0047/00475400.pdf> [Accessed 1 December 2015]

Scottish Government. *Independent Advisory Group on Stop and Search*. Available at:
<http://www.gov.scot/About/Review/stopandsearch> [Accessed 1 December 2015]

Scottish Government. *Post-corroboration Safeguards Review*. Available at:
<http://www.gov.scot/About/Review/post-corroboration-safeguards> [Accessed 1 December 2015]

Scottish Government. *The Role of the Named Person*. Available at:
<http://www.gov.scot/Topics/People/Young-People/gettingitright/named-person> [Accessed 1 December 2015]

Scottish Government. (2012) *Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration*. Available at:
<http://www.scotland.gov.uk/Publications/2012/12/4628> [Accessed 1 December 2015]

Scottish Government. (2014a) *Criminal Justice (Scotland) Bill – Response from the Scottish Government to the Committee’s Stage 1 Report*. Available at:
http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CJ_Bill_Stage_1_Report_-_response_from_SG.pdf [Accessed 1 December 2015]

Scottish Government. (2014b) *Criminal Justice Bill*. News release 23 April 2014. Available at:
<http://news.scotland.gov.uk/News/Criminal-Justice-Bill-bba.aspx> [Accessed 1 December 2015]

Scottish Government. (2015a) *Stop and Search Review*. News release 31 March 2015. Available at:
<http://news.scotland.gov.uk/News/Stop-and-Search-review-181d.aspx> [Accessed 1 December 2015]

Scottish Government. (2015b) Letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee, dated 21 April 2015. Available at:
http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20150421_CSfJ_to_CG_Bonomy.pdf [Accessed 1 December 2015]

Scottish Parliament. (2014) *Official Report 27 February 2014 (Session 4) – Criminal Justice (Scotland) Bill: Stage 1*. Cols 28320-28377. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9471&mode=pdf>

Scottish Parliament Justice Committee. (2014) *3rd Report, 2014 (Session 4): Stage 1 Report on the Criminal Justice (Scotland) Bill*. SPP 468. Edinburgh: Scottish Parliament. Available at:
<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/72893.aspx>

Scottish Parliament Justice Committee. (2015a) *Official Report 29 September 2015 (Session 4)*. Available at:
<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10119>
[Accessed 1 December 2015]

Scottish Parliament Justice Committee. (2015b) *Official Report 6 October 2015 (Session 4)*. Available at:
<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10136>
[Accessed 1 December 2015]

Scottish Parliament Justice Committee. (2015c) *Official Report 8 September 2015* (Session 4). Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10071> [Accessed 1 December 2015]

Scottish Parliament Justice Committee. (2015d) *Official Report 22 September 2015* (Session 4). Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10100> [Accessed 1 December 2015]

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