

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from the Edinburgh Bar Association

The Criminal Justice Bill lays out a number of sensible provisions designed to protect accused persons being processed by the justice system. It is therefore a great shame that it also contains provisions that threaten to seriously damage that system - predominantly the abolition of the need for corroboration at Section 57. As requested in the Government's request for responses, the Edinburgh Bar Association's response will follow the order of the provisions within the Bill.

Following the decision in the case of Cadder, police were given the power to detain members of the public in custody for extended periods - in some cases for up to twenty-four hours. Lord Carloway raised concerns that this increase in detention was unnecessary and should be reconsidered. Clearly this has been given consideration, leading to the provisions contained in sections 9 to 12 of the Bill. Therein, a twelve-hour time limit is enshrined, with the necessity of detention to be reviewed after six hours. We say the Bill should go further and instead re-impose the six-hour limit previously in force. As an association, our experience is that this allows ample time for solicitor contact to be made and consultations to take place (in cases where it is requested). An extension beyond a six-hour limit is unnecessary and should not be provided for.

Post-charge questioning will be possible if Section 26 of the Bill comes into force. It is proposed that the Court be given power to grant warrant to arrest for questioning, "If it seems to the court expedient to do so". The phrasing of this provision is worrisome to the association. Expedience is convenience. "Where it seems to the court that there is good reason to do so" would represent a higher and more appropriate test. The right not to be detained unnecessarily is a theme in the Bill and would be better served by a shorter time limit, out with which further questioning should take place only where good reason is demonstrated.

Section 36 confers a right upon a detained person to consult with a solicitor at any time whilst in custody. Typically, this will take place prior to interview by police officers. We suggest that consideration be given to placing an obligation on constables to provide pre-interview disclosure to the solicitor. Disclosure should include all information relating to the subject matter of the interview necessary to advise the detainee - principally on the subject of the "right to silence".

The need for corroboration in criminal cases should not be abolished. No proper case has been made out for abolition. Lord Carloway describes the standard of proof as "the real protection" against miscarriages of justice. There seems to be a desire to dismiss corroboration as a sacred cow that serves no real purpose and will not be missed. Nothing could be further from the truth. Abolition places accused persons, at every level of prosecution, at risk of conviction on the testimony of a single, convincing liar. No cross check required. It is commonly said that the standard of proof in Scotland is a high one, and it is. But that does not mean that on its own it is sufficient to protect against grave miscarriages of justice. In a civilised society such

as ours we should not be seeking to pare back the legal protections of our citizens to a bare minimum. Scotland deserves better than that.

Concerns have been raised that abolition will make the jobs of our police and prosecution service more difficult. Corroboration provides a sensible, reasonable base line which inquiries and prosecutions require to meet before they are proceeded with. It allows decisions regarding reporting or prosecuting to be made quickly and fairly. If corroboration is removed, then all single witness allegations will - technically - meet the test of sufficiency of evidence. This will place enormous, and potentially unbearable, strain on police officers: firstly to make the reporting decision and secondly to follow up and prepare the greater number of prosecutions that will inevitably follow. The same can be said of the Crown and Procurator Fiscal Service. A lower prosecution threshold necessarily means more cases in a system that is already struggling to cope. This is evidenced by the move to extend custody time limits in sheriff and jury cases. We understand that reporting/prosecuting decisions will be made on the basis of whether there is a realistic prospect of conviction. This is an entirely subjective test. It is entirely possible to envisage the test being applied in different ways across the country. It would be a great surprise if that were not the case. Stepping away from the current objective test - "is there sufficient corroborated evidence to proceed?" - is stepping backwards.

Consideration has been given to safeguards, in the event that abolition does happen. The proposed safeguards are inadequate. In jury cases, a guilty verdict will be passed when ten jurors are in favour. This is a far lower threshold than in other jurisdictions where corroboration is not required. England is an obvious example, where ten out of twelve jurors must vote for a guilty verdict to result in conviction. A smaller majority means weaker protection. Perhaps most obviously and most importantly, the Bill does not propose any safeguards whatsoever in relation to summary prosecutions. The vast majority of prosecutions are at summary level. Conviction at summary level can result in imprisonment for up to twelve months - eighteen in aggravated cases. The stakes are high. Should there not also be additional protection in these cases? The logical course is to retain corroboration and solve the problem before it arises.

As indicated above, pre-trial time limits are to be extended in sheriff and jury level custody cases. As practitioners in Edinburgh, we are aware that there is often a large backlog of sheriff and jury cases and that the system is under pressure. However, extending the custody time limits is no way to go about resolving the problem. Inefficiencies and under-staffing in the Procurator Fiscal service, coupled with a number of recent policy decisions increasing the number of cases tried on Indictment, are to blame here.

It is disappointing that the Bill seeks at section 66 to introduce written records in sheriff court solemn cases. This would place a further bureaucratic burden on both prosecutor and defence. Defence solicitors are already required to lodge Statements of Defence – written records would mean duplication of work. We are under obligations to our clients in terms of quality of service, and to the court as officers of the court. There seems little justification for further provision on this point.

Naturally, the focus of responses such as this is criticism. The Edinburgh Bar Association hopes that in considering our views, the Scottish Government will understand that we share its objectives. Our sole concern is that the justice system in Scotland is protected and - where possible - improved. If the issues raised here can be addressed, we see no reason why the Bill cannot be a success. If they are not, fairness in our courts may soon be a thing of the past.

Edinburgh Bar Association.
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