

## Justice Committee

### Criminal Justice (Scotland) Bill

#### Written submission from the Crown Office and Procurator Fiscal Service

##### Introduction

1. In *Cadder v HMA* 2010 S.L.T. 1125 Lord Rodger said “*the recognition of a right for the suspect to consult a solicitor before being questioned will tilt the balance, to some degree, against the police and prosecution*”. Recognising that as a result of the Supreme Court decision there would require to be both legislative changes and changes to police and prosecution practice, he stated that there was also a need “*to ensure that, overall, any revised scheme is properly balanced and makes for a workable criminal justice system*”. Lord Carloway in his review sought to identify how to re-cast criminal law and practice in Scotland to meet the challenges and expectations of a modern society and legal thinking. His recommendations adopted this balanced approach with some, such as the abolition of the requirement for corroboration, being perceived as favourable to the victim; and others, such as the relaxation of the approach taken to a suspect’s admissions, being perceived as favourable to a suspect. His central aim was to ensure that a human rights based approach was fully integrated into criminal justice practice and procedure. The Scottish Government now seek to implement these recommendations in this Bill.

2. The Crown Office and Procurator Fiscal Service (COPFS) welcomes the introduction of the Criminal Justice (Scotland) Bill which proposes significant changes to Scottish Criminal Law and Procedure. The reviews conducted by Lord Carloway and Sheriff Principal Bowen provide the framework for this Bill which codifies their recommendations into a coherent structure of evidential and procedural reforms.

3. The Bill will have a significant impact on COPFS and how we deal with the cases reported to us. In particular, the abolition of the requirement for corroboration will result in a revised approach by prosecutors assessing available evidence when considering whether to take action in a case. The current prosecution test has two parts: firstly a technical quantitative assessment as to whether there is sufficient evidence for each essential fact, that is two sources of independent evidence; and secondly whether it is in the public interest to take action.

4. In response to the changes around the technical requirement for corroboration that the Bill introduces, COPFS proposes to introduce a new prosecution test. The proposed test would have two stages, namely an evidential test and a public interest test. In considering if a case meets the evidential test the following matters must be considered:-

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

(ii) a qualitative assessment – is the available evidence admissible, credible and reliable?

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

If a case meets the evidential test, the second part of the prosecution test must then be satisfied – is prosecutorial action in the public interest?

The full details of this test will be published in due course in an updated COPFS Prosecution Code which will inform all prosecutorial decision making including the wider decisions that prosecutors make which do not involve a decision to prosecute.

5. The “reasonable prospect” test is based on considerations of quality of available evidence. The current technical rules are focused on quantity of evidence in that a prosecutor requires to look for two sources of evidence before considering the second stage of the prosecution test relating to whether prosecution is then in the public interest. The new test will focus on the credibility of the allegation and the quality of evidence which supports the allegation, requiring prosecutors to assess all available evidence with regard to its admissibility, credibility and reliability.

6. COPFS has engaged fully in the consideration of a number of changes that will require to be made to implement the new approaches required as a result of the provisions of the Bill. We have carried out scoping exercises on the likely impact of the removal of the technical requirement for corroboration on the numbers and types of cases reported to us by the police. We are adapting our administrative processes to ensure they are efficient and fit for purpose in respect of the new test and we are developing extensive training resources to ensure that all our staff are prepared for the changes in working practices that will be required.

7. The law, and those who practise it, are sometimes viewed by society at large as antiquated, out of touch, resistant to change and restrictive. However this Bill is progressive and focussed on Human Rights entitlements of both suspect and victim, and will improve access to justice for many victims of crime who have previously been denied this most basic of rights.

## **Police powers and rights of suspects (Part 1)**

### Chapter 1

8. COPFS regard Sections 1 to 6, which introduce an entirely new regime of arrest without warrant, as a welcome simplification of the often complex rules regarding powers of arrest. It is in line with Lord Carloway’s views on an ECHR compliant system; it is consistent with the provisions of Article 5(1) (c) of the Convention which provides that deprivation of liberty will only be appropriate “on reasonable suspicion of having committed an offence”; and in combination with provisions such as s10 (test for keeping in custody), s14 (investigative liberation) and s41 (duty not to detain unnecessarily), protects the position of those reasonably suspected of having committed crimes.

### Chapter 2

9. COPFS considers that in conjunction with s51 which abolishes the requirement to charge (and thus also the concept of chargeable suspect) these provisions meet Lord Carloway's aims and allow the police to fully investigate allegations of criminal conduct whilst ensuring that a suspect's Article 5 & 6 rights are protected.

10. There has been some debate around the 12 hour period contained within the provisions. This is considerably shorter than the law allows at present and is also a more restricted period than the equivalent detention periods in other parts of the UK. COPFS has previously indicated its support for provisions to extend the 12 hour period in certain circumstances and continues to take the view that this may be appropriate in a limited number of the most serious cases where there are exceptional reasons for such an extension. The Police Service of Scotland have indicated that only 0.4% of all persons detained require to have their detention extended beyond 12 hours and in their written evidence to this committee have provided a number of strong examples of when such extensions have been necessary. Such extensions are used in the most serious of cases where there are compelling reasons to do so.

11. The provisions state that a person may be held in custody for a "continuous" period of 12 hours from the time his/her custody without charge is authorised under section 7. The policy intention is that this period can be over a length of time as long as the entire period the suspect is in police custody does not exceed 12 hours. COPFS support the contention that the period should be continuous counting only the period of time spent in police custody and not time whilst at liberty having been released on investigative liberation, irrespective of the number of occasions the individual is within police custody in respect of one inquiry.

12. The provisions recognise a suspect's Article 5 rights providing a clear regime to justify any deprivation of liberty whilst introducing the concept of "investigative liberation" to also ensure that a suspect is not kept in custody if that is not required. Investigative liberation respects the suspect's right to liberty whilst also protecting a victim's rights by the imposition of certain conditions on that suspect for a limited period of time. It is similar in effect to 'police bail' which has operated in England & Wales for many years. The ability of the police to impose conditions on liberation is not a new power and the police have had experience of imposing conditions on a suspect since the introduction of s22 of the Criminal Procedure (Scotland) Act 1995 some time ago. In addition, the Bill provides for a robust system of judicial scrutiny and review of any such conditions imposed.

13. s51 and the abolition of the requirement to charge has necessitated the introduction of the term "officially accused" which is first referred to in this chapter and is defined at s55.

### Chapter 3

14. This chapter largely repeats similar provisions in the 1995 Act and COPFS is satisfied that these provisions are appropriate.

#### Chapter 4

15. One of the novel provisions of the Bill is found at s27-29 which introduces a regime of “post charge questioning” for the first time in Scotland. COPFS are supportive of this provision. As we have said previously, the concept that an accused cannot be interviewed after charge is not based on a human rights analysis and is not required in a modern justice system. It is often the case that certain pieces of evidence such as the results of forensic examinations are not available at the time of an initial investigation and at present a suspect cannot be asked about them. It is without doubt the case that in many situations, as a matter of fairness, an accused should be given the opportunity to comment on matters which may not have been available at the time they were initially questioned by the police. This gains particular significance in light of s62 which abolishes the distinction between exculpatory, incriminatory and mixed statements made by the accused. In some circumstances it may be in the interests of an accused to state his position at an earlier stage of an investigation and then to rely on that position at trial without the requirement to give evidence.

#### Chapter 5

16. s30-36 relate to the rights of a suspect when in police custody and COPFS have no specific comments to make on this chapter other than to confirm it is supportive of the suspect’s right to legal access regardless of whether or not they will be interviewed.

#### Chapter 6

17. s37 to 40 expressly provide for the continuation of the common law in respect of powers available to a police officer. This is a pragmatic and practical approach and COPFS supports the policy intent that current common law powers which attach to arrest will continue alongside the new power of arrest without warrant introduced by s1.

18. COPFS also consider that s41 and 42 demonstrate the practical application of Lord Carloway’s intent to create a Human Rights based system by emphasising the right to liberty and the rights of a child, both provisions reflecting on earlier provisions in the Bill seeking to protect these same fundamental rights.

#### Chapter 7

19. These provisions are self explanatory and COPFS is of the view that they are clear and straightforward.

#### Chapter 8

20. COPFS welcomes the simplification of arrest powers which is introduced by s50 and refer to earlier comments made in this regard in respect of s1 above.

21. COPFS have repeatedly expressed the view that there should be no requirement to charge a suspect as long as that suspect is notified of the nature of

the allegation against them and what will be happening to them as a consequence. In many instances currently the terms of the charge narrated by the police is very different from that finally brought at court. In addition, the importance of the concept of “charge” has diminished and the position has been clarified in the recent case of *Lukstins v HMA* 2013 SLT 11 in the Appeal Court in Scotland and *Lauchlan v HMA* and *O’Neill v HMA* 2013 S.C.C.R. 401 in the UK Supreme Court. COPFS accordingly are supportive of s51 which abolishes the requirement to charge.

22. The remaining provisions in this chapter are relatively straightforward and do not require further comment.

### **Corroboration, admissibility of statements and related reforms (Part 2)**

23. COPFS strongly support the abolition of the requirement for corroboration and welcome the terms of s57. COPFS consider that this provision will allow proceedings to be raised in a number of cases where at present the Crown cannot proceed due to a technical lack of corroboration but where otherwise the available evidence is of high quality and supports the victim’s version of events. In particular this provision will allow COPFS to consider cases which arise from areas of law which currently disadvantage certain groups of victims purely due to the nature of the offences committed against them such as domestic abuse or sexual crime. The abolition of the requirement for corroboration is not about improving detection or conviction rates but is about improving access to justice for victims of crime.

24. The issue of corroboration is particularly acute in the charge of rape where currently a number of essential facts require to be corroborated for a charge to be proved in court. Penetration is one of the essential facts that must be corroborated in a rape case. It is normative behaviour in many cases of rape for a victim not to report the matter to the authorities until some time later. This means that forensic opportunities which may provide corroboration of penetration, such as vaginal swabs containing semen, are lost. The victim’s evidence is one source of this but there has to be corroboration or a second source of evidence to establish this. Pre-Cadder, it was common for a suspect to deny the charge of rape but explain that intercourse was consensual. This provided corroboration of penetration. Post-Cadder, it is the experience of police and prosecutors that this source of evidence is no longer available in the vast majority of rape cases. Accordingly, the technical requirement for corroborated evidence of penetration cannot be established regardless of how otherwise credible and compelling is the allegation and evidence to support it. And if penetration cannot be established then the crime of rape cannot be proved. Such a position, in denying rape victims access to justice, is surely untenable in a modern society.

25. In the English case of *DPP v Kilbourne* [1973] AC 729, the Lord Chancellor, Lord Hailsham of St Marylebone, observed: “*The word ‘corroboration’ by itself means no more than evidence tending to confirm other evidence*”. Dictionary definitions of “corroborate” include “to strengthen; to support with other evidence; or to make more certain”. Despite this, in the Scottish Criminal Justice system, “corroborate” has often come to have a technical and complex meaning resulting in cases which would meet the test for prosecution in other common law jurisdictions throughout the world not being taken up in Scotland due to this technical requirement

for corroborative evidence. The Scottish criminal justice system, with its continuing retention of a technical rule of corroboration, is in an isolated position and as a result some victims of crime in Scotland are currently denied access to justice. As a modern, 21<sup>st</sup> century society, Scotland must ensure that its criminal justice system is human rights compliant not only for suspects and accused but also for victims and witnesses.

26. Lord Carloway has said that there is a *“critically important aspect to the Convention’s declaration of individual rights and this is the concept of the rights of the victims or potential victims of crime. The state has a positive obligation to secure and protect those rights; not merely to avoid infringing them.....(these rights) can only be meaningful if the state secures their protection through an effective system for the prevention, investigation and prosecution of crime”*. The importance of effective criminal sanctions has been repeatedly stressed by the European Court of Human Rights. The Court’s research report *“Child sexual abuse and child pornography in the court’s case-law”* published in June 2011, states *“The Court has found a positive duty on the part of the Contracting states to protect their inhabitants in a range of cases. In such cases, the state is not the primary violator of rights (i.e. it is not the state that beats, rapes, enslaves etc.), but rather the state has inadequate structures in place to prevent these kinds of abuse. This can mean that the state does not provide adequate criminal sanctions for actions that violate Convention rights. States may also be compelled to provide regulations and policies that effectively deter and prevent abuse.”*

27. In addition, in the case of *M.C. v Bulgaria*, Application no. 39272/98 - (2005) 40 E.H.R.R. 20 at paragraph 149 the court said *“....the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals ....150. Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State’s margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection ....152. Further, the Court has not excluded the possibility that the State’s positive obligation under Article 8 to safeguard the individual’s physical integrity may extend to questions relating to the effectiveness of a criminal investigation ....153. On that basis, the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.”* The abolition of the requirement for corroboration is a vital step towards ensuring effective criminal sanctions and improving access to justice for victims of crime.

28. In recognition of the importance of securing access to justice, COPFS is committed to increasing public confidence in our policies and procedures regarding

case marking decisions and to ensuring that these are consistent with the EU Directive on Minimum Rights of Victims. If a victim or witness is dissatisfied with the decision taken by a prosecutor they may raise that under the COPFS Customer Feedback Policy and consideration of a victim's right of review is also ongoing in respect of the Victim and Witnesses Bill which is currently before Parliament.

29. The abolition of the requirement for corroboration will result in a move from a largely quantitative assessment of evidence to a more nuanced qualitative assessment. In this regard, it is worth noting the comments of the US Supreme Court in the case of Weiler v US 323 U.S. 606

*“Our system of justice rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy. In gauging the truth of conflicting evidence, a jury has no simple formulation of weights and measures upon which to rely. The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact in our fact-finding tribunals are, with rare exceptions, free in the exercise of their honest judgement, to prefer the testimony of a single witness to that of many”.*

30. In addition the European Court of Human Rights demonstrated its concern for the quality of evidence relied upon for conviction in the recent case of Gafgen v Germany (22978/05)(Grand Chamber 1/6/12) at paragraph 164.

*“..... the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker ....”*

31. It is vital to remember that it is the requirement for corroboration which is being abolished, not the concept of corroboration itself. The removal of the requirement for corroboration will not extinguish or even reduce the requirement to thoroughly explore all investigative avenues. In many cases corroborative evidence as we currently understand it will be available. In all cases the police and COPFS will look for evidence which supports the credibility of the allegation of the commission of a crime as it is this supporting evidence which will often be a check and a balance against possible injustice.

32. The abolition of the requirement for corroboration will not be an excuse to diminish either police standards of investigation or prosecutorial rigour in the assessment of the evidence. The duty on the Crown to fully investigate is emphasised in the COPFS Book of Regulations which is publically available on our website:-

**2.1.2 - The Procurator Fiscal has responsibility for the investigation of crime committed within his jurisdiction ... Procurators Fiscal accordingly must ensure that the police are made aware that they are subject to control in the investigation and reporting of criminal offences which fall to be dealt with by the Procurator Fiscal.**

**2.1.4** - *It is the duty of the Procurator Fiscal to ensure that all evidence which may be relevant to the crime under investigation is secured. This includes any evidence which may be favourable to an accused or potential accused. Accordingly Procurators Fiscal must ensure that the police and other reporting agencies submit all evidence which may be relevant to the offence under investigation.*

33. The case of Smith v HMA 1952 JC 66 also confirms the responsibility of COPFS to investigate crime:-

*"When a crime is committed it is the responsibility of the Procurator Fiscal to investigate it...The duty of the Police is simply one of investigation under the supervision of the Procurator Fiscal, and the results of the investigation are communicated to the Procurator Fiscal as the enquiries progress. It is for the Crown Office and not for the Police to decide whether the results of the investigation justify prosecution...It is their (the Police) duty to put before the Procurator Fiscal everything which may be relevant and material to the issue of whether they suspect the party is innocent or guilty..."*

34. In addition, the standard of proof remains the same, namely that a charge must be proved 'Beyond Reasonable Doubt' which remains a high threshold. COPFS will also put in place a robust evidential test, the "reasonable prospect of conviction" test referred to at paragraph 4 above, to assess the quality of the available evidence. In tandem with a public interest test, this will ensure that only the appropriate cases are taken up. These tests will be publically available, as our current prosecutions tests are publically available, in a revised Prosecution Code

35. In preparation for this Bill, COPFS and the police have conducted research into the impact of the abolition of the technical requirement for corroboration. The results of the exercises suggest a 1.5% increase in the number of cases which will be reported to COPFS by the police; a 1% increase in COPFS summary business; and a 6% increase in COPFS solemn business. The results for solemn cases, as far as any comparison can accurately be made, are within the same range as those suggested by Annexe A of the Carloway Report.

36. COPFS also welcome the terms of s59 which deals with the practical commencement of the abolition of the requirement for corroboration. This will be based on the date of the offence.

37. There were a number of possible mechanisms for the introduction of the abolition of the requirement for corroboration but each had its own difficulties and challenges. Although this provision will result in a "dual" system of cases running in tandem (cases which require corroboration and those which do not proceeding at the same time) this provision does avoid many of the difficulties that other possible solutions create and provides clarity and certainty for suspects, accused, victims and witnesses in respect of the offences which will be affected.

38. COPFS also support the simplification proposed by s62 which clarifies the position in respect of statements made by accused persons during interview and which abolishes the distinction between exculpatory, incriminatory and mixed

statements. The law in this area has become extremely complex and difficult to explain to juries. This provision simplifies this issue and complements s27-29 in respect of “post charge questioning” which recognises that it may be in the interests of an accused person to state their position at an earlier stage of an investigation.

### **Court Procedures (Part 3 plus s86 of the Bill)**

39. COPFS welcome the provisions contained within Part 3 of the Bill built upon the recommendations contained within Sheriff Principal Bowen’s Independent Review of Sheriff and Jury procedure published in June 2010 and which amend Sheriff and Jury procedure. COPFS consider that the provisions will help reduce the inconvenience to witnesses and provide an opportunity to reduce churn in Sheriff and Jury procedure. COPFS supports the aims of Sheriff Principal Bowen’s report and many of his recommendations for reform. This includes the citing of cases to first diet only, earlier engagement between the Crown and defence and having a full discussion at first diet on the status of the case all of which should assist in ensuring that only those cases likely to proceed to trial are allocated to a trial diet.

40. Internal COPFS statistics suggest that in the period from June 2012 to June 2013 769 cases were disposed of following a plea tendered at the trial sitting without evidence having been led. That represents almost 16% of all sheriff and jury cases over that period. In the vast majority of those cases witnesses will have been cited to attend court. COPFS believe that more effective preparation and engagement between the Crown and defence solicitors will lead to an increase in the number of pleas secured before the trial diet and more use of section 76 procedures.

41. COPFS consider that in the majority of cases the most effective stage at which meaningful discussions can take place between the Crown and the defence is after the case is indicted but before the first diet. This will not be the first point of engagement with the defence however it is only at this stage that Crown Counsel will have given authority to indict upon the final charges the accused will face. As a result, this is the point at which some form of resolution is most likely to occur.

42. COPFS agree with the approach contained within the Bill which requires this engagement to take place after the indictment is served but prior to the first diet. This is made possible by the proposed extension of the period between service of the indictment and first diet to 29 days.

43. The provisions provide flexibility to allow discussions to take place by the most effective means. This reflects the reality identified by Sheriff Principal Bowen that sheriff and jury procedure covers a broad spectrum of cases. The advent of secure email and secure online disclosure allows for more effective means of communication between the Crown and the defence which in turn allows space to be created for those difficult cases which would benefit from a face to face discussion.

44. In respect of s86 which relates to the use of live television links, COPFS are encouraged to note that the provision will allow the use of TV links for all court appearances with the exception of hearings where evidence is being led. This will allow for a significant increase in appearances from custody via TV link, particularly first appearances from Police custody centres. The increased numbers of

appearance via TV link will produce benefits such as long term financial savings across the system due to the reduced requirement for prisoner movement around Scotland and reduction in the risks involved with the movement of high risk prisoners. It provides opportunity to better schedule individual appearances and will also allow greater flexibility to consider prisoner health and welfare issues arising from the current need to escort them to court securely. There will be environmental gains in reduction to the carbon footprint of prisoner movement. We recognise that this also meets the Scottish Government commitments to make greater use of IT and electronic processes to deliver services. It will also enhance the development of the Cross Justice Video Conferencing Project

### **Appeals, sentencing and aggravations (Parts 4, 5 & 6)**

45. COPFS welcome the changes reflected in s74 to 82 in respect of appeals procedures. The draft provisions represent an across-the-board tightening of procedures and will improve the efficiency and effectiveness of the appeals process generally.

46. COPFS also welcomes the provisions creating a statutory human trafficking aggravation. There are often evidential difficulties in prosecuting human trafficking offences and a statutory aggravation will be a useful tool to allow prosecutors to bring those who exploit others to justice. The aggravation will be of use in circumstances in which there is insufficient evidence to proceed with a human trafficking offence but where other offences can be proved. At present, the lack of an aggravation means that in such circumstances prosecutors cannot lead evidence of the background or context of human trafficking against which an offence is committed.

47. s57 which provides for the abolition of the requirement for corroboration does not remove the need for or reduce the merit of introducing a statutory human trafficking aggravation. There may be some cases, particularly around peripheral matters relating to human trafficking, where it would be appropriate to consider labelling a statutory aggravation rather than a human trafficking offence. For example, actual criminal activity may relate to ancillary offences such as identity theft, fraud, drugs or sexual offences but these offences may be committed against a background of human trafficking. In some cases there will not be sufficient evidence to prosecute for human trafficking but it will still be possible to prosecute for other offences. The use of a human trafficking aggravation will allow COPFS to highlight to the court the context of such offences and therefore allow the court to properly sentence on the basis of the full circumstances. The absence of such an aggravation would give a false impression of the extent of the criminal behaviour of the accused and would not allow a properly targeted sentence to be considered.

### **Conclusion**

48. COPFS are highly supportive of the provisions contained within this Bill which recognise the complexity of the investigation of crime in the modern era. COPFS considers the Bill strikes a balance in a criminal justice system set in a modern society between the rights of the suspect and the need to properly investigate

criminal allegations and question the suspect. The Criminal Justice (Scotland) Bill will have a significant and positive impact on the criminal justice system in Scotland.

Crown Office and Procurator Fiscal Service  
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