

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from JUSTICE Scotland

Introduction

1. JUSTICE is a UK-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the UK section of the International Commission of Jurists. On Scottish matters it is assisted by its branch, JUSTICE Scotland.

2. In general terms, we welcome the Bill as a means of bringing forward reforms to the Scottish criminal justice system, particularly to amend changes brought about through the emergency legislation hastily enacted in response to the *Cadder* case¹ that recognised the right of access to a lawyer during police detention. The Bill follows extensive consultation over the past few years by the Government, through dedicated enquiries and cabinet reviews. We have responded to many of these in great detail. For ease of reference, we do not repeat that detail here, but refer to those responses which can be found on our website.² We agree that reform has been needed for some time to the arrest and detention procedure. The Bill allows the Scottish Parliament to focus on how the system might be improved. We have some suggested amendments to the proposed reforms, informed by standards provided in England and Wales under the Police and Criminal Evidence Act 1984, jurisprudence of the European Court of Human Rights, and research that JUSTICE has been engaged with for the past two years in police stations in Scotland.³ However, we continue to have concerns regarding proposals for other reforms to the criminal law, in particular, the abolition of corroboration and restrictions on appeal, which we do not consider have yet been justified, nor appropriate replacements envisaged.

3. We have focussed on particular elements of the Bill in our written evidence below. Silence with regard to any sections should not be taken as acceptance of the proposal.

¹ *Cadder v HM Advocate* [2010] UKSC 43

² See the Scottish section of our website <http://www.justice.org.uk/pages/policy-work-events-and-news.html> and in particular our response to the Carloway consultation where we set out comparative legal provisions and relevant case law.

³ J. Blackstock, E. Cape, J. Hodgson, A. Ogorodova, T. Spronken, *Inside police custody: an empirical account of suspect's rights during police detention*, (Intersentia, forthcoming). The research was conducted in two sites in England and Wales, France, the Netherlands and Scotland, with an average of two months spent in each site.

Part 1 – Arrest and Custody

Chapter 1

Sections 1 – 2: Statutory power of arrest

4. Whilst JUSTICE Scotland welcomes the decision to place the power of arrest on a statutory footing, the clear benefit of creating a legislative framework to govern police powers of compulsion is to sufficiently circumscribe those powers, to promote public confidence and to enhance legal certainty both for individuals and for police officers exercising those powers. We are concerned, however, that the powers set out in Sections 1 – 2 do not satisfy these benefits by being overly broad. We would welcome amendment of these provisions to make it clear that the power of arrest must be exercised proportionately. For example, in England and Wales, the Police and Criminal Evidence Act 1984 provides that a person should only be arrested where it is necessary for a limited number of purposes. These are in order to prevent the person arrested: a) causing physical injury to himself or any other person; (b) suffering physical injury; (c) causing loss of or damage to property; or (d) making off before a constable can assume responsibility for him. Some of these justifications are recognised in section 1(3), in the context of arrest without warrant for non-imprisonable offences, but are still not circumscribed with sufficient detail.

5. With regard to arrest for non-imprisonable offences we are concerned with the principle that the provisions in Section 1 would extend the power of arrest without warrant, in a range of circumstances, to relatively minor offences not attracting a custodial sentence. We find it difficult to assess any circumstances in which it might be necessary and/or proportionate to deprive someone of his liberty, albeit temporarily, in order to properly investigate a relatively minor offence for which a later power of arrest could be obtained by warrant, or more appropriately, a summons to court. If this power is to remain, further proscription of the power as set out in paragraph 4 above is essential to limit the likelihood of an interference with the right to liberty pursuant to Article 5 of the European Convention on Human Rights (ECHR) or the right to respect for private life pursuant to Article 8 ECHR.

Section 5 – Information to be given at police station

6. Section 5(2) lists the information about which a person must be informed when taken into police custody. Section 5(2)(b) refers to other sections of the Bill where substantive rights are set out. Section 33 should be included in the notification of information, regarding support for vulnerable persons, as this is a matter upon which persons with vulnerability should be informed. The assistance of an appropriate adult is a right that a suspect retains. The constable assessing vulnerability may not appreciate that a suspect is in need of assistance. By informing the suspect that support is available, they may be able to indicate whether this is needed, which will assist the constable in making their assessment pursuant to Section 33. Section 24 should also be included in this list, so that the suspect knows from the outset that they have not only a right to consult with a solicitor, but that the solicitor can accompany them to any interview.

7. Furthermore, no right to interpretation or translation is set out in the Bill. This right must be notified under Section 5(2) and inserted as an additional provision. It is

fundamental that suspects held in police custody are provided with the assistance of an interpreter and that certain documents are translated to assist them, in order to ensure that they understand the process and can communicate with their lawyer, should they request one and the police. It is also necessary to include notification and provision of the right pursuant to EU directive 2010/64/EU on the right to interpretation and translation in criminal proceedings⁴ and directive 2012/13/EU on the right to information in criminal proceedings.⁵

Chapter 2

Section 7 – Authorisation for keeping a person in custody

8. Section 7 provides the circumstances in which an arrested person may continue to be detained in police custody following arrest. It only applies to persons arrested without a warrant. Since a warrant only authorises the arrest of a person, we consider it necessary that the section apply to both those arrested without and *with* a warrant.

9. We welcome the provision in Section 7(3) that authorisation may only be given by an officer who has not been involved in the investigation of the suspected offence. However, we do not consider this goes far enough to ensure that a fair and objective decision is made. Upon arrival at the police station, the investigating officer presents the suspect to the custody sergeant. This is the person who should authorise the decision as to whether the suspect should remain in custody. The custody sergeant is independent, may be of senior rank to the investigating officer, but most importantly, is responsible for the welfare and control of the suspect during detention.

Section 10 – Test for sections 7 and 9

10. We welcome the test set out in Section 10 since it focuses on whether continued detention is necessary following arrest in order for the police or prosecution to make the decision whether to charge. However, Section 10(2)(a) as drafted provides that regard may be had to ‘whether the person’s presence is *reasonably required* to enable the offence to be investigated.’ We believe this test to be set too low, given the incursion of the suspect’s liberty. The person’s continued detention must be *necessary* to enable the offence to be investigated otherwise there is insufficient justification to keep him in custody.

Section 11 – 12 hour limit: general rule

11. The six hour detention period was extended to 12 hours by way of the emergency legislation⁶. We did not believe a case had been made out for the extension then, nor has one since. The justification at that time was a concern that the introduction of solicitors to police stations would delay the investigation, risking the six hour period of detention expiring prior to a decision being taken as to charge. This has not happened. In practice, most solicitors are able to attend a police station

⁴ OJ (26.10.10) L 280/1

⁵ OJ (1.06.12) L 142/1

⁶ Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

within a matter of hours. We therefore consider that the maximum period of detention should be six hours. In complex cases, the possibility to extend the period up to 12 hours could be made available upon the decision of a senior ranking officer.

Section 14 – Release on conditions

12. Section 14 provides for the possibility of conditions to be placed upon a suspect who is released from police custody prior to charge where a constable considers it necessary and proportionate to impose such conditions for the purpose of ensuring the proper conduct of the investigation. Whilst we have no concerns about release on condition in principle, firstly we believe that the decision should be taken by an officer of the rank of inspector or above, as has been provided for in Sections 9, 16 and elsewhere for decisions concerning the suspect's detention. This will ensure that the decision is taken by an officer independent of the investigation and with seniority to the investigating officer. Secondly we consider that the conditions that could be imposed must be set out in the legislation by way of an exhaustive list, to ensure that officers exercise their powers within reasonable limits and uniformly across the Police Service.

Section 16 – Modification or removal of conditions

13. Section 16 provides for the review of conditions imposed upon release by a constable of the rank of inspector or above, but it does not specify a period for such review. The review must be carried out at reasonable intervals between the release from custody and the end of the 28 day period of release upon conditions, provided in Section 14. We would propose seven day intervals of review to be reasonable, so as to ensure that the investigation is being pursued throughout the period of conditional release.

Chapter 3

Chapter 4

Section 23 – Information to be given before interview

14. Section 23(2) states that 'Not more than one hour' before a constable interviews a person about an offence, they must inform the suspect of their right to silence, to have a solicitor present in interview with them and to the other rights under Chapter 5. The time period specified is far too short to enable the suspect to exercise their rights effectively. Should a suspect wish to have consultation with a solicitor, as provided by Section 36, this will have to be organised. The SLAB Solicitor Contact Line must be contacted by the investigating officer, which must take sufficient details concerning the case in order to instruct a solicitor. Contacting a solicitor to act on the suspect's behalf will take over half an hour. Once the solicitor has agreed to act, they may speak to the suspect by telephone prior to attending. They will need travel time to attend at the police station from their location. The suspect is then entitled to consult with their solicitor prior to interview. In order to allow for proper discussion and advice we suggest that allowance should be made for the consultation to last not less than half an hour. In complex cases it may take considerably longer. With respect to assistance from a parent, guardian, appropriate

adult or interpreter, this may also take over an hour to organise and for the relevant person to attend.

15. In our view the suspect should be informed of the rights contained in Section 23, at the point in time specified in Section 5. The omission at Section 5 is to notify the suspect of their right to have a solicitor present during interview, as provided in Section 24, which as we set out above, should be included at Section 5. If the intention of Section 23 is to repeat the rights available to the suspect, it should state that the person must be informed not less than two hours before interview of the rights set out in Section 23, where these have not already been exercised. To repeat the rights unnecessarily and out of context can only serve to confuse suspects about what their rights are and can lead to them not exercising them effectively when they may well benefit from the assistance of a particular right.

Section 24 – Right to have a solicitor present

16. Section 24 provides that a person has the right to have a solicitor *present* while being interviewed. This does not adequately describe a solicitor's role, as understood in the judgment of the UK Supreme Court in *Cadder*. The section should specify that a person has the right to be *assisted* by a solicitor while being interviewed. This would ensure that a solicitor is able to make appropriate interventions on behalf of their client so as to effectively represent their interests. Section 24(4) provides that a constable may proceed to interview without a solicitor present in certain specified circumstances. As in the instances above, this is a decision concerning the exercise of the rights of the suspect whilst in police custody. It must therefore be taken by an independent officer of the rank of inspector or above, so that the decision is objective and fair in the circumstances. Furthermore, the exceptions to this requirement should be more tightly drawn so as to reflect the fact that Strasbourg has indicated that access should be allowed unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right.⁷

Section 25 – Children and waiver of legal advice

17. Broadly, Section 25 provides that children under 16 cannot consent to the waiver of their right to have a solicitor present. In effect, this will ensure that children cannot be interviewed without their having received legal advice in some form. We welcome this provision. Children in custody are particularly vulnerable and although accompanied by a relevant person in interview, that relevant person – often a parent or guardian - may have minimal or no experience of custody, little understanding of gravity of the offence which the child has been arrested in connection with, and no grasp of the significance of the right to have a solicitor present.

18. The Bill would exclude children aged 16 and 17 from this waiver, but would provide that they can waive consent only with the approval of their relevant person. We consider that many of the same risks will apply to all under 18s as apply to those aged 16 and under. The Bill may be designed to recognise that older children and young adults have increasing cognitive capacity and competence to understand

⁷ *Salduz v Turkey* (2009) 49 EHRR 19, para 55.

complex decision making and to take responsibility for their own choices. However, this approach is somewhat undermined as the determinative decision on waiver will ultimately be taken by the relevant person in many cases. The relevant person will often be in a significant position of responsibility and able to influence the decision of the young person in custody. Parliamentarians may wish to ask the Scottish Government to further explain the rationale behind this two step approach to under 18s and waiver. If the Bill is to adopt the distinction between under and over 16 year olds, we consider that it will be important to ensure that both the relevant person and the young person in custody are given clear guidance on the right to legal representation, the significance of the right to legal representation and the relevance of the waiver decision. In all circumstances this information should be provided in an accessible format which both the young person and the relevant person assisting them can readily understand. The requirement that this guidance be given should be statutory.

Sections 27-29 – Post-charge questioning

19. Section 27(1) allows for the questioning of a person after being accused of having committed the offence. This is immediately followed by the limitation of questioning to cases where it is in the interest of justice to do so (Section 27(2)) and where it satisfies a three-part test of determining: (i) the seriousness of the offence; (ii) the ability to have questioned the accused person pre-charge about the offence; and (iii) that the information, having been obtained earlier would have cleared the accused of any wrong-doing (Section 27(3)). JUSTICE Scotland considers that the perceived value of post-charge questioning is overstated and is unsure of what value it will add in the Scottish context. For offences such as terrorism which may require post-charge questioning, enabling provisions already exist.⁸

20. From our perspective, the general prohibition on post-charge questioning should be retained as: it prevents unfairness to and oppression of suspects and it may be contrary in certain instances to the jurisprudence of the European Court of Human Rights.⁹ As explained in our response to the Consultation, JUSTICE Scotland considers that any expansion of post-charge questioning must be accompanied by a legal framework providing safeguards in line with the recommendations of the Joint Committee on Human Rights.¹⁰ These include that:¹¹

- the post-charge questioning deals with evidence which has come to light after charges were brought;
- the total period of post-charge questioning last for no more than 5 days in aggregate;
- the presence of the accused's lawyer is necessary during any questioning;
- review of the transcripts from questioning after it has occurred by the same judge who authorised the post-charge questioning to ensure it remained within the prescribed scope of questioning;

⁸ Counter Terrorism Act 2008.

⁹ *Saunders v United Kingdom* (1997) 23 EHRR 313 at para 68; *Weh v Austria* (2005) 40 EHRR 37 at para 39-46; *Heaney and McGuinness v. Ireland* (2001) 33 EHRR 12 at para 40; *Shannon v United Kingdom* (2006) 42 EHRR 31 at para 38.

¹⁰ Memorandum from Professor Clive Walker, Centre for Criminal Justice Studies, School of Law, published in Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill (HL 50/HC 199: 7 February 2008)

¹¹ *Ibid*, Para 37.

- the questioning be completed within the allotted time; and
- post-charge questioning should be limited to the period before the commencement of a trial.

21. We welcome the acknowledgement in the Bill that post-charge questioning must end when a trial is commenced. It is also important that any questioning will be authorised by a judge and that the individual concerned will be able to make representations. However, many of the other safeguards are omitted. Importantly, the test to be applied by the relevant judge, as proposed in Section 27, is extremely vague. An 'interests of justice' test is extremely flexible and is clearly not limited to circumstances where new evidence comes to light which was not available at the time when the investigation leading to charge was ongoing. Equally there is no statutory time limit for the questioning authorised. Although the judge has the discretion to set a time frame for the questioning, there is no statutory framework for that discretion proposed, beyond that it be in the interests of justice. In theory, the time-scale set by order could provide for questioning over a period of months during a significant pre-trial period. Significantly, there is no provision, beyond authorisation, for judicial supervision. The rationale of the JCHR was that without supervision, there would be a significant potential for post-charge questioning to be abused. JUSTICE Scotland would urge the Committee to consider a recommendation that this provision – if not removed – should be amended to reflect the clear safeguards above.

Chapter 5

Section 30 – Right to have intimation sent to another person

22. Section 30(5) affords to a constable the power to delay the exercise of intimation. We repeat as set out above in relation to Section 24 that this decision should be made by an officer independent of the investigation of the rank of inspector or above.

Section 31 – Right to have intimation sent: under 18s

23. Section 31(4) distinguishes between juveniles under 16 or over 16 in relation to whether a constable should continue to contact a parent or guardian to attend at the station on their behalf where it has been difficult to reach them. We do not believe this distinction should be made between these age groups. A 16 or 17 year old child may become impatient at waiting for assistance and decide that intimation is no longer necessary simply to seek to avoid further delay and detention in the police station, rather than because they no longer need the support. Section 31(4)(b) should be deleted.

Section 32 – Right to under 18s to have access to other person

24. Section 32(3) again makes provision for the refusal of access in exceptional circumstances. As with other exercise of this power, the decision must be taken by an independent officer of the rank of inspector or above.

Section 33 – Support for vulnerable persons

25. Section 33(1) distinguishes between adults and juveniles with regard to whether they need assistance owing to a mental disorder. We do not think the distinction ought to be made. It cannot be assumed that a parent is able to provide appropriate assistance to a child with a mental disorder. The officer should make enquiries of the parent as to whether further assistance is needed, and have the residual discretion to obtain further support where they consider it necessary, even if the parent does not.

Section 34 – Power to make further provision

26. Section 34(1) provides that the Scottish Ministers may amend by regulations section 33(1)(c) and 33(3). It should be made clear by the Justice Secretary to what end these amendments may be made and we would encourage the Committee to seek clarification as to the purpose of this section.

Section 36 – Right to consult with a solicitor

27. Section 36(2) again makes provision for the refusal of access in exceptional circumstances. As with other exercise of this power, the decision must be taken by an independent officer of the rank of inspector or above.

28. We do not agree with the provision in Section 36(3) that appropriate consultation may be provided through telephone advice. Solicitors are unable to adequately advise their clients by telephone alone since they are unable to assess the suspect's welfare and demeanour; nor does the solicitor have the same opportunity for access to information from the police concerning the suspected offence. Furthermore, the solicitor cannot readily make effective representations to the police concerning the decision to charge or further detain if they only advise their client by telephone. Allowing solicitors to give advice only by telephone risks condoning the provision of inadequate advice. We would therefore propose that Section 36(3) be amended to provide that 'consultation means consultation *in person* but *initial advice* may be by such means as may be appropriate in the circumstances and includes (for example) consultation by means of telephone.' As stated above in relation to Section 24, the exceptions to this requirement should be more tightly drawn so as to reflect the fact that Strasbourg has indicated that access should be allowed unless there are compelling reasons, in light of the particular circumstances of the case, to restrict that right.

Chapter 6

Section 37 – Use of reasonable force

29. Whilst we welcome the setting out of the need to use reasonable force, we consider it necessary to define what reasonable force entails, and when it may be used, in order to ensure that all police officers apply the power uniformly. The use of force must be legitimate in the circumstances, not excessive, and never applied

routinely. The provision of clear guidance, training and support for officers on when force will be reasonable and proportionate is essential.¹²

Sections 39 - 40 – Power of search etc on arrest

30. Sections 39 - 40 concern the powers of police officers to search persons, seize an item from them and to place them in an ID parade. For completeness and to ensure the power is used appropriately, we consider it necessary to include at Section 40(2)(a) that the subsection applies to a person who is in police custody having been *lawfully* arrested without a warrant. By inserting ‘lawfully’ the section ensures that the power is used in accordance with the appropriate exercise of the power to arrest.

31. Further, since these powers are now placed on a statutory footing, we consider it necessary to set out when each power may be exercised. In relation to search, this must be on the basis of a reasonable suspicion that an illicit item (including any item which might be used to cause harm to himself or others), or item connected with a suspected offence, is concealed on the person. In relation to seizure, this must be on the basis that the item may present a danger to the public, is illegal, or is evidence in the commission of an offence. In relation to an identification parade, there must be a necessity for a witness to identify the suspect in connection with a suspected offence, and an identification parade must be the most appropriate means of securing that identification. Statutory proscription of the conditions of any search and the treatment of property seized would also be appropriate.¹³

Section 42 – Duty to consider child’s best interests

32. We welcome the statutory provision of the child’s best interests as a primary consideration. We are concerned however that the Section includes the possibility of holding a child in police custody. Custody should be used as a last resort in relation to children and for the shortest possible time.¹⁴ Rather, where their arrest is deemed necessary, a child must be taken to a place of safety. The Section should be re-drafted to reflect this as the standard procedure, and police custody only in circumstances of last resort where no other accommodation is available.

¹² The current guidance given by the Crown Prosecution Service in connection with the prosecution of police officers in England and Wales alleged to have acted excessively, provides: Where force is alleged to have been used in the prevention of crime or arrest of an offender necessity may not equate with reasonableness. The following must be considered: the nature and degree of force used a) the seriousness of the offence which is being prevented or in respect of which an arrest is being made; b) the nature and degree of any force used against an officer by a person resisting arrest. See http://www.cps.gov.uk/legal/a_to_c/allegations_of_criminal_offences_against_the_police/

¹³ In England and Wales, these powers are expressly governed by provisions in the Police and Criminal Evidence Act 1984 and further guidance given in the associated Codes of Practice. These measures provide for greater certainty of police powers on arrest. For example, search on arrest (PACE, Section 32), searches of detained persons (PACE, Section 54) . PACE Code D deals in detail with the issue of police identification. It, for example, explains that where suitable, for example, video identification should be used as an alternative to an identification parade.

¹⁴ Article 37 UN Convention on the Rights of the Child

Part 2 Corroboration of Statements

Section 57 Corroboration not required.

33. The Bill proposes that in future criminal proceedings in Scotland, a judge sitting alone or with a jury will be able to find a fact proved without corroboration. This would implement one of the most controversial recommendations of the Carloway review.

34. As we stressed in our earlier submissions, JUSTICE Scotland does not support the proposed removal of the rule of corroboration. Corroboration is still considered by many to be the mainstay of Scots criminal law and it is a principle around which the investigation and prosecution of crime in Scotland have long been formed. We are concerned that the seriousness of this change has not been sufficiently grasped by the Scottish Government. In order to effect such a profound change to our law of evidence and procedure, Parliament must be satisfied that the proposals which will replace it will maintain not only fair trial standards for persons accused of crime but will instil within the public at large confidence that our system of criminal justice will ensure, as far as possible, that the guilty will be convicted and the innocent acquitted. We are not persuaded that the case has been made for such a significant change to the criminal law in Scotland, nor have sufficient safeguards against ill-founded prosecutions and miscarriages of justice been proposed. In summary:

- The Carloway Review did not identify any specific problem with the operation and application of the doctrine of corroboration in practice. Before the conduct of this review, there was little or no discussion of the need to change the rule of corroboration, whether by practitioners or civil society. We find it difficult to identify why the changes prompted by the decision in *Cadder* could justify such a wholesale change to the law without further evidence to support the case for reform.
- Without provision for alternative mechanisms to protect the quality of evidence, the right of the accused to a fair trial and the credibility of our criminal justice system, we are concerned that the removal of the requirement for corroboration is highly likely to lead to miscarriages of justice. In our earlier submissions, we stressed our concern that the Review – and the subsequent Consultation – did little to address the risk of miscarriages of justice. We return to this issue below.
- The Review focused predominantly on the rights of victims, and particularly, vulnerable victims and victims of sexual offences. We acknowledge that there has been some concern expressed about the implications of the need for corroborative evidence on the prosecution and investigation of some types of offence. However, we are concerned that the Review did not conduct a full investigation into the implications of corroboration for the effective prosecution of sexual and other sensitive offences and other means of protecting victims in those cases. We are concerned that there is no direct evidence that removal of corroboration alone will improve prosecution rates. In many

countries where corroboration is not required, prosecution rates for sexual offences remain low (see for example, the long history of investigation of the low rate of conviction for rape in England and Wales). In any event, if the requirement for corroboration is removed, without appropriate consideration of safeguards to protect the safety of any ultimate conviction, this will be to the detriment not only of the criminal justice system but individual victims. If convictions are unsafe, we run the risk not only that the wrong people will be unfairly and unlawfully convicted, but that the true perpetrators of those crimes will go free.

35. We are not satisfied that any sufficient safeguards are proposed on the face of the Bill and we remain gravely concerned about the future of Scottish criminal law in the absence of corroboration. We consider that, without significant change, successful challenges to convictions under Article 6 ECHR as miscarriages of justice and incompatible with the right to a fair hearing are inevitable, whether before the Appeal Court, the UK Supreme Court or the European Court of Human Rights. The obvious points for challenge will arise in those areas of evidence where – as in historical miscarriage of justice cases identified by JUSTICE in our work in England and Wales – the risk of miscarriage of justice is most obvious: identification evidence, disputed expert testimony and the admissibility and weight to be afforded to confessions.

36. We are concerned that the only proposed amendment to the Scots system of criminal justice provided to try to compensate for the removal of corroboration will be a shift in the proportion of jury members needed for conviction from a bare majority to a majority of two-thirds (10 of 15, with adjustments for smaller juries). As noted in our response to the consultation, this measure, taken alone is altogether insufficient to compensate for the removal of corroboration. As a minimum, the consensus required in England and Wales for a conviction without corroboration is more robust (10 of 12 jurors, only after direction by a judge that a majority verdict will be accepted following an appropriate period attempting to secure unanimity). None of the other safeguards in place in systems where formal requirements for corroboration have been removed were considered seriously by the Consultation, nor are they proposed by this Bill. We are anxious that without these specific statutory safeguards, there will be inadequate, or perhaps even no, opportunities for judicial oversight of the quality and strength of the evidence in a prosecution case. Since, without a formal requirement for corroboration, quality of evidence will be at the heart of a criminal trial, this should be a serious concern for Parliamentarians. As we explained in our earlier submissions, without further protections to preserve the presumption of innocence, the right to silence, the prosecutorial burden of proof and the standard of proof ‘beyond reasonable doubt’, and the possibility to exclude unfairly prejudicial evidence, the likelihood of miscarriages of justice is high.

37. The prosecutorial burden of proof means that it is for the State to prove its case against any accused. The high criminal standard of proof serves a similar purpose: to ensure that the triers of fact, whether judge or a jury, set a high bar for conviction. We are concerned that after the removal of the requirement of corroboration, it is unclear what steps will be taken to ensure that these standards remain in place. While we expect that the Government intends that directions will be given to police, prosecutors and judges to ensure that cases are only presented and

prosecuted when evidence is sufficient to secure a conviction, the tests proposed for Scotland have not been explored or provided to Parliamentarians for scrutiny. This should be a matter of significant concern. Equally, judicial oversight of the sufficiency and quality of evidence is crucial. Without clear guidance and control on sufficiency and standards of evidence, the jury will be the ultimate arbiter of fact, but will also be required to adopt an entirely subjective assessment of the sufficiency of evidence in any individual case. Against this background, clearly any or only 'some' evidence could be deemed sufficient, bringing a real risk of serious inconsistency. This standard is no standard at all and would clearly violate the right to a fair hearing as protected by Article 6 ECHR.

38. Furthermore, there is no provision in the Bill to provide for judicial oversight and control in cases where a prosecution is clearly ill-founded, or the evidence presented involves a bare sufficiency, but unacceptably, poor quality (for example, by statutory provision for submissions of no case to answer). It is unclear whether the Government intends that existing criminal procedure rules might be used for the purposes of submissions of no case to answer. This is unacceptable. We struggle to see what role there would be in the future for section 97 of the Criminal Procedure (Scotland) Act 1995. With 'no reasonable jury' submissions already abolished by section 97D of the 1995 Act, there appears to be no role whatsoever for the Court in relation to the quality of the evidence, outwith a corroboration rule. Absent clear provision for judicial supervision of the quality of the prosecution case – according to high standards designed to maintain the prosecutorial burden and the requirement for proof beyond reasonable doubt, and sufficient powers to assess the quality of the evidence by the Court – JUSTICE Scotland considers that Parliament must remove these piecemeal and inadequate proposals from the Bill..

39. Before this Bill progresses Parliamentarians must, at a minimum, require the Scottish Government to explain precisely what standards will apply to ensure consistency and sufficiency in the rules of evidence and make provision for clear powers for judges to intervene when those standards are not met. In JUSTICE Scotland's view these standards must be expressed clearly and grounded in statute.

Part 3 – Solemn procedure

40. This Part of the Bill implements some of the recommendations of the *Bowen* report on indictment procedure in the sheriff court.¹⁵ Those recommendation in large part replicate the *Bonomy* reforms in the High Court and are on the whole to be welcomed.¹⁶ JUSTICE Scotland remains concerned about the resources available for the implementation of these changes and that proposed changes to time limits and the written record may not be appropriate or necessary. These reflect the concerns we expressed in connection with the consultation on Sheriff and Jury Procedure.¹⁷

¹⁵ Independent Review of Sheriff and Jury Procedure Report by Sheriff Principal Edward F Bowen June 2010

¹⁶ Improving Practice: 2002 Review of the Practices and Procedure of the High Court of Justiciary.

¹⁷ <http://www.justice.org.uk/data/files/resources/278/JUSTICE-Scotland-response-to-Sheriffs-and-Juries-consultation.pdf>

Resources

41. The qualified success of the High Court reforms may not easily be achieved in the Sheriff Court. Notably, the volume of cases is considerably greater. As Sheriff Principal Bowen noted in his original report, the overall trend is of an increase in the volume of both routine and priority cases in the Sheriff Courts. The disclosure obligations on the Crown have greatly increased since the date of the report and accommodation pressures, brought about by court closures, the relocation of justice of the peace courts and the proposed reforms to the civil jurisdiction of the Court of Session, are significant. If the aims of the reforms are to be achieved, it is crucial that adequate resources are made available to COPFS and Scottish Courts, to try cases within a reasonable period of time, and to ensure that victims, witnesses, and accused persons are able to access the courts. Further as both Lord Bonomy and Sheriff Principal Bowen have observed, successful implementation will require adequate funding of defence solicitors in relation to the additional (and earlier) work required of them as a result of the proposed reforms.

Section 65 - Time limits

42. Section 65 proposes an increase in the time limit between committal and trial. We do not support the proposal to simply increase the 110 day timelimit to 140 days wholesale. The justification for such an increase has not been made out. Lord Bonomy's view that the timelimits in the Sheriff court should be altered to bring them into line with his proposals for the High Court were not, at that time, accepted by the Scottish Government which noted that extensions of time limit were less frequently sought in the Sheriff Court. In any event, an evaluation of the *Bonomy* reforms noted that they had done little to alter the culture of applications for extensions in the High Court, even after the increase in time limit to 140 days.¹⁸ Whilst there has been a rise in the complexity of some cases indicted even in the Sheriff Court, very many are comparatively straightforward and a longer period before the case must be brought to trial may prove counter-productive to the aim of ensuring parties prepare their cases at as early a stage as possible. Of most significance is the period of time victims must wait for justice to be served, and accused persons to be tried, particularly those remanded in custody. The length of time between charge and trial must be kept to a minimum to ensure a fair trial can take place, within a reasonable period of time.

Section 66 – The written record

43. Section 66 of the Bill seeks to introduce the written record procedure to the Sheriff Court.¹⁹ The proposed section departs from the High Court procedure by requiring the parties to communicate within 14 days after service of the indictment and imposing upon the procurator fiscal the obligation to lodge the written record. JUSTICE Scotland considers that neither change is desirable, adding a layer of bureaucracy which is unnecessary. Pre-trial communication in busy jurisdictions may impose significant burdens on all parties and in particular the Crown. It is inevitable in custody cases that problems with disclosure, forensic reports or defence experts

¹⁸ An Evaluation of the High Court Reforms Arising from the Criminal Procedure (Amendment) Act 2004. Chalmers et al.

¹⁹ By inserting a new s71C in the 1995 Act.

will arise relatively late in the process, and after the stipulated meeting which has to take place at least two weeks before the first diet. In the High Court the perceived problem of late or inadequate communication has been addressed by changes to the written record form, requiring parties to detail the dates and nature of their communication. We consider that a similar approach is equally apt for the Sheriff Court and that section 66(3) is unnecessary. Equally, placing the obligation on the procurator fiscal to lodge the complete written record seems unnecessarily burdensome. The current High Court practice, whereby parties e-mail their own part of the written record to the clerk, seems preferable.

Part 5 Appeals and SCCRC

Sections 76 and 77 – Limiting the discretion to extend time

44. Both Section 76 and 77 would limit the discretion of the court to allow appeals out of time to cases where applicants are able to show ‘exceptional circumstances.’ JUSTICE Scotland is concerned that there appears to be little or no evidence that such a change is necessary or justified. The primary mischief identified by the Carloway Review related principally to the overall length of time taken to deal with appeals, not to the need for appeals to be started on a more timely basis. As we highlighted in our response to the Consultation, there is no evidence that unmeritorious appeals are being allowed to proceed without justification. On the contrary, it is our view that courts are increasingly robust in their approach to finality and the exercise of their discretion on time limits, in the interests of preserving the finality and certainty of proceedings.²⁰ Without such evidence, JUSTICE Scotland is concerned that this new statutory qualification would fail to strike the right balance between the need for an efficient appellate system and the right of appeal itself.

45. The time limits which apply to the lodging of appeals are already closely circumscribed. For example, the commencement of an appeal against a summary conviction is an application for a stated case which has to be lodged with the Clerk of Court within one week of the conclusion of proceedings (section 176(1)(a) of the Criminal Procedure Scotland Act 1995). The discretion to extend time, although already closely guarded, may be key to ensuring justice in an individual case.

46. It should be recalled that section 181 of the 1995 Act was last amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, with the purpose of avoiding floodgates appeals post *Cadder v HM Advocate*. JUSTICE submitted before the Supreme Court in *Cadder* that the floodgates argument was overstated. The Court’s workload has not multiplied as was predicted by the Crown in *Cadder*. It is therefore difficult to see why a further strengthening of this power, and consequent greater difficulty in gaining access to the Court for appellants, should be adopted.

47. We recommend that the Committee asks Ministers to provide clear evidence that a further hurdle is necessary and justified and will not pose an undue restriction on the individual right to appeal. If the test is to be restricted, we have a number of concerns about the procedure proposed:

²⁰ See *Toal v HM Advocate* 2012 SCCR 735, at [108]; *Carberry v HM Advocate* [2013] HCJAC 101.

- a. There is no guidance provided in the Bill or in the Explanatory Notes on what circumstances may be considered exceptional. If this discretion is to be left to the court, it should be broad and uncircumscribed.
- b. We are concerned that the effect of these provisions is that the Appeal Court will deal with any application for an extension of time solely on papers. Whilst an explanation in relation to delay should be provided and the proposed ground of appeal must be stated, the strength of those arguments, and their basis may not be readily identifiable simply from a perusal of papers. The appellant is encouraged (see *Lilburn and Toal*) to state his ground of appeal as soon as the information comes to hand. The outstanding preparation for appeal, and an explanation for the delay, can be best justified in oral submission.²¹ If the 'exceptional circumstances' test is adopted, as a minimum, the right to make representations and provision for a hearing before permission is refused, must be included.

Section 82 - References by the Scottish Criminal Cases Review Commission (SCCRC)

48. JUSTICE Scotland welcomes the repeal of section 194DA of the Criminal Procedure Scotland Act 1995 which granted the High Court the power to reject references from the Commission where it did not consider the action was 'in the interests of justice'. This measure was introduced to encourage finality and certainty in the proceedings. We objected to the introduction of this measure and we consider that it should be repealed. We reiterate the words of Lord Kerr which have a wider application in relation to this Bill and the general approach to time limits and finality:

Lord Atkin's remark in *Ras Behari v King Emperor* (1933) that 'finality is a good thing, but justice is better' seems to me to be infinitely preferable to that of his near contemporary Justice Brandeis in 1927 in *Di Santo v Pennsylvania* that it is 'usually more important that the law be settled than it be settled right'.²²

49. JUSTICE Scotland deeply regrets that it is instead proposed to reinstate the 'interests of justice' hurdle in section 194B. The standard required of the Appeal Court to find that there has been a miscarriage is already a high one. We cannot fathom how if such an injustice has been identified, there could be grounds based on the 'interests of justice' not to allow the appeal and quash the conviction.

50. In reintroducing the 'interests of justice' qualification, the High Court is required again to have regard to the need for 'finality and certainty' in the determination of criminal proceedings. Beyond Lord Kerr's principled preference as outlined above, we note that the application of the finality and certainty test has so far been applied by the Scottish appellate courts to the significant detriment of the individual right of appeal, particularly when considered in the context of the 'interests

²¹ *Toal v HM Advocate* 2012 SCCR 735, at [108]; *Carberry v HM Advocate* [2013] HCJAC 101 at [7].

²² *Dissenting judgments - self indulgence or self sacrifice?* The Birkenhead Lecture (8th October 2012), p 13, available at <http://www.supremecourt.gov.uk/docs/speech-121008.pdf>

of justice'. We are concerned that, in some cases, the need for finality is conflated with a determination that it would not be in the interests of justice for any appeal to proceed, which is a different and important determination.²³

51. Much of JUSTICE's early work related to miscarriages of justice. Working with the BBC's *Rough Justice* and Channel Four's *Trial and Error* programmes, JUSTICE helped secure the release of many prisoners who had been wrongly imprisoned. Our policy work and recommendations helped inform the reforms that brought about the establishment of the Criminal Cases Review Commission and subsequently the Scottish Criminal Cases Review Commission. We consider that the proposed change in Section 194B (Section 82 of the Bill) will pose a significant challenge to the ability of the Scottish Criminal Cases Review Commission to help to identify miscarriages of justice and to secure redress and remedy for those individuals affected by failings in our criminal justice system. We would ask Parliament to accept the repeal of Section 194A, but require the amendment of Section 82 of the Bill to delete new Section 194B.

JUSTICE Scotland
16 September 2013

²³ See *Toal v HM Advocate* 2012 SCCR 735, at [108]; *Carberry v HM Advocate* [2013] HCJAC 101.