

**Justice Committee**  
**Criminal Justice (Scotland) Bill**

**Written submission from the Sheriffs' Association**

The Sheriffs' Association has responded to a number of consultation documents relating to the topics you mention. Rather than attempt to distil our responses down, which we do not have the resources to undertake, we thought it might be helpful to draw your attention to the responses we have made and particular parts of those responses. To that end, I attach three documents previously prepared by the Sheriffs' Association as its comments on the Government's consultation on the Carloway Report, on the Criminal Justice Bill, and the proposals for reform of sheriff and jury procedure.

In relation to the themes which the Justice Committee is to consider, the Association draws the Committee's attention to the following.

- (1) Police powers and rights of suspects.  
See our response to questions 1 to 26 of the consultation on the Carloway Report. And response to the Criminal Justice Bill.
- (2) Corroboration, admissibility of statements and related reforms.  
See our response to questions 31 to 35 of the consultation on the Carloway Report. And response to the Criminal Justice Bill.
- (3) Court procedures  
See our response to the consultation on reform of sheriff and jury procedure.
- (4) Appeals, sentencing and aggravations

See our response to questions 36 to 41 of the consultation on the Carloway Report. And response to the Criminal Justice Bill.

I also attach some further comments by way of an additional response.

Gordon Liddle  
Secretary, Sheriffs' association.  
30 September 2013

## THE CARLOWAY REPORT - CONSULTATION QUESTIONNAIRE

### ARREST AND DETENTION (Chapter 2 of the consultation paper)

#### Question 1

*What are your views on the move to a power of arrest on 'reasonable suspicion' of having committed a crime, replacing the common law and statutory rules on arrest and detention?*

We agree. The new system must be easily understood by the public and police. This test is easy to understand and conforms to international standards.

#### Question 2

*What are your views on Lord Carloway's recommendations for the police no longer to be required to charge a suspect with a crime prior to reporting the case to the Procurator Fiscal? How is this best achieved in practice?*

The majority view of the Association is that such a change is acceptable. However, if such a change were to be introduced, we think that there ought to be safeguards to protect the suspect from unfairness.

The minority view is that there is a strong basis for retaining the importance of the significance of the stage of charge in the present system. A charge tells the suspect that his status has changed, that he cannot be questioned further, except before a sheriff. It tells the accused what crime or offence he or she is in fact accused of having committed and, if held in custody, why. Even though to some extent the point of charge is in the discretion of the police, it is an important point, being one after which the suspect cannot be questioned and at which point his status as a person to be released on an undertaking, on bail or remanded in custody has to be considered. At that point the suspect must be told what it is that he is to be reported for prosecution for.

#### Question 3

*Do you agree that a suspect in a criminal investigation, who has not been detained or arrested, does not require any statutory rights similar to those conferred had that person been arrested and detained?*

Yes. As we understand the Convention jurisprudence, the Convention provides protection from the point that there has been some significant curtailment of the suspect's freedom of liberty. We see no reason why Scottish domestic legislation should go further than that.

#### Question 4

*What are your views on the recommendation that a suspect should only be detained if it is necessary and proportionate having regard to the nature and seriousness of the crime and the probable disposal if convicted?*

We agree, subject to the proviso that regard needs also to be had to the interests of justice, such as the prevention of interference with the course of justice by destroying evidence, interfering with witnesses and so on. Further, the police must always be permitted to detain if the offence being investigated is sufficiently serious.

### **CUSTODY (Chapter 3 of the consultation paper)**

#### **Question 5**

*Do you agree with Lord Carlway's recommendation that the maximum time a suspect can be held in detention (prior to charge or report to the Procurator Fiscal) should be 12 hours?*

Yes. It appears from the data provided in the Report that in practice, in the vast majority of cases, no longer than 12 hours is usually required by the police to complete investigations and that in fact, the large majority of detentions in custody are for periods of less than 6 hours. The requirement that detention be reviewed after 6 hours is an additional safeguard.

#### **Question 6**

*What are your views on whether this 12 hour period could be extended in exceptional circumstances? How could this be regulated appropriately?*

There are bound to be some exceptional circumstances where an extension to the time limit is required. We think that a single extension of a fixed number of hours, perhaps 12, should require judicial authority.

#### **Question 7**

*What are your views on the need for the proposed 12 hour period of detention to be reviewed after 6 hours by a senior police officer?*

Yes, by a senior police officer unconnected with the investigation.

#### **Question 8**

*What do you consider the most effective way of ensuring that no person should be detained in custody beyond 36 hours before appearing before a Court, i.e. over the weekend period?*

- *Are there any practical difficulties to be overcome in delivering a model that achieves this?*

We agree that it is undesirable in principle for any person to be unnecessarily detained in custody and that periods in custody before being brought before a court ought to be kept within reasonable bounds. We note that there is no rule in either domestic or Convention jurisprudence which sets 36 hours as a limit, but rather, a period of up to four days has been found to be Convention compliant.

It appears to us that at present, current arrangements for court sittings (which include Saturday sittings where a holiday succeeds a weekend) taken together with extensive powers available to the police to release suspects on an undertaking are also Convention compliant.

Increased powers of the police and Crown (proposed at para 5.3.18) would permit a much greater number of releases on bail and undertaking before the first court hearing which would be an improvement. Further improvement would result from increased and earlier Crown involvement with liberation decisions concerning those in custody who have not yet appeared in court. Greater consistency in the application of pre-Court liberation policies and closer liaison between the prosecution authorities and the police on such matters, would be desirable in itself. The result should be that the police, with the involvement of the Crown, should only keep in custody over a weekend those where there is no realistic alternative at that time, or where it can reasonably be thought that a court would refuse bail when the case first calls in court.

We believe that the establishment of regular Saturday Courts, whether on a regional basis or not, would impose an unacceptable degree of extra strain and excessive extra costs on an already overburdened criminal justice system which is already suffering major reductions in expenditure and would be quite unnecessary, especially if increased liberation powers are exercised by the Crown and police prior to court appearance.

- *Bearing in mind the desire for suspects to be held for as short a period as possible, current ECHR case law which indicates a limit of 4 days and affordability issues do you consider there to be an alternative time period to the 36 hour recommendation before suspects appear before a Court?*

We have nothing further to add.

### **Question 9**

*What are your views on the police having the ability to hold an accused for court and report a case to the procurator fiscal without first charging the suspect?*

If we understand the proposal correctly, this would mean that the police would be entitled to arrest a person on suspicion of an offence, detain him for investigation and questioning, decide that they are unsure whether to charge him and advise the suspect that he will be reported to the procurator fiscal, but then continue to detain him until the next lawful court day, bring him before the court and the procurator fiscal could then oppose a bail application. We consider that as wrong in principle. If a person is to be detained for an extended period, whether by the police or the court, that should be on the basis of an explicit charge, rather than mere suspicion and the awaiting of a decision of the procurator fiscal.

## **LIBERATION FROM POLICE CUSTODY (Chapter 4 of the consultation paper)**

### **Question 10**

*Do you agree with Lord Carloway's recommendations that the police should be able to liberate a suspect from custody on conditions, referred to as investigative liberation?*

Yes.

*What are the practical issues with this and what comments do you have about conditions and safeguards?*

We see the potential value, in some cases, of investigative liberation if, and only if, that is an alternative to prolonged detention. The principal safeguards would be a strict limit on the time of such liberation and the right of the suspect to challenge that decision by application to a court. This is a sensible way to deal with volume in appropriate cases. It mirrors the English position. It is imperative that the suspect understands the procedure for being called back for questioning.

### **Question 11**

*Lord Carloway suggests that a limit of 28 days be set on the period that the police can liberate a suspect on investigative liberation. Do you think that 28 days is sufficient in all cases? Please explain.*

We note that there seems to be no explanation or justification for this period in the Report. We would prefer a clearer explanation of why this figure is proposed. Nonetheless, it does not seem an unreasonable period of time for this purpose as a starting point. It seems to us however that there could be many types of cases where this period would be too short: in cybercrime cases where computer forensics may well take longer. The period should be renewable on good cause shown on application to the Court.

### **Question 12**

*Are there practical issues with the police advising the suspect of a time and place for a return to the police station, at the point investigative bail is granted?*

We have no comment.

## **LEGAL ADVICE (Chapter 5 of the consultation paper)**

### **Question 13**

*What are your views on the recommendation for access to a lawyer to begin as soon as practicable after the detention of the arrested suspect, regardless of questioning?*

- *What do you see as the purpose of access to a lawyer when questioning is not anticipated?*

As a deterrent to abuse of power by the police. To provide the suspect with information about his/her rights: see *Dayanan v Turkey* 2009. To enable a suspect positively to assist his defence, when matters are still fresh.

- *What do you consider to be the best way of providing legal advice for suspects as soon as practicable after detention, whilst ensuring it is effective, practical and affordable?*

By telephone or video-call to a lawyer: either a solicitor identified by the suspect, if available, or to a duty solicitor.

#### **Question 14**

*Do you foresee any difficulties with the recommendation that the standard caution prior to the interviewing of suspects outwith a police station includes information that they have a right to access a solicitor if they wish? If so, please explain what these are.*

No.

#### **Question 15**

Lord Carloway recommends that it is for the accused to decide on the way legal advice is provided (by telephone, in person etc.) and whether their solicitor is present during a police interview. Do you agree with this approach? If not, please give reasons.

Yes.

- *Are there any additional considerations for the form of legal advice when questioning is not anticipated?*

In principle, we agree. However, the choice of method and identification of lawyer must be subject to practical considerations. For example, a suspect should not be permitted to insist on impracticable or impossible demands or deliberately to frustrate legitimate investigation of crime.

#### **Question 16**

*It is proposed that the right to waive access to legal advice, and the expression and recording of this, should be set out in legislation – do you agree? If not, please give reasons.*

Yes. We agree with the recommendations.

- *Lord Carloway also proposes that this right can only be waived once a person is fully informed of the right – what are your views on this?*

We agree with the recommendations.

**Question 17**

*Do you agree with Lord Carloway's recommendation that the practice of only enrolled solicitors giving advice to suspects should continue? If you disagree, please set out an alternative approach.*

Yes.

*Please comment on the reason(s) for your answer.*

We agree with the recommendations for the reasons given in the Report.

**QUESTIONING (Chapter 6 of the consultation paper)****Question 18**

*Do you agree that the police should be allowed to question a suspect after charge (subject to the permission of the court and any conditions they apply), as outlined in the recommendations? Please explain.*

The majority of the Association disagree with this proposal. After charge a person's status changes. See further our remarks at Answer 2. From that point the right to silence and the right against self-incrimination cannot be breached. The only way of ensuring this is for there to be no exception to the rule. Once charged, an evidential sufficiency should exist. Further questioning would bring no further benefit. The accused is free to make a voluntary statement post-charge.

If such questioning were allowed, we believe that there would be additional difficulties. An order from a sheriff would be required. Even with the use of email, it may be some time before it is possible for a sheriff to give attention to such an application. That would mean the accused remaining in custody during that time. The Report states that an application for questioning after charge would not be to extend the period of custody, but we rather suspect that will be the practical effect and that such applications would be likely to be accompanied with applications for extensions of the 12 hour custody period. Increased periods in custody runs counter to the principle in the report of custody being kept to a minimum. Further, we note that such an application would not be intimated to the accused. That seems wrong in principle as does the idea that, therefore, the accused would be unable to make representations to the sheriff.

However, a minority of the Association believe that in some circumstances, questioning after charge ought to be permitted in certain limited circumstances, such as where new evidence has emerged. In that case, the suspect will continue to have the right to legal assistance and has the usual Convention protections. It is unlikely that such a power would be often used, especially in summary cases which form the vast bulk of all criminal matters coming before the courts.

**Question 19**

*Do you agree that the procedure of Judicial Examination should be removed, whilst introducing provisions to allow the Crown to apply to the court to question a suspect after charge, as outlined in the recommendations? Please explain.*

Judicial Examination is now somewhat of an anachronism and is not often employed and should be abolished. Similarly anachronistic is the procedure whereby a person on petition may emit a declaration, which rarely if ever happens in practice. We agree that petition procedure should be modernised and that in solemn cases, the accused be brought before the sheriff on petition but not for “examination”. However, we reiterate the concerns about police questioning after charge expressed above.

**Question 20**

*Do you agree that the present common law rules of fairness concerning the admissibility of statements by suspects should be abolished in favour of the more general Article 6 test, as outlined in the recommendations? Please explain.*

Yes, for the reasons expressed in the Report. However, we do not believe that in practice there would be much difference regardless of which test is applied.

**CHILD SUSPECTS (Chapter 7 of the consultation paper)****Question 21**

*Do you agree with Lord Carloway’s recommendation that, for the purposes of arrest, detention and questioning, a child should be defined as anyone under the age of 18 years? Please explain why.*

Yes. In light of current international conventions, the age which should define a child should be 18, for these purposes only.

**Question 22**

*Do you agree that there should be a general statutory provision that, in taking any decision regarding the arrest, detention, interview and charging of a child, the best interests of the child shall be a primary consideration?*

Yes.

- *How would such a provision work in practice?*

We agree, so long as it is understood that the best interests of the child are one of many primary considerations in this context and it is also understood that this primary consideration will not in all cases be the most important consideration. The need to protect others and the public interest in the apprehension, prosecution of suspects may often outweigh this consideration. The interests of justice should be paramount.

**Question 23**

*Do you agree with the terms of the Report that the general role of the parent, carer or responsible person should be to provide any moral support and parental care and guidance to the child and to promote the child's understanding of any communications between the child, the police and the solicitor?*

Yes. We agree with the general role of the parent, carer or responsible person.

- *Should the responsibilities of a parent, carer or responsible person be provided for in statute or achieved through guidance and the possible provision of support or in some other way?*

In the first instance we consider that it should be sufficient to provide for the responsibilities through guidance. Legislation should only be considered if guidance is unsuccessful.

**Question 24**

*Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a lawyer only with the agreement of a parent, carer or responsible person?*

In order to avoid problems of admissibility at trial, the best solution is that there can be no waiver of the right of access to a lawyer where the suspect is under 18.

**Question 25**

*Do you have comments on the recommendation for children aged 16 or 17 years to be able to waive their right of access to a parent, carer or responsible person, but that in such cases they must be provided with access to a lawyer?*

We suspect that there may be some 16 and 17 year olds, perhaps those most likely to come into contact with the criminal justice system, who have no competent parent or carer or responsible person. And there will be some who will refuse to have such a person with them. We agree that 16 and 17 year old children should be permitted to give fully informed consent to waiver of this right. However, as we say above, we consider that those under 18 should not be entitled to waive access to legal assistance regardless of whether they have a parent etc with them.

**Question 26**

*What are your views on the recommendation that children under 16 should not be able to waive their rights to legal advice?*

We agree.

## **VULNERABLE ADULT SUSPECTS (Chapter 8 of the consultation paper)**

### **Question 27**

*Do you agree with Lord Carlway's recommendation that there should be a statutory definition of a "vulnerable suspect"?*

Yes.

- *Do you agree with the definition proposed by Lord Carlway?*

Yes.

- *If not, what do you think the definition should be?*

We agree that there should be such a definition, especially since there exists already a definition of vulnerable in relation to witnesses. We agree that the definition of vulnerable in relation to a witness is cumbersome and should not simply be carried over to a definition of vulnerable suspect. We agree the definition should be more clearly expressed. We agree that it should include those suffering from a mental disorder. However, we consider also that that may be some suspects who are vulnerable through some aspect of their psychology or recent experience who may be vulnerable for a reason falling short of mental disorder or because of a physical condition. It might be wise to provide a catch all addition to the definition.

### **Question 28**

*Do you agree with Lord Carlway's recommendation that the role of an Appropriate Adult should be defined in statute?*

- *Do you agree with the definition proposed by Lord Carlway?*
- *If not, what do you think the definition should be?*

The issue here is similar to that raised at question 23. We think that a similar approach should be adopted for both. Therefore, in the first instance we consider that it should be sufficient to provide for the responsibilities through guidance. Legislation should only be considered if guidance is unsuccessful. There may be a role for mental health officers as appropriate adults.

### **Question 29**

*Do you agree with Lord Carlway's recommendation that statute should provide that a vulnerable suspect must be provided with the services of an Appropriate Adult as soon as practicable after detention and prior to any questioning?*

Yes.

- *If so, do you agree that the current role of an Appropriate Adult should be extended so that a vulnerable suspect can only waive their right of access to a lawyer if the appropriate adult also agrees to this?*

No. The vulnerable adult must be provided with the services of an appropriate adult. In order to avoid problems of admissibility at trial, the best solution is that there can be no waiver of the right to access to a lawyer.

### **Question 30**

*Do you agree with Lord Carlaway's recommendation that statutory provision should be made to define the qualifications necessary to become an Appropriate Adult?*

Yes.

- *If so, what steps do you think are required to decide what these qualifications should be?*

We have no further comment.

## **CORROBORATION (Chapter 9 of the consultation paper)**

### **Question 31**

*Lord Carlaway concludes that the requirement for corroboration has no place in a modern legal system and should be abolished. Setting aside any question about whether this would require other changes to be made, do you agree with that conclusion?*

There are concerns about this proposal. Some of the arguments in favour of retaining the rule are set out in the Report at paragraphs 7.2.36 to 7.2.40. It is unnecessary therefore to repeat them here. It is worth emphasising however, the difficulties that do exist in practice in deciding whether a witness is credible and reliable. Skilful liars and the honestly mistaken but apparently convincing witnesses are no strangers to the courts. Those difficulties will not be assisted by removing the corroboration requirement. While the corroboration requirement does not prevent wrongful convictions, it is likely to reduce the risk since the Court has support for its assessment of a single piece of evidence. Without corroboration, there is a risk of increased wrongful convictions. There would also be a risk of poorer investigation of crime by the police (especially in times of economic austerity), a risk that investigations are cut short (which might otherwise have revealed corroborating or exculpatory evidence) and a greater risk of accusations of improper conduct against police officers. It is undesirable that a person should be convicted on the word of a police officer or other witness alone. There would be a substantial increase in prosecutions and a greater number of defended cases going to trial since an accused may often think that if there is just one witness, his chances of acquittal are fair. More attacks will be made on the character of witnesses. The end result may well be more prosecutions but without a corresponding increase in convictions or perhaps even a fall in successful prosecutions. There would be a serious and substantial extra burden placed on the whole criminal justice system. The Courts and

other parts of the criminal justice system are already suffering considerable strains which are very likely to increase in any event. This is not the time to precipitate further stresses. The rule is a tool, well used by all in the criminal justice system. If that tool is removed, it is unclear what will replace it.

However, there are arguments in favour of abolition of the corroboration requirement which are well summarised at paragraphs 7.2.41 to 7.2.50 of the Report. It is unnecessary therefore to repeat them here. It is worth emphasising that it is undoubtedly true that there are many crimes which are not prosecuted because of the rule, despite the existence of one clear and convincing source of evidence and justice is therefore not done because of the rule. That may be especially true of some types of cases involving women and children, but it is also true of other common types of cases, such as assault and theft. It is also worth noting, as the Report clearly states, that the existence of the rule has led to a considerable amount of elaborate legal theories and intricate exceptions and qualifications to the rule so that there are many cases where it may be quite unclear how to apply the rule and judges may disagree among themselves as to its application. Further, it is worth noting how far out of line this rule of evidence is when compared with other legal systems. No other Western legal system has a quantitative standard of evidence: the argument is that Scotland should be moving to a qualitative model.

That all said, the corroboration requirement is an ancient part of Scottish evidential law. It is, as the Report correctly says, a rule with deep roots in all parts of the criminal justice system. Its abolition has only very recently been mooted. With great respect to the author of the Report and those who contributed to it, we do not believe that this Report is a sufficient basis on which a conclusion as to retention or abolition of the rule should be reached. We believe that before such a decision is reached, much more study, research and analysis needs to be undertaken on the question, the consequent effects of abolition on the rest of the criminal justice system and what other changes might be required as a consequence of abolition. We therefore recommend that whatever is done with regard to the rest of the recommendations of this report, determination of this question be deferred until that further work is done and further public debate takes place.

### **Question 32**

*If the requirement for corroboration is removed, do you think additional changes should be made to the criminal justice system?*

Yes.

- *If you think additional changes should be made, what specific changes would you suggest and why? For example, if altering the size of jury majority required or verdicts what would a new system require or include?*
- *What evidence do you have to support your position?*

We believe that abolition of the corroboration rule would almost certainly entail changes to many other aspects of the criminal justice system. As we note above, we believe that much more analysis on this question needs to be done before a clearer

answer could be given. However, we believe that the following changes might well be necessary.

- Introduction of the qualitative test of evidence at trial before verdict.
- Warnings to juries about conviction on uncorroborated evidence
- Increase in size of the majority needed for a guilty verdict

Consideration of safeguards as to admissibility of evidence

## **OTHER CRIMINAL EVIDENCE ISSUES (Chapter 10 of the consultation paper)**

### **Question 33**

*Do you agree that the test for sufficiency of evidence at trial and on appeal should remain as it is now? If not what do you believe should change?*

*If the corroboration rule were abolished, there would need to be changes. There would need to be a qualitative test for sufficiency of evidence. The test in a jury trial would, therefore, have to be along the lines of “whether, assessing the evidence as a whole, the Crown case, taken at its highest, is such that a jury properly directed could not properly convict”. The judge would need to have the power to remove the case from the jury where the evidence does not reach the required standard.*

*In a summary trial, as the judge sits alone, the test would have to be “whether, assessing the evidence as a whole, the Crown case, taken at its highest, would entitle a reasonable sheriff [or stipendiary magistrate or justice of the peace] to convict”.*

### **Question 34**

*Do you agree the rules distinguishing treatment of incriminatory, exculpatory and mixed statements should be simplified allowing the courts to assess them more freely? If you do not agree, should any other change be made regarding these statements?*

*Yes. We agree with the analysis in the Report and its conclusion that the rules of admissibility as regards such statements are now far too complex and unlikely to be fully understood by juries however carefully framed the directions given to them are. We agree that all statements given to police and other public officials during the course of investigation should be generally admissible at trial, at the instance of any party, whether as proof of fact or otherwise. That must be subject to the right of any party, and the judge, to make comment on them as regards the circumstances in which the statements were made, their content and what inferences could legitimately be drawn from the statement.*

### **Question 35**

*Currently no adverse inference can be taken from an accused person failing to answer police questions. Do you agree that this should not change?*

*Yes. This is entirely consistent with the right to silence and the presumption of innocence enjoyed by the accused.*

## **APPEAL PROCEDURES (Chapter 11 of the consultation paper)**

### **Question 36**

*Do you agree that time limits in appeal cases should be enforced? What sanctions do you consider might be appropriate?*

Yes. Time limits in appeals should be enforced. The sanctions should be as noted in the recommendations of the Report. They include denial of the appeal.

### **Question 37**

*Do the amendments Lord Carloway recommends to sections 74 and 174 of the 1995 Act, together with the retention of the *nobile officium*, cover all situations in which Bills of Advocation and Suspension might reasonably be used? If not, what other situations can you envisage?*

Yes. We agree in principle that the present modes of appeal ought to be modernised and simplified. We agree in principle that the appeal route via Bills of Advocation and Suspension ought to be abolished providing that the revised modes of appeal permit the bringing under review the same types of decisions as are presently challenged using such appeal routes. We are not aware of any types of decisions where the proposed amended right of appeal, taken together with the petition to the *nobile officium* would not provide an effective remedy. We agree that such petitions should be used only for exceptional cases and that provision should be made to prevent such petitions being employed as a means of avoiding the statutory appeal procedure or the consequences of having failed to use the statutory appeal procedure.

### **Question 38**

*Do you have any comments on Lord Carloway's other recommendations for appeals?*

We do not consider that the Crown should have a right of appeal under section 74 or 174 of the 1995 Act without leave but the convicted person requires leave. In the interests of fairness, both should be subject to the same law.

## **FINALITY AND CERTAINTY (Chapter 12 of the consultation paper)**

### **Question 39**

*Do you agree that section 194C(2) of the 1995 Act should be retained and that there should be no further statutory listing of the criteria included in the "interests of justice" test for SCCRC references?*

Yes. The need for finality and certainty is an important consideration which ought to be taken into account by the SCCRC and it is worth enshrining that consideration in statute for the avoidance of doubt. We agree also that the SCCRC ought to be

permitted to take into account whatever other considerations it considers amount to the interests of justice and enumerating them would not be helpful.

#### **Question 40**

*What are your views on Lord Carloway's recommendation that section 194DA of the 1995 Act should be repealed?*

We agree. It is wrong in principle that the very body whose decisions are being challenged can veto that challenge. The evidence is that the SCCRC performs an important role responsibly and we believe that its independence ought to be preserved. The evidence of its decisions on the *Cadder* cases referred to the SCCRC tends to show that there is no need for the restriction introduced by section 194DA. We think that consideration could be given to providing the SCCRC with a right of appeal against decisions of the Court.

#### **Question 41**

*Do you agree with the recommendations that, when considering appeals following upon references from the SCCRC, the test for allowing an appeal should be:*

- (a) there has been a miscarriage of justice; and*
- (b) it is in the interests of justice that the appeal be allowed.*

- *If not, what do you think the criteria should be?*

Yes. Although we agree with this recommendation, we do see the strength of the argument that the only test ought to be miscarriage of justice.

## **REFORM OF SHERIFF AND JURY PROCEDURE - CONSULTATION QUESTIONNAIRE**

### **Statements to Accused**

#### **Question 1**

*a) Do you agree in principle with the proposals for statements to an accused?*

*b) If not please give reasons*

*c) What will be the potential benefit to the system?*

*d) What potential problems could arise?*

1(a) No.

(b) We consider the problems as set out in our Answer to Question 1(d) are such as to render the proposal potentially unworkable in practice and ill advised.

(c) We have, in any event, doubts as to whether there will be any noticeable benefit to the system. Agents should be telling their clients this anyway. The Case Law regarding discount makes it very clear that the discount clock starts ticking from the first appearance.

(d) The Consultation Paper states "it is not intended that these reforms should usurp the basic principle that the accused is entitled to require the Crown to prove their case." Lord Carloway in his review endorses the right to silence.

It may be argued that the terms of the statement reflect what a solicitor should be advising his/her client in any event. Does the statement therefore encroach on that relationship?

The proposed wording is "full engagement with their solicitor". What does "engagement" mean? It is unclear how the Sheriff will subsequently ascertain whether or not there has been such engagement without encroaching upon the solicitor/client relationship? What is the Sheriff to do if the solicitor submits that all his dealings with his/her client are confidential and privileged.

If through oversight the statement is not made by the Sheriff what happens? We pose this question as it is unclear whether or not "the discount of sentence" will be in some way affected.

There is no sanction proposed in the event of lack of "engagement" on the part of the accused. Is it to be inferred that failure to "engage" will be a factor the Sheriff is permitted to take into account when determining the level of discount of sentence to be afforded?

There is a further potential problem. It could be argued that the statement, particularly in referring to discount, is an attempt to influence an accused to plead guilty. In other words, full engagement should properly result in a plea of guilty. That assumption may not be well founded. Aside from anything else, whether an accused should be pleading to a charge depends on the strength of the prosecution case. Initial disclosure may not reveal a strong Crown case thus it would be perfectly proper and indeed appropriate advice to maintain a plea of not guilty. It will not matter in those circumstances whether there is engagement or not. It is all very well to say that an accused knows whether the offence was committed, the majority of accused persons do not however plead to charges until there is no realistic alternative option.

(e) We consider an amendment to section 196 will be required.

### **The Compulsory Business Meeting (CBM)**

#### **Question 2**

*a) Do you agree in principle to the proposal of a new compulsory business meeting procedure?*

*b) If not, please outline your reason(s)*

*c) What would be the potential benefits to the system?*

*d) What potential problems may arise?*

2(a) Yes, although we have reservations about the proposed timescale.

2(c) It may result in earlier resolution of matters and also reduce the number of adjournments.

2(d) It is dependent upon the accused giving appropriate instructions to his solicitor.

Our concerns over the timescale centre upon the existing failure, under the present procedure, of COPFS to make timeous disclosure of evidential material to the Defence necessitating adjournments. Leaving aside what may be set out in the Rules as opposed to primary Legislation, any continuation or repetition of such failings by COPFS, whether due to lack of resources or otherwise, will simply frustrate the purpose of the CBM and result in an additional layer of procedure being prescribed for no real benefit.

### **Question 3**

*a) Do you agree in principle that the CBM take place before service of the indictment?*

*b) If not, please outline your reason(s)*

*c) What would be the potential benefits to the system?*

*d) What potential problems may arise?*

3(a) Yes. If it does not take place prior to service, then there is no real change in the present system.

3(c) and 3(d) as in 2 above.

### **Question 4**

*a) Should sanctions be available if parties fail to comply with a requirement to hold a CBM?*

*b) If so, what should these be?*

4(a) Yes. Without some form of sanction the CBM may amount to nothing more than another ineffectual and rather meaningless part of the Procedure. Defence Statements, without any sanction for failure to comply, are a case in point.

4(b) While it may be thought failure on the part of the accused should be a factor the Sheriff is entitled to take into account when considering discount on sentence, the majority view of the Association would be against this being provided for. The

potential for “conflict” between Agent and accused, resulting in Agents withdrawing from acting, is obvious. It is unclear how such a “reduced” discount would be calculated, nor what is to occur if it is the Crown who has failed to comply.

Further amendment to Section 196 would in our view be required.

### **The Written Record of the CBM**

#### **Question 5**

- a) *Do you agree in principle to the proposal for a written record of the CBM?*
- b) *What would be the potential benefits to the system?*
- c) *What potential problems may arise?*

5(a) Yes.

5(b) It would provide information to the presiding sheriff at the First diet as to what had been discussed/agreed at the CBM and may mean that more is achieved at the First diet.

5(c) As it is a written record Defence representatives may be reluctant to commit themselves. Questions of what authority did representatives have at such a meeting may arise. Accused can change their minds. What will the status of such a record be? For example, would the record contain any information regarding negotiation of pleas? If it did and the accused subsequently did not plead to these offences, could the record be put to him in cross examination at a trial?

A fuller Minute of what takes place at the First diet is likely to be required. Although it is preferable that the same sheriff presides at the First diet, any continuation thereof and any subsequent Trial, this can cause programming issues in larger courts and is not always achieved.

#### **Question 6**

- a) *Do you agree with the proposal that the duty to lodge the written record of the CBM with the court be placed with the Crown?*
- b) *If not please provide alternative proposals with reasons.*
- c) *Is the time-scale for lodging with court appropriate?*
- d) *If not please provide alternative time-scale proposals with reasons.*

6(a) and 6(c) Yes

## **Service of Indictments and First Diets**

### **Question 7**

- a) *Do you agree in principle that cases should be indicted to a first diet only as outlined in the proposals?*
- b) *Do you agree with the proposal to amend the time scale in section 66 (6) of the 1995 Act to facilitate the proposed new procedure?*
- c) *Do you have any comments on the proposals for amendment of section 71 with regards to parties' responsibilities?*

7(a) and 7(b) Yes.

7(c) No. We are unable to assess the full impact of the proposed amendments to primary Legislation at this stage. The form and content of the written record of the CBM is to be prescribed by Act of Adjournal. We reserve the right to comment upon it in due course.

## **Time Limits**

### **Question 8**

- a) *Do you agree in principle that the current time bar (section 65 (4)(b) of the 1995 Act) requires to be amended to facilitate the proposed new procedures?*
- b) *Do you agree the 110 day period (section 65 (4)(b) of the 1995 Act) should be amended to 140 days as outlined in the proposals?*

8(a) and 8(b)

There is no real justification put forward for the proposed increase. The only point in favour of increasing the period from 110 to 140 days is that it would be administratively convenient for the Crown for there to be the same period in Sheriff Court solemn procedure as in High court cases.

The majority of the Association consider there are, however, more important concerns which point to it being both appropriate and proportionate to retain the period of 110 days in Sheriff Court proceedings:

- (i) The Consultation Paper proposes that there should be more preparation time at an early stage. That is the purpose behind the creation of the CBM. At this point the Paper is advocating the proposed extension because "more time is needed to prepare between the First Diet and Trial Diet". Surely the Crown cannot have it both ways. The purpose of the First Diet is to establish inter alia that the Crown is prepared. If the Crown is not going to actively prepare its case until shortly before or after the First diet an extension to 140 days is unlikely to suffice.

- (ii) It must be acknowledged that, particularly in these difficult financial times with numerous constraints upon the public finances, it is very expensive to keep accused on remand for another 30 days.
- (iii) A number of cases in the Sheriff Court under Solemn procedure do not attract either a custodial sentence or a sentence of great length. Without considering the matter of “discount” a period of remand of 140 days represents a sentence of over 9 months.
- (iv) The experience in the High Court suggests that the “140 day period” is frequently exceeded. This would be unconscionable in many Sheriff Court cases.

The majority accordingly favour retaining the period of 110 days.

### **TV Links**

#### **Question 9**

- a) *Do you agree in principle to the proposal for amendment to section 77(1) of the 1995 Act?*
- b) *What are the potential benefits to the system?*
- c) *What potential problems could arise?*

9(a) In principle yes, although as it is apparently a precursor to “ changes being made in the future” we consider it may be premature to remove the requirement that the accused must sign the guilty plea.

9(b) Cost of transporting an accused.

9(c) Lack of reliable technology. Until reliable technology is available in ALL criminal Courts Section 77(1) should remain in its present form.

### **Written Narrations**

#### **Question 10**

- a) *Do you agree in principle with the proposal to introduce written narrations in sheriff court solemn cases, where a plea of guilty is tendered (no evidence having been led)?*
- b) *What are the potential benefits to the system?*
- c) *What potential problems could arise?*

10(a) In principle.

10(b) Those highlighted in the consultation document. Such a document would provide the sheriff with advance notice of the circumstances of the offences.

10(c) Written narrations are likely to be more practically achievable when the accused is pleading to a Section 76 indictment. Where no adequate notice of a plea has been given to the Crown, particularly in a busy First Diet Court or even at a Trial sitting, such narrations, containing mitigating factors by the Defence, are unlikely to be available. Mandatory written statements will result in a further calling of the case which may not otherwise be required if reports are unnecessary. If reports are however to be called for, the narrative can be prepared in the intervening period, in which event it would assist the Sheriff if the written narration is made available in advance of the sentencing diet.

**SHERIFFS' ASSOCIATION  
RESPONSE TO THE FINANCE COMMITTEE OF THE SCOTTISH PARLIAMENT  
REGARDING THE CRIMINAL JUSTICE (SCOTLAND) BILL, INTRODUCED  
20 JUNE 2013**

[1] Sheriffs have no responsibility for costs or budgeting in the courts where they sit. In those circumstances, we have considered it appropriate to make only some general comments in response to the questions headed 'WIDER ISSUES'. However it seems self-evident that if any reform leads to more court time being expended on cases, then there will be the following consequences:

- If courts have to sit late, then there is likely to be a requirement to pay staff overtime or give them time of in lieu of extra hours worked.
- There will be an increase in collateral costs, such as police, custody officers, legal aid.
- If courts are expected to spend more time on individual cases, then there will inevitably be delays in the processing of the cases through the courts.

[2] We would have thought it a very difficult task to predict the savings in time, if any, to be gained from the implementation of, for example, the Bowen provisions regarding sheriff and jury procedure. We consider that it will take some time for prosecutors and defence lawyers to become familiar with new concepts such as the compulsory 'business meeting' prior to the first diet and it is difficult to predict how effective that will be in saving time. An analogy might be thought to lie in the 'defence statement' introduced into solemn procedure by Section 124 of the Criminal Justice and Licensing (Scotland) Act 2010 (becoming section 70A of the Criminal Procedure (Scotland) Act 1995). Experience shows that perhaps less information is imparted in these statements than might have been expected or hoped for.

[3] It is therefore perhaps over-optimistic to attach any particular figure to any savings which it is hoped will flow from the changes set out in the Bill.

[4] The sheriffs have no control whatsoever over the number of prosecutions brought or the level (summary or solemn) or court in which they are to be brought. We therefore cannot comment on the effect of the Carloway provisions, i.e. the removal of the requirement for corroboration, on the number of cases brought.

[5] Similarly, we would have thought that it would simply be speculative to predict whether more or less cases will go to trial once the requirement for corroboration is removed.