

Justice Committee

Criminal Justice (Scotland) Bill

Response from the Scottish Government to the Committee's Stage 1 Report

PART 1 ARREST AND CUSTODY

1. The Committee accepts that there might be some benefit in simplifying the powers of arrest along the lines proposed in Part 1 of the Bill. However, we do have concerns regarding the possible consequences of this change and we therefore make a number of recommendations aimed at improving the provisions in Part 1 of the Bill under the relevant sections below.

The Scottish Government welcomes the Committee's comments in relation to Part 1 of the Bill regarding the benefits of simplifying the process of arrest. We have responded on the specific issues raised below.

2. The Committee has concerns that use of the term "arrested" in relation to a suspect who has been taken into police custody for questioning but has not been charged may, amongst members of the public, be more suggestive of guilt than is currently the case for a suspect who is "detained" for questioning. We consider the terminology in the Bill concerning arrest to be somewhat confusing and are not convinced that members of the public, the accused or the media will be able to distinguish between a "person officially accused" and a "person not officially accused". We also have similar concerns relating to the proposal to allow the police to "de-arrest" a person when the grounds for arrest no longer exist (see paragraph 120 of this report).

The Scottish Government considers that the terminology used in the Bill is clear and accurately describes the new regime. Whether a person is guilty of committing the offence is a matter for the court. The presumption of innocence remains.

As to the ability of the press and public to talk about and understand the stage which an investigation has reached, it is already the case that it is the point at which the suspect is charged that marks the important change in the person's position. This will remain the case under the system set out in the Bill.

The Government agrees with Lord Carloway, and the large number of witnesses who gave evidence to the Committee, that having a single process for taking a suspect into custody (called "arrest") makes for a clearer system.

The terms "not officially accused" and "officially accused" have been used to differentiate between two distinct categories of persons, first people who are suspected of an offence but who have not been charged ("not officially accused") and second, those who have been formally charged with an offence, which includes accused on petition, indictment or complaint ("officially accused").

The term "de-arrest" is not used in the Bill and the Government has no intention of using it.

3. While we accept assurances from the police that, as with the current position, they do not intend to release a suspect's name to the media until they have been formally charged with an offence, i.e. "officially accused", we

consider that every effort should be made to ensure that the reputation of the accused is not detrimentally affected by these provisions. The Committee considers that the issue of suspects' anonymity is problematic, but merits further and careful consideration.

The Scottish Government is confident that the police will make every effort to avoid disclosure of a suspect's identity to the media. The principle of "innocent until proven guilty" is well understood. Moreover, the police and the prosecutorial authorities in Scotland are aware both of the Scots law on presumption of innocence and the requirement under the European Convention of Human Rights that no public official reflects an opinion that a person charged with a criminal offence is guilty prior to trial.

There are no current plans to make changes in respect of suspects' anonymity but the Government is willing to engage with interested parties with views on the matter.

4. The Committee is concerned that police officer training and adaptations to the new i6 programme required to effectively implement the provisions in Part 1 of the Bill may place a significant burden on an already stretched police service and individual officers. While we accept the Cabinet Secretary's assurances that sufficient time will be given to Police Scotland to implement a training programme and to update the new ICT system before giving effect to the Bill, we ask the Scottish Government to ensure that adequate resources are made available to Police Scotland to carry out these tasks without further strain on its shrinking budget.

The Financial Memorandum was developed through close consultation and discussion with key partners, including Police Scotland. This process took place alongside the development of police plans for the i6 programme. The Government recognises the particular pressures on the police: for example, we have already agreed that due to pressures on the force during 2014, implementation of the Bill's changes to police powers should be planned for 2015. We continue to discuss implementation and delivery with Police Scotland, to ensure that the timetable and programme is achievable.

The Scottish Government has undertaken to monitor the actual financial impact of the Bill during and after its implementation and maintain discussions with delivery bodies. If it becomes clear that there are additional financial costs as a result of the Bill, that will be considered in future funding discussions. The Scottish Government will ensure that delivery bodies have adequate resources to implement these reforms.

5. The Committee notes that the Bill does not give effect to Lord Carloway's recommendation that "arrest" be defined in the Bill. We further note that there was no consensus from witnesses as to whether arrest should be defined and, if so, whether this legislation was the best vehicle to do so. On balance, the Committee is not content with the Scottish Government's decision to exclude such a definition in the Bill.

The word "arrest" is not defined in the Bill because, after considering the matter carefully, the Government concluded that no elaboration of the expression's meaning is required, and any attempt to elaborate it could be counter-productive.

In one sense, the whole of Part 1 of the Bill defines what arrest by the police entails in the normal case. Part 1 sets out the circumstances in which someone can be arrested (with the use of reasonable force if necessary), that an arrestee is to be taken to a police station, given certain information, afforded certain rights and so forth. Picking a handful of those elements and simplifying them for the sake of concision would produce a partial and potentially misleading definition of what it means to be arrested. On the other hand, defining arrest to mean all the consequences set out in Part 1 of the Bill (and other enactments) would be circular and serve no purpose.

Similarly, trying to define arrest by reference to its purpose rather than its consequences is not without its difficulties. In his report, Lord Carloway proposed that arrest should be defined as bringing a person into custody with a view to bringing the person before a court. There is a risk that this could jeopardise the employment of widely-used alternatives to court proceedings, such as Police Fixed Penalty Notices.

In short, defining arrest poses difficulties for the smooth operation of the new system created under the Bill. Leaving the term to take its natural meaning within the context of the provisions in the Bill, ensures that this Bill will operate effectively alongside other legislation which makes provision regarding arrest and “arrested persons”.

6. The Committee notes the Scottish Government’s position that the power of arrest contained in the Bill combined with common law rules would be sufficient in allowing the police to arrest a person attempting or conspiring to commit an offence. However, we heard from the police that they were not yet convinced by the reassurances given, and from the SHRC that it would have serious concerns if the police were able to arrest a person “who has done nothing contrary to the criminal law”. We therefore call on the Scottish Government to further engage with both the police and the SHRC with a view to providing adequate reassurances on this matter.

The Bill will deliver the Carloway recommendation of having a single police power of arrest, under which a person can be brought into custody on suspicion of having committed an offence. There is nothing in the Bill which will permit the police to arrest anyone who has done nothing contrary to criminal law. The Government is continuing to engage with stakeholders on this matter.

7. The Committee notes the Scottish Government’s intention to bring forward an amendment to allow a person to be quickly released from arrest (“de-arrested”) when the grounds for arrest no longer exist. While we recognise that there may be situations where de-arrest could be a reasonable option, we have concerns that this should not lead to a situation where people are arrested without a proper assessment by police officers as to whether such action is appropriate. We would therefore welcome further details of the types of situation and expected frequency in which de-arrest would be used. The Committee also has concerns regarding use of the term “de-arrest” and consider the words “released” or “liberated” to be more appropriate.

The Government understands the Committee’s concern. However, having listened to the evidence presented to the Committee, the Government is persuaded that it should be possible for the police to release an arrested person, prior to arrival at a

police station, in certain circumstances. The Government will bring forward an amendment at Stage 2 to make provision for this.

An example has been provided by Police Scotland where such a liberation from initial arrest may be used:

Police attend a report of a householder having disturbed a youth breaking in to his car. The householder provides a detailed description of the suspect, including clothing. Shortly afterwards, in a nearby street, police find a male fitting the description of the suspect. Following brief questioning he is arrested and on being placed in the police vehicle, the householder attends and clearly states although there is a similarity, it is not the person who was breaking into his car. The grounds for arrest no longer exist, but as the male has been arrested the Bill as introduced requires that the arrested person must be taken to a police office.

In recognition of the Committee's concern about the potential for misuse of the arrest power, the amendment will allow a person to be released prior to arriving at a police station only if there are no longer grounds to suspect the person of committing an offence. The police have an equivalent power at present in relation to people they detain under section 14 of the Criminal Procedure (Scotland) Act 1995 and its use is very limited. On this basis, the Government would not expect the power to release an arrestee before arriving at a police station to be used often in practice.

It will also continue to be possible to release a suspect where a constable charges the person with an offence and having done so decides that the person's presence at the police station will not be required.

The Government's amendments to the Bill at stage 2 will include a requirement to keep a record of the reasons where an arrestee is released before arriving at a police station.

8. The Committee welcomes the recent introduction of a "Letter of Rights" for those in custody, in accordance with the EU Directive on the Right of Information in Criminal Proceedings. We ask the Scottish Government to respond to the suggestion of some witnesses that information to be given to suspects at a police station should be provided both verbally and in writing with a view to ensuring that they clearly understand their rights.

The effect of section 5 of the Bill is that a person will be provided with information on their basic rights, verbally, on arrival at the police station. This information includes the right to silence, the right of access to a lawyer and the right of intimation to a third person. In addition to this, a person is provided with a written Letter of Rights which they are able to keep with them. The Scottish Government considers it is more appropriate for the decision whether to hand the letter to the person or read it to them to be made depending on the specific circumstances of each person. Section 5(3) of the Bill does provide this appropriate level of flexibility and where the person requires assistance to understand the letter it can be read to them.

9. The Committee heard a divergence in views amongst witnesses regarding the appropriate maximum detention limit. However, we note the statistics provided by Police Scotland relating to the period of 4 June to 1 July

2013 which show that, although the majority of persons (80.4%) were detained for up to six hours, a not unsubstantial number (19.2%) were detained for between six and 12 hours. Given these statistics, there are mixed views on the Committee as to whether detention beyond six hours is necessary.

The Scottish Government considers that the evidence makes it clear that the provision in the Bill is appropriate. It is clear from the evidence that a six hour period of detention is not sufficient for every case.

The fact that a person can be kept in custody for up to 12 hours has not meant that most detainees are. The Bill will formalise current practice to ensure that detentions do not go on longer than necessary by creating a mandatory custody review, performed by a senior officer not directly involved in the investigation (see section 9 of the Bill).

10. We note the Cabinet Secretary's commitment to consider whether the detention limit should be extended in exceptional circumstances. While we recognise that there may be situations, particularly in relation to complex and serious crimes, where it may be necessary to consider extending the detention limit, we remain to be convinced whether this is really necessary, particularly when, under the Bill, the police would have the option of releasing a person on investigative liberation. We therefore seek further information on the types of "exceptional circumstances" in which the Scottish Government envisages that an extension to the detention limit would be granted, how often they are likely to be applied for, who would approve any extension, and how the Scottish Government intends to ensure that such extensions do not become commonplace over time.

The Scottish Government is continuing to consider whether to bring forward an amendment at Stage 2 to allow the 12 hour detention limit to be extended in exceptional circumstances.

Police Scotland has provided the Committee with written evidence detailing the circumstances in which the 12 hour period of detention has proved insufficient and when they have had to extend it under the existing powers in section 14A of the Criminal Procedure (Scotland) Act 1995. The examples given by Police Scotland provide strong evidence for the view that in rare but important cases, a 12 hour detention period is too short, for example when dealing with complex serious cases with suspects and potentially victims and witnesses under the influence of drink and/or drugs who are deemed by medical professionals to be unsuitable for interview.

The Government would expect that, should the police retain the power to extend the detention period, its use would continue to be rare. Any amendment would include similar safeguards against inappropriate use of the power as presently exist (eg. a requirement that the period can only be extended with the authorisation of a senior police officer). This would ensure the same high-level scrutiny of decisions and appropriate protection for those in police custody as presently exists. A copy of the examples provided by Police Scotland of the types of cases whereby an extension to the 12 hour detention period has been necessary is attached to this report.

Investigative Liberation is a new tool which police will utilise to manage their inquiries. It is, however, not an appropriate tool to use in the examples provided by

the police. Investigative Liberation cannot be used in all cases. When a person presents such a risk that no conditions set could mitigate that risk (for example, a very violent disposition) then investigative liberation is not appropriate. It should also be noted that it will not be possible to liberate a person, whether with or without conditions, when they remain heavily under the influence of drink or drugs and are deemed by a doctor to be not fit for interview. If the person is not fit for interview they cannot be safely released from custody and have an understanding of any conditions which have been attached to their release. The extension to the 12 hour detention period would serve a separate purpose to that of Investigative Liberation.

11. The Committee seeks assurances that investigative liberation will not have an unnecessary impact on the suspect's private life, whilst allowing the police to conduct complex investigations which could not be completed while the person is initially detained. We note that a person may apply to the courts to have any conditions imposed either removed or altered, which we believe is a welcome protection against disproportionate conditions being applied.

Investigative liberation will provide an alternative to prolonged detention of suspects in certain cases, and as such is itself a method of reducing an investigation's impact on the suspect's private life.

The Bill requires that any conditions set must be "necessary and proportionate" (section 14(2)), thus there is an in-built legal requirement for the conditions not to have an unnecessary impact on the suspect's private life. As the Committee notes, if the suspect feels the police have imposed a condition that is unnecessary or disproportionate the Bill provides a mechanism for that to be reviewed by the courts (section 17).

12. The Committee also notes suggestions from victims' groups that the Bill should include a specific requirement for complainers to be notified of a suspect's release on investigative liberation and of any conditions attached, however, we are unsure as to whether such a requirement needs to be placed on the face of the Bill. We ask the Scottish Government to work with the COPFS to ensure that, where they may be at risk, complainers are always informed timeously of the suspect's release and of any relevant conditions applied.

Upholding the rights of victims in a criminal case is crucial to ensuring a fair criminal justice system. The Scottish Government is discussing with stakeholders, including Police Scotland and COPFS, the processes which will be required as a result of the Bill. These discussions include the process for notifying complainers where a suspect is released on investigative liberation.

13. The Committee notes that there are likely to be resource implications relating to investigative liberation.

Investigative liberation is a new procedure for Police Scotland and indeed COPFS and other key stakeholders.

The operational aspects of the administration of investigative liberation are a matter for Police Scotland. The anticipated resource implications are set out in the Financial Memorandum, which was developed through consultation with key stakeholders, including Police Scotland. The Scottish Government will monitor the

resource implications of implementing the Bill, and will ensure that Police Scotland have adequate resources to deal with investigative liberation.

14. Like many witnesses, the Committee is concerned that suspects are sometimes held in custody for unacceptably long periods before their first appearance in court. We believe that court sitting times must be extended to reduce such lengthy periods in custody and the backlog of cases. We also recognise that there are implications for police time and resources in holding people in custody.

Where the volume of custody cases on any given day requires a court to sit for extended hours, both SCS and COPFS facilitate that. Court programmes are regularly monitored and amended, under the authority of the sheriffs principal, to ensure that they allow for the efficient disposal of business and meet the needs of court users. Any permanent change in court sitting times, however, would have resource implications for Scottish Court Service, COPFS, and others involved in the criminal justice system, and would need to be considered carefully.

15. We are not however convinced that specifying time-limits for periods in custody in legislation is necessary at this stage, particularly when a working group is actively considering options for Saturday courts. We recommend that this work be completed in a timeous manner to allow any recommendations of the working group to be implemented as quickly as possible. The Committee welcomes the Cabinet Secretary's assurances that he will "take a keen interest in the issue" and requests details of the timescale for meetings and completion of the work of the group.

The working group is presently meeting on a monthly basis, and reports regularly to the Justice Board. The group is evaluating the nature and scale of what will be required to introduce Saturday or weekend courts. At this stage, however, it seems clear that this will be a significant and complex piece of work involving process and policy changes across all criminal justice organisations, with considerable and ongoing consequences for the resources of those organisations, and implications for the employment terms and conditions of existing staff which will need to be addressed. It is hoped that the group will be able to report its initial conclusions by late summer 2014.

16. The Committee is content that sufficient safeguards are provided in the Bill regarding liberation of those officially accused from custody, in particular the right to apply to the sheriff to have any conditions imposed by the police reviewed.

The Scottish Government welcomes the Committee's view in this regard.

17. The Committee notes the different experiences of witnesses from the legal profession in relation to when the caution is given to suspects by the police under current arrangements. We therefore ask the Scottish Government to respond to the specific suggestion made by the Faculty of Advocates that the Bill should specify that the caution, which must take place not more than one hour before any interview, should also be repeated at the commencement of the interview.

The Bill recognises the importance of a person being reminded about their rights prior to the commencement of questioning. As currently drafted, the Bill is

sufficiently flexible to allow for a suspect to be reminded of their rights at an appropriate stage prior to interview, including at the commencement of the interview. The timing within the Bill enables a suspect to consider these rights and make decisions such as whether they wish to seek legal advice where they had not sought it initially, for example, with sufficient time to make arrangements prior to interview.

As is the practice at present, the police will continue to caution a person at the start of an interview, under common law. In addition to this, a Letter of Rights is, and will continue to be, provided to a person on arrival at the police station and they will be able to keep it with them.

The Scottish Government recognises the importance of ensuring that a person is aware of their rights at all times and we consider that the Bill delivers this, and that no further provision is required.

18. The Committee welcomes the extension of the right of access to a solicitor to all suspects held in police custody, regardless of whether the police intend to question the suspect, and that suspects are entitled to face-to-face contact with a solicitor. We recognise that there would be difficulties in specifying in the Bill that a suspect should be entitled to receive assistance from a solicitor of their choice, particularly in the more remote areas of Scotland, and we therefore agree with the Scottish Government on this matter.

The Scottish Government welcomes the Committee's support of the extension of the right of access to a solicitor.

19. The Committee is content with the procedure specified in the Bill allowing a constable to question a person not officially accused following arrest.

The Scottish Government welcomes the Committee's support of this provision.

20. The Committee is persuaded that post-charge questioning may be required in certain complex and lengthy investigations. We also note that the majority of witnesses were content that the requirement on the police to apply to the court for approval for post-charge questioning provides sufficient judicial oversight to minimise the risk of miscarriages of justice.

21. However, post-charge questioning should only be used when absolutely necessary. To this end, we ask the Scottish Government to maintain a record of the circumstances and frequency in which post-charge questioning is used, including details of the applications that are refused by the courts. We further seek confirmation from the Scottish Government that existing rules providing that no adverse inference may be drawn from a suspect's refusal to answer police questions would apply equally to post-charge questioning.

The Scottish Government welcomes the Committee's support for the post-charge questioning provisions. We will discuss with criminal justice organisations the detail of how the post-charge questioning provisions will be implemented. This will include: estimates of how often such applications will come before the courts, what systems can be put in place for the recording of the information required, and what the resource implications for those organisations would be.

The specific statutory provision which allowed comment on a failure to answer questions at a judicial examination is being abolished by this Bill, together with the judicial examination procedure itself.

As the Committee may be aware, Lord Carloway specifically considered the issue of “adverse inference from silence” as part of his review. Lord Carloway’s recommendation was that no change should be made “to the current law of evidence that prevents inferences being drawn from an accused’s failure to answer questions during the police investigation” (chapter 7.5). The Scottish Government accepts that recommendation and also agrees that there should not be a rule in place which would permit an adverse inference to be drawn from a refusal to answer questions during post-charge questioning. We can confirm that no rule to permit adverse inference in relation to post charge questioning is being introduced in this Bill.

22. The Committee notes that the Victims and Witnesses (Scotland) Bill defines a child as a person up to the age of 18. The Committee asks the Scottish Government to explain why there is inconsistency between the protections for under-18s in this Bill compared with this recent legislation.

The provisions in the Victims and Witnesses (Scotland) Act 2014 and this Bill serve entirely different purposes. In the context of this Bill, the Scottish Government does not consider it is appropriate to apply blanket provisions for all under 18s. Also, we consider it is important to provide protection up to the age of 18 whilst recognising the rights of 16 and 17 year olds to self-determination.

In considering the age distinctions within the Criminal Justice Bill, we recognise the importance of distinguishing between the different needs, stages of development and potential circumstances of older and younger children. While it might appear attractive to treat all individuals under 18 years consistently, the age-based laws which allow for seventeen year olds to be living independently and marry reflect the quite different contexts and degrees of self-determination that can exist between a 10 and a 17 year old. The Scottish Government prefers an approach which would allow children aged 16 and 17 years to make their own decisions with safeguards in place to support them in this.

23. The Committee has concerns regarding the lack of consistency in use of the terms “welfare”, “best interests” and “well-being” of the child in this and other legislation. While we make no comment on which is the most appropriate term, we ask the Scottish Government to ensure consistency in the language used in section 42 of the Bill.

The term “well-being” in the context of this Bill is understood by the police and is consistent with their wider assessments of the needs of children. It is this wider scope of primary consideration that we seek they take in relation to the arrest, detention, interview and charging of a child. The factors that they will consider will be dictated by the circumstances of the investigation they are dealing with, therefore, the term has not been defined in relation to any other statute or Bill to ensure that the holistic needs of the child are a primary consideration in relation to the decisions the police take.

The Scottish Government notes the comments made by the Committee in relation to section 42 of the Bill, and will seek to adjust the heading of this section to ensure consistency of language. This may not require a formal amendment.

24. The Committee welcomes the Cabinet Secretary's undertaking to give consideration to raising the age of criminal responsibility and would welcome regular updates on this work.

The Scottish Government will provide the Committee with regular updates.

25. The Committee has concerns that the definition of vulnerable person in the Bill may not capture all individuals needing additional support when in custody. We also note comments from the police that there are difficulties in identifying vulnerable persons. We therefore ask the Scottish Government to give further consideration to the definition of vulnerable persons in the Bill and to reflect on whether this is consistent with the definition in the Victims and Witnesses (Scotland) Act 2014. We also ask that the Scottish Government ensures that sufficient resources are provided to the police to undergo training in this important area.

The Scottish Government notes the Committee's concerns in relation to the definition of vulnerable person. The definition is in line with Lord Carloway's recommendations which expressly link the definition of "vulnerable suspect" to a person who is not able to understand fully the significance of what is said to them, the questions posed or of their replies because of an apparent mental illness, personality disorder or learning disability. This is consistent with current practice whereby access to an appropriate adult is linked to "mental disorder" (which is defined as mental illness, personality disorder or learning disability), which is a tried and practiced criterion on which police have been assessing the vulnerability of suspects, accused, victims and witnesses for many years.

In relation to consistency with the definition in the Victims and Witnesses (Scotland) Act 2014 (the 2014 Act) we would emphasise that the 2014 Act and this Bill serve very different purposes. However, mental disorder is one of the criteria used in assessing vulnerability for the purpose of entitlement to use special measures to give evidence to the court.

On the issue of training, police are already familiar with the need to identify whether a person suffers from a "mental disorder" and, where they do, to make arrangements for an Appropriate Adult to be present during police procedures. The resource implications of police training as a result of the Bill are covered in the Financial Memorandum, which was developed through consultation with key stakeholders, including Police Scotland. We will continue to work with Police Scotland on implementation and delivery of the Bill's reforms, and will monitor the actual financial impact.

26. The Committee asks the Scottish Government to respond to concerns raised by witnesses that its decision not to place the provision of appropriate adult services in the Bill could lead to a lack of funding by local authorities already facing significant financial challenges.

The Scottish Government expects that under the Bill, provision of appropriate adults will continue to operate as at present. It is on this basis that we agreed with COSLA that there are likely to be no additional costs for local authorities as a result of the Bill.

We have made a specific commitment to COSLA to review the impact of the Bill in relation to vulnerable adults after implementation. We will examine data collected by

the Scottish Appropriate Adult Network and the police, and continue to liaise with key stakeholders including COSLA and Police Scotland in order to identify any financial impact.

PART 2 (CORROBORATION AND STATEMENTS) AND SECTION 70 (GUILTY VERDICT)

27. The majority of Committee Members are of the view that the case has not been made for abolishing the general requirement for corroboration and recommend that the Scottish Government consider removing the provisions from the Bill.

The Government notes the view of the majority of the Committee, but it remains convinced that the case for abolition of the corroboration requirement has been made. It agrees with the opinion of a minority of Committee Members, as expressed in paragraph 413 of the Report, that:

“access to justice will be improved by such a reform, in particular, for victims of crimes which often occur in private.”

The extensive public debate since Lord Carloway reported in 2011 has exposed a system that simply does not operate as we would wish for victims in whole categories of crime. It does not adequately respond to crimes committed in private.

The Government has a duty to provide an effective justice system for all citizens, both victims and accused.

The Committee’s Report recognises the need to ensure that our system features appropriate protections for suspects at the same time as addressing the well-known problems in prosecuting sexual offending and other crimes typically committed in private. The Government would in particular highlight two of the Report’s observations in paragraph 412 of the Report. Firstly, the need to ensure:

“that the system as a whole is properly balanced and gives due weight to the interests of those facing criminal allegations, complainers and society”

And secondly, that we must:

“improve ‘access to justice’ in a meaningful way for victims of crimes, such as rape and domestic abuse, which are often difficult to successfully prosecute”.

Both of these statements accord with the principles of the Criminal Justice Bill, which seeks to deliver the rights of victims of crime as well as enhancing the rights of accused persons.

Substantial evidence on the cases affected by the requirement was presented by those responsible for investigating and prosecuting crime. The research assessments undertaken for the Carloway Report and for the Bill’s Financial Memorandum were made by prosecutors and police officers: the professionals responsible for investigating and assessing cases on a day to day basis. Their research consistently indicates that a substantial number of cases do not proceed to court because of the technical corroboration rule: cases which would progress in

other jurisdictions. The Government considers that it is not acceptable in a modern society to have victims across whole categories of crime denied access to justice.

The Government considers that sufficient evidence has been presented for Parliament to make a decision on the principle of removing the requirement for corroboration, and that the case has been made for abolishing the requirement for corroboration.

28. The Committee is convinced that, if the general requirement for corroboration continues to be considered, this should only occur following an independent review of what other reforms may be needed to ensure that the criminal justice system as a whole contains appropriate checks and balances.

The Government has listened to the evidence presented and the views expressed to the Committee. It accepts that many of the issues aired and identified in the Committee's Report are based on genuine concern about the future operation of our system following abolition of the corroboration requirement. There is universal agreement on the need to ensure any new system does not increase the risk of wrongful conviction. The Government's aim is to move Scottish criminal justice to a system where prosecutions proceed based upon the overall quality of evidence in a case, not on whether or not a narrow, technical, rule has been complied with.

It was in recognition of the concerns expressed to the Committee that the Cabinet Secretary for Justice asked Lord Bonomy to conduct a further review, the terms of which were set out in his letter to the Committee of 5 February.

The Government, along with many others, is convinced that the case for abolition has been made and that Parliament should vote this year on the overall principle. As a consequence, the provisions removing the requirement will remain in the Criminal Justice Bill for Parliament to consider this year.

However, abolition of the requirement should only occur once Lord Bonomy's Reference Group has reported and Parliament has a full opportunity to deliberate upon its findings. As the Cabinet Secretary for Justice acknowledged in his evidence session on 14 January, there is a need to take time to ensure that we have the right landscape for the future without the corroboration requirement. Lord Bonomy will fulfil that role in considering areas of criminal law and practice where reforms may be required.

29. The majority of Committee Members do not believe, in the event that the requirement for corroboration is abolished, that concerns relating to the need for further reform can be adequately explored during the passage of the Bill. The Cabinet Secretary's proposal that the commencement of the provisions abolishing the requirement for corroboration be subject to a parliamentary procedure requires further explanation and consideration, which the Committee requires before Stage 2.

The Government expects Lord Bonomy's Reference Group to take a year to recommend any reforms it considers necessary. It will proceed on the basic principle that criminal cases should be assessed on the overall quality of evidence. It will carefully assess the overall balance of our system once the corroboration requirement is to be removed, looking at any additional safeguards and changes to law and practice thought necessary to maintain a fair, effective and efficient system.

The Government is convinced that this process will answer and address the concerns aired around abolition of the corroboration requirement.

The Cabinet Secretary made clear in his letter of 4 February that commencement of the corroboration reform will not occur until any legislation proposed in light of the Bonomy review is approved by the Scottish Parliament. Parliament will be afforded a full opportunity to ensure that it is satisfied that the new system will be in balance and that it will not increase the risk of wrongful convictions. To that end, the Government intends to bring forward amendments at Stage 2 to specify that commencement of section 57 of the Bill will not occur until Parliament has approved any such reforms.

The Government will discuss the details of procedure with Parliamentary authorities, but the intention is for a draft order based on the Reference Group's recommendations to be published and consulted upon, with ample time allowed for Committee evidence-taking. The Order would then be amended following the results of this consultation and evidence gathering process and laid in final form for the usual Parliamentary scrutiny under affirmative procedure. The intention is that this would have to be passed before the provisions abolishing the requirement could be commenced. The Government is confident that arrangements can be agreed to permit full Parliamentary scrutiny and legislation passed by the end of 2015.

30. The Cabinet Secretary's letter dated 4 February 2014 came in the late stages of consideration of this report, and therefore cannot form part of this report. The Committee calls on the Scottish Government to provide, prior to the Stage 1 debate, further information on any review of additional safeguards (including the proposed remit, who might be involved, likely timescales and options for implementing recommendations).

The Government refers to the response above. The Government will write separately with details of membership of the Reference Group.

31. The Committee calls on the Scottish Government to provide more information on how any requirement for supporting evidence would differ from the current need for corroboration.

The Government has made it clear that no person should be convicted on one source of evidence alone (however reliable and credible it may be). All parties agree that something more is necessary, and the Government wants to move to a quality based system.

In the Government's view, a court should be free to look at all relevant surrounding circumstances, considering all the admissible evidence, in deciding whether it is satisfied beyond reasonable doubt that a crime has been committed, and that the accused committed the crime. This approach would usually include, but not be limited to, cases that meet the current rules of corroboration. Such an approach would also allow cases like the real cases submitted by the Crown Office in its written evidence to the Committee (which could not proceed under the rules of corroboration) to be taken forward.

However, the whole area of sufficiency of evidence will be considered in depth by Lord Bonomy's Reference Group. The Government looks forward to the outcome of those considerations.

32. The Committee also notes the Cabinet Secretary’s willingness to consider placing a revised “prosecutorial test” on the face of legislation. The Committee accepts that such a step might form part of new checks and balances in response to the proposed abolition of the requirement for corroboration, but recommends that the matter should be included for full consideration in any review process.

The Committee’s position is noted. Lord Bonomy’s Reference Group is indeed expected to consider whether any proposed prosecutorial test (or a requirement for publication of any such test) should be prescribed in legislation.

33. The Committee is fully aware of continuing concerns relating to how the justice system responds to cases of rape, domestic abuse and other offences which often happen in private. Members note ongoing efforts to improve the situation for victims of such offences and agree that further steps need to be taken, including measures aimed at addressing low prosecution and conviction rates.

The Committee’s position is noted.

34. The Committee calls on the Scottish Government to actively review all evidence relating to how improvements with regard to offences such as rape and domestic abuse may be achieved. This should include consideration of public attitudes as well as the justice system. In relation to the latter, all stages must be included, from initial contact with the police to the giving of evidence in court (eg. whether victims of such offences should have access to legal advice and support where their personal or medical details may be revealed in court).

The Government notes the Committee’s comments. It agrees that there are many concerns on this issue and many strands of work. A range of activity is underway and further detail can be provided if wished by the Committee. However, none of these initiatives address the problem identified in our system of a rule that prevents many cases of rape, sexual assault and domestic abuse from making it to court. Abolition of the corroboration requirement is not by itself the answer to difficulties inherent in pursuing offences such as rape and domestic abuse. But it is a key element in allowing such cases to make it to prosecutors and to our courts.

35. The Committee agrees that, if the requirement for corroboration is abolished, it should not apply retrospectively.

The Committee’s position is noted.

36. On balance, the Committee considers that there is a case for a review of the role of hearsay evidence in the criminal justice system but that this should be included in any wider review of the law of evidence.

The Committee’s position is noted.

PART 3 SOLEMN PROCEDURE

37. On balance, the Committee accepts the need to extend the pre-trial time limits as proposed in the Bill. However, we do have some reservations as to whether the proposal to extend the current 110 day limit within which the trial

of an accused person held in custody must commence to 140 days is proportionate. We are therefore pleased that the Scottish Government plans to monitor the implementation of this proposal, in particular to ensure that trials are started as soon as possible and that any extensions to the 140 day limit are rare. We seek updates from the Scottish Government on any findings and outcomes arising from its monitoring of implementation of this pre-trial limit.

The Scottish Government will be setting up monitoring arrangements with justice organisations and will ensure that the Committee is kept updated on the outcome of this process.

38. While the Committee considers that achieving effective communication must, at least in part, be dependent upon the availability of adequate resources (discussed further below), we are persuaded of the potential benefits of this measure, in particular, in reducing the possibility of victims and witnesses having to attend court when their cases are not ready to proceed.

39. The Committee supports the proposals in the Bill for statutory communication between the prosecution and defence to take place after the indictment is served and for there to be flexibility in the method of communication to be used.

The Scottish Government welcomes the support of the Committee on the solemn procedures provisions of the Bill.

40. The Committee calls on the Scottish Government to work with the COPFS and the Law Society of Scotland in seeking to resolve current difficulties in rolling out the secure email system to all defence solicitors, with a view to resolving such difficulties by the time the Bill comes into force.

The principle of effective communication is an integral part of the reforms to solemn procedure. We understand that COPFS are currently reviewing communication methods with defence agents with the aim of further improving the exchange of information necessary to allow the most efficient resolution of cases. COPFS have advised that they are working with defence solicitors locally to explain the revised processes they are putting in place and detail the benefits of using the secure email system. The secure email system is appropriately a matter for COPFS but we will seek updates on how this work is progressing. The Scottish Government is content to be part of any discussions between COPFS and the Law Society on any difficulties in rolling out the secure email system, if they so wish.

41. The Committee welcomes the Cabinet Secretary's commitment to review whether the Bill could usefully be amended to allow individual written records on the state of preparedness of cases to be submitted by the defence and prosecution.

The Scottish Government notes the Committee's comments.

42. The Committee agrees with witnesses that both the prosecution and defence solicitors must be adequately resourced for the duty to communicate to work effectively as planned. We note that the Scottish Government has worked with criminal justice partners to anticipate the costs and savings that

may arise from this proposal, but we recommend that the Scottish Government closely monitors the resource implications during implementation to ensure that resources are in place where and when needed.

The Scottish Government has undertaken to monitor the actual impact of the Bill as part of our ongoing management of the implementation of the Bill, and will maintain discussions with delivery bodies. If it becomes clear that there are additional financial costs as a result of the Bill, that will be considered in future funding discussions. The Scottish Government will ensure that delivery bodies have adequate resources to implement these reforms.

43. The Committee notes that the Bill does not impose any sanctions if the written record is not submitted timeously.

The Scottish Government notes the Committee's comments. As the Justice Committee will be aware, Sheriff Principal Bowen in giving evidence to the Committee indicated that he had given serious consideration to this issue but concluded that it was "virtually impossible to come up with an appropriate sanction". Parties will be well aware of their professional obligations and it is for sheriffs to determine how to deal with those who do not comply.

44. The Committee agrees that the proposal in the Bill for a trial only to be scheduled once the sheriff dealing with the first diet is satisfied that the case is ready to proceed will reduce inconvenience to witnesses, and give certainty to both the prosecution and defence regarding the date of the trial.

The Scottish Government welcomes the Committee's support in this regard.

PART 4 SENTENCING

45. The Committee welcomes the Scottish Government's continued focus on knife crime and its efforts to change the culture of carrying knives. The Committee is content with the increase in maximum sentences for offences relating to the possession of a knife or offensive weapon from four to five years.

The Scottish Government welcomes the Committee's support in this matter.

46. The Committee welcomes the provisions in sections 72 and 73 on sentencing offenders on early release.

The Scottish Government welcomes the Committee's support in this matter.

PART 5 APPEALS AND SCCRC

47. The Committee welcomes the policy objective to speed up appeals and understands that there are practical reasons why appeals ought to be lodged timeously. We note the concerns that, in applying a higher test for allowing late appeals, cases with merit may not be heard unless they meet an exceptional circumstances test. We ask the Scottish Government to consider the Law Society of Scotland's recommendation that sections 76 and 77 be redrafted with an emphasis on the interests of justice. The Committee also notes that Lord Carloway made other recommendations in relation to the speeding up of appeals.

The Scottish Government welcomes the Committee's support for the policy objective of speeding up appeals.

The Scottish Government proposes that when deciding whether to allow an appeal late the test that the High Court should apply is to ask itself whether there are exceptional circumstances for doing so.

The alternative suggestion of an "interests of justice" test would fail to get across that it is only exceptionally that an appeal should be allowed to proceed in breach of the time limits. The High Court is already insisting that there must be exceptional circumstances before it will allow an appeal to proceed late (see eg. *Toal v Her Majesty's Advocate* [2012] HCJAC 123, para [117]; *Duncan v Her Majesty's Advocate* [2013] HCJAC 2012, para 6). The provisions as drafted support the Court's approach to late appeals.

48. The Committee welcomes the removal of the gate-keeping role of the High Court when dealing with referrals from the Scottish Criminal Cases Review Commission (SCCRC).

The Scottish Government notes the Committee's position in this regard.

49. However, we are concerned that the Bill retains the High Court's interests of justice test, albeit during the determination of an appeal resulting from a referral from the SCCRC. Given that, according to Lord Carloway, despite the occasional lapse, the SCCRC has been a "conspicuous success in discharging its duties conscientiously and responsibly", we are not convinced that the arguments for the High Court replicating the duties of the SCCRC in this respect have been made. Consequently, we recommend that the High Court should only be able to rule on whether there has been a miscarriage of justice in these cases, and if there has been, the appeal should be allowed.

In looking at this area, it is important to assess the wider role of the SCCRC and the High Court in the area of miscarriages of justice.

It is appropriate that the SCCRC is required to consider interests of justice when deciding whether to refer a case to the High Court for a further appeal. This is because the type of case the SCCRC investigates can often give rise to wider considerations than emerge through cases taken on appeal at first instance. This can be due to, for example, the passage of time or changes in the law since a case was originally considered by the court. This Bill does not change the SCCRC's responsibility to consider interests of justice.

The SCCRC has an important role as part of the checks and balances within our justice system. However, the SCCRC is, and always has been, a review body rather than a decision body. It is the High Court that makes the decision as to whether a miscarriage of justice has occurred in any given case.

The Scottish Government considers it is appropriate that the High Court, as the decision maker, should be able to consider interests of justice as part of the test they apply for cases originating from a SCCRC reference, given:

- considerations of interests of justice are accepted as often being relevant in SCCRC referred cases,
- the SCCRC itself has to consider interests of justice, and

- the High Court has a fundamental constitutional role as final decision maker with Scotland's criminal justice system.

MISCELLANEOUS

50. The Committee welcomes the two aggravations with regard to people trafficking proposed in the Bill. The Committee requests that the Scottish Government keeps it updated on progress with the Modern Slavery Bill and its extension to cover Scotland.

The Scottish Government welcomes the Committee's support for the statutory people trafficking aggravations contained in the Bill. Any proposal for the UK Modern Slavery Bill to cover devolved matters in Scotland would, of course, be subject to the approval of the Scottish Parliament and as progress is made on this matter the Scottish Government will update the Committee.

51. The Committee welcomes the establishment of a separate Police Negotiating Board for Scotland which will include participation from all ranks of police officers.

The Scottish Government welcomes the Committee's support for the establishment of the PNBS.

52. The Committee supports the general principles of the Bill. However, this is with the exception of proposals regarding the corroboration provisions. Our recommendations on this issue are set out in the main body of this report.

MAXIMUM DETENTION PERIOD

The following are anonymised examples provided by Police Scotland where the suspect could not be released back into the community without an extension beyond the 12 hour threshold.

1. MURDER

The deceased and male suspect met up and began drinking early in the morning. They made their way to a secluded wooded area where they continued to drink alcohol and met a further suspect. One of the suspects encouraged the other to assault the deceased. The deceased was injured and left lying at locus by both suspects.

The suspects returned in the early hours of the following day having continued to drink in each other's company. They both found the deceased injured at locus and repeatedly assaulted him again, resulting in his death.

The deceased's body was found several hours later and the Major Investigation Team (MIT) took up the investigation. Both suspects were identified and one detained later the same day. The suspect was still heavily under the influence of alcohol and removed to police station where the SARF process (Solicitor Access Recording form) was completed. The suspect underwent a full medical examination and also had injuries photographed. Given injuries found by the police casualty surgeon, it was recommended that the suspect be afforded an appropriate adult for support during any interview.

The Senior Investigating Officer (SIO) took the decision not to interview at that time given that it was now in the early hours of the following day and to allow the suspect to get a proper rest before being interviewed.

The investigating officers had also undertaken an extended tour of duty over a 24 hour period and were also in need of a rest before interviewing the suspect. The detention period was reviewed and extension beyond the 12 hour period agreed.

The following afternoon the suspect was interviewed by officers who had been fully briefed by the SIO and an Interview Advisor. Admissions were made which identified a further locus which was examined and forensic evidence recovered. The interview last for 4 hours and 20 minutes and the suspect was charged with murder.

Without the ability to extend beyond the 12 hour mark, any interview with the suspect would have been seriously questioned at court given their emotional state due to fatigue, alcohol consumption and vulnerability given the police casualty surgeon recommendation for an appropriate adult to be appointed. There was also the potential for evidence to have been missed due to the fatigue of the investigating officers and matters having to be rushed to interview the suspect within a 12 hour window. The SIO decision to allow the suspect and his interview team time to recover before interviewing was not only considered best practice and in the public interest, but also in fairness to the suspect.

2. REPORT OF MALE IN POSSESSION OF A HANDGUN

An initial report was made to the Police that a male was observed in the street in possession of what appeared to be handgun. A firearms operation commenced and the accused was ultimately traced and detained but not in possession of any weapon. A search by officers near to the locus of his detention resulted in the recovery of an imitation handgun.

The male was found to be extremely drunk and volatile on being detained. On returning to the police station he was afforded his rights as per the SARF procedure, however when the Police attempted to facilitate his initial telephone consultation the accused became aggressive, threatening to smash the phone. It was apparent at this point that the accused would require a significant period before he was sober and compliant enough to have his rights as a detained person facilitated. He was also assessed by the police casualty surgeon who supported the custody supervisor's assessment the male was unfit for interview and would require several hours to sober up.

In the interim period further investigations revealed the suspect had been in the company of a number of persons, who would have seen the weapon in his possession. The extension period allowed these witnesses to be sought and further CCTV evidence from nearby business premises to be sought.

As there was not a sufficiency of evidence to arrest the suspect, coupled with his drunken and aggressive demeanour the decision to extend his detention period beyond the 12 hour limit was proportionate and necessary to complete all available lines of enquiry in order to serve the public interest. The male was interviewed regarding the matter on being deemed fit for interview later the following day. He was subsequently arrested and charged with a Breach of the Peace.

3. RAPE OF 16 YEAR OLD FEMALE

Two males were detained in rural Scotland prior to midnight for the rape of a 16 year old who was known to one of them. The victim was forensically and medically examined by a police casualty surgeon at the nearest medical suite. She was only able to provide a partial statement to a Sexual Offences Liaison Officer (SOLO) trained officer due to the time of night and her traumatic experience. The journey between her home and the police medical suite took approximately 1 hour and 30 minutes.

The locus was stood by for examination until the next day during daylight hours as the circumstances indicated that there may be forensic opportunities on the bed clothes and which is viewed as best practice. A number of witnesses had also to be traced during the detention period in order to corroborate the victim's statement. Both suspects had to be removed to another police station to be examined by a Police Casualty Surgeon (PCS). The return journey between the detention office and examination suite is a round trip of approximately 2 hours notwithstanding the time necessary to complete the suspect's medical examinations.

It was necessary to extend the detention period beyond the 12 hour threshold to allow further enquiries to be concluded and ensure the safety of the victim. Both suspects were interviewed once the victim had completed her statement the

following day and the other witnesses had been traced. A full forensic examination was also completed under the guidance of a Crime Scene Manager (CSM). Both males were subsequently arrested and charged with rape.

Without extending the detention period enquiries could not have been properly concluded and as a result both accused would have had to be released.

The community impact assessment was such that the victim and witnesses were considered potentially at risk if the suspects had been released. In addition the suspects could also have been at risk given the crime under investigation from reprisals. As a result this would not have been suitable for Investigative Liberation.

4. DOMESTIC ASSAULT - RAPE

There was considerable history of domestic violence between the victim and suspect with the former at considerable risk from the suspect had officers not been able to conclude all diligent and necessary enquiries. The victim and suspect were in a relationship residing together at the locus. Both had consumed alcohol throughout the day at home.

The victim was woken by the suspect in their bed who then raped her. Afterwards she went downstairs and phoned the Police. On police arrival, in addition to being visibly distressed, the victim was found to be under the influence of alcohol.

The suspect was detained and the locus secured and arrangements for forensic examination instigated with the assistance of a Crime Scene Manager (CSM), Forensic Services and a biologist. A forensic medical examination took place of the complainer at Archway while additional enquiries such as door to door, forensic examination of locus, etc., were undertaken.

The victim was still clearly distressed and suffering from fatigue and the effects of alcohol in her system. The victim also requested that she be allowed to rest between her forensic examination and her statement being noted. The suspect was also under the effects of alcohol and police casualty surgeon opined that he was unfit to be interviewed at that time. As such the decision to extend the detention period beyond the 12 hour threshold was made. Without this ability to extend there would have been insufficient time to complete the necessary police enquiries with the victim and attempts to trace other potential witnesses. The suspect also required to sober up prior to interview and completion of the Solicitor Access process.

Investigative Liberation would have been unsuitable in these circumstances given the gravity of the crime and relationship of those involved.

The victim subsequently provided a full statement to the police allowing the suspect to be interviewed once deemed fit by a police casualty surgeon. He was subsequently interviewed and charged with rape having been arrested.

5. ABDUCTION AND RAPE

The victim and witnesses were within their home address and had retired to bed at various times over the evening. The following morning the victim heard creaking on the stair outside her bedroom and was confronted by the male suspect who was in possession of a knife. A struggle ensued during which an adult male and his child

left their bedroom. All parties were threatened by the accused. The accused cut telephone lines, collected mobile phones and pulled down blinds. A male witness and child were told to stay within their bedrooms or the victims would be killed.

The accused thereafter indecently assaulted and raped a female victim repeatedly before he fled the locus.

Police were called and enquiries commenced. The crime scene was secured for forensic examination by a CSM, assisted by a photographer and Scene of Crime Examiner. The victim underwent a forensic medical examination and provided a statement via a SOLO trained officer. The male and child were also provided with medical assistance and provided statements over what was a prolonged period as the victims of the crime were extremely traumatised and required a period of rest during their interviews.

A male was identified as a possible suspect and a warrant sought and granted to search his home address. During this search distinctive clothing was found, believed to belong to the suspect. He was subsequently detained in terms of section 14 of the Criminal Procedure (Scotland) Act 1995. During his detention period extensive enquiries were still being undertaken at the locus and with the witnesses. An extension was sought beyond the 12 hour threshold to allow sufficient police enquiries to be completed prior to any interview with him. It was necessary to photograph him whilst detained in order to have him formally identified, as at this stage there had been no identification.

Had there have been no opportunity to extend the detention time to allow the identification, and if the accused had made a 'no comment' interview, then he would have had to be released for further enquiries to be completed. This case would not have been suitable for Investigative Liberation due to the seriousness of the offence, public safety and reassurance issues and the danger of reprisals in the local community.

The male was subsequently arrested and charged with several offences including abduction and rape. He has since been convicted at Edinburgh High Court receiving a substantial custodial sentence.

6. TRAFFICKING

A property landlord reported a possible cannabis cultivation at one of his city properties. Uniform officers attended at this address as a 'routine' call and found 3 foreign national females working as suspect prostitutes. They also found 4 foreign national males (of different nationalities), two of whom were to be later identified to be involved in the trafficking, rape, prostitution of the females.

The detention of 5 persons was extended past 12 hours to allow a proper investigation/ assessment to be carried out, particularly to determine the status of the females involved i.e. if they were victims or suspects. A lack of appropriate interpreters for witness and suspect interviews was largely a contributory factor in the extension, as was allowing the suspects adequate rest time.

During one interpreter-assisted interview, one of the females disclosed that there was another 2 brothels in the city and a pregnant female was possibly being held

against her will. Enquires ultimately identified a network of foreign national males who were trafficking European females up and down Britain for prostitution.

The extended detention period allowed the Senior Investigating Officer to thoroughly complete the initial investigation as well as identification of additional victims of trafficking/sexual abuse. If the detention time had been limited the 3 females may well have been arrested for management of a brothel based on the witness testimony and would not have disclosed their trafficking and sexual abuse to the police. As a consequence, the males responsible for the human trafficking offences would have been released and the offences gone undetected.