



Criminal Justice (Scotland) Bill

Briefing and Suggested Amendments Stage 2

April 2014

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Introduction and Summary

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. On Scottish matters it is assisted by its branch, JUSTICE Scotland. The issues raised in this briefing should not be taken as our sole concerns with regard to the proposals contained in the Bill.

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

3. In summary, our position is:
 - The power to arrest must be clearly circumscribed;

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

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

³ J. Blackstock, E. Cape, J. Hodgson, A. Ogorodova, T. Spronken, *Inside police custody: an empirical account of suspect's rights during police detention*, (Intersentia, 2014). The research was conducted in two sites in England and Wales, France, the Netherlands and Scotland, with an average of two months spent in each site.

- The full rights of suspects must be delivered upon detention in police custody, including the right to interpretation and translation;
- Decisions to continue detention or delay rights must be taken by senior officers, independent of the investigation;
- Conditions of liberation must be set out in legislation and pertain to the possible conduct of the suspected person;
- Review of conditions following liberation must take place at reasonable intervals throughout the conditional release period;
- A full restatement of suspects' rights in police custody must take place at a reasonable period prior to interview for them to be useful;
- Delay or denial of the right to have a solicitor present must be for narrowly circumscribed reasons in exceptional circumstances;
- No distinction should be made between children under and over 16 years old. The assistance of a solicitor and parent or guardian during police detention must be available to all children without waiver. If a distinction is to be made for over 16 year olds, clear written guidance should explain the significance of the right;
- Consultation with a solicitor must be in person, save for exceptional circumstances;
- Detailed provision must be made in the Bill for the circumstances in which a waiver of legal advice will be valid;
- Corroboration must not be abolished until the Corroboration Review Group has reported;
- The period for pre-trial detention should not be extended;
- The High Court must retain its discretion to extend time for appeals and exercise this as it deems appropriate;
- The High Court must not be required to consider whether the quashing of a conviction, after finding a miscarriage of justice, is in the interests of justice.

Part 1 – Arrest and Custody

Sections 1 – 2: Statutory power of arrest

Proposed Amendments

Page 1, Line 11 after “committing an offence” insert:

(-) A constable may only arrest a person under subsection (1) for the purpose of facilitating the carrying out of investigations—

(a) into the offence; and/or

(b) as to whether criminal proceedings should be instigated against the person

Briefing

4. While JUSTICE Scotland welcomes the decision to place the power of arrest on a statutory footing, the clear benefit of creating a legislative framework to govern police powers of compulsion is to sufficiently circumscribe those powers, to promote public confidence and to enhance legal certainty both for individuals and for police officers exercising those powers. We are concerned that the powers set out in Sections 1 – 2 do not realise these benefits as a consequence of being overly broad. Our amendment inserts the current condition upon detention of a suspected person, pursuant to section 14 Criminal Procedure (Scotland) Act 1995, to ensure that the power to arrest is operated fairly and proportionately. Our amendment would allow for the current regimes of both detention and common law arrest to be encompassed within section 1.

Section 5 – Information to be given at police station

Proposed Amendments

Page 2, Line 22 after ‘persons under’ – leave out subsections (i) - (iv) and insert:

(i) section 24,

(ii) section 30,

(iii) section 32,

(iv) section 33,

(v) section 35,

(vi) section 36

(c) that if they do not speak or understand English, they are entitled to the assistance of an interpreter and/or translator in accordance with Directive 2010/64/EU of the European Parliament and the Council on the right to interpretation and translation in criminal proceedings.

Briefing

5. Section 5 requires persons in police custody to be informed of their rights. Section 5(2)(b) refers to other sections of the Bill where those substantive rights are set out. Our amendments would add to that list section 24, regarding the right to assistance of a solicitor during police interview, and 33, regarding support for vulnerable persons. Suspects should know what their rights are from the outset. Being aware that the right of access to a lawyer encompasses not only advice, but assistance during interview, may have a bearing on the exercise of that right. Likewise, a constable assessing vulnerability may not appreciate that a suspect is in need of assistance. By informing the suspect that support is available, they may be able to indicate whether this is needed, which will assist the constable in making their assessment pursuant to Section 33.

6. Furthermore, no right to interpretation or translation is set out in the Bill at all. This right must be notified under Section 5(2) along with the other important safeguards. It is fundamental that suspects held in police custody are provided with the assistance of an interpreter and that certain documents are translated to assist them, in order to ensure that they understand the process and can communicate with their lawyer and the police. It is also necessary to include such notification and provision of the right pursuant to EU directive 2010/64/EU on the right to interpretation and translation in criminal proceedings⁴ and directive 2012/13/EU on the right to information in criminal proceedings.⁵

Section 7 – Authorisation for keeping a person in custody

Proposed Amendments

Page 4, line 6, after 'having been arrested' insert: 'with or'

Page 4, line 13, leave out (3) and insert:

⁴ OJ (26.10.10) L 280/1.

⁵ OJ (1.06.12) L 142/1.

- (3) Authorisation may be given only by a constable who-
- (a) is of the rank of sergeant or above, and
 - (b) has not been involved in the investigation in connection with which the person is in police custody

Briefing

7. Section 7 provides the circumstances in which an arrested person may continue to be detained in police custody following arrest. It only applies to persons arrested without a warrant. Since a warrant only authorises the arrest of a person, not what happens to them during detention, we consider it necessary that the section apply to both those arrested without and *with* a warrant.
8. We welcome the provision in Section 7(3) that authorisation may only be given by an officer who has not been involved in investigation of the suspected offence. However, we do not consider that this goes far enough to ensure that a fair and objective decision is made. Upon arrival at the police station, the investigating officer presents the suspect to the custody sergeant. This is the person who should authorise the decision as to whether the suspect should remain in custody and our amendment would provide for this. The custody sergeant is independent, may be of senior rank to the investigating officer, but, most importantly, is responsible for the welfare and control of the suspect during detention.

Sections 14 and 20 – Release on conditions/undertaking

Proposed Amendments

Page 6, line 35, after ‘for the purpose of’ leave out the rest of subsection (2) and insert:

‘securing-

- (a) that the person surrenders to custody,
- (b) that the person does not commit an offence while on bail,
- (c) that the person does not interfere with witnesses or otherwise obstruct the course of the investigation, or,
- (d) the person's own protection or, if the person is under the age of 18, for the person's own welfare or in the person's own interests.

Page 9, line 32, after ‘for the purpose of’ delete the rest of subsection (3)(b) and insert:

'securing-

- (a) that the person surrenders to custody,
- (b) that the person does not commit an offence while on bail,
- (c) that the person does not interfere with witnesses or otherwise obstruct the course of the investigation, or,
- (d) the person's own protection or, if the person is under the age of 18, for the person's own welfare or in the person's own interests.

Page 9, line 34, leave out subsection (4).

Briefing

9. Section 14 provides for the possibility of conditions to be placed upon the liberation of a suspect who is released from police custody prior to charge where a constable considers it necessary and proportionate to impose such conditions for the purpose of ensuring the proper conduct of the investigation. Likewise, section 20 provides for conditions to be imposed upon liberation post charge. We do not think that conditions of liberation should pertain to the conduct of the investigation, which is a matter for the police. The conditions should relate to the possible conduct of the person upon liberation and be limited to an exhaustive set of scenarios, to ensure that officers exercise their powers within reasonable limits and uniformly across the Police Service.
10. Our amendment would also remove the possibility for the police to impose a curfew upon liberation. This is a restriction which deprives the liberty of the person to such an extent that we feel it can be justified only by the independent oversight of a judge.

Section 16 – Modification or removal of conditions

Proposed Amendment

Page 7, line 29, after 'must keep under review' insert: 'at least every seven days'

Briefing

11. Section 16 provides for the review of conditions imposed upon release by a constable of the rank of inspector or above, but it does not specify a period for such review. The review must be carried out at reasonable intervals between the release from custody and the end of the 28 day period of release upon conditions provided in Section 14. We would

propose seven day intervals of review to be reasonable, so as to ensure that the investigation is being pursued throughout the period of conditional release.

Section 23 – Information to be given before interview

Proposed Amendments

Page 11, line 9, after 'Not more than' leave out 'one hour before a constable interviews' and insert 'two hours before a constable intends to interview'

Briefing

12. Section 23 enables the provision of further information to a suspect about their rights prior to interview. In our view the timescale of 'not more than one hour' before a constable interviews a person about an offence provided by section 23(2) is far too short to enable the suspect to exercise their rights effectively. Should a suspect wish to consult with a solicitor, as provided by section 36, this will have to be organised. The SLAB Solicitor Contact Line must be contacted by the investigating officer, which must take sufficient details concerning the case in order to instruct a solicitor. Experience shows that contacting a solicitor to act on the suspect's behalf may take over half an hour. Once the solicitor has agreed to act, they may require to speak to the suspect by telephone prior to attending. They will need travel time to attend at the police station from their location. The solicitor will wish to obtain a pre-interview briefing from one of the investigating officers. The suspect is then entitled to consult with their solicitor prior to interview, which in our experience can take at least half an hour. In complex cases it may take considerably longer. With respect to assistance from a parent, guardian, appropriate adult or interpreter, this may also take over an hour to organise and for the relevant person to attend.

13. If the intention of section 23 is to repeat the rights available to the suspect, this is in principle welcome. However, to repeat the rights unnecessarily and out of context can only serve to confuse suspects about what their rights are and lead to a failure to exercise them effectively. Our amendment extends the timescale to a more realistic period and removes the rigidity as to when the interview will take place, by focussing on the constable's intention.

Section 24 – Right to have a solicitor present

Proposed Amendments

Page 11, line 30, after ‘has the right to’ leave out ‘have a solicitor present’ and insert ‘be assisted by a solicitor’

Page 12, line 2, after ‘being present if’ leave out ‘the’ and insert ‘an appropriate’.

Page 12, line 4 leave out Subsections (4)(a) and (4)(B) and insert:

- (a) An urgent need to prevent interference with evidence in connection with the offence under consideration, or
- (b) An urgent need to prevent interference with or physical harm to a person

Page 12, line 13, after ‘right to have a solicitor present’ insert:

- (7) An “appropriate constable” must be a constable who-
 - (a) is of the rank of superintendent or above, and
 - (b) has not been involved in the investigation in connection with which the person is in police custody

Briefing

14. Section 24 provides that a person has the right to have a solicitor *present* while being interviewed. This does not adequately describe a solicitor’s role, as understood in the judgment of the UK Supreme Court in *Cadder*. Our amendment would reflect the active participation a solicitor ought to provide their client during interview, as required. The section should specify that a person has the right to be *assisted* by a solicitor while being interviewed. This would make clear that a solicitor is able to make appropriate interventions on behalf of their client so as to effectively represent their interests.

15. Section 24(4) provides that a constable may proceed to interview without a solicitor present in certain specified circumstances. This is a significant curtailment of the rights of the suspect whilst in police custody, which may have critical consequences for their right not to self-incriminate. The circumstances in which the denial of the right is appropriate must be more tightly drawn. The European Court of Human Rights has indicated that access should be allowed unless there are compelling reasons, in light of the particular

circumstances of the case, to restrict that right.⁶ Our amendments would ensure that the decision must be taken by an independent officer of the rank of superintendent or above, so that the decision is objective and fair in the circumstances. They also follow the EU Directive on the right of access to a lawyer⁷ and the narrower circumstances provided in England, Wales and Northern Ireland pursuant to the Police and Criminal Evidence Act.⁸ This would ensure that it is only in the most exceptional circumstances that a person is denied access to a legal representation during interview.

Section 25 – Children and waiver of legal advice

Proposed Amendments

Page 12, line 22, leave out Subsections (3) to (5).

In the alternative,

⁶ *Salduz v Turkey* (2009) 49 EHRR 19, para 55.

⁷ Directive 2013/48/EU. The UK has not opted in to this measure, but it is a reflection that standards in other EU countries will be higher in other EU countries than in Scotland.

⁸ Section 58 Police and Criminal Evidence Act provides:

(6) Delay in compliance with a request is only permitted—

- (a) in the case of a person who is in police detention for an indictable offence; and
- (b) if an officer of at least the rank of superintendent authorises it.

...

(8) Subject to sub-section (8A) below an officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by subsection (1) above at the time when the person detained desires to exercise it—

- (a) will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons; or
- (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
- (c) will hinder the recovery of any property obtained as a result of such an offence.

(8A) An officer may also authorise delay where he has reasonable grounds for believing that—

- (a) the person detained for [the indictable offence]⁴ has benefited from his criminal conduct, and
- (b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right conferred by subsection (1) above.

Further detailed provisions as regards delay are set out in Annex B to the PACE Codes of Practice.

The Police and Criminal Evidence (Northern Ireland) Order 1989, article 59 applies in Northern Ireland.

Page 12, line 23, after 'a solicitor present only' insert '(a)'

Page 12, line 24, after 'a relevant person' insert:

'and (b) having received written guidance suitable for their level of comprehension on the right to legal advice and assistance'

Briefing

16. Section 25 prevents children under 16 consenting to an interview without having a solicitor present. We welcome this provision. Children in custody are particularly vulnerable and although accompanied by a relevant person in interview, that relevant person – often a parent or guardian - may have minimal or no experience of custody, little understanding of the gravity of the offence that the child has been arrested in connection with, and no grasp of the significance of the right to legal advice and assistance. The denial of waiver should extend to the right to legal advice, contained in Section 36, and we set out amendments to ensure the right to legal advice is secured for children below.

17. However, the Bill would exclude children aged 16 and 17 from the operation of this provision, but would provide that they can waive the right to the presence of a solicitor only with the approval of their relevant person. We consider that many of the same risks will apply to all under 18s as apply to those aged 16 and under. The Section may be designed to recognise that older children and young adults have increasing cognitive capacity and competence to understand complex decision making and to take responsibility for their own choices. However, this assumption is undermined by the fact that the determinative decision will be taken by the relevant person in many cases. JUSTICE Scotland considers that in order to safeguard the rights of young people the distinction should be deleted. If the Bill is to continue to adopt the distinction between children under and over 16 years old, written guidance on the right to legal representation, the significance of the right to legal representation and the relevance of the waiver decision must be given to the child and the relevant person prior to the exercise of the decision. This information should be provided in an accessible format that both the young person and the relevant person assisting them can understand.

Section 30 – Right to have intimation sent to another person and section 32 - Right to under 18s to have access to other person

Proposed Amendments

Page 16, line 19, after 'This sections applies where' leave out 'a' and insert 'an appropriate'

Page 16, line 25, after 'who has care of the person' insert:

“an appropriate constable” has the meaning set out in Section 9(3)

Page 17, line 29, after 'restricted so far as' insert 'an appropriate constable considers'

Page 17, line 34, after 'who has care of the person' insert:

“an appropriate constable” has the meaning set out in Section 9(3)

Briefing

18. Sections 30(5) and 32(3) afford a constable the power to delay the exercise of intimation or access to another person for under 18s. For the reasons set out above in relation to Section 24, this decision is a significant restriction to a person's custodial rights and should be made by an officer independent of the investigation of the rank of inspector or above.

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

Proposed Amendments

Page 17, line 3, leave out Subsection (4)(b)

Briefing

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

Section 33 – Support for vulnerable persons

Proposed Amendment

Page 18, line 1, leave out Subsection (1)(b)

Briefing

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

Section 36 – Right to consult with a solicitor

Proposed Amendments

Page 19, line 12, after ‘exceptional circumstances’ leave out ‘a’ and insert ‘an appropriate’

Page 19, line 14, leave out Subsections (2)(a) and (b) and insert:

- (a) An urgent need to prevent interference with evidence in connection with the offence under consideration, or
- (b) An urgent need to prevent interference with or physical harm to a person

Page 19, line 18, after ‘telephone’, insert:

- (4) An “appropriate constable” must be a constable who-
 - (a) is of the rank of superintendent or above, and
 - (b) has not been involved in the investigation in connection with which the person is in police custody

Page 19, line 16, after ‘means consultation’ leave out ‘ by such means as may be appropriate in the circumstances and includes (for example)’ and insert:

‘in person save for in exceptional circumstances, but may include initial’

Briefing

21. Section 36(2) makes provision for the refusal of access to consultation in exceptional circumstances. As we set out above with regard to refusal of legal assistance during interview, this power is a significant curtailment on the most important right a suspect holds during police custody. It must be narrowly exercised by a sufficiently experienced and independent officer.

22. We do not agree with the provision in Section 36(3) that appropriate consultation may be provided through telephone advice. Solicitors are unable to adequately advise their clients by telephone alone since they are unable to assess the suspect's welfare and demeanour; nor does the solicitor have the same opportunity for access to information from the police concerning the suspected offence. Furthermore, the solicitor cannot readily make effective representations to the police concerning the decision to charge or further detain if they only advise their client by telephone. A pre-interview telephone consultation cannot provide sufficient protection for a suspect in the dynamic setting of a police interview, especially where such interviews are increasingly carried out after detailed planning, and advice to the interviewing officers from a Police Interview Adviser. Allowing solicitors to give advice only by telephone without a presence in the police station risks condoning the provision of inadequate advice. Our amendment recognises that, in exceptional circumstances this may be the only option, and that initial telephone advice can assist a suspect, but would require consultation to be effected in person as a standard practice.

New Section - waiver

Proposed Amendments

Page 19, after Section 36 insert:

Section X – Waiver of right to consultation with a solicitor

- (1) A person may only waive the right to consultation with a solicitor where a constable is satisfied-
 - (a) that the person has received clear and sufficient information about the right,
 - (b) that the person understands the content of the right and consequences of waiver, and
 - (c) that the waiver is made voluntarily and unequivocally

- (2) A person may not waive the right to consultation with a solicitor if-
 - (a) the person is under 18 years of age, or
 - (b) the person is 18 years of age or over and, owing to mental disorder, appears to the constable to be unable to-
 - (i) understand sufficiently what is happening, or
 - (ii) communicate effectively with the police.

Briefing

23. The new section would ensure that proper checks are in place prior to a person waiving their right to legal advice. The decision to waive legal assistance should not be taken lightly given the implications for the suspect. Our amendment follows the wording in Directive 2013/48/EU on the right of access to a lawyer, and reflects some of the comments made in the judgment of the UK Supreme Court in the case of *McGowan v B*.⁹
24. Subsection (2) replicates the acknowledgment in Section 25, concerning interview without a solicitor, that a child has insufficient capacity to waive their rights and should always be provided with legal assistance.

Section 42 – Duty to consider child’s best interests

Proposed Amendments

Page 20, line 18, after ‘(1)’ leave out ‘Subsection (2) applies’ and insert ‘Subsections (2) and (3) apply’

Page 20, line 25, after ‘primary consideration’ insert:

(3) A decision under subsection (1) must be taken as a last resort and exercised for the shortest possible time.

Page 20, line 26, replace ‘(3)’ with ‘(4)’

Briefing

25. We welcome the statutory provision of the child’s best interests as a primary consideration prior to arrest and detention of a child. We are concerned, however, that the section includes the possibility of holding a child in police custody. Our amendment would insert the requirement in article 37 of the UN Convention on the Rights of the Child as regards the detention of children. Where the arrest of a child is deemed necessary, they should be taken to a place of safety and not detained with adult suspects, in order to safeguard their welfare.

⁹ *McGowan v B* [2011] UKSC 54, 2012 S.C. (U.K.S.C.) 182

Part 2 - Corroboration and Statements

Section 57 Corroboration not required

Proposed Amendments

Pages 25 and 26, leave out Sections 57 -61.

Briefing

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

27. As we stressed in our earlier submissions, JUSTICE Scotland does not support the proposed removal of the rule of corroboration. Corroboration is still considered by many to be the mainstay of Scots criminal law and it is a principle around which the investigation and prosecution of crime in Scotland have long been formed. All evidential rules are complex in their application to the facts of a case, and the corroboration rule is no different. There has been no evidence to demonstrate that its removal is required, nor that prosecutions will increase in its absence. In a JUSTICE Scotland event on the 23rd January 2014, the Lord Advocate accepted that it would not be possible to prosecute on the account of a single witness alone; there would have to be supporting evidence.¹⁰ If that is to be supporting evidence of the crucial facts (the commission of an offence and the identity of the perpetrator) in JUSTICE Scotland's view, that is corroboration. If it is to be supporting evidence of a non-crucial fact there must be serious questions as to what protection such a requirement would offer. The corroboration rule may require clarification or reform, but abolition is not a realistic reflection of the process of investigation and prosecution of crime, which requires a sufficiency (and therefore, suitable quality) of evidence to charge, report to the Crown and to convict.

28. While we welcome the establishment of the Corroboration Review Group (the Review), chaired by Lord Bonomy, and the remit it has been given to consider appropriate safeguards in place of corroboration,¹¹ we do not believe that the case has been made

¹⁰ JUSTICE Scotland, 'Corroboration: The Debate', DLA Piper, Edinburgh, 23.01.14, details and media reports at <http://www.justice.org.uk/events.php/67/corroboration-the-debate>

¹¹ Which will include consideration of many areas that we have previously identified as an issue: a formal test of sufficiency of evidence; a prosecution test; the admissibility and use of confessions; judicial exclusion of

out for abolition at this time. Moreover, in order to effect such a profound change to the law of evidence and procedure, Parliament must be satisfied that the proposals replacing it will maintain not only fair trial standards for persons accused of crime but will instil within the public at large confidence that our system will ensure, as far as possible, that the guilty will be convicted and the innocent acquitted. The Review will take a year to consider the appropriate replacements for corroboration, and will no doubt seek evidence from all relevant sources to assist its deliberations. The question of whether corroboration should be abolished can only be answered once the Review has reported. Sections 57-61 are premature and should be deleted from the Bill.

Part 3 – Solemn procedure

29. This Part of the Bill implements some of the recommendations of the *Bowen* report on indictment procedure in the Sheriff Court.¹² Those recommendations in large part replicate the *Bonomy* reforms in the High Court and are on the whole to be welcomed.¹³ However, JUSTICE Scotland remains concerned about the resources available for the implementation of these changes and that proposed changes to time limits and the written record may not be appropriate or necessary. These reflect the concerns we expressed in connection with the consultation on Sheriff and Jury Procedure.¹⁴

Resources

30. The qualified success of the High Court reforms may not easily be achieved in the Sheriff Court. Notably, the volume of cases is considerably greater. As Sheriff Principal Bowen noted in his original report, the overall trend is of an increase in the volume of both routine and priority cases in the Sheriff Courts. The disclosure obligations on the Crown have greatly increased since the date of the report and

evidence; dock identification; jury size and majority; removal of the case from the jury where there is no case to answer; jury directions; changes in summary proceedings. See announcement at <http://news.scotland.gov.uk/News/Group-to-examine-corroboration-safeguards-8fe.aspx>

¹² Sheriff Principal Edward F. Bowen, *Independent Review of Sheriff and Jury Procedure Report* (June 2010).

¹³ Lord Bonomy, *Improving Practice: 2002 Review of the Practices and Procedure of the High Court of Justiciary* (December 2002).

¹⁴ <http://www.justice.org.uk/data/files/resources/278/JUSTICE-Scotland-response-to-Sheriffs-and-Juries-consultation.pdf>

accommodation pressures, brought about by court closures, the relocation of justice of the peace courts, and the proposed reforms to the civil jurisdiction of the Court of Session are significant. If the aims of the reforms are to be achieved, it is crucial that adequate resources are made available to COPFS and Scottish Courts, to try cases within a reasonable period of time, and to ensure that victims, witnesses, and accused persons are able to access the courts. Further as both Lord Bonomy and Sheriff Principal Bowen have observed, successful implementation will require adequate funding of defence solicitors in relation to the additional (and earlier) work required of them as a result of the proposed reforms. Parliamentarians may wish to ask the Government how these changes are to be resourced.

Section 65 - Time limits

Proposed Amendment

Page 27, line 21, leave out Subsection (2)(c)

Briefing

31. Section 65 proposes an increase in the time limit between committal and trial. We do not support the proposal to simply increase the 110 day timelimit to 140 days wholesale. The justification for such an increase has not been made out. Lord Bonomy's view that the time limits in the Sheriff Court should be altered to bring them into line with his proposals for the High Court were not, at that time, accepted by the Scottish Government which noted that extensions of time limit were less frequently sought in the Sheriff Court. In any event, an evaluation of the *Bonomy* reforms noted that they had done little to alter the culture of applications for extensions in the High Court, even after the increase in time limit to 140 days.¹⁵ While there has been a rise in the complexity of some cases indicted even in the Sheriff Court, very many are comparatively straightforward and a longer period before the case must be brought to trial may prove counter-productive to the aim of ensuring parties prepare their cases at as early a stage as possible. Of most significance is the period of time victims must wait for justice to be served, and accused persons to be tried, particularly those remanded in custody. This amendment would extend pre-trial detention by 30 days, without any evidence that it is necessary. The length of time between charge and trial

¹⁵ Chalmers et al, *An Evaluation of the High Court Reforms Arising from the Criminal Procedure (Amendment) Act 2004*, (2007).

must be kept to a minimum to ensure a fair trial can take place, within a reasonable period of time.

Section 66 – The written record

Proposed Amendments

Page 28, line 7, leave out Subsection (3).

Briefing

32. Section 66 of the Bill seeks to introduce the written record procedure to the Sheriff Court.¹⁶ The proposed section departs from the High Court procedure by requiring the parties to communicate within 14 days after service of the indictment and the procurator fiscal to lodge the written record. JUSTICE Scotland considers that neither change is desirable, adding a layer of bureaucracy which is unnecessary. Pre-trial communication in busy locations may impose significant burdens on all parties, and in particular the Crown. It is inevitable in custody cases that problems with disclosure, forensic reports or defence experts will arise relatively late in the process, and after the communication proposed here. Whilst we agree that communication between the parties is necessary to ensure the progression of the case, this should be closer to the First Diet to make it meaningful. In the High Court the perceived problem of late or inadequate communication has been addressed by changes to the written record form, requiring parties to detail the dates and nature of their communication, as well as the date on which preparatory work was done, legal aid applied for, etc. We consider that a similar approach is equally apt for the Sheriff Court and that section 66(3) is unnecessary.

Part 5 - Appeals and SCCRC

Sections 76 and 77 – Limiting the discretion to extend time

Proposed Amendment

Page 35, line 1, leave out subsection (2)

Or in the alternative,

¹⁶ By inserting a new s71C into the 1995 Act.

Page 35, line 13, delete subsection (3) and insert:

(3) In subsection (2C)-

(a) for the words 'if the respondent' there is substituted 'if the appellant'

(b) for the words 'the applicant must also' there is substituted 'the respondent must also'

Briefing

33. Both Section 76 and 77 would limit the discretion of the court to allow appeals out of time to cases where applicants are able to show 'exceptional circumstances.' JUSTICE Scotland considers that there is no evidence to justify such a change. The primary mischief identified by the Carloway Review related principally to the overall length of time taken to deal with appeals, not to the need for appeals to be started on a more timely basis, albeit the two may be related in some cases. As we highlighted in our response to the Consultation, there is no evidence that unmeritorious appeals are being allowed to proceed by the courts without justification. On the contrary, the time limits that apply to the lodging of appeals are already closely circumscribed. For example, the commencement of an appeal against a summary conviction is by way of an application for a stated case which has to be lodged with the Clerk of Court within one week of the conclusion of proceedings.¹⁷ It is our experience that courts are increasingly robust in their approach to finality and the exercise of their discretion on time limits, in the interests of preserving the finality and certainty of proceedings.¹⁸ For a recent example see *AMI v PF Glasgow*.¹⁹ However, the discretion to extend time, although closely guarded, can be key to ensuring justice in an individual case.

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

¹⁷ Pursuant to section 176(1)(a) of the Criminal Procedure (Scotland) Act 1995.

¹⁸ See *Toal v HM Advocate* 2012 SCCR 735, at [108].

¹⁹ *AMI v PF, Glasgow* [2014] HCJAC 9.

appellants, should be adopted. We consider that the limitation on the Court's discretion should be deleted from the Bill.

35. If the test is to be so restricted, the applicant must have an opportunity to explain the exceptional circumstances in person. The effect of these provisions is that the Appeal Court will deal with any application for an extension of time solely on papers. While an explanation in relation to delay should be provided and the proposed ground of appeal must be stated in the application, the strength of those arguments, and their basis may not be readily identifiable simply from a perusal of papers. The outstanding preparation for appeal, and an explanation for the delay, can sometimes best be justified in oral submission. If the 'exceptional circumstances' test is adopted, as a minimum, the right to make representations and provision for a hearing before permission is refused, must be included.

Section 82 - References by the Scottish Criminal Cases Review Commission

Proposed Amendments

Page 37, line 16, leave out subsection (2) and insert:

- (2) In section 194B the words 'subject to section 194DA of this Act' are repealed

Briefing

36. Much of JUSTICE's early work related to miscarriages of justice. Working with the BBC's *Rough Justice*, Channel Four's *Trial and Error* programmes, solicitors and on behalf of our own clients, JUSTICE helped to secure the release of many people who had been wrongly convicted and imprisoned. Our case work and recommendations helped inform the reforms that brought about the establishment of the Criminal Cases Review Commission and subsequently the Scottish Criminal Cases Review Commission.
37. JUSTICE Scotland deeply regrets the proposal to impose the 'interests of justice' hurdle in section 194B of the Criminal Procedure (Scotland) Act 1995. The test would require the High Court to refuse to quash a conviction or sentence notwithstanding a finding that a miscarriage of justice has taken place, unless the Court considers it to be in the interests of justice. We do not agree that there should be an additional question of 'interests of justice' distinct to 'miscarriage of justice' to be applied by the

High Court. An additional test was introduced to encourage finality and certainty in the proceedings following the *Cadder* decision.²⁰ We objected to the introduction of the measure then, as there was no evidence that it was necessary, given that the Scottish Criminal Cases Review Commission already considers the interests of justice in making a referral. This test would be even more restrictive and should be deleted. We reiterate the words of Lord Kerr:

Lord Atkin's remark in *Ras Behari v King Emperor* (1933) that 'finality is a good thing, but justice is better' seems to me to be infinitely preferable to that of his near contemporary Justice Brandeis in 1927 in *Di Santo v Pennsylvania* that it is 'usually more important that the law be settled than it be settled right'.²¹

38. The standard required of the Appeal Court to find that there has been a miscarriage of justice is already a high one, and one which is met fairly infrequently. We cannot fathom how, if such an injustice has been identified, there could be grounds based on the 'interests of justice' to decline to quash the conviction. Yet by applying the precondition that it be in the 'interests of justice', the High Court is required to have regard to additional matters, such as the need for 'finality and certainty in the determination of criminal proceedings', over and above the wrongful conviction of the appellant. The Scottish appellate courts have considered the need for finality and certainty to the significant detriment of the individual right of appeal, particularly when considered in the context of the 'interests of justice'. In *Carberry*, the Lord Justice Clerk observed that "[I]n determining whether it is in the interests of justice for a case to proceed upon a reference [from the SCCRC], regard must be had to what has gone on in any prior appellate proceedings involving the same case".²² This has meant in a number of cases that the Court will consider whether a reference is consistent with the interests of justice where an appellant failed to meet the time limit for filing in the post-conviction appeal.²³ In our view, this cannot be a relevant

²⁰ By way of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

²¹ *Dissenting judgments - self indulgence or self sacrifice?* The Birkenhead Lecture (8th October 2012), p 13, available at <http://www.supremecourt.gov.uk/docs/speech-121008.pdf>

²² *Carberry v HM Advocate* [2013] HCJAC 101 at [48].

²³ For example, *Hunt v Aitken* 2009 SCCR 919; *Kelly v HM Advocate* 2010 SLT 967. The Court in *Carberry* continued:

consideration where evidence supports the finding that there has been a miscarriage of justice.²⁴ As Lord Kerr observed, delivering the JUSTICE Scotland Human Rights Day Lecture 2013²⁵:

A system of criminal law which has, as its cornerstone, proof of a defendant's guilt beyond reasonable doubt, cannot permit any different formulation for retrospective review of whether a conviction can be allowed to stand. If that review discloses a reasonable basis for doubting the defendant's guilt, the conviction is sufficiently unjust that it should be quashed.

As such, we believe that the limitation on the Court's discretion proposed in the Bill should be deleted.

JUSTICE Scotland
15th April 2014

The court itself is unable to see what basis there might be for referring a case where the ground of appeal, and the supporting material for it, has been deemed inadequate even to allow it to be entertained in the appeal process and the appellant has elected not to pursue that matter by seeking leave to appeal. For this reason also the court, having had regard to the need for finality and certainty, does not consider that it is in the interests of justice that this appeal proceed (at [49]).

²⁴ As to the test of miscarriage of justice, Lord Hope in *McInnes v HM Advocate* 2010 SC (UKSC) 28 expressed this as follows:

The question which lies at the heart of it is one of fairness. The question which the appeal court must ask itself is whether after taking full account of all the circumstances of the trial, including the non-disclosure in breach of the appellant's Convention right, the jury's verdict should be allowed to stand. That question will be answered in the negative if there was a real possibility of a different outcome - if the jury might reasonably have come to a different view on the issue to which it directed its verdict if the withheld material had been disclosed to the defence. (at [24])

²⁵ <http://www.justice.org.uk/data/files/resources/361/Miscarriage-of-Justice-Lord-Kerr-10dec13.pdf>, at page 5.