

Comments on Carloway

The interim response of the Scottish Legal Action Group on the recent Carloway Review¹

Introduction

1. The decision in *Cadder v HMA* gave rise to a great deal of public comment, emergency legislation and a decision by the CSJ to order a review of the relevant law and practice. The review's terms of reference were however, not restricted to issues arising from access to legal advice by suspects, and its recommendations range across Scottish criminal procedure and evidence. Before addressing the discrete issues raised in the report we would note our concern that fundamental changes to the criminal justice system are brought forward in this way. In our submission root and branch reform of important institutions ought only to be carried out on the basis of carefully conducted research and analysis of detailed proposals, in order that the consequences of change can be fully understood. Our existing system of criminal law and procedure has evolved over many decades and can be seen as producing a careful balance of interests. Recommendations which seek to overturn fundamental precepts of the law of evidence without also considering procedural aspects such as the size of the jury and majority verdicts risk upsetting this balance.

2. An inquiry of this scope, no matter how eminently lead, is in our view, under resourced and ill equipped to carry out such a important task. It is for that reason that whilst we broadly support the recommendations in relation to arrest, detention and police questioning, we do not consider that the report can or does provide a basis for fundamental changes to the law of evidence.

Arrest and detention

3. We welcome the recommendations for reform and statutory regulation of this area. In general terms the emphasis on the article 5 rights of those detained and the presumption in favour of liberty is welcome and is likely to limit further challenges to the system. We support the specific proposals for the reduction of the maximum detention period without charge to 12 hours, the requirement for a detainee to be taken to court within 36 hours after charge and the proposal for police bail.

Police Questioning

4. We welcome the proposals in relation to the provision of legal advice to those questioned whilst detained and the strengthening of the protections for vulnerable persons. In our view the proposal could go further in requiring access to legal advice for those who are to be questioned as suspects but not detained. Whilst we acknowledge the practical difficulties with such a requirement in some circumstances, these should not prove insurmountable. It may well be that developments in the Strasbourg jurisprudence will in the future, require access to such advice to be provided.

Corroboration

5. We do not accept that the review has as yet made the case for the removal of the requirement for corroboration. It is important to bear in mind its functions as a safeguard against wrongful conviction. We are not wedded to the concept of corroboration but note that the review does not propose the introduction of any additional safeguards in its place. In our view those proposing the removal of a long established safeguard for accused person's, have the burden of establishing that other additional protections are unnecessary. In England these include pre-trial committal proceedings, the close regulation of police investigations by PACE, the ability of judges to

exclude prejudicial or unreliable evidence in some circumstances and the size of majority required for conviction. What-it might usefully be asked- are the special features of the Scottish system which render such measures unnecessary in the absence of the requirement for corroboration?

6. The plight of the victims of sexual offences and the difficulties in prosecuting such crimes should not be lightly dismissed. We note the very limited research carried out by the review which is said to support the contention that the removal of the requirement for corroboration would result in more prosecutions. We support the criticism of the methodology of the research that has been made by others. On any view it is limited, carried out solely by prosecutors and is inconsistent with much larger studies conducted in England. What empirical evidence there is does not suggest that the removal of corroboration will increase the level of convictions (as opposed to prosecutions).

7. In our view there is the real risk that the removal of the corroboration will lead to further uncertainties and legal challenges. In the recent past objections to identification evidence and the use of statements in lieu of oral testimony have been rejected by judges who have relied upon the safeguard provided by corroboration. The removal of corroboration would re-calibrate Scots law with uncertain consequences.

Exclusionary Rules of evidence

8. We have concerns about the overall thrust of the reviews recommendations in this area. Whilst a case can be made for the removal of exclusionary rules in the law of evidence we do not accept that anything approaching such a case is made out in the review. The analogy drawn with the civil reforms of the 1980's is in our view a false one. The position of an individual prosecuted by the state cannot be equated with a party to a civil action. We accept that the current system is imperfect as is demonstrated by the report's criticism of the complexity of the current rules in relation to 'mixed statements'. However we would suggest that the proposed alternative is likely-given its lack of content-to give rise to speculative and complex arguments. More fundamentally experience shows that a general fairness test, fails to adequately protect the interest of accused persons. As with corroboration we would strongly contend that any review of this aspect of the law of evidence be carried out by a body such as the Scottish Law Commission.

Appeals

9. We do not agree with the proposal to introduce stricter time limits for appeals. We are of the view that the current system is a fair one and the no case has been made out for change.

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10. We welcome the proposal to remove the right of the High Court to refuse a referral. We disagree with the proposal that a different test for appeals referred from the Commission be introduced. The success rate of appeals referred by the Commission is considerably higher than in conviction appeals generally and that in other jurisdictions. Given the small number of referrals annually, we consider the current arrangements fair and reasonable.

1. See www.carlowayreview.org; also "Initial Responses to the Carloway Review", 2012 SCOLAG 6-9