Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Scottish Criminal Cases Review Commission

1.0 Introduction

1.1 In June 2013 the Scottish Government presented a Bill to Parliament (the Criminal Justice (Scotland) Bill 2013) based upon the recommendations contained within the Carloway Report and issued a call for stakeholders and interested parties to submit written evidence on the content of the Bill. The Scottish Criminal Cases Review Commission ("the SCCRC") welcomes this opportunity and is pleased to provide its short response which is by way of an update on the position outlined previously in its written responses both to the initial Carloway Review[1] and to the subsequent Scottish Government Consultation Paper "Reforming Scots Criminal Law and Practice: The Carloway Report". As with previous responses, it has restricted its written evidence to the issues which directly relates to the function of the SCCRC.

2. Response

2.1 The SCCRC notes that the relevant provision in the Bill is contained within section 82 as follows:-

> *82 (1) The 1995 Act is amended as follows.*
> *(2) In section 194B—*
> *(a) in subsection (1), for "section 194DA of this Act" there is substituted "subsection (1A)".*
> *(b) after subsection (1) there is inserted—*
> *"(1A) Where the Commission has referred a case to the High Court under subsection (1), the High Court may not quash a conviction or sentence unless the Court considers that it is in the interests of justice to do so.*
> *(1B) In determining whether or not it is in the interests of justice that any case is disposed of as mentioned in subsection (1A), the High Court must have regard to the need for finality and certainty in the determination of criminal proceedings.".*
> *(3) The title of section 194B becomes "References by the Commission".*
> *(4) Section 194DA is repealed.*

2.2 The SCCRC is pleased to note the intention to repeal section 194DA of the 1995 Act, as indicated in section 82(4) of the Bill. In the recent case of *RMM v HMA*[2], on the interpretation of section 194DA as presently enacted, the (current) Lord Justice General made the following comments:

> *"[33] An independent body specifically entrusted with considering cases of possible miscarriages of justice has decided that it is in the interests of justice that it should make these references (1995 Act, s 194C(1). In making that decision the Commission has considered the interests of finality and certainty (s*

[1] http://www.scotland.gov.uk/Resource/Doc/925/0120161.doc#R046
[2] 2012 SCL 1037

194C(2)). Although this court has been given the power to reject a reference in language that replicates the provision applicable to the Commission (s 194DA(1), (2)), it cannot be right for us simply to duplicate the Commission's function and give effect to our own view. In light of the impressive record of the Commission, it is unlikely that we will have cause to differ from its judgment on this point. I think that we are entitled to assume, unless the contrary is apparent, that the Commission has considered the criteria set out in section 194C and has duly made its independent and informed judgment on them. In my view, we should reject a reference only where the Commission has demonstrably failed in its task; for example, by failing to apply the statutory test at all; by ignoring relevant factors; by considering irrelevant factors; by giving inadequate reasons, or by making a decision that is perverse."

2.3 The Commission notes that the opinion of the Lord Justice General was supportive of the Commission's previous written submissions on this matter to the effect that there is no empirical basis to conclude that the Commission has in the past applied its interests of justice test unreasonably, or that it is likely to do so in the future.

2.4 The Commission is opposed to the provision contained within section 82(2) of the 2013 Bill to insert the new subsections (1A) and (1B) into section 194B of the 1995 Act. In light of the sensitive relationship between the SCCRC and the High Court, it would be highly unsatisfactory for the High Court to refuse to consider a reference where the Commission, in the exercise of its powers, has concluded that there *may* have been a miscarriage of justice and that it is in the interests of justice that the conviction or sentence, or both, be reconsidered at an Appeal. The Commission remains of the view that there should be no veto of a referral at either stage of the appeal process. By introducing the new subsections (1A) and (1B) Parliament is retaining the "gatekeeping role" of the High Court which was the subject of so much criticism when originally introduced by S194DA of the 1995 Act. Simply shifting the implementation of that role from the start of the appeal process to the end of the process appears to be counter-intuitive and makes little pragmatic sense. If the Carloway reforms were intended to save time and expense and to reduce complexity, the changes now proposed in section 82 of the Bill flies in the face of them. It is entirely possible that the proposed reform will, in comparison to the currently prevailing scheme, result in greater expense to the justice system, slower processing of Commission referrals and, as a consequence of the proposed changes, a weakened Commission in the eyes of the public. This would appear to be contrary to the Government's stated aim, in the policy memorandum which accompanies the present Bill, "*to enhance efficiency and bring the appropriate balance to the justice system…".*

2.5 Of greater concern however is the shift in the construction of the proposed test from negative to positive. Whereas under 194DA the court is enjoined to reject the reference if it believes that it is not in the interests of justice to allow it to continue the new provision makes clear that the court may only quash a conviction or sentence if it believes that to do so is in the interests of justice. One might argue that these are two sides of the same coin. To do so, however, is to overlook the degree to which the

decision in *RMM* placed certain restrictions on any application of section 194DA by the appeal court. Out of adherence to constitutional principle, the court has taken what is, it is submitted, a most restrictive interpretation of that section. It was assisted in this task by the framing of the issue in terms of whether the interests of justice are served by allowing the appeal to continue rather than whether it is in the interests of justice to quash the conviction or sentence. The proposed amendment is, one might reasonably argue, constructed in such a way as to convey the impression that Parliament expects the court to consider the matter again. That is not to say that the court will not interpret the section more restrictively once more, but such an outcome is not guaranteed. When the Commission, having considered a case in full, concludes that there may have been a miscarriage of justice and it is in the interests of justice that a referral be made, there is no logical reason to place in statute a provision which allows the High Court to reject the case on the basis that it does not consider it in the interests of justice to allow the appeal.

2.6 It is worth stressing again that, at page 368 of his report, Lord Carloway suggested that the High Court might choose to bring a Commission reference to a conclusion by considering and applying, *"in whatever order it deems appropriate in the particular case"*, either leg of the proposed new two-tier test to be applied by the High Court under subsection (1A). Accordingly, whilst this new provision entitles an applicant to a full hearing of his appeal, the court may choose to address the second leg of the test first; and if the court is not satisfied that it is in the interests of justice to proceed the appeal could be dismissed, notwithstanding the fact that the Commission believes that a miscarriage of justice may have occurred. The Commission is of the view that such an outcome would seriously undermine both the independence of the Commission and its role in strengthening public confidence in the ability of the Scottish criminal justice system to address miscarriages of justice.

2.7 When considering the provision of an appropriate remedy for addressing historic miscarriages of justice the Sutherland Committee[3] considered, and rejected, the possibility of giving additional powers to the High Court to carry out its own investigations into potential miscarriages of justice. As it stated at para 5.45 of its Report *"…We doubted whether petitioners or the public would regard it as a satisfactory arrangement that the body which had already refused an appeal should be given the responsibility of considering and investigating whether there were any grounds in effect for a further appeal and should then determine it. We do not regard this as a sensible solution in relation to miscarriages of justice."* The Commission believes that the same principles can be applied to the present provisions which seek to introduce an "interests of justice" element to Commission appeals. It seems contrary to the *raison d`etre* for the creation of a Commission to create a new statutory provision whereby an appeal court can decide to ignore the grounds established for a possible miscarriage of justice by introducing a default position which entitles the court to reject an appeal "in the interests of justice" and applying the criteria of finality and certainty at this stage. As has

[3] Sutherland Committee, "Report by the Committee on Criminal Appeals and Miscarriages of Justice Procedures" (Cm 3245, 1996)

previously been identified, Commission referrals can occur many months (sometimes many years) after a case has been concluded. A referral may be made in a case where the High Court has already considered an appeal, and on a ground that the High Court has already rejected or refused to allow as it failed to be raised within the time limits which applied during the original appeal. All of these matters would be considered by the Commission in applying its own “interests of justice” test. If a decision is subsequently taken to refer the case then the matter should proceed as a normal appeal and there is no reason why the High Court should apply a different test in Commission referrals.

2.8 The only matter which should concern the High Court is whether the appellant has suffered a miscarriage of justice. Whilst the SCCRC agrees and has publicly stated that matters such as *finality and certainty*, or the rights of the victim of crimes, should be fully addressed in any comprehensive, effective and fair criminal justice system, it does not believe that it is appropriate that, when hearing an appeal, the High Court should carry out some form of balancing exercise in deciding whether that appeal should be allowed. The SCCRC knows of no other modern criminal justice system where such a balancing exercise is carried out at the appellate stage.

Scottish Criminal Cases Review Commission
2 September 2013