The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

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26 January 2012

Dear Kenny

Carloway Review of Scottish criminal law and practice

As you will be aware, the Committee took evidence on Lord Carloway's review over three meetings in late November and December; first from Lord Carloway himself,[1] and then from interested professionals, academics, and stakeholders.[2] We are grateful to all witnesses for their contributions. The purpose of our work was to obtain a "snapshot" view of interested parties' initial reactions to Lord Carloway's recommendations, rather than to conduct a full-blown inquiry. This letter is the outcome of that work, although we recognise that this will not be the end of the Committee's scrutiny of the very important issues that Lord Carloway has raised.

The Committee warmly welcomes Lord Carloway's report as a thorough piece of scholarship, informed by Lord Carloway's practical knowledge of the relevant issues, and an important contribution to the debate on the future of Scottish criminal procedure and evidence post-*Cadder*. However, it is important to stress that we have not yet reached a concluded view on whether we support his main recommendations. The main purpose of this letter is to pass on the Committee's observations as to what appeared to us to be the principal issues arising from our evidence-taking. We note that you have yet to provide a formal response to Lord Carloway's report, and hope that this letter may help inform it.

[1] Scottish Parliament Justice Committee, *Official Report,* 29 November 2011, available at http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6588&mode=pdf [accessed January 2012]
[2] Scottish Parliament Justice Committee, *Official Report,* 13 and 20 December 2011, available at, respectively: http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6618&mode=pdf and http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6726&mode=pdf [accessed January 2012]

Without seeking to anticipate your response, we expect that you too may wish to reserve your position on some recommendations pending further consideration, consultation and research. On the other hand, it may be that some of his apparently more widely accepted recommendations could be implemented more expeditiously. We envisage that this may apply in particular to recommendations concerning police powers in relation to detention and arrest. We would however wish to stress one of the key themes to have arisen in evidence; the importance of taking a holistic and comprehensive approach to reform of the criminal trial process (as discussed further below.)

Corroboration

Unsurprisingly, the matter most discussed during evidence-taking was Lord Carloway's recommendation that the rule of corroboration be abolished.

Some witnesses agreed with Lord Carloway. They argued that:

- Lord Carloway was correct in his view that, whilst the rule may have served its purposes in earlier times, it had now outlived its usefulness, and that other jurisdictions appear to have a fair criminal justice system despite having no general rule on corroboration;
- there was also merit in his view that the rule may, in its own way, deliver "miscarriages of justice", in that it prevents cases that would otherwise have reasonable prospects of success from being taken to court;
- the rule risked leading to a box-ticking mentality, requiring prosecutors to focus sometimes more on the quantity than on the quality of evidence;
- the rigidity of the rule had led to corroboration "fiddles", exceptions devised by the courts over the years. These, it was argued, had made the rule increasingly incoherent and inconsistent, raising the question of whether it was not the principle of corroboration itself that was at the root of the problem.

Others disagreed. Arguments against abolishing corroboration included that:

- corroboration had continued importance and relevance, within the overall context of Scots criminal law, in providing a form of evidential quality control that reduced the risk of unsafe convictions;
- countries without a general corroboration rule did not have a significantly higher conviction rate than in Scotland. Their conviction rates for those types of offence where convictions rates here are considered worryingly low (eg rape) tend not to be significantly higher either;
- Lord Carloway anticipated significantly more cases being prosecuted if the rule were abolished but it was unclear how that could be achieved in an overall context of reduced expenditure on prosecution services;
- the methodology Lord Carloway had relied upon to argue that abolishing the rule would increase the likelihood of successful convictions was flawed;
- Lord Carloway had not considered corroboration in the overall context of Scots criminal procedure (for instance, the existence of simple majority guilty verdicts or the absence of any general rule, corroboration itself excepted, entitling a judge to throw a case out on the basis of insufficient or weak evidence) and had erred in ruling out other safeguards to replace it;
- the complexity of the corroboration rule had been somewhat exaggerated and, inasmuch as elements of it had become incoherent or inconsistent, there was scope to simplify, rationalise and improve them, rather than simply to abolish

the principle outright (in which connection, our attention was drawn to the Scottish Law Commission's soon to be completed work on the *Moorov* doctrine and similar fact evidence).

Behind this disagreement, however, the Committee noted an underlying consensus; that the corroboration rule should not be seen as sacrosanct, and that it was legitimate to re-investigate from first principles whether it continues to serve a useful purpose in 21st century Scots criminal law. The Committee agrees. Lord Carloway is to be congratulated for having provoked a much-needed discussion on the purpose of corroboration. The question now is how best to continue that discussion, and in which forum.

In considering that question, it may be helpful to highlight another issue raised by a number of witnesses. This was the importance of ensuring that any future work on corroboration should avoid considering that single issue in isolation. Instead, it should also take into account the complex web of factors that, taken together, set the current balance between the state's ability to secure a conviction and the individual's right to a fair trial, and to be acquitted where there is a reasonable doubt. Witnesses suggested that this might include not only rules on the admissibility, quality and sufficiency of evidence, but also, for example, the not proven verdict or the availability of convictions by simple majority verdict. They also underlined the importance of studying other jurisdictions, building on the comparative work already undertaken by Lord Carloway. Some witnesses proposed taking the opportunity to "future-proof" our laws and practices to reduce the risk of future ECHR referrals. In short, these witnesses argued, all relevant matters should be on the table.

As regards where the debate should now be conducted, some witnesses proposed that consideration of corroboration be referred to the Scottish Law Commission. Others queried whether it had the necessary time and resources at the present time to undertake such a demanding project. It appears to the Committee that this would particularly be the case if the Commission were to be asked to undertake a project of far wider scope than simply corroboration, along the lines alluded to above. Accordingly, some witnesses proposed the setting-up of a Royal Commission, or some other suitably empowered expert body, to re-examine criminal procedure and evidence. Parallels were drawn with the Thomson Committee on criminal procedure, which comprised 13 members and met over a period of many years in the 1970s.

I would invite you to reflect on these views in considering how best to move the debate onto the next stage.

Sexual offences

The sufficiency of evidence in relation to domestic abuse and, in particular, sexual offences arose in the course of the Committee's evidence-taking. Whilst the Committee appreciates that the law of criminal evidence should be consistent in application, we also consider that there is a need at least to consider the very low conviction rates for some sexual offences, and whether this points to an innate failing in the way the system currently handles those cases. One witness drew our attention to a 2009 speech[3] by Lord Hope, in which he queried whether our current rules of

[3] Corroboration and Distress: a lecture in honour of Sir Gerald Gordon. Available at http://www.supremecourt.gov.uk/docs/speech_090612.pdf [accessed January 2012]

evidence put certain crimes effectively beyond the reach of the law. These observations should give us all cause for concern.

The Committee appreciates that concerns over conviction rates for certain offences, such as rape, are not new, and that a number of initiatives have been pursued over the years, with varying rates of success. In any country that respects the rule of law and the principle that a conviction should only be secured on the basis of proof beyond reasonable doubt, there is always going to be a fundamental difficulty in successfully prosecuting cases characterised by one witness as being of a "he said, she said" character. Whilst some witnesses (including Lord Carloway) argued that the abolition of corroboration would allow some cases to go to Court, where previously they would not have been proceeded with, and that this was a good thing, they were also at pains to stress that abolishing the rule should not be seen as leading, on its own, to a radical increase in the number and proportion of convictions secured.

It was also acknowledged that if the corroboration rule were abolished, leading more cases to go to trial, this would in practice place considerable reliance on the credibility of the complainer, in turn leading defence counsel to place an increased emphasis on challenging that credibility. The Committee has concerns that this may have unintended consequences.

In the Committee's view, all of this points towards the continuing importance of considering *all* the issues surrounding the conduct of such cases in seeking to secure that justice is done, rather than focussing too narrowly on evidential issues. However, the Committee considers that future work on corroboration, and on criminal evidence generally, should expressly take into account the application of the current rules in sexual offences cases and any other cases where the outcome tends to turn on the comparative credibility of the accused and the complainer, absent any other significant evidence. This could include considering the current rule that distress may, under certain circumstances, constitute corroboration (one of the corroboration "fiddles" identified by one of our witnesses).

Other evidential issues

As regards Lord Carloway's recommendations on incriminatory, exculpatory and mixed statements, the Committee did not have sufficient time to consider these in detail but notes again that a Commission charged with looking at criminal evidence in the round may wish to consider how best to take these forward. The same goes for rules on hearsay evidence. (I stress that this should not be interpreted as the Committee expressing a preliminary rule that current criminal hearsay rules are defective; instead we are simply observing that the rules could be amongst the issues that are "on the table.")

On Lord Carloway's recommendation that no change be made to the current law that prevents inferences being drawn at trial from an accused's failure to answer police questions, there was a difference of views in evidence. The police argued that this recommendation should be looked at again, since a suspect's silence could have a crucial bearing on the credibility of their subsequent defence case. Academics and practitioners, however, argued that changing the law might risk putting Scots law on a collision course with the ECHR. The Committee appreciates that this is a finely balanced issue, but is obviously concerned by any suggestion that changing the law

could raise ECHR concerns. Again, the whole issue could be considered as part of a wider review of the law of criminal evidence.

Detention, arrest and questioning in custody
The Committee notes that most of Lord Carloway's recommendations in relation to detention, arrest and questioning during custody were accepted in principle by witnesses, although again we would expect that further consultation, discussion and refinement would be necessary to bring them to fruition. A point made in evidence is that the public do not clearly understand the distinction between detention and arrest and why it is possible to question witnesses after the former but not the latter. Lord Carloway's recommendations would help address that gulf between common perception and legal reality.

Another point that arose was whether these reforms might lead to a spike in voluntary statements made to the police by suspects who have not been arrested and cautioned. If so, this would give rise to questions as to what is causing such an increase. Witnesses were understandably reluctant to express a view on a hypothetical question, but we suggest to you that this is a matter that should be carefully monitored if and when changes are proceeded with.

Lord Carloway's review found it unsatisfactory that suspects could be detained for as long as 72 hours simply because they were arrested near the start of the weekend and left open the question whether Saturday court sittings should be reintroduced to deal with this. The Committee agrees that the current situation appears arbitrary and unsatisfactory, but notes that the reintroduction of Saturday courts might, understandably, constitute a "hard sell" to the legal profession and others concerned with the administration of criminal justice. We would welcome the Scottish Government's preliminary view on this issue.

Investigative liberation and police bail
Most witnesses either welcomed Lord Carloway's recommendations on investigative liberation and police bail, or had no objection to them in principle. Clearly the underlying issue is to ensure an appropriate balance between police powers to investigate crime and individuals' right to liberty absent any finding that they are guilty of anything. The Committee notes the view of police witnesses that 28 days (as recommended by Lord Carloway) may not be a sufficient amount of time to investigate more complex cases and invites the Scottish Government to reflect on this concern.

Access to a lawyer
It is to the credit of the legal profession and police, and others involved in the administration of criminal justice, that the massive impact of the *Cadder* case has been largely absorbed in the relatively short time since then, with new procedures and practices rapidly evolving to deal with the Supreme Court's judgment. This is not to underestimate the challenges that still remain. Lord Carloway's main recommendations in this area were generally accepted by witnesses and seem to the Committee to amount to a common-sense way forward.

The Committee notes Lord Hope's judgment in the case of *McGowan v B,* decided too late for Lord Carloway's report. Lord Hope laid down guidelines for circumstances where a detained person waives their right of access to a solicitor.

Representatives of the police assured the Committee that they were aware of the judgment and considered that the procedures they had in place would be sufficient to meet Lord Hope's criteria. The Committee was pleased to hear this. However, we would nevertheless ask the Scottish Government to consider the implications of the case carefully. We suggest that this should include checking that police good practice includes dealing appropriately with situations where comments given by the detained person in purporting to waive their right are ambiguous or indicate a defective understanding of what the legal or practical situation is. It was suggested that it might be useful to examine comparative practice in this area (Canada being cited as one good example).

Lord Carloway recommended that rules on access to a solicitor should make allowance for exceptional circumstances where it would not be appropriate to offer a detainee access to legal advice. In his appearance before the Committee, Lord Carloway helpfully furnished the committee with examples of such exceptional circumstances, where the key considerations appeared to be urgency and danger to others. However, he took the view that it would on balance be best not to define "exceptional" circumstances in statute. This is something the Scottish Government may wish to reflect upon further.

The Committee welcomes the main thrust of Lord Carloway's recommendations on vulnerable adults and on children and young people. Specifically as regards access to legal advice, a majority of witnesses who expressed a view agreed with him that children under 16 should not be able to waive their right. However, it was also suggested that this recommendation was perhaps paternalistic, and might fail to take into account the emotional maturity of some older children. We invite you to take these differing views into account.

The Scottish Criminal Cases Review Commission and criminal appeals

Emergency legislation passed in the wake of the *Cadder* case gave the High Court of Justiciary the power to reject a reference from the SCCRC if the Court, having regard to the need for finality and certainty in criminal proceedings, considered that it was not in the interests of justice to accept the reference. The Committee appreciates that the main purpose of this provision was to prevent a possible flood of references in the wake of the *Cadder* judgment involving individuals convicted mainly on the basis of information volunteered during detention, without access to a solicitor having been offered.

However, as Lord Carloway's report noted, the legislation gave the High Court a "gate-keeping role" relating to the interest of justice, that formerly rested only with the SCCRC, and which applied to all cases, not just those raising *Cadder* points. Lord Carloway further noted that that anticipated flood has not, in fact, materialised, and recommended that the relevant provisions in the emergency legislation be repealed. In doing so, he noted that the gate-keeping role assigned to the High Court was in principle inconsistent with the functions originally vested by Parliament in the SCCRC.

Given the overall thrust of Lord Carloway's argument, the Committee was surprised to note that, alongside this recommendation, Lord Carloway recommended restating the test for the High Court in determining whether to allow an appeal arising from an

SCCRC reference as follows: (a) that there has been a miscarriage of justice, and (b) that it is in the interests of justice that the appeal be allowed.

Whilst the first leg of the test, being a restatement of the current position, is unobjectionable, practically all witnesses to express a view, queried the purpose of the second leg. The witness from the SCCRC characterised the recommendation as amounting to dismantling the gates at the bottom of the driveway only in order to reassemble them at the entrance to the front door.

Whilst Lord Carloway helpfully provided some examples of what he had in mind in proposing the second leg of the test (for instance, that the appellant had confessed to the crime following the SCCRC making its reference), it was not clear to most witnesses why this could not be dealt with as part of the appeals process itself, rather than laying out a new test, of rather broad wording, which might end up in practice being used in unanticipated or unintended ways. If the perceived mischief behind the second leg is an excess of low-quality references emanating from the SCCRC, most of which would fail on appeal, then the Committee has seen no evidence to suggest that this is a problem. Indeed evidence from the SCCRC suggests that SCCRC references are low in number and that a far higher percentage of them are successful than are conventional appeals.

Another point to arise in evidence was that the opportunity should be taken to repeal a second element of the emergency legislation; provision requiring the Commission itself to take into account finality and certainty in deciding whether to make a reference to the High Court. The SCCRC witness argued that the SCCRC did, in practice, consider these matters in deciding whether to make a reference, but said that the statutory test imposed by the emergency legislation gave these criteria undue prominence, especially given that the very existence of the SCCRC is an exception to the general principle that there should be finality and certainty in the judicial process.

The Committee would urge you to reflect on these representations and would respectfully suggest that further consideration of Lord Carloway's recommendations on the SCCRC is necessary.

Yours sincerely

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Convener
Justice Committee