Justice Committee

The Carloway Review Report

Faculty of Advocates Memorandum on Corroboration

The Report recommends, *inter alia*, that the requirement for corroboration in Scottish criminal cases should be abolished.

The remit of the review included consideration of corroboration in light of the decision of the Supreme Court in *Cadder*. The resulting report includes a review of the requirement for corroboration generally and recommends its abolition, but does so without taking into account existing procedural and evidential issues closely related to the requirement for corroboration, or giving adequate consideration to any additional safeguards or consequential changes required in the event of its abolition.

The Faculty is of course aware that the Justice Committee has already (on 13th December 2011) held evidence sessions on the Carloway review. The Faculty notes with approval many of the points made during the evidence given by Brian McConnachie QC on behalf of the Faculty of Advocates Criminal Bar Association.[1]

The Faculty remains of the view, as stated in its response to the Consultation Document, that the matters considered (including corroboration) are of such fundamental importance to the administration of justice in Scotland that they should be the subject of much fuller consideration by a Royal Commission. Nevertheless, on the discrete subject of corroboration, the following comments are offered:

The requirement for corroboration must be considered in context, both procedural and evidential. For example, it is suggested that the requirement for corroboration must be considered in light of majority verdicts and not proven verdicts (neither of which are features of many of the comparator jurisdictions which do not require corroboration), and in the context of the nature, extent and practical operation of corroboration in conjunction with other rules of evidence. The report recommends the abolition of corroboration without proposing the introduction of any compensatory safeguards. On the contrary, it expressly excludes some. The High Court of Justiciary has consistently emphasised the importance of corroboration as an essential safeguard against miscarriages of justice. Whilst corroboration, on its own, cannot and should not be regarded as a sacred cow, any discussion regarding its abolition should be the subject of full consideration, including consideration of the safeguards that would be a necessary consequence of abolition.

The Faculty notes that, in the evidence session referred to above, its position regarding the need for consideration of additional safeguards was coherent with that of the Law Society of Scotland, James Chalmers (senior lecturer in law, Edinburgh University) and Fiona Raitt (professor of evidence and social justice, Dundee University). The Faculty considers it particularly noteworthy that even Professor Raitt, who was alone in positively advocating the abolition of corroboration before the

[1] Justice Committee Official Report: Tuesday 13th December 2011, item 2 (columns 624-646)

Committee, expressed the view that "to take out the requirement for corroboration individually is not the right approach"[2].

Consideration of other jurisdictions is, of course, helpful and essential in such an exercise, as is consideration of reliable empirical data from our own jurisdiction. However, it would be difficult to draw firm conclusions on the use of corroboration from an examination of other jurisdictions without analysing the procedural and evidential context in which those jurisdictions require or do not require corroboration. The resources required for such an exercise to be carried out thoroughly and effectively are one reason why the Faculty considers that a Royal Commission would be the appropriate forum for a reconsideration of this fundamental aspect of our criminal law[3].

More broadly, the Faculty respectfully adopts the observations of the Senators of the College of Justice[4] in relation to what might be thought to be the appropriate scale and size of the exercise that should be undertaken before contemplating such a fundamental alteration of our law:

> "In its consultation paper, the Review has canvassed certain fundamental options regarding evidence and procedure both before and during trial which would constitute a radical departure from our existing law.
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> The last review body to consider such questions was the Thomson Committee appointed by the Secretary of State for Scotland and the Lord Advocate, a committee of thirteen members with a wide range of collective experience of the justice system. The Committee carried its work over a period of about eight years and produced three reports, in 1972, 1975 and 1977 respectively. It consulted extensively and received written and oral evidence from many individuals and organisations. The Committee's work on criminal procedure is embodied in its Second Report (October 1975, Cmnd 6218). In the preparation of that Report, the Committee held 122 meetings, 117 of which were devoted exclusively to the topics dealt with in its Second Report. The Committee heard oral evidence from 52 representatives of 17 interested bodies and from eighteen individual witnesses. Certain aspects of its work were carried out by its sub-committees. This section of its work was carried out over a period of about three years.
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> In contrast, in the present consultation exercise consultees have been given a period of a matter of seven weeks in which to consider certain fundamental questions such as the abolition of corroboration and the modification of the right to silence. In our opinion, good law reform requires an extensive pre-consultation review of problems and possible options for reform; the preparation of a detailed consultation paper; an adequate period for public discussion and consultation, a thorough analysis of the consultation responses and the publication of a report and recommendations.

[2] Official Report (column 632)
[3] See the concerns expressed in evidence by James Chalmers as to the capacity of the Scottish Law Commission to undertake such work: Official Report (column 640)
[4] Responses to the Carloway Consultation Document (pages 361-362)

> Furthermore, for the reasons that we shall give, we consider that many of the reforms that are canvassed in the consultation paper do not relate to the ratio decidendi of Cadder and cannot therefore be said to arise in consequence of it: for example, the abridgment of the right to silence.
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> We acknowledge that this is an impressive consultation paper. It has been prepared expeditiously. But we consider that, excellent though it is, it would have benefited from a thorough review of the options that are to be found in England and Wales, Ireland and other English speaking jurisdictions. Moreover, we consider that the consultation period is unreasonably short. For these reasons we fear that there is a risk that the Review may lead to fundamental changes, the results of which may be difficult to predict, that are the product of undue haste."

The Faculty has emphasised above the need to place any comparison of procedure in other jurisdictions within its proper context. Similarly, there may be a danger in seeking to compare statistics such as the respective rates of conviction or numbers of cases prosecuted in other jurisdictions. In any event, the Faculty does not understand that the rates of conviction, for instance, in comparator jurisdictions, are considerably different from our own. This is another area which, the Faculty considers, merits much closer examination and consideration than appears to have been done in the context of the Carloway review.

Likewise, the use of empirical data from within Scotland may be helpful only insofar as it is (or was) gathered according to a robust and verifiable standard. The data cited by the report in support of its conclusion may lack the scientific methodology required and has the appearance of being anecdotal. It may also be open to the accusation of being partial and not properly balanced. In that regard, the Faculty notes, and endorses, the evidence (at the session referred to above) of James Chalmers[5].

The Faculty notes the emphasis placed in the Report on the potential effect of abolition of corroboration on the prosecution of rape cases. The Faculty endorses the concerns, expressed in the evidence session referred to above and elsewhere[6], that reliance on the "empirical research" referred to in the Report might raise unrealistic expectations, and that the abolition of corroboration might lead to more rape prosecutions but not necessarily more convictions. The rate of convictions achieved at present demonstrates that, even with a requirement for more than one source of evidence, rape trials are not decided on sufficiency but rather on the jury's assessment of credibility and reliability. Leading feminist writers have suggested that jury research is conducted. The Faculty recognises that this is primarily a political issue but suggests it cannot be disregarded in the context of the Report and its recommendations.

[5] Official Report (columns 627, 629-630)
[6] See for example "Corroboration: a second opinion" (Margaret Scott QC), The Scotsman 5th December 2011

In conclusion:

1. The Faculty accepts the need to debate the requirement for corroboration.

2. The Faculty considers that the debate cannot take place in isolation. It must include a full consideration of the safeguards that have developed in comparative jurisdictions where corroboration is not required.

3. Allied to the issue of corroboration are the system's reliance upon juries and its retention of not proven verdicts and simple majority verdicts. These ought to be considered as part of the debate.

4. The Faculty adheres to its response to the Consultation Document that a Royal Commission ought to be convened to consider the foregoing issues. It recognises that the Scottish Law Commission might also be thought an appropriate body to consider the issue in greater depth, but is concerned that the scale of the task might give rise to significant resource and capacity issues for that body.