

Justice Committee

The Carloway Review

Written submission from Rape Crisis Scotland

1. Introduction

1.1 Rape Crisis Scotland welcomes Lord Carloway's recommendation that the requirement for corroboration be removed, and hopes that, if implemented, this will better equip our legal system to respond effectively to the reality faced by the vast majority of rape survivors.

1.2 Due to the nature of the crime of rape, there are often few witnesses, meaning that, with the exception of rapes involving significant levels of violence, corroboration can be particularly difficult to find. The Cadder ruling has had a significant impact on sexual offences. Prior to Cadder, the police were often reliant on admissions from the accused to help them build a case (for example, prior to Cadder, men accused of rape would often admit to intercourse but claim that it was consensual). Since Cadder, defence lawyers seem to be routinely advising their clients to make no comment at all during police interviews, which is seriously hampering police efforts to put cases together and appears to be making prosecutions in rape cases even more difficult than they were previously. Prior to Cadder, there was already a very low rate of prosecution for rape cases – the majority of rapes reported to the police do not make it as far as court with figures from the Crown Office for 2008/9 suggesting that only about a fifth of reported rapes resulted in a prosecution.

1.3 Figures released by the Scottish Government in December 2011 (see <http://www.scotland.gov.uk/Publications/2011/12/12131605/0>) show that in 2010/11, there was a 14% increase in the number of rapes and attempted rapes reported to the police, with reports totalling 1,131. Although recent years have seen a good deal of progress in the way that rape is investigated and prosecuted in Scotland, it is a matter of great concern to see that there has been a significant drop in the number of prosecutions, with only 81 prosecutions, a drop of 31% compared to the previous year. The number of convictions has also fallen significantly, with only 36 convictions. Reporting a rape can take a great deal of courage, and it can be devastating for rape survivors to find out that their case will not make it to court. In our view Cadder is a major factor in the drop in prosecutions.

1.4 Of the small number of reported rapes which reach court, the conviction rate is encouraging, particularly in relation to cases under the new Sexual Offences (Scotland) Act, which was implemented in December 2010. Of the 13 rape cases prosecuted under the new Act, 62% have resulted in a conviction. However, to have such a small proportion of reported rapes being able to be prosecuted signifies that our current law is unable to respond effectively to the reality of rape. The requirement for corroboration plays a major factor in this.

2. Corroboration and the burden of proof

2.1 The burden of proof for rape in Scotland is extremely high – currently, not only do the Crown have to prove and corroborate that sexual intercourse took place and the complainer did not consent to it, they also have to prove and corroborate that the accused knew the complainer wasn't consenting. As most rapes take place in private, with no witnesses and frequently little if any physical injury, the requirement for corroboration arguably means that our justice system is ill equipped to respond effectively to the reality of rape (as opposed to the stereotype of a stranger rape involving a significant amount of physical injury). The courts have attempted to get round this by allowing distress on behalf of the complainer to assist in corroborating lack of consent. While this has been welcome in individual cases, it runs a serious risk of embedding stereotypes of how 'real' rape victims should react: some rape victims are visibly distressed following a rape and confide in someone immediately, but many do not. Reactions to rape can be counter-intuitive – some rape victims may not display overt distress in the hours or days following an assault, and may take days, weeks or even years to confide in anyone. Survivors of rape and sexual assault experience a very wide range of emotional and psychological consequences following an assault and express these in widely diverse ways. Shock is an entirely normal response to a traumatic event and can manifest itself in differing ways: it is not at all uncommon for survivors to appear to be entirely calm following an attack.

2.2 If survivors of rape are to have any chance of obtaining justice, we need a legal system which is able to respond to the reality of rape, which is frequently committed by someone known, and where it is not uncommon to have little or no evidence of physical injury.

2.3 Removing the requirement for corroboration does not mean there will be a flood of cases with very little evidence making it to court, or an unacceptable risk of miscarriages of justice. There will still be a test against which cases will be judged before they can proceed to court, but it will be one based on the quality of the evidence, not the quantity. Removing the requirement for corroboration should, however, enable the Crown to bring prosecutions in cases where there is a lack of corroboration but where they believe there is still enough evidence to give a reasonable chance of conviction.

2.4 Rape Crisis Scotland is aware of the proposition put to the Justice Committee that removing the requirement for corroboration could actually make obtaining justice harder for rape complainers. We strenuously disagree with this. There is no doubt that some rapists deliberately target women who are vulnerable and who may have difficulty being considered credible witnesses in court. The law must provide the possibility of protection and justice in these cases. Balanced with this, however, is the fact that the Crown will be considering the quality of the evidence available and whether there is a reasonable prospect of conviction, when deciding whether or not a case should proceed to court. Cases based on the testimony of a single witness i.e. the complainer are likely to be rare, and are unlikely to proceed to court unless the quality of the evidence from the complainer is considered to be very strong.

2.5 In our view, it is deeply paternalistic to use the prospect of vulnerable women giving evidence unsupported by other evidence as a reason to retain a system which acts as a significant barrier to justice. Some agency should be accorded to rape survivors. Even where women are considered vulnerable for whatever reason, they are still likely to be capable of participating in a discussion with the Crown about the risks or otherwise of giving evidence, and to expressing a view as to whether or not they feel capable of doing this. Too often, rape survivors can feel like decisions are being made for them, often for well intended reasons based on a desire to protect, but which remove their agency and are in danger of infantilising them. The National Sexual Crimes Unit has built up significant expertise in communicating with complainers, and we believe that dialogue between complainers and prosecutors is the best way of addressing this concern.

2.5 The standard of proof required – of beyond reasonable doubt – remains the strongest protection available in relation to preventing miscarriages of justice. This will not change if the corroboration requirement is removed. Rape Crisis Scotland agrees with the approach taken by Lord Carloway, which is that rather than preventing miscarriages of justice, Scotland's requirement for corroboration hinders justice by preventing credible and reliable cases from being prosecuted.

2.6 It is important, however, to be realistic about the impact removing the requirement for corroboration may have on conviction rates – England and Wales (in common with the rest of Europe) do not have a requirement for corroboration, yet their conviction rate for rape is comparable to that in Scotland. Additionally in Scotland, unlike the rest of the UK, we have the not proven verdict: there is a real concern that removing the requirement for corroboration might lead to more cases getting to court, but could also lead to a corresponding increase in not proven verdicts. Removing corroboration should therefore be seen in context of other measures which need to be considered, not least the need to change public (and therefore jury) attitudes towards rape.

3. Conclusion

3.1 Obtaining corroboration in sexual offence cases – particularly cases where there is little if any physical injury – is inherently problematic. We believe that removing the requirement for corroboration, and moving to a test for prosecution based on the quality rather than the quantity of evidence, would be a step forward in improving access to justice for rape survivors. The most recent figures for convictions of cases reaching court are very encouraging, but if the proportion of reported rapes which actually make it to court continues to fall at the current rate, we have grave concerns about the ability of the justice system to act as a deterrent to rapists and potential rapists.

In addition to the impact on rape survivors of cases failing to reach court, the very high rate of attrition for rape and attempted rape cases raises the very real possibility of guilty men walking free with no judicial sanction, and the resultant risks for both public safety and public confidence in the Scottish justice system.

3.2 Central to any consideration of the Cadder decision and the issues it has raised is the question of human rights. Peter Cadder's appeal was underpinned by European human rights legislation, and reflects a growing trend for discussions on human rights within the criminal justice system to focus exclusively on the human rights of those accused of crimes. What about the human rights of women (and men) to be protected from rape, and to have access to justice should they experience this devastating crime?

3.3 Rape Crisis Scotland would be happy to provide oral evidence to the Justice Committee to discuss these issues further.

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