

Justice Committee

Criminal Justice (Scotland) Bill

Written submission the Law Society of Scotland

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of its Criminal Law Committee (“the Committee”).

General Comments

The Committee welcomes the opportunity to respond to the Scottish Parliament’s Justice Committee’s call for written evidence upon the general principles of this Bill which was introduced into the Scottish Parliament on 21 June 2013.

The Committee has been actively engaged with the Scottish Government and Scottish Parliament since the Judgement in *Cadder v HMA* [2010] [UKSC] 43 and has also responded to a number of Scottish Government Consultation Papers which have been taken forward and which now form the basis of much of the Bill including the Scottish Government Consultation Paper entitled “Reforming Scots Criminal Law and Practice: Carloway Report” in October 2012, “Reforming Scots Criminal Law and Practice: Additional Safeguards following the removal of a requirement for corroboration” in March 2013 and “Reforming Scots Criminal Law and Procedure Reform of Sheriff and Jury Procedure (the Bowen Report)” in March 2013.

With particular reference to the Carloway Report which was published in July 2012, the Committee, while welcoming many of Lord Carloway’s recommendations, a number of which are contained in the Bill which will introduce safeguards concerning vulnerable suspects, child suspects under 16 not being able to waive their rights to legal representation and the reduction of the maximum detention period without charge to 12 hours, remains seriously concerned with regard to the proposal to abolish the requirement for corroboration in criminal proceedings as referred to in Section 57 of the Bill.

The Committee believes that in so doing, whilst also failing to introduce sufficiently strong safeguards in the Bill, will simply result in a contest between two competing statements on oath and result in an unacceptably increased risk of miscarriages of justice.

The Committee believes that the requirement for corroborated evidence is not an antiquated outmoded legal notion but is a fundamental principle on which the Scottish Criminal justice system has been founded. Any proposal to remove this

requirement should be set against the background of a wider review into the Scottish criminal justice system.

While the Committee notes that Section 70 of the Bill amends Section 90 of the Criminal Procedure (Scotland) Act 1995, by changing the number of jurors required to return a verdict of guilty from 8 to 10, this change alone is insufficient to remove the risks created by abolishing corroboration.

The Committee strongly believes that there needs to be full and informed public debate on the prosecution policy and criteria in respect of cases in which there is no corroboration.

The Committee strongly believes that careful consideration requires to be given to the leading and evaluation of identification evidence in trials. Routine reliance on dock identification of an accused person, sometimes years after an alleged offence, is a distinctive feature of the Scottish criminal justice system. In the past, the requirement for corroboration (i.e. identification from another source) has been used to justify this procedure. Without corroboration, continued reliance of dock identification of an accused by a single witness is likely to increase the risk of mistaken identification leading to a miscarriage of justice.

The Committee strongly believes that in cases where there is no corroboration, the trial judge should have the statutory power to withdraw the case from the jury on the basis that the evidence would not entitle a reasonable jury to convict.

Such safeguards have not existed previously precisely because there has always been a requirement for corroboration.

The Committee should like to respond to the Bill as follows:-

PART 1: ARREST AND CUSTODY

CHAPTER 1: ARREST BY POLICE – (Sections 1-6)

The Committee believes the current system is working well and there is no requirement to move to a system of arrest on the basis that a constable has reasonable grounds for suspecting that the person has committed or is committing an offence in terms of Section 1 of the Bill.

CHAPTER 2: CUSTODY

Person not officially accused (Sections 7-13)

The Committee notes that the Bill incorporates Lord Carloway's recommendation of the maximum time the suspect can be held in detention should be 12 hours without being charged or advised that he or she is to be reported to the procurator fiscal.

In respect of section 7, the Committee believes that an officer of the rank of sergeant, rather than the rank of constable, should authorise the keeping of a person in custody.

The Committee notes that the 12 hour limit cannot be extended and indeed, requires to be reviewed after 6 hours in terms of Section 9 of the Bill by an officer who is of the rank of Inspector or above and has not been involved in the investigation in connection with which the person is in police custody all in terms of Section 9(3) of the Bill.

Investigative Liberation (Sections 14-17)

This appears to reflect the position in England and Wales with regard to Police Bail where there have been criticisms regarding the accused not being in a position to make representations regarding bail or conditions.

The Committee is concerned that Investigative Liberation will become the norm rather than the exception and, with particular reference to Section 14 (Release on conditions), is concerned with regard to the period of 28 days referred to in Section 14(1)(c) of the Bill. It is noted from Lord Carloway's Report, that he recommended that the period of liberation on conditions should be limited to a maximum of 28 days. The Committee believes that the period should be any period up to a maximum of 28 days as opposed to a blanket 28 day period as is provided for in the Bill.

The advantage in allowing a shorter period upon which a person can be released from custody is that more onerous conditions of investigative liberation may be accepted on the basis that a lesser period is provided for.

This will also have the advantage of there being fewer applications for a review of conditions as provided for in terms of Section 17 of the Bill.

The Committee notes that Section 17 of the Bill allows a review of conditions before the Sheriff, but suggests that the time period should also be subject to review. Such a review should be undertaken within 48 hours of an application being made, in writing to the Court. Where a review hearing has been fixed, the Crown must provide the accused, or his agent, with full written details of the evidence relating to the case, as at the date of the hearing. Said summary of evidence to be provided to the accused, or his agents, prior to the hearing to review special bail conditions

The Committee highlights the Legal Aid implications for this new procedure of investigative liberation and review and welcomes clarification in this regard.

CHAPTER 4: POLICE INTERVIEW

Rights of Suspects (Sections 23, 24 and 25)

The Committee notes that Lord Carloway's recommendation that the rights to have a solicitor present should apply to a person either in police custody or attending a police station or other place voluntarily for the purposes of being interviewed by a constable is now incorporated in Section 24 of the Bill.

In respect of section 24, the Committee believes the proposed threshold of "in the interests of the investigation" allowing the police to interview a person without a

solicitor is inappropriate. The Committee strongly believes that the threshold should echo the existing statutory test of “in exceptional circumstances”.

The Committee, while welcoming that a person may not consent to being interviewed without having a solicitor present if that person is under 16 years of age, also believes that this should apply to 16 and 17 year olds who should not be permitted to waive their rights to a lawyer at all. The Committee is concerned that many 16 or 17 year olds are vulnerable and require protection during police interview. The Committee does not believe that such protection could be afforded by a parent or relative, its, in some cases, may be ill-equipped for the task.

In respect of section 25, the Committee believes that any person who appears unable to understand sufficiently what is happening or communicate effectively with the police should be provided with support. Support should not be restricted to situations where this is due to mental disorder. The Committee makes the same observation in respect of section 33 of the Bill.

PART 2 CORROBORATION AND STATEMENTS

Corroboration not required (Section 57)

The Committee refers to its general comments and to its comments expressed in previous consultations and maintains that the requirement for corroboration is an essential evidential safeguard. Its purpose is to protect against miscarriages of justice. Other than increasing the minimum jury majority for a guilty verdict, no other safeguards against miscarriage appear to have been considered. The Committee observes that Lord Carloway himself did not consider an increase in the minimum majority to be “necessary or desirable”. The Committee notes that Lord Carloway’s position has been rejected.

In paragraph 7.0.6 of Lord Carloway’s Report, it is stated that independent research was commissioned to assess the impact of corroboration in the progress of criminal cases through the system and that, after thorough consideration of this research alongside all other information, evidence and submissions on the subject, the Review is able to recommend with confidence that the system would be best served by removing the requirement. However, the Report did not consider the alternative safeguards which exist in other jurisdictions which do not have the safeguard of corroboration.

The Committee further notes that the Bill does not take into account police reporting standards nor prosecutorial tests in the absence of the requirement for corroboration.

The Committee further notes that other safeguards incorporated in other jurisdictions where there is no such requirement, such as rules of admissibility of eyewitness identification evidence and the possibility of withdrawal of unreliable evidence by a judge from a jury as safeguards are restricted in Scottish criminal procedure precisely because there is a requirement for corroboration. It is noted that such safeguards have not been considered and do not appear on the face of the bill other than a minor change from a simple to a weighted majority verdict at Section 70. The Committee reiterates its previously stated position that any change to the law in

Scotland requiring corroboration requires to form part of a full scale review of Scottish criminal procedure and should under no circumstances be contemplated in isolation in order to prevent miscarriages of justice from taking place.

As a consequence of the removal of the requirement of corroboration, the Committee remains of the view that cases will be less likely to be thoroughly investigated by procurators fiscal taking into account resources used and that there will be less evidence presented at trial. The Committee believes that proper research should be commissioned into the removal of requirement for corroboration in that any change to the size of a jury majority as is proposed in Section 70 of the Bill may well have resulted in acquittals in cases where there had previously been a conviction on a majority verdict. The Committee believes that research into assisting juries should be part of the overall review of the Scottish criminal justice system. In particular, there is no evidence that a jury of 15 persons is better able to determine questions of guilt or innocence than a jury of 12 persons

The Committee remains seriously concerned that this proposal runs the risk of radically transforming the criminal justice system in Scotland from one which is widely recognised as having a very strong procedural safeguards for the prevention of miscarriages of justice to one with weaker procedural safeguards.

The corroboration rule in Scots Law has consistently been cited by successive Governments as a reason for not introducing into Scots Law safeguards against wrongful conviction which are common in other jurisdictions. Removing the corroboration requirement without, as a minimum, properly reassessing the case for these other safeguards, would be wholly inappropriate.

The Committee further notes that the removal of the requirement for corroboration will expose a large cross section of the public who deal with the individuals on a one-to-one basis, to the possibility of inappropriate prosecutions. What prosecution policy will apply in the case of an individual alleges that he was assaulted by a police officer or a prison officer? Or a pupil alleges that a teacher or social worker acted inappropriately?

The Committee notes that no consideration has been given to the test of sufficiency of evidence at trial and, on the basis that corroboration is an integral part of this test, this proposal to abolish the requirement for corroboration will be problematic given the terms of Section 97D of the Criminal Procedure (Scotland) Act 1995 whereby a judge has no power to direct a jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed in the evidence, could convict on the charge and accordingly, no submission based on that ground or any ground of like effect is to be allowed.

The Committee believes that, on the basis that the requirement for corroboration is to be abolished in terms of Section 57, it should therefore be possible for the trial judge to sustain a submission that no reasonable Jury could convict on the evidence led. The Committee notes that the Scottish Law Commission has previously recommended this (Report on Crown Appeals) Scot Law Com No. 212, 2008)).

Statements by accused (Section 62)

The existing rule was designed to prevent an accused from avoiding giving evidence on oath and being subject to cross-examination by relying instead on exculpatory or mixed statements (containing incriminating and exculpatory material) made earlier. This new provision would allow an accused alleged to have committed a sexual assault to have his position of consent considered without going into the witness box.

PART 3: SOLEMN PROCEDURE (Sections 63-70)

The Scottish Government's Consultation entitled "Reforming Scots Criminal Law and Practice: Reform of Sheriff and Jury Procedure" identified at that time a number of practical issues regarding proposals for reform in this regard.

In particular, and with reference to Section 66 of the Bill (Duty of parties to communicate), the Committee remains concerned regarding the resource implications of this provision for both Crown and Defence. The Committee believes that responsible practitioners will seek out procurators fiscal and vice versa in order to set up discussions with a view to progressing the case in any event without the requirement for legislative change.

With regard to the written record of state of preparation, the Committee notes that in High Court cases the practice which has developed is for each party to individually prepare and email to the court an electronic record of that party's preparation. An electronic copy of the record is also emailed to the other parties in the case.

Accordingly, the Committee believes that there should not be a requirement for a joint written record as referred to in Section 71(c)(2) of the 1995 Act as asserted by Section 66(3) of the Bill. Rather, the requirement should be for an individual written record.

First diets (Section 67)

The Committee believes that, as indicting cases to the first diet will happen every day in Sheriff and Jury Courts in both Glasgow and Edinburgh, consideration must be given to the impact that this proposal will have on "hub" jury courts in rural areas and how this will work in practical terms.

Guilty Verdict (Section 70)

The Committee refers to its general comments and believes that proper research should be carried out under the direction of the Scottish Law Commission in order to determine the number of persons who sit on a modern jury and the majority required for any verdict.

The Committee notes that this was not part of Lord Carloway's remit, and that such research has not been undertaken.

The Committee believes that this research should look at the existing system in Scotland as well as other modern jurisdictions where serious charges are determined by lay juries.

The Committee believes that it may well be the case that 12 jurors rather than the traditional 15 jurors is the appropriate number. The Committee notes that if the number was reduced to 12, as is the case in many modern jurisdictions, then this would result in significant savings in expense to the public purse and a deduction in the inconvenience caused to persons who sit on juries and to the large number of people who are cited to attend for jury duty.

. A reduction in the quorum of all juries throughout Scotland would inevitably result in significant and sustained savings. In a time of pressure on public funding, these savings would free up money for investment in practical and effective measures to assist juries e.g. the one-off investment in electronic tablet devices to view photographs and documents instead of the present practice of providing printed copies for each jury member. In addition, money could be spent on providing juries with paper or electronic copies of the lengthy legal directions given at the end of the trial. At the moment, juries have to listen, try to note down, understand and then apply legal directions to the facts of the case.

The Committee further notes that, in England and Wales, a minimum number of 10 out of 12 jurors is required for a verdict of guilt with a further safeguard that, in the first instance, juries are instructed to seek a unanimous verdict.

On the basis that Scottish juries continue to have 15 members, the Committee suggests that, in line with other modern jurisdictions, consideration should also be given to requiring 12 out of 15 jurors to be persuaded before any verdict is returned. The Committee believes that this provision is, however, only piecemeal reform and believes that proper research into the working and findings of juries in Scotland should be undertaken as soon as possible as there is at present no information available regarding jury verdicts in Scotland. Regard should also be given as to the age of jurors and who should be eligible to sit on a jury as part of overall jury reform. The Committee notes that the Scottish Government consulted in 2008 ("The Modern Scottish Jury in Criminal Trials") Other than the limited provisions at Sections 93-97 of the Criminal Justice and Licensing (Scotland) Act 2010, there has still been little in the way of jury reform.

Separately, the Committee notes that the not proven verdict is not a matter which has been placed on the face of the Bill.

With reference to Lord Carloway's evidence to the Justice Committee on 29 November 2011, he stated that "if we go down the route of examining majority verdicts, we must examine the not proven verdict. If I had gone down that road, there would have been another 150 pages in the Report".

Although the Committee understands that the Scottish Law Commission is to consider the three verdict system, the Committee believes that the research it has previously recommended be undertaken, should also consider the impact of the three verdict system.

In this regard, the Committee refers to its general comments that, rather than piecemeal reform, a wider review into the Scottish Criminal Justice system is necessary.

PART 4: SENTENCING: (Sections 71 to 73)

The Society has no comment to make on the basis that sentencing is a matter of public policy.

PART 5: APPEALS AND SCCRC (Section 82 References by SCCRC)

The Committee welcomes the repeal of Section 194DA of the 1995 Act which removes the High Court's 'gatekeeping role' The Committee believes, however, the SCCRC should be in a position to decide the interests of justice point or otherwise and accordingly the Committee sees no merit in this repeal only to be introduced as an interests of justice test at Section 194B of the 1995 Act as inserted by Section 82(2) of the Bill at the point when the appeal is to be determined.

The Committee does not believe that it can be in the interests of justice for the Appeal Court to allow a conviction based on a miscarriage of justice to stand. Such an approach would undermine the credibility of the court and confidence in the Scottish criminal justice system in which the SCCRC plays a respected and important role.

PART 6: MISCELLANEOUS (Section 86 Use of live television link)

The Committee supports the policy intent of this provision on the basis that the Court should only allow the Hearing to proceed by television link on the basis that it is satisfied that it is not contrary to the interests of justice to do so.

Law Society of Scotland
6 September