INITIAL RESPONSE TO THE CARLOWAY REPORT

November 2011

For further information contact

Maggie Scott QC;

Jodie Blackstock, Director of Criminal and EU Justice Policy

Email: scottish.justice@advocates.org.uk Tel: 0131 260 5845/ 020 7762 6436

JUSTICE, 59 Carter Lane, London EC4V 5AQ Tel: 020 7329 5100
Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists. On Scottish matters it is assisted by its Scottish Advisory Group.

2. The Carloway Review today reported following the Cabinet Secretary for Justice's decision a year ago to review key elements of law and practice as a result of the decision in *Cadder v HM Advocate.* Despite that case concerning access to a lawyer at the very outset of criminal proceedings, emergency legislation passed immediately after judgment was handed down to give effect to the decision, also covered appeals and review by the Scottish Criminal Cases Review Commission (SCCRC). The Carloway review terms of reference were even more wide ranging and considered almost the entire criminal justice procedure. JUSTICE provides an initial response here to what is a very detailed report. Where we have not commented on an aspect of the proposals this should not be taken as acceptance or dismissal of the measure.

3. The consultation period of the review was only eight weeks. This made responding to the detailed consultation paper a difficult task. As such, there are recommendations which we are very pleased to see in the Report which will enable the period of police detention to far better provide for safeguards for suspects. Equally the role of the SCCRC would be largely restored under these proposals. However, the parts of the Report which deal with evidence and appeals in our view demonstrate how little time there was to consider such wide ranging issues. The proposed reforms here would do much to strip away the safeguards recommended for police detention and risk unfair trials once the case is before the courts.

Police Detention and Questioning – Good News

4. We welcome the Report's proposals in respect of its approach to the statutory regulation of arrest and detention which seeks to protect Convention rights and places some emphasis upon liberty. The proposal to replace the current provisions regarding detention for up to 24 hours with detention only for up to 12 hours is an important step that, together with other measures that would ensure detention is strictly necessary (such as to be taken to court within 36 hours after charge), recognises that there is no apparent need to detain for lengthy periods of time in Scotland.

5. We welcome the general recognition that the trial begins in the police station and the accused must have access to legal advice after detention in the police station, not just prior to

questioning. It is important that it is understood by decision makers that significant evidential consequences occur during police detention which impact upon the accused at trial. As such, the recommendation that the caution should ensure a suspect be advised of his right to a solicitor is most important, though we would have welcomed a stronger proposal that secured access to legal advice in all circumstances where the person is to be questioned and is a suspect. This issue is under consideration by the European Court of Human Rights in a pending case which may clarify the position in the near future.

6. We welcome the proposal that statements made to the police that are obtained in breach of Article 6 ECHR should not be admitted in evidence and that this principle should be put in statutory form.

7. We do have some concerns over the proposals that the police could set conditions which curtail freedom of movement when liberating persons from detention. We are not clear of the circumstances where this would need to be exercised. Where it is, review by the courts must be available of restrictions imposed.

EVIDENCE - Bad News

8. Whilst an exclusionary rule is recommended for statements obtained in breach of article 6 ECHR by the police, we are most concerned at the recommendation for the abolition of all other rules for the exclusion of relevant evidence in criminal cases. This seems extraordinary. Under Scots law evidence of statements unfairly obtained in all circumstances are excluded and there is no good reason why this should be changed.

9. In particular, JUSTICE is utterly dismayed at the proposal to abolish corroboration whilst at the same time offer no alternative safeguards – indeed the thrust of this aspect of the Report is *against* the introduction of new safeguards. The Report repudiates safeguards such as:
   - The most basic protection of a warning to juries regarding the quality of evidence;
   - Rules of law enforced by judges controlling the quality of evidence which can be admitted or relied upon for conviction;
   - Unanimous verdicts

10. The rule of corroboration has as the Report states '....lain at the heart of the criminal justice system since time immemorial' and has always been the fundamental safeguard in Scots law against wrongful conviction. This is not just in terms of a rule of sufficiency in the courtroom but in respect of the investigation of crime and in decision making as to the prosecution of alleged crimes. The vast majority of those consulted, including the Law Commission, the whole legal profession and the judiciary, did not support this abolition. There was an

overwhelming call for a more comprehensive and careful review before any such step should be taken. The Report suggests that in respect of the *Cadder* decision:

> the sudden over-ruling of previously well-established and accepted law is not the best way to bring about change in any criminal justice system. It leads to instant reactions rather than measured and thought-through plans for reform.

In our view the same can be said over this proposal to abolish corroboration.

11. Its abolition will have manifest consequences and we consider, not least in the absence of any alternative proposals, a hugely detrimental affect on both persons accused of crimes and on victims, particularly in domestic violence and sexual offences. If as is proposed, corroboration is removed without any alternative safeguards or rules of law being put in place, there is a real and dangerous prospect of criminal trials being conducted absent any rule of law or protection against wrongful conviction. Most modern jurisdictions including the approach of the European Court of Human Rights increasingly recognise the importance of the rule of law – of legal protections – to secure a fair system of criminal justice. The approach of this Report on this issue appears archaic, a position the Review specifically sought to remove from the system. It would return to a pre ECHR, pre common law development, simplistic view that all evidence should be left to the jury.

12. Whilst other comparable jurisdictions do not have a corroboration rule, they instead have a body of rules of law designed to protect against wrongful conviction and to exert control over the quality of evidence upon which a person can be convicted. To take England, Wales and Northern Ireland as an example, their protections include:

- In respect of decisions to prosecute they have the option of a preliminary committal hearing in court to test the quality of evidence;
- Regulation of police investigation and conduct in obtaining and recording evidence – for example in the taking of witness statements and over identification procedures;
- Judges have a clear role in trials to exclude poor quality and prejudicial evidence (s76 and s78 Police and Criminal Evidence Act 1984);
- Unanimous verdicts are required in the first instance;
- Wider grounds for appeal where the verdict is 'unsafe.'

13. It is generally well recognised today, that it is not enough to simply place any evidence before a jury and leave the decision to them. This puts great pressure on juries in trying to assess the quality and weight to be attached to the evidence. We consider whilst both the police and prosecution will aim to present the best case to a jury, over time and under pressure, including financial, time constraints and media pressure, in the absence of any legal requirements, poor quality and unsupported evidence, may simply be relied upon. There is a

potential disincentive under pressure to do no more than present the minimum evidence to a jury rather than to investigate all sources of evidence to ensure the best case, and therefore the correct case, is brought.

14. The results could undermine confidence in the criminal justice system. Victims of crime – particularly in respect of sexual offences – could necessarily be put under additional pressure where their's is the only evidence available for the defence to question. If all the Crown relies upon is the evidence of the complainer, in circumstances which under the corroboration rule would not demonstrate a case sufficient to prosecute, then her credibility and reliability will be the focus of any trial.

Example of Identification Evidence

15. To try to explain the potential dangers of the simple removal of corroboration we would suggest the position over identification evidence provides a good example. It is has been recognised since the 1970s that eyewitness identification evidence carries with it special risks of wrongful conviction. This is because whilst on the one hand due to the way memory works such evidence is notoriously unreliable, yet on the other hand the witness making an identification believes they are telling the truth and they are correctly recalling. As such the witness is often compelling and convincing but in fact wrong. Other jurisdictions have built in safeguards – such as regulation of how this evidence is obtained in ID procedures, quality controls for the admission of such evidence and judicial warnings. In Scotland such safeguards were rejected as unnecessary, because of corroboration. Removal of corroboration will leave the Scottish accused unprotected against such poor quality evidence, particularly in dock identifications and is liable to result in miscarriages of justice.

16. The main justification in the Report for this proposal is that corroboration acts to prevent the prosecution of cases which could result in convictions. We accept that the corroboration rule prevents some cases being taken to trial, but we see this as a protection against prosecution on a poor quality of evidence, both to ensure a fair trial, but also to preserve victims and witnesses from further harm through a futile process. We do not accept that abolishing corroboration will result in convictions. Approaches in other jurisdictions suggest that in the absence of supporting evidence juries are reluctant to convict, for example the conviction rate for rape in England is not much higher than that in Scotland. It would be unfortunate for this Scottish Government to abolish such an important and fundamentally distinctive Scottish feature of our system of justice and we would urge a full scale review before any such step be taken.

Appeals

17. We do not agree with the proposals to introduce stricter time limits and sanctions in appeals. The effect would be to restrict access to the court which is undesirable and unnecessary. In Scotland the appeal rate is very low, with the majority of cases sifted out prior to proceeding to court. There are already time limits and requirements imposed regarding the presentation of appeals. Such rules can only be departed from where the Appeal Court considers it should be allowed. This ensures flexibility and secures a fair procedure.

18. In particular we do not accept that appeals which are lodged late should be required to pass a higher test than any other appeal before they can be heard – namely being required to show that the case would probably succeed. The question which should be addressed in these cases is whether there is a reasonable explanation allowing for the late acceptance of grounds of appeal and whether in the test currently applied it is in the interests of justice to allow the appeal to be heard.

19. Furthermore, we do not agree with the proposal to abolish bills of suspension or advocation. These are procedures which allow the accused to challenge procedural issues before trial where something has gone wrong and is unfair or unlawful. There is no justification for removing such procedures and restricting access to the higher court when the consequences are so profound for a accused.

Scottish Criminal Case Review Commission

20. We welcome the recommendation to remove the current statutory provision imposed by the emergency legislation whereby the appeal court can refuse to accept a reference from the SCCRC. However, we remain of the view that the provision in the statute specifying the requirement for the SCCRC to have regard to the principle of finality is unnecessary and by highlighting this one factor gives it disproportionate weight.

21. Finally we do not comprehend the need for the recommendation that appeals which come before the court by way of a reference from the SCCRC can only succeed where they not only show a miscarriage of justice but also that it is in the interests of justice to grant them. Surely it is always in the interests of justice to allow an appeal where the court is satisfied that there has been a miscarriage of justice?

JUSTICE
November 2011