Briefing on the Carloway Review
May 2011

Background Information

In November 2010, the Justice Secretary Kenny MacAskill asked Lord Carloway to undertake a review 'of Scottish law and practice' following what is known as the Cadder ruling.

Peter Cadder, who was convicted for assault based on evidence obtained before he spoke to his lawyer, made an appeal based on European human rights laws which was upheld. The decision of the UK Supreme Court in the Cadder case led to the Scottish Government introducing emergency legislation to ensure that a suspect has the right to legal advice before being questioned by the police.

The Cadder ruling has had a particular impact on sexual offences. Due to the difficulties in obtaining corroboration in sexual offences cases (because they often happen in private, with no witnesses) the police prior to Cadder were often reliant on admissions from the accused to help them build a case. Since Cadder, defence lawyers seem to be routinely advising their clients to make no comment at all during police interviews. There is 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. Cadder has the potential to make prosecutions in rape cases even more difficult.

Discussion on human rights within the criminal justice system has tended to focus exclusively on the human rights of those accused of crimes. We believe that it is also crucial to consider the human rights of women and men to be protected from rape, and to have access to justice should they experience this devastating crime.

The areas under consideration

The review considers a number of key areas arising from the Cadder ruling, including rights relating to custody and questioning, arrest and detention and questions relating to the length of custody for an accused person. It also considers broader issues relating to sufficiency of evidence, including the requirement for corroboration and whether adverse inference from an accused's silence should be allowed. This briefing paper focuses on corroboration and adverse inference, two issues which have a particular impact in sexual offence cases.

Corroboration

Under Scots law, all crimes require to be proved by corroborated evidence i.e. by a least 2 separate sources of evidence. Due to the nature of sexual crime, particularly rape, there can be significant difficulties in obtaining corroboration. What this means is that the vast majority of rapes never even make it as far as court – figures released by the Scottish Government suggest that only around 10% of rapes reported to the police result in a prosecution. This can have a devastating impact on rape survivors. It also 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.

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, our 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: while some rape victims are visibly distressed following a rape and confide in someone immediately, 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.

For these reasons, there is a serious argument to consider whether the requirement for corroboration should be removed to ensure our justice system is able to respond effectively to sexual crimes. There would still clearly need to be a test applied by the Crown Office as to whether or not there was a reasonable chance of conviction in individual cases, based on the quality of the evidence available. 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.

It is important, however, to be cautious about the impact this 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 not significantly higher than that of 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, for example by allowing adverse inference to be drawn from an accused's silence.

Adverse inference

Since the Cadder ruling, there has been considerable concern about solicitors advising their clients to give 'no comment' responses / interviews. For rape, this means that where previously an accused would admit that intercourse had taken place but claim that the complainer had consented, the police are now frequently getting no information at all. This can result in significant challenges in taking forward a prosecution.

Currently in Scotland many men accused of sexual offences choose not to give evidence in court – this is their right. What it can mean, however, is that jury decision making is not based on a choice between two competing accounts; they only have one account – that of the complainer. This can mean that every aspect of the complainer's behaviour – including her sexual history and parts of her medical records – are under intense scrutiny. It does not seem unreasonable that if an accused is relying on a defence of consent that a jury should be entitled to draw an adverse inference if he has not been willing to say anything at all about why he believed she (or he) consented.

We believe that there needs to be a change in approach in Scotland to adverse inference, including a change to the police caution, to make it clear that an adverse inference may be drawn if the accused does not mention something which they later rely on in court.

Summary

In summary, the position of Rape Crisis Scotland is that the requirement for corroboration should be removed, and that adverse inference in relation to an accused's silence should be permitted. There are broader issues, for example in relation to the not proven verdict, and the use of sexual history and character evidence, which are outwith the scope of this review but which require to be considered.

The issues covered by the review are, however, of significant importance. The review raises fundamental questions regarding how our legal system works in Scotland. The outcome of this review has the potential to have a profound impact on how sexual offences in particular are responded to within our justice system, and we would encourage all organizations and individuals with an interest in this issue to participate in the consultation.

Copies of the consultation document can be found here:
www.carlowayreview.org

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