Introduction

Following on from Lord Carloway’s review of key aspects of Scottish criminal law and practice the Scottish Government issued the Criminal Justice (Scotland) Bill. The Bill covers a wide range of measures however our focus concerns those affecting victims of sexual crime in particular and we have submitted our written evidence accordingly. The deadline for responses is the 30th August 2013.

One of the most significant recommendations from Lord Carloway’s review, which has been incorporated into the Bill, is that the requirement for corroboration in Scots law be abolished. This proposal is very much welcomed by Rape Crisis Scotland, however we are disappointed to note this will not be retrospective, thus denying historical abuse and rape victims increased opportunity for access to justice. The other main aspect of the bill which causes some concern is the increase in the requirement for a jury majority from 8 to 10. Given what we know about public attitudes around sexual crime this change raises questions about its possible impact on the outcome for jury decision making and conviction rates.
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 was already a very low rate of prosecution for rape cases, and following Cadder the level of prosecutions fell even further: in 2010/11 there were 1,131 reported rapes & attempted rapes but only 81 rape & attempted rapes were prosecuted, a drop of 31% from the previous year.

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.

Corroboration

Under Scots law, all crimes require to be proved by corroborated evidence i.e. by a least 2 separate sources of evidence. Scotland is one of the very few legal jurisdictions to retain the requirement for corroboration. This requirement has had a disproportionate impact on crimes experienced primarily (although not exclusively) by women, such as sexual crime and domestic abuse. 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. 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
The 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).

We very much support the Bill’s plan to remove the requirement for corroboration. There will still 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, but with this removal this will be based on the quality rather than the quantity of the evidence available. We do not consider that the removal of the requirement for corroboration will result in significant numbers of prosecutions based on a single source of evidence (in sexual offence cases this would normally be the complainer’s statement). The police and prosecution will be continuing to look for all possible supporting pieces of evidence. 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. Critics of the move to abolish corroboration claim that it would lead to more miscarriages of justice, yet as Lord Carloway points out in his report, there is no evidence that Scotland has a lower occurrence of miscarriage of justice than other countries, despite almost every other jurisdiction having moved away from requiring corroboration. The Crown would still need to prove the crime beyond reasonable doubt – this is the ultimate safeguard against wrongful conviction and one that will remain.

The requirement for corroboration disproportionately affects complainers in sexual offence crimes, the vast majority of which are committed in secrecy and without witnesses. Lord Carloway’s Review was clear in its evidencing of the impact of corroboration on sexual offence case progression. The Review’s research examined 141 sexual offence cases dropped in the period July to December 2010. It concluded that 95 (67%), of those cases would have had a reasonable prospect of conviction without the requirement for corroboration. This is significantly higher than for other serious crimes. Whilst clearly not all of these would have secured a conviction this is explicit evidence that abolishing the requirement for corroboration would result in improved access to justice for victims of sexual crime.

What the Bill does not do however is apply the removal of the need for corroboration retrospectively. This in effect means survivors of historic child sexual abuse or rape will continue to face this barrier to justice and that regardless of the quality and nature of their evidence their case has no chance of being heard. Given that there is a precedent in applying retrospective application in the Double Jeopardy (Scotland) Act 2011 we have urged the Government to review this.

Jury Majority

Rape Crisis Scotland has some concerns about the raising of the majority required for a jury to reach a guilty verdict from a simple majority of 8 to 10 out of 15. Whilst we are aware of the need to ensure adequate safeguards are in place to maintain a fair and robust justice system we are also keenly
aware of the prevalence of prejudicial attitudes and misconceptions around sexual violence and the impact this could have. One of the intentions of this Bill, as we understand it, is about improving access to justice; addressing the considerable barriers for victims of sexual crime and addressing the consistently low conviction rate. One concern we have is that in moving to a higher majority requirement the effect will be a lowering of the conviction rate, given what we know about public perceptions around sexual violence and the likely impact this has on jury decision making.

Research consistently shows that public perceptions are significantly negatively biased and victim blaming, particularly towards women, around a number of key issues in sexual violence cases, such as previous consensual sexual contact, alcohol consumption, the nature of clothing and previous sexual history.

Research carried out by MRUK for the Scottish Government in 2010 found that 23% of people thought a woman was at least partly responsible for rape if she was drunk at the time of the attack, 17% thought that a woman bore some responsibility if she wore revealing clothing, 15% said there should be some burden of responsibility if the woman was flirting and 8 per cent thought rape can be the woman’s fault if she is known to have had many sexual partners.

Juries are made up of members of the public and at least some of them are likely to hold these kinds of attitudes. We have real concerns about what this means for jury decision making in rape cases, and particularly so where a larger majority is required to reach a decision.

Judicial Direction

To assist juries in coming to informed decisions Rape Crisis Scotland have also urged the Government to implement its previously stated commitment to introduce judicial direction in sexual offence cases, by giving factual information on aspects such as delayed disclosure and apparent lack of physical resistance.

Research

Given the extensive research on mock juries’ decision making and the influence of rape myths on this process we have also asked the Government to explore the feasibility of conducting research into the factors influencing the jury’s decision making process in Scotland. Whilst we appreciate the challenges this presents, in terms of addressing fair access to justice this issue merits further consideration.

1 For example BRIT. J. CRIMINOL. (2009) 49, 202 – 219 REACTING TO RAPE Exploring Mock Jurors’ Assessments of Complainant Credibility Louise Ellison and Vanessa E. Munro
Public Attitudes

On a wider note we have asked that the Scottish Government commits to continuing to address & challenge prejudicial public and thus jury attitudes.

Evaluation

Given some of the thrust of the current Bill is to improve access to justice we have also stressed the importance of ensuring some form of evaluation to address any unintended consequences, as appeared to have happened with the Sexual Offences Scotland Act 2002 – see below.

Further Considerations

Not Proven Verdict

Whilst not dealt with within this Bill Rape Crisis Scotland welcomes the commitment of the Scottish Government to review the future of the ‘not proven’ verdict. The not proven verdict is most commonly used in cases of rape and sexual violence. According to the Scottish government statistical bulletin for criminal proceedings 2010-11 the proportion of people receiving a not proven verdict for rape or attempted rape was 26% with sexual assault at 30%, significantly higher than the overall mean of 16%.

Jury members can be notoriously reluctant to convict in rape cases, even in cases where there is significant evidence, and we are concerned that the not proven verdict could contribute to wrongful acquittals.

An argument which has been used in the past for retaining the not proven verdict is that it at least enables complainers to be reassured that the verdict didn’t mean that the jury didn’t believe them. However, a not proven verdict is still an acquittal, and can be just as devastating as a not guilty verdict. Following an article in the Daily Record about the number of men accused of rape who were acquitted by means of the not proven verdict, a number of rape survivors and their families wrote into the paper to tell of the devastating impact this verdict had on their lives (see for example http://www.dailyrecord.co.uk/news/scottish-news/mum-who-endured-double-rape-1393744). We believe that there is no convincing argument for retaining this verdict, and that it’s removal would lead to a less confusing jury decision making process.

Sexual History & Character Evidence

Whilst it is a matter not expressly covered by the Bill Rape Crisis Scotland would like to highlight our continued concern about the use of Sexual History evidence in Sexual offence cases.

The previous consultation document stated that the provisions of the Sexual Offences Scotland Act 2002 relating to sexual history and character evidence “help to ensure that complainers in sexual offence cases cannot be subjected to potentially distressing cross-examination relating
to their personal life or sexual history where this is irrelevant to the charge before the court.”

In 2007, the Scottish Government published an independent examination\(^2\) of the effectiveness of these provisions, which found that rather than restricting the introduction of this type of evidence, the legislation had actually led to its increase:

- **72% of trials featured an application to introduce sexual history or character evidence**
- **Only 7% of these applications were refused**
- **The Crown rarely objected to defence applications to introduce this type of evidence**

We are aware from research that the use of sexual history evidence can have a negative impact both on the experience of the complainer and also on the possible outcome of the case. The research mentioned previously\(^3\) highlights that 15% of the general public believe a woman is at least partly responsible for being raped if she is known to have had many sexual partners.

This evaluation is now 5 years old, and guidance has since been introduced within the Crown Office advocating a ‘robust’ approach to applications to introduce sexual history and character evidence. However, in the absence of any current data about what is happening with the use of this type of evidence, we cannot be confident that this legislation is protecting complainers.

We consider that there is a clear need to commission further research in this area, to enable us to obtain an up to date picture of whether or not the legislation is protecting complainers in the manner which the Scottish Parliament intended when it passed the legislation. In the interim we would ask that clear and accurate data is made available on the use of sexual history evidence as well as medical & sensitive records in sexual crimes cases. Research is clear on these and other factors such as mental health concerns or self harm as influential factors in jurors’ perceptions of witness credibility. Having accurate factual information would allow fuller scrutiny of the court process and a clearer understanding of the influential factors in sexual crime cases outcomes.

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In summary, the position of Rape Crisis Scotland is that we welcome the Bill’s proposed removal of the requirement for corroboration, however we are concerned that this is not retrospective, denying possible access to justice for historical rape and abuse victims. We have some concerns about the increasing of a jury’s majority requirement and the possible unintended outcome for sexual crime cases given what we know about the prevalence of negative public attitudes towards victims of sexual crimes. 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 Bill but which require further consideration.

This Bill raises a number of fundamental issues for the legal system in Scotland. The Bill has the potential to have a significant impact on our justice system’s response to sexual offences in particular and we would encourage all organisations and individuals with an interest in this issue to submit their responses.

Copies of the Bill

Copies of the Bill can be found here:
http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx
Submissions to be returned by the 30th of August to:
CriminalJusticeBill@scottish.parliament.uk

More Information

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