



# BRIEFING

## Corroboration (2012)

**RAPE  
CRISIS  
SCOTLAND**

**Reforming Scots Criminal Law & Practice:  
The Carloway Report  
A Rape Crisis Scotland Briefing  
September 2012**

## **Introduction**

In July 2012, the Scottish Government issued a consultation paper 'Reforming Scots Criminal Law & Practice: The Carloway Report'. The consultation paper seeks views on the Scottish Government's plans to reform the law following on from Lord Carloway's review of key aspects of Scottish criminal law and practice. The deadline for responses is the **5<sup>th</sup> October 2012**.

One of the most significant recommendations from Lord Carloway's review was that the requirement for corroboration in Scots law be abolished. This is a recommendation which Rape Crisis Scotland supports and which, if implemented, could have a significant impact on the prosecution of sexual offences.

## **Background Information**

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 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).

If corroboration is removed, 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, 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. 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.

It is important, however, to be cautious about the impact that removing the corroboration requirement is likely to 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 similar to that in Scotland. Additionally in Scotland, unlike the rest of the UK, we have the not proven verdict: there is a concern that removing the requirement for corroboration might lead to more cases getting to court, but could lead to a corresponding increase in not proven verdicts. Removing corroboration cannot therefore be seen as a panacea which can in itself address the long standing concerns about the ability of the justice system to respond effectively to rape. It could, however, in the context of other measures which need to be considered, make a significant difference.

**Does removing the requirement for corroboration mean that other changes need to be made to the Scottish legal system to ensure protection for those accused of crimes?**

The Scottish Government is seeking views in their consultation on whether additional changes should be made to the criminal justice system. Some critics of Lord Carloway's recommendation that the corroboration requirement be removed have argued that this would necessitate additional changes in the way the criminal justice system works, to provide additional protection to those accused of crimes. The proposal to remove the corroboration requirement has arisen in response to the Cadder ruling, which has created significant problems in how the legal system operates. The Cadder ruling has been described by some commentators as a development which has created an "imbalance" within the justice system – and thereby had a detrimental impact on the ability of crime victims to access justice. However claims that the removal of corroboration (which has the potential to compensate for any such skew and restore some proportion) would necessitate yet further adjustments to recalibrate the system are specious, and risk perpetuating the very difficulties that corroboration's removal was designed to overcome.

### Summary

In summary, the position of Rape Crisis Scotland is that the requirement for corroboration should be removed. There are broader issues, for example in relation to the not proven verdict, and the use of a sexual history and

character evidence and complainers medical records, which are outwith the scope of this consultation but which require to be considered.

This consultation raises fundamental questions for the legal system in Scotland. The outcome of the consultation has the potential to have a profound impact on our justice system's response to sexual offences in particular 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:  
<http://www.scotland.gov.uk/Publications/2012/07/4794>**

**For more information on this briefing, please contact  
Sandy Brindley or Eileen Maitland  
at Rape Crisis Scotland  
Tel: 0141 331 4180 or email: [info@rapecrisisscotland.org.uk](mailto:info@rapecrisisscotland.org.uk)**