

Criminal Law Reform in Scotland

In December 2014, the Scottish Law Commission announced the appointment of two new Commissioners.¹ Neither of the two new appointees has particular expertise in criminal law. This seems likely to bring an end to the relatively constant programme of criminal work which was carried out under the auspices of two previous Commissioners, Patrick Layden and Gerry Maher,² and the Commission announced in February 2015 that it would remove the law of homicide from its programme of work.³

Criminal law has featured significantly in the range of legislation passed by the Scottish Parliament and, given the political salience of crime and justice issues, will almost certainly continue to do so.⁴ Scottish Law Commission reports have been only one source of reform proposals. The purpose of this brief note is to sketch some of the mechanisms which have been used to generate proposals for reform in recent practice, and to highlight some of the difficulties to which they give rise, particularly in the absence of the option of referring an issue to the Commission.

A. CRIMINAL LAW REFORM WITHOUT THE LAW COMMISSION

(a) Internal review

Perhaps the simplest approach for the government to take is to deal with law reform in-house, issuing a consultation paper followed by a Bill in due course. This has the attractions of both relative speed and the absence of any requirement for additional expenditure.

A current example of this approach is the consultation paper *Equally Safe*.⁵ This omnibus paper canvasses a number of different issues, with two proposed new criminal offences being particularly prominent: a specific offence of domestic abuse a new criminal offence to address so called “revenge porn”. This disparate group of measures is presented, somewhat creatively, as having arisen out of a broader Scottish strategy for combatting violence against women and girls.⁶

This is not the place to discuss the merits of these proposals, but the consultation on “non-consensual sharing of private, intimate images” highlights the limitations of the government’s approach here. The research basis for the proposal consists of approximately one page of text referring to a seemingly arbitrary selection of jurisdictions: South Australia, Queensland, Germany, Arizona, Delaware, New Jersey and England and Wales (appearing in that order). In all cases,

¹ Scottish Law Commission, “News: new Commissioners”, 23 Dec 2014, available at <http://www.scotlawcom.gov.uk/news/new-commissioners/>.

² Prior to Maher’s appointment in 2000, the Commission addressed criminal law projects somewhat intermittently: see C H W Gane, “Criminal law reform in Scotland” (1998) 3 SLPQ 101.

³ Scottish Law Commission, *Ninth Programme of Law Reform* (Scot Law Com No 242, 2015) para 1.5.

⁴ For a survey of reforms until 2010, see P R Ferguson, “Criminal law and criminal justice: an exercise in ad hocery”, in E E Sutherland, K E Goodall, G F M Little and F P Davidson (eds), *Law Making and the Scottish Parliament* (2011) 208.

⁵ Scottish Government, *Equally Safe – Reforming the Criminal Law to Address Domestic Abuse and Sexual Offences* (2015).

⁶ At 6. See Scottish Government and COSLA, *Equally Safe: Scotland’s Strategy for Preventing and Eradicating Violence against Women and Girls* (2014).

weblinks are provided for the relevant legislation, not always to authoritative versions. In the case of Germany, the reference is to an English translation of the German *Strafgesetzbuch*.⁷ Unfortunately, the particular section which the consultation paper quotes was deleted and replaced with a different provision in January of this year.⁸ That does not really matter, however, because the discussion of legislation in other jurisdictions is little more than rhetorical in nature, serving simply to show that other jurisdictions do in fact have an offence of this type. Almost nothing is actually drawn from the way in which they have constructed those offences. There is no discussion of any of the policy discussions which led to their creation, the principles which were thought to underpin their creation and scope, any difficulties which have been experienced in their implementation, or relevant scholarly literature of any sort.

The consultation notes a series of questions to be considered in the formulation of any new offence, including whether it should be restricted to images, what type of images (if this is the formulation) should be covered, and the fault element that should be required. The tone is consistently one of caution: if expansive definitions and low thresholds of fault are adopted, then there might be cases which could not be prosecuted. (There is no express acknowledgment of the fact that expansive definitions and low thresholds of fault may lead to people being convicted for behaviour which should not amount to a criminal offence.) Because the consultation paper does not clearly identify what principles should apply in marking out the scope of criminal liability, it is difficult meaningfully to engage with these questions. Identifying the principles which underpin any criminal offence or offences⁹ is no mere academic flourish:¹⁰ it allows us to assess the desirability of proposed formulations of a possible offence. Consultation should be an attempt to refine those principles, not to discover them for the first time.

(b) An investigator and reference group

An alternative approach which has found favour in recent practice is for the government to appoint an individual – often, but not always, a judge – to conduct a review. Examples of this are the Carloway Review of criminal procedure,¹¹ Lord Bonomy’s recently completed *Post-Corroboration Safeguards Review*,¹² and John Scott QC’s review of stop and search.¹³ There is no fixed structure for these reviews, which sometimes identify the reviewer as the chair of a group of individuals with relevant knowledge and experience,¹⁴ and sometimes place the review in their hands personally but with the assistance of a similarly constituted “reference group”.¹⁵

⁷ Available at http://www.gesetze-im-internet.de/englisch_stgb/.

⁸ The provision remains StGB §201a, as amended on 21 January 2015.

⁹ See e.g. the guiding principles identified in Scottish Law Commission, Report on *Rape and Other Sexual Offences* (Scot Law Com No 209, 2007) paras 1.22-1.31.

¹⁰ See O S Kerr, “A theory of law” (2012) 16 Green Bag 2d 111.

¹¹ *The Carloway Review: Report and Recommendations* (2011). Lord Carloway’s own views on law reform are canvassed in his lecture “To ‘mend the lawes, that neids mendment’: a Scottish perspective on lawyers as law reformers”, delivered to the Commonwealth Association of Law Reform Agencies at its conference in Edinburgh in April 2015 and available at <http://www.scotland-judiciary.org.uk/Upload/Documents/LJCCALRAsBiennialConference11April2015.pdf>.

¹² *The Post-corroboration Safeguards Review: Final Report* (2015).

¹³ See <http://www.gov.scot/About/Review/stopandsearch>.

¹⁴ As in the case of the stop and search review, and also the earlier McInnes review of summary justice: *The Summary Justice Review Committee: Report to Ministers* (2004).

¹⁵ As in the case of the Carloway Review and the *Post-Corroboration Safeguards Review*. I was a member of the reference group for the latter review and chaired the accompanying academic expert group. See also Sheriff

In the “reference group” model, the relationship between the investigator and the group appears to be at the discretion of the reviewer. The reviewer may choose to take such soundings from the group as they feel appropriate, but to present their own views alone. When Lord Carloway gave evidence to the Justice Committee regarding his review, he could not answer a question from the convener on which members of his reference group had disagreed with his proposals on corroboration: “we did not have a system whereby the final report was put to the reference group and we noted who was in favour of one part of the report and who was in favour of the other”.¹⁶ In contrast, the Post-Corroboration Safeguards Review’s final report was presented as representing the views of the reference group as a whole, with certain members of the group including dissenting statements on particular points.¹⁷

B. TIMESCALES

One of the unusual features of the Post-Corroboration Safeguards Review was that Lord Bonython chose to commission an academic report to inform its work. Compared to (for example) a Scottish Law Commission report, this was produced in a relatively short timescale, being published within six months.¹⁸ Despite the reference group largely delaying its work until this academic report was available, the Review itself reported within fourteen months of having been established, only two months longer than the year required for the Carloway Review.¹⁹

Scottish Law Commission projects may take somewhat longer: for example, the review of rape and other sexual offences took almost three and a half years from the issue being referred to the Commission to a report being submitted to the Scottish Ministers.²⁰

There are obvious attractions to governments in being able to undertake law reform projects within short timescales. There are also obvious reasons why such attempts might fail. The Expert Group on Corporate Homicide,²¹ which reported within six months, is an example of this: having been told that there was insufficient time or resources for a literature review or research project to be carried out, it produced a report which was entirely unworkable and potentially created considerable difficulties

Principal Bowen’s review of sheriff and jury procedure: E F Bowen, *The Independent Review of Sheriff and Jury Procedure* (2010).

¹⁶ Justice Committee Official Report 24 September 2013, col 3241. Some confusion appears to have been caused by the fact that Lord Carloway’s report used “we” rather than “I” in expressing its recommendations: see *ibid* col 3242 and Justice Committee Official Report 29 November 2011 col 555.

¹⁷ See *The Post-corroboration Safeguards Review* (n 12) paras 2.15, 7.27 and 9.25-9.26.

¹⁸ J Chalmers, F Leverick and A Shaw (eds), *Post-Corroboration Safeguards Review: Report of the Academic Expert Group* (2014).

¹⁹ Lord Carloway commenced work in November 2010 and reported in November 2011: see *The Carloway Review* (n 14) para 1.0.1.

²⁰ Scottish Law Commission, *Report on Rape and Other Sexual Offences* (n 12). See also Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Scot Law Com No 195, 2004) (two years and seven months). Cf Scottish Law Commission, *Report on Age of Criminal Responsibility* (Scot Law Com No 185, 2002) (one year and one month). In November 2007, the Commission received a reference covering a number of different issues of criminal procedure and evidence, resulting in three reports, the third of which was submitted to the Scottish Ministers in April 2012, four years and five months after the reference was made. See Scottish Law Commission, *Report on Similar Fact Evidence and the Moorov Doctrine* (Scot Law Com No 229, 2012) para 1.1.

²¹ Scottish Executive, *Corporate Homicide: Expert Group Report* (2005).

for the Scottish Executive,²² conveniently avoided by a decision that corporate homicide was not, after all, within the competence of the Scottish Parliament.²³

The Independent Advisory Group on Stop and Search has been asked to report within six months. Within two months of its creation, it issued a call for evidence.²⁴ Potential respondents were informed that the group wanted “views, opinions and experiences” but “does not wish to be prescriptive by setting a series of questions for you to answer”. This seems only to put a brave face on the fact that, in such a short timescale, the group is unlikely to have been able to satisfy itself as to what the relevant questions are. It will be challenging – although certainly not impossible – for the group to produce within this timescale an authoritative report which can be used to build a consensus for reform.²⁵

C. CONCLUSION

There are a number of obvious advantages to an issue being considered by the Scottish Law Commission: for one, the Commission can be expected to report on the basis of a programme of consultation which is likely to have gone some way to building a consensus for any changes proposed. One difficulty with the Carloway Review’s proposal to abolish corroboration was that little consensus on the point of corroboration had been achieved, thus miring the Scottish Government in political controversy which led to the need to commission another review (that is, the Post-Corroboration Safeguards Review) and subsequently to remove corroboration entirely from the Criminal Justice (Scotland) Bill.²⁶

The second advantage is that Commission reports will draw on both consultation and extensive research in order to provide considered proposals for change. The other mechanisms canvassed above have sometimes relied heavily on consultation to supplement rather limited research. There is, however, a limit to what consultation can achieve. Consultation exercises may not receive many responses, and it cannot be assumed that consultees will themselves have been able to carry out extensive research or give detailed consideration to the issues involved. Moreover, consultation is most effective when it takes place on the basis of considered suggestions which can be fine-tuned, rather than open-ended and rushed proposals.

The Post-Corroboration Safeguards Review is an example of what can be achieved here. Academic work provided a basis for public consultation and further consideration by the Review which was successful in achieving a high level of consensus across the legal profession and victims’ groups in respect of some controversial and sensitive issues. It is to be hoped that the government gives this model careful consideration when carrying out future reform exercises.

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²² J Chalmers, “Just an expert group that can’t say no: reforming corporate homicide law” (2006) 10 EdinLR 290.

²³ See M Peck, B Brevitt and E Beale, *The Corporate Manslaughter and Corporate Homicide Bill* (House of Commons Library Research Paper 06/46, 2006) 43-44.

²⁴ Available at <http://www.gov.scot/About/Review/stopandsearch/secretariat/callforevidence>

²⁵ The short timescale to which the group is operating means that its report should be available before this note appears in print.

²⁶ See Scottish Parliament Official Report 21 April 2015 cols 10-13.