



Chalmers, J. (2017) Developing Scots criminal law: a shift in responsibility? *Juridical Review*, 2017(1), pp. 33-37.

This is the author's final accepted version.

There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

<http://eprints.gla.ac.uk/138160/>

Deposited on: 16 March 2017

Enlighten – Research publications by members of the University of Glasgow  
<http://eprints.gla.ac.uk>

This is a pre-copyedited, author-produced version of an article accepted for publication in the Juridical Review following peer review. The definitive published version (awaiting publication in the 2017 volume of the Review at the time this version was deposited) will be available online on [Westlaw UK](#) or from [Thomson Reuters DocDel service](#).

## Developing Scots Criminal Law: A Shift in Responsibility?

James Chalmers\*

In 2002, when a group of academics were close to completing an unofficial draft criminal code for Scotland,<sup>1</sup> one commentator remarked that the project sought “to follow the path marked out by other Anglo-American codification initiatives in respect of its political ends: wresting the control over law-making from the judiciary”.<sup>2</sup>

That observation was significant at the time, and more so in retrospect. It might be thought odd that the legislature or government would not naturally be identified as the body in control, but the reality was that the Scottish Executive (as it then was) had demonstrated little interest in substantive criminal law, being willing to leave reform to the courts.<sup>3</sup> Around that time, the High Court had certainly been willing to reshape the law, and radically so. In *Drury v HM Advocate*,<sup>4</sup> the court sought to clarify the law of provocation by redefining the definition of murder in a fashion which it was widely accepted ran risks of legal changes not anticipated by the court.<sup>5</sup> In *Galbraith v HM Advocate (No. 2)*,<sup>6</sup> it recast the partial defence of diminished responsibility, offering a definition notionally grounded in the older Scottish authorities but in fact bearing a striking similarity to the statutory form of the defence found in English law.<sup>7</sup> In *Lord Advocate’s Reference (No 1 of 2001)*,<sup>8</sup> it rewrote the law of rape, holding that the offence was based on the absence of consent on the part of the complainer, rather than the use or threat of force on the part of the accused – the sort of

---

\* University of Glasgow.

<sup>1</sup> Subsequently published by the Scottish Law Commission in 2003, and submitted to the Minister for Justice in July of that year: E Clive, P Ferguson, C Gane and A McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (2003).

<sup>2</sup> L. Farmer, “Enigma: Decoding the Draft Criminal Code” (2002) 7 S.L.P.Q. 68 at 79-80.

<sup>3</sup> J. Chalmers, “How (Not) To Reform the Law of Rape” (2002) 6 Edin. L.R. 388 at 396.

<sup>4</sup> 2001 S.L.T. 1013.

<sup>5</sup> See F. Leverick, “Mistake in Self-Defence After *Drury*” 2002 J.R. 35; M.G.A. Christie, “The Coherence of Scots Criminal Law: Some Aspects of *Drury v. H.M. Advocate*” 2002 J.R. 273.

<sup>6</sup> 2002 J.C. 1.

<sup>7</sup> J. Chalmers, “Abnormality and Anglicisation” (2002) 6 Edin. L.R. 108.

<sup>8</sup> 2002 S.L.T. 466.

fundamental redefinition of a serious offence that might occupy law reform bodies for years in another jurisdiction. In *Webster v Dominick*,<sup>9</sup> it abolished the offence of “shameless indecency”, substituting a new crime of “public indecency” in its place.

These decisions were not some exceptional flurry of activity, but the continuation of a well-established pattern of judicial law reform.<sup>10</sup> Gradually, however, something seems to have changed. The power of the Lord Advocate to seek an authoritative determination from the High Court of a point of law which has arisen in a trial,<sup>11</sup> which led to the law of rape being rewritten, has not been exercised for over a decade.<sup>12</sup> In *Petto v HM Advocate*,<sup>13</sup> faced with a tricky question as to the scope of the law of murder, the High Court largely sidestepped the question, while eschewing any suggestion that all was well in the state of the law:<sup>14</sup>

“In Scotland we have a definitional structure in which the mental element in homicide is defined with the use of terms such as wicked, evil, felonious, depraved and so on, which may impede rather than conduce to analytical accuracy. In recent years, the authors of the draft Criminal Code for Scotland have greatly assisted our thinking on the matter; but we remain burdened by legal principles that were shaped largely in the days of the death penalty, that are inconsistent and confused and are not yet wholly free of doctrines of constructive malice. My own view is that a comprehensive re-examination of the mental element in homicide is long overdue. That is not the sort of exercise that should be done by *ad hoc* decisions of this court in fact-specific appeals. It is pre-eminently an exercise to be carried out by the normal processes of law reform.”

It seems unlikely that a High Court judge might now argue that the court should actively develop the law so as to ensure that it is not “subject to undue influence by overenthusiastic legislators”.<sup>15</sup>

---

<sup>9</sup> 2005 1 J.C. 65.

<sup>10</sup> See C. H. W. Gane, “Criminal Law Reform in Scotland” (1998) 3 S.L.P.Q. 101.

<sup>11</sup> Criminal Procedure (Scotland) Act 1995, s. 123.

<sup>12</sup> The power does not appear to have been exercised since *Lord Advocate’s Reference (No. 1 of 2002)* 2002 S.L.T. 1017 (admissibility of evidence obtained pursuant to a search warrant where police officers had been accompanied by a civilian employee). There are nine reported *References*, beginning with *Lord Advocate’s Reference (No 1 of 1983)* 1984 J.C. 52. The longest gap between the power being used was, in 2002, around six years: it has now been around 15 years since the last reported reference.

<sup>13</sup> 2012 J.C. 105. See C. McDiarmid, “‘Something wicked this way comes’: The *Mens Rea* of Murder in Scots Law” 2012 J.R. 283.

<sup>14</sup> At paras 21-22 per Lord Justice-Clerk Gill.

<sup>15</sup> *McLay v HM Advocate*, 1994 J.C. 159 at 173 per Lord McCluskey. Cf. the comments of the same judge in *Lord Advocate’s Reference (No 1 of 2001)* 2002 S.L.T. 466 at [4] (“unless they can find the existing law to be wrong, as a result of a discernible mistake, [judges] must leave the possible reform of the law to the legislature”).

So what might explain the court's seemingly increased caution? Part of the answer is that the Scottish Parliament has found its voice in criminal law. Although the Parliament was active in reforming criminal procedure from its inception,<sup>16</sup> enthusiasm for criminal law reform was absent. It was notable that, following the controversial trial decision which led to the law of rape being rewritten in *Lord Advocate's Reference (No 1 of 2001)*, the immediate response was for the Lord Advocate to announce a reference to the High Court for the law to be reconsidered, rather than there being any suggestion of law reform via a body such as the Scottish Law Commission.

Gerry Maher's appointment to the Commission in 2000, however, gave that body the opportunity to develop a body of work in criminal law which had previously been absent.<sup>17</sup> Subsequently, when it became clear that the law of sexual offences remained particularly problematic despite the 2001 *Reference* decision, the Scottish Ministers referred the subject to the Commission, ultimately resulting in the Sexual Offences (Scotland) Act 2009.<sup>18</sup> (Referrals to the Commission were to prove an attractive option for the Government in responding to criminal justice controversies once again in 2007, with the acquittal of Angus Sinclair resulting in three different topics being referred to the Commission for review.<sup>19</sup>)

While the 2009 Act remains by some distance the Parliament's most significant innovation in criminal law to date, a more cautious approach by the courts has been accompanied by a greater willingness on the part of Parliament to intervene in the area. So, for example, after the High Court decided in *Harris v HM Advocate (No. 1)*<sup>20</sup> that the offence of breach of the peace required a "public element", it was not long before statutory offences of threatening or abusive behaviour and stalking were created to plug the gaps in the law which this left.<sup>21</sup>

This greater interest on the part of the Scottish Parliament and Government is welcome but not unproblematic. The Scottish Law Commission is now significantly less well-placed to carry out criminal law work, having at present no Commissioner specialising in the area and having adopted project selection criteria which suggest precedence should be given to projects which are suitable for the special Parliamentary law reform procedures (which, in the Scottish Parliament, exclude

---

<sup>16</sup> A point discussed further below.

<sup>17</sup> Starting with the Scottish Law Commission's *Report on the Age of Criminal Responsibility* (Scot Law Com No 185, 2002).

<sup>18</sup> See G. Maher, "Principles and Politics in Law Reform: Sexual Offences in Scots Law" 2013 J.R. 563.

<sup>19</sup> See S. Wortley, "Law Reform After World's End" (2008) 12 Edin. L.R. 293.

<sup>20</sup> 2010 J.C. 245.

<sup>21</sup> Criminal Justice and Licensing (Scotland) Act 2010, ss. 38-39.

issues of criminal law).<sup>22</sup> Law reform may, at best, result from work by an ad hoc independent review<sup>23</sup> – perhaps lacking the resources and time normally available to the Scottish Law Commission – or even be a hurried responses to political pressures, such as the controversial Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.

As noted earlier, the picture has been somewhat different in respect of criminal procedure (and criminal evidence), with the Scottish Executive and Parliament having engaged actively in this area since devolution.<sup>24</sup> Given the largely codified nature of Scottish criminal procedure (and partial codification of evidence law), such interventions did not involve any departure from existing patterns of law reform in the same way as amendment of the substantive criminal law.

What may have changed, however, is a move from relatively managerialist changes, aimed at improving the efficiency with which the criminal justice system processes cases, to a willingness to contemplate more fundamental reform. In a process of law reform which stretches back to the 2008 decision of the European Court of Human Rights in *Salduz v Turkey*,<sup>25</sup> abolition of the corroboration requirement – one of the most distinctive features of the Scottish legal system – is now under serious consideration. The controversy to which that proposal gave rise has not removed that proposal from consideration, but has instead prompted further review of the Scottish jury system – again highly distinctive, given the use of 15-member juries, three verdicts, and the practice of permitting decisions to be reached by a simple majority. Controversy has been postponed for now

---

<sup>22</sup> See J. Chalmers, F. Leverick and S. W. Stark, “The Process of Criminal Evidence Law Reform in Scotland: What Can We Learn?”, in P. Duff and P. R. Ferguson (eds), *Current Developments in Scottish Criminal Evidence Law*, forthcoming.

<sup>23</sup> The most recent such review is the independent review of hate crime legislation, announced in January 2017 and expected to last up to 12 months: see Scottish Government, “Review of Hate Crime Legislation” (news release), 26 January 2017, available at <http://news.gov.scot/news/hate-crime-legislation-review>. That is a rather shorter period than the review which led in England and Wales to the Law Commission’s report *Hate Crime: Should the Current Offences be Extended?* (Law Com No 348, 2014), a project with a rather narrower remit.

<sup>24</sup> See, in particular, the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002; the Criminal Procedure (Amendment) (Scotland) Act 2004 (implementing recommendations from *Improving Practice: The 2002 Review of the Practices and Procedure of the High Court of Justiciary by the Honourable Lord Bonomy* (2002)) and the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (implementing recommendations from *The Summary Justice Committee: Report to Ministers* (2004).

<sup>25</sup> (2009) 49 E.H.R.R. 19. This decision on the right to legal assistance for suspects interviewed by the police led in due course to the decision in *Cadder v HM Advocate* 2011 S.C. (U.K.S.C.) 13 that the absence of such a right in Scotland was contrary to art 6 of the ECHR, and (after such a right had been created by legislation) the *Carloway Review: Report and Recommendations* (2011), which recommended *inter alia* that the corroboration requirement should be abolished.

by the Scottish Government's decision to put reform on hold pending a programme of research into the Scottish jury,<sup>26</sup> but can be expected to resurrect itself after that work is completed.

What remains relatively absent from the development of criminal law and procedure in Scotland, however, is pro-active rather than reactive reform. Particularly in the context of criminal law, reforms have largely been a response to particular court decisions or public controversies, and little attention has been paid to the question of ongoing improvement of the criminal law. (Legislation-scepticism still exists, although it has perhaps shifted from an unwavering faith in the genius of the common law to ill-founded assertions that the Scottish Parliament for some reason cannot legislate well.<sup>27</sup>) The *Draft Criminal Code for Scotland*, which might have been hoped to be the starting point for a debate, has failed to gain any real traction. The Scottish Law Commission had for a time a commitment to reviewing the law of homicide, but this has been suspended.<sup>28</sup> This is not the place for a rehearsal of the debate on codification of the criminal law,<sup>29</sup> but it is reasonable to think that a mature legal system should at least have the capacity to reassess the basis on which it inflicts punishment on its citizens and to identify where reform is required. Developments since devolution provide a basis for optimism about the future improvement of the criminal law of Scotland, but there is still much progress to be made.

---

<sup>26</sup> See J. Chalmers and F. Leverick, "How Should We Go About Jury Research in Scotland?" [2016] Crim L.R. 697.

<sup>27</sup> For critical discussion of such claims, see A. McHarg, "Legislative Quality and the Scottish Parliament" (2017) 21 Edin. L.R. 109.

<sup>28</sup> Scottish Law Commission, *Ninth Programme of Law Reform* (Scot Law Com No 245, 2015) para 1.4.

<sup>29</sup> See P.R. Ferguson, "Codifying Criminal Law (1): A Critique of Scots Common Law" [2004] Crim. L.R. 49; P.R. Ferguson, "Codifying Criminal Law (2): The Scots and English Draft Codes Compared" [2004] Crim. L.R. 105; T. H. Jones, "Towards a Good and Complete Criminal Code for Scotland" (2005) 68 M.L.R. 448.