

Consultation on Scots Law launched today

✖ One of the Scottish law lords, Lord Carloway, is launching a consultation process today on the way that Scots Criminal Law may need to alter further to take account of human rights issues. Some of these were highlighted in the Cadder judgement handed down by the UK Supreme Court. This means that when arrested Scots now have the right to legal representation before being questioned by the police. The ruling has thrown some cases into confusion, and others have had to be deserted.

The Scottish Government passed new emergency legislation to cover the position, but also charged Lord Carloway in October 2010 with the task of reviewing the law. The Scottish Government says that :-“The consultation is intended to be used as a forum for discussion and evidence gathering, and for testing out the variety of options.”

This is what Lord Carloway said at the launch of the consultation today:-

The UK Supreme Court's decision in Cadder and the emergency legislation which followed have brought significant changes to our criminal justice system. They have required major adjustments to the ways in which the police carry out detentions and solicitors provide legal advice. But more than that, they have prompted a re-evaluation of key elements of our system.

As the Cabinet Secretary made clear at the time, the 2010 Act was a short-term solution – it introduced measures that the Scottish Government believed were required to secure the system's compliance with the European Convention. It did not – and did not claim to – address all the issues raised by the Cadder decision. Many questions remain to be answered.

That is why Mr MacAskill asked me in October to undertake a more comprehensive review of the relevant law and practice.

Our initial work in preparing this consultation paper has shown that this is a large and complex area. The Review's Terms of Reference have required that we look at the implications of Cadder and other decisions, with specific reference to the evidential rules relating to corroboration and the suspect's right to silence. That has meant that there has been a great deal to fit in to the document in a short space of time. It has also necessarily meant that there are some connected subjects we have had to exclude. There is always the risk that a consideration of the rules of evidence will suggest consideration of trial procedures in their entirety, including , for example, jury sizes and majority verdicts. These matters may need to be looked at for a variety of reasons, but are beyond the scope of this Review.

One consideration at the forefront of the Review's thinking from the outset has been that this cannot be just an academic exercise in jurisprudence. The subject matter is the criminal justice system in practice, directly affecting the rights of suspects and victims and changing the working practices of the police, lawyers and the courts. We are talking about the practical investigation of crime and what happens when a person is deprived of his/her liberty during that investigation.

That is why I am determined that my recommendations will be practical as well as compliant with the general requirements of the European Convention on Human Rights and the needs of justice more generally. What is needed are clear, effective, efficient and practical rules and procedures which all can understand and follow.

This consultation is therefore essential to glean the benefit of the experience of all those involved in or affected by the

criminal justice system. I have been greatly helped in the preparation of the consultation paper by the Reference Group of leading practitioners and other experts in the field, for which I am very grateful. They have proved to be an invaluable sounding board. I trust that they will continue to be so in the months ahead. I must say, however, that responsibility for the content of this consultation paper and the report to come in the Autumn is entirely mine.

The consultation document contains 11 chapters divided into four main themes:

Key elements of Custody;

Key stages of Custody;

Evidence; and

Appeals.

The aim of the consultation is to stimulate open discussion of the issues raised, rather than to present draft recommendations for response. Each chapter provides an overview of the law and practice in the particular area, and explores some of the possibilities for change. There are 34 questions under the various chapter headings and these will help shape the discussions to come,

I expect that there will be special attention on some topics in particular, such as corroboration and whether there should be any inference from a suspect's silence in answer to questioning. But it is important to consider the functioning of the system as a whole. The document raises questions about the very concepts of detention and arrest, asking if the unique distinction between the two that exists in Scotland is still required. There is an important exploration of the procedures relating to Appeals and the role of the Scottish Criminal Cases Review Commission.

So this is the start of the public consultation process. The deadline for responses is 3 June. In addition to analysing any responses, we will continue to speak to as many

interested parties as we can. We have planned four major workshops – in May – one each in Aberdeen, Edinburgh, Glasgow and Inverness, and the document contains a general invitation to those events. We have a programme of further meetings both here in Scotland and elsewhere to identify the best practice available.

My aim is to publish a report that detailing final recommendations in the Autumn. It will of course be for others to determine what to do with those recommendations – and they will also have to take into account any further decisions of the UK Supreme Court and the European Court. But this Review is a real opportunity to make a major contribution to the further development of a fair and effective criminal justice system and I encourage everyone with an interest to take part.

John Lamont, Scottish Conservative Justice Spokesperson, said:

“This consultation cannot come soon enough as for the past few months we have seen the devastating effect the Cadder ruling had on the Scottish justice system. Our conviction rate is suffering as self-confessed criminals are being allowed to walk free, and it will continue get worse as closed cases are referred back to the High Court for reconsideration.

“Make no mistake, Labour’s decision to incorporate ECHR into the 1998 Scotland Act has been a disaster. In addition to Cadder, it has also given us the slopping out fiasco, cost us millions of pounds in other prisoner compensation claims and prisoners challenging for the right to vote. Frankly, an apology from them would not go amiss.

“We know the SNP and Lib Dems wanted to take ECHR further, which would have had even more profound consequences. Although the situation with Cadder should have been dealt with sooner and caused untold problems, I welcome Lord Carloway’s review as action is needed now.”