

Justice Committee
Criminal Justice (Scotland) Bill
Written submission from Petal

The Case for the Abolition of Corroboration

The case for abolition involves 3 main arguments:

1. The rule, in being difficult to understand, inconsistent and ineffective, is not fit for purpose in the modern Scottish criminal justice system.

2. It is unnecessary because fact-finders can and should be trusted to accurately evaluate the strength, persuasiveness and reliability of evidence free from legal regulation and technical rules, and because there are a range of other protections against unjust convictions, most notably the high standard of proof which 'beyond reasonable doubt' requires.

And, most pertinent to Petal's standpoint as an organisation which supports victims' families through their understanding and experience of our criminal justice system at a time of great trauma and anguish:

3. It is disproportionately prejudicial to the interests of victims, their families, witnesses and the public

1. As the **Carloway Report** notes, the corroboration requirement is "frequently misunderstood by lay persons and lawyers, not least judges", difficult to explain to juries and applied differently by different judges. Moreover, alterations to the rule, such as the development and application of the Moorov doctrine: has further complicated the rule. We suggest that the simplification of jury directions is in the interests of justice, and so the abolition of corroboration is necessary.

Moreover, in addition to complexity, the resulting "interpretations, refinements, exceptions, loopholes and pure 'fiddles'" ensure that "corroboration is not as strong a safeguard against miscarriages of justice as many of its supporters believe".¹ For instance, a study by Duff² points to case law holding that:

- 'corroborating evidence need only be consistent with evidence that needs to be corroborated rather than more consistent with such evidence than with alternative explanations for such evidence'³;
- "where one starts with an emphatic positive identification by one witness, then very little else is required"
- dock identifications can corroborate even when not preceded by an identity parade or even where the witness identified one of the stand-ins;
- distress may corroborate lack of consent in sexual offences although it can be easily feigned;

¹ REFERENCE

² REFERENCE

³ NICOLSON reference

- confessions may be corroborated by special knowledge of the crime, even where that knowledge was not uniquely known by the suspect.

There is no doubt that these examples considerably weaken the corroboration requirement.

2. In response to those who claim abolition poses a threat to civil liberties, as well as the fact there is no evidence for the proposition that corroboration prevents wrongful convictions it is clear that there will and should still be a test against which cases will be judged before they can proceed to court, but it should be one based on qualitative, not quantitative, considerations. Police and prosecutors will continue to seek the best evidence in every criminal case, and fact-finders will be unlikely to convict on the basis of flimsy or unreliable evidence. Abolishing 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 sufficient evidence to give a reasonable chance of conviction.

The protections for suspected and accused persons in Scotland following implementation of the Bill will continue to be substantial - access to legal advice, right to silence, extensive rights of disclosure, the high standard of proof of beyond reasonable doubt (which seems, rather obviously, the greatest protection afforded to an accused person, given that in practice juries are really being asked to assess the quality of witness evidence), the unique and stilted three verdict system, and robust rights of appeal (which are not enjoyed by complainers, victims or their families). As such, we do not believe that the abolition of corroboration will result in an unfair or fundamental unbalancing of the system.

3. As is noted in the Carloway Report, the corroboration rule has its origins in a different era: one in which there was little or no scientific evidence, and which included the presence of capital punishment. It was designed to prevent miscarriages of justice occurring in the form of wrongful convictions. Today, however, as the Report highlights, there is no evidence that corroboration prevents such wrongful convictions. Rather, the rule now serves all too often to actively prevent justice from being done, and from being seen to be done. Potentially meritorious cases are prevented from proceeding to trial on the basis of what is, and is observed by victims, their families, and witnesses as being, a 'technicality'. The Report suggests that but for the corroboration rule, an additional 450 serious cases would have proceeded to trial in Scotland in 2010. Although this does not necessarily mean that these trials would have led to convictions, the victims, their families, and witnesses would have been given their day in court and a chance to see justice being brought to bear on factually guilty people.

In short, the rule can bar prosecutions that would in another legal system seem entirely appropriate, and victims of crime are denied access to the courts simply because the prosecutor could not bring proceedings due to a lack of corroborated evidence. As has been stated elsewhere, that situation is due to variations of fate or providence, which in a modern legal system is not acceptable.⁴ In this we agree with Lord Carloway's position that convictions should not depend on matters of chance, such as whether there is more than one source of evidence, which may in fact be

⁴ REFERENCE

less persuasive than “a single independent or impartial eyewitness, whose character cannot be impugned”.⁵

As an organisation which supports the families of victims of serious crime, and campaigns for changes and improvements to the criminal justice system in their interests, Petal agrees that the present situation, where witnesses and victims see an accused who may in fact be guilty go free due to an outdated technicality, must now change.

JURY AND VERDICT

Although we are of the position that the abolition of corroboration is necessary and that it does not fundamentally alter the balance of the criminal justice system, we recognise that the simple majority required for conviction may need to be revised to adequately protect the accused in solemn trials should abolition happen.

As such, we accept the Bill’s proposal that a guilty verdict can only be returned should 10 out of the 15 jury members agree.

NOT PROVEN VERDICT

Some commentators have suggested that removal of the corroboration requirement would impact upon use of the 'not proven' verdict.⁶ One justification offered for the not proven verdict is that it can be applied where a jury considers that an accused may be guilty but does not think that there is adequate corroboration. As a result some might argue that removal of the requirement for corroboration would render the not proven verdict unnecessary. There is also an argument that has been advanced that, without the requirement for corroboration; the distinction between not proven and not guilty would become much harder to appreciate, running the risk of confusing jurors as to its use.

We at Petal welcome and agree with these arguments. For us, however, the three verdict system has long been a barrier to justice, rather than posing a threat only upon the abolition of corroboration. It provides the defence and the accused with a 2:1 advantage, given that the not proven and not guilty verdicts are of the same effect – acquittal. Petal can find no justification or logic in having three verdicts when two are of the same effect.

Also, it is not clear that juries understand that this same effect occurs, or indeed understand the three verdict system itself. They are not given an explanation of either at trial, and so it is open to their own interpretation. Indeed, in a study by Hope et al, results showed that understanding of the Not Proven verdict was poor, highlighting ‘inadequacies in the nature of judicial instructions relating to this verdict’.⁷ This in itself can only hinder the workings of justice, certainty and consistency.

Furthermore, for victims of crime, their families and also witnesses, the three verdict system presents confusion, disappointment, and frustration. A return of the ‘not proven’ verdict can leave these people bereft of the justice, redress and conclusive

⁵ REFERENCE

⁶ REFERENCE

⁷ Hope, L. et al (2008) A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making

answers they sought from our legal system, given how it is commonly understood as being positioned between the 'guilty' and 'not guilty' verdicts. Such an eventuality can be devastating for the families and loved ones of victims.

As an organisation which supports victims of crime and their loved ones and which has advocacy as a central concern, Petal therefore strongly suggest that the abolition of corroboration in the Criminal Justice (Scotland) Bill should lead to a re-examination of the not proven verdict's place in our legal system. We are firmly of the opinion that a two verdict system should be reinstated in Scotland, be it 'guilty' and 'not guilty' or 'proven' and 'not proven'. It is in the interests of justice and fairness, and legal certainty. Juries should be able to reach their decision of whether they are satisfied beyond reasonable doubt that the accused is guilty/case is proven based not on outdated technical rules of corroboration or the availability of an outdated and manifestly unfair third verdict, but upon the quality of the evidence before them. Moreover, victims' families deserve conclusive answers as to the accused's guilt or innocence.

Petal
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