

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from False Allegations Support Organisation

1. Introduction

This paper aims at providing a response to the consultation on the Criminal Justice (Scotland) Bill issued by the Scottish Government in June 2013, after Lord Carloway's review of key aspects of Scottish criminal law and practice. This paper also discusses a few issues not raised by the Bill but which are worth considering to the end of improving the Scottish criminal justice system.

It is an undeniable fact that false allegations of crime can and do exist. Although admitting that quite often crime figures and statistics are inaccurate and difficult to be collated, the relevant authorities themselves confirm the existence of false allegations.¹ The fact that in some areas, such as rape and domestic violence, the number of people persecuted for perverting the course of justice is significantly smaller than the number of prosecutions is by no means evidence that malicious or misguided allegations are irrelevant, but it might rather indicate the greater difficulty met when persecuting false allegation makers. By the same token, the same figures should not lead to underestimate the impact false allegations might have on the individual concerned and on the system of justice as a whole.

It should also be remembered that the goal of any change in the law should not be to merely increase conviction rates at all costs but rather make sure that only the guilty is punished. Thus, any change in the current law and practice must not skew the balance in favour of the Crown but rather confirm the overriding principle that a person is innocent until proven otherwise.

2. Corroboration

It is our understanding that the Bill recommends the abolishment of corroboration in Scots law.

A number of arguments are put forward against the retention of this principle, such as the increase of bureaucracy, the quality v. quantity argument, the difficulty of the general public to grasp such a concept.

The corroboration principle has however served Scottish law very well over the years mostly avoiding persecution based on petty evidence and inception of numerous and costly trials resulting in no convictions. The selection of cases going to trial needs indeed a filter, which should be as far as possible objective (rather than left to the prosecutor fiscal judgement's and thus subjective) as persecuting any allegations would by contrast obstruct justice, for instance by dramatically increasing the prosecutors and courts' workloads as well as the associated costs.

¹ By way of example see the Crown Prosecution Service Annual Report and Accounts 2011–12 as downloaded from

http://www.cps.gov.uk/publications/docs/cps_annual_report_and_accounts_2012.pdf

Providing for the persecution of single evidence cases is likely to result in trials solely started on the basis of the persecutor's own perception of the credibility and reliability of the complainer, or the likelihood of success. Therefore, a subjective test would be used when determining the quality and sufficiency of evidence.

The public interest is better served if the legal system is just, impartial and efficient and, therefore, corroboration should be retained. By the same token, the argument that corroboration should be abolished in order to balance the system appears faulty because our system is based on the overriding principle of presumption of innocence, and thus the Crown and the defendant are not supposed to be on an equal footing but rather the former should prove the latter guilty beyond any reasonable doubt. The presumption of innocence is indeed a legal instrument to favour the accused based on the legal inference that most people are not criminals.

Furthermore, the fact that the Scot law is unique in providing for corroboration should not be viewed in isolation. In jurisdictions where there is no corroboration, further safeguards are often provided to avoid miscarriage of justice and to ensure that a person is only convicted if found guilty beyond any reasonable doubt. For example, in most European jurisdictions, the appeal stage allows for full reassessments on not only points of laws but also of facts, and the right to appeal is always granted to the accused, as opposed to being subject to a permission by the relevant court. Therefore, the corroboration principle may be better defined or explained but should be retained by the Scottish legal system.

3. Jury Majority and Size

The increase of the number of jurors (from 8 to 10) required to make a guilty verdict as envisaged in the Bill is welcome because it upholds the overriding principle that one must be proven guilty beyond any reasonable doubt in order to be convicted.

Any possible change in the number of jurors needed for a jury must be accompanied by a system of weighted majority because, inter alia, the risk of verdict contaminated by prejudices of individual jurors increases in smaller juries.

Furthermore, it is well known that in some jurisdictions (such as Canada and New Zealand) where the number of jurors is lower than in Scotland, unanimity or at least a qualified majority is always required.

No change in the number of jurors making a jury shall, therefore, be made without careful consideration and implementation of sound measures, which preserve justice.

4. Not proven

It is often said that the Scots system is unique in providing for the "not proven" verdict.

In fact, this is not accurate because similar acquittals verdicts are indeed present in other jurisdictions. For instance, under the Italian Criminal Procedure Code, in addition to the two verdicts that resemble the Scottish not proven and not guilty, three further acquittal verdicts are present, namely that no crime was committed by anyone; that the defendant acted justifiably; and that a procedural technicality requires acquittal.

Furthermore, in the US a number of academic proposals² favouring the introduction of not proven verdicts have been made in the last years. The main reason why some scholars in the US would favour a system which resembles the Scottish one is because they believe the two-verdict system limits the jury's speech. Furthermore, in cases such as rape, often revolving on the credibility of both the accuser and the accused rather than on totally convincing evidence, a not proven verdict would appear particularly helpful because it would allow a jury to acquit the defendant without casting doubts on the honesty or reliability of the victim. The same scholars conclude that consequences of introducing this verdict would amount to more information, more acquittals, and more stigma depending on the case.

Some detractors of the not proven verdict would favour its abolition based on the argument that in sexual related crimes, the number of not proven verdicts is indeed higher compared to other types of offences. However, this information should only be interpreted as reflecting the jury's difficulty in making a decision, particularly in cases where due for example to different gender or cultural interpretations of certain behaviours, it could be extremely complex to draw clear cut conclusions.

The not proven verdict should, therefore, be retained.

5. The confrontation clause under article 6 of the European Human Rights Convention (EHRC)

Article 6 of the EHRC provides that everyone charged with a criminal offence has, inter alia, the right to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

It is our understanding that Scots law already provides for the possibility of defence lawyers to read any witness statements and to obtain pre-recognition statements from the same. However, it is also our understanding that, under Scots law, witness statements cannot be disclosed to the accused, but just provided to their lawyers on the strict understanding that they are to be treated as highly confidential, and they will not be copied to an accused person. The motivation behind this seems to be that they ought to be kept out of the public domain.

This law seems unique across the European member states and poses questions on its compatibility with letter d) of article 6 of the European Human Rights Convention. If the accused has a right to a fair trial, he should be put in the position of being fully aware of the details of the charges against him. Obviously, being able to read a witness statement by oneself or being told of it by a third party can make a difference including in the understanding and interpretation of the same witness statements. Not allowing the defendant to have direct access to witness statements impairs the defendant's confrontation right and does not seem fully justifiable on the basis of the need to keep such statements out of the public domain.

Furthermore, since the prosecutor is likely to have access to any statement, the same right should be granted to the accused.

² 2 See Bray, Samuel (2005). "Not Proven: Introducing a Third Verdict". University of Chicago Law Review 72 (4): 1299–1329, as downloaded from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339222

The right to a fair trial is indeed an essential right in all countries respecting the rule of law and it is worth bearing in mind that the trial rights listed by article 6 of the EHRC are clearly and expressly defined as minimum rights.

6. Directions given by judges to the jury

It is our understanding that some organisations are urging the Government to introduce judicial direction in sexual offence cases. In other words, judges would be required to inform juries that factual information such as delayed disclosure and lack of physical resistance should be disregarded when making a verdict.

It is self-evident that if judges were to lecture juries, this would dramatically affect jurors decisions, and this would undermine one pillar of Scots criminal procedure law: either jurors are trusted to be able to make decisions or they are not.

Jurors should make their decisions without any influence whatsoever and are not supposed to be familiar with the law. This explains why some professionals and categories of people, such as those involved in the judicial/legal/social sectors, are actually considered ineligible to serve as jurors.

The jury is and should be required to make its decision solely based on the evidence provided.

7. Criminal records

It is understood that, under the current laws and procedures, when an allegation of rape or sexual abuse is made, any possible information on the arrest of the accused is retained on police computer records from the moment of the arrest for the rest of the accused's life. The fact that such record won't be removed even if the allegation is not followed by conviction or later proved to be false means that the accused may experience difficulties and restrictions in finding employment or involvement in some voluntary organizations. Furthermore, the keeping of such information can interfere with the right to a family life, as social services interventions dictate access to families (even those whose case has been dropped).

These restrictions contravene UN and EU Human Rights principles and in particular article 8 of the ECHR, which guarantees people the right to "private and family life". Therefore, if the current laws and procedure do not provide for removal of such records, they should be promptly amended or repealed.

It's also worth noting that the European Court of Human Rights (ECtHR) in a recent case stated that "indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable."³

By the same token, the UK judiciary has recently expressed concerns about the impact that disclosure of past offences might have on an individual life, and has

³ See the European Court of Human Rights (ECtHR) ruling in M.M v. the United Kingdom of November 2012, as downloadable from [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114517#{"itemid":\["001-114517"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114517#{). The ECtHR stated inter alia that retention and disclosure of a job applicant's police records to potential employers was incompatible with the European Convention on Human Rights.

pointed out the need for “overdue reforms – properly balancing the aim of public protection with privacy rights”⁴.

If the disclosure of certain past offenses after some time from their occurring looks disproportionate to the judiciary and is also discouraged by some UK legislation, such as the Rehabilitation of Offenders Act 1974, the retention of records on people not convicted but simply investigated or arrested results completely unjustifiable.

Margaret Gardener
FASO (UK) Director
29 August 2013

⁴ See, inter alia, Lord Dyson, the Master of Rolls, statements in the UK Court of Appeal judgment of January 29, 2013, in the case of R v. Chief Constable of Greater Manchester, as reported by The Guardian newspaper and downloadable from <http://www.theguardian.com/law/2013/jan/29/criminal-record-checks-human-rights>