

## Justice Committee

### Criminal Justice (Scotland) Bill

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#### Criminal Justice (Scotland) Bill 2013 – Submission on s.57

##### Summary

1. The essence of the corroboration rule is not two sources of evidence, but instead is confirmation by coincidence, and the urge to seek such confirmation exists in everyday life, to reduce the risk of mishap, which is the rationale of the corroboration rule. It is difficult to see why such confirmation is not required in the criminal courts.
2. The corroboration requirement is flexible and applies in different variations, giving the prosecutor a toolkit of applications to suit the case.
3. The Carloway Review, at least as far as its examination of corroboration is concerned, is a starting point for a wider debate; it is not a sufficient basis alone for legislation abolishing corroboration.
4. There are a number of reform possibilities short of abolition, none of which have been explored (including in the Carloway Review).
5. In conclusion, it would be rash and dangerous to the administration of criminal justice in Scotland to abolish corroboration in the absence of a wider debate.

##### Part A: The corroboration rule in Scotland

1. The starting point for examination of the proposals is consideration of the corroboration rule as it currently applies in Scotland. The corroboration rule in Scotland requires that the *facta probanda* (essential facts) of each criminal charge are proven by corroborated evidence. There are two *facta probanda* for each charge: that a crime was committed and that it was committed by the accused. These are the only two facts which require to be corroborated. In the basic case, there is a main source of evidence (for example the eyewitness account of the victim) and that main source is 'confirmed or supported' by another adminicle of evidence from an independent source (such as the accused's DNA found on the weapon used to commit the crime). A variation on this might be the eyewitness testimony of the victim, supported by the eyewitness testimony of a bystander. The idea is that there are two sources. They may be of the same type (as in the latter example) or of different types (as in the former example). The doctrine, in its traditional form, operates by the identification of one of the pieces of evidence as the main adminicle, which is 'confirmed or supported' by the other piece of evidence. Of course, there may be more than two adminicles, but the minimum requirement is two.
2. Today, the requirement to corroborate might accurately be described as a *de minimis* requirement. This is for two reasons: the technical nature of the rule and variations on its basic (traditional) application. Both are considered later. Before we

do so, we need to consider the essence of corroboration, and in doing so we consider its underlying rationale.

### ***The essence of corroboration in Scotland***

3. This has not changed at all since the time of the institutional writers, where the current concept finds its roots.<sup>1</sup> The content of the doctrine has changed, not its essence. Content is considered below. On essence, the key to corroboration is coincidence or correlation, as demonstrated by confirmation. In order to understand this, we need to consider how confirmation is valued in everyday life. Some examples will demonstrate this. These include: the need to have a four digit code as well as a bank card in order to withdraw money from an ATM; photographic (as opposed to non-photographic) identification (involving an identification card/document of a certain specification, confirmed by the use of an incorporated photograph for comparison purposes); elaborate forms of ID such as passports; special security measures on tickets for events – all involve confirmation of entitlement above and beyond mere possession.

4. The human urge for confirmation does not end there. In everyday life, we seek confirmation of something we strongly suspect to be the case. If we notice someone we think we know across the street, we will make sure that we have not made a mistake before drawing attention to ourselves. We do this by taking a second look or looking for confirmatory clues in the gait, height, clothing, hair or other physical quality of the person we think we recognise.

5. Why does this urge for confirmation exist? The answer is simple. We wish to avoid mishap, to avoid an error. Of course, the presence of confirmation does not guarantee that an error has not been made; a bank card might be stolen in circumstances where the thief has acquired the matching four-digit password; we might mistakenly spot someone who is uncannily similar to someone we know in the street; we could miss an error on the document we are completing; convincing forged passports are available. However, the likelihood of such outcomes is considerably reduced by the use of confirmatory techniques.

6. This brings us to a criminal charge. The possible consequences of guilt are clear and harsh – a criminal record, loss of reputation, loss of employment, imprisonment. It is not difficult to see why the natural, everyday urge for confirmation should apply here too; indeed, why it would be stronger, given the consequences of a conclusion on the question of guilt, when compared with the consequences of lack of confirmation in everyday life.

7. Considered in this way, the essence of corroboration lies in the confirmation provided by coincidence. In this sense, corroboration is not about the number of sources or even the strength of the individual adminicles; it is about the coincidence between them. So, it could be said that a stronger case for guilt arises from the combination of two adminicles of weak evidence, compared to the existence of one adminicle of strong evidence.

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<sup>1</sup> See Hume's discussion of corroboration at Commentaries ii, *Commentaries on the Laws of Scotland Respecting of Crimes* (first edition, 1797) Vol II, Chapter XIII, page 383.

8. Sometimes the essence of the requirement to corroborate is described in numerical terms; two sources are required. This can make the doctrine seem rather technical, artificial or arbitrary. Indeed, often the test is stated to be a quantitative one rather than a qualitative one. However, this is misleading. It suggests that the two are unconnected, that the corroboration requirement must fall into one camp or the other. As we will see later, when considering the Carloway Review's analysis, the requirement for confirmation is both quantitative and qualitative; the quality of the Crown case is measured by whether confirmation exists.

9. This all leads us to consider the rationale for the corroboration rule. It is often said that its justification is that it is better to exonerate the guilty than to convict the innocent. However, there is no need to resort to such general (and perhaps controversial) platitudes, pitting one undesirable outcome against another to determine which is the least desirable. The case for corroboration can be more simply put: the desire to reduce the risk of mishap. It is often said that there are two main risks: that a witness may lie or is mistaken, and so gives inaccurate evidence against the accused. On lying, those who have represented clients in the criminal courts, as well as those who deal with criminal trials<sup>2</sup>, are only too well aware of how witnesses can (and are) motivated to lie by dislike, revenge, jealousy, loyalty, money, love or self-preservation, naming just a few common motives. Some witnesses are good at lying.<sup>3</sup>The honest witness (and it is safe to say that most fall into this category) will be truthful, but can often be mistaken. Crime happens quickly, leading to fleeting glimpses. Add to this the lengthy time period between the event and the trial (compounded in Scotland by the emphasis on dock identification –see later) and one can see how a witness might make an error in identification or in remembering the details of who did what to whom. A further source of mishap is the reliability of scientific evidence of guilt, a prominent source of high profile appeals.

10. The consequences of mishap are clear – someone may be convicted of a crime which he/she did not commit. By requiring a minimum level of confirmation from coincidence, the requirement to corroborate reduces that risk to an acceptable level.

### ***The scope of the corroboration rule in Scotland***

11. Now that we have considered the basic rule and its essence, we need to consider in more detail its content (or scope) before examining how the Carloway Review process handled the doctrine.

#### *The technical nature of corroboration*

12. A number of points of clarification of the concept in its modern form require to be stated. The most fundamental of these is that the Crown case need only be capable of being corroborated. This is the position when the court is considering a no case to answer submission at the end of the Crown case. In order to adjudicate on such a submission, the judge (whether or not sitting with a jury) must pretend that the Crown

<sup>2</sup> See the interesting and practical comments of former sheriff, DJ Cusine in *To corroborate or not to corroborate* 2013 SLT 79.

<sup>3</sup> It has been noted that “humans are surprisingly poor at using witness demeanour to discern dishonesty, not least because the alleged signs of lying, such as sweating and a raised voice, may also indicate nervousness, and this can be suppressed by practised liars.” See Nicolson and Blackie, *Corroboration in Scots Law: “Archaic Rule” or “Invaluable Safeguard”?* *Edin Law Rev*, 17.2 (2013) 152 at 170 and the research cited at footnote 122.

case is perfect: that all witnesses will ultimately be regarded as credible and reliable; that all ambiguities in the evidence will be resolved in favour of the Crown; in short, that the Crown evidence will ultimately be accepted.<sup>4</sup> The reason for this rather artificial consideration is clear: the court cannot yet assess the evidence, since at that stage, only the Crown case has been presented. For the purpose of corroboration, however, what is being considered is the technical, legal requirement of corroboration.

13. The second point to be made is that the adminicle of evidence used to 'confirm or support' the main (or other) piece of evidence need not be, in itself, incriminating, demonstrating how little is required by way of confirmation. The requirement to 'confirm or support' has led the courts in some cases to the conclusion that certain evidence is neutral, and so cannot corroborate.<sup>5</sup> However, as discussed later in considering possible reform, in these cases there is confusion between evidence which is incriminating and evidence which is not but which could be incriminating.

14. The third point is that not all adminicles of evidence need to be corroborated; only the *facta probanda* are caught by this rule. In this sense, then, it is not facts in the ordinary sense that need to be corroborated, but rather it is two parts of the Crown case: crime and identity. For this reason, thinking of corroboration as requiring the confirmation or support of facts, is misleading, making the requirement seem more onerous than it is.

#### *Variations on a theme*

15. So much for the technical nature of corroboration, what of the variations on its basic operation? Not surprisingly, there are many such variations which have developed in order to cater for the multitude of circumstances which can arise from the configuration of evidence available in any particular case. These variations are sometimes considered as exceptions to the corroboration rule; however, this is misleading. They are simply examples of the operation of the basic rule as it applies in certain situations. They all have in common the application of the essence of corroboration: confirmation from coincidence. They also have in common the fact that they do not fit the mould of the traditional application of the corroboration rule: namely the identification of the main source of evidence, confirmed or supported by another source.

16. The main variation of the corroboration rule is the *Moorov* doctrine. The idea here is simple. Rather than taking the confirmation of the main adminicle (almost always the account of the complainer) from other evidence related to the charge (as such confirmation does not exist) the conformation comes from a course of offending, a pattern of conduct. Such a pattern need only consist of two similar offences. The confirmation, then, arises from the similarity between each pair of offences. The similarities need not be between all of the offences on the complaint or indictment; for the purposes of the application of *Moorov*, charges are paired up. Indeed, *Moorov* might apply between two charges in a four charge indictment, the

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<sup>4</sup> The question is whether there is sufficiency in law, and so this requires the judge to assume that the Crown evidence will be accepted: *Williamson v Wither* 1981 SCCR 214.

<sup>5</sup> For examples, see the cases of *Gallagher v HMA* 2000 SCCR 634 and *Gonshaw v HMA* 2004 SCCR 482. In the latter case, of Lord Macfadyen's dissent is hinged on the capability of confirmation or support, and his reasoning is convincing.

other two charges each attracting their own corroborating evidence. This rule has been classified as a kind of ‘similar fact’ evidence rule.

17. Another variation is the rule on ‘special knowledge’ confessions. Confession evidence is very powerful, and so attracts special protection in many jurisdictions. As Lord Justice-Clerk Thomson observed:

“One reason for this rule is to ensure that there is nothing phoney or quixotic about the confession. What is required by way of independent evidence in order to elide such a risk must depend on the facts of the case, and, in particular, the nature and character of the confession and the circumstances in which it is made.”<sup>6</sup>

18. In Scotland, little is required by way of corroboration where there is an admissible confession. Where all that is available is the confession, in order to be sufficient, the confession needs to disclose some knowledge of the crime such that the only reasonable explanation for the suspect having that knowledge is that he was involved in the crime.<sup>7</sup> In fact, it would be unusual for a suspect to confess to a crime in such a way that special knowledge is not displayed. This means that in the vast majority of cases where there is a confession, nothing else will be required.

19. A further significant example of the corroboration rule involves cases categorised as ‘circumstantial only’ cases. These occur where there is no direct (eyewitness or confession) evidence connecting the accused to the crime. Instead, the Crown focuses on indirect evidence which, when taken as a whole, points to the guilt of the accused.<sup>8</sup> There is no requirement in such cases to identify the principal piece of evidence and find independent confirmation of that; indeed, none of the adminicles of evidence relied upon in such cases need be, when taken alone, incriminating at all. It has been made clear that in circumstantial only cases, the concentration is on the indirect evidence taken as a whole, and not on whether the adminicles are, on their own, incriminating.<sup>9</sup> These cases essentially involve an examination of sufficiency in the round, in much the same way as the English prosecutor would examine sufficiency (see below). There is a requirement that the indirect evidence does not all come from one source, and so in this sense, the core of corroboration (confirmation) is retained. Indeed, at its core, these cases demonstrate the value of coincidence since it is this value which compensates for the lack of direct evidence.

20. Where the libel consists of a number of component parts (common in assault and breach of the peace cases) not all parts of the libel require to be corroborated; the rule seems to be that the main part of the libel should be, but that the remainder of the libel can be proven by one source: *Campbell v Vannet*<sup>10</sup>. This means that in a case where there are three alleged actions by the accused (for example, punch, kick

<sup>6</sup> *Sinclair v Clark* 1962 JC 57 at 62.

<sup>7</sup> *Woodland v Hamilton* 1990 SCCR 166; 1990 SLT 565. The explanation as to how the suspects may have innocently acquired the knowledge should not be speculative, for example he may have been a witness may have visited the locus or *via* the media, where there is no evidence that this was the case: see *Beattie v HMA* 2009 JC 144. In other words, there must be some evidential foundation for the alternative explanation.

<sup>8</sup> See, for example, *Little v HMA* 1983 JC 16, *Norval v HMA* 1978 JC 70, and for a case where the evidence was deemed insufficient, see *Broadley v HMA* 2005 SCCR 620.

<sup>9</sup> *Al-Megrahi v HMA* 2002 JC 99; *Scott v HMA* 2008 SCCR 110.

<sup>10</sup> 1998 SCCR 207.

and slap) only one of these elements needs to be corroborated, meaning that two-thirds of the libel (or four fifths, or some other proportion) may be proven on a single source.

21. The corroboration rule applies in a flexible (although unsatisfactory) way where fingerprint or DNA evidence features. The basic rule is this: where the fingerprints or DNA of the accused is found in a place which is not a public place nor a place to which the accused has access as a matter of course, where this place is the scene of the crime, it is presumed that the accused is guilty of that crime, and the Crown will have a sufficient case. The onus then shifts to the accused (not formally, but in practical terms) to offer an innocent explanation as to why his DNA or fingerprints have been deposited at the crime scene.

22. Where the accused's fingerprints or DNA are found at the scene of a crime, a number of assumptions need to be made before the presence of such material can be taken to be an indication that the accused committed the crime, but these assumptions are indeed made. Given the importance of DNA and fingerprint evidence, this evidential shortcut makes many criminal prosecutions much easier.

23. Other more minor variations of the rule allow evidence of the identity of the driver of a vehicle to be corroborated by the status of the suspect as the registered keeper of the vehicle.

24. Taken together with corroboration in its ordinary application (an adminicle from a principle source confirmed or supported by an adminicle from a subsidiary source) these variations represent a toolkit from which the Crown may choose the most convenient tool when seeking to justify corroborative sufficiency. One can readily see that very little in terms of volume is required to compile sufficient corroboration. However, corroboration is not about volume; it is rooted in the value of a basic, *de minimis* level of confirmation.

### **Part B: The Carloway Review ('the Review')**

25. The Carloway Review fails to capture the essence of corroboration. In any event, the Reivew is far too limited in length on corroboration to be adequate as the basis for abolition. It considers corroboration over only 35 single-spaced pages (less than 13,000 words). This includes a three-page description of an empirical study. This is limited treatment of a critical, distinctive and enduring cornerstone of the Scottish criminal system of proof, and is certainly less exhaustive than one would expect as the basis of a case for a recommendation of outright abolition. This contrasts with the rigorous approach to law reform adopted by the Scottish Law Commission ('SLC'). The SLC produces much more detailed reports on what are sometimes less fundamental law reform proposals. For instance, the SLC *Report on Similar Fact Evidence and the Moorov Doctrine*<sup>11</sup> extends to 162 pages, and arguably the reforms suggested there are less far reaching than the abolition of corroboration (they would not apply to every prosecution, by any means). Indeed, it is very surprising (some might even say inexplicable) to note that such a major reform of the law is being carried out without a reference to the SLC, especially when one considers the remit of the SLC; its task is to "recommend reforms that improve, simplify and update the law of Scotland" and it offers the Government "independent

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<sup>11</sup> Scot Law Com No 229, May 2012.

advice on law reform”.<sup>12</sup> The work carried out by the Review team is a valuable starting point for what should be a much wider debate about the law of evidence in criminal cases in Scotland. Further, it is clear from the Reference Group views (as minuted and published) and the views expressed both during the Review’s consultations and the Governments consultation that there is very little appetite for reform as a result of the Carloway Review’s process (even among those who support reform or might support abolition).

26. A further limitation of the Review is its failure to fully consider the wider legal context of abolition, such as the SLC’s proposals on previous conviction/prior conduct relevancy, the weaker tenor of the ‘beyond reasonable doubt’ directions in England and Wales; the discretion to prosecute as it operates in other jurisdictions compared with in Scotland, and Scotland’s uniquely unusual liberal attitude to the admissibility of the internationally discredited dock identification process. Indeed, the rules on identification sufficiency generally have been seriously weakened over recent years. All of these points are of considerable importance, to avoid a situation where Scots Law is made more vulnerable than other systems (such as England and Wales) in the event of corroboration abolition; it will arguably be left in a weaker state, with a greater risk of miscarriage of justice than at present and than exists in other systems.

27. The Review’s comparative discussion is flawed too, failing to take account of French Law which arguably carries a requirement to corroborate (Federal Code of Criminal Procedure Article 80-1 requiring ‘strong or concordant evidence’). There are other corroboration requirements, such as in the US in relation to confessions, which are not considered by the Review, and other corroboration requirements exist elsewhere. In the absence of a proper survey of corroboration requirements internationally, there is a real danger that the Government will proceed on an incomplete (and therefore inadequate) survey of the global position. When one considers the wider context factors in those systems (as described above, such as standard of proof and other evidential rules) there is a real risk that the Government will make Scots Law weaker than in many other systems.

28. Further, there is little discussion of reform of the law of corroboration in the Review – the choice seems to be all or nothing. It is not clear why this is so. Some possible reform options are discussed below.

29. The empirical research in the Review is limited and of little use. It is aimed at gathering evidence of the impact of corroboration, when such evidence is simply not available reliably, and there are several obvious flaws in the research methodology. The impact of the empirical research is, therefore, overstated by the Review.

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<sup>12</sup> These comments are on the “About us” page of the SLC’s website: <http://www.scotlawcom.gov.uk/about-us/>. See also s.3(1)(e) of the Commission’s founding legislation, the Law Commissions Act 1965, which provides as one of the functions of the Commission: “to provide advice and information to government departments and other authorities or bodies concerned at the instance of the Government of the United Kingdom or the Scottish Administration with proposals for the reform or amendment of any branch of the law.”

## Part C: Possible reform of the corroboration requirement

### Option 1: retention with some reforms

30. There are some aspects of the current corroboration requirement which are problematic, and could be reformed by legislation:

(1) the requirement of corroboration of *mens rea* could be removed. This has caused some considerable confusion in the law, and even recently has had to be considered by the High Court.<sup>13</sup>

(2) the definition of corroboration could be enshrined in statute, indicating that corroborative evidence is evidence which is capable of supporting or confirming an admixture of incriminating evidence, and includes evidence which may otherwise be considered neutral. This would prevent acquittals in cases where the evidence might be regarded as neutral, when in fact it could also be regarded as being capable of providing an independent check on the principal source.<sup>14</sup>

(3) the ability of the jury to consider whether a legally sufficient case has been presented could be removed; currently, the accused may make a submission of no case to answer following the close of the Crown case, and, in the event that this fails, can still argue that the accused should be acquitted due to lack of corroboration. Where a submission of no case to answer is not made, or is made and rejected, the accused should not be able to argue legal insufficiency (around corroboration or for any other reason) before the jury. This is consistent with the notion that corroboration is about the capability of certain evidence to support or confirm other evidence; the actuality need not be instrumental. There would remain a right of appeal against the refusal of a submission. This reform would mean that the only test which the jury would need to consider is the 'beyond reasonable doubt' standard. This would mean that the jury could still convict on uncorroborated evidence (for example if there are two eyewitnesses and one is believed and the other is disbelieved) but the Crown would still require to present (by the close of its case) evidence such that a corroborated case is possible. In other words, corroboration would be limited to being a pure sufficiency barrier, and would not limit the jury's discretion.

(4) The reform recently suggested by the SLC (the retention of *Moorov* but absent the requirement for evidence of a course of conduct) could be introduced, making proof in *Moorov* cases easier.

(5) On corroboration by distress, considered by the Review,<sup>15</sup> it would seem that this is capable of corroborating the complainer's evidence, and should be permitted to do so (not just to corroborate lack of consent, as is currently the case). The source of the evidence of distress is not the complainer but is the witness who perceives it (the idea that the source is the complainer is flawed,

<sup>13</sup> *Adamson v HMA* 2012 JC 27.

<sup>14</sup> See the cases of *Gallagher v HMA* 2000 SCCR 634 and *Gonshaw v HMA* 2004 SCCR 482. In the latter case, the dissenting opinion of Lord Macfadyen is very persuasive.

<sup>15</sup> Para 7.2.21.

since the evidence is an observation of the condition of another, not the distress itself). This would make conviction in cases of sexual assault easier;

(6) The requirement that the gathering of a confession (and of fingerprint and DNA evidence, if such a rule exists) by two witnesses should be abolished, since, as argued above, this is not a requirement born out of a proper application of the rule requiring the corroboration of the *facta probanda*.

31. Taking together these reforms, many of the current problems with corroboration can be ironed out, leaving the requirement in place offering clear, consistently applied and a minimum level of protection against unfair conviction.

### **Option 2: abolition for only certain crimes**

32. One of the concerns in modern criminal cases in Scotland is the low conviction rate in rape cases, and this seems to have heavily influenced the Scottish Government's desire to abolish the corroboration requirement.<sup>16</sup> The requirement for corroboration in such cases may deter victims from reporting the crime, especially where there is a perception that conviction is more difficult, and can lead to less convictions where cases are prosecuted.<sup>17</sup> The abolition for sexual crimes (as defined in s.288C of the 1995 Criminal Procedure (Scotland) Act) would be simple to legislate on, and could be justified on the basis that such crimes are normally committed in private. There is a precedent for different evidential rules applying to sexual crimes: see ss.274-275A of the 1995 Act on the posing of sexual history questions and the effect that granting an application to ask these has on the exposure of evidence of the accused's previous sexual offending.<sup>18</sup>

### **Option 3: retention for only certain crimes**

33. Corroboration could be required in only the most serious charges (for crimes which could be statutorily defined) and abolished for all other charges. In England, the corroboration requirement is retained for only certain crimes, as the Review

<sup>16</sup> See the Scottish Government's Policy Memorandum to the Criminal Justice (Scotland) Bill at paragraph 136, available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx>

<sup>17</sup> Some commentators have highlighted the fact that prosecutions for sexual assault often fail even in the presence of corroboration since they hinge largely on credibility and reliability issues mainly around the question of consent. The other flaw in the sexual prosecutions argument is that in the absence of a corroboration requirement, more victims of sexual crimes will require to give evidence in a 'complainers' word against the accused's' context, leading to more concentration on the complainers' credibility and character than is the case currently: see Nicolson and Blackie, *Corroboration in Scots Law: "Archaic Rule" or "Invaluable Safeguard"?* The Edinburgh Law Review, 17.2 (2013) 152 at 165-166. For a detailed discussion of this issue as one of the possible unintended consequences of the abolition of corroboration, see Cairns. I., *Does the Abolition of Corroboration in Scotland Hold Promise for Victims of Gender-Based Crimes? Some Feminist Insights* [2013] Crim L R 640 at 651-652.

<sup>18</sup> This reform is supported by Professors Raitt and Ferguson but in cases where the accused is known to the complainer and so identification is not in issue, and where the issue is whether or not consent was given – see *A Clear and Coherent Package of Reforms? The Scottish Government Consultation Paper on the Carloway Report* [2012] Crim LR 909 at page 924.

notes.<sup>19</sup> In Scotland, these crimes could be the most serious ones, defined by name or maximum sentence.<sup>20</sup>

34. It would be possible to combine options 2 and 3: a corroboration requirement for the most serious offences, but abolition of this requirement for all sexual offences.

#### **Option 4: a new test**

35. A more flexible option would be to define the requirement to corroborate according to the reasonable availability of corroborative evidence. The requirement could be to corroborate an incriminating admixture of evidence only where such evidence is 'reasonably available'.<sup>21</sup> Reasonable availability could be statutorily defined with reference to a number of factors: the seriousness of the crime, the impact of the crime on the victim, and the reasonable expenditure of public funds. This would mean that where there is no corroborative evidence which is reasonably available, an uncorroborated case would be sufficient. Examples of areas where disputes might emerge would include: whether DNA testing should have been carried out or whether a more extensive search for a missing witness should have been undertaken.

36. This option would lead to case law on the question of whether 'reasonable availability' exists in any particular case, but this would be a distinctive and innovative approach which would protect against the danger of complacency in the face of a complete abolition of the corroboration requirement. Options 2 and 3 would not, then, apply, since there would be no need to define the requirement by reference to crime-type or severity. The reforms suggested under option 1 could still (with any other reforms) be enacted.

37. Option 4 would lead to the retention of a balance between the legitimate protection of the accused's rights and the effective prosecution of crime, especially given the more weakened state of the corroboration requirement if reformed from its current position.

#### **Concluding comments**

38. It seems ironic that corroboration is being abolished now, at a time when the detection and prosecution of crime is easier than it has ever been<sup>22</sup>, given the variations of corroboration coupled with the increase in technological and scientific evidence gathering and presentation techniques. The purpose of the current rule on corroboration is to provide for an independent check against the principal source of

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<sup>19</sup> Review Report, para 7.2.24.

<sup>20</sup> Gordon suggests a possible variant which would be to abolish the requirement for trivial offences, which already happens to some extent (the example he refers to is the Road Traffic Offenders Act 1988, s. 21): Gordon GH, 'At the Mouth of Two Witnesses': *Some Comments on Corroboration in Justice and Crime – Essays in Honour of Lord Emslie Hunter*, RF (ed), (1993) 33 at 37.

<sup>21</sup> Gordon hints at a kind of availability test defined by crime-type when he says: "One can take the view that in some cases corroboration is so difficult to obtain, and the type of single witness likely to be called by the Crown so reliable, that the requirement can be dispensed with." Gordon GH, 'At the Mouth of Two Witnesses': *Some Comments on Corroboration in Justice and Crime – Essays in Honour of Lord Emslie Hunter*, RF (ed), (1993) 33 at 37.

<sup>22</sup> This is due to advances in science and technology such as CCTV and DNA – see this point discussed in Thomson, D.J.C., *A defence of corroboration in criminal law* 2012 SLT 7 at 7.

evidence. As has been recently stated: "Witnesses lie. They can be mistaken."<sup>23</sup> In abolishing a concept designed to counter the possible ill effects of these undeniable observations, carefully developed and adapted over hundreds of years, the Scottish Government has demonstrated its preference for radical change in haste (and against the tide of powerful opinion) over sober, careful law reform debate. I hope there is still time to have that debate and that the current proposal in s.57 of the Bill is abandoned, at least until that debate has been concluded.

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<sup>23</sup> See Professors Raitt and Ferguson *A Clear and Coherent Package of Reforms? The Scottish Government Consultation Paper on the Carloway Report* [2012] Crim LR 909 at page 917.