

## Justice Committee

### Criminal Justice (Scotland) Bill

#### Supplementary written submission from the Crown Office and Procurator Fiscal Service

In anticipation of the Lord Advocate and Catriona Dalrymple, Head of Policy's appearance at the Justice Committee on 20 November 2013, COPFS considered it would be helpful to provide further information about the Crown's position on the abolition of the requirement for corroboration.

#### Introduction

1. COPFS support the abolition of the requirement for corroboration and welcome the terms of s57 of the Criminal Justice (Scotland) Bill.

2. The technical requirement for corroboration has proved a barrier to justice for victims in many cases which would be prosecuted in most other jurisdictions in the world, a fact recognised by Lord Carloway in his report.

3. As stated at paragraph 23 of our written evidence to the Justice Committee dated 12 September 2013, COPFS consider that this provision will allow proceedings to be raised in a number of cases where at present the Crown cannot proceed due to a technical lack of corroboration but where otherwise the available evidence is of high quality and supports the victim's version of events. In particular this provision will allow us to consider cases which arise from areas of law which currently disadvantage certain groups of victims principally women and children purely due to the nature of the offences committed against them such as domestic abuse or sexual crime.

4. It is important to be clear at the outset that the abolition of the requirement for corroboration is not about improving detection or conviction rates. It is about improving access to justice for victims of crime. The comments of the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 Can CC 273 at 270 are highly pertinent:-

"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime."

5. It is also vitally important to remember that it is the legal and technical requirement for corroboration which it is proposed to abolish, not the concept of corroboration itself. In many cases corroborative evidence as we currently understand it will be available - that will not change.

6. The abolition of the requirement for corroboration will not diminish the necessity of professional and thorough investigations by the police under the direction of the Lord Advocate. In all cases police and prosecutors will seek out

evidence which supports the credibility of the allegation of the commission of a crime.

### **What is corroboration in law?**

7. In order to prove a crime in the law of Scotland the Crown must lead evidence from 2 independent sources of the essential facts. These are: that a crime has been committed; and that the accused committed the crime. However over the years what the law regards as corroboration has significantly altered from its original form. Another area in which the courts have developed the concept of corroboration in the legal context is the doctrine of mutual corroboration. This is known as the “Moorov doctrine”, which provides that where the accused has carried out a series of offences and there is only one witness to each of these offences, corroboration of each of the offences can be found in the fact that he or she behaved in a similar manner to another victim. There is only one witness to each crime. This method of corroboration is particularly used in the proof of sexual cases.

8. Dictionary definitions of “corroborate” include “to make strong” or “to strengthen”; “to confirm”; “to support with other evidence”; and “to make more certain”. These definitions and explanations of what constitutes corroboration appear straightforward to apply. Yet in Scotland, “corroborate” has come to have a narrow technical meaning, as acknowledged by Professors Chalmers and Leverick in their recent article<sup>1</sup>.

“The Scottish law of corroboration has become technical and highly complex, and cannot simply be described as a ‘two-witness’ rule”

9. Scotland finds itself in an isolated position in its continuing requirement for corroboration. This requirement is not found in other jurisdictions. Notably it is not required in supranational courts such as the International Criminal Court<sup>2</sup>. Its rules of procedure and evidence state:

“..... a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.”

10. Corroboration as a legal principle in Scots law is different from the application of evidence which supports the credibility of the allegation. Support can be found in evidence that does not at present amount to the legal definition of corroboration, but is none the less highly persuasive.

11. *Three recent appeal cases demonstrate the uncertainty of what amounts to corroboration in Scotland. The case of HMA v Mair [2013] HCJAC 89 related to a*

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<sup>1</sup> “Substantial and radical change’: a new dawn for Scottish criminal procedure?” (2012) 75 Modern Law Review 837,

<sup>2</sup> International Criminal Court, Rules of Procedure and Evidence, U.N.Doc. PCNICC/2000/1/Add.1 (2000). Chapter 4. Provisions relating to various stages of the proceedings: Section I. Evidence, Rule 63.4

*charge of murder; HMA v Hutchison [2013] HCJAC 91 and Mutebi v HMA [2013] HCJAC 142 to allegations of rape. All three cases proceeded to trial in the High Court and in all three cases the defence made a “no case to answer” submission at the end of the Crown case. It was argued that the Crown had failed to lead sufficient that is corroborated evidence<sup>3</sup> of the crime charged. In the cases of Mair and Hutchison, the High Court judges hearing the trials agreed with the defence that there was insufficient evidence and stopped the prosecution after the Crown case. The Crown appealed these decisions. In both cases the Appeal court, consisting of three other High Court judges, upheld the Crown appeals, disagreeing with the trial judges and deciding that there was in fact corroborated evidence in both cases. Conversely in Mutebi v HMA, the High court judge ruled that there was corroborated evidence and refused the defence submission. The case was determined by the jury who found him guilty. The defence appealed the conviction. The three appeal court judges decided that the trial judge had erred in concluding that there had been corroborated evidence. The appeal was allowed and Mutebi’s conviction quashed. It is therefore clear that there are disagreements and misunderstandings as to what amounts to corroborated evidence even at the highest levels of our legal system.*

12. *Another area of complexity is the treatment of evidence of a victim’s distress. It can have differing evidential weight depending on the circumstances of the crime it relates to. So the evidential significance of distress of the victim of an assault and theft may be regarded differently to that of the distress of a rape victim. And even in cases of rape, the evidential weight of distress will be different in cases of a rape where force was used to those of non-forcible rape such as where the victim was asleep or intoxicated.*

13. *These examples amply illustrate that the technical requirements of corroboration have resulted in a complicated set of legal rules which can often be difficult to apply and for victims to understand.*

14. *It may be of assistance to look at a number of areas to give some further information on how the abolition of the requirement for corroboration may impact on COPFS and the justice system as a whole.*

### **Test for prosecution**

15. The abolition of the requirement for corroboration will require the introduction of a new test for prosecution. The proposed test would, as at present, have two stages, namely an evidential test and a public interest test. However it is proposed that the evidential test will be in different terms to our current test which is largely based on assessment of the quantity of evidence. Under the new test the prosecutor will have to make the following assessments:-

- a. a quantitative assessment– is there sufficient evidence of the essential facts that a crime took place and the accused was the perpetrator?

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<sup>3</sup> A “No case to answer” submission is not based on the quality of the evidence, only on the quantity and is made when the defence does not think the Crown have lead corroborated evidence of the crime charged.

- b. a qualitative assessment – is the available evidence admissible, credible and reliable?
- c. on the basis of the evidence, is there a reasonable prospect of conviction in that it is more likely than not that the court would find the case proved beyond reasonable doubt?

16. Only if a case meets the evidential test, will the prosecutor consider what, if any action, to take in the public interest. This aspect of the test will not change and public interest considerations will remain as at present.

17. The proposed new test focuses on the credibility of the allegation and the quality of evidence which supports that allegation. The evidence must be sufficient to allow a reasonable prospect of conviction.

18. We consider *the application of the test* will allow proceedings to be raised in a number of cases where at present the Crown cannot proceed due to a technical lack of corroboration for what are credible allegations where there is compelling supportive evidence. In particular this provision will allow us to consider cases in which some victims are disadvantaged purely due to the nature of the offences committed against them.

19. This test will be published as part of the Prosecution Code which will be publically available and which will give further guidance on the way this test will be applied.

### **Supporting evidence**

20. We have noted the concerns expressed by many commentators that this will allow the Crown to raise cases on the evidence of a “single witness” or “one witness” cases. Such terms are unhelpful and can misrepresent the evidential position in a case. The removal of the requirement for corroboration will not extinguish or even reduce the requirement for the police and prosecutors to thoroughly explore all reasonable investigative avenues.

21. It is wrong to suggest that the abolition of the requirement for corroboration will result in sloppy police investigation or poor prosecutorial analysis. The police and COPFS are professional organisations which have duties to investigate crime which are independent of the evidential basis of our decision making.

22. It is wrong to suggest that the Crown would be content to attempt to convince a court beyond reasonable doubt at trial on the basis of the account of one person which had not been investigated further or where no attempt had even been made to obtain evidence without supporting evidence. To do so demonstrates a complete misunderstanding of the ethos and standards of COPFS. The Crown will always look for supporting evidence in every case.

## Case examples

23. Case examples can be found at Annex A. We consider that these examples could meet the new prosecution test should the requirement for corroboration be abolished. These examples are from real cases which were marked for no proceedings due to insufficient corroborated evidence and accordingly the perpetrator was not prosecuted. In each example there is evidence which supports the credibility of the allegation and is of such quality as to give a reasonable prospect of conviction. The cases have been anonymised and specific details changed to protect the parties.

## Sexual offences

24. Sex offenders do not wait until there is someone about before committing a crime, rather they do the opposite. They will wait until the victim is isolated and alone, when there is no-one and nothing to corroborate the victim's account. By their very nature sexual offences are committed in private when there is no-one else around. As a society we find ourselves unable to prosecute many such crimes, as the supporting evidence does not amount to corroboration but is highly persuasive as outlined in the examples. This is one reason why COPFS supports the abolition of the requirement for corroboration

## Domestic abuse

25. Domestic abuse often occurs behind closed doors where there are no other witnesses. In such circumstances, it is often the case that there is a lack of corroborative evidence. The domestic abuse examples at annex A demonstrate that in many cases of domestic abuse there is evidence which goes to support the credibility of the allegation made and so makes access to justice possible.

26. Each of these crimes deserves to be prosecuted. Each victim deserves access to justice. Each accused person deserves to be punished for their behaviour. In each of these scenarios, COPFS were unable to take action due to the technical requirement for corroborated evidence. In each case, there is sufficient quality and quantity of evidence to put before a jury. In each case, we assess there is a reasonable prospect of conviction. It should properly be for the judge or jury to consider the facts and whether they point to guilt.

## Effective criminal sanctions

27. *As a modern, 21<sup>st</sup> century society, Scotland must ensure that its criminal justice system is human rights compliant not only for suspects and accused but also for victims and witnesses, a fact that Lord Carloway recognised in his report. The importance of a state having effective criminal sanctions has been repeatedly stressed by the European Court of Human Rights<sup>4</sup>.*

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<sup>4</sup> ECtHR Report "Child sexual abuse and child pornography in the court's case-law" June 2011; M.C. v Bulgaria, Application no. 39272/98 - (2005) 40 E.H.R.R. 20 at paragraph 149

“The Court has found a positive duty on the part of the Contracting states to protect their inhabitants in a range of cases. In such cases, the state is not the primary violator of rights (i.e. it is not the state that beats, rapes, enslaves etc.), but rather the state has inadequate structures in place to prevent these kinds of abuse. This can mean that the state does not provide adequate criminal sanctions for actions that violate Convention rights.”

28. *This question of whether Scotland provides effective criminal sanctions has recently been commented on by the United Nations Committee on the Elimination of Discrimination against Women in their report dated 23 July 2013 at paragraph 26:-*

“The Committee is concerned that, following the findings of the Carloway Review of criminal law and practice in Scotland, the burdensome requirements of corroboration impede the prosecution of rape and other sexual violence cases”

29. The abolition of the requirement for corroboration is a crucial step towards ensuring effective criminal sanctions and improving access to justice for victims of crime. As we have said earlier, the abolition of the requirement of corroboration is not about improving detection or conviction rates. It is about improving access to justice. It is about changing the law to ensure that criminals are not immune from prosecution, protected by complicated rules of evidence that create injustice. And it is about ensuring that the victims of those crimes do not have to sit in silence but have the opportunity for their voices to be heard.

30. Concerns have been expressed from various commentators about the Crown being able to take forward certain types of case. In particular cases based on solely confession evidence, what has been termed as the one witness case and false allegations against professionals. It is important that we make our position on these areas of concern clear.

### **Confessions**

31. Confessions are now rarer following the ruling in the Cadder case that a suspect has right of access to a lawyer. This was recognised by Lord Rodger in his opinion in the Cadder case

“the recognition of a right for the suspect to consult a solicitor before being questioned will tilt the balance, to some degree, against the police and prosecution. “

**32. It is though recognised that people will confess to crimes they have not committed. The Lord Advocate agrees with Lord Hope’s comments in the recent article from Holyrood magazine<sup>5</sup> that no-one should ever be convicted on the basis of a simple confession alone. Therefore it is essential that there is evidence to prove that a confession is true. The police and the Crown will**

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<sup>5</sup> Edition dated 04 November 2013

always look for supporting evidence which in cases of confession evidence will be evidence which supports the truth of that confession.

#### **False allegations against professionals**

33. COPFS acknowledges that certain professional witnesses are susceptible to malicious allegations, including police officers, teachers, social workers, health professionals and prison officers. Again proceedings in such cases would not be taken up without strong supporting evidence.

34. We already have measures in place to guard against the taking of proceedings based on false allegation. In the case of allegations against teachers by pupils in the course of their employment, prosecutors must investigate these and precognosce the eye witnesses. Proceedings against a teacher can only be instructed by Crown Counsel. In the case of allegations of criminality by police officers, COPFS has a dedicated specialised unit to investigate these. Criminal proceedings against police officers can only be taken on the instruction of a law officer. Such processes ensure that prosecutions founded on malicious allegations are guarded against. The abolition of the requirement for corroboration will not change that approach. In each and every case the evidence will be carefully scrutinised and robustly examined to protect all individuals against malicious allegations.

#### **Conclusion**

35. As prosecutors in the public interest we are justly proud of the criminal justice system in Scotland where the rights of those accused of crime are robustly protected by the courts. As prosecutors though we support the abolition of the requirement for corroboration to ensure that all victims of crime have access to justice and to ensure perpetrators of crime can be brought before courts for their guilt or innocence to be determined, rather than be hampered by technical rules which do not allow us to present strong cases to the court.

**Annex A****Some case examples**Example 1

The victim was at home asleep at night. She woke up to find the accused, who was a complete stranger, standing in her bedroom, brandishing a weapon. He raped her and threatened her, telling her not to report the crime to the police after he left. He also forced her to wash herself to get rid of evidence. She was terrified and did not contact the police. The following day whilst she was out, the accused entered the house again and stole items which may have linked him to the crime had they been forensically examined. A number of witnesses saw the accused taking these items away. The accused was clearly trying to destroy any evidence of sexual activity. The victim is credible and reliable and there was recent distress after the incident and the circumstances are highly supportive of her account.

As there is no corroboration of penetration, we cannot prosecute the charge of rape.

Example 2

The victim is a girl under 12 years of age. She was going to play with friends when she was grabbed by the accused and pulled behind a building. She recognised the accused as he lives near her. The accused unfastened his trousers and she could see he was wearing distinctive underwear. He put his hand under her clothing and indecently touched her. She tried to run off but he stopped her and threatened her. She managed to run away again but tripped over items and was grabbed again. She managed to break free again, ran home and told a family member what happened. She was screaming hysterically and showed where the accused had touched her. The accused was detained a short while later and was found to be wearing similar clothing and underwear as that described by the victim. On going to the locus, the police found a number of items which the victim had described, all of which support the credibility of the account given by the victim.

No action could be taken as there was no corroboration in law of the commission of a crime.

Example 3

In a Moorov case, where the evidence of one complainant to each crime corroborates the, the failure of one witness to be able to give evidence at the door of the court has resulted in the collapse of the case as a whole. The evidence of the one witness, even if there was for instance evidence to say the accused and the victim were seen together at the time of the offence, would not be sufficient to provide corroboration.

**Annex B****Domestic abuse examples**Example 4

The victim and accused has been in a relationship for a few months and the accused had been violent towards her on a number of previous occasions, none of which had been reported to the police. On the date in question the victim was in a neighbour's flat waiting for a workman to arrive at her own flat. The only other person with a key to the victim's flat is the accused. The victim and her neighbour heard the sound of someone entering the victim's flat. The victim left but the neighbour did not go out or see who had entered the flat. On entering her flat the victim found the accused was inside. He immediately attacked her and then dragged her out the flat and down the stairs. A neighbour later described what they thought was furniture being dragged along the floor. The accused dragged her along the street making a number of threats as he did so. She managed to escape and ran into nearby premises where she asked for the police to be contacted. She was injured and very distressed. She was taken to hospital by ambulance and detained in hospital due to her injuries. Her injuries were consistent with her account of the attack. When police attended at the victim's home to uplift personal items for her, they found the accused waiting within. He denied any assault.

Although there is evidence of an attack and the accused being the perpetrator, there is no corroboration that it was the accused who carried out the attack and as such proceedings could not be taken.

Example 5

The accused and the victim had been in a relationship and have a child but have now separated. The accused attended to uplift the child for access. He was under the influence of alcohol or drugs, was behaving aggressively towards the victim, and was shouting and swearing at her. The victim decided that the child should not go with the accused due to his behaviour. The accused then grabbed her by the neck and ran her towards the door causing her to strike her head against the door. He then grabbed her by the throat and pushed her to the floor causing her to strike her head against the floor. All of this occurred in the full view and presence of the child who was sitting in a highchair. The accused then left the house but he continued to shout and swear and threatened her with violence. The police were called and found her to have swelling and reddening to her left cheek and a substantial lump to the back of her head with fresh scratches to her body. The police also spoke to a witness who heard the sounds of a male voice shouting and a female screaming.

Again there is no corroboration that the accused committed the assault. We can say only that it was a male. Proceedings could therefore not be taken.

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