

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Professor Peter Duff

Proposed abolition of corroboration

1. I have no fundamental objection to the abolition of corroboration. First, no other major jurisdiction still has such a requirement and there is no evidence that this leads to a greater number of miscarriages of justice. Second, the Scottish requirement has been so 'watered down' over the years, principally by judges anxious to avoid the acquittal of the obviously guilty, that is not nearly as strong a safeguard against wrongful convictions as its supporters claim. Additionally, the 'fiddles' that judges have created to get around corroboration have led to a confusing, illogical and inconsistent set of evidentiary rules which practitioners, including judges themselves, often have great difficulty in applying.

2. On the other hand, I very much doubt that the abolition of corroboration will have much impact upon the conviction rates for rape, indecent assaults, domestic violence and the like, as is often claimed. Commentators are generally agreed that the Crown Office 'research' carried out for the Carloway Review, purporting to show that a large number of cases that do not presently proceed would be prosecuted if corroboration was abolished, is highly questionable.

3. To make the most obvious point: the Crown Office reviewers of the sexual assault cases that were not prosecuted for lack of corroboration simply assumed that all such cases would have proceeded if there was no requirement for corroboration. This ignores the fact that many rape victims are under the influence of drugs or alcohol at the time and/or suffer from addiction problems, mental illness etc. Unfortunately, such vulnerable women are particular targets for rape. The defence is usually one of consent and, in the absence of the corroboration requirement, the Crown would inevitably have to make a decision on the likely credibility of the victim and, in particular, whether she will stand up to robust cross-examination in court. There is much research demonstrating that juries are reluctant to convict accused of rape in a 'he says, she says' dispute over consent and unless the jury has almost complete faith in the complainer's version of events, it will acquit.

4. The Crown Office reviewers implied that all such cases where there is no corroboration would be prosecuted in England but the practice south of the border is that the Crown will only proceed if there is a 'reasonable chance' of conviction. In many cases, the likely credibility of the complainer will be highly questionable and there will be no proceedings. The 'research' would have had some validity if, for instance, English prosecutors had been asked to review the Scottish cases where there was no corroboration and to determine whether they would have embarked upon a prosecution. All the evidence suggests that in England the Crown is often reluctant to proceed where there is no evidence supporting (ie corroborating) the victim's account where her potential credibility in front of a jury is questionable. This is borne out by the fact that, as is well known, there is no difference between conviction rates for reported rapes in Scotland and England.

5. In my view, the best hope for increasing the number of prosecutions and convictions in cases of rape and other sexual assaults is a reform allowing the appointment of a lawyer to safeguard the complainer's interests during the trial. This has long been advocated by Professor Fiona Raitt of Dundee University and I would suggest that you might take this possibility up with her.

6. Finally, if corroboration were to be abolished, there is the question of replacement safeguards. I think it advisable to 'tweak' the rules of evidence in some areas. For instance, I think a conviction based solely upon 'dock identification', even by more than one witness, should not be permissible. Second, I am not convinced that the proposal to adjust the majority verdict will act as an alternative safeguard, simply because there is no evidence as to how juries reach decisions in Scotland nor on the effect of the bare majority rule. In contrast, many studies have been done by social psychologists demonstrating that 'peer pressures' within jury rooms will strongly influence 'hung' juries in one way or the other. Therefore, most 8-7 majorities for conviction may simply become 10-5 majorities in practice. We simply do not know. I am ambivalent on the question of granting the judge the power to remove the decision from the jury where, in his or her view, 'no reasonable jury' could convict. On the one hand, this would prevent 'perverse' convictions which I think are inherent in trial by jury. On the other hand, this would require one judge, rather than 15 jurors, to make a decision on the credibility and reliability of a witness or a piece of evidence (eg a purported DNA match) and the judiciary, of course, are not immune from misjudgements in this area and the influence of extraneous matters.

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