

## Justice Committee

### Criminal Justice (Scotland) Bill

**Written submission from Professor James Chalmers,  
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1. While this submission focuses on those aspects of the Bill about which we have concerns, that should not detract from the fact that we are broadly supportive of the proposals made by the Carloway Review and are similarly supportive of the Bill. We have no comments to make on those aspects of the Bill which do not stem from the Carloway Review.

2. James Chalmers and Fiona Leverick have published an extensive analysis of the Carloway Review's proposals ("Substantial and radical change: a new dawn for Scottish criminal procedure?" (2012) 75 Modern Law Review 837-864) and a shorter analysis of the related issue of majority jury verdicts ("Majority jury verdicts" (2013) 17 Edinburgh Law Review 90-96). We would be happy to supply the Committee with copies of either publication should these be of assistance. In broad terms, we are concerned that the Bill as it stands would leave Scotland with a lower level of protection against wrongful conviction than any comparable system, insofar as such comparisons are possible.

3. With these general comments in mind, we wish to make the following points in this submission:

- (1) Some aspects of the drafting of the legislation are excessively complex.
- (2) While we express no view on the desirability of abolishing corroboration, we do not support the case made by the Carloway Review to justify this proposal.
- (3) We do not consider that section 70 (providing for new rules regarding guilty verdicts returned by juries) provides an adequate safeguard against wrongful conviction in the absence of a corroboration requirement.
- (4) We believe that the trial judge should have the power to withdraw a case from the jury where the evidence is such that no reasonable jury could convict on it.
- (5) We believe that section 82, requiring the High Court to apply an additional "interests of justice" test when considering references from the Scottish Criminal Cases Review Commission, serves no appreciable purpose and that the resulting cost to the public purse would be wasteful and inappropriate.

4. The remainder of this submission deals with each of these points in turn.

#### **(1) The legislative drafting**

5. Some aspects of the drafting of the legislation are excessively complex. For example, the abolition of corroboration is achieved by way of four sections with

multiple cross-references. The same effect could be achieved in a single section, as follows:

### **57 Corroboration not required**

(1) If satisfied in any criminal proceedings that a fact has been established by evidence, the judge or (as the case may be) the jury is entitled to find the fact proved by the evidence although the evidence is not corroborated.

(2) Subsection (1) applies only to proceedings for an offence committed on or after the day on which it comes into force, including proceedings for a continuous offence committed during a period of time which includes that date.

(3) Subsection (1) does not affect the operation of any enactment which provides in relation to the proceedings for an offence that a fact can be proved only by corroborated evidence.

6. Even this section is a relatively cautious and lengthy approach to drafting the necessary rule. It is not clear why the drafting needs to be as lengthy or complex as it is, nor how this is believed to assist in making the legislation comprehensible and accessible.

### **(2) The abolition of corroboration**

7. There is no doubt that corroboration is a complex and unsatisfactory area of the law which has little parallel in other jurisdictions. While we would not wish to make a positive case for its retention, we are not satisfied that the case for its abolition has been made out. James Chalmers and Fiona Leverick have already made extensive criticisms of the approach taken by the Carloway Review to corroboration in their article “‘Substantial and radical change’: a new dawn for Scottish criminal procedure?” (2012) 75 *Modern Law Review* 837-864, noting in particular the inadequacy of the empirical research upon which the Review relied and the Review’s apparent unawareness of research conducted on behalf of the Royal Commission on Criminal Justice which ran contrary to some of the claims made in the Review.

8. The broader problem is that the Scottish criminal justice system has been constructed around the requirement of corroboration. Other systems which do not employ a corroboration requirement have developed a variety of other mechanisms to safeguard against wrongful conviction. In Scotland, such mechanisms have consistently been rejected on the basis that Scotland offers an alternative safeguard in the form of corroboration. To remove corroboration without a full reassessment of safeguards would, therefore, verge on the reckless. Making a token change to the rules regarding majority jury verdicts is patently insufficient.

### **(3) Majority jury verdicts**

9. We do not believe that requiring a majority of 10 jurors from 15, in the absence of a corroboration requirement, provides an adequate safeguard against wrongful conviction. We note that the Scottish Government chose, in consulting publicly on additional safeguards, to ask whether a majority specifically of 9 or 10 should be required. Despite this, a significant number of respondents to the consultation went beyond the terms of the question asked and indicated that a higher majority was necessary.

10. As James Chalmers and Fiona Leverick have explained elsewhere (“Majority jury verdicts” (2013) 17 *Edinburgh Law Review* 90-96), lay jury systems worldwide typically require either unanimity or near-unanimity in order for an accused person to be convicted. The only significant exception appears to be the Russian criminal jury, where a verdict of guilty can be returned by seven of twelve jurors. The Russian system, however (which was wrongly characterised as one with “no additional safeguards” in the Scottish Government consultation) counterbalances this rule with a number of safeguards which have no parallel in Scotland: (a) extensive rights to question and object to potential jurors; (b) a minimum period of three hours’ deliberation before a vote may take place (a unanimous verdict may be returned before this) and (c) jury verdicts being returned in the form of answers to a questionnaire, thus providing additional information regarding the basis of the jury’s decision which is not available in Scotland.

11. Insofar as it is possible to quantify the level of protection against wrongful conviction offered by any criminal justice system, the effect of the Criminal Justice (Scotland) Bill as it now stands would be to reduce the level of protection against wrongful conviction offered in Scotland below that offered in any other comparable jurisdiction. We are not aware of any other jurisdiction which has chosen to experiment with the combination of (a) no corroboration requirement; (b) a near-simple majority requirement within the jury and (c) minimal judicial supervision of jury verdicts (see (4) below). We are unclear on what basis the Scottish Government has felt able to conclude that the Criminal Justice (Scotland) Bill would represent a safe manner in which to run a criminal justice system.

### **(4) Withdrawing a case from the jury**

12. We have previously argued that a trial judge should have the power to withdraw a case from the jury on the grounds that the evidence is such that no reasonable jury could convict on it. We repeat that submission here. We are concerned that the failure to permit the trial judge to do this leaves the level of protection against wrongful conviction in Scots law at a dangerously low level, and in addition risks needlessly wasting public funds.

13. We note the statement in the Carloway Review (at para 7.3.19) that:

“If the requirement for corroboration were to be abolished, there is no need for any further change to the existing law on sufficiency of evidence at the trial stage. The issue for the trial judge would be the same as it is at present, except that there would be no need for corroboration.”

14. We find this statement peculiar to say the least. A no case to answer submission currently requires the trial judge to consider whether there is corroborated evidence available in respect of each fact which is crucial to the prosecution case. To say that if corroboration were abolished the issue for the trial judge “would be the same... except that there would be no need for corroboration” seems to us to misrepresent the practical reality of the current law.

15. Because the abolition of corroboration would bring Scots law into line with English law, it is helpful to note how a no case to answer submission should be dealt with in that jurisdiction (as did the Carloway Review). In *R v Galbraith* [1981] 1 WLR 1039, Lord Lane observed that a submission should succeed in the case (1) “where there is no evidence that the crime alleged has been committed by the defendant” and (2) “[w]here the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it”.

16. Case (2), however, is currently excluded from the ambit of the Scottish no case to answer submission as a result of the Criminal Justice and Licensing (Scotland) Act 2010, which inserted a new section 97D into the Criminal Procedure (Scotland) Act 1995 to this effect. Consequently, implementing the Carloway proposals as they stand would mean that the no case to answer submission would verge on the redundant and would offer significantly weaker protection against wrongful conviction than that available to accused persons in England and Wales.

17. As the consultation paper notes, the Scottish Law Commission previously recommended that it should be possible to sustain a no case to answer submission on the basis that no reasonable jury could convict on the evidence led (*Report on Crown Appeals* (Scot Law Com No 212, 2008)). The government chose not to implement that recommendation, but as the consultation paper again acknowledges, this was in the context of the accused being protected by a requirement of corroboration. This is consistent with a longstanding view that the requirement of corroboration minimises the need for trial judges to be given further powers to prevent wrongful conviction (see e.g. Scottish Home and Health Department, *Identification Procedures under Scottish Criminal Law* (Cmnd 7096: 1978) para 5.03). If corroboration is to be abolished, the Scottish Law Commission’s proposals should be implemented.

18. We cannot see why, if an appeal court is permitted to quash a conviction on the grounds that no reasonable jury would have convicted (as it is under section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995), a trial judge (who is in a

far better position to judge what the jury can reasonably do, having heard all the evidence) should not have a similar power to prevent a case proceeding at the end of the prosecution case. We accept that the practical importance of such a rule would have been relatively limited while a requirement of corroboration remained in place, but this is unlikely to be so if that requirement is abolished. If a judge were of the view that no reasonable jury could convict on the evidence led, they would surely be obliged to state this in their report to the appeal court in an appeal against conviction, and the appeal court would in turn be all but obliged to accept the view of the judge who had personally heard all the evidence. Requiring such cases to be dealt with by way of an appeal against conviction is a waste of public resources and would unjustly and unjustifiably leave the individual concerned with the stain of a criminal conviction, notwithstanding its being quashed on appeal. We are fortified in this view by the fact that the other recommendations of the Scottish Law Commission in its 2008 report, as implemented in 2010, now mean that it would be possible for the appeal court to correct any error made by a trial judge in this regard in the unlikely event that this should be necessary.

#### **(5) Scottish Criminal Cases Review Commission references to the appeal court**

19. Section 82 requires the High Court to apply an additional “interests of justice” test when considering references from the Scottish Criminal Cases Review Commission. We believe that this section of the Bill should be removed except insofar as it repeals section 194DA. Either the SCCRC is competent to decide the interests of justice point or it is not. It makes little sense to argue, as Lord Carloway did, for section 194DA of the 1995 Act (which allows the appeal court to refuse to consider a reference if it would not be in the interests of justice to do so) to be repealed only to re-introduce an “interests of justice” test at the point when the appeal is determined. Indeed, this proposal is more objectionable than the present situation, as it would prolong proceedings unnecessarily and waste resources. We would refer to *References by the SCCRC in the cases of RM and Gallacher* [2012] HCJAC 121, where the appeal court expresses its full confidence in the Commission’s ability to decide the interests of justice test.

20. Under the current section 194DA of the 1995 Act, introduced in the post-*Cadder* emergency legislation, the appeal court has the power to rule that it is not in the interests of justice that an SCCRC reference should proceed to an appeal. Case law (see *RM* and *Reference by the SCCRC in the case of Mark Chamberlain-Davidson* [2012] HCJAC 120) has suggested that the Crown has little interest in pursuing the “interests of justice” point but has nevertheless invited the court to rule on this point. This seems only to have wasted public time and money.

21. It is difficult to see exactly what problem Lord Carloway is attempting to address here. In evidence to the Justice Committee, he gave the example of someone who had their case referred to the High Court by the SCCRC but who, in the interim, confessed to the crime. But this unlikely scenario could happen in any appeal. There

is no reason to think that it is more likely in a case referred by the Commission; if anything, it is less likely. If this *is* the basis for section 82, section 82 is a wholly inadequate means of addressing it. In any event, the problem does not need to be addressed: it could be dealt with by the High Court's existing power to quash the conviction while granting permission for a retrial. Moreover, it is not clear how section 82 could *ever* address the problem, as it creates no power for the court to hear evidence of the alleged confession and so take it into account.

22. In summary, section 82 is an inadequate means of addressing a non-existent problem and will result only in a waste of public time and money.

23. For these reasons, our view is that the test for determining SCCRC appeals should be the same as the test for determining any other appeal against conviction: whether or not there has been a miscarriage of justice.

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