

**Justice Committee****Criminal Justice (Scotland) Bill****Supplementary written submission from Professor James Chalmers  
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1. I am grateful for the opportunity to provide supplementary evidence to the Justice Committee in light of the evidence given by Lord Carloway on 24 September 2013. I have written an article for a forthcoming issue of the *Scots Law Times* dealing with this issue, and summarise that article here.

2. In summary, I note in that article that Lord Carloway made three particular claims in his evidence to the Committee, as follows. First, that “other countries” are disturbed by Scotland’s application of a corroboration rule. Secondly, that Scotland is the “only country in the civilized world” to retain such a rule. Thirdly, that corroboration’s abolition could be supported by the lack of evidence to suggest that the rate of miscarriages of justice in Scotland was higher than elsewhere.

3. I suggest in the article that these claims cannot be justified. First, I am not aware of expressions of concern by “other countries” about corroboration, and such references to the Scottish rule of corroboration in the international literature as I can identify are either positive or neutral. I note, however, that international concern *has* been expressed about the Scottish simple majority verdict in jury trials, accepting that this unusual rule may be counter-balanced by the corroboration requirement. I note also that the reforms proposed to the simple majority verdict in the Criminal Justice (Scotland) Bill would still leave Scotland significantly out of line compared to common law jury systems around the world.

4. Secondly, I note that it would be wrong to suggest that Scotland is the only country which retains a rule prohibiting conviction on the evidence of a single witness. The Netherlands continues to maintain a general rule to this effect, while various other countries prohibit such convictions in particular circumstances.

5. Thirdly, I note that there is an absence of evidence on rates of miscarriages of justice in Scotland. No material is available which would allow us reliably to assess this issue. In any event, if all that can be said is that the rate of miscarriages of justice in Scotland is no higher than elsewhere, it is doubtful that we can afford to remove a key safeguard against wrongful conviction such as corroboration.

6. In conclusion, I suggest that the failure to recognise corroboration’s importance as a safeguard against wrongful conviction is a lacuna in the Carloway Review. I do not support calls for a further broad review of the criminal justice system. The Carloway Review itself was such a broad review, and an excellent one. However, the issue of safeguards was omitted from that review and deserves further careful consideration.

7. Further review of this issue need not delay the progress of the Criminal Justice (Scotland) Bill. If the Scottish Government is determined to abolish corroboration, it could do so on the basis that the relevant provisions will not be

brought into force until the Scottish Law Commission, or an *ad hoc* body, has completed a focused review of safeguards against wrongful conviction and any legislation which is necessary as a result of that review has been enacted.

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### **Abolishing Corroboration: Three Bad Arguments**

On 24 September 2013, Lord Carloway gave evidence to the Justice Committee of the Scottish Parliament as part of its Stage 1 investigation into the Criminal Justice (Scotland) Bill. Unsurprisingly, a considerable part of the questioning was taken up with the issue of corroboration, which has proved to be the most controversial part of the Bill by some distance.

A great deal has already been written about the possible abolition of corroboration, and this article will not rehearse these debates. However, Lord Carloway's appearance before the Justice Committee provided him with an opportunity to refine the arguments which he has made for removing this rule, and to emphasise certain key points.

There were three such points repeated by Lord Carloway throughout his evidence. The first was a claim that "other countries" were disturbed by Scotland's application of a corroboration rule. The second was a claim that Scotland was the "only country in the civilized world" to retain such a rule. The third was that corroboration's abolition could be supported by the lack of evidence to suggest that the rate of miscarriages of justice in Scotland was higher than elsewhere.

Each of these points was made more than once by Lord Carloway, with the second being described as "the critical feature that I ask the committee to bear in mind" (col 3247). They seem now to form a core part of the case – perhaps *the* core of the case – which is being made for corroboration's abolition. This article assesses each of these arguments in turn, arguing that none of them can be justified. All references to column numbers are references to the Official Report of the Justice Committee for Tuesday 24 September 2014.

#### **The views of other countries**

Lord Carloway asked the Justice Committee to take into account "what other countries think about our having such a rule", which he described as an "extremely persuasive reason why the rule must go" (col 3248). He repeated this point subsequently: "Other countries regard the fact that we have such a rule as disturbing" (col 3258).

This is a surprising statement. Scotland is a small jurisdiction and it is unlikely that our corroboration rule is particularly well-known in other jurisdictions. Silence should, therefore, not be taken as endorsement. However, the claim that other countries have expressed criticism of the Scottish corroboration rule is a new one. No such

criticism was cited in Lord Carloway's report, and so it is unclear on what basis this claim has been made.

I have reviewed the international literature to try and identify comments from abroad about the Scottish rule. There are not many, but such references as I can identify – there will doubtless be others – have been either positive or neutral. I include a list of examples at appendix A to this article.

Perhaps more importantly, international observers have consistently expressed concern about the possibility of a jury convicting on the basis of a simple majority verdict, while accepting that this may be counter-balanced by the corroboration requirement. I include a list of examples at appendix B. While the Bill would increase the majority required for conviction from 8 of 15 jurors to 10 of 15, this remains out of line with the general requirement in the common law world that lay juries must return unanimous or at least near-unanimous verdicts. Civilian systems are more likely to permit conviction without near-unanimity, but counterbalance this with a degree of judicial supervision of the jury which is absent from the Scottish system.

In summary, it is not clear on what basis Lord Carloway felt able to assert that the corroboration rule has provoked concern internationally. It is clear, however, that the reform which his review proposed – allowing a jury to convict by a simple majority on the basis of uncorroborated evidence – is something which would be regarded with concern outside of Scotland. The Scottish Government's separate proposal to adjust the jury majority required for conviction does not provide an adequate answer to this concern.

### **The uniqueness of the rule**

Lord Carloway described Scotland as “the only country in the world that has the rule” (col 3240), going on to say that “Scotland is the only country in the civilised world – I include in that the whole of Western Europe and all the Commonwealth countries – that has a rule that requires corroboration.” (col 3242). Finally, he remarked that “Scotland is the only country in the civilised world that retains this archaic rule of medieval jurisprudence” (col 3247).

In his Report, Lord Carloway identified the requirement of corroboration as having Romano-canonical origins, and so being influential both within Scotland and in continental Europe. He suggested that the corroboration rule was abandoned by other European systems in the eighteenth and nineteenth century, stating (at para 7.1.14):

“...advances in thinking changed the approach entirely. Provided society could ensure that its judges were learned, reasonable and impartial, the essence of proof of guilt would involve the subjective persuasion of the trier of fact. The test would become, in French, ‘l'intime conviction’ and, in German, ‘freie Beweiswürdigung’. This is the antithesis of a system with formal rules of evidence, including a requirement for corroboration. Instead, there are no rules of proof and conviction depends upon the view of the judge, or subsequently a jury, having heard all relevant evidence placed before the court.” (*Carloway Review: Report and Recommendations* (2011) para 7.1.14)

This is an accurate statement of the manner in which criminal procedure has developed in continental Europe, in general terms (see e.g. the comments about French and German law made by H Mannheim (1950) 13 MLR 90). However, the more sweeping statements made by Lord Carloway in his evidence to the Justice Committee are problematic.

The Scottish corroboration rule can fairly be described as unique, insofar as it represents our own modern development of a rule with its foundations in Romano-canonical law. However, the suggestion that all other countries have abandoned the Romano-canonical rule requiring more than one witness is wrong. The Netherlands appears to retain a general rule of *unus testis nullus testis* ("one witness is no witness": art 342(2) of the Dutch Code of Criminal Procedure), which prevents a conviction being based on the evidence of one witness alone, although the two witnesses may speak to different matters and so not provide corroboration in the sense required by the modern Scottish rule. (See P J P Tak, *The Dutch Criminal Justice System*, 3<sup>rd</sup> edn (2008) para 7.17; S van der Ah, *Stalking in the Netherlands* (2010) 191-192; App No 39024/97; *LN v Netherlands*, European Court of Human Rights, 9 November 1999.)

Perhaps more importantly, a 2006 study published by the Council of Europe suggested that a number of European jurisdictions remained sceptical about conviction on the basis of a single witness's evidence in particular contexts, applying special rules prohibiting conviction on the basis of, for example, incriminating testimony delivered by an anonymous witness, an alleged accomplice of the accused, a witness who refused to be cross-examined, or a witness who gave evidence by video-link. (See Council of Europe, *Terrorism: Protection of Witnesses and Collaborators of Justice* (2006) 20-21, referring to the law of Belgium, France, Germany, Italy, Luxembourg and Portugal.)

Such rules provide a lesser safeguard against wrongful conviction than the Scottish corroboration rule, but they provide significantly *more* of a safeguard than would remain in Scotland were the Criminal Justice (Scotland) Bill to be enacted in its current form.

I do not intend here to make any general claims about the approach of continental European jurisdictions to corroboration, and would not claim any comprehensive understanding of the many different criminal justice systems in Europe. It may be that the Dutch rule is unique on the continent, but that is mere speculation. When, in 1997, the International Criminal Tribunal for the Former Yugoslavia had to consider whether *unus testis nullus testis* represented a general rule of law which it should apply to its own procedure, it felt able to say only that the Dutch rule represented "*an exception to the prevailing rule in the civil law*" (*Prosecutor v Tadić*, ICTY Trial Chamber, 7 May 1997 para 538, emphasis added.) Importantly, the *Tadić* court concluded that *unus testis nullus testis* was *not* a general rule which it should apply. It would clearly be correct to say that most countries have abandoned such requirements. It is not, however, correct to claim that Scotland remains uniquely isolated in requiring a plurality of witnesses for conviction.

It would be possible for the Scottish Government to commission the necessary research to establish the extent to which this rule persists across Europe, although it would be a time-consuming process which would require the assistance of experts in each jurisdiction and an understanding of the criminal justice system as a whole in any given country. No such research was carried out as part of the Carloway Review, and it is doubtful that any such research would have been particularly helpful. However, now that the supposed uniqueness of the Scottish rule has been stressed so strongly to the Justice Committee, it is important that the committee does not uncritically accept the claim that “Scotland is the only country in the civilised world that retains this archaic rule of medieval jurisprudence”. Scotland is at least unusual, but the research which would be required to justify such a strong claim as the one Lord Carloway made in evidence has not been carried out. In any event, the claim seems simply to be incorrect given the Dutch rule.

### **The rate of miscarriages of justice**

Lord Carloway referred to the lack of “material to suggest that the incidence of miscarriage of justice... is different from that in any other country in the civilised western world or the Commonwealth” (col 3240); later “there is no evidence whatsoever that Scotland’s incidence of miscarriages of justice is any lower than that of any other country in the civilised world” (col 3250); saying later that “there is no suggestion that the incidence of miscarriages of justice in England is greater than it is here” (col 3261).

There are two serious problems with this argument. First, it cuts both ways. If there is no evidence that the Scottish incidence of miscarriages of justice differs from other countries, this suggests that we are not in a position where we can afford to abandon one of our principal existing safeguards against wrongful conviction.

Secondly, it is not at all clear what the evidence for this claim is. As Donald Nicolson and John Blackie have noted in their important review of corroboration, “[n]o one has begun to estimate the rate of unjust acquittals in Anglo American jurisdictions, whereas the rate of convictions of the “factually” innocent have only been capable of reasonably accurate estimation following the advent of DNA testing and then only where DNA was available to establish innocence.” (D Nicolson and J Blackie, “Corroboration in Scots law: ‘archaic rule’ or ‘invaluable safeguard’?” (2013) 17 Edin LR 152 at 158-159). There is no clear evidence on the rate of miscarriages of justice in Scotland, nor is it clear how such information could be reliably compiled. The best mechanism we have for establishing guilt or innocence is the criminal justice process itself. Outside of the narrow category of cases where DNA evidence was not initially available, but is at a subsequent date, and can be regarded as determinative, we lack any secondary mechanism which we can use to check the overall accuracy of that process.

In summary, the Justice Committee should place no weight on the claim that Scotland’s miscarriage of justice rate is no different from elsewhere. There does not appear to be any evidence which supports that claim, and in any event there would be no means of reliably testing it. But even if we accept that Lord Carloway is right to suggest that the Scottish miscarriage of justice rate is no different from elsewhere, that would suggest that we could not afford to abolish corroboration. If our existing criminal justice system

is as it stands no better at preventing miscarriages of justice than other systems, how can we afford to remove one of its key safeguards?

One other aspect of Lord Carloway's approach to miscarriages of justice during his evidence is worthy of note. He explained to the Justice Committee that additional safeguards were not required, because the abolition of corroboration "would not cause miscarriages of justice of the type that we are discussing in the narrow sense of appellate jurisdiction – that is, something going wrong in the trial process" (cols 3243-3244). That is correct, but it is also irrelevant. The "narrow sense" Lord Carloway refers to treats a miscarriage of justice as consisting of a significant failure to follow the rules governing a criminal trial. That means that Lord Carloway appears to have claimed that changing the rules governing a criminal trial will not cause the rules governing a criminal trial to be breached. On that approach, no change to the rules of evidence or procedure could ever cause miscarriages of justice. The claim is a meaningless one and tells us nothing about whether abolishing corroboration would be likely to lead to an increase in the number of factually innocent people convicted of criminal offences.

### **Why does this matter?**

In identifying corroboration as an "archaic rule", the Carloway Review failed to recognise that however archaic the rule may be, it is by virtue of its lengthy heritage the rule around which so many other aspects of our criminal justice system have been constructed. The existence of a broad corroboration rule has meant that we have simply never engaged in debate about a whole range of more specific problems. We have never, for example, had to consider whether it would be safe to allow a jury to convict based solely on the evidence of an accomplice, an anonymous witness, hearsay evidence or dock identification. Corroboration always rendered such questions moot; even if we might have doubts about particular forms of evidence, there would at least have to be two incriminating sources.

Moreover, we have been able to assuage our doubts about permitting simple majority jury verdicts, an approach which looks remarkably lax compared to the rest of the common law world, by pointing to the counterweight offered by corroboration. We have resisted a rule which would allow trial judges to withdraw unsafe cases from juries, but maintained a meaningful no case to answer procedure on the basis that trial judges assess whether corroborated evidence has been presented by the Crown. And aside from questions of corroboration (and fresh evidence), we have permitted very little review of the factual basis for a conviction on appeal.

If corroboration is abolished, the assumptions which underpin Scots law's position on every single one of these positions is undermined. It is remarkable, therefore, that Lord Carloway takes the view that alternative safeguards against wrongful conviction are simply not "directly relevant" (col 3244) to the question whether or not corroboration should be retained.

This does point to a way forward. Some criticisms of the proposal to abolish corroboration have suggested that there should be some form of broad review of the Scottish criminal justice system before such a change is made. This is a suggestion which is unlikely to find favour with the Scottish Government, and for good reason: it

is difficult to see what the Carloway Review was if *not* a broad review. However, there is a clear lacuna in that review. The failure to acknowledge corroboration's importance as a safeguard against wrongful conviction, and the manner in which the criminal justice system has been constructed around it, means that further work must be done to identify what safeguards the criminal justice system should put in its place. The Scottish Government's own consultation on this matter, which canvassed only the most minimal of changes, provides a starting point for this but cannot claim to be an adequate review of the issues involved.

The narrow issue of safeguards is a focused one which could realistically be referred either to the Scottish Law Commission or to an independent body, to be addressed in a relatively short timescale. That need not even impede the passage of the Bill: if the Scottish Government is determined to abolish corroboration, it could do so in this Bill but delay the implementation of that provision until a safeguards review is carried out and any necessary changes are made.

This would not be revisiting the Carloway Review itself, but addressing an issue which was omitted from that exercise. It would remain possible, of course, to make the argument that no safeguards actually are required, although that seems to be a view which is unlikely to command much support.

## **Conclusion**

Lord Carloway's review has been an enormously valuable exercise. The Criminal Justice (Scotland) Bill will put a large part of the Scottish criminal justice system on a footing more sound and rational than that which currently exists. Lord Carloway's proposals give great weight to the protection of suspects at the investigative stage, and will ensure that Scots criminal law continues to give greater protection at this stage than many other jurisdictions. There is a danger, however, that the abolition of corroboration will seriously damage the review's legacy. If corroboration is to be abolished, serious consideration needs to be given to safeguards against wrongful conviction in Scots law. Lord Carloway himself claimed that there is no evidence that the incidence of miscarriages of justice in Scotland differs from elsewhere. If that is true – although it is difficult to see how we could reliably know this – then we cannot afford simply to abolish our principal safeguard against wrongful conviction and leave nothing in its place. A focused review of safeguards against wrongful conviction would fill the gap in Lord Carloway's own work, allow the Government to proceed with its settled intention of abolishing corroboration, and ensure that Scotland retains a criminal justice system which properly recognises the dangers of, and seeks to prevent, miscarriages of justice.

**Appendix A: international observations on the Scottish corroboration rule**

L Griffin, "International perspectives on correcting wrongful convictions" (2013) 21 William and Mary Bill of Rights Journal 1153 at 1207 (noting how the Scottish rule would avoid certain single-witness convictions which have proved problematic in the United States); P Hardin, "Other answers: search and seizure, coerced confession and criminal trial in Scotland" (1964) 113 University of Pennsylvania Law Review 165 at 183 (describing corroboration an "important" and "salutary" rule); S Mount, "A criminal cases review commission for New Zealand?" [2009] New Zealand Law Review 455 at 462 (suggesting that the "added hurdle[] to conviction" presented by corroboration might make miscarriages of justice less likely in Scotland than in New Zealand); C Sherrin, "Jailhouse informants in the Canadian criminal justice system, part II: options for reform" (1997) 40 Criminal Law Quarterly 157 at 160-164 (expressing scepticism about how much protection corroboration could offer as a safeguard against wrongful conviction on the basis of false testimony from an informer, but expressing no disturb as to the general rule).

**Appendix B: international comments on the Scottish simple majority verdict**

C C Bingaman, "Criminal justice in Scotland" (1976) 62 American Bar Association Journal 881 at 885; J D Jackson and N P Kovalev, "Lay adjudication and human rights in Europe" (2006) 13 Columbia Journal of European Law 83 at 114; M P Scharf, "Terrorism on trial" (2000) 6 ILSA Journal of International and Comparative Law 355 at 358. See also T Drabasch, *Majority Jury Verdicts in Criminal Trials* (New South Wales Parliamentary Library Research Service Briefing Paper 15/05, 2005) 16; New South Wales Law Reform Commission, *Majority Verdicts* (Report No 111, 2005) paras 2.16-2.17.