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To

The Scottish Government Consultation Paper: *The Not Proven Verdict and Related Reforms*

Introductory Observations

The consultation paper raises the prospect of radical change to fundamental and important aspects of the structure of Scots criminal law. Each of the issues raised has been the subject of detailed discussion over the last 10 years or so in the form of responses to Government consultation papers, at various public information events and in parliamentary debate. That no substantial change has been made to date may reflect an acceptance that the changes discussed are controversial and are firmly opposed by many informed consultees.

The structure of Scots criminal law contains three elements which distinguish it from other similar systems and which are not replicated in any other comparable jurisdiction. It should also be noted that it does not have elements which are present in some comparable jurisdictions, notably England and Wales, where in certain circumstances evidence of bad character and/or a previous conviction is admissible to prove fact and, in certain circumstances adverse inferences can be drawn from a failure to provide information to the police on being questioned about an offence.

The distinctive features of Scots Criminal Law are:

1. The availability of three verdicts
2. The opportunity to convict on the basis of a simple majority
3. The requirement for corroboration

It is useful to note the following from the Carloway Review 2011

> "1.0.20 The Review has not ignored specific comments made about altering the level of the majority verdict in jury trials from the current eight in favour of guilty before a conviction can follow. It has not considered that to be specifically within its remit and did not, in any event, regard such an alteration as either necessary or desirable. It did not consider that the system of majority verdicts was directly comparable with those in common law countries where unanimity, or near unanimity, is required for either a "guilty" or a "not guilty" verdict. Thus in these countries, failure to have a majority in favour of guilty does not lead automatically to acquittal, as it does in Scotland. Rather the elaborate process of a retrial may follow with all the implications that such a process might have on accused, witnesses and victims. Furthermore, if the issue of majority verdicts were to be examined, a review of the three verdict system (i.e. 'not proven') would have to follow. The Review has been presented with no material to suggest that the majority verdict presents a problem or indeed that it results in a greater conviction rate than in other common law jury systems."

The possibility of changing or removing all, or one or other, of each of the three distinctive Scottish elements is raised within the consultation paper. Within the judges of the High Court there are differing views as to whether it is appropriate to remove any of these features of the present system but there is a shared understanding that the present system operates as a collection of checks and balances which would likely be put out of kilter by change made to any one of the three elements listed. In the response by the judges of the

High Court of Justiciary to the Carloway Review in 2011 it was observed at page 7 that:

> "Scottish criminal law did not arrive at its present state overnight. The modern law is the product of centuries of development during which the law has grown and matured organically, partly through the analytical works of institutional writers, partly through experience of practical problems in the courts, and partly in response to emerging problems, political pressures and sometimes to controversial cases."

At page 33/34 of that same response it was noted that:

> "These checks and balances are interdependent. They cannot be viewed in isolation. For example, the fact that a person can be convicted in Scotland on a simple majority has to be viewed in a wider context that includes the availability of two verdicts of acquittal and the rule of corroboration. There is a symbiotic relationship between the various aspects of the overall system. If established rules, which by and large work well in practice, are dismantled in a piecemeal fashion then we face the obvious risk of a de-stabilised and potentially chaotic alternative."

These observations suggest that the individual questions now posed cannot properly or helpfully be addressed in a vacuum. They require to be informed by an appreciation of the detailed research and debate which has preceded the present consultation exercise. The current paper refers to the principal consultation exercises carried out over the last 10 years, namely:

- The Carloway Review Consultation Document April 2011,
- The Carloway Review Report and Recommendations November 2011
- Reforming Scots Criminal Law and Practice: The Carloway Report Scottish Government Consultation Paper 2012,
- Reforming Scots Criminal Law and Practice: Additional Safeguards Following The Removal for Corroboration Scottish Government Consultation Paper: (2013?).
- The Post-corroboration Safeguards Review Consultation Document 2014
- The Post-corroboration Safeguards Review Final Report 2015 (by Lord Bonomy's Review Group).

We are concerned that no proper analysis or synthesis of these various detailed papers, or of the responses to them, is set out in the present consultation paper. Nor has there been any apparent attempt to correlate the evidence obtained from the independent jury research with the views expressed in any of the previous debates. The view of the judges is that any proposed change to any one of the three unique features of the current structure will require a re-appraisal of the suitability of the remaining elements in their current form.

We agree with the observation made by the Cabinet Secretary for Justice in the Ministerial Forward to the consultation paper when he comments that the matters raised are complex issues. As a consequence, in attempting to respond constructively to the questions raised, we have sought to analyse the

proposal reflected in each question and to provide a reasoned response rather than using the preselected answers.

Part 2: The Not Proven Verdict

This section of the consultation paper considers the issue of how many verdicts should be available in a criminal trial in Scotland and engages the debate as to whether there should remain two verdicts of acquittal. For the purposes of this section we shall approach the issue upon the view that the real question, as identified at page 17 of the consultation paper, is whether the not proven verdict ought to be abolished.

It may be helpful to begin by revisiting the views expressed by the then judges in the previous responses which have addressed this issue.

In the response to the 2012 consultation *Reforming Scots Criminal Law and Practice: The Carloway Report* the judges stated, at page 23, that in principle they were not persuaded that there should be any change in the not proven verdict. At page 24 the view was expressed that a not proven verdict might allow a jury a principled third option where they found it impossible to work out which of the complainer or the accused was telling the truth. The judges also observed that the not proven verdict might be less harmful to a complainer than a not guilty verdict and that in cases where the corroborated evidence was not strong a not proven verdict might give the complainers the comfort that their evidence was not necessarily disbelieved.

In their 2013 response to the consultation *Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration*, the judges observed, at page 7, that:

> "the abolition of the not proven verdict may be seen as a removal of an additional safeguard rather than the introduction of one".

They stated that:

> "To abolish corroboration and the not proven verdict at the same time, as well as introducing qualified majority verdicts, would be to launch the Scottish jury system into the complete unknown".

Noting that, looked at in isolation, there were arguments for and against the retention of the not proven verdict, with different views being held within the judiciary, the concluded view was that no change should be made to the available verdicts at that stage, it being better to allow the system to settle down in light of the (then proposed) abolition of the requirement for corroboration before addressing the issue of the three verdict system.

In the 2015 final report of the Post-corroboration Safeguards Review, the Review Group headed by Lord Bonomy touched upon the issue of the not proven verdict at paragraphs 12.15 & 12.16 as follows:

> 12.15 It is thought to be unsatisfactory to have two verdicts of acquittal where, as at present, a trial judge or sheriff is discouraged from explaining the distinction between them. While one might be thought to be more emphatic than the other, the fact that the legal effect of both is the same means that any attempt to explain the difference is fraught with the risk of causing confusion in the mind of jurors. There is a belief, for which there is anecdotal evidence as well as some research evidence, that jurors do on occasion mistakenly think that a Not Proven verdict leaves open the possibility of a retrial. That is not the case.
>
> 12.16 The reputation of our criminal justice system requires that there should be public confidence that verdicts are returned by juries on a sound, rational basis. It is important that any apparent source of confusion should be eliminated.

The group also noted at paragraph 12.18 the view of some that the Not Proven verdict should not be removed, as it acted as a safeguard. It was with these considerations in mind, and because so little was known about the relationship between the unique features of the system required to be operated by Scottish juries, that Lord Bonomy's Review Group recommended further research be carried out.

As noted in the current consultation paper, the research which Lord Bonomy envisaged has been undertaken and the final report of the independent research team has been published. That research, whilst useful, was inevitably limited by the artificial nature of the process which the mock jurors engaged in. In our view, a degree of caution should be exercised when drawing any conclusions from it.

Nevertheless, certain concerning issues were identified. There was shown to be a level of confusion over the meaning and effect of the not proven verdict, with a number of jurors expressing the view that a not proven verdict would allow for a retrial, whereas a guilty verdict did not. This was in direct conflict with the instruction given to the mock jurors in the judge's directions. It is interesting to note that this same misconception was identified in the Report of the Academic Expert Group in August 2014, at page 158, where it referred to research conducted in 2008 with two study groups, one comprised of Scottish undergraduate students and the other of local volunteers from the Aberdeen area. That research found that 35 per cent of the jurors who considered the mock case on the basis of three verdicts believed that a not proven verdict permitted the retrial of the accused at a later stage, despite the written directions which had been provided to them expressly stating that this was not the case.

These are troubling findings but perhaps not altogether surprising in circumstances where juries are directed that not guilty and not proven are both verdicts of acquittal but where the difference is not, and cannot be,

explained to them. The risk that this lack of explanation might provoke jurors to try and identify a difference for themselves seems to be vouched by the research conducted.

Judges could no doubt further emphasise the direction already suggested in the Jury Manual that:

> "An accused acquitted of the charge cannot be prosecuted again on that charge, save in exceptional circumstances, and it makes no difference whether the acquittal verdict is not guilty or not proven."

However, unless any further emphasis identifies a difference between the two verdicts, or attempts to suggest when one might be appropriate as opposed to another, then it may be thought to be unsurprising that jurors will search for a meaning to be attached to each of the two concepts which they are invited to apply.

In addition to these concerns, the further work which was carried out in the engagement sessions referred to at pages 15 to 17 of the consultation paper may tend to cast some doubt over the suggestion that a not proven verdict might carry with it a degree of signalling which would be of comfort to complainers. That same engagement process highlighted a sense of dissatisfaction over what was perceived to be an unsatisfactory lack of certainty associated with this verdict.

Accordingly, it may be said with a degree of confidence that there remain concerns about the extent to which a not proven verdict is understood, both by jurors and by victims and their families, and a sense of unease as to whether or not it reflects a satisfactory resolution of the judicial process.

These concerns aside, there are powerful principled arguments which can be levelled against the continuing availability of the not proven verdict.

An accused person is presumed innocent by operation of law. The judge will direct the jury that the accused is presumed innocent until proven guilty, that the crown must establish guilt beyond a reasonable doubt and that if that is not done a verdict of acquittal must result. One might legitimately ask how the availability of a verdict of not proven can be reconciled with these directions.

If the crown has not established the case against the accused then he remains, as he started, innocent. On what basis can a jury declare anything other than that he is not guilty? What does the jury mean to convey by exercising its choice to return a verdict of not proven? Neither the accused nor the complainer can find out. If the justification for allowing the verdict of not proven to be available is to permit emphasis, or to allow some form of view of the evidence to be signalled, either to the accused or to the complainer, then such a use would require to be explained to the jury. To do otherwise is to permit the jury to engage in an entirely ungoverned exercise which is

contrary to the instruction which they are given that there is no difference between the verdicts.

If, as a matter of law, there is no difference there is then no purpose in the choice being available. It is unacceptable for a jury to be offered two different acquittal verdicts when the judge will not, and cannot, explain the difference between them. If the presumption of innocence has not been overcome by the jury being satisfied that guilt has been proved beyond reasonable doubt then the verdict should be not guilty. It is inconsistent with the entire rationale of the judge's charge for him or her to offer the availability of a particular assessment of the evidence which the judge is incapable of explaining the meaning of.

All of these arguments and more are set out most convincingly in the article by Lord Uist: *'Not Proven' – not logical or sensible*, published in the Scottish Legal News on 27 April 2021, a copy of which is in the appendix to this response.

The views and analysis set out above reflect the thinking of almost all of the current judges of the High Court. One judge takes a different view and considers that the not proven verdict is a distinctive aspect of Scottish criminal procedure which our society is well used to and it was not necessarily a negative aspect of our system. That judge would argue that there is a benefit to retaining a third option which would permit a jury to acquit without affirming the innocence of the accused.

In light of the discussion set out above, in the view of almost all of the judges, the answers to the questions posed can be summarised as follows:

Question 1: Which of the following best reflects your view on how many verdicts should be available in criminal trials in Scotland?

- Scotland should keep all three verdicts currently available
- Scotland should change to a two verdict system.

Scotland should change to a two verdict system. However, any such change might necessitate a re-assessment of the majority which requires to be present for any verdict of guilty to be returned.

Question 2: If Scotland changes to a two verdict system, which of the following should the two verdicts be?

- Guilty and not guilty
- Proven and not proven
- Other

The two verdicts available ought to be guilty and not guilty These are the commonly understood concepts which are applied throughout every other

English-speaking jurisdiction. That being said, one judge would favour proven and not proven.

Question 3: If Scotland keeps its three verdict system, how could the not proven verdict be defined, in order to help all people including jurors, complainers, accused and the public to better understand it?

In our view this cannot be done. To introduce any definition of not proven would be to introduce the availability of an entirely novel and inappropriate halfway house verdict which would be inconsistent with the presumption of innocence and the purpose of the trial process.

Question 4: Below are some situations where it has been suggested a jury might return a not proven verdict. How appropriate or inappropriate do you feel it is to return a not proven verdict for each of these reasons?

1 – Appropriate
2 – Inappropriate
3 – Don't know

• The jury returns a not proven verdict because they believe the person is guilty, but the evidence did not prove this beyond a reasonable doubt.

• The jury returns a not proven verdict because they believe the case has not been proven beyond reasonable doubt, but they wish to publically (*sic*) note some doubt or misgiving about the accused person.

• The jury returns a not proven verdict because they believe the case has not been proven beyond reasonable doubt, but they wish to indicate to complainers and/or witnesses that they believe their testimony.

• The jury returns a not proven verdict as a compromise, in order to reach agreement between jurors who think the right verdict should be guilty and others who think it should be not guilty.

In our view, the first two situations are inappropriate for the use of a not proven verdict. If, for any reason, the jury is not persuaded of guilt beyond a reasonable doubt the appropriate verdict should be not guilty.

Looking to the third situation, if the jury has accepted the evidence of the complainer, and it implicates the accused in the commission of the crime, then unless the jury considers that there is no corroboration or finds that some other evidence leaves a reasonable doubt, the verdict should be guilty. In many cases, believing the testimony of the complainer would necessarily involve rejection of contrasting evidence. If contrasting evidence on essential facts is accepted, or leaves reasonable doubt of the accused's guilt, the use of the verdict would be inappropriate, it should be not guilty.
Looking to the fourth situation, the use of a verdict of not proven would be inappropriate. If there are 8 votes or more for guilty, a compromise verdict is

not appropriate, the proper verdict is guilty. There is no principled basis upon which jurors who conclude that the right verdict should be one of guilty should be encouraged to depart from that decision on the basis that a compromise can be reached which results in the accused's acquittal. If there are fewer than 8 votes for guilty, then the presumption of innocence has not been displaced by the necessary number of jurors and the accused should be found not guilty.

Question 5: Do you believe that the not proven verdict acts as a safeguard that reduces the risk of wrongful conviction?

Yes/No/Unsure

No.
Whilst it has been described as such, we consider that it is may be better to describe it as a feature of our system. Our analysis of the scenarios in question 4 suggests that the appropriate acquittal verdict is not guilty. Removal of the not proven verdict would not remove a safeguard if an accused person was instead found not guilty.

Question 6: Do you believe that there is more stigma for those who are acquitted with a not proven verdict compared to those acquitted with a not guilty verdict?

Yes/No/Unsure

Question 7: Do you believe that the not proven verdict can cause particular trauma to victims of crime and their families?

Yes/No

These two questions appear to ask for a subjective view from consultees as to the presence of stigma or trauma as a consequence of a not proven verdict being returned. We do not consider that we are in a position to offer any such view. We note however the observations at pages 14, 16 and 17 of the consultation paper reflecting the views of those who have been directly impacted by such verdicts.

Part 3: Jury Size

In this section of the consultation paper the issue raised is whether there is any reason to consider reducing the present jury size of 15 to 12 jurors.

As pointed out in the response by the judges to the Scottish Government's 2008 consultation document *The Modern Scottish Jury in Criminal Trials*, juries comprising 15 members had for a very long time enjoyed, and continued to enjoy, the confidence of the public and all those who work in our criminal courts, including judges and sheriffs. Nothing which was drawn attention to

in the current consultation paper causes us to depart from that view. No persuasive reason to alter the current size of a Scottish jury has been identified. A larger number permits a wider representation of the community and ought to reduce the risk of biased, irrational, capricious or eccentric reasoning having undue influence. A larger number may allow more flexibility when a juror or jurors become unavailable.

Question 8: Which of the following best reflects your view on jury size in Scotland?

If Scotland changes to a two verdict system:

- Jury size should stay at 15 jurors
- Juries should change to 12 jurors
- Juries should change to some other size

In our view if Scotland changes to a two verdict system the jury size should remain at 15.

Part 4: Jury Majority

This section of the consultation paper addresses the question of whether moving to a two verdict system could operate safely as a stand-alone reform or whether such a change would require a re-assessment of the basis upon which a majority verdict of guilty could be returned.

This is a question upon which the judges expressed views in their responses to previous consultation documents, albeit those comments were in the context of a proposal to abolish the rule requiring corroboration.

In the 2012 response to the consultation paper *Reforming Scots Criminal Law and Practice: The Carloway Report* the issue of jury majority was considered in the context mentioned. At page 24, it was stated that:

> " … if the requirement of corroboration is removed, consideration may have to be given to adopting the type of majority required in England, namely 10 out of a jury of 12. This would certainly require to be the case if the "Not proven" verdict were to be abolished."

In the subsequent response to the consultation paper *Reforming Scots Criminal Law and Practice: Additional Safeguards Following The Removal of the Requirement For Corroboration* the same point was made at page 4 as follows:

> "We agree that if the requirement for corroboration is removed it is difficult to maintain that a simple majority reflects the jury being satisfied beyond reasonable doubt. If, in addition, the not proven verdict was to be abolished, the case against a simple majority reflecting the jury being satisfied beyond reasonable doubt would be even stronger."

In the 2015 Final Report by Lord Bonomy's Review Group, the members of the group agreed that conviction on the basis of a simple majority of 8 out of 15 jurors would not be an adequate reflection of the principle that guilt must be established beyond reasonable doubt in a system in which the essential elements of the commission of a crime do not require to be proved by corroborated evidence[1].

The Academic Expert Group who assisted with Lord Bonomy's Review reported at para 13.10 that:

> "The simple majority jury verdict is an anomaly out of step with the common law world, difficult to reconcile with the presumption of innocence and the requirement of proof beyond reasonable doubt."

The Group noted at paragraph 13.3:

> "The Scottish approach has consistently been justified on the basis that Scotland applies a unique set of practices in jury trials – corroboration, three verdicts and simple majority verdict – which, taken together, represent a proper approach to the criminal justice system's key goal of acquitting the innocent and convicting the guilty."

In the response prepared by the judges of the High Court to the consultation paper *The Post – corroboration Safeguards Review* the judges observed, at page 25, that:

> "We agree that if the requirement for corroboration is removed it is difficult to maintain that a simple majority reflects the jury being satisfied beyond reasonable doubt and that a simple majority verdict of guilty would no longer be appropriate."

That view was expressed in the context of the opinion subsequently expressed that three verdicts should remain available.

It can be seen then that all of the views advanced in the previous response papers were predicated upon the understanding that the focus for reform was the abolition of the rule requiring corroboration. The present consultation paper looks at matters through a different lens, suggesting that the not proven verdict might be removed and asking whether any consequences would flow from that change, although the requirement for corroboration is also turned to as a substantive issue on its own.

We should point out that not all judges agree with the way in which the academic group conceptualised the place of reasonable doubt in the context of a jury verdict in Scotland and do not consider that the concept of the jury's verdict as collective can have quite the same meaning in different systems.

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[1] Paragraph 12.3

There is one verdict but it need not be collective. We do not require unanimity at all. We do not require 8 for acquittal. In England a minimum of 10 are required for any verdict, including acquittal.

Some judges do not agree that there is, in Scotland, a collective finding "beyond reasonable doubt." Those judges consider that "proof beyond reasonable doubt" is a standard to be applied by the individual jurors who then reach their individual verdict and what happens next depends on the numbers. They consider that all that can properly be said about a majority verdict of guilty is that at least 8 jurors were persuaded of the guilt of the accused beyond reasonable doubt and that in an acquittal verdict that fewer than 8 jurors were persuaded of the guilt of the accused beyond reasonable doubt.

The question remains, what should the threshold majority be for a verdict of guilty?

The first point which we would wish to emphasise firmly and unanimously is that in a two verdict system where the present rule requiring corroboration no longer applied the opportunity to return a guilty verdict by a simple majority would be unacceptable.

The less straightforward question is whether the opportunity to return a verdict of guilty by a simple majority would be acceptable in a two verdict system where the rule requiring corroboration also operated. Given the importance of the presumption of innocence, the need to protect against conviction of the innocent and noting the trend across the English speaking world towards a requirement for near unanimity, it may be appropriate to introduce a qualified majority of 10.

In a two verdict system a juror who was not satisfied beyond reasonable doubt that the Crown had established guilt would be bound to return a verdict of not guilty. To this extent it might be said that to remove the opportunity to return a verdict of not proven made no difference. However, account would need to be taken of how unusual it would be to permit a verdict of guilty by simple majority.

The Academic Expert Group conducted a review of the availability of majority guilty verdicts across the various jurisdictions in the common law world. At page 150 of its report it explained its analysis as follows:

> "… there is a clear consensus across the common law world that jury verdicts should be reached by unanimity. This is regarded as a consequence of the requirement of proof beyond reasonable doubt, the presumption of innocence, and the view that the jury verdict is a collective decision. The verdict is one of the jury as a whole, not simply the result of counting votes in a ballot."

The report then went on to explain why, over time, the rule requiring unanimity had been qualified in most jurisdictions to permit juries to return verdict by a qualified majority.

In the view of the majority of the judges there is no obvious reason why the threshold for the minimum number of jurors who find guilt proved beyond reasonable doubt, displacing the presumption of innocence, should be set so differently in this jurisdiction as compared to any other. That is not to say that unanimity should be a requirement for a verdict of guilty but the majority of judges would find it difficult to assert that the decision-making body has arrived at a confident and reliable decision when the number voting for guilty is only one more than the number voting for not guilty. In this context it is not thought that the continued presence of the rule requiring corroboration will serve to provide the necessary confidence in any simple majority verdict. There will be many cases in which the issue splitting the jury is nothing to do with corroboration. In the view of this significant majority group of judges, a qualified majority of 10 out of 15 jurors would be necessary to return a verdict of guilty in a two verdict system where the rule requiring corroboration remained in place.

As set against these observations, a competing view held by a minority group of judges is that Scotland does not have a tradition of instructing jurors that they must try to reach a unanimous verdict, that 15 jurors who constitute a broad spectrum of society are likely to have differing views and that a bare majority of a 15 person jury should be sufficient for a verdict of guilty. For this group of judges there seemed no logical reason to alter the necessary majority merely on account of moving to a two verdict system.

Although no question is asked directly about the necessary majority for a guilty verdict in a two verdict system if the rule requiring corroboration is abolished, as alluded to above, the judges are unanimously of the view that a simple majority would be unacceptable. In this situation the substantial majority of judges would favour a qualified majority of 10 out of 15 being required but some take the view that it ought to be 12 out of 15.

Question 9: Which of the following best reflects your view on the majority required for a jury to return a verdict[2] in Scotland?
If Scotland changes to a two verdict system:

- We should continue to require juries to reach a "simple majority" decision (8 out of 15).
- We should change to require a "qualified majority" in which at least two thirds of jurors must agree (this would be 10 in a 15 person jury, or 8 in a jury of 12).
- We should reduce the jury size to 12 and require a "qualified majority" of 10 jurors for conviction as in the system in England and Wales.

[2] The question posed is for "a verdict", not a guilty verdict but we would understand that the focus is on a guilty verdict.

- We should change to some other majority requirement.

The majority of the judges agree that if Scotland changes to a two verdict system we should change to require a qualified majority in which two thirds of jurors must agree, namely 10 out of 15, before a verdict of guilty can be returned. An alternative view is that a verdict of guilty by simple majority should remain available.

Question 10: Do you agree that where the required majority was not reached for a guilty verdict the jury should be considered to have returned an acquittal?
Yes/No/Unsure

In our view, if the required majority is not reached for a guilty verdict the jury should be considered to have returned a verdict of acquittal. The onus of proof is on the Crown to prove guilt and if the Crown cannot persuade the requisite majority of the jurors of proof beyond reasonable doubt then acquittal is the appropriate verdict. This is straightforward and readily capable of being understood by all concerned. It is consistent with the law as it stands in Scotland and has the benefit of not forcing a member of the jury to conjoin explicitly in a verdict that juror does not accept to be correct.

Part 5: The Corroboration Rule

The rule requiring corroboration is not a necessary component of a fair trial for the purposes of Article 6 of the European Convention on Human Rights. This much is obvious from the fact that Scotland is the only comparable jurisdiction with such a requirement. Nor is there thought to be anything by way of structural weakness in the process of a Scottish criminal trial, such as is absent in other systems, and which requires to be compensated for by the rule. Every system has its own checks and balances and in Scotland corroboration has been regarded for centuries as one of these checks and balances[3].

Previous Reviews and Responses

In the response by the Judges of the High Court of Justiciary to *The Carloway Review Consultation Document* and in the subsequent response to the Scottish Government Consultation Paper: *Reforming Scots Criminal Law and Practice: The Carloway Report*, the view of the judges was that the rule requiring corroboration should be retained. A detailed assessment of the purpose and value of the rule is set out between pages 36 and 40 in the first of these responses. In the second response the judges explained that they did not agree with the suggestion that the requirement for corroboration should be abolished giving the following explanation:

[3] A description of the historical source of the rule and its development in Scots Law is given in Part 7 of the Carloway Review Report and Recommendations of November 2011.

> "In our view, it is often difficult to assess the true facts on the basis only of the evidence of one witness. A witness may be credible and reliable, yet not be telling the truth (or the whole truth). The Scottish courts have on many occasions been grateful for the requirement of corroboration, which in our view provides a major safeguard against miscarriages of justice. We acknowledge that the requirement of corroboration has been removed in civil cases; but we consider that there are significant differences between civil and criminal cases. In criminal cases, the standard of proof is "beyond reasonable doubt", not merely on a balance of probabilities. A criminal case may result in the accused losing his or her liberty. Arrangements for vulnerable witnesses are such that the court or jury may not see or hear the complainer in person. One particularly anxious area is that of alleged sexual offences, where (without corroboration) our concern is that the abolition of corroboration may result in miscarriages of justice.
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> We are also concerned that the abolition of corroboration may result in less diligent police investigation pre-trial: knowing that corroboration is not required, there may be a relaxation in the search for supporting evidence (even though such may well exist). Furthermore the court or jury, faced with the danger of one person's word against another's, may be reluctant to convict. In our experience, juries have always found corroborative evidence of great assistance.
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> The current perception may be that the conviction rate in certain types of crime (for example, sexual offences) is low. It is our considered view that if corroboration were to be abolished, that would lead to decreasing confidence in the legal system, and to lower rates of conviction generally."

As against these considerations, *The Carloway Review Report and Recommendations* took account of the research commissioned from COPFS which examined cases over a particular period which had been reported but not proceeded with due to an assessment of insufficient evidence. In more than half of these cases it was assessed that sufficient evidence to proceed was available if the requirement for corroboration did not apply. Nearly 70% of the cases passing that test would also have met a test of reasonable prospect of conviction. This led the Review to suggest that the requirement for corroboration was operating as an impediment to justice rather than a safeguard in a significant number of cases.

In setting out the case for abolishing corroboration the Review identified three main arguments. First, the requirement for corroboration did not, in practice, serve its stated purpose of preventing miscarriages of justice, a conclusion which was reached after an examination of the evolution, and dilution, of what was required for corroboration, a process which it might be said has continued since 2011. The real protection against miscarriage of justice at first instance was said to be the standard of proof required. It was the need to satisfy this test which made the existence of supporting evidence, whether classified as corroboration or not, important. The Review noted that there was no evidence or even anecdote to support the idea that the formal requirement for corroboration reduced the number of miscarriages of justice. It noted the

absence of any evidence to suggest that Scotland has a lower miscarriage of justice rate than any other jurisdiction in the civilised world.

Second, the abolition of the rule might prevent miscarriages of justice occurring, in the broad rather than appellate sense, since it might permit convictions to be achieved in cases where the evidence of perpetration or identification came from only one witness. The Review questioned why, if there was a single credible and reliable witness to an offence, the suspect ought not to be prosecuted and why a conviction should not follow if the judge or jury were satisfied beyond reasonable doubt of that suspect's guilt. A requirement which prevented such a conviction was seen as creating an injustice.

The third argument was that the requirement for corroboration was frequently misunderstood by both lay persons and lawyers, including judges. It was a restrictive method of looking at the quantity of the evidence without reference to its quality. The Review was of the view that it was by no means apparent that the requirement for corroboration provided any more consistency than an alternative approach based on quality would bring. It was noted that judges can have very different views on what constitutes corroboration or sufficiency in general in a particular case. The requirement for corroboration had developed into a series of rules which were not realistically capable of being understood by many outside the world of criminal legal practice and were applied differently by courts depending upon their own experience in that practice.

Having developed these arguments in more detail, the conclusion of the Review was that the rule requiring corroboration had no place in a modern legal system where judges and juries should be free to consider all relevant evidence and to answer the single question of whether they were satisfied beyond reasonable doubt that the accused person committed the offence libelled. Such a reform, it was thought, would bring Scots law into line with modern and almost universal thinking on how to approach evidence in criminal and other cases.

Current views

The responses from the judges of the High Court to the suggestion that the rule requiring corroboration should be abolished were provided in 2011 and 2012. Since then the composition of the High Court Bench has changed significantly. The view of the current judges, by a majority of two to one, is that the rule requiring corroboration ought to be abolished. Of particular note is the extent to which the remaining judges who contributed to the previous responses have now changed their minds. Around two thirds of this group are now in favour of abolishing the rule requiring corroboration.

The majority group of judges, including those who have revised their views, have revisited the question of whether there remains a valuable role for corroboration in acting to prevent miscarriages of justice, or whether it is in fact a confusing and imprecise requirement which serves no real purpose and

may act as an inappropriate impediment to bringing cases based on the evidence of a single witness regardless of the quality of that evidence. A factor of influence is the extent to which confusion over the requirements of the rule has continued to be present, even at appellate level - see eg *Spinks v Harrower* 2018 JC 37 and *HMA v Taylor* [2019] HCJAC 2 (both cases in which the Sheriff Appeal Court's approach to the application of the rule was held to be incorrect).

A further factor of concern for the majority group of judges is that the rule has continued to develop, or alter, in the intervening years to the extent that a sufficient body of corroborated evidence can now be seen to be present in circumstances which would previously have resulted in the case being dismissed at no case to answer stage, or not being prosecuted based on an assessment that there was insufficient evidence available. These ongoing developments illustrated by recent appeal decisions[4] and the exposition of a fundamental change of thinking,[5] tend to suggest that the rule does not have a settled application of a sort which is conducive to the effective and predictable operation of the criminal law. Of principal concern however is the extent to which the requirement for corroboration acts as a barrier to accessing justice, particularly in the cases of many women and child victims of both sexual abuse and more general domestic abuse. Whilst this effect was highlighted in the Carloway Review Report and Recommendations in 2011, the passage of time and the very large increase in the number of sexual offences cases reported has served to bring this effect into very sharp focus.

The judges who support the abolition of the rule requiring corroboration are strongly of the view that the rule acts as a barrier to justice and is of a sort not found in any other comparable legal system. A prosecution cannot be brought in the absence of corroboration and, if a prosecution is brought on the basis of a second source of evidence which falls away, it cannot reach the stage of consideration by a jury no matter how truthful, reliable and compelling a single witness's evidence may be. In their view this may be considered to institutionalise miscarriage of justice in a broad, as opposed to an appellate, sense as Lord Carloway explained at paras 7.2.30 - 7.2.34 of his Report and Recommendations of November 2011.

These judges are concerned that in a system which does not permit adverse inferences from silence on the part of an accused on police questioning and does not permit evidence of previous convictions and bad character to assist the jury to resolve questions of fact (unlike in England and Wales), the requirement for corroboration can operate as a substantial barrier, or impediment, to the doing of justice. They also point out that the rule can have random effects resulting in corroboration being available in some circumstances and not others, eg *Munro v HM Advocate* 2015 JC 1, where the serendipitous finding of a pubic hair in the underpants of the complainer

[4] eg *Fergusson v HMA* 2019 SCCR 70, *Munro v HMA* 2015 JC 1, *LW v HMA* 2021 SCCR 15, *Garland v HMA* 2020 HCJAC 46,. None of these concern the application of the *Moorov* doctrine which has itself continued to "expand".

[5] *Jamal v HMA* 2019 JC 119 at paras 18-20.

afforded corroboration of her evidence of penile penetration. Corroboration may or may not be available depending upon the chance expression of distress varying according to how the complainer reacts and who the complainer encounters. This is seen as unsatisfactory, particularly in the light of research and clinical experience which shows that there a wide range of ways in which the impact of trauma in the immediate aftermath is both experienced and expressed.

The majority group emphasise the fact that rules regarding what may constitute corroboration are not always consistently understood by judges and that the jury research suggests that they may be misunderstood by jurors. That research demonstrated that on occasions jurors understood the rule to require independent evidence which was conclusive of guilt, rather than evidence which was simply supportive of the primary evidence. They consider that the rule requiring corroboration frequently causes judges to give complicated and confusing directions to juries, which of itself might be seen as suggesting that the rule hinders rather than promotes justice.

The considerations and concerns outlined in this section of our response paper show that the views expressed in the response to the Scottish Government Consultation Paper: *Reforming Scots Criminal Law and Practice: The Carloway Report*, as quoted at page 14 above, are no longer held by the majority of judges. This reflects the substantial change in thinking which, for a number of these judges, has occurred over the last decade or so. The consequence is that the majority of the judges now agree with the conclusion of the *The Carloway Review Report and Recommendations* that the requirement for corroboration should be abolished for all categories of crime.

A minority group of judges however support the retention of the rule. They consider it performs an important role and suggest that the law has developed in a nuanced way with the result that the requirement is readily satisfied, particularly in cases of sexual assault. They consider that the requirement for independent evidence which supports, or confirms the main source of evidence about a crime is an important safeguard for an accused person and avoids the arguably more subjective and potentially less uniform approach of juries being directed by individual judges in relation to the strength or otherwise of the case against the accused. Based on their own experiences of directing juries, the judges within the minority group consider that jurors do understand the concept of corroboration and apply it appropriately. For the judges in this group the solution to any identified difficulty on the part of jurors in understanding the concept of corroboration is for judges to develop more informative and effective directions. If the rule operated as a barrier to bringing cases then that had to be seen as the balance to be struck in order to permit the safeguard against inappropriate conviction to operate effectively.

Question 11: Which of the following best reflects your view on what should happen with the corroboration rule in the following situations?

a) If Scotland remains a three verdict system and keeps the simple majority:

- Scotland should abolish the corroboration rule
- Scotland should reform the corroboration rule
- Scotland should keep the corroboration rule as it is currently

b) If Scotland changes to a two verdict system and keeps the simple majority:

- Scotland should abolish the corroboration rule
- Scotland should reform the corroboration rule
- Scotland should keep the corroboration rule as it is currently

c) If Scotland changes to a two verdict system and increases the jury majority:

- Scotland should abolish the corroboration rule
- Scotland should reform the corroboration rule
- Scotland should keep the corroboration rule as it is currently

In summary, and for the reasons set out above, our answers to the questions posed are as follows:

a) In the majority view the corroboration rule should be abolished
b) In the majority view a two verdict system with a simple majority is not supported. It is not feasible to factor into the hypothesis posed a further consideration of whether corroboration should or should not be present in such a situation. However, in principle the majority of judges are in favour of the abolition of the corroboration rule. The question should be what further changes would be needed in that instance.
c) In the majority view the corroboration rule should be abolished.

Question 12: If the corroboration rule was to be reformed, rather than abolished, what changes do you feel would be necessary?

We are not able to offer an informed or constructive response to this question since the consultation paper does not suggest any reform of the rule to which we could give consideration.

Question 13: Do you feel further safeguards against wrongful conviction should be in place before any reform or abolition of the corroboration rule?

If a decision in principle is made to abolish the rule requiring corroboration we would suggest that it might be appropriate to revisit the Final Report of the Post-corroboration Safeguards Review prepared by Lord Bonomy's review group in 2015, whilst also making clear that when judges considered the report in 2015 not all of the recommendations were agreed with and that remains the position for at least some judges.

Question 14: If the corroboration rule was kept or reformed, what else could be done to help people, including those involved in the justice system and the general public, to understand it better?

We have no suggestion to offer.

Questions 15 – 19

We refer to our responses above to which we have nothing to add.