they may not diminish litigation anyway, it may be wise to exercise caution before legislating. It is to be hoped that the Scottish Parliament will debate thoroughly before taking a step whose impact is so difficult to predict.

Charlie Irvine
University of Strathclyde

EdinLR Vol 17 pp 90-96

Majority Jury Verdicts

As is well known, the Carloway Review has recommended that the requirement of corroboration in Scottish criminal cases be abolished as an "archaic rule that has no place in a modern legal system",[1] the retention of which would leave Scots criminal law "deeply steeped in what is essentially late medieval jurisprudence".[2] The language of this claim is significant in itself: as John Cairns has pointed out, "medieval" in general usage implies disapproval, whereas the corroboration rule might equally be characterised as "classical", implying the opposite.[3] Describing a rule as either "medieval" or "classical" offers the illusion of an argument at most.

The case for abolishing corroboration cannot rest solely on the antiquity of the rule, but instead whether it serves some useful purpose, regardless of its history. In Lord Carloway's view, it does not. On his account, the requirement of proof beyond reasonable doubt is "the real protection against miscarriages of justice".[4] It follows from this that any other safeguards against miscarriage of justice, such as the corroboration rule, are not only redundant but even counterproductive. If such safeguards serve only to prevent the conviction of persons whose guilt cannot be proven beyond reasonable doubt, they are unnecessary; if they prevent the conviction of persons whose guilt *can* be proven to this standard, they do more harm than good.

As we have argued elsewhere,[5] this approach places rather too much reliance on the capacity of the standard of proof to operate as a safeguard against miscarriages of justice, particularly as Lord Carloway's report did not engage in any critical scrutiny of the beyond reasonable doubt test itself. The Scottish Government's own consultation on Lord Carloway's proposals is not quite so reductionist, noting other safeguards

1 Carloway Review, *Report and Recommendations* (2011) para 7.2.55.

2 Para 7.1.21.

3 J W Cairns, "Corroboration and the Carloway report – the evil of the medieval?", *Edinburgh Legal History Blog*, 22 Oct 2012, at *http://www.law.ed.ac.uk/elhblog/blogentry.aspx?blogentryref=9042*

4 Carloway Review, *Report* (n 1) para 7.2.41.

5 J Chalmers and F Leverick, "'Substantial and radical change': a new dawn for Scottish criminal procedure?" (2012) 75 MLR 837 at 863-864. We made extensive criticisms of the Review's analysis of corroboration (at 849-855) which we will not repeat here.

which already exist in the criminal justice system, and asking expressly whether further changes might be required were corroboration to be abolished.[6]

The Scottish Government has already, before its own consultation ended, stated that it intends to abolish the corroboration requirement – now described as "ancient" – in a forthcoming Criminal Justice Bill.[7] Since then, the Law Society of Scotland,[8] the Faculty of Advocates,[9] JUSTICE Scotland,[10] the Scottish Police Federation[11] and the Senators of the College of Justice (Lord Carloway excluded)[12] have all publicly opposed such a change, as the Scottish Law Commission had previously.[13] This may make no difference: the Justice Secretary's response to the judges' defence of corroboration was to describe it as "hardly unprecedented for there to be a divide in legal opinions amongst learned friends", and to suggest that opposition to the abolition of corroboration is contrary to the interests of victims of crime.[14]

A. THE QUESTION

Against this background, our intention is not to debate the merits of the corroboration requirement. Such a debate would appear to have little purpose given the Scottish Government's commitment to its abolition. Rather, it is to consider whether one specific change might be necessary if it were to be abolished: the modification of the rule that a Scottish criminal jury can return a verdict of guilty based on a simple majority (that is, 8 votes for conviction).[15] Should some form of weighted majority be required as a safeguard against wrongful conviction? Lord Carloway argued that this issue was "not specifically within [the] remit" of the Review,[16] but suggested that

6 Scottish Government, *Reforming Scots Criminal Law and Practice: The Carloway Report* (2012) para 9.26 and Q32.

7 Scottish Government, *Working for Scotland: The Government's Programme for Scotland 2012-13* (2012) 67.

8 Law Society of Scotland, *Scottish Government Consultation Paper: Reforming Scots Criminal Law and Practice: The Carloway Report. The Law Society of Scotland's Response* (2012) 20-21.

9 Faculty of Advocates, *Response by the Faculty of Advocates to the Scottish Government on Reforming Scots Criminal Law and Practice* (2012) para 66.

10 JUSTICE Scotland, *Reforming Scots Criminal Law and Practice: The Carloway Report: Response to Consultation* (2012) para 171.

11 Scottish Police Federation, *Briefing Paper: Federation Opposes Lord Carloway's Proposal to Abolish Corroboration* (2012).

12 Senators of the College of Justice, *Response to the Scottish Government Consultation Paper: Reforming Scots Criminal Law and Practice* (2012) 21-22. The response is available via *http://www.scotland-judiciary.org.uk/24/943/Judges-respond-to-public-consultation-on-Carloway-Report*. That web page specifically notes that the view expressed on corroboration is a unanimous one.

13 Scottish Law Commission, Report on *Similar Fact Evidence and the* Moorov *Doctrine* (Scot Law Com No 229, 2012) para 1.24.

14 R Dinwoodie, "MacAskill stands by criminal evidence shake-up", *The Herald* 22 Oct 2012, where it is noted that the Association of Chief Police Officers in Scotland, in a response which did not appear to have been published at the time of writing, had supported the abolition of corroboration.

15 *Allison v HM Advocate* 1995 SLT 24.

16 Para 1.0.20.

change would nevertheless be undesirable, because it would leave open the possibility of a retrial if the jury failed to agree.[17]

This is simply wrong. First, it is not clear that even if a retrial were required where the jury failed to agree, this would be particularly problematic. The number of retrials under such a system could be expected to be relatively small: in 1994, the Scottish Office estimated that, were the possibility of a hung jury to be introduced into Scots law, the number of retrials which would take place annually as a result could be expected to be in single figures.[18] Moreover, while retrials are one possible consequence of such a system, they are not an inevitable one. A system which required a weighted majority for conviction could simply take the view that, where no such majority existed, this should mean that the prosecution has failed satisfactorily to prove its case and so the accused should be acquitted. The Scottish courts previously took exactly this approach during wartime, when the size of the criminal jury was reduced and a weighted majority required.[19] At a later date, the Thomson Committee agreed that were a weighted majority to be required for conviction, any failure to attain that majority should result in acquittal with no possibility of retrial.[20]

These points aside, we would argue that there is a strong case for introducing a weighted majority verdict into Scottish criminal procedure if the corroboration requirement is abolished.[21] That case has three parts. First, the Scottish simple majority verdict is inconsistent with lay jury systems worldwide. Secondly, it has consistently been justified on the basis that corroboration provides an alternative safeguard against wrongful conviction, a justification that disappears if the corroboration requirement were to be removed. Thirdly, a weighted majority would not significantly reduce the number of convictions, but would operate as a safeguard against miscarriages of justice.

B. THE EVIDENCE

(1) The simple majority verdict is inconsistent with lay jury systems worldwide

Few other criminal justice systems accept that it would be legitimate to convict and punish an individual on the basis of a simple majority verdict. Unanimity has been described in the Supreme Court of Canada as one of the "fundamental characteristics of criminal jury trials".[22] The High Court of Australia has said that the unanimity

17 Ibid. See also Lord Carloway's evidence to the Justice Committee on this point: Justice Committee Official Report, 29 Nov 2011, cols 543-544.

18 Scottish Office, *Juries and Verdicts* (1994) para 6.5.

19 Administration of Justice (Emergency Powers) Act 1939 s 3; *Mackay v HM Advocate* 1944 JC 153.

20 Criminal Procedure in Scotland (Second Report) (Cmnd 6218: 1975) para 51.12. The committee recommended, however (over the dissent of Gerald Gordon), that a weighted majority should not be required.

21 A view which has some support in the comments of the Senators of the College of Justice: see Senators of the College of Justice, *Response* (n 12) 23-24, suggesting that the abolition of corroboration would mean that "consideration may have to be given to adopting the type of majority required in England, namely 10 out of a jury of 12". We would suggest that, if the Scottish jury were to remain comprised of 15 members, a requirement of 12 votes for conviction would seem appropriate.

22 *R v Bain* [1992] 1 SCR 91 at [145] read with [146] per Gonthier J (dissenting, but not on this issue).

requirement "constitutes one of the hallmarks of the common law institution of trial by jury", explaining that:[23]

> ... there is a significant difference in nature between a deliberative process in which a verdict can be returned only if consensus or agreement is reached by all jurors and a process in which a specified number of jurors can override any dissent and return a majority verdict. The requirement of a unanimous verdict ensures that the representative character and the collective nature of the jury are carried forward into any ultimate verdict. A majority verdict, on the other hand, is analogous to an electoral process in that jurors cast their votes relying on their individual convictions ... The necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed. Thereby, it reduces the danger of 'hasty and unjust verdicts'. In contrast, and though a minimum time might be required to have elapsed before a majority verdict may be returned, such a verdict dispenses with consensus and involves the overriding of the views of the dissenting minority.

The High Court of Australia went on to observe that "the common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt",[24] reflecting the views of Sir Patrick Devlin, who acknowledged the Scottish system in his 1956 Hamlyn lectures but concluded:[25]

> The criminal verdict is based on the absence of reasonable doubt. If there were a dissenting minority of a third or a quarter, that would of itself suggest to the popular mind the existence of a reasonable doubt and might impair public confidence in the criminal verdict.

Over time, concern about one or two members of the jury having undue influence over its verdict (and also concerns about it being possible to tamper with a jury verdict by intimidating a single juror) have caused various jurisdictions to accept weighted majority verdicts, such as the 10:2 verdict which has been permitted in England since the Criminal Justice Act 1967.

Such developments have never gone so far as accepting the simple majority verdict found in Scotland, while in some instances departures even from pure unanimity have been resisted. For example, the New South Wales Law Commission relatively recently examined the rule in that jurisdiction that verdicts must be unanimous, and concluded that it should be retained.[26] The New South Wales government did not accept this recommendation, but went only so far as to legislate to permit 11:1 majority verdicts.[27] In New Zealand, where unanimity was formerly required, the New Zealand Law Commission gave extensive consideration to the issue, and recommended that majority verdicts be permitted only to

23 *Chealte v R* (1993) 177 CLR 541 at [7], references omitted.
24 At [8].
25 P Devlin, *Trial by Jury* (1956) 56.
26 New South Wales Law Reform Commission, *Majority Verdicts* (Report 111, 2005).
27 Jury Act 1977 s 55F.

the extent of 11:1.[28] That recommendation has since been implemented by legislation.[29]

Perhaps the only major exception (other than Scotland) to the general requirement of unanimity or near-unanimity is found in the Russian criminal jury. Russian criminal juries can return verdicts by a simple majority (seven votes from twelve jurors), but this is counterbalanced by a number of safeguards against wrongful conviction which have no parallel in the Scottish jury system. These are (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 are 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.[30]

(2) The Scottish simple majority verdict has consistently been justified on the basis that corroboration provides an alternative safeguard against wrongful conviction

Scotland has been able to maintain a simple majority system because of the corroboration requirement. The Thomson Committee noted that the witnesses who gave evidence to it favouring retention of the simple majority verdict thought it was appropriate because of corroboration (and also the not proven verdict); the Committee itself concluded that a "weighted majority" was "unnecessary in view of the other safeguards which our system provides for the protection of the innocent".[31]

Corroboration has been cited by successive governments as a justification for maintaining simple majority verdicts.[32] More generally, the Sutherland Committee saw corroboration as one of the "considerable strengths and distinctive features" of the Scottish criminal justice system which meant that certain safeguards against wrongful conviction which might be necessary in other jurisdictions might not be necessary in Scotland.[33] The view that the simple majority verdict can be justified by reference to the requirement of corroboration has been similarly expressed by academic commentators, albeit with some doubt as to whether this justification should succeed.[34] If the corroboration requirement is removed, this justification evaporates and if the simple majority verdict is to be retained, another justification for it must be found.

28 New Zealand Law Reform Commission, *Juries in Criminal Trials* (Report 69, 2001) ch 13.

29 Juries Amendment Act 2008.

30 G Esakov, "The Russian criminal jury: recent developments, practice, and current problems" (2012) 60 American Journal of Comparative Law 665.

31 Criminal Procedure in Scotland (Second Report) (n 20) paras 51.06 and 51.12.

32 Scottish Office, *Firm and Fair: Improving the Delivery of Justice in Scotland* (Cm 2600: 1994) paras 3.20-3.21; Scottish Government, *The Modern Scottish Jury in Criminal Trials* (2008) para 7.13.

33 *Criminal Appeals and Alleged Miscarriages of Justice* (Cm 3245: 1996) para 1.24 and *passim*.

34 P Duff, "The Scottish criminal jury: a very peculiar institution" (1999) 62 Law and Contemporary Problems 173 at 191-192; G Maher, "The verdict of the jury", in M Findlay and P Duff (eds), *The Jury Under Attack* (1988) 45.

(3) A weighted majority would not significantly reduce the number of convictions, but would operate as a safeguard against miscarriages of justice

A jury does not simply vote; it deliberates. In the course of that deliberation it is to be expected that a particular view of the evidence will in most cases prevail and that all or nearly all the jurors will agree on the verdict to be reached. In England and Wales in 2011, 81 per cent of convictions were reached by a unanimous jury and 19 per cent by a majority.[35]

It is difficult to compare directly rates of jury verdicts across different jurisdictions, not least because the necessary Scottish statistics are not readily available. In 1994, the Scottish Office's *Juries and Verdicts* paper noted that 18% of persons proceeded against in the High Court, and 14% of persons proceeded against in the Sheriff Court, were acquitted.[36] The most recent English statistics indicate that 18.6% of persons proceeded against in the Crown Court are acquitted.[37]

All this suggests that requiring a weighted majority would not significantly reduce the number of convictions. It would, however, ensure that the weakest cases, where the level of dissent amongst jurors means that the accused's guilt cannot fairly be said to have been proven beyond a reasonable doubt, would not proceed to conviction. In cases where, after deliberation, a significant minority of jurors are not persuaded of the accused's guilt, it would be perverse to allow a bare majority to convict. If the requirement of corroboration is abolished, it would follow that a person could be convicted on the word of A against B, even if 7 of 15 jurors were convinced that B was telling the truth and that it had in fact been shown beyond reasonable doubt that the accused was innocent.

In passing, it might be observed that the requirement of a weighted majority could be expected to have prevented one of the most notorious Scottish miscarriages of justice: as Lord Hunter noted, the guilty verdict returned against Patrick Meehan was understood to have been by either an 11-4 or 10-5 majority, although the size of the majority was not formally recorded.[38]

C. CONCLUSION

Significantly, the Scottish Government has chosen to ask consultees who propose that the abolition of corroboration should result in further safeguards the stark question: "What evidence do you have to support your position?"[39] That question is perfectly reasonable in its own terms, but it seems significant that it is the only time the government has chosen to ask it. Elsewhere in the consultation paper, consultees are expressly invited to consider whether the government should weaken

35 Ministry of Justice, *Judicial and Court Statistics* 2011 (2012) 48.

36 Scottish Office, *Juries and Verdicts* (n 18) 28, table 2.

37 Ministry of Justice, *Judicial and Court Statistics* 2011 (2012) 47-48. This figure has been calculated from the guilty plea rate given on page 47 and the conviction rate in not guilty cases given on page 48.

38 *Report of Inquiry by the Hon Lord Hunter, VRD into the Whole Circumstances of the Murder of Mrs Rachel Ross* (HC 1981/82: 444, July 1982) paras 7.221 n 1, 8.67 and 9.185.

39 Scottish Government, *Reforming Scots Criminal Law and Practice* (n 6) Q32, emphasis in original.

the protection for suspects and accused persons proposed by Lord Carloway.[40] Those who wish (encouraged by the Government) to take issue with Lord Carloway's recommendations are not exhorted to provide evidence: that requirement is an asymmetrical one.

There is evidence, as we have shown above, but there is a deeper problem: where should the burden of persuasion lie? If the requirement of corroboration were to be abolished without alternative safeguards being put in place, this could leave the level of protection available against wrongful conviction in Scotland at a dangerously weak level. No evidence has been offered to suggest that such a system would be effective at avoiding miscarriages of justice. Such evidence cannot be found in historical practice (as corroboration has always been required in Scottish cases), nor from experience in other jurisdictions which have never chosen to run the risk of permitting conviction by a simple majority on uncorroborated evidence. The onus should be on the Scottish Government to prove that its proposals are a safe way to run a justice system, not on critics to prove that they are unsafe.

James Chalmers and Fiona Leverick
University of Glasgow

40 Ibid Q6 (asking whether it should be possible to detain suspects for a longer time than the maximum limit proposed by Lord Carloway) and Q8 (asking whether it should be permissible to hold a person in custody before a court appearance for a longer time than the maximum proposed by Lord Carloway).