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CHAPTER 2: CORROBORATION: CONSEQUENCES AND CRITICISM

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The question of whether corroboration *should* be abolished is not part of the remit of the Post-Corroborator Safeguards Review, and it is not a question which this chapter seeks to answer. In considering alternative safeguards, however, it is essential properly to understand the effect of the corroboration requirement and the grounds on which the corroboration requirement has been criticised.

The current law of corroboration is discussed in detail in chapter 3. In summary, it is a rule that in a criminal case, there must be two sources of evidence in respect of each “crucial fact”.¹ Without such evidence, a conviction is impossible, regardless of the persuasive weight of whatever evidence has been adduced. The report of the Carloway Review contained a detailed discussion of how the requirement for corroboration had developed in continental Europe but had (largely) been abandoned on the Continent in favour of principles of free proof.² A rule of *unus testis, nullus testis* (one witness is no witness) does survive in the Netherlands and is discussed in an appendix to this report.³

2.1 What practical effect does a corroboration rule have?

Hume, in comparing the criminal law of Scotland and England, saw corroboration as an advantageous rule denied to English defendants, although he preferred to present it not as a straightforward advantage but rather as a trade-off whereby Scotland could justify permitting simple majority jury verdicts rather than the unanimity demanded in England.⁴

Other writers, such as Alison,⁵ were more sceptical as to whether corroboration provided any significant additional safeguard for those accused of crime. Dickson wrote that:⁶

The law of England recognises a different rule...; the evidence of one witness, if believed by the jury, being sufficient in almost all cases. Yet, as has been well observed, this difference is more apparent than real; for the credibility of a single witness can seldom be ascertained without corroborating circumstances, the want of which often leads to an acquittal on the advice of the Court; while, in Scotland, the absence of a second witness may be supplied by circumstances, and, if there is such corroboration, it lies with the tribunal to say whether the whole evidence is credible.

There is modern empirical research which provides some evidence as to the practical effect of the corroboration rule. In the 1990s, two research studies were carried out for the Royal Commission on

¹ *Smith v Lees* 1997 JC 73.

² *The Carloway Review: Report and Recommendations* (2011) ch 7.

³ See ch 18.

⁴ D Hume, *Commentaries on the Law of Scotland, Respecting Crimes*, 4th edn by B R Bell (1844) i, 6.

⁵ A Alison, *Practice of the Criminal Law of Scotland* (1833) 554 (“where the principles of the two [Scots and English] laws seem fundamentally at variance, the difference in practice is really not so considerable as might be expected”).

⁶ W G Dickson, *A Treatise on the Law of Evidence in Scotland* (P J Hamilton Grierson’s edn, 1887) para 1812. The “well observed” reference is to Alison’s *Practice*.

Criminal Justice. At the time, there was particular concern in England and Wales about convictions on the basis of uncorroborated confession evidence, and the studies were concerned in particular with prosecutions founded on a confession by the accused.

The first of the two studies found that only 30 of a sample of 2210 magistrates' court cases relied on confession evidence alone.⁷ The second estimated that in 524 cases, 14 convictions based on confessions "would probably have become acquittals because of the apparent lack of supporting evidence of any kind".⁸

These studies suggest that in a system – such as England and Wales – which does not require corroboration, few prosecutions will actually be brought in the absence of corroborating evidence, no doubt because it is difficult to satisfy a finder of fact that proof beyond reasonable doubt has been made out in such cases.

The Carloway Review itself included a research report from Crown Office which purported to assess the effect of the corroboration rule. This research suggested that in two samples of cases which had been discontinued on the grounds of insufficient evidence, a "reasonable prospect of conviction" existed in over half (59 per cent in one sample, 67 per cent in another). The design of that research study has been strongly criticised,⁹ and Lord Carloway said himself that removing the requirement of corroboration "may not result in significant changes to conviction rates".¹⁰

When the Criminal Justice (Scotland) Bill was introduced into the Scottish Parliament, the accompanying Financial Memorandum suggested a rather more conservative picture:¹¹

...shadow reporting and shadow marking exercises carried out by Police Scotland and COPFS suggest that there are likely to be increases in the number of cases reported by the Police to COPFS, and in the number of cases prosecuted by COPFS. The potential scale of increase is as follows:

- Police – increase in police reports to COPFS in the range 1.5%-2.2%, with a most likely estimate of 1.5%
- COPFS – change in summary prosecutions in the range of a 1% decrease to a 4% increase, with a best estimate of a 1% increase; and increase in solemn prosecutions in the range of 2-10% increase, with a best estimate of a 6% increase.

⁷ Including admissions falling short of a confession. See *Report of the Royal Commission on Criminal Justice* (Cm 2263: 1993) para 4.69.

⁸ *Ibid.* See M McConville, *Corroboration and Confessions: The Impact of a Rule Requiring that No Conviction can be Sustained on the Basis of Confession Evidence Alone* (Royal Commission on Criminal Justice Research Study No 13, 1993).

⁹ J Chalmers and F Leverick, "'Substantial and radical change': a new dawn for Scottish criminal procedure?" (2012) 75 MLR 837 at 852-853.

¹⁰ *The Carloway Review: Report and Recommendations* (2011) para 7.2.41. This is a reference to conviction rates and not to the absolute number of convictions. It might be suggested that the abolition of corroboration would lead to a greater number of prosecutions and therefore a greater number of convictions overall, even if the conviction rate remained the same. However, Lord Carloway was later to suggest in evidence to the Justice Committee that the abolition of corroboration would mean that "although the total number of convictions may or may not go up or down, one would hope that if there is a focus on quality, the number of convictions per prosecution ought perhaps to go up": Justice Committee Official Report, 29 November 2011, col 528.

¹¹ *Criminal Justice (Scotland) Bill: Financial Memorandum* (2013) para 32.

2.2 Why has England and Wales not adopted a corroboration rule?

Given the perceived significance of corroboration as a safeguard against miscarriages of justice, and the extent to which English law has grappled with the problem of miscarriages,¹² it might be expected that reformers in England and Wales would have seen the Scottish corroboration rule as a ready-made solution to their problems. English law has taken from Scots law in this fashion before. In the Homicide Act 1957, Westminster legislated to introduce the Scottish doctrine of diminished responsibility into English law,¹³ remedying a defect in English law whereby the law of homicide had previously failed properly to account for cases where people killed while suffering from impaired mental capacity. Corroboration might have been seen as a similar off-the-shelf solution to a recognised problem, but it was not. Why not? Answers can be found in a variety of English reviews of the problem of miscarriages of justice.

The Devlin Committee (1976)

The Devlin Committee was set up in 1974 following two cases of wrongful conviction, with a remit to examine “all aspects of the law and procedure relating to evidence of identification in criminal cases”.¹⁴ The Committee did consider whether there should be a requirement of corroboration in cases of identification, but doubted the value of such a rule. It noted three principal arguments against such a requirement: (a) it could not see how to tailor the rule so as not to cause injustice in cases involving “prolonged or repeated observation” where, it felt, the risk of error was rather less; (b) it felt the requirement would confer effective immunity on many petty offenders; (c) an alleged offender who had been identified by an apparently reliable single witness should be expected to present a defence rather than having the option of making a no case to answer submission at the end of the prosecution case.¹⁵

JUSTICE’s 1989 report on miscarriages of justice

A 1989 report by JUSTICE on *Miscarriages of Justice* noted calls which had been made for a corroboration requirement in respect of confession evidence (either generally or in certain cases),¹⁶ and “[i]n order to see what effect a requirement of corroboration would have... examined the situation in Scotland”.¹⁷ They suggested that the difference between Scots and English law was “more apparent than real” and that the degree of corroboration required by Scots law was not

¹² Indeed, the 1993 *Report of the Royal Commission on Criminal Justice* (Cm 2263: 1993) has been seen as a watershed in the treatment of miscarriages of justice in common law jurisdictions: see T Thorp, *Miscarriages of Justice* (2005) 11.

¹³ See HC Debs 27 Nov 1956, col 318 (statement of the Attorney-General); HC Debs 15 Nov 1956, col 1153 (statement of the Home Secretary).

¹⁴ *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (HC338, 1976) vii.

¹⁵ Paras 4.27-4.42.

¹⁶ JUSTICE, *Miscarriages of Justice* (1989) para 3.21, citing *Report of Inquiry into the Circumstances Leading to the Trial of Three Persons on Charges arising out of the Death of Maxwell Confait and the Fire at 27 Doggett Road, London SE6* (HC90, 1977) paras 2.26-2.29. JUSTICE also examined identification evidence, concluding in this respect that the recommendations of the Devlin Committee (on which, see ch 5) should be given statutory force: para 3.12.

¹⁷ Para 3.22.

“high”.¹⁸ They concluded that “corroboration is not necessarily the foolproof safeguard that its proponents suggest”,¹⁹ and that it offered only protection of a “limited nature”.²⁰

Despite this scepticism, JUSTICE did recommend that a confession should be inadmissible unless (amongst other things) “the truthfulness of the facts contained in the alleged confession is corroborated by independent evidence of other witnesses”.²¹ In part, JUSTICE’s lukewarm evaluation of the Scottish rule was based on the view that it had been “relaxed” so as to diminish the protection which it offered.²² JUSTICE did not consider whether a different, stronger corroboration rule might be desirable.

The Runciman Commission (1993)

In 1991, on the same day that the convictions of the Birmingham Six were quashed, the Home Secretary announced the establishment of a Royal Commission on Criminal Justice, chaired by Viscount Runciman. The Commission had a broad remit “to examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent”.²³ It reported in 1993.

The Commission reviewed the arguments for and against a supporting evidence requirement, particularly in the context of confessions.²⁴ In favour of such a requirement, it noted that (a) there were a number of cases where confessions had been believed by juries but were subsequently found to be false, including both cases of police malpractice and cases where there had been no investigative impropriety; (b) that persons do confess to crimes which they have not committed; (c) that, particularly given the risks associated with such evidence, confessions had “hitherto taken too central a role in police investigations”.

Against such a requirement, it noted (d) that a supporting evidence requirement would hinder cases brought against people “properly convicted on the basis of genuine confessions alone”; (e) that a supporting evidence requirement would affect only a very small percentage of cases, although the absolute number would be high; (f) that a supporting evidence requirement would result in additional acquittals despite some members of the Commission doubting that “the proposed corroboration rule gave significantly greater safeguards against wrong convictions than are now available”; (g) that police decisions not to seek evidence supporting confessions were often “a rational decision to conserve limited resources”; (h) that the law had tended generally to move away from corroboration requirements and (i) that placing too much emphasis on a corroboration requirement would be dangerous, because it might dissuade scrutiny of cases where there were multiple but weak pieces of evidence against the defendant.

A minority of the Commission (three of eleven members) considered that it should not be possible for a conviction to be based upon a confession alone.²⁵ The majority took a different view, recommending that:²⁶

¹⁸ Para 3.23.

¹⁹ Para 3.27.

²⁰ Para 3.29.

²¹ Para 3.27.

²² Para 3.24, citing G More, “An open letter to the Lord Advocate” (1985) 30 JLSS 429.

²³ Royal Commission on Criminal Justice, *Report* (Cm 2263: 1993) i.

²⁴ Paras 3.65-3.75.

²⁵ Para 3.86.

...where a confession is credible and has passed the tests laid down in PACE, the jury should be able to consider it even in the absence of other evidence. Where a confession is not credible we would expect the case to be dropped before it reaches the jury; either the police will not pursue it, or the prosecution review will screen it out, or the judge will direct an acquittal following the reversal of *Galbraith* or exclude the confession under section 76 or 78 of PACE. We think that a confession which passes all these tests should be left to the jury to consider. We do, however, recommend that the judge should in all cases give a strong warning [about the dangers of convicting on a confession alone].

2.3 Criticisms of the Scottish corroboration rule before *Cadder v HM Advocate*

Criticisms of the Scottish corroboration rule have, until recently, been rare and intermittent.²⁷ In a short 1943 article, the advocate and barrister C de B Murray attacked the corroboration rule, arguing that “our law of evidence ought, like the Law of England, to prescribe quality, not quantity, in order that the guilty may not escape justice, when the evidence against them is, in the opinion of a jury, at once credible and sufficient”.²⁸ He returned to the point in more detail a few years later:²⁹

...one notes that while the Scottish rule differs from the English, the Scottish writers do not bother to examine it or defend it. It is stated in peremptory form as though it were an axiom of Euclid’s, and to question it, sacrilege. On the other hand, English textbooks on the law of evidence (Best, for example) are not content merely to say that by the law of England one witness, accepted as credible and not contradicted, is enough. They go into the matter both historically and logically. In primitive times proof depended on the number of a man’s witnesses. As the law developed and barbarians became citizens, it was seen that the value of evidence depended not on the number but the character of the witnesses – not quantity, quality. The evidence of one intelligent and honest man is worth more than twenty rogues. Other points I have space barely to indicate: (1) the necessity of having more than one witness is a temptation to commit perjury, or, at any rate, to induce some one else to do so; (2) crime is committed in solitude and darkness, not openly in the light of day and requiring two witnesses is an encouragement to criminals, for if they assault a man in a desolate place where no one else is present, they may escape conviction; (3) a mechanical and rule of thumb method of proof is, in these enlightened days, surely an anachronism.

In 1975, the Select Committee on Violence in Marriage criticised the corroboration rule, stating that in cases of domestic violence it “in practice usually means there must be a witness to the assault other than the woman concerned before a conviction can be obtained”, and recommended that it

²⁶ Para 3.87, referring to the Police and Criminal Evidence Act 1984. The Commission proposed (at paras 3.41-3.42) reversing *R v Galbraith* [1981] WLR 1091, so that a trial judge could stop a case if “the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be allowed to go to a jury”. This would have been a wider power than that permitted under *Galbraith*, where it was held that a trial judge should stop a case only if (a) there was no evidence that the defendant committed the offence or (b) taking the prosecution evidence at its highest, a reasonable jury, properly directed, could not properly convict on it. This proposal was not implemented.

²⁷ I D Macphail, *Evidence: A Revised Version of a Research Paper on the Law of Evidence in Scotland* (1987) para 23.28: “the abolition or relaxation of the requirement of corroboration in criminal cases has seldom been suggested”. The only examples he cites are the papers by C de B Murray noted immediately below.

²⁸ C de B Murray, “Plurality of witnesses” (1943) 59 Scottish LR 141 at 143

²⁹ C de B Murray, “Quality or quantity of evidence” (1946) 62 Scottish LR 249 at 254-255.

be amended in respect of assaults between husband and wife in the matrimonial home.³⁰ The Secretary of State for Scotland and the Lord Advocate undertook to study this recommendation,³¹ but nothing appears to have come of it. The Scottish Law Commission was later to suggest that the Select Committee's concerns may have been misconceived:³²

Apprehensions as to the difficulty of obtaining sufficient corroborative evidence of domestic violence may in many cases rest on a misconception of the rule. But we add the rider that it is most important that those concerned with enforcing the law relating to domestic violence should properly understand the nature of the evidence which can constitute corroborative evidence. It has been suggested to us, for example, that there is a widespread belief that evidence cannot be corroborative evidence unless it derives from a second eye witness. It seems to us that it is important to ensure that this notion is dispelled particularly if it is entertained by policemen.

The Scottish Law Commission returned to this topic in its work on the evidence of children and other potentially vulnerable witnesses from 1988 to 1990, noting that there had been moves towards relaxing corroboration requirements in respect of child witnesses in English law. In its discussion paper, however, it rejected the suggestion that Scots law should take a similar path. Corroboration was a general requirement in Scotland, and there could be:³³

...no possible justification for creating a privileged class of case, or a privileged class of witnesses, for which or for whom the normal requirements of corroboration would no longer apply. It may, of course, be argued that child abuse is a particularly objectionable form of criminal behaviour, but that consideration, even if it be right, merely seems to us to strengthen the desirability of ensuring, by retention of the corroboration requirement, that innocent people are unlikely to be wrongly convicted.

In its report, the Commission noted that its view had been "widely accepted" by consultees, and recommended that there should be no exception to the corroboration requirement in respect of child witnesses. It noted, however, that a general corroboration requirement was comparatively unusual, and suggested "it may be that this Scottish rule should be reassessed at some time to see whether its retention, as a general requirement, is justified".³⁴

The Commission returned to this issue once again in 2004, when the Scottish Ministers asked it to "examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences and to make recommendations for reform".³⁵ In its Discussion Paper on *Rape and Other Sexual Offences*, the Commission noted that the corroboration requirement could be

³⁰ *Report from the Select Committee on Violence in Marriage* (HC 553-II, 1975) para 55.

³¹ Department of Health and Social Security, Department of the Environment, Home Office, Scottish Office and Welsh Office, *Observations on the Report from the Select Committee on Violence in Marriage* (Cmnd 6690: 1976) para 72.

³² Scottish Law Commission, *Report on Occupancy Rights in the Matrimonial Home and Domestic Violence* (Scot Law Com No 60, 1980) para 4.30.

³³ Scottish Law Commission, *The Evidence of Children and Other Potentially Vulnerable Witnesses* (Scot Law Com DP No 75, 1988) para 5.20.

³⁴ Scottish Law Commission, *Report on The Evidence of Children and Other Potentially Vulnerable Witnesses* (Scot Law Com No 125, 1990) para 3.3.

³⁵ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences* (Scot Law Com DP No 131, 2006) para 1.1.

“especially problematic” in some cases of sexual assault,³⁶ and that Scots law was unusual in requiring corroboration.³⁷ It suggested, however, that this was counterbalanced by the absence of other safeguards from the criminal justice process (in particular, the fact that Scottish jury verdicts need not be unanimous).³⁸ It asked whether the requirement of corroboration should be removed for proof of sexual offences (and, if so, which ones).³⁹ Only seven of 52 respondents supported the abolition of corroboration.⁴⁰ The Commission summarised the position of those who opposed abolition as follows:⁴¹

Consultees who opposed abolition of the corroboration requirement gave several reasons for their view. One reason, stressed by many consultees, was the risk of miscarriage of justice if a conviction could proceed on the basis of uncorroborated evidence. A further point was stressed by several groups representing the interests of victims of sexual attacks: allowing convictions in cases where there was no corroborating evidence could result in successful appeals, which in turn might lead to a general perception that all convictions based solely on the word of the complainer are unsound. The overall effect could be to discourage victims from raising allegations that they had been sexually assaulted.

The groups to which the Commission refers here were largely, although not unanimously, opposed to the removal of the requirement of corroboration for sexual offences. While the Central Scotland Rape Crisis and Sexual Abuse Centre suggested that it was “ludicrous” that corroboration was required for conviction of sexual offences, given that it had been removed for civil actions and did not apply to statutory offences of poaching, this was a minority view. The predominant view was that offered by Rape Crisis Scotland, in a submission adopted by a number of other bodies,⁴² who argued first, that there was no evidence from other jurisdictions that this would lead to a “significant rise” in convictions; and secondly, “the risk that this development would lead to a general perception that convictions obtained on this basis were unsafe, may put complainers at more of a disadvantage than any resulting benefits would advance their interests”.

The Commission concluded that, if the requirement of corroboration were to be altered or abolished, this should be considered “across the whole range of criminal offences”, and that such a review should not be carried out in isolation of other aspects of the criminal justice system such as

³⁶ Para 7.16.

³⁷ Para 7.24.

³⁸ Para 7.24.

³⁹ Para 7.26.

⁴⁰ Scottish Law Commission, Report on *Rape and Other Sexual Offences* (Scot Law Com No 209, 2007) para 6.4 n 1. The reasons which these consultees gave are not recorded in the report. The Commission adds “although some expressed uncertainty”: this presumably means that some of the remaining 45 consultees were uncertain, rather than indicating uncertainty on the part of some of the seven supporting corroboration’s abolition, but this is unclear.

⁴¹ Para 6.4.

⁴² Rape Crisis Scotland’s submission on this point was expressly adopted by the Edinburgh Women’s Rape and Sexual Abuse Centre, SASSIE (Sexual Abuse Survivors Support in Edinburgh) and Scottish Women’s Aid. The Fife Domestic and Sexual Abuse Partnership submitted that corroboration “should remain, considering that a majority verdict is sufficient to convict in Scotland”. Action for Change, Stirling opposed the suggestion that the requirement for corroboration be removed but did not give any reasons for this view. The Women’s Support Project stated that they would “tend to say no” to the suggestion as it “would not necessarily be a solution to addressing the barriers women face, in fact it may even exacerbate the situation for women”.

the simple majority jury verdict.⁴³ Accordingly, it did not recommend any change to the law of corroboration.

Despite the terms of reference for the Commission's work, it did not propose any changes to the law of evidence, and no such changes were included in the Sexual Offences (Scotland) Bill. When the Bill was considered by the Justice Committee, a number of those who submitted written evidence to the Scottish Parliament raised concerns about the law relating to sexual history and character evidence,⁴⁴ but none mentioned corroboration. This was reflected in the Committee's report, which sought clarification from the Scottish Government "on what is being done at present on the issues of sexual history and character evidence",⁴⁵ but did not consider corroboration.

2.4 Criticisms of the Scottish corroboration rule following *Cadder v HM Advocate*

The current debate over corroboration in Scots law is a direct result of the 2010 decision of the Supreme Court in *Cadder v HM Advocate*⁴⁶ and, before that, the 2008 decision of the European Court of Human Rights in *Salduz v Turkey*.⁴⁷ In *Salduz*, the European court had held that "in order for the right to a fair trial to remain sufficiently 'practical and effective' art.6(1) [of the ECHR] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right".⁴⁸

The Scottish courts had previously rejected the contention that the European Convention required that suspects detained by the police be permitted access to a lawyer.⁴⁹ Post-*Salduz*, it maintained that position in *HM Advocate v McLean*,⁵⁰ observing that the right to a fair trial was safeguarded by other features of the Scottish criminal justice system – such as corroboration. The Supreme Court's decision in *Cadder* overruled *McLean*. Corroboration could not defeat the right of access to a lawyer identified in *Salduz*.⁵¹ The right recognised in *Salduz* existed specifically to protect the right against self-incrimination,⁵² meaning that many other safeguards recognised in Scots law were "really beside the point".⁵³

Immediately following *Cadder*, the Scottish Government introduced emergency legislation into the Scottish Parliament to create a statutory right of access to a lawyer during detention and to address

⁴³ Para 6.5.

⁴⁴ Michele Burman; Engender; The Equality and Human Rights Commission; The Lesbian, Gay, Bisexual and Transgender Domestic Abuse Project; Rape Crisis Scotland; Zero Tolerance Scotland.

⁴⁵ Justice Committee, *Stage 1 Report on the Sexual Offences (Scotland) Bill* (1st Report, 2009 (Session 3)) para 42.

⁴⁶ [2010] UKSC 43.

⁴⁷ (2009) 49 EHRR 19.

⁴⁸ Para 55.

⁴⁹ *Paton v Ritchie* 2000 JC 271; *Dickson v HM Advocate* 2001 JC 203.

⁵⁰ [2009] HCJAC 97.

⁵¹ See e.g. *Cadder* at para 50 per Lord Hope: "Much was made, of course, of the rule of Scots law that there must be corroboration of a confession by independent evidence. But there was independent evidence in *Salduz*. The reasoning in that case offers no prospect of its ruling being held not to apply because any confession must under Scots law be corroborated."

⁵² See para 70 per Lord Rodger. See further F Leverick, "The right to legal assistance during detention" (2011) 15 Edin LR 352.

⁵³ *Cadder* at para 73 per Lord Rodger.

certain consequential issues.⁵⁴ On the same day, the government announced a review by Lord Carloway of various aspects of criminal law and practice. The terms of reference of this review included the following:⁵⁵

(b) To consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime;

(c) To consider the criminal law of evidence, insofar as there are implications arising from (b) above, in particular the requirement for corroboration and the suspect's right to silence

As the following sections illustrate, the debate over corroboration, and the reasons suggested for its abolition, have shifted over time following *Cadder*.

Stage 1: Concerns forming the background to Lord Carloway's Review

As the terms of reference for the Carloway Review make clear, corroboration was to be considered as part of a general review of criminal law and practice in the light of *Cadder*, and not because of pre-existing concerns about the rule of corroboration itself. This is consistent with comments made by Lord Rodger in *Cadder*, suggesting that as a result of that decision "there will need to be changes in both legislation and police and prosecution practice to bring the Scottish system of police questioning into line with the requirements of Strasbourg and to ensure that, overall, any revised scheme is properly balanced and makes for a workable criminal justice system".⁵⁶

The Cabinet Secretary for Justice returned to this point in the Stage 1 debate on the emergency legislation which followed *Cadder*, arguing that:⁵⁷

...the scales of justice require to be balanced. When they are changed in one direction, in the interests of the rights of the accused, they require to be balanced in the other direction, in the interests of the rest of our community.

Corroboration was repeatedly mentioned in the debate as an issue for Lord Carloway's consideration, but without specific criticisms being made of the rule. Instead, it was felt that the rule should be considered as part of the general "balance" to which the Cabinet Secretary had referred. One specific reason for this, it was suggested in newspaper reports, was that "interviews in the presence of a solicitor may be seen substantially as doing away with the need for corroboration".⁵⁸

⁵⁴ Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. See F Stark, "The consequences of *Cadder*" (2011) 15 Edin LR 293. The Bill was introduced on 26 October 2010 and passed the following day.

⁵⁵ *The Carloway Review: Report and Recommendations* (2011) 13-14.

⁵⁶ *Cadder* at para 97.

⁵⁷ Scottish Parliament Official Report, 27 October 2010 col 29557. See also K MacAskill, "Scots law is now at risk", *Express on Sunday*, 31 October 2010, noting existing safeguards in Scots law and arguing that the *Cadder* ruling "disturbed the balance of these checks".

⁵⁸ "Scots law is found wanting once again", *The Herald* 26 October 2010. See similarly G Rose, "Judgment day for Scots law", *Scotland on Sunday* 31 October 2010.

Stage 2: The case against corroboration made by Lord Carloway

In his report, Lord Carloway rejected the “balancing” approach suggested in the immediate aftermath of *Cadder*:⁵⁹

Concern has been expressed that the Review was commissioned with a view to re-balancing a criminal justice system which had been thrown out of kilter by *Cadder*. There was some perception that *Cadder* had tilted the system in favour of the suspect in a criminal investigation and there required to be a re-adjustment by adding weight to the causes of the police and prosecution. The Review has not sought to analyse whether there has been a tilting or not and, in any event, in whose favour the balance has wavered. It has not approached its remit with a view to re-adjusting the system in favour of any particular institution or group of persons.

Lord Carloway noted the suggestion of Gerald Gordon that the corroboration rule could be justified on the basis that it would lead to “less injustice” than choosing to run the risk of making mistakes about the reliability of a single witness,⁶⁰ and explained his approach to the issue of corroboration as follows:⁶¹

The question, which the Review has asked itself, is whether the requirement is a useful tool for achieving Professor Gordon’s stated purpose in the modern world or whether it is an artificial construct that actually contributes to miscarriages of justice in the broad, rather than appellate, sense. Is corroboration merely a comfort blanket for decision makers; that is, something which does not really assist in making a decision the correct one, but which can be used to justify that decision in objective terms?

Corroboration was, therefore, something to be considered on its own terms: any case against it would be valid even if *Salduz* or *Cadder* had never happened. On Lord Carloway’s account, that case had three principal limbs. First, he argued, corroboration did not in fact prevent wrongful convictions; that goal was achieved by the standard of proof beyond reasonable doubt.⁶² Secondly, it was wrong that the evidence of a single witness could not, if the finder of fact considered it to amount to proof beyond reasonable doubt, result in a conviction.⁶³ Thirdly, the requirement was “frequently misunderstood by lay persons and lawyers, not least judges”.⁶⁴

On the basis of these arguments, Lord Carloway concluded that the corroboration requirement was “an archaic rule that has no place in a modern legal system”.⁶⁵ Two features of Lord Carloway’s argument should be stressed. First, the argument which he presented was not based on the consequences of the decision in *Cadder*. Secondly, it was not based on any difficulties with prosecuting specific crimes such as sexual offences. It was an entirely general argument, independent of these considerations.

⁵⁹ *The Carloway Review: Report and Recommendations* (2011) para 4.0.6. See also para 7.0.2.

⁶⁰ Para 7.2.3, citing G H Gordon, “‘At the mouth of two witnesses’: some comments on corroboration”, in R F Hunter (ed), *Justice and Crime* (1993) 33 at 35.

⁶¹ Para 7.2.5.

⁶² Para 7.2.41.

⁶³ Para 7.2.42.

⁶⁴ Para 7.2.44.

⁶⁵ Para 7.2.55.

Stage 3: The case against corroboration made by the Scottish Government

When the Criminal Justice (Scotland) Bill was introduced into Parliament, the accompanying Policy Memorandum restated the arguments made by Lord Carloway and stated that the Government had been persuaded by them.⁶⁶

Over the course of the Bill's progress, however, the debate shifted to reflect a focus on the difficulties of prosecuting particular crimes. In evidence to the Justice Committee, the Cabinet Secretary for Justice emphasised the difficulty of prosecuting rape and sexual offences, alongside other offences committed against elderly and vulnerable people and children.⁶⁷ When, during the Stage 1 debate on the Bill, the Cabinet Secretary was asked by one MSP why he was pressing forward with the abolition of corroboration, he responded as follows:⁶⁸

One of our most distinguished judges said that we cannot have a whole category of victims who are routinely denied access to justice. We cannot have those who suffer rape or domestic offences, those who suffer domestic abuse behind closed doors, those who are young, those who are vulnerable and those who are elderly preyed upon, picked upon and routinely denied access to justice...

The voices of brave individuals have been echoed by those of the professionals who see the very personal and devastating impact that the corroboration rule can have in practice – not only our police and prosecutors but groups such as Victim Support Scotland, Rape Crisis Scotland and Scottish Women's Aid, all of which play such a vital role in supporting the victims of crime.

2.5 Corroboration and positive obligations

In June 2011, the Lord Advocate made comments to *The Times* newspaper suggesting that the corroboration rule might place Scotland in violation of the ECHR:⁶⁹

"Very often in rape cases there is a delay in reporting the offence, which means that the opportunity to gather forensic evidence is lost," he said. "The combined effect of the need for corroboration with the right of suspects to have a lawyer in attendance could leave us in the position of falling foul of human rights law again on the grounds that we might not be meeting the requirement to provide effective sanctions in our system."

He was quoted to the same effect by *Holyrood* magazine in February 2012,⁷⁰ while in July 2013, the former Lord Advocate, Elish Angiolini, was quoted expressing similar concerns in a BBC interview.⁷¹

⁶⁶ Criminal Justice (Scotland) Bill Policy Memorandum, paras 131-139.

⁶⁷ Justice Committee Official Report 14 January 2014, col 4099.

⁶⁸ Scottish Parliament Official Report 27 February 2014, col 28323. See also Scottish Government, "Reforms needed to protect victims" (news release), 25 February 2014 ("Too many victims of domestic abuse and other crimes committed behind closed doors are being denied their day in court, Justice Secretary Kenny MacAskill warned...")

⁶⁹ "Rape convictions will fall without change in the law", *The Times* 14 June 2011.

⁷⁰ "Corroboration debate intensifies", 13 February 2012.

⁷¹ BBC News Online, "Scots rape law rule 'could face European challenge'", 21 July 2013. As Lord Advocate, in oral evidence to the Justice Committee on the Sexual Offences (Scotland) Bill in 2008, Dame Elish described corroboration as "an important part of our justice system and... a protection against miscarriages of justice"

Despite these high profile interventions by the current and former Lord Advocate, Crown Office has not developed its position beyond this bare assertion that Scotland may be in breach of its human rights obligations. Indeed, its formally expressed position seems to fall short of this claim. The matter was canvassed briefly in the Crown Office response to the Carloway Review's consultation exercise, which stated:⁷²

...the judgement [in *Cadder*] not only tilted the balance against the police and the prosecution, but presents a significant barrier to effective criminal sanctions for victims. The European Court of Human Rights has in a number of cases recognised the importance of an effective criminal sanction for victims.⁷³ In the case of *Doorson v Netherlands*,⁷⁴ the Court stated[:]

"Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled... principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses"

In written evidence to the Scottish Parliament on the Criminal Justice (Scotland) Bill, Crown Office stated that "[t]he importance of effective criminal sanctions has been repeatedly stressed by the European Court of Human Rights", accompanying the statement with lengthy quotes from a research report on *Child Sexual Abuse and Child Pornography in the Court's Case-Law*⁷⁵ and the 2005 decision in *MC v Bulgaria*.⁷⁶

In neither of those documents did Crown Office (in contrast to the public comments of the Lord Advocate) go so far as to claim expressly that the corroboration requirement is or may be in violation of the ECHR, nor did it set out the argument which might be made for reaching this conclusion. It is important, therefore, to identify and evaluate just what that argument might be.

Positive obligations: the case law of the European Court of Human Rights

The obvious starting point for any discussion of this issue is *MC v Bulgaria*.⁷⁷ In that case, MC alleged that she had been raped by two men. Criminal proceedings were commenced but terminated, with the District Prosecutor finding "*inter alia*, that the use of force or threats had not been established beyond reasonable doubt. In particular, no resistance on the applicant's part or attempts to seek help from others had been established."⁷⁸ In order for a person to be convicted of rape, Bulgarian law required either that the alleged victim had been in a "helpless state": "circumstances where she

and stated that she was "not suggesting" its abolition: Justice Committee Official Report 25 Nov 2008, cols 1407 and 1431.

⁷² *The Carloway Review: Responses to the Consultation Document* (2011) 348.

⁷³ Here, the Crown Office response cited *X and Y v The Netherlands* (1986) 8 EHRR 235 and *Oyston v United Kingdom*, app no 42011/98, 22 January 2002.

⁷⁴ (1996) 22 EHRR 330 at para 70.

⁷⁵ European Court of Human Rights, *Research Report: Child Sexual Abuse and Child Pornography in the Court's Case-Law* (2011), available at http://www.echr.coe.int/Documents/Research_report_child_abuse_ENG.pdf

⁷⁶ (2005) 40 EHRR 20.

⁷⁷ (2005) 40 EHRR 20.

⁷⁸ Para 61.

has no capacity to resist physically owing to disability, old age or illness or because of the use of alcohol, medicines or drugs”,⁷⁹ or that she had been “compelled by means of force or threats”.⁸⁰

The European Court of Human Rights observed “that states have a positive obligation inherent in Arts 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution”,⁸¹ and went on to say:⁸²

...the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the Member States’ positive obligations under Arts 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.

What *MC* indicates clearly is that where *substantive rules* of criminal law leave certain non-consensual sexual conduct unpunishable, a violation of the ECHR may result. At one point, it was observed that Scottish cases which suggested it might in some instances not be possible to convict of rape without evidence of the use or threat of force could therefore place Scotland at risk of a violation of the Convention.⁸³ This is because that approach might effectively introduce a force requirement into the substantive definition of rape. That argument is no longer relevant given the Sexual Offences (Scotland) Act 2009, as the redefinition of rape in that Act superseded the case law concerned.

An argument that the corroboration rule is a potential breach of the Convention is rather different in nature. Unlike *MC*, where the state was in breach of the Convention because it did not regard certain acts as legally criminal, this would involve an argument that the state’s rules of evidence – not its rules of substantive criminal law – amount to a breach of positive obligations owed to victims of crime.

At first sight, any such argument would run into difficulty because of the “fourth instance doctrine” applied by the European Court of Human Rights. Ashworth, Emmerson and Macdonald summarise this doctrine and one consequence of it as follows:⁸⁴

The Court has held that it is not its function to substitute its own judgment for that of the national courts, or to act as a fourth instance appeal... the Court will not interfere with the findings of fact made by the domestic courts, unless they have drawn arbitrary conclusions from the evidence before them.

The European Court of Human Rights has, as the authors note, emphasised repeatedly that assessment of evidence is “as a general rule” a matter for the national courts.⁸⁵ It might be noted,

⁷⁹ Para 79.

⁸⁰ Para 74.

⁸¹ Para 153.

⁸² Para 166.

⁸³ M Redmayne, “Corroboration and sexual offences” 2006 JR 309 at 323.

⁸⁴ A Ashworth, B Emmerson and A Macdonald, *Human Rights and Criminal Justice*, 3rd edn (2012) para 2-114. See also ch 17.

however, that such assertions normally arise in cases where a convicted person claims that they did not receive a fair trial and that article 6 of the Convention has been breached. A claim based on the state's positive obligations under articles 3 and 8 is different in nature. As the court noted in *MC*, the state's legal framework must "effectively punish" rape. This would seem to leave room for an argument that a rule such as corroboration prevents the criminal law being "effective". While the court in *MC* might have rested its decision purely on the substantive letter of the law, it did not, referring to a "rigid approach to the prosecution of sexual offences" and the requirement of certain types of "proof" as the basis for finding that there had been a breach of the Convention.

While this would leave room for an argument that the corroboration rule represents a "rigid approach" to the prosecution of sexual offences and so violates the Convention, such an argument would lack any clear foundation in the case law of the European Court of Human Rights. Case law following on from *MC* has been concerned largely with the scope of domestic criminal law⁸⁶ or failures in evidence gathering,⁸⁷ rather than rules of evidence themselves. It is also significant that the Dutch *unus testis, nullus testis* rule does not appear to have been criticised on the basis of Convention rights.⁸⁸ Moreover, as is demonstrated in the next chapter, the law of corroboration is not "rigid" at all, but has developed flexibly to alleviate the problems which it might otherwise pose for the prosecution of such crimes. It is not open to the same criticisms as were made of Bulgarian law and practice in *MC*.

⁸⁵ See e.g. *Kostovski v Netherlands* (1990) 12 EHRR 434 at para 39; *Klaas v Germany* (1994) 18 EHRR 305 at para 29; *Van Mechelen v Netherlands* (1998) 25 EHRR 647 at para 50; *Barbera, Messegue and Jabardo v Spain* (1989) 11 EHRR 360 at para 68.

⁸⁶ See e.g. *CN v United Kingdom* (2013) 56 EHRR 34; *S v Sweden* (2014) 58 EHRR 36.

⁸⁷ See e.g. *Hajduova v Slovakia* (2011) 53 EHRR 8; *Angelova v Bulgaria* (2008) 47 EHRR 7; *Secic v Croatia* (2009) 49 EHRR 18.

⁸⁸ See ch 18.