JUSTICE COMMITTEE

AGENDA

27th Meeting, 2012 (Session 4)

Tuesday 25 September 2012

The Committee will meet at 10.00 am in Committee Room 4.

1. **Declaration of interests:** Sandra White will be invited to declare any relevant interests.

2. **Decisions on taking business in private:** The Committee will decide whether to take items 4, 5, 6 and 7 in private.

3. **Petitions:** The Committee will consider the following petitions—

   PE1280 by Julie Love and Dr Kenneth Faulds on amending the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad;

   PE1370 by Dr Jim Swire, Professor Robert Black QC, Robert Forrester, Father Patrick Keegans and Iain McKie on behalf of Justice for Megrahi on opening an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohmed al-Megrahi for the bombing of Pan Am flight 103 in December 1988;

   PE1427 by Robert Kirkwood on behalf of Leith Links Residents’ Association on implementing the Scottish Civil Courts Review recommendations on multi-party actions by making changes to existing protocols that will (1) encourage the Rules Council to use rule of court 2.2 for multi-party actions; (2) modify court fees to a single payment; (3) encourage the Rules Council to introduce a protocol on recovery of documents; (4) clarify the common law right of nuisance; and (5) introduce compulsory insurance;

   PE1436 by Colette Barrie on passing new Criminal Justice System legislation which allows for the retrospective abolition of the corroboration requirement thus ensuring full access to justice for victims of crime;
PE1449 by Dr John Wallace Hinton on behalf of Accountability on preserving an independent Scottish Administrative Justice Council when the UK AJTC system is abolished, ensuring the new body has a critical user-interface to enable base-roots input from the public and that it has complete independence from political or civil service influence.

4. **Prisons (Interference with Wireless Telegraphy) Bill (UK Parliament legislation):** The Committee will consider its approach to the legislative consent memorandum lodged by Kenny MacAskill, Cabinet Secretary for Justice (LCM(S4) 15.1).

5. **Work programme:** The Committee will consider its work programme.

6. **Defamation Bill (UK Parliament legislation):** The Committee will consider a draft report on the legislative consent memorandum (LCM(S4) 13.1).

7. **Scottish Civil Justice Council and Criminal Legal Assistance Bill:** The Committee will consider a draft Stage 1 report.

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The papers for this meeting are as follows—

**Agenda item 3**

Paper by the Clerk J/S4/12/27/1

Paper by the Clerk J/S4/12/27/2

Paper by the Clerk J/S4/12/27/3

Paper by the Clerk J/S4/12/27/4

Paper by the Clerk J/S4/12/27/5

**Agenda item 4**

Paper by the Clerk (private paper) J/S4/12/27/6 (P)

**Agenda item 5**

Paper by the Clerk (private paper) J/S4/12/27/7 (P)

**Agenda item 6**

Draft report (private paper) J/S4/12/27/8 (P)

**Agenda item 7**

Draft report (private paper) J/S4/12/27/9 (P)

Paper by SPICE (private paper) J/S4/12/27/10 (P)

Paper by SPICE (private paper) J/S4/12/27/11 (P)
Justice Committee

27th Meeting, 2012 (Session 4), Tuesday 25 September 2012

Petition PE1280: fatal accident inquiries

Note by the Clerk

Background

1. Petition PE1280 by Julie Love and Dr Kenneth Faulds calls on the Scottish Parliament to urge the Scottish Government to give the same level of protection to the families of people from Scotland who die abroad as is currently in place for people from England by amending the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1967 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad.

2. The petition was lodged on 5 September 2009. At its meeting on 6 October 2009, the Public Petitions Committee (PPC) agreed to suspend consideration of the petition pending publication of Lord Cullen’s review of fatal accident inquiry legislation. Lord Cullen’s report was published on 3 November 2009. On 9 February and 26 October 2010, the PPC agreed to keep the petition open until the Scottish Government had announced whether it would amend the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad.

3. The petition was carried over to Session 4 and on 28 June 2011, the new PPC referred it to the Justice Committee under Rule 15.6.2 of Standing Orders for further consideration.

4. Since referral, the Justice Committee has been keen to establish exactly when the Scottish Government intends to legislate in relation to fatal accident inquiries. The Scottish Government’s latest response to the Committee on this issue dated 16 August 2012 indicates that it is committed to introducing a Bill to implement those of Lord Cullen’s recommendations that require primary legislation during the second half of this session. The Scottish Government reiterated its position in relation to introduction of FAI legislation in correspondence to Lewis MacDonald MSP, which was copied to the Committee on 6 September (see Annexe A). All other correspondence in relation to this petition is available on the Committee web pages.

5. On a partly related issue, the Cabinet Secretary for Justice, in recent correspondence to the Committee (attached at Annexe B), announced that, once sections 12 and 50 of the UK Coroners and Justice Act 2009 are commenced on 24 September, it will be possible to hold fatal accident inquiries in Scotland into the deaths of Scottish domiciled service personnel who are killed abroad. (This would not relate to the tragic circumstances that led to the petitioner raising her petition.)

6. The petitioners have submitted further information to be considered at this meeting, which is attached at Annexe C.
Possible options for action

7. The Committee is invited to consider the petition and agree a course of action\(^1\), for example:

   (a) keeping the petition open pending introduction of the Scottish Government’s legislation on fatal accident inquiries expected later in the session, as requested by the petitioner;
   (b) taking any other action the Committee considers to be appropriate (e.g. seeking views or take evidence from any appropriate person/body); or
   (c) closing the petition (but in so doing, the Committee could, if it considered it appropriate, write to the Scottish Government suggesting that it take up the petitioners’ request to engage with them in relation to the forthcoming legislation on fatal accident inquiries).

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\(^1\) Under Rule 15.6 of Standing Orders, the Committee may take such action as it considers appropriate to the petition.
Correspondence from the Scottish Government to Lewis Macdonald MSP on fatal accident inquiries, copied to the Committee on 4 September 2012

I am writing to you in relation to a point you raised in your contribution to the debate on the Government's legislative programme on 4 September.

During your speech you suggested (at column 10930) that there were areas in which the Government was not proposing measures, such as fatal accident inquiries, for which Ministers have said that they lack the Parliamentary time.

I am not sure which other measures you are referring to, but, in relation to fatal accident inquiries, you may be interested to know that I gave an undertaking to the Justice Committee in January this year that a Bill to implement the recommendations of Lord Cullen's Review of Fatal Accident Inquiry Legislation would be brought forward during the lifetime of this Parliament. A copy of my letter is attached.

My letter also points out that many of Lord Cullen's recommendations did not require primary legislation, but were addressed to the Crown Office and Procurator Fiscal Service. These recommendations have largely been implemented already.

I hope this is helpful. I am copying this letter to Christine Grahame, the Convener of the Justice Committee.

Kenny MacAskill MSP
Cabinet Secretary for Justice
6 September 2012
Correspondence from the Cabinet Secretary for Justice to the Committee in relation to fatal accident inquiries into deaths of Scottish domiciled service personnel abroad (dated 16 September 2012)

I am writing to inform you that the Ministry of Justice (MoJ) are announcing today that sections 12 and 50 of the Coroners and Justice Act 2009 will be commenced on 24 September. It will then be possible to hold fatal accident inquiries in Scotland into the deaths of Scottish domiciled service personnel who are killed abroad. This will ensure that bereaved families based in Scotland do not have to travel long distances to hear a coroner’s inquest into the death of their loved one, thereby reducing any unnecessary additional stress.

Section 12 of the Coroners and Justice Act 2009 applies to a death (outside the United Kingdom) of service personnel domiciled in Scotland. If the person’s body is within Scotland or is expected to be brought to the United Kingdom, and the Secretary of State thinks that it may be appropriate for the circumstances of the death to be investigated under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 Act, the Secretary of State may notify the Lord Advocate accordingly. If the person’s body is within England and Wales (as would be the case if the body was repatriated to RAF Brize Norton or Lyneham), and the Chief Coroner thinks that it may be appropriate for the circumstances of the death to be investigated under the 1976 Act, the Chief Coroner may notify the Lord Advocate accordingly. The transfer to Scotland is permitted, but it is not compulsory.

Section 50 of the 2009 Act amends the 1976 Act to permit the Lord Advocate to decide that a fatal accident inquiry should be held in Scotland. A decision will then be taken as to which sheriffdom the inquiry should be held in.

The Ministry of Defence has worked closely with MoJ and the Crown Office and Procurator Fiscal Service (COPFS) to ensure that the interests of bereaved families are at the heart of proposed changes. There is no compulsion for them to opt for a fatal accident inquiry – in those cases where the family choose not to request a fatal accident inquiry, the death will be investigated by the Oxfordshire coroner, though it is expected that most will wish to have an inquiry closer to home. To enable them to make an informed decision, families will be provided with a guide to both the inquest and fatal accident inquiry processes.

Even in the tragic circumstance that a Scottish soldier were to be killed immediately after commencement, it is unlikely, however, that any fatal accident inquiry could be held until spring 2013 (by the time a decision was taken to refer the matter to the Lord Advocate under section 12, etc).

A protocol has been drawn up between COPFS, MoD and MoJ in order to regulate the transfer of service personnel cases to Scotland.

I hope this explanation is helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
16 September 2012
ANNEXE C

Additional submission provided by the petitioners on 20 September 2012

I wish to comment on the recent communication of May/June 2012 with the Cabinet Secretary for Justice, Kenny MacAskill MSP and Christine Grahame MSP, Convener of Justice Committee.

The Justice Committee Convener, Christine Grahame MSP had asked the Government to provide an update as to the Scottish Government’s legislative plans in relation to Lord Cullen’s proposals on Fatal Accident Inquiries. I am disappointed that this, once again has not been forthcoming and that the response from the Cabinet Secretary was that consideration is still being given to whether to update or completely replace the existing legislation although, I am pleased to learn that the Government remains committed to bringing forward a Government Bill in this parliamentary session.

I am aware, as indicated in previous communication that there is a full programme of legislation for the coming year am also sympathetic that the work involved raises complex issues and has practical implications for the Government to amend legislation however “Scots” are still dying abroad and grieving families are still not receiving the same legal protection, facts and expediency from agencies as English and Welsh families receive concerning deaths abroad.

I would also like to make the Justice committee aware that with other families I have founded a charity and recently received Scottish Charitable Incorporated Organisation (SCIO) status for DAYNA (Death Abroad - You’re Not Alone) and we aim to support Scottish families experiencing the trauma of a death overseas.

I would also ask that the Committee find out at what stage the legislation is at and if there will be the possibility that our group can influence or be part of a group or committee to discuss the legislation.

I would request that in light of no timetable for legislation that Petition PE1280 remains open pending the introduction of the relevant primary legislation.

Julie Love
20 September 2012
Background


2. The petition was lodged on 1 November 2010. The PPC heard from the petitioners on 9 November and agreed to seek the Scottish Government’s position on the petition. The Scottish Government’s response, which confirmed that it did not intend to hold an inquiry such as that proposed in the petition, was considered by the PPC on 25 January 2011. At that meeting, the PPC agreed to seek further views from the Scottish Government, the Scottish Criminal Cases Review Commission (SCCRC) and Crown Office and Procurator Fiscal Service in relation to appeals where a case has been abandoned. The petition was carried over to Session 4 and on 28 June 2011, the new PPC referred it to the Justice Committee for further consideration.

3. The Justice Committee first considered the petition at its meeting on 8 November 2011 and agreed, by division, to keep the petition open pending (a) publication of Lord Carloway’s report on criminal law and practice and, (b) introduction of legislation relating to the SCCRC. The Committee took evidence on Lord Carloway’s report, which was published on 17 November 2011 and which, among other things, made recommendations in relation to the power of the High Court of Justiciary to reject a reference from the SCCRC in certain circumstances. The Criminal Cases (Punishment and Review) (Scotland) Bill, which contained provisions in relation to the disclosure of information obtained by the SCCRC, was introduced on 30 November 2011. The Committee’s consideration of the Bill at Stage 1 included taking evidence from the petitioner on 7 February 2012. The Bill was passed by the Parliament on 20 June 2012.

4. Abdelbaset Ali Mohamed al-Megrahi died on 20 May 2012. The Committee’s Stage 1 report on the Criminal Cases etc. Bill refers to a consensus which had emerged that it would be legally possible for Megrahi’s abandoned appeal to be taken up again after his death.¹ A statement made by the Cabinet Secretary for Justice on 23 February noted that, if an application for such an appeal were made, the SCCRC would need to decide whether to make a referral and the High Court would need to determine whether to take it.²

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5. The petitioners have submitted further information to be considered at this meeting, which is attached as an Annexe.

Possible options for action

6. The Committee is invited to consider the petition and agree a course of action\(^3\), for example:

(a) keep the petition open;
(b) to take a view on whether there should be an independent inquiry as proposed by the petitioners;
(c) take any other action the Committee considers to be appropriate (e.g. seek views or take evidence from any appropriate person/body); or
(d) close the petition.

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\(^3\) Under Rule 15.6 of Standing Orders, the Committee may take such action as it considers appropriate to the petition.
Additional submission provided by the petitioners on 19 September 2012

Whilst for some the death of Abdelbaset Ali Mohamed al-Megrahi on 20 May this year may have changed the tenor of the debate surrounding the 1988 Pan Am 103 tragedy, it has not deflected the determination of campaigners seeking justice for the 270 victims of the disaster and an independent inquiry into the conviction of Mr al-Megrahi for the atrocity, see:

*Lockerbie bomber: Public figures demand inquiry into conviction*
www.bbc.co.uk/news/uk-scotland-scotland-politics-18162464

*Lockerbie bombing: In full - Statement by Justice for Megrahi*

Events of 2012 have only strengthened the argument for an inquiry. Along with the publication of the Scottish Criminal Cases Review Commission (SCCRC) Statement of Reasons for Mr al-Megrahi’s second appeal, the many existing doubts over the Zeist conviction have been added to and exacerbated following the publication in February of *Megrahi: You are my Jury* by John Ashton. Amongst other things, serious question marks were raised concerning the quality of forensic evidence relating to the shard of PCB alleged by the Crown to have been part of a triggering device for a bomb. It would now appear that expert evidence provided to the court by representatives of the Royal Armament and Research Establishment (RARDE) was deeply flawed and at least one of the expert witnesses may well have perjured himself.

The quest for redress and justice in this case has always been defined by two basic approaches. Firstly, the appeal route, and, secondly, the inquiry route.

**An appeal by the al-Megrahi family**
On Mr al-Megrahi’s death, the baton passed to his executors and /or immediate family to lodge an appeal (see the provisions in the Criminal Procedure (Scotland) Act 1995, section 303A, relating to the transfer of the rights of appeal of a deceased person). Libya post-Gaddafi currently remains a country in turmoil, riven by political factionalism. Living in such an environment, it is unlikely that the al-Megrahi family will be receiving encouragement to pursue an appeal; there are almost certainly elements on the Libyan political scene at present who are actively discouraging them from doing so. If the situation is so unstable that no less a person than the US ambassador to Libya can be killed in an assault on his country’s Bengazi consulate, what hope does an ordinary family such as the al-Megrahis stand if they incur the disapproval of some of the factions?

**An alternative appeal**
At present, we must wait to see what happens once the appeal is referred back. However, if the al-Megrahi family opt not to pursue it, the door may be open for bereaved families who question the conviction to do so. Nevertheless, irrespective of who decides to apply for an appeal, lurking in the background will always be the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
(specifically section 7), which provides the judiciary with exceptional powers to block any further appeal.

If this legislation is invoked and an inquiry is frustrated, or should the Megrahi family fail to lodge an appeal, it will become even more essential to the reputation of the Scottish criminal justice system that JFM’s petition, PE 1370, remains a live issue.

The ‘live’ investigation
It appears that the Libyan authorities’ unsubstantiated claims about the existence of evidence pointing to the Gaddafi regime’s guilt for Lockerbie are losing their previously high profile. Gone are Transitional National Council Chairman Abdel al-Jalil’s embarrassing assertions that the proof of Libyan guilt lay in the fact that Colonel Gaddafi paid Mr al-Megrahi’s legal fees. Gone too, it seems, are the visas for Scottish investigators to visit Tripoli at UK taxpayers’ expense to attempt to unearth elusive evidence to shore up flagging public confidence in this increasingly discredited conviction, see:

*Officers yet to visit Libya in fresh Lockerbie inquiry*


Where once it could be said there was a cosy relationship between Libya and the Scottish and American authorities, who insist they are maintaining their ‘live’ investigation into the Lockerbie tragedy, it appears now to be considerably less so.

The clear impression given is that the Libyan Government does not now wish to have foreigners, in the form of the Crown and Scottish police, or Libyan nationals, in the form of the al-Megrahi family, dragging this issue into the media glare any more, for their respective and contrasting reasons. Other more immediate concerns come higher up their list of priorities. Indeed, it would appear that the Crown’s efforts to extract new evidence from the new Libyan government have become so fruitless that the focus has now moved on to Malta, a country which has always denied that any bomb suitcase ever left the ground at Luqa airport. See:

*Maltese courts gather fresh Lockerbie evidence*


Letter of complaint
Earlier this month, Justice for Megrahi (JFM) sent a letter to Justice Secretary Mr Kenny MacAskill, lodging serious formal allegations relating to the conduct of the Lockerbie investigation and the Kamp van Zeist trial of Fhimah and al-Megrahi. Out of respect to Mr MacAskill, JFM does not propose to go public with the text of the letter or to divulge detail concerning the precise nature of the allegations for a period of thirty days from 13 September, in order to allow Secretary MacAskill sufficient latitude to respond. The manner in which the allegations are dealt with could have a direct bearing on PE1370.

Submission
The demand for an independent judicial inquiry into the investigation of Lockerbie, the subsequent legal proceedings and the conviction of Mr al-Megrahi of course
stands in its own right, supported by the many submissions JFM has made publicly and to both the Public Petitions Committee and the Justice Committee.

We believe it is vitally important that JFM's petition PE 1370 remains a live issue within the Scottish Parliament. It is essential that our elected representatives send a clear signal to those at home and abroad that, despite the efforts of the UK, US and other governments to consign Lockerbie to the history books, seeking justice for the 270 victims of this tragedy remains the highest of priorities to the people of Scotland.

See: 
Author warning over Lockerbie
www.heraldscotland.com/news/home-news/author-warning-over-lockerbie.18891757

The outcome of the Hillsborough enquiry has undoubtedly shone a light on the inner workings of a justice system that purported to keep its citizens safe and secure. Now we can see that protection of the system and the wrongdoers within it took precedence over protection of the individual citizen. Indeed efforts were made to transfer blame to innocent third parties. If Hillsborough was England’s shame then Lockerbie is Scotland’s, and much of the indifference and arrogance identified within the former can be identified in the latter. We applaud the openminded approach of the Hillsborough Independent Panel, and hope to see a similar scrutiny of the Lockerbie investigation, without fear or favour.

The Justice Committee and through them the Scottish Government presents the best and perhaps only chance that the families who lost loved ones will ever have of uncovering the real truth behind Lockerbie. Please do not let us down.

The Committee of Justice for Megrahi
19 September 2012
Justice Committee

27th Meeting, 2012 (Session 4), Tuesday 25 September 2012

Petition PE1427: multi-party actions

Note by the Clerk

Background

1. Petition PE1427 by Robert Kirkwood on behalf of Leith Links Resident Association (LLRA) calls on the Scottish Parliament to urge the Scottish Government to implement the Scottish Civil Courts Review recommendations on multi-party actions by making changes to existing protocols that will (1) encourage the Rules Council to use rule of court 2.2 for multi-party actions; (2) modify court fees to a single payment; (3) encourage the Rules Council to introduce a protocol on recovery of documents; (4) clarify the common law right of nuisance, and (5) introduce compulsory environmental insurance. Background information provided by the petitioner on PE1427 is attached at Annexe A. Further details of the petition are also provided in the SPICe briefing on PE1427.

2. The petition was lodged on 23 March 2012 and is prompted by various procedural difficulties experienced by the LLRA in raising a court action against the owners and operators of the Seafield Sewage Treatment Works, in relation to unpleasant odours released from the plant. The petitioners lodged an earlier petition (PE1234) in February 2009, calling for the introduction of a class or multi-party action court procedure in Scotland in February 2009, but this was closed by the Public Petitions Committee (PPC) later that year at the request of the petitioners who were of the view that the Scottish Civil Courts Review had made it redundant.

3. On 1 May 2012, in evidence to the PPC on PE1427, the petitioners explained that “there is little political will at the moment to enact the Gill recommendations in this respect” and that “perhaps the public finances are not in a fit state at the moment for that kind of primary legislation”. This petition is an attempt to bring forward measures that would allow multi-party actions to proceed in the interim until primary legislation is introduced.

4. At the 1 May meeting, the PPC agreed to seek views on the petition from the Scottish Government, and Lord President (in his own capacity and as chair of the Court of Session Rules Council). In its response (at Annexe B), the Scottish Government stated that it agrees with Lord Gill’s recommendation to introduce a multi-party, or class, action procedure and that it will introduce legislation in the lifetime of the current Parliament to give effect to the recommendation. In his response (at Annexe C), the Lord President commented on the calls in the petition affecting the Rules Council and stated that, in his view, these were matters which required primary legislation. As regards calls for introduction of a protocol on the

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1 Multi-party actions are court actions where a number of people have the same or similar rights and there are several different types of such actions. The most relevant to this petition is an action where one (or several) pursuers are appointed as typical cases to pursue a court action reflecting the interests of a wider group of people. It is not currently possible to raise a multi-party action in the Scottish courts.
recovery of documents, the Lord President indicated that “it was not clear to me from the terms of the petition in what respect the existing statutory provisions are considered to be deficient”.

5. The petitioner responded (Annexe D) to the issues raised by the Scottish Government and Lord President in their responses.

6. The PPC considered this correspondence on 4 September 2012 and agreed to refer the petition to the Justice Committee, under Rule 15.6.2 of Standing Orders, for further consideration.

Possible options for action

7. The Committee is invited to consider the petition and agree a course of action, for example:

(a) keep the petition open pending the introduction of primary legislation to implement Lord Gill’s recommendations on multi-party actions;
(b) write to the Scottish Government asking for a fuller response to the petitioners’ concerns, as requested by the petitioners in their response at Annexe D.
(c) take any other action the Committee considers to be appropriate (e.g. seek views or take evidence from any appropriate person/body); or
(d) close the petition.

2 Under Rule 15.6 of Standing Orders, the Committee may take such action as it considers appropriate to the petition.
ANNEXE A

Background information provided by the petitioner when lodging PE1427

In general LLRA seek to establish common access to justice for multi-party claims, as a minimum on a par with that enjoyed in the rest of the UK. To that end LLRA wishes to propose a cheap and pragmatic approach, by legal or procedural means as best fitted, to each of the categories listed above. This will be developed in the following section.

The Scottish Ministers in their response to the Gill report (paragraphs 164-167) have subsequently agreed in principle that there should be a special multi-party procedure based on the proposals of the Scottish Law Commission. However, in view of the time required before such legislation can be introduced (and also taking into account that previous proposals were lost in the legislative wash-up before the last UK elections) this petition proposes changes to existing protocols that can give, within a relatively short period of time, true practical access to justice, for non-corporate multi-party groups seeking to pursue a legal claim against a corporate defendant. These proposals are furthermore consistent with The Scottish Ministers Response to the Scottish Civil Review (4.5) which makes the following point:-

"The difficulty, of course, is that Scotland faces a period of unprecedented pressure on public finances, and it is clear that simply spending more money on a wider range of publicly funded services to improve access to justice is unaffordable and unsustainable. It will be necessary to prioritise, to co-ordinate expenditure more efficiently, and to be innovative in identifying opportunities to secure justice in new, cheaper ways."
http://www.scotland.gov.uk/Publications/2010/11/09114610/0

This petition’s proposal to change existing protocols does exactly this. These protocols focus on the following issues:-

- Court Fees
- Recovery of Documents
- Common Law Right of Nuisance
- Insurance

As outlined above, LLRA have made several attempts to pursue litigation (which are no longer continuing) against a private company acting for a public utility supplier. In each case Scots Law or court procedure has denied public access to justice. This petition therefore urges the Scottish Parliament to take the following pragmatic action.

Multi-Party Actions
Rule of Court 2.2 allows the Lord President to direct that normal rules of procedure can be departed from in certain circumstances. Rule 2.2 could be used as a vehicle to progress multi-party actions pending the development of bespoke multi-party rules and any associated primary legislation should that be necessary. This petition requests the Government to encourage the Rules Council to use existing Rule 2.2 to allow non-prejudicial access to justice in multi-party actions.
Court Fees
A multi-party action in Scotland would require each individual claimant to pay an initial fee (currently £180) resulting, where say 500 residents are involved, in a total fee of £90,000. The size of the signet fee would make pursuance of the claim untenable. In England and Wales only one fee, in the region of £1500, is payable. Scottish Ministers are allowed to exempt or modify court fees by Section 2 of the Courts of Law Fees (Scotland) Act 1895. This petition encourages the Government, in the specific instance of a multi-party action, to exercise their existing power to modify court fees to a single payment at a level commensurate with the rest of the UK.

Recovery of Documents
In comparison with the situation in England and Wales the provisions for recovery of documents in Scotland are prejudicial to potential claimants primarily in that the associated protocol is not enforceable. In addition, in Scotland, there is no protocol for environmental issues.

Successful pursuance of a multi-party claim will, in all probability, rely on recovery of relevant documentation from the corporate defendant. Under Scots Law recovery of anticipated key documentation can only be enforced by taking court action against the defendant but, paradoxically, pursuance of that very court action will depend on prior knowledge of the existence and content of the targeted document. A “catch 22” situation in favour of the corporate defendant therefore exists.

In the recent past, a similar action in England was successful having turned on the evidence provided by key documentation which the defendant was legally obliged to disclose.

This petition requests the Government to encourage the Rules Council to introduce an enforceable pre-action protocol in which are listed the types of document that should be made available by the holder. In this way the legal advisors of the potential claimants could advise their clients whether the documentation supported litigation, thus avoiding subsequent frivolous court action. In the event of refusal of the holder to supply the documents compliance with the protocol could be enforced by an Order of Court.

It may be noted that, as a result of recent experience, the Association of Personal Injury Lawyers (APIL) has been asked to re-consider its previous stance against enforcement of disclosure.

It should also be noted that pre-action protocols, albeit voluntary, currently exist in Scotland for disease claims, personal injury and professional negligence. It should be a relatively simple matter to draft a similar protocol for environmental issues. This petition requests the Government to encourage the Rules Council to introduce a pre-action protocol for environmental issues.

Common Law Right of Nuisance
The Waste Management Licensing (Water Environment) (Scotland) Regulations 2006 statute was introduced to govern the operation and maintenance of sewage management. It is not clear whether or not this regime has removed the common law
right of nuisance in Scotland. In the case of Marcic vs Thames Water in England a landmark decision was ultimately made when the House of Lords ruled that, as the public utility company was legally required to operate under statutory provisions, control and procedure, the common law right of nuisance had been removed and replaced by a new statutory regime. As the 2006 statute is silent on the matter this petition requests the Government to state categorically whether or not the introduction of the statutory regime has or has not removed the common law right of nuisance.

**Insurance**

Corporate liability insurance is compulsory for personal accident but not for environmental claims, even though the risks are similar. Public utility companies therefore risk having to meet validated environmental claims from their own funds. Where the value of the claim threatens the company’s expected trading capability, the company may be tempted to take action such as asset stripping in order to reduce the enforceable forfeit. This petition encourages the Government to introduce a law of compulsory environmental (e.g. sewage, land fill, open cast) insurance to ensure that there are sufficient funds to restore the environment to its original form. This would have the added advantage of removing risk provision premiums from the public purse.
Multi-party actions
The petition asserts that a procedure for multi-party actions may be set down without primary legislation. There is, however, a common understanding between the Scottish Court Service, the judiciary and the Scottish Government that any special multi-party action procedure would require to be underpinned by primary legislation. The development of multi-party action procedure is likely to be complex and the procedures which would be appropriate in relation to, for example, a common disaster or an environmental nuisance claim might not necessarily be the same. The adoption of multi-party procedure would therefore require some careful consideration, beyond the requirements of one dispute.

That said, the introduction of a multi-party, or class, action procedure is an important recommendation of the Scottish Civil Courts Review led by Lord Gill, the then Lord Justice Clerk. The Government agrees with that recommendation and will introduce legislation in the lifetime of the current Parliament to allow that to happen.

Pre-action protocols
The adoption of the particular pre-action protocols suggested in the petition would be a matter principally for court rules rather than primary legislation, and so would primarily be the responsibility of the Lord President and the Court of Session.

The Scottish Civil Courts Review included proposals to allow the Court of Session to make pre-action protocols compulsory, where appropriate. The Scottish Government is giving careful consideration to the adoption of Lord Gill's suite of recommendations on case management and is working closely with the Lord President, the judiciary, and the Scottish Court Service on developing the detail of proposals in this regard.

Common law right of nuisance
The Scottish Government is not currently of the view that the common law right of nuisance requires clarification. We would, however, welcome any further information the petitioner might wish to provide as to why this is considered necessary.

Legal insurance
The independent Review of Expenses and Funding of Civil Litigation in Scotland, under the leadership of Sheriff Principal James Taylor, is considering the issue of legal insurance (also raised in the petition) and other alternative options for improving access to the courts. Further details are available at: www.taylorreview.org

I hope the Committee finds the information in this letter, the terms of which have been cleared by Kenny MacAskill MSP, Cabinet Secretary for Justice, of assistance in its consideration of PE1427.

Civil court reforms
We plan to consult by the end of this year on a number of aspects of court reform to take forward many of the recommendations of the Scottish Civil Courts Review. We would encourage the petitioners to contribute a response to the consultation.
Robert Sandeman
Head of Courts and Legal Services Reform, Scottish Government
27 July 2012
ANNEXE C

Correspondence from the Lord President to the Public Petitions Committee in relation to petition PE1427

Thank you for your letter of 3 May 2012. This asks me, as Lord President, and the Court of Session Rules Council to provide responses to a number of calls made on behalf of Leith Links Residents’ Association regarding implementation of recommendations relating to multi-party actions in the Scottish Civil Courts Review Report.

I should point out at the outset that I am the Chairman of the Court of Session Rules Council (“the Rules Council). The comments set out below reflect both my position and that of the Rules Council.

I note that the petition calls on the Scottish Parliament to urge the Scottish Government to take certain specified measures. Part of those proposed measures is that the Scottish Government should make changes to existing protocols that will “encourage the Rules Council to use rule 2.2. (of the Rules of the Court of Session) for multi-party actions” and to “encourage the Rules Council to introduce a protocol on recovery of documents” and introduce a pre-action protocol for environmental issues”. This response focuses on those three calls in the petition.

The petition was considered by the Rules Council at its most recent meeting on 14 May 2012. You will see from the minutes of this meeting that a number of observations were made at the meeting.

*Call to “encourage the Rules Council to use rule 2.2. (of the Rules of the Court of Session) for multi-party actions”*

It may be helpful if I explain some of the background to the introduction to rule 2.2 of the Court of Session Rules. In 2010, the Court required to deal with over 400 cases brought as personal injuries actions under Chapter 43 of the Rules in respect of the drugs vioxx and celebrex. Neither personal injuries procedure nor ordinary procedure was considered to be entirely appropriate in relation to such cases. Accordingly, there was a need to develop a special procedure to facilitate the case management of these cases. Rather than prescribe a bespoke procedure on the face of the Rules, it was agreed that a rule of general application should be introduced, in order to provide flexibility for different types of cases.

The rule was therefore introduced to facilitate the case management of particular categories of cases which were already before the Court.

The rule provides that the Lord President may make a direction where he is satisfied that an aspect of the procedure that would otherwise apply is unsuitable for the efficient disposal of those proceedings. In those circumstances, a direction may be made that that aspect of the procedure is not to apply and that such other procedure as the Lord President directs is to apply instead. To date, I have made only one direction under rule 2.2; Direction No. 2 of 2010, in relation to the actions of damages relating to the drugs vioxx or celebrex.
When the petition was considered by the Rules Council at its most recent meeting on 14 May 2012, some observations were made about the limits of the scope of rule 2.2. In particular, some doubts were expressed as to whether a direction could be made under the rule in relation to the initiation of a single group action, rather than simply providing a mechanism by which existing court proceedings could be case-managed. I share those doubts.

There is the further difficulty that the use of rule 2.2 does not affect court fees. If a direction were to be made under rule 2.2 and the Scottish Ministers wished to reduce their court fees in respect of such procedure, they might need to make subordinate legislation to allow the charging of reduced fees for the signetting of actions which proceed under that procedure.

In any case, the introduction of a single set of procedural rules might not necessarily suit all types of action; for example, what is appropriate in relation to a claim for a common accident or disaster may not be appropriate in relation to an environmental nuisance claim. The adoption of a generic multi-party procedure will require careful consideration, which will be influenced by factors which extend beyond the exigencies of one dispute, or even one type of dispute.

Ultimately, it will be a matter for the Scottish Government and the Scottish Parliament to determine the content of any legislation on this matter. I am also very mindful of the face that the recommendations on multi-party action procedure in the Scottish Civil Courts Review Report are very closely related to the recommendations on how such actions are to be funded. I would have thought that the Scottish Government’s position on that matter is likely to be influenced by recommendations of Sheriff Principal Taylor’s Review of Expenses and Funding in Litigation. In my view, these are matters for primary legislation.

*Calls to “encourage the Rules Council to introduce a protocol on recovery of documents” and to “introduce a pre-action protocol for environmental issues”*

In relation to the proposed introduction of pre-action protocols, you will note from the minutes that there was some discussion at the Rules Council meeting on 14 May about the extent to which the Court has a remit under current legislative provisions to issue “mandatory” pre-action protocols. Certainly, the Civil Courts Review Report recommended that the court should have the power to make orders in relation to expenses and interest for non-compliance with pre-action protocols. That tends to suggest that the Court does not currently have such a power and that legislative provision would be required in order to confer the power upon it.

Provision is made in section 1 of the Administration of Justice (Scotland) 1972 to enable the recovery of documents prior to court proceedings being raised. It is not clear to me from the terms of the petition in what respect the existing statutory provisions are considered to be deficient, or indeed how guidance contained in any pre-action protocol would enhance the operation of those statutory provisions. I am also not clear which particular matters the petitioner would wish to be referred to in any pre-action protocol environmental issues.

Lord President (Lord Hamilton)
29 May 2012
ANNEXE D

Response from the petitioner to issues raised by the Lord President and Scottish Government in their responses to petition PE1427

Response to the Lord President
Petition 1427 was based on legal opinion received from Scottish based lawyers and represents a view substantially different to that expressed by the Lord President. It would seem then that there are grounds for further discussion in those areas where there are contrary views expressed. The LLRA recognises that this will need to be conducted by those who have a complex understanding of Scottish law and consequently does not intend to offer any more comments other than to quote from The Scottish Ministers Response to the Scottish Civil Review:

“The difficulty, of course, is that Scotland faces a period of unprecedented pressure on public finances, and it is clear that simply spending more money on a wider range of publicly funded services to improve access to justice is unaffordable and unsustainable. It will be necessary to prioritise, to coordinate expenditure more efficiently, and to be innovative in identifying opportunities to secure justice in new, cheaper ways.”

Petition 1427 represents the LLRA's attempt to be 'innovative in identifying opportunities to secure justice in new cheaper ways'.

Response to the Scottish Government
Mr Sandeman states that the Scottish Government is not currently of the view that the common law right of nuisance requires clarification. However, he does so without commenting on the issues raised in petition 1427.

Without addressing them it is not clear why the Scottish Government holds this view. The LLRA would appreciate a fuller response to our concerns.

Robert Kirkwood
Leith Links Residents Association
10 August 2012
Justice Committee

27th Meeting, 2012 (Session 4), Tuesday 25 September 2012

Petition PE1436: retrospective abolition of corroboration

Note by the Clerk

Background

1. Petition PE1436 by Colette Barrie calls on the Scottish Parliament to urge the Scottish Government to pass new Criminal Justice System legislation which allows for the retrospective abolition of the corroboration requirement thus ensuring full access to justice for victims of crime. Background information provided by the petitioner on the petition is attached at Annexe A. Further details of the petition are also provided in the SPICe briefing on PE1436.

2. This petition was lodged on 22 June 2012. The Public Petitions Committee considered the petition on 4 September and agreed to refer it to the Justice Committee, under Rule 15.6.2 of Standing Orders, for further consideration.

3. Lord Carloway, in his report on criminal law and practice published in November last year, concluded that “the review is in no doubt that the requirement of corroboration should be entirely abolished for all categories of crime”. His report did not however discuss the possibility of retrospective abolition of corroboration.

4. In July 2012, the Scottish Government published a consultation paper on all aspects of Lord Carloway’s recommendations “as the first step towards legislating on his proposals”1. As regards corroboration, the consultation paper stated that the Government “was not minded to revisit Lord Carloway’s recommendation on removal of the requirement for corroboration or to remit this question to a further review”. However, it did indicate that “the focus of the Government is now on deciding how to best achieve abolition and what, if any, additional measures require to be taken as a consequence”.2

5. The Scottish Government’s legislative programme 2012-13 includes a Criminal Justice Bill which will, among other things, implement Lord Carloway’s recommendations, including “reforming the law of evidence”. This legislation is expected to be introduced in Spring/Summer 2013.

Possible options for action

6. The Committee is invited to consider the petition and agree a course of action3, for example:

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3 Under Rule 15.6 of Standing Orders, the Committee may take such action as it considers appropriate to the petition.
(a) keep the petition open pending the introduction of primary legislation to implement Lord Carloway’s recommendations, including on corroboration;
(b) ask the Scottish Government whether it is minded to consider retrospective abolition of corroboration, even in specific circumstances;
(c) take any other action the Committee considers to be appropriate (e.g. seek views or take evidence from any appropriate person/body); or
(d) close the petition on the basis that the future criminal justice Bill is likely to afford a full opportunity to consider a range of views on the abolition of corroboration, including retrospective abolition.
ANNEXE A

Background information provided by the petitioner when lodging PE1436

Under Scots Law, single source evidence – even although the witness is credible and reliable – is in itself insufficient and a second source is required. I am not the sole victim in my own particular case but, owing to a number of reasons, the other victim withdrew shortly before the trial and thus removed the „second source“. On the day that the trial was due to start, the Lord Advocate ruled that the trial could not proceed; thus denying me access to justice and destroying all my hopes for „closure“.

One of the reasons that the Criminal Justice System exists is so that we are prohibited from taking the Law into our own hands. In handing over our victimisation to the State, we subscribe to the notion that the violation caused by the crime extends to society as a whole and not purely to the victim as an individual. The expectation therefore is that, through the application of Criminal Justice, the State will dispense appropriate punishment and protect us all from future harm.

As did I, so too have many thousands of victims entrusted their victimisation to the Scottish State. The corroboration requirement has denied justice not only to myself and these victims but also to the Scottish society as a whole. For living unpunished and unknown within its midst, are those guilty of some truly heinous crimes.

New legislation which alters the rules of evidence, allowing single source evidence alone to satisfy the rules of sufficiency, needs to be retrospective / reactive so that victims and society can be better served by the justice system which exists in order to protect them. This protection comes from reducing the risk and impact of harm – psychological and physical – perpetrated by offenders.

In making the Double Jeopardy (Scotland) Act 2011 retrospective, the legislators state that „…..it is immaterial whether the conviction or, as the case may be, the acquittal was before or after the coming into force of the Act“.

Other examples of retrospective legislation are those Acts brought into statute in order to address War Crimes and Tax Avoidance. Both such Acts also decree that the timing of the offence in relation to the legislation is immaterial.

The same must apply to legislation which abolishes the corroboration requirement, It is immaterial whether the offence was committed before or after the coming into force of such legislation; what is material – what matters – is that the justice system punishes the guilty and protects the innocent.

There are many voices within the Scottish Legal system itself calling for the abolition of a requirement which many legal practitioners witness as causing miscarriages of justice.

In 2010, the Scottish Government commissioned the High Court judge, Lord Carloway, to conduct an independent review of key elements of Scottish criminal law.
The requirement for corroboration was one of these key elements and Lord Carloway is unequivocal in his observation that it is an archaic rule which has no place in a modern criminal justice system. He recommends that it is abolished immediately.

His full review report was published in November 2011 and has generated much debate within the criminal justice system and legal professions. http://www.scotland.gov.uk/About/CarlowayReview

There are many supporters for this recommended change to legislation – of the practitioners to whom I have spoken, all are in favour of it.

The rule is archaic and belongs to an era when capital punishment resided amongst the consequences of wrongful conviction. We now live in a more enlightened age wherein our adversarial criminal justice system is sufficiently sophisticated as to ensure proper testing of the evidence.

As Lord Carloway comments: „if a person is the victim of a criminal act and is capable of identifying the perpetrator, that person”s case should be judged on the quality of the testimony. Its progress should not depend on a formal requirement, compliance with which is often a matter of chance.

If the judge or jury is satisfied beyond all reasonable doubt of guilt of the accused, why should a conviction not follow?” (Carloway Review, P279, paragraph 7.2.42)

Amongst the arguments against abolishing corroboration is one which suggests that the system would then require every allegation of rape made by a believable complainer to go to trial and this would be unworkable in practice. Other arguments against new legislation also focus on the financial implications.

I believe our society to be civilised. Surely then such arguments are incompatible with our values? Are we really to deny justice to a believable complainer simply because it is too costly or onerous to activate the machinery which delivers it?

There is no supporting evidence for another popular anti-abolition argument which suggests that we will be left with a system which is more vulnerable to miscarriages of justice. For surely we need only to emulate other jurisdictions which still apply a test of sufficiency; for example: „….an objective, impartial and reasonable jury or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged”

I am not alone in my opinion that the only miscarriage of justice is the one created by a requirement that prevents such evidence being presented and such a conviction being possible.

I have been informed that sometime later this year, the Scottish Government is planning to conduct a Public Consultation on the Carloway Review report and this includes the recommendation to abolish corroboration. In order to raise public awareness ahead of this, I have launched a campaign (which can be found at: www.abolishcorroborationnow.com) and seek to have this petition made available on-line so that other voices can be heard.
Annexe B

Written submission from Colette Barrie

Petition update

I submitted my petition to the Parliament website the week before the new site - which allowed the gathering of on-line signatures - was launched. Thus, the petition was unable to gather signatures.

Therefore, I replicated it at Change.org, the internet platform for social change. The petition can be found at:


It has, to date, gathered some 93 signatures.

Reasons why people are supporting the petition:-

KV
I too am a victim of crime whose case failed to proceed owing to this mad rule of Scots Law. What are rape victims or DV victims supposed to do when it is only they and their abuser involved in the horror? Ask them to please stop whilst we take a photo or phone a friend to come witness?

AM
Because no rapist should ever be allowed to get away with it

MM
Because my rapist, after 2 other allegations in England, was let free by Scottish law to go on to abusing and raping more women thanks to the corroboration system. My rape was historical and although there were lots of written proofs, that wasn't enough. The system has to change or rape reports rate will be as low as it is now.

LM
That 90% of rapists aren't called to account, aren't even charged, is unconscionable and cannot even sit in the same room as the word justice.

AB
Experience of working with women who have been raped

ATC
I am signing the petition because the perpetrator in my particular case also got away scot-free to do as he wished with any other female he so chose, and doubtless get away with his machinations, yet again! Initially I was informed he was detained owing to the fact they owned to one and a half pieces of corroboration (not enough, apparently). Then somehow he, the perpetrator managed to wriggle out from the sexual assault charges laid against him by the police. The Amethyst Team based @ The Gyle, Edinburgh were LESS than friendly or helpful in their approach towards victims of sexual assault / rape. [...] Therefore HOW on earth can a woman seek or
even apply and be granted fairness and justice when all the evidence points at the perp's foul deeds and then the police deem it insufficient to gain a conviction. How can the law apply here, especially ‘Scottish Law’?

DF
I'm signing because Scotland has the worst conviction rates for sexual assault of any developed nation in the world.

JB
My rapist sent me an email confessing to his crimes and 'apologizing' but wasn't even charged as he didn't state times and dates. The police told me that they know he did this but we will have to wait until he does it again. I wasn't even the first woman he had attacked, plus he was on bail for offences against me at the time of the attack(s).

JD
Women are not innate liars who routinely falsely charge males with subjecting them to sexual violence. Corroboration is a method male legal system has long used to deny women justice and to ensure men continue to have their pseudo sex right of access to any female irrespective of her autonomy. Remove corroboration requirements immediately and this will send a clear message to all males who commit sexual violence against women and girls that they will not have their crimes against females excused/justified.

CV
The changes already made in Scots law with regard to sexual offences are good, but only the first steps in the marathon. The abolition of retrospective corroboration would achieve veracity for those who experience Scotland's thwarted Justice System, instead of giving validation to the perpetrators rather than the victims of these crimes!!

DMcP
Through my experience of working with survivors

HM
Regardless of who saw what, people should be held accountable for their actions where evidence compounds them.

LG
I am signing because my mother was a victim of sexual assault and near rape. This perpetrator (a part time employee of the NHS) is still working in a 'so-called dreadful doctors surgery, nicknamed the quackery, the worst in Scotland, if not the entire UK which is 100 yards from her home. This monstrous individual (who owns to the Napoleon Complex, a recognized psychological syndrome has followed her threatened her. She is frightened out of her wits and afraid to leave the house. The complaints are mounting about him and the police 'claim' they did not have enough corroboration or 'evidence' to charge him in court. Many females have tried to get him sacked to stop harming more women and to actually think he still 'works' in the NHS is pretty appalling in itself. He is a little egotistical and megalomaniac monster who thinks he can get away with abusing women and he must be stopped for the sake of all females residing in [...] before it's too late! many have taken their own
lives and cannot live with the guilt of what he has committed to/ If i had my way and many others I would have him publicly castrated and allowed to bleed to death...he is an insult to good males who surely exist in this world somewhere. He gives them a bad name altogether.

Media coverage

Via Rape Crisis (Scotland), I was contacted by the Herald Scotland journalist, Lucy Adams and agreed to be interviewed. The subsequent article appeared on 21st July and can be found at:


An STV journalist, Claire Stewart, and a Sunday Express journalist, Ben Borland, have also been in touch recently (Claire last week and Ben last month) but I have not as yet responded to them.

MSP support

I have to date contacted 28% of the current MSPs. (37 MSPs out of 129)

Of these 37 MSPs, 57% (21) responded.

Of these 21 MSPs, 28% (6) are in favor of the abolition of the corroboration requirement. None are willing to commit to the view that such abolition needs to be retrospective but neither do they disagree that it should be.

An example of the supportive replies received thus far:

I was appalled to hear about your situation and experience and extremely disappointed with your experience of Scottish Justice.

The treatment of women in the justice system has been an issue close to my heart for a number of years [...] I am hopeful that the removal of corroboration will also help to increase the number of sexual assaults that are brought to trial and have enclosed statements made by Scottish Labour’s Justice team on this issue below.

In terms of retrospection in principle I would be fairly supportive but would need to see the details of proposals before being able to offer unconditional support. I understand that with the removal of double jeopardy it may be possible to bring in a retrospective element and if it was practical and legal to do so I would be likely to support this.

I hope this reassures you as to my position on this matter and I sincerely hope that you are successful in your campaign for justice.

The remaining 15 MSPs who replied to me do not express strong anti-abolition views. Their stance is that they will listen to the debates with due care and interest.
Community agency support

Rape Crisis (Scotland) have been very supportive of the aims of this petition.

CSRC & SAC (Central Scotland Rape Crisis and Sexual Abuse Centre) have also added their support.

Additional personal case information

The sexual assaults / rapes

I am one of three women who have been sexually abused and raped by the same person, A.

We were aged 8 – 9 when he started. I myself was aged 8 when he started and was 10 when he raped me. B was 9 when he started and 12 when he raped her. C was 9 when he started and he continued to abuse her throughout her life until, aged 24, she had a complete breakdown of her mental health. Now aged 52, she had been institutionalized ever since by psychiatrists who fail to treat her for what she is – a survivor of sexual abuse and rape - and continue to treat only the symptoms of a fractured mind. She is now considered too vulnerable to make her own statement.

Contacting the police

It is as a result of many years in therapy that I was able, at the aged of 42, to make my initial statement to the police back in 2009. I had been in therapy some three and a half years at that time and I have remained in therapy throughout the ensuing process, continuing now into my seventh year.

B was able to make her own statement in 2010 and, now satisfying the requirements for corroboration, we undertook the Procurator Fiscal's precognition in October 2010. A was placed on petition 28th January 2011, formally charged with several indictment charges on 4th October 2011 and, on 8th January 2012, we were advised of the trial being fixed for 17th April 2012.

Collapse of the trial

A refused to enter an early guilty plea and there were several continuations of the preliminary hearing. Ten days before the trial date, the Victim Advice and Information officer at Hamilton PF office informed B that A's defense team had decided to pursue a particular line of questioning and this information combined with the fact that the Advocate Depute would not grant her special measures (such as giving her evidence behind a screen partition or via video link) intimidated B to the point that she withdrew from the process – one week before the trial was due to start.

We now longer satisfied the corroboration requirement and case was presented to the Lord Advocate to rule on whether or not the case could legally proceed.

He made his decision – that it could not proceed – on the very day that the trial was due to begin.
At 10.30am on Tuesday the 17th April 2012, I was informed that the case was withdrawn. A, who abused and raped me when I was a little girl, was not being held to account.

**Continued risk of harm posed by this man**

A is in a job that involves regular contact with children and, as he has proven by his successful history of abuse and rape of myself, B and C, he is a skilled pedophile. It is not only we who are being badly served by this corroboration rule – it is children in the community within which he works and lives.

A”s employers are aware of the charges against him. Between the dates of the indictment and the collapse of the trial, they had suspended him from front-line duties and employed him within the depot only. However, on the day that the trial was withdrawn, he went to work „crowing” that he was innocent as he had always claimed to be. (I know this from a family member who received a phone call along those lines from him an hour after the Lord Advocate”s decision).

On 20th June 2012, I made A”s employers aware that, as there was no trial which exonerated and acquitted him, he was not proven innocent of these charges. Yet they allow him to continue in his public-facing role involving contact with children. (I know this because B encountered him on a shopping trip from her supported accommodation to ASDA. He encountered her and sneered at her. How truly awful is this? The man who raped her, destroying her life in the process, mocking her with his freedom and arrogance).

A”s employer have not as yet responded to my letter and allow A to continue working as he does.

I work as a probation officer within my local probation trust and one of the things which we know about men who are sexually aroused by children is that they never, ever, stop being sexually aroused by children. The only measure available to us to reduce their risk of reoffending is to teach them skills and techniques with which they can control their urge to abuse / rape a child.

The corroboration requirement in Scots Law means that A – and a great many men like him – has / have not been identified via conviction of his / their predilection for sex with children and, as such, have never been introduced to the strategies available to prevent further victims. It is therefore inevitable that here are – and will be – other victims.

**Scots Law – allowing miscarriages of justice**

You will note from some of the reason why people are signing my petition that there are several known men who continue to molest, abuse and rape. You will note too the account of victims either committing suicide or being so traumatized as to be unable to function as a whole, intact person.

In my interview with Lucy Adams, I use the analogy of Russian Dolls to describe the impact of what A did to me. There is a hollowness inside of me which never seems to reduce. I myself am the veteran of several suicide attempts and I would not be
alive today were it not for my patient, skilled therapist and my wonderful, understanding GP.

When one is violated, abused, raped, the trauma fractures something precious and one is plunged into a deep freeze state of woundedness. One is removed and separated from one’s life and things take on a quality of unreality. As though being observed rather than experienced.

For me, I stopped living in the present. My life became – and remains – one which is lived in replay like something recorded on TV and watched later. It is also akin to something from the black and white silent era – there is no color, no sound.

Occasionally, thanks to my therapy, I get a glimpse of what it feels like to be properly whole, fully alive, awakened from this sleep walking through the black and white, silent landscape and I get to see what it is like to be in a day which has color and sound and music and happiness and joy. But I have neither the skill nor the know how to remain in such a vital place and I withdraw back to my hollow, silent void.

When they choose to violate us, our abusers and rapists inflict upon us a harm from which recovery is never certain. Those of us who still live, look to the Criminal Justice System to deliver to us the means by which we can hope for healing. To know that we are believed, that our abuser is punished and, importantly, prevented from doing this again to another child or adult is to know that, someday and somehow, the „salve of justice“ will work its magic and we will be restored to living lives in the moment and in beautiful and glorious, musical and vibrant Technicolor.

**Why the abolition of corroboration needs to be retrospective**

From what I have read recently, it appears as though the Scottish Government is leaning towards the corroboration requirement being abolished.

In both my petition and my interview with Lucy Adams, I make it clear as to why this abolition needs to be retrospective.

I recall a quote which I believe that a great social reforming prime minister had on his desk and which went along the lines of a civilized society should be judged on the way it treats its criminals – the allusion being that if we hang draw and quarter them, then how can we claim to be civilized?

Should a civilized society not also be judged by the way in which it treats victims of crime? Can a society which, owing to an archaic and almost medieval requirement, fails to deliver justice to victims thus inflicting upon them something almost worse than hanging, drawing and quartering (barbaric though it is, it least there is an end to it) call itself civilized?

My case is obviously very specifically a sexual offence and contains child sexual abuse and rape. We cannot ignore that the corroboration requirement also denies justice to victims of domestic abuse, common assaults of all types, robberies, muggings, hate crime, racially aggravated crime and homophobic crime to name but a few.
As cited by Lord Carloway, „justice delayed is justice denied“ and as was quoted by of me in my interview with Lucy Adams, justice has been delayed in far too many cases for far too long. Will Scotland truly continue to deny justice to the victims of crime?

Abolition of the corroboration is the first step towards recognizing and addressing an element within Scotland’s Criminal Justice System which is no longer compatible with the modern „civilized“ nation in which we live. Making the legislation retrospective is the next, completely necessary step towards recognizing and addressing the harm which this requirement has caused Scotland”s innocent and wounded petitioners for justice. The very victims that the legal system is there to protect.

As stated in my petition and elsewhere, in passing the Double Jeopardy (Scotland) Act 2011, Scotland”s law makers sets the precedent for legislation which, when passed, accommodates retrospective justice.

To quote direct from my petition-

„In making the Double Jeopardy (Scotland) Act 2011 retrospective, the legislators state that „…..it is immaterial whether the conviction or, as the case may be, the acquittal was before or after the coming into force of the Act“. 

Other examples of retrospective legislation are those Acts brought into statute in order to address War Crimes and Tax Avoidance. Both such Acts also decree that the timing of the offence in relation to the legislation is immaterial.

The same must apply to legislation which abolishes the corroboration requirement, It is immaterial whether the offence was committed before or after the coming into force of such legislation; what is material – what matters – is that the justice system punishes the guilty and protects the innocent."

Colette Barrie
24 September 2012
Justice Committee

27th Meeting, 2012 (Session 4), Tuesday 25 September 2012

Petition PE1449: Scottish Administrative Justice Council

Note by the Clerk

Background

1. Petition PE1449 by Dr John Wallace Hinton, on behalf of Accountability Scotland, calls on the Scottish Parliament to urge the Scottish Government to preserve an independent Scottish Administrative Justice Council when the UK AJTC system is abolished, ensuring the new body has a critical user-interface to enable base-roots input from the public and that it has complete independence from political or civil service influence. Background information provided by the petitioner on PE1449 is attached at Annexe A. Further details of the petition are also provided in the SPICe briefing on PE1449.

2. The petition was lodged on 29 August 2012. The Public Petitions Committee considered the petition on 18 September 2012 and agreed to refer it to the Justice Committee for further consideration, under Rule 15.6.2.

3. As part of its reform of public services, the UK Government plans to abolish the Administrative Justice and Tribunals Council (AJTC), a UK-wide body with responsibility for overseeing administrative justice, such as tribunals, ombudsmen and statutory inquiries, as well as complaints-handling in the public sector. As a consequence, the AJTC’s Scottish Committee will also be abolished. The AJTC Scottish Committee has written to the Committee on a number of occasions expressing its concern regarding abolition of the organisation. For example, in correspondence dated 26 September 2011 it argued that “there is a real and substantial requirement that the functions of the AJTC so far as Scotland is concerned, must be located in an independent statutory body, if as proposed by the Ministry of Justice, the AJTC were to be abolished” (Annexe B).

4. On 4 September 2012, the Minister for Community Safety and Legal Affairs copied the Committee into correspondence (Annexe C) to the AJTC Scottish Committee, outlining her intention to set up a non-statutory advisory committee to carry out many of the functions of the Scottish Committee after abolition. She also confirmed that the Scottish Government will continue to consider longer-term options.

5. The Scottish Government, in its Consultation on the Creation of a Scottish Civil Justice Council published in 2011, proposed that the SCJC’s functions could take on some of the functions of the AJTC Scottish Committee. The Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Bill, currently being considered by the Committee at Stage 1, is silent on administrative justice functions for the SCJC.

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1 Statutory inquiries are different from public inquiries. Statutory inquiries cover inquiries held in relation to a duty imposed by statute or under an order made by the Lord Chancellor.
2 The Minister confirmed in her letter that Scottish Government officials are not yet in a position to state which functions will be transferred, but it is clear that the current Committee’s reserved functions cannot be covered by the Minister’s current proposal and also that this new advisory committee could not have statutory functions at this stage.
The Policy Memorandum on the Bill explains that the SCJC will only take on administrative functions once judicial leadership for tribunals passes to the Lord President. A Tribunals Bill, included in the Scottish Government’s legislative programme 2013-14, is expected to be introduced in spring 2013.

6. As part of its Stage 1 scrutiny on the Scottish Civil Justice Council etc. Bill, the Committee took evidence from Richard Henderson, chair of the AJTC Scottish Committee, on 4 September, who expressed concerns that the administrative and tribunal functions may not sit well with the civil justice functions of the SCJC.

Possible options for action

7. The Committee is invited to consider the petition and agree a course of action\(^3\), for example:

(a) keep the petition open pending the introduction of the Tribunals Bill;
(b) agree to ask the Scottish Government for further details of
   (i) the functions of the non-statutory advisory committee,
   (ii) the timetable for its creation, and
   (iii) the timetable for producing and considering long-term options;
(c) take any other action the Committee considers to be appropriate (e.g. seek views or take evidence from any appropriate person/body); or
(d) close the petition, on the basis that, since the petition was lodged the Minister has outlined new proposals for a non-statutory advisory committee and is also considering longer-term options.

\(^3\) Under Rule 15.6 of Standing Orders, the Committee may take such action as it considers appropriate to the petition.
ANNEXE A

Background information provided by the petitioner when lodging PE1449

The remit of the AJTC, specifies Administrative Justice in these terms: “Administrative Justice” includes the procedures used by public authorities for making decisions in relation to individual people, the law that regulates decision-making, and the systems (such as the various tribunals and ombudsmen) that enable people to challenge these decisions. The statutory functions of the AJTC include keeping the system under review and considering ways to make the system accessible, fair and efficient.”

The Scottish Committee of the Administrative Justice & Tribunals Council (AJTC) is expecting to be abolished soon. This move by the Scottish Government results from the decision of the UK Government to abolish the whole Council. Oversight of tribunals is catered for by the proposed new Scottish system but it does not cover the vast range of areas where oversight of Administrative Justice is required. We believe that an independent bastion of Scottish Administrative Justice should continue.

So the Scottish Government's proposal to abolish the Scottish Committee of the AJTC is driven from London and it leaves a gap. The question is how to plug it. This petition focuses on what we in Scotland must not lose in any changes to this independent body which oversees and reports to the Scottish Parliament - not just on the operation of Tribunals but the wider Administrative Justice field.

We have been unable to discover why a Scottish alternative to the AJTC has been proposed in which Administrative Justice in the broad sense is not included. Is the AJTC thought to be too expensive? Is the current system not fit for purpose? If it is fit for purpose, why change it? Are those who are currently in post not doing their job diligently? If they are, then why dismiss them? The separation of the Tribunals oversight aspect seems now to be fixed, so that leaves a general Administrative Justice gap which this petition addresses.

As Professor Mullen points out to us, there is a serious need for an Administrative Justice oversight policy: it is necessary to maintain an oversight of official administrative systems – to identify weaknesses. Also there is a need to help Government Departments with policy. Furthermore, the new Scottish Government proposals have no provision for Administrative Justice oversight of the courts.

Regarding oversight of the SPSO operations, the AJTC can currently report on mal-administration by the Ombudsman in regard to his systems. We currently have examples where the SPSO has decided to exclude the School Inspectorate from his investigation remit and disallows both teachers and concerned members of the public from complaining about the Inspectorate. If the AJTC goes, who will deal with this?

A new Scottish Administrative Justice Council would and could advise on the set-up and functioning of the proposed New System of Tribunal Supervision.

The creation of a Scottish Council for Administrative Justice would accord with the recommendations of the Crerar Review: The Report of the Independent Review of
Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland. This gives recommendations on processing citizens’ complaints: specification of the oversight policy (not audit & inspection, but including listening to an individual person’s complaints).

The proposed new system would result in the loss of sufficient policy development capacity in government. Therefore Scotland would then need an Administrative Justice body to deal with the list of issues concerning policy and implementation. This is in accord with the Government’s code of conduct on Consultations, and this body should report to Parliament.

In Professor Mullen’s view it is not a problem to implement an Administrative Justice System: the question is, can the Scottish Government spare half a million pounds to operate it?

Our particular concern is with its Scottish Committee and specifically with “Administrative Justice”. We emphasize the latter because the number of administrative justice hearings in a year so greatly exceeds the number of criminal justice hearings and they affect everybody every day.

The AJTC consists to a large extent of highly qualified academics in the field of Administrative Justice, and most importantly it is separate from the Civil Service and independent of Government and Civil Service control. It has an important role in overseeing the functioning of other bodies, such as the Scottish Public Services Ombudsman, regulators, quangos, Government and local government bureaucracies. Therefore the number of highly qualified experts in Administrative Justice within an oversight body in Scotland needs to be maintained. (Under the new proposals for a general Scottish Civil Justice Council it would be reduced to only a couple within a larger body which has no guarantee of independence from Civil Service influence. Furthermore this body is exclusively concerned with tribunals.)

We are particularly concerned with the potential loss of direct input from the public to the AJTC. A user-interface is critical, but it is not included in the new proposals on oversight of Tribunals. The public input aspect needs to be boosted, not lost, and this applies to the Administrative Justice Council proposed in this petition.

Acceptance of this petition now is critical, since the first consideration of proposals on the future of the AJTC in Scotland has just started in the Scottish Parliament, with the current Scottish Civil Justice Council and Criminal Legal Assistance Bill.

This UK PASC report applies to the UK AJTC, but it is crucial to our Scottish case and we ask for the Petitions Committee to read this summary and follow it up as necessary. Please note especially the last paragraph: “The AJTC should be part of the machinery to help government get decisions „right first time”. Instead, over half a million decisions have to be reviewed each year, at great cost and considerable injustice and inconvenience to citizens. If the AJTC is abolished, what will take its place, and how will Government do better?”

The Scottish Government is proposing a system for oversight of tribunals, only, so a general Administrative Justice Council is now needed.
Correspondence from the Administrative Justice and Tribunals Council
Scottish Committee to the Committee on the abolition of the AJTC dated 26 September 2011

I am writing to you as Chair of the Scottish Committee of the Administrative Justice and Tribunals Council to draw your attention to the response of the Council to the above consultation.

I should say at the outset that the Scottish Committee associates itself with the response of the Council as set out in Richard Thomas’ letter, a copy of which is attached. The Committee felt however that it might also be appropriate if in drawing the letter to your attention, it also commented on the current position in Scotland so far as the effect of abolition of the AJTC is concerned.

The Scottish Committee is, along with the Council, concerned that it does not appear that the Ministry of Justice has, at present realistic plans for the relocation of the Council’s functions. The consequences of abolition of the AJTC therefore will be that there will no longer be an independent statutory body charged with the functions of keeping Administrative Justice and Tribunals under review throughout the UK.

The Committee accepts that matter of whether the AJTC is to be abolished is, of course a matter for the UK Parliament and the UK Government. It is apparent, however, that in the event of abolition there may in future be a divergence in the position so far as such functions are concerned as between Scotland and the rest of the UK. The Scottish Government has indicated that it will, in the course of the current session of the Scottish Parliament, introduce a Bill directed at the creation of a Scottish Civil Justice Council. It is likely that it will seek to legislate in a subsequent session for reform of the Tribunals system in Scotland. While, naturally, the Scottish Committee supports the status quo being maintained so far as the existence of the AJTC is concerned, it would in general terms welcome such measures provided that they recognise the importance of administrative justice within the Scottish civil justice system.

The Committee cannot of course know the content of any such proposals in advance of their publication, but it believes that Richard Thomas’ letter is highly relevant in setting out some of the principles which ought to apply in such cases. In particular the Scottish Committee would suggest that there is a real and substantial requirement that the functions of the AJTC so far as Scotland is concerned, must be located in any independent statutory body, if as proposed by MoJ, the AJTC were to be abolished.

Please do not hesitate to get in touch with me if you wish to discuss any of the issues raised either in this letter or the attached letter from the Chair of the Council, Richard Thomas.

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Richard Thomas’ letter to which Mr Henderson refers is not included within this paper, but clerks can provide copies on request.
Richard M Henderson
Chair, Scottish Committee of the Administrative Justice and Tribunals Council
26 September 2011
Correspondence to the Administrative Justice and Tribunals Council Scottish Committee from the Minister for Community Safety and Legal Affairs on arrangements after its abolition dated 4 September 2012

Firstly, may I note my thanks for the work of the Scottish Committee of the Administrative Justice and Tribunals Council (AJTC) in supporting the reform of the tribunals’ landscape in Scotland. Reports and the contribution by the Committee to this debate have been valuable. I am also interested in the work the Committee has been taking forward on administrative justice more generally.

With this in mind, I wish to consider what we may put in place in Scotland following the abolition by the UK Government of the AJTC. I have asked my officials to consider options for the long-term. Until I have received this advice, I am conscious that I do not want work to falter under the uncertainty of timing around when the abolition may take place. Therefore, I would like to confirm that my intention is to continue many of the functions of the Committee post abolition by setting up a non-statutory advisory committee.

This will see a small shift in responsibilities as the advisory committee can only at this stage be non-statutory. I believe that this will allow us some certainty and continuity whilst we consider long-term options for the work of tribunals and administrative justice in Scotland.

I have asked Norman Egan, Chief Executive of the Scottish Tribunals Service, to discuss this proposal with you in more detail.

I am copying this letter to the Justice Committee for their information.

Roseanna Cunningham MSP
Minister for Community Safety and Legal Affairs
4 September 2012
ANNEXE D

Written submission from Accountability Scotland

Accountability Scotland would like to thank the Committee for this opportunity to add this further submission to our petition. Accountability Scotland have discovered that retention of a statutory AJTC could deliver real savings in excess of £3.5 million for the UK government per annum.

The new Scottish Administrative Justice and Tribunals council (SAJTC) does need to be a statutory body separate from the new civil justice council for the following reasons:

- It must have the ability to oversee that effective administrative justice is delivered, to assess the performance of bodies within the administrative justice landscape in Scotland.

- It must have the ability to undertake individual independent research and not be just an advisory body. It needs the same abilities as the (SC)AJTC has at present. Accountability Scotland has discovered that there is evidence to suggest that some organisations fail to deliver effective administrative justice. Therefore the SAJTC needs to deliver research on the failures or successes, thus enabling steps to be taken to improve the situation. A non-statutory body could not carry out this vital role.

- It needs to ensure by reporting to ministers that adequate and effective investigations are carried in all aspects of the administration and that the privileged position of “investigator and judge” is not abused.

- Administrative Justice is the “Citizen User Versus The State”. If the SAJTC is not a separate statutory body but is included with the Civil Justice Council, there would be no user interface and therefore no balance to administrative justice. As HH Judge Robert Martin stated in his memorandum to the Commons select committee on Work and pensions:

  The Administrative Justice and Tribunals Council has an impact on claimants’ experience of tribunals in two ways. Firstly, the Council plays an influential part in the process of drawing up the tribunal's procedural rules by championing the users' interests. Secondly, it performs a monitoring function by carrying out observations of tribunals in action and appraising their performance. September 2009.

- The SC AJTC has the necessary expertise. The Scottish committee produced “Right First Time” which if fully implemented across Scotland could deliver effective administrative justice. This can make real savings for the government by reducing the costs of unnecessary appeals to tribunals. The SAJTC could ensure that the principals of Right First Time by producing research to confirm this. See quote above.

- Administrative justice is entirely separate from either civil or criminal justice and as such needs separate representation.
If the SAJTC was allowed to oversee a full implementation of Right First Time across the government, there could be huge financial gains to be made from reductions in numbers of appeals, thus reducing the costs of delivering administrative justice. The gains would be many times the cost of the SCAJTC. This can be demonstrated by the number of successful appeals made in Scotland against the tribunals hearing the Disability Living Allowance and the ESA.

In 2011-12, 33,000 DLA and ESA Tribunal appeals were heard. 15,000 of these were successful. The cost per appeal according to HH Judge Martin in 2009 is £235/appeal hearing. Total potential saving in Scotland for these tribunals £3.525 million per annum. As these tribunals are only half the total number tribunals there would be total savings of £7 million per annum across all Scottish tribunals.

Again, if Right First Time were correctly applied, the number of vexatious and persistent complainants that cost a disproportionately large amount would be reduced. The cumulative effect would be to increase both staff morale and public confidence.

We feel that parliamentary knowledge of the state of administrative justice is at present imperfectly coordinated. For example, Parliament was only informed of the latest Craigforth report on the SPSO by us, and not by the SPSO. Like previous Craigforth reports, it reveals major dissatisfaction of complainants with the SPSO. We submitted a detailed report on this to the SPCB and can supply further evidence.

Accountability Scotland
21 September 2012