OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 22 December 2021

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 22 December 2021

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CRIMINAL JUSTICE COMMITTEE
15th Meeting 2021, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*Collette Stevenson (East Kilbride) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Rt Hon Dorothy Bain QC (Lord Advocate)
David Harvie (Crown Office and Procurator Fiscal Service)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual

Scottish Parliament

Criminal Justice Committee

Wednesday 22 December 2021

[The Convener opened the meeting at 10:00]

Prosecution of Violence against Women and Girls

The Convener (Audrey Nicoll): Good morning, and welcome to the 15th and final meeting in 2021 of the Criminal Justice Committee.

No apologies have been received this morning. I ask members and our guests to switch all mobile phones to silent and to wait for the sound engineer to switch on your microphone before speaking.

Our first item of business is the continuation of our consideration of evidence on efforts to improve the ways in which we prosecute violence against women and girls and how we support the survivors of such crimes. I refer members to papers 1 and 2.

I am pleased to welcome to today's meeting the Rt Hon Dorothy Bain QC, the Lord Advocate, and David Harvie, the Crown Agent and chief executive of the Crown Office and Procurator Fiscal Service.

I will allow up to an hour and a half for this evidence session. Before we start, I will go over a few practical points. This is a fully virtual meeting, and I intend to use the chat function as the means of communicating. Therefore, if you want to come in, please type R in the chat function and I will bring you in if time allows. If we lose connection at any point with a member or a key witness, I will suspend the meeting and try to get them back into the meeting. If we cannot do so after a reasonable period of time, I will have to deem the member as not being present and we will carry on. If we lose connection with me, our deputy convener, Russell Findlay, will take over convening. If we lose him too, Rona Mackay will step in as our temporary convener with the committee's agreement. I ask everyone to please keep their questions and answers as succinct as possible.

If that is all clear and there are no questions, we will make a start. I invite the Lord Advocate to make some brief opening remarks.

The Lord Advocate (Rt Hon Dorothy Bain QC): I thank the committee for inviting me to this evidence session and for permitting me to make some opening remarks. I am appearing today with the Crown Agent, David Harvie, who is the professional head of the Crown Office and Procurator Fiscal Service.

Rightly, there is public concern over the numbers of rapes, sexual offences and crimes of violence against women and girls, as well as over the response to that offending from the criminal justice system. The World Health Organization describes sexual violence against women as a major public health problem and a violation of women's human rights that perpetuates gender inequality.

Scotland has a lot to learn about attitudes towards women and the intolerable levels of sexual violence in society. There is a responsibility on us all to do what we can to address those profound challenges.

Before the coronavirus situation, the volume of serious sexual offences cases indicted and awaiting trial was significant. There has been a clear and obvious upward trend in those cases, which doubled in the two years up to March 2020, when trials were suspended.

The pandemic has had significant consequences for the justice system, with increased delays in cases calling for trial and uncertainty over whether trials will proceed on a given day causing anxiety and distress to victims and witnesses. There is a particular impact in the High Court, where, as of 30 September, 837 serious sexual offences cases were indicted and awaiting trial. The situation impacts disproportionately on female victims and witnesses.

The range of issues raised, from the roots of these crimes through to the way that they are dealt with by the justice system, requires a broad response, drawing on a societal and political will to do better for our women and girls. Members of the committee have heard from victims and support agencies about what it means to be involved in the criminal justice system and the trauma that accompanies that. Scotland's prosecutors work with justice partners as we strive to ensure that victims are treated with dignity and respect. Furthermore, the Crown Office and Procurator Fiscal Service is committed to working with those partners to transform the way that the criminal justice system deals with these cases.

As part of that commitment, I would like to inform the committee of two major initiatives by the Crown that I am confident will deliver long-term improvements to the experience of victims and witnesses. First, I have commissioned Susanne Tanner QC to become assistant principal Crown counsel and to conduct a full review of how prosecutors deal with reports of sexual offences. The remit of the review will be approved by me in due course. It will take into account the views of victims and agencies from across the criminal justice system and will build on the existing specialist approach that prosecutors take to sexual

offences cases and the expertise that they have in that work.

Since becoming Lord Advocate, six months ago, I have had important conversations with the senior prosecutors in the Crown Office and Procurator Fiscal Service about how sexual offence cases are prepared and presented in court. I have been impressed by their dedication to improving the experience of complainers in these cases, and the review will support those prosecutors in their ambition to improve. I am delighted that Susanne is taking forward that crucial work, and I am confident that she will make a significant contribution.

Secondly, the changing profile of prosecution casework and the backlog that has been created by the pandemic have placed huge pressures on the Crown's victim information staff. I am pleased to announce that Deputy Crown Agent Lindsey Miller will lead a review of that work to ensure that the service can continue to deliver the high levels of support and advice to all victims and witnesses that it currently provides. Although that is a long-term programme of work, any measures that are identified by the review that could assist in the delivery of victim information services will be put in place in the interim while the review is on-going.

Those are two of the steps that are being taken. I am determined that the part of the prosecution service for which I have responsibility will do everything that it can to make improvements for the people it serves. Those steps are being made in a wider context of change and challenge. The Crown Office has received a satisfactory financial settlement from the Government this year, and the committee's views in its budget report are noted and most welcome. The processes of increasing capacity and of recruitment and training are under way. The planning for how to develop and improve the prosecution service is kept under review to ensure that goals are realistic as the pandemic develops.

Improving the experience of women in the justice system is something that Scotland's prosecutors and their work partners endeavour to do every day. To make further improvements possible, some of the steps that may be required—for example, the implementation of the Lord Justice Clerk's review on improving the management of sexual offence cases—will require extensive consultation and careful consideration. Ultimately, it will necessitate decisions by the elected members of the Scottish Parliament that will have a profound impact on the way in which Scotland's justice system deals with serious sexual offence cases in the future.

The Crown Agent and I will be happy to elaborate on the service's plans in this evidence session.

The Convener: Thank you, Lord Advocate, for that helpful and welcome update.

We will move on to questions, and I will open up with a fairly general one. You will be aware that a key focus of our work so far in this session has been understanding the experiences of complainers and witnesses as they journey through the criminal justice system following an allegation of rape or sexual assault.

As part of our work, we have heard at first hand from a number of brave women about their experiences in that regard. This morning, we would like to pick up on some of their testimony. I will start by referring to Lady Dorrian's review—which you just mentioned, Lord Advocate—on the management of sexual offences. I would like to ask a little bit about what actions the Crown Office and Procurator Fiscal Service has taken to date in response to Lady Dorrian's recommendations, bearing in mind that her report was published almost a year ago. Can you give us a broad update in respect of your response?

The Lord Advocate: Convener, you will appreciate that I took office six months ago, which was some time after Lady Dorrian's review was published, so perhaps the best way to deal with this is to say what I have done following my appointment. Then we can add to that equation what other information the Crown Agent can assist with.

It is important to put some of Lady Dorrian's review in perspective in relation to my own involvement on the prosecution of the sex crimes concerned. In 2008, I was commissioned by the then Lord Advocate, Elish Angiolini, to report and make recommendations on the prosecution of sex crimes in Scotland. The outcome of that work was the formation of Scotland's national sex crimes unit.

That was 12 years ago. In that time, the challenges that the Crown Office faces in the prosecution of sexual crime and domestic violence have changed, with the main change being a significant increase in the number of reports that the Crown issues through the police and the proportion of work that that makes up in both the High Court and the sheriff courts.

However, I see that the principles that underpin the creation of the national sex crimes unit remain good today. Many of those principles are reflected in the recommendations in Lady Dorrian's report that do not require legislative change. In that respect, I refer to support for victims and witnesses in these very difficult cases; dedicated training in these matters for the lawyers who are undertaking the work; and, importantly, the advocate deputes meeting the victims of sexual crime in the High Court pre-trial, as the procurator

fiscal depute does in the sheriff courts that deal with these cases on indictment.

In addition, I see much of what I recommended at that time as being still relevant. One example is sound marking of these difficult cases—that is, sound decisions being taken on whether to proceed with them—with specialism being brought to bear in the assessment of prosecutorial decisions, the way in which complainers are supported and the way in which those who prosecute the cases conduct them. At the time of that recommendation—and, indeed, until I left the Crown Office, in 2011—there was a standing instruction that specialism be brought to bear in these cases.

There were also standing instructions that advocate deputes meet complainers well in advance of cases and that particular training be given to advocate deputes to provide them with the necessary skills to assist complainers in giving their evidence in court. I have direct experience of doing just that in many cases. I found that my own personal commitment and professional contribution to the prosecution of those difficult cases was enhanced by meeting those vulnerable people well in advance of the trial and spending time with them to give them the support that they needed. It gave them the confidence and the ability to come into court, with a screen, and to give sound, compelling and powerful evidence that often resulted in a conviction.

I do not know why some of the principles underpinning the creation of the national sex crimes unit did not continue after I left the Crown Office, in 2011. I do not think that it was because of a lack of ambition to manage the cases well. I suspect that much of it had to do with the volume of casework and its increasing complexity, as well as with the challenges that the Covid pandemic brought.

The review by Susanne Tanner QC will reflect on what we did previously in the formation of the national sex crimes unit and will bring all the principles that were identified as being necessary and that were reflected in Lady Dorrian's report to the situation that we have today. Along with me, it will deliver the sort of prosecution service that Lady Dorrian's review championed, which is one that I would very much welcome and want to be a part of.

Perhaps the Crown Agent could fill you in on what happened between my departure and my return, six months ago.

10:15

The Convener: Thank you, Lord Advocate. Mr Harvie, do you want to come in?

David Harvie (Crown Office and Procurator Fiscal Service): I will come in briefly, convener, if I may.

I will touch on a number of points, as I suspect that they are matters that we might return to. The first point is the one that the Lord Advocate made about the change in the profile of the High Court case load. There is no doubt that it changed dramatically over that 10-year period. The committee has heard the realities of that—sex crimes are now 70 per cent of the casework that is indicted into the High Court. That is, frankly, a dramatic shift over that decade, and it speaks not only to a range of investigative and prosecutorial approaches but to continuing issues at a societal level that I hope we will have an opportunity to touch on.

Your key question concerned the steps that are being taken in the meantime to implement elements of the Lord Justice Clerk's review, which are being taken collectively, as you would expect. There are issues for prosecutors, but, because it is system, matters need to be taken forward collectively. The key element in the review—the presumption in favour of prerecording complainers' evidence in serious cases—is gathering momentum. Evidence and commission hearings are now assigned for the High Court on an almost daily basis, which is a significant change from two years ago. The recommendation on visually recording the evidence of complainers at the start, through video-recorded interviews, is at a pilot phase and we are awaiting cases coming through. Nineteen cases involving a video-recorded interview at the inception of the case have been invited, and we anticipate that those will start to come through for trial, which will enable evaluation at that stage.

Separately, in the light of developments in case law and following the Lord Justice Clerk's review, there have been changes to Crown policy on the intimation to complainers making applications under section 275 of the Criminal Procedure (Scotland) Act 1995 of their rights and their opportunities, to ensure that they are separately represented when it comes to issues in and around access to their records.

Those are just three examples of matters that are being taken forward in the interim.

The Convener: Thank you. That is very helpful. You are right—I am sure that we will come on to some of those issues, and others, throughout the meeting.

We will move on to questions about the not proven verdict and judge-only trials.

Russell Findlay (West Scotland) (Con): It is interesting to hear that 70 per cent of High Court cases are about crimes of a sexual nature, and

about the disproportionate impact on female victims. In a recent interview, Lord Advocate, you suggested that

"sexual crime requires a different and distinct approach".

Can you explain what you would like that to be?

The Lord Advocate: Much of what I was referring to is reflected in Lady Dorrian's review. The reason why I said that sexual crime requires a different and distinct approach is because of the particular nature of the crime and the particular impact that it has on the individuals who are the victims of those crimes. The World Health Organization, in particular, has identified that the nature of those offences is very problematic and that they perpetuate gender inequality. Those particular types of crime have a wide impact on society and they impact on women's human rights.

If we are to do something about those issues, we require to look with great care at the nature of this type of offending. When we do that, we see that victims of sexual crime have a very powerful response to the fact that they have been sexually abused and their personal integrity impacted. It has a particular effect on the mental health of individuals and life-enduring consequences for them. We see that readily by virtue of the work that Lady Smith's inquiry has done. Reading through the reports of her work, we see the profound impact that sexual offending has on children. It leaves them scarred for the rest of their lives and makes it very difficult for them to sustain relationships and engage well with society, in terms of being able to progress at work. It often leads them to offending in turn, because they struggle with mental ill-health, and drug and alcohol addiction.

We know that the nature of such an offence is very damaging, and because of that and the impact it has on society at large, we need to look at the issue with care. We need to ensure that the victims of those crimes are properly supported and that as a proportion of our society, they are given equal access to justice. I am supported in that ask for specialisation and a distinct approach by many expert writers in the field, the European Court of Human Rights and our appeal court. I ask that, because of the nature and impact of the offence and the lifelong scars that it leaves, it should be looked at differently.

Russell Findlay: There is strong resistance from criminal defence lawyers to judge only trials. One concern is that, instead of a jury of their peers trying somebody, the accused would be in front of a usually male, white, middle-aged and privately educated lawyer. What do you say to that specific concern and those lawyers who are very vocal about the issue? Are you trying to persuade them? Finally—I suppose that it is a three-part question—have you seen any evidence in the profession of a male-female split in relation to that view, given that it relates primarily to crimes of a sexual nature?

The Lord Advocate: I am trying not to persuade but, as the head of the prosecution system in Scotland, to bring to the committee and the public at large, if I possibly can, the issues around those particular types of cases. I do so at this stage because, obviously, I have been invited to do so; because we have the Lord Justice Clerk's review; and because there is a backlog that is causing problems in the prosecution of these very difficult cases.

It is important to understand that what I am saying comes on the back of one of the recommendations in Lady Dorrian's review, which is for

"a time-limited pilot of single judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way."

That recommendation is rooted in the fact that the review explains in detail that for many years there has been a lower conviction rate for these cases than for any other type of crime. The review identified a demonstrable inequality and a lack of justice for a particular group in society.

The review states that there was public disquiet about that. It said:

"the conviction rate for rape and attempted rape has been the lowest for all crimes in each of the past 10 years."

I repeat: all crimes. It goes on:

"The figures cannot ... be ignored. The disparity is such that it cannot ... be explained ... by poor prosecutorial decision making"

or by the fact that victims, who are predominantly women and girls, are not capable of being believed.

The review legitimately asks all those with responsibility for the prosecution of sexual crime whether the system of justice is failing to provide justice and whether there is genuinely a perceived lack of justice for victims of sexual crime. The review said that that is "not unique to Scotland" and that similar statistics and concerns exist in "all corners" of the United Kingdom and in New Zealand.

The review group has identified a problem that might be remedied in a particular way. As the independent head of the prosecution system in Scotland, it would be fundamentally wrong for me to reject the Lord Justice Clerk's reasoned and rational recommendations, because all that she seeks to do is to further explore a possible method of dealing with this seemingly intractable problem

that results in an erosion of the public confidence in our system of justice.

I support the review but, as I said at the outset, it is for the democratically elected members of the Parliament to give effect to any or all of its recommendations. I support the review because any modern and progressive prosecution system must be inclusive and uphold equality before the law, which is one of the guiding principles of law—justice and fairness. If it is legitimately the case, as identified by the review, that there is public disquiet over a failure to deliver justice for a particular group in our society, then, as the head of the prosecution service, I ask that the review be considered, that parliamentarians take on board what it says and that there is a debate that is informed by all members of society and all members of the legal community in order to tell our elected representatives what might be the right way forward. That is all that I seek to do.

I do not want to persuade members one way or the other, but I point out that a review has said that justice might not be being delivered to a group in our society and, as head of the prosecution service, I have a responsibility to react to that.

Russell Findlay: Separate but connected to that is the not proven verdict. Do you have a view on whether not proven should be scrapped? Do you have a view on whether, instead of "guilty" and "not guilty", the two verdicts should be "proven" and "not proven"?

The Lord Advocate: I and the Crown Office and Procurator Fiscal Service will consider any proposal from the forthcoming Scottish Government public consideration and consultation on the not proven verdict and the abolition of the requirement for corroboration. Those matters cannot be considered in isolation, and consideration will require to be given to whether abolition should be accompanied by other safeguards. The detail and interconnectedness of any elements of any proposal will be critical. As head of the prosecution service, I look forward to receiving the outcome of the consultation, and I will react appropriately to any decision that is made by the Parliament in that regard. As the head of the prosecution service, it is not for me to express a personal view.

Katy Clark (West Scotland) (Lab): Lord Advocate, you have been very clear in your support for a time-limited pilot of single judge rape trials. Another suggestion has been that there could be more training or support for juries. Have you given any thought to that? What do you think that might look like?

10:30

The Lord Advocate: That was explored in Lady Dorrian's review, and there was some concern about whether it could be delivered. I have also seen some discussion of that in expert papers and have heard some views on it from expert psychologists, who have looked at the jury system and identified that believing rape myths can negatively impact the jury's decision on whether somebody is guilty or not guilty. I therefore understand the point that Ms Clark makes.

The review has recommended that better and clearer directions should be given to the jury, including over the noting of the evidence. Those are all things that could no doubt assist. Over and above that, I can honestly say that I have not given any further thought, but anything that can help a jury's understanding of rape myths, the negative impact that they can have on the decision-making of a jury, and the unfairness that they might bring about in that process, would be a very good thing. There have been some evidence-based reviews that demonstrate that that does happen.

If a jury were to be assisted in relation to how they see their way through the evidence and come to the decisions that they require to come to in these difficult cases, I would be very supportive of that, and indeed the Crown Office and Procurator Fiscal Service would assist in any work that was needed to be done on that with the judiciary, the Judicial Institute for Scotland, and other parts of the profession.

Katy Clark: I think that you have already said that changing the not proven verdict could perhaps be linked to other changes in the system. If there were a decision to move to two verdicts, would other changes be essential and, if so, could you outline in more detail what they might be? For example, it has been suggested that there should be a change to jury majorities. Would that be a necessary condition? What other aspects of the justice system would we need to look at, as well as the verdicts, if this were being given live consideration?

The Lord Advocate: I have made my position clear on the not proven verdict—I require to await the outcome of the consultation. I understand that the consultation on the not proven verdict and corroboration is also to take place alongside the work that is being done on Lady Dorrian's review by the governance review group. In addition to that, there will be a consultation on Lady Dorrian's review.

The justice system is such that all those issues are interconnected, so if you alter one aspect of the system, it is essential that we take great care to explore what impact that will have on other

parts of the system. If there is a change to the verdicts, we must consider whether that will impact on jury size and jury majorities. We must also look at whether the rules of corroboration are relevant and whether, ultimately, those issues might impact on a potential decision about the best way to prosecute cases of sexual violence and to ensure that justice is served in such cases.

The Convener: Russell Findlay wants to come back in, and then I will hand back to Jamie Greene, followed by Rona Mackay.

Russell Findlay: I am sorry. I did not indicate that I wanted to come back in.

The Convener: Apologies. I thought that you had. In that case, I will bring in Jamie Greene, followed by Rona Mackay.

Jamie Greene (West Scotland) (Con): Thank you, convener. I hope that everyone can hear me okay, despite my earlier technical difficulties.

Good morning, Lord Advocate and thank you for appearing before us today. Much of what I was going to ask about has been covered in the initial questions. I will pick up on another point, which is based on the evidence session that we had with the cabinet secretary last week, which I am sure that you saw or indeed read the transcript of.

I was quite struck by what the cabinet secretary said in many of his answers. He made it clear that any fundamental changes to the legal system, whether on corroboration, judge-only trials, the removal of the not proven verdict and jury sizes and majorities, were matters for the Lord Advocate, and not for him, as cabinet secretary, to comment on. I want to get to the bottom of that, because in your answers you seem to be implying that such decisions are political decisions and matters for parliamentarians, not for the Crown. The politicians, on the other hand, are saying that those are matters for the Crown.

Where do you think that the buck will stop with the decisions that we are talking about, some of which will be very difficult and controversial?

The Lord Advocate: If we take the question of a time-limited pilot on judge-only trials, Lady Dorrian's review made it clear that there was a strong historical and emotional attachment to trial by jury and that there were strong and valid arguments in favour of the democratic benefit of community involvement. However, the review also said that there were very strong arguments in favour of conducting trials in other ways, and that

"The traditional arguments in favour of juries are met by equally compelling arguments for trial by judge alone, which cannot be left unexamined and ignored."

Lady Dorrian's review identified the issue of judge-only trials because it identified that there was a question as to whether we were delivering justice for a particular group in society. As the independent head of the prosecution service, I am troubled by that and by the low conviction rates, for good reason. It would be irresponsible of me to not be concerned about that.

However, ultimately, a decision needs to be made as to whether the change is needed in order to legislate for a time-limited pilot on judge-only trials so that we can understand whether Lady Dorrian's review was correct in its assessment and, indeed, how that might be examined at a later date in order to better inform our understanding of whether we can genuinely make things better for the group of people in question. That is what we want to achieve, but the only way to achieve that is through legislative change, and legislative change is for the Government and the elected members of the Scottish Parliament to decide on.

I can only give my views as the independent head of the prosecution service. As such, I can only say that I would like there to be a really strong and properly informed debate on that critical issue. Change is not for me; it is for you and all the other members of the Scottish Parliament who were elected by the people of Scotland, who, I am sure, want a criminal justice system that delivers for everybody and is consistent with the rule of law. The rule of law requires that the criminal justice system serves every member of society, not just one section of it. Everyone must feel confident that the law is there for them if they need it.

Jamie Greene: That is helpful. I might come back to you on that, but I believe that the Crown Agent would like to comment.

David Harvie: As the Lord Advocate said, if we were to go down the route of judge-only trials, that would require a legislative fix. However, there is another, more fundamental point here. We are talking about not just the rule of law but equality. There are obligations on the state and on Scotland, in relation to which parliamentarians have a role to play.

I want to look back to Mr Findlay's question about whether there was a male-female split in any way, shape or form. I chose not to come in at that stage, so as not to interrupt the flow. There is absolutely no doubt that the current situation is having a disproportionate impact on women and girls. That is clear, and men need to own the problem as well as the solution. That comes back to the broader societal point, but it is also relevant for the purposes of the professional response.

I was involved at the very inception of the Lord Justice Clerk's review. There are a number of significant recommendations in it, beyond the headline ones relating to independent legal representation, victim advocacy and single points

of access. Members will recall that the Lord Justice Clerk's review was clear about starting with a blank sheet of paper. Be in no doubt that, in relation to that blank sheet of paper, you would not start with where we are. That is why the proposals in the review are as they are. We need a shift, not only in the way in which we deal with those cases and support people through the system, but—separately, and more broadly—in challenging the behaviours that underlie the need for the changes in the first place. I thought that it would be helpful to pick up on Mr Findlay's point.

In relation to Mr Greene's point, the key elements from my perspective are leadership across the board, whether political, prosecutorial, judicial or otherwise. We have had some judicial leadership in making recommendations that are well informed and follow consultation with a range of individuals, including experts in the system. I commend the report to the committee.

Jamie Greene: Thank you. Convener, could I respond to what we have just heard?

The Convener: Yes, of course.

Jamie Greene: I appreciate it. Thank you.

There is very little with which to disagree in what I have heard in the previous two answers. It is a collective problem, but I am trying to get to the nub of what happens next. To me, that is still unclear.

I raise the issue because I listened with great interest to the language used by the cabinet secretary, who represents the Government and sits in the Parliament, about how we could make quite significant changes. I appreciate that those changes, whether they are trials or are more permanent, will require legislative change. However, is the legislative change simply a technical requirement to enable the changes to happen, or is it the legislative change that informs the changes?

When asked about juryless trials or other such changes, the cabinet secretary went to great lengths to say that those were matters for the Lord Advocate. Therefore, I am trying to understand whether you, Lord Advocate, are advising the Government as to what changes it should be introducing through legislation—which the individual members of Parliament will debate and vote on—or whether you are looking to the Parliament to come back with a set of proposals that you will then be forced to introduce as the Lord Advocate.

The Lord Advocate: I am the head of the system of prosecution of crime in Scotland, which is a constitutional position that is independent of the Government. My response to what you described is that legislative change is for the Parliament, the Government of the day, or individual parliamentarians, who can introduce their own bills in order to debate the issues that they have concerns about. As I understand it, you are introducing your own bill because you are concerned about many of the issues that we will be touching on today.

I do not think that I can be any clearer. I read Lady Dorrian's review, and I deal day and daily with the consequences of the pandemic and its impact on the prosecution of sexual and other crime. I want to have a prosecution system that is progressive, humane and delivers for all sections of society.

10:45

I say what I say in relation to sexual offences in the hope that people will listen to me and will understand that I see that we have problems. Some of those who have conducted expert reviews, informed by experts in the field and by very eminent senior members of the judiciary, have identified a real possibility that a section of our community is not being properly served by the justice system. They look to remedy that and have made recommendations about that.

It would be fundamentally wrong for me, as the independent head of the prosecution system, to reject the Lord Justice Clerk's reasoned and rational recommendations. She seeks to further explore a possible method of dealing with a seemingly intractable problem that results in an erosion of public confidence in our justice system. That problem has been with us for a long time. We cannot allow it to go on for another 40 years—we must do something about it. Any reasonable person—whether they are the head of the prosecution service or someone that you would meet on the street—would agree with that.

I say to Mr Greene that legislative change is for the legislature. As the independent prosecutor, I cannot say more than I have said.

The Crown Agent might be able to come in here.

Jamie Greene: I think that he has dropped off the call. I appreciate your response. I have some other questions but I am happy to reserve them for later in the meeting.

The Convener: I will bring in Rona Mackay before we move on to questions on the role of the advocate depute.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Lord Advocate, you said in a recent interview that

"Judge-led trials don't impact on the right to a fair trial [but] we need to look at the suitability of a jury to prosecute a case."

You added that

"We should be properly informed ... properly informed about judges."

You will be aware that Professor Fiona Leverick's research found "overwhelming evidence" that jurors hold "prejudicial and false beliefs". In our private evidence sessions with victims, we heard that they felt that there was an element of that. They felt that juries might be prejudiced if the complainer had been drinking.

What is your opinion on that? What do you mean by the "suitability" of a jury? Does that suggest a need for media training—I am referring to specialist courts?

The Lord Advocate: The major purpose of my interview with *Holyrood* magazine was to seek to engender a well-informed, reasonable, balanced debate on the critically important issue of the prosecution of crime in Scotland. I was not pursuing a personal agenda. I hoped to engage with others in order to encourage them to take part in a properly informed and reasonable debate that takes account of all viewpoints across society. That was the purpose of the magazine article.

I made a point about the need to look at whether juries are appropriate to prosecute these cases and return verdicts in them. I made that reference as a result of part of what was in Lady Dorrian's review. She and others looked at expert evidence and at qualitative and quantitative reviews and work. She looked at the work done by Fiona Leverick. There was a question as to whether juries were in fact suited to this particular type of case. It was highlighted that the Law Commission in New Zealand had concluded that they were not suited to such cases because of attitudes towards rape victims and because of beliefs that blame the victim/survivor, cast doubt on their allegations, excuse the accused or are about what a so-called real rape looks like. As Fiona Leverick recognised, there was overwhelming evidence to show that, because of those beliefs, juries were just not returning verdicts on the basis of the evidence before them and were too influenced by rape myths.

Lady Dorrian's review asked for that issue to be looked at. She said that we needed to consider whether a particular proportion of our society was getting justice, and there is evidence from all the people whom we have been talking about—Fiona Leverick and the like—to support the view that it is not.

All I ask is that Lady Dorrian's review be looked at, because we legitimately question whether juries are the right way of proceeding with these very difficult cases. In that context, then, the question has to be asked whether there is a right to trial by jury in Scotland. Is there a constitutional right as there is in the English system? The situation in Scotland is very different: there is no historical right to trial by jury and whether a case proceeds to such a trial is determined by the prosecutor and the statutory provisions governing the relevant crime. If the question is whether there is a constitutional bar to trial by judge alone, the answer is no.

I ask, therefore, for a debate on all of these issues to answer the legitimate question that was raised in the review and which I will repeat: is a proportion of our society just not getting justice? The conviction rate cannot be ignored and cannot be explained away by the fact that women just cannot be believed—and I would point out that the conviction rate for these types of crimes is way lower than for any other type of crime. Something has to be looked at in order to address the issue.

The Convener: I think that we lost Rona Mackay momentarily, but I think that she might be back now. Rona, can you hear us? [*Interruption*.] We are obviously still having some problems.

Thank you for those comments, Lord Advocate. I will move on to our next area of questioning and hope that we can get Rona Mackay back in to ask any follow-up questions that she might have. I should also remind everyone to keep their questions and responses succinct where possible. Our next questions are on the role of the advocate depute.

Collette Stevenson (East Kilbride) (SNP): Good morning, Lord Advocate and Mr Harvie. As the convener has said, we have had some powerful contributions from survivors in previous sessions, and I want to look at the role of the advocate depute in this process. We have been told that going through the system is like a second violation, and I want to ask about the way in which statements are taken when a case is prosecuted. In some cases, statements were taken four or five times. Moreover, when the prosecution element of the process was reached, it was found that the statement that was used was completely wrong compared with what had been provided, and the whole thing had taken years. Is that standard practice and, if so, why?

The Lord Advocate: With regard to statements given to the police by complainers, which I think is what you are referring to, the police officers who investigate the crime are responsible for taking police statements from complainers. Those statements form the basis of the prosecution service's assessment of whether a case should proceed to trial. We look to the detail of the complainer's statements, the other report made by the police in relation to any particular offence that is reported and surrounding evidence to identify whether there is sufficient evidence in law to

prosecute and whether the case should be taken forward.

The complainer's statements are productions in any trial and they are disclosed to an accused's representatives in the disclosure process before a trial. You will appreciate that what a complainer said in her first or second statement is looked at with care by the accused's counsel to see whether the evidence that is given before the court or commission is consistent with the statement that was originally given to the police.

The statements are productions in the case. The way in which I require advocate deputes to approach a case of this type is to read all the complainer's statements in the preparation phase of the case and to know them inside out. The advocate depute should arrange for the complainer to see the statements in good time before her trial, so that she—or he—can read them in a quiet space and a relaxed period of time and understand what she said previously to the police. If there are issues in and around the statements, I would hope that the advocate depute would raise that with the procurator fiscal or the advocate depute responsible for the conduct of the case at that stage.

I should say that, prior to the advocate depute being given the trial for court, there is a process during which the case preparer and the procurator fiscal consider the complainer's statements, and there are opportunities for them to speak with the complainer, discuss the case and look at the statements with her. Therefore, if there are issues with the accuracy of the statements, I would have thought that, with the system that I push for, that would all be identified well in advance of the trial and the issues would be resolved, in order that the complainer is properly prepared for any issues that might be raised around inconsistencies in her statement.

That is the process that I touched on before, which I very much pursued when I was an advocate depute. It involved meeting complainers in a supportive environment and ensuring that they were prepared for court and that they were given all the support that they needed. Indeed, in cases that I have recently prosecuted, in which their advocacy support worker has been with them, the rape complainer has sat in a room with the advocacy support worker and gone through the statement in a supportive way, so that they are not on their own and they are given the necessary support and advice around those issues.

That is how it should work, and if it has not been working in that way, I am very disappointed. The difficulty is that much of the criticism within material to the committee is anonymous and cannot be followed up by me or explored in detail. However, following my reading of the evidence of those complainers to the committee, that is something that I have followed up directly with the deputy Crown Agent and all of the advocate depute team. I reacted to it immediately. All I can say is what should happen, what I have done in response to reading the evidence to the committee and what we are trying to do in driving through improvements—the review that I have asked for and the increased level of training for advocate deputes and procurators fiscal in and around the expertise that is needed for these cases.

Collette Stevenson: Thank you. I do not know whether Mr Harvie wants to come in, if he is available.

David Harvie: I was offline for an extended period with a connection issue. My apologies—I missed the question.

Collette Stevenson: I was touching on our evidence session with the survivors. There was very strong criticism of the process—not just the Crown prosecution but the police—in terms of giving statements, and of the interaction or lack of it from the advocate depute. My question was to see whether you feel that is standard practice, in terms of the delays—the years of backlog and whatnot. If so, why, and what can we do to rectify that?

11:00

David Harvie: It is certainly not best practice—that is where I would start. I agree entirely with the points that I heard the Lord Advocate make once I was reconnected. I will add just a bit of context about where we are. The victim information and advice staff in particular, as well as case preparers and those who are involved in contact with victims are seeking to deliver to those standards against a reality in which, as we have said, things are taking longer. There are more cases than there were, simply because of the backlog that has built up. As a result of all that, and as an unintended consequence of the recovery, there is also, frankly, greater uncertainty. For example, there is uncertainty over when cases will call. I think that the committee has heard about the anxieties and uncertainties around floating trials and so on.

The net effect of all that is that individual interactions with victims are taking longer and there are more of them, simply because of all the various uncertainties and because of the scale of the issues.

I agree entirely with all the points that the Lord Advocate has made. I would add that, during periods in which our public counters were closed, it was often not possible to meet complainers in circumstances where it would be helpful to them to look at their statement. In some instances, we were using Microsoft Teams for that, which is sub-

optimal. I suppose that that is an indication of the efforts that were made, notwithstanding the difficult circumstances that we found ourselves in at some stages, to make good progress with the provision of information in the discussions in preparing for cases, which the Lord Advocate has talked about.

I am adding context on scale, uncertainty and the mitigations that had to be put in place in the context of lockdowns to try to progress matters. I in no way take away from the experience that individuals have had, nor am I in any way disagreeing with the Lord Advocate's points about how things ought to be conducted.

Collette Stevenson: My next question is for the Lord Advocate. Who provides complainers with legal advice at present? What are your views on whether victims of sexual assault and domestic abuse should have access to independent legal representation as well?

The Lord Advocate: That is a good question. The Crown Office and Procurator Fiscal Service does not provide legal advice to complainers—we are not the complainers' lawyers. It is important to say that there has to be an enormous cultural shift and an understanding of how sexual crimes are prosecuted nowadays, in the sense that it is no longer a two-dimensional process involving the Crown and the defence. Victims of sexual crime have legally enforceable rights under the European convention on human rights and the Victims and Witnesses (Scotland) Act 2014. We have to recognise that they have a voice and a right to information and effective participation in the process. For example, they have a right to be informed about applications in relation to their case to lead evidence in court of previous sexual behaviour.

Issues around sexual behaviour and previous sexual conduct are all very difficult. The Crown cannot give independent legal advice to a complainer in a case. It would have to be an independent lawyer who gave that independent legal advice. Through the victim information and advice service and through the lawyers working in the system, the Crown can and does give advice to complainers about particular issues, but that is not independent advice and we are not their lawyers. We are therefore restricted in what we can say and do.

I think that the time has come for recognition that there should be independent legal representation for victims of sexual crime, because of all the issues that we are talking about, the complicated nature of the subject matter, the impact on victims and the challenges that the system provides. I support it in particular as Lady Dorrian's review has supported it, in the context of applications under section 274 and 275 of the Criminal Procedure (Scotland) Act 1995, because it is important to understand that that process, of itself, engages victims' rights under article 8 of the European convention on human rights. Their rights are enforceable in that regard.

One other thing that I should say on independent legal representation is that, for some time now, non-means-tested legal aid has been available for victims of sexual crime or domestic violence that would allow them to get independent legal representation if an application is made to the court for recovery of their personal and sensitive records, such as medical records. Scots law recognises that such a complainer in a case of that nature can get legal representation, can be heard through her own lawyer in the court process and is entitled to non-means-tested legal aid for that application and advice.

I have a memorandum of understanding with Rape Crisis Scotland, which provides me with information to assist us in how we deal with such cases. The tragedy, as I understand from that, is that women are often turned away by the legal profession, whose members do not seem to understand that legal aid is available or that legal representation and the right to be heard in such applications are available for complainers at that stage. The law has moved on significantly. The case of WF v the Scottish ministers set the law for the right to be heard in relation to sensitive records. The Government of the day reacted to that and provided those women with non-means-tested legal aid to ensure that they could have lawyers to represent them. However, the outcome is not quite as predicted, as there is a lack of understanding that that is currently available.

That goes back to what I said about there having to be a cultural shift and an understanding that the situation is not two-dimensional but three-dimensional, and that victims of crime have legal rights that are underpinned by the European Union directive on victims of crime and enshrined in Scottish law and in the European convention on human rights. We have to alter our thinking on such cases.

Collette Stevenson: That was really interesting. I do not know whether Mr Harvie wants to come in. If not, I will be happy to hand back to you, convener.

The Convener: Mr Harvie, would you like to come in? After that, I will have to move us on, because I am very conscious of time. I will pass over to Mr Harvie, and then I will bring in Rona Mackay to follow up on her original question, as she dropped out.

David Harvie: I will pick up on the point about the availability of legal aid. Again, as part of our response, we have been seeking to promote and

highlight that point with the Law Society of Scotland and the Scottish Legal Aid Board to ensure that practitioners are well aware of the availability of the provision for securing non-means-tested funding to assist individuals in those circumstances.

My other point relates to the Lord Justice Clerk's review and the potential benefits of the independent legal representation that the Lord Advocate has discussed. As the committee heard in its private session, and, to be frank, as we have heard repeatedly over a number of years, there is absolutely no doubt that there is an understandable combination of misunderstanding and frustration on the part of victims in their perception of the Crown's role. In many instances, people have a sense of dissatisfaction when they appreciate that role's true nature, which is not necessarily what they would have expected—the representation of their interests—but the representation of the broader public interest.

To be frank, that independent legal representation would be not only of great assistance to those individuals but of great benefit to the system. It would enable prosecutors to focus on the assessment of public interest and on advocating on that part, while giving support, clarity and advocacy rights to victims in the context of applications for material and section 275 applications.

The Convener: I will hand back to Rona Mackay, who we lost previously, so that she can pick up on her previous line of questioning, and then we will move on to Pauline McNeill.

Rona Mackay: Apologies, convener—I lost connectivity there.

I will come back on the second part of the question, and ask the Lord Advocate to expand on her comment that we need to be "properly informed" about judges. I would like to know what that means. In that context, would you support a register of judicial interests?

The Lord Advocate: I meant that we need to be properly informed about what the role of the judge is in the determination of cases of this nature, and in very sensitive cases throughout our system of justice in Scotland. We have a judiciary that is appointed through an open and transparent process and through the Judicial Appointments Board for Scotland. Our judiciary are subject to their own professional rules and responsibilities. They are professional judges, who judge.

The criticism that is levelled against Lady Dorrian's recommendation for a pilot for judging these trials is that judges do not represent democratic society. It is argued that they are not reflective of society—they are white, middle-aged and affluent university-educated individuals who will not return convictions or acquittals in the way that the current system, which is properly informed by a jury system, does.

My point is that we should consider whether that criticism of judges is fair against the background of what judges in Scotland are known to do, day and daily, in the work that they undertake. We know that, in England and Wales and in Scotland, thousands of criminal cases are heard before members of the judiciary sitting on their own, and there is no criticism of that process. The magistrates' courts in England and Wales hear cases without juries, as do the Crown courts in certain cases.

Across the country, day and daily, the sheriff courts hear many cases of a sexual nature, and in relation to summary crime, without a jury, without any criticism of the process. Judges sit in the Court of Session and deal with difficult and sensitive cases that require difficult decisions to be made, and there is no criticism of the fairness of that process.

If we are to have a balanced debate about the issues to which the suggestions in Lady Dorrian's review give rise, we need to properly understand what judges do, and think about whether we can just dismiss the judiciary as being the appropriate trier of facts in sexual offence cases and say that those cases are only ever suitable for trial by jury. That is the point that I was getting at.

I am sorry, but I have forgotten your other point, Ms Mackay.

Rona Mackay: Would you support a register of judicial interests?

The Lord Advocate: That is not a matter for me, as the independent head of the prosecution system, to comment on—it is a matter for others. I support having a debate on an issue that is eroding public confidence in the prosecution of a particular type of crime. I would like a debate, and I would like the recommendations in Lady Dorrian's review to be looked at in a careful and balanced way. I support the review for that reason, and for the reasons that I have given previously.

Rona Mackay: Thank you—I appreciate that.

The Convener: I will hand on to Pauline McNeill, and then I will bring in Jamie Greene.

11:15

Pauline McNeill (Glasgow) (Lab): I am interested in the line of questioning that Colette Stevenson started regarding independent legal representation, and in the Lord Advocate's answer. It is a critical area for the committee to consider.

I note that the Lord Advocate said that there is already a right to be heard on a section 274 and 275 application where the application relates to medical records. Should that right apply more widely than medical records? I would have thought that, if an application is made to use evidence of sexual history at a preliminary diet, the complainer should have an interest in the whole application, not just medical records.

The Lord Advocate: Currently, the right to be heard is available in the pre-trial process or in the process that is called in connection with the criminal procedure. That relates to the recovery of personal and private records—you have that spot on. The right to be heard is available now. That was confirmed in WF v the Scottish ministers and is in statutory form. We know that complainers are entitled to be heard on such applications for recovery.

An application under sections 274 and 275 relates to the lines of cross-examination that an accused person wishes to lead at trial. It is an extremely sensitive issue for complainers in sexual offences cases. It can be so troubling and so profoundly impactful that they find it very difficult to cope with even just knowing that an application has been made. You can understand the situation. They are awaiting their trial and it is the first real contact that they have to understand what lines of cross-examination will be led against them, what attack might be made on their character and what evidence might be led of previous sexual conduct. It is a very sensitive point in the case.

We understand that different complainers deal with those issues very differently. Each has different vulnerabilities. It is important that we identify the nature of those and the support that is required before we embark on the process of telling them that the application has been made, explaining the contents of it and whether we think the judge will or will not grant it at first instance. You can understand that that is a really important conversation that needs to be done with great care, support and sensitivity. Currently, the Crown does that through contact with VIA and other representatives and lawyers of the Procurator Fiscal Service.

We have engaged in discussions with Rape Crisis Scotland about that and we have good guidance on how an approach is made to a complainer about a section 275 application. That was informed by Rape Crisis and has recently been updated. The issue is important, because the section 275 process engages the complainer's legal rights under article 8 of the ECHR so they have to be told about the application and their views have to be taken and reported to the court.

You will appreciate from what Mr Harvie and I have said that we are not the complainer's lawyers, so there is a restriction on what we can do and on the context within which we meet and discuss such matters. Therefore, independent legal advice on one of the most sensitive issues in the case would be entirely beneficial for a vulnerable complainer who has been contacted about one of the most difficult issues in the trial process.

Lady Dorrian's review recommended that independent legal representation would involve giving legal advice and being able to make submissions on behalf of the complainer in court so that the court can be properly informed about how to balance the competing rights of the accused and the complainer in a sexual offences case and properly apply the statutory test under the Criminal Procedure (Scotland) Act 1995. I see great benefit in what Lady Dorrian's review recommended and enormous benefit in the Parliament considering that and the Government consulting on it.

Mr Harvie, who was part of the review, might like to come in quickly.

The Convener: We still have a few areas of questioning that we would like to cover, so I ask the Lord Advocate to keep her answers fairly brief. Mr Harvie, would you like to come in?

David Harvie: Thank you, convener. I will keep this answer as brief as I can.

To pick up on the point about the obvious complexity and sensitivity of these issues, I add that the current statutory framework requires a notice of an application seven days before a preliminary hearing—in other words, the contact and discussion can happen in very compressed timescales. As I am sure all members will appreciate in light of the potential content of the applications, there is a need to ensure that they are approached sensitively and that there is appropriate time to reflect and seek advice. If that is the line that members are minded to go down, which I would commend, covering it all in the current seven-day timescale is frankly unrealistic.

Pauline McNeill: Those are helpful answers. It is clear that, if we want to pursue the issue, there is quite a bit of work to be done to strengthen the right to be heard, on which I agree with the Lord Advocate. The question is how we can make that happen through legislation. Also, I note what the Lord Advocate said about women being "turned away" by the legal profession, so there is a lot to be done in that respect.

I have one remaining question, given the shortage of time. If we legislated and created the right for the complainer to be fully represented at a preliminary trial where sexual history evidence is asked for, albeit that there are issues with the timescale, I take it that the Crown would have no

objection to dealing with what is in effect a third party representing the complainer? Mr Harvie, as the Crown Agent, would you be happy to deal with a third party on this matter?

David Harvie: Yes. To refer again to the Lord Justice Clerk's review, of which I was a member, I commend paragraphs 4.43 and 4.44 to committee members. You will see that, if we were to go down this line, we would not be trailblazers. It is happening in other common law jurisdictions. Positive research has been produced which, as set out in paragraph 4.44, concluded that the provision had two important benefits, which are:

"(i) it allowed the prosecutor to focus on the application purely in terms of its significance for the prosecution; and (ii) it ensured that complainers could be satisfied that their views were heard by the court deciding the application."

The report continues:

"Such benefits would equally apply in Scotland,"

reducing

"almost entirely the tension between Crown and complainer discussed above".

Therefore, for all the reasons that are discussed in the report, the answer is yes.

Pauline McNeill: Thank you.

The Convener: I will hand over to Jamie Greene. Before I do, I know that these are really interesting topics and I am able to extend the session beyond 11:30, but I ask the Lord Advocate and Mr Harvie to make their responses as succinct as possible.

Jamie Greene: Thank you, convener—I will try to keep my questions succinct.

In 2018, Her Majesty's Inspectorate of Prosecution in Scotland produced its "Thematic Report on the Victims' Right to Review". Last year, there were nearly 34,000 cases in which the Crown Office either discontinued prosecution or decided not to prosecute a case in the first place. What percentage of complainers were notified of those decisions and how were they notified? Why are less than 1 per cent of victims applying for a review of a decision not to prosecute or continue a case?

That question is to the Lord Advocate.

The Lord Advocate: I hope that I am still heard; I had a problem with my connectivity. I see that you can hear me, Mr Greene.

The Crown Agent is in a far better position than I am to give such figures. It may be that we cannot give all of them today, but we are happy to follow that up in a letter.

Crown Agent, do you have a bit more information than I do?

David Harvie: I would be happy to follow that up in writing. For the avoidance of doubt, the numbers of discontinuations to which Mr Greene refers do not specifically relate to cases involving the main topic of today's discussion. Mr Greene will correct me if I am wrong, but I think that I am right in saying that the figures relate to the overall proportion of prosecutorial decision making, both at first instance and discontinuations. They might involve a whole range of offences, many of which might not involve any complainer or victim at their heart.

Separately, there are provisions in place in relation to intimation, and those do not yet fully extend to all cases. I wrote to the committee previously, but I am happy to do so again regarding the work that we are doing to seek to explore how we could extend that. I am conscious that that is covered by Mr Greene's bill.

Jamie Greene: Thank you, Crown Agent—I appreciate that. I wanted to flag up the point, because the review was clear in its recommendation that all victims should be "notified of such decisions" and offered whatever options of remedy are available to them, should they wish to apply for a review. The numbers speak for themselves. I look forward to getting more detail on that from the Crown.

My second question concerns the Moorov doctrine, which is highly relevant to many of the cases that we are discussing today. We heard compelling points from victims of such crimes in our private sessions. I will not go into great detail, but they felt that the practice was perhaps misunderstood. They felt that they misunderstood the implications of that type of prosecution, and that juries perhaps misunderstood the consequences of the decisions. That is well documented in the public paper that we have produced.

Will the Lord Advocate or the Crown Agent comment on what measures the Crown is taking to improve communication on Moorov as practice and on whether they feel that it is an appropriate and successful metric for prosecuting people in complex and multiple circumstances?

The Lord Advocate: I will start by explaining that the Moorov doctrine is a very important doctrine of evidence in Scots law and it is very important to the prosecution of sexual offences in Scots law. As you and all committee members will be aware, in order to have sufficient evidence in relation to any charge in Scots law, there requires to be corroboration, and corroboration, in a sexual case, is evidence that supports or confirms the complainer's account.

We often have the account of the complainer, DNA evidence, some eye-witness evidence and

some evidence of distress, and the combination of those elements of evidence mean that there would be sufficient evidence in law and there would be corroboration—there would be a basis upon which to take the prosecution.

The Moorov doctrine is an exception to the rule of corroboration. The Moorov doctrine means that you could have the evidence of one complainer speaking to a sexual assault against her in relation to the accused, and her case is corroborated not by independent evidence but by the evidence of another complainer speaking to sexual assault by the same accused in similar circumstances that demonstrate that the accused is responsible and guilty of a course of conduct. In that way, you can have two sets of evidence of sexual assault from two individual witnesses—two individual complainers—that corroborate each other: they are mutually corroborative. That would give sufficient evidence to ask a jury to return a conviction against the accused in relation to both complainers. Each complainer supports the other.

11:30

The difficulties arise in the sort of case that was documented in the report from the committee in which there are two complainers and the jury rejects one but believes the other. For the other complainer, the difficulty is that, in law, there is no corroborated evidence, so there is no basis to convict. I believe that that is how one of the women who spoke to the committee in such compelling terms described that particular case.

I know that the committee found it pretty shocking, upsetting and disturbing to hear that a conviction for rape could not be returned in that case, because of the way in which the jury understood the operation of the Moorov doctrine. They plainly had not understood it because, in the case in question, the only way in which complainer 1 could have been corroborated would have been if complainer 2 had been believed and the only way in which complainer 2 could have been corroborated would have been if complainer 1 had been believed. That would have been the only basis on which you would have been able to return a conviction. What we can identify from the situation that the committee heard about is that the jury plainly had not understood the legal direction. In a way, that is not unsurprising, because the law on corroboration is complex.

The Crown can make as much use as possible of the rules of evidence to bring forward such prosecutions. It does all that it can to use the Moorov doctrine and to develop the law around it and push the boundaries to try to secure convictions in cases where we would otherwise be unable to do so, because we do not have corroboration. That is what we can do on the issue. It might be worth thinking about the issue that is discussed in Lady Dorrian's review of whether the directions that are given to the jury are appropriate and adequate and appropriately reflect the law that the jury needs to apply. That is how I feel that I can answer your question, Mr Greene.

Jamie Greene: Thank you—that was very helpful.

The Convener: We will move on to look at the area of communication. I call Russell Findlay, to be followed by Pauline McNeill.

Russell Findlay: A few weeks ago, my colleague Jamie Greene and I met some of your Crown Office colleagues who prosecute cases in the lower courts to discuss an issue that is not often talked about: plea deals. In one serious domestic violence case that I am familiar with, there were 16 charges, and after four years, there was a plea deal in which seven of the charges were dropped and some of the others were amended. The victim was not informed of the decision. Moreover, the amending of some of the details was quite jarring and, in some respects, revictimising. Should victims be told of any plea deals and the detail of them? Given the court backlog, is there not a risk of such deals being used more than they are currently—and perhaps disproportionately, to the detriment of justice? What safeguards are there against that happening?

The Lord Advocate: I will follow up the issue that you have raised about that particular case. I think that you met John Logue—is that right?

Russell Findlay: Yes.

The Lord Advocate: I will follow that up, because—

Russell Findlay: It is an historical case that I mentioned as an example to give people an idea of what happens. I do not suppose that there is much purpose in revisiting it.

The Lord Advocate: All I can speak to is the practice that I understand should take place in relation to these cases. If there is a plea on offer from the accused, the procurator fiscal depute or indeed the advocate depute will discuss it with the defence counsel or defence agent and decide on the basis of the evidence and in the public interest whether the plea is acceptable. It might be that the complainer does not understand or does not approve of some of the detail of the plea. However, what should have happened—it is what I always did and what I understand is the standing instruction to all lawyers in the service—is that there should have been a discussion with the complainer about the plea. The complainer should

be told the detail of the plea, the basis on which it is accepted and the reason or rationale for that.

I am disappointed to hear that that did not happen in a case that you know of. That should not have been the case, because it is imperative that victims are told about plea deals in their case before they hear it in court and that that is done in a sensitive and supportive way. That is what I have always done, and it is what I expect to be done. If that has not happened, I will make efforts after this meeting to reinforce that instruction across the service and the instruction to the advocate depute team.

I think that you hinted that, because of the backlog, there might be a temptation on the part of prosecutors to just take a soft plea in order to get through that backlog. I reject the point that that would be a temptation for any prosecutor who is prosecuting in the public interest. I certainly would not support that approach.

The difficulties with the backlog remain and, as I said in my first evidence session with the committee, they need a political solution. We have a moral responsibility to take a fresh look at where we are with the backlog. We need to look at remedies to that, but it cannot be that soft justice is the answer—I certainly do not support that.

I wonder if the Crown Agent can come in, because he will be able to give a better position on the overall service approach.

The Convener: Mr Harvie, do you want to add something briefly?

David Harvie: Again, I will be brief, convener. Crown policy on the issue has not changed in light of the pandemic. There have been calls from various individuals within and outwith the system for the Crown to take some sort of wholesale approach in trying to resolve the backlog. That has been rejected—that will not be the approach, and individual cases continue to be assessed in terms of individual public interest.

On the initial case that prompted the question, I appreciate Mr Findlay's comment that it is now historical but, for the avoidance of doubt, since this is a public hearing, I point out that there are complaints handling procedures that are available to all members of the public. If situations give rise to the kind of concerns that Mr Findlay has alluded to, we want to hear about them. I encourage people to look at the material that is available online as to how complaints can be made. They will be acted on.

Russell Findlay: I am reassured by the commitment from you both that plea deals will be taken only in the public interest and the interests of justice. However, the case that I referenced was not unusual and, from the conversation that I had with your colleagues who prosecute in the lower courts, my understanding is that there is not a mechanism to routinely inform complainers about plea deals. That is perhaps because of the volume of work. It might be that that was more likely for the Lord Advocate in her day when she was prosecuting in the higher courts because she was prosecuting fewer cases, albeit more serious ones. Thank you for your answers.

The Convener: Pauline McNeill has a question before we move on to the next area of questioning.

Pauline McNeill: There has been a suggestion that a single point of contact for complainers might reduce the scope for complaints about communication—I think that Lady Dorrian said that in her report. Is that practical? What would be the relationship between that point of contact and Victim Support Scotland?

I have listened to the evidence, and I will not go through all the testimony again, but I understand that there have been a lot of communication failures. A single point of contact could be a way of solving that. Do you think that it is practical to bring that in, and who would do it? I thought that Victim Support Scotland already did that, but maybe it does not have the capacity to contact the police and the Crown. A complainer cannot just pick up the phone and ask the fiscal what is going on; they probably would not even know where to find the number. Somebody has to do that for them. I just wonder who you think should do it and whether it would be practical.

The Lord Advocate: The Crown Agent can probably give more detail on that. Lesley Thomson QC produced a report around all of that, which recommended that there be a single point of contact. One can see the sense in having one point of contact, as it would give you all the information about your case throughout its history and journey. That means that you would have consistency in your advice and confidence in the assistant who is giving you the information for your case. It makes good sense for that to be the way forward.

I think that work is being done around that, which the Crown Agent could come back on, and he could say how it links in with the Crown Office's victim information and advice service. He is better placed than I am to explain the strategic arrangement that that would require.

David Harvie: I suppose that I might look back once again to the theme of the day: the Lord Justice Clerk's review. On careful reading of it, members will note that it mentions three elements in that area—the single point of contact, the advocacy and the independent legal representation. All of those, I would respectfully

submit, are gaps in the system that lead to many of the frustrations that the committee has heard about during its various evidence sessions.

In so far as the single point of contact is concerned, the Lord Advocate is correct that work on it is taking place. Committee members who were on the predecessor committee might recall previous discussions about the Thomson review's recommendations and the work that was taken forward by the victims task force. That work is on-going. It is led by Victim Support Scotland with support from the Scottish Government and all relevant justice organisations, including COPFS. That is still at the design phase. We entirely support that work.

When one looks at those three elements in the review—single point of contact, advocacy services and independent legal representation—I would just say that, given that none of them yet exist, bringing them in would be a further investment in the system, and therefore consideration would have to be given to it in terms of not only legislative vehicles but also organisational structures and budgets.

The Convener: I am going to move on to questioning around the use of pre-recorded evidence and culture issues.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I have a question for the Lord Advocate on something that we heard in our private sessions where we had testimony from survivors; it is around the culture in the Crown Office. We heard an example of the advocate deputes acting like they were part of an old boys' club and being friendly with the defence counsel. I think that we can all understand how that might come across, because people will know each other—defence lawyers will know advocate deputes and suchlike. I wonder, though, whether the Crown Office and the Lord Advocate recognise that as a cultural issue and, if so, whether it could be addressed.

The Lord Advocate: Just to be clear about what the criticism was, was it that a complainer in a sexual offence case considered that the advocate depute in the High Court was too close to the defence and it looked as though they were friends and part of what seemed to be an inappropriate relationship or a relationship that was too close?

Fulton MacGregor: That is a good summary. It is a difficult time for victims when they have to present at court, but that was this person's experience, and they were quite definite about it. Was that a one-off, or is it something that you recognise as being an issue? There is no getting away from the fact that those people will have professional relationships, but it can look like something else to somebody who is going through such a traumatic experience.

11:45

The Lord Advocate: I completely agree that it would be very upsetting to a complainer in a sexual offence case if she was in court in relation to her case and she considered that the prosecutor was behaving inappropriately and demonstrating, to her eyes, that they were overly friendly and part of what you describe as a boys club. That is entirely inappropriate, and it is inconsistent with anything that I believe in.

A prosecutor in the High Court, and indeed any other court, has to be respectful of all of the individuals who appear in the court—the judge, the defence counsel, the accused and the complainer. A prosecutor has to behave with appropriate professionalism and give each and every one of those individuals respect. You have to recognise that a complainer in that situation feels very vulnerable and exposed. All that the complainer is looking for is justice, and that sort of conduct, as described, is inconsistent with the way in which I consider that cases should be prosecuted, and I am deeply upset to hear about that. It is not something that I recognise. However, we are not immune to criticism, and we are open to self-reflection.

As I say, I have appointed Susanne Tanner QC to do a review. As part of that review, we will be examining our own conduct and our own engagement with complainers, because it is an aspect of humanity that we deal with complainers respectfully and properly, and that they feel that justice is being done in their case.

Fulton MacGregor: If the individual who took time out to speak to the committee privately is watching this, or watches it at some point in future, I hope that she will be pleased with that pretty strong response from you, Lord Advocate. Thank you.

Convener, I think that there is something in the chat about David Harvie wanting in.

The Convener: Mr Harvie, do you want to come in on that?

David Harvie: No, convener. I have nothing to add.

Fulton MacGregor: Sorry—that might have been my fault. I might have misread the chat.

I have a second question, if that is okay. I know that we are tight for time. It is on the taking of statements. The issue has already been discussed and the Lord Advocate gave a good overview of it. However, on the introduction of pre-recorded complainers' evidence in serious sexual assault

cases, are there any barriers to introducing that service quickly? Could prerecorded evidence be extended to domestic abuse cases? I ask the Lord Advocate to reiterate her plans in that area.

The Lord Advocate: In relation to recorded statements, a pilot to visually record the statements of complainers in rape cases is taking place in a number of jurisdictions. The Crown Agent will tell us about those, but I think that we are yet to hear about the outcome of that pilot.

I am not sure what the situation is in domestic violence cases, but, as recognised Lady Dorrian's review, there are benefits from evidence being taken on commission. That means that the evidence is captured before the trial, so that a complainer's evidence is recorded and they do not need to wait for the trial to come to court.

In and around all that, there are some issues. While we are working with Lady Dorrian's review and seeking to implement those parts that can be implemented without legislation, there is a push for evidence to be taken on commission. As Lord Advocate, and having spoken to a number of prosecutors in those cases, I would like to see just how impactful prerecorded evidence is in securing a conviction or otherwise.

It is still very early days with evidence being recorded on commission, and we need to be careful about a wholesale adoption of that approach. I say that because, sometimes, the prosecutors whom I work with and who support tell me that they are anxious about the impact of the evidence in a live court. They question whether recorded evidence is as impactful as live evidence. That is one question that we need to explore.

I have also met victims of sexual violence who have told me that they felt disengaged by the process and wished that they had gone into court with a screen. When they chose to give evidence remotely, through closed-circuit television, they found that they did not enjoy it. They felt disconnected from the process, and felt that they did not come across as well as they should have done. I simply repeat what victims of crime have told me.

However, I also know that there are some benefits from prerecorded evidence in terms of commissions. It means that victims do not have to wait for ages to give their evidence in court, and they do not have to put up with constant adjournments of their case before they are actually called to give evidence. Adjournments are currently a feature of the system—because of the backlog, and the number of cases in the system, cases are repeatedly adjourned before the witness gets to come to court or to give their evidence remotely.

The issue is not straightforward or black and white, and we need to take care to revisit all aspects of the issue in sum, in a reasonable period of time. Perhaps the Crown agent can tell you about recording evidence in domestic abuse cases; I do not have the answer to that question just now.

The Convener: Thank you, Lord Advocate.

If Fulton MacGregor has finished his line of questioning, I invite Mr Harvie to come in, and then I will bring in Pauline McNeill and Russell Findlay, who are both interested in asking supplementary questions on this topic.

David Harvie: Perhaps, given the time available, I can follow up in more detail in writing. The headline is that evidence by commission is not currently used in summary cases. The video-recorded interview process in the pilot, to which I referred earlier, tends to involve allegations at the higher end.

With regard to those cases that are likely to end up as summary prosecutions in particular, any discussion, and correspondence on any future discussions, might want to focus on the potential use of body-worn cameras in that context.

Pauline McNeill: I imagine that one of the key issues with prerecorded evidence—forgive me if I have not understood the process—concerns the cross-examination of the complainer in court. How is that done? I imagine that the lawyer for the person who is standing trial would want to put questions to the complainer. Is that done beforehand or in court? It would be helpful to know that.

Would you be concerned about that? It is certainly a concern that I have, and I would like to hear any answers that you have in that regard.

The Lord Advocate: I hope that I can answer most of that. A victim statement that is prerecorded would be the victim's evidence in chief. It would be played either at a commission, where cross-examination would then take place, or as evidence in chief at the trial, and cross-examination would take place at the trial. It might be that the victim would give evidence remotely or in court, but undoubtedly, in order to ensure a fair trial, there has to be an opportunity for the accused to cross-examine the witness.

Prerecorded evidence can be used as evidence in chief, but the opportunity to cross-examine must remain. The way in which that would be done would depend on the way in which the evidence was led at trial, but I suspect that if the evidence in chief was recorded, the cross-examination would be done on commission and those recordings would be played to the jury at the trial.

Pauline McNeill: Thank you very much.

Russell Findlay: My question is on a similar theme—that of support for victims and witnesses.

Lord Advocate, I think that you said in your opening remarks that you had tasked Lindsey Miller with reviewing the Crown's victim information and advice service. Does its ability to help victims and witnesses not boil down entirely to decisions that you make about your budget? In other words, the primary function of the Crown is to prosecute crime—ergo, that takes up by far the biggest slice of your budget. Given the chronic backlogs, funds for victim information will always be a secondary consideration. Do you agree? If so, can anything be done about that?

The Lord Advocate: I do not know about the budget and the allocation to VIA. As I said, I am only six months into the role of Lord Advocate. I am sure that the Crown Agent will be able to give you chapter and verse on that.

We really want to ensure that VIA communicates effectively and timeously with complainers, and that it does so in a supportive and sensitive way. As a result of the backlog, each VIA officer has cases for far longer, and their case load has probably increased by 100 per cent, if not more. The challenges of the backlog mean that VIA has cases for longer, and it is finding the situation more and more challenging because of the immense emotional involvement that is required to support individual complainers. The fact that cases are lasting for longer and there is anxiety around adjournments and delays is making the job much more difficult.

Some of the hidden issues of the backlog relate to people in the service who perform distinct roles. Those who are involved with VIA at the coalface, who are dealing with the difficulties that victims and witnesses are experiencing because of the backlog, face major challenges. That is part of the reason why we instructed Lindsey Miller to conduct a review.

The Crown Agent will be able to answer your question on the budget.

David Harvie: I am happy to provide further information.

To pick up on the point about the broader context, cases are taking longer, there are more of them and there is greater uncertainty as to when they will be called. There is also the overall societal issue of greater uncertainty because of restrictions, the pandemic, the availability of diets and so on.

I will illustrate the impact that that is having on VIA and its case load. The most recent figures that we have indicate that the number of contacts—in other words, the number of times that VIA officers have discussions with complainers—has increased by 92 per cent since March 2019. That is obviously very significant.

To come back to the question about the budget, bearing in mind that we face a constantly moving picture in relation to the nature of the backlog, the Covid variants and the implications for the system, we have consciously increased VIA staffing in the High Court, and we will continue to do so. When I spoke to the committee on a previous occasion, I referenced the on-going recruitment exercise. There will have been an increase of more than 50 per cent in VIA staffing capacity in the High Court once those posts have been filled, but you will appreciate that, even with those projections and the budget that we got, there is a difference between a 50 per cent increase in staffing and a 90 per cent increase in demand in terms of the number of contacts.

The other point that I would highlight is simply that, although we welcome the enhanced court programme moving from 16 to 20 High Court trials because it will tackle the backlog, it does by definition mean that more of those VIA officers want to be court facing, for want of a better phrase. That is important for the experience of those who are going through court at that particular moment in time, but it increases the pressure on those who are seeking support in relation to those cases that have yet to come to court. It is a constantly moving picture. We have been planning in terms of mitigations and, as you can see, steps have been taken on that through the increase in staffing, but there is much more to do, which is why the review is necessary.

12:00

Russell Findlay: I seek clarification on the 92 per cent. I do not know what that relates to exactly.

David Harvie: Compared to March 2019, which we use as a baseline pre-pandemic level, the number of interactions with complainers that an individual VIA officer is having has increased by in excess of 90 per cent.

Russell Findlay: Thank you.

The Convener: Time is against us, as usual. We were hoping to ask some further questions about the backlog of cases, but we will follow those up in writing.

Lord Advocate, you mentioned a review that Susanne Tanner will be conducting. It will be helpful for committee members to have further details from you on that. Could you write to the committee on completion of the review with some updated information on any appropriate action that it identifies? That would be helpful.

In the meantime, Lord Advocate, I thank you and Mr Harvie for your time today. It has been most helpful. As I say, if there are any questions that we have not asked today, we will follow them up in writing.

That concludes the public part of the meeting. Our next meeting will take place on Wednesday 12 January 2022, when we expect to take oral evidence from the Cabinet Secretary for Justice and Veterans and witnesses from the Scottish Prison Service on the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2021. Further details on that meeting will be available with the agenda and papers on our website in early January.

In closing, I take this opportunity to thank all those who have given oral and written evidence to the committee in 2021. I wish all members, staff, witnesses, and members of the public a safe and happy festive season, and a happy new year.

12:03

Meeting continued in private until 12:32.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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