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Criminal Justice Committee

Wednesday 24 January 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

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CRIMINAL JUSTICE COMMITTEE
4th Meeting 2024, 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)
*Sharon Dowey (South Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*John Swinney (Perthshire North) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor James Chalmers (University of Glasgow)
Simon Di Rollo KC
Tony Lenehan KC (Faculty of Advocates)
Alan McCreadie (Law Society of Scotland)
Professor Vanessa Munro (University of Warwick)
Professor Cheryl Thomas KC (University College London)
Sheila Webster (Law Society of Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 24 January 2024

[The Convener opened the meeting at 09:31]

Victims, Witnesses, and Justice Reform (Scotland) Bill: Stage 1

The Convener (Audrey Nicoll): Good morning, and welcome to the fourth meeting in 2024 of the Criminal Justice Committee. We have no apologies. Katy Clark is joining us remotely.

Our first panel of witnesses are here as part of phase 3 of our scrutiny of the Victims, Witnesses, and Justice Reform (Scotland) Bill, focusing specifically on parts 5 and 6. I welcome Professor James Chalmers, regius professor of law at the school of law at the University of Glasgow, and Professor Vanessa Munro, professor of law at the law school at the University of Warwick, both of whom are joining us online. In the room, we have Professor Cheryl Thomas KC, co-director of the University College London judicial institute. Thank you for taking the time to attend today's meeting—it is much appreciated.

I intend to allow up to 90 minutes for this session. I propose that we initially focus our questions on the proposal in the bill for a pilot for judge-led trials in certain rape cases. After that, we will move on to other areas.

I will open with a question on rape myths. I will come to Professor Thomas first and then bring in Professor Chalmers and Professor Munro. What does available research tell us about the potential impact that rape myths and other misconceptions have on jury deliberations in rape cases?

Professor Cheryl Thomas KC (University College London): Thank you, and welcome to my colleagues who are online.

The first thing to say is that it depends on which jurisdiction you are referring to. I provided a written submission to the committee to try to set out the contrast between the amount of empirical evidence that you have on the jury system in Scotland compared to the empirical evidence in England and Wales. I am here to provide you with information on the research that I have conducted in England and Wales and some other jurisdictions over the past 20 years.

In relation to rape myths and stereotypes, there are two main aspects of the research that we have looked at in the UCL jury project. One is jury conviction rates in rape and sexual offences cases. We have been conducting a detailed analysis of every single jury verdict against every defendant in every court in England and Wales over the past 15 years. That applies to rape offences as well as any other offences. That is important for our understanding of the relative conviction rates when juries deliberate to reach a verdict on a rape offence compared to the rate with other offences. Our analysis of all those verdicts is that juries in England and Wales are more likely to convict than they are to acquit in rape cases.

When we carried out a very detailed analysis of 10 different types of rape offences, we found that the jury conviction rate ranged from 63 to 91 per cent, depending on the age and sex of the complainant and whether or not the offence was historical.

In other research, we saw juries post the verdict and asked them about their particular views about rape and sexual offences, and we found that, contrary to popular belief, individuals on jury service in England and Wales did not overwhelmingly believe rape myths and stereotypes. However, there were a few issues on which they could have done with some additional information to ensure that they were not confused. When you marry up those two pieces of research, you will see that there is no evidence in England and Wales to suggest that juries are biased against complainants in sexual offences cases on a systematic basis.

The Convener: Thanks very much for that. Professor Munro, I said that I would bring you in next. Would you like to come in?

Professor Vanessa Munro (University of Warwick): Thank you very much and thank you for the opportunity to give evidence today. I also thank the committee for allowing us to do this by Zoom after storm Jocelyn intervened.

I want to start by saying that identifying and understanding jury decision making is obviously a complicated matter. Inevitably, it is always going to be difficult to get into the heads of jurors to uncover what is informing their evaluations of the evidence, and those difficulties are compounded when you try to predict the effects on verdict outcome, given the specific and unique nature of each trial and the complicated ways in which group interactions during the deliberation process can impact on perspectives and narratives. Inevitably, I think, there are pros and cons to the various approaches that we might take to try to better understand the jury decision-making process. We might well come back to discuss that further.

I would say that our submission paints a picture that is somewhat different from what Professor

Thomas has presented, although there are important areas of commonality. Our submission is largely based on a number of previous studies that have relied on simulation methods in order to better understand the dynamics of the deliberation process, with participants being provided with mock simulations and people looking at how they deliberate in those very grounded and communal environments. The research suggests that that might give a more nuanced understanding of attitudes instead of our simply asking through abstract questionnaires, "Do you think X or Y?"

In our submission, we rely heavily on the findings of the Scottish mock jury study that I, Professor Chalmers and other colleagues were involved in conducing, but those findings also sit in the context of a wider body of evidence, including other simulation studies in England and Wales—indeed, those studies and the Scottish jury study have spanned a total of more than 1,500 participants—as well as other international studies involving mock and real jurors and post-deliberation interviews with the real jurors. That includes the work in New Zealand.

What we have found fairly consistently across that evidence is that, as I said at the start, it is obviously difficult to track a linear trajectory from individual views that are expressed in deliberations to verdict outcomes. However, prominent themes have consistently marked the juror discussions. In particular, jurors often express expectations with regard to signs of resistance or physical injury in order to consider a complaint and a complainer to be credible, and they have focused on the behaviour of complainers before, after and during the incident that might provide evidence of consent—or at least a reasonable belief therein—including, say, accepting a lift from the accused, receiving compliments from them or drinking alcohol in their company.

In more than half of the juries in the Scottish study, jurors expressed during their deliberations, sometimes quite repeatedly, the view that false allegations of rape are routinely made and that that should be borne in mind when assessing the credibility of a particular claim.

Taking all that evidence together, our view is that there is certainly a credible basis for concern with regard to the role that misconceptions and misunderstandings of rape, rapists and rape complainers might play in the deliberation process.

Professor Thomas mentioned her research, which suggests that there is perhaps not, in her assessment, overwhelming evidence of a source for concern. Nonetheless, we would flag up some significant findings in her study regarding certain attitudes that continue to be held. For example, 27 per cent of the respondents reported that they either agreed or were unsure whether they agreed with the statement that

"It is difficult to believe rape allegations that were not reported immediately",

and 17 per cent agreed or were unsure whether they agreed that

"A woman who wears provocative clothing, puts herself in a position to be raped".

We would argue that, in the context of group deliberations in particular cases, the uncertainty view can often be amplified and can have a more significant impact.

The Convener: Thank you, Professor Munro—there is a lot in there. I will move swiftly on and bring in Professor Chalmers.

Professor James Chalmers (University of Glasgow): I thank the committee for its flexibility in allowing me to give evidence via Zoom.

I agree with all of what has been said so far. I emphasise the difficulty, which colleagues have mentioned, in actually unravelling what is going on with rape myths in deliberations. As Professor Thomas said in her submission:

"As human beings, we cannot consciously know all the factors that influence our individual decisions",

so it is difficult to identify exactly when rape myths are having an effect.

Individuals who are asked about abstract statements that indicate agreement or otherwise with rape myths may well realise that certain answers are socially unacceptable and will shy away from giving them, but may nevertheless rely on those myths, explicitly or unconsciously, in deliberations.

In the Scottish jury research, as Professor Munro said, we saw, to a significant extent, jurors expressing and explicitly relying on rape myths in deliberations. However, given the nature of that research, we cannot quantify exactly what difference that made to outcomes. It is not easy, or even perhaps possible, to do that in the context of group deliberations. In addition, all our jurors were watching the same trial, so we cannot say, therefore, how they would have reacted had there not been the basis for that particular myth to be expressed, if that could be excluded by the design of the trial materials.

As Professor Thomas notes in her submission, there is an issue with the comparability of conviction rate data between Scotland and England. The situation with regard to the available data on conviction rates is slightly unsatisfactory; we may come back to that.

I understand that the latest data shows a conviction rate of 48 per cent. That covers all

cases, including guilty pleas—it does not explicitly give details of the plea rate in rape cases. We know from the Dorrian review that, in sexual offences in the High Court in general, the plea rate is 19 per cent. That suggests that the conviction rate is rather lower in Scotland. The committee has already heard evidence from the Lord Advocate to suggest that

"conviction rates are ... 20 to 25 per cent"

in what she described as

"acquaintance-type rapes".—[*Official Report*, *Criminal Justice Committee*, 10 January 2024; c 33.]

There may well be a difference there, but we cannot easily bottom that out from the published data.

The Convener: I will stay with you, Professor Chalmers, before I open up to other members. You referred—I think that I am quoting you correctly—to the challenge of

"unravelling what is going on",

looking across the wider body of evidence and research work that has been undertaken around rape myths.

In trying to understand the issue, how important is it that we are aware of, and take into account, the purpose of individual pieces of research and the context in which they were developed? I am thinking about avoiding the risk of comparing apples with pears with regard to what happens in one jurisdiction as set against another. How important is it that we are aware of that when we are considering what the evidence is telling us?

09:45

Professor Chalmers: It is important to be aware of the limitations of different kinds of research. All jury research has different sorts of limitations—there is no perfect way of going about it. The purpose for which the research is carried out is indeed important, but there are limitations to any sort of research. The mock jury research in Scotland was limited by the fact that participants knew that they were role playing. They knew that a real person's fate did not rest in their hands. Nevertheless, the participants took the discussions very seriously and they were earnestly engaged in their task. That limitation remains, however.

Research that involves asking jurors about agreement with abstract statements and whether or not they subscribe to certain rape myths is subject to limitations, partly in the design of the statements, which can vary between different bits of research, and also through what researchers would call socially desirable bias. Referring to an example that Professor Thomas has used in her research, there is a question about whether or not a woman who goes out alone at night puts herself in a position to be raped. That question has an obviously socially acceptable answer, so it is unlikely that respondents will say yes to it—although a small number did—even if jurors give weight to such factors in their deliberations. The difference between what jurors or any individuals say they do and what they actually do is difficult to get at through research.

The Convener: I am sure that we will come back to that question. I will open up the floor to members, starting with Katy Clark, who is joining us online.

Katy Clark (West Scotland) (Lab): Is it fair to say, from what the witnesses have said so far, that different research has come to quite different conclusions in relation to rape myths? Is there any difference between mock jury research and research into real jurors? Can any witnesses expand on that point or give any other explanation as to why different research has come to different conclusions? We have heard a lot about the Scottish jury research, which involved mock jurors. We have also heard that the cases were quite short, and that the amount of time spent by the jurors on the case was quite short compared with a real case. Also, there were only two sets of facts, so there might have been limitations there.

Do you think that it is wise for politicians to base decisions in relation to the abolition of jury trials on research when there is so little clarity? There might be other reasons to get rid of jurors in rape cases—reasons to do with the experiences of witnesses, survivors and complainers, for instance—but would it be unwise to base conclusions around rape myths when the evidence seems so unclear?

Perhaps Cheryl Thomas would want to respond—although the convener will be better placed to see whether the witness wishes to answer.

The Convener: Yes—I will hand over to Professor Thomas.

Professor Thomas: It is a very good question. As Professor Chalmers has mentioned, every empirical research method will have its limitations, and that is why the strongest research uses a range of multiple methods to address a particular question. In the UCL jury project, when we have considered similar factors, such as the role of race in jury decision making or factors that might affect juries' decisions in cases of rape and sexual offences, we have always strived to use a range of multiple methods to examine the issue.

If you use a range of methods and both or several of them come up with the same answer, you can feel more secure that the research findings are reliable. If you have contradictory

findings, something else is going on. Therefore, I personally would feel uncomfortable with relying on a single study to come to large conclusions about major changes in the jury system.

The particular challenge in Scotland is that you currently lack any empirical research with actual juries. There are some issues to do with your statistics about jury conviction rates—I am happy to talk about that if you want to go into that in detail—and you have not had any research to explore, for instance, who does jury service, who is summoned, how representative juries are, what views they hold and how the jury system works, as well as what the impact might be of some of the very significant changes that the bill proposes to make.

The proposed changes include not just the issue of juryless rape trials but very significant changes in the size of the jury and in majority verdicts. Also, you currently have some movement away from your existing legal principles on corroboration in cases, and judges in Scotland are changing the way that they direct juries, whether that is in relation to rape myths or, very interestingly, with an increasing provision of written directions for juries.

All those things have been happening in England and Wales for a much more substantial period of time but, to come back to your question, we have to be careful about how much empirical evidence there is in Scotland underpinning the proposals to change the system. It would be wonderful in Scotland; you have fantastic academics here who could do the research.

I will just comment on a point that is often mistakenly made. There are no legal prohibitions against doing research with real juries at court to address all the issues that I have mentioned. That is the research that I have been doing in England and Wales, Northern Ireland and other jurisdictions, fully within the prohibitions that exist about discussing deliberations with juries, post verdict.

The Convener: Katy, would you like to bring in anyone else on that issue?

Katy Clark: Perhaps Vanessa Munro might have a different perspective.

Professor Munro: I probably have a similar but slightly different perspective, as you might expect. I absolutely agree with Professor Thomas's key point, which is that we need to look holistically at that body of evidence, and we should rightly exercise considerable caution before we make any fundamental decisions based on one piece of evidence. I would not encourage that.

We might need to be a little bit careful not to get into the territory of assuming that there is a body of evidence that says certain things based on mock juries and a body of evidence that says certain things based on real juries. Actually, even there, the findings are more complex. On the one hand, there is the work in England and Wales that is based on those post-deliberation questionnaires that Professor Thomas has been discussing. There was also some important work in New Zealand. That involved real jurors but used a different methodology, which, as with them all, had its pros and cons.

The research in New Zealand observed sexual offences trials to get a deeper understanding of the narratives and strategies that were deployed during the trial process. Subsequent to their deliberations, jurors who had participated in them were interviewed about the deliberative process. Again, the research relied on the jurors' retrospective recollections and their assessments of what they thought were the influencing factors in the deliberative process, as well as what they were willing to share with the researcher in that context. Those findings underscore the complexity of the trajectory between views expressed or intimated and the outcome in terms of verdict, but, again, they broadly support the basis that there is some cause for concern regarding reliance on misconceptions and misunderstandings—what are referred to as cultural misconceptions in that work. That slightly adds to the complexity of the picture—it is not that mock studies say one thing and real juror studies say something else.

It is also important to reference the work of our colleague, Professor Leverick, who has done substantial work, which I am sure the committee is well aware of, to draw together the body of pre-existing evidence. That work indicates that there is a mass of evidence—again, with methodological pros and cons—that supports a basis for concern about what might be happening in juries in those cases.

Professor Thomas rightly points out the lack of empirical research to date in Scotland with real jurors. I do not disagree at all with the assessment that that would be a valuable contribution to our evidence base and would help to triangulate some of the findings that we have from the mock study, particularly due to some of the unique features of the Scottish criminal justice and jury system.

The Convener: Professor Munro, can I just come in? There is a lot of interest in this topic, and I know that members are keen to come in, as is Professor Chalmers. Therefore, I will bring in Professor Chalmers, and then we will move on.

Professor Chalmers: I will be very brief. I would not want the committee to think that it is in the position of having to adjudicate between two competing bodies of research. I think that you have written submissions relating to the next

evidence session that place our research—that is, my research and that of Professor Munro and others—and Professor Thomas's in opposition to each other, but I do not think that that is quite appropriate. The appropriate course is to read the available evidence together and decide what conclusions can be drawn from that.

I refer the committee to Lady Dorrian's report and, in particular, to paragraph 5.41, which says exactly that about comparing the research emerging from the Scottish jury research and the research emerging from the UCL jury project. There might be room for debate about the conclusions of that, but I think that Lady Dorrian was quite clear that it is not a case of choosing one body of research over the other, but of reading the two together and seeing what conclusions could be drawn.

The Convener: Thank you. Katy, would you like to come back in?

Katy Clark: No.

The Convener: In that case, I will bring in Russell Findlay, followed by Rona Mackay.

Russell Findlay (West Scotland) (Con): I thank the witnesses for coming to the committee. The submission from Professors Chalmers, Leverick and Munro refers to your research, Professor Thomas, from 2020, saying that it is sometimes cited as evidence

"that jurors do not believe rape myths",

but that that interpretation is untrue and that the research does not actually demonstrate that. They point to alternative New Zealand research from 2022, which they say "found considerable evidence" of rape myths among jurors. Will you clarify what your research actually found, and do you agree with Professors Chalmers, Leverick and Munro's assessment of it?

Professor Thomas: I thank the committee for asking me to come to give evidence. My research has been discussed quite a lot in Scotland. I feel that it has sometimes been misrepresented, so it is very helpful to be able to explain the research to all of you.

In 2018, there was a petition to the United Kingdom Parliament that called for all juries in rape trials in England and Wales to be provided with training about rape myths and stereotypes. The petition claimed that very large numbers of juries believed rape myths and stereotypes, that the jury conviction rate in rape cases in England and Wales was extremely low and that that was leading to many guilty people walking free.

The then head of criminal justice in the judiciary, and the president of the then Queen's bench division of the judiciary in England and Wales, asked me to look specifically at the matter in response to that petition to Parliament. I was asked to do two things: one was to survey jurors post-verdict to see what their views were about various rape myths and stereotypes; and the second was to conduct a detailed examination, as I mentioned earlier, of every jury verdict by deliberation that occurred during a 15-year period in England and Wales.

Quite often, the research that I have done on the issue has focused primarily on post-verdict surveys with jurors. There has been a lot of discussion about that, with people claiming that the jurors felt pressured into saying that they did not believe rape myths and stereotypes and so on—all sorts of reasons have been given as to why the research might not be valid. I find that a bit disappointing, simply because, if you have one body of research that says one thing and one body of research that says another, the scientific approach is to try to understand why there might be differences between the two.

10:00

One of the differences is that I conduct research only with real juries at court, and other research has primarily been done with people who have volunteered to act as jurors. We know from all our other research with juries—with people who actually do jury service—that, if they had had the option, they would not have done jury service. Therefore, by and large, jurors are not volunteers. The overwhelming proportion of people who do jury service do not necessarily want to be there; however, the research shows that they have a very different experience once they have done that jury service.

Therefore, I agree with Professor Chalmers that it is incorrect to set up my research as somehow being in opposition to all the other research. As researchers or anyone interested in the issue, we simply need to ask why the differences might exist. The interest in England and Wales was, in relation to that petition to Parliament, whether there is evidence that juries are systematically refusing to convict defendants in rape cases.

Actually, the stronger bit of the research that we have done is the detailed analysis of every single jury verdict in the country for 15 years, which leads to the inevitable conclusion that juries are not failing to convict in England and Wales. The situation might be very different in Scotland, and therefore you would want to ask yourself what might lead to there being differences between the two jurisdictions.

Russell Findlay: In respect of whether your research shows evidence of rape myths among jurors, does it do that?

Professor Thomas: Does it show evidence of rape myths among jurors? Certainly, a small number of jurors held some views that would be considered to be rape myths and stereotypes. That was a very small proportion across the range of issues. If it was, say, 3 per cent of all the jurors who were surveyed, that would amount to less than one person on a jury.

I want to make another point. There has been an awful lot of discussion of and reliance placed on a study that was conducted in New Zealand. Professor Munro has helpfully summarised for the committee what that research involved. It is important to point out that that study did not come to the conclusion that jurors overwhelmingly hold biased views against complainers. It said that, in their deliberations, jurors sometimes express those views. To quote from that report, it said:

"if any cultural misconceptions were expressed in deliberations, it was not possible to draw conclusions about whether these influenced actual jury verdicts".

That is the difficulty. Juries are asked to go into deliberations to discuss the case. Certainly, in England and Wales, people are told that they bring their experience of life and their knowledge of human nature into that discussion and their assessment of the evidence against the defendant. We ask jurors to debate and discuss those issues, and it might be that people express certain views in jury deliberations. However, we do not have evidence to say that, just because someone expresses a view in jury deliberations, that automatically leads to their voting in a particular way in a case.

That is certainly one area where I am very interested in the research that Professor Chalmers, Professor Munro and others have done in Scotland. They have some very interesting statistics on the number of juries in which people expressed certain views. However, no connection is made between the expression of a view in deliberations and the person's ultimate decision in the case. Jury deliberation is complex, because 12 individuals make individual decisions that lead to one decision, which further complicates decision making.

I am not sure if that completely answers your question, but the long and short of it is that there was some limited evidence that a small number of the people who do jury service in England and Wales hold some beliefs that would be considered to be false assumptions.

Russell Findlay: Your research also analysed and assessed every rape case in England and Wales between 2007 and 2021, which was thousands of cases. No such research has taken place in Scotland.

You have proposed two possible reasons for the apparent difference in outcomes in the two different jurisdictions, one being that Scottish jurors may be more biased, the other being that it is due to differences in the legal systems. However, because of the lack of similar research in Scotland, we cannot properly get to the bottom of that.

My question is for all the witnesses. Does the lack of research into the Scottish system make it difficult for the committee to assess whether the measures in the bill are required? Anyone can answer that.

The Convener: Professor Chalmers, would you like to come in?

You seem to have a wee sound problem, Professor Chalmers.

Professor Chalmers: Can you hear me now?

The Convener: Yes.

Professor Chalmers: I am not sure that I can say much, other than to agree that the lack of research is a difficulty for the committee. That is not specific to this area; it flows from doing law reform in a small jurisdiction—one that, in this case, is distinctive because of its jury system and the corroboration requirement. Therefore, taking lessons from research done elsewhere is problematic, which is one reason why the Scottish jury research was commissioned. Further back in time, the post-corroboration safeguards review found it difficult to draw any conclusions for Scotland, although there were many thousands of pieces of jury research from across the world.

There is a limit to what is available, so I think that there is a decision for the committee and Parliament to make on whether the evidence base that is available is sufficient to justify reform. I recognise the difficulty, but I cannot offer an easy way out of it.

Russell Findlay: I have a quick question about research. Professor Thomas has helpfully torpedoed another myth, which is that you cannot speak to real jurors. Are there any moves for that to happen in Scotland?

Professor Chalmers: I am not aware of any. There are limitations on speaking to real jurors. Some very limited research, using surveys of jurors' experiences at court, was done in Scotland some time ago, but that is not relevant to this discussion.

You cannot ask jurors about the content of their deliberations: that is prohibited. As Professor Thomas notes, there are limits to what conclusions you can take from the answers that jurors give to any questions. Any research in the area would

require legislative reform to enable those specific questions to be asked.

As Professor Thomas noted, research can be done by getting real jurors to serve on mock juries or to answer questions after their experience at court. I would have some doubts about a description of that as being real juror research, because it would be subject to the same limitation as other research, which is that the jurors are not deciding on real cases and do not hold people's fates in their hands. However, you certainly get the benefit of having a sample of participants who were selected in the same way as a real jury, which gets around the limitation that Professor Thomas noted, which is that we do not have research in Scotland to show how far juries are representative of the population. Professor Thomas herself conducted such research in England and Wales. That is another limitation that we are subject to here.

Russell Findlay: Professor Thomas, do you want to come in on my original question? I went off at a slight tangent.

Professor Thomas: What was the original question?

Russell Findlay: It was about how the lack of similar research data in Scotland makes it very difficult for us to assess the proposals.

Professor Thomas: It makes your job hugely problematic. You do not have the baseline information about how your current jury system works. The bill proposes to make fundamental changes, on the size of the jury, majority verdicts and a range of other things. There are also other important changes to the jury system coming in. All those things will make it incredibly difficult to assess the impact of any of the changes that are proposed in the bill.

That is not to say that you should not make the changes; it is simply to say that that will be difficult. For example, we started the discussion by talking about juryless rape trials. According to the bill, there is to be a review of the pilot, but how are you actually going to do that? What are the measure or measures going to be? Will the measure be the jury conviction rate in Scotland in comparison with the juryless trials conviction rate?

I am not sure that there is currently a lot of clarity in Scotland about exactly what the conviction rate is arising from jury deliberation on rape charges. You need that baseline information on which to measure any changes.

Russell Findlay: You have helpfully answered one of my other questions, so I will come in with one more quick question.

In England and Wales, judges have been able to direct juries about rape myths since 2006; that is effectively compulsory. However, it is only since autumn 2023 that that has begun to happen as a matter of routine in Scottish courts. The legal fraternity says that the practice needs to be allowed to bed in and that an assessment of its impact needs to take place—I think that you essentially agree with that.

Can you give us your thoughts on that?

Professor Thomas: Yes. That is a very significant difference between the way in which jury trials are run in England and Wales and the way in which they are run in Scotland. There is now a sort of coming together, with the judicial view that juries should not only be directed on that issue—which was anathema in Scotland for a very long time—but that, as in England and Wales, judges should have the freedom and discretion to direct the jury at any point in the trial where the judge feels that it would assist the jury. In England and Wales, the result is that judges in rape and sexual offences cases are increasingly directing the jury, on the standard direction that they now have on avoiding false assumptions, at the outset of the trial.

The other significant difference is in the use of written directions to juries. The research has shown that that is an important tool for juries in focusing their deliberations and guiding the outcomes of the cases. Although it has been discretionary in England and Wales for a number of years, it is pretty much universal that all juries will receive written directions, and a change in the criminal procedure rule has, in effect, made that compulsory.

As you said, however, that has been coming in only very recently in Scotland.

Russell Findlay: Yes. Thank you.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. Professor Thomas, your research casts doubt on the existence, or the prevalence, of rape myths. However, your results show that 43 per cent agreed with the statement:

"I would expect anyone that was raped to be very emotional when giving evidence in court".

We heard some very powerful evidence from survivors, one of whom said that she felt that she was penalised because she was not crying; it was not how she was dealing with her trauma on that particular day. She was also told that she could not sit in the public gallery, because it would be a bad look. We have heard a lot of evidence like that.

Another part of your research says that 23 per cent agreed or were not sure that,

"If a woman sends sexually explicit texts or messages to a man she should not accuse him of rape later on".

I find that very concerning. The numbers that I have quoted—43 per cent and 23 per cent—are not small. Do you find that concerning?

Professor Thomas: First, let us be clear about the statistics. You are absolutely right on the figure of 43 per cent—that was raised in the research report. One area where the report notes that jurors could do with additional guidance on the issue was whether the level of emotion in someone who was giving evidence was relevant to whether or not they were telling the truth. That is now part of the judicial directions in England and Wales.

I find it quite interesting that when you read out the other statistic, concerning the 23 per cent, you referred to those who said that they believed that statement or were not sure. The largest proportion of the 23 per cent were unsure; only a very small proportion said that they actually believed that that was the case.

10:15

The point that we were making in the research is that jurors saying that they are unsure is an indication of where they could benefit from additional guidance from the judiciary. However, it is very difficult to see how a judicial direction can be made on the issue that you cite about sending explicit text messages to someone. That is very different from a judicial direction on something that we know to be factually incorrect or correct.

If you look at the research, you will see that we have been very clear about the issues that judges could direct a jury on or jurors could be given additional guidance on, whether that is through training or supplemental written information. It is very difficult to imagine how a judge could give a legal direction on some other issues.

Rona Mackay: Going back to the 43 per cent, do you agree that that is a rape myth? You just said that judges have—

Professor Thomas: I am not sitting here saying that I do not believe that there is no juror who believes a rape myth. I find it quite worrying that, for some reason, my research has to be knocked down in Scotland.

Rona Mackay: It is not a question of knocking it down; I am just questioning you about the 43 per cent. You are saying that action was taken on that, which proves that some rape myths are evidential.

Professor Thomas: Yes—did I ever say that they are not?

Rona Mackay: That is why I am questioning you on it. That is fine—you have answered the point.

Professor Thomas: Can I clarify that point? We made it very clear in the research report that there were two issues on which enough jurors were unsure or incorrect in what they thought that they could do with additional guidance. One issue was whether someone was more likely to be raped by a stranger than by someone who they knew, and there were enough people who were unsure about that. We know that that is factually incorrect; therefore, jurors should have that information.

We know from psychological research and various other aspects about the issue of the level of emotion that is displayed when someone is giving evidence. That is sufficient grounds for a judge to direct a jury on. Other issues may not be sufficient grounds. There may not be universal agreement on whether something is actually true or false.

Rona Mackay: Finally, did your research include taking any evidence from survivors?

Professor Thomas: I was not asked to do that. If you remember, I explained that I was asked to do research by the Government and by the judiciary, with jurors, to understand what the jury conviction rate was in rape cases and whether jurors held rape myths and stereotypes, so that was not part of the brief that I was given.

Some excellent research has been done with witnesses in rape cases, and with those whose cases never got to court, who have described very difficult experiences with the criminal justice system.

The Convener: I ask for fairly succinct questions and answers, as there is a lot of interest and a lot to cover.

Sharon Dowey (South Scotland) (Con): Good morning. My first question is for Professor Thomas. You said in your submission that the reason for juryless rape trials being considered in the bill is because of the low conviction rate in Scotland. Is it acceptable to remove juries for the sole reason of increasing the conviction rate?

Professor Thomas: That is really a question for you, the Scottish Parliament, to answer. What I was trying to say is that it is difficult to identify exactly the reason for the proposal—it appears to be the belief that there is a very low conviction rate in rape cases in Scotland. That may be true, but I am simply making the point that I cannot find comparable evidence in England and Wales as to what exactly is the conviction rate when juries deliberate on a rape charge and bring back a verdict.

Sharon Dowey: My next question is for Professor Munro and Professor Chalmers. The Scottish Solicitors Bar Association has said that

"no amount of judicial training or legal direction can remove unconscious biases."

Is a single judge not also susceptible to the same rape myths and unconscious biases? I ask Professor Munro first.

Professor Munro: That is an excellent question. In our written submission, we have tried to say that a judge-only pilot would not be an unreasonable move for gathering more evidence, and that is akin to what Lady Dorrian said in her testimony to the committee on the importance of developing a stronger evidence base for comparison.

That is not to say, however, that a judge-only trial will necessarily be the solution to some of the issues. To frame the issue purely in terms of conviction rates perhaps misses some of the other aspects of what might be driving a number of the reforms in the bill, and it remains to be seen whether judge-only trials would be a solution for addressing issues around misconception. In conjunction with specialist courts and a more concentrated opportunity to develop sustained culture change and systematic training, one might hope that they might create some shift. Part of the reason for having a pilot would be to learn more about what that alternative would look like and what change it may or may not result in.

Professor Chalmers: I agree with Professor Munro. Judges are not immune from bias. There are some safeguards or benefits to the use of judges, in that judges will produce written judgments, which provides an opportunity for scrutiny. There is also a discipline involved in the process of producing a written judgment that can force the writer to check their own biases and ensure that what they conclude is actually supported by the evidence. There are potentially benefits from the accumulation of experience and training, too.

On the fundamental point underlining the question, which is whether judges are in some way immune from bias, they absolutely are not—I do not think that anyone is.

Sharon Dowey: I have a question on the pilot itself, which I will put first to Professor Chalmers. We have heard from various witnesses that such a pilot would need extensive debate and discussion. Are you at all concerned that the details of the pilot are not included in the bill and will be brought in through secondary legislation? Might that mean that we will not interrogate the proposal as much as we could if it was contained in the bill?

Professor Chalmers: That might be a question for you, as a matter of parliamentary process. I understand that the proposed use of secondary legislation would require further parliamentary debate in this case. The point has rightly been made by Professor Thomas and others that so many changes are being proposed in the bill that it would not be possible to run a pilot immediately. There would be a need to gather baseline data about the operation of the system as reformed by the legislation before any comparisons could be drawn with the pilot.

Therefore, I would have thought that any pilot would have to be some way down the line—it would not be immediate—and that further debate would be required in the Parliament on the terms of the secondary legislation. I would hope that, if the bill is passed, the secondary legislation will be subject to extensive scrutiny, as it certainly ought to be. I suppose that that is in your hands.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning to the witnesses who are online and to you, Professor Thomas. I was going to ask some questions in a very similar area to those asked by Sharon Dowey. With the convener's permission, I will still take the opportunity.

I have what I suppose is a simple question for our online guests on judge-only trials. In your academic opinion, do you think that having a single judge to determine such cases, as opposed to a jury, is better?

Professor Munro: That is a difficult question to answer. Going back to some of the points about transferability from one context to another, we do not really have a super-robust evidence base for evaluating that. I suppose that that is part of the thinking behind the pilot proposals, subject to appropriate scrutiny about what the baselines and points of comparison for "better" might involve.

Some relatively recent work from New Zealand has been looking at judge-only deliberation versus jury deliberation in rape cases. The findings indicate that a switch to a judge-only process is not a magic bullet that will address all the areas of potential concern in relation to sexual offences and the handling of complaints throughout that process.

In the abstract, though, it is quite a difficult question to answer, because we do not currently have enough of an evidence base to be able to say that, in this context, one model is better than another, with "better" being evaluated according to specific measures.

Fulton MacGregor: Following on from what Sharon Dowey said, I have a question for Professor Chalmers. Given your academic expertise, could you tell me how a pilot would look at this issue? How should the pilot be assessed and where should the voices of victims and witnesses be heard in the assessment of the pilot? The reason why I ask is that, when we heard from victims last week, a number of them, quite surprisingly—to me, anyway; I do not know about other committee members—said that they were

not in favour of juryless trials, because they felt that it was better that a larger number of people were making the decision.

Professor Chalmers: A set of potential questions has been produced by a working group associated with the Dorrian review. Those questions do not simply look at outcomes and conviction rates; they ask complainers and survivors about their experience of the process. If the committee requires the reference, I can send it later on. If a pilot were to go ahead, there would have to be a decision about exactly how it was going to be conducted. It would also have to look not simply at outcomes but at the experience of everyone involved in the process.

At the end of that, there is, perhaps, a political decision about which factors matter. In any evaluation, there may be factors that point in different directions: there may be some things that are good about judge-only trials and some things that are bad about them. The decision has to be taken on the balance of that evidence about whether judge-only trials are the appropriate way forward. However, I agree that it would absolutely not be appropriate to go ahead with a pilot programme that was not, as part of the evaluation, looking at the experience of complainers.

Fulton MacGregor: I have a final question for Professor Thomas. First, Professor Thomas, thank you very much for coming up to Scotland, and I am sorry that you feel that your research is coming under so much scrutiny. We are delighted to have you here—the fact that we have invited you indicates that we want to hear more about your research. It is just a sort of scrutiny process, so apologies if it sometimes comes across as a bit harsh. We are making really big decisions here, so we want to hear about your research.

I want to ask you the opposite end of the question that I just asked. I know that your research was in England and Wales. Rather than tell me what the positives would be of having a single judge, can you tell me what you found were the positives, if any, of having a jury make those decisions?

Professor Thomas: It is kind of you to say that. I do not feel that the committee has been attacking my research. I have simply been slightly bemused by the need—not by the committee, but in discussions in Scotland—to place my research somehow in opposition to other research.

We have done quite a lot of research in England and Wales, which I am happy to share with you. There has been other very good long-term research in the United States about the overall impact of jury service on members of the public. That is regardless of whether they are serving on a rape or sexual offences trial or some other type of trial.

10:30

I mentioned earlier that we have done research in which we asked jurors who had returned a verdict and were about to leave court to reflect back on when they had been summoned for jury service and what their views were at the time of being summoned. Eighty-seven per cent said that, if jury service had been voluntary, they would have opted out at that point. So, the overwhelming majority of people who are summoned in England and Wales—I make it clear that the research was conducted in those two countries, and that we do not know what the situation is in Scotland—were not necessarily there voluntarily.

The research revealed that those people were not looking forward to jury service, they wondered whether they could get out of it and so on. However, once people had served on a jury and had at least attempted to return a verdict, the proportion flipped, and 81 per cent said that they would be happy to serve again if they were summoned, and that they found the experience educational, interesting and challenging. I do not think that there is anything necessarily wrong with jury service being challenging—it is challenging from time to time. That indicates that doing jury service has some kind of potentially transformative effect on members of the public.

The American research is extremely interesting. It has followed people over many years who did jury service and looked at their behaviour post-jury service. It found, for instance, a very interesting civic change or democratic change in the behaviour of individuals who do jury service. Those who had not voted before doing jury service were significantly more likely to vote after having done jury service, and it changed the way in which they consumed information about politics through the media. The research also found that substantial proportions of them became more engaged in civic and other democratic activities.

There is something to be said for juries, or perhaps there is reason to pause before doing away with juries, whether in general or in relation to specific offences. I hope that that is helpful and answers your question.

The Convener: We will move on. I will maybe come back to you if we have time, Fulton.

Fulton MacGregor: Okay. Thank you very much.

The Convener: I call Pauline McNeill, to be followed by John Swinney.

Pauline McNeill (Glasgow) (Lab): Good morning, Professor Thomas. My first set of

questions are to you. In your submission—this is on page 9 of committee paper CJ/S6/24/4/1—you talk about why there appear to be substantial differences between England and Wales and Scotland in both jury trial outcomes in rape cases and juror attitudes. You have already explored that with the committee, but I want to focus on how you have qualified that. You say in your submission:

"there is a lack of clarity in Scotland about jury conviction rates."

Am I correct in saying that, because we do not have clarity on the conviction rates, it is very difficult to come to a determination on which of the two factors results in that apparent difference, or are you suggesting that you would not really expect to see substantial differences between the two systems?

Professor Thomas: I do not have an expectation. I think that you need to have the data on which to rely so that you are able to say that you know exactly what the rate is when juries are asked to reach a verdict.

I am not sure of the extent to which that data exists in the court service in Scotland. As such data has existed in England and Wales for a very long time, we are able to do that long-term study of jury conviction rates. My understanding from reading the Scottish criminal statistics is that conviction rates are calculated in Scotland by using the number of individuals who are proceeded against each year in relation to a rape offence and the number of individuals who are convicted of rape. That is done on an individual basis, so it refers to defendants. They will not necessarily be the same individuals, because a prosecution can be brought against someone in one year with, obviously, the outcome coming in another.

Also, just to be clear, juries do not reach overall decisions on a defendant—juries reach decisions on individual charges, and that is what we analyse. Unless the case involves a single charge against a single defendant, juries are having to reach multiple decisions in individual cases. Sometimes they convict on a rape offence; sometimes they might, at the same time, acquit on another rape offence; or there will be other related offences in the same trial.

Pauline McNeill: However, the two issues that you have brought to the committee are the lack of clarity on conviction rates and your concerns about our drawing conclusions without any baseline knowledge of how juries actually work. Would that be fair?

Professor Thomas: I just think that you need to know how your juries work and what the effects are of your very unique system in Scotland, given your jury numbers, the three verdicts and all of that.

Pauline McNeill: I understand that, yes.

Professor Thomas: You do need that information.

Pauline McNeill: I wanted to ask about the jurors that you used in your studies. Had they sat on rape trials, or just trials in general?

Professor Thomas: They had sat on a range of trials. We ensured that there were those that were rape and sexual offences cases—as I have said, an individual case might include multiple different offences—and then there were cases in which there were no sexual offences. We made sure to include jurors from a wide range of cases, and from a wide range of courts around the country.

Pauline McNeill: Thank you.

In your submission, you talk about something that has not been mentioned until now—the use of pre-recorded evidence under section 28 of the Youth Justice and Criminal Evidence Act 1999.

Professor Thomas: Yes.

Pauline McNeill: I think that the suggestion is that that provision is being used more readily in Scotland than it used to be, and it seems to be going well. It gives victims and witnesses the opportunity to give evidence outwith court. Does your evidence suggest that we should look at whether that is impacting on conviction rates? You seem to be saying that, where pre-recorded evidence is used under section 28 of the 1999 act in England and Wales, it has an impact on conviction rates. Is that right?

Professor Thomas: The bill mentions the use of pre-recorded cross-examination. Therefore, I thought that the committee might be interested in the very recent research that we have done. In that, again, we look at actual jury verdicts, considering each offence and whether similar offences had used pre-recorded evidence-in-chief and pre-recorded cross-examination, and comparing such cases with cases where there was no pre-recorded cross-examination.

Pre-recorded cross-examination is part of a very important package of special measures that were introduced in England and Wales more than 24 years ago, I think, to assist individuals in giving evidence who might otherwise find it very difficult to do so. The measures are important, so this is not to say that they should not be used, but there has been a roll-out in England and Wales of the use of pre-recorded cross-examination much more widely.

Concerns had been expressed by both the judiciary and the legal profession about the impact of the main complainant's evidence all being pre-

recorded, and our analysis showed that there are consistently lower jury conviction rates when that happens. I am just sharing that with you, because the use of pre-recorded cross-examination is part of the bill. It might be something that you wish to consider.

Pauline McNeill: That was really helpful.

I want to ask Professor Chalmers and Vanessa Munro about juryless trials and whether you have a view on how the Government can measure their effectiveness. That has given me some cause for concern. Whether you are for or against the idea, how would you ascertain how effective a single judge would be? What are you benchmarking it against, given that there are no other jurisdictions with single judges? Do you think that it is possible to measure that effectiveness, given that the Government has also said that the intention is not to increase or decrease convictions per se, but to give victims a different experience of the court system?

Vanessa Munro, since you are on screen, do you want to answer first?

Professor Munro: It is fair to say that, in discussions on the issue, this has also given us some pause for thought and reflection. There is no doubt that it is a challenging task, and it is compounded by the fact that, as we have already identified, there are a number of contemporaneous reforms and shifts potentially at play, which would make it very difficult to establish baselines for comparing effectiveness.

The reality of any pilot, no matter how carefully it is constructed, is that—as with any piece of evaluation or research—it will have limitations in terms of what it can and cannot tell us. It will be for the people who are reviewing the evidence to assess how robust or otherwise they feel the measures of effectiveness are.

Having said that, it is right that we think about the outcomes somewhat more broadly than simply in terms of convictions. There is evidence that indicates potential for judge-only trials to shift the tone of the adversarial process itself—

Pauline McNeill: I understand that, and it is a very important aspect of the proposal. However, on that point, you seem to be saying that, if we legislate for judge-only trials, it will be difficult to ascertain their effectiveness, because there is a question of what we would benchmark that against. Is that fair?

Professor Thomas: Yes, I think that that is fair. It would be a challenging task, but I suppose the challenge lies in having as much clarity as possible about what effectiveness looks like before commencing the process, and in thinking about what alternative reforms would need to happen to provide baseline evidence for comparison. In this discussion, we have identified that that might include greater clarity around conviction rates, or more information on the jury trial alternative.

Pauline McNeill: Have we lost James Chalmers, or is he still with us?

The Convener: James should still be there. Yes—there he is.

Professor Chalmers: I am still here.

I do not have much to add to what Professor Munro has said, other than to emphasise that there will be no single measure of effectiveness. Any evaluation will produce data about outcomes and the speed and conduct of the trial process, and that data will be pulled in different directions in relation to how the Parliament and Government want to go forward with the system.

I do not think that measuring is difficult in principle, although a complex and extensive programme of research is required to evaluate any such pilot. However, I caution against the idea that there might be a single green or red light at the end of the evaluation process, as I suspect that it will be much more complex than that.

Pauline McNeill: I understand that, but as one of the parameters is to ascertain the effectiveness of the change, there must be one or two benchmark measures. I am struggling to see what they would be.

Professor Chalmers: Fundamentally, one of the benchmarks would—despite some rhetoric—be the conviction rate and whether the outcomes of the new process differed in that regard. Another would be the experience of the process for complainers—

Pauline McNeill: It is interesting that your first answer was that it would be the conviction rate. The Government has made it explicit that it is not going to look at the pilot in terms of whether it is more effective, because it says that that is not what it is designed to do, so that would not be a benchmark.

Is it fair to say that it is going to be difficult to benchmark effectiveness?

Professor Chalmers: The committee also heard evidence from the Lord Advocate, who cited the very low conviction rate for “acquaintance-type” cases—as she put it—as a reason for the reform. For all that might be said in principle, it would be surprising if conviction rates did not factor in the decision whether to go forward with the reform.

Underlying that, there is a concern not about conviction rates per se, but about the nature of the process and reliance on rape myths. There is no way in which a correct conviction rate can be

identified, and in any event, the rate would be affected enormously by the cases that the prosecutor chose to bring into the system in the first place. There is no natural—

Pauline McNeill: Can I stop you there? I am trying to get this straight in my head. That is a different question. How juries are directed or trained is an entirely different measure as to the outcome. A single-judge pilot is quite a different measure. Is that right?

Professor Chalmers: Yes.

10:45

Pauline McNeill: Then there are two distinct measures here. One is about what we do with juries with regard to trauma-informed practice, but there is also a distinct proposal for a single judge to sit. That is what my question is about. I am struggling to see how you could judge the effectiveness of that measure.

Professor Chalmers: Going back to a point I made earlier, that is why I do not think that you could have any pilot for some years. You would have to implement the other changes in the bill first; you would then have to measure how the system operates with those changes in place, and at that point you might conclude that everything is working well and that you do not need to go ahead with the pilot. I think that that is unlikely, if there is a desire to have the pilot in the first place. However, it would be only after those changes had been made that you could have a pilot that would enable you to draw meaningful comparisons between the two types of system.

Pauline McNeill: That was very helpful.

John Swinney (Perthshire North) (SNP): I want to pursue a point that Professor Chalmers made—although it relates to the contributions of all our witnesses—about the adequacy of the research base.

If I have heard it once in my time that we do not have enough research on a subject, I have heard it a million times. The airing of the research this morning has been enormously helpful in informing the committee's proceedings, and my conclusion is that we should look at all the research in the round and make our judgments out of it. Would it be fair to say that the gold standard of research that we require here is to understand better the deliberative process of individual and collective jurors, and that we will never be able to fully get a hold of that?

Professor Chalmers: I think that that would be fair. Obviously there is a danger in making changes without adequate research, but there is also a danger in believing that an ideal, perfect body of knowledge can be attained. There will always be a limit to what realistically can be known.

As you have said, the deliberative process is difficult to get at. One advantage of the mock jury method is that we can change certain parts of the stimulus that is given to mock jurors and hold everything else constant. For example, although it is not relevant to this part of the bill, we were able in the Scottish jury research to give one set of juries the option of using not proven and another set of juries only the options of using not guilty and guilty, and to see the differences in outcome.

However, an understanding of what individual jurors were relying on in their heads, the extent to which an individual juror's expressions of views, such as those indicating belief in rape myths, influenced other jurors in their deliberations or the extent to which holding that belief made a difference to that juror's own view on what the outcome should be would be very difficult—and in practice perhaps not even possible—to get at. There will be a limit to the evidence base that the Parliament can draw on, no matter what is done, unfortunately.

John Swinney: Thank you. Professor Thomas, would you like to reflect on that?

Professor Thomas: Yes. I would simply say that jurors are judges—they are simply lay judges. Moving to juryless trials is putting the deliberative process and the decision making into the hands of a professional judge.

The same issues arise when it comes to understanding the decision-making process of professional judges. There has been more than half a century of research on trying to understand what factors influence professional judges' decision making, so I do not think that it is simply an either/or matter. We will have similar difficulties with judges as well.

John Swinney: In that circumstance, though, we would have a written judgment that we could all pore over.

Professor Thomas: Yes, but part of the research into judicial decision making is assessing the extent to which a judge's written judgment is actually a revelation of their decision-making process. Those of us who do empirical research on judicial decision making do not assume that what is in a written judgment reveals everything that went into a judge's decision-making process.

There are reasons why judges have to provide written reasons for their decisions, and it will be helpful, I am sure, to see the extent to which that happens, but I think we all know that judgments can often become very pro forma—that is, judges set out their decisions in written judgments in standard ways. As an alternative, we could talk

about juries providing reasons for their decisions. Juries now have written directions, which, in England and Wales, usually include a route to verdict, requiring the jury to make an assessment of the evidence. One option is to require your juries to have routes to verdict and to provide answers at each stage of the judgment. There are alternatives.

John Swinney: Thank you.

I was interested in Professor Munro's comment a moment ago that having juryless trials can affect the tone of a case. I am particularly interested in that point. Could you perhaps elaborate on that, Professor Munro? What particular elements of a judge-only trial could be enhanced or developed to enable proper and fair justice for all parties to be better assured than it is under our current arrangements?

Professor Munro: There are two elements to what I was alluding to there. The first concerns the narratives given by complainers that they often find having the jury present in their line of vision—that group of strangers to whom they have to narrate their account, and whom they might not wish to be present in the courtroom—particularly challenging in itself.

More significant, mention is made in the literature of the theatrical components of the adversarial courtroom and how counsel, potentially on both sides, are apt to take into account the presence of the jury and the persuasive tactics that might or might not work with the jury as the target. It would require significantly more evaluation and research to ascertain the extent to which this is borne out, but there is a suggestion that, were the jury not the target decision makers for some of the factual matters in a case, that would impact on how counsel perform in the courtroom, and that that, in turn, might shift some of the tone and dynamics of the trial process.

John Swinney: Thank you for that. That answer gets into some of the territory that links with other parts of the bill with regard to trauma-informed practice. One of the themes of the bill that I have been interested in is that, if that principle is to be faithfully applied in all situations, the courtroom dynamics have to change dramatically as a consequence. Would you agree with that conclusion?

Professor Munro: As I think has come up in previous evidence sessions, I am on record as saying that the adversarial courtroom is not a space that was designed for dealing with sexual offence complaints or complainers. We have made a number of inroads into ameliorating some of the excesses of that and reducing retraumatisation—special measures and rape shield protections being the most obvious examples. However, such measures often sit on the periphery of an adversarial process, as exceptions to the norm. In my personal opinion, that diminishes the potential for establishing really different treatment of such cases.

Having a specialist court, which is, of course, part of the bill, might be one way of assisting the development of some of that culture shift, but certain aspects of the adversarial trial process itself will continue to make that difficult, in my opinion.

John Swinney: Thank you. That was very helpful.

The Convener: We have spoken in great detail today about the jury research and the proposal to pilot juryless trials. I will move on to the proposal to create a sexual offences court. The evidence that we have heard, and the written submissions that we have received, have reflected a range of views about that particular provision.

I am interested in hearing the academic perspective and to know whether Professor Chalmers and Professor Munro support that particular proposal. The committee is trying to visualise what an effective and successful sexual offences court would look like. In your view, what key elements must exist to make that model work effectively and to improve victims' experiences?

I put that question to Professor Chalmers first.

Professor Chalmers: I am not sure that I can say much in response. Any success is largely a question of the training that is offered to the participants in that court, whether they are judges or lawyers, and of the support offered to complainers.

I know from reading the *Official Reports* of previous meetings that there might be a perception that the court would be in a different building or facility, although what is clearly envisaged is that the court would sit within existing court buildings and would not look terribly different to the current High Court or sheriff court. However, the judicial and court personnel and lawyers would have the necessary training and experience to deal with those cases.

In that sense, the shift is not terribly radical, but there is more of a shift in the jurisdictional rules that will be required. Who will sit as a judge in that court? What sentencing powers will they have?

The shift might look more radical in the bill than it will in practice. It is a welcome development, but the changes might not be as substantial as they at first appear.

Professor Munro: Although the mindset is not necessarily to create a radically new court, it is still

important to underline the point that the vision is not only about moving business to a distinct building. One of the significant benefits of a specialist court would be a consistent approach to embedding training, and the culture shift that that can create. Cultural change is difficult. There should be trauma-informed training for every person with whom parties might interact, including court clerks and ushers. We need a holistic trauma-informed approach to dealing with trial parties.

The technology should also be appropriate and effective. One of the things that sits in tandem with the specialist court is a possible increase in the use of pre-recorded evidence. Professor Thomas has already discussed her findings on section 28 of the Youth Justice and Criminal Evidence Act 1999. There appears to be a connection between conviction rates and the use of section 28 pre-recorded evidence in England and Wales. The format for that pre-recorded evidence is quite different from the one that we might use in Scotland, particularly under a commissioned process. It is also clear that there have been substantial problems with the technology, in playing videos and in the quality of the audiovisual recordings, which makes it quite difficult to disentangle how much of an impact those factors are having on the reception of that pre-recorded evidence and on the outcomes of trials. To reduce any negative impacts that are associated with bad tech, a specialist court requires resourcing to have high-quality appropriate technology for such measures.

11:00

The Convener: Thank you for your interesting commentary on how essential good technology is. Before I bring in Katy Clark for a final question, does Professor Thomas want to add anything?

Professor Thomas: It is difficult to imagine that the use of specialist sexual offences courts will be widespread if the technology is not there to support it. One of the major challenges will be ensuring that any special measures that are brought in have the highest-quality technology. That is based on research, which will continue, about how technology impacts on decision making.

The Convener: Thank you—that is helpful. Katy Clark has a question about independent legal representation.

Katy Clark: Professor Chalmers kindly attended an event that I held in the Parliament last year on independent legal representation. The witnesses will be aware that a number of other jurisdictions have far more extensive independent legal representation for rape victims or complainers through the trial process and outside the courtroom. That happens in systems that are in many ways similar to the Scottish system. Have the academics looked at that? Do they have views on it?

On independent legal representation, is there scope to look beyond what is proposed in the bill that we are scrutinising? The committee is extremely concerned—it is fair to say that the concern is cross-party—about low conviction rates and, just as importantly, about the experience of rape complainers who have given evidence repeatedly over many years about the retraumatising effect of the criminal justice system and how that system lets them down.

It is often said that the role of the criminal justice system is not to deliver for the complainer—it is a process by the state. We are keen to explore how we improve the experience for complainers. Would independent legal representation and advice provide one way to empower complainers through the process and improve their experience? As Professor Chalmers has looked at the issue previously, I will bring him in first.

Professor Chalmers: I am not sure that I have much to say other than that I support the bill's provisions on independent legal representation. I suspect that there will be challenges with resourcing that, because it is not an existing stream of work—it is new work—and the legal aid sector is under considerable pressure.

Views differ about the appropriateness of having a wider right of representation. That would be best looked at with the benefit of the experience of the initial step. It is a future question, rather than one for the bill.

More can certainly be done on access to legal assistance and advice at other stages, even if it does not involve formal courtroom representation. As the committee is aware, my colleagues at the University of Glasgow are involved in work to establish a clinic to provide legal assistance and support to survivors.

Things are moving in the right direction and, some years down the line, they might well prompt consideration of the more extensive rights of representation that some other countries have, as you said. I cannot say anything more specific at this stage.

The Convener: Would Katy Clark like to come back in?

Katy Clark: Yes. I am sorry—I could not unmute myself to come in.

Can I bring in Cheryl Thomas on that issue? Parliament is being asked to make some substantial changes to the court processes for rape cases, but some of us genuinely believe that

a better approach might be to look at the independent legal representation issue. Can Professor Thomas can give any information on that from her experience? Is that something that she has any knowledge about?

Professor Thomas: I have not conducted any research on that issue, but it is also being examined in England and Wales, where it has a great probability of coming into being. One relevant aspect is whether the provision of legal advice for complainants will lead to more of them staying within the system and getting their case to trial. That is where the real challenge has been in England and Wales. The overwhelming proportion of complaints fall out of the system before they get to a jury trial. If the provision of legal advice is shown to have that effect, that will help with understanding of the measures that you are proposing to make available to complainants so that they can make an informed choice and feel that they can stick with the process and bring a case to trial.

Katy Clark: It would be fair to ask Professor Munro if she has anything to add to that.

Professor Munro: Thank you. I will keep it super brief. Mostly, I would echo what has already been said. It is perhaps worth underscoring that we certainly have a substantial evidence base from survivors who lament the fact that, as things stand, they experience the process as one in which they feel that they become a piece of evidence rather than a party to proceedings. That certainly needs to be addressed, whether through ILR or otherwise.

One of the ways in which we can do that outside of an ILR process—I think that you have already heard this from survivors—is by addressing the profound lack of consistency and communication experienced by many in their justice journeys with police and the Crown, in particular. There is often an issue of resourcing and capacity at its core. Mechanisms that take seriously the need to improve those processes could make a significant contribution to redressing some of the issues, outside of any sort of more radical independent legal representation, which may or may not prove to be appropriate.

Katy Clark: Thank you.

The Convener: Okay, thank you. That concludes our first panel this morning. I thank our witnesses for attending the meeting. It has been hugely valuable, so thank you very much indeed. We will now have a short suspension to allow for a wee comfort break and a changeover of witnesses.

11:07

Meeting suspended.

11:15

On resuming—

The Convener: I welcome our second panel of witnesses: Tony Lenehan KC, president of the Faculty of Advocates criminal bar association; Sheila Webster, president of the Law Society of Scotland; Alan McCreadie, solicitor and head of research and secretary to the Law Society of Scotland's criminal law committee; and Simon Di Rollo KC. Welcome to you all. We are very grateful to you for joining the meeting.

I intend to allow around 90 minutes for this panel. I propose that we initially focus our questions on the proposal for a new sexual offences court before moving on to the proposal for a pilot for judge-led trials in certain rape cases. Finally, we can discuss the proposals for independent legal representation for complainers and anonymity for victims of sex offences.

As usual, I will open with my general question for the panel. Recently, in her evidence to the committee, Lady Dorrian argued that a specialist sexual offences court, among other measures, is required if we are to achieve the kind of changes that we need. She warned that piecemeal reforms would not bring about the necessary shift in culture. I will start by asking Tony Lenehan to respond to that.

Tony Lenehan KC (Faculty of Advocates): So that I understand the question, is it asking for that to be considered in the breadth of all the proposals in the bill, or just what I think about the specialist sexual offences court?

The Convener: I am just interested in your view on Lady Dorrian's comments, particularly on the proposal in relation to the specialist sexual offences court. However, if you feel more comfortable responding in the context of the other provisions, that is absolutely fine.

Tony Lenehan: I have concerns about the exact specialist court that seems to be on offer through the bill. I do not have concerns about moving towards greater specialism—I see advantages in that—but I have other concerns, which I have shared in both my original document and the more recent further submission.

The committee will know that rape has been in the High Court for generations—it might have been for centuries—and it can only be in the High Court. Particularly in the modern world, as we have improved our understanding of the devastating impact of rape as a crime, I think that it sits squarely in the High Court's territory. My worry is that, albeit that we are moving towards

some signs of specialism, the practical reality of what you are being asked to deliver in the bill is a downgrading of rape towards the sheriff court.

I will tell you why I say that. You need to look at specific sections of the bill and, first, at the personnel involved. At the moment, because a rape trial will be in the High Court it will be either a solicitor advocate or an advocate who prosecutes the case, so it will be an advocate depute who is from the elite corps of prosecutors. The bill will allow that to change, so that a procurator fiscal depute can prosecute. You will see from section 47(6) that the requirements for the additional training and experience that currently exist will not apply to prosecutors, who will simply need a certificate from the Lord Advocate. That worries me.

I should say that I am naive when it comes to the workings of the Scottish Parliament—I have never particularly involved myself in politics in any way—but my strong suspicion is that every word in that bill has been carefully chosen by somebody. I do not know who does that upstream. Section 47(6) is there for a reason—which is, I think, to allow procurator fiscal deputes to start prosecuting everything in the specialist court. I worry about that. There is a reason why further training and experience are necessary before someone is allowed to appear and have rights of audience in the High Court.

I also worry about the level of the judges. Section 41(4) deals with the population of the bench of the specialist court. The bill reads as if it is presumed that the president of the court will be the Lord President. I understand that. However, section 41(4) says that, if the president of the court is not the Lord President or the Lord Justice Clerk, it cannot be any of the judges of that court—it has to be a senator of the High Court. That says to me that the bill is designed so that judges in the specialist court are to be subordinate to High Court judges.

Looking at it in the round, my fear is that the prosecutors will be sheriff court prosecutors—I mean no offence by that, but they will not be advocate deputes, who are an elite cadre of High Court prosecutors—and that the judges will be of a rank below High Court judge, otherwise the bill would not have section 41(4).

I hope that I am not being excessively cynical, but my worry is that, for some, the specialist court is a flag of convenience under which they sail towards cheaper rape convictions. That very poorly serves the public and, in particular—to deal with the reality of the greatest number of people who will come before that court—the victims and survivors. In court, I know them as complainers, but they are victims and survivors. The issue worries me.

The Convener: Thank you. I move on to Sheila Webster and Alan McCreadie. You do not both have to come in; I leave it up to you.

Alan McCreadie (Law Society of Scotland): I am happy to take that question. Thank you for the opportunity that you have provided to the Law Society of appearing before the Criminal Justice Committee this morning.

We agree with the faculty that there is no need for a sexual offences court. There may, however, be a need—there is always a need—for greater specialisation in the existing court structure of the High Court and the sheriff solemn court.

As is reflected in our written submission, we have made the same point as the faculty about the appointment of judges to the sexual offences court, on the basis that there must be trauma-informed training for all of them, as for everybody who appears before that court, including, certainly, those on the defence bar.

I will reiterate another point that we have made. There is an issue about the independence of a judge of the sexual offences court, by virtue of the fact that he or she will be appointed by the Lord President. There is nothing in the bill about the length of the period for which that person will be appointed. The question is about removal. Through section 40(7) of the bill, the judge of the sexual offences court can be removed by the Lord President without reason. The society's respectful position is that, if the kick-off point is article 6 of the European convention on human rights—that a fair trial must be afforded to the accused—a challenge may be brought over questions about the tenure of the judge.

The Convener: Thank you very much. I bring in Simon Di Rollo.

Simon Di Rollo KC: I do not wish to add anything to what has been said about the specialist court. Specialism and high calibre are required. Those two things are necessary. How you get there is another matter, but that is what is needed.

The Convener: It is safe to say that, as a result of the written submissions and the evidence that we have heard in committee, we are acutely aware of the breadth of views that exist. As you will know, there are some very supportive views, not least of which are those of the Lord Advocate and Lady Dorrian. We have the lovely job of trying to pull all of that together and do the best job that we can to respond and to populate our report.

My question bears in mind that broad range of views. There have been some helpful suggestions—particularly, as we have heard, in your profession—about what a specialist approach in Scotland to sexual offence cases would look

like. I will bring in Sheila Webster on this. I am interested in teasing out a bit more about the key elements in a specialist approach to dealing with sexual offences and rape cases.

Sheila Webster (Law Society of Scotland): It is very difficult to design something that will be perfect for all. Our system is underlaid by the presumption of innocence. The system should naturally be focused on convicting the guilty but acquitting the innocent. Trying to achieve all of that is a difficult balance. I do not envy you your job—it is a difficult one.

I am conscious that the starting point of a lot of the proposals is the experience of complainers, as we call them in legal terms, or victims and survivors in the language that the bill uses. You will find that most lawyers will generally say that specialisation is not necessarily a bad thing. We have heard from Mr Di Rollo and Mr Lenehan that there is a general agreement that specialisation is a good thing.

Part of what we are aiming to do is to improve the experience. I have questions around that. It is probably acknowledged by most that being involved in a prosecution in a serious sexual offence case is not a great experience. It is a difficult thing for anyone to go through. How do we make it better? Would the creation of a sexual offences court alone do that? Being realistic about it, I do not expect that we are about to build a number of new centres that would look more modern in style and that might look at some wider issues.

It is interesting that you touched on Lady Dorrian's comments in her evidence, about tinkering with small bits. The difficulty is that we have an old-fashioned court estate. I am not sure how many of you have had experience in the courts. I have been in quite a few across Scotland over the years, and it is fair to say that they are not modern. They do not look like this building. I suspect that that in itself is intimidating. The legal language that we use has been part of our system for hundreds of years. I suspect that all of those things—and the wigs and gowns and so on—contribute. There are all sorts of debates around those things.

Specialisation, in and of itself, may not assist in the task that I think we hope to achieve, which is to improve the experience for victims and survivors.

The Convener: There is lots of interest in this, so I will open it up to questions from members.

Katy Clark: I thank the witnesses for the clarity in their responses so far, which have made clear that their concerns are not about specialisation or the concept of a specialist court but about the specific proposals in the bill.

One issue that the committee has to consider is whether the bill is acceptable as it stands or whether it is amendable. Sheila Webster has spoken about the experiences of witnesses.

Do the panel members have a view on whether amendments could be made that could address some of the genuine concerns about the experiences of trial witnesses? We are getting evidence that, even with some of the new practices that have already been brought in, such as taking evidence on commission, the experience of complainers is simply not acceptable throughout the process of the criminal justice system and not just in court.

I invite Tony Lenehan to come in on that, although the convener could perhaps bring in others who wish to respond. I am not in the committee room, so it is difficult to catch people's eye to see if they wish to contribute.

11:30

Tony Lenehan: I respectfully suggest that you think about ensuring that, whatever the specialist court looks like and wherever it sits, cases that were in the High Court continue to be prosecuted by people of a High Court standard. That would involve looking at the relevant subsection—I forget which particular one it is, but it is perhaps subsection (2) of section 47. You could vary the comments about solicitor advocates and advocates having the right to appear in what would previously have been High Court cases and ensure that that provision exists for prosecutors, too.

I also suggest that you incorporate an amendment whereby cases that would have been in the High Court continue to be tried by people who are worthy of sitting in the High Court. If you do that, you have not moved the rape trial out of the High Court, from my perspective; you have simply moved it sideways into a specialist court, according it the same respect as you did for the past 100 years.

The Convener: We seem to have lost Katy Clark momentarily. Would Simon Di Rollo like to come in on this point?

Simon Di Rollo: It is absolutely clear to me that rape should be prosecuted by an advocate depute who is properly qualified, experienced and trained, and not by somebody who has been selected because they happen to be available in a fiscal's office somewhere. Mr Lenehan is on the right track in that respect.

The Convener: We will patiently wait and see whether we can get Katy back; I imagine that she will have some follow-up questions.

Would you like to come in, Mr McCreadie?

Alan McCreadie: Sure. On the point about Lady Dorrian's report, there was a departure, in that she did not want murder to be prosecuted in the specialist sexual offences court. I think that her recommendation was for a sexual offence to be the principal charge. How much of a sexual offences court will it actually be? Clearly, there must be a sexual offence charge on the indictment but, if that is dropped, the court can proceed with the other non-sexual offence charges that remain on the indictment. Those can be the most serious of charges, such as murder, which are traditionally prosecuted in the High Court—and they have to be, as they are a plea of the Crown. Other witnesses have referred to the potential downgrading of the most serious charges and crimes in Scotland, rape and murder, if those cases are to be heard or adjudicated upon in the new court.

The new court seems to be something of a hybrid. It seems to sit between sheriff solemn and the High Court. I have made a point about the judges, who will be appointed by the Lord President. The only other thing that I could usefully add is that there seems to be no locus at all for the Judicial Appointments Board for Scotland in either the appointment of judges to the court or their removal from it.

Tony Lenehan picked up on the matter of rights of audience. Normally, the right of audience is associated with the court itself. A solicitor would have rights of audience in the sheriff court, but not in the High Court, unless the solicitor is a solicitor advocate; an advocate or solicitor advocate would have rights of audience in the High Court. The sexual offences court takes a slightly different approach, in that it is not the court itself but the offence that is the determining factor. If the offence is other than rape and murder, the solicitor has a right of audience, subject to trauma-informed practice training. If the offence is one of rape and murder, the solicitor does not have the right of audience, which is enjoyed only by the solicitor advocate or advocate.

The Convener: Thank you—that is helpful. We are still working on getting the connection with Katy Clark back, so we will move straight on.

John Swinney: Good morning. I do not know whether all the witnesses were here for the previous evidence session with the legal academics, but I want to highlight one of the points that I explored with Professor Munro. She made a remark about how judge-only trials could affect the tone of a case. I am particularly interested in that point. Does the panel believe that there is a problem with the tone of sexual crime cases in Scotland today? Maybe Mr Lenehan could start on that.

Tony Lenehan: There is always a risk with the extreme or eye-catching cases and what is presented in the press. Such cases tend to represent the extremity of what happens in court, but it is easy to perceive that as being the norm.

All I do is criminal work, and that is all that I have done for the past 20-something years. I think that there have been improvements year on year, with a particular acceleration recently, in moving away from the approach of the past when I, with my finery in court, was entitled to be regarded as some sort of elevated being, such that I could speak to witnesses as I liked and expect the jury to weigh my every word as gold as I addressed it. I think that that has moved a great deal. I do not know whether that is just my perception, but I do not think so; I think that the reality is that we have moved away from that.

Every year in which I have spoken to juries, I have upgraded my appreciation of their cumulative intelligence. I think that this applies to my fellows and colleagues—otherwise, I would not have been put in the position that I am in. Nowadays, people are abandoning the theatre and pomp that were previously there, and they are being very direct with the juries and the judges. That has allowed for a growing appreciation.

I am very positive about commissions, for example. That is a different point that we will come on to, and we can speak about that. Witnesses are always treated with civility and respect. I think that the theatre that went along with powerful sarcasm or whatever as a tool of the trade should not be tolerated, and it currently is not.

I am taking too long to say this. To go back to the question of tone, judges are much better now than they ever were in setting the tone and saying, "We need to back off a bit," "Don't use that tone of language," "Don't shout," "Don't raise your voice," or whatever. We hardly hear that nowadays. Enormous progress has been made.

John Swinney: The problem that I have with that is that, last week, we had six witnesses in front of us who had all been involved in sexual offences cases, and they would not say that that was their experience.

Let me place a quote from Lady Dorrian on the record. I thought that it was an incredibly powerful quote from her appearance before the committee on 10 January. She said:

"We have, of course, managed to bring in the changes in the way in which juries are directed and so on, but even if they were brought in rapidly, they are still being done in a piecemeal way. They are not being done in a principled way, with the underpinning of a whole court that is dedicated to trauma-informed practices.

One of the things that we said in the report was that, if we do not seize the opportunity to create the culture

change from the ground up that Mr Swinney spoke about, there is every risk that, in 40 years, my successor and your successors will be in this room having the same conversation."—[*Official Report*, *Criminal Justice Committee*, 10 January 2024; c 22-23.]

I found that to be a powerful comment because it addressed directly the argument about piecemeal change that we are wrestling with—that is what I have heard—versus a substantial departure from some of the traditional norms that Sheila Webster talked about, which can be very off-putting to individuals involved in the judicial system.

I am keen to understand the reluctance to fully absorb and incorporate the ground-up culture change that Lady Dorrian talked about. I worry that Parliament might legislate in one part of the bill for trauma-informed practice, but not see it happen in courts throughout the country.

Simon Di Rollo: Your original question was about what the academics said this morning and the difficulty in the contrast between a single-judge process and a jury-type process. There is no doubt in my mind that, for lawyers presenting the cases, the skill sets and approaches to those scenarios are different. Lawyers approach a jury case in a way that is different from the way in which they would approach a case with a single judge. It is, if you like, the contrast between an impressionistic approach taken with a jury—that is, they try to create an impression—and the more analytical approach that is taken with a judge. There is a difference in that.

You went on to talk about a culture change.

John Swinney: Can you pause there, Mr Di Rollo? The contrast that you have just drawn for the committee—that the difference in tone and approach is in being impressionistic versus analytical—is fundamental to our consideration of what the arguments are for a single-judge trial.

Simon Di Rollo: That is a different issue from the culture issue that we are also talking about. You quoted Lady Dorrian, who spoke about a ground-up change in culture. There has been a shift over the years—Mr Lenehan has talked about that. I do not think that we have quite got to where we need to get to, but there has been an enormous change during my career in the way in which cases involving sexual matters have been dealt with. However, there is still significant room for improvement in the way in which things are dealt with.

Will a specialist court improve that? It might do, but there is a danger that creating a specialist court would be just a bit of window dressing and that it would not get to the nitty-gritty of what you are trying to achieve. A culture change in the way in which lawyers approach things is necessary, and we should recognise that. Complainers' experiences bear that out.

Tony Lenehan: On the question of tone specifically, I agree with half of what Simon Di Rollo has said, in that the way in which I would address the fact finder would inevitably change. The time that I spend now speaking to a jury includes time bringing it up to speed on concepts that a judge knows. I do not think that how I approach cross-examining witnesses would change at all. My beloved laptop has charts on how I will go about that for each witness. I think about it in advance, and I have a basis for it. There is no theatre attached to it. There are no illicit tactics. It is based on the statements that I have, the statements of other witnesses, and things that seem to me to need help from the witness. I do not think that I would change any of that.

I do not think that the essential question of a change in tone would apply to witnesses, and I think that that is what you care about. My tone to the judge is almost neither here nor there, because the judge will be the same whether I speak more quickly or whether I focus on what I am going to say. Your targeted improvement is about what happens to the complainer in court, and I do not think that how I approach them would change.

I do not say that I am—

John Swinney: Do you not think that the difference between there being a jury and there not being a jury, given the very helpful distinction that Mr Di Rollo put on the record between impressionistic, performative issues for the jury and analytical presentation to a judge, would fundamentally affect the experience of a complainer? I cannot for a moment imagine that your line of questioning to a witness would be the same in those two different contexts.

11:45

Tony Lenehan: It honestly will be exactly the same. My questioning to a witness is planned in advance, and it is purely either to focus on facts that seem to me to be important or to draw attention to other things that seem to conflict with what the person is saying. That is not going to change—it will not change.

John Swinney: I will take that example. That strikes me as highly analytical. I understand that point. Mr Di Rollo has just said that, although the culture has changed a lot, it has not changed enough. It still strikes me, as a member of Parliament who is scrutinising a bill on victims, witnesses and justice reform, that there is a risk that victims—complainers—might well be subjected to conduct that, if we do not pass the bill, might not be addressed by the reforms that we

might leave for the legal profession to make in a piecemeal fashion.

Tony Lenehan: The changes that Mr Di Rollo recognises as having already happened continue and the improvements continue. There is much more marked intervention from the bench and the senior judiciary from the appeal court saying, "This, this and this. Don't do that. If you do that, we'll be speaking to you about it." I am conscious of releases on that to the profession because there are still people who approach things in a way that is different from my way. I am not here to say that I have the best way; I do not know whether I have the best way. I do my best—that is all that I can tell you. There are people who do it differently, but they are not the majority.

I described the analytical approach that I take, and I think that my approach is the majority approach. However, there are still examples of a different approach. We would not have the focus and the need that drives this sort of change unless there were things that still needed to be improved on.

John Swinney: That is really interesting. You have made the point, points were made to us by Lady Dorrian, and the point was made very powerfully to us by the citing of a case by the Lord Advocate in the same evidence session on 10 January. In that case, the Court of Appeal laid down a very hard judgment about the conduct of a case in 2020, which is not terribly long ago. I have read the judgment of the Court of Appeal, which makes grim reading in 21st century Scotland. When I read that as a member of Parliament, I think to myself that we had better legislate for that because, even with the direction that I recognise that there has been from the Lord President and the Lord Justice Clerk throughout their tenure in order to improve those issues, there is still a way to go. Mr Di Rollo said that there is still a way to go.

Tony Lenehan: I said that, too. I agree with—

John Swinney: When reading the submissions, all that I am seeing are all the reasons for not doing something. The committee must address the reforms, which, by necessity, are significant. If we take a piecemeal approach, which, if I may say so, is what the submissions seem to me to be suggesting should happen, we will be back having this conversation in 10, 20 or 30 years' time. Do you see my dilemma?

Tony Lenehan: I do.

John Swinney: The necessity of the reform provides the impetus for the action to be undertaken.

Tony Lenehan: From my perspective, and in my role, I have no difficulty in saying that the sort of questioning that you are speaking about needs to be outlawed. Personally, I do not even think that it is effective, so I do not know what the justification is for the belittling of someone or whatever. I have never understood the point of that. I suspect that my doing so would turn decision makers against me because they would just think, "Why's he being so horrid?"

If there is a way to outlaw that approach, I will be at your shoulder to help you to outlaw it. I have no problem with that at all. I do not see a place or a justification for it. However, I also do not see it as being the majority who use that line of questioning; rather, I see it as a decreasing minority—for what that is worth. I accept that, from your point of view, tolerating having such a decreasing minority stretching off into the distance is not an attractive prospect.

John Swinney: Correct.

Tony Lenehan: I understand that. If I can be of help in that process, from the professional side, you can trust that I will be, because my approach—which is shared by my members, or I would not have been sent here to speak with you—is that there is no room for anything other than civility and respect.

However, there is a practical difference. I worry a little about the trauma-informed aspect, which I know we will come on to. My experience—this experience has been shared with me by people who are going through the same journey that the people who have spoken to you have gone through—is that, upstream of me, no one has said to them, "We need to look at that in the context of what other people are saying. We need to look at that because there's a problem with that from my point of view." That is part of the problem and that feeds into the changes about independent legal representation, for example, and it feeds into the changes about the advantages of commission and pre-recording.

Complainers—victim survivors—are owed the respect of having someone say to them, in advance of my standing up and lumbering round to the lectern in court, that they need to have a look at the closed-circuit television or whatever. I think that they have been ill served, although with good intentions, up to that point. I think that the police are now very reluctant to sit down and say that there is a problem with something because of whatever reason. They are just using their usual investigatory minds.

I have had people telling me that the first time that they realised that there was an evidential issue that needed to be ironed out in front of the jury was when I stood up. That is far too late, because they have not been given the opportunity to think. I often ask a complainer a question to

which I suspect I know the answer, if I am allowed to do that. However, they are hearing that question for the first time in a forum in which people are wearing wigs and gowns and there is 25 stone of me at the lectern, which is not the best place for them to say, "There is an answer to that. I know it looks counterintuitive, but this is the position."

There are some great benefits to commissions. I do not know whether you have been to see any of the commission suites. They are less intimidating than this room—I am not saying that this room is intimidating, but there is a much more organic feel to the commission suites.

There is a process by which defence counsel should sit down beforehand with the witness and introduce themselves in advance of the commission. My practical difficulty is that I look like a big cartoon pirate, so if I am dealing with a 13-year-old or a 15-year-old, it is important that I sit down with them in advance, and not to talk about their evidence. It is important that I am allowed to say to them beforehand that the trial can be conducted as slowly as they need it to be, that they can think about the questions and, if they do not understand the questions, that they can tell me that. We can build that into the process so that, when they come into the court, they know me a bit. When they are in the commission room, they see that I am interested in what they can tell me. I am absolutely not there to be horrid to them or to do any of the things that you have identified and that must be stopped as soon as possible, if not instantly. I do not think that such behaviour is the broad reality. However, things are not perfect. I agree that we have not reached the stage of perfection.

John Swinney: Do any of the other witnesses want to reflect on my points?

Sheila Webster: I am happy to do so. It is important to recognise that the system is wholly different to what it was when I started in the profession 25 or 30 years ago. We must acknowledge that we are not there yet, but we have made substantial progress, some of which, including the rape shield legislation, is quite recent. The convener alluded to the fact that there is evidence that some of those changes are bedding in, which is true.

It is also important to recognise that we have an adversarial system. However, adversarial does not mean hostile. We have made changes to the system for dealing with vulnerable witnesses in all cases. We must be considered and respectful. The system does not have to be aggressive and hostile.

Mr Lenehan spoke about pre-trial experience. The charges that we are discussing in this committee and that relate to the subject of the bill, are serious ones. The evidence will be tested, but that can be done in a considered and respectful way.

Lady Dorrian acknowledged the issue in her evidence, and she mentioned the steps that she had taken to encourage the drawing to her attention of those rare but egregious cases. That is an excellent step. Judges across the justice system have become far more interventionist. They will—and do—intervene. There will be exceptions, undoubtedly, as in the case that you alluded to, Mr Swinney. We all look at that, read it and think, "How can that happen?" However, such cases are rare. The reality is that judges intervene. In most cases, they stop such conduct.

John Swinney: Is the Law Society active in protecting the interests, perspectives and experiences of complainers and victims who have been on the receiving end of what all of us would judge to be inappropriate conduct?

Sheila Webster: As I think that you are aware, the Law Society of Scotland is supportive of the proposals in the bill on trauma-informed training. We encourage and provide such training. Certainly, for us, it is important. I appreciate that that is not all that you are talking about, but that is our starting point. We believe in the trauma-informed system—that is what the system should be.

In advance of our appearance today, somebody in the team with whom I was discussing the issue suggested that the way to view it is to see it as having a fence at the top of the cliff rather having an ambulance at its bottom. We want to stop inappropriate conduct before it ever happens rather than fix it afterwards—by regulation, which might be what you were alluding to.

John Swinney: That analogy is fair, and I accept it, but my point was that there must also be a regulatory element, because I worry about conduct.

The profession is very exercised about all aspects of supposed interference in its regulation. I have heard that over many years. However, some people are ill served. In my humble opinion, the profession does not have the strongest foundation for its position.

Sheila Webster: As is probably not surprising, I do not agree with that.

The Convener: Will you make your comments very brief? We are straying slightly, and other members want to come in.

Sheila Webster: Absolutely, convener. My view is that regulation comes too late. If we are to improve the experiences of those who are involved in sexual offence trials, we need to stop inappropriate conduct before it starts. That takes

us back to the analogy of the fence. We can deal with regulation afterwards.

I think that our regulation works. What Lady Dorrian said in her evidence on 10 January indicates that the judiciary is stepping in. There have been examples of regulatory action in the most egregious of cases. Perhaps the question is for Simon Di Rollo or Tony Lenehan, because the most highly publicised cases have not related to the solicitor branch of the profession.

Regulation is in place and it works. The judiciary is involved in it, we are involved in it and we will take action, but the most important thing is to stop inappropriate conduct from happening in the first place.

Sharon Dowey: To come back to complainers' experiences, we have heard from complainers that they feel that there is a lack of communication throughout the process, that they are not listened to and that they are treated as a piece of evidence. Some have also told us that evidence that they thought was crucial to their case was not brought up in court.

One witness that we heard from last week told us that her experience was greatly improved because, throughout the process, she had a lot of contact with the advocate depute. Does anything stop that approach from happening just now? What are the barriers to that? Why can we not do more of that?

12:00

Sheila Webster: The short answer is, probably, resourcing. A lot of those experiences—seeing the advocate depute, obviously, is on the Crown side of things—are at the start the process. Quite often, people talk about the experience in the run-up to trial—the preparation for it. I have heard that, and Mr Lenehan has touched on that as well. Resourcing is a problem in all areas. Touch on any area of the justice system and someone will tell you that there is a resourcing issue. That is a difficulty, and we can address it.

Could we improve people's experience? Yes, we could, with appropriate resourcing to do that. There are lots of ideas. I have heard the convener of our criminal law committee, who was not able to be with us today, talk about technical fly-throughs. Let us use technology to show people what they will be doing, so that they can see what it looks like in the old-fashioned courtrooms that we deal with. Things can be done to minimise bad experiences.

Several of the things that you alluded to are perhaps to do with the way in which evidence is presented, which will ultimately be for the Crown and the defence to deal with. However, I think that it is about preparation and people understanding what they will have to deal with.

Sharon Dowey: It is about resources, then.

Sheila Webster: Predominantly; that is a big part of it. I am not sure whether anyone else on the panel wants to contribute anything, but I think that that is probably the main area.

Alan McCreadie: Resource will always be an issue. However, on the question of the sexual offences court, if there is an appetite for a stand-alone court, one might want to think about modernisation. I know that one of the victim survivors who gave evidence last week—unfortunately, I cannot remember the lady's name—made specific reference to court jargon, and I thought that that was absolutely spot on. Perhaps, if there is an appetite for creating a specialist sexual offences court, that would give a chance to sweep that away.

I know that the bill provides for the procedure in the sexual offences court being the same procedure as is set out for the High Court. As we get to the second quarter of the 21st century, the specialist court will be operating—in the main but perhaps not always—in 19th-century buildings and conforming to the procedure of a court that was set up in the 17th century. We might want to start thinking about modernisation—in the context of sexual offences, absolutely, but perhaps across the board—and that would need resources.

Sharon Dowey: Resource is probably the answer to my next question, too. In the Law Society of Scotland's submission, you noted that the requirement that solicitors and advocates take an

"approved course on training on trauma-informed practice"

in order to represent clients in the new court would

"restrict the capacity of defence solicitors",

considering the restraints that they are already under with legal aid. Again, do you think that the Scottish Government has to fund the defence properly before the reforms are passed?

Sheila Webster: I would like that funding to be for the whole justice system, not just for the defence. I am conscious that, through the budget, there has been a funding increase for some aspects, but that does not apply to all aspects. You are hearing a theme from me about how resourcing is an issue in all areas.

I would not limit such funding to the defence. Yes, there is a question to be asked about that, but today is not about the funding of the defence. That is a big part of it, but all parts of the system need to be addressed to make the system, certainly in the sexual offences area, more "user friendly". I do not like that term, so I will instead

say that we need to make the experience for those who are involved in those cases less traumatic.

Sharon Dowey: My concern is financing the whole bill. If we do not fund it properly, we will not be able to implement any of it.

I will move on and ask a question about juryless trials. Do you have any concerns about bringing in such a shake-up of the jury system for sexual offences through secondary legislation rather than doing so through the bill? I have a concern about that. Do you have any comments on that?

Sheila Webster: I do not think that we would dispute that at all. We heard in the earlier session about the scrutiny that we believe is required. We did not mention this when we were talking about the creation of the sexual offences court, but a lot of our concern is that there is so much that we do not, which is also true for juryless trials. Therefore, it is difficult for us to comment on how we think that those will work.

If I take the juryless trials as an example, the proposal from the working group was for a time-limited trial. We do not even know what the time limit is, let alone how the pilot will be measured, as you have covered this morning with the previous witnesses.

Professor Thomas spoke about the large number of changes to the bill—perhaps that is what I mean when I talk about "tinkering" and "piecemeal" changes. I think that it is fair to say that the bill will introduce huge changes to various aspects of the criminal justice sector. How will we design a measure to assess what has made a difference when we are introducing all those changes together and, as I have already said, when many other changes are still bedding in, in our view? How you measure that is a big challenge.

Therefore, your point about secondary legislation and all the other questions that remain are a concern.

Sharon Dowey: Would anyone else like to comment?

Tony Lenehan: I cannot think of anything that has caused greater disquiet in the profession than the question of moving towards juryless trials in rape cases. Parliament will take whatever steps it decides are necessary, but they need to be well thought out, because a misstep on that front, where emotions run so high, would be a disaster.

We have a practical situation to consider just now. I know that you are concerned with delivering change rather than with talking about change. You want to deliver that change. Right now, people in my situation earn a lot of money. I am not a premiership footballer, but I earn a lot of money. However, people still do not want to do my job. People are fleeing those roles, despite the fact that my job is, from my perspective, very rewarding.

If Parliament decides to implement something that is so widely unpopular, there is bound to be a practical consequence of that. It is a struggle to resource the courts that are currently sitting. There was an article in the paper about, I think, Livingston sheriff court—I do not know whether Livingston is cursed, because I think that the 2020 case came from there, too—where a trial had to be adjourned because there was no one to do it. That is the reality. It is not that no one wants to do it or a question of someone's first choice not being able to do it; there is literally nobody to do it.

People are being driven out of the profession—I talk about an "outflux" in my written submissions. That is a reality. Therefore, with massive changes, you have to be supercareful that you do not, with the best intentions, deliver chaos, delay and disaster through people just not wanting to do the job. Unless you are going to conscript people to do my job, you need to be realistic.

I know that you want to deliver change, but you need to think about it holistically. I say that as if that had not occurred to you—I know that it has, but I am just providing some emphasis.

Simon Di Rollo: What has just been said comes back to what we were discussing about the different skill set that might be required to present a case before a single judge rather than a jury. I am an independent person; I am not representing the faculty. I am here to give the benefit of my experience. You have to recognise that the concern of the profession, which has been expressed quite vociferously, is perhaps a result of fear of change in relation to the way in which people conduct their work. That change will be brought about quite quickly.

The proposal in the bill for juryless trials is described as a pilot, but the concern is whether it is a pilot or a revolution. That is a legitimate concern that people have. For my part, it is something that we should do. We should have a genuine pilot of a non-jury way of trying certain cases for a period of time. That is worth looking at. At the same time, you have to recognise that that will require the profession—not just the practitioners but the judges themselves—to adapt to that situation.

The question that you asked was whether the pilot should be done through an act of Parliament or through secondary legislation. The clever answer that was given in the previous session is that that is a matter for you to decide. However, there is a difficulty in that regard because the question is whether the nitty-gritty—the need for the details to be worked out—will be properly

looked at and scrutinised and whether that will be done in a way that is properly accountable to the legislature. That is something that you must decide, I think.

Rona Mackay: I have a brief supplementary question on what you have just said. I understand that you have been involved in civil cases involving personal injury actions for rape et cetera, in which the decision was made by a judge sitting alone. Does that change the way that the case is presented?

Simon Di Rollo: Yes.

Rona Mackay: Did it have an impact on the scope for rape myths et cetera to impact the outcome?

Simon Di Rollo: With regard to rape myths, it is difficult to comment on the impact of having a single judge dealing with the case. It is also important to recognise that judges need to be trained. In the session with the previous panel, there was a question about whether judges are subject to unconscious bias and, clearly, they are.

However, yes, judge-only trials have a different atmosphere and tone. The great prize is having a reasoned decision, whereby the judge sets out why the decision was made in a particular way, and that can be considered. The complainer gets the benefit of that; the accused also gets the benefit of it. There are disadvantages, too, because the decision can be appealed more easily and therefore subjected to scrutiny. The process might also go on for longer.

Rona Mackay: Does that happen a lot?

Simon Di Rollo: In the two cases that I have done that involved civil allegations that went to trial, one was appealed and the other one was not, so it is difficult to say. In a pilot scheme, you would find out to what extent cases would be appealed. You would learn a bit about the extent to which there would be appeals and how those would be dealt with.

Rona Mackay: That is interesting. Thank you.

Russell Findlay: Good afternoon. The Scottish Solicitors Bar Association told us that its members will boycott any juryless rape trials, which it says would increase the risk of

"a miscarriage of justice, deliver no discernible benefits ... and undermine the public's confidence in our criminal justice system."

Incidentally, it is worth putting on record that members did not make any decision not to have witnesses from the SSBA here, and I am confident that we will continue to welcome its engagement.

I put the risk of a boycott to Lady Dorrian, who responded by saying that that was more an issue for us to deal with and not so much for her. However, I expect that it will very much become an issue for the senior judiciary, if they end up sitting in a court with no jurors and no defence lawyers. My questions are quite practical. Is a boycott the set position of the profession? Is that position universally held? What engagement has there been with the justice secretary or the Scottish Government more generally on that?

Sheila Webster: I am happy to take that question initially. You referred to statements of the SSBA and then asked whether that was the position of the profession. Those have to be distinguished. The profession is not the SSBA. The SSBA is a membership organisation that represents a significant part of what I understand to be the criminal defence bar, but it is not all of the profession. The SSBA's position is not the position of the Law Society of Scotland, because that is not a position that we take. It is the SSBA that has said that, and it has said that on the basis of what its members are telling it, as I understand it, so—

Russell Findlay: I am sorry to interrupt. According to the SSBA, its members have pretty much universally said no. However, as your membership incorporates all of its members, there may be solicitors who may indeed take part.

Sheila Webster: I do not think that we can exclude the possibility that there will be solicitors who will be prepared to participate in any trials and who will not participate in the boycott. Those are issues for the members of the SSBA and the other independent professionals who we regulate. We cannot compel people to do work—that is not how the system works.

I do not know that we can say that there will definitely be a boycott. That is a question that would have to be addressed to the SSBA. However, I think that there is a high risk. Mr Di Rollo certainly alluded to the strength of feeling across the profession generally, on both sides. Among both the Law Society and the Faculty of Advocates, there is a very strong sense of concern, specifically about the judge-only pilot.

12:15

Russell Findlay: Will the faculty boycott it?

Tony Lenehan: No. One of the advantages of an independent referral bar is that I have a different relationship with the accused person, because my client is not the accused person but my instructing solicitor. We have the cab-rank rule, which ensures that, if you come along with a set of papers, it does not matter how unpleasant the subject matter, you will be able to instruct an advocate. Many of my members have expressed strong views, but the cab-rank rule means that if

they declined to take instructions, that would be a matter that would have to be referred to the dean of faculty. I do not have the luxury of declining instructions. However, there might very well be members who say that they will not do it, and if so, they will live with the consequences of that.

Russell Findlay: Do you mean that there would be a disciplinary consequence, potentially?

Tony Lenehan: Correct. That is why it is a matter for the dean. As the president of the criminal bar association, I do not have a disciplinary function. That would be the role of the dean of faculty. Through advice from the dean, I have issued guidance to our membership about how they stand as far as that is concerned, given that we do not share the luxury that is enjoyed by solicitors, who can choose whom they represent and whom they do not.

Russell Findlay: Thank you. Last week, we heard from rape victims who waived their anonymity and who had mostly had a pretty terrible experience of the courts and the wider justice system. I asked them if they backed the proposed juryless rape trials, and their answers were quite surprising. One of them, Anisha Yaseen, said:

"I do not think that the proposal is a good idea. That would definitely have put me off. Had that been a thing before I reported what happened, I do not think I would have reported it."

Sarah Ashby said:

"Having a single judge is not, in my opinion, the way to go."

A third response, from Hannah Stakes, was a bit more nuanced. She said:

"There is something to be done on that, but I am concerned that, if a case was heard by a single judge and they were biased, there might be more reason to worry about a mistrial."—[*Official Report*, *Criminal Justice Committee*, 17 January 2024; c 30.]

Their position is at odds with that of Rape Crisis Scotland. Sometimes, we fall into the trap of believing that all victims speak as one and that all experiences are universal. Are you surprised by the strong views that were expressed last week by those victims? Have you had any indication from behind-the-scenes discussions and lobbying about whether there is any movement from the Scottish Government on that particular issue?

Simon Di Rollo: I suppose that nothing surprises us, ultimately. It is not unreasonable for people to have different views, and one would expect that. I would be interested to know whether their view would be the same if the proposal was for a panel of individuals to hear such cases rather than a single judge, because there is no doubt that there is a great benefit in having a corporate decision. Something would be lost by not having a number of people making a decision. Decisions in such cases are not easy and those cases are very stressful. Having more than one person making the decision would be a good thing.

For my part, I think that it does not necessarily have to be a choice between a jury and a single judge. There is the possibility of having a panel of judges who would not all necessarily have to be at senator level. The decision could be made by a High Court-level judge and a number of others who were drawn from other areas. There would be a lot of benefit from that. That would water down the potential for bias and the idiosyncratic nature of one person making those decisions.

Russell Findlay: Have any of you picked up any sense from the Scottish Government that, in the face of all the opposition that there has been, there might be some movement on that?

Tony Lenehan: I have not, I have to say.

Sheila Webster: I do not think that we have, either.

Russell Findlay: Thank you.

Moving on to the proposed sex crimes court, the Faculty of Advocates has told us that

"there is no single feature of the proposed court which could not be delivered rapidly",

and the Law Society of Scotland has said that the establishment of a specialist division in the existing courts would be—I am paraphrasing—quicker, cheaper and as effective as the proposed new court. When I put that to Lady Dorrian a couple of weeks ago, she said that we need to

"seize the opportunity to create the culture change from the ground up".—[*Official Report, Criminal Justice Committee*, 10 January 2024; c 22.]

She said that if we fail to do so, that will result in us having the same conversations in 40 years' time. I do not want to put any of you in the position of murmuring a judge, but are you persuaded by the Lord Justice Clerk's argument on that?

Sheila Webster: It might not come as a surprise to hear that we continue to have the reservations that we have all talked about this morning. Although we understand why the Lord Justice Clerk is looking for that kind of change, I am not convinced that it will deliver and that that is the solution to the problems.

On your earlier question about our surprise, or otherwise, at the responses that you received, I refer back to the fact that the working group led by Lady Dorrian was, as she acknowledged to the committee, divided on the question. It is a big question and it is attracting a wide range of views, many of which, it has to be said, are not positive. We all understand and recognise what Lady

Dorrian is trying to do, but, across the profession, we remain unconvinced.

Russell Findlay: Earlier, we heard from the academics that there is a significant lack of research in Scotland on a lot of these matters. Professor Cheryl Thomas's view is that the juryless rape trials would therefore be, at best, premature. Those who support the measures, including Lady Dorrian, say that the pilot will allow for the collection of evidence. The academic in turn responds and asks how, without any existing evidence or research, we can measure what we are trying to measure with the new body of evidence that will be yielded from the pilot.

Do you think that we should get more evidence? I know that John Swinney said earlier that it is not unusual to hear a call for more evidence, but it seems particularly important in this case, given the radical changes that are being proposed and the significant lack of evidence that exists. Do you think that much more evidence should be collected before we embark on this?

Sheila Webster: I would not differ from what you heard from the academics. The evidence from the research that we have is not conclusive one way or another. More research is always a good thing, but one has to recognise Mr Swinney's point about that as well.

I refer back to the concerns that we all have about measurement. How are we going to measure it? We have changed the system and we are about to introduce a ton of other changes at the same time. How are we going to know? How will that bring us more research evidence? We are comparing apples with pears. We are looking at some very different systems. We do not have a baseline that says, "Here's what we've got at the moment: how is this going to change it?"

Russell Findlay: In addition, it was only in autumn last year that the new rules were brought in under which judges instruct jurors about rape myths, so we do not yet know what effect that has had.

Sheila Webster: That is certainly a view that we share. The reality is that many of the positive changes that have been made, which we welcome in the main, have simply not had enough time to bed in. That is our view at the moment.

Pauline McNeill: Good afternoon. I have a number of questions about your submission.

I want to start with the specialist court. Lady Dorrian's report suggests that it should be a division of the High Court. If it was a division of the High Court, perhaps we would not need all these exchanges about rights of audience and whether sheriffs could sit in it. Do you think that the Government has overcomplicated the situation with what it has put in the bill?

Alan McCreadie: If there is an overcomplication, it is in the fact that another level is being created in the criminal justice system. As I understand it, we are moving from three to four: the justice of the peace court, sheriff summary and solemn, the sexual offences court and the High Court as the court of first instance and the court of criminal appeal. Those are all the courts. The Government is bringing in a brand-new court.

There is definitely a question about specialisation, which can take place in the High Court—in fact, it can take place in any court, but it was particularly recommended for all cases on indictment in the sheriff solemn court. There is always going to be a question about whether what is proposed is the best way forward. Does it create more confusion in the system?

Pauline McNeill: You described a hierarchy of courts, in which you do not see the sexual offences court as provided for in the bill. Section 46 of the bill says that, "on cause shown", a case can be transferred from the sexual offences court to the High Court or the sheriff court. Does that speak to the point that you are making? Does section 46 indicate that the sexual offences court would be a lower court than the High Court? Is that fair?

Alan McCreadie: That would seem to be the case. The High Court is Scotland's highest court: it is the High Court. I know that there is provision in the bill for cases to be transferred out of the sexual offences court or into the sexual offences court, but I must say that what is proposed is quite confusing. I appreciate that it is being done with the best will, but the issue is whether it can be done in a way that keeps the separation of the High Court and the sheriff court.

I made a point about right of audience. As I understand it—I stand to be corrected—this is the first time that we will have a court where, if you ask a solicitor whether they have a right of audience, they will say, "Sometimes I do, sometimes I don't. It depends very much on the offence."

Simon Di Rollo: I do not think that I have anything to add to that. A division of the High Court sounds more attractive to me than what is proposed.

Pauline McNeill: Tony Lenehan, do you have anything to add?

Tony Lenehan: I am hoping that my view is clear. Such offences are worthy of being tried in the High Court, and I do not see the justification for stepping them down below that, unless the reason is purely financial. I do not reject the fact

that financial decisions are important, but that does not seem to be the way that it is being couched. If that is a hidden part of it for some proponents of the bill, I very much regret that. Such offences are worthy of being dealt with in the High Court, and they should stay in the High Court.

Pauline McNeill: Two weeks ago, I questioned the Lord Advocate and Lady Dorrian specifically on the inclusion of the indictment of murder in the remit of the specialist court. I find that extraordinary. I am not a practitioner, so it would be helpful if you could give a view on that. As a layperson, I think that murder is a plea of the Crown for a reason, even if there is a sexual element. The crucial element is that although, under the bill, murder could, of course, still be prosecuted in the High Court, a Lord Advocate could choose not to prosecute it in the High Court. I would appreciate it if you would comment on that.

Alan McCreadie: As I understand it, that was not one of Lady Dorrian's recommendations.

Pauline McNeill: That is right.

Alan McCreadie: As the bill is drafted, it would allow for not just a charge of murder but any other non-sexual offence to be heard in the sexual offences court. There could be a situation in which someone broke into a house, there was a rape and a murder, the house was set fire to and the car was stolen. I know that that sounds a little far-fetched, but, in theory, that is the type of case that could be allocated to the sexual offences court, because it involves at least one charge of a sexual nature. Even if that charge was dropped, the other charges on the indictment could remain in the sexual offences court.

Tony Lenehan: It is a regressive step to have a situation in which a murder case goes into another court, and—as per my comments earlier—is possibly prosecuted by a procurator fiscal depute; that is not a progressive step.

12:30

Pauline McNeill: Does that mean that in the High Court a case would be prosecuted by an advocate depute, but in another court that could be done by either an advocate depute or a procurator fiscal depute?

Tony Lenehan: It could be done by someone who is in the second year of their traineeship, which would mean that they would be a year out of university.

Pauline McNeill: Next, I want to ask about section 39(6), which allows the Scottish ministers to amend by regulation both the definition of sexual offences in section 39(5) and the list of sexual offences in schedule 3 to the bill. That gives me cause for concern, particularly since a justice committee of the Parliament in 2009 did a reform of the crime of rape. It seems extraordinary that we do not have primary legislation for such changes, but anyway, I ask you to speak to that.

Alan McCreadie: We think that any changes to what a sexual offence is should be a matter for the Parliament. Such changes should be in the bill.

Pauline McNeill: Do you have any comment on why the Government would want to include such a provision in legislation?

Alan McCreadie: I do not want to comment on that. The Law Society's position is that that should be in primary legislation.

Pauline McNeill: The case is the same in section 55, which says that provision for procedures of the court could be made by regulations.

Alan McCreadie: I made the point earlier that section 55 ties in High Court procedure to the procedure of the sexual offences court. If there is an appetite for a new court, then it should be made a new court with its own procedure.

Pauline McNeill: Sharon Dowey asked about victims having access to their advocate depute or legal representative. We spoke with one survivor who had a positive experience of proceedings, and it was loud and clear that that seemed to be because she had meetings with the lawyers before, during and after the trial.

Tony Lenehan, would the profession have any objection to reforms in that area? Some advocate deputes do it and some do not; some just go straight to court and do not talk to the victims, and others do talk to them. Is there a need to prescribe that more, in your view?

Tony Lenehan: It is always going to be a good thing for an advocate depute to engage with the complainers and principal witnesses. It is also a good thing for the defence to do that but, at the moment, there is no obligation on them to do so. Going back to the commission situation, it might be possible to have a situation in which it is expected that all lawyers will engage with the complainers beforehand. I am certain that only good will come from that. It can only serve to reduce complainers' apprehension and improve their engagement and experience. I do not know whether that should be legislated for.

Pauline McNeill: Would you see objections from the profession if, to change the experience of victims, it would be a requirement for the victim to be able to speak to those legal representatives—however it is legislated for?

Tony Lenehan: I have colleagues who do not want to do it, so I cannot say to you that I was sent

here by the profession to say that. I can give you my view about it, and my view is that it is beneficial and that I would do it.

Sheila Webster: It is probably incumbent on me to come back to the resourcing question again, and say that if additional obligations are placed on the defence, in particular, then I suspect that there will not be a principled objection to it, but they will ask how it is to be paid for. It is more work at a time when they are already struggling.

Pauline McNeill: Forgive me if I have misunderstood, but in the case of the defence, presumably the accused would have access to their lawyer or solicitor and there would be engagement with the accused, so there would not be a requirement for any change.

Sheila Webster: Yes.

Pauline McNeill: However, it would apply in relation to the prosecution. The principle of the prosecutor prosecuting in the public interest and not acting on behalf of any victim is the reason why there is a question whether it is appropriate for a victim to discuss with the prosecutor the prosecution of the case and have an understanding of the case.

Simon Di Rollo: I have been a prosecutor for many years, although I do not prosecute in the High Court currently. The position when I was prosecuting was that you could speak to the complainer and go over various things. You would not necessarily go into a huge amount of detail, but you would try to put the complainer at her ease.

The problem is that, if specific matters need to be drawn to the attention of the prosecutor who is conducting the case, the complainer might not have as good a point of contact as they would like. That is not a matter for legislation; it is just a matter of practice. Prosecution authorities can lay it down as a way of improving the communication that takes place. Dovetailing it with having independent legal representation is where that seems to be going and is a welcome development.

I do not see it as a resource issue, to be honest. It seems to me to be good professional practice to build up a rapport with the person you are about to lead in evidence and spend a bit of time with them. If specific matters about the case need to be drawn to the person's attention, that might or might not happen in one of those meetings. That might need to be dealt with at an earlier stage, and independent legal representation might help that more.

Pauline McNeill: My final question is for anyone, but I should ask you first, Simon Di Rollo, as you have a different perspective on the proposal for single-judge trials.

Given what has been said about the experiences that victims might have in front of a single judge, notwithstanding the fact that you might prefer a panel of judges—we are talking about there being no jury—would there be a need for single-judge trials and a specialist court? If a specialist court is about trauma-informed practice and making sure that the jury understands that there are myths about the crime of rape, do we need a specialist court and a single-judge arrangement? It seems to me that one might cancel out the other.

Simon Di Rollo: I do not know whether they would cancel each other out. The benefit of having a judge decision as opposed to a jury decision—as I say, I am in favour of corporate decisions—is that you get a reasoned decision. You will not get that from a specialist sexual offences court. That will happen only if you have a judge or a panel of judges dealing with the matter.

You can instruct a jury about trauma-informed practice but to what extent the jurors take it on board is an open question. At least you will improve matters if the judges are required to be trained in and use trauma-informed practice. That is certainly an improvement worth making.

Pauline McNeill: The other witnesses might want to address my follow-up question.

I am trying to understand the proposed legislation before us and all the possibilities. It is possible to create a specialist court, as proposed in the bill. We can decide where that is in the hierarchy, but there could be different levels of representation and rights of audience, and sheriffs appointed by the Lord President would be able to sit as judges in that court. However, it seems to me that there is nothing to say that the pilot would not run in the specialist court as opposed to the High Court. Is that fair to say?

In other words, the specialist court with national jurisdiction, wherever it sits, is not the High Court. It would be possible under the bill to have a sheriff appointed by the Lord President, solicitors or any other representation—there is no ban on solicitors representing accused persons in the specialist court—and a single judge all at the same time. Is that right?

Alan McCreadie: That is a good question.

The pilot can only deal with cases of rape or attempted rape. The court can sit in either the High Court or the sexual offences court. In a case of rape, because of the provisions, a solicitor could not represent the accused in the sexual offences court. However, if you have the pilot in the sexual offences court, the court could be presided over by a sheriff who has never presided over a rape case, but who has applied to become a judge of the sexual offences court, and the Lord President is

happy with that and has afforded him or her that position. That sheriff is then a single judge in the sexual offences court in which you are running a pilot where their decision is being measured.

We talked about research earlier, and about whether we have too much research or need more research, but the pilot itself is research, because you are testing live cases. It is not something that is being done in the abstract; this will be run with real cases. Contrary to the position in other common law jurisdictions—there is nothing in the bill, and I come back to the point about it all being in regulation—there seems to be nothing about whether the consent of the accused is going to be required before the pilot can operate.

Tony Lenehan: I think that it has been said, or it has been advocated, that there will be no need for the consent of the accused. When they rolled out the Public Defence Solicitor's Office—however many years ago that was—there was an initial reluctance by people to go there. What the administration did was to say that if someone was born in January or March, they would be diverted in the custody court from lawyer of choice to the Public Defence Solicitor's Office.

I had some involvement in the pilot delivery project—I was sitting in, in the place of a colleague. I think that it is anticipated that, if someone is born in January, March or December—whatever months are decided—then they are in the pilot and that is it. It is not an opt-in. That is one of the problems that I had with it. You are then forcing people into an experiment that could change the course of their lives, and there is nothing experimental about 10 years in jail or a life on the sex offenders register. If, in due course, it is decided that the proposal is not a great way forward, that will not be much comfort to those people. There is a real problem with the fact that, as things stand, it is not proposed that an accused opts into it or agrees to go into it—they will be forced into it.

Alan McCreadie: It is trial by horoscope.

Pauline McNeill: Interestingly, I do not know whether it is connected, but section 46, on where the case is tried, allows the accused to apply for the case to be heard in a different court.

Tony Lenehan: That is absolutely limited, and it is in the guidance notes to the bill that such an application can be made only when it fits the criteria. That is the only basis for such an application. One cannot say, that, in the particular circumstances, it does not suit the interests of justice—there is no provision for that.

Pauline McNeill: It is on cause shown.

Tony Lenehan: It is just whether the case is one of rape or attempted rape and, if it is not, an application can be made to get it out of the sexual offences court. I cannot see how that would be used in practice, because it is obvious that the case is either in or out in terms of its subject matter. That means that there is no scope for a case to come out. The intention of the bill is to—

Pauline McNeill: Just for completeness, section 46 allows the prosecutor or accused to say that they do not want to be heard in the specialist court and that they want to be heard in the High Court or the sheriff court. Given what you have said and the evidence that you have given the committee already, it sounds to me as though, whereas at the moment there are rules on where cases can be heard, under the bill there will be no rules at all. In fact, the provisions would mean that the prosecution and the defence would just work it out amongst themselves in which court the case is heard. If that is a concern, at least legislators should have the confidence to say with certainty what cases will be heard in which courts. However, if we pass the bill, it would be completely a matter for the court system to decide where cases are tried. Is that fair to say?

Alan McCreadie: Yes. I will just take a look at that. If the pilot is operating in either court—I am just thinking this through—you then have a situation where the decision could be made to have the case in the sexual offences court, even though it is in the pilot. I am interested in the interaction of the pilot and the sexual offences court, and whether there can be an application for a transfer from the sexual offences court into the High Court, albeit that it is also part of the pilot.

Pauline McNeill: It appears so, because under section 45 it says that the prosecutor, the defence or even the sole application of the accused can ask, "on cause shown", for a transfer to another court.

Alan McCreadie: But there would still be a pilot.

12:45

Fulton MacGregor: My questions are also around the pilot of juryless trials. I know that the issue has been widely covered, but I want to ask your opinions on what the pilot should look at and assess. We heard in the previous evidence session that such a pilot would be further down the line and that its remit and considerations would need to be given more thought. I know that that is mostly for Government and politicians to look at, but given your expertise in the area, have you thought about what sort of parameters the pilot should look at in answering whether it is making the system better for victims and witnesses and for the accused?

I come back to a point that Russell Findlay made to you earlier, and which I made in the

previous session. It is that there was an element of surprise at some of the survivors' evidence last week on the proposal to have a single judge. The witnesses were more reluctant to approve of that proposal than I had perhaps anticipated. Therefore, I will put to you the question that I put to the academics earlier: what role should be given to victims and witnesses in the assessment of the pilot?

I know that we are coming to the end of our evidence session, so I do not need everybody to answer if they do not want to. I am happy to take nods from anyone who wants to come in.

Tony Lenehan: It was very interesting to hear from Mr Findlay about the experiences of people who spoke to the committee last week. I imagine, if I am allowed to do so, that that relates to what the make-up of the court will be. The fact-finder will be somebody my age or older—that is a point that was made previously, in the submissions. It will probably be a man, and it will definitely be somebody who is university educated.

That might be what inspires a lack of confidence in the people who spoke to you at the session that you are referring to. I was not aware of that previously and it was interesting to hear about it. The particular point would be that, if that is going to act as a deterrent to people coming forward, you will never know that it is a problem because you will never hear from those people, which is one of the principal ills that I thought that the whole process was being designed to cure. It is to allow people who have suffered wrong to come into the process and be helped through it, whether by ILR, evidence on commission or whatever.

However, if you have a situation in which the people whom the process is designed to help are saying, "I would not have fancied that. I would not have come into it," that should set the alarm bells clanging for people who are thinking that it is a worthwhile vehicle. Having been involved in the debate for the past two or three years or however long, I think that, for a lot of people, juryless trials are an article of faith rather than an interesting academic exercise of research. The point was made earlier that you do not really have anything to compare with, so what are you going to do with the pilot?

My impression, over the past few years of being involved, is that there are some people for whom juryless trials are a grail. They will go towards it and do whatever is necessary to achieve that grail, rather than the job that you have to deliver, which is to ask how we can actually make progress. It is not just about photo opportunities with vulnerable groups, which feel great from your point of view. It is not about that. You are tasked with improving the actual experience of those people.

Therefore, it does not matter how vocal the minority is—if it is a minority—who want juryless trials and to take citizen jurors out of the process because, according to them, the jurors do not have the wit to understand what is a rape and what is not. If, at the end of that process, you have people who are not even going to take the first step into the process because of the juryless trials, you really need to ask, "Why are we doing it?" If you cannot answer the question of why we are doing it based on the research and the evidence, then do not do it.

Fulton MacGregor: Do you not think that much of what you said there points to the need for the pilot? I think that the pilot is key. If anybody else wants to come in to answer it, I suppose that that is what my question is getting at. We have given the whole of section 6 a good hearing today, but my question is about the pilot.

If we, as a committee and a Parliament, are to pass the bill with that provision intact, what should we do in the pilot? Based on your expertise in the area, what should we look at? Professor Chalmers said that we should look at conviction rates, but, as we heard from Pauline McNeill when she went back to him on that, the Government has been saying that that is not a main aim of the bill. What should the pilot try to assess?

Sheila Webster: The starting point, which one has to remember, and which has been mentioned, is that it is not truly a pilot. We are talking about live cases here. People's lives will be permanently affected, and at the end of the pilot we might decide that it was not a very good idea. We are using the word "pilot", but we are dealing with real-life cases, and, as we understand it, it will not be optional. People in those cases will have to go into the pilot, whether they like it or not. That is a concern.

I acknowledge entirely what Ms McNeill said about conviction rates and whether they will be used, but I think that that is bound up in the whole concept of what we are doing here. We have heard so much about the not good at all experiences that many complainers have, and it is very difficult to see how you can disassociate conviction rates from what we end up looking at. It might not be the Government's stated aim, but it is still bound up in it somehow. I do not know how you separate it, to be honest.

Tony Lenehan: I have to say, at the risk of causing offence to others, that I would be astonished if it is not about conviction rates, at least in substantial part. Professor Chalmers is absolutely right—that is what it is about.

Simon Di Rollo: You can say that it is about conviction rates, but we have heard evidence

today that tells us that we do not know how to measure that effect very well at the moment.

For my part, I think that it should not be about conviction rates. If you had a pilot, you would want to know what the outcome would be in respect of convictions, but that is not the reason for doing it. It sounds as though there is a need to properly analyse the data in relation to convictions.

One of the interesting things that came across in the evidence this morning was that the problem in England seems to be the number of cases that never get to trial. That means that when you are looking at conviction rates, you are measuring a very small number of cases that presumably have a good chance of succeeding, because they have got to a particular stage. You need to get a grip on that and make sure that whatever is being analysed is being analysed properly. That is key to the whole thing. You would want to know whether there is a difference, but you also need to know whether it is a relevant difference or a difference that you can properly measure.

For my part, I think that the motivation for doing it should not be to improve the conviction rate. You would not necessarily be able to tell whether there would be a different outcome in relation to convictions. It is perhaps the case that some cases in which there would be a conviction would be acquittals and other cases in which there would be acquittals would be convictions. That is possible.

The question that you asked was about what should be looked at. If the answer is the complainer's experience, a measure of that and an understanding of how that can be properly analysed is needed before you embark on the project. You have to think through how you will measure whether the complainer is happier with that experience than they would have been with the current arrangements. I hope that you will be able to say to a complainer, "Here's why there was an acquittal." You cannot do that easily at the moment.

Tony Lenehan: Fulton MacGregor's question was about what we should do and how we will measure it. If it is true that conviction rates do not matter, you are looking for two things: an improvement of complainers' participation in the process and a reasoned decision.

I think that it was Professor Thomas who said to you that, in the evolving routes to verdict, you could have instructions to juries and a pathway by which they reach a conclusion. You could then say to juries that it is now part of their job to identify that conclusion. We would not interview each juror but give the jury a flow chart of how they might reach a conviction or an acquittal and ask them simply to tell us the nodes in that flow chart.

You can achieve that from an existing jury. If the bill's proponents are truly not worried about convictions, you can achieve what you want to achieve without a revolt within the profession, which is justified by many on the basis that the public are not behind you on the matter.

Fulton MacGregor: The bill is about victims and witnesses, and the panellists have said that we should be considering the experience of victims and witnesses. Without putting aside some of the evidence that we heard last week, which Russell Findlay and I mentioned, I think that most of us and the Government have been convinced that the proposal to have a single judge on rape trials is a way to try to make things better. What would victims and witnesses—not the accused, the legal profession or anybody in the Procurator Fiscal Service or anywhere else, but victims and witnesses, or complainers, as you have been referring to them—lose by there not being a jury?

Sheila Webster: Diversity is part of it. A single judge, or even two or three judges, will not give the diversity that exists on most juries.

Tony Lenehan: That is not diversity in the strict sense, but a life-experience diversity. When complainers, by and large, are 19, 20 or 26, you are not going to get any judge sitting who has shared their life experience. I do not know what age the youngest judge is just now, but I would be surprised if it was someone younger than 52 or something like that. Complainers lose the ability to look across and see that there are people in the jury who are of an age with them and, presumably, have lived life through the years that they have. That tracks into the point that was made to me that people who have been through the system say that they would not want to do it with someone who looks like me or Sheila Webster sitting there, because that would be off-putting.

Sheila Webster: We talk about "a jury of their peers". Are people looking out and seeing their peers? If they are not, is that what is putting off some of the victims that you heard from last week?

Simon Di Rollo: I will sound a slightly dissenting note. I am not sure that the juries are of the peers of the person being accused or the person making the complaint. The profile of the jury is random. Sometimes it might reflect the profile of the complainer and sometimes it might not. It just depends. However, there will be a loss of diversity. You cannot get away from that.

Tony Lenehan: That cannot be a relevant point, realistically, because one thing that you can be sure about is that, when you take juries out of it, there will definitely not be a jury of their peers. That is an absolute given. You will have someone sitting there who earns £182,000 a year. At the

moment, you have 15 people there—it might become 12—so the complainer has 15, or 12, times the chance of having a direct comparison with someone on that jury.

I have never had a single-sex jury. I have never seen one. Therefore, with a jury, the complainer will have somebody of their gender there to take a decision in their life. If it is just me sitting there, the chances are that they will not.

The Convener: I will start to pull things together. I have a supplementary from John Swinney—it will have to be the briefest supplementary—and Katy Clark would still like to come back in. I ask the witnesses to bear with us.

John Swinney: My question follows directly on from that point. Mr Di Rollo told us that he appears in cases in front of judges and it is an analytical experience, if I can express it that way. Is there something philosophically wrong with that concept? Sheila Webster and Mr Lenehan talked about the importance of being judged by your peers, but juries are selected from the full range of the population. On juries that are looking at sexual assault cases involving 18 and 20-year-olds, there will be a lot of 50-year-old men and 60-year-old women who, frankly, in my humble opinion, grew up in a different world from the one that we now live in. I speak as a just-about-to-be-60-year-old man—it is full disclosure here today.

I am struck by Mr Di Rollo's earlier point that his cases are heard by a judge, which is fine. Everyone says that that is okay, so what is wrong with it in these cases?

13:00

Tony Lenehan: There are three things to say. I struggle to understand the foundation of what you say, because you are describing a criticism of juries based on the fact that there might be older people on them.

John Swinney: Yes, but you are saying that they are peers. I could be put on a jury to hear a case about a sexual assault involving an 18-year-old, but I am living in a different world.

Tony Lenehan: That is exactly my point, because somebody your age would be the single judge.

John Swinney: My point is that Mr Di Rollo has put on the record that he is able to stand in front of a judge and get an analytical experience and a statement of reasons, and I am asking whether there is something philosophically wrong with that.

Tony Lenehan: There is. There are practical differences. Decisions in those cases are made on the balance of probabilities, not proof beyond reasonable doubt.

Simon Di Rollo: They do not have to be.

John Swinney: Okay—we will hear from Mr Di Rollo in a second, which I look forward to.

Tony Lenehan: First, those decisions are made on the balance of probabilities, not proof beyond reasonable doubt, and secondly, the consequences are quite different. You are not sending someone to prison for life on that basis.

John Swinney: Mr Di Rollo?

Tony Lenehan: Can I answer the philosophical question before you go on? It deals with the problem that arises from having a singularity of decision maker. I will not bore you all with what I have said in writing, but I have a real problem with the fact—this is shared by my colleagues—that you will invest perfect trust in every single decision maker in that situation.

Judges and sheriffs are people who have been lawyers like me and my colleagues, and I know that we share the diversity of personalities that I suspect you in Parliament share. You are not created and cracked out of a mould; nor are lawyers. The fact that someone sits on the bench and takes the oath is not a guarantee of an absence of hidden bias or an absence of character defect; there are recent examples of people who have clearly smuggled character defects through the Judicial Appointments Board for Scotland to end up on the bench. That happens, and that is my problem.

At the end of the day, I could be entrusted with your son or brother or whoever and have to say, "I have known that judge for 10 years, and I have a problem with them," because of whatever reason. I make that point in my submission. As I have travelled the land in all my years, I have gone through courts with different judges. There could be sheriff X, who is a convicter; sheriff Y who is a heavy sentencer; and sheriff Z, who is a light sentencer, or whatever. I may have to say to your son—and then you—"We are stuck with this person."

There was a sheriff who would have been perfectly placed to become a judge—or whatever you call them—in the sexual offences court who appeared before Edinburgh sheriff court on some business to do with pornography and racist comments or whatever it was. That is somebody who had gone through the whole process and they could have been sitting on the bench in the trial of whoever it is that I am trusted with defending, and if it is one person, I have no way around that.

Philosophically, that is my problem. It is the plurality—Simon Di Rollo makes this point—of a corporate decision that reassures me. If you want to multiply decision makers and say, "There is a reason why citizens cannot sit there but we are

going to give you that plurality," I will be quiet, but the singularity is a real problem.

Simon Di Rollo: Is there anything philosophically wrong with doing it analytically? In my view, no, there is not. I have concerns—more than concerns—about having a single judge, because it is much better that such decisions are made in a corporate way. It is much harder for an individual fact finder to do that on their own. With a panel of judges, they have the opportunity to discuss the evidence with their colleagues. They can go over what was said and come to a view about whether the person was lying or telling the truth, or whether they were reliable or not reliable.

In my experiences in the civil courts, there is, of course, a different standard of proof, but that is irrelevant, because you can apply whatever standard of proof you like to the case that you are dealing with—that is not a significant problem. The other point is that there is no reason in principle why you cannot have a fair trial before a single judge or, indeed, a panel of judges. You can, clearly, if it is designed properly. It can be done, but, as I say, my preference is very much for a panel.

The Convener: I will bring in Katy Clark, very quickly, if she would like to come in.

Katy Clark: I want to ask about independent legal representation, in order to put on the record the views of the witnesses and, in particular, those of Sheila Webster, because she has spoken a number of times about the whole judicial process and not just the court element.

Given everything that survivors and rape victims have said about the disempowering nature of the whole process for them, and given its adversarial nature, does Sheila Webster not think that there is a strong case for those people to have advice and legal representation throughout the process, so that they will understand what is going on and their interests will be protected? Perhaps, given the time, Sheila can respond briefly.

Sheila Webster: I will be very brief. The Law Society's position is that we are entirely supportive of independent legal representation. There might be questions, including the old question of resourcing and questions on how all the practicalities work, but we are 100 per cent behind the principle.

Katy Clark: Convener, I do not know whether you want to bring in any of the other witnesses.

Sheila Webster: I do not know whether Alan McCreadie has anything to add to that.

Alan McCreadie: I do not think that there is much that I can usefully add to that. We certainly support the principle for the reasons that are outlined in our written evidence.

The Convener: I think that you will all be very relieved to hear me say that that brings our evidence session to a close. I thank the witnesses very much for attending today. It has been an extremely important and helpful session.

Next week, we will return to the Victims, Witnesses, and Justice Reform (Scotland) Bill with evidence from the Lord Advocate on parts 1 to 4 of the bill and evidence from members of the judiciary and academics on the bill's anonymity provisions.

Are members content to defer agenda item 3, which would have been considered in private?

Members *indicated agreement.*

The Convener: Thank you all, again. I close the meeting.

Meeting closed at 13:08.

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