OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 7 February 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 7 February 2024

CONTENTS

CRIMINAL JUSTICE COMMITTEE
7th 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:

Andrew Baird (Scottish Government)
Alastair Bowden (Scottish Government)
Angela Constance (Cabinet Secretary for Justice and Home Affairs)
Jeff Gibbons (Scottish Government)
Nicola Guild (Scottish Government)
Lisa McCloy (Scottish Government)
Heather Tully (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 7 February 2024

[The Convener opened the meeting at 09:30]

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

The Convener (Audrey Nicoll): Good morning, and welcome to the seventh meeting in 2024 of the Criminal Justice Committee. We have not received any apologies.

Our first item of business is an evidence session on the Victims, Witnesses, and Justice Reform (Scotland) Bill. I refer members to papers 1 to 3. I welcome to the meeting Angela Constance, Cabinet Secretary for Justice and Home Affairs. We will also be joined by a number of officials at various points during the meeting.

I intend to allow up to two and a half hours for the evidence session. We will stop for a comfort break, and I will suspend the meeting as we move between parts of the bill so that officials can change over. I remind members to keep their questions specific to the part of the bill that we are looking at at the time.

I invite the cabinet secretary to make some opening remarks.

The Cabinet Secretary for Justice and Home Affairs (Angela Constance): Good morning. The Victims, Witnesses, and Justice Reform (Scotland) Bill places victims and witnesses at the heart of the system. It is informed by the experience of victims, their families and organisations that support them, as well as by independent research, cross-sector groups and individuals with academic, legal and practical expertise.

The committee is well aware of the significant and long-standing concerns about the not proven verdict. You have heard evidence that it is not defined or well understood. It can result in confusion and trauma for victims and their families, and it can lead to stigma for the accused. It is vital that we improve the fairness, clarity and transparency of decision making in the criminal justice system and in criminal cases. The bill seeks to abolish the not proven verdict and to retain the widely understood verdicts of guilty and not guilty.

Reforms to our criminal justice system must command confidence in its integrity and protect balance and fairness. Therefore, the bill proposes to change the jury size from 15 to 12 and to change the majority required for conviction from a simple majority to two thirds. That is a proportionate way to achieve balance.

Violence against women and girls is a worldwide endemic problem. Lady Dorrian has been clear that we need to make seismic structural and statutory changes to how our system responds to sexual violence. Piecemeal change is not enough to achieve the cultural shift that is needed to improve the experiences of victims and give them meaningful access to justice.

The bill proposes an automatic lifelong right of anonymity for victims of sexual and certain other offences to ensure privacy and dignity during their lifetime. That might help to increase confidence in reporting offending behaviour. Placing that right in statute is particularly important in today's social media age.

The bill also proposes to strengthen the rights of complainers through automatic, publicly funded independent legal representation when requests are made to lead evidence about their sexual history or character. That substantial reform will ensure that complainers have a right to access their own legal representative, who will assist them in ensuring that their voices are heard in that deeply intrusive aspect of sexual offence cases.

The bill seeks to create a new sexual offences court with national jurisdiction to hear solemn-level sexual offending cases. The court will embed specialist approaches to the way in which those cases are managed and complainers are treated, and it will drive reform of practice, process and culture.

Complainers' experiences will be improved through greater use of pre-recorded evidence, better judicial case management and mandatory trauma-informed training for all who are involved in the work of the court, including lawyers.

Finally, the bill seeks to enable a time-limited pilot of single-judge rape trials. I am aware that there are mixed views on that proposal, which, again, arose from Lady Dorrian's review. I agree with her that we should explore, in a practical way, the role of juries in delivering justice for victims of rape. Piloting single-judge rape trials for a time-limited period will provide much-needed evidence and will let us have a properly informed debate on how our system deals with those most difficult and challenging cases.

The committee has heard compelling evidence from multiple sources that our Scottish justice system is not working for victims of sexual offences. None of us should be comfortable with that and, as the Lord Advocate observed, it is "simply not good enough". As parliamentarians, it is our role to address the issues that have been identified. This is our watch, and it is our

responsibility. If we do not act, we will pass the problem on to our successors and lose the opportunity to bring about real change for victims who are going through the system now and those who will do so in the future.

No part of the system should be beyond scrutiny. The bill proposes reforms. I repeat the remarks that I made in the chamber last May in a debate about trauma-informed justice:

"if not this, what? If not now, when?"—[*Official Report*, 9 May 2023; c 68.]

It is time to move forward in the debate. I hope that we can do so together.

The Convener: Thank you, cabinet secretary. I will start with questions on part 4 of the bill, which is on the abolition of the not proven verdict and on changes to jury majorities. As you said, the committee has heard a range of views on the proposals on both issues. Is the Scottish Government still persuaded that the not proven verdict should be abolished? If so, will you outline the reasons for that?

Angela Constance: The short answer to your question is yes. The Scottish Government firmly believes that our law and legal processes must meet the needs of modern 21st century Scotland. Clearer and more transparent decision making is an important part of that.

As the committee heard during its evidence sessions, many people do not trust a verdict that cannot be adequately explained. It causes trauma to victims and can leave the accused with lingering stigma. The proposed reform is a historic one, and it is based on significant and long-standing concerns. The fundamental point is that we should always strive to increase confidence that verdicts are returned on a sound and rational footing, while ensuring balance and fairness to all parties.

I believe that there is broad support for the measure. At the most recent Scottish general election, four political parties' manifestos contained commitments to abolish the not proven verdict, and the idea attracted strong support in the Government's consultation.

The Convener: Thank you, cabinet secretary. That helpfully leads on to my next question. The evidence that we have heard reflects broad support for the proposal to abolish the not proven verdict, but we have been less clear about the extent of support for the proposed jury size change from 15 jurors to 12 and the associated majority required. Concerns have been expressed that that might make it harder to secure convictions. Indeed, the Lord Advocate expressed her concern about the proposal when she gave evidence last week.

Have you reflected on the concerns that have been raised? If so, what is your view on what we have heard? How might you respond to those concerns?

Angela Constance: Convener, are you asking me about jury size, jury majority or both?

The Convener: Probably both.

Angela Constance: I will start with jury size.

Scotland is an outlier in that we have a jury size of 15, while most other comparable jurisdictions have a jury of 12. The independent Scottish jury research, which was one of the largest studies of its kind, was able to look exceptionally closely at the process of deliberation and decision making, because it involved simulated trials with mock jurors. What it found with regard to jury size perhaps speaks to more commonsense arguments. The research involved some factors being held constant so that the impact of various jury sizes on decision making could be examined. In short, it found that having a jury size of 15 provided no particular advantage for the quality of deliberations but, when the group was a little bit smaller, at 12, there was increased participation and fewer people did not participate. That informed the Government's view that, because there was more participation, there was better deliberation and there were fewer dominant voices.

The Convener: Thank you. Members will have similar questions about the composition of juries and majorities.

Angela Constance: I did not address the question about majorities, which, to be fair, is a much more complex matter. There are black and white arguments in favour of the abolition of the not proven verdict, and there are long-standing concerns that support its abolition. However, there are very different considerations around the jury majority.

In all of this, at the forefront of our minds is how we not only improve the experience for complainers by overcoming barriers to access to justice, but protect the integrity and balance of the system and reduce any risk of miscarriages of justice. There are some fine judgments to be made on how we achieve those two things. I will explain why, on the basis of evidence, the Government proposes that we move from a simple majority to a qualified majority of two thirds and why we do not propose to move to near unanimity or unanimity, but it is a complex area.

In short, Scotland's jury structure system is an outlier. No other system has three verdicts. No other comparable jurisdiction convicts on the basis of a simple majority and, as I intimated earlier, no other comparable system has a jury of 15.

09:45

There are three sources of evidence on this. There is the Scottish jury research; there is a recent meta-analysis; and there are other reports over the past 15 years that show that, if you move from three verdicts to two verdicts, you will increase conviction rates for all crimes. The Scottish jury research is not quite as unequivocal, but the evidence shows that moving from three verdicts to two will increase convictions across all crimes, not just sexual crimes. Therefore, we have opted to move away from a simple majority, but not to move to near unanimity, because of the other protections in the system that exist, which we may, at the convener's discretion, get on to. I have opted for the two-thirds majority.

I will leave my remarks there, because I appreciate that there will be other questions.

The Convener: Thank you for that. A number of members want to come in. I will bring in Sharon Dowey and then Fulton MacGregor.

Sharon Dowey (South Scotland) (Con): There are criticisms that there has been a lack of research on changing jury numbers. The bill would change the jury size to 12, as it is in England and Wales, but it would also provide for a two-thirds majority, which differs from the situation in England and Wales. Why have you decided to go down that road?

Angela Constance: Our proposal on the size of the jury is based on the Scottish jury research, for the reasons that I outlined to the convener. Although I acknowledge that the Government's proposal to abolish the not proven verdict is tied in with reforms to reduce the size of the jury and to increase the majority required, my own thinking has changed a bit. Initially, I would have described those as the three legs of the stool. On jury size, there is the research that I mentioned, and there are commonsense arguments. I think that the committee and Parliament will come to a view on that.

Where we need to be really engaged and invested is in the debate and discussion on what the jury majority should or should not be as a result of the abolition of the not proven verdict, for which, I would contend, we have overwhelming support.

I have touched on the data that has informed our view about moving to a two-thirds majority, including that from the Scottish jury research. It showed that, when juries deliberated and came to a conclusion about which verdict to pass, in finely balanced trials, the structure of our jury system, and not simply the reflections on and the assessment of the evidence, had an impact on outcome. The number of jurors, the number of verdicts and the jury majority requirement—those structural issues—influence the outcome. That is why we want to shift the balance a little bit by moving from a simple majority to the two-thirds qualified majority.

You will have heard some support for that in your evidence sessions—I am thinking of the comments from Lord Matthews in particular. In our consultation, there was 52 per cent support for a qualified majority. I acknowledge that a consultation is not a vote or a plebiscite, and that these are difficult and complex matters. There was 40 per cent support for a two-thirds majority.

If you do not mind—I hope that this does not come across as a bit cheeky—I will note that, in 2013, the then Justice Committee made some reflections about this. I appreciate that the personnel on the committee are different now, but I want to point out that there is a history of evidence or consideration in this matter. In 2013, there was an acknowledgement that, if you abolish not proven, you need to consider the jury majority size, because of the impact that it could have on all cases across the board.

I am also aware—again, I hope that members do not think that I am being cheeky—that there was previously a member's bill by Michael McMahon that proposed the abolition of not proven. That bill was tied into a two-thirds qualified majority, too.

I appreciate that these are judgments that we will all have to make together and navigate our way through. There is a particular relationship between the not proven verdict and the various options for the majority, which I am sure that we will continue to discuss and debate.

Sharon Dowey: Did you say that there was 40 per cent support for the two-thirds majority?

Angela Constance: There was 52 per cent support in our consultation for a qualified majority, which could be at various levels, and there was 40 per cent support in the consultation for the particular option of eight out of 12.

Sharon Dowey: That is not even half.

Angela Constance: There was majority support for a qualified majority, as opposed to a simple majority. As I said, it is a consultation and not a plebiscite or a vote. I was just reflecting on various strands of evidence.

Forgive me, Ms Dowey—you asked about England. There, by contrast, its two-verdict system requires near unanimity, with a majority of 10 out of 12. That option was not popular in our consultation; I think that it received about 13 per cent support.

There are other safeguards in our system as it stands. Notwithstanding the Lord Advocate's

recent successful reference to the appeal court, we still have corroboration as a mainstay of our system. That is one of the reasons why the Government would not support going to near unanimity or unanimity.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning to you and your officials, cabinet secretary. I had questions on the link between the removal of not proven and the jury changes that are being proposed. However, you have given a good account of that, and the Government's thinking on it is now a wee bit clearer in my mind.

We have heard some evidence that the changes to the majority will make convictions more difficult. I know that you and your officials will have heard that evidence. Not everybody who has been in front of us has said that, but a large body of evidence says that removing not proven and bringing in the jury changes will make it more difficult to get convictions in such cases. What is your and the Government's response to the issues that have been raised? What is your thinking? Do you, too, believe that to be the case, or are you confident that it would not be the case?

Angela Constance: The evidence is clear that, if we go from three verdicts to two, that will increase convictions across the board in all cases. We need to ensure that we keep the balance and the integrity in our system if we are turning up the dial a little bit on the basis that there are other aspects—in particular, how the jury system is constructed—that influence outcomes, particularly in finely balanced cases, as opposed to just the facts and circumstances.

It is a balance, and I hear those voices. I think that that is the part of the bill that I have wrestled with most and it is the part that I will continue to wrestle with most, because it is about how we ensure that we minimise the risk of increasing miscarriages of justice. Members will have heard Lord Matthews talk about whether a majority of one is sufficient for decisions on innocence or guilt or beyond reasonable doubt in the most serious cases. That applies to all cases, of course. The jury reforms and the abolition of the not proven verdict would apply to all cases.

In many respects, that part of the bill is almost a stand-alone reform. It is not unrelated to the experience of victims in terms of transparency and the very strong views that victims have, particularly about the not proven verdict. I suppose that, in other parts of the bill, there is a much stronger correlation to improving that experience. The point that I am trying to make is that, wherever we land on that matter and, indeed, other matters, it is about the confidence in our system to maintain fairness to both parties, whether that is the complainer or the accused.

Fulton MacGregor: I accept that. Finding that balance is a very difficult job for the Government and the committee. Obviously, concerns have been raised that getting convictions under the system could be more difficult. Is there anything built into the bill that would review whether the approach is working, getting convictions has become more difficult, or the approach is leading to more miscarriages of justice or whatever? Is anything built into the bill to review the legislation if it is passed?

Angela Constance: We have built a bill that is based on the substantial research that exists, and I have no doubt that we will build into it that there will have to be on-going evaluation of its impact, whether that is a more collective impact or the impact of particular aspects of it.

Fulton MacGregor: Okay.

I have a final question. To clarify, the Government's position is that removing the not proven verdict is tied—for want of a better word—to jury sizes. That is the Government's clear view. There is not an option to remove the not proven verdict and keep the jury size as it is, for example.

Angela Constance: Ultimately, Parliament will decide on that, particularly as we proceed through stages 2 and 3. I have outlined the Government's position and our preference, and we will, of course, continue to engage on the issue. I am conscious of the evidence that the Lord Advocate gave the other week as well as the contribution of Lord Matthews.

The overriding point that I want to make is that we have to give serious consideration to all this, and there needs to be on-going depth to our mutual scrutiny, if I can put it that way, because of what the evidence tells us about the impact of moving from three verdicts to two.

10:00

The Convener: We have about 15 minutes left, and I still have five members who want to come in. If we can have fairly brief questions and succinct answers, that would be helpful.

Russell Findlay (West Scotland) (Con): "Brief questions" is my middle name, convener.

Good morning, cabinet secretary. The not proven verdict is likely to be on its way out, but part 4 also deals with jury sizes, as we have heard. In reducing the number of jurors from 15 to 12, we will require eight out of the 12 to reach a guilty verdict, as we have also heard. That would be inconsistent with just about every comparable jurisdiction worldwide, which requires either unanimity or 10 or 11 out of 12.

We have received a comment from the Faculty of Advocates that that would be

"an international communication that Scotland places less value on protecting its citizens accused of crime than any and every other nation with a jury system."

More surprisingly, perhaps, Professors Fiona Leverick and Eamon Keane told us that they oppose the eight out of 12 jurors proposition in the bill. I struggle to understand why the Scottish Government wants to get rid of one international anomaly—the not proven verdict—and, in effect, replace it with another, which is the two-thirds majority in a jury of 12.

Angela Constance: With respect, I would strongly refute some of the views that have been expressed by the Faculty of Advocates. As Mr Findlay has acknowledged, we are removing a verdict that is not understood by jurors and we are seeking to make associated reforms that are clear, proportionate and balanced, and that have at their core fairness to the complainer and the accused.

On Mr Findlay's more specific point, the existence of corroboration is one of the main reasons why I and the Government would not support going to near unanimity or unanimity. I understand your point that all the other comparable jurisdictions with a two-verdict system have 10 out of 12 or 12 out of 12, but we do not have hung trials in our system and we still have corroboration, notwithstanding the changes to corroboration as a result of the Lord Advocate's recent reference.

Russell Findlay: What surprises me is that the two professors who, until now, had not expressed a position on the size of the required majority, both said that they believe that this is a mistake. Have you taken that on board or reflected on it, or is there now a fixed view?

Angela Constance: I have worked hard to listen to a range of views on all aspects of the bill. I genuinely believe that what complainers, the accused and we all require is a debate of the highest standard. I have set out that we prefer to go to a two-thirds qualified majority, because we need to ensure that we have the right protections and balance in the system. Bearing corroboration in mind, our judgment is that unanimity or near unanimity would be more than is required.

Russell Findlay: To continue that line of questioning, the Crown Office and the Lord Advocate—perhaps unsurprisingly—support the proposal for the two-thirds majority, but they want to go further than that. If, for example, seven out of 12 people believe that the accused is guilty, they would like to have the power and the mechanism to seek a retrial. They say that they are in discussion with the Scottish Government about that. Have you taken that on board? Are you likely to amend the legislation to include that provision, or do you think that that would further exacerbate the concerns of those who I referred to in my initial question?

Angela Constance: Just for clarity—I really hope that I have not misheard Mr Findlay—I stand to be corrected, but I do not think for a minute that the Lord Advocate in her evidence last week was in any shape or form arguing for unanimity or near unanimity.

Russell Findlay: No, she was not. She agrees with the bill's provision, which is a two-thirds majority.

Angela Constance: Yes, a qualified majority.

Russell Findlay: However, she wanted to take it a step further in that she wanted to have an additional protection or mechanism of seeking a retrial if, for example, only seven out of 12 jurors believed in the accused's guilt. Will the Government agree to the request by the Crown for the bill to be amended to include the capacity to seek a retrial?

Angela Constance: Our consideration of that is at a fairly early stage. I would always seek to take seriously the views of the Lord Advocate, given her independent role. She has many years of experience and, in particular, a long-standing interest in seeking justice for complainers in sexual offence cases.

Russell Findlay: So it is not off the table; it is being considered.

Angela Constance: I think that that is fair. It is not off the table. I want to say something positive and then say where we need to be careful. In removing the not proven verdict, where we have moved towards taking out something that is seen as a third verdict, or the compromise verdict in difficult cases, we need to keep clear positions. In our system thus far, retrials have not been a feature. Our system has rested on the finality of verdicts. In terms of transparency between me and the committee, I would want to explore further whether the Lord Advocate has outlined, or is looking for, a system of retrial, or whether it is more about adding in additional exceptions to double-jeopardy legislation. There will, of course, be discussions—that is the short answer.

Russell Findlay: I think that the Crown's submission was that, in the event of a seven out of 12 verdict, for example, it would be able to ask the court for a retrial. Thank you.

John Swinney (Perthshire North) (SNP): I will continue with the same line of argument or discussion. I was particularly struck, last week, by the comments of the Lord Advocate when she said:

"I consider that the changes that are proposed will make it more difficult to get a conviction in the type of cases that we are talking about."—[*Official Report, Criminal Justice Committee,* 31 January 2024; c 12.]

The bill in front of us has the objective of ensuring that we get better outcomes in relation to prosecution and conviction for sexual crimes and that the situation that the Lord Advocate expressed concern about does not materialise. I am very concerned that the abolition of the not proven verdict has been linked to the questions of jury size and simple majority, and I would like to explore that further.

The not proven verdict—which Eamon Keane and Professor Leverick from the University of Glasgow helpfully explained to us—and the not guilty verdict amount to the same thing. We have to be blunt about that point. I would like to understand why there is a need for us to undertake any compensatory changes in relation to jury size and the majority that is required if the verdict that we propose to abolish in the bill amounts to the same as a not guilty verdict.

Angela Constance: I will not repeat what I said earlier, other than to acknowledge that there are some very fine judgments to be made on that matter. I have to recognise that there are particular challenges with sexual offence cases, and I have no doubt that we will continue to pursue that issue.

I also have to recognise that the evidence, as it stands, shows that the balance is tilted when you move from three verdicts to two and that the raison d'être of all our reforms is absolutely to improve access to justice but in a way that improves life and experience for complainers without compromising the rights of the accused.

Alastair, would you like to add further detail in response to Mr Swinney's question?

Alastair Bowden (Scottish Government): I will flag up some of the history that was referenced. As Lord Matthews said last week, the not proven verdict has always been seen as a counterbalance to the simple majority, which goes back not just years but decades. For example, you can look at the Thomson committee on criminal procedure in Scotland.

By that logic, if you abolish the not proven verdict, it follows that you should, at the very least, reconsider the majority that is required for conviction. The logic is not straightforward, as has been touched on by various people throughout the committee's evidence sessions. Lord Matthews captured that when he commented:

"Whether in sheer logic that is the case is doubtful, but I think that it probably does counterbalance it."—[*Official Report, Criminal Justice Committee,* 31 January 2024; c38.]

The logical case may not necessarily be straightforward, but, in effect, that seems to be what is happening.

As the cabinet secretary said, the proposal to abolish the not proven verdict is contested, and you have heard views on both sides, but the data that we have supports that proposal. That is further backed up by the fact that we do not know of a single similar legal system in the world that has two verdicts and requires a simple majority, hence Lord Matthews telling the committee that the simple majority could possibly be conducive to miscarriages of justice.

John Swinney: The difficulty that I have with all of that relates to the fine judgments that the cabinet secretary talked about. Cabinet secretary, you have made it clear that there must be balance and fairness to all parties. However, when I read the Lord Advocate's evidence, I am worried that, as a consequence of that change, there is a risk of imbalance in relation to complainants compared to where we are today. The whole purpose of the legislation is to address the fact that none of us is happy about where we are today.

There are questions about the relationship that has been constructed in the legislation. I hear the background evidence for why it is so, but the Government needs to explore whether there is sufficiently compelling evidence of the need for a compensatory action in relation to jury size and composition, given that the not proven verdict amounts to the same as a not guilty verdict. I encourage the Government to further consider whether the evidence exists to substantiate that position.

Angela Constance: I take that point on board. We are not at the end of the stage 1 process yet. As I have said before, the bill is a marathon as opposed to a sprint.

It is important to recognise that, as the jury evidence shows, the not proven verdict is seen as the compromise verdict. In a two-verdict system, juries do not have that option. They have to decide whether someone is innocent or guilty.

10:15

At this point, without prejudging the rest of the parliamentary process, the Government's view is that we should make a small adjustment. A simple majority in a jury of 12 would be seven out of 12. We propose a majority of eight out of 12. However, I am also conscious that there continues to be a live debate about the role of corroboration across our system. The Lord Advocate touched on that and spoke powerfully on the impact of corroboration across all cases, especially in sexual offence cases.

Pauline McNeill (Glasgow) (Lab): Good morning to you and your team, cabinet secretary. You are right to say that all the political parties had a manifesto commitment to abolish the not proven verdict. I did not take a view on Michael McMahon's bill, but I did not support it. We might have a consensus on abolishing the not proven verdict, but the problem, as you have heard in the lines of questioning, is how we get a consensus on the formulation of the change in the size and majority of the jury.

You said that Scotland is an outlier. However, with the proposals, Scotland would still be an outlier, because no other jurisdiction has the majority that you propose. If I have understood your position, you are saying that we do not want to be an outlier but we will still be an outlier under the proposals. Is the reason for that position the corroboration that we have in Scots law? Is that why you are comfortable with still being an outlier in the international arena?

Angela Constance: I am trying to seek as much consensus as possible on the bill. Through our consultation, the other working groups, the work that flowed from various research and other work that has underpinned the bill, such as Lady Dorrian's work, we are trying, in the interest of our justice system and its standing in our society, as well as the interests of complainers and the accused, to build as much consensus as possible. We consider our position, as it stands, as doing our best to reach that consensus.

You are right in saying that we are currently an outlier on three fronts in the jury system. However, the way that corroboration features in our system also makes us different. We have taken on board the research and the views that were expressed through the consultation. The continued existence of corroboration, notwithstanding the Lord Advocate's successful reference to the appeal court, means that our position just now is that we should have a qualified majority. Instead of the jury convicting on seven out of 12, it would convict on eight out of 12.

Pauline McNeill: Does that mean that the answer to my question is that Scotland would still be an outlier but you are comfortable with that because we have other measures that other jurisdictions do not have? Do those amount to corroboration?

Angela Constance: Even if all aspects of the bill are passed, parts of our system could still be described as unique.

Pauline McNeill: So, we will always be an outlier—is that what you mean? We will always be different.

Angela Constance: In terms of—

Pauline McNeill: That is a good thing, not a bad thing.

Angela Constance: I am not giving a view for ever and ever, because that would be beyond any of us at the table, but—

Pauline McNeill: No, but you can understand why I am asking the question if the argument for removing the not proven verdict is that Scotland is an outlier—we would still be an outlier if it was removed. I do not particularly have a problem with that, because I think that some features of our system are good. I just wanted to understand that.

Angela Constance: We are an outlier with not proven—

Pauline McNeill: We are still an outlier.

Angela Constance: But the evidence for the abolition of not proven goes way beyond that. It far exceeds the fact that we are an outlier—

Pauline McNeill: Yes, I am not arguing with that point.

Angela Constance: Some people have argued for the retention of the not proven verdict on the basis of its uniqueness.

Pauline McNeill: To be fair, in my assessment, even those who support its retention realise that there is a consensus that we must move on from it. I am trying to understand how we then get a consensus on another thing if we remove that verdict. Am I correct in saying that you have put on the record that the purpose of the reform is not to increase conviction rates per se?

Angela Constance: That part of the bill is about neither increasing nor decreasing conviction rates.

Pauline McNeill: You referred to research—did you say "meta-analysis"?

Angela Constance: Yes.

Pauline McNeill: I was trying to establish whether the committee is aware of that research. I do not know that we are. You said that that research says that the removal of the not proven verdict would increase convictions, which is at odds with what the Lord Advocate said last week. John Swinney, in his line of questioning, expressed concerns about the Lord Advocate saying that she thought that it would result in a lower conviction rate. Your research shows otherwise. The problem that I have is that I would like to have put that research to other witnesses. Did we miss that?

Angela Constance: I do not know what research or evidence the committee has looked at. The meta-analysis to which I referred was published last month. It is an independent bit of research by Jackson et al. It is a quantitative

meta-analysis that is based on data sets from 10 different mock trials.

Again, I would point to something in the research, which we can share with the committee if that would be helpful. It says that

"the results are ... unambiguous: there is a statistically significant effect towards lower conviction rates under the Scottish three-verdict system than under an Anglo-American two-verdict system"

and that that effect was seen across offences

"ranging from death by negligence to physical assault, rape and homicide."

We can share that research with the committee.

Pauline McNeill: Okay.

The Convener: I do not know that the committee has been made aware of that research. The clerks are looking at it just now, and we will ensure that it is circulated to members.

Pauline McNeill: Thank you.

Lastly, I go back to Russell Findlay's question on a point that the Lord Advocate raised with the committee. In cases in which there was a seven-to-five majority, there would be no conviction. That is what you are legislating for. On the question of whether the Crown should have the right to a retrial, you said that you might look at the double-jeopardy provisions. Are you prepared to give an assurance that any amendments at stage 2—I suppose that that is what we are talking about—will take into consideration that any right of the Crown, if that is the direction of travel that you choose, should be clearly set out in the legislation?

What I am getting at is that, although I think that the Lord Advocate made a fair point, we have to consider that a future Lord Advocate might take a different approach. The Parliament should not give away powers lightly. If the Parliament, in legislating for the provisions in the bill, feels that some allowance should be made for the Crown to move to a retrial, that should not be a wide provision. I would be deeply concerned if the Parliament did not have the final say on that, because it cannot be divorced from what we are looking at right now. Can you give me an assurance that, if you were looking at such an approach, you would ensure that it was based on a parliamentary decision? Does that make sense?

Angela Constance: It would always have to be based on a parliamentary decision, because, irrespective of its merits or otherwise, the right to a retrial would be a significant departure from what we have now. That is not to say that it should not be considered or scrutinised, but it would nonetheless be a significant change that I contend would need to be looked at properly and considered fully.

I am trying to assure the committee that we will consider the Lord Advocate's evidence—we have started that process—but that, as with all legislation, we also need to look at the detail. Where there would be significant departures, we would have to think carefully about whether stage 2 or stage 3 amendments would be appropriate for such changes. The answer to that question might be yes or no. I am trying to convey to the committee that we all need to be collectively invested in the understanding and debate around these very complex and difficult decisions.

Pauline McNeill: That is helpful. We have to be open to that idea, since the Lord Advocate mentioned it, but I would have concerns about a provision that was wide in scope and gave the courts the power to decide. I would be more comfortable if you were thinking about a provision that was more tightly drawn in terms of criteria for the Crown.

Angela Constance: I acknowledge that I have heard Ms McNeill make the point a number of times in this committee that we need to be careful about the scope of powers and the decisions that we make about powers being retained or additional powers being given to other parts of the system.

The Convener: We are running over time, but this is a vitally important discussion.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Conviction rates for rape are the lowest of any crime type; indeed, I think that the Lord Advocate said that the conviction rate for single-complainer rape cases is 20 per cent, which is quite shocking. Cabinet secretary, you will know that Rape Crisis is very concerned about the two-thirds majority in a 12-person jury and feels that it would make it harder to get convictions, which is clearly the last thing that we want.

Before we go on to talk about the new sexual offences court, I have what is quite a left-field question, but I am going to ask it anyway. We are talking about jury balance and sizes. Do you envisage the Government ever making provision for a different configuration of or different criteria for juries in that court, to try to balance out Rape Crisis's fears in relation to corroboration and all the rest of it? Given that we are setting up a new court anyway, is that something that the Government would ever consider?

Angela Constance: That is quite a left-field question, Ms Mackay, if you will forgive me for saying so.

Our proposition is that the jury system will operate across all offences. I think that we would

need to give very careful consideration to whether you could have a different—

Rona Mackay: I completely appreciate that. What I am trying to do is to break the impasse in the problem with convictions in sexual crime cases compared with the rest of cases. Rape Crisis is concerned that the bill will make it harder to convict because of the jury configuration, which will not help victims.

10:30

Angela Constance: I understand and entirely accept that there are unique challenges around sexual offences cases. When we look at the system overall, we see that although the not proven verdict is rarely used—it is the verdict in 1 per cent in summary cases and 5 per cent in solemn cases—it is used more frequently in sexual offences cases.

The short answer to your question, Ms Mackay, is that we will reflect on the matter accordingly. There would be particular challenges with what you suggest, but it is perhaps better for me not to give an off-the-cuff response.

Rona Mackay: I totally understand.

Katy Clark (West Scotland) (Lab): Cabinet secretary, you said that the evidence was clear on the impact of removing the not proven verdict on the number of convictions, but the evidence that we have heard is far more mixed. We were not aware of the metadata evidence that you mentioned to Pauline McNeill, but we were aware of the other Scottish mock jury research to which we have been directed.

The views that we have heard from the various witnesses who have come to speak to us are far more complicated, as, I am sure, you are aware. Witnesses have also told us that it is not possible to provide a breakdown of whether jury decisions were unanimous or majority or to provide exact numbers and a breakdown of outcomes from juries. Would it not be sensible to get that data before we make significant changes to jury majorities in the Scottish system? There is a dispute over whether we can do that legally in Scotland, and legislation has been passed down south to enable that kind of research to take place. Would it not be sensible to have a better understanding of what happens now before we make really significant changes to the system?

Angela Constance: I will pass the question to Alastair Bowden in a moment, but my understanding is that the limitations in the Contempt of Court Act 1981 place constraints on live, real-life research as deliberations happen.

Katy Clark: From what we have been told, there seem to be different views as to whether that is correct in Scotland, but irrespective of that, the law in England was changed to make it absolutely clear that it would be possible to carry out such research. Instead of proposing controversial changes that go way beyond the manifesto commitments of the various political parties to abolish the not proven verdict, why are we not trying to enable the collection of data and analysis so that we can get our evidence base and, as a result, make evidence-based policy? That legal change could, I presume, be incorporated into the bill.

Angela Constance: We might have a different understanding of what occurs or the changes that have been made south of the border, and there might be different views on what the legal barriers are to getting the breakdown that you mention. I do not know whether Alastair Bowden or Nicola Guild wants to come in on that.

Alastair Bowden: I can give you a bit of background. It is not necessary to collect the data on how juries split in the current system, because the outcome is the same regardless. If the threshold is reached for conviction, it is a conviction; if not, it is an acquittal. Therefore, courts do not need to know the fine-grained details of how the jury splits. That is why that information is not collected. In fact, there would be a downside to collecting it, which I will come on to, and there is a question whether it would take us any further, which I will also cover.

On the downside, such data is not collected because of important reasons of public confidence. With, for example, an eight-to-seven jury split, as happens in the current system, you can imagine how that sort of simple majority might be covered in the press and on social media and what that might do to public confidence. Whether we were talking about a narrow conviction or narrow acquittal, the stigma would not be beneficial to anyone involved in such a case.

Secondly, and perhaps more important, I am not sure that the data would ultimately take us that much further forward. If, for example, it were found that a jury did not reach a two-thirds majority in a particular case, it could be inferred that, under the new, reformed system, that would have been an acquittal. However, I am not sure that you could infer that; under the current system, juries are directed that they need to reach a simple majority, whereas in the new system, they would be directed that, if they wanted a conviction, they would need to reach a two-thirds majority. In other words, what the jury does in the current system would not be a reliable guide as to what they would do if directed differently under a different system. It might give you some idea, but I think that, a few years down the line, the same people would be questioning the data and asking what it

really told us. I am just not sure that it would seal the deal with regard to evidence.

Katy Clark: I do not think that there is any suggestion that the outcomes of individual cases would be publicised; we are talking about research across the board so that we can begin to understand trends and what is actually happening. I know that we are short of time, but it is surprising that we are not trying to get a firmer evidence base. The cabinet secretary says that the evidence is clear, but that is not what other witnesses have said to us, as I am sure that she has seen.

Angela Constance: I appreciate that there is a range of views, but I have pointed to substantive bits of research. I know that time is short, convener, and we can certainly follow this up in writing, but Nicola Guild might be able to add something.

Nicola Guild (Scottish Government): Under the Contempt of Court Act 1981, it is unlawful to question jurors or for them to reveal the particulars of the deliberations in a case, so they cannot speak about the views that they formed, the evidence that they heard or why they voted in the way that they did. There is, therefore, that legal restriction. There is not a restriction per se on speaking to people who have served on juries about their understanding of the system generally, but we have to be very careful that we do not stray into the territory of how they deliberated in a case.

Angela Constance: My understanding—and I stand to be corrected—is that although there is research south of the border in relation to people who have served on a jury, there are still limitations. We cannot ask them about their deliberations on a particular jury.

Katy Clark: The information that we asked for is quite basic, though. We are asking only for numbers, but I have heard what the cabinet secretary has said.

The Convener: We have to move on. If there is time at the end, I am happy to come back to members who have further questions on part 4 of the bill.

We move on to part 5, which contains the provisions that relate to the creation of a sexual offences court. Cabinet secretary, you will be aware that, last week, Lord Matthews gave evidence to the committee during which he said:

"The judiciary is, broadly speaking, in favour of the proposal for a sexual offences court. We agree with the thinking of and the conclusions drawn by Lady Dorrian's review group, for the various reasons that she has set out. Despite a number of statutory interventions over the years and the best efforts of everyone involved, the pace of change has been glacial, and we have not been able to effect the cultural change that we think is needed, because reform has been piecemeal."—[*Official Report*, *Criminal Justice Committee*, 31 January 2024; c 21]

We have, of course, heard other concerns about the proposals on resourcing, sentencing powers and the ability of the Lord Justice General to remove judges. Have you had an opportunity to reflect on the evidence that we have heard, and are you able to provide some reassurance on the concerns that have been raised?

Angela Constance: With regard to the views or concerns that have been expressed regarding the Lord Justice General's power to remove judges, we have listened carefully and are looking at potential amendments so that the situation is clear and unambiguous. There is an arrangement for the appointment and removal of temporary judges, and it might be that we need to make things clear in the bill by introducing provisions that mirror those arrangements.

On sentencing powers, I am firmly of the view that the sexual offences court should have unlimited sentencing powers. That is a departure from the work that was undertaken in the original review. We should absolutely guard against any perception that the court is a downgrade; it is a court with status that should have the same powers as the High Court, given the gravity of some of the offences that it will be dealing with.

It will be transformative. You will have heard lots of evidence about the opportunities when you build something from the ground up. The founding principle of the court is to improve the experience of complainers. There is broad support for the establishment of a court with national jurisdiction and the ability to operate in around 40 venues across the country, and it is within the gift of us all to shape how the new court is seen.

In respect of resources, the financial memorandum outlines set-up and on-going costs. Inevitably, there will be costs, and we will look at that issue constantly from now until implementation because, as we know, costs can change. In the longer term, there are potential savings to be had with the more efficient use of court resources. Indeed, we have already seen in other courts in the system the benefits of really good judicial case management.

What we are talking about is around 700 cases that are currently in our system—both sheriff and jury cases and solemn cases in the High Court—and the issue is also the more effective management of those cases, which was at the heart of Lady Dorrian's review. Given that we are now dealing with a huge increase in those cases compared with 10 years ago, thought needed to be given to the efficient case management of those particularly difficult cases in the interests of serving justice and in the interests of complainers.

Russell Findlay: I know that we have moved on from the previous part of the bill, but I found Alastair Bowden's testimony to be quite staggering in respect of his explanation for not having data on how juries are split. The bill that is in front of us will fundamentally alter juries, yet we do not know anything about how they have previously been split, and the Government's rationale appears to be that we do not need to know what were called the fine-grained details, and that the public and the media perhaps cannot be trusted to know. Katy Clark's questions yielded a further question: even if that is the case, why on earth can researchers not get that basic information? I find it mind blowing that we are being asked to radically alter jury sizes and jury ratios when no one in the criminal justice system has sought that information.

10:45

I have one question about part 5 of the bill with regard to trauma-informed practice. I know that the issue is central to part 2, but it also features under the provisions in relation to the sexual offences court in part 5. In evidence to the committee last November, NHS Education for Scotland said that its five-part definition of being trauma informed was not being used in the bill. Two parts of its five-part definition had been omitted, and it said that that might hinder the effective implementation of the bill's other elements. Cabinet secretary, when I asked you whether you would consider its request to think again on that, you said that your door was always open. Has NES been through your open door? Have you agreed to its request for the five-part definition to be part of the bill, or have you now ruled that out?

Angela Constance: In exercising the right to reply to the preamble to Mr Findlay's question, I think that I have laid out today that we have lots of evidence. We have also laid out some ethical and legal considerations about the type of evidence that can be gathered and how it can be gathered. I accept the argument that there is always a case for seeking more evidence, but we also have to acknowledge that there can be other limits and that we could continue to seek evidence for ever and a day without ever implementing any of it. I do accept, however, that, as Ms Clark has pointed out, there is a balance to be struck.

On the very important question about trauma-informed practice, there is a difference between the definitions that are required in practice and what has to be expressed in the context of the law. Let me reassure Mr Findlay that my door is never closed and that we continue to engage with a large number of stakeholders—

Russell Findlay: Has NES been through your door with that particular request?

Angela Constance: It has not been through the specific door of my office up to this moment in time. I hope that that is not too much information for you, Mr Findlay—

Russell Findlay: No, no.

Angela Constance: However, the work that was led by NES and Dr Bruce on the trauma-informed framework is particularly important to us and particularly valued.

Russell Findlay: Are you going to change the bill?

Angela Constance: I am looking at it but, with respect, I want to—

Russell Findlay: It has been about three months since NES raised the issue in a written submission to the committee. I put it to you then and we are now three months down the line.

Angela Constance: I know that you are impatient.

Russell Findlay: I am just wondering whether it is on or off the table.

Angela Constance: It is on the table.

Russell Findlay: Right. Okay.

Angela Constance: Is there anything to add from a more legal point of view?

Nicola Guild: No.

Lisa McCloy (Scottish Government): Perhaps I can say very briefly that we have been exploring the matter with the justice partners to whom the definition would apply. We need to understand what it would mean if we changed the definition that we had in the bill to something broader. It is absolutely something that we are exploring.

Russell Findlay: Are there timescales attached to that?

Angela Constance: We have a stage 2 timetable and a stage 3 timetable that we will all have to adhere to.

Russell Findlay: Sure, but if you, as the Government, want to change your own bill, you will surely have to get on with it before then.

Angela Constance: Yes, I would and, with regard to due process—and with respect to you, Mr Findlay, and to the committee—I would, before I lay out responses to Parliament on our intentions for stages 2 and 3, like to see the committee's stage 1 report.

Pauline McNeill: I preface my remarks by saying that I think that the proposal for a specialist sexual offences court is the most significant proposal in the bill. However, I have to say that the Government is putting itself in danger of losing the

consensus on that, which is what my line of questioning relates to.

Why did you not fully adopt Lady Dorrian's suggestion? As you said, cabinet secretary, you do not think that the specialist sexual offences court should be considered to be a lower court but, in fact, it will be. However, if you had adopted Lady Dorrian's recommendations for it to be a parallel court, there would be no question over that.

I have questions on rights of audience that illustrate why I think it will be seen as a lower court. I know that you were not cabinet secretary when the bill was drafted, so I would be happy if your officials want to come in. It seems extraordinary for Lady Dorrian to do this work and come up with a proposal that everyone thinks is good but for you to dilute it by saying that it will not be a parallel court to the High Court—I really do not understand that.

Angela Constance: I suppose that I am looking at the mountain from a different side. I will come to my officials in a moment. Although we have taken the spirit and the majority of the detail of Lady Dorrian's report, I contend that some of the changes around unlimited sentencing power enhance the status of the court. I am genuinely struggling to see why it would not be seen as a court of equal status.

Pauline McNeill: Well, let me help you then. We have established that it will not be the High Court. It will be a national court with wider sentencing powers, but in the hierarchy of the court system, it will not be as high as the High Court—is that right? It cannot be.

Angela Constance: We are not grafting a new court that is being built from the ground up and a new way of working on to existing court systems, purely because that would mean that changes would be iterative, as opposed to seismic.

Andrew Baird, you have longevity in this issue.

Andrew Baird (Scottish Government): I do. The reason for establishing the court is about managing those cases differently. It is less about status than about ensuring that we have a court that improves the experience of victims in a way that is fair for the accused. It is not necessarily about having a parallel court; it is about doing it in the right way for victims. That is the rationale and the reasoning that has gone into establishing the court.

Pauline McNeill: Lady Dorrian specifically said that she thought that it should be a parallel court, but you did not go for that. Why is that? I hear what you are saying, and I totally support the Government in seeking to change the experience and do things differently, but why did you not adopt Lady Dorrian's suggestion that it should be a parallel court? If you had, we would not be having an argument about whether you have lowered the status of sexual offences. Do you see what I mean?

Andrew Baird: With respect, I am not sure that she suggested that there should be a parallel court. That was not my reading of Lady Dorrian's recommendations.

Pauline McNeill: Well, it is my understanding.

Andrew Baird: She suggested that the model of the sexual offences court would share a number of similarities with the High Court, but she also suggested a number of differences from the High Court in its sentencing powers, rights of audience, jurisdiction and so on. In the process of developing the court, we engaged with a variety of stakeholders on the model of court. The differences that have emerged from what Lady Dorrian suggested in her review have come about as a result of that engagement with stakeholders.

Pauline McNeill: You have probably heard me ask questions about rights of audience, and that concern about a change to the rights of audience is shared by the senators. Forgive me, because, as a layperson, I am trying to fully understand this:

> "Despite the restriction in relation to rape and murder, the types of cases where a solicitor would be able to represent the accused in the Sexual Offences Court could include ones which are currently prosecuted in the High Court. Thus allowing solicitors to represent an accused in a broader range of serious cases."

The bill will allow that to change so that a procurator fiscal depute cannot prosecute. That is in section 47(6). For some offences, rape and murder excluded, there will be a change to the rights of audience.

Surely you must realise that that will be seen as lowering the status of the court. We have the rules for a reason. We have had years of differences between advocates and solicitor advocates and who can represent an accused person who faces eight or nine years in jail. Did that proposed change come about by deliberate provision or accident?

Angela Constance: The sexual offences court would be a hybrid court in that it could deal with all the High Court solemn cases as well as the serious sheriff and jury cases. On how it is constructed, we have been clear that there would be no diminution in the quality or the status of representation that is available to the accused. There are particular High Court cases that have to be—

Pauline McNeill: I am sorry to challenge you on that, but there would be a diminution. Cases that go to the High Court attract rights of audience for

advocates and solicitor advocates. However, the Scottish Parliament information centre briefing is clear that, because the sexual offences court would not be the High Court, it would be possible for solicitors, who currently cannot represent accused in certain categories of case, to represent them in those cases. I do not understand why you would have legislated in that way.

Angela Constance: Andrew Baird can keep me right on this, but my point was that, although there would be an opportunity for solicitors to deal with a broader range of cases, there would be no diminution in the representation that would be available to the accused in cases that currently go to the High Court.

Pauline McNeill: There would be. The SPICe briefing is clear. It would be helpful if Andrew Baird could answer that.

Andrew Baird: I will set out the rationale behind the rights of audience that we have arrived at for the sexual offences court.

Lady Dorrian's review suggested that only those with higher rights of audience should represent the accused in the court but, during the process of engaging with partners, a concern was expressed that the fact that the sexual offences court would take High Court and sheriff court cases would significantly increase the workload of advocates and solicitor advocates, who would be required to do cases that were previously heard in the sheriff court and that a solicitor would have been able to appear in.

During the process of engaging with the working group, we came to the conclusion that the way to address that would be to protect rights of audience and require that only solicitor advocates and advocates appear in murder and rape cases, because those cases are currently pleas to the Crown and, therefore, can be tried in the High Court only. We wish to mirror those provisions in the bill and the sexual offences court.

Pauline McNeill: For reasons of workload, you decided to broaden out the scope of who could represent accused persons in cases that are not rape and murder. Is that fair to an accused person, who would not necessarily be represented by an advocate or solicitor advocate when they previously would have the right to be?

Angela Constance: My apologies, Ms McNeill. I think that I have understood your question from the wrong angle. The Government did not want solicitor advocates or counsel to be compelled to represent cases that they would not normally be involved in. There is an underlying issue of ensuring that appropriate legal aid is available.

Pauline McNeill: I am sorry, but I think that Andrew Baird just said that, for reasons of workload, you have allowed for solicitors to represent cases where previously there would have been counsel. Have I understood that?

Angela Constance: I was going to get to that point. I ask Lisa McCloy to address that.

Lisa McCloy: Andrew Baird is absolutely right in his description of some of the discussions on the matter that we had in the working group with representatives from across the sector. Because the sexual offences court would seek to take the High Court case load as well as the sheriff and jury case load, that would obviously expand the case load. The group considered whether the current complement of advocates and solicitor advocates would be able to cope with such an expanded case load, as per the recommendation of Lady Dorrian.

As you say, Lady Dorrian recommended that the rights of audience should be identical to those of the High Court, and we have departed from that. Part of the reason why we have departed is the workload problems in relation to the sheriff and jury cases that the court will hear. Those cases are currently represented by solicitors in the sheriff and jury courts and that presents a development opportunity for solicitors. Solicitors have, as Lady Dorrian says—

11:00

Pauline McNeill: So, representing those accused persons is a development opportunity that you give solicitors. I think that we need clarity. You can understand my concern.

Lisa McCloy: May I continue?

Pauline McNeill: Sure.

Lisa McCloy: That is the split in the court that we were trying to recognise. Because it is bringing together High Court cases and sheriff and jury court cases, we were not satisfied that there was a need to change the rights of audience, if you like, in the sheriff and jury court cases. For High Court cases, there is no intention that cases that would otherwise have been called to the High Court will not have legal aid access to counsel and solicitor advocates.

The difficulty in being able to set out that position on rights of audience in the bill is because, as you say, only rape and murder are within the exclusive jurisdiction of the High Court. The other sexual offence cases that are heard in the High Court are ultimately at the discretion of the Lord Advocate and of prosecutors.

It is difficult to reflect that distinction in this hybrid court. However, we are exploring with the Scottish Legal Aid Board how we can make sure that the right mechanism is in place to allow legal

aid for counsel in cases that would otherwise have appeared in the High Court. There is no intention to try to change that type of representation; it is simply about how it is reflected in the bill because of the hybrid jurisdiction.

Pauline McNeill: I would welcome further discussion on that. I know that Katy Clark has a supplementary question.

This is an important issue. It is a significant proposal. If the issue is not resolved, I would have difficulty in supporting the provisions in the bill, to be perfectly truthful with you.

I have mentioned this issue previously and I apologise for mentioning it again, but when we increased the sheriff court's sentencing powers in 2004, the Legal Aid Board eventually refused to sanction advocates for cases that previously would have been heard in a higher court. Ask any of the profession. The problem is that, unless the Legal Aid Board gives you assurances, accused persons who would otherwise have been properly represented by senior counsel or junior counsel will, by your admission, no longer be automatically entitled to that representation. If you leave it to the Legal Aid Board, the same thing will happen that happened in 2004—serious cases that are indicted in the sheriff court will no longer attract a higher level of representation.

We will be throwing the baby out with the bath water if we do not close the door on that. The cabinet secretary opened by saying that she does not want the sexual offences court to be seen as a lower court, but it will be if we do not resolve these issues. I would be happy if—

Angela Constance: We will make sure that we learn all the relevant lessons from history. If the committee requires us to write to you in detail on the exchange that officials had with Ms McNeill, we will do that.

Pauline McNeill: I would be grateful for that, because the issue is giving me cause for concern. I am happy to leave it there.

Katy Clark: Given everything that Pauline McNeill said about previous experience, cabinet secretary, do you not accept that we need clarity in the black letter of the law? It does not matter what politicians' intentions are, and it does not matter what assurances or correspondence there is with the committee—what matters is what the law will be.

If you are going to set up a separate court, there need to be clear rights. The alternative would have been to have specialist divisions of the sheriff court and the High Court and many people would argue for that. They could work differently from the way things are at the moment, with their own rules of court. However, you have chosen this pathway, so you must surely accept that there must be absolute clarity in the black letter of the law that the rights of those involved will not in any way be reduced. Does the cabinet secretary accept that?

Angela Constance: I accept that the law needs to be as unambiguous and clear as possible. There is always a distinction between what is in the black letter of the law and what might follow through further regulation or guidance. There is a need for a clear pathway and for clarity and mutual understanding with regards to what is and is not on the record. We will seek to give comfort to members in that regard as we proceed with stages 2 and 3.

Lisa McCloy, would you like to add anything else?

Lisa McCloy: No, cabinet secretary. I think that is a good point. We will continue to explore what mechanism we might be able to look at in order to give that reassurance.

Ms Clark, to pick up on your point about the specialist divisions, the working group considered that and discounted it as it would not provide the change at the scale at which it is needed.

Katy Clark: You have to accept that politicians will presume that there might be a cost-cutting agenda here, because that was the experience in the past. Pauline McNeill has outlined one example of that, and there are others.

Sharon Dowey: Cabinet secretary, in your response to the convener, you talked about building something "from the ground up" in relation to the sexual offences court and, in your reply to Pauline McNeill, you said that the new court will be built "from the ground up". What will the difference be between the sexual offences court—which we know will not be built from the ground up; it will use the estate that we already have—and the High Court, which will be required to operate in accordance with trauma-informed practice following the passage of the bill?

Angela Constance: I was paraphrasing Lady Dorrian in relation to building a new court, new structures, new rules, new practices and a new philosophy. To, again, paraphrase Lady Dorrian, we are talking about a "'clean sheet' approach".

The advantage of the national jurisdiction aspect is that the sexual offences court will be able to sit in nearly 40—that is, 39—court facilities around the country, so it will have a presence in localities that are nearer to local justice, whereas the High Court can currently appear in only 10 locations. I contend that, given where this court with national jurisdiction can appear, it is in line with trauma-informed practice.

Sharon Dowey: Will you be able to make all the adjustments? The victims groups that we have

heard from have said that they want separate entrances, exits and areas, so that the accused do not come into contact with victims. Will you be able to provide for that in the current estate?

Angela Constance: The fabric of the court estate is a fundamental issue. The Government is committed to continuing to make improvements to the court estate. Perhaps Ms Dowey is aware that, in the draft budget, there is not only a 9.5 per cent increase in resource funding for courts but a capital funding increase of 28 per cent. That is a significant uplift, in recognition of the need to continue to invest in the fabric of our buildings to ensure that all the correct arrangements are made for the safety, security and wellbeing of victims and witnesses.

Sharon Dowey: What training would you expect parties involved in the sexual offences court to undertake? How would that be different from the trauma-informed practice set out in part 2 of the bill?

Angela Constance: That detail will be worked through with experts in sexual offences cases and trauma-informed practice, as well as with the courts, which will have to ensure that all participating parties in the new sexual offences court have undertaken the requisite training. The point about training for professionals who will support the operation of the court is important. We are working with our justice partners on how that training will be developed and, crucially, how we will implement it.

Substantial work on what is required was undertaken with the publication of the trauma-informed skills framework for the justice sector as a whole, which we debated in the Parliament. We know what trauma-informed practice is and what trauma-informed training should look like, and my officials are engaged with our partners on the mechanisms for how, as part of the implementation process for the court, all that will be rolled out in advance of the court becoming operational.

Sharon Dowey: Will those who will be working in the sexual offences court get more training than what is set out in part 2 of the bill?

Angela Constance: That is possible, but the bill includes clear duties on participants and agents across the justice system. Those who participate in the sexual offences court will have to have undergone trauma-informed training. It is not for me to define the content and the nature of the courses; that would be a matter for the sexual offences court. The view might be that additional training is required.

Sharon Dowey: You mentioned the budget earlier. One of my concerns, in relation to the financial memorandum, is how much money the provisions will cost and whether we will allocate enough money. The Lord Advocate also raised doubts about financing. She said that the Crown Office struggles for finances presently and that it possibly will do in the future. How is the Scottish Government considering how it will finance the Crown Office more appropriately?

Angela Constance: I am very pleased to say that the draft budget that is being considered by the Parliament includes a proposition for a sizeable uplift of 11.66 per cent for the Crown Office, which equates to £21.2 million. There has been in excess of a 50 per cent increase in resources for the Crown Office since the start of the previous parliamentary session. More recent figures show that, in 2019-20, the resource input into the Crown Office was £113 million. In the draft budget, the amount is now £203 million, so that is a sizeable increase.

The Crown Office negotiates, as I do, with the finance secretary every year on the budget. In the past, the Crown Office has benefited from significant additional investment—particularly resource funding, but also capital funding and some non-cash support. Overall, total investment has gone from nearly £121 million in 2019-20 to £223 million in this year's draft budget.

11:15

Sharon Dowey: My concerns over the budget are whether we are providing the right resources to achieve our aim, whether it is a real-terms increase and whether it will cover all the training that will be required under the bill.

We heard from somebody that, if we had better-prepared witnesses, we would probably get the verdicts that we were looking for. However, if we get those verdicts, more guilty people will go to prison, which will increase the prison population. We already have issues with the prison population just now. To get people out of prison and on to community payback orders, we need the budget for criminal justice social workers, who are basically saying that they have had a flat-cash settlement for the past four years. I still have concerns about the financial memorandum and whether we are providing the required funding for all the areas of the service that will require it.

Angela Constance: I will not go into the prison population issue, because, as I said yesterday in reply to Mr Findlay, I will come back to the Parliament in the not-too-distant future to make a statement on that. I refute some of the remarks that Ms Dowey has made and point to the investment in criminal justice social work that is in the draft budget. However, I will lay all that to one side for now.

At the end of the day, we all want guilty people to be convicted, and we all want victims to receive the best support so that they can give the best evidence. It is always fair to scrutinise resources, and it is, of course, fair for me to say that the Government's funding has not kept pace in real terms. There was a 1.2 per cent real-terms reduction in our block grant funding. That equates to £500 million, and that is before we even get to capital funding, which will contract by 10 per cent in real terms over the next five years.

Nonetheless, when it comes to our resource and capital investment in the Crown Office and in the courts service, the justice budget has a very good settlement in comparison with other areas, despite the real-terms cuts to what the Government has to play with as a whole. There are significant increases—of 11 per cent, 10 per cent and, in some cases, 28 per cent—to budgets, which I hope will give some comfort to Ms Dowey, and I hope that she will support the budget when we come to that point in the parliamentary timetable.

Sharon Dowey: I am sure that we will have more conversations on that.

Rona Mackay: I want to ask about floating trial diets. I think that it is generally accepted that they are not a good thing. They bring uncertainty and cause great distress to complainers, and the Lord Advocate has said that she would like them to disappear. Will the sexual offences court alleviate that problem? Is it at all possible to legislate to end them, or is that best left to the independent judiciary?

Angela Constance: I am supportive of reducing the use of floating trials. I very much recognise that they can cause anxiety and uncertainty. I must also recognise that delays cause trauma and anxiety to complainers, victims and witnesses. I am conscious that the Scottish Courts and Tribunals Service has a different perspective from the view that has been expressed by the Lord Advocate and victims groups. As I say, I would very much like to see a reduction in the use of floating trial diets. The sexual offences court will have the opportunity to set its own rules, so that will be a matter for it to consider.

Colleagues will be aware that, in the past week, the Scottish Courts and Tribunals Service wrote to the committee to set out evidence that 97 per cent of trials call within the float period. It provided information that showed that, if floating diets were to be banned altogether, that would add 22 weeks to the process. We therefore need to take some care in that area. An outright ban might have other consequences, particularly while the court recovery programme continues. That is another example of why the use of pre-recorded evidence is important. I appreciate that it is a live issue, with people having different views.

Russell Findlay: I have a quick question. I did not realise that we would go off on a tangent and talk about budgets, and I know that we do not have the time for me to counter some of what has been said as much as I would like to.

My question relates to the remit of the sexual crimes court. Lady Dorrian believes that it should not include crimes such as murder, as do others. Is the Government's position fixed that it will?

Angela Constance: It is quite correct that that is a point of divergence from the original report. I accept that there were points raised by the Crown—by the Lord Advocate, in particular—about that, and we have sought to take them on board.

The discretion in deciding what offence goes where for murder cases in which there is a sexual element would, ultimately, remain with prosecutors. They would decide whether a case went to the sexual offences court or the High Court.

I will try to be brief, convener. The rationale is that, quite often in a sexualised murder case, there are surviving witnesses—people who will be called to give evidence on the offence that is being tried.

Russell Findlay: There is such a case right now, in fact.

Angela Constance: There will be other surviving witnesses who have experienced sexual abuse or a sexual offence, and the proposal provides the flexibility to acknowledge the needs of those victims and witnesses—

Russell Findlay: I am sorry to interrupt, but can I just come in on that? Will that, therefore, stay in the bill? Will the prosecution have that discretion?

Angela Constance: Right now, Mr Findlay, my preference is that the Crown should have the discretion to decide whether sexualised murder cases go to the sexual offences court or the High Court. I also want to acknowledge and put on the record that there are very sound reasons why such a case could and should go to the sexual offences court, bearing in mind the needs of surviving victims and witnesses.

Russell Findlay: Thank you.

The Convener: We will have a comfort break for five minutes or so. I suspend the meeting.

11:23

Meeting suspended.

11:31

On resuming—

The Convener: We will move on to part 6 of the bill, which contains the proposals for a pilot of juryless trials. As usual, I will kick off our questions.

Cabinet secretary, you will be aware of the concerns that have been raised about the proposed pilot of rape trials without juries. For example, the Faculty of Advocates has indicated that it strongly opposes such a pilot, stating that the rights of the accused would be compromised, and the Scottish Solicitors Bar Association has said that it will not take part. I am interested in your response to the concerns that have been expressed, and in whether you have had an opportunity for any engagement or discussions with some of the bodies that have been particularly opposed to the proposal.

Angela Constance: The pilot of single-judge juryless rape trials is a core proposition. As you will know, it comes from the work of Lady Dorrian. The essence of the time-limited pilot is to examine matters in greater depth; to ascertain its effectiveness and how it is perceived by everybody involved; to enable the issues to be assessed in a practical rather than theoretical way; and to have informed debate. In that regard, it is an unrivalled opportunity to look at what, if anything, is next, bearing in mind the long-standing concerns in and around the prevalence of rape myths—in our society and in juries—and about conviction rates.

I assure the committee that I have had many discussions with people and organisations that are opposed to the pilot that Lady Dorrian proposed. My commitment, whether to bar associations or to the Faculty of Advocates, is to continue those discussions. I strongly refute any suggestion that anything in the pilot undermines the rights of the accused, given the role of written statements and the fact that single-judge trials are not a novel experience in our justice system as it stands; nonetheless, I remain more than open to dialogue on how the criteria are crafted and how the pilot will operate and be evaluated, in order to give as much assurance as possible to those who have concerns.

The Convener: That allows me to come in nicely with my follow-up question, which is about what you anticipate the pilot would explore. For example, does it seek to examine the impact on conviction rates, the experience for survivors and the resource implications? I am interested to get a wee bit more detail on what questions the pilot might ask and what it seeks to evaluate.

Angela Constance: As I said, convener, the purpose of the pilot is to gather empirical evidence to inform the debate on how our justice system can most effectively respond to cases of rape or attempted rape. It poses the question whether changing the decision maker improves the complainer's experience and removes barriers to justice.

Three working groups flowed from Lady Dorrian's work, one of which dealt with the pilot in particular. There are three broad strands to the purpose of the pilot and what it will elicit information on.

The first strand is how everyone involved, including the victim, the accused and the lawyers, perceives the pilot.

The second strand is the impact that the pilot has on the effectiveness and efficiency of the trial process. In some of my discussions with members of the legal establishment, they have spoken to the different atmosphere, tone and even skill set that is utilised when a case is made to a judge as opposed to a jury. Would that lead to more focused deliberations? Is such a process more efficient as well as more victim centred?

The third strand is the impact on outcomes. I am not going to prejudge the outcomes of any pilot. The word "time-limited" is there for a purpose. The pilot cannot go on in perpetuity. It would have to be evaluated and a report would have to be laid before Parliament. It would then be for Parliament to make a decision on whether there would be no further action, a continuation of the proposition or the development of another proposition. The proposition is for a time-limited pilot.

Russell Findlay: Is the Scottish Government's motivation behind the juryless rape trials to increase conviction rates?

Angela Constance: It would be wrong of me to portray those as a tool—a lever or a button—that can increase conviction rates.

I am on record expressing deep concern about conviction rates. We know that, over a five-year period, conviction rates for rape and attempted rape are at 46 per cent, compared with about 84 per cent for other crimes. When we disaggregate different types of rape cases, the conviction rate for acquaintance rape is, according to the Lord Advocate, around 20 or 25 per cent. There is a difference in conviction rates depending on whether the victim is an adult or a child. From memory, in relation to children, where there has been an offence under, I think, section 18 of the Sexual Offences (Scotland) Act 2009, the conviction rate is higher, at more than 70 per cent;

in relation to adults, where the offence is prosecuted under section 1 of that act, the rate is about 35 per cent.

I cannot be unconcerned about those rates. I must respect the independence of the courts and judiciary—indeed, I am under a legal obligation to do so—but I want to find the right way to tackle the issue and I want to look at the evidence without prejudging, because we cannot ignore those conviction rates.

Russell Findlay: That is one of the reasons, or the reason, for piloting juryless trials.

Angela Constance: The concern is not only mine: it is a concern for a number of well-respected legal people and for victims and witnesses groups. Much of the bill, including the pilot, comes from that place of concern about the consistently lower conviction rates for offences such as rape and attempted rape.

Russell Findlay: We have heard evidence about how the pilot will be assessed. Apparently, the only assessment measure will be conviction rates.

Angela Constance: No! I do not know where you got that impression. Sorry; forgive me—I was just—

Russell Findlay: It was in evidence that we heard yesterday.

Angela Constance: Sorry?

Russell Findlay: We heard evidence yesterday to that effect.

Angela Constance: You did not hear that from me.

Russell Findlay: No, not from you. The Scottish Solicitors Bar Association believes that that will be the only measure.

Angela Constance: I am deeply surprised by that. Just a few moments ago, you heard me speak at length to the convener. I outlined, admittedly in broad terms, what the evaluation would look at. It would look at outcomes and at whether there is a conviction or an acquittal, because those are outcomes, but there is so much more to the pilot.

I will be absolutely up front with you, Mr Findlay: I am not opposed to or anti juries. There is a real value to juries.

Russell Findlay: I am just amazed that the work has not been done in respect of existing trials. That is what surprises me.

Angela Constance: We have already addressed that today.

Russell Findlay: There has been talk of a boycott. Are you confident that the proposed new court would still be able to function if that came to pass?

Angela Constance: Let me be clear: I am absolutely determined to do better for victims and witnesses, but I also deeply recognise, respect and would seek to uphold the rights of the accused.

There is no doubt that people need representation. Any pilot would need solicitors to represent clients. What I will not do, bearing in mind that we still have a long way to go with the bill, is to turn up the volume on the debate.

Russell Findlay: I am not seeking to inflame the debate; I am just trying to assess the Government's confidence in the proposal. In evidence from the Scottish Solicitors Bar Association yesterday, and from others previously, a boycott was mentioned. What confidence do you have that the proposed new court, which will be introduced at great cost and with great effort, will be able to function?

Angela Constance: The proposed new sexual offences court is separate from the pilot. We still have to make a decision about whether the pilot will take place in the sexual offences court or in the High Court. I can talk about the thinking on that if time permits.

I deeply regret that some criminal defence lawyers feel so strongly that, at this time, they are talking about a boycott. I will continue to seek to engage as much as possible, and I will seek to work with people on the detail. However, with respect, Mr Findlay, a parliamentary process is going on, which, in my view, should be respected. A process of inquiry and scrutiny is taking place. I will not box myself or anybody else into a corner at this stage.

11:45

Russell Findlay: I would not expect you to.

In my previous question, I slightly conflated non-jury trials with the sexual offences court. Will accused people be compelled to take part in the juryless rape trial pilot, or will they be given a right to object or not take part?

Angela Constance: My view, and the view of Government and of stakeholders—notwithstanding the various views of those on the working group—is that no accused and no victim decides which court they appear in or which procedure they appear under. It may be the case that, when setting the criteria for the type of offence—for example, criteria could be focused on the single complainer, single accused and single act such as acquaintance rape—someone might dispute

whether their offence meets the category. There was certainly some discussion about that, but nobody gets—

Russell Findlay: The position is that no accused and, indeed, no complainer can choose their court, whether they are taking part in the pilot or not, and yet we heard from rape victims who—perhaps to some people's surprise—said that they would have preferred, and did prefer, having a jury. In that case, given the trauma-informed ethos of the entire legislation, would their views be taken into account?

Angela Constance: In the pilot, there would be no option for the accused to choose whether they participate; that would be clearly defined in the criteria. The question is whether the crime that someone is accused of fits the criteria for the pilot. On victims and witnesses, I was reflecting that, right now, across the piece, no one decides which court their case is heard in or which procedure is followed.

The point that you touched on is that, invariably, we cannot pigeonhole or assume that victims and survivors are one homogenous group who have one homogeneous view. I would never assume that; I understand that there can be different views. However, we have done work as part of the consultation on our proposals, and we have had engagement with victims and witnesses and groups who represent them—of course, the committee has also heard a lot of evidence—and I would point to the fact that, although there is not unanimous support for the proposition, there is good support for it.

Russell Findlay: In the bill as drafted, the accused cannot have any say about whether they take part in the pilot, and neither can the complainer, but that is open to some form of consideration. Is that a fair summary?

Angela Constance: No.

The Convener: That would be for the Lord Advocate to decide.

Russell Findlay: I do not know. It is pertinent to the bill, is it not?

Angela Constance: The point that I am making is that no one chooses the procedure or the court that they appear in right now; that decision is taken elsewhere.

Pauline McNeill: I want to examine how the single-judge trial would operate. You have had questions from the convener and Russell Findlay about how the pilot will be assessed. Will you publish what you are looking for? There is some confusion. At least three of our witnesses, including Professor James Chalmers, seem to think that you will measure conviction rates. It is not just the Scottish Criminal Bar Association that thinks that that will be one of the assessment criteria, but you have clearly said that it will not.

Angela Constance: No, no.

Pauline McNeill: But there is confusion around that. Will you publish—

Angela Constance: There clearly is confusion. I said to the convener that the evaluation would include outcomes—which, of course, would include the outcomes of trials.

Pauline McNeill: I see. You would evaluate conviction rates, in that case.

Angela Constance: Conviction rates will be recorded. That information will be gathered.

Pauline McNeill: That is where the confusion comes from.

Angela Constance: That information will be gathered. Information will be available in depth about the written statements. What I was refuting, Ms McNeill, was the suggestion that the only thing that would be looked at, in isolation, was conviction rates.

Pauline McNeill: Right, but you will look at conviction rates. That will be a criterion. The witnesses are correct, then.

Angela Constance: The conviction rate is one of many criteria, but it is not the only thing that we are looking at.

Pauline McNeill: What is the purpose of including conviction rates?

Angela Constance: We will want to look at the wide range of empirical evidence that is available. Why should they not be included?

Pauline McNeill: That is because that confuses people. You previously said that you are not trying to alter the rate of conviction but that you are trying to change experiences. That is what I had always understood. Since we do not have any criteria—am I correct in saying that, or could you republish them?—I do not know what the criteria for assessing the single-judge pilot is.

Angela Constance: There are two points to your question. What would be evaluated—the empirical information or evidence that is gathered—is about efficiency and effectiveness, experience and the outcome of the trial. Can we publish more detailed information on that? The short answer is yes. The working group worked on that information, and I will check in a moment on what we have and have not published. We published a fact sheet. I will ask Heather Tully to remind me of the detail.

Pauline McNeill: It would be useful to summarise that for the committee, Heather.

Angela Constance: The fact sheet did that, but I think that I am hearing that people want more detail to be made available, the proviso being that there is still no definitive—

Pauline McNeill: We want to understand what the assessment process is.

The Convener: Let the cabinet secretary respond.

Pauline McNeill: But she is not answering my question.

Angela Constance: I assure you that I am trying very hard to answer your question, Ms McNeill.

We can share new information or reshare information that has already been in the public domain, if that aids discussions and deliberations. That is not a problem. The proviso is that decisions are still to be made about the criteria and the time limit—for example, whether it is to be a year or two years—and about some of the processes around evaluation.

My views are emerging on much of that, including what should be in legislation—because more detail on the pilot could be put in legislation—so you will forgive me for also being keen to understand the committee's deliberation, in its stage 1 report.

I can share more information now. I am just highlighting that some decisions are not absolutely made yet, because further engagement is, I hope, on-going with people who have fundamental objections to the pilot. However, I am absolutely open to the suggestion that, if there is need for more detail in the bill, as opposed to leaving all the detail to regulations, which was the original plan, it will be anchored in the bill, then we would come back to Parliament with more detailed regulations.

The change will not happen without secondary legislation, but if we can anchor more information in the bill and make more information public, we will do that. Before the bill passes, and before we get to stages 2 and 3, we will have made more definitive decisions on the back of further consultation about the shape and size of the change.

Heather Tully (Scottish Government): I will build on what the cabinet secretary has said. She mentioned that the working group had set out three broad objectives for evaluation: to look at how the process of conducting single-judge trials was perceived by everyone involved in the process, to explore the impact on effectiveness and efficiency, and to consider the impact on outcomes. "Outcomes" does not just mean the conviction rate; it includes things such as early pleas and the point in the process at which those have happened. The working group felt that the first objective should have the most weight given to it, because the group's primary interest was in whether complainers' experiences were improved, so that was where it felt the focus should be.

On additional information, the working group published as an annex to its report a detailed list of questions that it suggested could be used in evaluating the pilot. We can make sure that the committee has a copy of that. That goes through possible research questions and methodologies for each of the three strands of investigation.

As the cabinet secretary has set out, there is obviously a balance to be struck between what is in legislation and what is not in legislation. For a research project, the typical approach would be that that was not included in legislation but that we would, as part of, or alongside, developing the regulations, work with stakeholders on developing a specification for the research. That list of questions, I hope, gives a good indication of the kind of issues that could be explored as part of evaluation, how we might look at each of the three strands and what questions might be used to try to evaluate the pilot.

Pauline McNeill: When you decide when to run the pilot and for how long, will you be absolutely certain that cases in which an accused person is convicted in a single-judge trial under a pilot—which I do not think is a great word; witnesses have mentioned that these are real cases, so it is not really a pilot, per se—will not be appealed on some human rights grounds? For example, if a pilot were to run for a year, other people would be tried for the same crimes with a jury either side of that year.

Angela Constance: I am confident that a pilot will be lawful, and I am confident that, as a Government, we will comply with the European convention on human rights. People have a right to a fair trial, but they do not have a right to a jury trial. I know that people have different views on that. Bear it in mind that single-judge trials are not unique to our current system.

On appeals, you might have heard me say that one of the strengths of a pilot is that written reasons will be produced. Under the current jury system, written reasons are not produced by a jury, and the option of juries writing their judgments was dismissed by Lady Dorrian's review. I know from engagement with other jurisdictions that there is real value in written decisions. They not only give us an insight and understanding into what has led to conviction or acquittal, but offer real transparency for the complainer and the accused. I argue that written reasons potentially enhance the rights of the accused. I cannot predict whether they will lead to more appeals from accused persons, but there is a real value in written decisions. They are used in

other jurisdictions, and I think that they are very valuable.

12:00

Pauline McNeill: I agree.

Lastly, I am trying to piece together the different legal forms, because they connect quite a bit. I take it that, if you were to set up a specialist court, it would be possible that a single judge would sit alone in a specialist court without a jury and with two verdicts.

Angela Constance: We have still to make a decision as to whether the pilot—if we call it that—would take place in the sexual offences court or the High Court. Let me run through the pros and cons of both. If we want the pilot to look more at how the current system operates in the High Court, we could do that comparatively quickly in the implementation process. However, there are advantages to the pilot taking place in the sexual offences court, because, given the wide-ranging nature of the reforms in the bill, their sequencing is very important.

When the pilot is evaluated, we want it to be a clear evaluation of the added value—or otherwise—of the pilot, as opposed to findings being more related to other reforms. Therefore, the phasing and sequencing of the different reforms is particularly important. Again, no final decision has been made, but we could, for example, start with the jury reforms and the abolition of the not proven verdict. The introduction of lifelong anonymity is fairly straightforward, but the sexual offences court is a bigger undertaking. We would probably want to phase that in as the court recovery programme comes to an end. The establishment of a court would take approximately 18 months. If we run the pilot in the sexual offences court, to which there are advantages, we would introduce the pilot at that point.

Pauline McNeill: I have a supplementary question. Given what you said about there being a lot of change and the fact that you want to compare and assess, would not it make sense to run the pilot in the High Court, because you already know how it operates? Rather than running the pilot in the specialist court that you would have just set up—and which you need to get right—would not it make sense for the pilot to be run in the High Court, so that you do not have to worry about the vagaries of a new system?

Angela Constance: The shortest way of putting it is to say that there are pros and cons. Bearing it in mind that there are many reforms, the advantage of running the pilot in the sexual offences court would be that that would give us other options regarding the nature of the pilot. If the pilot were to take place in the High Court, that would involve a single judge, whereas if it took place in the new sexual offences court, we might look at the option of having a panel of decision makers. That is what we are wrestling with.

Katy Clark: My first question was going to be very similar to the one that was asked by Pauline McNeill, so I will pick up where she left off. I was going to ask about how to evaluate a pilot with so little base data, and how that relates to the many and massive changes that the bill proposes.

As you know, one of the criticisms of the bill is that it might cause a range of big changes all at the same time. You have outlined that some of those decisions are still to be made, including on whether a pilot might take place in the new court, with some cases perhaps being within the pilot and others being outside it, or would happen after the abolition of the not proven verdict and the changes to jury majorities.

You have also not decided whether concurrent cases would be compared with one another or cases within the pilot would be compared with historical cases. We understand that there is very little data, but we have some—for example, about conviction rates in recent decades.

I appreciate that you are still thinking through much of that, but do you not think that Parliament should know which options will be taken forward? Do you not think that those decisions should be made during the passage of the bill and that, given the significance of many of the changes, Parliament should be very clear about which proposals will be taken forward?

Angela Constance: I do think that. It has always been my intention that Parliament will know that as we progress, and following deliberation by the committee. There is a bit of a chicken-and-egg scenario, here. It is appropriate for me to canvass a full range of views and insights. Fundamental decisions about how the pilot will operate will have to be made in the not-too-distant future. That will certainly happen before stage 3. I hope that, before stage 2, I will at least be in a position to give more definitive detail about our thinking and the direction of travel, rather than just giving options.

Katy Clark: Are you saying that the committee's views would be taken into account? I am not saying that you would necessarily agree with those views, but would you consider them?

Angela Constance: Of course.

Katy Clark: Based on her research, Professor Cheryl Thomas told us that jury conviction rates for rape cases in England and Wales ranged from 65 per cent to 91 per cent, depending on the age and sex of the complainer, whether the offence was historical and a range of other factors.

Yesterday, the Scottish Solicitors Bar Association told us very clearly that solicitors do not feel that the many issues affecting rape cases are necessarily due to use of juries. Rape survivors who have spoken to us have not raised the issue of juries. I appreciate that there is not one view and that different people have different experiences, but the main issues that rape victims repeatedly raise when they speak about the re-traumatising effect of the process are how they are treated, the massive problem of delay in the system—which also relates to the issue of the floating diet—and outcomes, including whether there is a conviction and what the sentence is.

Do you accept that survivors, victims and complainers do not seem to identify juries as being a significant problem, but that other issues and concerns seem to be raised repeatedly?

Angela Constance: Juries are at the core of decisions to convict or acquit, or to use the not proven verdict. You, as I have, will have heard victim testimony about conviction rates and other matters. You will have heard the very strong views of victims and victims organisations about the not proven verdict. The role of juries is integral to that, so I do not accept the narrative that juries are removed from the picture.

I accept that, in responding to low conviction rates or the support for and experience of victims, there must be a whole-systems approach—an end-to-end justice journey. I have never argued against that. The police have made changes to how they investigate. No one is suggesting that anybody's journey in that regard is over.

With regard to specialisms and prosecuting, again I note that the journey is never over. My challenge has always been that we, as parliamentarians, must avoid the situation in which part of the justice system says, "Actually, the problems don't rest with us. They rest elsewhere", when in fact the problems exist throughout the system.

In relation to what you said about conviction rates at the start of your question, Ms Clark, it is greatly frustrating to us all that comparing different jurisdictions' conviction rates is deeply problematic: data is recorded differently and conviction rates are measured differently. There was an excellent report by the UK Government in 2021, "The end-to-end rape review report on findings and actions". The Government actually apologised to victims and witnesses for their experiences.

The number and quality of cases that actually get to court have a huge bearing on conviction rates. In England and Wales, we have seen a drop of nearly 60 per cent in charges and prosecutions. Committee members might have seen, in the debate south of the border—I am narrating, not passing comment—that some senior police chiefs have been saying that cherry-picking goes on among prosecutors. I am pointing out the fact that we need a whole-system approach but that we are, right now, focused on this part of the system.

Katy Clark: I understand that, and that there are different criteria for taking cases forward in England and Wales. In Scotland, the decision is based on whether there is a sufficiency of evidence. The view is that conviction rates for rape in Scotland are too low, compared with other crimes; notwithstanding what the Scottish Solicitors Bar Association said yesterday in relation to, for example, murder cases, rape conviction levels are an outlier compared with other offences.

You have said very clearly that you are abolishing the not proven verdict not just to increase conviction levels, and in changing jury size, you are trying to fix the system so that it does not have any impact on conviction levels. Surely, though, we should be looking for a system in which there is a higher conviction rate in rape cases, given that there is sufficient evidence to convict. Those cases have been marked in the same way as any other case would be marked, on the basis that the Crown believes that there is sufficient evidence to convict.

Angela Constance: I most certainly believe that we cannot walk away and ignore conviction rates. We need a system in which we can all have absolute confidence. The consistently and comparatively low conviction rates for particular sexual offences, particularly where the victim is a woman, should cause us all great concern and puts a dent in the confidence that we can have in the system.

12:15

As I have said, there is no quick button that we can press or lever that we can pull here. Nobody here wants to interfere with the independence of the courts and the decision makers. However, we have legitimate grounds for inquiry in relation to the pilot. Other reforms in the bill are highly germane to giving confidence to the system and to giving victims and witnesses the confidence to come forward. However, in relation to the pilot, we have very legitimate grounds for further inquiry.

That is what the pilot is about—not ignoring low conviction rates but recognising that the cases in question are complex and are among the most sensitive and difficult in terms of their outcomes and their devastating lifelong impact primarily, but not exclusively, on women. There is a fundamental question about access to justice for women. Why would we not invest ourselves in further inquiry in

that process, given that the case has been made for that further inquiry?

Katy Clark: Do you see success—or a major factor of success—as being higher conviction rates for rape? If the pilot led to higher conviction rates, would you see that as a successful outcome?

Angela Constance: It is not the only outcome. I am sure that I am not alone in wanting to improve access to justice for women, girls and other victims of the most heinous offences, which have lifelong consequences. We all share that.

Katy Clark: If the pilot led to fewer convictions, would that be seen as a failure?

Angela Constance: I have outlined—

Katy Clark: I am quite happy to have a yes or no answer. What do you see as success and failure?

Angela Constance: It is not binary. I understand why you are pressing me, but it is not binary. Of course I want more women to have the justice that they deserve but, as I have outlined—

Katy Clark: If the pilot led to lower conviction rates, I would see that as a failure. I wonder whether you agree with me on that.

Angela Constance: We do not want to turn the clock backwards, so yes, we need more justice for more women.

John Swinney: Katy Clark referred to a number of issues about the conduct of trials that were raised with us by victims during our evidence taking. A point to which Katy Clark did not refer, but I certainly will, was the conduct of the defence. An interesting point in the evidence that we heard from Simon Di Rollo was his belief that, if a judge presided with no jury, the tone and atmosphere of the court would become less prone to theatrics, with a more considered focus on the evidence. Does the cabinet secretary believe that that is an important consideration in addressing the experiences of complainants? Will that enable them to have confidence that the conduct of a trial in a judge-only pilot will most definitely be trauma informed and will perhaps provide a greater opportunity to consider dispassionately the evidence that is put in front of the court?

Angela Constance: I very much agree, Mr Swinney. There are benefits in taking a more inquisitorial approach as opposed to an adversarial approach. As I alluded to earlier in the proceedings, I have spent some time engaging with other jurisdictions. I am not for a minute suggesting that a lift and shift can be done from one jurisdiction to another, but valuable learning and reflection can always be gained from experience elsewhere.

Many comparable jurisdictions have a more inquisitorial rather than adversarial approach. Given that such cases can be evidentially challenging, they need a particular approach, and the intention of the pilot is to ascertain whether a change in the decision maker will lead to better outcomes. Will more women get justice? Will the process be fairer for all involved including the accused, as well as the victims and witnesses? Will it be a better way of conducting affairs? Will it use resources more effectively? I have always been persuaded that a more inquisitorial approach is worthy of consideration, particularly in what are sensitive, complex and sometimes evidentially challenging cases.

I must also recognise, from my engagement with criminal defence lawyers, that the proposals mark a big change for people. Someone who has spent all of their career presenting evidence to persuade a jury might well find the change quite difficult. I have heard Simon Di Rollo talk about a different skill set being involved in persuading either a single judge or a panel of judges. I acknowledge that change can be difficult, but I stress that we are talking about a pilot, and we need minds to be engaged on it, because the fact is that we are collectively failing people, primarily women and girls, and I think that we all agree that we want to do better.

We need to find a way to bring as many people as we can on board with the proposition of a pilot. I give the committee the absolute assurance that we will do whatever we can to provide more detail and clarity on key decisions at an earlier stage.

John Swinney: What significance does the cabinet secretary attach to the provision in section 65(5), which specifies the necessity for written reasons to be provided by a presiding judge in such circumstances? It strikes me that such a provision provides some foundation for long-term developments in the approach to prosecuting sexual crime. There will, for everybody concerned, be a greater distillation of the analysis of the case and the evidence that can be scrutinised as a consequence of written reasons being produced by a presiding judge in those circumstances.

Angela Constance: I think that there is huge value in having written reasons, for the reasons that I outlined to Ms McNeill earlier. For a start, such a move will provide an unparalleled quality of deliberative information. The provision of written reasons as part of the pilot, together with transparency for victims and safeguarding the rights of the accused, will give us an unrivalled opportunity to gather better evidence about what the real issues, deliberations and challenges are. It will give us information that we cannot, with the best will in the world, gather in any other fashion.

Fulton MacGregor: I must apologise in advance, cabinet secretary. Because of the fullness of your answers so far in this evidence session, I run the risk of asking you questions that might prompt you to repeat yourself.

You have talked a lot about the various opinions on juryless trials, and we have seen a variety of opinions among victims who have experienced the court process. When you assess the pilot—assuming that it goes ahead—what weight will you give to such questions? The people in the pilot will not have had experience of a jury, but will you be making some comparisons to identify those areas where victims and witnesses felt that one system was better than the other? I ask that, because one of the victims said that they would prefer to have a number of people involved in their case instead of just one. How will that be filtered into the review of the pilot?

Angela Constance: A major part of the evaluation will look at the experiences of everybody involved—that is, lawyers, victims and the accused—and I am sure that the judiciary will also have their own reflections. It is important that we gather the views and the experiences of everybody involved, and it is imperative that we do so in a rounded way. I hope that that answers your question.

Fulton MacGregor: Yes, I think so.

You might not be able to answer this, but how close do you—or the Government—feel that a pilot is to beginning, after the bill as currently drafted is passed? What is in the Government's mind about that? Is it considering any dates or timeframes?

Angela Constance: As I have said, I hope to come back to the committee with further clarity on implementation and sequencing. On balance, my preference right now—and I am not closed to other representations—is for the pilot to take place in the context of the sexual offences court, partly because it might give us further options to have a panel of decision makers rather than a single judge.

Perhaps I can reflect briefly on some of my European engagement. I have already visited the Netherlands and Germany and, in the not-too-distant future, I will be going to Norway. I stress again that we cannot do a lift and shift from other people's jurisdictions, but one of the reasons for Lady Dorrian's focus on a single-judge pilot in her review was that it was not novel to our system. Our system is quite hierarchical, and there is not an endless supply of judges. When I visited other jurisdictions, I saw that they had flatter systems with many more judges. In the Netherlands, for example, I met a lot of judges who were younger—I hope that the lords and ladies will not mind my saying that. The diversity issue that they have in the Netherlands is that 75 per cent are women; however, it has a bigger judicial resource, because its structures are flatter.

When I met judges in the Netherlands, I found that there are single-judge trials, but for the most serious cases, there is a panel of three. That would be challenging in Scotland, given that we do not have an endless supply of judges. Other countries have mixed panels of judiciary and lay representation. However, when I engaged with the judges from the Netherlands, they spoke to the value of having peers and colleagues involved in the process of deliberation and in writing up written judgments. I am in favour of a time-limited single-judge pilot, but if we are talking about the sexual offences court, where there will be judges, temporary judges, sheriffs and principal sheriffs, we might have the option to have a pilot involving more than one decision maker.

I hope that I have not pre-empted any of my thinking on this, because our own conclusions have still to be completed. As with any proposition, there are things that you need to work through properly. I want to make it clear that I am absolutely in favour of a pilot of single-judge trials, but there might be other options that we could explore.

12:30

Fulton MacGregor: Given that there is more work to be done around the modelling of the pilot, which you have articulated well, and given all the factors involved, will there be an opportunity, assuming that the bill is passed, for all stakeholders—those who are supportive and those who have expressed concern—to come together to find a pilot process that at least tries to meet some of those concerns? Can the bill be amended to make that point and ease some of the concerns, given that there seems to be a 50:50 split on the proposal, even in Lady Dorrian's review group?

It feels as though single-judge trials could work and could be good, but perhaps the period between the passing of the bill and the implementation of the pilot should be seen as an opportunity to bring people together. Indeed, the bill says as much just now, and the defence lawyers and other folk who have raised concerns could have an opportunity to engage at that point. Have you thought about that? Could that be done?

Angela Constance: I want to build as much consensus as possible, because that is in the interests of our justice system and of victims, witnesses and the accused. I have spoken on that point at length.

Fulton MacGregor: I have one more question, convener, if that is okay.

The Convener: I will bring in Sharon Dowey and come back to you if there is time.

Fulton MacGregor: That is no problem.

Sharon Dowey: I might already know your answer to my question, given your previous comments. At the moment, juries are being directed by the judge on rape myths. There is also the Lord Advocate's recent reference to that. We have not yet been able to assess the impact that that has had or the outcomes—we do not have any details on that—and we are now proposing huge changes to the judiciary. Again, it will be a long time before we manage to assess the impact and outcomes of all those changes.

Given that there is a lack of clarity about the pilot process—as we have said, it is not really a pilot, because it involves real lives, real cases and real outcomes—would it not be better to remove section 6 of the bill, wait until we have done a full assessment of the outcomes of all the other things that the bill will implement and then bring the pilot process back through clear legislation, rather than bringing it in through secondary legislation?

Angela Constance: We will bring forward clear legislation. Obviously, the bill is at stage 1; stage 2 and stage 3 are yet to commence. I dispute aspects of Ms Dowey's proposition, but I am not about copping out. You will have heard the phrase, "Now is the time, now is the hour". We have decisions to make, and I do not think that we should be kicking difficult decisions down the line. There is evidence on the prevalence of rape myths in society and of how they impact on juries. We have discussed at length the lower conviction rates for rape, compared with those for other crimes. We have discussed the fact that there is an entirely legitimate and pressing need for further examination. Why would we kick that further down the line? Yes, there is always work to be done and we always need to work through the detail, but I am not prepared to kick things down the line.

We have an opportunity here and now to make seismic change through the bill as a whole. The pilot is one part of that, but the inclusion of the pilot in the bill says that we are not about to walk away from difficult issues. We are not prejudging the pilot, but we are prepared to invest the time, work and resources to tackle difficult issues that we are nowhere near to resolving. We should not be walking away from victims or difficult issues. We need to be focused on that now. That is what I and the Government are focused on, and I am quite sure that the committee is also focused on what we need to do now.

Sharon Dowey: I do not see it as kicking anything down the line; I see it as ensuring that we have all the evidence that we need to make the right decision so that we do not have bad legislation. We all want what is best for victims and we do not want miscarriages of justice, but the evidence that we have already heard has been contradictory and dependent on who was giving it. We are hearing both sides of the story.

We do not want to put something in place that will affect someone's life. There will be real results and a real verdict. Someone could be found guilty or not guilty during the pilot. That is different to the research on juries, which was done with mock trials and not in real life. We have looked for evidence about the use of the not proven, guilty or not guilty decisions in real trials, but we do not have that evidence.

We do not want to make a poor decision now, when we do not seem to have the backing of many of the judiciary and when even victims are saying that they do not support juryless trials. We want to ensure that we make the right decision. Why did the Scottish Government suggest that when it is not in the bill? Why would it be brought in through secondary legislation? It feels to me as though there is a rush to include it in the bill, which is a massive one that could have been broken down into smaller chunks.

Angela Constance: The issues that we are wrestling with here and now have been around for at least 40 years. If we do not grasp those difficult issues, we will be kicking the can for another 10, 20, 30 or 40 years, and I am not content with that.

On secondary legislation, it is not unusual for detailed research, a proposition or something very specific to come in at a later stage through regulation. Such regulation often allows for more in-depth consultation and analysis. I have been transparent—and I might be accused later of being overly transparent—about my thinking, about the direction of travel on amendments and the pilot and how it might affect the bill.

We have overwhelming evidence that rape myths are a factor and that they influence decision making. I know that there is not unanimous agreement and I would never expect to find that among academics, just as I would never expect unanimous agreement within the legal profession or among politicians. Legislators are meant to take everything in the round. I am not going to cherry pick or play one piece of evidence off against another. Much of the evidence from the past 20 years is overwhelming that rape myths can feature in jury trials. We should not ignore that. There will be more than one solution to it, but we have a duty to explore the benefits of all the tools that are available to us.

Sharon Dowey: If we are not going to pause to take account of the effect of all the other things that we have implemented, why is the detail of the

pilot not in the bill? Why is that coming in secondary legislation?

Angela Constance: With respect, I have answered that. It is not uncommon for secondary legislation to flow from any piece of primary legislation. I have already given a commitment, in response to what I have heard not only from this committee but elsewhere, that there will be more detail in the bill.

Sharon Dowey: Will that not be seen as rushing or as trying to avoid scrutiny?

Angela Constance: I do not think that is avoiding scrutiny.

Sharon Dowey: I would like to scrutinise the detail about the pilot, but we do not have that detail.

Angela Constance: With respect, I have outlined lots of detail today, notwithstanding that people seek further information. We have also published a lot of information, I might add. We will always endeavour to be as transparent and timeous as possible in conveying the decisions that we have to make and will make.

The Convener: We have had a long session, so I will move on to the other parts of part 6, on lifelong anonymity for survivors and independent legal representation.

Katy Clark: I have spoken to the cabinet secretary previously about independent legal representation beyond what is proposed in the bill. Given that she has been to Norway and various other jurisdictions that have more extensive rights of advice and representation for victims, has she any reflections on that?

Angela Constance: I have not been to Norway as yet.

Katy Clark: But you will go there.

Angela Constance: I have been to the Netherlands and to Germany. In Berlin, I had the opportunity of meeting victims' lawyers, among other representatives of the judicial system. That was very informative.

What is currently proposed for independent legal representation has centred around the section 275 process. I am committed to its being implemented in a way that is a foundation for future potential change. Bearing in mind the committee's correct focus on deliverability and implementation, my focus is first and foremost on what is proposed in the bill. However, I am conscious that Katy Clark and other MSPs are actively engaged on that issue.

Katy Clark: As the convener is aware, last year we heard from a lawyer from Norway, who was over in the Parliament. She was previously a defence agent but is now employed full time as a representative of victims. That system has developed in Norway in the past 50 years. When the cabinet secretary is in Norway, is it possible—obviously, it will depend on the rest of her commitments—for her to look at that system, to see whether anything can be learned?

Angela Constance: I would love to do that.

Russell Findlay: Everybody seems to support independent legal representation for rape victims in principle, but there are very detailed and specific concerns about how it will work in practice. The Crown Office submitted four pages of concerns. The courts, the Law Society of Scotland and the Scottish Solicitors Bar Association have all raised concerns. Those concerns are more about practicality and how it will inevitably lead to more delays in the system, which will be contrary to the interests and wellbeing of complainers. Lady Dorrian said in her evidence to us that the bill, as drafted, needs to be streamlined in that respect. What exactly is the Scottish Government doing, practically, to address all that concern?

Angela Constance: There are two issues. I note that Lady Dorrian also said that, if people stick to the timescales, there should not be any undue impact from delays.

She also gave a commentary on the disclosure process, and I note that others shared her views. I confirm that we are looking to use amendments to simplify that area. As envisaged, the process has the Crown Office applying to the court to release information to the victim's representative. That process could be more efficient and abbreviated. There was some suggestion that, bearing in mind the scope of a section 275 application, which is very clear about the evidence to be shared, the Crown Office should not need to go to court.

12:45

Russell Findlay: A section 275 application can be made during a trial, and concern was expressed that that could cause a trial to halt while the application was addressed. Has that been looked at specifically?

Angela Constance: It has been looked at, and, again, the timescales are very specific. In the current system, various processes and actions have to take place in not less than seven days or not less than 14 days. In relation to enabling—we all recognise that the complainer would need time to appoint representation and so on—some of those processes would go to not less than 21 days.

There is an overarching timeframe. Committee members such as Ms Clark will probably be more

in and around the detail from a practice point of view, but some overarching processes have to happen within 28 days in the context of a trial.

Russell Findlay: All of that makes sense when it is a preliminary hearing in advance of a trial, but there is still an issue about how that will be addressed during proceedings. Whatever the timescale, if a section 275 application is made during a trial, the complainer will have to seek legal representation and then to go through that process. That will, by its nature, cause the trial to stop while that happens.

Angela Constance: Some aspects of the issue are about court processes. I have indicated that we will lodge amendments on and around that, but there are other aspects around ensuring that people and resources are available for people to access independent legal representation.

Jeff Gibbons, is there anything that you would like to add in answer to Mr Findlay's question?

Jeff Gibbons (Scottish Government): First, the provisions as drafted in the bill were developed with stakeholders, so those concerns emerged as we walked through the process. We have tried to reflect some of the issues that Mr Findlay quite rightly raises. A key focus was always on how to manage a new intervention in the criminal justice process and the impact that it would have on timescales, recognising the person-centred trauma-informed approach. We have been looking at that closely.

There will be a number of iterations of the operational process as we walk the provisions through with operational partners, particularly the one about disclosure. The initial view was that that would best be led by the Crown Office. In retrospect, however, we think that it should probably rest with the independent legal representative. Again, we need to measure the impact that it would have on the role of the ILR.

Russell Findlay: Presumably, that work will also include assessing the effect of the intervention on the ILR.

Jeff Gibbons: Absolutely—the full process.

Russell Findlay: Will the ILR just be there to sit beside a complainer and have no meaningful input other than to advise them? We do not know whether the court has to take heed of anything that they say or whether the judge has to assess that.

Jeff Gibbons: Enabling sufficient time for the ILR to undertake their role is key for us as we work through the timeframe.

Pauline McNeill: I agree 100 per cent with the cabinet secretary about the need for change and I am with the Government on what it is trying to achieve. However, among some of the things that survivors and complainers have said would make a difference, we have aired the difference that independent legal representation might make to complainers who have felt that their voice is not heard at the preliminary stage and that there is no one to defend their interests. I therefore welcome what the cabinet secretary said.

A lot has been said in evidence and at our round-table sessions about the notion of a single point of contact. In my mind, changing practice is probably as important as changing the law. We have heard positive stories, and a lot of horrific stories, and the positive ones seem to turn on those complainers getting proper access to their advocate depute and understanding how the trial will be run. I realise that there is only so far you can go with the matter, but a lot of victims say, "I did not get to tell my story in court. I do not understand why the advocate depute did not ask me what I thought was a critical question." I am sure that there are good reasons for that.

Are you willing to explore changing the experience for all complainers and victims? How can we ensure that every victim gets access to their advocate depute before the trial?

Having a single point of contact has a lot to do with changes to court venues and other practical things, such as where and when someone's case will be heard. As for the relationship with an independent legal practitioner, perhaps someone who is legally qualified is the best person to be that single point of contact, as they know the court process.

Angela Constance: As anyone who has been through the trauma of a sexual offence goes through the criminal justice system, they encounter decisions that are not in their gift or are outwith their control, such as which court the case goes to and what process is applied. We must be open to choice on some matters. You will have heard many examples that support the move towards prerecorded evidence, but some victims might want to have their day in court, and having that sense of control and choice can be imperative to recovery.

Your point about the single point of contact is well made, and I am cognisant of the difference between independent legal advice and independent legal representation. Do you want to add anything that might be useful to Ms McNeill, Jeff?

Jeff Gibbons: I would reflect back to the original consultation document, which informed development of the provisions on ILR. A lot of the commentary from many respondents concerned improved communication, awareness and engagement, which are very distinct from the

concept of ILR as envisaged by Lady Dorrian. We feel that we can explore that area with the Emma Ritch law clinic and others as we move in parallel with the work on delivering the ILR model, while also considering the evidence base for whether to extend ILR beyond that.

There is still a bit of work to do with lived experience to be clear about expectations, but the focus has been on feeling part of the process, as opposed to introducing something new. It has been more about existing services and potentially improving service delivery.

Pauline McNeill: That is helpful.

Angela Constance: It was remiss of me not to mention the work of the victims task force, which is very much focused on the quality and nature of communication, whether verbal or written.

Pauline McNeill: I have dealt with many families who felt similarly about murder trials, in that they had the same feeling of exclusion. That is not particular to rape trials.

We have heard the Lord Advocate say that she is very particular about changing the practice, and I see a drive behind that. That is good. However, Lord Advocates change and, in time, another Lord Advocate may take a stricter view about access to ADs and so on.

I will leave you with this thought. Is there any way in which you could enshrine that right of access to advocate deputes in some way? I do not need an answer to that just now, but this worries me: we are beginning to see chinks of light, which is really good, but that needs to continue—and the law is a tool. I was just wondering if you could consider how we could hang on to that right.

Angela Constance: It is about embedding the best of practice. Of course there always needs to be flexibility for individual circumstances, and we will take away Ms McNeill's thoughts on the matter.

Pauline McNeill: Thank you.

The Convener: I have a final question on the proposals about anonymity for victims. The written and oral evidence that we have received indicates that there is significant support for victims of sexual offences to have a statutory protection of their anonymity. Some issues were raised in relation to that, however. One question was whether protection of anonymity should extend beyond the death of a victim, and it was coupled with a right for family members to waive that. Can the cabinet secretary respond to that point?

Angela Constance: That is another area of great complexity and sensitivity. On one hand, we do not want victims to feel that they are being forced into anonymity, which goes back to the point about choice and control. On the other hand, I am also conscious that, for loved ones who are left behind, there can continue to be traumatic and on-going intrusion. It is therefore a complex and difficult issue.

The starting point is that a person's general data protection regulation rights to privacy expire on their death. Therefore we are not talking about changing or making a wee tweak in one bit of legislation. However, we have started the process of considering the matter, following representations that I and others have had from victims organisations. I have also discussed it with Dr Andrew Tickell, whose evidence the committee has heard.

We are also considering the experience in other jurisdictions. It is an area in which we need to proceed with great care. We do not want to criminalise families who want to speak and give testimony to the loved one whom they have lost, and who might also want to be critical of the justice system, the court process or the sentence. A lot of lessons can be learned from other jurisdictions—for example, from the state of Victoria in Australia and from Ireland—that have gone down one road towards legislating on anonymity continuing beyond a victim's death, and then, on the back of further representations from victims, they have had to revisit all that.

Members will have seen—as have I—Dr Tickell's written correspondence with the committee. A week or so ago, I wrote to this committee and also to the Education, Children and Young People Committee, which has been considering the Children (Care and Justice) (Scotland) Bill.

As regards finding a way forward, I have made a few commitments. The first is that I will not make false promises on the issue. There is no way that I would make such promises to victims and then have to make a big retreat. I just will not do that. However, I can commit to genuinely engaging with the issue, while acknowledging that it is not an easy one.

We will hold a round-table meeting on 20 February. I know that invitations have gone to members of the committee who are spokespeople for their parties. That meeting will involve a wide range of stakeholders, including people who might have a view on the issue from a press perspective, legal experts—for example, Dr Tickell has been invited—and victims organisations.

I have also had my own engagement with people who have been affected by the greatest levels of intrusion. We will undertake further engagement that will focus on families, in which we will explore with them their views on how we could overcome the various difficulties. For

example, a set of parents might have differing views on whether anonymity should be waived. That is a live issue in today's world. There is a whole host of other complexities.

While making absolutely no promises, I want to empower people who want to speak, but protect the privacy of those who are left behind.

The Convener: Thank you for that comprehensive response.

We will bring our session to a close. I thank everyone for their forbearance. I might incur the wrath of members in doing so, but, before the cabinet secretary leaves, I ask whether she wants to add any final comments, either on the parts of the bill that we have looked at today or on parts 1 to 3.

Angela Constance: No, other than that I look forward to reading the committee's stage 1 report and to the debate that will be held in due course. I have no doubt that the committee will provide further food for thought on how we might achieve the very best of legislation for victims, both here and now and in the future.

The Convener: I thank the cabinet secretary and her officials for attending.

That concludes the public part of our meeting. We will now move into private session.

13:00

Meeting continued in private until 13:18.

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