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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 16 November 2010

Session 3

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JUSTICE COMMITTEE
31st Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

*Claire Baker (Mid Scotland and Fife) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Patrick Layden QC (Scottish Law Commission)
Michelle Macleod (Crown Office and Procurator Fiscal Service)
Scott Pattison (Crown Office and Procurator Fiscal Service)
Gertie Wallace (Crown Office and Procurator Fiscal Service)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 16 November 2010

[The Convener *opened the meeting at 10:02*]

Subordinate Legislation

Criminal Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/377)

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I get the meeting under way with the usual reminder to ensure that all mobile phones have been switched off. We have full attendance this morning and therefore have no apologies.

The first item is consideration of a negative Scottish statutory instrument. As members will see from the cover note, the Subordinate Legislation Committee has not drawn any matters to the Parliament's attention. If members have no comments, are we content to note these amendment regulations?

Members *indicated agreement.*

Double Jeopardy (Scotland) Bill: Stage 1

10:03

The Convener: This morning's substantive item of business is our first evidence session on the Double Jeopardy (Scotland) Bill, which has been introduced by the Cabinet Secretary for Justice. Because of the tight timescale for consideration of the bill, it has been necessary to arrange this evidence session before the deadline expires for the committee's call for written evidence, which runs until 30 November.

I welcome to the meeting our first panel of witnesses: Patrick Layden QC, solicitor, and Alastair Smith, project manager, both from the Scottish Law Commission. I invite Mr Layden to make a short opening statement.

Patrick Layden QC (Scottish Law Commission): The Scottish Law Commission is always very pleased to see its reports reflected in legislation and is grateful for the opportunity to give evidence.

Although the bill largely reflects the recommendations in the commission's report, it is framed slightly differently. I wish to highlight certain points of difference, three of which are relatively minor.

The first relates to admissions made before or after acquittal, which are covered in section 3. When we investigated the matter, we found a strong body of opinion that admissions allegedly made by the accused should be put into the same category as other new evidence. We decided to suggest that they should be treated separately, partly because we could see a distinction between them and a straight new-evidence exception. At that time we had not decided, and made no recommendation, on whether there should be a new-evidence exception, but the Government has put such a provision before the Parliament, and we accept that things are going that way.

If that is the case, there is little logic in leaving admissions out of the ordinary new-evidence exception. If the provision is to be extended to include admissions made before as well as after the acquittal, there is no logic at all in treating admissions as anything other than another type of new evidence. We suggest that the admissions exception is put into section 4 with the other new-evidence exceptions.

The second point relates to section 4(5), which states:

"Only one application may be made under"

the new-evidence exception rule. There is no similar provision in relation to the admissions provision in section 3. If our suggestion is followed and admissions go into section 4, there will be no problem. However, if the Parliament decides that admissions will stay as a separate category, we suggest that there should be only one bite at that particular cherry. If a chap turns up and says, "The accused told me that he did it", that may or may not justify a second trial, but it should justify only one further trial and no more.

Thirdly, with regard to what is now section 12, we suggested that where the prosecutor took the view that previous proceedings had been a nullity, he could still get the court's agreement to that proposition before starting new proceedings. We thought that that was very unlikely, but we included the provision for the sake of completeness.

Section 9 of the bill goes even further. It provides for a situation in which the previous allegedly null proceedings took place abroad and the Scottish prosecutor did not know that they were null. That seems to be a complication too far. If such a contingency was ever to occur, the court already has the discretion under section 7(4) to allow the trial to go ahead. We suggest that section 9 is simply unnecessary, overcomplicates the legislation, and should be removed.

My principal point relates to retrospection. The Scottish Law Commission, as I said, was undecided on whether there should be a new-evidence exception, but we were strongly of the view that if such an exception was to be introduced, it should not be retrospective.

The reason for that, apart from the general rule about not making criminal legislation retrospective, is that there are currently people in Scotland who have been tried for and acquitted of crimes. Those people have a right, which is recognised by and enforceable in the courts, not to be tried again. They are different from the rest of us. If a crime is committed in Scotland and every person in Scotland is notionally liable to be tried for that crime, they are at present only liable to be tried once. After they have been tried once, they cannot be tried again.

That is a real right that those people have. They are innocent people: they have had a full, proper trial according to the rules of evidence and have been found not guilty. They currently enjoy a right that is set up by the courts in the teeth of opposition from the executive, and if we make the provision retrospective, we take that away. According to our brief survey of the statistics, 1,500 people have been acquitted since 1998 of the sort of crimes that are mentioned in schedule 1 to the bill. Those people all have that right, and the legislation will take it away from them.

The reason for that, we are told, is that this is the area in which it is said that the police and prosecutors may be able to reopen cases in the light of advances in technology. People talk about DNA and so on. Where physical evidence is retained, it can be re-examined in the light of scientific advances. When DNA became a useable technology, it was possible to re-examine blood and other samples in unsolved cases and compare the results against the developing national database. That was how Angus Sinclair was convicted in 2001 of the rape and murder of Mary Gallacher, which happened as long ago as 1978. It is an extremely useful technology.

When a crime is unsolved and there has been no trial, the police keep the physical evidence as a matter of routine so that it is available if and when more evidence more turns up. However, we checked with the Crown Office, which confirmed that where there has been a trial and the accused has been acquitted, as a matter of routine the physical evidence is thrown away. There is no point in keeping it. Therefore, it does not matter what scientific advances there may be. Where someone has been acquitted, no physical samples are available for testing. Making the exception retrospective will have no practical effect. No doubt the Crown Office will be able to tell the committee how it intends to deal with that matter in future, but as far as the past is concerned, there is no evidence. Not only is there a strong, principled objection to making the legislation retrospective, but retrospection will not achieve any noticeable practical effect.

We raised in our discussion paper the question whether anyone knew of any cases in Scotland that might be reopened if the legislation were passed and made retrospective. The police, the prosecutors and the judges were not able to think of a single example. So far as I am aware, that remains the position today.

That concludes my opening statement. If there are any questions that we can help with, we are at your disposal.

The Convener: Thank you, Mr Layden. There are indeed a number of questions, some of which you anticipated in your opening statement.

Patrick Layden: Good.

The Convener: Is it the case that you do not see the need to replace the current common law with a statutory one, except under certain headings?

Patrick Layden: No. We considered that there were various infelicities—various unclear areas—in the law and that it made sense to restate the position in statutory form. We are entirely persuaded that it is right to restate the rule in statutory form. We had differences about whether

that should extend to new evidence or any exceptions, but we were quite clear that it was a good thing to put this into statute.

The Convener: You dealt earlier with the practical impact of that, which is what we had been going to ask you about.

Dave Thompson (Highlands and Islands) (SNP): Will you explain why we need to have in the bill both the core rule against double jeopardy and the broader principle about unreasonably splitting cases?

Patrick Layden: You need them both because it is possible to charge a number of offences on the basis of the same facts. One of the cases that we looked at involved a chap who was found walking along the road with a dead hare in his hand. He was charged with poaching because the inference that the court was asked to draw was that he must have got the hare illegally on one of the estates on either side of the road. However, he was found not guilty. He was then charged with being in possession of a hare without a game licence. The facts were precisely the same. He was on the road, with a dead hare, and no licence. He was effectively tried twice, on the basis of the same set of facts. The more general rule is meant to prevent the Crown from having one shot one way and, if that bounces, having another shot another way.

Dave Thompson: So it is basically to stop any manipulation of the system by the Crown.

Patrick Layden: Yes. The legislation is all about protecting the citizen.

10:15

James Kelly (Glasgow Rutherglen) (Lab): Section 11 deals with circumstances in which a lesser charge than culpable homicide or murder has been brought, and the victim dies subsequent to trial proceedings. Current case law seems to confirm that a subsequent charge can be brought for murder or culpable homicide when the victim dies. You took the view that that should happen only when proceedings for the lesser charge result in a conviction, and that if there has been an acquittal, it would not be relevant to start another case.

The Government goes further than that in section 11. It seeks to allow subsequent retrials when there is either an acquittal or a conviction. How did you arrive at your decision to move away from the existing position in law? What is your view of how section 11 of the bill has been drafted?

Patrick Layden: We accept that there are two views on the matter. Both stem from the legal position that murder is treated as an entirely separate offence from any other kind of assault. We could treat all physical violence as if it goes up an ascending scale that goes from bumping into someone in the lift, to hitting him with a fist, to hitting him with a weapon, to killing him. On that view, you might say that murder is an aggravated assault, and you can find the odd statement in cases to that effect. However, some time ago, the courts took the view—by a narrow majority—that murder is a separate crime and can be tried separately. A previous trial for a serious assault does not, therefore, thole your assize in relation to a future charge of murder.

We took what we thought was the equitable view that, if a trial results in a conviction, that is all right. However, if a trial, which is essentially on the same facts, results in an acquittal, it is inequitable to proceed to a second trial. The Government disagrees with that. I understand that the Crown Office is giving evidence later this morning, so I will not go too far down this road, but I recollect that the Government disagrees because the amount of time and effort that is put into a murder prosecution is naturally much more than is put into an assault case. It might therefore be that once the victim dies, something might happen that means a better case is put together. The committee might take that up with the Crown Office. If you ask the same question, it can give you the ins and outs of that.

We took an equitable view, and the Government has taken a different view. I have no comment beyond that.

Robert Brown (Glasgow) (LD): Presumably, there will be some potential for such a situation to be dealt with under the new-evidence rule if an enhanced murder inquiry produces evidence that has not been heard before.

Patrick Layden: You would have to get round the provision that the evidence not only should be new, but could not have been obtained earlier with reasonable diligence. That is unlikely. More witnesses might be found and—I do not know; I am not an expert on that. You will have to ask the professionals about that.

The Convener: I want to pursue that point a bit further. Let us say that, following an incident, an accused is charged on indictment that he did assault so-and-so by punching and kicking him repeatedly about the head and body to his permanent disfigurement and severe injury. After evidence is led, he is found guilty of, or he pleads guilty to, serious assault and is imprisoned for three years. The victim suffers brain damage, as a result of which he develops epilepsy—which happens frequently when someone is kicked or beaten about the head—and, three months later, he has a fatal seizure. As the bill stands, it would

be allowable for the Crown to proceed. Do you agree with that interpretation?

Patrick Layden: I think so. The Crown could then prosecute the man for murder.

The Convener: Would it be useful if the bill provided for some sort of fail-safe position? If the epileptic seizure occurred, say, 10 years later, it might be somewhat less fair then to indict the accused on a murder charge, because of the lack of immediacy.

Patrick Layden: It might. I suspect that in such a case the Crown would exercise its wise discretion and would consider whether it was proper to prosecute and whether the public interest required a prosecution. The Lord Advocate has very wide discretion in relation to whether it is in the public interest to prosecute. I would expect such a case not to be prosecuted, but that is obviously a matter for the Lord Advocate.

The Convener: It is a matter that we can pursue with the Crown.

Patrick Layden: Certainly.

Nigel Don (North East Scotland) (SNP): Good morning. Your report suggested that there should be an opportunity to retry when the original trial has been tainted by any kind of perversion of justice. Will you outline your thinking on how you see the bill carrying that forward? Do you have any concerns about what is in the bill?

Patrick Layden: I do not think that I have any concerns about what is in the bill. If there was some interference with the original trial—so that it was not a fair trial—it is proper that there should be a second one. Interference could happen in a number of ways, and the fact that interference had taken place would have to be established to the satisfaction of the court. The court could then order a second trial. Am I missing the point of your question?

Nigel Don: No. It was an open question, because I was not aware that you had any concerns—I just wanted to close that off.

What thought have you given to the balance of evidence in that regard? It is not that I do not have any respect for a court, but it is apparently very much down to the balance of evidence and the judgment of the court as to whether something should be reopened.

Patrick Layden: The test that we suggested, which is incorporated in section 2(3)(b), is that the court to which the application is made has to be satisfied, on the balance of probabilities, that one of the stated offences against the course of justice has been committed. The judgment is on the balance of probabilities, because the nature of these matters means that they are very difficult to prove. If you find out after or during the trial that somebody has been talking to the witnesses and perhaps threatening them or trying to bribe the jurors, it will all be very fuzzy. There will be a lot of telephone calls made late at night from untraceable mobile phones and so on. It seemed to us that it would be unreasonable to require the Crown to prove beyond reasonable doubt that there had been interference with the trial. The test that, on the balance of probabilities, there had been interference would be a sufficient hurdle for the Crown to get over in order to get a new trial.

The English did it differently. The Criminal Procedure and Investigations Act 1996 provided that it had to be proved beyond reasonable doubt that there was interference. What has happened since is that there have been no trials in England on the basis of tainted acquittals. That might be because nobody tries to interfere with the course of justice in England. If that is the case, I am happy for them, but I doubt that it is.

Nigel Don: Indeed. That is probably the point. I am grateful for that evidence, because I was not aware of it. Perhaps it is right that the test is on the balance of probabilities, given what the result would be otherwise. However, that means that, from the point of view of the ordinary citizen—which is the seat that I sit in—the possibility of a retrial following that route seems far greater than all the other things that we have spoken about. It appears to carry the greatest risk, particularly if somebody wants to set me up as having tried to nobble a witness when, in fact, I did not.

Patrick Layden: I suspect that there is murky mud at the bottom of the pond here, which will bob up every now and then in cases. The prosecutors, the police, the courts and the judges are probably well able to find their way through it. We have given them a framework. Time alone will tell how it works.

The Convener: You mentioned that one issue that might arise in respect of a tainted acquittal would be some pressure being put on members of the jury, whether collectively or individually. Do you foresee any difficulties in the operation of the bill in that regard, bearing in mind the terms of the Contempt of Court Act 1981?

Patrick Layden: I am sorry—in what particular respect?

The Convener: There are restrictions arising from a number of cases—I recollect that one, the case of Pullar, recently went to the European Court of Human Rights—that say that we are not really required to know what goes on within a jury room.

Patrick Layden: I see. The way that these matters tend to come out, looking at recent

reported cases—mostly from England but occasionally from Scotland—is that a juror comes under some pressure or finds that one of his fellow jurors has come under some pressure, reports the matter to the clerk of court, and judges deal with the situation according to its merits. Sometimes they excuse the juror, sometimes they instruct everybody not to pay any attention to the incident and sometimes it seems so minor that they do not do anything about it, so it comes out in the wash in the appeal court. A juror who is concerned about something is encouraged to go to the judge through the clerk of court and tell them, either orally or in writing, that they are having a problem. I think that, in the Pullar case, a juror was a friend of one of the principal witnesses for the prosecution.

The Convener: You have dealt with admissions, but I ask Robert Brown whether there are any other questions on that matter.

Robert Brown: Yes, I have a couple of brief points. You rightly said, Mr Layden, that there is an illogicality if we have the new-evidence exception but do not include admissions within that. First, do any problems or issues cross your mind where the admissions situation poses different considerations from those posed by new evidence more generally?

Patrick Layden: I do not think so. Admissions are always delicate territory because it is so inherently improbable that somebody who has committed a crime—let alone somebody who has got away with it—should go and tell anyone about it. Therefore, when someone turns up and says, "He told me that he did such and such," you have to treat that with a fair amount of suspicion. No doubt, that would be in the mind of the court when it was considering whether to accept that there was credible evidence that the admission had been made. I do not think that it raises any particular issues.

Robert Brown: My second point is that I think the exception that is set out in section 3 goes a bit further than the SLC's proposal, because it includes the possibility of new evidence of pre-acquittal admissions that come to light later on. Do you have any view on that? That provision clearly goes against the SLC's view. Do you accept the Government's reasoning on the matter, or do question marks remain?

Patrick Layden: Once that provision went into the bill, that tipped us into thinking that there was no logic in leaving admissions out of the general new-evidence exception, because an admission made before the trial is simply evidence. If the Crown had found out about the admission, it would have led that evidence in the trial.

We saw a different point involving somebody who, having been tried and having conducted his trial on the basis that he did not do it, goes around afterwards saying, "I did it, and I got away with it." The last man we know about who did that in Scotland was a chap called Cairns in 1967. He could not be retried for the murder, which he had denied having committed, but he was tried for perjury and got 18 years. You could do him under the new-evidence exception and achieve the same result, but give him a conviction for murder.

The Convener: Again, you dealt with the issue of exceptions, but perhaps Cathie Craigie wants to follow some points up.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Patrick Layden anticipated many of the questions that the committee would have asked this morning. The SLC did not reach a firm conclusion in its report on whether there should be a more general new-evidence exception. Could you tell us in a bit more detail about your difficulty in reaching a conclusion on that?

10:30

Patrick Layden: The difficulty that the commission was unable to get over—others get over it much more easily—is that the rule against double jeopardy is an affirmation of the status of the individual against the state.

We all know that we must pay our taxes, have controls on our land use and so on. There are various ways in which society, the state or the Government—however we like to put it—is required to control the individual and channel what he or she does in the interests of society generally.

When the rule against double jeopardy started, the state—the executive or the Crown—saw no problem in carrying on with court cases until it got the result that it wanted. The judges put a stop to that and said, "No—if you have tried a man once for an offence, you cannot try him again." The prosecution gets one bite at that cherry. It can lead all the evidence that it wants and have a fair trial but if, at the end of it, it has failed, it cannot prosecute again because that would be persecution.

That works out as an affirmation of the status of the individual. The individual does not simply exist to be processed by the Crown—the prosecution—again and again until it gets the result that it wants; he has freedom and a status that means that the prosecution is entitled to try him once but, once it has done that, he is home free, he is clear of the accusation and the prosecution cannot come bothering him again.

There are all sorts of complicated provisions in the bill about how the Crown will have to go to the court and get three judges to agree that the case is good before it can start the process of trying the accused. At a much lower level, the possibility exists that the police, say, could put pressure on acquitted persons on the basis that they will re-examine and reopen the case. That may never happen but, in the real world, it might. That is the kind of pressure that somebody who has been tried and acquitted can simply ignore because he knows that he cannot be tried again. The commission thought that that was an extremely important right for every individual citizen in Scotland. That was why it was difficult for us to reach a conclusion on it. As the committee knows, the vast majority of those who responded to our discussion paper were in favour of having an exception to the rule, but the position at the moment is that that principle—the status of folk in Scotland to be clear of prosecution following them round the place—is extremely important.

That is one of the more important questions with which the Parliament has to grapple. It is not only the fact that the rule against double jeopardy has existed for hundreds of years that is important, but the fact that it matters. It matters just as much now as it ever has.

If you look at the general picture of how citizens' rights are constrained, you can see all the bother that the authorities in England are having over control orders. We are told that they are vital. I am not in a position to judge one way or the other, but the net effect is that the freedom of citizens is being constrained without a proper legal process in a court and on the basis of evidence that they do not get to examine.

Liberty is not something that we can come and go with. The new-evidence exception in the bill is a marked diminution in the status of individual Scots people. That is why the commission was not able to come to a conclusion on it.

Cathie Craigie: That was a very full answer. Perhaps, rather than speaking for the whole commission, you could give me your views on my next question. I understand that the citizen needs to be protected and that people who have been acquitted should not spend the rest of their lives looking over their shoulders wondering whether the prosecutors will come for them again. However, when it comes down to the interests of the general public, it seems to me reasonable to say that, if there is new evidence, it is in the public interest to bring a person to trial again.

Patrick Layden: That, of course, is the point. There is a public interest in preserving the freedom of the individual and a public interest in bringing criminals to justice. Another public interest is to provide finality and certainty in legal proceedings. If you have a civil case against somebody and it comes to a conclusion, you cannot come back next year and say, "I want to try that one again, because I have thought of some new evidence." The life of society and the country must be able to move on.

We have a system for solving disputes and, once they have been solved, that is the end of it. That applies in civil and criminal cases. There is an exception to the rule for the accused person because of yet another public interest, which we treat as very important: we do not want innocent people in jail. The criminal justice system is always balanced in favour of the accused person.

I accept as a matter of principle that there will be cases where new evidence comes up after the trial has happened. However, as I have said to the committee, nobody has produced a single live example of such a case in Scotland. There have been very few cases in England, even though England has 10 times as many people as we have. In theory, yes, it would be terrible if new evidence came up, but no one has produced a case where that has happened.

The Convener: You dealt with the 2001 case involving Angus Sinclair.

Patrick Layden: Yes.

The Convener: He was, of course, involved in another murder trial—the World's End murder trial—that failed following the submission of no case to answer. When the Government's intentions in the bill were made clear, one individual commented that it would result in Angus Sinclair being made eligible for prosecution again. Do you agree that that is not the case because the evidence was available at the time?

Patrick Layden: Yes, I would agree with you. There is an old saying that might apply in this case, which is that hard cases make bad law. It was right to re-examine the rules on double jeopardy and similar fact evidence and the Moorov doctrine and so forth and, if that was sparked by the Angus Sinclair case, that is fine. However, it would be very wrong to change the law for the sake of retrying any individual, in particular Angus Sinclair, who will spend the rest of his life in Peterhead prison unless there is some contingency that I would prefer not to contemplate.

The Convener: I think that we are all in that position.

Stewart Maxwell (West of Scotland) (SNP): I want to pursue the discussion on the rights of the individual. I understand completely your argument and the commission's concern about new evidence. I know that you accept that there is a balancing act, but surely it is not just between the individual and the state. It is more of a triangle, in

which the rights of the individual are balanced against the rights of the state and the rights to justice of the victim and their family. There are more rights involved than just those of the state and individual accused. If a new scientific technique is found—such as DNA, as we have seen in recent years—that provides new and compelling evidence of the guilt of an accused, it would seem perverse not to use that evidence. I am still slightly confused about why the commission ended up coming down in the way that it did.

Patrick Layden: As I said earlier, DNA is useful if you have a physical sample to test. If you get a knife with fingerprints on it from the murder scene, but fingerprint technology has not yet started and you have no one to try because you cannot find the guy, you put the knife carefully to one side and hope that enough evidence will emerge. In due course, along comes whoever the chap was who thought about fingerprinting and says, "We can now distinguish between fingerprints." You then can compare the fingerprints on the knife to those of the chap who was brought in two weeks ago for an unrelated crime and say, "Oh, they are the same." You can now try the man for the murder because you have his fingerprints on the knife.

If you have tried somebody and acquitted him, the police throw away the knife and the blood samples. You have nothing to test for fingerprints. If DNA is used, you have bits from the fingernails of the victim or whatever other samples, such as bodily fluids. If you have those samples but have not prosecuted anybody, you keep them because you might get evidence that will enable you to pin the crime on somebody. However, if you have tried somebody and acquitted them, those things are of no use any more and they are thrown away. That means that, when the new technology arrives, there is nothing to test it on.

Stewart Maxwell: Although the scenario that you paint may be correct, it is based on a view that the prosecution is not looking for anybody else. If there were any doubt about that, the prosecution would retain the evidence; if they were in no doubt about it, they would dispose of the evidence as you say. There is still a possibility of the evidence being retained in some cases, even if a trial has taken place.

There is a wider point about the retrospective nature of the bill. Even if what you say were correct in all cases and there were no past cases in which a prosecution could be brought, from the point at which the bill became an act onwards, all that would be required is a slight change in the procedures of the prosecution and the police so that they retained the evidence. Then, if there were a future scientific breakthrough, the provision could be applied retrospectively at that point. Retrospection is therefore necessary.

Patrick Layden: Retrospection is not necessary—that is precisely my point. If you want to change the law to provide for a new-evidence exception, that is a decision that the Parliament can make having struggled with the dilemma about the rights of the individual. I am sure that I have heard that the Crown Office and the police are in discussions about how best to keep evidence in acquittal cases. You will be able to find out about that from the witnesses from the Crown Office and Procurator Fiscal Service later this morning. However, there is no practical point in making the provision retrospective.

Stewart Maxwell: Let us move on to what the report says about the new-evidence exception. Initially, you thought that that should apply only in murder and rape cases. Why did you propose that limitation? Perhaps you can give us your thoughts on the list of offences that are contained in the bill, which goes wider than murder and rape and includes genocide and other sexual offences.

Patrick Layden: It is extraordinarily difficult to find a logical, principled selection of offences to which we should apply a new-evidence exception. There were various possibilities. The exception could have applied in any case that was prosecuted in the High Court, although almost any case can be prosecuted in the High Court if it is serious enough in its own terms. The offence could be anything punishable by life imprisonment, but that is every common-law offence in Scotland. Where would we draw the line? It would have to be a matter of judgment.

The bill contains a perfectly reasonable list of serious offences. One of my colleagues wondered why incest between consenting adults would be regarded as a very serious offence, but it is on the list. Also, I see no mention of drugs offences or serious money laundering. There are various ways in which one could look at the list and say, "We don't want anyone to get away with this"—whatever it is. We looked at the list in the English legislation, but that seemed a bit clunky. The commission could not come to a view on the list, so we suggested what we regarded as the basic minimum and invited the Government—as we are now inviting the Parliament—to consider whether that was the correct list. The Government added to it, and there is the potential for adding further offences to it if that is thought to be desirable. However, I cannot provide any guidance about how you should approach the matter.

Stewart Maxwell: No, I understand that. Different people will have different views on what should and should not be included. I just wondered why your initial suggestion was so restrictive.

Patrick Layden: The list should be restricted. We think that the exception to the rule against double jeopardy should be very limited.

Stewart Maxwell: But why so limited? You originally suggested that it should apply only in cases of rape and murder as opposed to cases involving some of those other offences. Why did you take that view?

Patrick Layden: The commission thought that those were the two offences that everyone would agree on. Obviously it would be possible to put in a further list of offences that people may agree on.

Stewart Maxwell: So it was just for certainty. There was no disagreement over those two offences, whereas there might or might not be with regard to others.

Patrick Layden: Precisely so.

10:45

Stewart Maxwell: On the number of tests that must be met before there could be a second prosecution on the basis of any general new-evidence exception, does the bill reflect or deviate from the commission's thinking? If it does deviate in some way, what are your views on that?

Patrick Layden: Our impression was that the bill reflects our thinking on the matter. The tests are difficult—as they should be, given the importance of the process. Three judges should be involved and that is the provision in the bill.

Stewart Maxwell: You think that the bill strikes the right balance and that the number of tests and hurdles that it contains is entirely reasonable.

Patrick Layden: Yes.

Dave Thompson: I wonder whether you can help me to understand the retrospective aspect more fully. You said that retrospection would not have a practical effect because if, after a person had been tried and acquitted, the authorities did not think that anyone else was involved, they would not keep the evidence. I presume that that means that, in certain cases, the evidence will be kept on the basis that they think that something might come of it in the future. I am not sure that I understand the difference between the current system for keeping evidence from previous cases and any new system set up under the bill for keeping evidence in future. After all, if we are talking about the authorities keeping evidence after a person has been acquitted because they think that someone else might be involved—and it might well be many years before a new person would be tried—surely that is exactly the same as the present situation, apart from the fact that, in the past, they might have kept much less evidence or evidence from fewer cases. Do you understand what I am getting at?

Patrick Layden: Yes. We start from the principled position that criminal legislation should not be retrospective; that, at the moment, people have the right not to be tried again; and that we should not take that right away from them. However, in practical terms, if the evidence used in their trial has been thrown away, the application of new technology will not help us. Retrospection is neither a principled nor a practical way of proceeding.

Dave Thompson: But what if the evidence has been kept?

Patrick Layden: The Crown Office cannot have thought that it would be able to prosecute the same person, because of the rule against double jeopardy, and if it thought that it could prosecute someone else, one might well wonder why it had prosecuted the first chap. If the question is as open as that, should the prosecution have been brought in the first place? This is a very grey area for someone such as me who is not a prosecutor and I think that you should take it up with the Crown Office. I can think of no reason why it would keep evidence—unless, of course, something emerged in the course of the trial to make it think that it was X not Y and it then decided to chase X.

Dave Thompson: What is the difference between the Crown Office keeping evidence, for whatever reason, in the past and the Crown Office keeping evidence in future? After all, if someone is tried and acquitted, the same argument holds. The evidence would be kept only if it was felt that someone else—or more than one person—was involved. I do not see the difference in principle between the situation from now on and the situation prior to now.

Patrick Layden: The difference is that, if Parliament passes the bill as it is and changes the law, everyone in Scotland will know that the position is different and they will be liable to be tried for a crime not once but twice. At the moment, 1,500 people in Scotland have been tried for and acquitted of the kind of offences set out in schedule 1 and each of those people has a right, enforceable in the courts, not to be tried again. You can either take away their right or leave them with it. That is the difference: they have a right at the moment, while all that the rest of us have is a notion of what the law is. If you change the law, we will know what it is, but no one is taking our rights away from us; you are just adjusting our position in the future.

Dave Thompson: But the fact remains that, if the legislation is passed, we will have fewer rights in future than we had in the past. Those 1,500 people would retain their rights, but from then on

those rights would not be there for people in future.

Patrick Layden: Yes, that is precisely the point.

The Convener: Although one could advance the argument that they could be prosecuted only on cause shown, on the basis of a decision taken by three judges, which would put in place the checks and balances that may be necessary.

Patrick Layden: Just so. There are a lot of checks and balances in the bill, and I have no doubt that everything will be done to ensure that nothing is undertaken irresponsibly or frivolously. However, the end result is still the same: someone who has a right at the moment will have it taken away from him. It is a serious point in principle, but also in practicality. If you are going to take away someone's right, you should do so on the grounds of solid evidence that it will make a difference. There is no evidence that such a provision would make a difference to cases in the past.

Nigel Don: I will pursue the theoretical possibilities, because I am not a criminal lawyer and do not know the cases. Suppose a person has been tried for the murder of someone whose body has never been found, which I think happens occasionally—

Patrick Layden: Yes, it has happened quite recently.

Nigel Don: Okay. Suppose that person is found innocent, which I imagine is quite likely, and the body is subsequently found, complete with enough evidence to connect the two otherwise unconnected people. That is surely one of the cases in which retrospection in the bill might well be entirely appropriate. I cannot name a case, but that is the type of situation that might turn up.

I am sure that you are right in saying that no one has yet thought of a case, but there is therefore no harm in making the provision retrospective, because it would pick up only that type of situation. If that was to happen, it would be good that we could pick it up.

Patrick Layden: That is the argument. The contrary argument is that you should not take away people's rights. They have a right, which the judges gave to them, which protects them from being prosecuted again. If there were a number of cases in which the police, prosecutors or judges were able to say that they could rerun the trial and get a different result, and that that would be in the interests of justice, the argument would be much more balanced. One can think of theoretical cases in which that might happen, but we are lacking practical examples.

Nigel Don: If it is any consolation, I can tell you that I have written down your reference to "an affirmation of the status of the individual against the state" on my piece of paper. It is a lovely line, and I entirely understand what you are saying. This is about status. It is exactly the same when people get married: they become married people and they are no longer individuals, and their status in the world changes.

Patrick Layden: I am not sure that I want to go into whether marriage is a conviction or an acquittal.

Nigel Don: Well, you can argue whether it is a conviction or an acquittal, but it changes one's status in society against the state. The issue that we are discussing is about status, and I understand that.

The Convener: I see that there are no more questions. Mr Layden, we are much obliged to you for giving evidence this morning. You have given us a lot to think about, and it has been a most useful evidence session.

10:53

Meeting suspended.

10:59

On resuming—

The Convener: We welcome the second panel of judges—[*Laughter*.] In the case of all three of you, I am sure that that is premature. The next witnesses are from the Crown Office and Procurator Fiscal Service: Michelle Macleod is the head of the policy division, Scott Pattison is the director of operations and Gertie Wallace is the head of criminal justice policy.

I invite Ms Macleod to give a short opening statement.

Michelle Macleod (Crown Office and Procurator Fiscal Service): The Crown supports the general principles that underpin the bill. It is recognised that the double jeopardy rule is an important safeguard against individuals being prosecuted repeatedly for an offence of which they have been acquitted. However, it is also important that a criminal justice system strikes an appropriate balance and delivers justice for victims and bereaved next of kin.

In a modern criminal justice system, it is incongruous to have a rule that prevents a new trial when a person who has been acquitted later confesses to having committed the crime, where the original proceedings were tainted in some way or where new evidence of a compelling nature becomes available. It has been recognised by jurisdictions throughout the world that a rule that prevents a second trial in such circumstances can have the unintended effect of undermining public confidence in the criminal justice system and that,

in a prescribed set of circumstances limited to the most serious of offences, it is necessary to provide some exceptions to the double jeopardy rule.

The Crown also supports the intention, as set out in the bill, for the exceptions, including the new-evidence provision, to be applied retrospectively. If it is accepted that public confidence may be weakened where compelling evidence emerges and a new trial cannot be held, the argument applies regardless of whether the original trial was held before or after the new reforms.

There has been detailed consideration by the Scottish Law Commission, followed by a consultation process. From the Crown's perspective, the resulting bill is measured, proportionate, workable and sits well with similar legislation that has been enacted in other jurisdictions. The Crown recognises the intention for the exceptions to be used sparingly and only in relation to the most serious offences. Indeed, the bill provides a number of checks and balances that are aimed at securing that objective.

Overall, it is the Crown's view that the bill potentially represents an important and welcome addition to the law of Scotland.

The Convener: Thank you. Clearly, you are of the view that the existing common law is not sufficient and that statute is required.

Michelle Macleod: Yes. It is appropriate that the double jeopardy rule be placed on a statutory footing. It befits a modern society to have that well defined, and to have clarity about exactly what it is envisaged that it will cover. The rule needs to be defined in order for exceptions to be applied.

The Convener: Fine. We will proceed to further questions.

Dave Thompson: The Scottish Law Commission proposes a core rule against double jeopardy, supplemented by the broader principle against unreasonable splitting of cases. Are you happy with that approach and how it is being taken forward in the bill?

Michelle Macleod: From a practical perspective, as prosecutors, it is always the principle of the Crown to proceed on indictment or complaint on all charges arising out of the same acts, facts or circumstances. The only exception to that would be where, by doing that, there may be prejudice to the accused or suspect. It restates our current practice for proceeding with prosecutions and does not really cause us any concerns.

Dave Thompson: You have never been tempted to try a case again.

Michelle Macleod: The bill provides a number of safeguards for the accused. The plea in bar of trial is reinstated, as well as there being the double jeopardy rule, so the accused person would be in a position to take a plea in those circumstances.

James Kelly: Section 11 of the bill would restate in statute the current position in common law that if someone is charged with a lesser offence than homicide but the victim subsequently dies, the accused can be tried again. That is the case whether there has been a conviction or an acquittal. That is at odds with the position of the Scottish Law Commission, which stated earlier in evidence and in its report that situations in which someone had been acquitted over a previous offence should not be subject to a retrial where a victim subsequently dies. What is your position on those conflicting views?

Gertie Wallace (Crown Office and Procurator Fiscal Service): We do not imagine that the exception would be used very often, especially in an acquittal situation, but there are merits in having it on the statute book. Our justification for supporting that section is that following an assault, an investigation would not necessarily be as extensive as it would be in a situation where it was clear at the outset that there had been a murder. The victim could have serious injuries from which he might seem to be recovering—that is more likely these days due to advances in medical treatment. If the accused was tried within custody time limits for the original assault, the trial could take place while the victim was still alive. If the evidence did not convince the court to find the accused guilty and he was acquitted and the victim subsequently died, it might be that further investigations would bring out more evidence. Witnesses might be more likely to come forward in a murder investigation than in an investigation of an assault, even of assault to severe injury. It would be appropriate in those circumstances for the accused to be placed on trial again and to be held accountable for the full extent of his actions.

In response to the consultation, the Association of Chief Police Officers in Scotland illustrated the point quite nicely. It gave the example of an incident at a football match involving opposing fans, after which the victim gets up, shakes himself down and is fine. The accused is brought to court the following day and the plea of not guilty to the major charges is accepted—they can all be rolled into one—but the victim subsequently dies. It is important for the person to be held accountable for the full extent of their actions and to bring in the interests of the victim and the next of kin, so that the full circumstances of the incident can be played before a court, in public.

James Kelly: Thanks a lot for that full answer.

Do you think that, when the victim dies, a time limit should be placed on bringing a subsequent charge? The example was given earlier that

somebody might be assaulted and go into a coma and 10 years might pass before they die. After that time, the evidence might not be as readily to hand as it would be in the example of the incident at a football match that you gave. Do you think that it is worth considering amending section 11 to put a time limit on when retrials can happen?

Gertie Wallace: Do you mean in a case where there was an acquittal originally?

James Kelly: Yes.

Gertie Wallace: As time goes on, it might be seen as being less and less in the public interest to bring somebody to justice. In the interim, perhaps no subsequent charges had been brought and they might have gone on to live their life to the full. In those circumstances—depending on the original charge—the balance of interests might not lie with prosecuting again.

I do not really know how a time limit would be applied and I do not know what time limit one would choose. There would always be a plea of oppression against the Crown in bringing proceedings a long time after the incident had occurred. You would expect that the Crown would not necessarily bring proceedings in those circumstances, given the facts and circumstances of the case. A court would have the overall ability to say that it was not in the public interest to bring proceedings because the individual had gone on and lived his life.

Nigel Don: I have some concerns about what you have just said. It seems to me that you are happy to confuse causation and public interest, which does not sound right in principle. It might be that using the public interest test would be a useful way of dealing with a matter of causation, but surely in principle that is not where we should be going. Assuming that we pass the bill, surely the only reason for not bringing a charge of homicide would be that it did not appear that the homicide could be connected with the previous event. Surely that is what we should be saying in statute, is it not?

Gertie Wallace: There are real difficulties with causation, especially when death occurs a long time after an incident. You would have to weigh that in the balance. I take your point that in principle it should not matter that time has passed, but you have to balance that with the interests of the accused as well as the strict letter of the law.

Nigel Don: Do you have any evidence on what would be a sensible time delay? English law always said a year and a day, which was essentially a year plus an overnight period to ensure that we knew what the date was. Is that still English law? I suspect that it is; I do not think that it would have been changed in a hurry. I am sorry—I am not worried what English law says, but if that has lasted them for centuries, would it not do us?

Michelle Macleod: The issue of a person being charged initially with an assault and then, when he is convicted, being charged with a more serious charge if the victim dies, is a circumstance that the Crown Office deals with and on which we assess the evidence on a day-to-day basis at present. It is not uncommon for the Crown Office to proceed to a murder charge following an assault when we have secured a guilty plea; it is much less common for us to do so when we have prosecuted someone for an assault and not achieved a guilty plea. However, as my colleague says, there may be circumstances in which witnesses come forward after they have realised the seriousness of the matter, in which case we may consider it appropriate to take proceedings.

In doing that, the Crown Office must always have regard to all the factors that we normally take into account, and you are right to suggest that those would include whether we could prove a causal link between the assault and the person's subsequent death. It may be easier to do that in some circumstances than in others, and it would involve a lot of medical reports and an investigation. Also, as the death became more remote from the assault, that would become more problematic.

We would have to weigh up all the factors, as we do in any prosecution—we take account of the circumstances, a person's record and the accused's own position. In those circumstances, we would continue to apply the same considerations that we always apply, with the evidential consideration being paramount. However, it would be inappropriate to apply a time limit because there would be so many varied facts and circumstances of which to take account. We would have to continue to take the appropriate factors into account in determining whether a prosecution was in the public interest, and causation would play a critical role in that.

Nigel Don: In any public statement, however, you would still rely on the public interest. If you were required to say why a case had not been prosecuted, you would say that it had not been in the public interest to do so.

Michelle Macleod: In some circumstances, when a person has been acquitted, depending on the evidence, prosecution may not be in the public interest. As I say, the more time that passes between an assault and the person dying, the more difficult it is for the Crown Office to be successful in a prosecution. We have regard to the circumstances of every individual case, so I cannot say categorically that we would never take proceedings as the death became more remote

from the assault. It would depend on the circumstances of the individual case.

Scott Pattison (Crown Office and Procurator Fiscal Service): I will make two points on that, the first of which is on the question of a time limit. I confess that I am not on top of English law regarding that issue, but it is difficult to see how we could apply a time limit that was not somewhat arbitrary. With the constant advances in medical science, individuals and victims can be kept alive for a significant period of time. On that basis, I would be reluctant to go down the road of introducing a time limit.

Secondly, you are correct to say that in the context of a public statement about a prosecution decision, the public interest would play a significant part in our consideration of what the right decision was. As you know, we often issue statements in which we say that that has been part of the Crown counsel's consideration of the overall facts and circumstances of the case. It is a fundamental part of the reasoning behind our prosecutorial decisions.

Robert Brown: Can you give us an idea of how often—leaving aside the theory of the matter—somebody dies after a trial has been concluded and how often the question of a retrial for murder arises following an acquittal?

Scott Pattison: I will venture an answer. I am happy to come back to the committee with further information on the matter because I do not have the statistics to hand but, in my experience, although it happens it is somewhat rare. If you can accept a heavy qualification to what I am about to say, it is perhaps one or two cases a year. However, even that may be overstating it. I am happy to come back to you if the committee would find that to be of interest and help, but we are not talking about many cases at all.

11:15

Robert Brown: For the avoidance of doubt, you are talking about cases in which a prosecution for murder has been taken after a prosecution for assault has been concluded. However, I also asked about whether the question of fresh proceedings for murder has arisen in cases in which the accused has been acquitted of an assault charge.

Scott Pattison: I would have to come back to the committee on that. It would be even rarer than the numbers to which I referred.

Robert Brown: Have you any experience of that?

Scott Pattison: I cannot recall a case in which there has been an acquittal for assault and a subsequent prosecution for murder, but I am happy to consult colleagues and come back to the committee on that.

Robert Brown: It would be helpful to know.

The Convener: The witnesses heard what Mr Layden said earlier. Clearly, the Crown would not commit the same time and resources to investigating a simple assault as it would to investigating a murder. Could any difficulties arise in that respect?

Scott Pattison: There are potential difficulties. As the committee will be aware, if there is a prima facie case of homicide, significant police and law enforcement resources are deployed to that. It is different if, on the face of it, the case looks like a simple assault, albeit one in which the victim is in hospital for some time. Of course, some victims do not go to hospital initially and the aftereffects are very much aftereffects, albeit significant ones. The scenario that you mentioned would involve a substantial subsequent investigation and, as Michelle Macleod indicated, a substantial medical investigation with consideration of detailed expert medical reports. That would not be without difficulty: it is not without difficulty, when we encounter it.

Robert Brown: I do not know whether you heard the earlier evidence from the Law Commission that, given that we are now including in the bill arrangements on new evidence, admissions should be dealt with on the same basis—as one particle of the new evidence that might arise. Do you agree?

Michelle Macleod: I heard the earlier evidence. In any case, our approach would be to apply to admissions the same principles that we would apply to considering new evidence. For example, the test for the new evidence is more stringent in that it limits the prosecution to one opportunity to proceed. I find it difficult to envisage our being tempted to prosecute a person on more than one occasion due to a series of admissions. That would not cause us any difficulties.

Similarly, the exception for new evidence is restricted to the most serious offences, as laid out in schedule 1. The Crown recognises that the exceptions are to apply only to such offences, so that would not cause us difficulty.

Having looked at some of the evidence that was given to the Scottish Law Commission and at the commission's report, we find it difficult to justify a distinction between the approach taken to new evidence and the one taken to admissions, which have been treated differently. On one view, objective scientific new evidence may be equally compelling to, or even more compelling than, admissions, depending on the context in which the admission is made.

We do not see the justification for the distinction that the Law Commission has previously drawn. It would not cause us too much difficulty to apply the same rules to admissions as we do to new evidence because we would take that approach to ensuring that admissions evidence was credible and reliable.

Robert Brown: Do I hear you say that you envisage no problems in running the two themes together as one new-evidence rule?

Michelle Macleod: The tests are clearly a matter of policy for the Parliament but, operationally and practically, it would not cause us too much difficulty.

Robert Brown: The exception in section 3 goes further than the commission's proposal by including new evidence of pre-acquittal admissions that come to light later. That fits with the new-evidence provisions. Do you have any preference for which approach should be adopted—the commission's or the slightly different approach in the bill?

Michelle Macleod: The approach that is set out in the bill is appropriate. The test is that, without due diligence, the police could not reasonably be aware of the previous admission, so the balance is right in the bill.

Nigel Don: I would like to pursue Ms Macleod's point about the provision applying only to the most serious cases. That is where I have a problem. Schedule 1 to the bill contains a long list of relevant offences, and I understand that it has to be a long list because a lot of prosecutable offences might be serious offences. What can we do within the bill to make it clear that this really is about the most serious cases without reducing the list to the point at which it covers only the most serious cases and misses out other ones?

This might be a drafting issue, but how can the Parliament tell you as prosecutors that this will happen only in the most serious of cases and that we are not the slightest bit interested in being manipulated by your successors and assigns? You are wonderful and honourable people, but perhaps Scottish society needs to protect itself from people who might not be quite as scrupulous.

Scott Pattison: I will answer, but again with the heavy qualification that I am not a draftsman. We are talking about cases of the highest seriousness and sensitivity in Scotland and Scottish society. It is appropriate to have a list because it gives legal certainty and foreseeability, and it is right that the Parliament should do that if it is so minded. The concept of a list is also consistent with article 7 of the European convention on human rights, which is about certainty in the law and foreseeability, so that individuals know when they might be the subject of a potential further prosecution.

I am not sure that it is for me to venture anything further than that. From the perspective of the Crown Office and Procurator Fiscal Service, we see the provisions as applying to cases that lie at the top end of seriousness and sensitivity in Scottish society, if that helps. I hope that it does help to some extent.

Nigel Don: It reassures me that you see it that way because everyone who is talking about the point sees it in that way. We are making Scottish law. That is our job. It is not your job. I am bothered as a citizen, not as an MSP, and I want to make it absolutely clear to the state, of which you are the prosecuting arm, that the provision will apply only to the most serious of offences. It should not matter what someone is charged with; the provision will apply only to the most serious of cases and must not be used otherwise. We are not in the business of doing that. I speak for myself rather than my colleagues, but I think that that is where we are all coming from. I am bothered to know how we can set down clearly within the statute or elsewhere that that is what the provision will apply to.

Scott Pattison: The list helps with defining that, to a large extent, because it covers matters at the top end of the scale. The fact that the bill proposes the tests that it proposes is also helpful, and it sends a strong signal about the state of Parliament's intentions, should Parliament be disposed to pass the bill as it stands. The fact that the Lord Advocate has to make an application to the High Court sitting as a court of criminal appeal is hefty, and it will send to the prosecution service a strong signal of Parliament's intentions.

The Convener: We turn to the question of acquittals.

Bill Butler (Glasgow Anniesland) (Lab): Are you happy with the provisions in the bill that will allow an acquitted person to be prosecuted again when the acquittal is tainted by certain offences against the course of justice?

Gertie Wallace: Yes. The test is somewhat lesser because there does not have to be a conviction for an offence against the course of justice. That reflects the fact that jury intimidation is done covertly: it is not open or out there. Various people could be intimidating various members of a jury, and those members might come forward separately to say that they were intimidated during the trial and so came up with their verdict. In that case, a conviction is not likely to happen, but again, we would have to go to the High Court sitting as the court of criminal appeal and convince it that what we are alleging has happened, and it would have to found that on the balance of probabilities.

Bill Butler: So, are you content with the tests that are set out in section 2(3)(b)?

Gertie Wallace: Yes.

Bill Butler: Is there anything in the bill that you would like to be changed or are you content with the proposals?

Gertie Wallace: We are content with the proposals, which we think strike the right balance. A fair comment that has been made is that subversion of the trial process is very serious and undermines not only Scottish justice itself but public confidence in that justice.

Bill Butler: That is very clear. Thank you.

The Convener: Alternatively, of course, one could simply charge the individual involved with attempting to pervert the course of justice, which itself carries a fairly high-tariff sentence.

Gertie Wallace: Yes, but securing the conviction of an individual involved in the trial process for attempting to pervert the course of justice would enable us to go back to the court with stronger evidence.

Cathie Craigie: The Scottish Law Commission did not reach a firm conclusion on the question whether there should be a general new-evidence exception to the rule. Why do you believe that such an exception is needed?

Michelle Macleod: A new-evidence exception must be among the exceptions to double jeopardy that we have to consider. As I have pointed out, an admission that is made by someone who has been acquitted, and objective scientific DNA or fingerprint evidence that is discovered and which implicates a person who has been acquitted, can be of equal strength. In fact, the latter might well be stronger, given the circumstances.

The previous witnesses referred to murder cases that the Crown had prosecuted but in which the body had not been recovered. Persons have been acquitted in such cases, although it is entirely possible that at some future date the body might well be recovered. An example that is not exactly on point is the case of Peter Tobin; Vicky Hamilton's body was not recovered until many years later, by which time, as a result of scientific advances, we were able to prove that fingerprints on plastic were related to the accused and to link the accused to DNA from the body. It would not have been possible to benefit from those advances had Vicky Hamilton's body been found soon after the tragic circumstances of her death.

That example shows that new evidence can be compelling and in such circumstances the public would be entitled to expect the Crown to bring the case and the person involved to face the consequences. Of course, that evidence would be subject to the tests that are set out in the bill and, ultimately, the extremely high test of high likelihood of conviction to which the jury would subject the new evidence, combined with the original evidence. Public confidence would certainly be undermined if we were not able to proceed with cases in which such compelling new evidence became available.

Cathie Craigie: I do not know whether you heard the Scottish Law Commission's strong evidence, which was about protecting the citizen. As I pointed out, someone who had been acquitted would always be looking over their shoulder and wondering whether the prosecution service would come for them again. After taking evidence from academics and looking at the balance of arguments from both sides, the commission itself, which comprises experienced people, could not agree on the matter or reach a conclusion. Your answer does not really challenge that in any way.

11:30

Scott Pattison: I will try to address that point, as it is fundamental. The bill is about finding the right balance between rights in Scotland. The rights of an accused person are, of course, fundamental in our law and in the European convention on human rights, but I think that the search in Scottish society is for a balance between the rights of the accused person and the rights of victims and witnesses of crime and those who are bereaved as a result of crime. They also have rights that they can assert under the European convention on human rights. I suppose that it is for the Parliament to find a proportionate way through all that.

We can find some signals from the experience of other jurisdictions. The bill will bring the Scottish jurisdiction to parity with the jurisdiction south of the border to some extent and with Commonwealth and European jurisdictions. As framed, it also strikes a proportionate balance in the sense that the tests are hard to satisfy but they allow, in appropriate cases, where the Lord Advocate can satisfy the appeal court, an intrusion into the rights of the accused where that is right, where there is strong evidence and where a conviction would be highly likely on the basis of the new evidence. The rights of bereaved relatives, next of kin and victims of crime are always borne in mind. We feel comfortable with the balance that is struck in the bill and feel that it is proportionate. It feels right for Scotland at this time. We can find guidance from experience elsewhere around the world. The preponderance of democratic jurisdictions have such provision.

Cathie Craigie: I presume that some of the evidence that you have gathered is contained in

the responses to the Government's consultation. Is that evidence available? Can you supply it to the committee?

Scott Pattison: We would be more than happy to provide the committee with what we know about the experiences of other jurisdictions. I am sure that colleagues in the justice directorate would be equally happy to provide a summary of that. Please let us know if we can provide anything that would be helpful.

The Convener: It would also be useful to have comments from you on ECHR compatibility, particularly in respect of retrospectivity, bearing in mind that other European legislators have similar laws.

Scott Pattison: Absolutely. I think that I am right in saying that what has been proposed would be consistent with article 4.2 of protocol 7 of the ECHR. I should say that I do not think that the United Kingdom is a signatory to that part of the ECHR, but it is a signpost of international standards, with which the bill appears to be compatible.

The Convener: It would be helpful if the comments that I mentioned were supplied.

Scott Pattison: Absolutely.

Cathie Craigie: In allowing for the retrospective application of a general new-evidence exception, the bill departs from the Scottish Law Commission's recommendations. What practical difference is that likely to make in relation to the prosecution of people acquitted before the provisions become law?

Scott Pattison: Obviously, we were part of the consultation process. I have already said that we see that exception applying only to cases of the highest seriousness and sensitivity. We do not see there being an avalanche of cases. If the bill is passed as it is, or pretty much as it is, we, as a responsible prosecution service, will, of course, begin a process of reviewing cases. I think that the estimate in the financial memorandum is that perhaps one case every five years might proceed on that basis. I give the heavy qualification that that is an estimate. Obviously, it will be for the prosecution service and the Lord Advocate to apply the tests to cases as they stand and in the light of anything new that emerged.

I hope that that is helpful, but I am happy to expand on it.

Cathie Craigie: You clearly do not think that many cases will be brought forward if the bill becomes law. Have you done any work to identify any such cases?

Scott Pattison: We have not progressed work as yet; we do not want to pre-empt what Parliament might do in that regard. However, it is fair to say that we have in mind a very small number of cases—I am sure that the committee will not want to draw me on the detail or the names of cases—that we will review if the bill is passed as it stands. We will review those cases on the basis of the evidence as a whole and in light of new advances in technology and science. I am sure that the committee would expect that from a responsible prosecution service.

The Convener: We cannot go down that particular route, as it is a matter that requires Crown Office discretion and confidentiality.

Scott Pattison: Indeed.

Robert Brown: With regard to present practice, what is currently retained by the police and the prosecution service following an acquittal? The commissioner raised that issue earlier.

Scott Pattison: Patrick Layden, as ever, made very good points in that regard, and he liaised closely with the Crown Office during the Scottish Law Commission's consideration of the subject.

It is important to be clear on the matter. Although labelled productions—the physical evidence—are returned to the owners or destroyed after an acquittal under current law, documentary productions, which often comprise a significant amount of evidence in trials these days, are kept for 10 years in High Court cases. Documentary productions include forensic science reports, photographs of injuries and such like. A substantial amount of material is kept for quite a long time in the context of our most serious prosecutions.

It is important to say that not all new evidence is scientific evidence; some is eyewitness evidence that becomes available at a later stage. It is not unreasonable to postulate that a victim of or a witness to an offence that is committed by a serious and organised crime group might feel reluctant to speak up today, whereas 10 years down the line circumstances may have changed or someone may be in jail for something else. Sometimes witnesses disclose very relevant crucial evidence at a later point.

That is one point that relates to the evidence that the committee heard earlier. The second point is that not all cases are production dependent, if I can put it like that. Some cases are eyewitness dependent and are not dependent on examination of what we call real evidence, such as labelled productions or scientific evidence.

With regard to documentary and other productions, we have a process whereby copy productions that have been retained by the Crown can be certified, which means they can be admissible at a later date. As the committee will be

aware, we have conducted retrials under the current law, for example in cases in which there was a successful appeal and the Crown sought authority to retry the individual. We have some experience of doing that in cases in which productions are not, by the time of the retrial, available to the Crown in the same way that they were at the start of the process. That happened in the Duncan Edwards case in 2001. The original trial took place in 1999, and was followed by an appeal process and a retrial in the absence of a significant number of productions. The evidence in the case was a mixture of eyewitness evidence and other types of evidence, and the case proceeded successfully in 2001, even though there were some difficulties with the productions.

Robert Brown: I want to clarify two points. You say that documents are bunged out after 10 years under current rules. There would therefore appear to be no case whatsoever for retrospectivity going back beyond 10 years, because so much of the evidence would not be available and information such as witness names would have been lost.

Michelle Macleod: Discretion is available. Ten years is the minimum time but, for some high-profile cases or other cases—perhaps those that have achieved notoriety—papers are kept for longer. Keeping papers for only 10 years is not a blanket rule; that is the minimum time for High Court cases. We have probably kept papers for many cases for quite a bit longer than 10 years, which is the minimum standard.

Robert Brown: I will ask about real evidence—the scientific stuff. The purpose of having a real evidence rule is to ensure that such evidence is available for examination as appropriate. A report does not help much, because it does not allow people to re-examine the evidence in the light of whatever new scientific discoveries have been made. If the potential prosecution depends on such an interpretation of the real evidence, is that a fatal flaw?

Scott Pattison: We will take cases as we find them. Some real evidence will no longer be available, because we have applied a particular legal regime for all time past. However, it is important for the committee to know that, sometimes, new real evidence becomes available. The good example has been given that sometimes the body of the deceased is found much later, which allows new DNA analysis and other analysis.

My colleague Michelle Macleod mentioned the case of Vicky Hamilton and Peter Tobin. The committee might be aware that the murder weapon in that case was found many years after the fact and then examined for DNA. That was a major part of the Crown case.

It is right to say that real evidence will no longer be available in some cases, but it is conceivable and consistent with our experience that, in some cases, new real evidence will become available and be able to be subjected to the sophisticated forensic and scientific techniques that are available to us now. I hope that that helps.

Robert Brown: Yes, thank you.

Dave Thompson: When we pursued the point with Mr Layden, his objection related to the principle that people who have been tried in the past will lose a right that they currently have. Will you elaborate on whether the right for people who have been tried is different from the right that the rest of us will have in the future? We have not been tried, but we might well be tried and acquitted. Is there a difference in principle between a right that some people have because they have undergone a trial and a right that others will have in the future when they go through a trial? In principle, is the position of people who have been acquitted in the past different from that of people in the future? Many years hence, evidence that goes back 10 or 15 years might be pulled up.

Michelle Macleod: Mr Layden gave evidence about a person's right at present not to be pursued by the state for an offence of which they have been acquitted, which is the essence of the double jeopardy rule. That right has been enshrined in Scots law for centuries. It was conceived in historical times as a right of the individual against the state. As my colleague Scott Pattison said, the bill considers the balance more between the right of a suspect and the right of victims and the bereaved next of kin. In a modern society, we must examine the balance between the state, the suspect and the rights of victims and the bereaved next of kin.

I will describe the principle that underlies the exceptions to the double jeopardy rule, which other jurisdictions recognise. In the handful of rare cases in which the most serious and heinous crimes are committed and in which a person is acquitted but new and compelling evidence implicates them or an admission is discovered, the bill strives to rectify the balance with the rights of the next of kin who suffered the deprivation of a loved one's life and who perhaps considered that they saw no justice when the accused was acquitted. The principle that underpins the bill is that the balance has to be looked at again in very rare and serious cases, and in such circumstances the balance may fall on the side of the next of kin. If that principle underpins the bill, it makes no sense to say that there should be a cut-off date or that the provision should apply only to certain people, particularly as we do not know what will happen in future.

11:45

It is time in Scots law to rectify the balance in our system. The provision should apply retrospectively as well as to all future cases. If, a week or two after the act came into force, we found compelling new evidence in a case where someone was acquitted, it would neither make sense nor fit with the principles that we are trying to achieve to bar the application of the act's provisions. This is about the balance between the three sectors not, as Mr Layden had it, the state and the accused. We have another set of interests that we must take into account. That is the basis for our argument. The provision should be retrospective and apply with all the checks and balances that are set out in the bill.

Dave Thompson: So you see no distinction in principle between past and future cases in that respect.

Michelle Macleod: No.

Stewart Maxwell: Good morning. From your evidence thus far, I think that you are relatively content with the balance that has been struck in terms of the tests that have to be met before a second prosecution can be brought forward on the basis of new evidence. Is that correct?

Michelle Macleod: Yes.

Stewart Maxwell: What comments do you have on the newness of evidence? I understand that the evidence cannot be something that you should have known about first time round and which you did not use; it has to be evidence that is genuinely new. How easy will it be to distinguish between genuinely new evidence and something that was around at the time but that you missed?

Scott Pattison: For me, this goes back to the correct balance of rights. It is right that the state should investigate thoroughly the crime that is before it. The forces of law enforcement and the police must do that as effectively as they can in the context of the investigation. They must uncover everything that they reasonably can at the time using the resources that are available to them. The right test is that the evidence has to be genuinely new or could not reasonably have been obtained at the time. The scenario must be that the state did its best at an earlier stage but that something new comes out later that could not reasonably have been available at the time. From our perspective, the bill strikes the right balance on that front.

Stewart Maxwell: You referred to the Crown doing its best in prosecuting the case. What about the scenario in which the Crown did not do its best? What if an individual had failed to do their best—I am sure that no one in the room would fall into that category—because they had had an off week for whatever reason and had not done their job properly? If someone was acquitted because of a mistake of that sort, and that was found at a later date, would it be reasonable to bar a new trial because the evidence had been available?

Gertie Wallace: That goes back to the idea that the state should not be allowed to rely on its own errors to have a second bite at the cherry. It is instructive to look at the English provisions under which new evidence can be used if it was not made available at the initial trial. However, the director of public prosecutions and the Attorney General have stated that they will not use such evidence if it was available at the time but not led for tactical reasons, which is presumably their understanding of the fairness element. I do not think that we would rely on errors.

Stewart Maxwell: I agree; I just wanted to hear your opinion. Clearly, it would be unreasonable to rely on errors and—I am sure that this would not happen—for the bill to lead to sloppiness and people thinking, "Well, I can always get it next time if I'm not particularly bothered this time."

Gertie Wallace: The exceptions to the rule against double jeopardy will be absolutely exceptional, and any taking away from that would not recognise the gravity of what we try to do.

Stewart Maxwell: I will move on to a slightly separate subject. You may have heard Mr Layden talking earlier about the list in schedule 1 of the offences covered by the exceptions. Mr Don pursued a point about the seriousness of the offences, and I would like to ask about a couple of the offences in particular. Mr Layden commented on incest between consenting adults. No matter what our view is on that particular offence, does its inclusion strike the right balance in terms of seriousness?

Gertie Wallace: My understanding is that that offence is included because of the Crown's charging practice. When a victim is abused by a close relative, it is often from a very young age until they leave home or even beyond then. Charges can therefore start with the crime of rape before they are 12 years old and then move on to unlawful sexual intercourse, but after the age of 16 the activity may be consensual, so the inclusion of incest in the schedule is to allow the Crown to charge throughout the whole period. That is how the bill strikes the balance. It is not a case of prosecuting incest on its own; more than anything, it is a matter of charging practice.

Stewart Maxwell: That explanation is helpful. I do not want to go through all the offences in schedule 1, as most of us would agree with most of them, but I wonder about your view on the sexual offences under common law, which are listed in paragraphs 6 to 12 of schedule 1. Rape,

clandestine injury to women, abduction of a woman with intent to rape and so on are clearly very serious offences, but I wonder about lewd behaviour. I do not want to underestimate the issue, but is lewd behaviour in the same category?

Gertie Wallace: That reflects the historical nature and difficulty of charging sexual offences. Lewd, indecent or libidinous practice or behaviour can range from touching right up to almost prior to intercourse. It is a wide offence; it is almost indecent assault, but for children. That is why that offence is included, and again it probably relates to charging practice and allowing a victim to give all their evidence in court. If we charged only the rape, we would not be allowed to lead the full evidence.

Stewart Maxwell: Thank you, that is very helpful.

The Convener: There is a slight inconsistency of approach that will cause difficulty. Sexual offences and rape are clearly horrible crimes that in many cases have a profound impact on the victim, but so does attempted murder when the victim is left brain damaged or paralysed. As I read the bill, attempted murder would not be included.

Gertie Wallace: That is right: attempts are not included. These are difficult matters, because attempted murder can range from a fairly minor situation in which the consequences of actions could have led to somebody's death to somebody just about dying as a result of a person's actions—

The Convener: And being left permanently disabled.

Gertie Wallace: Yes. Again, it is a matter of striking the right balance. For instance, the bill does not cover assault to severe injury, permanent disfigurement or permanent impairment. In some cases, those offences can be charged similarly to attempted murder—they are just below it—but in other cases they are charged in the sheriff court at sheriff and jury level.

The Convener: Perhaps there is an argument that the criterion should be the impact that the alleged crime has on the victim, irrespective of the charge that is libelled.

Gertie Wallace: That would lead away from certainty and finality, and it would bring in a much more subjective approach. It might be difficult to frame.

The Convener: I think that this is altogether fraught with difficulties.

We will go to questions from Nigel Don, bearing in mind that the bulk of questions have been asked.

Nigel Don: There is just one other issue. We have talked an awful lot about historical evidence, but I imagine that you will be talking to the police about the future and the implications of holding on to evidence for longer—assuming that the bill is passed. Is there anything that you would like to tell us about what you are discussing?

Scott Pattison: We will discuss matters with the Scottish forces and ACPOS. During Mr Layden's evidence, the issue was raised of the retention of real evidence post acquittal in relation to the offences covered in the list in schedule 1. There is a major piece of work for the police and the prosecution service in looking carefully at the rules that should apply to retention.

Nigel Don: Do you see any conceptual problems, or is it just a matter of doing some work and having some slightly bigger cupboards to hold a few more things? I am being slightly flippant, but is it simply a practical issue?

Scott Pattison: For me, it is a practical issue. It is a significant one, as I am sure it will be for the police, and we will have to work together to find a solution.

Nigel Don: Thank you.

The Convener: I thank the witnesses for coming this morning and giving evidence in a clear manner. We would be grateful to have further written evidence along the lines that Mr Pattison undertook to provide.

The committee will move into private for the remaining agenda items.

11:57

Meeting continued in private until 13:26.

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