The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

# JUSTICE COMMITTEE

Tuesday 7 December 2010

Session 3

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

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## JUSTICE COMMITTEE
**35th 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:**

Richard Keen QC (Faculty of Advocates)
Shelagh McCall (Scottish Human Rights Commission)
Alan McCreadie (Law Society of Scotland)
John Scott (Former Chair, Scottish Human Rights Centre)

**CLERK TO THE COMMITTEE**

Andrew Mylne

**LOCATION**

Committee Room 2

# Scottish Parliament

## Justice Committee

*Tuesday 7 December 2010*

[The Convener *opened the meeting at 10:05*]

## Decision on Taking Business in Private

**The Convener (Bill Aitken):** Good morning, ladies and gentlemen. I ask everyone to ensure that mobile phones are switched off. The weather has taken its toll this morning: we are short not only of witnesses, but of committee members. I am hopeful that some of them will arrive, but as some of the witnesses have other engagements later in the morning, I think that we should proceed. The members who are not present can, of course, get a flavour of the evidence from the *Official Report* of the meeting.

The first item on the agenda is a decision on taking business in private. Do members agree to consider agenda item 3 in private?

**Members** *indicated agreement.*

## Double Jeopardy (Scotland) Bill: Stage 1

10:06

**The Convener:** We turn to the principal business of the morning, which is consideration of the Double Jeopardy (Scotland) Bill. This is the second of our scheduled evidence sessions on the bill. I welcome the first panel of witnesses, who are Richard Keen QC, the dean of the Faculty of Advocates, and Alan McCreadie, the deputy director of law reform with the Law Society of Scotland. We are particularly grateful to them for coming this morning. I know that, for Mr McCreadie, it was not done without considerable difficulty. The dean lives somewhat more locally but, even still, it is very good of him to attend.

We will go straight to questioning. The first batch of questions relates to the general rule against double jeopardy. The Scottish Law Commission recommended a core rule against double jeopardy supplemented by a broader principle against the unreasonable splitting of cases. Leaving aside, for the moment, issues relating to the proposed exceptions, does the bill effectively capture the important elements of a general rule against double jeopardy?

**Richard Keen QC (Faculty of Advocates):** I am content that the principal objective of the bill reflects the wish of the Law Commission to have the matter of double jeopardy expressed in clear statutory form. However, I have material reservations about certain aspects of the bill that depart from the recommendations of the Law Commission. In particular, I refer to the bill's retrospective effect and, more particularly, to section 11. Those aspects materially undermine the intention of the bill and confuse the issue in a way that I regard as being unsatisfactory.

**The Convener:** Obviously, that is an issue of some import and we will revisit it at greater length. Mr McCreadie, do you have any comments?

**Alan McCreadie (Law Society of Scotland):** The Law Society's position on section 1 has been consistent. Like the Faculty of Advocates, the society welcomes the setting into statute of the rule against double jeopardy in section 1. That was our position when we responded to the Scottish Law Commission's discussion paper and to the Scottish Government's consultation earlier this year. We recognise that the rule should be set in statute. Thereafter, as my colleague said, there are certain exceptions with which the society has some issues.

**The Convener:** Will you outline how the proposals in the bill would affect the possibility of

prosecuting in Scotland cases that have already been prosecuted in other countries? Are you content that that would work in practice?

**Richard Keen:** There are two questions there. As a matter of principle, the faculty has no objection to the exception that is provided for in the bill with regard to an earlier foreign prosecution, but there is a question about whether it will work in practice. I suspect that the outcome of implementing the legislation is the only thing that will give clear guidance. The issue might need to be revisited once we have seen how it works in practice. One of the difficulties will be in establishing the standards that have been applied in the context of a foreign prosecution.

**Alan McCreadie:** We have no particular difficulty with section 10, bearing in mind that it refers to the Schengen convention.

**The Convener:** The current common-law rule is subject to a proviso that allows a person who has been tried for assault to be tried again for homicide if the victim subsequently dies from the injuries. In restating that proviso in statute, the bill takes a different approach from that which was recommended by the Law Commission. Which approach do you prefer and why?

**Richard Keen:** In my submission, it is not just a matter of personal preference. It seems to me that the proposal in the bill simply cuts a swathe through the rationale for the legislation. The whole point of the legislation is to express in statutory form the rule with respect to double jeopardy and to clearly identify exceptions to that rule, which turn, essentially, on the issue of new evidence. That new evidence may also embrace, for example, the idea of an admission.

We now have reflected in section 11 a proposal whereby a person who has been tried for assault and is acquitted may then be tried on a charge of murder or culpable homicide. The only change is with respect to the consequence of the act: the actus reus remains the same and there is no new evidence and no admission. You are inviting a situation in which the first jury, having heard all the relevant evidence with regard to the act or any special defence, such as self-defence, acquits and then, because of an unrelated change of circumstance—unrelated to the evidence of the act—there is a new trial and a jury that hears exactly the same evidence is invited to convict. That is wholly inappropriate and goes against the whole theory of the exception to double jeopardy. Indeed, it raises issues about the victim's rights under article 8 of the European convention on human rights.

When I use the term "victim", it normally applies to the person who has been the immediate recipient of a criminal act, whether it be assault or something else. However, we must remember that the victims of crime include the family and the immediate partners of those who have been the recipients of criminal acts and also those who are accused of a criminal act, tried and acquitted and found not guilty. I count them as victims of the criminal act because, although they have been found not guilty, they have gone through the process of being stigmatised, charged and tried. It seems to me that there are perfectly sound reasons for allowing a charge of murder in circumstances in which someone has been convicted of an assault, but that there are fundamental problems with extending section 11 to include cases in which someone has been acquitted. I must say that that is the section of the bill that causes the Faculty of Advocates the greatest concern.

**The Convener:** Before we hear from Alan McCreadie, I will allow further exploration of this point, which is important.

**Nigel Don (North East Scotland) (SNP):** Thank you for that outline, Mr Keen, because it was not what I thought the bill said. This is where I need your advice. My expectation was that section 11 allowed the possibility of a case being reopened when the first accused had been found not guilty, but still only where there was new and compelling evidence. I might have been wrong about that, but that was my expectation of what it would do. In other words, it covers the single exception in which the accused had originally been found not guilty.

10:15

**Richard Keen:** That is not my reading of section 11, which is not expressed in that way. The draftsmen may wish to comment on the matter but, if that was their intent, it is not evident from the product of their efforts.

**Nigel Don:** I am grateful to you for those comments, because I agree entirely with your previous point—that the principle is that a case cannot be brought twice on the same evidence. My expectation was that new evidence would be required. Section 11 deals with an exceptional circumstance, in which someone has died and it is appropriate to have another go at someone who has been found not guilty.

**Richard Keen:** It is not apparent to me that section 11 is needed in such circumstances. One view is that the earlier sections provide some modifications to deal with that outcome. Section 11, especially section 11(1), is so clearly worded as to lead to a situation in which a person who had been acquitted of an assault may be charged with murder, although no new compelling evidence had been identified.

**Nigel Don:** Thank you for that clarification. Assuming that the draftsmen reword the provision as I think it should be worded, how would you good gentlemen react to the idea that section 11 creates an exception to the general principle that someone must be convicted the first time before they can be retried? People are innocent until proven guilty. However, section 11 says that, despite the fact that someone was found not guilty the first time around, they may, on the total evidence that is subsequently available, be found guilty of homicide the second time around.

I will rationalise the provision to you as the Crown Office or the police rationalised it to us; I apologise for the fact that I cannot remember where the argument came from. The point was made that what appears to be a relatively minor assault will be investigated at one level, but that the moment that it is known that the victim is dead, the investigation will normally be a great deal wider and may throw up evidence that was not produced the first time around. Whether that is the way in which to police the world is another question, but I would be grateful for your comments.

**Richard Keen:** First, it seems to me that the issue can be dealt with properly under sections 2, 3 and 4. Secondly, I find the point that the Crown Office or the police made about widening an investigation to be extremely unsatisfactory, not because one would be surprised to find that resources must be applied according to the seriousness of the case—that is understandable—but because the test for new evidence in section 4 refers to evidence that could not reasonably have been obtained prior to the first trial. I see no reason to alter that test in the context of the assault, murder and culpable homicide scenario. The same test should apply.

If the Crown wishes to make the argument that evidence could not reasonably have been recovered because the resources that were available to deal with an apparently minor assault were not such as to disclose that evidence, then so be it, but I see no reason to change the test.

**The Convener:** You have identified a difficulty that we will pursue in due course.

**Alan McCreadie:** I endorse the dean's comments on section 11, with which the Law Society also has some difficulty. I understand what has been said about new evidence, but one could look at section 4 rather than at section 11. The Law Society notes that the provision is a departure from the Scottish Law Commission's recommendation that a subsequent prosecution should be made available only where there has been a conviction, rather than where there has been either a conviction or an acquittal.

**Nigel Don:** I turn to the provisions that relate to tainted acquittals. You will be aware that, essentially, the bill says that a tainted acquittal can always be overturned. Does that make sense to you?

**Alan McCreadie:** The Law Society's position has been consistent throughout, in its evidence both to the Scottish Law Commission and to the Scottish Government. A number of issues arise in respect of section 2, on tainted acquittals, and section 3, on subsequent confessions. In particular, the society has mentioned the fact that the provisions will apply to all offences, regardless of whether they are prosecuted on indictment or on summary complaint.

The Law Society also has difficulty with regard to the phrase "some other person", as opposed to the acquitted person. There could be circumstances in which the acquitted person had nothing to do with the offence against the course of justice. Also, the offence against the course of justice might not have had a bearing on the acquittal. Against that background, the Law Society respectfully suggests that section 2 be amended.

**Nigel Don:** Are you saying that there is no test in the system that asks whether the result would have been the same?

**Alan McCreadie:** It appears that such a test would have to be incorporated into section 2. When a case is brought back for the court to determine whether there should be a retrial, there must be consideration of whether the offence had any bearing on the acquittal in the original trial.

**Nigel Don:** Is there no provision in the bill that requires the judge who considers whether there should be a retrial to consider that point? I do not yet know every word of the bill.

**Alan McCreadie:** I am focusing on section 2(3). Perhaps that is the place for provision for the test to be met.

**The Convener:** How is a tainted acquittal going to arise? There could be undue pressure on witnesses to change their evidence or not to give evidence at all, but another possibility is that the jury might be suborned in some way. Will we get ourselves into difficulties in the context of the Contempt of Court Act 1981, in that we are not allowed to know what goes on in a jury room?

**Richard Keen:** I do not think that we will. I do not entirely agree with the Law Society's point on the matter—I should make that clear before I answer the question. I will make two comments. First, where we are dealing with tainted acquittals, I see no reason why that should be limited to matters on indictment.

Secondly, although one might have reservations about extending the approach to the acts of a third party, one has to be practical. Very often, it might be difficult to determine whether a third party was acting on the instructions—implicit or otherwise—of the accused. It seems to me that it would be too easy to elide the consequences of section 2 by ensuring that it was always a third party who suborned the jury, rather than the accused himself. As a matter of practice, if the accused is not on bail, it will be a third party who ends up suborning the jury, anyway. Therefore, if section 2 is to be effective, it must be as wide as it is.

On the question of there being a test, section 2(3) invites the court to conclude

"on a balance of probabilities that the acquitted person or some other person has ... committed such an offence against the course of justice."

I see no reason why the court should not also be invited to conclude—by whatever test, whether that be probability or otherwise—that but for that offence the outcome of the trial could have been materially different. That would not offend against the idea of not going into the jury room; it would be the court expressing its objective stand-alone view, which would not influence a second jury.

**The Convener:** We are talking about serious offences, in any circumstances. Would it be simpler to leave it so that someone who was guilty of such practices would find themselves charged with an attempt to pervert the course of justice?

**Richard Keen:** The difficulty with that is that we might charge the third party who was directly implicated in the actings in question, but the actings had an effective outcome in so far as the original accused might have been acquitted. The objective of section 2 is to ensure that the accused does not secure the benefit of a third party's actings in suborning a jury.

**The Convener:** Cynic that I am, I find it difficult to envisage circumstances in which the third party had carried out the acts without the active knowledge and compliance of the accused, albeit that he is in custody.

**Richard Keen:** One might want to arrive at that conclusion, and one might readily infer that. The difficulty is that, particularly in the context of organised crime, if someone at a high level in the pecking order is the accused and someone further down the pecking order is the third party carrying out the relevant act, we are likely to find that both the accused and the third party will stand before a jury and disown the idea that the accused had anything to do with it. I regard the proposed measure as an anti-avoidance provision, if I may put it that way.

**Nigel Don:** If I have got you alright, you are still suggesting that section 2 might say that the court is invited to conclude whether or not an offence has taken place. The offence might have taken place, but that still might not have changed the result in the jury room.

**Richard Keen:** The court could conclude that, on the balance of probability, the offence took place. However, the nature and circumstances of the offence could be such that it would not have had any bearing on the outcome of the original trial. If the court is in a position to say that, it should be able to stop the proceedings there and then.

**Nigel Don:** So, you really do want something in section 2 that splits those two things, so that the court knows.

**Richard Keen:** I think that section 2(3) should have a paragraph (c) that says that the court must be satisfied that, on the balance of probability, there would have been an impact on the outcome of the original trial.

**Nigel Don:** Thank you. That was extremely helpful.

Let me move beyond tainted acquittals—unless there is anything else that you particularly wish to refer to in that respect, Mr McCreadie.

**Alan McCreadie:** No. I do not think that there is anything else on that.

**Nigel Don:** Let us turn to admissions. I had thought that they would be a much more vexing subject, but there was quite a lot to say on tainted acquittals.

Could you outline, gentlemen, your current position on where we should be when it comes to admissions?

**Richard Keen:** I am content with the provisions in section 3. How they will work in practice is another matter. Under section 3(4), the court must be in a position to be satisfied

"on a balance of probabilities that the person credibly admitted having committed the original offence".

That is "credibly admitted"—not just admitted.

I wonder how the court would approach that test without having to rehear the entirety of the evidence relating to a case. It is not possible to judge the credibility of an admission simply by reference to the circumstances in which the admission is made. Somebody might very credibly admit to having done something, but on intense inquiry regarding the original evidence, it might transpire that they could not conceivably have committed the offence because they were not in the country, or whatever.

I quite understand the reasoning behind section 3, and I do not disagree with it. It is necessary to have a test such as that which is set out in section

3(4)(a), but I wonder how easily the courts will be able to deal with that test. Could we end up in a situation in which the court essentially has to rehear all, or at least a major part, of the evidence pertaining to the original crime? What do we have in mind as far as the test of credible admission is concerned?

**The Convener:** Let us suppose that the actual indictment was fairly detailed, as these things tend to be, and that the admission revealed special knowledge, which only the perpetrator of the crime could have. That would obviate the problem, would it not?

**Richard Keen:** Yes, but that is only one type of case. We are not relying on special knowledge as the test of a credible admission. I am not unsympathetic to the entire notion, but I wonder how, in many circumstances, the court would be able to make its judgment.

**Nigel Don:** I would like to hear from Mr McCreadie at this juncture, and I might then come back to Mr Keen on that last point.

**Alan McCreadie:** In its written evidence, the Law Society stated that there are

"procedural difficulties with Section 3(4)".

We have referred to the standard of proof and the balance of probabilities—the civil standard. The instance was given in another written submission of a fellow prisoner who said that the accused did, in fact, do it. I take on board entirely what the dean of the faculty has said about issues of credibility in that regard, however. Perhaps, as well as credibility, reliability of the evidence should also come under section 3(4)(a). Procedurally, the way forward would have to be for the court to hear evidence before it was able to determine the matter.

10:30

**Nigel Don:** Am I right in thinking that you two gentlemen have had the benefit of reading Professor Paul Roberts's written submission to the committee?

**Richard Keen:** I cannot say that I have.

**Nigel Don:** I commend it to you, although there is no point in asking you to read it just now. He is seriously critical of the historical reliability of confessions, which leads me to wonder whether we should have some kind of test of confessions. You gentlemen suggested that special knowledge would be one indicator, and that another test might be that the court has to be satisfied—I am trying to make the words from something else fit—"beyond all reasonable doubt" rather than

"on a balance of probabilities".

Would it be appropriate to consider some test for such evidence that goes well beyond mere credibility so that the court has to exercise some serious judgment in deciding whether to bring a case back on the basis of an admission?

**Richard Keen:** We need to make the provision workable. I just find it difficult to envisage how the court will deal with this issue without finding itself saying, "We need to hear fresh evidence before we can form a view under section 3(4)." That will mean an inordinately long and expensive process. On the other hand, if we were to set the bar somewhere else, such as a reliable admission disclosing special knowledge, or something of that kind, then that is a test that the court could apply quite effectively without hearing myriad fresh evidence.

**Alan McCreadie:** There is nothing that I can usefully add to that. There has to be some addition to section 3(4). However, perhaps a special knowledge test would obviate the need for evidence to be heard in court again.

**Dave Thompson (Highlands and Islands) (SNP):** The Scottish Law Commission did not reach a firm conclusion on whether there should be a general new-evidence exception. Leaving aside the issue of retrospective application for a moment, do you support the inclusion of such an exception in the bill? If so, what are your reasons for that view?

**Richard Keen:** Let us be clear that the exception to the rule against double jeopardy arises in circumstances where there is fresh evidence. The test is that it is not evidence that could reasonably have been secured at the time of the original trial. I would be in favour of that exception as expressed, and the faculty would not have a difficulty with that. However, it is important to underline the requirement that the evidence could not have been reasonably obtained at the time of the original trial. That goes back to a point that was made earlier about the police or the Crown saying, "Well, some crimes are more thoroughly investigated than others." There must be a question mark over whether evidence was not reasonably available simply because the investigation was not as thorough as it might otherwise have been.

**Alan McCreadie:** The society would agree with that. We would accordingly endorse section 4(6)(b), which states that the evidence

"could not with the exercise of reasonable diligence have been made available".

On section 4(6)(a), the society's position has been consistent throughout the consultation process that new evidence should have to be in some way compelling rather than just evidence that was not available at the original trial or evidence that just

"strengthened substantially" the case against the accused. The society has other issues with regard to section 4, but I do not know whether this is the appropriate time to mention them. Unlike sections 2 and 3, section 4 is tied into schedule 1 offences, which the society stated in its written evidence are "offences against the person". The society's position has been that any exception to the rule against double jeopardy should apply to serious cases that are prosecuted on indictment. It questions at least some of the offences to which schedule 1 refers, and the fact that the schedule 1 list can be amended by Scottish ministers rather than by primary legislation.

**Dave Thompson:** That was the next point that I was going to come to. Do you believe that any of the offences on the list should not be there? Are there others that should be on the list?

**Alan McCreadie:** We have mentioned that all the relevant offences that are listed in schedule 1 are offences against the person. We have no difficulty with paragraphs 1 and 2, which relate to murder and culpable homicide respectively, or with the paragraphs on genocide. We have some difficulty with regard to indecent assault, which can be tried summarily. The society respectfully suggests that, if there is to be such a list, the starting position should be that it contains offences that are triable on indictment only. The society questions why other serious offences such as serious frauds, serious drugs cases and armed robbery are not listed.

**Richard Keen:** Reference was made to schedule 1. To take the example of paragraph 11, which refers to

"Lewd, indecent or libidinous practice or behaviour",

one could be dealing with offences that are marginal breaches of the peace. It seems that there is a disparity between the type of offence that may come under paragraph 11, and the other offences to which schedule 1 refers.

I would not disagree with Alan McCreadie's observation with regard to other serious offences that relate to drugs or armed robbery. Why are those not in the list?

**The Convener:** It is not envisaged that we will have a great many cases in Scotland; it would frankly be unworkable if there was to be a plethora of cases. Rather than seeking to limit the type of case to specific crimes of murder, rape or whatever, should we simply leave it as a matter for the Crown? It would presumably seek to invoke the double jeopardy provisions only in cases in which there was a very marked public interest in doing so or in which the impact on the victim had been particularly cruel.

**Richard Keen:** I believe that one would then have to balance the terms of the bill by limiting the provisions to crimes that had been charged on indictment. That sends the appropriate message that the provisions apply only in respect of serious crime.

**The Convener:** I think that that is a given. I cannot for a moment envisage circumstances in which a matter that had been dealt with in summary complaint would be subject to the revised rules in this respect. However, it can be argued that we should simply not specify the type of crime, and leave it to the Crown. Their lordships would look askance at any effort to reraise matters that were not of the utmost gravity.

**Alan McCreadie:** There may be some difficulty with that, in that any exception to the rule against double jeopardy is an exception to the principle of finality of proceedings to which an accused person is entitled. It is clear to my mind that any departure from that must not be taken lightly. The view can be taken that there should not be a schedule to section 4, and it should simply—as with sections 2 and 3—apply to all crimes and offences. However, there is some difficulty with that with regard to a new-evidence exception in that it departs from the principle of finality.

**Dave Thompson:** Picking up on that point, I note that you mentioned the ability of ministers to add to or take away from the list in schedule 1 by order. Could you elaborate on that a wee bit? You said that you would perhaps prefer primary legislation. Would it make any difference if the order had to go through the positive rather than the negative procedure?

**Alan McCreadie:** I am not sure that it would. The society's position has been consistent: the provision should apply to anything that has proceeded on indictment, and section 4 could simply say that. That would obviate the need for schedule 1 but, if there is to be such a schedule, given my previous comments on the principle of finality, perhaps it should be for the Parliament to determine which other offences should be included in the list in schedule 1.

**Dave Thompson:** Would stipulating that such an order would be subject to the affirmative procedure—in other words, ensuring that it had to be approved by the Parliament—not deal with that?

**Alan McCreadie:** It might do, but our principal position is that the provisions should apply to all crimes prosecuted on indictment. On the procedural issue of how offences would be added, the society's view would be that the process that you have described might be another method of dealing with the matter. In normal circumstances, if it were decided that there should be new-

evidence exceptions with a particular crime or offence and that it would be appropriate to add that to the list, how that would be done is not a concern, as long as the appropriate safeguards were in place and it was not the case that the list was simply added to.

**Dave Thompson:** Mr Keen, do you have a view on that?

**Richard Keen:** I would not like to impugn the processes of the Parliament, particularly when I am appearing before one of its committees, but I observe that even the process of positive approval of a ministerial order does not give rise to the same sort of intense scrutiny that takes place with primary legislation. We are talking about a significant piece of proposed legislation.

I believe that the faculty would align itself with the Law Society's view that it would be more appropriate for section 4 to be limited to cases tried on indictment. That would underline the serious nature of the offence that will be the subject of section 4, and it seems to me that it would give a degree of clarity to the Crown on when it should proceed and to the court on how it should tackle the matter when it comes before it.

Is there any compelling public interest in making cases that were taken on complaint the subject of the new-evidence rule and therefore exceptions when it comes to double jeopardy? No is the opinion that I would venture.

**Dave Thompson:** Thank you very much for that extremely helpful answer.

A number of tests are built into the bill that must be met before there can be a second prosecution. What are your views on that approach? Do you think that the tests are adequate?

**Richard Keen:** I think that we are referring, in particular, to the requirement that the court should be satisfied that the outcome would be materially different. I approve of that test and of the requirement that it is in the interests of justice that the case should proceed. I believe that, if we are entertaining exceptions to the well-entrenched rule on double jeopardy, we should give the court some margin of appreciation in applying that test.

**Alan McCreadie:** I agree. I am not sure that there is anything that I could usefully add on the tests that are set down in sections 5 and 6.

**The Convener:** Nigel Don has a point that he wanted to raise earlier.

**Nigel Don:** I have several, which have arisen as we have gone along.

I will begin by referring you to a point that the Royal Society of Edinburgh made in its submission, with which you may not be familiar. It said that, in a retrial, there could be two crucial bits of evidence. One might be a small one that has recently come to light and the other a substantial piece of evidence whose significance was appreciated only in the light of the small piece of evidence that has subsequently become available. I suspect that that would cause the prosecutor no problem, but I just want to ensure that that is the case. If there was a new piece of evidence, albeit small—classic television drama stuff—that told you that something that you had previously ignored was significant, surely that new evidence should enable you to use all the evidence, even if it had not been led the first time, in the second trial. Is that a fair interpretation?

**Richard Keen:** It appears to me that it is necessary to take a global view of what is meant by "new evidence". If some piece of evidence—some adminicle—is discovered that you could not reasonably have discovered before that casts other evidence in a wholly different light, it seems to me that you are entitled to adduce that new adminicle and to invite the court to cast the existing evidence in a different light. I do not see a problem with that.

10:45

**Nigel Don:** Neither do I, but—

**Richard Keen:** You might have an adminicle in which two eye-witnesses claimed that the perpetrator had a beard. If the perpetrator had given evidence that he did not, surely you would be entitled to look at the adminicle's impact on the evidence as a whole.

**Nigel Don:** Indeed.

Returning to the question of what constitutes a serious crime, I am entirely clear that with this legislation we are talking about the exception rather than the rule. We have to get it right because it will probably not be considered again for a generation or two. You have suggested that an indicator of a crime's seriousness is whether the original trial was on indictment. I accept that, but is such an indicator adequate? Is there a better way of making clear in the bill that its provisions are only for very serious cases?

**Richard Keen:** I would venture that it is the only objective criterion that can be applied after the event. If the Crown has decided to proceed on indictment, it is because the offence is serious. If we start to introduce other categories of serious offence, we will be in danger of confusing matters.

We are relying on—and will have to defer to—the Crown's judgment on these matters. The Crown will decide whether to proceed and, even if a case was tried on indictment, it might determine that the matter was not sufficiently material to justify an attempt to secure a new trial.

**Alan McCreadie:** I agree that it is the only objective test.

**Dave Thompson:** Will the bill encourage the Crown to look at, say, more marginal cases and think, "Well, we'll proceed on indictment, just in case"?

**Richard Keen:** I do not believe so. For a start, although, unlike the majority of the population, the Crown Office might want to make more work for itself, the reality is that it has finite resources and will apply them in consideration of the need not only to prosecute past offences but to have the capacity to prosecute future offences. I suspect that the legislation will be used sparsely and employed by the Crown only in quite exceptional cases.

**Nigel Don:** Before I ask the question that I am supposed to be asking, I wonder whether we can go back to the list in schedule 1. We take your point about armed robbery but, if the list were to be retained, should it include attempted homicide or murder?

**Richard Keen:** I am not particularly in favour of the list. For example, cases in which juries have been seriously suborned probably involve considerable sums of money. The two things tend to go together and they might well lead directly to, say, serious drug cases, which probably have a more obvious place in the schedule than attempted murder.

**Nigel Don:** Forgive me, but I suspect that the schedule applies not to tainted acquittals but to the new-evidence rule.

**Richard Keen:** You are quite right to correct me—it applies only to section 4.

**Nigel Don:** But should attempted crimes be included in the list? As I understand it, under Scots law you would regard such crimes as separate offences—

**Richard Keen:** You would.

**Nigel Don:** —whereas, curiously, south of the border they are regarded as the same offence. If we are going to have the list, should we in principle think about adding such crimes to it?

**Richard Keen:** The more fundamental question is whether we should have the list. My view—and the view of the Faculty of Advocates—is that the list is probably redundant if section 4 is limited to crimes tried on indictment.

**Alan McCreadie:** I agree entirely. I see no need for the list at all if section 4 is to be limited to crimes on indictment.

**Nigel Don:** Forgive me, but I want to push you on this. After all, we do not answer the questions. If we are somehow or other persuaded by others that we should have the list, should it include attempted homicide?

**Richard Keen:** Yes. Why include the

"Lewd, indecent or libidinous practice or behaviour"

mentioned in paragraph 11 of schedule 1, which could be marginal and just a breach of the peace, and not include attempted murder? There is no balance there.

**Nigel Don:** I will move on to the issue of retrospectivity—if that word is in the English language; if it is not, it will have to get there. You will be aware that the bill disagrees with the Scottish Law Commission's original proposals, and I think that it is fair to say that both of you disagree with what is in the bill. Will you explain why?

**Richard Keen:** Lawyers are instinctively repelled by the idea of retrospective legislation; in any event, there is a presumption against it. Putting that to one side, however, I will go back to the question of who the victims of crime are.

In a broad sense, the victims of a crime include persons who are arrested, investigated, tried and acquitted, because that experience has an immense impact on their personal lives. Those people are entitled to certainty, and to date they have had certainty conferred on them by the common-law rule against double jeopardy. The bill proposes to take that away, with the result that someone who has been acquitted of a serious offence may now be told that the police are still looking and still pursuing them and may come back. I wonder in general whether that is appropriate.

We must also remember that those people have article 8 rights under the European convention. They have a right to a private and personal life and, if you introduce retrospective legislation, you may be impinging on their article 8 rights. It is rather different if the legislation is not retrospective: people who go through the same process in future will know that they are amenable to the terms of the double jeopardy act, as it will become. However, you need compelling reasons to make provisions retrospective, and it is not obvious—notwithstanding the Tobin case, for example—that there are compelling reasons for section 13. You must take care, because the persons who would be impacted by retrospective legislation have convention rights, particularly under article 8.

**Alan McCreadie:** I agree. To my mind, the article 8 rights will be impinged on to a greater extent if section 13 remains.

The Law Society's position has been consistent throughout the consultation process and now at the bill stage that retrospective application would

not be in the interests of justice for the reasons that the dean has referred to. The Scottish Law Commission's position was that it may be justifiable under article 8, but Parliament would want to consider public policy grounds for whether section 13 should remain.

That takes me back to my point about finality. There will be cases before the bill becomes law in which the accused person, having been acquitted, will have been entitled to the finality of proceedings. To my mind, such a person's article 8 rights may be impinged on to a greater extent than in a case that occurs after the bill has been placed on the statute book.

**Nigel Don:** I understand that point entirely, and I suspect my colleagues do too, but I will put a proposition to you that I do not think is unreasonable. I wonder whether, first, you will agree that it is not unreasonable and, secondly, you will reflect on what we should do with it.

I imagine that there are cases in which a woman is murdered, no body is found, and the man who killed her is the prime suspect but—despite being tried using all the other available evidence, including circumstantial evidence—he is not convicted. Subsequently, the victim's body is found, and there is enough DNA evidence to confirm the identity of the victim and the fact that the man—the killer—was close to her in her dying moments. Is there not a matter of public policy that says that justice is done by bringing that man to trial and convicting him?

**Richard Keen:** One could answer that in the affirmative without altering the views that have already been expressed about section 13. The point is that there will be hard cases on both sides of the divide, however section 13 is expressed—whether it is retrospective or not. There will be hard cases, but one must make a judgment. It seems to me that to apply this fundamental legislation retrospectively and, therefore, to make a major inroad into the common law without proper regard to rights under article 8 of the convention is a dangerous course to take. The faculty would be against that. However, I readily acknowledge that one can bring up difficult cases, particularly those involving developments in DNA testing.

**Nigel Don:** Do you accept that it might be reasonable in that specific circumstance—which is rare, mercifully—to allow retrospectivity? Otherwise, somebody could be walking the streets against whom there is compelling evidence. Does justice not demand that we should be able to apprehend and convict him?

**Richard Keen:** There are already people walking the streets against whom there is compelling evidence of a criminal offence but who, for a variety of reasons—whether it be time limits or whatever—have never been convicted. Therefore, I do not believe that we should generalise about this. The justice system is not and never will be perfect. You will not make it perfect or approach perfection by breaking down the rules on double jeopardy in the way that you suggest. If you start singling out cases because they seem particularly unjust, you are moving into dangerous territory. One person's subjective view of what is particularly unjust may differ radically from someone else's.

**Nigel Don:** With respect, I am not suggesting that it is unjust; I am suggesting that it is very serious. The example that I have cited is homicide. I am deliberately going there because I would be with you absolutely if we were talking about anything else. I am trying to look at the matter from the position of the ordinary citizen. If we know, or think we know because the newspapers tell us—although that is another problem—that a person is guilty of an offence and, once the body has been found, there is enough evidence, why should that person be walking the streets on what 99 and a bit per cent of the population would say is a technicality?

**Richard Keen:** It may be a technicality, but it seems to me that we must approach this as a matter of principle, and the principle is such that there may be hard cases on both sides of the divide. It would be equally unfortunate if that person were to be tried for that serious offence only for us to discover, in 10 years' time, following further developments in DNA testing, that the DNA evidence was not reliable.

**Nigel Don:** I accept entirely that there are limits to DNA evidence and that we must be careful. The person who is most likely to have the same DNA as me is my brother, and it is quite easy to get these things wrong.

**Richard Keen:** I am not saying that. I am merely pointing out that further developments may throw in doubt that which appears compelling at the time. There is an issue of fairness to those who are put on trial and those who are acquitted—they have rights as well. I believe that it was Jeremy Bentham who observed that, although he had great faith in the system of juries, he would not like to be tried for murder once a week.

**Dave Thompson:** Is there any real difference in principle between a situation in which someone commits an offence after the legislation comes into force—maybe five, 10 or 15 years down the road—and gets off only for the evidence then to be uncovered and a situation in which someone commits an offence a week before the legislation comes into force?

**Richard Keen:** There is a difference in so far as the legislation, if retrospective, carries with it

certain issues regarding people's rights. I recognise that it can be pared down to that sort of distinction—the day before and the day after. Parliament must take a view and it appears to me that, as a matter of principle, Parliament should only in the most exceptional cases contemplate retrospective legislation, especially in the sphere of criminal law. I do not find—and, in considering the matter, the faculty has not found—a compelling case for retrospectivity. I take comfort from the fact that the Scottish Law Commission arrived at the same conclusion.

**The Convener:** Mr McCreadie?

**Alan McCreadie:** There is nothing that I can usefully add.

**The Convener:** You adopt his arguments.

**Alan McCreadie:** I absolutely adopt them.

**The Convener:** Gentlemen, thank you very much indeed for coming this morning. I know that it has not been without its difficulty, but it has been an interesting session from which the committee—albeit in depleted numbers—has derived considerable value.

11:00

*Meeting suspended.*

11:04

*On resuming—*

**The Convener:** I welcome the second panel of witnesses, which comprises Shelagh McCall, a commissioner in the Scottish Human Rights Commission, and John Scott, former chair of the Scottish Human Rights Centre. I thank you both for turning out in somewhat difficult circumstances.

I ask Mr Scott for his view on the first question. The Scottish Law Commission recommended a core rule against double jeopardy, supplemented by a broader principle against the unreasonable splitting of cases. Leaving aside issues that relate to the proposed exceptions, does the bill capture effectively the important elements of a general rule against double jeopardy?

**John Scott (Former Chair, Scottish Human Rights Centre):** Yes.

**The Convener:** We cannot ask for a more succinct answer than that.

Ms McCall, do you have anything to add?

**Shelagh McCall (Scottish Human Rights Commission):** My answer is also yes. We welcome the enshrining of the rule against double jeopardy in statute, but we have concerns about the exceptions.

**The Convener:** We will come to the exceptions presently.

The current common-law rule is subject to a proviso that allows a person who has been tried for assault to be tried for homicide if the victim eventually succumbs to his injuries. In restating that proviso in statute, the bill takes a different approach from that which the Scottish Law Commission recommended. Which approach do you prefer, Mr Scott? I ask you to justify your answer.

**John Scott:** I associate myself with the comments that were made by the first panel of witnesses. I do not mean this callously, but the death is an irrelevance in such circumstances. If an earlier acquittal has been given, the fact of death does not reflect back and turn what was not an assault as far as the jury in the earlier trial was concerned into an assault or a murder. In rejecting the Law Commission's approach and altering the position from the common law, the bill goes too far.

**Shelagh McCall:** The Scottish Human Rights Commission's perspective is that any second prosecution—whether under section 11 or another exception—is an interference with an acquitted person's right to private and family life. As such, it must be justified under article 8.2 of the European convention. The test for that is whether the interference

"is necessary in a democratic society"—

that is, does it serve a pressing social need and is it proportionate?

The SHRC's concern about section 11 is similar to what the dean of faculty and Mr Scott said. The section contains no criteria for a test that the courts would apply, such as the new-evidence test. Like Mr Scott, we struggle to see the difference when an acquittal has been given and the only change in circumstance is that the victim has—unfortunately—subsequently died.

**Nigel Don:** Good morning. I will pursue where I went with the Faculty of Advocates and the Law Society. You have all identified an issue. I think that the bill does the wrong thing; indeed, I will presume that it does and take us to what it should do. The bill should provide for an exception to the requirement that the accused must have been found guilty the first time round, to allow new evidence to be brought. If the bill did that—in other words, when an assault turned into a homicide, the accused's acquittal the first time round would not help them if new evidence was available—would that be unreasonable? That is not in the bill but, if we amended the bill to say that—which is probably what it should say—how would you feel about that?

**John Scott:** I would not be entirely sure why it was necessary to have such a provision over and above section 4. If new evidence was available anyway, that would be the reason for the Crown to make an application for the court to consider—unless you suggest that the death would in some way be new evidence.

**Nigel Don:** I guess that the problem is that that takes us back to the schedule 1 list. The original assault might not be in that list, and the list allows the new-evidence rule to apply. Perhaps an addition should be made to schedule 1 to ensure that, if a victim dies subsequently, what the accused was originally charged with does not matter.

**John Scott:** In the context of an acquittal and in terms of section 4, there would have to be some new evidence that could not have been located with "reasonable diligence" at the time. The death does not really have anything to do with that.

**Nigel Don:** Right. Let us say that someone is convicted of assault and found not guilty. Subsequent evidence says that they probably were guilty of the assault—an assault that resulted in a death. I am aware that I am almost pushing the bill aside in putting the question. Do you have a problem with a person in that situation being tried again?

**John Scott:** I drafted the Society of Solicitor Advocates submission. I do not agree with the bill other than in its stating the rule against double jeopardy in statutory form. I am not comfortable at all with the exceptions. The schedule is a list of serious charges. I heard the discussion with the previous panel on ways of adding to it, but I cannot think of any serious charges that are not already included. Obviously, all parties have indicated their support for the principle. If this has to be done, my preference is that the provisions should be restricted to murder and rape, as the Scottish Law Commission suggested. The bill is in serious need of being tightened up in terms of the exceptions. That would ensure that it intrudes only to the limited extent that is necessary. In terms of the human rights aspect, the bill goes much further than necessary.

**Dave Thompson:** Do you agree with the previous witnesses that there should not be a list and that the bill should relate only to cases that are dealt with on indictment? Does that idea attract you more than a list that spells out particular offences?

**John Scott:** That would be an improvement to the extent that some offences on the list can be prosecuted at summary level. I would prefer the bill to be restricted to the old Crown pleas of murder, rape and treason, although there have not been many prosecutions for treason for a while.

**Dave Thompson:** I accept that you do not want to add to the list. The suggestion has been made that the list—even the truncated list that you mentioned—should be added to or reduced not by order but by primary legislation.

**John Scott:** Absolutely. The committee has seen evidence of the difficulty of agreeing what should be on a list and I struggle to see how, in this case, that could properly be dealt with by way of an order. If, having given proper consideration to all the evidence, including the evidence to the Scottish Law Commission, its report and the consultation that followed, we have not been able to come up with other matters that should be included in the list, I do not think that extending it by order would be appropriate.

**The Convener:** Is there an argument for having no list at all? Why not just leave it up to the Crown? Clearly, it would not invoke the legislation unless the matter was of considerable public interest and portent.

**John Scott:** I am sorry, perhaps I am trying to answer too many of the questions.

I see the point, but such legislation should be as tightly drawn as possible. I am not comfortable with the idea of simply leaving it to the Crown to decide. To that extent, there should be a list on which, from my point of view, there should be murder and rape. That would be an improvement on the bill. Leaving things entirely to the Crown could allow matters to be included that no one has considered. For example, the Crown may want to test a matter, perhaps because of pressure to do so. It is inevitable that the cases that we are talking about will be those that attract a fair degree of publicity. Those cases could be of any description.

11:15

**Shelagh McCall:** The committee has already heard from the dean of faculty and the Law Society on the importance of the principle of legal certainty and finality of judgment. We are talking about how to justify exceptions to that important principle.

From the SHRC's perspective, there are two lenses through which the committee should be asking itself the question about the list of offences. The first is whether those particular exceptions—and the offences that they are meant to cover—are shown to be necessary because of substantial and compelling circumstances or serious, legitimate concerns that outweigh the principle of legal certainty. The second is the lens of article 8.2 of the ECHR, which the dean of faculty and I have already mentioned. Can one say that there is truly a pressing social need for particular offences to be identified and included? Is it proportionate to

identify particular offences or just the level at which offences are prosecuted? The SHRC advises that one is likely to fall on the right side of the line and enact proportionate legislation when one draws the list of offences as narrowly as possible, and the gravity of offences as high as possible. We agree with the view that including cases on indictment satisfies that requirement in respect of gravity.

It is for the committee and Parliament to consider whether there is particular social concern about offences against the person of the type that are included in the list, or whether there is another social concern to do with serious fraud, drugs offences, money laundering and the other crimes that have been mentioned. That question is about what

"is necessary in a democratic society",

and there is no straightforward answer that one way is definitely right and one way is definitely wrong. The more narrowly the list is drawn, and the more serious the offences that are included—which is what the legislation purports to aim at—the more likely it is to comply with article 8.2.

**Stewart Maxwell (West of Scotland) (SNP):** I apologise if what I am going to ask has been covered. I was late because of my rather extended journey this morning.

I go back to the questions that Nigel Don asked on section 11 and the "Eventual death of injured person", and the comments that have been made about section 4 and "New evidence". We have heard evidence that the amount of resources that is applied to particular cases varies for obvious reasons. Let us take a case in which someone who is accused of assault is acquitted, the person who is injured subsequently dies of their injuries, and the case becomes a murder case. Do you accept that additional resources would be applied to that case, and it might well be that the Crown would wish to take the same person to trial for the murder? Does section 4 cover that eventuality because of the level of resource that is applied to the case, and because the publicity of a death tends to bring forward witnesses who had not noticed the case before?

**John Scott:** I do not think that section 4 would cover a case when the only additional matter was the fact of the death. I have been trying to think of an example of someone being prosecuted on summary complaint for an assault, and the victim dying some time later, apparently from the injury involved. I cannot see how what you describe would happen. If someone is involved in an incident in which the alleged victim has been assaulted or injured and the case is taken at summary level, we would be talking about six to eight months for the trial. If there was any change in the alleged victim's situation in relation to their injuries or their extent or effect, the matter could be reviewed, the summary complaint could be deserted, and the case could be reraised and proceedings taken on indictment. If, however, the original assault was thought to be sufficiently serious to be dealt with on indictment, the resources that were applied to it would have been pretty serious anyway. I accept that yet more resources are applied to murder cases, but that is probably because of the different types of evidence that are examined.

I cannot see a situation in which someone is prosecuted on summary complaint for assault and the victim succumbs, apparently because of the same injury some time after the trial has taken place. There are no examples of such situations. This is another aspect of the evidence on which the committee is being asked to consider the bill not justifying the changes that are being proposed. I struggle to see the argument. In a previous evidence session, the Crown almost seemed to suggest that, some time after an incident and the summary prosecution, the victim could succumb to their injuries without there having been any warning of that at all during the period before the summary trial.

A point that has been overlooked, even by the Crown, is that, to a significant extent, the Crown has control over when it starts proceedings. If there was any uncertainty about the matter, the Crown would not take summary proceedings; it would wait and see. That also applies in other areas that are affected by the bill: the Crown can wait and see if it does not think that the evidence is good enough. If necessary, it can wait for years. There might be issues with that, but corroborating evidence might come to light only several years later. The Crown has been allowed to bring proceedings in the past in such situations.

**The Convener:** Let me put forward a scenario that might arise. There is a street brawl involving a rough sleeper, who eventually finds himself charged with a simple assault—of punching and kicking an individual—plus the ancillary breach of the peace, which is inevitably contained in such a complaint. He has no fixed abode, and he has a criminal record, but not one that would justify prosecuting on indictment. Because he has no fixed abode, he is put through the custody court. He gets weighed off by the sheriff or, in Glasgow, by a stipendiary magistrate, for six months. What we do not know at that point is that the victim, who appeared simply to be bruised and to have superficial injuries, is suffering from a haematoma that, three days later, kills him. Such a situation can arise, in which the prosecution proceeds and is completed but, subsequently, the victim dies. It is perhaps not entirely far fetched.

**John Scott:** I am not sure. Even in the sort of incident that you are talking about, there will be a police investigation. It depends on whether there is any doubt about the state of the victim. If the victim cannot be contacted or disappears—if they are a rough sleeper, for instance—and then dies without anyone knowing about it, that would come to light when they did not appear to give evidence at the summary trial. You are talking about something happening without any forewarning after a summary trial has taken place.

**The Convener:** Yes.

**John Scott:** Although I am sure that that is medically possible, if there is any doubt or any warning about the case, the Crown will not approach it in that way.

**The Convener:** It is a Saturday night in Glasgow following a Rangers v Celtic football match. Police resources are stretched. It appears that there has been a simple case of assault, and a guy has some bruising. He is not examined fully, and he does not require hospital treatment. The accused is of no fixed abode and is put through the custody court. He pleads guilty, and the case is disposed of. The difficulty could arise.

**John Scott:** But if the accused has pled guilty, that is not the situation that we are discussing. The difficulty lies where someone has been acquitted.

**The Convener:** It would mean revisiting a prosecution. The law at present would allow for that.

**John Scott:** Yes. I have found it hard to identify my main difficulty with the bill, but this is one aspect of it. I am talking about a situation in which there has been a judicial determination and a person has been acquitted. They can be prosecuted again, once the Crown has decided that it is in the public interest, on a sufficiency of evidence, to proceed with a prosecution. The point is that the Crown should not be given another shot at it.

**The Convener:** We turn now to the subject of tainted acquittals.

**Nigel Don:** We will proceed in the same order as earlier, so the witnesses will know what is coming.

What do you feel about the tainted acquittal provisions in the bill and all that comes with them, particularly from the human rights perspective?

**John Scott:** Given the amount of talking that I have been doing, I wonder if Ms McCall might start on that.

**Shelagh McCall:** The commission has a number of concerns about the tainted acquittal provisions. First, there is no limitation on the offences to which the provisions might apply, nor is there a limitation on the level of seriousness of those offences. Secondly, the provisions do not restrict subsequent prosecution to once only, as the bill does in relation to new evidence. The bill would allow for repeated prosecutions of an acquitted individual—and repeated acquittals of that individual every time he subsequently confessed.

The commission's third concern relates to the particular tests that are set out in section 3. First, there is the balance of probability test—is the court satisfied, on the balance of probability, that the person made the admission?

**Nigel Don:** Sorry, but can I drag you away from admissions for the moment and go back to tainted acquittals? We will come to admissions.

**Shelagh McCall:** I am sorry. I have gone on to a slightly different tack.

**Nigel Don:** That is okay. We are going there, but if you just stick to the issues in order and deal with tainted acquittals, that will help us.

**Shelagh McCall:** Yes. I reiterate that our first concern is the lack of restriction in relation to the offences to which the provisions apply. The commission also has a concern about the terms in section 2 that allow for a second prosecution in circumstances in which the interference with the course of justice in the first trial has nothing to do with, or cannot be shown to have anything to do with, the accused who ends up being acquitted. There was some discussion earlier with the dean of the Faculty of Advocates about that.

An example that may or may not be helpful is that of a multiple-accused trial, in which accused person A incriminates accused person B as the perpetrator of the crime, but a third party, with the knowledge of and at the behest of A, interferes with the course of the trial in an attempt to have A acquitted and B convicted, with A's defence being that B did it. It may be as a result of that interference that A is indeed acquitted; it may be that person B is also acquitted in spite of the interference because he is genuinely innocent of the offence. The difficulty with the provisions is that both A and B will fall liable to a second prosecution as a result of that interference with the administration of justice. The question for the committee is whether that is a proportionate interference with B's rights that is necessary in pursuit of the bill's aim of securing against the sort of activity in which A was involved in my example.

There are perhaps two ways in which the matter can be dealt with in the bill. The first is to include in section 2(3) an additional condition that the court must consider: that the offence against the administration of justice is shown to have occurred with the knowledge of the acquitted person. Secondly, section 2(7)(b) perhaps requires to be

amended to require there to be a link between the effect on the outcome of the proceedings and the accused, which would allow the court to separate out A and B in a proportionate way.

**Nigel Don:** Thank you. I think that I understand in principle, but I am not quite sure. None of us is a draftsman, of course, and I am not quite sure how we can separate those effects without having the subsequent trial. That may be a problem that we need to consider.

**The Convener:** At the end of the day, that will not be our problem, but it certainly is an issue.

11:30

**Stewart Maxwell:** I have two questions, the first of which Nigel Don has just touched on. How can you separate out A and B in the scenario that you described, given the individuals involved and their propensity to lie and cheat—some of them, anyway—without having a fresh trial?

Secondly, irrespective of who tainted the trial, or how it was tainted, it must be accepted that it has been tainted. There has not been a fair trial, so it could be suggested that the trial should be treated as if it had never happened. You have suggested that there could be one trial after another—with the accused acquitted and retried, acquitted and retried, acquitted and retried—if it was continually proved that a trial had been tainted. However, if a trial is tainted, it should surely be wiped from the record. The trial was never fair in the first place, and there has to be a fair trial. The situation is therefore not quite the one that you have suggested, with a person being continually retried.

**Shelagh McCall:** I should perhaps clarify my comments. I apologise, but I strayed slightly into consideration of the admissions provision while glancing at my notes. My point about repeated trials related more to admissions than to tainted acquittals.

From the Scottish Human Rights Commission's point of view, the fundamental point is this: any criminal prosecution is, by its nature, an interference with one's right to private and family life. That is a given, and such interference is justified, under article 8.2 of the European convention on human rights, in relation to the prevention and detection of crime, for example. Under our current system, we allow one prosecution. The question that the committee will have to grapple with is whether it is proportionate, in pursuit of the aim of the prevention and detection of crime, to prosecute someone for a second time when there has been some interference in their trial—an interference of which they have been blissfully ignorant—and when they have subjected themselves to what, from their perspective, has been a valid and fair trial, only for them later to discover that it has not, at the hand of some third party, been valid and fair.

I acknowledge that such a scenario might be rare, but we feel that it is one that the committee will have to tackle. If possible, it will have to be wrestled with in the provisions of the bill.

**John Scott:** A few years ago, the appeal court dealt with a situation in which there were allegations that jurors had become involved with someone who was connected to one of the accused in a multiple-accused case. An investigation was carried out, and the appeal court appears to have accepted that one person connected to an accused, who I think was acquitted, had developed a relationship with at least one juror—I think that it was two separate jurors. However, because the appeal was at the instance of a separate accused, who was not involved in this odd situation, the appeal court felt that there was no reason to think that the jurors who had become involved in those relationships would necessarily be influenced in their views of that separate accused. They might be influenced in their views of the accused who was connected to the person with whom they were in a relationship, but not in their views of another accused. The court made that distinction. Even though the trial had clearly been tainted, the court decided that that would not have affected matters relating to the appellant.

The cause and effect aspect is very important—cause and effect showing that the accused was involved in any attempt to pervert the course of justice, and that any attempt to pervert the course of justice, or any perversion of the course of justice, was the reason why the trial proceeded as it did.

**Stewart Maxwell:** Is your problem only with cases in which there are multiple accused? Just as Nigel Don struggled earlier, I am struggling to imagine a situation involving a single accused in which, unbeknown to them, some third party somehow became involved in trying to get them acquitted.

**John Scott:** My difficulty is that the bill works on the assumption that, in such a case, the accused person must have known about it and must have been involved. The bill should contain a provision that makes it clear that some standard of proof is required—preferably, proof beyond reasonable doubt—that the accused was involved at all.

**Shelagh McCall:** I can perhaps postulate an example for you of a single accused. I accept that this, too, may be a rare example. Let us imagine that a complaint of rape is made against Mr A that is later withdrawn as being false; in the meantime, Mr A has been stigmatised as having been accused of rape, but the matter does not proceed

to trial. The same complainer then makes a complaint of rape against Mr B that Mr A finds out about. Mr A then interferes with Mr B's trial—not out of any interest in whether Mr B is guilty but out of a desire to obtain revenge against the complainer by undermining her and the impact that her evidence may have on the jury. Mr A succeeds in doing that, but Mr B is entirely unaware of the situation. He has subjected himself to what in his mind is a fair and valid trial, yet he may find himself exposed under the provisions in section 2 to a second prosecution. The question is whether the bill is sufficiently precise to enable those examples to be weeded out from the aim that it seeks to achieve.

**Stewart Maxwell:** I accept that, but I think that we are really stretching the bounds of several of these questions into strange and very unlikely theory rather than providing a practical example—nobody seems to have a practical example for any of these cases.

**John Scott:** That is indeed a problem, but the examples showing why the bill is necessary are thin on the ground, too.

**Stewart Maxwell:** Okay. Thank you.

**The Convener:** Let us move on to the issue of admissions.

**Nigel Don:** The issue of admissions is obviously much more contentious in principle. Will you both give us the benefit of your views on the issue? You will already have heard what the lawyers had to say—forgive me: what the Faculty of Advocates and the Law Society of Scotland had to say.

**Shelagh McCall:** I simply go back to what I said earlier about this particular provision to try to make my view as clear as I can. First, the Scottish Human Rights Commission has concerns that the admissions provision applies to all offences prosecuted at any level of gravity. From that perspective, the provision is very broad. The question is whether such interference in article 8 rights is justified.

The commission's second concern about the provision is that it is not confined to only one subsequent prosecution. As I said before—at the wrong time—under the bill someone could confess over and over, be prosecuted over and over and be acquitted over and over, until by chance a jury believes the admission.

The commission's third concern has to do with the tests to be applied under section 3. The test is, first, that the court is satisfied on the balance of probabilities that the admission was credibly made. As I think the dean of faculty mentioned this morning, it would perhaps be appropriate to consider whether that test should be one of beyond reasonable doubt. Mr Don referred earlier to the written submission of Professor Roberts, who set out some of the history on the unreliability of confession evidence; the English experience of similar legislation has brought that unreliability to light in the Miell case, to which the commission referred in its written response. Setting the test higher, at beyond reasonable doubt, would perhaps begin to address that issue.

The commission also has concerns about the second part of the test and the fact that there is no requirement for the confession to be reliable as well as credible. That is part of the test in England and the Miell case is a very good example of repeated confessions by an individual that were found to be manifestly untruthful and unreliable when the application for second prosecution was considered. A requirement for an admission to be reliable as well as credible would also deal with the commission's concern about the situation of vulnerable individuals who have been acquitted and who may make admissions not because they are truthful and reliable but because they are suffering from a mental illness or something of that nature. The court needs the ability to weed out the vulnerable and unreliable acquitted person.

Mention was made earlier of whether a special knowledge condition would address those issues. I observe that there will have been a public trial in which the circumstances of the crime will have been publicly revealed, recorded and, probably, reported, so I am not sure that there would be any vestige of special knowledge left for a second prosecution to use that as the test.

One final issue, which we raised in our submission, is that the current provision in the bill does not require the source of the evidence about the admission to meet any particular standards. For example, if a cell mate comes forward to say that Mr A, the acquitted person, confessed to him, there is no requirement for the cell mate to be capable of being regarded as a credible and reliable source of evidence before an application can proceed.

The changes we have suggested are ways in which one might be on safer territory with regard to that particular exception and its interference with article 8 rights.

**John Scott:** I associate myself with Ms McCall's comments and the written submission from the SHRC. On the possible special knowledge condition that was discussed earlier, beyond the fact that there will already have been a public trial, given that the Crown says that the power will be exercised sparingly, the type of cases involved will inevitably be those that have attracted the most publicity.

There is a trial in the High Court in Glasgow at present and not only are the public benches

packed, with people queueing to get in, but there is a very detailed blog associated with the trial. Having been present one morning, I know that the blog is a very full and pretty accurate reflection of the evidence that has been given.

That is the sort of trial that we are talking about these days. There was a queue round the block for the Luke Mitchell trial. Many more people will know far more about such a case than they would about a typical situation. In effect, special knowledge has become a fairly devalued expression, in our appeal court in any event.

On the possibility of admissions involving old confessions as opposed to post-acquittal confessions, there is nothing in the bill to require a reasonable explanation from the person who claims to have heard the admission as to why the information was not brought forward at an earlier stage. I included that point in the written submission from the Society of Solicitor Advocates. In other areas, if the defence wants to bring forward such evidence, it needs to provide a reasonable explanation. Such a test should be a requirement in the bill in relation to pre-trial or pre-acquittal admissions as well, because otherwise there could be serious issues of unreliability.

The possibility of having to hold, in effect, a trial before the trial has been mentioned in relation to admissions, tainted evidence and new evidence. The committee should be in no doubt that evidential hearings will be absolutely necessary in order to deal with such matters. That will not simply be a matter of going through a paper exercise before proceeding straight to a trial. Inevitably, admissions will be hotly contested and will come from sources that might have question marks over their credibility and reliability. Reliability must be included in the requirements.

Admissions will usually come from people who are acquainted with the accused or who are from the criminal fraternity, and who may have expectations about things that will happen in prosecutions against them. All that will have to be flushed out when the High Court is considering whether to allow a case to be reopened, rather than be left for the trial. It should be part of the whole decision about whether a second trial should go ahead.

**Nigel Don:** On that basis, is there anything left? You have shot the idea of admissions being acceptable more or less to pieces; I am not sure that the plane is actually flying now that you have shot at it. Is that your intention? Do you believe that there is scope for admissions evidence? If we are allowing the law on double jeopardy to be changed and if we can write the legislation properly, might there be circumstances in which it would be appropriate, subject to the long list of safeguards that you have spoken about, to allow a trial on the basis of an admission, should it be sufficiently credible, reliable and so on?

11:45

**John Scott:** I struggle to see how anything would survive the tests that we are suggesting, particularly evidence that has a sort of unreliability associated with it. It is not as if the committee is being given examples of people who are wandering around confessing to things, whom the Crown wants to be able to prosecute. If someone had given evidence in their own trial and been acquitted and then confessed to things later, there might be other steps that could be taken.

**Dave Thompson:** We have already spoken about the general new-evidence exception. It is important that we do not forget that the provisions will be used only in exceptional circumstances—evidence from elsewhere suggests that such a case would be taken once every five years or so. We are talking about serious matters. The prosecutors would have to go to the High Court to get approval for a case, and the High Court would have to set aside the acquittal or grant authority for a new prosecution. Section 4(6) lists the various tests that would have to be met before a case could be taken. What is your view of that approach? Could you elaborate on the tests? It strikes me that there are a lot of hurdles that people must get over before a case can take place.

**Shelagh McCall:** A number of places do not allow for any exceptions to the rule against double jeopardy in international law. It is an absolute rule in the International Covenant on Civil and Political Rights and the European Union's charter of fundamental rights. Under the European convention on human rights, however, some exceptions are permitted, including one concerning new evidence. The United Kingdom has not ratified that particular protocol but, leaving that aside, new evidence is an exception that is envisaged in the convention.

You mention that the provision is directed at serious matters. We have had some discussion of the list in schedule 1 and we have identified that it is perhaps not a sufficiently robust way in which to pinpoint those serious matters. That is the issue on which the commission would suggest that the committee should focus its attention.

One of the principal concerns that the commission has about the new-evidence exception is its retrospective nature. You heard evidence from the Faculty of Advocates and the Law Society about that. To apply the provision retrospectively fundamentally alters the relationship between the state and the individual that has been set up over centuries in this country,

and the Scottish Law Commission's work traced that—

**Dave Thompson:** Can I just stop you there? Are you saying that the tests, as laid down, are irrelevant, as you do not think that the provision should be passed anyway or are you saying that the tests should be strengthened?

**Shelagh McCall:** One can view the matter on two levels. The first is the level of principle, and I have already set out the test that the committee should apply when considering that principle, which is: are there compelling and substantial circumstances necessitating a departure from the rule of finality of judgment? The Parliament, as the committee is aware, has recently reaffirmed the importance of finality of judgment in criminal proceedings, in the emergency legislation that followed Cadder, so it is clearly a principle that the Parliament values. At that level of principle, the committee has to consider whether there are compelling circumstances requiring the consideration of new-evidence exceptions.

If the committee is satisfied that that is the case, in certain circumstances, we should then ensure that we make the tests sufficiently robust to ensure that the legislation is directed precisely to those circumstances and is not too broad and does not extend in a disproportionate way.

The commission has some concerns that the current test, which is that the new evidence substantially strengthens the case, might not be sufficiently robust. In particular, there is no requirement for that new evidence to be compelling or persuasive or for it to be capable of being regarded as credible and reliable—that last phrase is the test that is used in relation to a convicted person who seeks to overturn a wrongful conviction using fresh evidence. Those are two principal ways in which it might be possible to strengthen the test.

**John Scott:** I associate myself with Ms McCall's comments. On the point about the legislation being used sparingly, the schedule suggests that hundreds of cases a year could be affected. I would prefer the legislation to be drafted in such a way that it was even more obvious—in the legislation itself, rather than through assurances during the passage of the bill—that the provisions are not supposed to apply to hundreds of cases. That probably means that the bill should state that it is concerned only with murder and rape, as the Scottish Law Commission has said.

**Dave Thompson:** Is it not the case that the list is similar to the one that is used in England? It has not led to hundreds of cases a year.

**John Scott:** It has not, but I would prefer legislation that would not allow that possibility, instead of simply relying on practices developing that do not use it in that way.

**Shelagh McCall:** In England, the legislation confines the exception to offences prosecuted on indictment, which is not what is envisaged here. This would cover—

**The Convener:** It is highly unlikely that summary cases would be covered by the provisions. Would it be acceptable to people who come from your perspective if the bill said that the provision should be used only in exceptional circumstances?

**John Scott:** That would help.

**Shelagh McCall:** Throughout the bill, efforts should be made to make the provisions as narrow as possible and as robust as possible in terms of the article 8.2 test of proportionality that I have mentioned. That test applies at three stages: first, in the legislature, requiring the bill to be sufficiently well drafted to make it compliant with article 8.2 and to ensure that those who give it effect are in compliance with article 8.2; secondly, in the exercise of the Crown Office's discretion as regards the cases that it brings—what cases and at what level—which the bill should confine as far as it can; and thirdly, in the courts' decisions on which particular cases will get through to a second prosecution. At all of those stages, the obligation is on the state to justify the interference and be satisfied that any interference is proportionate and necessary.

**Dave Thompson:** From what you are saying, I imagine that you are not happy with retrospective application. However, there has been a retrospective application of the provision in England, Wales and Northern Ireland and I know that there are such proposals in Australia, although I do not know how the individual states have dealt with the matter. There are precedents for retrospective application. Will you elaborate on your views on that?

**Shelagh McCall:** It is not the commission's view that making the provision retrospective in itself violates convention rights—it does not do so. The convention right that is associated with the retrospective application of criminal law is article 7 and it applies to substantive law—it involves making something a crime that was not a crime yesterday and applying that to actions that occurred yesterday and previously, or giving someone a heavier penalty for something that they did in the past. That is not what we are talking about here.

Such a protection indicates the value of legal certainty and the requirement for the law to be specific and precise enough to ensure that individuals can regulate their conduct and organise their affairs in such a way that they do

not violate the law and expose themselves to sanctions—unless, of course, they choose to do so. As far as interference with the right to private and family life is concerned, the provision's retrospective application essentially says that every verdict of acquittal for a scheduled offence is no longer a final but a provisional verdict and therefore sweeps away the principle of legal certainty from every such verdict. I agree with the dean of the Faculty of Advocates that that undermines the rationale behind the principle of legal certainty.

The very difficult question that the committee and the Parliament face is whether such an approach is proportionate and indeed necessary in this society. The Scottish Human Rights Commission has been struck by the dearth of either tangible, concrete examples of cases from the profession or anecdotal examples from the public or press that have been given in evidence to the committee or the Scottish Law Commission. As I have said, the real question is whether the committee has properly identified the need to make the provision retrospective and whether such a move is proportionate.

**Dave Thompson:** Surely the legislation's purpose of allowing people to look back at evidence and to retry cases some time in the future is itself somewhat retrospective in nature. Does it make any difference if someone is tried either just after or a week or a day before the legislation comes in? After all, in both cases, people will be looking at evidence that will have come to light in a case that happened many years before.

**Shelagh McCall:** The difference is this: acquittals made before the legislation is enacted will be regarded as the final verdict by the individuals in question, who will organise their affairs accordingly and get on with their lives. The same is true of the victims and witnesses in such cases, because their article 8 rights will be interfered with in any subsequent prosecution. I note that in its written submission Victim Support Scotland repeats our point that it cannot be assumed that all victims and witnesses will welcome a second prosecution years from now with regard to an incident that they might very well have put behind them and from which they have moved on to reorder their lives. Prior to the enactment of this legislation, acquitted persons and victims and witnesses will proceed on the basis that the matter will never raise its head again; indeed, they are entitled to rely on that state of affairs. The retrospective application of this provision turns that on its head and says, "However long you have been proceeding on that assumption, it is all irrelevant because the verdict is now provisional. Should we come across further evidence, you might be open to a subsequent prosecution."

**Dave Thompson:** But if the legislation goes through as it is, all verdicts from then on will be provisional.

**Shelagh McCall:** Yes.

**Dave Thompson:** So in that sense—

**Shelagh McCall:** But people who go to trial or give evidence after the legislation is enacted will know that that is the case and will order their lives accordingly. The fundamental difference lies in what the individuals do in their private lives following the verdict. That is what we are interfering with. It is less of an interference if they know that a subsequent prosecution is a possibility than if they have been told that it is definitely not a possibility.

12:00

**John Scott:** A lot of what is said in court at the moment is going to have to change. As the commission's submission points out, every jury is told that three verdicts are open to it. The guilty verdict is discussed but the other two—not guilty and not proven—are verdicts of acquittal and mean that the accused is forever free from further prosecution. That is everyone's understanding, although over the years there have been one or two people, such as Mr Duffy, who have campaigned about verdicts in particular cases. Everyone has approached the issue on exactly the same basis. As I have said, much of what is said in court will have to change and, as I suggest in the Society of Solicitor Advocates submission, what is said to the accused who is acquitted in a trial will also have to be different. They will have to be told, "You're acquitted. That's the end of the matter—unless the Crown decides to make an application under the double jeopardy legislation." That makes a huge difference.

I am troubled by that because I was deeply unconvinced by the Crown's evidence to the committee on whether old cases would ever be prosecuted. It might well be argued that we are debating a point of only academic importance, but I do not agree. It is an important matter of principle. After all, the principle of finality was recognised in the emergency legislation that followed the Cadder decision. We cannot have it both ways: finality cannot be important only when it suits us and when it does not suit us we simply reopen cases.

Although you will be able to tell every accused person something different from the day the legislation comes into force, you cannot do anything to ensure that accused people who have been acquitted on the understanding of finality are

made aware of what has happened. It is, for example, unlikely that they follow the proceedings of this bill, but what happens in future cases can be determined through judicial studies and other matters to ensure that no one is labouring under any misapprehension. Like Ms McCall, I am sure, I have spoken to clients. Once they are acquitted, that is it. They are told, "Forget about it—you never need to come back to court." I and the system itself have played our parts in allowing people to have that understanding. We should not be ashamed of the fact that we might have gone further than other countries in allowing that safeguard to develop over hundreds of years—indeed, we should be proud of it—and in changing that situation through this legislation we should go no further than is considered necessary. Obviously, the Parliament seems to have agreed on the need to go much further than we have suggested but the legislation should look not back, only forward.

**Stewart Maxwell:** I accept that. I certainly do not think that anyone is ashamed of the law that, as you say, has developed over hundreds of years in this area, which in effect seeks to protect an individual from a state that might overstep its bounds. Much of this, though, comes down to the development of modern scientific techniques. If some new technique for analysing DNA evidence were to be invented tomorrow that produced almost undeniable evidence proving the guilt of a previously acquitted individual, how would one strike a balance in ensuring that justice was done?

**John Scott:** I would prefer to legislate after such devastating scientific techniques were developed. They just do not exist at the moment.

People often cite the example of DNA evidence, but it does not tell you whether someone is guilty. When forensic scientists give evidence about DNA in courts, the lawyers—and perhaps the jurors—want more from them than they should be prepared to offer, if they are doing their jobs properly. They will talk about probabilities; they might point in the right direction; and they will certainly be able to exclude the innocent. However, the science is not as good as it should be yet and I am not sure that it is safe to legislate for prosecutions to go ahead in anticipation of being able to come up with evidence of guilt beyond any doubt. It happens in courtrooms all the time: we have elevated science beyond its place and I am not sure that we yet have the means to get the evidence that is required to do as you have suggested.

**Stewart Maxwell:** That is an interesting point of view.

**The Convener:** The whole concept is interesting.

I think that the committee has got all the answers that it sought. I thank Mr Scott and Ms McCall for their exceptionally useful evidence, which will give us considerable food for thought. I hope that attending the meeting has not been too much of an inconvenience.

12:04

*Meeting continued in private until 13:28.*

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