The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 20 December 2011

Session 4

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CONTENTS

JUSTICE COMMITTEE
19th Meeting 2011, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*James Kelly (Rutherglen) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (SNP)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
*David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
*Humza Yousaf (Glasgow) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kathleen Caskie (Victim Support Scotland)
Lily Greenan (Scottish Women's Aid)
Maggie Scott QC (Justice Scottish Advisory Group)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 20 December 2011

[The Convener *opened the meeting at 10:30*]

Decision on Taking Business in Private

The Convener (Christine Grahame): I welcome everyone to the 19th meeting of the Justice Committee in this session. I ask everyone to switch off mobile phones and other electronic devices completely as they interfere with the broadcasting system even when switched to silent. We have received no apologies for absence.

Under item 1, I invite members to agree to take three items in private—consideration of our response to the consultation by the Commission on a Bill of Rights; a discussion of our fact-finding visits to Cornton Vale, Saughton and the 218 centre; and a discussion of the evidence that we have received on the Carloway review. Is that agreed?

Members *indicated agreement.*

The Convener: One of our witnesses has not arrived yet, so with the leave of the committee, I intend to move to item 3. Is that agreed?

Members *indicated agreement.*

Subordinate Legislation

Act of Sederunt (Contempt of Court in Civil Proceedings) 2011 (SSI 2011/388)

10:31

The Convener: The instrument is not subject to any parliamentary procedure. Members will recall that we considered it at our meeting on 29 November and that, given the drafting concerns that the Subordinate Legislation Committee had raised, we agreed to come back to it at a future meeting. We have a paper on the instrument, which is paper 2.

I suggest that we have two main options: to note the instrument and take no further formal action—we may want to do that if we are sufficiently assured that there are on-going discussions between Subordinate Legislation Committee officials and the Lord President's private office—or to write to the Lord President to note and echo the concerns that the Subordinate Legislation Committee expressed about the drafting of the instrument. In doing the latter, we would welcome the on-going discussions with the Lord President's private office on drafting practice. I ask for members' views.

Humza Yousaf (Glasgow) (SNP): It is clear from the paper that discussions and dialogue are on-going and there has been a fair bit of to-ing and fro-ing, so I am not sure what further role this committee can have. I do not know whether we can keep an eye on how the discussions are going.

The Convener: The options are simply to note the instrument and do nothing else or to note it and write to the Lord President.

The clerk has drawn to my attention the quality of the instruments that come before us, as quite a few of them have issues relating to them. We might want to draw attention to that. It is on the record that we are concerned by the quality of the instruments, but our options for the instrument that we are considering today are to write to the Lord President and echo the concerns that have been expressed, or simply to note the instrument and take no further action.

Roderick Campbell (North East Fife) (SNP): I think that we should write.

The Convener: I agree. I think that we should put down a marker and say that we are going to be more proactive about the quality of instruments.

James Kelly (Rutherglen) (Lab): I agree.

Alison McInnes (North East Scotland) (LD): I agree.

The Convener: Thank you. I suspend the meeting for a moment to allow the witnesses to take their seats.

10:34

Meeting suspended.

10:35

On resuming—

Carloway Review

The Convener: We come to the main item on today's agenda, item 2, which is further evidence on the Carloway review. We have previously heard from Lord Carloway, academics, legal experts and the police. I welcome Maggie Scott QC, chair of Justice's Scottish advisory group; Lily Greenan, manager of Scottish Women's Aid; and Kathleen Caskie, business implementation manager at Victim Support Scotland.

Good morning and thank you for coming before the committee at such short notice. I thank Maggie Scott for Justice's written submission on Lord Carloway's proposals. Before we move to questions, it would be helpful if Ms Greenan and Ms Caskie could outline their views on Lord Carloway's findings, if they wish to do so, in brief statements of about two minutes.

Kathleen Caskie (Victim Support Scotland): Do you have my written submission?

The Convener: We do indeed. Do you wish to add to it? If not, that is fine.

Kathleen Caskie: It covers where we are starting from.

Victim Support Scotland understands that the Carloway review came from looking at the human rights of the accused. Our position is that the human rights of victims and witnesses are rising up the agenda and that there will be changes to the system to meet the need for them to be recognised.

Overall, we welcome the Carloway review. We are relatively content with the proposals on detention of the accused, appeals and so forth. We are particularly interested in the proposals on corroboration and how they will work for victims and witnesses. We welcome the suggestion that the need for corroboration be removed from the Scottish criminal justice system.

The Convener: Do you wish to say anything, Ms Greenan? I do not think that you provided a written submission.

Lily Greenan (Scottish Women's Aid): No—you do not have a written submission from me. I apologise for that.

The Convener: That is all right—you were invited at very short notice. Please do not be concerned.

Lily Greenan: My colleague Louise Johnson was to give evidence this morning, but she is unwell, so I am afraid that you have me instead. Thank you for the invitation.

I will give a bit of context. I thank David McLetchie for using this information in the recent debate on violence against women. Of the 51,926 incidents of domestic abuse that the police recorded in 2009-10, 10,259 ended up being dealt with in court, so the proportion of such incidents that reach court is relatively small. Only half of the 21,660 cases that were reported to the procurator fiscal made it to court. As is well documented, the situation with rape and sexual assault cases is even worse. According to statistics that the Scottish Government released recently, the number of rapes that are reported is rising and the number of prosecutions is falling.

Our position on corroboration must be seen in the context that it is difficult to get cases involving violence against women into court. Historically, it has been her word against his, regardless of whether we have been talking about a stranger rape or an assault by an intimate partner. With our colleagues in Rape Crisis, we have had concerns for many years about the role of corroboration in the criminal justice system and the barrier that it presents to cases reaching court. Our position is that we should be looking at the quality rather than the quantity of the evidence that is available to the court.

In the past few years, we have seen huge developments in the way in which the police respond to domestic abuse—in particular, I draw the committee's attention to the work of Strathclyde Police's domestic abuse task force. The police's approach to evidence gathering has broadened and they now take a more forensic approach and adopt a much more robust approach to the presentation of evidence to the fiscal. We are seeing an increase in the number of cases that reach court and, overall, the police stats show a reduction in repeat victimisation.

We have some concerns about the situation of women who defend themselves against a violent partner and find themselves being charged with assault. The reality is that a woman who tries to defend herself against an abusive partner is more likely to lift the nearest object and clonk him with it, which means that there will be evidence against her while there may not be evidence against him. There is an opportunity to begin to look at domestic abuse as a crime in which account must be taken of the whole context, instead of focusing on a single incident.

My final point is that the law evolves. Over the 30 years for which I have been involved in this line of work—and, indeed, over the 35 years of Scottish Women's Aid—Scots law has evolved to take account of the changing times in which we live. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 reflected the recognition that women were no longer subject to the whims of the man with whom they lived and could ask for him to be excluded from the family home if he was using violence against them. Lord McCluskey's decision in 1982, which opened the door for a man to be prosecuted for raping his wife—whether or not they were estranged—reflected our changing understanding of what marriage entitles men to, while the beginning in 1985 of changes with regard to sexual history and sexual character evidence reflected the fact that society had moved on to the extent that the moral codes of the 18th and 19th centuries were no longer appropriate standards against which to measure the behaviour of 20th century women. The proposal to remove the requirement for corroboration should be seen in that context, as part of the evolution of the law in Scotland and a recognition of the fact that we now know much more about gathering robust evidence.

Our organisation's clear position is that the implications of removing the requirement for corroboration must be explored further. However, in doing that, we should look not at what will happen if that is done but at how we can make such a move work.

The Convener: Thank you very much. Before I ask members to come in with their questions, Ms Scott, I wonder whether it might be useful if you could comment on the other witnesses' opening remarks, which, although not entirely in favour of the views in your submission, reflect them to some extent. I am sure that you will have things to say.

Maggie Scott QC (Justice Scottish Advisory Group): Certainly. I do not think that there is much of a difference between us. I agree that we need to look at the quality of evidence and that, before there is any move to abolish the requirement for corroboration, there should at the very least be a further review to consider the matter carefully.

Two issues emerge—first, getting cases into court and, secondly, getting convictions—and one does not necessarily follow the other. The real concern is about getting convictions, and we should be looking at the problem with the conviction rate for sexual offences. I do not think that the abolition of the requirement for corroboration will make any difference in that respect, because the evidence that we have suggests that, in the absence of other supporting evidence, juries are less likely to convict.

That problem will need to be tackled in other ways, by taking a broader view and being more imaginative. I suggest that, as a first step, we should start researching juries and finding out why they are not convicting. The view used to be that one could not possibly speak to juries, but that has changed to quite a degree and there has been quite a lot of research in England in which approaches to juries have been allowed. That is

the direction in which we should be going if we are to tackle the problem of conviction rates. As I said, removing corroboration is not going to assist in that.

The Convener: Will you expand on your point about the need to research juries? I do not think that it has been raised before.

Maggie Scott: Juries have always been kind of sacrosanct; one was never allowed to approach or speak to them and, indeed, it was felt to be contrary to the law to speak to jury members about their deliberations. However, criminologists have done some research on the decisions of mock juries on mock cases, and more recently the Lord Chief Justice in England has allowed specially qualified researchers to speak to jurors, particularly about their understanding of what took place. That research has come up with some quite interesting responses. The research that has been done to date on mock juries suggests that, if the decision comes down to the woman's say-so against the man's, they will not convict. That problem will remain, and it will perhaps become worse if the requirement for corroboration is removed.

The Convener: Do either of the other panellists wish to comment on that before I move to members' questions?

Lily Greenan: I am interested that research into jury functioning is coming up now, as the Scottish Rape Crisis Network was calling for it 25 years ago. At that time, we were told firmly that it was against the law to question juries, so it is nice to see that it is back on the table.

There is a need to carry out research into how juries make decisions. However, I can share with you that 36 per cent of Strathclyde Police's workload and 30 per cent of Glasgow sheriff court's workload relate to domestic abuse. Most of those cases are heard by sheriffs and not by juries, so it is clear that addressing the jury question will not address the issues around domestic abuse.

10:45

Roderick Campbell: Good morning. Lord Carloway states in his report that juries

"must be trusted to be sufficiently sophisticated to be able to assess the quality and significance of testimony without the need for intricate exclusionary rules."

What do the panel think of that comment?

Kathleen Caskie: I agree with Lord Carloway. Only 5 per cent of Scottish cases are heard in front of a jury. The jury issue affects the big, difficult cases, but in the cases that are the everyday bread and butter of agencies such as ours, the people with whom we work would tend not to go for a jury trial.

I would caution against what has been called High Court-itis, whereby we focus on the cases that go to the High Court in front of juries. In fact, changes to the legal system apply across the board, including in the everyday, shorter cases that are heard by sheriffs alone.

Maggie Scott: I do not think that corroboration is a particularly intricate or difficult rule. On the issue of juries, most other comparable jurisdictions are increasingly moving towards having legal guarantees or legal rules in place, because they recognise that it cannot necessarily always be left to juries; there must be some guarantees of quality in the system.

My real concern about the Carloway recommendations is not the abolition of the corroboration rule per se, but the fact that no alternative safeguards in relation to the quality of evidence have been suggested. Indeed, Lord Carloway is positively against quite a number of the alternative safeguards that other systems have in place.

I do not think that the modern view is that it should simply be left to juries. We must also realise that it is difficult for a fact finder—whether it is a sheriff or a jury—to assess the credibility and reliability of witnesses without testing them against other evidence. Corroboration is a rule that assists the fact-finding process. It is difficult to draw conclusions, particularly beyond reasonable doubt, unless there is other supporting evidence.

The requirement for corroboration at least guarantees that there is some other independent source of evidence to enable the fact finder to make an assessment. The Sheriffs Association, which is primarily concerned with its members sitting alone as sheriffs, opposes the abolition of the requirement for corroboration, partly on the basis of the difficulties that will arise with the testing of evidence if sheriffs end up relying on single sources.

Roderick Campbell: Is it your view that, as Lord Carloway suggests, there is no evidence that corroboration per se has a bearing on the number of miscarriages of justice, or do you disagree with that?

Maggie Scott: We know that the level of findings of miscarriage of justice in our system by the court of appeal is quite low in comparison with other systems. That is with corroboration in place. We do not know what the system will be like without it, but if there is nothing else in its place, I am confident that there will be miscarriages of justice, because we will not have any other type of quality control over the evidence. We will leave it to a jury to decide on what Lord Carloway calls

"some evidence" about the crime and who perpetrated it. That is bound to lead to miscarriages of justice.

Kathleen Caskie: I am reluctant to say that corroboration is necessarily the only or the best way in which to have quality control over the evidence. It has been suggested that it is a simple counting exercise in some cases, and I believe that we would trust the Crown to deliver evidence of sufficient quality without the need for such a rule.

When we think of miscarriages of justice, we think of miscarriages of justice for accused people, and that is the language that we use. However, many victims of crime have a sense that there has been a miscarriage of justice when they make allegations and give themselves to the police for full investigation only to be told that their case cannot go to court because there is not quite the right amount of evidence to support it. Many victims have the sense that they are the victim of a miscarriage of justice when the corroboration rule keeps them from going to court and putting their story in front of a jury or a sheriff.

Ms Scott talked about the importance of convictions. Yes, convictions are important, but it is important to many victims that they have a chance to have their story heard, tested and put in front of the decision makers—that they have their day in court. If a victim who wants to tell their story to a judge is denied their day in court, that can be seen as a miscarriage of justice in a different way.

Humza Yousaf: Good morning. My question follows on from Roderick Campbell's questioning. It seems that Maggie Scott is not against the abolition of the requirement for corroboration per se, but she would like to consider introducing safeguards, which seems a sensible position to take. When the Government starts a wider review of Lord Carloway's recommendations, in particular in relation to corroboration, what safeguards should we consider? Should we look at qualified majority voting and the not proven verdict? Are there other safeguards in other systems—whether in the UK, Europe or elsewhere in the world—that we should consider in tandem with the possibility of removing the requirement for corroboration?

Maggie Scott: If we are going to abolish it, we must consider the matter properly, as it is the fundamental of our system and we have hung on to it for a long time. I fully accept that there are valid arguments to suggest that the corroboration rule is no longer fit for purpose; the question is whether we add to it or replace it. Comparative analysis will be very important as we look at what happens in other jurisdictions, by which I mean adversarial systems in the Commonwealth and in England that have abolished the requirement for corroboration and have instead built in different kinds of quality control or safeguards.

Such safeguards are numerous. They start with quality controls over police investigations that we do not have and which guarantee that proper records are kept, how statements are taken, how identification procedures are conducted and so on to ensure that there is evidence of a good quality. There are systems of assessment for prosecution that determine what tests should be applied before cases are put into court. Those are important, as it could be a difficult area if they are not done properly.

Safeguards are also built into trials, and are particularly important. Most systems have a procedure whereby a trial judge can, using their judicial experience, exercise discretion in saying that a certain piece of evidence is of too low a quality to be relied upon for conviction. He or she will then exclude that evidence from a jury or from his or her consideration if sitting as a single judge. Warnings can be given to juries to be careful when there is no supporting evidence and so on, and there can be warnings about particular types of evidence such as eye witness identification evidence. We do not have any of those measures in place because we have, somewhat complacently, told ourselves that we have corroboration and do not need to do those things. That is a real concern.

The question of the verdict is very important if we abolish corroboration simpliciter. If, for example, people are convicted on the basis of poor eye witness identification evidence that has not been subject to quality control, such as the fleeting glances of strangers—

Humza Yousaf: Do we not already have quality control of evidence? We decide whether evidence is circumstantial or whatever. Are you talking purely about corroboration? I am sure that there is some sort of quality control.

Maggie Scott: There is quality control in the sense that there are a number of legal rules. For example, hearsay evidence—evidence that is given by somebody about what somebody else has said—is not allowed in criminal cases, although it is allowed in civil cases. That is a basic quality control. There is also some control over prior statements in terms of how they are obtained and what the witnesses must do in adopting those statements before they become evidence. However, we do not have the rules in respect of eye witness identification that they have in England. In England, there are regulated procedures at the police station, and dock identification is not allowed unless there has been a prior identification procedure that is more fair and reliable. Warnings are given, fleeting-glimpse stranger identifications are often excluded from

juries, a unanimous verdict is sought at the end of it rather than an 8 to 7 verdict, and there is a wider prospect of appeal.

Humza Yousaf: That was a comprehensive answer. I have one more question—the other members of the panel might want to comment.

Even in systems in which the requirement for corroboration does not exist, the figures for rape conviction are still broadly in line with what we have in Scotland. What are the barriers that prevent rape convictions? If we are talking about abolishing the requirement, especially in the context of sexual offences, what else should we be looking at?

The Rape Crisis submission contained a useful observation that although the element of distress can act as a corroborating factor, it places a burden on some victims, who feel that they have to act in a certain way. The convener touched on that in previous evidence sessions. If we are to abolish the requirement for corroboration, what other factors should be considered in respect of bringing cases to court and securing convictions?

Lily Greenan: As I said in my opening remarks, one of our concerns is that we are still a long way from having a clear understanding of the context in which violence against women happens and the ways in which that impacts on how women give evidence—how they give statements and how they present. If we are talking about there being one way to be as a rape victim, which excludes women whose reactions do not tick the box, that happens already. The difficulty that some women face is that their reaction to a traumatic rape is not the reaction that people expect, so they are not taken seriously when they try to talk about it.

The other issue is that the majority of rapes and sexual assaults are committed by people who are known to the women. I do not think that our society fully understands the dynamics of relationships between women and men and looks at where responsibility sits in the negotiation of any kind of sexual interaction. Despite the fact that we now have legislation in place in relation to consent, assumptions about what constitutes consent are still problematic.

Although jury attitudes play a part, defence solicitors play on those attitudes. The fact that we live in a society that still has different expectations of the behaviour of women and men is played out clearly in our courtrooms when a woman gives evidence about a rape. Despite the prohibitions on the use of evidence on sexual character and sexual history, it is still possible for the defence to suggest that a woman is not really a worthy victim or that she is not really a victim at all because of the way in which she was dressed and so on. That kind of evidence is no longer supposed to be in use but in a society that sees women as being culpable and as responsible for leading men on, it still plays quite a significant part.

Humza Yousaf: So it is about public attitudes and context. Ms Caskie may want to come in on this. As you will be aware, it can take a long time to change public attitudes. Are there any practical measures that we could introduce in the short term that would help to secure more convictions?

Lily Greenan: Yes, but possibly not ones that I would share with the committee.

Humza Yousaf: Fair enough.

The Convener: Why not?

Lily Greenan: I was trying to frame it diplomatically.

The Convener: Do not be diplomatic with us. We are not diplomatic.

Lily Greenan: Okay. This is my view, which is not necessarily representative of the views of colleagues in the sector. There is still an issue about judicial education and awareness, and how judges and sheriffs act as gatekeepers and direct juries—that is their proper role. Nevertheless, people working in the justice system are just as subject to the influences and prejudices of society as any of us, and that informs and influences the way in which they direct and instruct. We were talking about research into juries, but some research into judicial decision making would also be quite interesting.

11:00

Kathleen Caskie: I generally agree with Lily Greenan's description of the wider social and cultural background and support her on the issues that she has raised.

I will respond to Humza Yousaf's first question. You noted that the rates of rape conviction in jurisdictions that do not have the same rule on corroboration are not significantly higher than they are in Scotland. From that, it might be possible to conclude that abolishing it will perhaps not be the great big dramatic controversial change that some people suggest that it will be and that it might be a relatively minor legal reform. That might be one conclusion that one could draw.

You also asked about what might be a useful change. I know that Rape Crisis Scotland and the feminist organisations have looked at the option of rape victims and sexual assault victims having a lawyer who has status in the court. That happens in places such as Belgium, where the victim herself has a lawyer who contributes to the investigation. The lawyer cannot direct the investigation, because that would obviously be inappropriate, but they can make suggestions,

help with it, work with it and provide representation for the client in court. There are a lot of ideas that could be explored around that.

That would be a radical change to the system. Currently, victims who go to court regularly ask our witness service where their lawyer is. When we tell them that they do not have a lawyer—and they respond, "But I'm the victim"—we have to tell them that when they step through the door of the court they are just there as a witness and do not have a lawyer, although the accused has one. Thinking radically and out of the box about such ideas is probably where I would like to see the Scottish criminal justice system going over the next 10 to 20 years.

The Convener: Has the national sexual crimes unit not developed such a relationship with alleged victims? Is that not working?

Kathleen Caskie: The unit takes a fantastic approach to sexual offences. It looks at all the evidence and is not bound by rules of corroboration but gets evidence from wherever it can. Within what is possible in the Scottish framework, it has been a fabulous initiative for victims. Lily Greenan would probably like to comment on that.

Lily Greenan: The unit does not go as far as Kate Caskie's suggestion, which reflects discussion that has taken place about victims being represented in court. The development of specialist responses to sexual violence and domestic abuse has definitely made a difference to the way that evidence is gathered and used to support court prosecutions.

The Convener: I have a waiting list of members who want to ask questions. However, before this goes out of my head, I want first to raise an issue that no one has raised previously. My question is about the role of the press in relation to public attitudes and identification.

Ms Scott can perhaps explain the difference between the rules in England and those in Scotland on press coverage of someone who is taken into custody. I remember the incident in England when the landlord was vilified and tried by the press. That must make a situation extremely difficult. Can you explain the different rules in Scotland on press coverage of someone who is taken into custody? Do we need to examine that issue if we are looking for balance? The same can also be true of the alleged victim, who may be displayed in a way that suggests that she deserved it because of the way she looked. How do we deal with the press? What are the current rules?

Maggie Scott: There are rules on contempt of court. If the press potentially prejudice the outcome of the trial through unfair reporting, the Lord Advocate can impose sanctions, which are supposed to act as a deterrent.

There are two big difficulties with press reporting, which are being looked at in England and which we should start to look at carefully in Scotland. One issue is prejudicial reporting. We are getting photographs and coverage of accused people in advance of trials in a way that we never used to some years ago. Prejudicial publicity is also available to juries on the internet. There are concerns about what can be done about that. The current safeguard is that juries are warned by judges not to have regard to the press coverage, but I have my doubts about how effective that is. The effect that such coverage might have on juries is another matter that may or may not be ripe for investigation, if such research is allowed to be carried out.

The Convener: Do any members of the panel want to comment from the point of view of alleged victims on whether such coverage has an impact?

Kathleen Caskie: We have given evidence to the Leveson inquiry in England on the role of the press, which is probably outwith the scope of this discussion. Victims of crime have also given evidence to that inquiry and told their stories. The Watson family gave evidence about how the murder of their daughter was reported, and the McCann family gave evidence, as has the landlord who was accused, whom you mentioned—his name temporarily escapes me. Even celebrities have given evidence to the Leveson inquiry. Hugh Grant talked about one of his girlfriends and his daughter being chased by cars. That, too, is a crime.

There is a huge issue with the treatment of victims in the press. It is probably outwith the scope of this discussion, but if you are looking at the bigger picture of human rights for the victims and the accused in the criminal law, action will have to be taken on that issue. Some of the stuff that goes on is outrageous.

The Convener: I do not know whether that is outwith the scope of the discussion. We are talking about public attitudes, and such coverage could influence public attitudes in specific cases. Although a minority of trials involve juries, it is another interesting point to add to the pot for our consideration of what influences decisions.

Maggie Scott: Perhaps something more could be done on judicial warnings—when I say "warnings", I mean judicial explanation and charges. At the moment, some indication is given to juries about the dangers of eyewitness identification. However, it is limited compared with that in other jurisdictions, and the judge could perhaps play a greater role in respect of such indications on press coverage.

One of the problems is that judges are not gatekeepers. Introducing that role in the future might ensure the quality control of evidence. Steps could be taken, but the law can only go so far in respect of public attitudes. That is a different question. We cannot expect the criminal justice system to solve the whole problem.

The Convener: No—and I do not expect that. You raise an interesting point about identification—particularly in your submission—which can have an impact on press coverage.

Graeme Pearson (South Scotland) (Lab): To come back to the Carloway review, the recommendation on corroboration obviously attracted the biggest attention. Jury trials are at that high-value end. I will ask about what happens in the majority of cases—the tens of thousands that go through the court yearly.

Maggie Scott made an interesting comment to the effect that sheriffs were not awfully keen on the removal of the requirement for corroboration. Other jurisdictions have resolved that issue and no longer have corroboration as an essential part of the process.

I note what Maggie Scott said about the safeguards that are necessary in the absence of corroboration. Does she have any knowledge of how professional judges elsewhere deal with single-witness evidence in the absence of corroboration and weigh up such evidence in their decision making? Let us leave aside juries as the lay part of a court process.

Maggie Scott: I have a little bit of awareness of that. In England, judges are given some guidance about when it is appropriate to give warnings. I know that that involves juries, but it is an indicator of when concerns start to arise if there is a single source of evidence. If it is known to be a particularly unreliable type of evidence—such as identification by or evidence from a co-accused or someone who has a vested interest in giving evidence against the accused—particular care will be taken and there will be a degree of hesitation about accepting it.

Judges apply that approach in the fact-finding process. When it is really a single source and there is no other evidence of facts and circumstances to support it, juries are given warnings about whether to rely on it.

Graeme Pearson: Let us leave aside juries. I am asking about the professional judge—the magistrate elsewhere, rather than the sheriff in Scotland.

Maggie Scott: I am trying to say that that approach reflects how judges themselves go about the process, certainly in the lower courts.

I have certainly found, sitting as a part-time sheriff, that one hears a witness at the beginning of a case and thinks, "That evidence is credible and reliable", and then one hears another piece of evidence and thinks, "Actually, that doesn't fit." It is really about testing pieces of evidence against other pieces of evidence.

My concern is that, although that evidence could still be produced, if there are no legal guarantees that it will be produced, there is a real danger that it will not be, particularly given the pressure on resources at the lower level.

I suspect that there will be quite a variation among judges at the lower level in terms of convictions. I am also concerned that they might be overwhelmed by cases.

Graeme Pearson: Obviously, there will be training if it is decided to move forward in the suggested fashion. Indeed, there would almost be a process of re-education involving the judiciary at the lower levels, in particular, who would be left facing a challenging situation.

Maggie Scott: There would have to be some sort of guidance. However, the reason why corroboration makes sense at all is to do with the fact that, to be sure about a piece of evidence, one normally needs to have some other support or independent source pointing in the same direction. It is difficult to be sure without that. That is common sense.

Graeme Pearson: But other jurisdictions achieve that.

Maggie Scott: Yes. It would be interesting to know whether those jurisdictions have a much lower rate of convictions in cases in which there is no other supporting piece of evidence.

Lily Greenan: Germany does not have a jury system; it uses a three-judge bench. Its conviction rate for rape is a good bit higher than ours—of course, that would not be difficult. I do not know how it deals with the corroboration issue, but it might be worth the committee's while to find out about that.

Graeme Pearson: Kathleen Caskie and Lily Greenan spoke of the importance of victims being heard in the court and the issue of miscarriages of justice. How is that seen from the point of view of the defence? Is the justice of the position that they outlined recognised?

Maggie Scott: I understand people's desire to have a day in court—that applies to accused people as well. However, I do not feel that, if there is little likelihood of a conviction, that particularly helps anyone in the process. My experience of representing accused people suggests that it is not having a day in court that matters but having a day in court with the right result at the end of it.

David McLetchie (Lothian) (Con): At a previous meeting, we heard that the rule on corroboration has been adjusted in recent years. I think that there was a reference to corroboration fixes and the fact that the rule of law in this area is not as pure as it once was—the Moorov doctrine and other issues were mentioned. Does that suggest that the rule is no longer fit for purpose, never mind the alternatives? Is it possible that, because the rule has become so complex and convoluted and has been manipulated so much, it no longer provides the clarity in terms of evidential value that it once did?

Maggie Scott: I am not sure that the rule on corroboration has become convoluted, but it has certainly been stretched and watered down, to a degree, particularly in relation to sexual offences. In the cases in which it has been stretched, there is a question about whether it is providing the safeguard of equality that it used to.

With regard to whether the rule is fit for purpose, I agree that there has been complacency about corroboration and that it has become a bit of a tick-box exercise that does not involve a consideration of the issue of quality. I suspect that there is room for building in alternative means of quality control.

11:15

David McLetchie: I was interested in the examples of rules on evidence that you gave in response to Mr Yousaf. I thought that they were impressive. You outlined such rules in your submission to the committee. Might such an approach be superior to the stretched rule of corroboration that we currently use?

Maggie Scott: It might be. We must look at the issue carefully. On the face of it, there is certainly an argument that such an approach would be better.

Kathleen Caskie: Much of the debate about how the rule of corroboration has become convoluted or stretched revolves around how judges and lawyers use it; I make the simple point that the rule is stretched and twisted—however we describe it—to the extent that the public do not understand it. It is all very well for lawyers and sheriffs to understand the Scottish criminal justice system, but if we want there to be public confidence in the system, the public need to understand it. The rule of corroboration is not easy for the public to understand.

I appreciate that the rule is ancient and has Roman roots, which is a wonderful aspect of our Scottish legal heritage, but when a rule has become virtually impossible to explain to the general public, we must question whether it still has a place in a criminal justice system that ought to be responsive to and understandable by the public. The rule and the exceptions to it are incredibly complex—the evidence that the committee heard last week made clear how complex the issue has become in recent years.

David McLetchie: Thank you. Ms Scott, in your submission you generally welcomed the proposals on police detention and questioning. You said in paragraph 5:

> "the recommendation that the caution should ensure a suspect be advised of his right to a solicitor is most important, though we would have welcomed a stronger proposal that secured access to legal advice".

You went on to say:

> "This issue is under consideration by the European Court of Human Rights in a pending case which may clarify the position in the near future."

We have probably learned that "near future" and the European Court of Human Rights do not always go together, but let us leave that aside. Will you explain what you meant by "a stronger proposal"? Will you also enlighten us about what is currently being clarified by the European court and how we should be taking note of the case? It would be a matter of concern if we reformed our procedures along the lines that are recommended, which have generally been welcomed, only to find that—lo and behold—another European judgment has put us back where we started.

Maggie Scott: The grey area is where someone is a suspect in an offence—they are not being interviewed just as a witness, for example—but they have not been detained or taken into custody. The issue is whether the fact that someone is suspected of a crime means that they should not only get a caution but be given proper legal advice in respect of the consequences of statements that they might make.

A case is going through the European Court of Human Rights on the position of suspects who are not in custody. It is not clear how the court will respond to the issue, because there is a bit of debate about whether what really matters is the fact that a person who is in custody is so vulnerable that it is essential to give them legal advice or the fact that all suspects are vulnerable to a degree.

Recent decisions of the Supreme Court have not been entirely helpful, in that the court has drawn the line at custody but said that it might have to redraw the line after the decision from the European court comes out. The Supreme Court will not redraw that line at the moment and will go only as far as it has to go in terms of Strasbourg jurisprudence, rather than try to anticipate it. The issue is whether Strasbourg jurisprudence will develop further in respect of applying the right to legal advice, so that people in certain situations

have the right not just to be given a warning, through the caution, but to have some sort of access to legal advice.

David McLetchie: We explored that area with witnesses from the Association of Chief Police Officers in Scotland at our previous evidence session. As you say, at the moment the line tends to be drawn when a suspect is taken into custody. For the purposes of all these rules, that is where the trial starts.

The police evidence seemed to be that largely this was not a problem. I recall asking about statements that might be made in police cars on the way to the jail and so on. I think that we were reassured that that was not a problem. There were no interrogations and very little damning evidence came to light in those circumstances, in which a decision had been taken and the person was clearly at that point a suspect as opposed to just a witness. Is that your experience? Is it an area that requires further exploration?

Maggie Scott: I think that we will have to wait and see whether a lot of voluntary statements suddenly emerge, as it were, which are made in people's houses or in the backs of cars. I am not aware of how much that is happening at the moment. We will have to see whether it happens.

If somebody is a suspect and is subject to quite extensive questioning, albeit that they are technically there on a voluntary basis, the concern will be whether that crosses the line. It will not impact on people being asked two or three questions at road traffic stops or anything like that—there is no danger of that—but there is a slightly greyer area where somebody who is not in custody is in the police station or the back of a police car on a voluntary basis. That could get problematic.

Justice has done some work to help the police in police stations to be on the safe side, as it were. I do not think that it will be such a big problem. When this right was first introduced in England, there was a fairly dramatic jump in voluntary attendances and police-car-type statements, but I think that the police in Scotland are aware, partly from that experience, that it is not really appropriate to go in that direction.

John Finnie (Highlands and Islands) (SNP): Good morning, panel. I would like to ask about the right to silence. Scottish Women's Aid states:

"there should be serious consideration given to allowing the courts ... to draw adverse inference from 'no comment'".

Victim Support Scotland states that witnesses will be rigorously tested, as against the accused's right to silence, but it goes on to refer to article 6 of the European convention on human rights. I would welcome your views on the accused's right to silence.

Maggie Scott: One of the concerns that were expressed—although I am not sure that it is really reflected in the Carloway report—about the effect of the Cadder ruling combined with corroboration was that men accused of violence of whatever kind, although particularly in respect of rape, will be advised to say nothing, because a statement of admission of consensual sex would still provide evidence. I am not at all convinced that that would necessarily be the case.

I have talked quite a bit to solicitors who are doing the work in the police stations at the moment and representing accused persons in detention and their experience suggests that many people who are accused of rape in particular want to make their position clear to the police. They are often very clear that they want to say that the accusation is nonsense and that they had consensual sex and there was not a problem. They have a stronger motivation to do that than people who are accused of other kinds of offences. Whatever advice they are given, it is likely that a lot of statements of the accused's position will still be made.

It is always best to have a timely and consistent defence. If the accused does not tell the police from the outset that they had consensual sexual intercourse, and that sexual intercourse can later be proved by other evidence, such as DNA evidence, that could harm their credibility in the courtroom. It is a difficult call as to what advice solicitors should give, but I do not think that we should assume that everybody will be told not to say anything. Indeed, I think that many people will be advised that they should put their position on record in the police station where they are accused of those types of offence.

John Finnie: Would it be reasonable for the court to infer something negative from the accused maintaining their right to silence?

Maggie Scott: I am not in favour of a legal rule about drawing an adverse inference from that. The European Court of Human Rights is increasingly against that. However, the reality is that in terms of their credibility in the courtroom, which is very important in such cases, juries and judges do not like it when someone has not told the police anything at the outset and will note that as a mark against their credibility. That is an issue. If a solicitor was defending somebody in the police station and they did not know at that stage whether there would be other evidence supporting the fact that there had or had not been intercourse, it is quite likely that they would advise the person to state their position. We will have to wait and see, but I do not think that one should assume that, because of Cadder and

corroboration, people in police stations are going to be told to say nothing.

Kathleen Caskie: Our position is that somebody who is accused of a crime is absolutely entitled to keep their mouth shut from the first moment when they are accused to the moment when the verdict comes; that is their right and it is for the Crown to prove beyond a reasonable doubt that the person did what they were accused of. At no stage does the person need to open their mouth. However, our question is again about balance and fairness, and victims' rights.

If the only witness in a sexual offences case, though not necessarily the only evidence, is the victim, their credibility will be tested to the limit by a good and robust defence lawyer. However, Rape Crisis has concerns about medical and personal records being brought into evidence and about attempts to discredit that one witness. In such a situation, I believe that, whether or not they are supposed to, a jury will draw an inference from the accused maintaining their right to silence. That area is worth further exploration, because there is no fairness for the victim and no protection for their human rights in that situation. However, I am talking about that fairly narrow situation in which the only witness is the victim and the accused maintains a right to silence throughout, as he or she is entitled to do.

Do you want to add anything?

Lily Greenan: I have nothing to add to what I have already submitted.

The Convener: I like your chairing, Ms Caskie. I like the way that you asked your fellow witness that question. What is your response to Ms Scott's view that, in practice in many cases, the attitude will be, "If you've got nothing to fear, speak"?

Kathleen Caskie: As I understand it, what commonly happens when there has been an accusation of rape is that the accused will admit in the police station to the sex but claim that it was consensual. If I were a lawyer whose client had been brought into a police station and accused of rape, my initial advice would be for them to say nothing. Ms Scott is obviously far more experienced in the ways of lawyers than I am, but to me it would be logical that, at that stage, someone would be advised to keep their mouth shut and say nothing, which would mean that they would not even corroborate that there had been a sexual act. That would be an issue for the kind of rape cases that currently go to court because the accused has corroborated that sex has taken place, which means that the debate in court is about consent. If the accused did not admit to sex taking place, it would be more difficult to get such cases into court. However, I am not a lawyer and Ms Scott is, so I bow to her superior experience on that issue.

The Convener: I think that that is a good idea. However, it is interesting to have those two viewpoints.

James Kelly: I have a question for Ms Caskie. You said in your opening statement that you have concerns about what I take to be the inadequacies of the justice system in looking after the human rights of victims and witnesses. Can you give examples of where you feel the system is deficient and of what needs to be done to address that?

Kathleen Caskie: I do not know how much longer you have got. When the human rights framework was introduced into Scots law, it was not surprising that many of the initial cases and decisions were about people who had been accused of a crime, because those people already have lawyers and, if they are in jail, they have a lot of time on their hands. Inevitably, many of the laws have developed as a result of cases being brought by people who have been accused of crimes. Victims and witnesses have not had the same history of having access to lawyers or of taking cases to court. What we see increasingly throughout Europe—Victim Support is very involved in European victim movements—is that, although people understand that an accused person has the right to a fair trial, they are starting to ask whether the right to a fair trial should not also apply to a victim. That is an open question but, if victims should have that right, how can we make it work?

There is also a right to a private and family life. If a victim in court is questioned about their medical health or sexual past, whether they have been a victim of sexual offences or whether they are a prostitute or were prostituting themselves on the night in question, that starts to raise questions about their rights to family life.

That is a huge issue, and it is a new one in that it is far behind the human rights of the accused. In the next 20, 30 and 40 years, we will see changes not just to corroboration but throughout the criminal justice system in Scotland and Europe and across the world, as the idea of human rights for victims, and indeed for witnesses, develops. It is a huge and growing issue, and it is one on which I would say, "Watch this space." There is a direction of travel, which Carloway recognises in the review when he talks about the growing recognition of human rights for victims. This will not be the last time that a justice committee in the Parliament looks at a criminal justice review that takes into account the human rights of victims.

11:30

Roderick Campbell: I have a small point on waiving rights of access to a lawyer. Lord Carloway did not specifically deal in his report with the recording of reasons for waiving the right to access but, when he was here to give evidence, he agreed that it would be a good idea.

Last week, we heard from a representative from ACPOS who said that the current manual provides that, at the police station, the accused should be advised that they can contact a solicitor by telephone very quickly and that there will be no cost to doing that. However, there are no specific recordings of the reason why legal access is waived. Lord Hope made some comments in the Supreme Court about the issue last month. Maggie Scott, what are your views on recording the reasons for waiving access to a lawyer?

Maggie Scott: I think that it is important to record the reason. The court has to be satisfied that the waiver has properly been given, so there has to be a record of it.

The Supreme Court is going a little further, because it says not only that there should be a proper record of the reasons but that, if the reasons that are given are at all ambiguous, there is an onus on the police to make inquiries. For example, if there is a suggestion that a person waives access because they do not think that the lawyer will get there on time or they think that it will cost them or if it is ambiguous whether the person understands the need for legal advice, there should be an onus on the police to investigate further. We need a record of what is, or is not, followed through. It will be important in assessing whether a person has properly waived their rights to know exactly what was said to them.

Roderick Campbell: If you were advising ACPOS, would you suggest that the manual needs to be extended?

Maggie Scott: Yes. There are some good examples from other jurisdictions. The Canadians, in particular, have clearly set out written material that the police use in their form keeping.

The Convener: It would be useful for the Scottish Parliament information centre to find out about that for us.

I call Colin Keir.

Colin Keir (Edinburgh Western) (SNP): My question is on a different subject.

The Convener: That is fine; there are no more supplementaries.

Colin Keir: Thank you. I was not expecting to be called quite so soon.

The Convener: If you do not want to speak—[*Laughter*.]

Colin Keir: Good morning to the witnesses.

I will go off on a slight tangent. Ms Scott, the last items of your submission—paragraphs 20 and 21—relate to the Scottish Criminal Cases Review Commission. Will you expand your thoughts on the subject?

Maggie Scott: We were very concerned and a little shocked by the provision in the emergency legislation—the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010—that imposed on the commission a requirement to look at the interests of justice, which we did not feel was necessary, and introduced the power of the court to refuse to entertain a reference notwithstanding the fact that it has been made. To me, and to Justice as a whole, that seemed to defeat the purpose of the commission. We are pleased that the review has recommended that the provision be removed.

However, one slight problem, which in some cases could turn into a big problem, is the recommendation in the Carloway review that, when an appeal is started as a result of a reference from the commission, an additional test be met before a miscarriage of justice can be found and the conviction can be quashed. The proposal is that, in dealing with a reference appeal, the court must be satisfied that not only has there been a miscarriage of justice but it is in the interests of justice to grant the appeal. I do not really understand that; part of me thinks, "How can it not be in the interests of justice to grant an appeal if there has been a miscarriage of justice?" Moreover, I feel that such a proposal is trying to introduce some impediment that should not be there.

The point of establishing the commission was to allow a body outwith the domination of the lawyers, judges and courts to have a proper look at a case about which there is continued unease and to decide on broad grounds—after all, there are a lot of laypeople on the commission—whether there might have been a miscarriage of justice and whether the courts should really take another look at the matter. It performs an extremely valuable function because it is often difficult for courts to review themselves in that way. However, once the matter has been put back before the court, it should be treated like any other appeal. Arguably, if there is to be any difference, it should be that there is more of an impetus to deal with appeals that have resulted from a reference by the commission. The Carloway review seems to be suggesting that although with every normal appeal a miscarriage of justice has to be established—which is quite a difficult achievement in itself—for these cases it must also be established that it is

somehow in the interests of justice to grant them. We are a bit concerned about that proposal and, indeed, do not fully understand the point of it.

The Convener: I have a supplementary question on this matter, which is something that I pursued during consideration of the emergency legislation. Lord Carloway highlighted an example in which the individual in question confessed after a reference to the High Court sitting on the appeal. Even before the determination, the High Court would say, "We know there has been a reference and the tests have been carried out, but this chap or woman has confessed, so we're refusing the appeal." Is that not a sensible course of action instead of just wasting time running through the various procedures? Is there some mechanism by which, if someone confesses prior to an appeal being heard, the appeal can be negated, abandoned or whatever the legal term might be?

Maggie Scott: That could be dealt with if a very compelling piece of evidence were to emerge. For example, in the Hanratty case, there was a lot of fuss when the prosecution subsequently discovered DNA evidence that made the accused's guilt pretty incontrovertible and presented it to the Court of Appeal, saying that another body of evidence had come to light establishing that there had been no miscarriage in this case. The court agreed that the conviction was not unsafe as a result. The courts can take account of confessions at the moment and we do not need this extra requirement for any such appeal to meet the interest of justice. Of course, it might not amount to anything, but I know from experience that, when you put in extra tests, they become hurdles and can cause problems that we do not need.

The Convener: To put it politely, then, you think that the example of a confession or substantial piece of evidence emerging after a referral is a bit of a red herring and will be dealt with anyway in the process.

Maggie Scott: Yes, I believe so.

The Convener: I am not going to say, "Members have no more questions," because when I do so hands tend to go up—in fact, I am not even going to look at them. Is there anything that we have not covered that the witnesses wish we had asked about?

Maggie Scott: Perhaps I am stating the obvious and I know that there have been a number of submissions in favour of abolishing the rule on corroboration, but it is important to remember that the Carloway report represents the views of one judge. The overwhelming majority of responses from people throughout the legal profession are against this move and certainly feel that any such proposal should be subject to a proper review carried out by, say, a royal commission or judicial committee. Again, it should be emphasised that such a major reform of our system has never been carried out on the basis of one judge's views.

The Convener: Thank you for that. Lord Carloway made it plain that these were his views, not the views of the whole review committee. Your own comments have made that as plain as a pikestaff.

I thank the witnesses for their evidence. We now move into private session.

11:39

Meeting continued in private until 12:49.

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