The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 29 November 2011

Session 4

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JUSTICE COMMITTEE
16th 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:

Lord Carloway

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 29 November 2011

[The Convener *opened the meeting at 09:46*]

Carloway Review

The Convener (Christine Grahame): Good morning. I welcome everyone to the Justice Committee's 16th meeting 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 they are switched to silent. No apologies for absence have been received.

The first item today is an evidence session on the Carloway review of criminal law and practice in Scotland. I am very grateful to Lord Carloway for offering to attend the meeting today to answer any questions that members have on his in-depth report. I welcome Lord Carloway and Lynne Mochrie, the project manager for the Carloway review. We will go straight to members' questions.

Roderick Campbell (North East Fife) (SNP): Good morning, Lord Carloway. I will start with a general question on paragraph 7.2.41, relating to corroboration. You say that

"The real protection against miscarriages of justice at first instance is the standard of proof required; that the judge or jury must not convict unless convinced of guilt beyond reasonable doubt."

You go on:

"Removing the formal requirement for corroboration may not result in significant changes to conviction rates, at least in cases of the type currently prosecuted."

Can you expand a little on that comment?

Lord Carloway: Yes. Is your question particularly about the number of people who are likely to be convicted? Is that the specific area that you are interested in?

Roderick Campbell: Yes, indeed. What difference will it mean in practice if your recommendations are accepted?

Lord Carloway: The essence of our recommendations not just on corroboration but on a number of areas of evidence is that we need to switch the thinking away from the quantity of evidence—the number of witnesses—to the quality of evidence.

At the moment, the prosecutor, under the guidance of the Lord Advocate, is likely to prosecute a case in which corroboration is found. That puts pressure on the prosecutors to prosecute cases in which there is corroboration just because there is a technical sufficiency of evidence. If we switched the thinking away from how many witnesses there might be to the quality of the evidence, we would expect prosecutors, under the guidance of the Lord Advocate, to start looking at the quality of the evidence in deciding whether it was in the public interest for a case to be prosecuted. They would, for example, consider the likelihood of a conviction following.

We are not anticipating that prosecutors will say, "There are these cases that have corroboration and they will continue to be prosecuted, and we will add to them cases that do not have corroboration"; we are expecting the prosecution system to rethink how and why it prosecutes all these cases. We would therefore expect some cases that have technical corroboration not to be prosecuted because they are likely to fail. On the other hand, there will be cases where there is no corroboration where the prosecutor will say, "This is a really good case, despite the absence of corroboration, and we think it should go ahead."

Roderick Campbell: On the conviction rates, the jury is still out in terms of what the impact will be. Is that fair comment?

Lord Carloway: There are two slightly different things: conviction rates in absolute terms—how many convictions there are—and conviction rates relative to the number of prosecutions. What I am suggesting is that although the total number of convictions may or may not go up or down, one would hope that if there is a focus on quality, the number of convictions per prosecution ought perhaps to go up.

The Convener: I think—and hope—that the *Official Report* is read by many people, so if you could define corroboration for the committee, that would be helpful.

Lord Carloway: Corroboration is a misunderstood term. The important thing to recognise is that corroboration is about the number of witnesses there are to speak to a given fact. It is probably best to explain that by way of illustration—I hope that this explains where people go wrong with corroboration.

The best example, which is contained in the report, is that of the fingerprint or DNA sample. One might imagine that there is a housebreaking and DNA or a fingerprint is found on the inside of a window, and that DNA or fingerprint is linked to a particular person. In Scotland, the accused person can be convicted only if there is corroborated evidence. In that situation, that means that you need two witnesses to speak to the finding of the DNA or fingerprint on the inside of the window; you need two witnesses to speak to the sample of DNA or the print taken from the accused; and you

need two witnesses to speak to the comparison of the sample taken with the sample found at the scene of the crime. It is about the number of witnesses who are there to prove things.

People think that you need other evidence apart from the DNA or fingerprint, which is not the case. It is not about the quality of evidence; it is about numbers—it is a numerical thing. Technically, the rule as stated simply is that for proof of every crime, there require to be at least two witnesses to speak to the two crucial facts: was the crime committed, and did the accused person commit it? However, that does not take you very far until you analyse how it works in practice.

The Convener: That is extremely helpful and has clarified things a lot, given what the press are saying and what the public think corroboration is—probably from watching a lot of Miss Marple. Does Roderick Campbell want to come back in?

Roderick Campbell: I have one other small point. I was not sure whether you had consulted Justice Scotland as opposed to Justice, Lord Carloway. I refer you to the comments of Maggie Scott QC, chair of Justice Scotland, who said that the removal of corroboration would risk "justice being undone". She said:

> "We are dismayed by the suggested wholesale removal of corroboration absent alternative safeguards to ensure evidence which ought not to be before a jury is excluded."

I seek your comments on her comments.

Lord Carloway: First—Ms Mochrie will correct me if I am wrong about this—we consulted both Justice and Justice Scotland. We set up a meeting with Maggie Scott QC, which she cancelled because of court commitments. We asked her whether she wanted the meeting to be rearranged and she did not get back to us. That is the answer to your first question. Maggie Scott had an opportunity to speak to the review about anything that she wanted to say, which she did not take up.

On the question of justice, for the reasons that I gave in the report I concluded that the abolition of corroboration would not lead to any more miscarriages of justice than there are at present. By "miscarriages of justice" in that context I am talking about wrongful convictions, where people are convicted who are not guilty of the offence. We could find no evidence that in Scotland, which is the only country in the world that has a rule on corroboration across the board, there is a lower miscarriage of justice rate than in any other country in the civilised world—and nobody suggested to us that it has.

That is the indicator that we were keen to get to grips with, because when we were considering corroboration the critical question for us was whether corroboration reduces the prospect of a wrongful conviction. We concluded that it does not. We looked at the other side of the coin and asked whether corroboration is actually impeding justice, and we concluded that that is exactly what it is doing in cases in which there is a victim of crime and coincidentally there does not happen to be corroboration. In many cases, the existence of corroboration is just a matter of chance, which means that to some extent our prosecution system is based on the luck of the draw. That is a bad thing, in my opinion. The system should not be like that; it should be about assessing the quality of evidence in a given case.

Roderick Campbell: I do not think that you touched on Maggie Scott's view that alternative safeguards will be needed if the requirement for corroboration is removed.

Lord Carloway: We do not think that alternative safeguards are needed. What we are trying to encourage, and we think that this is in line with modern thinking and, in particular, modern legal thinking, is an approach in which a judge or a jury has a general freedom to assess the quality of the evidence; the judge and jury should not be impeded in doing so by fixed rules that were designed for a different era. Corroboration basically stops a jury or a judge assessing a case freely, without being trammelled by an archaic and to some extent arbitrary rule. If we are trying to encourage an approach in our legal system whereby judges and juries can assess evidence freely, we should not go down the road of impeding them.

There is ultimately a safeguard, because there is an appeals system. If the jury's verdict is unreasonable in the minds of an appellate court, which is made up of three judges, the conviction will be overturned. In other words, if the three-judge appellate court thinks that the conviction was unreasonable, it will be overturned. For reasons that I think that I went into in the report, I was not an enthusiast for giving a single judge the power to remove a case from a jury on the ground that he or she happened to think that it would be an unreasonable verdict, because there is then the prospect of inconsistency in the decision-making process—I do not say that there is the prospect of irrational decisions. In other words, if there is enough evidence generally that the person committed a serious crime the case should go to a jury. If it is thought that the verdict was unreasonable because of some feature, the case must go to three judges, where there is much more likely to be a consistent approach.

The Convener: For clarification, would an appeal court be unable to consider the credibility of a witness, because those judges were not there in the first instance? Might not that be a key point?

10:00

Lord Carloway: I think that it is correct to say that appeal courts are reluctant to enter the field of credibility of witnesses, but they do and will do so. They can examine the reasonableness of the jury's verdict. You are absolutely right that they give a jury considerable latitude in their assessment of credibility and reliability, but if the three judges think that the verdict was unreasonable because, for example, the victim was patently telling lies because of contradictions in his or her evidence, or contradictions between his or her evidence and some other set fact, the verdict would be overturned on the basis that credibility and reliability were not sufficient.

The Convener: I will have to return to that issue, because a large queue of members are waiting to ask questions.

James Kelly (Rutherglen) (Lab): Good morning, Lord Carloway. Thank you for your extensive report and the work that you have put into it. Thank you, too, for the clear way in which the summary and the recommendations are written and for setting out not only your views, but those areas in which you think that legislation would be required and those areas in which it would not be required. That is helpful, and it will help the Government as it looks to take these issues forward.

I was particularly interested in the research that you carried out on corroboration, which is outlined in annex A of your report, in which you identified 458 cases that were not proceeded with because of lack of corroboration. If my interpretation of the research is correct, table 1 shows that if there had not been a requirement for corroboration, 374 of those cases, which is more than 80 per cent of them, could have been proceeded with, and in 268 of them, which is more than 58 per cent, there would have been a reasonable prospect of a conviction.

Will you outline the thinking behind that research and how it helped to inform your conclusions on corroboration?

Lord Carloway: Yes, certainly.

We were anxious to work out how corroboration worked in practice in the system. In other words, rather than just look at the law books, we wanted to look at actual cases and see what had happened.

We knew that the Crown Office would have statistics on no pro-ed cases, as they are called, in which the prosecutor had decided to instruct no proceedings. Those were all serious cases—they were cases in which the person was put on petition, so most of them would have gone before a sheriff or a judge and jury. Once we had the statistic that 458 cases had been discontinued, we thought that we would look and see how many of those cases were discontinued because of lack of corroboration. I am not sure that we could quite tease out that statistic, but we were able to analyse the cases and work out the number of cases in which there was no corroboration. As you said, that gave the figure of 374.

To go back to what I said about quality and quantity, it is not just a question of seeing whether there is corroboration in a case and then going ahead and prosecuting it. There ought to be some kind of qualitative test. A retired procurator fiscal and an active procurator fiscal looked at the cases and were asked whether they would have been prosecuted if there had been no rule on corroboration. We gave them a hypothetical test to apply, which was whether there was a reasonable prospect of conviction. Although that is a hypothetical test, it is the kind of test that is applied in a lot of Commonwealth countries, from England to Australia.

The answer to that was that 268 out of the total of 458—58 per cent—would have been prosecuted with a reasonable prospect of conviction. If we were talking about south of the border, Australia, Canada or almost anywhere else in the world, 268 of those 458 cases involving significant crimes would have been prosecuted and, if one looks at the statistics for convictions, a large proportion of them would have resulted in convictions. In other words, those are all cases in which the jury or the judge would have had no reasonable doubt about the guilt of the offender.

James Kelly: You have criticised corroboration in the sense that these are fixed rules and we should be looking at quality of evidence. We have heard from others that corroboration is a central tenet of the Scottish justice system and that it would undermine that system if it were to be abolished.

You examined some international examples. How do they compare with Scotland and how has that informed your conclusions?

Lord Carloway: I was not attempting to impose a model—not that I have the power to do that anyway; that is the Parliament's prerogative—or devise a system by lifting one from a particular part of the Commonwealth.

We looked at the system in England, because it is next door. We also looked closely at the system in Ireland, which is closer to ours in the sense that Ireland has a similar population and, like Scotland, is bound by the European convention on human rights. We considered how things were working there. We also looked at Australia and Canada. We worked out which were the good bits, so to speak, and we tried to devise a system that had in

it the good bits that were compatible with our own existing legal traditions.

I hope that what we are recommending is not seen as just taking a utopian system of law and imposing it on Scotland—I do not think that we can do that, because Scotland has its own legal traditions, many of which are extremely effective. We are trying to develop the system, improve it and take it forward into this century with—I shall not use the word "bonus" in the current climate—good add-ons that we think will enhance the justice system.

Graeme Pearson (South Scotland) (Lab): You have explained the practical implications of the changes. It is evident from members' questions so far and from comments that we have heard before your appearance here that some see your proposals on corroboration as somewhat radical. Are you able to explain the principles that lay behind the original application of corroboration in Scots law? In your assessment, what has changed in those principles that leads you to believe that we can now move forward and evolve to a new system?

Lord Carloway: I do not want to bore the committee with a history lesson.

The Convener: We are not bored.

Lord Carloway: As you will all know, Scotland took a lot of its law from the Roman system, particularly the Romano-canonical system of procedure and evidence, of which corroboration forms a part.

Let us jump ahead from the renaissance to the beginning of the 18th century and our own renaissance, so to speak. Our writers were beginning to develop the law, and while corroboration was probably there already, our writers emphasised corroboration as an important check on convictions. The quotation from Hume on crime is the classic statement of corroboration, which has defined the law in Scotland for 300-plus years. Corroboration was designed for a different system—one in which there was capital punishment and no appellate system for serious crime. If a person was convicted in the High Court, that was it, and that remained the case until 1926.

There was also the potential for the corruption of jurors. We all know about the situation in Argyll, for example, and the jurors who could try a MacDonald. Things were not looking good. There were some great lawyers in that era, but they did not have the sophistication of the well-trained defence lawyers we have now, and there was no legal aid. In short, corroboration was designed as a protection against wrongful convictions in a different era because of factors that do not really exist now.

We are living in the modern world, and we have a highly sophisticated legal system, appeals systems, very good defence lawyers, legal aid and a more sophisticated populace. Our juries do not just sit there and listen to what the judge tells them about what to do with the evidence, as people may have done—I do not know—at the beginning of the 18th century. Our juries will attempt to look at the matter on their own terms.

Basically, every other country in Europe abandoned corroboration. They said, "This can't work any more. This is just not working. The rule means that we cannot get people convicted who we know have committed crimes and against whom there is evidence that we believe." The rest of Europe simply threw out corroboration over time, but England and the Commonwealth never had the problem, because they never had an idea of sufficiency of evidence in that pure sense. We were a bit anomalous. The English jury system, which was introduced around Norman times, did not have an idea of sufficiency of evidence, as the jurors convicted or acquitted the accused depending on their own knowledge of what had happened. The idea of sufficiency or corroboration therefore never arose in England, so it never arose in Ireland, any of the other Commonwealth countries or, indeed, America, where the system took root.

We have been left in the middle. We are left with a European system that we had at the beginning of the 18th century, but we did not change our system when all the other Europeans changed theirs. We also had a Norman jury system into which we introduced Romano-canonical rules of evidence.

That is where we are, and the recommendation that I made is that we really ought not to be in that position.

Graeme Pearson: I am grateful. That is very helpful.

John Finnie (Highlands and Islands) (SNP): Good morning, Lord Carloway. I will pick up on a point that Rod Campbell raised. I hope that I noted what you said correctly. You used the phrase

"just because there is a technical sufficiency of evidence"

with regard to the current situation and you subsequently said that there ought to be a qualitative test—that is mentioned throughout the report. Is it your position that prosecutions are taking place that need not take place because, although there is a technical sufficiency of evidence, that does not meet some qualitative test? How is the public interest served by the present situation and what you propose? What influence would the public interest have when there was what might be seen as a lower level of evidence?

Lord Carloway: I know, of course, that prosecutors do not prosecute cases purely because there is sufficiency of evidence. They have a residual discretion in cases, but my impression is that there is very heavy pressure on prosecutors in this country to prosecute cases when there is sufficiency in the sense of there being corroboration. In other words, corroboration deflects the marker of the case away from what he or she should really be doing, which is considering the quality of the evidence.

10:15

The public interest will always feature in any decision whether to prosecute a case, because you should not prosecute cases that you know are certain to fail, even with corroboration. That is how the public interest kicks in. For example, the Lord Advocate has specific guidelines on whether to prosecute sexual offences cases that apply even where there is a technical sufficiency of corroboration.

I am not sure that I quite grasped your point about the public interest. In referring to the public interest, I am not talking about pressure from the public to do something; I am simply talking about the decision of the procurator fiscal, the advocate depute or the Lord Advocate himself about whether a case should be prosecuted in the public interest. That is usually based on whether he or she thinks that such a move is likely to result in a conviction. Can you clarify your point?

John Finnie: Is prosecuting in the public interest legally defined in terms of the likelihood of securing a conviction?

Lord Carloway: I am not sure that such a definition exists in Scotland. It is up to the Lord Advocate to set the guidelines for prosecution. My report says nothing about minimum standards for prosecutions, because that is essentially a matter for the Lord Advocate, who has to set the parameters for prosecution. My point is that there should be no artificial barrier to conviction. We did not think that the question of what the Lord Advocate chooses to prosecute fell within our remit. If you were to abolish corroboration, the Lord Advocate could still say, "Well, where there is no corroboration, here is the test that I want you as a prosecutor to apply before deciding to prosecute this case."

The Convener: Mr Finnie, I do not want to put words into your mouth, but I think that you are saying that the public interest evolves and that it is not necessarily anything to do with pressure from the public or the tabloids. Is it not the case that what is deemed to be in the public interest to prosecute can vary over time?

Lord Carloway: Yes, it can, but—

The Convener: Is that what you were trying to get at, John?

John Finnie: Indeed—that and the extent to which public influence has driven any proposals for change. As the convener has pointed out, certain issues that would have been seen as fairly routine in the past are now abhorrent to people.

Lord Carloway: Absolutely. That is why we did not want to tie the Lord Advocate down to any test that he would have to apply in deciding whether to prosecute. He or she will determine the guidelines for prosecution, which will change over time, depending on societal desires and needs. All we are doing is looking at things at the other end and examining the requirements for a conviction.

John Finnie: I noted your earlier definition of corroboration. As I was a police officer, I have 35 years' experience of corroboration requiring two eye-witnesses or perhaps one eye-witness and sufficient circumstantial evidence. Surely it could be argued that with technical advances in, say, DNA testing and the additional safeguards for an accused person, there is no need to alter the requirements for corroboration. [*Interruption*.]

Lord Carloway: I am sorry—someone at the back of the room coughed and I missed some of your question.

The Convener: No coughing at the back, please.

Lord Carloway: I have a bit of a cold myself, convener.

John Finnie: You do not necessarily need another eye-witness for corroboration; instead, you can have a sufficiency of other circumstantial evidence. Surely if technical advances, particularly in DNA testing, enshrine greater protection for an accused person, there is no requirement to alter the law of corroboration.

Lord Carloway: We got the impression that the police and the prosecution service put a lot of resources into cases of serious crime and carry out a lot of tests of one sort or another. In many of those cases, you will achieve a level of corroboration. However, with offences at the other end of the scale—say a simple assault, perhaps in a domestic context—the resources are simply not available to start doing DNA swabs for every single crime.

We suspect that the major difference will be for cases that would normally be prosecuted summarily. It is in such cases that we will see people being correctly convicted in the absence of corroboration. Major crime, where the resources are put in, is slightly different. However, as I think the statistics show, there are still cases where the victim may be the only witness and an entirely credible and reliable person. Alternatively, the

witness might not be the victim, because the victim might remember nothing, having received a blow to the head; the witness might be an independent pedestrian walking by who is, again, an entirely credible and reliable witness. The question then is why the prosecution of the alleged offender should be hidebound by coincidence. That is the essential point that the report makes.

I am not sure whether I have quite answered your question.

John Finnie: You will understand that the committee's role is to scrutinise, which is why I am asking these questions.

Lord Carloway: Yes. Have I answered your question?

John Finnie: Yes, indeed.

Can I make a point that will certainly be seen as pedantic, although I do not mean it to be? I represent the Shetland Islands. The logo on the front cover of your report excludes the Shetland Islands, but I presume that the provisions are intended to apply to them.

Lord Carloway: Yes, they are. We were conscious of that.

The Convener: That is Shetland sorted out—that is fine.

Lord Carloway: I have one or two island connections myself, but several islands are not in the logo. We could not get them all in.

The Convener: Please, Lord Carloway—we do not want to go through all the islands. However, I am glad that Shetland has been acquitted here.

John Finnie: It is crime free.

The Convener: You draw it on, John.

Alison McInnes (North East Scotland) (LD): Good morning, Lord Carloway. I welcome your thorough and well-reasoned review, which deserves similarly thorough consideration from everyone. I am therefore concerned by some of the immediate responses to it.

Continuing with corroboration, I am interested in your views on the impact on the complainer in cases where crimes are committed in private. Scottish Women's Aid made a submission to you but did not come down on one side or the other on corroboration. However, it raised concerns about the abolition of corroboration, particularly in relation to a prosecution that relies solely on the complainer's evidence, because it acknowledged that that would mean that fiscals would have to look more closely at the complainer's "credibility and reliability". SWA wondered whether there would be

"unintended consequences ... in relation to ... rape and sexual assault cases"

and perhaps

"a greater emphasis on ... character ... sexual history",

further intrusive questioning and suchlike. Would you like to respond to those concerns?

Lord Carloway: I do not think that the abolition of corroboration will lead to any greater problems for complainers in sexual offences cases than exist at present. The problems stem from the need to scrutinise cases of that sort in some depth, although they are not unique in that. There must be a testing of the complainer's evidence.

I will give a simple example of how complex the law has got in that kind of case. Let us suppose that there is a sexual incident and the victim goes next door immediately and tells his or her neighbour what happened. That is the kind of thing that would be persuasive that what the victim is saying is true. However, in our law that evidence cannot be used as corroboration, because it comes from the mouth of the person who is the complainer. That type of evidence is of course taken into account but, if you abolish corroboration, such evidence will assume a greater importance in persuading the jury of the quality of the complainer's case.

The worries about the cross-examination of the complainer, especially in rape cases, are justified, but they are all to do with the operation of the provisions in the Criminal Procedure (Scotland) Act 1995 on what one can and cannot ask a witness. That is something on which I have strong views, but they have nothing to do with the report.

The Convener: You are teasing us, Lord Carloway. We may come back to that issue.

Alison McInnes: There are concerns about assessing whether to proceed with a case and about the testing and questioning of a complainer if a case goes to court. There are also, perhaps, some concerns—which are understandable, given the imbalances in the justice system at the moment—about what is considered to be the behaviour of a real rape victim. Would the Lord Advocate need to develop further guidance on that?

Lord Carloway: If it is decided to abolish corroboration, the Lord Advocate will have to consider the guidelines on all cases. Specific guidelines are already in place for rape cases. They apply a weak qualitative test—I hesitate to call it that, but it is not a particularly high threshold. We did not think it appropriate to make recommendations on that, because that is up to the Lord Advocate, but I wonder whether the threshold for the quality of evidence that is required for prosecution in rape cases might, as a

generality, increase as the requirement for formal corroboration drops. That may or may not mean that the quality of cases that we prosecute will be greater than it is at present. Please do not hold me to that in five years' time.

David McLetchie (Lothian) (Con): Annex A to your report contains statistical analysis of the no pro-ed cases that might have been brought had it not been for the existence of the rule on corroboration. Will you put those numbers into the context of the total numbers of cases that were prosecuted on petition in 2010 so that we can get a sense of where they fit within the justice system as a whole? If you cannot give that information off the top of your head, can we be provided with it? It is important to put your analysis in the context of the total numbers with which the system deals.

Lord Carloway: You would need to have the total number of solemn cases that were prosecuted in that year, which will be available in the criminal statistics. I have not examined that. In percentage terms, the figure for no pro-ed cases will be quite low, but one has to consider the matter numerically as well, especially with serious cases. Even if one was talking about a low percentage figure, such a number of people not being convicted of serious crimes would be a source of worry, even in a country much larger than Scotland.

The other statistic that we do not have is the number of cases that the police do not report to the procurator fiscal because of a lack of corroboration. We did not try to get that because we knew that the statistic does not exist. It is another interesting element in the general equation. How many cases are simply never reported and never become a statistic of the type about which you are asking because of a lack of corroboration? Such cases are at the other end of the scale: they tend to be minor matters, rather than solemn petition cases.

David McLetchie: I was interested in what you said about qualitative and quantitative assessment at the stage of deciding whether to prosecute. I am sure that I read somewhere that the conviction rate for rapes and sexual offences is not markedly different in England from that in Scotland.

Lord Carloway: It is slightly higher, as it is in Ireland.

10:30

David McLetchie: I presume that, if we translate the percentages—6 per cent in England and 4.6 per cent in Scotland—into absolute terms, the number of cases that we are talking about is relatively modest.

Lord Carloway: I would assume so, yes.

David McLetchie: Even if we adjust the bar for the initial assessment of whether to prosecute, the actual number of people who have committed such an offence and may then be convicted is relatively modest.

Lord Carloway: For that category of offence, that may well be the case.

David McLetchie: That is not to say that it should not be done—it represents justice for the victim concerned—but the actual numbers that we are talking about are modest.

If I may say so, much of the initial reaction to the report was to think, "My goodness, this is going to make a huge difference to the number of people who are convicted." I was probably as guilty of that as anyone when I looked at your statistical appendix and saw that 80 or 68 per cent of cases—or whatever the figure might be—might have resulted in convictions. However, when we put the matter into perspective in the context of the system as a whole, the numbers that we are talking about are relatively modest. Is that a fair comment?

Lord Carloway: Table 2 gives some statistics on sexual offence cases, but I cannot fully answer your question because I cannot predict with any certainty the practical effect that the abolition of the rule on corroboration would have specifically in sexual cases.

Sex cases are included in table 1, but table 2 deals specifically with sex cases. Some 141 sexual offence cases were looked at and there would have been a reasonable prospect of a conviction in 67 per cent of them if the rule of corroboration had not been a factor. That includes relatively minor sexual offences.

As far as rape is concerned, table 1 shows that only six cases fell into the category of cases that were not prosecuted but would have been prosecuted if there had been no requirement for corroboration. It was thought that two of those cases—a third—would have been prosecuted with a reasonable prospect of a conviction. That is the best that I can do.

David McLetchie: Six seems a modest number if we refer back to what you said about the qualitative bar that is adopted for the prosecution of such crimes in line with the Lord Advocate's guidelines.

Lord Carloway: The six cases would have involved six accused persons being put on petition and the cases being no pro-ed by the advocate depute. We do not have the specific reasons why the cases were no pro-ed. It may have been lack of corroboration or something else—it may have been that they did not reach the particular threshold.

David McLetchie: Moving on to a broader question, I note that the cabinet secretary established your review in response to the Cadder case. There was a sense that the rules that applied in the pre-Cadder system were justified because of other rules in the system, such as those on corroboration, which meant that it was acceptable for someone to be questioned while being detained without a lawyer being present. [*Interruption*.] Sorry, the noise from my phone has thrown me off track.

Some people might see your report and its recommendation that the requirement for corroboration be abolished as balancing up the system in the light of Cadder. However, I take it from some of your comments that the rule on corroboration might have been recommended for review and abolition whether or not Cadder had existed. It seems that you believe that its abolition is desirable irrespective of the Cadder case and what happens when people are detained by the police. Is that a fair comment?

Lord Carloway: Yes. We were anxious that any recommendations that we made would retain the efficiency of the prosecution. [*Interruption*.]

The Convener: I am sorry, Lord Carloway—can I stop you there? I think it would be helpful to yourself if you behaved at the beginning, Mr McLetchie.

He is new to the committee, Lord Carloway.

David McLetchie: I thought that I had obeyed your rules, madam convener.

The Convener: He does not know how strict the convener can be. Mr McLetchie, you will be kept in.

David McLetchie: I am sorry.

Lord Carloway: As we say in the report, we did not try to analyse what imbalance the Cadder case had caused. When we came to look at the rule on corroboration, we were looking at it not with a view to rebalancing the system but purely with the questions I have mentioned in mind. First, is it a feature of our system that means that our system has fewer miscarriages of justice than other systems? The answer was no. Secondly, is it a feature of our system that creates miscarriages of justice in the wider sense of people who ought to be prosecuted and convicted escaping justice? The answer was yes.

The answers to those two questions and the analysis were essentially irrespective of the decision in the Cadder case, although corroboration was a specific term of our reference and that is why we looked at it. However, there is a link. The pure effect of the Cadder case was obviously that statements made in detention without a lawyer were excluded from consideration, so the Lord Advocate and the procurators fiscal had to go back and examine all the various cases in which there was, basically, an illegal interview. As a result of that analysis, many hundreds of cases were discontinued.

Why were those cases discontinued? If you look at them purely in Cadder terms, they were discontinued because of an illegal interview, but the reality is that in many—probably most—of the cases there would still have been a sufficiency of evidence if we had not had the corroboration rule. In other words, the illegal interview was providing not the evidence in the case but the corroboration. I suspect that, in many of the cases, if it had not been for the rule of corroboration, the effect of Cadder would have been if not minimal then certainly considerably less than it was.

David McLetchie: I am glad that you have explained that. The recommendation is actually about outcomes rather than the principle, because in principle how someone is treated while they are detained has nothing to do with corroboration.

Lord Carloway: Yes.

David McLetchie: However, the chain of events allowed that different outcomes might arise because of the existence of the different elements in the system.

Lord Carloway: Yes.

David McLetchie: Given those connections, why do you think that it is appropriate to abolish the rule on corroboration on an almost freestanding basis without looking at other aspects of the trial?

Lord Carloway: We looked at other aspects of the trial, in particular to see what the appropriate test for sufficiency of evidence would be in a system without corroboration. There are chapters on that in the report.

First, on the trial, we asked ourselves whether, if corroboration is not required, we should give the judge, in a serious case in which he is sitting with a jury, the power to discontinue the case because he does not think that the evidence is qualitatively sufficient. We looked very seriously at that issue. In other words, should a judge in a serious case have the power to discontinue the case because he or she does not think the person should be convicted? We thought that that is not the way that our system operates: our system leaves that decision to the jury, so we should have the jury's determination on the issue first. At the appellate level, however, we noted the existence of the appeal court's power to overturn a conviction when it thinks that the jury's verdict was unreasonable. We therefore thought that there are safeguards built into the system to protect against a verdict that is irrational in some way.

David McLetchie: I understand. Why did you feel that it was not appropriate to consider issues about the majorities required to secure convictions? Having recommended changing the rules of evidence, why did you not recommend, for instance, that we might need a weighted majority instead of a simple majority in a jury to secure a conviction?

Lord Carloway: I will preface my answer by explaining something that David McLetchie will probably know, but which I am not sure that everybody will know, about how the majority system operates.

Leaving aside the three verdicts, a majority is required for a guilty verdict in Scotland, so an eight-seven vote in a 15-person jury will convict. It is important to bear in mind the exact words—we need eight for a guilty verdict. Other jury systems do not have that approach. The system that operates in the Commonwealth is that either unanimity or a weighted majority is required for any verdict. That is a very important feature, which is lost on some lawyers in Scotland and on the general public.

In other words, in Scotland, if there is not a majority for guilty, the person is acquitted. That is not the case elsewhere. As I understand it, in England and in other places in the Commonwealth, unanimity or a 10-to-two majority is required not only for a guilty verdict but for a not guilty verdict. When we compare the Scottish system of majority verdicts with the system that operates in England or other Anglo-American common-law systems, we are comparing chalk and cheese.

People in Scotland say that somebody can be convicted on an eight-seven majority. That is correct, but is that better or worse as far as the accused is concerned than a system in which it is necessary to have unanimity or a qualified majority for acquittal or conviction? I do not know the answer to that question, because it would require a substantial amount of detailed research. We did not go into the matter in any great detail, because of its complexity. I did not think that the two systems could be compared in the way that some defence lawyers, for example, say that they should be compared.

In England, if eight people out of the 12 on the jury are for an acquittal, someone is not acquitted. The acquittal does not happen as it would in Scotland with eight out of 15. Instead, there is a retrial. My preface is therefore that it is important to realise that the other systems have an entirely different way of looking at how the jury functions. I do not really know how a jury functions in that type of system.

Some systems in the world still have a rule that a unanimous verdict of the jury is required and there is no qualification. That means that if 11 members of the jury think that someone should be acquitted and only one person thinks that they should be convicted, the accused faces the prospect of a retrial. The short point on majority verdicts is therefore that we have an entirely different system.

In Europe, there is a range of different ways of deciding whether to convict or acquit. In those systems there are usually some judges and some laypersons sitting to decide the case. In some cases it is purely judges, depending on the seriousness of the case; in other cases the panel is a mixture of laypeople and lawyers. In some cases, a pure majority is required for conviction; in others a qualified majority is required for conviction. A spectrum of options is open in determining how guilt should be established.

We would have to consider the conviction rates in England, Scotland, Ireland and elsewhere and decide whether we convict more people simply because we have an eight-seven system. I very much doubt that, but it may be the case.

10:45

The Convener: I do not want to get into muddier waters, but you did not mention the not proven verdict, which is the bit that must never be mentioned.

Lord Carloway: It gets a passing reference—I may be wrong on this, but I think that we said in the report that we have not ignored people who have mentioned the majority verdicts to us; we just did not think that the issue was directly connected with the work that we were doing. I think that I said that if we go down the route of examining majority verdicts, we must examine the not proven verdict. If I had gone down that road, there would have been another 150 pages in the report.

The Convener: Yes—that issue is for another day. We have time on our hands in this committee.

Lord Carloway: If Parliament wishes to examine the majority verdicts and the not proven verdict, it is of course free to do so. I am not saying that it should not be changed; I am just saying that we did not think that it was directly connected with what we were doing. We did not think that it was an obvious safeguard.

The Convener: I am getting signals from members. Roderick Campbell has a point. Is it still on corroboration?

Roderick Campbell: No, it is a new point.

The Convener: It is a new point, so you are in a different column. Does Humza Yousaf have a question on corroboration?

Humza Yousaf (Glasgow) (SNP): No, it is on a different topic.

The Convener: It seems that we have finished with corroboration. Humza Yousaf can go first on a new topic.

Humza Yousaf: Unlike many of my learned colleagues around the table who are quite familiar with the legal system, whether from previous experience or otherwise, I am learning on the job through a number of different reports and commissions.

My mind boggles when I learn about some of the anomalies in the legal system. For example, I find it unbelievable that in our system under-16s are still able to waive their right to legal access. Child suspects may not vote, consent to sexual activity or get married, but they are allowed to decide on such a complex issue. I am glad that you have recommended abolishing that possibility. Are we behind European and international convention in that respect? How did we allow ourselves to get into that position?

I will let you answer those two questions before I come back with a third, if I may.

Lord Carloway: Scotland is not unique. Cadder affected us directly because it was a Supreme Court decision made in London, but it was based on the Salduz case, which came from the European Court of Human Rights. That case has had profound effects in not only Scotland, but France, Holland, Turkey—obviously, because it came from there—and several other jurisdictions. We are not unique in having to adjust our system.

A famous politician said that in a progressive society, change is constant. That is what our review is about. We do not have to blame ourselves for not having a system that is absolutely up to date, because the law can never be up to date. It must trail behind developments in society, because it is reacting to them. There are things that we could have changed more quickly, but we did not. It is this committee's job to decide how and when changes require to be made.

We are behind in relation to international conventions on children. The report mentions the United Nations Convention on the Rights of the Child, which is not technically binding on the Scottish courts, although the Government quite often concedes its applicability in certain fields. The convention is a complex document and there are related international conventions on the subject. Any democracy has to progress as quickly as it can to make the changes that it needs to make and I hope that our report does that with regard to children, but I do not think that we have to blame ourselves too much.

Humza Yousaf: From recent discussions that I have had and research that I have done on the back of reading your report, it seems to me that child suspects are still being tried in adult courts. Does there need to be a more thorough examination of the progress that we can make in our treatment of child suspects in the Scottish legal system? It seems to my untrained eye that we have not made as much progress as we should have.

Lord Carloway: We recommended further research in relation to vulnerable adults, as we thought that we did not have the expertise to do that. As far as children are concerned, we have come up with a formula that we think reflects a reality in society, as you identified, that if a child is under 16 they cannot waive their right to a lawyer at all, but they can if they are 16 or 17 and their parents or carers agree.

Does the matter require further analysis? It is a platitude, but the treatment of children by the legal system in society requires continuous review because the way in which we protect children will change over time.

It is important to bear it in mind that, although I am making certain recommendations to ensure that these things are in statute—that they are written in stone—police practice in relation to child suspects has developed irrespective of what the legislation said. You used the word "anomalies" and I agree that there are a number of anomalies in the system. For example, the child did not technically have a right of access to the parent; it was phrased the other way round—the parent had a right of access to the child. However, even though that was what the legislation said, the police operated in such a way that the child would have access to a parent or carer in the circumstances. Practice sometimes changes in advance of the law.

The Convener: I would have thought that most children involved in offences must go through the children's hearings system, with few—we do not have figures, but we can find them out—ending up in the sheriff courts or the High Court. Is that the case?

Lord Carloway: Yes, that is the case. There are gradations. The modern approach is that minor offences are usually dealt with informally, so the vast bulk of offences involving children will never reach the children's hearings system, far less the courts. However, if the offence is more serious it will go to the children's hearings system. It is only when the offence is particularly serious that it goes to a court.

The Convener: I just wanted to clarify that for anybody who is reading the *Official Report*. We are not saying that all children are dealt with in the courts.

Humza Yousaf: No, but it is an important point that a few still are. As Lord Carloway says, that happens only in serious cases, but we are still trying child suspects in adult courts.

The Convener: Indeed. I just wanted to clarify the situation for anybody who is reading the *Official Report,* who is less informed than Humza Yousaf and does not know that there is a children's hearings system.

Humza Yousaf: I am not sure that there is anybody less informed than I am.

The Convener: I am sure that there is—stop flattering yourself.

Humza Yousaf: I was just fishing for a compliment. Thank you for that.

Roderick Campbell: Lord Carloway, you touched on the paragraphs in your report that deal with the position of children in relation to waiving the right of access to legal advice. I will widen that out.

Your report helpfully makes the point that your analysis of convention jurisprudence is that there is no reason to prevent a person from waiving his right of access to legal advice. You make recommendations in relation to children, but, in relation to waiver generally and since your report was produced there has been a judgment in the Supreme Court—it was made last week—on the case of McGowan v B. In paragraph 48, Lord Hope makes some comments about your review and, in paragraph 49, he suggests that the reasons why access has been waived should be recorded, following English practice. I do not know whether you have had the opportunity to read that judgment.

Lord Carloway: As it happens, I have not looked at that, but—

Roderick Campbell: Perhaps I can summarise Lord Hope's comments for you. He seems to suggest that an accused in custody should be told that he has a right of access to a solicitor; that, if he waives that right, he should be reminded that he has the right of access to a solicitor on the telephone; and that, if he again waives that right, the police officer should record the reasons why he has done so. Would that suggestion not be helpful?

Lord Carloway: Again, this is a question of terminology. I think that we have suggested that someone who declines to access a lawyer should have their reasons recorded—in other words, they should be written down. If it is being suggested that they be recorded electronically—I suspect that that is not the case, but maybe it is—I have to say that we are entering a world in which, I am sure, all of these things will be recorded electronically. Certain police stations might have infrastructure problems in that respect—I do not know. In any case one would expect that if someone were to waive their right to a lawyer and was then interviewed it would be prudent for the police to cover the matter in that interview.

Roderick Campbell: I think that Lord Hope seems to be saying that the more information is recorded about the reasons for waiving the right to access, the better the chance of dealing with allegations that there has not been a fair trial under article 6 of ECHR.

Lord Carloway: I agree entirely.

John Finnie: In the legal advice section of chapter 6 of your report, you recommend:

"In exceptional circumstances, the police must be able to delay all, or any part of, a suspect's right of access to a lawyer or to withhold all, or any part of, that right"

but that there should be no

"statutory definition of what is meant by 'exceptional circumstances'."

That will alarm many people. Can you explain the rationale behind that recommendation and give any examples of such "exceptional circumstances"?

Lord Carloway: Yes. The classic example that I can put into play is a case in the European Court of Human Rights—Gäfgen v Germany—in which, having arrested a person who had kidnapped a child, the police were extremely concerned about the child's safety and welfare. In such cases, where one has to act urgently to protect others' lives, questioning might have to proceed without waiting for access to a lawyer. Those might well be the "exceptional circumstances" to which you are referring.

I did not want to suggest any definition for "exceptional circumstances", partly because, with regard to the approach taken in Europe, we are talking about extreme circumstances of the kind that I have just described. In its judgment on the Cadder case, the United Kingdom Supreme Court made it clear that "exceptional" means rare and I certainly think that that court and the European court have provided enough of a definition to suggest what "exceptional" might mean. I think that the police will understand that it does not apply to run-of-the-mill cases.

John Finnie: But does that not immediately leave things open to challenge? If there is to be nothing in statute about the issue, will the Lord Advocate issue guidance on it?

Lord Carloway: He might do. I was about to say that the law on this is relatively well settled, but I will withdraw from that. It has certainly been settled to the degree that "exceptional" applies to those very rare situations in which, for some extraordinary reason, it would be right to proceed to questioning without access to a lawyer. We are talking about cases in which other people's human rights are at risk. The way things progress, you might be proved correct and the police or the prosecution might in certain cases try to argue that there were exceptional circumstances. However, I suspect that the courts will be pretty firm in that area.

11:00

James Kelly: I will ask about Saturday courts. In your recommendations you say that suspects should not be held beyond 36 hours without a court appearance and that, if that is happening, consideration needs to be given to Saturday courts. What are the practical and resource implications of that?

Lord Carloway: I do not know the answer to that question, which is partly why we did not recommend that Saturday courts must be introduced. If, a few months or years down the road, we are still in a situation where people are being kept in custody for more than 36 hours, consideration will have to be given to that. However, we did not attempt to cost the reintroduction of Saturday courts. They exist south of the border and in many other jurisdictions for exactly the reason that is being explored. The length of time that you are kept in custody should not depend on the day of the week on which you are arrested. The review states quite strongly that we have to tackle that.

Saturday courts were abolished at the time of the Thomson committee review, which decided that we should no longer have Saturday courts because of staffing difficulties and so on, which may or may not still exist. The short point is that in European convention terms and in pure Scottish human rights terms—depending what you all think—we should not have people being kept in custody from a Thursday to a Monday night without their being able to ask a sheriff, "Why am I being kept in cells?" That is too long.

Alison McInnes: What is useful about your report is that you look at the whole journey—the whole process all the way through. In order not to keep people in custody unnecessarily or disproportionately, you have recommended a couple of innovations such as investigative liberation and police bail. Those are quite significant changes, so it would be useful if you could talk us through them.

Lord Carloway: What we are trying to do as a generality is empower the police to be able to release people where they should not be being kept in custody. The police of course are very conscious of the risk of repetition of crime, especially in the domestic-type setting but also in relation to different feuds of one sort or another, whereby if they release people, there will be further trouble. They are rightly concerned about that. However, a sheriff can impose certain conditions on somebody getting bail that the police cannot impose. We are trying to introduce a system whereby the police can release people on basically the same kind of conditions as a sheriff. The police could release the person on those conditions and if he breached them that would be a criminal offence, in the same way that it would be if the sheriff had imposed the conditions.

The other issue is investigative bail. We have been working to a system of detention, initially with the six-hour limit and then with the 12-hour limit—with possible extension. People's perception is that all the questioning and investigation has to be carried out within that period. We are saying that we should look at this in a slightly different way. If the police want to go away and do some more investigation, let us give them the limited power to release people and to say, "Right, we want you to come back here a week on Tuesday when we'll have looked at your phone records and we'll question you again, but at the moment you are free to go." The idea is that that will enhance people's liberty by releasing them.

There are, however, dangers in that that we must safeguard against. In particular, there is the danger that the media might pick up that someone who had been released was still under suspicion, which could cause problems. One would have to be very careful about that.

The other important matter that we sought to stress is that if the police release a person on conditions, the person should have a more-or-less immediate right of recourse to the sheriff, to say that they should not be on those conditions, so that the person's position could be reviewed.

We also put a limit of 28 days on investigative bail. In other words, the person will not remain in a situation in which they are under formal suspicion for more than a month; the situation must come to an end in that period. All the questioning in the police station during the 28-day period will be added up and must not exceed the original 12 hours. That is the kind of scheme that we are trying to introduce.

Alison McInnes: That was helpful.

The Convener: The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 introduced a two-pronged approach to

referral for the Scottish Criminal Cases Review Commission. The commission must agree that there was a possible miscarriage of justice; and that

"In determining whether or not it is in the interests of justice that a reference should be made, the Commission must have regard to the need for finality and certainty".

That test will remain, but you recommended that a further test, whereby the High Court has the right to refuse a referral, should go. Is that correct?

Lord Carloway: Yes.

The Convener: That is the position.

You said that the High Court should not have a "gatekeeping role". I was happy about that. However, in the executive summary of your report you said:

"To ensure greater consistency across the appeal process, the High Court, in determining referrals from the SCCRC, should apply the two fold test of whether: (a) there has been a miscarriage of justice; and (b) if so, it is in the interests of justice that the appeal be allowed."

I take it that the second part of that is a change.

Lord Carloway: Yes.

The Convener: You said in your main report:

"it may be more appropriate for the Court to be able to bring matters to a conclusion in a reference by considering, in whatever order it deems appropriate in the particular case, but after a final hearing, whether: (a) there has been a miscarriage of justice in the trial process; and (b) it is also in the interests of justice that the appeal be allowed. The law might thereby be advanced in so far as the Court can determine in appropriate cases what wider considerations of justice might result in a conviction being sustained, notwithstanding the finding of a material miscarriage in the original trial or appeal proceedings."

That concerned me. That is my first problem.

My second problem is that you went on to say that

"Such a determination may assist the SCCRC when considering the interests of justice in subsequent applications."

It seems to me that the sword of Damocles is hanging over the SCCRC. If, in a case that is referred and goes through the appeal process, the court takes the view that there has been a substantial miscarriage of justice, but it is not in the interests of justice that the appeal be sustained, the knock-on effect will be not only that the person's conviction is not overturned, but that the SCCRC might look at the situation and think, "We'd better watch what we refer, because of the issue about what is deemed to be in the broader interests of justice." I am really concerned about that. Either there is a miscarriage of justice or there is not.

Lord Carloway: The problem arises in this way. At the moment, if a case is referred by the SCCRC to the High Court it becomes an appeal—that is what it is. The appeal process can determine only whether there has been a miscarriage of justice in the original proceeding. If the court decides to allow the appeal because there has been a miscarriage of justice in the appeal process, and it has the same powers as it would have on appeal, which will include, for example, the power to order a retrial, it must either acquit the accused, because the appeal has been successful, or order a retrial.

I appreciate that you know this, convener, but when one talks about miscarriage of justice in this context it is important to remember that one is talking about a very limited point, which is whether something went wrong in the trial process.

I will give one of the more obvious examples that we used. If the SCCRC refers a case, the appeal court has to decide whether there has been a miscarriage of justice but, in between those two stages, or perhaps even before the SCCRC has referred the case, the convicted person may have confessed to the crime. Either because the SCCRC did not know that or because it happened after the reference, that cannot be taken into account by the High Court in determining the outcome of the appeal. There would still have been a miscarriage of justice, but the person would have been proved to have confessed to the crime.

I am saying that that is one of the situations in which the High Court should have the residual power to say that there had been a miscarriage of justice in the original trial process, and so could look at the matter and take that into account. That is one example.

The Convener: I am sorry—I am not a criminal practitioner. Could not there be a retrial?

Lord Carloway: Yes—that is the process.

The Convener: That option is open, anyway. My concern is that it is pretty broad to say that it may not be

"in the interests of justice that the appeal be allowed."

Will there be public guidance on what is meant by that?

Lord Carloway: The SCCRC has to apply that test, anyway.

The Convener: I know that; I am talking about the High Court on appeal.

Lord Carloway: I am suggesting that there are situations in which the High Court ought to be allowed to apply the same test.

I will give an example of another type of situation. We are very conscious of the problems that we have in the appellate system on a number

of issues, such as the time that cases are taking and the possibility of repeat applications. Sometimes the material that is before the SCCRC is not the full story. One situation in which we think the interests of justice test could be applied is when someone has deliberately not appealed in the first place. The SCCRC goes into that matter, but the question is ultimately this: should not it be the court that decides the interests of justice test in that setting? In other words, should not it lay down guidelines about when someone who has deliberately not appealed in the first place would be allowed to proceed by way of a reference from the SCCRC? It is an overriding interests of justice test that the SCCRC applies. I am recommending that, ultimately, the court should apply the same test in deciding the appeal.

The Convener: I am sorry—I may have missed this, but did the SCCRC comment on the recommendation?

Lord Carloway: I am sure that it will have. The responses are on the website, so you could check there. My recollection is that the SCCRC would certainly not have been in favour of what I am recommending.

The Convener: Yes—I think that is the case.

Lord Carloway: I proceeded on the basis that the SCCRC wanted the status quo ante to be the case—in other words, that when a reference is made to it, the High Court should consider only whether there has been a miscarriage of justice in the original trial process, regardless of what has happened since then. I am saying that I do not think that should happen. The High Court should be allowed to take into account all sorts of things that have happened since the conviction in determining two issues: whether, if an appeal had been made, it would have succeeded; and whether, taking into account other matters, it is in the interests of justice to allow the appeal to proceed.

The Convener: I just want to clarify whether there would have to be additional matters that were not before the SCCRC at the time of the referral for that to come into play. Is it the case that something substantial must have happened, such as a confession, between the SCCRC referral and the appeal court hearing the appeal?

Lord Carloway: It could also be something that the SCCRC did not know about.

The Convener: Yes—it could be something substantial that happened in the interim that was not in the SCCRC's report and recommendations. Is that the category that gives the appeal court the opportunity to say that even though there has been a material miscarriage of justice, it will not allow the appeal?

11:15

Lord Carloway: I am not trying to avoid directly answering your question, but I would not like to close the category of cases in which the interests of justice test might apply. That is part of the problem that we currently have. We are not really quite sure what the test ought to be, which is why I suggest that the High Court provide guidelines on the subject. I agree with you that we are anticipating material that was not known to the SCCRC, for example, or something that happens afterwards, but we should not necessarily close that category. That is the broad position.

The Convener: I will settle for that, for now. We will perhaps go into that.

Roderick Campbell: My question is not on that point.

The Convener: You have five minutes at most.

Roderick Campbell: My question is a wee bit technical. I broadly agree with your recommendation on the distinction between incriminatory, exculpatory and mixed statements, but I am struggling with something. Your second recommendation is that

"further consideration should, in due course, be given to whether this rule should be applied to all pre trial statements by accused persons."

If we changed that for just statements in the course of police interrogations—for want of a better word—are we not introducing a new distinction that might cause us further trouble?

Lord Carloway: There is a mild prospect of that occurring, which is why I have suggested that further work must be done on the general law of hearsay, particularly on statements that have been made by accused persons. We cannot have a system in which somebody is interviewed by the police and the European jurisprudence says that that is effectively part of the trial in the broad, European sense, but different rules exist depending on what that person says. I have given one or two illustrations. We should not have a situation in which convictions are jeopardised because of the way in which the trial judge categorises a statement.

The problem is that you cannot predict with accuracy what will occur when recommendations are made and implemented—the committee is no doubt well aware of that in different fields. The mischief that the courts in the past have perceived from the existing rule being relaxed was that people would go into police interviews with prepared statements and use them as their position at trial, which meant that they did not have to go into the witness box; that is the danger. To use a slightly flippant example, if we simply had a general rule that all statements by accused

persons are admissible for all purposes, a person would go and tell their grandmother, who is a credible and reliable person, that they did not commit the crime and would explain the circumstances to her. The accused would then not go into the witness box, but their grandmother would, and she would tell the jury what the accused had said to her. That is the kind of problem that is perceived, although I am not sure that it is a problem. I am sure that juries would be well aware of what was going on in such a situation.

Roderick Campbell: I suppose that I am asking who would do the further work on that if there was a change.

Lord Carloway: Hearsay is examined from time to time, and some work has been done recently in certain areas. The Scottish Law Commission would be the obvious candidate to do such work. Again, hearsay has been abolished in the civil courts—or rather, it has been increased, but the rule that prohibits it has been abolished in them. The ultimate issue is whether that is another rule that we should get rid of in favour of a general power of the judge to control the fairness of proceedings.

The Convener: That brings us to 11.20, right on the button.

For clarification, you used the term "we" throughout your report. Is it your report or a unanimous report by your review group?

Lord Carloway: It is my report.

The Convener: So it was the royal "we".

Lord Carloway: Yes. The recommendations in the report are mine and mine alone. We did not ask the reference group to vote on the issues because there will always be disagreement, so it is my report.

The Convener: Thank you for that clarification. Is there anything further that you wish to put to the committee?

Lord Carloway: No.

The Convener: Thank you for coming. Your evidence was very interesting. I hope that the *Official Report* will be published before Thursday, because we will have a debate on your recommendations then and it would help the committee. That is a note to the official report to get it done quickly.

I suspend the meeting for two minutes to allow the witnesses to leave.

11:20

Meeting suspended.

11:21

On resuming—

Subordinate Legislation

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No 3) 2011 (SSI 2011/386)

The Convener: There are three instruments that are not subject to parliamentary procedure for the committee to consider.

The Subordinate Legislation Committee had no concerns regarding the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No 3) 2011. As members have no comments, is the committee content simply to note the instrument?

Members *indicated agreement.*

Act of Adjournal (Criminal Procedure Rules Amendment No 7) (Double Jeopardy (Scotland) Act 2011) 2011 (SSI 2011/387)

The Convener: The Subordinate Legislation Committee has drawn the Parliament's attention to the instrument on the ground that rule 59.2(2) makes superfluous provision that duplicates the effect of section 5(1) of the Double Jeopardy (Scotland) Act 2011. That is contrary to normal drafting practice.

As members have no comments, is the committee content simply to note the instrument?

Members *indicated agreement.*

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

The Convener: The Subordinate Legislation Committee has drawn the Parliament's attention to the instrument on a number of grounds. Members will see from paper 3 that it recommends that the Justice Committee give the instrument careful consideration.

During consideration of the instrument, the SLC wrote to ask the Lord President's office to respond to its concerns but was not entirely satisfied with the response that it received. If the committee thinks it appropriate, we might wish to follow up the Subordinate Legislation Committee's concern and write to the Lord President to reflect the fact that the drafting concerns remain outstanding.

I ask members for their comments.

James Kelly: It is a matter of concern that the drafting concerns that the Subordinate Legislation Committee flagged up remain unaddressed even though the Lord President has replied.

The Convener: Are members minded to continue our consideration of the instrument next week so that we can give the matter real thought before we jump to any conclusion?

Members *indicated agreement.*

The Convener: Thank you.

Our next meeting will be on 6 December, when we will take evidence for the consultation that the Commission on a Bill of Rights is undertaking on a UK bill of rights. We have an opportunity on 13 December to hear some responses to Lord Carloway's evidence, if members think that that would be useful.

David McLetchie: That would be useful, convener. Have you had any indication as to a process or timetable for taking the Carloway review forward, and the Government's position in that regard?

The Convener: I think that the Government will respond in early course, but I am sure that you will get a timescale if you ask about that in the debate on Thursday.

It is tentative, because we do not know about 13 December, but we would like to take some follow-up evidence. I will let the clerks come up with some suggested witnesses and members should feed in their ideas to the clerks if there are particular witnesses whom they would like to invite. We could have a panel, or even a round table if there are too many witnesses for that. It is always useful to interact on such issues. It was a useful evidence session today. Thank you.

Meeting closed at 11:25.

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