The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 13 December 2011

Session 4

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JUSTICE COMMITTEE
18th 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:

James Chalmers (University of Edinburgh)
Professor Peter Duff (University of Aberdeen)
Chief Superintendent Paul Main (Association of Chief Police Officers in Scotland)
Brian McConnachie QC (Faculty of Advocates)
Alan McCreadie (Law Society of Scotland)
Bill McVicar (Law Society of Scotland)
Professor Fiona Raitt (University of Dundee)
Gerard Sinclair (Scottish Criminal Cases Review Commission)
Chief Constable David Strang (Association of Chief Police Officers in Scotland)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 13 December 2011

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

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 18th meeting of the Justice Committee in this parliamentary session, and ask everyone to switch off mobile phones and other electronic devices completely as, even when switched to silent, they interfere with the broadcasting system. I have apologies from Graeme Pearson, who is unable to attend the meeting.

Agenda item 1 is a decision on taking business in private. Under item 3, the committee will further consider its approach to the scrutiny of the Criminal Cases (Punishment and Review) (Scotland) Bill at stage 1. Under item 4, we will discuss our fact-finding visits to Cornton Vale, Saughton prison and the 218 centre and consider any future work. Do members agree that we should take those items in private?

Members *indicated agreement.*

Carloway Review

10:02

The Convener: The main item of business on the agenda is item 2, which is an evidence session on the Carloway review. We took evidence from Lord Carloway two weeks ago and agreed that it would be useful to get views from academics, legal experts and some of those who might be affected by his findings. We will continue to take evidence on the review at next week's meeting. I am grateful to all of today's witnesses for agreeing to appear before the committee at such short notice.

I welcome the first panel, which consists of Brian McConnachie QC; James Chalmers, who is a senior lecturer at the University of Edinburgh; Fiona Raitt, who is professor of evidence and social justice at the University of Dundee; Alan McCreadie, who is deputy director of law reform at the Law Society of Scotland; and Bill McVicar, who is convener of the Law Society of Scotland's criminal law committee.

Before we go to questions, it would be helpful if the witnesses briefly outlined their views on Lord Carloway's findings. I can give you each a tight couple of minutes to do so. I thank those of you who have provided us with their opening statement in print form. That is useful to us.

Who wants to start? Do not be shy.

Brian McConnachie QC (Faculty of Advocates): I am happy to start.

I represent the Faculty of Advocates criminal bar association—FACBA—which has a number of concerns about the proposition in Lord Carloway's review that the rule of corroboration be abolished, and particularly the idea that that should be done without a comprehensive and detailed study by a body such as the Scottish Law Commission. There is no suggestion by FACBA that, just because that rule has existed for many hundreds of years, that is a reason to retain it. However, neither is it a reason to abolish the rule without the most careful and stringent consideration.

The seven-judge bench in the McLean case in 2010 referred to corroboration as one of the important safeguards in our system. That argument was adopted by the then Lord Advocate before the Supreme Court in the well-known case of Cadder. It is surprising that, within a very short period of time, we are now considering its abolition based on the views of one judge—no matter how eminent.

The rule of corroboration is that no one can be convicted on a single source of evidence; there must be at least two separate and independent

sources of evidence pointing towards, or consistent with, guilt. Corroboration is required only in relation to the essential facts of a case—namely, that a crime was committed and that the accused committed that crime. The review seeks to deal with the abolition of corroboration in isolation; no alternative safeguards are suggested by the review and, indeed, many potential safeguards are positively excluded. No mention is made of any alterations that might be considered in relation to the current jury system.

If corroboration is not required, there is a concern that, even where corroboration is potentially available, the police will not carry out exhaustive inquiries to discover it, and that the Crown, in certain circumstances, will simply not lead it. In the current climate, where there are significant pressures on resources, and where there is pressure by way of time and cost, there is a possibility that only the bare minimum will be done. That could easily have the effect of causing, rather than preventing, miscarriages of justice—for the complainers as well as for the accused.

It would appear that there is a particular view that the abolition of corroboration would have a positive effect on conviction rates in sexual offences cases. We consider that to be a fallacy unsupported by any proper statistical analysis of which we are aware. There would likely be significant pressure on the Crown Office and Procurator Fiscal Service to pursue all cases where any evidence exists, irrespective of the quality of such evidence, and there is a distinct possibility of there being a number of cases in which the evidence amounts simply to the word of the complainer—with no independent support whatsoever—against that of the accused. No in-built quality control of such evidence is suggested by the review. The test is a subjective test carried out by individuals within the COPFS with differing experience, expertise and ability—with no power for a judge to overrule decisions.

A question arises as to how any significant increase in the number of prosecutions at both summary and solemn level would be funded. At present, the Scottish Legal Aid Board is seeking to reduce the legal aid budget. It is difficult to see how that could be achieved with the abolition of corroboration.

We are not saying that it is inappropriate to have this discussion; it is important to consider all matters in an effort to assist with justice being done for all concerned. However, we do say that such a fundamental alteration to our system is of such importance that it ought to be considered by the Scottish Law Commission.

The Convener: I say to committee members that I asked for printed versions of opening statements to be given out to members because we did not have them in time for members to see them before the meeting. I say to David McLetchie that it is not usual practice for us but, in the circumstances, I thought it would be easier for members to cross-examine and question the witnesses if they had the written statements in front of them and did not have to take notes.

Bill McVicar (Law Society of Scotland): Good morning, convener and members of the committee. The matters that my colleague Mr McCreadie raised with you when he was good enough to write to all members of the Scottish Parliament on 29 November are pretty much the same as those that have been raised by Mr McConnachie. You now have the rare example before you of the Faculty of Advocates and the Law Society agreeing as one. It is a historic moment.

The Convener: Where is the cake?

Bill McVicar: We will get it later.

I reiterate our view that any Carloway review proposals for changes to the system should form part of a full-scale review of Scottish criminal procedure and should not be contemplated in isolation, as the report of the review seems to recommend.

I will give an illustration. A future case may be being prosecuted by the state on the word of one individual against another, and the argument between the two individuals may be placed before a jury. If no changes are made to what is proposed, eight members of that jury can decide that someone is guilty, and seven members of the same jury, on the word of one individual, can conclude that there should be an acquittal. The state now seems to be contemplating setting up a system whereby the state takes up the cudgels on behalf of one member of society against another—without there being any independent check on the complaint being made by the member of society for whom the state is prepared to take up the cudgels.

I draw your attention to the comments that Lord Justice Kerr made in the Supreme Court about how far European human rights law may go in future. He set out various dissenting judgments in relation to the sons and grandsons of Cadder cases and drew attention to the fact that, at least in his view, the Supreme Court has not gone far enough.

In his press release, Lord Carloway indicated that the aim of the review was

"a system that not only surpasses minimum requirements today, but also stands up to developments for the foreseeable future."

In any consideration of what is to happen, we need to bear in mind the comments made by

judges such as Lord Justice Kerr who point to the way in which things will go in future. Rather than being ambushed by European law, as we seem to have been until now, it might be better for us to try to work out what will happen in the future and build into any changes the flexibility that will be required to deal with any new developments that emerge.

James Chalmers (University of Edinburgh): I have paper copies of my statement, if those would be of use.

As I will focus on the aspects of Lord Carloway's review of which I am critical, I make it clear that the review deserves considerable praise and that I agree with far more of it than I take issue with. However, I have three areas of concern.

The first is the suggestion that the common-law test that governs the admissibility of statements by the accused—that is, the test of fairness—should be replaced with a general test based on article 6 of the European convention on human rights. I see the logical symmetry in the proposal, but it would prove difficult to apply in practice. Courts that are faced with article 6 arguments have repeatedly said that the fairness of the trial needs to be assessed in the round. That makes it particularly difficult to identify in advance of, or even during, a trial whether particular actions, such as leading certain evidence, would render the trial as a whole unfair. A test such as the one that is proposed would require complex and speculative arguments that might fail to protect the interests of the accused and those of the public.

My second concern is the proposal that the appeal court should be empowered to refuse appeals resulting from a reference by the Scottish Criminal Cases Review Commission even if the court concludes that a miscarriage of justice has occurred. Lord Carloway's evidence to the committee sought to justify that proposal by reference to a practical example, but the example that he gave was in no way peculiar to commission references and provides no basis for the suggestion that the test that the court should apply in respect of commission appeals should be different from the test that it would normally apply.

My third concern is the review's proposal to abolish the requirement for corroboration. I accept that there may be a case for that but am unconvinced by the one that is offered. The review seems to neglect the relationship between the requirement for corroboration and public confidence in the criminal justice system; to reject unconvincingly the relationship between corroboration and our current jury system; and to have proceeded on the basis of methodologically flawed research.

For the sake of completeness, I should note that I have some scepticism about whether the review's proposals for sanctions at criminal appeals would prove effective, but I am sympathetic to their aims.

Professor Fiona Raitt (University of Dundee): I support Lord Carloway's recommendation that we abolish corroboration for two main reasons. Those reasons derive from my experience over the past 30 years of my working life as a practising solicitor and, more recently, an academic, in which I have found myself acting for or being concerned with issues that particularly affect, women and children. Violence against women and children is the context in which I come before the committee today.

The first main reason why I support Lord Carloway's recommendation is that it addresses a long-standing deficiency in Scots law, namely the lack of a satisfactory response to women and children who bear the brunt of sexual offences. There is an alarming range and prevalence of sexual offences that are calculated to take place in private spaces precisely because there will rarely be independent witnesses or tangible evidence to provide corroboration.

In a public lecture at the University of Edinburgh in 2009, Lord Hope of Craighead posed the question whether the demand for corroboration in circumstances such as those that I described might make us conclude that certain crimes in Scotland were beyond the reach of the criminal law. Of course, were that to be the case, it could not be a fair or proper outcome of a modern justice system.

10:15

My second reason for supporting abolition of the corroboration rule is that it has been steadily eroded over the decades to such an extent that its application today is often artificial and technical and, because of that, its integrity is discredited.

The abolition of the rule need not and should not remove protection for the accused's right to a fair trial. A better approach is to focus on obtaining a sufficiency of evidence. Then, even if there were no need for corroboration, prosecutors would still be able to prosecute in the public interest only if there was sufficient evidence to ensure that there was a reasonable prospect of conviction. Moreover, juries, or judges in summary cases, would still require sufficient evidence in order to be satisfied beyond reasonable doubt—a very high standard—before they could return a guilty verdict.

The search for sufficiency has the potential to encourage a more holistic and proactive approach to the investigation and prosecution process of the type that is now being successfully pioneered in Scotland by the national sexual crimes unit. Such a proactive approach is adopted in some other

common-law jurisdictions and would be welcome here in Scotland.

James Kelly (Rutherglen) (Lab): Panel members have focused on one of the main recommendations in the report, which is on corroboration, with the majority having concerns about Lord Carloway's proposal in that respect.

Mr Chalmers said that he had some concerns about the methodology of the research. Lord Carloway presented his analysis of cases that were not proceeded with and concluded that, if the rule on corroboration had been abolished, up to 60 per cent of those cases would have proceeded, with a reasonable chance of prosecution. He also looked at international examples and illustrated that Scotland pretty much stands alone on corroboration. I am interested in how panel members viewed the evidence in the review and how they reached the position that they have presented to the committee today.

James Chalmers: I have three things to say about the research. The first is a fairly minor point. I was surprised that the two lawyers who were asked to review cases that were not proceeded with are both prosecutors—one of them is a retired prosecutor who was specifically employed for that purpose. I would have expected that, in the design of research such as this, if lawyers were to be used, one of them would have prosecution experience and the other would have defence experience.

Secondly, there is a more fundamental problem for the methodology. The lawyers reviewing the evidence were asked to consider whether they felt that, had each case been proceeded with in the absence of a corroboration requirement, there would have been a reasonable prospect of conviction. In fact, no Scots lawyer has any experience of prosecuting cases in the absence of a corroboration requirement. I am not sure, therefore, how such a lawyer could accurately come to the conclusion that the judge or jury was likely to be convinced beyond reasonable doubt.

Thirdly, the more accurate and useful way to conduct this kind of research—an approach that was used in England in the 1990s—is to look at actual cases that proceeded to conviction in the absence of a corroboration requirement and ask whether a corroboration requirement would have made any difference in those cases. There has been quite extensive research of that type, mostly concerned with confession-based cases. None of that is referred to. The research in the 1990s found that very few cases—as a proportion at least—in which corroboration had not been presented to the court resulted in a conviction. That is because it is difficult to persuade anybody beyond reasonable doubt in a case that amounts to one person's words against another's. The danger is that, by abolishing the corroboration requirement, you let through a relatively small number of cases to the stage of conviction but you run a very high risk of miscarriage of justice in those cases.

Bill McVicar: Mr Chalmers has put eloquently my feelings as a practitioner. I do not involve myself with the consideration of detailed research in these areas—I do not have time to do that—but my concern as a practitioner is that the goalposts are moving. Perhaps the goalposts should move although, to be frank, my personal view is that we should leave things as they are. My concern as a practitioner—I am not speaking for the Law Society when I say this—is that there is a move away from our original theory that those who might be guilty should be acquitted to ensure that those who are definitely innocent should not be convicted. We seem to be moving to a society in which we are prepared to countenance that the innocent should be convicted to ensure that we get the ones who are guilty. I do not think that that is a correct and sensible way to approach things.

The Convener: Are you saying that we would overturn the presumption of innocence until proven guilty beyond reasonable doubt?

Bill McVicar: Well, there would still be the requirement to have proof beyond reasonable doubt, but the proposal would change the sufficiency of evidence that would allow a court to consider whether there should be a conviction. At the moment, there are safeguards in place to ensure that people are not convicted on the word of one other individual—that is what the safeguard amounts to. There are all sorts of technical rules about corroboration that we do not need to worry ourselves about too much at the moment, but it comes down to the fundamental point that the proposals would allow a conviction to take place on the word of one witness against another. In my view, that is likely to lead to more rather than fewer miscarriages of justice.

The Convener: Or it might lead to more not proven verdicts.

Bill McVicar: We are speculating. The problem is that there has not been enough research and consideration. We should give a body such as the Scottish Law Commission time to look at the matter properly.

Brian McConnachie: The difficulty with the research, as highlighted by Mr Chalmers, is that it was done by two people either currently or formerly employed by the prosecution service assessing cases on a basis on which cases have never been assessed in the past in order to determine whether there would be a reasonable prospect of conviction in a case in which there was only one witness. Theoretically—I speak with

some knowledge because I spent seven years in the Crown Office—cases, particularly sexual offences cases, are prosecuted only where there is a reasonable prospect of a conviction. At the moment, with that as the test, there is not, as we all know, a particularly high rate of conviction. The research may show that, under the proposal, we might well prosecute more cases, but whether we would get more convictions is an entirely different matter. We might end up prosecuting the wrong cases.

The Convener: Professor Raitt, you must come in and rebut.

Professor Raitt: I would like to rebut because I think that there is a danger of conflating the ideas of corroboration and sufficiency, which are two different concepts. Sufficiency is a matter of law and—I am thinking of how I teach my students—it is always best taught in relation to the burden of proof and standard of proof that apply in a particular case.

There is a risk of assuming that, if you abolished corroboration, there would only ever be one witness. That is not at all how I imagine sufficiency would continue to work. There would be no change in the law of sufficiency just because you abolished corroboration. Instead, there would be a much clearer exercise for prosecutors marking cases and, in turn, for the trier of fact, whether it is the judge or the jury. They would weigh up and evaluate not the number of pieces of evidence to see whether there is corroboration but the quality and substance of each individual item of evidence. Sometimes the quality will indeed turn on the credibility and reliability of a witness. However, I think that prosecutors and triers of fact will instinctively continue to look for other evidence from other sources to ensure that they can be satisfied beyond reasonable doubt that there should be a guilty verdict.

The Convener: In the debate, the credibility of witnesses, particularly in sexual offences cases, has concerned me. If there is no requirement for corroboration, their credibility will be much more under test and they will have a tougher time in the witness box. A change to the law would be counterproductive if women did not report because they knew that that was going to happen. As I am sure you are aware, the character of women can be different if they have been through an horrific experience, and some may look more credible than others because they will deal with it in different ways. My concern, against your argument, is that a change to the requirement for corroboration would make it much tougher for women or men who have been sexually assaulted to be in the witness box, given that their credibility is practically all that they have.

Professor Raitt: I agree. I have focused on corroboration, given the short timeframe today, but I have written about that problem elsewhere. It is likely that the focus of cross-examination would be solely on the complainer's evidence because there would be little else. The way round that, as I suggest in my article, is to do what Mr McConnachie mentioned at the beginning and have a broader and wider examination of the law of evidence. I think that all of us on the panel would support that. To take out the requirement for corroboration individually is not the right approach. I suspect that what Lord Carloway has done is to lob a grenade into the debate, which has had the effect of producing opposing views; it has certainly got the debate going.

Bill McVicar: I make it clear that some members of the panel have a different view of what sufficiency of evidence is. From the point of view of practising lawyers who present cases in court, we regard corroboration as the essential part of sufficiency of evidence. That is what we mean by sufficiency of evidence when we are practising in the courts. Professor Raitt is going beyond what we mean by sufficiency and looking at it from a different point of view. It should be clear to the committee that we are speaking about somewhat different things. When we talk about sufficiency, we essentially mean that there is corroborated evidence. Professor Raitt is moving on to talk about sufficiency as meaning something that is sufficient to persuade the fact finder that there should be a conviction, which is a different exercise from the one that we are talking about when we consider the value of corroboration.

Alison McInnes (North East Scotland) (LD): I want to pursue Mr McVicar's comments. You said that we should leave things as they are. Will you address Professor Raitt's point that the current system does not respond satisfactorily to crimes against women and children? They are a significant group in society, but the system does not serve them well. Why would you leave things as they are?

Bill McVicar: We are not speaking about individual types of case. We are here to try to assist you with regard to our concerns about changing the law in a blanket fashion. Obviously, however, we are prepared to consider and discuss and give advice as best we can on individual aspects of things.

In the past, there has been a view that it would be wrong to change one aspect of the evidence system in relation to particular types of cases, but it might be that that debate requires to be had again as part of the wider debate that we advocate on the whole system. If changes have to be made, they should be based on a proper review of how the whole system operates, so that we do not

introduce unfairness either to potential victims of crime or to individuals who are accused.

Alison McInnes: Lord Carloway said that there might be a wider sense of a miscarriage of justice if we maintain the current system. Would Professor Raitt like to elaborate on that?

10:30

Professor Raitt: Only in so far as I cannot see the issue as a sectoral one, with women and children as a small part of the issue. They are profoundly affected by the corroboration rule. That point was raised by Lord Hope in 2009. I am not suggesting that he would support what I am suggesting or that he went on to say that we must, therefore, abolish corroboration. However, he raised it as an issue that we are, in effect, disenfranchising people of the right to a potential prosecution if we apply the corroboration rule too strictly.

With many types of sexual offences, especially those that are committed against children and vulnerable women, it will rarely be possible to gather the evidence to mount a successful prosecution. As we know, from much research that has been done in recent years, the perpetrators of sexual offences tend to be calculating and cunning and they target particular victims whom they know will make poor witnesses in court. That is a serious problem for the legal system. I do not think that women and children are a marginal, minority group; they are an important part of the process.

I absolutely agree that a comprehensive review of the law of evidence would be a better way of approaching the situation and, in the past, I have suggested that the Law Commission should be the body to do it. However, it is good that what is on the table now is discussion of a sensitive and controversial move to remove corroboration from our law.

The Convener: You have talked about poor witnesses in court. Does not that support my concern that people who would already be poor witnesses in court will have an even worse time when they come to give evidence at a trial if there is no requirement for corroboration? Surely, that would make it even harder for them.

Professor Raitt: Yes. Therefore, we should find out what other common-law jurisdictions that do not have a rule of corroboration do in such circumstances. We could look at Australia, New Zealand or England. I think that I am right in saying that no other jurisdiction has a requirement for corroboration; the emphasis falls on the complainer, and they try to bolster the evidence through other investigative techniques.

For example, in the United States they do not hunt just for the first piece of evidence, which might be the complainer's testimony or statement, and then, almost in a box-ticking exercise, say that they have a second piece of evidence as corroboration and need look no further. Rather, a far more exhaustive approach is taken in what is often called the proactive approach to prosecution. That approach has not traditionally been taken in this country, but the national sexual crimes unit has successfully adopted such a rigorous approach. That would mean that the lone complainer would not be alone; other forms of evidence—perhaps just circumstantial evidence—could be offered in support.

Brian McConnachie: You have made a good point, convener. The abolition of corroboration could, in my opinion, affect the complainer in such a case in a way that would amount to a miscarriage of justice. There will be cases in which the complainer, for one reason or another, is not an impressive witness, irrespective of whether they are telling the truth. A good prosecutor will often look to the corroboration and say to a jury, "You may or may not have thought that Mr X or Miss X was a particularly impressive witness, so I suggest that you set their evidence aside and look at what else there is." The jury can then, as Professor Raitt suggests, focus on the surrounding facts and circumstances that are supportive of the witness's position and which would demonstrate that the person who had come across as a poor witness in court was telling the truth. By abolishing corroboration, we run the risk of people not looking for it. That may well do a disservice to complainers as well as, in other instances, doing a disservice to accused persons.

Bill McVicar: The facts and circumstances that have been spoken about by others on the panel are sometimes called corroboration.

Brian McConnachie: There is one other thing that I want to say. Professor Raitt is absolutely correct that people who commit such offences tend to pick on people who are, in one way or another, vulnerable and will not make good witnesses or will not come forward or report the offences. The abolition of corroboration would not make that situation any better; such people would be in the same position.

James Chalmers: We should perhaps note—as Professor Raitt said—that few, if any, other jurisdictions have a corroboration requirement. However, the experience of those jurisdictions suggests that there is little ground for believing that abolishing the corroboration requirement will make any real difference to the conviction rate in sexual offence cases.

The Convener: Do you want to come back in, Professor Raitt? You are a bit outnumbered.

Professor Raitt: I am accustomed to being a lone voice.

As others have suggested, the answer is that, if one did a comprehensive review of the process of investigating such cases, one might see ways in which one could support complainers. Lord Carloway acknowledged that he did not have time to do such a review. He ruled out extending rules, for example being able to draw adverse inferences from the fact that an accused person chooses not to give evidence or says nothing in the police station.

I do not want to hijack the discussion, but there have been many suggestions of ways in which people could support complainers. For example, there is the suggestion that there be independent representation for rape or sexual offences complainers. The role of the Crown is compromised by having to try to support a complainer when, actually, its job is to prosecute in the public interest. One interest in that is that of the complainer, but there are many other interests that it must take into account, including that of the accused. That is a difficult task.

Other countries have far less concern for the hearsay rule; some people would say that that is the way Scotland is going, as well. However, there are instances in which, technically, hearsay is not admitted but in which it could support complainers to a much greater extent. The example that Lord Hope focused on in 2009 was the use of distress as corroboration. That has been another controversial issue. It involves the question whether the extent to which a complainer—a child or an adult—displays distress in the aftermath of an incident, even quite some time after the incident, can corroborate the fact of the crime. We know that that is difficult. Distress can prove that something occurred that was upsetting, but it cannot necessarily provide the necessary corroboration.

Whichever way you turn, you will often find that the rules have been stretched, squeezed and manipulated to try to find corroboration in cases in which the very circumstances in which the offence takes place almost preclude the likelihood of corroboration.

Humza Yousaf (Glasgow) (SNP): Most of the questions that I was going to ask have been answered, but I want to clarify one issue.

In his review, Lord Carloway asks whether it is right that an offence to which there is only one witness, who is deemed to be credible and reliable, should not be prosecuted. Do you think that the safeguards in the Scottish legal system are insufficient and that, therefore, we must also have corroboration?

Brian McConnachie: Mr McVicar, I think, pointed out that the circumstance that you describe—in which there is one witness who may well appear to be entirely credible and reliable and is giving evidence against an individual—would still be taking place in the context of a system in which we are dealing with simple majority verdicts, which means that even if seven people on the jury disbelieve that individual, a conviction will ensue. The kind of evidence that is, perhaps, most obviously an issue in that regard is eye-witness evidence. An individual who is absolutely 100 per cent certain that the accused is the person whom they saw commit a crime could be wrong. It is correct that other jurisdictions do not all have corroboration; however, it is also correct that other jurisdictions do not all have simple majority verdicts.

Humza Yousaf: Should the system of simple majority verdicts also be looked at while we are examining corroboration?

Brian McConnachie: Absolutely. I do not think that you can pick and choose only one fundamental aspect of Scots law in relation to evidence and procedure. You must also consider other fundamental aspects, such as majority verdicts and the not proven verdict. If one is going to carry out a review that involves the abolition of something that we have all grown up with—and, indeed, that many people have grown up with for many years before us—one has to look at everything in the round.

Humza Yousaf: Absolutely. Mr McConnachie and, I believe, the convener have already suggested that even if corroboration were removed there would still be vulnerable witnesses. However, would such a move not at least remove the initial barrier of getting the case to court? After that, you would need to examine how the witness might be treated in court and so on.

Brian McConnachie: The initial barrier is in having the vulnerable individual come forward and make the complaint. As Professor Raitt accurately pointed out, people who commit such crimes pick on individuals whom they know are weak or vulnerable and whom they expect will not come forward with a complaint. Abolition of corroboration will make no difference in that respect.

Humza Yousaf: I am not saying that people are suggesting that that is the case. However, cannot you see that removing corroboration might ensure that more cases get to the next stage and are prosecuted?

Brian McConnachie: Of course I can. If corroboration were to be removed in circumstances in which a single witness was speaking to an offence, there would be potential to prosecute that case. However, that does not make

it right and it certainly does not mean that you will get a conviction at the end of the day.

Humza Yousaf: I will let Mr McVicar in, in a moment, but as Professor Raitt suggested at the end of her opening statement, there has been less focus on quality than on quantity of evidence. How might that imbalance be addressed?

Brian McConnachie: A prosecutor should not simply be looking at a case to see whether there are two pieces of evidence. Instead, they should be looking at it with a qualitative eye to decide whether they should proceed to prosecution. After all, prosecutions are supposedly conducted in the public interest. It is not—or should not be—simply a case of saying, "Well, in this case we have two sources of evidence so we will proceed". A qualitative approach should be taken. It is not clear from what Lord Carloway has said where that quality assessment will come in, who will make it and—more particularly—who will oversee it and have the power to say, "That might well be your assessment, but it is not right"—unless, of course, that will just be a matter for the jury.

The Convener: You said that you were in the Crown Office for seven years as an advocate depute.

Brian McConnachie: I was principal advocate depute when I left.

The Convener: Were such qualitative assessments being made during that time? Did your colleagues appraise decisions? How were things done?

Brian McConnachie: Of course, the problem is that we are talking about advocates depute and procurators fiscal who are different people with different views, different abilities and different levels of experience. My qualitative assessment might be different from, say, Mr McVicar's assessment. You will never be able to do away with that. Speaking personally, I tried to ensure that we were not prosecuting cases simply because we had enough evidence. I know that I did not operate like that: I certainly hope that many of, if not all, my colleagues operate in the same way as I did.

The Convener: You say that you would not go to prosecution simply because you had enough evidence. What would have made you decide not to prosecute a case?

Brian McConnachie: With regard to the study that has been carried out, I should point out that everything that is done in the Crown Office or a fiscal's office is a paper exercise. There are papers, not witnesses, in front of you, so other than through what is in those papers, you have no way of assessing the quality of that witness. You cannot speak to or listen to a witness to decide whether they will be good, credible or reliable; instead, you have to work with the papers. You might well have sufficiency, with witness A speaking to the crime and witness B corroborating those comments in some way; however, you might then take into account the fact that witness A has given five different statements in which they said five different things. You may decide that you are not happy about the reliability of that, and that it would not be in the public interest to proceed. There might be sufficiency of evidence, but you might not consider it appropriate to prosecute.

10:45

The Convener: I do not want to hog the discussion, but would no one who had precognosced a witness note down an assessment? When I was in practice a long time ago, I would make a note of how I thought someone might be as a witness.

Brian McConnachie: Sometimes that happens—probably more so now than in the past. However, one is therefore relying on someone else's qualitative assessment in order to make one's own.

Humza Yousaf: I want to come in on another issue, but if members want to focus on corroboration, they can come in first.

The Convener: Roderick Campbell can come in on corroboration.

Roderick Campbell (North East Fife) (SNP): The witnesses have largely answered the questions that I was going to ask. However, I would like further clarification from Mr McConnachie. You talk about how potential safeguards were excluded by the Carloway review. Can you elaborate on that and say which other safeguards—aside from dealing with the jury system—would be helpful if corroboration were to go?

Brian McConnachie: Among the safeguards that were excluded was the suggestion that a trial judge would have the power to look at the evidence and decide that it was unsafe and that no reasonable jury could convict. The judge would be in a position to take a case away from a jury at that stage. That suggestion has been positively discounted by Lord Carloway in his review.

I do not profess to have an encyclopedic knowledge of the English legal system, but in England—at least initially—there was a period when juries on cases in which there was no corroboration were warned that they had to be certain before convicting on the evidence of one witness alone. I understand that that has fallen into desuetude; judges now have an option to do that, but it is not mandatory.

To return to my earlier point, there is a difficulty in trying to bolt on to what we have someone else's version of the law. It is difficult to pick part of it without looking at the rest of the system. In England, there is a different and, one could reasonably argue, less stringent test for appeals than we have, which is another potential safeguard that we do not have. Once someone is convicted in Scotland, the only way the conviction can be overturned is if the accused can establish that there has been a miscarriage of justice. In England, the test is that the conviction is unsafe.

All those safeguards are effectively excluded by Lord Carloway in his review, and any one or all of them would be of benefit if we are not to have corroboration.

The Convener: No one else wishes to come in on that, so we will move on.

David McLetchie (Lothian) (Con): I want clarification on an area on which there might be consensus among all the panel members. I was struck by the fact that Professor Raitt said—if I heard her correctly—that we should not remove corroboration individually. As I understand it from comments by other witnesses, there is a concern that the corroboration rule should not be considered or legislated on in isolation from other rules on evidence or on the trial process. However, Lord Carloway effectively recommended that the rule of corroboration be abolished by legislation independent of other matters. Do you all take the view that the approach that focuses solely on corroboration and invites us to pass a law to abolish it on its own would be an erroneous or unsafe way in which to proceed?

Bill McVicar: Yes. I agree with what Mr McLetchie suggests. My advice to the committee is to consider referring the matter to the Scottish Law Commission, and asking it to prepare draft legislation and examine not only corroboration but the knock-on effects that require to be considered before such a fundamental change is made to our system.

The point was raised earlier about other safeguards in the system and whether they are enough. Corroboration is an important consideration in prosecution and defence of criminal cases in Scotland and it should not be dropped lightly. I do not suggest that Lord Carloway is treating it in a light-hearted fashion, but we should not change important rules of that sort without full and anxious consideration.

The Convener: In fairness to Lord Carloway, I do not think that it was within his remit to look at the wider aspects; his review is more like a stone thrown into the pond to let us see the ripples and have a wider debate. Are all the witnesses in agreement with Bill McVicar on this point?

Alan McCreadie (Law Society of Scotland): The Law Society of Scotland responded in June this year to Lord Carloway's call for evidence during the period of his commission. Then, the society thought that abolition of corroboration should not be looked at in isolation and that a full review should take place. For the avoidance of doubt, that position was reflected in my letter of 29 November, to which Mr McVicar referred earlier, and which I sent to all MSPs in advance of the 1 December debate.

James Chalmers: There was a period—particularly when there was a high level of concern about miscarriages of justice in the English legal system—when Scots lawyers were keen on writing, for the benefit of English lawyers, articles explaining all the safeguards that we have that prevent such problems from occurring. If we were to implement the report's recommendations in full, there would be a danger that—as, I think, Mr McConnachie's evidence indicated—an English lawyer could write the same article for a Scots lawyer explaining all the wonderful safeguards that exist in English law that would be absent from the law of Scotland.

The Convener: On Mr McVicar's point, does everybody on the panel agree that it would be worth the committee's while to refer the proposal to abolish corroboration to the Scottish Law Commission for its views on the wider aspects?

Professor Raitt: Yes.

Bill McVicar: Yes.

Brian McConnachie: Yes. We cannot deal with such a fundamental aspect of the system on its own, because it is bound to have knock-on effects on so many other things. The only sensible way of proceeding is to look at them all.

The Convener: After the debate that we had in the parliamentary chamber about the impact of majority verdicts, the not proven verdict and all the ramifications, the committee generally accepts that.

James Chalmers: To refer the question on corroboration to the Scottish Law Commission may seem attractive but, given the point about the difficulty of looking at the matter in the round, we would need a review of the entire criminal justice system. The Scottish Law Commission might have its own views on whether it has the capacity at this time to take on a project of that nature.

The Convener: We will find out.

David McLetchie: On what else might be examined in that context, we have heard references to simple majority verdicts, Mr McConnachie's reference to the not proven verdict, and the suggestion that the trial judge have the power to withhold a case from a jury if

they thought that the evidence that had been presented was insufficient and did not meet the qualitative standard. That is helpful. There was also reference made to hearsay. For completeness, are there any other elements in the mix that should be looked at in the context of the corroboration rule? Does what I have enunciated basically encapsulate the main elements?

Brian McConnachie: Professor Raitt made a point about vulnerable people in society and certain circumstances in which there cannot be corroboration. One imagines that there would also be consideration of whether it would be feasible to isolate a particular kind of case for which it was accepted that corroboration was so difficult that in certain circumstances one could proceed without it. Similarly, in England, offences still exist for which corroboration is wanted.

David McLetchie: That is very helpful. Does anybody else have any other suggestions to throw into the pot?

The Convener: If you cannot provide them on the hoof, as it were, you can write to the committee. We will be hearing further evidence.

Bill McVicar: My predecessor Gerry Brown was well known to previous Justice Committees. He was forever going on about how we might need to have a royal commission to look at things. I mention that simply in the context of what Professor Chalmers had to say, which is that if the Scottish Law Commission does not have sufficient capacity to deal with an undertaking of this size, a royal commission is an alternative that is worth looking at.

On what Mr McLetchie said, Lord Carloway refers to other rules of evidence without being specific. I rather apprehend that he might be talking about whether hearsay evidence or suchlike should be admissible in criminal cases in circumstances in which it is not currently admissible. It may be that the restrictive rules of evidence to which Lord Carloway refers should be looked at in addition.

The Convener: Does Alison McInnes want to come in on the question whether there should be a royal commission?

Alison McInnes: During the debate on 1 December, I called for the cabinet secretary to consider referring the matter to a royal commission, given the scale of the change that was being proposed. Unfortunately, he batted that away, which was disappointing, but we might come back to it.

Mr McConnachie said that there might well be some crimes that require a different standard. I would be very concerned if we were to set up a two-tier system. Perhaps he wants to clarify what he said.

Brian McConnachie: I did not say that they would require a different standard. There are crimes, albeit that they are very trivial ones, that do not require corroboration.

Alison McInnes: Would not it immediately lay the system open to challenge and the possibility of a mistrial if someone was convicted without corroboration in a system that normally called for corroboration?

Brian McConnachie: It would not do so if the law were to specify offences that do not require corroboration. It would be a matter of whether legislation was in place. I am not necessarily saying that it is a good idea; I was suggesting it to Mr McLetchie as an area that could be looked at.

Regardless of whether we agree with the abolition of corroboration, we can all agree that conviction and detection rates for sexual offences are far too low, and that something needs to be done. My view is that that has very little to do with corroboration, but that is perhaps an argument for another day.

The Convener: I am just speculating here, but the victim might lack capacity or have a very low IQ or mental state. We still have corroboration, but it is a different matter for the jury to gauge their credibility in those circumstances.

Bill McVicar: I might be able to assist you with that. The capacity test was abolished under the Vulnerable Witnesses (Scotland) Act 2004; there is now no requirement for the court to assess whether someone should be heard as a witness. The vulnerable witnesses legislation has put in place various different means of bringing the information before a jury by way of reference to prior interviews and so on, particularly in exceptional cases.

The Convener: So there is stuff already in the pot, as it were.

Bill McVicar: There is stuff already being used day and daily in the courts to deal with matters of that sort.

The Convener: You can see how the corroboration issue has opened up this whole debate.

John Finnie (Highlands and Islands) (SNP): I want to pick up the points that Professor Raitt made about women and children and the widely held view that, whatever changes may be proposed, the present system does not serve those individuals well.

Mr McConnachie talked about an initial barrier for complainers. I know from meeting my local police force that the statistics are showing an

increase because historical crimes are being reported. That reflects changes to police procedures and a growing confidence in the criminal justice system.

Mr Chalmers used the term "public confidence" in relation to corroboration. That might be an entirely academic argument because, as long as the degree of proof remains the same, corroboration does not really matter to people. Would the panel care to comment on that?

Brian McConnachie: Are you saying that many more historical cases are being prosecuted now, in circumstances where we still have corroboration?

John Finnie: More are coming forward.

Brian McConnachie: Yes, and being prosecuted?

John Finnie: Yes indeed.

Brian McConnachie: In circumstances where we still have corroboration. I am not sure that I grasped your point. I am sure that that is my fault.

John Finnie: As I understand it, the thrust of the evidence from four of our witnesses here is that there would be insufficient protection for an accused after the removal of corroboration. I am suggesting, as I think that Professor Raitt has, that as long as the required degree of proof—beyond reasonable doubt—remains, that is an academic argument.

11:00

James Chalmers: I certainly would not agree with that. It is quite easy to imagine a case where there is either an established or an alleged miscarriage of justice rumbling on for some time, whereby an individual had been convicted on a majority verdict—possibly eight to seven—on the word of one witness alone, which had caused the public to lose confidence in whether the criminal justice system was doing its job.

Mr Yousaf asked earlier why a prosecution on the basis of a single, credible eye-witness should not be allowed. We should remember that a prosecution on the basis of a single source need not necessarily involve an eye-witness; it could involve a piece of circumstantial evidence or a confession.

Some of the most concerning miscarriages of justice in other jurisdictions have occurred as a result of false confessions. At least, here in Scotland, we have always been able to point to the fact that corroboration is required. If that were abolished, we would no longer have that safeguard. We would also no longer be able to rely on the rules of evidence that exclude unreliable or unfairly obtained evidence from being read in court. Some of the proposals in Lord Carloway's review could make it very difficult to exclude a confession on the ground that it had been unfairly obtained, for example.

Humza Yousaf: I am hoping to move on past corroboration, as I know that time is short. I have a more general question. In the debate on 1 December, I expressed my surprise to learn on reading Lord Carloway's review that children under the age of 16 could still waive their right to legal representation. I see a huge anomaly there, and I would like to hear the panel's view on that and on how the legal system could be improved in regard to child suspects.

Professor Raitt: The Vulnerable Witnesses (Scotland) Act 2004 tries to support the ability of those who would otherwise find it difficult to give evidence. Actually, that probably applies to all of us, but the act uses various measures to try to support those with particular difficulty.

There are certainly further measures that could be taken to support witnesses. There is a tension between the provisions in the United Nations Convention on the Rights of the Child on giving children a voice and autonomy, and allowing them to make decisions on giving evidence without special measures being in place. The tension occurs because the legislation states, perhaps in a slightly paternalistic way, that they should have special measures.

I think that the answer is to consult the child. Lord Carloway's view seems to be that we will simply decide that children should not be able to waive their right because it is not in their greater interests to do so.

Humza Yousaf: Do you think that a child under the age of 16 would be capable of understanding that right and its implications?

Professor Raitt: You could certainly have a discussion with a child about that and, ideally, persuade them that they required legal advice. There could come a point at which we would think that it was not in their best interests to continue without a solicitor being appointed. There are precedents in which solicitors have been appointed to represent people who did not wish to have a solicitor. In some cases, the accused has wanted to represent himself, for example.

Bill McVicar: Perhaps I misheard, but I thought that Carloway recommended that children under the age of 16 should not be permitted to waive their right to legal representation.

Humza Yousaf: I am sorry; perhaps I miscommunicated that point. I said that that was indeed the case. My legally untrained mind was surprised that those under the age of 16 had the ability to waive their right to legal representation at

present. I was asking Professor Raitt whether it was right that they should have that right—I am getting confused because there are so many rights—to waive their access to legal representation if they did not understand the consequences of so doing.

Bill McVicar: Obviously, they have that right at this stage, but Carloway is saying that that should not continue.

Humza Yousaf: What is your view?

Bill McVicar: My view is that Carloway is right. We wrote to the Carloway review to express our view that children under the age of 16, among others, should not be permitted to waive their right to legal advice.

Brian McConnachie: I think that the Supreme Court is not far away from saying the same thing—namely, that in order to waive their rights, a person first needs to know what those rights are. As Mr Yousaf said, the difficulty is that someone who is under 16 or vulnerable might not understand their rights. At the very least, that information should be provided for them before anything is done.

An aspect of the vulnerable witnesses legislation that a number of practitioners omit to notice is that it applies to the accused as well as to witnesses. It has been designed so that, if the accused is under the age of 16 or is vulnerable in some other way, an application can be made to the court on their behalf to make their giving evidence easier, in the same way as that would happen for prosecution witnesses.

The Convener: I want to ask a final question on an issue that I have pursued to do with the Scottish Criminal Cases Review Commission. I think that it was Mr Chalmers who made the point that, even after the High Court has made a determination that there has been a miscarriage of justice, it can refuse to allow an appeal, notwithstanding the fact that the finality and certainty test has been met. You disagree with that; I disagree with it, too—in fact, I disagree with a lot of what Lord Carloway recommends on the Criminal Cases Review Commission, including what he recommends on the finality and certainty test. We will hear from the SCCRC later. I understand that the SCCRC applies the test of finality and certainty anyway. I would like to hear your views on that, as I would like to put the point to the next panel of witnesses, if I get the opportunity.

James Chalmers: It is important that the commission has the power to decline to refer a case to the High Court because it would not be in the interests of justice to do so, even though it believes that a miscarriage of justice may have occurred. That helps to address issues such as the fact that the commission has historical jurisdiction in cases in which the convicted person may be deceased or the fact that there may be cases that are too trivial to warrant referral, and it prevents the commission from wasting the High Court's time unnecessarily. However, if a case has been referred to the High Court, it is difficult to see how that argument continues to hold. In theory, the High Court could deal first with the question whether it would be in the interests of justice to hear the case, but it would be extremely difficult to decide that point without hearing the full arguments.

Lord Carloway gave the rather surprising example of someone who had their case referred to the appeal court by the commission but who, in the interim, unwisely confessed to the crime. He said that that should be a ground for refusing the appeal. There may be something in that argument, but there is nothing peculiar to commission references in that example. A convicted person could confess to the crime between being given leave to have a normal appeal heard and that appeal being heard. There is no proposal that, in such cases, the appeal court would have the power to refuse the appeal. As you suggested in the evidence session with Lord Carloway, that could be dealt with by way of a retrial. Therefore, the proposal—at least, in the terms in which it was addressed in Lord Carloway's evidence—seems to be an attempt to address a false problem.

The Convener: Does anyone else wish to comment?

Brian McConnachie: Basically, what Mr Chalmers says is accurate. It seems to me that, having established the SCCRC, we must have trust in that system. One gets the flavour from the comments about the commission in Lord Carloway's review that the appeal court might simply be unhappy with the quality of the cases that are being referred to it. On one view, it seems that the appeal court is trying to erode the commission's powers.

The Convener: I do not have in front of me the statistics on the success rate of referrals from the SCCRC on sentence or, indeed, conviction and sentence, but I seem to recall that it is reasonable.

Brian McConnachie: I would imagine that it is certainly better than normal.

James Chalmers: It is also significantly higher than the success rate of referrals to the English Court of Appeal, so there is every reason to believe that the commission is doing its job properly.

The Convener: Thank you very much. That concludes our questioning. I thank you all for coming to what has been an interesting session.

11:08

Meeting suspended.

11:14

On resuming—

The Convener: I welcome our second panel of witnesses: Peter Duff, professor of criminal justice at the University of Aberdeen; Chief Constable David Strang, from the Association of Chief Police Officers in Scotland and Lothian and Borders Police; Chief Superintendent Paul Main, also from ACPOS and from Strathclyde Police; and Gerard Sinclair, chief executive of the Scottish Criminal Cases Review Commission.

I am happy to give witnesses up to two minutes to outline their views on Lord Carloway's findings.

Chief Constable David Strang (Association of Chief Police Officers in Scotland): ACPOS has welcomed the opportunity to contribute to Lord Carloway's report through the consultation process. Along with two other members of the panel, I was a member of Lord Carloway's reference group.

Since the emergency legislation was introduced in October last year, police officers and staff across Scotland have responded quickly and professionally to what was considered to be a significant change but is now considered to be business as usual. Further change has been required as a consequence of subsequent appeals in the Scottish and United Kingdom courts.

I hope that the implementation of those changes, often at short notice, persuades the committee and the Parliament of the Scottish police service's strong, relevant and current track record in implementing change in the criminal justice system.

More recent changes introduced by the Scottish Legal Aid Board to better facilitate the new legislation have assisted greatly in ensuring that police inquiries can be progressed quickly and that people detained in police custody can be detained for as short a period as possible.

ACPOS welcomes Lord Carloway's report. If his recommendations are supported and legislated for, the changes to the police service will be significant. We recognise the importance of those changes.

I will comment on detention time for suspects. ACPOS has been able to demonstrate that, over the past year, more than 83 per cent of detentions are completed within six hours, with less than 1 per cent requiring an extension beyond the current 12-hour threshold. I therefore understand why Lord Carloway has recommended that detention be limited to 12 hours before a person is charged or reported to the Crown. Although we fully support Lord Carloway's intention to have people in custody for as short a period as possible, and the concept of Saturday courts, we see a difficulty with the small number of cases that have required an extension beyond 12 hours throughout the last year. The most frequent reasons for extended detentions are the provision of medical and legal safeguards for the suspect or the complexity of the inquiry. As you will be aware, the current legislation requires investigators to be diligent and expeditious in their inquiries before a detention can be extended beyond 12 hours.

We support the notion that the police can continue to question a suspect for, potentially, up to 24 hours but suggest that the appearance at court the next day be retained. That would provide investigators with flexibility to investigate beyond 12 hours in a very small proportion of cases, provide suspects with appropriate safeguards and ensure that those charged are brought before the court more quickly than is currently the case.

Professor Peter Duff (University of Aberdeen): I will go next, because some of what I have to say perhaps leads into what Gerry Sinclair will say.

I have divided my comments into four groups. I am in general agreement with the proposals on arrest, detention and custody, although I am slightly sceptical about one or two little bits.

I generally agree with the proposals on legal advice and questioning. I certainly agree that the ban on questioning after charge should be abolished. I do not know whether the issue has been highlighted in previous evidence, but a bit of a fuss is still rumbling on because the requirement for a solicitor to be at a police station causes solicitors difficulty, particularly in rural areas. I know that they have made a lot of fuss about it, but I am not sure that the legal aid arrangements adequately compensate them for a long drive in the middle of the night to a distant police station.

I am, probably contrary to most of my academic colleagues, quite content that corroboration should go. I would have preferred the Scottish Government to have referred the proposal to the Scottish Law Commission for fuller and more detailed consideration, but now that it is on the table, I agree that corroboration should go. An important fact is that no other modern system has the rule, and if all the other systems can get by without it, I do not see why we should not be able to. At the moment, the various corroboration fiddles, as they might be termed—the exceptions to and ways of getting around the rules—and the resulting lack of clarity, mean that there is a very complex area of law that operates in some circumstances and not in many others. However, if we are to get rid of corroboration, we must do so

for all offences. That was alluded to earlier. We cannot get rid of corroboration for some offences and keep it for others, otherwise a system of what will be seen as first-class and second-class acquittals will be set up.

I am not sure that I entirely agree with Lord Carloway's recommendation that the present sufficiency test should remain unaltered. If we get rid of corroboration, the present sufficiency test should allow a judge to prevent a case from going to a jury where it would be unsafe to allow it to do so, although the precise formulation of the judge's discretion is very difficult. I am talking about some sort of qualitative as well as quantitative judgment, in other words. Of course one very often elides into the other, and the judge can stop a low-quality case going to a jury by dressing it up as a quantity issue. That will probably always go on, here and south of the border, but it might be best to be a bit more open about that.

I will not say anything about the proposed reforms of the appeal system, as I do not really have sufficient practical expertise to do so, but I declare an interest as I was a member of the Scottish Criminal Cases Review Commission for eight and a half years. Quite frankly, I was rather insulted when I saw section 194DA of the 1995 act, which says that the High Court has the right to reject referrals for appeal from the commission. I do not think that that is necessary. I think that the commission has always acted responsibly in deciding whether to refer cases—I hope that it did so when I was a member. It is inevitable that the commission will refer some cases that the appeal court rejects. That is in the nature of the commission's job, as it has a relatively low threshold for referring cases, which is that there may have been a miscarriage of justice. It is up to the appeal court to determine whether there has been or not. It would be rather worrying if the appeal court upheld every referral from the commission, as that would indicate that there were probably some referrals that the commission should be making but was not.

Although Lord Carloway's review recommends getting rid of the right of the appeal court to not hear a referral from the SCCRC, I do not agree that the appeal court needs to revisit the interests of justice test. I know that Gerry Sinclair will talk more about that. The point about the commission referring an appeal to the High Court is that that basically gives the accused a second appeal, and that should be the same as any other appeal, without the extra qualification of the appeal court having to decide whether it is in the interests of justice to hear it. The commission has already applied that test and I think that it can be relied on to apply it properly.

Gerard Sinclair (Scottish Criminal Cases Review Commission): I thank the committee for inviting me to give evidence.

I have submitted quite a detailed paper, and members will be delighted to hear that I will greatly summarise in my opening remarks.

I agree with the vast majority of Lord Carloway's report. There are 76 recommendations and I disagree with only a handful of them, including those relating to corroboration and finality and certainty.

I listened to what was said about corroboration in the first session this morning and I simply say that I agree with the submissions from the Faculty of Advocates and the Law Society. For the purpose of brevity, if no other, I simply adopt those as my submissions.

I will restrict my remarks to finality and certainty, and refer to recommendations 74 to 76—the last three recommendations—on page 369 of the report.

On recommendation 74, the commission has always, in considering whether it is in the interests of justice to refer an application to the High Court, taken account of the requirements of finality and certainty in criminal proceedings, but there is no reason to give undue prominence to the concepts of finality and certainty, which in themselves run counter to the reasons why the commission was established. In my view there is no reason for the Parliament to seek to define the term, "Interests of justice". Section 194C(2) of the Criminal Procedure (Scotland) Act 1995 is unnecessary and risks placing undue weight on what may be a number of factors that may be considered in deciding whether it is in the interests of justice to refer a case. For that reason I disagree with Lord Carloway's recommendation.

Recommendation 75 is on the new power in section 194DA of the 1995 act, which was inserted by last year's emergency legislation, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. The power, which permits the High Court to reject a reference made by the SCCRC, in my view created a fundamental change to the relationship between the court and the commission. Had such a power been in place when the commission was initially created it is certainly arguable that a number of high-profile miscarriages of justice that were referred by the commission might not have been corrected. While the explicit intention of the Government in passing the emergency legislation appears to have been to bolt the door on prospective appeals arising out of Cadder cases, the concern is that it gave the High Court a new power to refuse to reopen any case, even when a case had been made by the SCCRC that a miscarriage of justice may have occurred.

Crucially, that power was not restricted to Cadder-type applications, but covered all cases dealt with by the commission. Lord Carloway was in agreement that that gatekeeping role is inappropriate and that section 194DA of the 1995 act should be repealed. I agree with that recommendation.

Where Lord Carloway and I disagree, however, is on the final recommendation that, when considering appeals following references from the SCCRC, the test for allowing appeals should be the same two-tier test that the commission applied. This is a novel proposal which, to my knowledge, was neither considered nor debated during the course of the review process. In my respectful submission, what Lord Carloway is proposing in suggesting this two-tier test for commission appeals is not to remove the gatekeeping role of the High Court at all, but instead to dismantle the gates at the bottom of the driveway and reassemble them at the entrance to the front door.

If nothing else, that appears wasteful of both the time and the cost of preparation for a full appeal and is counter to the spirit of the other proposals in the report to improve and simplify appeal procedures. Issues such as the age of the case, the previous conduct of the applicant during an appeal, the seriousness of the offence, the likely benefits to the applicant or the effect on his reputation and the more general public interest are, in my submission, both appropriate and pertinent considerations for a quasi-judicial body such as the commission when it believes that there is a possibility that the applicant has suffered a miscarriage of justice. However, once the commission has made a decision I believe that the High Court should treat an appeal following a commission referral in the same way as any other appeal. The only matter that should concern the High Court is whether the appellant has suffered a miscarriage of justice.

While I accept and agree that matters such as finality and certainty and the rights of victims of crimes or witnesses should be fully addressed in any comprehensive, effective and fair criminal justice system, I do not believe that it is appropriate when hearing an appeal that the High Court should carry out some form of balancing exercise in deciding whether that appeal should be allowed. I do not know of any other modern criminal justice system where such a balancing exercise is carried out at the appellate stage.

The retention of section 194C(2) of the 1995 act and/or the creation of a new two-tier test for the High Court when dealing with commission referrals risks fatally prejudicing the fragile balance within the existing relationship between the commission and the High Court. Such a course could seriously undermine both the independence of the commission and its role in strengthening public confidence in the ability of the Scottish criminal justice system to address miscarriages of justice.

The Convener: I will not question you because you know my position on this; I have made it clear that I fully support the SCCRC's position and everything that you have just said. What might be useful—I do not know whether you can provide this today or later—is the number of referrals from the SCCRC to the High Court and the success rate of referrals, on sentence alone or on conviction and sentence. You said that only eight cases per year get referred.

Gerard Sinclair: Yes. To date there have been 103 referrals since the SCCRC's inception in 1999. At the time of Lord Carloway's report there had been 99, which equated to something in the range of eight per annum. I think that the figure you were looking for in an earlier session is the success rate, which presently sits at about 65 per cent. That is compared with the usual success rate of the 2,000-odd appeals heard annually, which is 20 per cent, of which 17 per cent are sentence appeals. As a result, the chance of a successful appeal at first instance on conviction is about 3 per cent, and the commission's rate is running considerably higher than that.

11:30

More important, in each of the past two years, the commission has dealt with more than 150 cases and in those two years—or, I should say, in the previous year and this year to date, given that we are only two thirds of the way through it—we have referred only two. If the plan is for the High Court to indicate, through opinion evidence, what the criteria should be for applying interests of justice, I do not think that such a move will be effective. It could take it years to do so with regard to successful appeals from the commission. If it wished to give such an indication or information for the commission to take cognisance of, it would be far better if it did so through opinion evidence when it refused the original appeal as being out of time or marked too late.

The Convener: That was very helpful.

Roderick Campbell: I would be grateful for some clarification. Obviously you prefer the view that the court should not administer a second test of the interests of justice. Given your comment that the commission does not have to make a referral to the High Court if it believes that doing so will not be in the interests of justice—and, indeed, that it has not referred cases in the past—can you tell us a bit more about the circumstances

in which the commission refused to proceed because of the interests of justice test?

Gerard Sinclair: The factors that the commission takes or has taken account of are similar to those that I outlined at the start. For example, it will look at the age of the conviction; the practical benefit of a referral to the applicant; whether a sentence has been served and whether that is of some historical interest; the seriousness of the offence; and the effect on an applicant's reputation. Obviously, a conviction for an offence such as rape will be carried throughout a person's life.

The difficulty for the commission is that, in cases that we decide not to refer, the information is retained confidentially. In the case of Cochrane, which we chose not to refer and which was judicially reviewed—and which we can discuss because it has been recorded—there was a defect in the libel of the charge that everyone agreed was a fundamental nullity and should have been spotted by the Crown, the defence and perhaps the judge at the trial. However, the commission took the view that, although there was every likelihood that the court would have been obliged to declare a miscarriage of justice had the issue been challenged initially at appeal—and although we believe that there might have been such a miscarriage—it did not think that it was in the interests of justice to refer the case. Although there was a technical defect in the libel, we were satisfied that the jury understood what the libel should have been and what it should have convicted Mr Cochrane of. We refused the referral on that basis.

The Convener: That, too, was helpful.

David McLetchie: I was interested in Mr Sinclair's statistics on the success rate for referrals by the SCCRC to the High Court. However, that success rate has been achieved at a time when we have corroboration as a rule of evidence. By definition, the persons who are, at least from their perspective, successfully referred back to the court have already been convicted on the basis of corroborated evidence and have had appeals rejected. Is it fair to say that the rule of corroboration does not seem to have been a barrier to unsafe convictions?

Gerard Sinclair: I do not think that any rule or legal process will be an absolute barrier to unsafe convictions. Miscarriages of justice and unsafe convictions occur in every jurisdiction; it just so happens that the jurisdictions of Scotland, England and Norway are the only three that have provided an independent assessment of the process at the conclusion of all matters. You cannot create a system that will abolish miscarriages of justice, simply because every court process has a human element. Witnesses give evidence, the police investigate the matter, the defence defends the case and each of those elements can be fallible and make mistakes.

David McLetchie: What is the success rate in the other jurisdictions that you mentioned? As I understand it, there is no rule that requires corroboration in Norway or England.

Gerard Sinclair: I do not know the statistics in Norway, but the success rate in England, contrary to what was said this morning, is not dissimilar to that in Scotland, although the referral rate in England is lower, percentage-wise.

Professor Duff: I think that you are asking for an unknowable statistic. In the SCCRC's workload, there are alleged miscarriages of justice on a variety of grounds. When I was on the commission, we had some applications in which it was alleged that corroboration had not been applied properly. Such cases are not unknown. We had applications in which people said that the rules of corroboration had not been applied properly even after an appeal, because there was no corroboration. Indeed, I think that we referred a distress case back on that ground.

In a sense, you are asking for the unknowable. All sorts of factors can lead to a miscarriage of justice and lack of corroboration is just one. We do not know how many extra applications to the commission might be generated if the rule was abolished, but I doubt that it would double the workload. It might add a few. When we look at other jurisdictions that have adversarial common-law systems of justice like ours but which do not have corroboration—such as Australia, New Zealand, Canada and England—we do not find a heightened risk of miscarriages of justice. As Gerry Sinclair said, every jurisdiction has miscarriages of justice because all sorts of things go wrong, many of which involve human frailty.

David McLetchie: So there is no correlation between a rule on corroboration and the incidence of miscarriages of justice. One does not prove the other.

Professor Duff: I would not say so. As you know, most of the spectacular miscarriages of justice in the United Kingdom have been in England and they were nothing to do with the lack of corroboration. Similarly, there have been spectacular miscarriages of justice in Scotland but, again, they were nothing to do with corroboration. There are so many other factors that the presence or a lack of a corroboration rule does not seem to make much difference.

David McLetchie: Thank you.

The Convener: I notice that ACPOS did not say anything about corroboration in its submission, which is all about custody. Do you want to enter

the discussion and give the police point of view on corroboration?

Chief Constable Strang: ACPOS's position is that we support Lord Carloway's recommendation that the absolute, quantitative requirement for corroboration is unnecessary. It is the quality of evidence that should be taken into account. In my discussion with Lord Carloway, I argued that a miscarriage of justice is when someone is guilty but the evidence cannot be led. There might be good evidence from a credible, reliable witness, but it cannot be led if there is only a single source. That, in itself, is a miscarriage of justice.

In pursuing investigations, the police always seek the highest quality of evidence. If that can be corroborated, that clearly strengthens the case. However, we support Lord Carloway's recommendation that the absolute requirement should be removed and that it should be the quality rather than the quantity of evidence that is taken into account.

Chief Superintendent Paul Main (Association of Chief Police Officers in Scotland): Mr Strang missed the start of the meeting, during which witnesses on the first panel suggested that, if the rule was changed, and especially in the current financial climate, the police would not carry out inquiries to seek further corroboration. I hope to persuade you that that is not the case.

We look for two sources of evidence to prove a case, but we regularly present cases to the Crown with three, four, five or more sources. It was suggested that, if there was a change to the corroboration rule, we would not seek a second source or further evidence, but I am not persuaded by that. Lord Carloway talked about abolishing corroboration, and the committee has previously commented that abolishing it does not mean that it would be banned. It is just that it would not be needed in every single case.

Alison McInnes: I want to return to something that Professor Duff said in his opening statement, which rather echoed what Professor Raitt said. She spoke about the application of corroboration being artificial and technical and its integrity being discredited. Professor Duff talked about corroboration fiddles and a lack of clarity. Can you explain in detail to a layperson what you mean by corroboration fiddles and the ways in which the rules are being stretched at the moment?

The Convener: Roderick Campbell is smiling; he obviously knows.

Professor Duff: To start with, we have the Moorov doctrine whereby, if there are three individual victims of similar alleged sexual assaults, those will corroborate each other albeit that there is only one source of evidence for each assault. That has caused all sorts of problems in Scots law over the years and the Scottish Law Commission is now reviewing it. Its recommendation will be to introduce a doctrine of similar-facts evidence, such as that which already exists in most other Commonwealth countries. The Moorov doctrine works only when all the charges are live. As we discovered with the World's End case, for example, past convictions cannot be used as a live charge can be used. There is no logic to that, and every other country in the English-speaking world uses the Moorov doctrine more widely, as it were, as a doctrine of similar-facts evidence. The artificiality of the Moorov doctrine is already seen to lead to a lacuna in the law, which is now being corrected by the Scottish Law Commission to bring us into line with elsewhere.

There is also the doctrine of distress, which is used to get around the rule of corroboration primarily in cases of sexual assault. If the victim is seen by a passing taxi driver or by her mother or someone to be distressed following the sexual assault, that will corroborate her story. In reality, there is only one source of evidence—the testimony of the victim herself—but the judges, because they are aware of the weaknesses and problems that the corroboration rule causes, have ingeniously found a way around it and have said that the victim's distress corroborates her story. If you look in any book on criminal evidence, there will be 30 pages of incomprehensible legalese on when the doctrine of distress can be applied and when it cannot be applied.

Back in the late 1980s or early 1990s, the appeal court could not make up its mind whether corroborating evidence had to be incriminating in its own right, be more consistent with guilt than with any other explanation or just support the other evidence. In the end, it decided, after much to-ing and fro-ing, that it should just support the other evidence. I asked my honours law students to read about the subject for an honours seminar and they came away completely perplexed. As Lord Carloway says, most solicitors will not fully understand such doctrines.

There are also self-corroborating confessions. Those made sense in the beginning, when the accused said that the dead body was in a certain field and nobody else could possibly have known that apart from the criminal. That, in a sense, corroborated the confession. However, that doctrine has been expanded because of the problems with the corroboration rule and now, as long as the accused shows some sort of detailed knowledge, it does not matter whether the police or even the public would have known those details. Again, it is an artificial way of getting around the corroboration rule.

When we have a rule and there are so many exceptions that keep expanding and that are very confusing, we have to ask whether the problem is with the rule itself. If the judiciary had held the line and said, "No, we have a strong doctrine of corroboration and there it stays," the rule might be supportable. However, when the judiciary themselves have got around it and undermined it in various ways, one realises that there is not the faith in the rule that there is claimed to be and it is probably time to rationalise the situation and accept it for what it is. That is what has happened in every other jurisdiction of our type—there is no corroboration rule.

11:45

The Convener: I want to follow up something that you said earlier. Are you suggesting that previous convictions might be led in the trial rather than previous convictions being notified after trial and conviction?

Professor Duff: Correct. That is the Scottish Law Commission's proposal. The classic case would be Robert Black. As you know, the serial killer has just been convicted in Northern Ireland. The main evidence against him was his previous record and the fact that he was there at the time, but there was no firm evidence against him beyond the question that, if he did not do it, who else did?

The Convener: Is the suggestion therefore that that would apply to all crimes that are not statutory offences or common-law crimes?

Professor Duff: The Scottish Law Commission's position is that that would be a general doctrine. You look doubtful.

The Convener: I am not in any doubt about that, but what has happened to the presumption of innocent until proven guilty beyond reasonable doubt? Most juries will look at the proposal and say, "Aye, you're guilty. I don't need to hear the evidence."

Professor Duff: Sorry, I should have made myself clearer. It is like the Moorov doctrine. You only lead the previous conviction of an accused if the circumstances are very similar and that previous conviction demonstrates a consistent course of conduct. If you have a shoplifter, you cannot lead that he has 17 previous convictions for shoplifting because there is nothing particularly unusual about that. However, when you have a child killer such as Robert Black, and he already has three or four convictions for that crime, that is very unusual behaviour. There was a clear pattern in Robert Black's case. That pattern was met in Northern Ireland, so the prosecution led that.

The Convener: Would a preliminary hearing be held before the judge about whether the case fell within that category of legal debate?

Professor Duff: Yes. Again, we have the consultation paper in which the Scottish Law Commission supported the introduction of that doctrine, and we are waiting for the commission's finely tuned recommendations.

In England, before allowing in a previous conviction, the judge has to be sure that its probative value—its relevance, tested similarly to Moorov—outweighs any prejudicial effect that it might have on the jury. In the great majority of cases, a relevant previous conviction will probably have more prejudice than evidential force. However, there might be circumstances in which there are three or four very similar, very unusual crimes, and the accused has perhaps been convicted of two and is facing two further charges, or has been convicted of three and is facing one further charge. Without the peculiar course of conduct of which the accused has already been found guilty being brought in, corroboration might not be possible or there may not be enough evidence to convict him on that final charge.

As I said, Robert Black would not have been convicted a couple of weeks ago of that further child killing in Northern Ireland were it not for the introduction of his previous convictions. However, I do not think that anyone is in any doubt that he was the guilty party.

The Convener: When will the Scottish Law Commission report on this? We are talking about corroboration and all the difficulties that that presents, yet here is another issue.

Professor Duff: The last I heard was that the Scottish Law Commission would report in January or February.

Colin Keir (Edinburgh Western) (SNP): I have a less technical question, which I will direct to Mr Strang and Mr Main.

Is there any fear that the withdrawal of corroboration might lead to more accusations against your officers during investigations?

Chief Constable Strang: I do not see why that would necessarily be the case. At the moment, having to get corroboration for documents and so on, and for what might be non-contentious routine matters, is a large administrative burden that involves a huge amount of additional work, often when the evidence that is presented is not in any way contested. From that point of view, we would see advantages in removing the requirement for corroboration. However, I would not anticipate an increase in complaints.

Chief Superintendent Main: Perhaps I can add to that, from relatively recent experience. A

complaint about the police with a single witness is investigated with the same enthusiasm as a complaint with more than one witness. On that basis, the number of investigations into complaints about the police would be the same.

John Finnie: Mr Strang, I would like to ask you about the 1 per cent of cases in which there is an extension of the 12-hour period. If I noted you correctly, you talked about the complexity of inquiries. Are you able to outline the general nature of those cases? Is there a theme to the type of case that would be involved? Would the reduction to 12 hours inhibit proper investigation of that type of crime?

Chief Constable Strang: Let me give you a couple of examples of cases in which detention beyond 12 hours would be necessary. Paul Main might be able to assist with some details.

An extension might be required if someone is severely under the influence of drugs or alcohol and is not able to be interviewed, or if there have been delays in getting legal assistance. Those cases involve situations in which, through no fault of the investigating officers, proceedings have had to be delayed. In a small number of such cases, there has been an extension beyond 12 hours.

Another category of cases in which there might be an extension is that of complex investigations involving multiple suspects and more than one locus. I am talking about serious crimes in relation to which long investigations have been conducted by various teams and in which it is impossible to conduct a full interview within 12 hours. Clearly, if such a restriction applied in those cases, the investigations would be impaired.

Chief Superintendent Main: We can release to the committee a report that breaks down what we mean by complexity of inquiry and details the number of cases that we are talking about, the age and gender of the people involved and the crimes that they are charged with. In general, however, complexity of inquiry relates to exactly the things that Mr Strang has mentioned. It involves cases in which there are multiple accused and situations in which the detention of the suspect takes place at the moment that the crime is alleged, which means that you might be in the middle of interviewing a range of witnesses and securing crime scenes, which can often be a complex matter. It might even be that you do not know exactly where the crime scene is.

In the past week, there has been a high-profile case—which is currently sub judice—in which we have detained two people in two police force areas, both of whom were involved in the same crime. We detained them four hours apart and gathered significant evidence as the detentions were taking place. That would have been physically impossible if we had been operating under the six-hour rule. Indeed, it was impossible to complete the inquiry under the 12-hour rule, and we absolutely needed to go beyond 12 hours.

I hope that the report that we will share with the committee will persuade you that, when we extend a detention beyond 12 hours, we do so in a proportionate way and only in circumstances in which it is necessary to do so. That is in keeping with Lord Carloway's recommendation. Further, when an extension takes place, officers demonstrate that the inquiry has been progressed in a diligent and expeditious manner, which is the current requirement under the legislation that has been in place since last October.

John Finnie: Do you have any reservations regarding the change to straight arrest—the removal of detention—and what implications, if any, that might have for voluntary attendance?

Chief Constable Strang: The proposals to have arrest on reasonable suspicion are straightforward. In the past 30 years, it has been evident that the general public do not understand the notion of detention being followed by a technical arrest while someone is in the police station; they understand that, when someone has been arrested, that means that they have been detained and are not at liberty to leave. The notion of arrest on reasonable suspicion, with an investigation continuing after that, is more straightforward and would be understood by the general public. The arrest would take place at the point at which someone becomes a suspect.

There would be a judgment to be made about what would constitute reasonable grounds to suspect that someone has committed an offence. Clearly, if someone is purely a witness and is simply being interviewed, there would be no impact until the point at which they became a suspect, when there would be a requirement for an arrest, and they would be subject to the provisions around solicitor access and legal advice in relation to any subsequent interview.

Chief Superintendent Main: The situation with regard to voluntary attendance at police offices is similar. Since last October, whether someone is detained or is attending a police office voluntarily, they have the same rights of access to a solicitor. There is an element of crystal ball-gazing, as it depends on which of Lord Carloway's recommendations are supported, but I suspect that, if the general ethos of his recommendations is that one can detain someone more than once and interview people after charge, voluntary attendances may reduce.

You will be aware that we are currently allowed to detain a person only once for a crime, and we cannot do so a second time. People are often

invited to attend voluntarily, or such an arrangement may be made through their solicitor—tactically, to be frank, as it preserves the opportunity to detain someone formally for a subsequent occasion. If the law changes, and someone can be detained more than once, I would imagine that voluntary attendances may reduce, albeit that—given the voluntary nature—people may still wish to attend of their own volition.

David McLetchie: On the issue of advice and questioning, the current situation as I understand it is that the right to legal advice arises at the point when the suspect arrives at the police station, following Cadder and the legislation that we passed last year.

What happens in practice, and what is the legal position, prior to that? For instance, if someone becomes a suspect and is then arrested and conveyed to a police station, what are the rules that govern any questioning that may be carried out at that point by police officers, and the admissibility of any evidence that might arise from such conversations?

Chief Superintendent Main: If the person was arrested, there would be no questioning anyway. If they were detained, one would be allowed to question them. At present, if someone is arrested, it means that there is a sufficiency of evidence to charge them. At that point, one is not allowed to question. However, if someone is detained under reasonable suspicion that they have committed a crime, they can be interviewed under caution and questioned.

The simple answer to your question is that if there was an interview at that stage without solicitor access, or without the right to such access being offered and an answer being given, the Lord Advocate would not lead any evidence that was solicited from those questions. That is the general nature of our guidance just now: police officers should not conduct any interviews, and any interviews will not be admissible.

David McLetchie: Outwith the context of the police station.

Chief Superintendent Main: Outwith the context of the police station.

David McLetchie: Right. But that presumably does not apply to what might be regarded as voluntary admissions. If the suspect is sitting in the back of the police car and volunteers a statement that may be incriminating, that presumably is of evidential value, whether it has been induced or not.

Chief Superintendent Main: Absolutely, although that does not happen as often as people might think. One could argue that if a voluntary or an involuntary comment was made by someone en route to a police office, or prior to someone being given their rights to consult a solicitor, that comment would be put to the person during the interview. We would seek confirmation under caution—perhaps with a solicitor present, depending on the response that the suspect has given on whether they want a consultation with a solicitor—and seek to introduce that comment into the evidence chain by those means.

Obviously, notebook entries would be made by officers if a comment was made in a police vehicle. From my visits to forces down south, I am aware that there is a view that that happens all the time. I suspect that 20 or 30 years ago it may have happened more frequently than it does now, but I can assure you that it happens infrequently now.

David McLetchie: I have a more general question about the review's recommendations on arrest, detention, custody, advice, questioning and so on. In contrast with the comments on corroboration and evidential rules in trials, we have received very little evidence on or criticism of those proposals. From a police perspective, Mr Strang and Mr Main, are you happy—by and large—that those proposals should be enacted as recommended?

Chief Constable Strang: Yes. We support the recommendations. One of the advantages is the ability to liberate on police bail to allow investigations to continue. At present, if someone is in custody, there is almost a time pressure, and the person is kept in detention while investigations continue. The ability to release someone on bail to return to the police station up to 28 days later means that people will be kept in custody for a shorter period of time.

Lord Carloway's recommendation that people should be appearing at court within 36 hours of being detained is one that the police service supports. We do not want to act as prisons for suspects who are awaiting trial, so we support all those recommendations from Lord Carloway.

12:00

Chief Superintendent Main: As Mr Strang said, the idea of investigative bail lasting 28 days is a sound recommendation. However, the tone of Lord Carloway's report indicates that that should be a maximum. He suggests that the 28 days should allow things like gathering of telephone billing evidence to be completed. The reality is that often telephone bills and evidence of internet use are not held in either Scotland or the United Kingdom. The jurisdictions in which such things are held are often beyond Europe, which means that it is physically impossible to gather such evidence in 28 days. If there is a debate about legislation subsequently, we would hope to push

for the 28-day rule to be able to be extended where that is proportionate and justifiable.

David McLetchie: Thank you very much for that.

The Convener: James Kelly wants to ask about policing, as does Humza Yousaf. I will allow Roderick Campbell in first, because he has been waiting.

I want to finish by 12:15, so questions should be short, please.

Roderick Campbell: One matter that I hope either Chief Superintendent Main or Chief Constable Strang might be able to help me with is the recording of reasons why a suspect waived their right of access to a solicitor. I raised that matter with Lord Carloway, but I am still a bit confused. Lord Carloway refers in his report to the ACPOS manual guidance on solicitor access, which requires you to record it where the right of access has been waived. Does the manual currently require you to record the reasons why the right has been waived?

Chief Superintendent Main: No, it does not, albeit that since Lord Carloway published his report, the manual has been updated. This is a complex issue, but given that the convener is looking for brevity, I will summarise it by saying that Lord Hope, in a recent UK Supreme Court case, suggested that we should copy the English and Welsh procedure by asking for the reasons. The reality is that that procedure was introduced in England in the early 1990s because of a low take-up rate of solicitor consultations. It was before the letter of rights and many other safeguards were introduced, such as a co-ordinated method of contacting solicitors 24 hours a day, seven days a week, 365 days a year. I think that Lord Hope was unaware of the purpose of that procedure being introduced into the English and Welsh system in the early 1990s.

Research was done that found out that people generally waive their right for two reasons: the first is that they do not want to be delayed in custody any longer than necessary; and the second is the potential cost. We have amended our guidance to add two points to the advice that suspects are given: one is that they can contact a solicitor by telephone very quickly and the other is that there is no cost to that. By not recording the reasons for the right being waived but, rather, providing that information to the suspect, we are allowing the suspect to make a more informed decision about their rights than has been the case up to now.

The current position is that we do not record the reasons for the right being waived.

Roderick Campbell: At least I am clear about what the position is.

James Kelly: I was interested in Professor Duff's comments about the letter of rights. He said that he felt that that was perhaps a box-ticking exercise, because some of the suspects who come through the police station are functionally illiterate and others are not in a condition to understand the issuing of the letter. What is the police's position on the letter of rights and what is your opinion on the points on which Professor Duff focused?

Chief Constable Strang: The letter of rights is helpful, because it sets out clearly what someone's rights are when they are taken into detention and it means that there is not a dispute as to whether the officer told the accused what their rights are, because they are there in black and white.

Clearly, if someone had difficulty understanding the letter of rights, it would need to be explained to them. The information should also be available in foreign languages through Language Line, and if someone needed an appropriate adult to be present, one would be made available. If someone were unfit as a result of a medical condition, some sort of medical provision would be provided. There are therefore reasonable safeguards for the officer and for the accused person. The rights are clearly written down, and they would be explained to the accused.

Humza Yousaf: Following on in the same vein, I want to ask the chief constable and the chief superintendent a question. In the previous part of the meeting, we discussed child suspects, and I wonder whether you could clarify whether a 15-year-old child who had been picked up for a misdemeanour would be treated in the same way as an adult, with regard to being told about their rights. Would they be talked through the implications of waiving their right to legal representation? Are your officers trained to do that, or would those children be treated in the same way as an adult suspect?

Chief Constable Strang: The issue of how we treat young people is really interesting. The Scottish system provides a children's reporter for anyone under 16. There is an assumption that we will always act in the best interests of the child and, wherever possible, whatever their behaviour, we will not immediately leap to a criminal prosecution. There is a growing presumption in favour of diversion away from reporting into the criminal justice system.

If the offence involving a 15-year-old were a very serious one—if they were breaking into houses, stealing cars or committing serious sexual offences, for example—they would be dealt with according to the seriousness of the offence. However, we want to avoid younger children having to go through a formal legal process. A

shoplifting offence, for example, might be dealt with at the scene or in the family home. We would not want to formalise that process by arresting or detaining the young person and taking them into the police station, where they would need a solicitor, because that would compound the impact on the child.

There is a tension between acting in the best interests of the child by minimising the formality of the legal process and ensuring that, when serious offences are involved, we protect their interests. I support Lord Carloway's view that no one under 16 should be able to waive their right to legal advice. We would of course always have an adult carer or appropriate adult with the child as well.

Humza Yousaf: Even before that adult carer or guardian arrived, would the implications of the charge be explained to the young person? Or would you just wait until the adult or carer was present?

Chief Superintendent Main: The reasons for the detention are explained to them, as are their rights. They might be explained to them at the first point, but a decision would be taken from the young person when a parent or carer or someone else was with them. As Mr Strang said, we support Lord Carloway's recommendation on this.

However, there are three paragraphs in Lord Carloway's report—paragraphs 4.0.11, 6.3.6 and 6.3.23—that need to be looked at. While no recommendation is made specifically about those paragraphs, the review suggests that when article 6 issues are not going to be affected, for example, regarding the arrangements for a safe trial, if there was not going to be a trial we would not need to provide the safeguards. So, there could be a disproportionate effect on, for example, a 13-year-old who has never been in trouble with the police and who has stolen confectionery worth 50p from the local shop. My personal and professional view is that it would be disproportionate to detain that person, bring them into police custody and put them in a cell, simply for the purpose of providing a safeguard that will ultimately not be necessary.

One of the directions that we have taken in the past 13 months with regard to emergency legislation is that, while we want to provide the appropriate safeguards to children, we do not want to arrest more children at a time of reducing crime and reducing youth crime, simply to provide a safeguard that is not necessary.

Currently, we are in discussions with the Scottish Children's Reporter Administration, which supports our position. I believe that Scotland's Commissioner for Children and Young People also supports our position. We are engaging with the Crown with a view to amending our current arrangements in light of the clarity that Lord Carloway has provided and in light of the effect on waiver of rights that some recent decisions by the UK Supreme Court will have.

Humza Yousaf: Thank you for that clarification. Would you give me those paragraph numbers again?

Chief Superintendent Main: Yes—they were 4.0.11, 6.3.6 and 6.3.23.

Humza Yousaf: Thank you.

The Convener: Our admirable clerks will already have taken a note.

Are there any questions that we should have asked but have not asked? I am sure that there are. Is there anything that you are itching to tell us? Have we missed anything?

Chief Constable Strang: In my opening statement, I did not mention Lord Carloway's recommendation on adverse inference from the exercise of the right to silence. We would ask the committee to consider that issue again. We absolutely accept the right to silence and the right not to self-incriminate. However, issues arise if, in someone's subsequent behaviour as they approach trial, they try to rely on something that they could perfectly reasonably have mentioned at the time of interview. Lord Carloway has said that no adverse inference should be drawn from the exercise of the right to silence, but we would ask you to consider that again.

Professor Duff: May I disagree with that? I support Lord Carloway's view. When the rule in England was changed, allowing adverse inferences to be drawn, it spawned an immensely complicated jurisprudence—yet again. Five or six cases have gone up to the House of Lords—or now the Supreme Court—and one case has gone to the European Court of Human Rights, relating to concerns over when it is legitimate to draw an adverse inference from silence, and when it is not. It is right on the edge of what the European convention will allow as a fair trial. A horrendously complicated jurisdiction results. In fact, I understand that, in English courts, the jury is very rarely invited to draw an adverse inference—precisely because it is known that an appeal will be forthcoming. If they go down the road of drawing an adverse inference, goodness knows what can happen.

Chief Superintendent Main: The basis of Lord Carloway's recommendation, I think, is that the adverse inference situation arises infrequently in court; I understand that only 4 per cent of trials in Scotland are affected. However, the fact that we do not hear about it often in trials does not seem like a good reason not to consider its use.

In England and Wales, adverse inference issues are more significant in the interview room. I am

thinking only about certain types of question; I do not want to suggest that an adverse inference from silence could be drawn in relation to any question. However, the law would suggest that a small number of questions almost cry out for an answer and, in such cases, the adverse inference rule would apply.

The Convener: Could you give us an example?

Chief Superintendent Main: Let us say that someone has been found in the back garden of a house when the alarm has gone off. Then, during an interview, when we ask them why they were there, they do not answer. Then, six months later in court, there is an ambush defence in which a number of witnesses are prepared to swear on the Bible that there was a party in the street over the fence and that Joe Bloggs had been invited to the house. That is the kind of thing I am thinking about—and, in such cases, the adverse inference rule could be significant in interview rooms. Down south, guilty pleas can often mitigate a sentence.

The Convener: I will leave it at that. It is lovely to have people who debate with each other and offer some controversy. We have had that from all our panels today, and it is extremely useful—although it makes the whole thing more complicated for us. I hope that the Government is listening to this, and realises how complex the situation is. I think that it realises that.

I thank the witnesses very much for their evidence.

12:14

Meeting continued in private until 12:28.

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