The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 2 October 2012

Session 4

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JUSTICE COMMITTEE
28th Meeting 2012, Session 4

CONVENER

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

DEPUTY CONVENER

*Jenny Marra (North East Scotland) (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)
Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Aamer Anwar
Helen Arnot (STV)
Alistair Bonnington
Detective Chief Superintendent John Cuddihy (Association of Chief Police Officers in Scotland)
Donald Findlay QC (Faculty of Advocates)
David Harvie (Crown Office and Procurator Fiscal Service)
Magnus Linklater
Gordon MacDonald (Edinburgh Pentlands) (SNP) (Committee Substitute)
Alan McCloskey (Victim Support Scotland)
Iain McKie
Steven Raeburn (The Firm)
Matt Roper (STV)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 2 October 2012

[The Convener *opened the meeting at 09:48*]

Role of the Media in Criminal Trials

The Convener (Christine Grahame): I welcome everyone to the Justice Committee's 28th meeting in 2012. I ask everyone to switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system even when switched to silent. Rather ironically, I do not like people tweeting, BlackBerrying or anything during committee sessions.

We have received apologies from Sandra White, and I welcome Gordon MacDonald in her place. David McLetchie has just come in—I think that you are to sit to my right, David. We are all jiggled about today, just to confuse you.

Agenda item 1 is a one-off evidence session on the role of the media in criminal trials and activities that are associated with court proceedings. We are gathering evidence that we hope will inform a Scottish Parliament chamber debate on the topic later this month.

I welcome our witnesses, who are interspersed—against their will—among members around the table, with the aim of encouraging a more open and informal debate. Committee members will be in the background today. I want the witnesses to interact with one another, but please do so through the chair, so that I can regulate the discussion and so that it makes sense in the *Official Report*. Committee members will not involve themselves too much in the debate; we are here to listen and learn.

We will start by introducing ourselves and saying whom we represent.

Aamer Anwar: I am a criminal defence solicitor.

David McLetchie (Lothian) (Con): I am a committee member.

Magnus Linklater: I am a columnist for *The Times*.

John Finnie (Highlands and Islands) (SNP): I am a committee member.

Alistair Bonnington: I was formerly the BBC's lawyer in Scotland.

Roderick Campbell (North East Fife) (SNP): I am a committee member.

Detective Chief Superintendent John Cuddihy (Association of Chief Police Officers in Scotland): I am from the Association of Chief Police Officers in Scotland.

Iain McKie: I am a justice campaigner.

David Harvie (Crown Office and Procurator Fiscal Service): I am from the Crown Office and Procurator Fiscal Service.

Colin Keir (Edinburgh Western) (SNP): I am a committee member.

Donald Findlay QC (Faculty of Advocates): I am the chairman of the Faculty of Advocates criminal bar association.

Gordon MacDonald (Edinburgh Pentlands) (SNP): I am a substitute member of the committee.

Steven Raeburn (The Firm): I am the editor and publisher of *The Firm* magazine and a trainer in social media.

Alison McInnes (North East Scotland) (LD): I am a committee member.

Matt Roper (STV): I am the digital news editor at STV.

Helen Arnot (STV): I am a lawyer at STV.

Graeme Pearson (South Scotland) (Lab): I am a committee member.

Alan McCloskey (Victim Support Scotland): I am from Victim Support Scotland.

The Convener: I chair the committee.

I thank all the witnesses who provided written submissions. I know that I said that committee members would not say much—at least, that is what I have now told them—but I ask a member to start with a question to get the discussion going.

John Finnie: Given the rapid expansion of social media, what are the challenges in ensuring that all aspects of justice are addressed properly?

The Convener: We have concerns about the situation; it may or may not be getting out of control and it may affect how justice is done and how it is seen to be done. As my old history teacher would say, "Discuss". Who would like to start the discussion?

Magnus Linklater: I will take a wee step back, although you raise the central issue, particularly when contempt of court and the media are discussed. One needs to recognise that the context was that there was already quite a lot of confusion in Scotland about contempt of court. When I arrived as editor of *The Scotsman* back in 1988, I was in absolutely no doubt that the position in Scotland was a great deal tougher than what I had been used to in England. There were many

stories of editors being fined hefty amounts for contempt issues that would probably have escaped notice in England but which were picked up in Scotland.

I remember a particular example. In an incident at Edinburgh airport, a football manager—I think that it was Jim McLean of Dundee United—had floored a television reporter, probably with justification. He was charged that night, so we sought advice from the Crown Office. We were told that nothing could be published.

The next day, *The Sun* had the story in full on its front page, with a picture. When I rang the Crown Office to complain, I was told, "Well, that's *The Sun*." The perspective on such a newspaper differed; the report would not have been permitted in *The Scotsman*.

That story illustrates that there has been quite a lot of confusion in Scotland down the years about the application of the law of contempt of court to the media. There is also a yawning gap between contempt in Scotland and contempt in England, which has—if anything—grown.

Iain McKie: Good morning. I would like to get in now, before the media, the lawyers and the politicians start. I come from a slightly different angle from many people around the table. I am a firm believer in the media's role. My experiences as a justice campaigner, particularly for my daughter and for Lockerbie, brought home to me the media's value, so I totally take the media's part—we need a strong media and we need challenge from the media. That is the background.

We cannot make the digital age disappear and we cannot put the genie back in the bottle—it is out of the bottle. I would like people to consider the situation from a systems point of view. My experiences tell me that all this will not be sorted out through repressive legislation, rules and procedures—or, as one paper said, jailing jurors.

The issue needs to be looked at from a culture and systems point of view. Unless we change the system that is inherent in Scotland at the moment, we will not change anything. What you will get is first aid instead of the major surgery that is required.

I believe that openness and accountability are major issues in Scotland. For instance, complaints have been made about the lack of freedom of information, and I personally have been refused access to thousands of documents. The Crown Office is not particularly known for openness and accountability. Without openness and accountability, how can the media get the information that they need? Given that lack of openness and accountability, the social media come in and people start just to make up their own stories and the truth disappears. So I ask you—even if it is not done here in debates—to put openness and accountability at the forefront.

I would certainly like you to consider jury reform, but not the locking up of jurors. I just cannot see that one at all—I cannot see repressive legislation working. I believe that you should be looking at ideas such as professional jurors, who could, if you like, be trained to handle the social media and would be people who could be trusted. Quite bluntly, I think that the jury system is the emperor with no clothes on—it is good to look at, it is very traditional and people love to say that it is a wonderful thing, but I am not sure that it is. Unless you look at jury reform, the media problems will continue.

Aamer Anwar: Good morning. The first point is that there are significant powers in the Contempt of Court Act 1981, but the problem for a number of us as practitioners, whether as lawyers or as media people, has been that its remit is so wide and the rules are unclear. There are really no specific guidelines on what you can and cannot do. We are advised that we can do this or we cannot do that, but generally speaking most people do not know what the law means.

It needs to be recognised that the media have a role to play in the courts and that it is important that we have a free press. Had it not been for a free press, issues such as child abuse, the human trafficking of women for prostitution, honour killings and rape would have remained hidden away. More recently, in the issues around Hillsborough, phone hacking and the Leveson inquiry, we have seen how important the media are.

However, I have a real concern that there seems to be a headlong rush into following England and Wales in allowing the use of Twitter and the televising of trials. There is a big difference between allowing live streaming of the Supreme Court, where cameras are focused on Supreme Court judges rather than on witnesses or individuals, and placing a camera consistently in High Court trials. My concern is that we know from experience that there are resource issues for the media anyway. By and large, as practitioners we can find it extremely frustrating when, after sitting through a trial that might have lasted from two days through to several months, we watch the 6 o'clock news attempting to summarise the whole day's proceedings by picking out the most sensational element. If cameras are allowed into High Court trials without limitations, there is a real danger that they will succeed in trivialising the proceedings, which will be reduced to the O J Simpson element. There is no getting round the fact that, whether the case is covered on STV, Channel 4 or the BBC, with the best of intentions we will be talking about prime-time entertainment.

Recently in this country, we have focused quite a deal on the rights of victims but no one has answered the question why an accused who is acquitted should have his trial shown on television. In these days of YouTube, the cross-examination and the allegations will be replayed again and again. Beyond that, there is the question of what happens to individuals who have been found guilty. What about their rehabilitation? What about their vulnerability when they enter the prison system or the danger that they could be killed or stabbed or whatever simply because of a television report? That is the price that we would pay if we allowed cameras into the courtroom without limitations. We do not believe in mob justice or vigilante justice. In a democracy, we have a duty to protect the guilty as well as the innocent, so we should not allow the courtroom to be reduced to prime-time entertainment. It means a lot more than that.

Steven Raeburn: Good morning, everybody. I think that the issues presented by the social media can be summarised very succinctly. The cornerstone of the law that regulates everything that goes on in the courts is the Contempt of Court Act 1981, which is an excellent piece of legislation in so far as it applies to the print and broadcast media—there are very few issues there—but the advances in social media mean that everyone who can use a smartphone, an iPad or a computer has the same power that was formerly restricted to broadcasters and editors.

The distinction is that lay members of the public and those who are not media trained cannot be presumed to know the constraints in the 1981 act. The technology turns laypeople into broadcasters with the ability to reach thousands, tens of thousands, hundreds of thousands or millions of people easily and swiftly but without the prerequisite knowledge.

10:00

The law dates from 1981. At that point, it was perfectly adequate, but I describe it as using a bow and arrow against chemical weapons. In its current form, it is completely inappropriate for governing social media and it requires a massive and fundamental overhaul if it is to have any impact on the use of social media—it simply cannot be applied to that. As we have all seen, it works fairly well with the print and broadcast media, which adhere to its terms. However, members of the public cannot be expected or presumed to know—and they do not know.

Alistair Bonnington: To give a bit of background to the discussion on contempt of court, it is important to understand that the legislation was imposed on this country by the European Court of Human Rights. Our anti-press attitude in the United Kingdom was so extreme that we fell foul of the European court and, quite rightly, we still lose almost every case involving the media that goes before that court.

As Magnus Linklater said, the situation has always been much more restrictive in Scotland than in England, despite the fact that the legislation is the same. One reason for that is that not only can the Lord Advocate, as prosecutor in the public interest, take a case to court, but the accused person can do so and a judge can raise the issue ex proprio motu. Therefore, as a result of a matter of procedure, the press in Scotland is in much more danger. Further, in Scotland, the 1981 act has been interpreted very restrictively in relation to the media. As I say, we rightly lose all the cases that go to the European court. As members will probably know, the European court is not the quickest thing in the world, and it was three years after my retirement when I won my last case there, but I am pleased to say that I won it.

On social media, I dislike legislation that is useless. I suggest that any Parliament that passes legislation that is useless is being rather foolish, because it discredits other legislation that might have some purpose. As Iain McKie said, the genie is out of the bottle and there is nothing that we can do about that. Last week, Barack Obama said in a speech that he, as President of the most powerful nation on earth, with every form of internet communication device at his hands, could do nothing about the dissemination of an anti-Muslim film. If Barack Obama cannot do anything about that, I respectfully suggest that you cannot do anything about it, either.

The Convener: I do not think that you were looking only at Magnus Linklater there.

Matt Roper: Thanks a lot for asking us to come along today.

I want to pick up on some of Steven Raeburn's points. When we talk about the media and court cases, we are no longer talking about the traditional domestic media. Social and digital media have for the first time placed the means of publication in the hands of the masses. Our contempt laws are not drawn up for a world in which the distinction is blurred between amateur and professional and national and international media. The media can be the public at large, and the courts should not pretend otherwise. If we were to take the issue to its conclusion, we might well have to send contempt of court advisories or warnings to everybody in Scotland who has a Facebook account, which is simply not practical.

Aamer Anwar made good points about some of the risks that are attached to the televising of court proceedings. His points were all well made, but we should start from the principle that we should try to

open up our courts to television cameras. If we believe that that is a good idea, it is then up to us to work through the practicalities and consider the safeguards and guidelines that would protect us.

The Convener: I thought that we already had practices in place with regard to court proceedings being televised.

Matt Roper: Yes, we have some, but we have had only a series of experimental cases. One of those was the David Gilroy case, in which STV made a successful application. My contention is that if we are to further open up the courts to televising in the way that we have discussed this morning—perhaps involving live court proceedings and High Court trials rather than only sentencing diets—we need a set of guidelines and safeguards. However, the committee should address the principle and say, "Yes, we should go down that path."

Alan McCloskey: From the perspective of victims and witnesses, coming to court is one of the most traumatic things that an individual has to do. That is particularly true for a victim. When someone who has suffered psychological damage as a result of a crime has to go to court and relive the experience, that is very traumatic. The potential to be in the media spotlight and to be part of that circus adds a different dimension. The facility to have television cameras running, particularly in high-profile cases, could affect the evidence. In some cases, the victim or witness might not give their best evidence, which could have an impact on justice. That is an important point.

Aamer Anwar: I agree with Alistair Bonnington that we cannot use contempt of court to police the internet. Anyone who attempts to police social media will find that that is an impossible task, because of the nature of the beast.

I am concerned about the role of the jury. It is inevitable that research goes on. In our daily lives, if someone asks a question to which we do not know the answer, many of us simply go into our iPhones and search on Google to find the answer. I find it impossible to believe that a juror does not sometimes go home and secretly download material to carry out research—or that jurors do not inadvertently come across material. A juror might simply go home to their husband or wife at 6 o'clock and watch Jackie Bird on the BBC news, or their teenager might come out of their room and say, "Listen, I've heard about that case. This is what I've seen."

That is going on. The problem for the courts is that we know that it is going on, but there is no research into the issue. The judge simply gives guidelines at the start of the trial, during the trial and at the end of the trial and the jury is simply told to put out of their minds matters that they might have read about. In contrast, newspaper editors can be brought to trial for contempt of court and accused of prejudicing the right to a fair trial. Which is it to be?

We have reached a stage at which the judge's directions must be in severe and unequivocal language, so that jurors understand that if they go home and research and download material, they can be sent to prison for doing so. Jurors need to understand that it is as serious as that. It is a question not of policing the internet but of ensuring that the jury system remains the jewel in the crown of the Scottish legal system.

Iain McKie: The jury issue is perhaps the most important issue that we face. I come at the issue from the perspective of someone who wants to facilitate openness, not legislate against it. I had occasion recently to look at expert evidence, and it is clear to me that judges, the prosecution, the defence and juries do not have a clue about what many experts are talking about in court. I suspect that we are quickly reaching that stage in many areas, as scientific, philosophical and psychological knowledge increases.

We have to look at juries, and I hope that the committee and the Parliament will do so. Juries are the human link between legislation and the lawyers and courts, and we must do something to assist juries, whether we continue with the current approach or have professional jurors, which is an approach that I think should be considered. We must be inventive. Juries are central to the whole issue.

The Convener: You have broadened the discussion to include the quality of jurors rather than just what they do.

Iain McKie: Yes. Juries are a great idea. In my daughter Shirley's trial, the jury was wonderful, but it would not have worried me if they had been professional jurors who knew what they were doing. I am not talking about professors and people with degrees; I am talking about the normal run of people—but they would be trained for and understand the job. The approach should be looked at. It has been done in Asia. There are advantages and disadvantages to it. All that I am asking is for you to debate the issue.

Donald Findlay: Good morning. Having listened to the general debate, I wonder whether I might return to the item on the agenda, which is the role of the media in criminal trials.

It has to be borne in mind that we are talking about justice—something with which the committee is of course concerned. The whole purpose of a criminal trial is to achieve justice as best as we can. That means affording the citizens of this country who are accused of crime a fair

trial, in serious matters, before a jury of their peers—not professional jurors, as Iain McKie suggested, which would be a seismic shift in how we do business.

A criminal trial takes place on the evidence that is led in court, and according to the law. That must be preserved and protected, because a fair trial system is at the very heart of this country.

The media are there to broadcast, cover and report criminal trials to the wider public, and there is no issue in that regard. However, the media must not be allowed to interfere with the trial process. Interference is beginning—not maybe, but definitely—to be felt now that devices such as mobile phones and iPads allow jurors to access information about accused persons, witnesses and events, which they may rely on beyond the evidence that is led in the trial. That strikes at the very heart of the trial process, and it must be regulated.

Nobody wants a juror to end up in prison, and no one is talking about that. However, it must be made plain to jurors that if they break the rules and prejudice a fair trial, they run the risk of significant penalty, and that the way to avoid that is to concentrate on the evidence and not to use search engines to find out about people's previous convictions.

Similarly, if people want to go and watch a trial, it is a bus ride away. They can go and see what happens, and they can sit there all day. I have to tell you that I am not in the habit of having to fight my way through the hordes waiting to get in to see a criminal trial. We do not need any security or queueing facilities. Half a dozen people turn up, and four of the six will be regulars who visit the High Court every day of their life because it is their hobby. There is no great public clamour.

That is not to say that we should not broadcast or televise criminals—I am not against that. However, I am totally—and always will be—opposed to the television broadcasting of a criminal trial. That would put pressure on witnesses, and it is difficult enough to get people to come forward.

It would also put pressure on the citizen: the accused. If someone is acquitted, why should they have their image blasted into every home by the television? People have to make an effort to pick up, buy and read a newspaper, but television is put into the home. Even if an accused person is acquitted, their image—minutes of it, perhaps hours of it in a long case—would be put into people's homes. That is very different from a fuzzy image on the front page of a newspaper. The lives of people who are convicted or acquitted of serious criminal charges could be put at risk, because there are people out there who want to seek vengeance.

I will make two other quick points. If someone is acquitted, that is what the justice system has done. Why should it then be for a television company to put together some kind of package of what it thinks happened in the trial and what it thinks the evidence amounted to, and show it to the public at large and say, "This man's been acquitted, but you decide for yourself—you have a go and try him by television"? That is a very real risk.

My last point is also on the role of the media. We now have instant messaging systems that allow people to sit in court with their mobile phone and broadcast the evidence as it is taking place to witnesses who are waiting to give evidence in the same building. Once that information is out there, it is—as I understand it—out there for good.

The people who write what I am reliably informed are blogs, or diaries of some kind, cannot be found or located. They can say on the internet, "This man is on trial today. I say to the jury that he has 43 previous convictions, he is a villain, a rogue and a charlatan and he has done this before—it is your job to convict him". There is apparently to be nothing that we can do about that.

The media will shrug their shoulders and say, "Well, that's just the way it is". There is a crying need for regulation at the hands of this Parliament to preserve the justice system, which I think is important to us all—it is much more important than the media's ability to cover criminal trials.

The Convener: Thank you—I think that you have provoked some discussion.

10:15

Magnus Linklater: I hesitate to disagree with Donald Findlay but I cannot see his argument that television coverage is materially different from reporting in the print media. After all, the summary of a trial in a newspaper will be very particular to that newspaper, might be every bit as prejudiced and might home in on a particular aspect of the trial that was not exactly intended in the evidence. I cannot see that well-regulated television coverage materially alters the basic proposition that any report has to be fair, accurate and contemporaneous. That has always been the case and I cannot quite understand the argument that, because television is somehow that much more pernicious in the way it conveys images of a trial, such a move should be disallowed. I believe that those experiments should continue.

Far more important is Donald Findlay's point about access to evidence in the course of a trial

through texting, tweeting and various forms of social media that were not previously available. My contribution to a debate that I think lies at the heart of the issue is to highlight the pressure on newspapers, which see all this information pouring out of the internet and stories being picked up and run without any supervision whatever while they are expected to operate within a certain constraint—a box, if you like—that has not changed significantly; indeed, every now and again, the law is tightened up. It seemed to me that the English papers, which had been pushing the boundaries wider and wider, were clamped down on in the Joanna Yeates case, when two newspapers were finally fined for contempt and pulled back. Meanwhile, in Scotland, the boundaries have been pushed a bit but no such latitude has been observed.

Even with the plethora of information that is coming out, newspapers still get very little help from the Crown Office and the police—they are notoriously restrictive in Scotland about what newspapers can and cannot publish. There is no real give and take or trust between them. As a result, given the barrage of information—from which, of course, juries have to be protected, but that is another matter—and the expectation on newspapers to operate within the constraints that have always applied, the law of contempt in Scotland needs to be revisited, the communication between newspapers and law officers on the one hand and the police on the other reconsidered and a new atmosphere of trust built up to ensure that the openness and accountability mentioned by Iain McKie become a two-way process. Newspapers should not simply be locked in as if nothing happened in the outside world—any new assessment of the law of contempt in Scotland must address that.

The Convener: I have a considerable list of people who want to speak. I call Matt Roper, to be followed by Alistair Bonnington.

Matt Roper: With regard to Donald Findlay's comments, it is not the case that regulation does not exist at the moment. Broadcasters are already regulated by the Office of Communications code and, in the case of the BBC, by the BBC charter.

On the impact of the image of the accused or witness in a case, I think that what we are arguing about is whether it is moving or still. The fact is that a still photograph can be used after a certain point in the evidence.

On the immediacy of social media and live reporting, I remember going to court as a young reporter on a regional newspaper in England and working what we called relay reporting. We would go in, make our notes on the court case, rush out and phone through the copy for the afternoon deadline and it would come out in the evening's paper.

The only difference between that and social media reporting is the delay. Currently, anyone who is sitting in a court can take down notes, walk out of the precincts of the court and post a message or a blog. The way that I see it, we are privileging the person who is outside the court over the one who is inside the court. In some ways, all we are talking about is delay pressures.

Alistair Bonnington: It is understandable that Donald Findlay looks at the matter from the perspective of the accused person, but I suggest that there is a wider interest in a criminal trial—the public interest. After all, we pay for everything that happens—the judge, the defence lawyer and the Crown—and we have a right to know what is going on.

Donald Findlay particularly mentioned that, after an acquittal, TV would not be doing its job properly if it speculated about another explanation from the one that the jury found to be the case—no doubt he will correct me if I picked that up wrongly. That is simply an aspect of freedom of speech. It should never be forgotten that freedom of speech is just what it says. It is not freedom of nice, middle-class speech, nor is it freedom for victim-oriented speech; it is just free speech.

The Channel 4 submission states that the two best judges of our age—Lords Hope and Rodger—specifically mention the fact that there should be no control over the methodology of communication. Free speech allows methodology such as tabloids. Personally, I find tabloids revolting, but that is me and I have no right to prevent them from reporting in the way that they do. We just have to live with that if we live with free speech. When we get into qualitative judgments, we are sunk and we are not in favour of free speech any more.

To be frank, the United Kingdom's position on free speech is bad enough as it is. As Magnus Linklater said, the position on contempt is much stricter in Scotland than in the rest of the UK and always has been. In European terms, we are in the Jurassic age.

The Convener: Colourful as ever.

David Harvie: Good morning. I agree with Mr Findlay, to the extent that the overriding principle is the proper administration of justice. All speakers are saying that, no matter what the balance is in the freedom of media reporting, the key is preserving the proper administration of justice.

There is a fine tradition of reporting the criminal justice system in Scotland. With politics and sport, events in the courts dominate the press and broadcast media. Experienced court reporters and

editors have, as Mr Raeburn indicated, a sound grasp of the balance between the freedom to report and the potential prejudice to proceedings. The 1981 act and the common law have tried to reflect that in the test that is in place, which is whether publication would risk serious prejudice to the proceedings. The test at the moment is fairly high.

There is no plague of reporters being brought before the courts for criminal sanction. Unrestrained and irresponsible reporting can impact adversely on proceedings, and that has happened recently, but it is an exception. The judiciary are rightly left as the arbiters responsible for securing the fairness of proceedings. They can investigate and protect the fairness of the proceedings. Proceedings have been halted in some cases.

The Crown's view is that the majority of, if not all, those matters can be cured by jury direction. The defence can help to inform that. As Mr Bonnington indicated, the legal system in Scotland allows flexibility for the defence to make representations to the court if it perceives any unfairness or any risk to the proceedings. That is a helpful check and balance, unlike in other jurisdictions, where certain directions are arbitrary. Indeed, there is a risk in directions being arbitrary because that may highlight something to jurors about the particular circumstances of the case that would not otherwise have crossed their minds. I suggest that there is an advantage in that flexibility.

The helpful briefing note circulated to members in advance of the meeting referred to Crown operational notes. It might be helpful if I capture the extent to which operational notes are used, although those who are in the media and who have advised on these matters will be more familiar with them. They are commonplace and their key use is to indicate to those who may seek to report on such matters when the various triggers for proceedings have kicked in.

Some of the examples that have been quoted are relatively historical—I am conscious of the McLean example and others. There have been some helpful changes in recent years—indeed within the past year or two—and helpful challenges in the courts by some media outlets to try to clarify various issues. It would be fair to say that that has prompted greater clarification. There is not only, as you are perhaps aware, the Lord President's practice note in relation to broadcast media accessing court proceedings but, separately, there is now a far greater, more coherent and agreed protocol in place with the media on early access to productions.

On the guidance that might be available to the non-traditional media, for want of a better phrase—the bloggers and so on—again, there might be an issue with the profile of the guidance document, "Working with the Media", which might be worth taking away for consideration. However, there is guidance in the protocol for those who are not part of what would traditionally have been described as the mainstream media about the types of situation in which contempt issues might arise and the places where they can go for guidance, which includes not only us and the Scottish Court Service but, where appropriate, the defence.

A careful balance is required between article 10 of the European convention on human rights and the common law, and open justice and the potential prejudice to proceedings. I would counsel care for the committee in contemplating any legislation that might seek to restrict reporting in any way and the open justice—

The Convener: If I can just give you some comfort, we do not have legislation on our minds at the moment, nor do we have the space.

David Harvie: That is helpful.

The Convener: I am interested in the protocol that you refer to. Perhaps you could advise the clerks later where we could see that.

David Harvie: It is published on our website.

The Convener: There we go—the good old internet. It has some pluses. Sorry, please go on.

David Harvie: Finally, on dealing with TV in the courts, as was referred to earlier we have experience of dealing with applications in relation to the permissions that have been in place since 1992. It is fair to say that when initial contact is made with victims and witnesses, the response is usually negative. Given all the other pressures that they face, they are not eager to have themselves broadcast.

As for media interest, I echo Mr Findlay's comments about those who are present in the public galleries. It is certainly my experience that their presence is directly related to the profile of the accused and/or the witness and, potentially, the victim. In the BBC's submission, it is acknowledged that there is likely to be greater interest in televising cases that are regarded as high profile, for want of a better phrase.

I remind everyone that such individuals are equally entitled to fair proceedings. There is a helpful line of authority about that. It should not be seen that simply because someone is a well-kent face, they suddenly lose any of the protections, particularly if they are an accused person. Identification can still be an issue, whether or not we regard them as a publicly known face. They may not be publicly known or recognised by the key witnesses in the case. It is absolutely

essential, in testing the truth or otherwise of a witness's evidence, that it is properly gauged in the light of their recollection and not tainted in any way by anything that others might perceive as being their position.

10:30

Steven Raeburn: The starting point in all this must be the presumption that, although we want to observe all the correct protections for victims and so on, the functions of the court are not operated for victims or for any particular interest group; they are for the public interest, and the public interest must be fully served. I would argue that the public interest is best served by exposing the courts to as much public scrutiny as possible. I do not for a second see any reason why the experience of attending court could not be simulated, warts and all, through the presence of strategically and carefully placed cameras that would not impinge on the witnesses. As we have seen with the sentence advisings and so on—the live proceedings—the cameras have been very carefully placed, and that has been very effective.

If it is a question of juror anxiety, I suspect that that may well be localised, if that is the best way of putting it. If there is concern about local reprisals and so on, the people concerned will be there in any event. If you are broadening it out to the wider public interest, I am not sure that that would necessarily have any additional impact on victims. If we are talking about supplementing the problem, I am not sure that broadcasting would create any new issues provided that it was handled sensibly.

There are a number of models to look at. The committee's meetings are televised—there are not a lot of people here, but I suspect that a lot of people in the wider public have an interest in what is being discussed today. This is an example to follow, as is the BBC Parliament channel. It runs debates as often as Parliament sits, late into the night, probably to a limited audience but to a dedicated audience that is interested. It is our Parliament and we are entitled to see it. Parliament TV and BBC Democracy Live are available to stream online and in no way impinge on the integrity of the proceedings. The only consideration is whether the integrity of the proceedings is affected—if there is a risk of that, you cannot do it. However, there is no reason why the proceedings could not go ahead without that risk.

I will touch briefly on the issue of social media. At the moment, the use of Twitter and external communication devices is constrained—they cannot be used without the special permission of the presiding judge—so, in essence, it does not happen. It has happened on the odd occasion recently, including Tommy Sheridan's sentencing, when the broadcasters felt that there was a need for urgency and a quick response. Perhaps for a sentencing, when there is only a matter of guilt or innocence to be transmitted to the public, it could be used far more widely. If there is a risk of unfiltered use of Twitter by any member of the public, that harks back to the point that I made a few moments ago. Members of the public who are not trained in the provisions of the Contempt of Court Act 1981 cannot be expected to know the damage that they are doing. That type of use would need to be restrained among those who were aware of the contempt of court provisions—on not being selective in what is mentioned, on contemporaneous reporting, and so on. Such reporting would have to be thorough, even-handed and clear.

As Matt Roper said, at the moment anybody can attend a court, leave with a careful note of what they have written down and then post it on the internet. There is no restraint on that under the Contempt of Court Act 1981. As I mentioned, the act is perfectly adequate in terms of print and broadcast, but it is beyond useless when it comes to the internet, as the access and the material are not restrained by having people who are trained in the act.

An effective blog ran during the Tommy Sheridan trial, which was created by a fellow who sat in the court, wrote down what had happened and then posted it online. It happened to be very clear, methodical and diligent—that was down to him—and it left a valuable record that was not replicated in the mainstream or in any other reports of that case. Even online—I am in the same boat whenever I publish anything online—journalists abide by the broadcast and print conventions, giving a headline, the substance of the story and the essential detail, then stopping. The report is constrained in length. A blog is not constrained in length. It tends to be much more methodical, linear and more likely to follow the sequence of events; it can run for pages and pages. That can be extremely valuable. If it is properly regulated, it can be a useful facility.

My final point is that cameras in court would add greatly to the administration of justice. I refer specifically to many of the fundamentals of our law, which have recently been eroded and destroyed. The removal of corroboration is on the cards and we have already introduced so-called double jeopardy—the multiple trials rule. There is also talk of the disclosure of prior convictions and so on. Those are not small matters. They are utterly fundamental and the changes have massively degraded our justice system.

The Convener: I do not want us to get into those other issues now. Can we keep it to the subject in hand, please?

Steven Raeburn: Sure. The specific point is that with additional eyes on procedures, with additional visibility and with additional scrutiny from interested members of the public, and perhaps interested members of the media who do not have the resources to attend, there is a far greater likelihood that the actings in the court will greater serve the interests of justice.

There is one particular reason for that. I spoke to a colleague in criminal defence—we have learned counsel in attendance and, of course, Mr Anwar; they have far more direct experience than I do, so they may be able to speak on this point—who in 20 years of trial work had never been involved in a case in which anybody had been charged with perjury, although it was quite clear that through the course of proceedings perjury had been committed.

If there is more visibility, there is probably more chance that people's evidence would speak closer to the facts and that others would ask, "Why was that person not charged with perjury? They were clearly lying." If there are more eyes on the court, more visibility and more scrutiny, that can improve the administration of justice. My view is that that ought to be encouraged.

The Convener: Appropriately, you will be followed by Donald Findlay and Aamer Anwar, who will no doubt pick up on those points.

Donald Findlay: I am sorry to begin by taking issue with an old friend. Magnus Linklater is a distinguished newspaperman, but with respect he is defending the indefensible and living in the past. He says that there is no difference between a newspaper and television. Come on, Magnus, please. If you read, "Today in Afghanistan a suicide bomber killed four people", and you see on television an image of the site where a bomb has gone off—the blood and the destruction—you cannot tell me that there is no difference in impact. There is a huge difference in impact, because you can see what happened for yourself. You cannot make that comparison.

Magnus Linklater: It is a matter of degree, Donald. Of course there is a difference, but it is a matter of degree not substance.

Donald Findlay: But substance and degree are one and the same thing. If you read a report of something that happens in a criminal trial, it is covered and it is there, but when the trial is taken into somebody's home that is different.

If I can ally that to what Alistair Bonnington said, of course I agree with him entirely about freedom of speech, and I happen to think that there is a danger that Parliaments generally are imposing far too many restrictions on freedom of speech. I am a great believer in resisting the power of the state at every opportunity, but it is a balancing act. We are talking about a criminal trial being a trial on the evidence led in court according to the law. If you want to change that, by all means blast it apart and change the whole system but do not pretend that you can ignore that central core.

You are talking about the American model. Do we really want to go down that route and have the trial played out in front of the cameras before it starts, with the prosecution saying this and the defence saying that? If there is freedom of speech during a criminal trial, why does a reporter not come out and say, in front of the High Court in Edinburgh, "Today was a bad day for the defence in court number 3. Four witnesses identified the accused. You could see that the jury is with the prosecution in this case?" That is freedom of speech, but it drives a coach and four through the fundamental principle of a trial.

The same applies to Parliaments. As Steven Raeburn said, we already broadcast Parliaments. We have freedom of speech and we are entitled to know what is discussed. Why not broadcast Cabinet meetings? Let us see what it decides and how it goes about doing that. Never mind the public debate, let us broadcast Cabinet meetings and all the other private meetings at which decisions are taken. We are the public and we are entitled to know. The issue is really about principle.

I do not know who Steven Raeburn was talking to, but it could not be somebody who was that much involved in the High Court for those 20 years if they had never known anybody be convicted of perjury. I have known people be convicted of perjury and be sent to jail for it, and I have defended a number of people who were accused of perjury in High Court trials. We do not need television cameras for that.

It is about striking a balance, and nothing will convince me otherwise. I will debate the subject anywhere and at any time. We have a system whereby a trial is just that—it is a test of the evidence in court, and that aspect must be protected. We must look at the role of the media against that background.

I will make just one further comment. I say to Iain McKie, with the greatest of respect, that some of us who ply our trade in the courts know a fair bit about what expert witnesses are talking about. We manage to stumble along.

Iain McKie: The emphasis there was on "some".

The Convener: Is it Donald Findlay's position that there should be no television coverage in

courts, not even the limited coverage that we have had so far on an experimental basis?

Donald Findlay: I apologise—I should have made my position on that plain. I have no difficulty with criminal appeals being covered. Aamer Anwar mentioned that. In a recent case, the judge was filmed passing sentence. I have no difficulty with that. However, I have an absolute difficulty with the problems and the risk to justice that arise from the broadcasting of criminal trials on television. With the greatest of respect to my broadcasting colleagues, and taking an eleemosynary view of their approach, I note that they are concerned only with what they are doing and not with the interests of justice, at the end of the day.

The Convener: Thank you.

Aamer Anwar: I agree with everything that Donald Findlay said. To pick up on what Magnus Linklater said, I agree that we need to bring the law on contempt into the 21st century. There is no point in continuing with a law from 1981. I also agree that the judges need to embrace the fact that there have been advances in technology. We need to get up to speed with that, which means that we need to review what is going on in the courts, because there seems to be a contradiction. Steven Raeburn and others are right to say that, although people cannot tweet in court, they can go outside and e-mail material straight away.

On the point that we already have the print media and television in court, I do not believe that they are to be congratulated on what they do in the court process. It is incredibly frustrating to sit in a trial day in, day out, only to find that all that we see at the end of the day is a two-minute soundbite. Usually, it is weighted in favour of the Crown and it does not reflect what has happened during the day. It absolutely has an impact on the juror when they go home to their wife, their husband or their family and they say, "Surely you're going to find that person guilty. It was all over the news." When they pick up a newspaper the next day, there are headlines and quotes about the trial. In certain high-profile trials that have been on-going—and prior to them—there has been a mass of prejudicial publicity, but judges in this country have been unwilling to desert trials before they start because they say they will simply direct the jury to put those millions of internet hits out of their minds.

I say to Magnus Linklater that the fact remains that there is pressure on the print media, which is losing readers by the hundreds of thousands. There is pressure to compete and to succeed in selling advertising space, which means that it all comes down to that. It is the same in the case of prime-time TV. That leads to the sensationalising of trials in the way that we have seen in the United States, the most notorious example being the O J Simpson trial. It is no coincidence that, since that trial, there has been less televising of court trials in the United States.

Steven Raeburn mentioned the blogger of the Sheridan trial, who was James Doleman. That was an excellent piece of blogging. We were lucky in the sense that there was just one blogger and that he was conscientious and wrote down everything that happened during the trial, but what would have happened if it had been a different blogger who was not conscientious? What happens when a blog is put on the internet that invites opinion? There is no way of combating that. Once everyone starts writing their opinion on the internet, it is out there. What is to stop a jury coming across that inadvertently or overtly?

10:45

Another thing that frustrates us, as criminal lawyers, is that, because the media are incredibly pressed and face a great deal of pressure on resources, they cannot afford to have a journalist sit in a trial throughout the day to report the pluses and negatives, and the positions of both the defence and the Crown, so we are reduced to having a soundbite culture.

As far as Twitter is concerned, it was used in the Sheridan trial and during sentencing. I have no problem with Twitter, but when I looked at some of what was said during the day when we were waiting to find out whether the jury had found Mr Sheridan guilty, I did not see what purpose it served for the BBC, I think it was, to talk about whether defence solicitors or others looked grey-faced, troubled or worried. What did that have to do with the jury coming back and delivering its verdict?

I say to Alistair Bonnington—I agree absolutely with Donald Findlay on this—that free speech does not always mean just free speech. In this country and in Europe, free speech carries responsibilities. The right to free speech under article 10 of the ECHR must be balanced against the right to a fair trial under article 6. The United States values free speech—the first amendment values free speech. The US also has other safeguards, such as jury vetting, which ensure the right to a fair trial. We do not have jury vetting in this country, which is why contempt of court is essential and needs to be extended. It needs to be updated rigorously to take account of technological advances, otherwise it will be a case of getting the cameras in.

With the greatest respect for the media, they say that they have a genuine interest in court cases, but their genuine interest is not concerned with justice; it is simply about getting the cameras in. If that happens, we will open the floodgates to

the Hollywoodisation of our courts, and that is unacceptable.

Detective Chief Superintendent Cuddihy: It is interesting to note that the agenda item is entitled, "Role of the media in criminal trials". In light of the discussion that we are having, it might be more appropriately entitled, "The impact and implications of the role of the media in criminal trials".

The Convener: I think that that is what we meant; perhaps we should take lessons on how to do our agenda headings.

Detective Chief Superintendent Cuddihy: In general, it is ACPOS's view that the police are charged with the preservation of life, the protection of property and the bringing of offenders to justice by enforcing the law and, in so doing, identifying the crimes, the victims, the witnesses and the accused. When the due process of law results in judicial proceedings, we must ensure that victims, witnesses and their families are protected from the fear of intimidation and influence—perceived or otherwise—and that they are free to give evidence without any undue pressure being applied to them that may result in the integrity of the evidence, the trial and justice being compromised.

It is our experience—it is certainly my experience—that in most cases members of the public are extremely reluctant to come forward and provide witness testimony. That is particularly true in cases involving the most serious of crimes. Although ACPOS welcomes the debate on judicial transparency, we must be careful to ensure that, in our attempts to show that justice is seen to be done, the principle that justice is actually done is maintained.

Iain McKie: I would like to respond to Mr Findlay by saying that his expertise—certainly on fingerprints—is acknowledged. He gave a masterclass at my daughter's trial. Unfortunately, I do not believe that many of his colleagues could have followed him, but that is an aside.

I have a great deal of sympathy with many of the things that have been said, and in particular with what Mr Findlay and Mr Cuddihy said about justice. Justice is absolutely paramount. I also agree with what has been said about victims and their feelings as they go to court. However, the fact of the matter is that we will have to get to grips with the issue. That is the case not just in Scotland—the role of the media is an international issue. A lot is written about it internationally on the internet. It seems to me that we cannot sit with our heads buried in the sand. We should look beyond our shores as well as at the situation in Scotland.

We are asking judges to be gatekeepers of a lot of things, not just expert evidence. We are asking them to be gatekeepers of the media and the social media. Quite frankly, I think that that is impossible. We need to find a way to assist the courts in the handling of this whole thing. Judges are not gatekeepers. There is an arrogance among the judiciary that they can do everything—they cannot. Things have moved on since the last century and we really need to get to grips with that.

I believe that we need training in the court system, particularly of the judiciary and lawyers, and possibly of jurors. Training and communication are two of the major things. If we are going to look at the problem and at solutions, we have to look at things such as training. The question is how we get the courts to truly gate-keep, instead of continuing with the fiction that they can already do it.

Alistair Bonnington: There is a danger that we proceed on the basis of something seeming to us to be prejudicial—if we are exercising what one would hope is a reasonable degree of common sense—although it does not actually have a prejudicial effect on a jury.

We are not allowed to do any research in the UK—it is illegal, so we do not have any research. Lord Hope rightly pointed out in the Chhokar case—HMA v Montgomery and Coulter—that there is research in New Zealand. I taught media law in New Zealand this year, and I talked to academics there about it, which was very interesting. So far as the research that has been done in a society that is very similar to ours is concerned, it appears that juries become what I think—Mr Findlay will correct me if I am wrong—some lawyers call a mini-Parliament. They become part of a little society that meets to try an accused person. As Donald Findlay and I remember, the last thing that you should do is what Sheriff Irvine Smith used to do: he would tell everybody that the accused in the dock was guilty as sin, but juries regularly said quite rude words privately and acquitted them. I am sure that Donald Findlay benefited from that as I did, when we were both a lot younger than we are now.

Let us not proceed on the basis of having front pages of *The Sun* that say "This man has 45 convictions" with a big arrow that says "Guilty man—hang him!" That is not allowed, as we know, but if it was, would it lead to that man's conviction? I do not think that it would. There is no research to justify that conclusion. My firm was involved in X v Sweeney—the Glasgow rape case. I was with Ross Harper doing criminal work at the time and we carried out the private prosecution of the accused persons. Committee members may remember the case. Despite all the advance publicity, which basically said that the accused were guilty sods who should be hung, drawn and

quartered at best, a discerning verdict was brought in, as the court pointed out.

I do not understand the idea of updating the 1981 act. The 1981 act was a response to the decision of the European Court of Human Rights in the *Sunday Times* thalidomide case and it therefore has the imprimatur of European law. There are certain problems with it, however. Promises were made to Europe about things that Scotland would do, which it failed to do—England did not fail to do them—in relation to appeals and the right to be heard.

I will set that aside and say that the 1981 act gives judges a wide canvas. It has to be done on a case-by-case basis by experienced judges. We do not need any more legislation. The last thing that we want is for legislation to be updated with references to Twitter, when someone might invent something called Twongle—legislation would not cover Twongle, because the references would be to Twitter. We should not do that. We should stick where we are—there are enough weapons in the judiciary's hands.

The Convener: This is a good place for Steven Raeburn to come in, after which we will have Matt Roper, Magnus Linklater and Aamer Anwar. I will then ask committee members if they want to ask questions. Committee members may wish to cogitate on the fact that we have not yet touched on filming witnesses arriving at and leaving court, newspaper commentary on witnesses' character, or police making statements to the press during and after trials. We might want to touch on those subjects if they are not addressed by the following witnesses.

Steven Raeburn: The issue of whether the law should be updated to account for social media cannot be avoided. As the Ryan Giggs episode has proven—as have many others—although the judiciary has wide discretion to apply existing law, it is very hard to do that when the people who are potentially flouting the law are utterly invisible and anonymous. The law might not be able to reach them, in its present form. That is certainly an issue.

Aamer Anwar and I have already highlighted an extremely useful example that touches on the issue of blogging and the technology that allows members of the public, without restraint, to become broadcasters, journalists and editors. The widely read blog about the Sheridan case happened to be extremely well written—indeed, it was carefully written by someone mindful of the contempt of court provisions. That person could just as easily not have been so careful. One might argue that the contempt of court provisions would have caught that individual, who was trackable and accessible and open about who he was; however, he might not have been, and a problem at one remove is how we reach people who are able to remain completely anonymous.

In the Ryan Giggs case, there was a court restriction on identifying certain individuals, but all across England, where the law applied, people were using social media to transmit the names left, right and centre. There were little explosions going off all over the internet as people kept mentioning the names while remaining, I would argue, beyond the reach of the law. As a result, regardless of what the technology is called, the law has to factor in all those possibilities. The fundamental difference is that members of the public now have editing and broadcasting powers that they never had before. When the 1981 act was drafted, editors and broadcasters were trained in and understood the restraints but we cannot presume that members of the public have the same understanding.

I do not see how the presence of cameras in court or other such coverage necessarily equates to soundbite breakdowns for broadcast packages. I am in favour of broadcasting court proceedings as they transpire, but that is completely different from breaking something down for a broadcast package, which necessitates editing, selection, cherry picking and prioritisation. That must all be done with immense care, but I would argue that it is happening already without cameras, with the material available to court reporters, and that the current law in that respect is perfectly adequate. If the same material is going to be packaged with images, the same rigour needs to be applied, but I do not think that that necessarily presents any problems.

Of course, when you edit a visual package, you run the risk of highlighting more colourful elements. However, that is completely separate from broadcasting court proceedings as they happen, which I believe would enhance—indeed, would greatly improve—the administration of justice. I accept that certain objections have been raised about possible risks to witnesses' willingness to speak and so on, but I am not entirely satisfied that such risks outweigh the public interest in the broadcasting of proceedings. In any case, as I have said, that is completely different from an edited package. I am sure that many people around the table will be aware of a long-standing Channel 4 effort to take that kind of edited-package approach after a trial has been completed, by which time justice will have been served. However, that gives rise to a different set of issues. For example, the person in question will at some point serve their time, the programme will be on an archive and so on.

Nevertheless, such issues are not related to the question of broadcasting proceedings as they take place. Perhaps an example that highlights the

worst excesses of television is “Big Brother” but, all the same, it is very informative and instructive. As you will recall, George Galloway took part in the programme and ahead of his appearance he told a newspaper that he wanted to use the platform of the programme to espouse certain political views. Of course, that is contrary to Ofcom regulations and not a word of his political feelings found its way into what turned out to be three weeks of live broadcasting.

The Convener: But was there not a delay on transmission for that very reason? I am not confessing to having watched the programme—that is what I have been told. Are you suggesting that there be such a delay for the broadcasting of court proceedings?

Steven Raeburn: That brings me to certain safeguards that can be easily introduced. Indeed, that very example demonstrates that such safeguards can be introduced. There are other issues about the immediacy of court proceedings and, of course, the judge might decide to hear certain evidence in private and so will clear the court. However, there is no reason why the transmission cannot simply cease or be blank screened; after all, this is public service broadcasting, not entertainment.

Aamer Anwar mentioned prime time. If it is a live broadcast, it is not in prime time—end of discussion. The court shuts at 4 pm, so broadcasting would stop at 4 pm—the court is not open during prime-time television hours. There is no selection to compete with the evening’s entertainment or broadcasting, which has a completely different purpose. I do not think that the audience at 8 o’clock on a Thursday night is the same as the audience at 2 o’clock in the afternoon, who may have an interest in the administration of justice. The two things just do not connect.

11:00

The Convener: I think the red-button option enables people to catch up with programmes later on. I am not very technological, but people could in fact—

Steven Raeburn: Yes, the broadcasters can facilitate an awful lot of possibilities, but if the court is concerned about the contemporaneous issue, my belief is that the technology can be used to replicate the live experience of attending court. The audience who attend court in person do not have the red-button facility so perhaps, when it comes to the administration of justice, there is no reason why that facility has to be provided for people who are watching the live proceedings. Why should people be able to have another look at something that was said?

There are enough brilliant minds in television to easily get around those specific details and set up safeguards. The principle of facilitating live broadcasting from court in a sensitive way that does not interfere with the administration of justice is hard to defeat and I do not believe that there is a sustainable argument against it any more.

The Convener: Your point is clear. I am trying to watch the time and I am mindful that we have had quite a long session. The witnesses can write to the committee if they think that they have missed something out, because I need to let committee members in at some point. I know that Aamer Anwar is itching to come in—Matt Roper will go first, then Magnus Linklater, then Aamer Anwar, then committee members, so committee members had better start indicating now if they want to ask a question.

Matt Roper: Picking up on what Steven Raeburn and Aamer Anwar were saying, I point out that the special status of TV is already recognised in law. We have Ofcom regulation.

It is a privilege to be able to go into people’s front rooms. Television journalists are probably better placed than anyone to understand the perils of live reporting because we do it all the time. I do not think that there is any chance of any Hollywoodisation of court proceedings—it simply could not happen in this country under the current laws.

There have been no objections so far to the televising of appeals and sentencings—it is interesting because they are very rare. I would be interested to see whether we can make any progress on that after this committee and perhaps see some of those things come to fruition.

We recognise that social media is a risky business. We have codes and guidelines for all our journalists to follow to make sure that it is not something that is done lightly. Using social media in court increases the risks, but there are ways to mitigate those risks with proper training.

Magnus Linklater: I relish being accused by Donald Findlay of being locked in the past because I do not understand the impact of television, but—dare I say it—there is a confusion here in what Aamer Anwar and Donald Findlay have said about the impact of television. We should probably not get too bogged down in this specific argument, but Donald is making the point that television has an impact that the print media does not have and that that impact is likely to lead to a greater prejudice than the current situation, in which the print media on the whole dominate.

Aamer Anwar complains that the media are very bad at reporting trials and, hands up, I am sure that we are. I am sure that we reduce complex arguments to simplicities. Aamer, in the course of

a day, may note a highly significant exchange of information, but when he picks up the paper it may have been reduced to a story on page 94.

That is unsatisfactory, but those are two entirely different arguments. Continuous TV streaming of a trial would answer Aamer Anwar's case right away. People would have the ability to follow a trial all the way through a day. The packaging that Donald Findlay complains of at the end of the day, with a reporter standing in front of the court and giving a wholly prejudicial account of the trial, would presumably be covered by contempt of court and rules would govern that in the same way that they govern the media today. Those are two completely different arguments and, despite being locked in the past, I cannot grasp Donald's objection to the use of television.

Finally, as Iain McKie said, all this comes down to the way in which a jury is instructed. I do not, however, understand his point about judges not being gatekeepers. If judges are not gatekeepers, what on earth are they? They instruct a jury to ignore this, that and the other. They are in a very important position. I rather like what Lord Prosser once said that addresses the point:

"Juries are healthy bodies. They do not need a germ-free atmosphere."

There might be greater risks today, but I think that what Lord Prosser said remains the case. A jury is there, listening to a day's proceedings, and it is far more likely to be influenced by what it has heard during that day in court than it is by picking up a newspaper and reading an unsatisfactory report or getting an account from their family of a TV report.

The Convener: I ask Aamer Anwar to be brief, please, so that I can get some members in.

Aamer Anwar: In response to Steven Raeburn, I say that I am all for public scrutiny of the judiciary, the courts, the police and the Crown Office. They need to be held to account and they should be more accountable for and transparent in their dealings. During the past decade, I have become particularly fed up that judges in this country see everything as an affront to their authority. They need to come into the 21st century.

I do not buy the suggestion that the media has genuine public interest at heart and that that is why it is looking for this change. The analogy with the Parliament is false. Courts are not supposed to be dictated to by public opinion. That is the central issue; Donald Findlay was right. We are talking about justice and the rule of law that should apply, not personal party interests. Public outrage about what should happen in certain cases should not translate into pressure on judges or lawyers when they are doing what is already an extremely difficult job.

I understand what Steven Raeburn says about streaming, but let us look at the one example that we have, when the Lord President gave a film team access to lawyers and the court system—it was Windfall Films on behalf of Channel 4. I met Windfall Films a couple of times when it made approaches to film a couple of trials, but I stepped back from it eventually because, yes, the film team would follow us around for between six months and a year and produce something that was not sensational but did the job, but the bottom line was that it would be prime-time entertainment, and the filming of lawyers, prosecution, defence, judges and witnesses would all be squeezed into a one-hour documentary that would eventually go out on television.

Live streaming contradicts the current positions of STV and the BBC. They do not have the resources to put a cameraman in the room during a High Court trial to film what is going on for a full day. They usually have to bring in contractors to film it, they bring their cameraman in for the most sensational parts, and the reporter goes running out to do their piece to camera. What is to stop those TV companies from taking the most sensational aspects out of the live stream and producing a documentary for TV?

Alistair Bonnington talked about what would happen if *The Sun* printed, "He's guilty, hang him" and said that there was no research that showed that that would change the jury's conclusion. There is no research into what is going on in the jury room, because, under current law, we are not allowed to ask a jury member whether they understood their directions, or whether they had any knowledge from the internet prior to the case. There is much opinion or speculation about what goes on in a jury room, or what jury members might do on their computers at home, but it is no more than speculation. Perhaps, in the 21st century, we should stop thinking as if we are in the 19th or 20th century and decide that we should do some research. We should be able to ask jurors what is going on. We do not have jury vetting in this country, but perhaps it is now time for jurors to be given written guidelines about their role and responsibilities, as well as an explanation of what is unacceptable conduct.

It is my submission that it is very difficult and very rare for a juror to stand up and say, "Something has gone wrong in the jury room." Occasionally they do that, and it is fantastic when they do, but that is very rare. Jurors do not even know how to go about doing that or whether it is right for them to do it. Not every jury room in this country will be like the one in the film "Twelve Angry Men". Advances in technology mean that it is essential that we revisit the Contempt of Court Act 1981 and start to look at what is best placed to

drive justice. The public interest is to achieve justice, not to get cameras into courtrooms.

The Convener: Thank you very much. This is an extremely interesting discussion that I am sure we could continue much longer, but we cannot. I call Roderick Campbell to be followed by Graeme Pearson.

Roderick Campbell: I will make just a quick point. Does anyone have concerns about the filming of witnesses, or for that matter solicitors and counsel, coming to court?

Aamer Anwar: That already happens. Witnesses, solicitors and counsel are filmed going into and coming out of court, so I do not think that that is much of an issue. The courts already have a process by which they can say that, for certain witnesses who are vulnerable, applications can be made that they should not be filmed. During the Sheridan trial, attempts were made by certain high-profile witnesses to try to disappear out of the back door of the court, but that was not allowed to happen. They were public witnesses for whom no application had been made and—so be it—they were filmed.

I do not think, however, that people should be filmed beyond the steps of the court. People should not be followed all the way up the street to the car park. I think that that is unacceptable, but going into and coming out of court is fair game.

Alan McCloskey: I disagree with Aamer Anwar on that point. There have been examples of the media chasing people who have gone into and exited from the rear or side door of the court to avoid the media, although that does not happen very often. Having a TV camera accidentally filming the public coming in and out is one thing, but there have been examples of the media chasing people to their car.

Aamer Anwar: I was saying that that is completely unacceptable.

Alan McCloskey: Yes, it is absolutely unacceptable.

The Convener: What happens to the media if they do that? Is there any retribution, or does it just happen and that is it—tough?

Aamer Anwar: There is no retribution. Again, that is why the law needs to be revisited. Whether or not they are victims—we always assume that victims are necessarily those who are giving evidence against the accused, but they can sometimes be the accused as well—people should have a right of recall. It should not be necessary to take a defamation action against the newspapers, which, as we have seen in recent times, are all extremely powerful. Unless you have a lot of money, there is not very much that you can do about it.

The Convener: Perhaps Steven Raeburn can respond to the point about filming.

Steven Raeburn: Perhaps witnesses or other people are filmed coming to and from the court simply in the absence of any other available material. If the court process were filmed as is proposed, that could provide a library of additional material for broadcasters to use instead of filming people coming to and from court, for which there would be no need.

The Convener: I wish you could see Donald Findlay's face at that suggestion. He does not need to say anything.

Steven Raeburn: I hesitate to disagree with a learned counsel, but I am afraid that we do not have the same point of view on this one.

Helen Arnot: While agreeing with both Mr Anwar and Mr McCloskey—

The Convener: Sorry, I will first take Mr Bonnington, who has been waiting.

Alistair Bonnington: I may be making the same point, but while I quite understand what Mr McCloskey is talking about, that situation seems to me to be perfectly covered both by the common law and by the Protection from Harassment Act 1997. If a complaint were made to the police by the victim—if we may use that term—the matter could be dealt with there and then. My memory is that a press photographer was arrested outside Kilmarnock sheriff court. That was during a fatal accident inquiry—it was a terrible FAI into why some children had been burned to death. Understandably, the family had said that they did not want to be photographed, but the photographer, who was from a newspaper that I do not like, did not take the hint and was then arrested.

The Convener: So there is a precedent.

Alistair Bonnington: I think that there is, yes.

Helen Arnot: I agree that broadcasters should not overstep the mark. They should either be self-regulating under their own codes or be subject to criminal prosecution.

The Convener: If Aamer Anwar is about to make the same point, I ask him please not to bother.

11:15

Aamer Anwar: There may well be common-law remedies, but in two recent high-profile trials I have seen a media scramble, with about 100 photographers and cameras surrounding the accused as they walked out of court and tried to get to their car. It was the middle of winter with ice on the ground and people were almost falling over

and getting trampled on. The police see their role as to be there for the court, not to carry on and police the outside of the court. Fair enough, on the occasions in question the police tried to send men, but they did not take any action and the situation was impossible. The police did their job policing the court and it is not their job to police outside the court or in the car park, but because we were followed by the media, a journey that would normally take 30 seconds took about 20 minutes. I was surprised that somebody was not seriously injured.

That kind of situation is unacceptable for those who leave through the doors of the court. If someone is a vulnerable witness or whatever, they might need to go out the back, which is fair enough. However, people are placed in jeopardy when they leave the court and try to get to their car. In addition, witnesses do not want filming to show their car number plate, or identify the make of car, or show whether they are with their children or their families—if they are not giving evidence, why should they be filmed going into or leaving court?

The Convener: Thank you.

Graeme Pearson: I return to the point that Steven Raeburn addressed. Donald Findlay, as a defence agent, has raised issues about the safety of witnesses and accused persons in the court, which David Harvie confirmed and to which John Cuddihy and Aamer Anwar referred. Steven Raeburn suggested live running of the court process. Do you suggest that all people who are part of that process would be seen on television? Would you suggest that people going into the court would be able to utilise the freedom not to be broadcast? How would the process work? Do you just reject the suggestion that witnesses will feel intimidated in such circumstances?

Steven Raeburn: The answer to that is in whether it would impact on the administration of justice. If someone—

Graeme Pearson: No. Can I stop you there? It is a fairly simple question about people going into court to play their part and perform their citizen's duty in order to adhere to the administration of justice. You have heard from people who are practitioners in the field with long experience who suggest that ordinary people, whether witnesses or accused, are frightened and feel intimidated and that the presence of cameras broadcasting to the world would add to that and would, likely, impact on how court processes operate. Do you just not accept that, or do you feel that we should, in the interests of the public, bypass that concern at the key moment of deciding the guilt or innocence of a person in our courts?

Steven Raeburn: Mr Pearson has touched on the balance of the answer there, because we need to put the two things together. We do not, of course, override people's concerns, because the vulnerabilities, sensitivities and fear are real and traumatic. Obviously, many people who come to give evidence in court are traumatised before they start, whether they are witnesses to or victims of crime. That is the starting point and it exists in any event. So, the question is whether broadcasting the court process would compound that or inhibit any of the process. I think that this committee and the Parliament would have to look carefully to see whether there is any evidence that it would. If there is such evidence, the question then is whether it outweighs the public interest in justice being seen to be done properly and appropriately. That is where the rubber meets the road and where the real issues lie.

I might not have articulated this earlier as well as I could, but if someone is feeling anxious or, what is worse, intimidated, that will not necessarily be exacerbated if, for example, the events take place in the south side of Glasgow but somebody in Banff watches them. They are not really worried about the person in Banff who is watching; they are perhaps more worried about specific people connected to the events.

Broadcasting or not broadcasting is not going to change that, because anyone who has a direct interest or concern that is causing that fear already has that fear. Would broadcasting enhance it or make a difference? I am not entirely convinced at this stage that there is evidence that it would.

Graeme Pearson: Would everyone who is going into that court on that particular day be able to exempt themselves from the performance, or would everyone entering the court have no choice in the matter and be broadcast?

Steven Raeburn: There is a clear answer to that. I see that Liz Cutting is in the gallery. As you probably all know, she has played a powerful role in moving the judiciary closer to better and wider communication and has played a key role in facilitating the broadcasting that has already taken place, under the strict safeguard that, principally, the camera is positioned to see the bench and only the bench.

That is a great step forward. If you were to broadcast proceedings in their entirety, with the camera showing only the bench, the court professionals—the prosecuting counsel and the defence counsel—and, perhaps, at a push, professional witnesses such as expert witnesses and police witnesses, who could accept that as part of their obligation to attend court to give evidence—

Graeme Pearson: Such people are not obliged to appear in the media. That is not part of their duty.

Steven Raeburn: That is up for debate. However, there is no doubt about the fact that they have a role to play in the administration of justice. If there were any possibility that the administration of justice could be adversely affected, you would not take that risk and you would ensure that the camera stayed fixed on the bench. Some people might say that that would be dull to watch. In response, I would reiterate the point that I made earlier: so what if it is dull to watch? We are not talking about entertainment. The purpose is not to provide stimulating visuals; it is to provide the administration of justice and transparency.

The Convener: This committee can be quite dull to watch, too. I did not know that we had such a vast audience.

It would be useful if you could develop your checks and balances argument in writing rather than trying to do it in the limited time that we have today.

I see that David Harvie would like to say something. I ask him to be brief.

David Harvie: On the point that Mr Raeburn raised about evidence, I think that that evidence arises from what has been alluded to previously, in relation to the Windfall Films experience. The reality is that that production company has made significant efforts to engage with the Court Service, the Crown Office and Procurator Fiscal Service, witnesses, victims and so on. It is fair to say that it has experienced some concern and reluctance. The Lord President's rules have been modified recently, and we will see what impact that has.

I have a slight concern about the checks and balances to which Mr Raeburn is referring. As I understood his original point, part of the argument is that the public have access to the court and can assess the demeanour of witnesses and so on. I now understand that there may be some witnesses who will not be seen and will only be heard. As we know, we gain an impression of what is happening around us through the use of our five senses. I would have thought that any limitation of that would, by definition, automatically skew our interpretation of what is going on. I urge caution about any ideas about sanitisation of material.

Colin Keir: Part of my question was based on what Graeme Pearson has just said.

I have always been of the opinion that, in most cases, the visual image is stronger than what appears in the papers the following day.

I have a concern about the discussion surrounding the live broadcasting. It does not sort out the problem of the sensationalisation that happens in the evening news. Regardless of whether proceedings are broadcast live, "Scotland Today", "Reporting Scotland" and other outlets are still going to open their broadcasts with a two-minute segment that will cherry pick aspects. That problem will remain. I do not think that the argument for full live broadcasting that has been made, particularly by Mr Raeburn, has really been considered fully.

The convener mentioned the issue of comments about victims during proceedings, or about alleged character defects in some of the main players in a court case. How can people avoid making a determination on somebody's character if comments are put out there before the court has made a determination?

The Convener: That was more a comment than a question.

Colin Keir: I was asking how we could balance that.

The Convener: Yes. I will leave that sticking to a wall somewhere, as somebody once said. We will come to that.

Jenny Marra (North East Scotland) (Lab): I want to leave this discussion with a clear idea of the advantages of the proposal to broadcast trials. Throughout the discussion, I have not been convinced by the arguments. The main proponents, who are Mr Raeburn and Mr Linklater, have cited the public interest and the administration of justice. Mr Raeburn talked about the change in the rules on double jeopardy and on corroboration, if that comes about. He said that things might be elucidated by having a camera fixed on the bench all day long and proceedings broadcast on television, but I do not understand how that would happen. How would the public interest be better served by broadcasting all day long with a camera fixed on the bench?

Magnus Linklater: There is a simple answer to that. Television is the most used media in the world. To me, it seems illogical to exclude the most popular media, and the one that has defined our generation, from the public process of a trial. Despite Donald Findlay's best arguments, I cannot understand the logic of excluding television if all the safeguards that we have been talking about this morning are introduced to ensure a fair trial and are not interfered with. Those are the same safeguards that govern my media—the print media.

Jenny Marra: How would the suggestion assist us in making the administration of justice better?

Magnus Linklater: Why allow any media coverage of a trial? We allow media coverage

because it is the public's right to know what is going on in our courts of law.

The Convener: I will simply challenge you on one thing. The interaction between people is different when they are on television—their behaviour changes. That does not happen when the press cover something, but people's behaviour changes if cameras are there. If you were put on television, you would moderate your behaviour, as I and everyone else here would do. Will that not happen in courts?

Magnus Linklater: I return to the question of degree. Behaviour might change, but my behaviour changes if I am interviewed by a press reporter—of course it does, because I am suddenly aware that I am talking to somebody who might report what I am saying. However, that is just a matter of degree. How people face up to a television camera might be slightly different from how they face up to a reporter with a notebook but, in both cases, their behaviour changes. The difference is one of degree.

Steven Raeburn: Jenny Marra asked how the proposal would improve things. The principle that the courts are public exists to facilitate the administration of justice. It is an open-door court in which people are judged by a jury of their peers, with the evidence tried in public. That is a fundamental principle. I simply argue that extending that to broadcasting widens the application of the principle.

On the convener's point about whether people would behave differently, I argue that anybody who goes to court as a witness is, in essence, "performing" for the judge and jury, if that is the right way to put it. There is an element of public performance, anyway. People are already in public and performing and they are being careful in what they say. They are under oath, and they know that there will be scrutiny and that something serious is at stake. I do not see that the presence of a camera or a slightly wider audience would change that. It might expand visibility, but my argument is that expanding visibility is better for the public administration of justice. The available scrutiny would improve the performance.

The Convener: I am just watching body language round the table and thinking that cameras would be doing that, too.

One or two people want to come back in, but I am afraid that I am going to stop there. We have had a good go at the issue. If anybody wishes to add anything, perhaps once you have reflected on the *Official Report* of the meeting—which I know members will certainly read carefully—please do so. Any additional submissions will inform our debate and the Parliament's debate on the issue. It is a big discussion and we have opened up a whole lot of cans of worms, with difficult issues to address on the balance of freedom of expression against a fair trial.

I suspend the meeting for 10 minutes.

11:30

Meeting suspended.

11:43

On resuming—

Decision on Taking Business in Private

The Convener: Agenda item 2 is to decide whether to take items 3 and 4 in private. Do members agree to take those items in private?

Members *indicated agreement.*

11:44

Meeting continued in private until 13:28.

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