The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 24 September 2013

Session 4

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JUSTICE COMMITTEE
25th Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*John Pentland (Motherwell and Wishaw) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Rt Hon Lord Carloway (Lord Justice Clerk)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 24 September 2013

[The Convener *opened the meeting in private at 10:15*]

10:46

Meeting continued in public.

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome members of the public to the Justice Committee's 25th meeting in 2013. 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. No apologies have been received.

Item 2 is a decision on taking business in private. I ask the committee to agree to take in private item 5, which is further consideration of our approach to scrutiny of the Criminal Justice (Scotland) Bill at stage 1. Is that agreed?

Members *indicated agreement.*

Petitions

Corroboration (PE1436)

10:47

The Convener: Item 3 is consideration of two petitions.

PE1436, by Collette Barrie, calls for the retrospective abolition of the requirement for corroboration. Are members content to consider the petition alongside our stage 1 consideration of the Criminal Justice (Scotland) Bill?

Margaret Mitchell (Central Scotland) (Con): I wonder whether there is merit in the petition. How retrospective are we talking about making the application of the bill? It seems to me to be a proposition that will not go anywhere, so I wonder whether there is any point in considering it further.

Elaine Murray (Dumfriesshire) (Lab): On the other hand, among the submissions that we have received on the Criminal Justice (Scotland) Bill, there are requests to look at making it retrospective, particularly in the case of historic sexual abuse. There is therefore an opportunity to at least give further consideration to the issue.

The Convener: I suggest that we can look at this at the end of the meeting when we consider our approach paper on the evidence sessions. We have already decided to take that item in private. We can have a full discussion on the matter at that point. We are certainly not closing the petition down. We will look at it then and continue it until we consider our evidence sessions on corroboration.

Roderick Campbell (North East Fife) (SNP): I am not entirely happy with that approach, because I think that the discussion should be in public. The petitioner is entitled to know what we are thinking.

The Convener: I am happy to discuss the petition now if members want to do so. My view is that it certainly makes an interesting point and we could put the proposal to our various witnesses when they come along. Certainly, we should by no means close the petition; we should keep it open. As we all know, substantial difficulties are involved in retrospective legislation, but my view is that we should continue the petition and absorb it into our determinations on corroboration when we consider the Criminal Justice (Scotland) Bill. We can put the question and the petitioner can hear the arguments for and against.

Margaret Mitchell: If a majority of the committee is so minded, I will certainly not vote against that approach.

The Convener: Are members content to continue the petition and absorb it into our consideration of the bill at stage 1, so that the petitioner can hear the arguments and we can report back? I certainly have no intention of closing the petition. Is everybody content?

Members *indicated agreement.*

Justice for Megrahi (PE1370)

The Convener: PE1370, by the Justice for Megrahi campaign, calls for an independent inquiry into the conviction of Abdelbaset al-Megrahi. The petitioners have submitted further information on the police investigation into JFM's claims of criminal actions during the investigation of the Lockerbie bombing. We may wish to consider the issue very carefully. I ask members to bear in mind the possible perception that the committee is becoming involved with a live police investigation.

I refer members to the letter that has just come in from Police Scotland. I believe that Justice for Megrahi has seen the letter.

John Finnie (Highlands and Islands) (Ind): If members will bear with me, I would like to take us through the petition stage by stage. It was lodged almost three years ago. I am not familiar enough with parliamentary procedure on petitions to know whether that is unusual, but it certainly seems a long time to me.

On the content, in June this year, the Cabinet Secretary for Justice wrote to the convener saying:

> "The Scottish Government respects fully, and operates in accordance with, the separation of functions between Government and prosecuting authorities. We have no involvement with this process and no locus or intention to intervene or comment whilst it is on-going."

That certainly seems reassuring. However, a matter of days later, the Crown Agent, Catherine Dyer, in response to the question whether the Crown Office and Procurator Fiscal Service would keep Justice for Megrahi informed of developments in its investigation of allegations, said:

> "As indicated above The Police Service of Scotland is at this time conducting the investigation of the allegations made and any request for information in respect of that investigation would be for them."

That tends to suggest a clear separation between the investigation and the prosecuting authorities. I just pose the question whether that is always the case, because it certainly is not my understanding of the relationship.

Ms Dyer went on to say:

> "As indicated above The Police Service of Scotland is at this time conducting the investigation of the allegations made. COPFS has not instructed The Police Service of Scotland as to how that investigation should proceed."

However, in a letter of 23 August from Mr Forrester, the secretary of Justice for Megrahi, we hear of a meeting with Mr Shearer, the deputy chief constable, who

> "informed them that the Crown Office had instructed that he no longer investigate allegations 5, 6 and 7".

It goes on to say:

> "He was unable to give any further explanation and gave no indication if or when the investigation might be resumed and by whom."

Convener, you are looking at me—do you wish me to stop?

The Convener: No, I simply want to add to that by saying that, in the second paragraph of the letter that we received today, Mr Shearer refutes that. I just wanted to put that on the record.

John Finnie: Indeed. I will certainly come to Mr Shearer's letter and the remarkable timing thereof.

The letter from Mr Forrester continues:

> "The JFM representatives unanimously expressed their concern at these developments and made it clear that they only served to underline the relevance of their original request to Secretary for Justice Kenny MacAskill for an independent investigation free of Crown Office and Scottish police influence."

I am aware that there are on-going live inquiries and I certainly wish to do nothing to intrude on them. JFM assures us that its allegations

> "are aimed at UK nationals on the grounds of their having attempted to pervert the course of justice, committed perjury and been guilty of gross professional incompetence."

I will miss out some of the other comments and suggestions about blocking and political interference, which some people might consider intemperate, although I think that they reflect an understandable sense of frustration.

The root of the issue is that, at this stage, we seem to have conflicting perceptions as to who was doing what at whose behest and why. I hope that the Justice for Megrahi people have received a copy of the letter from Mr Shearer, the gentleman who has been referred to, that came into my email box this morning. The most significant passage in it is in the third paragraph on page 2, which states:

> "This passage is an accurate reflection of what I explained to ... Justice for Megrahi".

So that endorses the position on that. Mr Shearer goes on to state:

> "I am very clear that ultimately, the decision not to pursue these allegations at this time rests with me".

Astonishingly, three paragraphs from the end, he goes on to say:

"I can add, however, that the background enquiries relating to allegations 5, 6 and 7 have been undertaken".

I suppose that we could debate for ever and a day about the difference between inquiries, investigations and background inquiries, and who those inquiries are into. It is, however, clear that this level of understandable frustration on the part of JFM has resulted in the group making a formal complaint to the United Nations International Association of Prosecutors. I understand that Scottish prosecutors all sign up to that association's principles.

I do not know where we go from here, convener. These people are looking to the Justice Committee to be honest brokers in a very important matter. I do not think that allegations are being thrown around carelessly. People of the highest integrity who are leaders in each of their fields are making serious accusations and I do not think that the Justice Committee can sit back and ignore that. At the very least, the petition must be kept open.

I am sure that we are all conscious that there is no wish to intrude on any live inquiries, but it is incumbent on us to ensure that we have some clarity about whether the police have been directed to stop inquiring into allegations 5, 6 and 7 and, if they have, from whom has the direction come? What is the difference between background inquiries and investigations? When there are legitimate concerns, they must be examined.

The key to this is the question about who guards the guards. The difficulty that we have here—questions have been raised in this committee previously by me and others—is whether the Scottish legal system, as it is now configured, has the wherewithal to address such a situation. It pains me to see that people feel compelled to go outwith the jurisdiction to look for justice, but I can understand why that is the case.

At the very least, therefore, we should keep the petition open and I would like the committee to institute further inquiries into how the authorities have responded to it.

Sandra White (Glasgow Kelvin) (SNP): John Finnie referred to a letter and we all have a copy that is marked "Restricted". Is the letter on the website for people to see? It is important that we correct some of the allegations that have been made.

The Convener: Yes. The answer is yes.

John Finnie: The police like to put stamps on things.

Sandra White: I want to put on the record what is in the letter. John Finnie mentioned how it says that the police were instructed not to investigate certain allegations. In the letter, which anyone can see on the website, there is the assertion that that allegation is incorrect. John Finnie also talked about the investigation being deferred, and there is an explanation in the letter:

"I can add, however, that the background enquiries relating to allegations 5, 6 and 7 have been undertaken and can be advanced at a time when there is no conflict with the live investigation."

The Convener: The next sentence is important. Read the next sentence.

Sandra White: It says:

"I am confident that this deferment will only be a matter of weeks as I now understand that the point of conflict with the live investigation will then be resolved."

I think that that answers John Finnie's question and if we wish to keep the petition open, that is one of the reasons why it could be kept open until we see what the live investigation is. It is important that all the letter is read out and that we do not just pick out certain issues.

I also want clarification from the clerks about the briefing that we got from the Scottish Parliament information centre, which is about the Scottish Criminal Cases Review Commission. It says:

"The Commission can also accept an application for a review of a conviction where the person who has been convicted has died."

It also says that only the deceased's family can make that application and goes on to say in the next paragraph:

"Therefore, where the person who applies to the Commission on behalf of a deceased person is not the deceased's executor or a family member, before accepting the case for review, the Commission would normally seek the views of the deceased's family and executor, if possible."

Have we moved on on that point at all?

The Convener: We have, actually. At this point I must declare myself as a member of the Justice for Megrahi campaign.

I wrote to JFM on the committee's behalf on 5 September. I do not think that it just has to be a family member or executor who makes the application; it can be someone who can broadly show a locus and who goes back to ask the SCCRC to refer the case back to the Court of Appeal.

In my letter of 5 September, I asked:

"In advance of the Committee's considerations, it would be helpful to know whether Justice for Megrahi is aware of any intentions to refer the conviction of Mr Abdel al-Megrahi to the Scottish Criminal Cases Review Commission for review."

11:00

The response from the Justice for Megrahi campaign—all these letters are on the website—said:

“The short answer is yes. However, the situation in totality is infinitely more complex.”

In the third paragraph of that letter, the JFM campaign explains that bringing such a case to the SCCRC

“is very much circumscribed by two major factors. Firstly, the enormous cost implications and, secondly, the fact that they have expressed an unwillingness to submit an application without the consent and support of the al-Megrahi family.”

In other words, no one wants to go forward, apparently, without the support of the Megrahi family. The letter continues:

“with circumstances in Libya being as fraught as they are, it may be some considerable time for such approval to be forthcoming, if ever”.

That issue is in limbo, so we can park that. At the moment, no application to the SCCRC for a further review to be made to the Court of Appeal is in train. Frankly, such an application does not look very likely, if I may say so, from my reading of the letter. That is the answer to that question, but that is only one avenue.

I share many of the concerns that John Finnie expressed, but the letter from Deputy Chief Constable Shearer states that the live investigation should be resolved within “a matter of weeks”. Given that, for various reasons that I need not embellish for the committee, we really are circumscribed while those issues are on-going, I submit that we keep the petition open up until they have been resolved. We are told that that will be within a few weeks rather than just some time in the future. To me, “a matter of weeks” does not mean more than a month.

Are members content to keep the petition open until that is resolved?

Elaine Murray: Yes.

Roderick Campbell: I agree that, as we are talking about a matter of weeks, that is a prudent way forward.

For the record, I want to correct something that John Finnie said. When he read from Patrick Shearer’s letter, he omitted the word “alone”—

The Convener: To which paragraph are you referring?

Roderick Campbell: In the seventh paragraph of his letter, Patrick Shearer states:

“I am very clear that ultimately, the decision not to pursue these allegations at this time rests with me alone.”

John Finnie omitted the word “alone”, but for the record the word “alone” should be included.

John Finnie: Convener—

The Convener: Before we tussle about words, do members agree that we should keep the petition open until such time as that investigation is resolved? We can reconsider the petition once that inquiry is resolved.

John Finnie: If I missed out the word “alone”, I unreservedly apologise. Likewise, I say to Sandra White that my intention was not to read out the documents. In any case, as has been established, the documents are available for the public. I was not in any way seeking to do that.

For me, the crux of the matter is that, on the day of our committee meeting, we have received a letter from the person who is charged with investigating the issue. In that letter, he confirms—this information is in the public domain—that, in relation to the note about his meeting with the JFM campaign,

“This passage is an accurate reflection of what I explained to the Justice for Megrahi Committee members”.

The passage in question very clearly says that Mr Shearer informed the campaign that the Crown Office had instructed that he no longer investigate. However, we also have a letter from the Crown Agent, Catherine Dyer, who states:

“COPFS has not instructed The Police Service of Scotland as to how that investigation should proceed.”

Now, we could spend all day looking at how all those words fit together, but I would like the committee to establish some clarity around that. For me, the crux of the matter is that an issue of fundamental integrity is possibly being raised that could be resolved by a simple explanation from both parties.

The Convener: First, regarding the letter from Deputy Chief Constable Shearer, we did not write to him, so he would have noticed that the petition was on our agenda only when the matter was published on the Public Petitions Committee website. I am not defending but explaining.

On the many other questions that you have raised, I ask that anyone who is paying attention to our discussion—including Deputy Chief Constable Shearer and others—respond to any of the statements that have been made. You have asked several questions, but I do not think that we can discuss the petition further until the particular issue has been resolved, which is due to happen within a few weeks. We can then come back to the petition. By no means is our consideration of the petition concluded.

Let me also say on record—the committee may rebuke me for this—that the Justice for Megrahi

campaign has provided us with an overwhelming amount of paperwork, but it is quite difficult for members to follow all the submissions and additional submissions that have come in. I ask that the petitioners—I hope that the committee will agree with me on this—be a little more succinct, because a blow-by-blow account can be difficult for committee members to follow. Do members agree, or do they think that I have been unfair?

Elaine Murray: I agree.

Sandra White: Yes, that is right.

The Convener: I say to the Justice for Megrahi campaign that I fully understand its wish to raise concerns, but in busy schedules we need things clearly and succinctly summarised so that we can continue to follow what is a very complex—and becoming more complex—situation and do justice to the petition.

Do we agree that the petition should remain open?

Members *indicated agreement.*

The Convener: I suspend the meeting for five minutes.

11:06

Meeting suspended.

11:09

On resuming—

Criminal Justice (Scotland) Bill: Stage 1

The Convener: Agenda item 4 is our first evidence session on the Criminal Justice (Scotland) Bill. I welcome the Rt Hon Lord Carloway, the Lord Justice Clerk; Elise Traynor, deputy legal secretary to the Lord President; and Jacqueline Fordyce, law clerk to the Lord Justice Clerk.

Alison McInnes (North East Scotland) (LD): Before we start, convener, I draw members' attention to my entry in the register of interests. I am a council member of Justice Scotland and a member of the cross-party group in the Scottish Parliament on adult survivors of childhood sexual abuse. Both those groups have submitted written evidence, although I have not been involved in drafting it.

The Convener: Thank you. Does anybody else have anything to declare that is relevant?

Margaret Mitchell: I am the convener of the cross-party group on adult survivors of childhood sexual abuse.

Roderick Campbell: I refer to my entry in the register of interests, which states that I am a member of the Faculty of Advocates.

The Convener: I wish that I had something to declare, so that I could feel important, but I do not—so far—so there we are.

We move to questions from members.

Colin Keir (Edinburgh Western) (SNP): My question relates to your report, Lord Carloway. In paragraph 7.2.56, on page 285, you mention that there are

"a series of rules which, realistically, are not capable of being understood by many outside the world of criminal legal practice."

Will you explain further the current difficulties in understanding the rule?

Rt Hon Lord Carloway (Lord Justice Clerk): So far as corroboration is concerned—which is the issue that is being addressed here—it is reasonable to say, as I said in the report, that corroboration and how it operates is not widely understood by the public. Further, I do not think that the concept is particularly well understood by many of the legal profession, and there are continuing difficulties with what it means among the judiciary, at both the High Court and sheriff court levels. That can be seen by the decisions

that continue to come out from the courts from time to time.

Do you want a specific example?

Colin Keir: Yes. Obviously, that is quite a sweeping statement and it would be handy to have some examples.

Lord Carloway: Would you like an example in relation to public misconception?

Colin Keir: Yes.

Lord Carloway: An example that I think that I gave the last time that I was at the committee was the misunderstanding about what corroboration means in relation to, for example, a finding of a DNA specimen or a fingerprint. If one were to find a fingerprint or DNA of someone, say on a windowsill in a house that had been the subject of a housebreaking, the finding of that fingerprint or DNA sample is in itself—and without more—sufficient for guilt. I get the impression, however, that some people think that there requires to be another piece of evidence against the person in order to bring in a verdict of guilty, but that is not the case.

Corroboration comes into play in that particular situation in that, in Scotland, two forensic scientists would be required to speak to the finding of the DNA sample, two forensic scientists—they could be the same or different—would be required to speak to the taking of the sample from the suspect, and two forensic scientists would be needed to speak to the comparison between the sample that was found and the sample that was taken from the suspect. One gets the impression that, in the public's mind, corroboration is about different pieces of evidence, but it is not—it is about having different witnesses speaking to particular things.

Colin Keir: Can I continue, convener?

The Convener: Yes. I have not stopped you.

Colin Keir: I have been given the first chance to ask questions, which does not happen very often under this convener, I can tell you.

The Convener: No, then—you are not getting another question. [*Laughter.*]

Colin Keir: Lord Carloway, your report highlights that

"there is no evidence ... to support the idea that the formal requirement for corroboration reduces miscarriages of justice."

Will you elaborate on that?

Lord Carloway: During the review, we consulted widely with a range of people, including the legal profession in particular and others outwith it, and at no point did anyone come up with any material to suggest that the incidence of miscarriage of justice in Scotland, which is the only country in the world that has the rule, is different from that in any other country in the civilised western world or the Commonwealth. We were given no material to suggest that there is a difference and that the rule in relation to corroboration reduces the likelihood or incidence of miscarriage of justice in our jurisdiction—that is essentially what was meant.

11:15

The Convener: Can I just ask you about your use of the plural "we"? I recall that you made it plain at the previous session that we had with you that this is your review or report.

Lord Carloway: Yes, that is correct.

The Convener: You have referred to a review team and a reference group. Who were those people?

Lord Carloway: Those who were in the reference group ought to be detailed in the report. I will find that information in a moment. I apologise if I have used the word "we" when referring to the review team, but the report is certainly mine. The assistance that I had consisted of a full-time secretary to the review and two full-time members of staff. We also co-opted a member of the police on a part-time basis to give us views on police procedure.

Now, if the information on the membership of the reference group is not there—

The Convener: It is—it is annex D of your report. I am looking for your members, but I do not see any names here. It is annex—

Lord Carloway: Annex E?

The Convener: I have found the names now in annex D. It states that the members of the review team were Tim Barraclough, Ian McFarlane—this information is on page 394 of your report.

Lord Carloway: Is it not page 387?

The Convener: I have page 393.

Lord Carloway: That is probably because—

The Convener: It is a different copy.

Lord Carloway: The report was not produced in hard copy; it was produced electronically only.

The Convener: Right. You used the term "we", although you made it clear that it was your report. Who in the group disagreed with your finding or line on corroboration? That is the contentious one—let us be honest about it. Who among all the people outlined in annex D disagreed with that line?

Lord Carloway: Now, there's a question. The table in annex D on the reference group shows that it included Ian Bryce, a member of the Law Society of Scotland. My recollection is that—please do not hold me to this if my recollection is entirely wrong—the Law Society representative was in favour of retaining the rule on corroboration. I think that the Scottish Human Rights Commission was in favour of retaining it, and I suspect that John Scott was in favour of retaining it. Those are the main ones who come to mind as expressing views seeking to retain the rule, rather along the lines of the consultation materials that were produced by their representative bodies.

The Convener: It would be very useful for the committee to know who in the reference group and the review team agreed with the finding that corroboration should be abolished.

Lord Carloway: I cannot answer that question positively, because of the way in which the reference group operated. It operated during the course of the report's preparation; it was not that we put the report to the reference group for approval—that was not the way in which it was done. We had a series of meetings with the reference group at which its members could express their views, but we did not have a system whereby the final report was put to the reference group and we noted who was in favour of one part of the report and who was in favour of the other.

The Convener: I just wanted to nail this bit about whose report this is, because you used the term "we". The committee has read a paper from *The Modern Law Review* that makes a fairly serious allegation. At page 840, it says:

"The review process may have given the views of a single individual a momentum which will be difficult to counter."

The inference seems to be that it was you and you alone who suggested that the law of corroboration should be abolished.

I give you the opportunity to say that you are not a man alone, saying in your review that you alone want the change.

Lord Carloway: You are asking me to recall who exactly said what at meetings a year or two ago. My recollection is that those who were in favour are those who expressed supporting views after the report was produced. For example, the Crown Office and the Association of Chief Police Officers in Scotland were in favour. I do not wish to answer for people who might or might not have changed their views after seeing the report.

The Convener: As I understand it, you did not all sit down to discuss this major issue, with minutes in which people asked for their position for or against the proposal to be noted.

Lord Carloway: The minutes of all our meetings are on our website. We sat down and had sessions on corroboration—yes, we did.

The Convener: I hear that, but this is big—it is huge. I am trying to get at how this major proposal was included, because you used the term "we", but you previously used "I" and said that it was your report.

Lord Carloway: It is my report—I accept that. I am not suggesting that anyone on the reference group was asked to endorse the report, and I think that I made that clear when I previously appeared before the committee. The cabinet secretary asked me to produce a report, and it is my report. I do not seek in any way to detract from that.

The Convener: So you refute the line in the article by James Chalmers and Fiona Leverick that

"sweeping changes to the Scottish criminal justice system may now stem from the recommendations of a single individual."

Lord Carloway: I do not refute that in the sense that it is my report and therefore they are my recommendations—that is correct.

The Convener: I just thought that, when you introduced the word "we", we had to clarify that.

Elaine Murray: I will go further on corroboration issues that arise from the bill rather than your report. I am interested in your reaction to the bill and to some of the submissions that we have received on it. I think that 12 organisations are in favour of abolishing the requirement for corroboration and 15 oppose that, so views are conflicting.

The view has been expressed that the value of the empirical research for the review was overstated and that it was not appropriate to make a direct comparison with European models of justice, which do not make the presumption of innocence and which take an inquisitorial rather than adversarial approach—a direct translation cannot be made between the Scottish criminal justice system and other European systems.

Lord Carloway: As far as I am aware, the system in every European country that has signed up to the European convention on human rights has the presumption of innocence.

In reaching my views on corroboration, I did not concentrate solely on European systems, particularly as there are clear procedural differences between us and Europe, as you said. The fundamental reason why I recommended the change in relation to corroboration is that Scotland is the only country in the civilised world—I include in that the whole of western Europe and all the Commonwealth countries—that has a rule that requires corroboration.

My view is that the corroboration rule in this country is not reducing the incidence of miscarriages of justice in a narrow sense but creating miscarriages of justice in the broader sense, because perfectly legitimate cases that would result in a conviction are not being prosecuted because of the corroboration rule. We looked at other countries, and that was a main driver for the recommendation that Scotland must change, to bring itself into line with modern thinking on criminal justice.

As for the research, in the course of producing the report, we had an opportunity to test how the system operates in Scotland. We took all the petition cases—that is, all serious cases—that were considered in Scotland in 2010 and examined every one that had been what the prosecutors would call no pro-ed—in other words, marked for no prosecution. We had more than 450 cases that had been marked no prosecution—numerically, that is a large number of cases. We then tried to apply the type of rule that other countries would apply to those cases. By “other countries”, I do not mean only England and Wales or Ireland—south or north—but countries with a similar approach to us, such as Canada, Australia and New Zealand. Something like 268 of those 458 cases—serious cases that we had not prosecuted in Scotland—would have been prosecuted in those other countries with a realistic prospect of success.

That is why we used that cohort as illustrative of the problem that exists in this country as a result of the operation of corroboration. Serious cases are not being prosecuted when, in other countries, they would be and the people involved would be found guilty. Moreover, those cases are not classified as resulting in miscarriages of justice in those other countries.

Elaine Murray: The argument has been made that, in countries that do not have corroboration, there are a number of safeguards against unsafe conviction. The bill goes with one—an increase from a simple majority to a two-thirds majority for a guilty verdict. It does not consider, for example, the abolition of the not proven verdict or other safeguards that may exist in other countries. Does the bill contain sufficient safeguards if corroboration is abolished?

Lord Carloway: I do not consider that the abolition of the requirement for corroboration requires any rebalancing of the system by the introduction of further safeguards. I made that relatively clear in my report. Because of the fundamental view that it would not cause miscarriages of justice of the type that we are discussing in the narrow sense of appellate jurisdiction—that is, something going wrong in the trial process—I did not consider that it was necessary to introduce any safeguards.

The Government proposed certain safeguards following upon my review. I can comment on those if you wish me to do that, but I do not consider any of them to be directly relevant to the question of the abolition of corroboration.

Elaine Murray: I would be interested in your views on the safeguards that the Government suggested, including those that were not taken forward.

Lord Carloway: The increase in the numbers necessary for a verdict of guilty from eight to 10 may result in greater confidence in the criminal justice system at solemn level. If we know that there are at least 10 in the majority rather than eight, it may introduce more confidence in the system. I have no problem with that proposed reform. However, as I think I have said previously, when one compares that with other systems, one must be extremely careful to understand how the majority verdict system operates in other countries. Again, there are public misunderstandings, but a large number of people in the legal profession—including on the criminal side of things—also misunderstand how the systems operate in England and Wales and what one would call Anglo-American common-law jurisdictions.

Our system is straightforward. We require a majority of eight for a verdict of guilty but there is no requirement for a majority to return either of the acquittal verdicts. That is not the way in which the systems abroad operate—I appreciate that I am saying things that some of you already know—with some countries retaining the necessity for unanimity for the verdict. Such a system operates by requiring a majority of 10 to two or unanimity for either of the two verdicts that can be returned.

11:30

The practical import of that is straightforward. Some people think that having an eight to seven majority requirement makes our system weaker with regard to guilty verdicts, but that is not necessarily the case. In Scotland, if eight jurors are in favour of a not guilty verdict, the defendant will be acquitted. In other jurisdictions, if eight out of 12 jurors are in favour of a not guilty verdict, the defendant will not be acquitted, because those countries require a majority or unanimity for both guilty and not guilty verdicts.

One can analyse that and work out how it would operate in practice. The problem that other jurisdictions have is the so-called hung jury. It is important that the committee understands, as I am sure most—if not all—of you will, that there is a huge difference between simply having a majority

system for the verdict of guilty, and requiring a majority verdict for guilty and not guilty verdicts, as happens in other systems.

That takes me on to the second element of Elaine Murray's question, which I think was probably about the not proven verdict. Contrary to various comments in the press, I have not expressed any view on whether the not proven verdict ought to be abolished. If you are considering its abolition—which I know is proposed in another bill—you must be very careful, given what I have said about the difference between the way in which our system operates in relation to majorities and the way in which other systems operate in that regard. You would have to consider the issue very carefully in order to decide what you think the effect of a change of that nature would be.

To put it another way, if you are dropping the not proven verdict, you have to consider whether you wish to introduce the same system as other countries have, and require a majority of 10 out of 15 for any verdict that the jury is to return, which would be the equivalent of what happens abroad.

The Convener: Alison McInnes has a supplementary.

Roderick Campbell: I have one, too.

The Convener: Will either of you pick up on the issue of the cases that were re-examined—

Alison McInnes: That is the subject of my supplementary.

The Convener: Thank you. Alison McInnes will ask that question—if she does not, I will.

Alison McInnes: Lord Carloway, you mentioned that you had reviewed those 458 cases—

Lord Carloway: Well, I did not do that personally, but it was done.

Alison McInnes: Yes—that was done in the review. How long did it take to analyse those cases? Who carried out that review? It has been criticised as a cursory desk-top study that was undertaken in a one-sided way, and involved simply asking whether a case would have proceeded to court if corroboration was not required. No one from the defence side of the cases was involved in discussing how a case would have played out in court.

Lord Carloway: Absolutely—there was no one from the defence side, because that was not the question that we were asking. The question was being asked of prosecutors. We had the materials available for review, and two procurators fiscal were asked the question. We had the data on the 458 cases that were discontinued because of lack of evidence, but that does not necessarily mean lack of corroboration. Lack of corroboration would be a principal factor, but the case would have been no pro-ed on the basis of insufficient evidence.

The question that we were asking, therefore—which we asked of prosecutors—was, "Would you have prosecuted this case if the requirement for corroboration was abolished?" We asked prosecutors to apply the standard for prosecution that one would expect to see in other countries—namely, would there be a realistic prospect of conviction in the case?

If your question is, "Would all the 268 cases that would have been prosecuted have resulted in a guilty verdict?", the answer is absolutely not; we are not suggesting that that would have been the case. In a proportion of those cases, the jury would have acquitted—we did not have any difficulty with that. The significant point is that a lot of the cases would have resulted in convictions.

Alison McInnes: You assert that, but it is very difficult for you to evidence it in any way whatsoever, because you have not been able to factor in how the juries would have handled these things.

Lord Carloway: It is an estimate—

Alison McInnes: Upon which hinges an immensely profound change. The review is nothing more than a desk-top survey.

Lord Carloway: It is absolutely a desk-top survey. I agree entirely. That is what it was always intended to be.

Alison McInnes: I have substantive questions, but I will come back to them later.

The Convener: I have a question on the same point. The *Modern Law Review* article picks up on this issue, which is not just about prosecuting. The question that was asked was, "Would there have been a reasonable prospect of conviction?", which you have alluded to. The article states:

> "On the basis of this evidence, the Review concluded that corroboration is in fact an 'impediment to justice', and in fact even a cause of miscarriages of justice, which the Review takes as including both wrongful acquittal and wrongful conviction. The research design is at best curious and at worst badly flawed."

It states that the review appeared to be unaware of research carried out by the Royal Commission on Criminal Justice in the early 1990s, which dealt with these matters. It goes on to say:

> "On that basis the Royal Commission concluded that 'a supporting evidence requirement would affect only a very small percentage of cases'. This research suggests that, in practice, the abolition of the corroboration requirement would not lead to a significantly greater number of prosecutions or convictions".

That is pretty tough stuff.

My colleague Alison McInnes alluded to the fact that the review was a desk-top survey by two prosecutors. There are people out there in certain fields who think that if corroboration is abolished, perhaps in sexual assault and rape cases, there will be a greater prospect of convictions and so on. However, nothing that I am reading in your evidence supports that. You are the very man who sits and tells us about the quality of evidence, but I have to say that the quality of evidence on which the assertions were made is pretty thin.

Lord Carloway: I did not make a recommendation to abolish the requirement for corroboration based solely on that research. As I think I have explained, the critical feature that I ask the committee to bear in mind is that Scotland is the only country in the civilised world that retains this archaic rule of medieval jurisprudence. It is holding back the criminal justice system.

The Convener: I will let committee members in. I do not think that the committee takes the view that there is not a case for the abolition of corroboration, but we are asking whether this is the right way to make that argument.

Roderick Campbell: I have a supplemental question, Lord Carloway. I want to touch on the question of majority verdicts. When you gave evidence on 29 November 2011, you said that you did not think that the issue of majority verdicts was directly connected with the work that you were doing. You went on to say:

> "I think I said that if we go down the route of examining majority verdicts we must examine the not proven verdict."—[*Official Report, Justice Committee*, 29 November 2011; c 544.]

The Government is proposing not to proceed with any immediate work in relation to the not proven verdict. Do you have any comments on that? Do you think that the two can be disentangled or should they be considered together?

Lord Carloway: I do not think that they should be considered together, for the reasons that I gave earlier. I think that they are entirely separate issues. If you are analysing the question of the not proven verdict, you have to analyse the question of majorities for either a verdict of not guilty or a verdict of guilty and to try to get to grips with what effect you think that would have on conviction rates and, of course, the potential for miscarriages of justice. I regard the two issues as quite separate. I agree with the Government's view that if one is looking at the question of abolition of the not proven verdict, further work requires to be done in that regard.

Roderick Campbell: Okay. May I move on to something slightly different?

The Convener: I will move on if your question is on something different. I have John Finnie, Margaret Mitchell, Sandra White and Alison McInnes to bring in, then I will let you back in again. John, is your question on corroboration?

John Finnie: No, it is on something completely different. I beg your pardon.

The Convener: Can we finish off with corroboration, interlocking juries and not proven verdicts? I will come back to you, John.

Margaret Mitchell: Good morning, Lord Carloway. I want to ascertain whether the fact that no other jurisdiction has the requirement for corroboration is a reason in itself to abolish it.

Lord Carloway: That fact is an extremely good indicator that Scotland is on its own in the western civilised world in relation to justice systems, and that is a very good pointer to one having something anachronistic in one's system. In the perhaps slightly more academic aspects of the report, I have traced the reason why we still have the rule, and it is because of historical anachronism. Over time, everyone else abolished it for good reason.

Margaret Mitchell: But the fact that everyone else happens not to have the requirement is not in itself a sufficient reason to abolish it.

Lord Carloway: It is not an absolute reason, no. However, if one realises how isolated Scotland is on this and what other countries think about our having such a rule, I think that that is an extremely persuasive reason why the rule must go. The same happened previously in relation to civil cases, in which we had exactly the same arguments.

Margaret Mitchell: Does any other member of the judiciary agree with your view that the requirement for corroboration should be abolished?

Lord Carloway: Do you mean at the High Court level?

Margaret Mitchell: I mean anywhere, at any level.

Lord Carloway: I think that you have received responses from at least two sheriffs who agree with my recommendation.

Margaret Mitchell: Among all the judiciary in Scotland, two sheriffs agree with your recommendation. Does that not give you pause for thought about whether you have got this right?

Lord Carloway: I conducted a year-long review into the matter, on which we consulted widely. As you will see from the terms of my report, I had no doubt whatsoever when compiling my recommendations that the recommendation to abolish the requirement for corroboration would be met with extreme resistance among the Scottish

legal profession, including the judges. I was in no doubt that that was the case.

Margaret Mitchell: Why is that the case, Lord Carloway?

Lord Carloway: Because it is ingrained into the minds of the lawyers in this country that the requirement for corroboration is an important factor that prevents the occurrence of miscarriages of justice. I spent a long time analysing the matter, and I came to the conclusion that they were in error because there is no evidence to support that proposition.

Margaret Mitchell: But that is just your conclusion. Given the magnitude of this decision and the weight of opinion from all sections of the criminal justice system, surely the proposal should be put to the test—rather than put in a bill—by being made the subject of a wider review. If you are confident, as you certainly seem to be, you would not mind that additional scrutiny. Such a review should include the option to retain the requirement for corroboration and to try to improve it.

Lord Carloway: I was asked to carry out a review by the Cabinet Secretary for Justice. I had specific terms of reference, which included looking at the question of corroboration. That was the task that I was asked to do, and that is the task that I carried out. I was not asked to consider whether there would be better or longer ways of carrying out that task. I carried out that task to the best of my ability and I looked at as much material as I thought was necessary in order to reach a reasoned conclusion.

Margaret Mitchell: Why did you not suggest that one option would be to look at how corroboration could be improved?

Lord Carloway: I do not think that the concept of a requirement for corroboration is something that we should have in our criminal justice system.

Margaret Mitchell: With respect, that is only your view.

Lord Carloway: It is not only my view. There are plenty people who agree with me, as we saw during the consultation process. You have material from the Crown Office, from ACPOS and from certain sheriffs and others who support the idea that the requirement for corroboration should be abolished. You have views to the contrary that are primarily from members of the Scottish legal profession, who are opposed to change. That is not a particularly unusual set of circumstances.

Margaret Mitchell: You have asserted that abolishing the requirement for corroboration will not lead to miscarriages of justice in the future, but that is merely an assertion. Is it not?

Lord Carloway: It is not an assertion. It is based on a detailed review that I carried out on the operation of the rule in Scotland. As I said, there is no evidence whatsoever that Scotland's incidence of miscarriages of justice is any lower than that of any other country in the civilised world.

11:45

Margaret Mitchell: What opportunity do people who hold the contrary view have to debate the issue properly? The measure is being steamrollered through. If the cabinet secretary agrees with it, we have a majority Government and—

The Convener: Allow that some of us have different views will you, please?

Margaret Mitchell: It will potentially go through on your say-so, Lord Carloway. Forgive me, but when you are speaking, an old Scottish phrase comes to my mind: "We are all out of step but oor Jock". The criminal legal system is not having its view widely debated, and that is a travesty.

Lord Carloway: During the course of my review, everyone was offered the opportunity to give their views on the subject. They are all contained on the website of the review process, in so far as the contributors consented to that.

It is not for me to decide whether the law should be changed. That is for Parliament. I am not attempting to steamroller anyone into doing anything. I was asked to conduct a review of the matter. I have produced my recommendations, which I am convinced are correct on this topic. Everyone had the chance of consulting and, as I recall, we produced a consultation document at the tail end of 2010 and received responses to that. I produced my report and there have been responses to that. There is now a bill and there have been responses to that. Obviously, it is this committee's job to decide whether the recommendation is correct or wrong. If you disagree with my views and you consider that corroboration should be retained, that is entirely a matter for Parliament, and I respect that view, and of course, I enforce the law of corroboration in the courts every day.

Margaret Mitchell: For the avoidance of doubt, the consultation was done on the presumption that corroboration would be abolished and it considered what would need to be done, if anything, to guard against miscarriages of justice. In other words, the option to retain and improve corroboration was not considered. It seems to me that you have a real hostility towards considering that and recommending it, as you could have done within the remit that you were given by the Scottish Government.

Lord Carloway: I am sorry, but I cannot understand that.

The Convener: In fairness to Lord Carloway, he carried out the review under the Government's remit. He could not just change the remit himself. That is one of the problems that we face.

Margaret Mitchell: The option of corroboration could have been left open. Why not look at retaining corroboration but improving it?

The Convener: That is a question for the cabinet secretary about the nature of the remit of the review. By no means do I want to stop robust questioning, but the review remit was a matter for the cabinet secretary; we will deal with him when he comes before the committee.

Margaret Mitchell: I thought that the remit was to look at corroboration. Could I have some clarification on what the remit was? If the remit was to look at corroboration, the review could have looked at all aspects of it and considered retaining it as well as abolishing it.

Lord Carloway: I was asked to look at that and that is exactly what I did. That is what we consulted on.

Margaret Mitchell: And improving it? The middle road was not suggested.

Lord Carloway: I am not quite sure what you mean by improving corroboration.

Margaret Mitchell: I mean retaining corroboration and looking at other sources of evidence, such as the timescales involved with the Moorov doctrine, which means looking at cases that are so similar that, even though the time between them is longer, they can be used as evidence. There is also the training of the judiciary. There is a host of ways, it seems to me, that you have not considered.

The Convener: I think that we will leave that one there.

Margaret Mitchell: It would be helpful if we could have the actual remit for the review, because it is germane to the question.

The Convener: I will come to that in a moment. While we get the remit out, I believe that John Pentland has a supplementary question.

John Pentland (Motherwell and Wishaw) (Lab): Yes, my question goes along the same lines.

Lord Carloway, if Parliament agrees to the abolition of corroboration, surely there will emanate some practical challenges that will have to be faced. What do you think those challenges might be?

Lord Carloway: If the Parliament determines to abolish the requirement for corroboration, we will require to rethink the way in which we prosecute crimes, the way in which we direct juries and possibly other matters as well.

The main difference will be that, instead of deciding to prosecute a case at least partly on the basis that corroboration exists, we will have to have a much more qualitative assessment of the evidence, which would presumably mean introducing a test similar to that which is involved in other countries—that is to say, the realistic prospects of success test. It is a matter for the Lord Advocate to determine what instructions he should give to his prosecutors relative to what cases should be prosecuted under a new system.

The other area that will, no doubt, require to be determined is the extent to which judges—if at all—caution juries in relation to the absence of corroboration in cases where there is none, and to what extent a judge should direct a jury, for example, to be careful in the event of the absence of corroborative evidence. That is also something that we will have to determine over time.

John Pentland: We heard earlier that 458 cases have been reviewed and some 268 of them could have gone to court for judgment. Will the courts be tooled up to deal with the increasing number of cases that may be referred?

Lord Carloway: Whether an increasing number will be referred is a difficult question to answer because it depends on the standard that is applied by the Lord Advocate and also, I presume, on the level of resources that the Lord Advocate has.

The Convener: Can I stop you there, Lord Carloway? I thought that we were still on corroboration, John. Your question was a supplementary on the issue of corroboration.

John Pentland: I just thought that the number of cases will be one of the practical challenges that—

The Convener: I agree. I will let Lord Carloway continue with his answer, but I will then bring in other members, because I have others waiting. Please excuse me, Lord Carloway; do continue with your answer about the pressure on courts.

Lord Carloway: The Lord Advocate will no doubt set the standard of prosecution, which will depend on a number of practical matters and not just the realistic prospects of prosecution. Presumably, he can only prosecute so many cases and the courts can only cope with so many cases per year. The number of cases will be determined by those practical factors.

I am not persuaded that there will necessarily be a significant increase in the number of cases that are prosecuted. There may be an increase in the

number of cases that might be prosecuted, but it will be for the Lord Advocate to set the appropriate standard, and I imagine that he will set a higher qualitative standard than is currently applied in practice.

The Convener: Thank you.

Sorry about that, John. It is just that I am trying to keep us on corroboration, the impact on juries and so on.

Roderick Campbell: Can I ask a supplementary question?

The Convener: On?

Roderick Campbell: On what Lord Carloway has just said.

The Convener: The pressure on courts?

Roderick Campbell: No. It is on the test for the Lord Advocate. It follows on from what Lord Carloway has just said.

The Convener: All right. I will then bring in Sandra White.

Roderick Campbell: Lord Carloway, do you agree that the new test that the Lord Advocate and others will need to put together will have to focus on the credibility of the allegations and the quality of the evidence that supports them, requiring prosecutors to assess all the available evidence with regard to admissibility, credibility and reliability?

Lord Carloway: The short answer is yes. I think that there will be much more focus on the part of the prosecutors on the quality of material that is in front of them.

The reality at present is that, if you are sitting looking at a series of statements and there is corroborative evidence to support the proof of the crime, there is a temptation to mark the case for prosecution. Once that is taken away and you have to apply a different test, which involves really looking at the quality of evidence, I think that there will be a much more careful analysis of the evidence before the case goes to court, because there will not be a formal corroboration requirement.

Roderick Campbell: Following on from that, it is not necessarily the case that there will be more prosecutions.

Lord Carloway: Absolutely. You put it better than I did in my previous answer.

The Convener: I am sorry to jump in before Sandra White, but *The Modern Law Review* article states that the assertion about quality versus quantity

"is misconceived and is not developed beyond the single paragraph in which it appears. The structure of a Scottish trial is in fact such as to separate out questions of quantity and quality with reasonable effectiveness. The quantitative requirement created by the corroboration rule is a matter of law for the judge, normally to be determined at the point of a submission of no case to answer."

The article suggests that the idea that getting rid of corroboration means that prosecutors—and, indeed, the defence—will focus more on quality rather than quantity is a false argument, because that happens in any event.

Lord Carloway: It happens to a degree, because there is always a residual power with the prosecutor not to prosecute something in the public interest for whatever reason he thinks fit.

The Convener: That is surely a separate matter from quality and quantity.

Lord Carloway: It is the same thing. If you do not think that you have sufficient quality of evidence, you will not prosecute because it is not in the public interest to do so.

The Convener: I would have thought that sometimes cases are not pursued in the public interest because it is such a narrow matter that it would not be appropriate to prosecute. Is it not correct that there are other issues that are not prosecuted in the public interest?

Lord Carloway: I am not sure about that.

I am saying that, at present, if there is a legal sufficiency of evidence, there is a temptation to prosecute, because if you do not do so in the face of a sufficiency of evidence, your decision may be open to criticism. If you do not have that barrier—the limitation produced by the requirement for corroboration—you are in a much more free-thinking, free-flowing world, in which you have to look at the quality of the evidence and decide: is it in the public interest to prosecute the case? The decision depends on the quality of the evidence that is available.

The Convener: Can I put that a different way? When it comes to the credibility of a witness in a rape or sexual assault case, if the Crown is of the view that the witness will not stand up to scrutiny—perhaps because of their lifestyle or something—will the prosecutors say to that person, "I'm not going to prosecute this because, if I put you in the witness box, I think that we will not be successful because they will not believe you"? On the other hand, will they say, "There is no need for corroboration now; I will put you up anyway, whether or not your credibility withstands it."

In my view, the protection for the person who alleges the offence against them is corroboration, no matter how slight it is. If it comes down to credibility alone, you take away that protection in such cases.

Lord Carloway: It is obviously for the Lord Advocate to determine exactly what procedures he will follow in deciding whether to prosecute a case, whether it is a rape case or another sexual offence case. The reality of the situation is that many single-witness cases are currently not being prosecuted because of the absence of corroboration, but its absence can be a matter of pure chance.

The Convener: I appreciate all that, but will you answer my question? What will the Crown say to somebody whose credibility prosecutors think will not stand up, even if the Crown believes them?

Lord Carloway: I can give you a view on that, if you wish, but I cannot answer for the Lord Advocate—

The Convener: Of course not.

Lord Carloway: I cannot answer for the Lord Advocate as to what he or she will tell complainers in sexual cases, but I know that this is done daily throughout the rest of the civilised world. Decisions are made about whether to prosecute sexual offences not on the basis of chance that there happens to be an adminicle of distress or other evidence, but on the basis of whether the prosecutor, looking at the evidence as a whole, considers that there is a realistic prospect of the jury convicting.

The Convener: So prosecutors may say to somebody, "I would like to take you to court so that you can give evidence against this party, but I do not think you will be believed, so I will not prosecute."

Lord Carloway: As I understand it at the moment, in such cases, although there is a minimum requirement of corroboration, it is still for the prosecutor to determine whether the case should be proceeded with in the public interest, so the situation that you describe will happen now.

The Convener: I agree, but at least there would be something else to support the Crown bringing the case forward. There would be something other than the credibility of the party.

My concern is that, in the recent case in England, for example, in which a chap in some soap opera was—rightly—found not guilty, the only evidence was that of the accuser. There was no corroboration, and that evidence was not believed. Are we going to import that into Scotland?

12:00

Lord Carloway: I am not entirely sure what the question is, convener.

The Convener: The question is: does that make it harder in some circumstances? Many people have certain beliefs about rape and sexual offences. The corroboration requirement does not apply to all cases in all courts, but those in which it does are more likely to result in successful prosecutions.

I put it to you that there may be circumstances in which it will be harder on the person who alleges that they have been sexually assaulted or raped because, if the case proceeds only on their evidence, they will have only their credibility to put before the court. That results in a difficult choice for the prosecuting Crown Office between putting that person in the witness box, after which they will perhaps find that they have not been believed, or not putting them in the witness box because that would be tough on them and they would not be believed.

Lord Carloway: I agree entirely with what you say about the difficulty of making a decision on whether or not to prosecute. I am recommending that, instead of just proceeding with a case because there happens to be a piece of corroborative material, one proceeds on the basis of having properly analysed the quality of the evidence. I suggest to the committee that that is a better system than the one that we have now.

With regard to the complainers in sexual offences cases, the reality at present—I have views on the subject that cover a different topic—is that, in almost all such cases, it is clear that the question of the credibility and reliability of the complainer will be a central feature. Whether or not you decide to recommend the abolition of the requirement for corroboration, that will not be changed.

The Convener: I agree.

Lord Carloway: It will not change either way.

The Convener: Sometimes the Crown may have to turn round and say to a woman or a man who alleges such an offence, "We're not going to prosecute because we don't think you will be believed", because that is all the evidence that it has. The complainer may be saying, "Well, you don't need corroboration any more", and people outside will say the same and expect the case to be prosecuted. Someone is perhaps going to have to tell them, after assessing the quality of evidence, "We are not prosecuting this case", notwithstanding that corroboration is no longer required. That is tough—that is all that I am saying about that.

Roderick Campbell: I have a supplementary, convener—

Sandra White: Convener?

The Convener: I beg your pardon, Sandra—I got carried away.

Sandra White: I understand, convener. A lot of us have been very patient in waiting to come in.

Good afternoon, Lord Carloway—it is afternoon now.

I am not a lawyer, but I am a member of the Justice Committee, and I want to put forward the view of the people on corroboration. You mentioned that, in civil law, corroboration is no longer taken on board, and that certain people in the judiciary look on the requirement for it as ancient or archaic. It is up to them whether they view it in that way, but I am interested in how it affects people out there.

The convener and others have mentioned rape cases, domestic violence and so on. Written evidence from Sheriff Maciver in 2013 made it clear, as well as raising the issues of rape and domestic violence, that the removal of corroboration will, in general, enable the public to have better protection in court. If an elderly person is mugged in their home, for example, there is no corroboration or other witness present, so the change would be effective for them.

We have to get away from the idea that the requirement for corroboration affects only domestic abuse and rape cases. There are other areas in which crimes against individuals do not have any element of corroboration.

I was interested in what you said in your opening remarks, Lord Carloway, about corroboration not being widely understood. When I first came to the Justice Committee, I did not have much of an idea of what corroboration meant, but I have been out—as most of the committee members have—to speak to various people. I have spoken to Scottish Women's Aid, Rape Crisis Scotland and others, and the fact is that the requirement for corroboration, or for another witness to have been present, is preventing justice from being done in what is a very horrendous crime.

Can you give us an example of how, for crimes such as rape or domestic abuse where the case involves one person's word against another's, abolishing the requirement for corroboration would benefit the person who the crime was committed against?

Lord Carloway: It is difficult to say that there would be a benefit to the complainer in any form of crime in that sense.

The important feature is that, if the requirement for corroboration is abolished, the prosecuting system and the courts will be able to secure convictions in cases where there is by definition no corroboration. There are many such cases. They are particularly prevalent in the domestic setting, but they are by no means exclusive to that setting.

There are many cases in which the undoubted victim of the crime will know who did it—there may be no real issue of identification because, for example, the person involved is a relative—and what was done. Currently, when the victim of the crime goes to the authorities and explains what has happened, the case is simply not prosecuted. To my mind, that is an injustice in our criminal system, and that injustice exists nowhere else in the world. Other countries regard the fact that we have such a rule as disturbing.

You asked for examples, and one can give many. In a simple robbery case, you—being a perfectly respectable citizen—may be standing at the bus stop with a bag when somebody whom you know comes along, snatches your bag and runs away. Let us make no mistake: some of our criminal fraternity know about the law of corroboration and they know how to adapt their practices in accordance with it.

If you, being a member of the Justice Committee, are robbed in that way at the bus stop and you know the person because you have lived all your life in the same close or whatever, when you go to the police, the police will tell you, "Well, that is just too bad, because there is no corroboration." The other person will not even be prosecuted, never mind acquitted. If, on the other hand, it so chances that a friend of yours wanders round the corner and sees the person snatching your bag, the person will be prosecuted and convicted. Whether or not justice is done depends on whether someone wanders round a corner.

The Convener: In fairness, Lord Carloway, as you have said, there does not have to be another person. There could be other evidence to corroborate.

Lord Carloway: But in the situation that I have described, there is unlikely to be other evidence.

The Convener: Possession of the stolen goods might constitute other evidence.

Lord Carloway: Yes, that is an option.

Sandra White: I have a small follow-up question, as I want to get the issue correct in my mind.

As we have talked about, for people who have suffered horrific crimes such as domestic violence, rape or abuse, the experience of prosecution can sometimes be very difficult. My understanding is that the proposal to abolish the requirement for corroboration is part of a more holistic approach to criminal justice, under which the Lord Advocate will, for example, put forward specific details on the circumstances in which a case will be prosecuted and may use special measures to allow witnesses to give evidence by videolink. Would that type of approach be beneficial?

Actually, I know or believe that such an approach would be helpful, but I want to ask for your thoughts on that. Obviously, Women's Aid and others are worried about what defence lawyers might say, but, as part of a holistic approach to the criminal justice system that includes the use of special measures such as videolinks, would it be beneficial for victims of sexual crimes if there was no longer a requirement for corroboration?

Lord Carloway: Are you asking about the introduction of special measures in court and matters of that sort?

Sandra White: Yes.

Lord Carloway: The short answer to your question is, in my view, yes.

In relation to videolinks, I have written papers that are probably available on the internet about where I consider we should be going in relation to evidence. In many cases, especially summary cases, the idea that we should require all the witnesses to come into court to give evidence in a courtroom is something from the past. We are in an age of technology that allows people to give evidence by a number of means. I do not wish to go into the issue in detail, because I suspect that it is a completely different area—

The Convener: Yes—it is not part of the bill.

Sandra White: I just wanted to clarify that point.

The Convener: Yes.

The next question is from Alison McInnes.

Alison McInnes: Lord Carloway, I was going to ask whether you had had pause for thought over the past year, given the significant concerns of many of your peers and colleagues, but you have been fairly robust this morning. You have been surprisingly dismissive and almost disdainful of some of your colleagues and the significant concerns that they have raised about the recommendation on corroboration. I want to go back to the discussions that you had with the cabinet secretary in the early days, before you agreed to take on the role of carrying out a review. Can you recall those discussions?

Lord Carloway: I remember being asked to enter a room by the Lord President—the Lord Justice General—who said that the Government was anxious to have someone of sufficient knowledge and experience in the field to conduct a review. In that sense, if I remember rightly, I was not selected by the cabinet secretary—I was selected by the Lord Justice General. I suspect that I then had a brief meeting with the cabinet secretary. I certainly had some form of exchange, perhaps through email, on the terms of reference, as might be expected.

Alison McInnes: At the heart of the review was the aim of future proofing our criminal justice system against ECHR challenge following the Cadder ruling. At what point did the consideration of corroboration and its removal come into the discussions on the remit? Did you posit that, or did the cabinet secretary put it into the remit? Is it something that you have always had a bee in your bonnet about?

Lord Carloway: No. If I had been asked, before I sat down and started reviewing the matter, whether the rule on corroboration ought to have been abolished, I would probably have come up with exactly the same reasons as the rest of the legal profession has done. It was the conduct of the review that persuaded me that we are wrong.

Alison McInnes: Can you recall whether the cabinet secretary specifically put that in the remit?

Lord Carloway: Do not hold me to this—I am almost certain, but I do not wish to be absolutely positive because I would need to look at the email exchanges—but my recollection is that the question of corroboration was already in the draft terms of reference before I agreed to them. The reason for that is relatively straightforward. You might recall that the case of Cadder had, in effect, reviewed by a rather strange method the case of McLean, which had said that we do not need the particular safeguard of a solicitor being present at interview because we have a whole lot of other safeguards, central to which is corroboration. The United Kingdom Supreme Court said that corroboration is not a safeguard in that context. As I understand it, that is why corroboration, among other things, was put into the remit. As soon as one started to look at the Cadder-type situation, one then had to look at the safeguards.

I apologise if I seem disrespectful of my colleagues, as that is not my intention and I respect their views, as I always have. I had no doubt what their views would be because they were expressed to me during the course of the review, some of them forcefully and some not.

Alison McInnes: Indeed, but on at least a couple of occasions this morning, you have said that other people misunderstand corroboration.

Lord Carloway: Absolutely.

Alison McInnes: Paragraph 35 in the submission from Justice Scotland states:

> "We are not satisfied that any sufficient safeguards are proposed on the face of the Bill and we remain gravely concerned about the future of Scottish criminal law in the absence of corroboration. We consider that, without significant change, successful challenges to convictions under Article 6 ECHR as miscarriages of justice and incompatible with the right to a fair hearing are inevitable, whether before the Appeal Court, the UK Supreme Court or the European Court of Human Rights."

You were asked to future proof the system against challenges, and here we have a central challenge being put forward. How do you respond to that?

Lord Carloway: I am not sure that I was asked to future proof the whole Scottish criminal legal system; I was asked to look at specific matters. The committee has asked about my terms of reference, but I am not sure that I was asked to provide a guarantee. For the reasons that I have given, I disagree with Justice Scotland's view on this. I am not sure that I can expand on that without repeating what I have said.

12:15

Alison McInnes: Justice Scotland identifies three obvious areas: identification evidence, disputed expert testimony, and the admissibility of and weight to be afforded to confessions. Are you going to address these issues?

Lord Carloway: All those issues have been discussed in other countries that do not have the rule of corroboration. The first area that you mentioned was identification evidence. We already have the pronouncements of the UK Supreme Court on the issue of identification and how it should be dealt with. We give juries warnings in cases that have only eyewitness identification evidence. South of the border, of course, they rely on single eyewitness evidence to convict people and there is no suggestion that the incidence of miscarriages of justice in England is greater than it is here.

Alison McInnes: As I recall, England does not have dock identification.

Lord Carloway: England does not have dock identification, because it is prohibited. In England, there is a series of other methods by which an accused person can be identified. The UK Supreme Court has told us that dock identification is convention compliant, provided that certain safeguards are put in place, which they are. Again, I do not wish to bore the committee with the details but, as you would expect, they include whether the witness has had the opportunity of identifying the accused before court at an identity parade as they now exist. The absence of dock identification has, as I understand it, already been ruled on.

Alison McInnes: I have a final question. When you were speaking in response to Mr Pentland, you suggested that there is a real need to give victims the chance to take their case to court even without corroboration. I thought that we always prosecuted in the public interest, but it is beginning to sound as if we are moving towards prosecuting in the victim's interest. Is that fair?

Lord Carloway: I am not suggesting that there should be private prosecution in Scotland. The system here is that the Lord Advocate intervenes and he makes the decision about whether a prosecution should go ahead. I am not suggesting any change to that system.

The point that you are making has, I think, been touched on, possibly by the Crown Office, and it has certainly been mentioned by previous Lord Advocates. There are certain rights under the ECHR to have adequate remedies to protect the citizen. For example, there is the right to security of person, and so on. Basically, people have a general right of that sort. The legal system under which an individual operates must provide a proper remedy, including the remedy that people are properly prosecuted and punished for crimes. As I think someone has said in the past, at some stage someone might decide to take a challenge to the European Court saying, "I don't have a remedy because the man didn't come round the corner and see what happened." We might have to address such a situation in due course.

I hope that the changes to our system will not be forced on us from outwith but that they can be duly considered by our own Parliament.

The Convener: I have Roderick Campbell followed by John Finnie, Elaine Murray and Margaret Mitchell. I will try to get everyone in. I know that I am guilty of asking too many questions myself.

Roderick Campbell: I would like to start with a supplementary question to something that was raised a little while ago. It was about sexual history. Do you have a view on reviewing sexual history applications under sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 in the context of corroboration if corroboration were to go?

Lord Carloway: In the context of corroboration? I am not quite sure what the link is.

Roderick Campbell: Some people have suggested in their submissions that the committee ought to consider that but, if you do not have a view, I will not press the question.

Lord Carloway: I think that I am on record as speaking on several occasions about the need for greater protection for the complainer in sexual offences cases and for what one might call a more robust enforcement of certain provisions in that regard. I can say that with confidence having had protective measures that I suggested in relation to lines of questioning overruled by the appeal court some years ago. I have strong views on that, but I am not sure that there is a direct link with corroboration.

Roderick Campbell: I just wanted to raise the point.

On the complainer's credibility being more in focus in the system if we have no corroboration, should consideration be given to the defence having greater freedom to challenge the complainer's credibility, as some have suggested in their submissions?

Lord Carloway: I consider that, as a generality, the ability to challenge the complainer's credibility in sexual offences cases is quite adequate to secure a fair trial at present and might be strengthened.

The Convener: Sorry, do you think that the protection for the complainer should be strengthened?

Lord Carloway: Yes.

The Convener: Even though there might be nothing else. Everybody wants successful, just prosecutions for sexual offences, but my concern is that that might not be the case. The defence might rightly argue that, if it is the accused's word against the complainer's word and the complainer has a bit of a history, it is going to open it up and start questioning the complainer's credibility and sexual history. The bill might make the complainer more vulnerable to that and some of the protections might be eroded.

Lord Carloway: The level of protection that should be afforded to rape complainers has been considered widely in the Commonwealth, notably in Australia and Canada, which—as you will know—have very strict rape shield laws. No doubt it differs from state to state but, as I understand it, not only do they have relatively robust rape shield laws—which are to do with the protection of the witness's dignity—and a system in which there is no corroboration, they have prohibitions on judges cautioning juries about the absence of corroboration in that category of case because it is not thought to be fair when one is balancing the interests of the accused and those of the victim.

The Convener: I am sorry, but that is not the question that I was asking. I was asking whether taking corroboration out of the picture and pursuing cases of that nature without it would leave female or male victims open to tougher questioning about their sexual histories if it is in the defence's interests to do that. The protection for certain individuals, such as an element of corroboration, assists them and is not a problem, but abolishing corroboration might open things up. I thought that that was where Roddy Campbell was going with his questioning—that the protections that, rightly, exist now might be eroded in some way over time.

Lord Carloway: I can see no reason why they should be. It would be contrary to the way that criminal justice is going generally in the world, to return to the wider picture. The tendency is towards greater rape shield protections.

The Convener: I accept your point.

Roddy, do you have another question?

Roderick Campbell: I have not really embarked on the major question that I want to ask you, Lord Carloway, which largely concerns procedural safeguards.

When you gave evidence in November, you suggested that you saw no need for alternative safeguards. You reiterated that this morning. Notwithstanding that, the Government embarked on a second consultation in relation to additional safeguards.

We have dealt with majority verdicts and the not proven verdict, but we have not really touched on direction to the jury. Do you remain of the view, which you expressed in November, that the judge and the jury should have the freedom to assess quality? A number of the senators of the College of Justice—a minority—said that they see a direction to the jury as part of the evidence and not as a factual matter for the jury. That is also the view of a number of other people including the Scottish Human Rights Commission, which has also raised concerns in relation to article 6 of the ECHR.

Since you prepared your report and gave evidence, a couple of European Court decisions have touched on the importance of procedural safeguards. Will you expand on whether you remain of the view that the additional safeguards are not required?

Lord Carloway: In talking about procedural safeguards, are you focusing particularly on jury directions?

Roderick Campbell: Yes. I am interested not only in the direction that no reasonable jury could convict but in the jury's discretion to exclude evidence and in whether, as the Scottish Human Rights Commission suggests, there should be a statutory discretion on the face of the bill, following section 78 of the English legislation—the Police and Criminal Evidence Act 1984.

Sorry—I am wrapping up too many things in one question. It is the general topic of procedural safeguards that I would like you to comment on.

Lord Carloway: There is a suggestion that the judge or sheriff in a jury trial should be able to withdraw the case from the jury if he or she thinks that no reasonable jury could convict. I can address that—

Roderick Campbell: Perhaps you could deal with that one first.

Lord Carloway: I do not think that that reform should be encouraged. The reason for that is primarily procedural. Let us imagine that a jury trial is coming to an end, all the evidence has been heard and somebody makes a submission that there is no case to answer. If that goes in favour of the Crown and the jury subsequently convicts, the case can be subject to an appeal in the normal way, so that does not create a problem.

On the other hand, if there is a submission that there is no case to answer, the judge's decision is that no reasonable jury could convict and he or she acquits the accused, that will, in effect, terminate the jury trial unless an appeal court can be convened extremely rapidly. If that is not done, the trial will be wasted if the decision is wrong, because it cannot be appealed without having a new trial. That is one reason why, as far as safeguards for the accused are concerned, he has a right of appeal if he is convicted. It is much more difficult, if the decision is wrong, for the prosecutor to appeal effectively without forcing people to go through the whole process again.

The other reason why I am against the reform is that it would give a single judge power in relation to what he thinks a reasonable jury should do with the evidence, and we should guard against that. It is different to have a ground for appeal that is based on reasonable verdict. There is much less scope for idiosyncratic decision making in that case, because three judges make the decision. Experience dictates that there have been decisions that have led to acquittals that cannot then be changed in circumstances where they are demonstrated to be wrong.

That is my answer on that suggestion.

Roderick Campbell: You would accept that a number of your colleagues take a different view.

Lord Carloway: I do not think that many of them take a different view on that issue.

Roderick Campbell: It is not possible to determine that from the submission as it refers only to minorities and majorities, so we do not know the numbers. However, a minority of the senators seem to believe that it is a matter that the judge should deal with.

Lord Carloway: That is correct. There was a minority view, but the majority said that the reform should not be introduced, broadly for the reasons that I have given. That is the position.

Roderick Campbell: One of the principal points that you seem to be making is that an appeal court of three judges is more likely to get it right than a single idiosyncratic judge.

12:30

Lord Carloway: That is the way in which the legislation is framed at the moment. The question of what a reasonable jury would or would not do is determined in retrospect by the appeal court. However, if there is an insufficiency of evidence—in the sense that there is just no evidence that the person committed the crime—then even if the requirement for corroboration is abolished, it will still be possible to make a submission, which the judge can sustain, that there is no evidence. That would continue to be the case.

Again, I looked at this matter in the context of the review and I looked at the way in which they did these things south of the border. I spoke to someone who was, in effect—I cannot remember his precise title—the appeal court administrative judge in the Court of Appeal in England. I also spoke to various people in other systems. I think that they are all generally of the view that if there is enough evidence on which a jury could convict, then that is really a matter that ought to be left to the jury. If it turns out that the decision is wrong, the appeal court can sort that out.

Roderick Campbell: You are confident that that does not leave a line of exposure for an article 6 claim in the European Court.

Lord Carloway: Yes, I am reasonably confident on that, but it is sometimes a difficult matter to be confident on.

Roderick Campbell: Indeed. Moving on to the general concept of statutory guidelines such as section 78, I detected in the submissions a general view that such matters are best left to the discretion of the judge rather than having statutory discretion in the bill. Do you adhere to that view?

Lord Carloway: Sorry, this is section 78 of—

Roderick Campbell: The suggestion was made by the Scottish Human Rights Commission, among others, that we should have something on the face of the bill resembling section 78 of the Police and Criminal Evidence Act 1984 in England.

Lord Carloway: I cannot remember precisely what section 78 states.

Roderick Campbell: It is about the direction to exclude unfair evidence.

Lord Carloway: Oh, right. I beg your pardon. If evidence is unfairly obtained, that discretion is already there in Scotland, so I am not sure that—

Roderick Campbell: The question is whether to have something statutory rather than leaving discretion to judges. I think that your colleagues' view is that the discretion is best left to judges, rather than it being statutory.

Lord Carloway: I think that the judge's discretion is sufficient at the moment, without any additional powers. That probably answers the question.

Roderick Campbell: I will let other members in, as I am conscious of the time.

The Convener: I am conscious of the time, too, but I hope that you can stay a little bit longer, Lord Carloway, as this is our only opportunity to go through this matter. I hope that we can go on for another 20 minutes to half an hour—I think that we will manage to exhaust all our questions by then. Thank you very much for staying, as I appreciate that it is a long session. John Finnie has the next question.

John Finnie: Thank you, convener, and Lord Gill. I would like to touch on some of the practical applications of your report.

The Convener: I think it is Lord Carloway we have with us and not Lord Gill, but if you want to cause judicial ructions—

John Finnie: I am sorry, Lord Carloway. I do beg your pardon for that, and for my voice. I am a bit heady today, I am afraid.

I am interested in practical applications of your report in areas such as arrests and custody. Your remit was very clear and included a review of developments since 1980 in relation to arrest and detention and the effective investigation and prosecution of crime. On arrest without warrant for offences that are not punishable by imprisonment, will you say why you thought that the course of action that you suggested is appropriate?

Lord Carloway: Yes. Again, it is basically a question of being able to process the particular person. For many relatively minor offences, it would be sufficient for the prosecuting authorities to serve a complaint on the person in due course. However, to do that, you have to find out, for example, who he is and where he lives. If you do not have a power of arrest whereby you can detain and, in effect, restrain the person for the purposes of finding out those things, then you will not be able to prosecute him at all. So, you need a very limited power of arrest in order to carry out the essentials if you have a disruptive individual whom you are trying to process.

John Finnie: So, if the individual is co-operative—

Lord Carloway: There ought to be no requirement to arrest someone for an offence that is not imprisonable, if you are dealing with someone who tells you properly what their name and address is. Of course, you might suspect that although they are apparently being co-operative, they are not giving you the right information. That is what my recommendation concerns.

John Finnie: Would you see a benefit, as others do, in having a statutory definition for the reason for arrest and subsequent detention?

Lord Carloway: I cannot remember exactly how it is phrased at the moment. Is there not a qualification in relation to non-imprisonable offences, which means that that would be done only in certain circumstances?

John Finnie: I am looking at section 1, which deals with the power of a constable.

Lord Carloway: Yes, I would hope that those three subsections cover the issue.

John Finnie: It is a long time since I had cause to enforce this, but would the part that refers to a belief that the person will

"obstruct the course of justice"

be similar to the common-law power of arrest for various reasons?

Lord Carloway: That provision deals with the kind of activity that I have mentioned. The notion of obstructing the course of justice would cover a situation in which someone said that their name was M Mouse and you had reason to suppose that it was not. You would have to arrest him and take him to a police station so that you could process him properly.

The issues are relatively well defined for a situation in which you encounter someone in the street who is committing a non-imprisonable offence and who is, in one way or another, not co-operating. The definitions in section 1 are clear. Seeking to avoid arrest basically means someone avoiding giving their name and address by running away. Similarly, if someone continued to commit a breach of the peace or whatever the offence was, they could be arrested for that, as they could be arrested for interfering with witnesses or evidence in some way.

John Finnie: Your view is that that is comprehensive enough.

Lord Carloway: I think that it is, yes.

John Finnie: I want to move on to deal with the information that is to be given on arrest and the information that is to be given at the police station. The Scottish Human Rights Commission was concerned about the possibility that sections 3 and 5 of the bill do not provide sufficient information to fully protect the right of silence, under article 6 of the ECHR.

Lord Carloway: As far as I am aware, the sections are convention-compliant at the moment. Under the sections, the constable informs the person of the reason for the arrest and tells them that they do not have to say anything, and then takes the person to the police station, where he is

placed under some form of restraint and is given the additional information in relation to his right to legal representation.

John Finnie: Is that the appropriate time to talk about legal representation, rather than at the point of arrest?

Lord Carloway: As long as you are not engaged in questioning the person at that point, it should not be a practical problem. However, as you rightly identified, it is at the point at which a person’s movement has been curtailed that he is entitled to be advised of his rights to have legal assistance.

John Finnie: Is it robust enough to prevent spontaneous admissions en route to the police station?

Lord Carloway: The person is told that he does not have to say anything. There is not much else that anyone can do. Advising him that he has a right to legal assistance earlier will not assist him, as you cannot give him legal assistance before he gets to the police station. At least, I think that that is the reasoning.

John Finnie: One hears of innovative situations in other jurisdictions in which police officers have, for instance, facilitated the person under arrest gaining legal advice over the phone, prior to being taken to a police station, by giving them a mobile phone. Would that be a positive?

Lord Carloway: I am not sure. If the person was behaving in an appropriate way I cannot see why one would necessarily stop them doing that. You would do it anyway before you indulge in any form of—as they put it in Europe—interrogation of the person.

John Finnie: Okey-doke. Can I ask about investigative—

The Convener: Was that an okey-doke?

John Finnie: Did I say okey-doke?

The Convener: I think you said okey-doke, but that is fine.

John Finnie: Surely it has been in the *Official Report* before now.

I want to move on to investigative liberation and to the concerns expressed about the range of questions and the period that an investigation can go on for, and about the unintended consequences of that investigation. For instance, there is the potential for someone to face suspension from their job on the basis that an investigation has gone ahead.

Lord Carloway: That is why the 28-day limit was put in—to stop it going on, as we heard it did in England, where people were effectively under investigation for a prolonged period. That was why I recommended that there be a time limit put on the investigation.

John Finnie: Should subsequent investigative periods have regard to a suspect’s work and family commitments and, indeed, access to a solicitor during them?

Lord Carloway: Could you maybe expand a little on that? I am not quite sure—

John Finnie: You acknowledge that there can be implications for an individual’s family and work circumstances if further investigations go on. Should the police have regard to the family and work circumstances and, indeed, to the availability of the individual’s solicitor, prior to engaging in that further investigation?

Lord Carloway: Do you mean prior to releasing the person on investigative bail?

John Finnie: No. I mean prior to the continued investigation.

Lord Carloway: I am not sure that I quite grasp the situation that you envisage. Do you mean that, rather than release the person, the police should simply process him through the courts, depending on his family circumstances?

John Finnie: No. I mean a person who has been dealt with and released, and at a future point is subject to further questioning by the police.

Lord Carloway: Oh, right.

John Finnie: I mean the regard that the police officer should have to the individual’s domestic and work-related circumstances, and the availability of a solicitor to facilitate their being legally represented when it takes place.

Lord Carloway: If he is requestioned, he will again be entitled to legal representation, as I understand it.

John Finnie: As things stand, would there be anything to preclude someone from being repeatedly rearrested after the 28 days?

Lord Carloway: The time limit of 12 hours for questioning applies throughout. In other words, if you are rearrested, the time that you have already spent in custody counts. That will in itself limit arrest, at least for the purposes of questioning. If you repeatedly arrest someone for the same offence, that would be oppressive conduct and I suspect that the courts would take a very dim view of that if it resulted in any unfairness. However, I am not sure that we had any evidence—or I had any evidence—that this was something in which the police indulged.

John Finnie: Can I move on, Lord Carloway, to information to be given before an interview? The

Scottish Human Rights Commission is of the opinion that the suspect and his solicitor should be informed prior to the interview of the content of the "reasonable grounds for suspicion".

12:45

Lord Carloway: The person should already have been told why he is being arrested. He should be aware of the general reason why arrest is being carried out because that ought to be given at the point of arrest and, I think, also at the police station, and that is recorded.

The person may not be given the information that has led to the reasonable suspicion, and I suspect that the reason why it is not thought appropriate to give that information is that it may disclose, for example, who is providing the evidence against him at a very early stage, which might have repercussions.

I do not think that it is a requirement, certainly in human rights terms, to tell the person of the nature of the evidence against him as distinct from the allegation that is being made against him. If he gets a solicitor, the solicitor can advise him not to answer any questions until such time as the source of evidence is apparent. If he gets legal advice, that ought to deal with that type of situation.

John Finnie: Another concern voiced is that an individual might be arrested but not taken to a police station. Of course, it is arrival at the police station that triggers some of these things.

Lord Carloway: Is it not in the bill that the person has to be taken to a police station as soon as practicable?

John Finnie: You take that to mean taken directly to a police station.

Lord Carloway: Within reason, yes. We did not have any evidence in relation to detention—

The Convener: I think that the words used in the bill are "reasonably practicable", which is an expression that we understand. Obviously it would depend on location, rurality and so on.

Lord Carloway: The police would be able to tell you about this a lot better than I can, but there are certain operational reasons why you would not take someone to a particular police station. You might have to take them to a high-security facility or suchlike.

We did not have any evidence that when someone was detained and was supposed to be taken to a police station, the police were doing anything significantly different by way of transporting them around the country or other such things that we hear about in films.

The Convener: We will move on. Alison McInnes, are your questions on this tack?

Alison McInnes: They are still about police custody, but post charge.

Lord Carloway, your report went into some detail about the length of time for which suspects may be held in police custody prior to their first appearance in court. You expressed some concern about that. You concluded:

> "a significant proportion of suspects are held for periods which are at least at the outer limits of what may be regarded as acceptable even under the Convention. More important than that, suspects are being held for periods that are longer than ought to be regarded as acceptable in Scottish human rights terms."

That was a welcome conclusion.

I am really interested to know whether you think that the bill has gone far enough in addressing that problem. As far as I can see, the bill provides that wherever practicable the suspect must be brought before the court not later than the end of the next court sitting day. There is no suggestion that we should be moving to weekend courts or anything like that. Would you have liked the bill to go further?

Lord Carloway: I think not at the moment. My view was that this is something that has to be kept under review. Here is a new regime, which may not be radically different from that under the emergency legislation or which existed before it, whereby a person is supposed to appear in court on the next court day. That sounds good, but when you examine how it is operating in practice, you see that it is a problem. It is a practical problem that is primarily for the Crown authorities to resolve. They have the power to resolve it, along with the Scottish Court Service, by ensuring that there is a court sitting day in some kind of proximity to the point when the person is charged. What I was saying was, "Here is a new regime. Let's see how it operates but somebody should be keeping it under review to make sure that people are not being kept in custody for longer than three days, or 36 hours."

Alison McInnes: It might be worth while to read you the Sheriffs Association's response, which says:

> "We believe that the establishment of regular Saturday Courts ... would impose an unacceptable degree of extra strain and excessive extra costs on an already overburdened criminal justice system"

and would be unnecessary in the light of increased liberation powers. Is that a fair way of responding?

Lord Carloway: It is a fair way of responding, but I do not necessarily agree with it.

The Convener: Alison McInnes might want to rephrase her question.

Alison McInnes: Yes.

Lord Carloway: The approach does not involve more work being done; it just means doing the work at a different time.

Alison McInnes: You suggest that we should not worry about the bill not being specific on the number of hours for which someone can be in custody, but I read out the reaction of the people who can fix that.

Lord Carloway: The committee should be worried in practical terms about the amount of time for which people are kept in custody. Exactly how to fix that is a much more difficult question. I was loth just to recommend the introduction of Saturday courts—weekends are the problem that we are talking about—if the problem could be solved in a practical way.

Part of the problem is that, when people are processed into a court's cells on a Monday morning, little has been done on their cases. They languish in a cell and, at that point, nobody is in a position to decide whether they should be put through the court, released unconditionally or released conditionally. If we got to a system in which decisions were taken over the weekend—which would not require legislation, because it does not require a court to sit—people could be processed much more quickly on a Monday, whether or not it was a holiday. Custody courts would also not go on well into the afternoon, which I said in the report should not happen, especially given the conditions in which people are kept.

Margaret Mitchell: I will return to your review's terms of reference. The section that is relevant to corroboration is paragraph (c), which says:

> "To consider the criminal law of evidence, insofar as there are implications arising from (b) above",

which is

> "To consider the implications of the recent decisions, in particular the legal advice prior to and during police questioning, and other developments in the operation of detention of suspects since it was introduced in Scotland in 1980 on the effective investigation and prosecution of crime"—

Lord Carloway: I am sorry; I am not with you.

Margaret Mitchell: I was just quoting paragraph (b), which is not really relevant but is mentioned in paragraph (c). The relevant words are:

> "in particular the requirement for corroboration and the suspect's right to silence".

Nothing in your terms of reference stopped you looking at retaining and improving corroboration, did it?

Lord Carloway: I did look at retaining corroboration. That is what I was asked to do and I did it.

Margaret Mitchell: You looked at retaining or abolishing the rule; the review did not consider how to improve it.

Lord Carloway: I am sorry, but no one as far as I can recall suggested some form of intermediate step.

Margaret Mitchell: In that case, was the review not fundamentally flawed? In view of that, there should be a full review. Plus, the weight of opinion against abolition was that something of this magnitude should be fully reviewed and not passed in a bill that has many other provisions—it is too important.

Lord Carloway: I did not determine the method by which the situation was reviewed. I was asked to carry out a review and I did that.

Margaret Mitchell: There was nothing to stop you looking at improving corroboration.

Lord Carloway: I say with due respect that I do not think that the requirement for corroboration can be improved.

Margaret Mitchell: That is your view.

Lord Carloway: Yes.

The Convener: We have an answer.

I will briefly, because it has not been touched on, mention section 82, which deals with the SCCRC. This is a little hobby-horse of mine. You will recall that, following Cadder, we got in—under the wire—a double test for the SCCRC, which was that it had to consider not only whether there had been a possible miscarriage of justice, but whether it was in the interests of finality and certainty to make a referral to the High Court. In the same emergency legislation, we introduced the ability of the High Court to reject a referral. You have asked for that second part to be changed, which would get rid of the gatekeeping role of the High Court. I would have liked something else to have been done for the SCCRC, but that is just my view.

It is a complete mystery to me why you still support the idea that, even if the High Court considers that there has been a miscarriage of justice, it can determine that upholding an appeal is not in the interests of finality and certainty. I am a simple person. If there has been a miscarriage of justice, there has been a miscarriage of justice. If a person has been wrongly convicted and their appeal has been successful, the appeal should be granted. I do not understand the interests of finality and certainty provision. I think that it erodes the integrity of the High Court as the court of appeal.

Lord Carloway: There are basically two points to pick up on. I have suggested that the gatekeeping role be ended, but I have also suggested that, in addition to there having been a

miscarriage of justice, it should be in the interests of justice that the appeal be allowed. The issue is to do with the definition of "miscarriage of justice". In looking at this provision, we are not talking about a miscarriage of justice in a general sense; we are talking about a miscarriage of justice in the sense of something having gone wrong in the trial process.

I will give a straightforward example of the first area where that would be something that the court would look at. Let us say that someone comes before the court with an appeal of this nature—we should remember that that normally happens at a stage that is well remote from the trial process—but that, in the interim, new evidence against the person emerges or the person confesses. I am suggesting that, in a reference—as distinct from a straightforward appeal—the court should be able to take into account those wider considerations, which the Crown may or may not wish to put forward, as to whether, in the interests of justice, it is appropriate for that conviction to be quashed. Retrial is almost never going to be an option in an SCCRC reference, because of the timescales.

The Convener: You posited that highly unlikely example the last time you appeared before the committee. Your argument is very narrow because, as you quite rightly say, if that happened, the appeal could be granted and a new trial could be held on the new evidence; the two aspects could be separated.

The provision does not apply only to cases in which new evidence appears; it gives the High Court wide discretion. That is why I am concerned. Even if the SCCRC has already looked at finality and certainty and, notwithstanding that, has referred the case to the High Court, that test will have to be gone through again.

Lord Carloway: Yes.

The other example that I was going to give relates to the situation—which does arise—in which the SCCRC is not given, and does not have, complete information. In that situation, the court should be able effectively to review the matter. The situation that I envisage—we have had such cases in the past—is one in which a person who has lodged an appeal after his conviction and has taken a conscious decision to abandon that appeal, or has taken a conscious decision not to appeal within the time limits, comes along several years later and says, "I now want to appeal."

We, as the court, would look at the merits of the case and consider his grounds for appeal, but in such a situation we would often say, "Well, I'm sorry, but you didn't appeal within the time limits, and you haven't given us a proper explanation as to why. We don't think your grounds for appeal are bound to succeed"—or something of that nature—

"and we are therefore refusing you leave to appeal late."

13:00

It would be very odd to have a situation in which a court said, in the interests of finality and certainty—particularly in relation to victims and any other people involved—"We are not allowing you to appeal because you are too late." If such a case comes back to us from the SCCRC several years later, we have to take a decision irrespective of the previous decision.

The Convener: As you and I know, however, the SCCRC does not say willy-nilly that there may have been a miscarriage of justice. I do not have the stats in front of me, but referrals are relatively successful. There was a change in the law in 2010, which I think was made because everyone thought that, after the Cadder case, people would be rushing to the SCCRC. Emergency legislation usually turns out to be bad.

My concern is that the SCCRC will have fully considered whether there has been a miscarriage of justice, and will even have applied the test of finality and certainty, which did not exist before. At least you are recommending that we get rid of the High Court's ability to say, "We don't care about that case and we're not going to take it", so that it will take the case in any event. However, it still has the test: it can still say that there has been a miscarriage of justice, but that it will not, in the interests of finality and certainty, grant an appeal.

You have given specific examples, but those are special cases, and that is not what the legislation says. Indeed, the executive of the SCCRC said in evidence to the committee that the legislation proposes

> "not to remove the gatekeeping role of the High Court at all, but instead to dismantle the gates at the bottom of the driveway and reassemble them at the entrance to the front door."—[*Official Report*, *Justice Committee*, 13 December 2011; c 651.]

The bill is, in effect, saying, "Right, we're taking away the ability to say that we don't want to accept a referral from the SCCRC and we're taking the gates down, but we're putting them back up at the top of the hill. We have heard the case and, yes, there has been a miscarriage of justice, but in the interests of finality and certainty, it's just tough, but we're not granting the appeal."

I have heard your examples, which are clear, but very unusual. There are remedies available—a case can be retried, or whatever—but my concern is that the proposed change does not give confidence to people who have taken their case through the SCCRC system and gone through all the tests that it applies, who have had the case referred to the High Court and had their appeal

heard, and have heard that there has been a miscarriage of justice, but then not got their appeal. Where is the security in the system in that respect? Do you have faith in the High Court?

Lord Carloway: I had such considerations in mind when I made the recommendation. You have expressed very articulately why there should not be a gatekeeping role in that sense, as the court must hear the merits of the appeal. However, the test for a referral by the SCCRC concerns not only whether a miscarriage of justice has occurred in the narrow appellate sense, but the question of the interests of justice.

The Convener: Yes, and it has done that.

Lord Carloway: What I am saying is that the question whether it is in the interests of justice for an appeal to be allowed outwith the normal course of criminal appeals should be capable of being reviewed by the courts, which are, after all, supposed to be the experts in that field.

The Convener: If the test was not there before, why is it there now?

Lord Carloway: I am trying to explain that. The interests of justice test has always been there in relation to the SCCRC's recommendation: the SCCRC must take into account not only whether a miscarriage of justice has occurred but whether it is, nevertheless, in the interests of justice to make a recommendation.

The Convener: Why was the finality and certainty test for the High Court not there before? That is what I am getting at. That is new.

Lord Carloway: I cannot answer that because I was not involved with the emergency legislation. I think that you have explained that already by saying that a Cadder floodgates-type situation was expected—

The Convener: Yes—and it did not happen.

Lord Carloway: That did not happen, but, for reasons that I have gone into in the review, there have been situations in which we, in the courts, have had referrals for cases in which a person had decided not to pursue his appeal in the first place.

There is no doubt that each case must be dealt with on its own facts and circumstances, but it is difficult to argue that it is in the interests of justice to allow someone who has deliberately decided not to carry on with an appeal to go to the SCCRC and come back to the court years later.

The Convener: Well, in the interests of finality and certainty in this meeting, we will just have to disagree on that. I have no doubt that some of us will disagree on many matters.

I thank you very much, Lord Carloway—I appreciate that it has been a long meeting for you, so I thank you for your attendance. I conclude questioning and suspend the meeting.

13:05

Meeting suspended.

13:06

On resuming—

The Convener: I have reconsidered: we have had a very long session, and it is now 1.06 pm. I suggest that we defer consideration of item 5 until next week, when we will consider our approach to the Criminal Justice (Scotland) Bill, which we have decided to do in private in any event. That will give members time to think about it. Is that satisfactory?

Members *indicated agreement.*

The Convener: Thank you.

Meeting closed at 13:06.

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e-format first available
ISBN 978-1-78351-746-6

Revised e-format available
ISBN 978-1-78351-762-6

Printed in Scotland by APS Group Scotland