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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 10 December 2013

Session 4

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JUSTICE COMMITTEE
36th Meeting 2013, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor John Blackie (University of Strathclyde)
Professor James Chalmers (University of Glasgow)
Professor Peter Duff (University of Aberdeen)
Professor Pamela Ferguson (University of Dundee)
Stuart Foubister (Scottish Government)
Lesley Irving (Scottish Government)
Michael McMahon (Uddingston and Bellshill) (Lab)
Professor Fiona Raitt (University of Dundee)
Shona Robison (Minister for Commonwealth Games and Sport)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 4

Scottish Parliament

Justice Committee

Tuesday 10 December 2013

[The Convener *opened the meeting at 09:32*]

Decision on Taking Business in Private

The Convener (Christine Grahame): I welcome everyone to the Justice Committee's 36th 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 they are switched to silent. No apologies have been received.

Under agenda item 1, the committee is invited to agree to take items 5, 6 and 7 in private. Item 5 is consideration of our next steps and the evidence received in relation to the supplementary legislative consent memorandum on the Anti-social Behaviour, Crime and Policing Bill following our session today; item 6 is consideration of European Union issues; and item 7 is consideration of our work programme.

Do members agree to take in private items 5, 6 and 7?

Members *indicated agreement.*

The Convener: Oh, you are so sweet.

Anti-social Behaviour, Crime and Policing Bill

09:32

The Convener: Agenda item 2 is an evidence session on the supplementary legislative consent memorandum on the Anti-social Behaviour, Crime and Policing Bill. This follows our evidence session a couple of weeks ago with the Crown Office and Procurator Fiscal Service, Police Scotland and Scottish Women's Aid groups on the forced marriage provisions in the bill. Members will see that we received a letter from the minister on Friday, copies of which are in front of them. The letter explains that the Government now intends the maximum sentence for forcing someone to marry to be seven years rather than two, so the LCM has been revised accordingly.

I welcome to the meeting Shona Robison, the Minister for Commonwealth Games and Sport, and Scottish Government officials Lesley Irving, team leader, equality, human rights and third sector division; Ian Fleming, policy manager, public protection unit; Keith Main, policy manager, police powers unit; and Stuart Foubister, legal services. I understand that the minister wishes to make a short opening statement.

The Minister for Commonwealth Games and Sport (Shona Robison): The LCM introduces provisions criminalising forced marriage. The Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 was a clear statement of our intention to work towards the eradication of forced marriage by making a breach of a forced marriage protection order an offence. We have kept in view developments in the United Kingdom and internationally in relation to the response to forced marriage. In June 2012, the UK Government became a signatory to the Istanbul convention, article 37 of which requires forced marriage to be a criminal offence. We understand that the existing legislation in Scotland does not wholly meet the relevant article.

Criminalising forced marriage will ensure that Scotland can comply with the relevant article and that forced marriage legislation and protection are consistent across the UK. The UK Government timescale for the potential inclusion of an LCM in the Anti-social Behaviour, Crime and Policing Bill did not allow for public consultation. Discussions on the issue continue with stakeholders and Westminster officials and we are aware that there will be an opportunity to feed views to the Justice Committee in its consideration of the LCM.

We intend to facilitate the change by working collaboratively with stakeholders to develop guidance for statutory bodies and by working with

support organisations to carry out awareness-raising work to ensure that communities understand the changes.

The bill also introduces sexual harm prevention orders to replace sexual offences prevention orders and foreign travel orders and introduces sexual risk orders to replace risk of sexual harm orders for England and Wales. Those matters are devolved to Scottish ministers. However, the UK and Scottish Governments wish to avoid the loophole that would exist if breaching those new orders was not an offence in Scotland. A similar approach was taken in relation to serious crime prevention orders in the Serious Crime Act 2007.

We continue to look at legislative and other ways of ensuring that our law enforcement agencies are provided with the relevant powers and processes to protect us and we are giving full consideration to the Home Office measures and how they might affect Scotland.

We have already legislated through the Criminal Justice and Licensing (Scotland) Act 2010 to strengthen Scotland's sexual offences prevention order and risk of sexual harm order regimes while allowing for the imposition of positive obligations where deemed appropriate by a court. Such positive obligations have been well received by practitioners and we consider that they are a particular strength of the Scottish provisions and may already address several of the difficulties that have been identified by the Home Office. Liaison is taking place with the Home Office to ensure that the Scottish orders remain enforceable in England and Wales.

The final element of the LCM relates to firearms offences. It is essentially a technical amendment, which reflects the introduction of a new offence in the Firearms Act 1968—the offence of possession with intent to supply. Firearms law is, in the main, reserved and the change to the 1968 act aims to strengthen firearms control. The LCM is needed to ensure that powers over licensing of certain weapons that have already been devolved to Scottish ministers are extended to include that new offence. Without the LCM, there is a danger that firearms controls in Scotland would be less stringent than those south of the border. We do not believe that that should be the case and have therefore agreed that the amendment and the new offence should apply equally in Scotland. The LCM will achieve those objectives.

The Convener: Thank you, minister. I am not prejudging, but I have a feeling that the only particularly controversial proposal is to do with the criminalisation of forced marriage. It would be useful to deal with that first and then we can deal with the other provisions. Are committee members content to take that approach?

Members *indicated agreement.*

The Convener: Right. Questions now—Sandra White first and then Margaret Mitchell, as they were both on the committee that dealt with the civil legislation on forced marriage.

Sandra White (Glasgow Kelvin) (SNP): Minister, we heard from Lily Greenan from Scottish Women's Aid, from Shakti Women's Aid and from others about the difficulties that they feel we would have here in Scotland with regard to the forced marriage legislation. Basically, they feel that the current legislation fits the bill, as you might say—it fits the Istanbul convention. However, from your earlier comments, it seems that you disagree with that view. Can you expand on why you believe that the legislation as it stands—Margaret Mitchell may come forward with more information on that—does not fit the bill, whereas Women's Aid and other groups have said that it does?

Shona Robison: We clearly disagree with those groups on that point, which is an unusual position because usually we agree with them on most things. However, we do not agree on this issue. Our advice is clear—we believe that forced marriage has to be made a criminal offence in order to comply with the Istanbul convention. That is our clear understanding.

It is worth noting that the civil remedies that are available—the forced marriage protection orders—will still be there as an option, so the civil remedies will be there alongside the criminal offence.

The Convener: The committee appreciates that the civil and criminal legislation will be side by side. However, the criminal offence may destroy—as my colleague is saying—the good work that is being done under the civil legislation. We recognise that both will exist.

Shona Robison: We believe that making forced marriage a criminal offence is the right thing to do, because of the repugnant nature of forced marriage. We should ask ourselves the question, given that there is criminal law in many other aspects that would apply to family members, why forced marriage should be any different. Domestic violence or sexual abuse, for example, can involve family members committing criminal acts, so why should forced marriage be different under the criminal law?

I and the Scottish Government believe strongly that this is the right thing to do. Countries across Europe and the world are looking at criminalising forced marriage and I do not want Scotland to be, or to be perceived to be, in a weaker position than many other countries that are going down this route.

Sandra White: On the civil process, organisations such as Scottish Women's Aid,

Shakti and others believe that forced marriage is a cultural issue. You mentioned that the processes will work side by side. When we are acting on incidents of forced marriage, do we go through the civil process before the criminal process kicks in?

Shona Robison: In essence, the person will be able to choose whether to use a civil remedy. If prosecutors wanted to use criminal law for reasons of public interest, it would be up to them. We do not need the victim's consent to go down that route, but the civil remedies will still be available to the victim.

The forced marriage protection orders can serve as an early stage in avoiding the potential risk of forced marriage. You can see how a protection order can be used when there might be a risk of forced marriage and before a criminal offence has been committed. Lesley Irving might be able to say a bit more about how an individual might use protection orders.

Lesley Irving (Scottish Government): The minister is absolutely right to say that both remedies will be in place. A number of different factors will need to be taken into account in each case to decide which route one would go down. The amount of evidence that is available would be one of those factors, because the civil test of evidence is a lesser test than the criminal test of evidence.

It is important to note that a lot of the potential victims are children and young people. We already have strong child protection procedures that come into play in such cases and would still come into play in the same way. There is, therefore, absolutely no way that the protection of potential victims would be jeopardised by criminalising forced marriage. In fact, we are strongly of the view that it will increase protection. As the minister said, there is some international evidence that making forced marriage a criminal offence can increase, rather than reduce, reporting of it.

Margaret Mitchell (Central Scotland) (Con): Why is article 37 of the Istanbul convention being breached as the law currently stands?

Shona Robison: Our interpretation of the Istanbul convention is that it requires forced marriage to be made a criminal offence. I know that others disagree with that, and although the Law Society of Scotland might have concerns about the LCM route, as I understand it, its interpretation is similarly that the Istanbul convention requires forced marriage to be a criminal offence.

Stuart Foubister (Scottish Government): I am not sure that I understand the view that it is possible to perceive existing Scottish legislation as delivering on the commitment on the Istanbul convention. Certain conduct that might be involved in forcing someone to marry might well be criminal if it involves physical violence, abduction and so on, but there is no existing offence of forcing someone into a marriage. The fact that a criminal offence will result if someone breaches a protection order under the 2011 act is not sufficient to meet the requirements of the Istanbul convention. Obviously not all circumstances will involve an order being in existence under the 2011 act.

09:45

Margaret Mitchell: Would it be possible to extend forced marriage protection orders to apply to people who are seeking to extricate themselves from a forced marriage, and make breach of such an order a criminal offence? We heard in evidence that some partners are not even aware that they are in a forced marriage.

The minister said that there is no fear or apprehension about criminalising some members of a family in the context of domestic abuse. However, forced marriage is a different situation. We heard that many people who are in a forced marriage hope to be able to return to their family once they are out of the marriage. That is rarely the case where there has been domestic abuse.

Shona Robison: Breach of an order carries a maximum sentence of two years, I think—Stuart Foubister is confirming that. Breach of an order is already a criminal offence—

Margaret Mitchell: Yes, prior to the marriage, but I am talking about someone who is already in a forced marriage. Can a forced marriage protection order be extended to cover someone who is trying to extricate themselves from a forced marriage, such that only at that point would the breach be a criminal offence?

Stuart Foubister: Under section 1(1) of the 2011 act, a protection order can be made in respect of someone

"who has been forced into a marriage."

Therefore, it is not the case that a protection order can be granted only before a marriage takes place. However, making criminal proceedings hinge on the existence of a protection order means that there must be prior identification of the situation and an application for an order, which seems unnecessary.

Margaret Mitchell: We must get this right and put in place the best law, which will encourage people to come forward. We know that there are cultural issues. We heard in evidence that criminalising forced marriage per se will mean that people are not inclined to come forward. Could not the way forward that I suggested be considered?

If we want to create a deterrent effect, making breach of a forced marriage protection order an aggravated offence would send a strong message about how severely we regard such a crime.

Shona Robison: As more countries criminalise forced marriage, more evidence will emerge; so far, Norway, Denmark, Germany, Austria, Malta, Belgium and Cyprus have criminalised forced marriage, and since Denmark did so in 2008 a Copenhagen-based organisation, LOKK, has reported an increase in young people coming forward. Grass-roots organisations in other countries that have criminalised forced marriage have reported a 50 per cent increase in the reporting of forced marriage.

Currently, very few people come forward. Indeed, I do not think that anyone has come forward to have a forced marriage annulled.

Lesley Irving: That is correct.

Shona Robison: There is, therefore, evidence that criminalising forced marriage appears to increase reporting, whereas under our current civil legislation no one has come forward during the past two years to annul a forced marriage. The evidence, albeit limited, seems to come down on the side of the criminalisation of forced marriage encouraging reporting.

The Convener: Why is that the case? Why would people who are reluctant to come forward when forced marriage is a civil matter be more enthusiastic about coming forward when it is a criminal matter? It seems to me that the opposite would be the case. I think that the committee is quite sceptical about the view that what works in one country will necessarily work in the culture and legal framework of another.

Shona Robison: I accept that, convener, but my reading of the evidence from other countries is that because forced marriage is a criminal offence, the reporting of it—not necessarily by the victim—has increased.

The Convener: That is a very different thing, if someone who is not the victim reports the forced marriage. What were victims' positions, according to the data that you have?

Shona Robison: The data that we have is fairly top line, but we can provide the committee with more detail. Although the evidence that we have is limited, there is certainly not evidence to say that the criminalisation of forced marriage stops people reporting it or others reporting it on behalf of the person concerned.

The Convener: That is the key—others reporting it. We are concerned about the people who are in the middle of the maelstrom reporting forced marriage.

Margaret Mitchell: Given the complexity of the issue and the conflicting evidence that we have heard about, should not there be more consultation? Indeed, should not there have been more consultation?

Shona Robison: As you are aware, the UK Government consulted. That consultation found that people were very much in favour of the criminalising of forced marriage. Because of the timeframes involved, a specific Scottish consultation has not been possible, but the evidence from the UK consultation would tend to suggest that there is support for the criminalisation of forced marriage.

It would be fair to say that if we had decided not to go down the route of criminalising forced marriage and to have a different and what might be perceived to be a weaker law on forced marriage than in the rest of the UK and other European countries, we might well have been criticised for that. I accept that the timeframes are not ideal. In an ideal world, we probably would have wanted to do a specific Scottish consultation, although the LCM has allowed some of that debate to take place.

As far as the timeframes are concerned, we discussed at length what the options might be and what alternative vehicles there might be. We came to the conclusion that the proposed legislation was timely and the best and most straightforward way of ensuring consistency.

Margaret Mitchell: I think that it is strange that, given our distinct Scottish system of criminal justice, we should rely on consultation in England, where the approach is different. In 2011, we looked at that approach. We fully understood the position in the UK and moved forward with a solution that we thought was better. It seems to me that we should not be rushing this—it is more important that we get it right.

Shona Robison: Since then, we have had the Istanbul convention. In order for a country to be a signatory to that, it is necessary for forced marriage to be a criminal offence. The women's organisations that gave evidence to the committee wanted us to be a signatory to the Istanbul convention. The disagreement is about what is required in order to be a signatory to it. We are clear—as is the UK Government—that, for a country to be a signatory to the convention, forced marriage requires to be a criminal offence. If you boil it all down, fundamentally, that is where the disagreement lies. Everyone agrees that we all want to be signatories to, and to ratify, the Istanbul convention. We and the UK Government are clear that, for us to do that, forced marriage must be a criminal offence.

The Convener: Why should we not introduce our own legislation?

Shona Robison: We could have done that. We debated the options at length and considered whether there were other vehicles that we could use, such as introducing our own legislation. The judgment was made that that would take much longer to achieve. If we believe that forced marriage should be a criminal offence—as I do—in my view it is better to make it so and, through the seven-year penalty that comes with that, to send out an extremely strong message that Scotland takes a very hard line on the issue.

The Convener: The committee's position is not that we do not think that it would be appropriate to make forced marriage a criminal offence at some point; it is that we probably feel that we are moving forward quite quickly when the civil legislation has bedded in for only a year. I presume that if separate legislation were to be introduced in Scotland to criminalise forced marriage, the fact that the intention to do so was there would show that we were not in breach of anything; it would simply be the case that we wanted to take our time and to have a proper and thorough consultation.

I note that the Law Society accepts what is proposed, but that it does so reluctantly. What concerns the committee is that those who are at the sharp end—who agree with the minister—have the feeling that going about matters in the way that is proposed at this time will be counterproductive. I may be wrong, but I think that the committee has that general feeling. Am I correct? The issue is getting it right for those who matter.

Elaine Murray (Dumfriesshire) (Lab): I wonder when it was first realised that there was a problem with the Istanbul convention. The convention was signed in 2011 and the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Bill was passed in 2011, so when did the Government become aware that there was a problem with the legislation that had just been passed?

Lesley Irving: The UK signed the Istanbul convention in June 2012, so that was some time after the passing of the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Bill. The UK Government, in common with many other Governments, signed the convention and then had to look at the process of ratification and what that would involve. At that point, there was consultation with officials around the UK about whether we were already compliant with the convention. It was agreed that we were not compliant either in Scotland or in England and Wales because we had not criminalised forced marriage.

As has been pointed out, we in Scotland were slightly ahead of England in that we criminalised the breach of an order in the 2011 act. However, we did not go to the next stage of criminalising forced marriage itself.

Elaine Murray: The minister now says that she believes that that is the right thing to do, so why was it not the right thing to do two years ago? We could have criminalised forced marriage two years ago.

Shona Robison: As Lesley Irving has explained, when the UK Government signed the Istanbul convention it became clear that ratification required forced marriage to become a criminal offence. I do not think that that was apparent back in 2011, so it is since then that that legal position has been established.

The Convener: That is fair.

Elaine Murray: The minister said that it is the right thing to do. Surely that would have been the case two years ago when we passed the legislation, whether or not it was in contravention of the Istanbul convention.

The Convener: I think that the minister is saying that the position is that it is now mandatory.

John Finnie (Highlands and Islands) (Ind): My question is about the relationship between the existing civil legislation and the current proposal. Is it your position that a conjoining of the existing civil and criminal law in Scotland is insufficient to meet the terms of the proposal? Would a breach of the civil legislation being a criminal offence, plus the existence of all the other crimes such as abduction and assault, not be enough?

Shona Robison: No. The only part that is a criminal offence under the existing legislation is the breach of an order. We are very clear that that does not constitute what is required to ratify the Istanbul convention. The UK Government is similarly clear about that.

John Finnie: Not even when taken in line with, as was referred to earlier, the law on abduction, assault, rape or whatever?

Shona Robison: No, but I will let Stuart Foubister elaborate on that.

Stuart Foubister: The shortfall is basically that the 2011 act will cover only circumstances in which an application has been made and an order has been put in place. Under existing law, someone will commit the offence of forced marriage only if they have been pre-warned by an order not to do a specific thing. However, that cannot be enough to criminalise forced marriage as such.

John Finnie: Are there transitional arrangements that could be put in place?

Stuart Foubister: Not if we are to put ourselves in the position whereby the UK can ratify the Istanbul convention.

John Finnie: Okay. The process that we have gone through seems very accelerated for something that would bring about a seven-year period of imprisonment. The process seems very speedy and there has not been the consultation that we would normally expect for something of such gravity.

Shona Robison: I accept that it is an accelerated timeframe. However, I believe that the matter is of great importance in ensuring that we in Scotland have the most robust legislation on forced marriage. I believe that that is the right thing to do, given the direction of travel by the rest of the UK and other European countries. We have a vehicle in the here and now to do that—whether we do so becomes a judgment on whether that is the right thing to do. In order to overcome some of the concerns, we are planning—it would not just be the legislation—an awareness-raising and information campaign.

10:00

We also want to undertake research to go alongside the legislation, so that we can understand further the cultural issues and barriers to reporting and what other measures might help women to come forward, whether under civil or the new criminal legislation. The research would build on what I accept is fairly limited evidence. I want us to have far more evidence about what is going on in families and communities so that we can support people. If that means that we have to give people additional support to come forward, that might help us to look at what is required in that light. The research will be going ahead in any case.

John Finnie: Has any assessment been done of the potential damage to relationships, given that the people who are involved directly day to day have clearly indicated no support for the proposal?

Shona Robison: It is not quite true to say that there is no support. Saheliya, which is an Edinburgh-based organisation, is supportive of the legislation. Leslie Irving will say a little bit more about its position.

Lesley Irving: Saheliya is a minority ethnic women's organisation that does a lot of important support work with women from many of the communities that are affected by forced marriage and others forms of honour-based violence. Its view is that it is important for the Government to adhere to the letter, as well as the spirit, of the Istanbul convention, so it is supportive of the need to criminalise the behaviour in order to comply with the convention. It believes that the legislation will strengthen support and preventative work, and that forced marriage should be in line with other abusive practices in the family, such as domestic violence and sexual abuse, as the minister mentioned.

In addition, Karma Nirvana, which is probably the leading UK organisation working on forced marriage, issued a questionnaire to which more than 2,000 responded. The results were that 96 per cent believe that forced marriage should become a criminal offence and 71 per cent believed that making it a criminal offence would not deter victims from reporting.

There are mixed views and it is important to reflect that. As the minister has acknowledged, some of our Scottish stakeholders have a different view from us. For example, Amina—the Muslim Women's Resource Centre ran a number of focus groups with women using its services. Responses were mixed. Some were against criminalisation; some were for it. At this stage in our knowledge, we do not know what the effect of the legislation would be because we do not have any evidence in the UK about that but, as the minister said, we are keen to do further research, find out what the position is and get more detail, which we will give to the committee, about how matters have rolled out in European countries that have gone ahead with criminalisation.

The Convener: The key phrase that you used was

"At this stage in our knowledge".

That is the problem. We have not heard from some of the organisations to which you referred, so we do not know what their views are. It is always a numbers game; it is the percentages that matter. I cannot remember the figure in the response to the UK consultation—you had the figure, Elaine.

Elaine Murray: The figure was 54 per cent.

The Convener: Yes—54 per cent agreed with criminalising the behaviour and 37 per cent were against, but the percentages depend on who responds.

John Finnie has made the point for us. You said that you will look at and do research on the matter. To do that while legislation is being enacted is topsy-turvy—you do the research first.

Shona Robison: We are carrying out that research anyway—we need more research whether or not the bill is passed. All I am saying is that, as we proceed with the bill, the research will help us see whether the position in Scotland mirrors that in some other European countries. We want to monitor whether reporting is increasing, to understand better why that is the case and to assess whether it would be the case in Scotland

as well. We think that it is prudent to have that research in place alongside the legislation. We want to understand why no one has come forward to use civil legislation to annul a forced marriage. We maybe need research on that as well.

The Convener: I think that we have been saying that we need to find that out first.

John Finnie: It was remiss of me to suggest that there was total opposition. I was more interested in your relationship with the organisations that do not support the proposal and with which you would seek to engage.

You mentioned Amina—the Muslim Women's Resource Centre. In its submission, it says:

"Furthermore we would emphasise that more could be done to ensure a robust and effective response to forced marriage disclosures by providing mandatory training to all frontline service providers; be that Police, Education, Social Work or Health."

Will that be actively considered?

Shona Robison: As part of taking forward this legislation, we will certainly want to make sure that all our front-line staff are well trained and informed, particularly about how the civil legislation and the criminal legislation sit beside each other. We also want to make sure that we raise awareness within communities. I suppose that the short answer to your question is yes.

You mentioned organisations whose view differs from ours. The important point is that we all agree that the Istanbul convention should be signed and ratified; where we disagree is about what is required to do that. We have been very clear about that and the UK Government is saying exactly the same thing. If what we say about what is required were to be proved beyond all reasonable doubt, if you like—

The Convener: Could we have corroboration, minister?

Shona Robison: —I wonder whether the women's organisations would take a different view. I do not know. They would obviously have to answer that for themselves.

It is fair to say that 99.9 per cent of the time we are in the same place as those other organisations. We have a very strong partnership and work with them very closely. This is quite an unusual situation. It very much boils down to whether you agree or disagree that forced marriage is required to be made a criminal offence in order for the Istanbul convention to be ratified. We are very clear that that is the case.

Roderick Campbell (North East Fife) (SNP): As I understand it, the bill makes it a criminal offence, among other things, for a person to use

"violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage without their free and full consent."

We have had evidence from the Crown that a number of current offences could be considered in relation to forced marriage but that the provision that I have read out is much more comprehensive and would cover the full spectrum of behaviours that are not necessarily covered at present. Would the panel like to comment? Do they agree with the Crown on that point?

Stuart Foubister: I entirely agree with that. I think that it is in line with what I said earlier. Certain conduct that might emerge when someone is being forced into a marriage will be criminal under existing law, but I do not see how one can possibly say that all conduct that would constitute forcing someone into marriage is a criminal offence at present.

Roderick Campbell: To that extent, if we agree to this LCM, we will be providing a more comprehensive response.

Stuart Foubister: Yes, and delivering the needs of the Istanbul convention.

The Convener: Given the purposes of the existing forced marriage legislation, it is not possible to amend it. I do not have the purposes in front of me.

Stuart Foubister: The difficulty with the present legislation is that it all depends on applications being made to set up an order in order to produce a criminal situation.

The Convener: So if we wanted something else in Scotland—I am not saying that we do—we would have to have a separate piece of legislation.

Stuart Foubister: Yes.

The Convener: That is fine.

You mentioned children. Children are very loth to report on parents or family members anyway, whether in a forced marriage situation or otherwise. They think that the social work department is going to come in and take the parents away and so on. I am thinking about the effect on children if we criminalised forced marriage. It will be up to the Crown Office to decide whether what is reported is in fact a criminal matter. However, it might be counterproductive to criminalise forced marriage. It might not only inhibit children from saying anything but place professionals in a difficult position.

At the moment, when forced marriage is reported to professionals by children, it is initially a civil matter. Professionals are not unhappy with their duty of confidentiality although they sometimes have to go beyond that to report forced marriage. However, if forced marriage is a

criminalising offence, they might find it difficult. I am thinking of two groups here: children, who might be reluctant to say anything; and professionals dealing with children, who might be put in a difficult position as a consequence of the legislation if it is introduced. Minister, will you comment on that?

Shona Robison: Yes. I will bring in others in a minute, but my understanding is that the position in relation to people under 16 will not change. If a disclosure is made by a young person, the relevant child protection procedures would be activated, as they are at present.

The Convener: But would children report it if they thought that what they were doing was reporting parents, aunties or uncles for a criminal offence? That is my point. It is difficult for them now. Would it be more difficult for them?

Shona Robison: If they did it now, child protection procedures would be enacted. If they do it once the legislation has been introduced, child protection procedures will be enacted.

The Convener: Yes, but will children do it? At the moment, they know that if they do it, it is a civil offence.

Alison McInnes (North East Scotland) (LD): I am not sure that children really know the difference between civil and criminal.

Shona Robison: That is a fair point. If they are going to report, they will report and, in either case, the child protection procedures will be enacted.

The Convener: Can I just dispute with my colleague here? If we are going to do the education and tell people all about it, I think that among some children—remember, children up to 16—in communities there will be an awareness of the facts and that forced marriage is a criminal offence. I raised that issue with you because I think that it is difficult for children to report it anyway.

Shona Robison: Sure, but if we consider other criminal offences that might take place within the family environment, we are always encouraging children to speak out and tell us what is happening. Why should forced marriage be any different? I know that it is difficult for children, but the criminal law exists, whether we are talking about disclosing domestic violence or sexual abuse.

The Convener: Yes, but this is a big cultural thing. It has ramifications within a community. It is something quite different. What if it is not an individual but a community that is to be criminalised? What if it was a group of people within an extended family and the community beyond who were party to an action such as this and who would be criminal under the legislation? It is very different from dealing with domestic violence situations that a child might report.

Shona Robison: The support of the community will be very important in ensuring that, where a crime has been committed involving forced marriage, that crime is reported. Whether it is civil or criminal legislation, we need to ensure that the community feels supported in order either that people are encouraged to report that a forced marriage has taken place if they are directly affected or that third parties report it.

The Convener: But it may be the community that is being criminalised. That is the difference here. Whatever we describe community as—whether it is an extended family or even a larger community—the community itself will be tinged with criminality. That is my point. It is different in this particular circumstance.

What interested me in the evidence that we had on domestic violence was how the legislation was progressive. The culture change came first with the Matrimonial Homes (Family Protection) (Scotland) Act 1981, which gave us exclusion orders and all kind of protections to married couples. That was extended to civil partners and then we moved on to recognising domestic violence as an issue. The women's groups that gave us evidence drew the parallel about taking it forward so that a community comes with you, rather than being against you in relation to what is being done.

10:15

Lesley Irving: The parallel with work on domestic abuse is a good one to draw, and particularly domestic abuse as it affects minority ethnic communities, where other family members are often involved. That is a key cultural difference. It is often the female members of the family who are involved—the mother-in-law, the aunties-in-law and so on—as well as the male partner. If someone discloses domestic abuse in that context, they are potentially criminalising a larger group of people. The same applies in relation to female genital mutilation—which is also a criminal offence, of course—where it involves family members such as mothers, aunts and so on. Again, disclosure potentially criminalises large numbers of people. We have said that, in those instances, it is important to have a powerful message to victims that what is being done to them is a very, very bad thing and that society is not prepared to stand by and support it. There are a number of parallels that suggest that what is proposed is the right way forward.

The organisations that have given evidence to you have a particular view. We respect that and we understand their concerns. We understand that

they are coming from the same place that we are coming from, which is an aspiration to do the best that we can for victims. However, we are not aware of communities expressing those views, which is why the minister mentioned research so that we can understand whether there are barriers and see what we can do to overcome them. That is an important way forward.

Alison McInnes: I have found this evidence session very useful and I have been persuaded by what the minister has said. In speaking strongly in defence of the proposals, she has identified clearly that there is a weakness in the civil system in that it needs people to self-refer, so it cannot absolutely meet the Istanbul convention.

Where I am left is that, like my colleagues, I am concerned about the speed of the introduction of the legislation and the impact that it will have. However, there is no point in saying, "What if you had done a bit more consultation when you saw this coming down the line?" I wonder what resources you believe need to be in place to support the community groups and other groups that work in the area. Do you need to ramp up the resources?

Shona Robison: That is a good question. We will continue the discussions with the organisations that we work closely with. We want to ensure that we support people to the maximum—particularly victims, but also communities—because ultimately we want to eradicate forced marriage, and we want to use the law as one part of the toolbox to do that. The rest of the toolbox is about the support organisations on the ground that work with potential victims. We will continue to have those discussions and, if they require additional support to carry out that job, that is something that we will want to take forward.

The Convener: Sorry—I was half listening to that and half listening to the clerk. Having raised the issue of speed, I would like to get an idea of the timetable. I have been advised that the committee has to report by mid-January. If the Parliament agrees to the bill, when will commencement be?

Stuart Foubister: The arrangements under the UK bill as it stands are that Scottish ministers will be responsible for a commencement order to bring the forced marriage provisions into force.

The Convener: What is the thought process about a commencement order? You talked about doing research. Can you give us an idea of what you are thinking about?

Shona Robison: My only concern is that we do not want it to be too far off the timeframe for the commencement of legislation south of the border, because we are keen that there is not a perception that Scotland does not have the same robust legislation to deal with forced marriage. Do we know when commencement south of the border will be?

Stuart Foubister: I do not, I am afraid. The bill is still going through at Westminster.

The Convener: It is in the House of Lords.

Shona Robison: It is likely to be into the middle of next year, I would have thought.

Stuart Foubister: I would not have thought that it would be any earlier than that.

Shona Robison: So it will probably be the middle of next year, although as you know it is always hard to be precise with processes south of the border. We would say that it will be well into next year before the bill is likely to be enacted.

We can commence legislation when we choose to. I would not want it to be too far out of step with the timeframe south of the border, but we are cognisant of the need to raise awareness and make sure that everyone is aware of what is forthcoming, as we have discussed today.

The Convener: That is helpful. It gives us an idea.

Margaret Mitchell: I want clarification on Alison McInnes's point. She is convinced that the bill requires people to self-refer. My understanding—although I could be wrong—was that forced marriage protection orders do not require self-referral: the police and other parties can do it.

Stuart Foubister: There is an ability for local authorities or the Lord Advocate on behalf of the Crown to seek protection orders, but there must be knowledge on the part of those parties.

Shona Robison: The person would have had to have reported to someone who would then—

Margaret Mitchell: Is that the case? Would the person have to report it?

Stuart Foubister: The case would not necessarily have had to come to the Lord Advocate or local authorities from the individual who was being forced into marriage, but those parties must be aware of the situation before they would think of going to court.

Margaret Mitchell: That is my understanding too.

Shona Robison: It is unlikely that those parties would be aware unless the person themselves had had that discussion. That would be the most logical way that a third party would have found out.

Margaret Mitchell: Similarly, if we passed what the minister is suggesting, it would be the same route: that party would still have to have

knowledge. I do not see that there is any difference between the two.

Stuart Foubister: The prosecuting authorities would have to know; they would have to have evidence.

The Convener: I do not know whether it is for the Scottish Parliament information centre or the ministerial team to give us more information about what has happened in the other European countries that the minister referred to; whether the people who referred were in fact the victims or third parties, and the consequences thereof. I am making a presumption because, again, I do not know. Do those countries also have civil legislation in place that runs in parallel? If the ministerial team does not know, SPICe will have to find out for us. It would be very useful for the committee to know that for when reference is made to the practice elsewhere.

I will leave it like that. I thank the minister. The committee is wanting to do very much the same thing as you, but you can hear our concern—which I know you will share—that we are in a rather accelerated position. We will give the issue consideration later today. Thank you very much.

Roderick Campbell: I wanted to raise another point on the change in sentencing.

The Convener: It is gone.

10:23

Meeting suspended.

10:27

On resuming—

The Convener: Before we move on to the next item of business, which is to take further evidence on the Criminal Justice (Scotland) Bill, just for the record, are members content with the other orders that are covered by the LCM? They will provide for the cross-border enforcement of certain orders.

Members *indicated agreement.*

The Convener: Members are content. That is nice.

Criminal Justice (Scotland) Bill: Stage 1

10:28

The Convener: Item 3 takes us back to the workface again. We are back to talking about corroboration and related provisions in the Criminal Justice (Scotland) Bill.

I welcome our panel of academics. Professor Peter Duff is from the University of Aberdeen; Professor Pamela Ferguson is from the University of Aberdeen—

Professor Peter Duff (University of Aberdeen): Dundee.

The Convener: Dundee? How dare I? Oh, heavens. Am I forgiven? No. There was a look that shows that I am not forgiven.

Professor Fiona Raitt is from the University of Dundee; Professor James Chalmers is from the University of Glasgow—not Edinburgh; and Professor John Blackie is from the University of Strathclyde.

I welcome you all to the meeting and thank you for your written submissions. We will go straight to questions from members.

Christian Allard (North East Scotland) (SNP): Good morning. I would like to clarify something that we talked about last week. I am pleased that Assistant Chief Constable Malcolm Graham came back with clarification, which I would like you to hear and compare with the written evidence that some of you have given. He said:

"I am conscious that those who oppose the proposal often appear, perhaps conveniently, to abbreviate it, simply referring to the 'abolition of corroboration'. I hope that my evidence to the committee assisted in dispelling this popular misunderstanding and clarified that the proposal is to abolish the absolute requirement for corroboration, not corroboration itself."

He added:

"Corroboration will continue to have a place in Scots Law and feature within court proceedings. It is simply that our law currently requires that certain particular facts must be technically corroborated before any proceedings can be commenced".

Some of the written evidence that we have received from you uses the abbreviation of "removal of corroboration". You will know your own evidence, but the first line of the written submission from the University of Dundee says:

"We are not satisfied that the case for abolition of corroboration has been made."

It goes on:

"The argument that other jurisdictions do not have corroboration, and therefore Scotland is 'out of line', also

adds little; there is no corroboration requirement as such in England, but it is our understanding that prosecutors routinely look for corroboration and do not generally prosecute without it."

That is exactly what the prosecutors of Police Scotland are saying: corroboration will not be removed, but they are happy to have the requirement for corroboration to be removed and for the situation to be as it is in England. Corroboration will still be used.

10:30

The Convener: First, I have to correct you: the police are not prosecutors and I do not think that they would be happy to be called that. That was a long question. I was asking for short questions and Christian Allard has set the bar. Witnesses know that they should self-nominate and indicate to me if they wish to respond. I think that we should take Dundee before Aberdeen.

Professor Pamela Ferguson (University of Dundee): I acknowledge that the legislation intends to abolish corroboration as a formal requirement. However, I fail to see why we are having this debate at all if we are saying that it will be business as usual because prosecutors will still look for it. In that case, why not keep it as a formal requirement?

I also acknowledge the fact that many jurisdictions look for corroboration. A couple of weeks ago Professors Duff, Raitt and I were in the Netherlands at a conference about the presumption of innocence. During coffee and lunch breaks, we asked academics about corroboration in their jurisdictions and, generally speaking, they said, "Oh no. We have no such thing as corroboration. Scotland is bizarre in having its corroboration requirement." However, when we probed a bit more deeply, they all said, "But of course no prosecutor would go ahead without what you call corroboration or two pieces of evidence" and that judges would not find someone guilty beyond a reasonable doubt just on the witness of one complainer. Even if it is not called a formal requirement, corroboration operates unofficially, if you like, in many jurisdictions.

Christian Allard: So you agree that we are not talking about the removal of corroboration.

The Convener: Professor Duff will enter the fray.

Professor Ferguson: Just a quick point first—the answer will depend on the practice of the prosecution.

Professor Duff: That is the problem. As a commonsense rule of thumb, we all use corroboration in our everyday lives. We are more likely to act on confident information and we are more likely to have confidence in that information if it has come from two sources. As a matter of practice or an everyday rule, corroboration will still exist.

The important point about corroboration being a formal requirement—and the reason why I think that Malcolm Graham's response is somewhat disingenuous—is that, at the moment, a prosecutor will not prosecute and a judge or jury cannot convict when there is no corroboration. That is the precaution. The bill will allow a judge, jury or prosecutor to go ahead when there is no corroboration and there is the possibility of conviction with no independent evidence.

Furthermore, we all know—and prosecutors complain—that the pressure on prosecutors in sexual assault and domestic violence cases is very great. They are under great political pressures to prosecute every case. What will happen, and what the justice minister envisages will happen, is that in cases in which there is only one witness to that sexual violence or domestic violence, the prosecution will go ahead. Prosecutors will be instructed to do that.

That brings with it a danger of miscarriages of justice, so having the formal requirement does make a difference. As Pamela Ferguson says, if we take the words in Police Scotland's supplementary submission literally, there is going to be no change anyway, so why bother with it? That is not the message that we have been given.

Christian Allard: I want to hear from Professor Chalmers on the point because he said:

"While we express no view on the desirability of abolishing corroboration, we do not support the case made by the Carloway Review to justify this proposal."

Again, you are talking about abolishing corroboration, but it is clear that that is not what we are talking about.

The Convener: Well, we know that we are not talking about abolishing corroboration per se; the issue is that, at the moment, it is a mandatory requirement. That particular comment is, I think, just shorthand. We do not need to go through all this again, but I ask Professor Chalmers simply to confirm that he objects to the removal of the mandatory requirement for corroboration.

Professor James Chalmers (University of Glasgow): The idea of removing corroboration itself makes no sense; indeed, it cannot be done. Police Scotland's supplementary submission seems to suggest that there will be the possibility of corroboration and that it is not going to be abolished. It cannot be abolished unless we introduce a rule that prosecutions have to go ahead on the basis of one source of evidence. The defence that the bill does not propose the remove

of corroboration itself is simply nonsense and the committee should pay no regard to it.

Christian Allard: I am—

The Convener: Please let Professor Blackie speak, Mr Allard.

Professor John Blackie (University of Strathclyde): I want to make two points. First, in civil cases, in which the requirement for corroboration was abolished in 1998, there have been all sorts of changes in practice. One could not have predicted what those changes were going to be when it was introduced.

Secondly, it is important that requirements with regard to evidence—for example, the use of hearsay in criminal law—are stated as such because they then become part of what is sometimes called in academic literature the protections for an accused. There is a complete difference between practice—after all, you will not go ahead with cases that you do not think that you will win—and requirements. I have not yet said what I mean about that requirement or indeed what is desirable in that respect, but practice and requirements are different things.

Alison McInnes: I am glad that Christian Allard has mentioned this new and rather strange defence that has been flying around for the past week and which I think simply plays around with words and attempts to obfuscate the quite significant change in the law that is being proposed.

Last week, Shelagh McCall of the Scottish Human Rights Commission told us about concerns about miscarriages of justice, given that, once corroboration is removed, there are very few other safeguards in the system to allow a case to be thrown out of court. Does the bill contain enough additional safeguards to avoid miscarriages of justice?

Professor Fiona Raitt (University of Dundee): This is going to sound like a circular argument, but I think that the requirement for sufficiency of evidence is much more important than people have recognised or commented on.

Given the tendency of the legal profession and the judiciary to be quite conservative, they will not need to look very far in their interpretation of sufficiency to find that corroboration would actually provide it. Given the discussion that we have had, I suspect that we will come full circle on this matter and that, in cases involving sexual offences, domestic abuse, children and vulnerable witnesses in general, prosecutors and, in particular, juries will seek the security of something equivalent to corroboration to achieve sufficiency. Juries will be charged by the judge to find sufficiency of evidence, which can usually be found in two sources.

Professor Duff: Taking the broad view, I know that the five of us are not of one mind about whether corroboration should be abolished. I am on the fence myself.

The Convener: Are you finely balanced on it or tipping one way or the other?

Professor Duff: I am teetering at the moment.

The Convener: Which way?

Professor Duff: I do not know. It depends on the breeze. [*Laughter*.]

Coming back to the previous question, I think that this issue should be looked at. Indeed, the majority of the Carloway expert group, of which I was a member, said that the issue had to go to the Scottish Law Commission for a balanced consideration—

The Convener: That is an interesting comment. Were any of the rest of you on that group?

Professor Ferguson: No.

Professor Raitt: No.

Professor Chalmers: No.

Professor Blackie: No.

The Convener: Perhaps your membership should have been declared at the beginning of the session.

Professor Duff: I am sorry, convener—

The Convener: It is no fault of yours, Professor Duff—I believe that this is the first time we have heard about the group. Can you tell us a bit more about it?

Professor Duff: I know that the group's minutes have been made public because a student of mine found them on the web and wrote about them in their dissertation.

The vast majority of experts in the Carloway reference group wanted the issue referred to the Scottish Law Commission. I make that point because safeguards were the kind of thing that we wanted to be considered if corroboration were to be removed. Some of the people in the group were against the removal of corroboration per se; others, including me, were ambivalent. However, we all thought that, if we are to remove corroboration, we have to have a very good think about it and about what all the other safeguards are.

We have that one view and, of course, all the other judges disagree with it and again want the issue bumped to the Scottish Law Commission. I think that it is precisely what the Scottish Law

Commission should be looking at—what kind of safeguards we will have if we get rid of corroboration. Could we get rid of it? Should we get rid of it? Most other countries do not have corroboration; that is fair enough, but what other safeguards are there? We have to come up with the right balance.

The suggestion that has been made at the last moment—which seems to be rather plucked out of thin air—is that the required jury majority be changed from the bare majority, with no evidence to support whether that would make any difference and no detailed consideration of it. It is a suggestion that goes back to the Thomson committee in the 1970s, but there has never been any research on it or on its likely impact.

If the issue were to go to the Scottish Law Commission, it could have a detailed look at what other safeguards we might want, including the one that Fiona Raitt mentioned—would sufficiency ensure that someone would be protected from the very credible but lying witness?

Professor Ferguson: I agree with Professor Duff. If we think about why we are where we are today, it is because we ended up with the Cadder case, which led to the police having to have solicitors present when interviewing suspects. As a knock-on effect, it was then mooted that we should abolish corroboration, and as a knock-on effect of that, we are now thinking about changing jury majorities. It seems to me that this is piecemeal reform. No one is stepping back and taking a broad view of the criminal process, looking at the checks and balances and doing a proper comparative study with other jurisdictions.

Professor Blackie: We know that there are some wrongful convictions—there are wrongful convictions in any system, however perfect it is. However, we do not know how many there are, and nor do we know how many wrongful acquittals there are, by which I mean people who have committed an offence that cannot be proved.

One thing that is greatly lacking in Scotland is empirical evidence, which exists in other jurisdictions. In America, there is a mass of literature on the impact of various protections and non-protections being in place, on the ability of juries to detect unreliability in evidence—which is very low, according to psychological work—and on witnessing as well.

Here we are in Scotland, not having addressed any of that interdisciplinary research, and we have come up with one thought—that we get rid of something—when what is needed is to look at the system holistically. It may be that we would then come up with many other changes, which might include the removal of the requirement for corroboration.

Professor Raitt: To add to that, I was struck by a comment that the Lord Advocate made when he gave evidence. I did not read the comment in the *Official Report*, so I hope that this is correct.

The Lord Advocate gave the example of two women who, when they were young girls, were very seriously abused. The prosecution went ahead but, when it came to the moment of appearing at trial, one of the women simply could not do it. The Lord Advocate commented that that is the problem with corroboration. I was very struck by that, because that is nothing to do with corroboration. The question is: why did a woman not wish to give evidence in court? The answer is to do with the adversarial process rather than anything else.

That point adds to the case for a broadening out of what we are looking at to consider all the issues that feed into where corroboration plays a role in the system.

The Convener: We are also at stage 3 of the Victims and Witnesses (Scotland) Bill this week—that bill will have an impact on court process and on how victims and witnesses feel within the court process.

Alison McInnes: We have heard the cabinet secretary stress quite a lot that he wants to widen access to justice—that is how he explains it. What is the panel's view on whether the change on corroboration will result in more prosecutions but not necessarily more convictions?

Professor Chalmers: We have seen evidence—at least in the financial memorandum—from Police Scotland and from the Crown Office that suggests that they believe that there would be additional prosecutions. However, we know from evidence in other jurisdictions that it is difficult to get a conviction when there is no corroboration, so the ultimate number of convictions is unlikely to go up in that situation.

The danger with abolishing corroboration is unlikely to be that you would create a significant number of additional wrongful convictions; it is that you would let cases through the net that are really too risky to get to that stage. However, the effect on numbers is likely to be small.

10:45

The Convener: I raised a point with witnesses from Scottish Women's Aid about a risky prosecution failing and the accused being acquitted, and they took the view that the women would rather go to court. What do you say about that? I did not see court as therapy—if I can put it that way—but they felt that it would be better that women got to tell their story and that there would perhaps be a culture change in the judiciary and in

juries. Did you read that evidence? I would be interested in your comments.

Professor Chalmers: I cannot add anything to your own comments. There is difficulty with seeing court as therapeutic. That is not a view that is often expressed by people who have been through the court process.

The Convener: Does anybody else want to comment? Did you feel that there was merit in that suggestion?

Professor Ferguson: I have certainly heard people from Rape Crisis Scotland say that, although for some women getting the accused into court is a big part of it, the vast majority are really looking for a conviction. The danger with the bill is that expectations will be raised and people will go to the police and say, "I know it's just my word against his, but that's good enough now because there's no corroboration requirement," but it will not be good enough because juries will not convict.

The Convener: The conviction rate for rape is poor. It is about 50 per cent, I think—I will just check that by looking at a recent parliamentary question that I asked. The answer shows 41 per cent of rape cases result in a verdict of acquitted not guilty or acquitted not proven.

Professor Chalmers: Those are figures for cases that have already got—

The Convener: They are figures for 2011-12. I wanted to find out the difference. I think that there are more successful prosecutions in domestic abuse and sexual abuse cases, but rape has a poor conviction rate.

Professor Chalmers: Those are figures for cases that have already got over the corroboration threshold, in the view of the Crown Office at least, because they have been taken to court. Abolishing corroboration could not raise that figure at all. It might raise the number of cases taken to court, but it is impossible to see any way in which it could raise the proportion of convictions that result.

Elaine Murray: I will carry on with the theme. The rationale behind the proposal to abolish corroboration is the lack of ability to take certain one-on-one crimes, such as sexual and domestic abuse, into court. It has also been said that there could be a case for retaining corroboration but with some reform—for example, inclusion of the distress of the victim as corroborating evidence—or indeed that a definition of what might be considered corroboration would be helpful in assessing whether or not cases should be taken to court. What are your views on that? Should we be recommending further investigation of the case for reform of corroboration?

Professor Duff: Lord Carloway rightly identified one of the problems, which is that the law on corroboration is very complicated at the moment. The reason why it is complicated is that judges have, on occasion, tried to find a way around it so that they can open the way to conviction for those who they think are guilty. In fact, a victim's distress already can corroborate.

As Lord Carloway says, the problem is that the law has become so complicated that nobody really understands it properly. Judges continually try to define it and then finesse their definitions, so I do not think that defining it in statute would actually help. It would be almost impossible anyway, given how complicated the situation is. All that would happen is that the definition would get overlaid with another layer of case law and matters would come back to where they are now, with nobody knowing where they stand and it being difficult to predict whether there is corroboration.

If you were to simplify the definition greatly, there is a risk that fewer cases would get through the net. I am not sure what should be done about that, but again that is something that the Scottish Law Commission could perhaps look at.

Professor Chalmers: Can I disagree with that?

The Convener: You would not be academics if you did not disagree. In fact, you would not be lawyers if you did not disagree—and we would not be politicians if we did not disagree. [*Laughter*.]

Professor Chalmers: Students complain that we do not tell them the right answer because we do not agree.

The committee has before it supplementary evidence from the Crown Office giving a number of case examples. It gives five examples, although there are really only four, because number 3 is not an example at all.

What is significant about the examples is that none is a case in which there is no supporting evidence at all; there is always some supporting evidence thrown into the mix. I am surprised that in at least some of those cases the Crown Office does not believe that that evidence meets the legal requirement for corroboration, but that appears to be its view.

The Convener: For the record, what is the difference between corroboration and supporting evidence? You are saying that, in some of the cases, the supporting evidence could have been corroboration.

Professor Chalmers: Corroboration requires supporting evidence on all the essential elements of the crime and the fact of the accused being the perpetrator; it requires supporting evidence across the board. In some of the examples that the Crown

Office gave, I am not sure why it took the view that such evidence was not there.

What is significant about the examples is that the Crown Office is not seeking to persuade the committee that it really wants to bring single-witness cases; it appears to be seeking to persuade the committee that it wants to bring cases where there is supporting evidence. That might be achieved through clarification of the law on corroboration.

Professor Duff mentioned distress as corroboration. One of the problems with that, which is flagged up in one of the examples, is that the extent to which distress can corroborate is limited; it can corroborate certain things but not others. That issue could be looked at.

The second thing I wanted to pick up on is the argument that corroboration is complex and that that might be a legitimate reason for thinking about abolishing it. We ought to remember that systems that do not have corroboration will safeguard against wrongful conviction through a wide range of different measures that are designed to prevent it. In the aggregate, those measures might turn out to be as complicated and confusing as corroboration itself. It is not clear that a system without corroboration is necessarily simpler.

The Convener: Professor Duff, do you wish to retaliate?

Professor Duff: No. I agree with much of what James Chalmers said. To try to define corroboration absolutely would be very difficult, although it could perhaps be defined more simply. As James said, once you start putting in place other mechanisms, you would get arms and legs growing and you would probably end up with as complicated a system.

I would not say that corroboration should be abolished just because it is complicated; it is complicated, but all evidentiary doctrines are complicated. I am not sure that one can really address it in an atomistic way—that goes back to Professor Blaikie's point about a holistic view—without looking at the overall context.

The Convener: Is it Professor Blaikie or Blackie?

Professor Blackie: It is Blackie. Blaikies live in the north-east of Scotland; Blackies live in the south.

Professor Duff: Sorry.

The Convener: I got the University of Dundee wrong earlier, so you can get something wrong as well, Professor Duff. [*Laughter*.]

Professor Blackie: There are complexities and the explanation given is absolutely correct that judges have acted to water down corroboration in cases where it has got in the way. I rather suspect that the routine cases that come up day to day do not feel terribly complex. The complexity is perhaps with circumstantial evidence, rather than the paradigm of two witnesses.

On thinking about tweaking corroboration, there are quite a lot of jurisdictions around the world that have half-way houses. For instance, in South Africa there has to be corroboration of confession evidence. In some places, the requirement applies to an extraordinary range of different crimes, ranging from perjury through speeding to feigned marriages. I am not terribly keen on those examples.

More important are examples of jurisdictions where warnings are given. The difficulty with that, however, is that, if the warnings are discretionary, they depend on the judge's understanding. Also, they only bite at the end of the trial, so they have no effect on the wider criminal justice process that starts with police work.

Those examples simply have not been looked at, and I do not have a firm view on them, either. I can see a ground for applying corroboration to certain serious crimes or crimes that are tried before juries only. There are all sorts of permutations, which is a reason in itself for having a holistic, wide, in-depth look at the whole system. The Scottish Law Commission is the obvious place to do that.

Alison McInnes: Professor Chalmers, you referred to the examples that the Lord Advocate gave and said that you were surprised that some of them had not made their way through to the courts. The Crown Office and Procurator Fiscal Service has recently rearranged how it deals with some cases and has specialist markers. Would not that assist in understanding? Professor Duff said that the process is very complicated, but a specialist marker for particular types of cases would make the process more efficient and easier to understand.

Professor Chalmers: Yes. I am absolutely sure that that is correct. My understanding of the examples that the Crown Office provided is that they are not real examples in that they have been anonymised and some details have been changed, so they might not really be cases that did not go through. In fact, it is clear that they are not cases that did not go through in that form.

I am concerned that we are not getting examples of real cases—albeit with anonymisation—and that details are having to be changed. That might be being done only for the purpose of anonymity, but it is impossible to tell.

Professor Duff: I agree that specialist markers might well help, and they might be able to spot that there is a possibility of corroboration when a

less experienced marker would not. However, the danger, as I alluded to earlier, is that there is a great deal of political pressure on the Crown Office to prosecute all sexual offence cases. However specialist the markers are, they will be aware of the pressure that they should prosecute all rape cases. They are already aware of the pressure in respect of domestic violence cases. They complain constantly about having to prosecute what they regard as minor, trivial cases. They might be wrong or they might be right, but that is the pressure that they feel. I think that if corroboration goes, they will feel the pressure to prosecute all sexual offence cases regardless of whether supporting evidence or corroboration exists, which brings with it the danger of miscarriages of justice.

Elaine Murray: The change in the jury majority was mentioned earlier. Was there a debate in the round at the Law Commission about what would have to be done if the requirement for corroboration is abolished? What other factors should be taken into the discussion? What other safeguards, if you like, ought to be considered in conjunction with any consideration of abolishing the requirement for corroboration?

The Convener: I think that we are asking you to write the remit.

Elaine Murray: Just briefly.

The Convener: Yes, a brief remit; a few bullet points.

Professor Chalmers: I think that the committee has already had some written evidence on that from Professors Ferguson and Raitt, as well as from me. A possible remit for the Law Commission might be for it to consider generally what safeguards would require to be put in place if corroboration is abolished, and possibly whether a package of such safeguards would be preferable to corroboration or whether retaining corroboration would be preferable.

The Law Commission or another body could consider conviction on particular forms of evidence, such as dock identification, anonymous witnesses or hearsay evidence; the majority jury verdict; and the power or lack of power of a judge to withdraw a case from the jury. That is not a comprehensive list, so there might be other things to consider.

Professor Blackie: The Law Commission might want to look at the educational side of it. One thing that has been mooted is that experts could assist in instructing juries on the dangers of eye-witness identification evidence. There are problems with that and the courts are currently not happy about it. There is also the issue of police practice; for instance, in England, under the Police and Criminal Evidence Act 1984 codes of practice, the whole process of questioning suspects and other people is much more regulated than it is here. I am not saying that that is necessarily a good thing, but there is a big agenda there as well.

Professor Duff: That is the Scottish Law Commission tied up for five years already.

The Convener: Lord Gill told us that it would be a year, tops.

11:00

Professor Raitt: A difficulty that some people have alluded to in other papers is how evidence is or is not gathered in cases in which corroboration is difficult, such as sexual and domestic abuse cases. I know that the women's groups often feel that, especially when they have been working with women who have survived an attack, a lot more evidence could have been or might still be capable of being accessed that is not always followed up. That is very much a police practice issue and might not be one that you want to explore, but it should not be ignored. If the evidence is not gathered early on, it will not be there at a later stage.

There is—I think that everyone will subscribe to this—excellent practice in the sexual assault referral centres. There is a SARC in Glasgow, and one was to be set up in Dundee, but I do not think that it has got off the ground yet. They have a clinical, medical method of collecting evidence, which makes the process of the medical examination much more conducive, and women are more willing to consent to it happening. A great deal of therapy can go on with that at the same time, which would not happen in a usual examination at a police station. There are lots of small things that could make a difference.

The Convener: That is interesting. The Victims and Witnesses (Scotland) Bill also deals with gathering medical evidence and determining the sex of the doctor who will examine a person, in so far as that is practicable.

Professor Raitt: Yes.

The Convener: We have heard little bits from everybody, apart from Professor Ferguson. Do you wish to say anything? You do not have to.

Professor Ferguson: The more we discuss the issue, the more we seem to be saying that the consequences that we are hoping for are unlikely to be achieved. In those sexual offence cases in which it is the word of the complainer against that of the accused, getting rid of corroboration will not help. Moreover, doing so will be dangerous in cases involving confession evidence and fleeting-glance eye-witness identification, which are notorious in every jurisdiction for miscarriages of justices.

If a witness is positive in their identification of the person who attacked them, it is very hard for a jury to ascertain whether they are correct. The witness might genuinely believe that they have identified the correct person, but they could well be mistaken. The Innocence Project in the United States of America has found that the major source of miscarriages of justice in that jurisdiction is a witness who is convinced that they have pointed to the perpetrator but who is shown later to have been quite wrong about that.

The Convener: Perhaps the panel can assist the committee by providing a general view of the time between a crime and when a case goes to court. The time between a crime and when the alleged victim identifies someone might be very long, and is even longer by the time they get to court. Will you give us some idea of the difficulties regarding the timeline for identification of the accused, which I think can be substantial?

I am looking for help and I am not getting any.

Professor Chalmers: A criminal trial can take place, especially in a summary case, well over a year after the incident took place. The committee can judge itself how difficult it is to remember faces a year after the event. We cannot offer special assistance on that.

A few moments ago, I referred to evidence from Professors Ferguson and Raitt when I should have said that it was from Professors Ferguson and Davidson. I mention that to be fair to Professor Davidson, who is not here.

Professor Blackie: A lot of psychological work has been done—principally in America, but some has been done in England and there is some foreign language stuff, too—to try to structure those issues, which we all feel intuitively. Broadly, in the first place, there are problems about the perception of one's witnessing, remembering—the storing of the memories—and recall. At each stage, there is a danger of distortion. Although that is common sense, it is structured common sense, and plenty of evidence exists about that. The American literature is quite striking on the high levels of inaccuracy. After a year, it is as high as 40 per cent in some cases.

Professor Ferguson: The issue is compounded in our jurisdiction because we allow dock identification, which many jurisdictions do not. It is perfectly possible for a witness to say to the police that they think that they might know the person again in court, assuming that they will be asked to point the finger in a couple of weeks. However, as James Chalmers said, when, a year down the line, they are in court giving evidence and at the end the prosecutor asks them whether they can identify the person whom they have spent the past hour and a half telling the court about, there is huge pressure on the witness to look at the person in the dock and say, "It must be him."

That definitely occurs. I was briefly a prosecutor about 20 years ago and I have seen, first hand, witnesses who, when asked to identify the accused, say, "It's that person there," and point to the person who happens to be sitting in the dock.

The Convener: Mercifully, they do not point the finger at the judge. That would be intriguing.

Professor Blackie: It has happened.

Professor Ferguson: Usually, with a bit more probing—

The Convener: Has it happened? Excuse me a minute, Professor Ferguson. This is interesting.

Professor Blackie: It happened to me. I was an advocate for a very brief period, donkeys years ago, and it happened.

Professor Chalmers: Was the judge convicted? [*Laughter*.]

Professor Blackie: It was a sheriff, and no.

The Convener: So when asked to identify the person, the witness pointed to the judge. Oh, heavens. Did the judge acquit himself?

Professor Blackie: The case fell apart. [*Laughter*.] I was prosecuting, in the new Kilmarnock sheriff court.

The Convener: Professor Ferguson, please go on. I am sorry.

Professor Ferguson: I was just saying that usually, with careful probing, it is possible to get the witness to admit that they are pointing the finger at an individual because that individual is sitting in the dock. However, when the accused is unrepresented, it is easy to take what the witness says as ticking the identification box and then just to move on to the next witness.

Professor Duff: John Blackie is right to point to the wealth of social psychological research on the matter and the results of that research. What is striking is that although our common sense tells us that identifications that happen two, three or six weeks later, or indeed three months or a year later, are bad—we know that—the research indicates that the situation is much worse than a commonsense approach would suggest. We are much less reliable than we think we are, even when we think about the matter sceptically and objectively. That is often not realised.

Professor Blackie: That means that when we sit as juries or, indeed, judges—as fact finders—we come from an overoptimistic view about identification.

The Convener: I got a bit distracted by your story about the judge being identified, I must admit. We will not identify the judge in the case—that would not be appropriate. It was an interesting diversion for us though. We will move on.

Margaret Mitchell: The motivation for the proposed change seems to be to address low conviction rates for certain interpersonal crimes such as sexual assault and rape, on the basis that corroboration is the barrier. As we heard from Professor Chalmers, that does not explain why cases that pass the corroboration threshold are not resulting in convictions.

It seems to me that we should be looking more at court practice. I am interested in Professor Raitt's suggestion that the complainer in a rape or sexual assault case should have legal advice. Women's groups have told us that there is sometimes a problem with inbuilt prejudice in juries, which must be overcome. In the current financial climate, the prospect of that is nil. However, as the convener said, the Victims and Witnesses (Scotland) Bill is going through the Parliament, and an amendment to the bill has been lodged in advance of stage 3—

The Convener: Is this a trail? Is it your amendment?

Margaret Mitchell: Yes, it is.

The Convener: Ah, there is a surprise.

Margaret Mitchell: The idea is that rape victims would be given legal advice about whether to give permission for their medical records to be used, to ensure that victims are a bit more careful about exactly what they give permission for. Very often, the whole medical record is accessed, and things that are totally irrelevant are brought up in court, to discredit the complainer. Would the approach that I have proposed help with conviction rates? It could be piloted relatively cheaply and put in place pretty soon.

The Convener: Professor Raitt, I think that Margaret Mitchell is looking for a quotation in support of her amendment—I can see that you know that; it is written all over your face. I think that we can talk more broadly about court process and procedures.

Professor Raitt: I will not comment on the specific model that Margaret Mitchell suggested—

The Convener: I knew that you would not do so.

Professor Raitt: I have written about a possible model. The approach builds on the type of model that is available on the continent and, most important, is available in other adversarial jurisdictions. Ireland and Canada are the two main examples, but I suppose that England is also an example to some extent, because it has piloted voluntary sexual violence advisers—I think that Rape Crisis Scotland is trying to do the same thing. Of course, voluntary advisers are not legally qualified.

It is thought that women who know their rights in relation to access to their medical and sensitive records and in relation to sexual history evidence, and who therefore do not just assume that the Crown will defend their privacy rights, are in a much stronger position in respect of the evidence that they are able to give when they are cross-examined on what is in their records or on the facts of the case that is being prosecuted.

The evidence from the large studies that have been done, mostly in European countries, shows that women feel a lot more confident and are more willing to discuss intimate and difficult matters in court if there is someone there whom they know, who has been supporting them and who will object if anything inappropriate is mooted.

The difficulty is that although we always hear that judges have a role in intervening when witnesses are being pushed and they feel that they are being given a really hard time, judges are reluctant to intervene. Some time ago, I did a study with judges and when I asked about that, they all said, "We have to be very careful if we intervene because it could lead to an appeal." They are put in a difficult position. Without that, we only have the Crown trying to do all the things that it has to do—to ensure a fair trial, look after the rights of the accused, prosecute in the public interest and, somewhere, look after the complainer's rights.

We are in a problematic position in relation to the Human Rights Act 1998 if we do not recognise that women may need independent advice. In the particular situation of a rape case, the focus is on them, and it will become more so if corroboration goes. Juries tend to find it difficult to know what to do in a he-said-she-said situation, so independent advice could help.

Professor Duff: Margaret Mitchell is right. We have to look at the broader court procedures. We know that the conviction rate in rape trials in other jurisdictions that do not have the corroboration requirement is similarly bad, so it is nothing to do with corroboration. It is about court procedures.

Comparative research could be done to look at what is done elsewhere. I am aware of the cost issue but, if I recall correctly, the number of rape trials in Scotland last year was under 100. There would be a cost, but it would not be huge if you restricted the legal representation to rape trials, as Fiona Raitt has argued elsewhere.

The Convener: I have the figure. In 2011-12, there were 75 trials.

Professor Duff: Okay, so we had an advocate or a solicitor representing the woman complainer in 75 trials. That is a cost, but it is not a huge cost.

Professor Raitt: I add that it would not be for the whole trial, if we followed the models of other countries.

The Convener: Does anyone else want to comment? Margaret Mitchell does—good try, Margaret.

Margaret Mitchell: I was going to say, "Given the complexity of the matter", but it is not necessarily complex. On the point about efficiency, I think that the stuff that has been going round about the quality of evidence is a total red herring. If there is more evidence, that will surely only help to prove the case.

Given that there has been such confusion, not least last week, when we heard depressing evidence from the police, is it the panel's view that the issue should be taken out of the Criminal Justice (Scotland) Bill and looked at either by the Scottish Law Commission or by a royal commission, where a panel of experts could look at it in depth and deliver some findings perhaps faster than the Law Commission could?

Professor Duff: Yes.

Professor Ferguson: Yes.

Professor Raitt: Yes.

Professor Chalmers: Yes.

Professor Blackie: Absolutely.

Margaret Mitchell: Thank you for that.

The Convener: There was a chorus there, although not in song—well, it is Christmas, after all.

I call Sandra White, to be followed by Roderick Campbell.

Sandra White: Thank you, convener, and good morning—

The Convener: Oh, wait a wee minute. John Finnie was slow to wake up. He has a supplementary question.

John Finnie: The policy memorandum, which the layperson is perhaps more inclined to go to, states at paragraph 130:

"The policy objective is to remove the requirement for corroboration in criminal cases".

That is the very clear statement that the Government makes. On the issue that my colleague Margaret Mitchell raised, it states:

"the Scottish Government considers that Lord Carloway's recommendations are intended to be implemented as a coherent package, and by failing to implement a significant aspect of the recommendations contained in his report, there is a very real risk of undermining Lord Carloway's stated aim of ensuring the justice system is appropriately balanced."

That is in the section of the policy memorandum on corroboration. Do you—

The Convener: You are on camera, Professor Duff, and you are grinning, so you had better answer that one.

John Finnie: My reading of that is that the recommendation to refer that aspect to the Scottish Law Commission puts the rest of the bill in jeopardy. Do the witnesses have a view on that?

Professor Duff: My view is that it absolutely does not. It is only one substantive section and two other little sections of the bill. The main thrust of the Carloway report and the main thrust of the bill is to cope with Cadder, new arrest procedures, new representation at police station procedures and so on—that stands alone. The removal of the corroboration part would make no difference to the rest of the bill in my view.

11:15

The Convener: Given your disclosure that you want the issue of corroboration to be referred to the Scottish Law Commission, were the rest of you on the review panel happy with most of the other issues?

Professor Duff: There was more or less general agreement to the rest of the package.

Professor Chalmers: Not only do I not believe that, but I do not believe that the Scottish Government believes it either.

The Convener: Can you take that past me again? I do not believe that you do not believe that I do not believe? That is one of those—

Professor Chalmers: Yes; exactly.

The Convener: What exactly do you not believe?

Professor Chalmers: The Scottish Government has not taken forward all the evidential recommendations in Lord Carloway's review. Lord Carloway made specific recommendations on the admissibility of confession evidence that the Government decided could be left out of the Criminal Justice (Scotland) Bill without destroying the "coherent package" that has been referred to, so the suggestion that the corroboration requirement cannot be taken out because it is all or nothing is not one that the committee should be persuaded by.

The Convener: I followed that.

Professor Ferguson: The jury verdict change is also not in the package as I understand it. The

package is a moveable feast, to mix some metaphors.

The Convener: A package that is a moveable feast. That does not displace my moment of the day, which was the case of the judge who was pointed at when the witness was asked to identify the accused. I wish I had been there. John Blackie was the defence at the time, I take it.

Professor Blackie: Yes.

The Convener: You would not have been very happy. [*Laughter*.] Anyway, we should get back to business. I digress.

Sandra White: I would like to go over some issues in order to clarify where we are. We have established that the bill is not about abolishing corroboration per se, but is about removing the mandatory requirement for corroboration. We established that in last week's evidence, when the convener said it.

The Convener: That is long since gone. We are all clear as a bell about that.

Sandra White: There is a second point that we all seem to agree on. In his submission, Professor Duff said that the corroboration

"requirement has been so 'watered down' over the years, principally by judges"

that it is

"not nearly as strong a safeguard against wrongful convictions"

as was previously claimed.

Professor Duff also said—I am quoting; I am not saying this—that

"Additionally, the 'fiddles' that judges have created to get around corroboration have led to a confusing, illogical and inconsistent set of evidentiary rules which practitioners, including judges themselves, often have great difficulty in applying."

If that is absolutely true and if, as Professor Ferguson said, there is a tick-the-box approach to dock identification, why is corroboration so important? Why is it the be-all and end-all? It is not in other jurisdictions, which have other safeguards. Why do academics including you, judges and so on say that we cannot get rid of corroboration? We have talked about victims, people who experience miscarriages of justice and the accused, as Professor Blackie mentioned. Why is there a big difference between academics, judges and lawyers, and victims, who feel that 3,000 cases of domestic abuse, rape and so on are not being heard because they do not meet the specific requirement?

Professor Duff: I will go first, because you quoted me. As I said, I am on the fence about corroboration. It is not the absolute guarantee against miscarriages of justice that it is often thought to be, because judges have been forced to water it down in order to secure or to open the door to convictions where they think that that is necessary. However, it still has some value in preventing miscarriages of justice.

I am not against getting rid of corroboration, although some of my colleagues may be. It is an important part of the Scottish criminal justice process—I will avoid the word package—and the collection of protections that are there for the accused.

If you are going to get rid of corroboration—which, as I said, I am quite open to—you have to think more holistically, as John Blackie said, about other protections that you might need to put in place. You need to examine other systems that do not have corroboration to see where to strike the balance between the right of the victims of an offence to expect a prosecution, the rights of the accused and, in fact, the rights of all of us not to be convicted wrongfully of a crime that we did not commit. All I am saying is that one has to have a proper look at this. We are not convinced that the Carloway review looked at the matter in the round.

Professor Chalmers: I do not want to put words in my colleagues' mouths, but I am not sure that any of us would say that a criminal justice system "requires" corroboration. Clearly it does not; many systems around the world do not use corroboration. However, where the system of protecting people against wrongful conviction has been built around the corroboration requirement, you cannot simply withdraw that requirement and put nothing in its place. It is the foundation of the system that we have built up over the years. I appreciate the concern about victims not having cases brought to court, but it is in no one's interests—victims or anyone else—to have a system that wrongfully convicts people for crimes of which they are not guilty.

Professor Blackie: We were talking earlier about the conviction rate in sexual offence cases. However, the bigger social problem is not the conviction rate but that many, many more sexual offences do not go to court. It might be thought that by abolishing the corroboration requirement, that will change. In my view, it will not, and there are other matters that we probably ought to be looking at urgently with regard to that whole area. The situation is deplorable, and I would be very worried if abolition of corroboration was being seen as a quick fix—which it would not be—to a serious social and justice problem.

Sandra White: Thank you for your comments. Professor Chalmers mentioned wrongful conviction. However, it is wrongful for victims, too, if evidence does not meet the criterion.

Safeguards have been mentioned, and the committee has been considering that issue. The panel mentioned a number of them, such as jury size and the issue of distress. Have any of you, as academics, been asked by the Government, the Law Society or anyone else what safeguards you would put in place?

Professor Duff: We have been asked here to give some ideas.

The Convener: I asked for a remit.

Professor Duff: As I said, I was on the Carloway expert reference group. One of the reasons, among many others, why I was there was to talk about that issue.

To follow up Professor Blackie's point, there is another side to the coin. We are perhaps focused unduly on wrongful convictions—we talked about it earlier. The problem is that if a lot more prosecutions fail, we do not know what will be the impact on the victims; they may be very disappointed. We all appreciate that court can be a terrible ordeal for victims but, as we have seen, removal of corroboration would do nothing about that. They may go through that terrible ordeal and end up with the accused getting an acquittal, which the victims might see as a slap in the face—the jury not believing them—which would make their situation worse. One of the problems is that an increase in prosecutions—which clearly the Crown wants—may result in an increase in acquittals and more unhappiness on the part of victims so, rather than resolving the problem with a quick fix, the Government would have succeeded in making the problem worse.

Sandra White: I do not think that I have a right to tell a victim that they cannot be heard in court and that their case cannot go forward. I cannot see into the future and know whether victims will feel better or worse. We should not assume that if there is an acquittal, every victim will feel bad about it. We should perhaps look at some of the positives. Rape Crisis Scotland and others said that it might be worse for victims, but others said that victims might feel better.

We should get this right and make it clear that going to court is not always a negative thing. People's experience can be positive, because they feel able to tell their story. They might not be believed, but at least victims would feel that there had been some justice.

I am sorry, convener. That was a statement rather than a question.

The Convener: The simple point is that we do not know. As we have thoroughly aired the issue, we shall move on. Roderick Campbell is up next.

Roderick Campbell: Good morning. What are your views on the new prosecutorial test and the evidence that was given by the Lord Advocate on 20 November on the Crown's general approach to evidence and the need for supporting evidence before reaching a view as to whether there would be a reasonable prospect of conviction?

Professor Chalmers: The test that is outlined in the Crown Office's evidence is sensible; indeed, it is probably the only test that could have been proposed in the absence of corroboration and is consistent with what happens south of the border in England, where corroboration is not required. However, it would be wrong to suggest that it offers additional safeguards. All it does is ask the question that the prosecution would have to ask in the absence of the requirement for corroboration.

As for the need for supporting evidence, I do not understand the position that there should be no requirement for supporting evidence but that, without it, prosecutions will not go ahead. That is simply incoherent.

The Convener: Incoherent. That is a wonderful word. Does anyone else wish to comment?

Professor Duff: I agree entirely with Professor Chalmers. Just as people have objected to the removal of corroboration without its being given sufficient thought, those who are in favour of retaining it keep changing their arguments and have found themselves in some very inconsistent positions. As we have said, we are not clear about the difference between corroboration and supporting evidence. If we do not need corroboration but need supporting evidence, one has to ask what that supporting evidence is. Actually, it is simply corroboration by another name, which is the position in most other jurisdictions. In short, therefore, my answer is yes—the position is incoherent.

Roderick Campbell: The bill makes no provision for any additional safeguards, for want of a better word, in relation to summary cases—which of course make up the majority of criminal cases—if the mandatory requirement for corroboration were to be removed. Do you have any comments about that?

Professor Ferguson: One might argue that if corroboration is to be abolished it should be done for summary cases; after all, although they form the bulk of the work of the courts, the stakes are not as high as under solemn procedure. I find it more worrisome that someone could be convicted of a very serious offence under solemn procedure without corroborated evidence. Again, a law commission or expert body could consider whether there is an argument for taking a more nuanced approach and saying that some crimes or forms of evidence need corroboration, instead of its simply being abolished across the board.

Professor Duff: As Professor Ferguson said, the stakes in summary cases are not as high. The other point to make is that decisions about guilt or innocence in such cases would be made by sheriffs, who are experienced lawyers and who will—we assume, perhaps without justification—be well able to see the failures in witness testimony and realise that witnesses who have come across as being credible are actually not. Because sheriffs will be more aware of such dangers, the real danger is that a jury will be taken in, as it were, by a very plausible witness who presents well in court but who is simply not telling the truth. A sheriff is less likely to be taken in by that sort of witness.

Professor Blackie: Of course, not all summary cases are presided over by sheriffs; some are presided over by justices of the peace. One might consider whether, in such cases, it would be better to have three justices instead of one.

The other issue is the use of resources in small cases. As the Carloway report points out, the police do not devote a lot of resources to getting corroboration in summary cases for the very obvious reason that, as has been pointed out, there is such a huge number of them. That, again, might be an argument for taking a different approach to summary cases.

Professor Chalmers: Anecdotally, a number of sheriffs have said—I think that one went to print with an example—that they have heard summary procedure cases in which they found a first witness's evidence to be persuasive and convincing and would have been prepared to convict based on that evidence. Only when a second witness gave evidence did they realise just how shaky and unreliable the prosecution case was, and that the standard of proof beyond reasonable doubt had not been met. If corroboration were abolished, I would be surprised if the Crown would continue to call such second witnesses.

11:30

Roderick Campbell: I am conscious of the time, so I will move on to a question about the Scottish Law Commission's role. I recently took the opportunity to review my book collection and came across Professor Raitt's excellent book on evidence—I think that it is a 1990s edition. In it, you refer to the background to the abolition of corroboration for civil cases and the fact that a 1965—I think—Scottish Law Commission report recommended abolition of corroboration across the board for civil cases. However, there was a political row that led in 1968 to the abolition of corroboration only in personal injury cases. Can we deduce from that that reference to the Scottish Law Commission is not necessarily the answer to all our problems?

Professor Raitt: I suppose that that must be true. The composition of the Scottish Law Commission changes, and most people have quite firm views, one way or another, on corroboration. Perhaps Peter Duff and I are no different; I, too, feel pretty much that I am on the fence in that I do not think that a great deal will change if corroboration is abolished. I may be completely wrong about that, but I think that the pull of relying on familiar culture will mean that we will not see a great change. However, I may be wrong; let us not put any money on that.

To answer the question a bit more fully, I think that the Law Commission would welcome the matter being referred to it. I am sure that it must feel that it was extraordinary that its "Report on Similar Fact Evidence and the Moorov Doctrine" came out at the time when the Carloway report came out. I suppose that the two had not really been speaking to each other because of events, but it seems to me that that very important Law Commission report got buried in respect of the media attention that it received and of attention to it in literature. A referral back so that the matter could be opened up in a wider context seems to me to be a much more sensible way forward.

Professor Blackie: I recently read the *Hansard* debates on that early legislation. Things have changed a great deal. That was the first-ever piece of work by the Scottish Law Commission. In its preliminary work—it was called "the memorandum" in those days—it recommended abolition of corroboration in personal injury cases but in the report, which was extremely brief, that suddenly changed to abolition of corroboration in everything. The proposals were introduced in the House of Lords, and Lord Reid was a Scottish judge there—they were political in those days, of course. Basically, the proposals were ripped apart because of that. All the research on the suggestion had been done in relation to personal injury. I honestly do not think that that example is a good guide as to what would happen today.

Roderick Campbell: Okay.

Professor Duff: It is interesting that it was thought appropriate, in order to get rid of corroboration in civil cases, to refer the matter to the Law Commission for its due consideration. It has always been accepted that corroboration in criminal cases is more important, which is why it has remained. Therefore, it seems strange that where removal of corroboration would be less important, the matter goes to the Scottish Law Commission for full consideration, but where removal of corroboration is more important, it does not.

The Convener: Are you finished?

Roderick Campbell: I would like to wrap up generally.

We have touched on the safeguards a couple of times this morning, but no one has really been drawn on the matter. Is that because you feel simply that the bill is misconceived? Why will you not be drawn on the question of what safeguards could improve the bill?

Professor Chalmers: Safeguards could not be dealt with adequately during the passage of the bill. The question is very complex and would require extensive comparative research. That could be done quite quickly—I do not agree with Professor Duff that it would tie up the Law Commission for five years—but the matter could not be dealt with by way of amendment to the bill.

The Convener: Were you being frivolous, Professor Duff?

Professor Duff: I was being frivolous.

The Convener: Can you amend what you said? How long do you think such work would take?

Professor Duff: I renege on my previous comment.

The Convener: Are we talking about a year? It is a serious point.

Professor Duff: How long did the SLC's report on similar facts and previous convictions take? I think it was a couple of years.

Professor Raitt: Yes.

Professor Duff: I think that a couple of years would be a realistic time.

The Convener: Do the other panellists agree?

Professor Chalmers: It could possibly be done a little quicker than that, but it would depend on the Law Commission's other commitments, on which I do not have information.

Professor Raitt: It struck me when looking at the options on safeguards that that is where we would see the interconnectedness of the rules of evidence unravelling. For example, hearsay evidence might become more important as part of the supporting evidence, which could be a disaster because the rules for hearsay evidence are even worse than those for corroboration.

The Convener: Yes. I remember doing essays on hearsay way back in the mists of legal time.

Michael McMahon is giving evidence next on his member's bill. I know that this is the tail end of this evidence session—do not look at the clock. Could the panel comment on the advantages and disadvantages of the three-verdict system, on whether abolition of the not proven verdict should be considered, and on what would be the most appropriate time for such abolition? I know that the Government is considering referring the matter to the Law Commission. Professor Duff is a man who gets into the fray.

Professor Duff: I have written about the not proven verdict in the past and said that it should be abolished. That has been considered at least twice in the past 20 years. However, for reasons that are not clear, it has been kept; it is probably because of a historical fondness for the fact that it is very different. To me, though, the presumption of innocence leaves no room for the not proven verdict. In a trial, someone is either found guilty or the presumption of innocence means that they must be found not guilty. There is no room for a kind of second-class acquittal that states "Well, we're finding you not guilty, but we'll leave you with a bit of bad press hanging around your name."

The Convener: What should be the route for abolishing the not proven verdict?

Professor Duff: I would be quite happy for it to stay in the bill, although it has come in by complete accident. However, it has been considered often enough before. Frankly, I do not think that it is important enough to go to the Scottish Law Commission.

The Convener: That provision is not in the bill.

Professor Duff: Is it not?

The Convener: It is in a member's bill.

Professor Duff: Right—it is in Michael McMahon's Criminal Verdicts (Scotland) Bill. I thought that it had been put into the Criminal Justice (Scotland) Bill along with the provision on changing the majority verdict, but I acknowledge that it is a separate matter. I would just treat it as an issue on its own merits, then.

Professor Ferguson: I agree that the not proven verdict does not need to go to the Law Commission and that it should be abolished. The biggest problem with the verdict is that jurors are not told by judges what it means specifically. When we talk to first-year law students about what the not proven verdict means, quite a number of them assume that it means that the Crown has not established the case beyond reasonable doubt and that therefore there is a kind of hung trial, which means that the jury could not make up its mind and the Crown could have another bite at the cherry. That is quite wrong. People do not appreciate that the not proven verdict is the same as a not guilty verdict. It is a historical anachronism and we should get rid of it.

The Convener: I am asking you to consider the impact on abolishing the requirement for corroboration of absorbing into the bill the abolition

of the not proven verdict. Is that one of the other things in the mix? Could it be done separately?

Professor Ferguson: It could be done separately; in my view, the two proposals are unrelated.

The Convener: That is fine.

Professor Raitt: I agree that the not proven verdict should go because it does not add anything.

Professor Chalmers: If juries are doing what they are asked to do—we must assume that they are; if they are not, we have other serious problems—then they must consider whether a case is proved beyond reasonable doubt. If so, they convict. If not, they do not. If they do not convict there is then the question of what acquittal they reach. On that basis, abolishing the not proven verdict would make no difference whatever. I agree that there is absolutely no reason for it to go to the Law Commission, and I cannot see any rational reason for retaining the verdict.

Professor Blackie: Another reason for abolishing the not proven verdict is that only about 10 per cent of acquittals are based on not proven verdicts, so it is not very common. Historically, it might have been better that we had the two verdicts of proven and not proven; there was no emotionally loaded language. We have the not proven verdict because that is what we had before the middle of the 18th century.

The Convener: The number of not proven verdicts is quite high in rape cases.

Professor Blackie: It is correct that the proportion is higher in rape cases than in others.

The Convener: It is 20 per cent.

Professor Blackie: Yes. It is interesting that the percentage is out of line in rape cases, which obviously says something.

The Convener: Yes.

Professor Blackie: In my ideal world, we would have two verdicts—proven and not proven—with no emotive language attached. It is has been well charted that the not guilty verdict came about by historical accident in the middle of the 18th century when a jury asked whether it could follow the English approach and bring in a verdict of not guilty, so it is anachronistic. That is particularly the case now that we have abolished the double jeopardy rule, which means that there can be retrials.

The Convener: Yes. Thank you very much, panel. I am glad that we managed to have that discussion, which Michael McMahon can hear about in the next evidence session.

11:39

Meeting suspended.

11:47

On resuming—

The Convener: I welcome to the meeting Michael McMahon MSP, who, as members will know, has just introduced his Criminal Verdicts (Scotland) Bill. We will be scrutinising Mr McMahon's bill at a later date, but there is some crossover between his bill and the Criminal Justice (Scotland) Bill and it will be useful to hear his views.

Given that I do not know how many parts your bill has, Mr McMahon, it would also be useful if you could explain what it does. As you will know, the previous panel endorsed the abolition of the not proven verdict. There you are, then—you start from a very good position.

Michael McMahon (Uddingston and Bellshill) (Lab): I certainly welcome that support, which is in line with the support that I received for the bill in general.

The bill, which has two main provisions and runs to only a page and a half, is very simple and will not be the most technically demanding piece of legislation that a committee has ever considered. Section 1 removes one of the acquittal verdicts, while section 2 amends the size of the majority in juries. In the responses that I received on that matter, some pointed out that there was no correlation between juries and the removal of the second acquittal, while others argued that, for a variety of reasons, it was important to take such changes into account. I am happy to explore those issues if members wish to fire questions at me.

The Convener: Indeed. Questions, please.

John Finnie: Is public perception an important part of your motivation for introducing the bill, Mr McMahon? I should also say that I share your view on the matter.

Michael McMahon: It is important. We need to have confidence in our judicial system and I believe that the third verdict is illogical and creates confusion. Sheriffs in our courts are not allowed to explain to the jury what the verdict means; in fact, when they have done so, it has led to action being taken against them and cases being reviewed. The verdict itself is set out only in common law, not in statute. That is creating confusion and we need to get clarity into the system so that people can have confidence in it.

That is why section 2 of the bill is so important. People need to have confidence that a jury has considered the evidence and found, one way or another, beyond a reasonable doubt. A simple

majority leaves that question hanging. As the responses to my consultation made clear, the fact that very serious cases can be concluded one way or another on a straight majority needs to be looked at.

John Finnie: How would the two new verdicts be styled? I do not know whether you heard Professor Blackie's comments on the matter.

Michael McMahon: I did not, but in my consultation I made the point that the original Scots law verdicts were proven and not proven and that it was the not guilty verdict that was added. However, it is only through custom and practice, the common law and common usage that these three verdicts are allowed in Scotland and, as a result, the current system exists by dint of history rather than through any considered decision on the matter. In short, we should bear it in mind that the system was not designed to be this way and, indeed, that is where I think part of the confusion arises.

The not guilty verdict was added to the proven and not proven verdicts and then the guilty verdict replaced the proven verdict. As I said, the system that we have now was not designed, but developed over about 400 years and we need to look at it. In my consultation I suggested that we could either revert to the original verdicts or, given how controversial the not proven verdict has become, move away from it altogether and have only guilty and not guilty. Most people preferred the latter option but I am open to being persuaded that we retain proven and not proven in order to have a distinctive Scots law system. However, the danger is that the confusion about the not proven verdict would be carried over. A clean break might be better.

John Finnie: When we discuss juries, we always hear about the lack of research into their integrity and ability. Have you come up against the same issue with regard to your bill?

Michael McMahon: It is a very difficult issue. In fact, I could not use a number of responses to my consultation because people are not allowed to comment on what happens within a jury. There are academics who have commented on their own knowledge and experience of the issue but, although I could tell the committee many anecdotes that I heard about people's experiences of serving on a jury—

The Convener: You are not allowed to, Mr McMahon.

Michael McMahon: Exactly. Because that evidence is purely anecdotal, it has not been included in my consultation findings.

Elaine Murray: Section 2 of your bill is pretty much identical to section 70 of the Criminal Justice (Scotland) Bill on changing jury verdicts, which has been included partly as a safeguard should the requirement for corroboration be removed. Do you feel that the argument with regard to your proposal on jury verdicts is a separate one and that the change is required, even if the proposal to remove the requirement for corroboration is referred back?

Michael McMahon: When I consulted on the removal of the third verdict, respondents also raised the issue of juries. I think that only one or two academics who responded said that juries should be looked at in terms of the third verdict and corroboration. Most respondents focused on the third verdict and juries. One academic said that, regardless of whether we change the law on corroboration or the third verdict, we should look at juries anyway, because the straight majority requirement raises questions about whether a conclusion has been arrived at beyond reasonable doubt.

Elaine Murray: The previous panel seemed to suggest that the not proven verdict was being referred to the Scottish Law Commission for consideration. Have you had any discussions with the Government about that?

Michael McMahon: The matter is reviewed periodically and, in my experience, the conclusion has always been that it should not be addressed. Again, despite the consultations that we have had and the commissions that the Scottish Government has set up—the Carloway commission and others—the not proven verdict has never been addressed. Although it is always a matter for conjecture and discussion, it has never progressed to consideration by a formal commission or by the Scottish Government in any of its consultations.

The Criminal Justice (Scotland) Bill does not refer to the matter at all but focuses on the verdicts—although, as I said, some people have made a connection between the two issues.

The Convener: The Scottish Government states in the policy memorandum that accompanies the Criminal Justice (Scotland) Bill that, in response to its consultation on whether the not proven verdict should be abolished,

"a significant minority of respondents were concerned that time should be given to allow the impact of implementing Lord Carloway's recommendations to be assessed before making changes to the three verdict system."

We may end up with a criminal justice bill that includes the abolition of the requirement for corroboration and a change to juries, or we may instead end up with a bill that leaves out the issue of corroboration and possibly jury size too. That clutters up what you are doing in a sense. I am sympathetic to your position, but I do not know

how we can disentangle your proposals from what has been included in the Criminal Justice (Scotland) Bill. Apparently, from the evidence that we received, it seems that there was not a great deal of research behind the proposed change to a majority of 10 out of 15 jurors; that just sort of came about.

I am not saying that your proposal in that regard just came about, but that is what happened with the Criminal Justice (Scotland) Bill. How do you reconcile that? What if the bill addressed just the not proven verdict on its tod, as it were, and did not touch juries? The jury issue is a difficult one for me.

Michael McMahon: I consulted twice on my proposed bill. The first consultation did not focus much on juries, but the information that I received made me realise that the jury aspect could not be disentangled, so I decided to have a second consultation as I felt that we needed to consider the issue much more thoroughly than had previously been the case.

The original consultation focused purely on the removal of the third verdict, but the issue of juries was a prominent feature in the responses that I received. I took stock of that, and carried out a further consultation on a proposal to introduce a bill in two parts, specifically because of those two issues.

I am aware of the legislation that the Government has introduced on previous occasions, and I have waited on it doing some work on the not proven verdict. However, I felt that it was time to move the issue forward, which means having to address the issue of juries—

The Convener: I appreciate that.

Michael McMahon: We will just have to wait and see what impact the Criminal Justice (Scotland) Bill will have.

Taking part 1 of my bill into the Criminal Justice (Scotland) Bill could be considered, depending on the committee's findings and on whether the Government thinks that there has been sufficient consultation to allow it to incorporate my proposal on the third verdict as we move forward.

Sandra White: Good morning, Michael—it is still morning. I am very supportive of the context around your proposed bill, and I have learned some interesting historical facts from you and Professor Blackie—for example, that our verdicts were proven and not proven until 400 years ago, when we took on the English legal terms of guilty and not guilty. Funnily enough, I have said that we should perhaps just go back to the verdicts of proven and not proven, as you mentioned. We might want to have a wee look at that.

We have discussed the jury issue, and you said that you went back out to consultation on that subject. Was that because it could be part of a safeguard if you got rid of the not proven verdict?

Michael McMahon: Some people have suggested that that could be considered as a safeguard. If we removed the third verdict and left the simple majority, that would be a concern to a number of people. That was highlighted quite clearly. It was pretty much a response to those questions being posed in the first consultation.

Sandra White: The Government has said that it is supportive and that perhaps it will go to the Scottish Law Commission. Can you give us a timescale for when you would like to see your bill being passed? If the issue went to the Scottish Law Commission would your bill take longer to go through?

Michael McMahon: That might well mean that it would take longer. However, convener, I am in your hands because the committee's work programme dictates whether my proposed legislation could be fitted in anyway. I am certainly open to having a discussion about how quickly the bill could be introduced. Whether it would have to wait on a Scottish Law Commission investigation would be worth considering.

We have been here for 14 years and looked at an awful lot of legislation. This is one of the most controversial areas of the judicial system—

12:00

The Convener: Not quite.

Michael McMahon: One of.

The Convener: Close.

Michael McMahon: It is one of the most controversial aspects of the Scottish judicial system and we have never looked at it. I feel that we have to address the issue of the not proven verdict, one way or another.

Sandra White: I want to clarify something convener, because I do not know whether I have overstepped the mark.

The Convener: You never do that, do you?

Sandra White: I just wanted to clarify that the Government has indicated that it agrees in principle with the Scottish Law Commission that a review should be carried out.

The Convener: I think that I said that, but I know that no one ever listens to me so I do not take it personally.

Sandra White: I wanted to clarify the point for Michael McMahon.

Michael McMahon: I am aware that that is under consideration.

The Convener: You will understand that if your bill progresses, its second part would change jury verdicts and there is another piece of legislation that does that. The committee might want to consider that when we review our work programme. The jury issue is the main issue for the committee and we are exploring that area in our scrutiny of the Criminal Justice (Scotland) Bill.

However, you had good support, as you know. Do feel free to come to the committee the next time.

Michael McMahon: I did not want to overstep the mark.

The Convener: Oh no, no. We are very relaxed in here; too relaxed sometimes. I thank you. You have been very helpful.

Subordinate Legislation

Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013 (SSI 2013/320)

12:02

The Convener: We looked at the regulations last week and agreed to write to the Scottish Government seeking its response to concerns raised by the Law Society of Scotland. We now have that response and it is included with members' papers.

I will just give members guidance on process. Any further consideration of the regulations would have to be taken next week. Alternatively, any comments that we now make will be on the record. If you want to do anything with the regulations, you will have to lodge a motion to annul. We have the opportunity to invite the cabinet secretary to give evidence next week on the interaction between the Government's position and that of the Law Society of Scotland.

Let me have your comments first.

Alison McInnes: I do not think that the cabinet secretary's letter properly addresses all the points that the Law Society has made about robbing Peter to pay Paul. I am therefore minded to lodge a motion to annul.

Margaret Mitchell: The Law Society of Scotland seems to be saying that offsetting the costs addresses the cost of the new provisions, but it is concerned that that will become a precedent. I also see that the cabinet secretary is saying that the total amount of money has not been reduced, but it has been allocated in a different way. Could we have some more advice on that?

The Convener: Does the committee want to seek a further response from the Government? The letter from the Government has responded to the letter from the Law Society.

Sandra White: I want to raise a couple of points that are similar to what Margaret Mitchell said. They made it a bit clearer for me so I do not know whether we need further information. Page 12 of paper 3, the second page of the cabinet secretary's letter, says:

"The current system is, therefore, a hybrid of inclusive fees and detailed fees which was developed with the Law Society's full involvement."

It goes on to say:

"Solicitors are being paid the same amount of fees overall, but in different, more transparent ways."

That seems to answer what the Law Society is saying, although it differs from what it is saying. The Law Society lawyers are getting paid for the work and a different way of doing that is being looked at. They are still getting the same amount of money, from what I can see here.

The Convener: Are there any other comments?

Elaine Murray: What will the consequences be if we move to annul the SSI? Will it leave us open to a challenge under the European convention on human rights?

The Convener: It is for the cabinet secretary to respond to that. If there is a motion to annul, it will be debated here in committee.

Roderick Campbell: The Law Society urged the committee to undertake a full ECHR assessment. What are the implications of that?

The Convener: I suggest that we defer this discussion so that we can involve the clerks and talk about it during the discussion of routes forward into our work programme today. That will mean that we can discuss all the options, which we cannot do in public. Members are perfectly within their rights to do what they want to do, but I will remit the regulations for discussion along with the work programme and we can go into private session and have a free discussion on processes.

12:07

Meeting continued in private until 12:26.

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