The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 14 January 2014

Session 4

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JUSTICE COMMITTEE
2nd Meeting 2014, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kenny MacAskill (Cabinet Secretary for Justice)
Kathleen McInulty (Scottish Government)
Graeme Pearson (South Scotland) (Lab)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 14 January 2014

[The Convener *opened the meeting at 09:31*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the second meeting of the Justice Committee in 2014, and 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. I welcome yet again Graeme Pearson to a meeting of the Justice Committee.

Graeme Pearson (South Scotland) (Lab): Thank you.

The Convener: Not at all.

Under item 1, I invite the committee to agree to consider items 3 and 4 in private. Item 3 is consideration of a draft report to the European and External Relations Committee on our European Union work in 2013 and discussion of our EU engagement plans for 2014. Item 4 is consideration of a draft report on the legislative consent memorandum relating to forced marriage in particular. Do members agree to take items 3 and 4 in private?

Members *indicated agreement.*

Criminal Justice (Scotland) Bill: Stage 1

09:32

The Convener: Our next item is our second evidence session with the Cabinet Secretary for Justice on the Criminal Justice (Scotland) Bill. The cabinet secretary will give evidence on corroboration and related reforms, such as the jury majority, admissibility of statements, and sheriff and jury proposals. Those provisions are contained in parts 2 and 3 of the bill.

We will start by looking at the provisions on corroboration and related reforms and the admissibility of statements. For the benefit of all the witnesses and the cabinet secretary—and, indeed, me and the committee—we will have a five-minute break after we have dealt with this batch of provisions, after which we will move on to the next sections.

I welcome to the meeting the Cabinet Secretary for Justice, Kenny MacAskill, and Scottish Government officials. Iain Hockenhull is policy manager in the Criminal Justice (Scotland) Bill team; Elspeth MacDonald is deputy director, criminal justice division; Lesley Bagha is the bill team leader; and Kathleen McInulty is policy manager in the bill team.

I understand that the cabinet secretary wishes to make an opening statement before members ask questions.

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you.

Last week, we discussed the bill's proposals for reforming police powers and increasing the rights of and protections for persons who have been accused of crime. Today, we will address the protection of the public.

Abolition of the corroboration requirement is an essential and long-overdue reform and is at the heart of a bill that seeks to ensure justice for all members of society in 21st century Scotland.

I do not seek conflict with the legal profession. As a former practitioner, an MSP and a citizen, I am proud of our system, but as the Cabinet Secretary for Justice, I have to consider the interests of all society. If we cannot protect the vulnerable, we as a society will have failed. We have a duty to provide an effective justice system for all citizens, not just those whose cases happen to meet complex corroboration rules that even judges find confusing.

Committee members will have heard the significant concerns that have been aired about justice being denied because of the corroboration

rule. Brave individuals, backed up by organisations such as Rape Crisis Scotland, Victim Support Scotland and Scottish Women's Aid, have spoken out.

Assistant Chief Constable Malcolm Graham spoke passionately here about there being 3,000 victims every year whose cases do not even get submitted to prosecutors. A United Nations committee has highlighted its concern that the requirement for corroboration impedes the prosecution of sexual offences. I know that some committee members have challenged witnesses to make positive suggestions about what can be done. I do not wish to dwell on the deficiencies of our rules on corroboration. Members have heard how they have been stretched, eroded and circumvented in order to cope with hard cases, but that has made for bad law.

Members have heard that no comparable system has the general requirement for corroboration, which is onerous in some cases and in others is, in the words of the Law Society of Scotland,

"whittled down ... to the bare minimum."—[*Official Report, Justice Committee*, 26 November 2013; c 3791.]

Few would adopt a corroboration rule in designing a system from scratch. Ensuring that cases are high quality must surely be the focus of a modern criminal justice system. Scots have every right to the same degree of access to justice as that enjoyed by their neighbours.

I know that some have concerns. There seems to be a popular view that the abolition of corroboration will mean prosecutions that are based purely on one person's word. That is not our intention, nor is it the Lord Advocate's. Simply looking at other systems should provide reassurance here. Their courts are not awash with cases based on a single source of evidence. The Lord Advocate has said that he will require supporting evidence to bring any case.

Let me make clear what is meant by supporting evidence. It means allowing cases like the examples presented in written evidence by the Crown Office and Procurator Fiscal Service to go forward. I think that most people would agree that those examples feature enough evidence to merit a court hearing. The second example features a victim's testimony, with her distress and her special knowledge of the accused's distinctive underwear and a description of the scene, but there is no corroboration of the alleged indecent assault. That case could not proceed in our country, but it could in others. That is what the Lord Advocate and I mean by supporting evidence.

I appreciate that many of those calling for further study are not wedded to the past, resistant to change or unsympathetic to the plight of victims, but a further review of whether the corroboration rules should be abolished would take us no further. We would hear the same voices, the same terms and the same suggestions, but I am convinced that in the end we would still be looking at the same recommendation: to remove the requirement for corroboration from our law. In the meantime, the manifest injustices would continue.

The Lord Advocate shared his personal experience of some of the hundreds of strong cases denied a hearing every year. We cannot wait a further three, four or five years to address those injustices. We need to hear those who have been suffering in silence behind closed doors: the elderly victim who is robbed by a bogus caller; the person who suffers day in, day out at the hands of a violent partner; and the rape victim attacked in her own home. We need to give them access to justice as soon as we can.

Although I am passionate about the need for reform, I will respond to constructive suggestions. I met with several stakeholders over the festive period and I look forward to the committee's stage 1 report. However, members should not doubt my commitment to seeing the corroboration rule abolished. The provision of justice is not a game; this is about getting it right for everyone: society, victims and accused.

I repeat that I remain open to constructive suggestions, but I cannot stand by and allow our system to perpetuate disregard for those being denied access to justice.

The Convener: I thank the cabinet secretary, although I have to say that I do not think that anybody on the committee considers that the abolition of corroboration is a game. I think that we take it very seriously indeed, which is why we are taking trouble over this very important issue.

John Finnie will be followed by Elaine Murray, followed by Roderick Campbell, followed by Christian Allard, followed by Sandra White, followed by—well, it is John, then Sandra. I wonder why they are so interested in asking questions. We do not normally have this flurry.

John Finnie (Highlands and Islands) (Ind): Good morning, cabinet secretary. The Scottish Human Rights Commission described corroboration as being a legal safeguard. Similarly, the Lord President described it as being

"one of the great legal safeguards in our criminal justice system."—[*Official Report, Justice Committee*, 20 November 2013; c 3717.]

Is it for that reason that you propose to alter the jury numbers?

Kenny MacAskill: I just put it on the record that the term "game" actually came from Derek Ogg

QC in a programme on corroboration, and I think that it is referred to in a letter to the committee from Colette Barrie. She said that it is not a game to her but part of the suffering that she sustained. I think that that letter will be part of the committee's evidence.

I had a very useful and helpful meeting recently with Professor Alan Miller and Shelagh McCall from the Scottish Human Rights Commission. We are happy to consider any additional safeguards. That is why we went out to consultation. One basis for seeking to increase the required jury majority from 8:7 is to have an additional safeguard for protection.

This is always about ensuring that the scales of justice are balanced. We have to protect the rights of the accused as well as the rights of the victim. I believe that corroboration impedes the rights of the victim. I also believe that if we remove corroboration, we have to ensure that the scales are calibrated appropriately. One suggestion, with which I am comfortable, is to move to a two-thirds majority. That seems to me to be a reasonable position to be in.

John Finnie: If that is one way of addressing the removal of corroboration that applies to solemn procedure, what additional or alternative safeguards have you put in for solemn procedure?

Kenny MacAskill: Do you mean summary procedure?

John Finnie: For summary procedure. I beg your pardon.

Kenny MacAskill: For summary procedure, that should be considered by the shrieval bench. We are happy to consider any additional safeguards. For example, it was suggested to me in discussions with the Faculty of Advocates that we should consider dock identification. That issue is long overdue for consideration. We are open to considering any such suggestions. The other suggestion is to consider whether matters should be removed from the jury. Obviously, that does not apply to summary procedure.

John Finnie: You have put a proposal in place in relation to solemn procedure, but you have not put any alternative proposal in place in relation to summary procedure.

Kenny MacAskill: No, because those are the safeguards on which we went out to consultation. They were approved by the senators of the College of Justice. I met Shelagh McCall and Alan Miller, who are not so much looking for additional safeguards. I think that where they are coming from is how the system operates in the new landscape, if I can put it that way. Some of that would be down to judicial training through the Judicial Institute for Scotland.

However, the position remains that, although we are open to any suggestions for additional safeguards, so far few have been forthcoming.

John Finnie: But the reason why safeguards are mentioned is that it is frequently said that the Scottish system is the only one in which corroboration is retained. Other systems, where corroboration does not necessarily apply, have alternative safeguards. Is that the case?

Kenny MacAskill: No. Again, I have been looking at potential safeguards and discussing the issue with academics. I think that the Lord Advocate wishes to get to the system in the Netherlands, where there requires to be additional evidence. That is why an additional safeguard that may be suggested—it has not been, but I would be open to it—would be to put the prosecutorial test in legislation.

The Netherlands system is not corroboration in that it is not required throughout the whole strand of evidence. However, for a conviction there has to be additional evidence beyond the principal matter, whether that is a confession or the main substantive piece. The Lord Advocate seems to have indicated that that is where he wishes to take the prosecutorial test, the quantitative and qualitative tests and the evidential test. The additional safeguard, if you wish, that would be available would be to put that on the face of legislation and enshrine what has to be proven before there can be a conviction.

John Finnie: The police staff associations' position seems to support you, cabinet secretary. It has clearly taken reassurance from the Lord Advocate about the protection that would be afforded its members prior to any prosecution being instituted. It is the same for the teaching and social work professions, and quite rightly so. What protection can the Lord Advocate give the unemployed labourer?

Kenny MacAskill: There are specific consequences for those professions, given the other organisations involved and other challenges in their employment when parallel investigations are going on.

The assurance that we have in the example that you gave is that safeguards can be brought in. If safeguards that exist in other jurisdictions are not referred to, I am happy to have them invoked. So far, the suggestion has been dock ID. We are also happy to consider putting the prosecutorial test on the face of the bill. Beyond that, it would be for others to state what is there.

Equally, the system that operates in the 47 countries that have signed up to the European convention on human rights seems to be fair and balanced. Scotland is unique and alone in its current system, but I am happy to sign up to the

additional safeguards that I have mentioned. If there are additional safeguards that you think should be brought in, I ask that you specify them and I would be more than happy to seek to implement them.

09:45

John Finnie: Do we take from your response that the Scottish Government will propose amendments in the form of additional safeguards?

Kenny MacAskill: It has always been our intention to lodge amendments to update the system and ensure that safeguards are in place. We have made clear our commitment that corroboration must go because it is denying access to justice for not tens or hundreds but thousands of people each year. That is unacceptable. I give the commitment that we must have the scales of justice properly calibrated. On that basis, it has always been our intention that there would be amendments to provide greater safeguards. We are discussing those safeguards and looking to have those confirmed or clarified, and I am looking to hear from the committee what additional safeguards you wish to suggest. I give you a commitment that we would be happy to look very favourably at them. That is also why we are engaging with other stakeholders. It is through those discussions that, for example, dock ID has been raised as a matter in which there must be some change.

John Finnie: In solemn procedure, do you favour allowing submissions of no case to answer, with the judge able not to refer the matter to the jury?

Kenny MacAskill: I am perfectly comfortable and relaxed about that. That was the situation before, but it was changed. I can see some good reasons why it should be in the power of the judge to take a matter away from the jury if he or she believes that there is an insufficient case to go forward with.

John Finnie: What would your understanding be—

The Convener: Can I just interrupt, John? I want to let other committee members in. I will let you come back in. In fairness, I have given you quite a long whack at it—you have had about quarter of an hour.

John Finnie: Okay.

The Convener: Elaine Murray has some questions.

Elaine Murray (Dumfriesshire) (Lab): I start by saying that I and all other committee members, irrespective of our views on the abolition of the requirement for corroboration, are equally concerned about the lack of delivery of justice to people who are victims of sexual crimes and domestic abuse.

First, I return to a point made by John Finnie. The abolition of the requirement for corroboration would apply to the trade unionist on the picket line and the protestor on a demonstration, as well as to the victims of the crimes that I have mentioned. Do you have no concerns about civil liberties?

Kenny MacAskill: I am satisfied with where the Lord Advocate is coming from. It will be inadequate simply for one officer to say that a crime has been committed. Additional supporting evidence will always be required before a case is brought. The need for additional supporting evidence provides some backstop along with any other safeguards. The requirement is for two or more witnesses—indeed, if there are two or more, they will be brought—but, as I say, no case will be brought without additional supporting evidence.

Elaine Murray: The problem is that that is the word of the current Lord Advocate and it does not tie any future Lord Advocate. It would no longer be in legislation, so it would tie nobody; it is only a desire of the current Lord Advocate and you as cabinet secretary.

Kenny MacAskill: That is a fair point and that is why I am perfectly happy to lodge an amendment to include it in the bill.

The Convener: In the instance that Elaine Murray gave of someone on a picket line and a police officer what would supporting evidence be as opposed to corroboration?

Kenny MacAskill: That would ultimately be for the Crown to decide. It could be closed-circuit television, for example. All these things depend on context. Normally, there would be more than one officer present at any melee, whether that is at a picket line or a football game. What any additional evidence would be would depend on the context or the circumstance. However, what you have an assurance of from the Lord Advocate and me is simply that the word of one individual will not, on its own, be enough.

Elaine Murray: Surely that is what corroboration is—it is supporting evidence and not necessarily a second witness.

Kenny MacAskill: The difficulty is that we do not know what corroboration is. I met two of our most senior academics and I asked them whether they could give me a one or two-page synopsis of the law of corroboration. They admitted that they probably could not get one on which they would agree. It is quite clear that the judiciary find it difficult to agree what corroboration is. If the committee can tell me what corroboration is and agree to it, that will probably mean some progress.

Elaine Murray: Could there not have been an alternative to abolition of the requirement for corroboration? You mentioned in your opening statement that the corroboration rules are complex and that they have been stretched, eroded and circumvented. Would an alternative have been to ask a body such as the Scottish Law Commission to draw up a definition of what counts as supporting evidence? It could include the distress of the victim and special knowledge, for example, as contributing towards corroboration. Would it have been an alternative to abolishing the requirement to have a stricter, recognised definition of what counts as corroboration?

Kenny MacAskill: There are two arguments there. One is that we should not abolish corroboration, but I think that the case against corroboration is made. When not tens, not hundreds, but thousands of people every year do not get access to justice, it is a clear impediment. It is not simply about rape and sexual offences. As the Solicitor General for Scotland has commented, and as has been raised by Sandra White, whether we are talking about elderly and vulnerable people who are victims of assault in their own home or a care home, an elderly person who is a victim of a scamming offence, or child victims, people are being denied access to justice. That is why every victims organisation that appeared before the committee, such as Scottish Women's Aid, Victim Support Scotland and Rape Crisis Scotland, was quite clear. I think that the case against corroboration is made, and I cannot see how we can tweak it.

I accept that there can and must be something that will allow us to get safeguards right in the new landscape. We have been and are open to consideration of further safeguards. We are open to discussing the issue and to placing it in the bill. We are perfectly comfortable with that in order to make sure that we do not remove a manifest injustice for those on one side of the equation and replace it with a manifest injustice for those on the other side.

The status quo is not, however, tenable. I firmly believe that the case against corroboration is proven.

Elaine Murray: I do not know, cabinet secretary. I might just be a simple-minded scientist rather than a lawyer, but I do not understand the difference between the supporting evidence that the Lord Advocate requires and the supporting evidence that is required for corroboration. They sound to me as if they are the same thing.

Kenny MacAskill: I do not want to put my own interpretation on that, but a view will be required from the very beginning right through the whole case. At present, two forensic scientists have to speak to a sample and two police officers have to speak to the collection of a CD-ROM from London. All that has to be done because such evidence is part of the integral thread of the case. The Lord Advocate is talking about the principal evidence that goes to court and how that happens in the Netherlands, for example. If people can tell me why we have to have two forensic scientists sign off on a label when the issue is not being challenged, I am open to being persuaded, but according to the rules of corroboration that is what is necessary when such evidence is part of the fundamental aspects of the case. That is why, as I say, corroboration cannot be tweaked or altered. We have to get rid of corroboration, but, in doing so, we must make sure that the safeguards, checks and balances, and the operation of the system, are appropriate.

Elaine Murray: The two police officers or the two forensic scientists are not the issue in domestic abuse and rape cases. It is the supporting evidence and the definition of the supporting evidence that will corroborate statements.

Kenny MacAskill: Yes, but that is not the law of corroboration, which requires not simply what happens in the court case—

The Convener: We appreciate that, and I understand your argument about the threads that lead up to the court case. However, to focus on what happens once a case is in court, I and others are concerned about the discretion or flexibility that exists for corroboration, and I think that the same thing will happen in relation to what is, or is not, supporting evidence. The judiciary will continue to make the same decisions. I agree with Elaine Murray: in the court context, I cannot see that there is a huge distinction, if any, between supporting evidence and what is now admitted as corroboration, in the widest sense, in the circumstances of each individual case.

Kenny MacAskill: That is probably because we have difficulties with the definition, and academics and the judiciary have difficulty with announcing what corroboration is.

The Convener: Will the same issues not also pertain to what the judiciary concludes is sufficient supporting evidence in the case? It seems as if we are changing labels to some extent.

Kenny MacAskill: No. What we are looking to do is start afresh, which is why we looked at the safeguards. Let us remember that when corroboration was brought in, it was meant to be evidence from two people. It has since been ameliorated and watered down. Is it evidence from two people? No. What is it? It depends on the circumstances. It has been ameliorated, understandably, for the right reason—to provide

flexibility, whether in relation to Moorov or a variety of other things.

I think we should get away from the view that corroboration has to be there, given all the difficulties that it causes from the very beginning. There is duplication of resources, as we heard from ACC Graham, given what individuals have to do, right through to the impediment of justice, given that cases of indecent assault do not even get into the court arena because there is no corroboration.

The Crown put forward evidence about a young girl who was assaulted and who was able to identify the perpetrator, who was apprehended because they were wearing distinctive underwear. That seems to me to be additional supporting evidence, because how could that girl know about the underwear? Why would she make it up? Was it just pure chance that she knew? A jury could decide, but, as things stand, such cases do not even get into court.

That shows why the case against corroboration is proven. Case law will always come up. In the world in which we live and the common-law system in which we operate, the court will always have to interpret the law and set rules. We can set down the matters that the committee and others feel are necessary. That is not just about the size of the jury majority or whether the prosecutorial test should be enshrined in statute, although they can be enshrined to make things quite clear. However, we will always have to have some flexibility for the judiciary because every offender is different and every case is unique.

The Convener: Yes. We understand that.

Roderick Campbell (North East Fife) (SNP): In the first supplementary written submission from the Crown Office—CJ46a—paragraph 4 states:

"It is important to be clear at the outset that the abolition of the requirement for corroboration is not about improving detection or conviction rates."

When the Lord President gave evidence, he said:

"I think that that is a rather simplistic statement from the Crown."

He went on to discuss matters that I think are largely incorporated in the new prosecutorial test. He then said:

"If it is simply a matter of giving access to justice, I have to say that that is not my understanding of the Lord Advocate's role. Of course, I might be wrong."—[*Official Report, Justice Committee*, 20 November 2013; c 3729.]

Can you clarify the Government's thinking at the present time about detection and conviction rates?

Kenny MacAskill: Conviction and detection rates are for the police and, ultimately, the courts. I agree with the Lord Advocate that this is about access to justice.

I come back to the letter sent to the committee by Colette Barrie. She wanted access to justice. When I met her, she was quite clear that she hoped that that would result in a conviction. She would be disappointed if it did not, but she would accept the view of the jury. She was groomed and abused as a child and had to live with the consequences. Despite the fact that she is a bright, intelligent woman, what happened to her affected her whole life in tragic ways.

Colette Barrie wanted her day in court. She told me that she wanted to look her abuser in the eye and say, "You ruined my childhood and you've damaged my life." She would be disappointed if there was no conviction, but she recognises that neither I nor the Lord Advocate can make up the jury's mind: it is down to the jury to decide. The jury might make a decision that is unacceptable to her, but she would at least have her day in court. As she put it, she wanted to be able to look her abuser in the eye. She wanted access to justice. She knows that we cannot deliver beyond that, because it is for the judge or jury to decide. She hopes that greater access to justice will result in more justice being delivered, but she recognises that the decision will be for the judiciary and the jury. Access to justice is about giving the Colette Barries the opportunity to have some closure on what has happened to them.

Roderick Campbell: But you will accept that as far as conviction rates are concerned what will happen is really a matter of speculation.

10:00

Kenny MacAskill: Absolutely. We have no control over that—and rightly so. However, we have some control over whether such cases get to court. Even in cases such as the five examples that the Lord Advocate gave, a jury could come back and say that something was just happenstance—for example, that the wee girl who was mentioned earlier knew what that individual's underwear was. Such things happen, but they are for the jury. The jury could come back and say that a woman who was raped might have known the man in question or invited him in or that the act had been consensual. I do not know what defence the accused would run but, as I have said, as legislators we have control over allowing access to justice. We cannot make a decision on guilt or innocence, because that rests with the judiciary—clearly, we need that separation of powers. However, if we do not give access to justice we are not giving victims the opportunity to have closure.

Roderick Campbell: Moving on to the question of—

The Convener: Before we move on, Mr Campbell, I note that the cabinet secretary referred to the people in question as victims. We have to be very careful with our language because, notwithstanding some of the horrors in the examples that have been highlighted, they are not victims until the case itself is proven. What of concerns about access to justice for the accused? You have talked about balances and recalibrations but there have been false accusations and one concern might be that, if those accusations come to court, there will be trial by media. Notwithstanding what happens at the end of a case and whether the person in question is acquitted or indeed the verdict is not proven—if that verdict is kept—their life will have been ruined.

Kenny MacAskill: We simply have to ensure that adequate safeguards are in place. That issue has been raised by Mr Finnie and I have already mentioned discussions that I have had with other bodies. My door is open to suggestions about additional safeguards and I will welcome any comments that the committee makes on the matter.

Equally, it is quite clear from discussions that I have had with many people that the issue is not just about the number of safeguards. When you look at other European or western democracies and even other Commonwealth countries, you will see that the additional safeguards are probably not all that great. The issue is how everything stitches together. We are happy to look at the matter and take time to get it right. As I have said, however, we have the opportunity to give victims access to justice.

As for the question of publicity, the courts have some powers over that issue—indeed, it has been touched on by commissions and inquiries elsewhere—but the bill is about getting the balance right. I accept that corroboration resolves matters but I believe that, in giving victims access to justice, we also have to provide adequate protections, not just safeguards, for the rights of the accused.

Roderick Campbell: I welcome your comments this morning about safeguards but I am slightly troubled by Lord Carloway's view that, if the requirement for corroboration was abolished, there would be no need for any rebalancing through the introduction of further safeguards. Moreover, in his evidence to the committee on 20 November, the Lord President said:

"If there is a good solid intellectual case for abolishing corroboration, there should be no need for any safeguards. The moment that we say that there have to be safeguards, we are conceding that the change creates a risk of miscarriage of justice, which, in my view, it will."—[*Official Report*, *Justice Committee*, 20 November 2013; c 3727.]

Is it not a matter of concern that the two leading figures in the judiciary have taken what I consider to be a slightly negative view of safeguards?

Kenny MacAskill: I am happy to accept that there have to be additional safeguards. We are perfectly comfortable with and think there are good reasons for, as Elaine Murray suggested, enshrining the prosecutorial test in statute and protecting it from political changes. I do not think that the issue is necessarily the number of safeguards that are in place but how things operate collectively once we remove corroboration.

Equally, however, a lot of the requirements for corroboration that I have mentioned are only a prelude. The issue is not simply what happens in court on that particular day.

It is accepted across the political spectrum that it is daft that two police officers have to go down to London to pick up a CD-ROM. Why do two forensic scientists have to sign off a label? That is core, so you do not necessarily have to counterbalance the safeguards there. However, when it comes to court hearings, we must ensure that when corroboration—albeit ameliorated from the days when two eye-witnesses were required—is gone, we have enshrined what is necessary. We must also ensure that any other issues that have been identified—such as dock identification, which I have always been somewhat sceptical about—are properly analysed, and the Administration is happy to review them properly and take time to get things right.

Roderick Campbell: Why do you think that it is important for the reform to take place now?

Kenny MacAskill: The reform must take place now because, as I said, Lord Carloway was asked to go away and carry out a review following the Cadder decision, he has done the review and he has given us the opportunity to draft the Criminal Justice (Scotland) Bill, which covers the point of first suspicion through to the point of final appeal. We have the benefit of seeing that process laid out in one bill.

Secondly, as we have not tens, not hundreds, but thousands of victims of crime who are denied access to justice every year, we need to act, and Lord Carloway's review has given us the opportunity to do so. We are quite comfortable about taking some additional time to get it right, so that the new landscape and new evidential regime are right and fit for purpose before we say that the reform is good to go.

The Convener: We shall hear from Graeme Pearson next, followed by Christian Allard, John

Pentland, Sandra White, Alison McInnes and Margaret Mitchell. After that, John Finnie can come back in if he has supplementaries.

Graeme Pearson: Cabinet secretary, you mentioned the Cadder decision, which was taken by the Supreme Court, of which Lord Hope was a member. Lord Hope gave the judgment and has recently gone public in indicating that he thought that the current Administration's approach to corroboration and its abolition as a principle is wrong. His voice and his view are joined by those of the Lord President and many other significant people in our community. Even Miscarriages of Justice Organisation Scotland has come on side, indicating its concerns. It is a controversial issue and one that causes concern.

Is there time to take a breath, and not lose years over the next stage but at least take the next months to ensure that we get the approach right and that we have a balanced process of delivering justice? We talk about what checks and balances we can put in place. Corroboration is one of those checks and balances in the current system, and it does not sit well merely to call it an outdated technical requirement; it is part of a process that has taken hundreds of years to hone down to its current state.

Have you taken time to think about whether the Scottish Law Commission or some other mechanism can be utilised to look at the judges' powers, the size of the jury—never mind what a majority looks like—and the not proven verdict, the use of hearsay evidence within the trial, dock identification, which you have mentioned, and the impact of corroboration on forensic science and post-mortem analysis? There are now minutes of agreement that do not require two witnesses to come forward. Is there time to stand aside for a moment and to get it right for everybody concerned?

Kenny MacAskill: There is time to get the new system of evidential requirements and the other aspects that you mentioned right, but I do not think that there is any time to delay in getting rid of corroboration. The view that it is archaic came not from me but from Lord Carloway. I know that there are other senior members of the judiciary who disagree with him, but let us be clear about the fact that Lord Carloway is the only judge who went away and spent a year investigating the issues. None of the others did. He came back persuaded of the need for abolition.

I have listened respectfully to Lord Hope. Equally, I note that at no stage has it been suggested in the Supreme Court of the United Kingdom or in other places, whether in the Commonwealth, the Caribbean or elsewhere, that a requirement for corroboration should be introduced in England, Wales, Northern Ireland, St Lucia or anywhere else.

I believe that the case against the requirement for corroboration is made. We have time to make sure that we have the system right and that it is the best system that it can possibly be. That will give it merit. It seems to me that the Netherlands, Germany and other countries are not awash with manifest injustices. They seem to me to be decent democracies that are signed up to the ECHR, and they do not have a requirement for corroboration.

I can certainly give you an assurance, Mr Pearson. We can take time to get it right, but I do not think that we can delay in getting rid of the requirement for corroboration.

The Convener: Before Graeme Pearson goes any further, I note that you said that Lord Carloway took a year out. Did the rest of his review panel take a year out as well? Were they out doing the work, too?

Kenny MacAskill: They were a reference group, so—

The Convener: The reference group spent a long time on the work too, did it not?

Kenny MacAskill: I do not know. The reference group was there to engage with Lord Carloway, whereas he was doing nothing but the work.

The Convener: We were told that the vast majority of the reference group opposed the abolition of corroboration. It was not a one-man operation; there was a team as well. I mention that just for clarification.

Graeme Pearson: Lord Carloway took the year out. He was a member of the bench at that time and has since been promoted to his current position. We have a huge number of people with similar experience to Lord Carloway—some might argue that there are people who have far more experience of the administration of justice in Scotland—who take an alternative view. That causes concern to people like me, who are trying to come up with the right way forward.

On your point about other jurisdictions, I did a brief review of miscarriages of justice in England and Wales, and in recent decades 62 cases have been found, after many years of people being imprisoned, to have been miscarriages of justice. Thankfully, that has not been the case in the Scottish system; in comparison, we have had very few miscarriages of justice.

Is it really the cabinet secretary's view that we can be as cavalier as this? We have motored on and considered all the issues in a matter of months. You say that the Government is open to suggestions from the public, the committee and others, but surely it was for the Administration to

come forward with a comprehensive suggestion on the way forward instead of saying, "We'll take this one brick out. If you're worried about the foundations, come up with a few suggestions."

Kenny MacAskill: We are building on Lord Carloway's review. This was not done by officials—

Graeme Pearson: The justice system is not Lord Carloway's system. We are talking about Scottish justice, and we have a community of people who have said that they are very concerned about the issues. They too seek justice for victims—as we all would.

Kenny MacAskill: First, let us deal with the question of justice. I cannot comment on the cases that you mentioned south of the border because I do not know them. Other aspects of the system there might be relevant. I do not think that you could say necessarily that they were all related to corroboration, although it is not for me to comment on them.

Equally, countries that are signed up to the ECHR, those in the Commonwealth and others do not operate a requirement for corroboration, but I am not aware of manifest injustices in Scandinavia, Canada, New Zealand or Australia. Doubtless they will have some, and miscarriages of justice also happen in Scotland. It is for those reasons that we quite correctly have the Scottish Criminal Cases Review Commission—which is a tribute to my predecessors, who brought it in—because occasionally the system does not get it right.

We should recognise that the requirement for corroboration has not avoided miscarriages of justice here, and equally that the lack of corroboration has not resulted in them elsewhere. They occur for a variety of reasons. The fact that we are one of the few countries that have a commission to review criminal cases is a tribute and testimony to the serious view that we take of the matter. That is the position.

10:15

Very few people are arguing for retention of the requirement for corroboration, but an awful lot of people are expressing concerns about the new landscape after the requirement for corroboration has gone, which is understandable. Very few, it seems to me, have come here to say that the requirement must stay. Those who have would probably caveat that by saying that the issue should go to a commission or whatever.

The Administration has been happy to consult on safeguards after the Carloway report. In response to that consultation, the senators of the College of Justice, for example, did not seek to have the right to remove the case from the jury. I am happy to take a contrary view to the senators on that. They were happy with a requirement for a two-thirds majority for a guilty verdict, but we are open to taking more time to get the new landscape right. I will come back to the point: corroboration has been shown to be "archaic". That is Lord Carloway's word, not mine.

Graeme Pearson: I am conscious that I am a guest of the committee. Can I ask one last question?

The Convener: We are very good to guests.

Graeme Pearson: You have said that you will take time. Would the Government accept an amendment to the effect that if it gets its way on the future of the requirement for corroboration, it will not enact the change until a group had reported on the appropriate checks and balances to be put in place when the change occurs?

Kenny MacAskill: Of course. We cannot go from the old regime to the new regime without ensuring that we have got it right. I am saying that if we have to ensure that we get it right, we have to give that time.

I am also conscious, as Graeme Pearson will be from his professional background, that we have to train not just police officers but the judiciary and prosecutors for the new landscape, so there must be some delay in its implementation.

Graeme Pearson: Yes, but before that training can take place that new landscape must be clarified and understood. Whether it be through the Scottish Law Commission or some other structure, it needs to be clear to us how you would do that.

Kenny MacAskill: We are happy to take the time to get it right and we are conscious that we cannot start training people until we have decided on that. We are also conscious that this is a busy year, with strain on the police from the Commonwealth games and so on, so we have never anticipated that police training would begin until a considerable period had passed.

The Convener: Can you clarify what you are actually saying? You have come out with a lot of substantive but not firm proposals—tests about other tests that you would put in place if the requirement for corroboration were to go. I, for the life of me, cannot see how we can deal with those at stage 2 or stage 3, because we would have to take further evidence, certainly at stage 2.

Are you saying that you would keep the removal of the requirement for corroboration in the bill but that it would not be enacted, pending something else?

Kenny MacAskill: No.

The Convener: You are not.

Kenny MacAskill: I am saying that the requirement for corroboration has to go. We believe that its removal must remain in the bill and we must trigger that. Graeme Pearson made a perfectly valid point, but we never anticipated that when the bill received royal assent we would immediately go live. The likelihood is that royal assent would be given before training and so on had taken place.

We also recognise that we have to get the landscape right and we must balance the scales of justice. We have to remain committed to the removal of the requirement for corroboration and adhere to the principles that have been set down by Lord Carloway, but we must ensure that the change does not take place until we have got right the new landscape in which the prosecution and the judiciary must make decisions.

The Convener: I am concerned about the phrase "got right". Would there be a role for the committee? Perhaps I should be asking not you, but the clerks. I appreciate that you say that the change would come later, but if it will not be enacted right away, is there a way that the committee or Parliament could look at it again? It would be in the bill and in the act as passed, but in suspended animation until such time as further evidence came back to the committee. That would allow us to say, "Okay. Now we have taken our time, which was better than trying to do it at stage 2." Maybe I am asking the wrong question; I do not know.

Kenny MacAskill: I think that such matters will be triggered by subordinate legislation but they can come back before the committee and Parliament through, say, the affirmative and super-affirmative procedures. Indeed, from my discussions with various people, including academics, I think that such a method would provide for greatest scrutiny.

The Convener: Do you want to come back on that, Graeme?

Graeme Pearson: In the light of that particular thought process, is it your intention that the bill will contain not only a commitment to discarding corroboration as a basic requirement but a safeguard that that discardation or whatever you might call it—

The Convener: Discardation? That is a new word.

Graeme Pearson: I am glad that I have invented it, convener. Do you intend that the bill will contain a safeguard to the effect that discarding will not occur until a committee or some other vehicle proposes safeguards with which the committee is satisfied?

Kenny MacAskill: Yes. We are perfectly comfortable with that direction of travel.

Elaine Murray: I want to ask a wee supplementary because, again, I am getting a little bit confused. Part of your argument for having to do this in the bill was that thousands of victims are not getting access to justice, even if the bill might not deliver justice for them. However—I have to say that I am, to a certain extent, reassured by this—you are now arguing that you would suspend such a move until the various safeguards had been interrogated, which might well put it off for a couple of years.

Kenny MacAskill: We never intended to bring the new regime into place until 2015 anyway, because the police had made it quite clear to us that with the Commonwealth games, the Ryder cup and so on, officers would simply not be able to undertake training either online or at Tulliallan in 2014. Although the bill will go through and receive royal assent, it has always been our intention that the changeover would not to be triggered until 2015 or whenever. As with many bills, things can come in at different stages; we have that window of opportunity.

Elaine Murray: So, your argument about the urgency of the move was actually irrelevant.

Kenny MacAskill: No. There is urgency to get this done as quickly as possible, but this is as quick as it can be done. It cannot be done any quicker than that. I cannot ask the chief constable to take officers away from carrying out necessary orders during what will be a busy time for Scotland, but they will have to be trained up. As a result, the measure was never going to come in until 2015. In fact, the period before it would come in had not even been considered, although it will happen in 2015. That gives us a window of opportunity to get it right. Does that mean that some people will suffer from lack of access in 2014? Well, yes—but we were never going to be able to do this in that time. We need to get this done as quickly as possible and, indeed, that is what we have discussed with Victim Support Scotland, which supports that position.

We need to get this right. Corroboration has to go, but we must replace it with something appropriate and we will take the time to get it and the timing right.

Sandra White (Glasgow Kelvin) (SNP): Having spoken to Victim Support Scotland and others about corroboration, I am concerned about the timescale. Are you saying that the measure will come in no later than 2015? Given the reference to the Scottish Law Commission, my great concern is that we could be talking about two, three or even four years before something is put in statute. Can you confirm that, if this process

has to go ahead, it will not take any longer than a year?

Kenny MacAskill: The Lord President himself said that it should not take longer than a year. Given that we did not, in any case, think that the police could be trained in less than a year, we think that we can use this dead time—if I can put it that way—to get this right. We want to get the balance of the scales of justice right between doing this as quickly as possible and having sufficient time to get it right, but at this juncture we can carry out a further review. The principle that will be enshrined is that corroboration will go, and that will be triggered as soon as possible to end the manifest injustice that so many victims face.

The Convener: Forgive me, but I was just checking with the clerk, because you have thrown in mention of the super-affirmative procedure. The committee will have to find out exactly what that does to primary legislation. I do not think we have done that before, but I know that the process allows us to take evidence and take a matter back to Parliament. However, I do not know what the procedure would do to a measure that is already enacted. As you say, cabinet secretary, the provision is coming in, but whether corroboration is abolished or not depends on Parliament; the committee will have to keep its finger on the pulse of that change.

Graeme Pearson: My question is about the change. You have shared a new approach with us today, cabinet secretary, saying that you would set up a review group. Have you thought about who would lead on that group? Would it be the Law Commission, with a timescale set to report back by a certain date, or do you see it being led by some other body?

Kenny MacAskill: I do not think that the Law Commission would be appropriate. It does not currently have the resources for that. We have some thoughts, but we are open to views from the committee. As I said, the principle that the Government is enshrining is that corroboration will go, and we will take time to get the safeguards and related matters correct, after which we will implement the change. We are happy to discuss other matters with the committee and, indeed, with other parliamentary groups.

Christian Allard (North East Scotland) (SNP): On that point, I would like to know more about the training of police officers. Do you think that we need to wait for all the safeguards to be debated before we start to train police officers?

Kenny MacAskill: Not necessarily, but it would probably be better. I would have to leave that to the police; it is a matter for them. The only discussions that we have had with the police were about the fact that, after the Commonwealth games, the referendum, the Ryder cup and the homecoming, police officers will probably need time off, as I am sure John Finnie and the Scottish Police Federation will agree. It would be difficult to organise in 2014 the training that is required, so we gave the police a commitment that we would not proceed with it this year. I am happy to leave that to the good offices of the police and the federation. What matters is that they get the training and get it right. They could probably start doing some training, but it might be easier to leave it until everything is sorted. However, that is a matter for the police and their staff.

Christian Allard: So it is a question of timing, and we have room to make sure that it starts as soon as possible, if we all agree that the removal of corroboration is the way forward, which now seems to be the view of the committee—everybody is talking about timing as opposed to whether we should remove the requirement for corroboration. I will go against the committee on that and go back to the suggestion that the requirement for corroboration could be abolished only for some cases, although when Lord Gill gave evidence he said that, if the requirement for corroboration were removed, it should be removed across the board. Did you think about the possibility of removing it only for some cases? How would you address that situation?

Kenny MacAskill: We thought about it, but there is a good reason why the law of evidence should apply to all cases. Although the Lord President did not use the terminology that I would normally use about different categories, I understand where he is coming from. Why should I have to find myself telling people whose son has been murdered that the case could not proceed because corroboration was required, yet if I was speaking about a rape offence, it could be that that case proceeded?

The creation of two categories would cause great difficulties for those who operate the system. The police and forensic scientists could turn up at a crime scene not knowing whether the crime that had been committed was a serious assault, a murder or a sexual offence. The victim could be unconscious or dead, so what law of evidence would they apply—the law for murder and assault or the law for rape and sexual offence? Take your pick. All the way through the system, forensic scientists normally know what to do, and we cannot have a system in which they do not know whether evidence needs to be corroborated or not. What would happen when a rape victim died, as sometimes happens? The police and forensic scientists would start out with no corroboration requirement, but then, all of a sudden, the law would change.

10:30

I think that the law of evidence should be, in the main, clear across the board. We considered the suggestion to which you refer, but the Lord President and the Faculty of Advocates were opposed to it, and in all the evidence that I have heard from forensic scientists and the police, they are opposed to it, too. Superficially, it might be easy to say that the requirement for corroboration would be abolished in cases of rape and sexual offence and that that would be it, but what about an old lady who was the victim of scamming? Would corroboration be required? What about an assault of a vulnerable victim? At the end of the day, in terms of both implementation and operation, it would be too difficult if people had to ask, "What rule of evidence am I going to apply today?" I think that there should be one law of evidence.

Christian Allard: It was just an alternative to your proposals. Is there any other alternative to your proposals?

Kenny MacAskill: The alternative to our proposal to abolish the law of corroboration as a routine requirement is to ensure that we have the appropriate safeguards, that the system fits together and that there are checks and balances. That is how all other regimes operate. Reference has been made to the fact that the Netherlands has corroboration, but it does not—the Netherlands has something much more akin to what the Lord Advocate is advising, which is that there should always be supportive evidence. I am comfortable with that. It does not need to be provided at the beginning or require two officers to go and collect a CD-ROM, for example. No other country has gone there.

I remember my first discussions with Lord Carloway about the matter. He said that he had tried to work out why we introduced corroboration, in which law it was introduced and when it was introduced. He could not trace it. As far as he could see, it came from Romano-canonical law. It seems to me that Scotland and the world have become different places since we routinely applied Romano-canonical law in Scotland. On that basis, I cannot see any alternative other than to ensure that we get the best safeguards, have the right landscape and go in the direction that most other modern, western and European democracies have gone in.

Christian Allard: Let us take the particular example of the Netherlands. We heard evidence from the University of Dundee—

The Convener: Before you go on to that, other members want to ask supplementary questions.

Margaret Mitchell (Central Scotland) (Con): On the law of evidence?

The Convener: Yes.

Margaret Mitchell has a question on that point.

Margaret Mitchell: Cabinet secretary, if you had listened to Lord Gill you would have heard him make it clear that corroboration has evolved over the centuries to where we are now. In your evidence this morning, you seem to be suggesting that every single fact in a case should be corroborated. The sad fact is that that is the way in which the prosecution has often looked at cases. What needs to be looked at is the law of evidence and how fiscals apply it in the courts. There is not a high threshold for evidence; all that is required to establish corroboration is that the essential facts of a case—first, that a crime was committed, and, secondly, that the accused did it—are backed up by two sources. Half the concern about the prosecutorial test that you are talking about relates to the fact that, in practice, the law of evidence is not applied properly in the courts just now.

Kenny MacAskill: I have to say that I do not know about that. Are you suggesting that the Lord Advocate has got it wrong, that his predecessor, Elish Angiolini, did not apply the law correctly, that Lord Hardie was incompetent and that Lord Boyd did not get it right? I practised law for 20 years and have always understood the position to be as it was articulated in the committee by the Lord Advocate. The committee took evidence from Assistant Chief Constable Malcolm Graham that it is not simply about what happens in the court but runs right through the system. It is for those reasons that we have two officers going to London for a CD-ROM and two forensic scientists. If we did not, there would be no case to answer in relation to a challenge that a matter had not been corroborated. That is not simply about the sexual assault aspect but about aspects further down the line.

It seems to me that either every Lord Advocate has got it wrong—

Margaret Mitchell: The interpretation of the law of evidence is a skewed one.

The Convener: Stop a minute. Margaret Mitchell is on my list to ask about the tests for two different cases and the question whether there could be no need for mandatory corroboration in certain cases. Is that what John Finnie is going to ask about?

John Finnie: I wanted to ask a question that follows on from the investigation of crime and Romano-canonical law, which was referred to.

The Convener: I will let you back in later to ask about that. I thought that you wanted to ask about the specific suggestion that whatever happens has to happen across the piece rather than there being

different approaches in relation to separate categories of offence.

Christian Allard: I would like to go back to the position in the Netherlands. We heard from Professor Pamela Ferguson and Professor Fiona Raitt, both from the University of Dundee, who told us that Scotland was bizarre in having the corroboration requirement. However, when they thought about it, they said that, in the Netherlands, although there is no requirement for corroboration, there is a system of corroboration that operates unofficially, as is the case in many jurisdictions. That leads me to think that removing the requirement for corroboration will be a lot more seamless than was first expected.

Kenny MacAskill: I think that you are right. I disagree with Margaret Mitchell's view of the current law of evidence, and the Procurator Fiscal Service has always operated as it does. What she suggests is unnecessary.

With regard to the points that you make about the Netherlands, the Lord Advocate has specified that he sees the position as being that additional evidence should always be required. I would take the view that the system in the Netherlands is not one of corroboration but one in which additional evidence is required. I think that every right-minded person would expect that. As Elaine Murray said, we do not want a situation in which an accusation that is made by one police officer or individual is sufficient for a conviction. That is not and will not be acceptable. There will always have to be additional evidence. Equally, it seems to me that, in the examples that were given by the Lord Advocate—the woman raped in her own home or the indecently assaulted child—there was additional evidence that would have meant that the cases could have proceeded in the Netherlands but, because of corroboration, not in Scotland.

I do not think that removing the requirement for corroboration will be entirely seamless, but I accept the point that you make. Margaret Mitchell tried to make the point—I think; whether I am right in saying so is for her to say, of course—that a lot of what goes on is viewed as perhaps being needless corroboration. However, I think that it cannot be dispensed with simply by the Lord Advocate saying, "I am not going to have corroborated evidence with regard to that CD-ROM." Far too many cases have fallen because an aspect in the build-up or preparations was not corroborated, and there was therefore no outcome.

John Pentland (Motherwell and Wishaw) (Lab): We are now in our 11th evidence-taking session on the matter and I am still unsure whether the Mexican stand-off will be avoided. However, from your opening remarks, I wonder whether you are softening in your pursuit of an all-or-nothing approach to the issue, given that you talked about taking on board suggestions or reaching compromises. On that point, bearing in mind that conflicting evidence exists, it is interesting to note that Lord Cullen and Lord Hamilton have said that limited exclusions from the requirement for corroboration would be better than its complete removal. Might that be one of the compromises that you would be prepared to reach?

Kenny MacAskill: No. I have the greatest respect for Lord Cullen and Lord Hamilton and was grateful for their contributions. However, their suggestion regarding limited change was rebutted by others.

I am clear that the case against corroboration is made. We are not softening our position on that in any shape or form. However, we recognise that there are concerns about the number of safeguards and how the system will work in the new landscape that will exist after corroboration has gone. We are happy to take the time to get that right. I do not think that we can have a partial removal of corroboration. I think that corroboration is past its sell-by date, given that it came from Romano-canonical law and that it is not applied in any other jurisdiction. Equally, we probably want to ensure that, later in the game, in the new jurisdiction and system that we will operate, we get the best aspects from wherever and that the system is fit for purpose in our land.

John Pentland: You have emphasised that we really need to get access to justice for victims of rape, sexual assault and domestic abuse. I certainly support that. However, have you looked at any alternative to the removal of corroboration?

Kenny MacAskill: Corroboration is not sacrosanct. The point has been made that when corroboration first came in it required two eye-witnesses to speak to an incident. It came in in a world that did not have CCTV, forensic science, 3 million-to-one certainty or professional legal defence teams. However, all those aspects have come about. The world has changed in that respect.

For good reason—because justice was being denied—the courts brought in the Moorov doctrine, which was a fundamental change to corroboration. Moorov has been tweaked, changed, ameliorated and broadened because it was just not working, and it still does not provide everything. There have been wholesale changes to the law of corroboration over the years. That is why I think that it has long passed its sell-by date. It causes more difficulties because it is unclear. When I speak to learned academics and they tell me that the definition of corroboration cannot be agreed, I think that we have a problem.

I therefore think that corroboration has to go. We must ensure that we get the alternatives right. However, I do not see how corroboration could be tweaked. It has been tweaked; Moorov was probably further broadened even within my time as a lawyer.

John Pentland: There is widespread opposition to the bill, so if it is unsuccessful do you have a plan B?

Kenny MacAskill: I do not think that there is widespread opposition to the bill, although I accept that there are concerns about it within the legal profession. However, we should remember that on the other side are Victim Support Scotland, Scottish Women's Aid, Rape Crisis Scotland, Police Scotland, the Scottish Police Federation and the Association of Scottish Police Superintendents. I do not seek to minimise the legal profession's understandable concerns about ensuring that whatever system we move to is right. However, I think that the case is made on corroboration, because those who suffer from injustice overwhelmingly seek the change that is the removal of corroboration.

John Pentland: Do you have a plan B if the bill is unsuccessful?

Kenny MacAskill: No. I think that we have a plan to deliver access to justice and, as I said, to take the time to get the safeguards and changes to the system.

Sandra White: I concur with what my colleague John Pentland said about the corroboration issue and access to justice for certain crimes that people are victims of. John Pentland and other colleagues have mentioned that most of the judiciary are against getting rid of corroboration. However, a number of members of the judiciary have also said that if they were starting afresh with the justice system, corroboration would not be part of the law. Have you heard that comment, cabinet secretary? Is that a fair summing-up of the position on corroboration?

Kenny MacAskill: It seems to me that most of the opposition is not about preserving corroboration, because I think that everyone accepts the difficulties that exist with it because we cannot define it.

I take the view that in the main laws should be understandable not just to lawyers but to the general public. In some instances, corroboration is not even understandable to the legal profession. One lawyer will disagree with what another views as corroboration; in fact, we should remember that although the Lord Advocate highlighted some cases as not being capable of going forward, one of Scotland's foremost legal professors disagreed and said that they could go forward. Surely a case either is or is not capable of going forward to court.

The fact is that people are unable to write down in one or two pages what the law of corroboration in Scotland is. Are two witnesses required for every case? No. Well, then, which cases are they not required for? Given that the law is not capable of being understood and given that, having been in place for hundreds of years, it cannot be tweaked or refined, the time has come to look at what works elsewhere. Graeme Pearson is right about protecting ourselves from miscarriages of justice, which is why we are looking at what is happening, say, in the Netherlands and building that in. The point is that we need to give people the right to access justice when there is a sufficiency of evidence and to ensure that we get the safeguards right. However, I just do not think that we can simply tweak this.

10:45

The Convener: The inability to define or describe something does not always mean that it does not exist. For example, people know an elephant when they see one, but it is very difficult to define or describe an elephant to someone who has never seen one so that they know exactly what it is. On the other hand, a judge or, indeed, a jury might well know what corroboration is when they come across it because of the facts and circumstances of a case.

Kenny MacAskill: I would accept that argument in many spheres of society. However, in a court of law, when we are talking about imprisonment and justice, we cannot say, "We'll know this when it comes in the room." No—we should know what it is and it should be understandable. When we cannot get the academics or the judiciary to agree on the law of corroboration, we are leaving it to individuals to make a decision—probably the right one—about access to justice, and there is something fundamentally wrong with that. Some areas of law, such as those applying to information technology or conveyancing and land and, indeed, certain laws of evidence, are very complex and are not understandable to the ordinary man or woman, but when such a fundamental law—the requirement for two sources of evidence—that superficially appears so simple is, when you get into it, not simple at all, that law is no longer fit for purpose.

What matters is not so much the intellectual argument but the fact that every year 3,000 victims are not able to get access to justice.

The Convener: I still stick by my elephant example, cabinet secretary, but there we are.

Sandra White: There are actually two types of elephants, convener, not just one. [*Laughter*.] I am not a lawyer or a member of the judiciary; I might be an MSP but I am also a member of the public

and I think that the cabinet secretary is absolutely right: the public should know exactly how the law works. After all, it should be for them, not just for the higher echelons, the intelligentsia or whatever you want to call them.

The committee has listened to the discussions, arguments and disagreements over whether the removal of corroboration will lead to further prosecutions. In that respect, I noted the cabinet secretary's opening comments about access to justice and Colette Barrie. I do not know whether he will agree but, having spoken to Scottish Women's Aid, I certainly agree with it that for many years domestic violence was hidden and that the more it came to light and the more people were heard in court, no matter whether there were prosecutions, the more people reported it.

Cabinet secretary, do you agree that, with the removal of corroboration, more people will feel more comfortable about coming forward and reporting such incidents and that, eventually—although perhaps not in six months or a year—we will see a cultural change among juries and others with regard to not just domestic abuse but rape, sexual assault and, say, assaults on older people in homes where there is no witness?

Kenny MacAskill: One would hope so. All the evidence points to an increase in sexual offences and the reason for that is that people feel more comfortable about reporting such matters and believe that they will be dealt with better by the police and the prosecution, that they will be better protected in court and that there will be better outcomes.

If people feel more secure that the law will support them in the challenges that they face, they are more likely to report crimes. I do not necessarily believe that more sexual offences are being committed now than before; I think that more sexual offences are being reported now than before.

Your point has merit. There are various factors that we do not know in why juries come to decisions—we will never hear the end of that—but if victims believe that the law provides support for them, they are more likely to report crimes and go through all the stages that can be traumatic for them.

Alison McInnes (North East Scotland) (LD): Cabinet secretary, over the past couple of years, you have used your parliamentary majority to drive through legislation that has been controversial: I am thinking of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 and the creation of the single police force. On both those occasions, you sat in front of this committee and, in your chirpy, friendly and confident way, told us that everything was fine and there was nothing to worry about. However, as the legislation was implemented, we saw very quickly that it had flaws.

We are at a critical stage of this bill and a host of voices have given evidence and wise counsel to this committee that cautioned against this move. Why are you deaf to that?

Kenny MacAskill: I listen respectfully to the voices of those who are concerned about the removal of the routine requirement for corroboration, but I cannot ignore the fact that not tens, not hundreds, but thousands of people are denied access to justice.

I can understand that the judiciary applies the law and will say that justice has been done—they would not necessarily even see the problem. The lawyers will submit their note or whatever and say that they have done their job. However, I have to meet the victims of crime who do not get access to justice—it goes with the turf. I have met Colette Barrie and I will meet the woman who gave her story to *The Herald* recently, because she contacted me. I have to listen to their stories, which are very poignant. Something is manifestly wrong when I have to say, as justice secretary, "Well, that's the law." When they tell me that they are denied access to justice, I have an obligation to them, others and Victim Support Scotland to make a change for the better.

Alison McInnes: I put it to you that you have an obligation to protect the justice system in Scotland, not to offer false hope to people. There is a real concern that you are raising false hope about prosecutions and convictions. If all you are doing is trading a compromise in the justice system for false hope, that is not a good way forward.

You have spoken a lot this morning; you keep saying that we must get this right, but you seem to have put the cart before the horse. You have said that it is essential to abolish the requirement for corroboration and you have started to acknowledge that there might need to be some safeguards, but I do not sense that you are doing anything to identify what kind of web of safeguards you need to put in place. I put it to you that there would be some sense in doing what many of us have called for for many months: ask either the Scottish Law Commission or a royal commission to look at the whole process, rather than somehow muddle through. We are beginning to get a bit of a muddle now, are we not?

Kenny MacAskill: I do not believe that I am raising false hope about access to justice. I return to the point I made about Colette Barrie. She was quite clear about this and I said that it is not for me or anyone else in Government or in politics to impose a conviction; it is about access to justice. She accepts that. She has said that she would be

deeply disappointed if there were not more convictions and she believes that there will be more, but she accepts that this is about access to justice, so I do not think that we have ever given false hope. The position of Rape Crisis Scotland, Victim Support Scotland and Scottish Women's Aid is the same, although—probably because of its strength—Colette's testimony sticks in my mind most of all.

On safeguards, we have always had the same position. Once Lord Carloway published his report, we did a further review of safeguards, which took on the view of the senators of the College of Justice, which included the no case to answer submission—if we can put it that way—which is about the right of the judiciary to take the case away from the jury. If the committee feels it fit, we are happy to consider that we should not take the senators' view on that.

Equally, as I said then, as I have said since and as I say again, we are open to other suggestions. That is why, when I meet James Wolffe and he raises the issue of dock identification, I say, "Fine; let us have a look at it." I accept that 21st century dock ID has moved on from what it was when someone was charged with stealing a horse in the 19th century.

We are happy to take the time to get this right but, as I say, I believe that the right of victims such as Colette Barrie to access to justice is sacrosanct.

Alison McInnes: Do you not think that taking a pick-and-mix approach, with members throwing in amendments at stage 2 and other people coming forward with concerns, puts at risk the integrity of the system? Would it not be better to look in the round at all the possible safeguards that we would need and come up with a comprehensive package that assures everyone that there are still strong foundations that will protect everyone against miscarriages of justice?

Kenny MacAskill: That is what we seek to do and is where I hope we get to. I do not believe that a royal commission would be appropriate, nor do I believe that the Scottish Law Commission is in a position to accept such a review. However, we have time to make sure that we can give some consideration to ensuring that the system will operate fairly for all—for victims as well as for accused. The issue can be dealt with and we can stay on course. I will take on board the views of committee members about how it can be dealt with.

We are currently engaging with individuals and organisations to make sure that we take on board the points about appropriate safeguards and the interoperability of the system.

Alison McInnes: How will you determine when you have got it right? What test will determine that?

Kenny MacAskill: Ultimately, that will be for the Parliament.

The Convener: I agree with Alison McInnes. It seems that issues are being raised ad hoc about safeguards. I do not know whether the cabinet secretary has actually said that if the committee was to propose the super-affirmative procedure, he would be amenable to accepting that proposal.

Kenny MacAskill: I am happy to look at that.

The Convener: Before I let Margaret Mitchell come in, I will make that point plain because she might want to focus her questions. I have a note from the clerks about what that would mean; I was not too sure myself. If the provisions on corroboration were kept in the bill, they could be subject to the affirmative or the super-affirmative procedure; it would need to be specified in the bill. Affirmative procedure would allow the committee to consider whether the proposed additional safeguards would be sufficient; that would mean three weeks of evidence. The super-affirmative procedure, under which the committee has already considered prison visiting committees, would allow us to take more evidence before final orders were laid. The Government would have to put final, super-affirmative subordinate legislation to the Parliament for it to accept or reject the commencement of the provisions on corroboration. I hope that I have explained that properly. That is how the procedures would work. As the committee is talking about having real concerns about safeguards and so on, that is a procedure that could be used. I just thought that I had better explain it, because it does not come up very often.

Elaine Murray has a question; is it on this matter?

Elaine Murray: It is actually on Alison McInnes's point about the Scottish Law Commission. The cabinet secretary has been very reluctant to refer the issue to the Scottish Law Commission but the Government has suggested that the third verdict be referred to the Scottish Law Commission, and we heard last week that section 53 of the Title Conditions (Scotland) Act 2003 is to be referred to the Scottish Law Commission, so why the reluctance to refer something as fundamental as the abolition of the requirement for corroboration and what will come in its place?

Kenny MacAskill: The view is that because of the nature of its staffing at the moment, the Scottish Law Commission is not necessarily best placed to deal with criminal matters. We do not think that the Scottish Law Commission is the

appropriate place to go at the moment. It also has a pretty full calendar because of everything that has been put there and its on-going research. It has published its work programme and the difficulty is that it is lacking in the specific criminal skills, and it has limited time and ability.

Elaine Murray: But that is not the case for the third verdict.

Kenny MacAskill: Well, it has some time. We discussed that issue with it and it was going to take it on board. It has a new commissioner going in—Lord Pentland—but its resources in terms of criminal staff are not great, or huge in number.

The Convener: Roderick Campbell has a supplementary question.

Roderick Campbell: Just to clarify, it is my understanding that, in respect of section 53 of the Title Conditions (Scotland) Act 2003, the Scottish Law Commission could not commence work until 2015 anyway.

11:00

Kenny MacAskill: It has published its work programme—I cannot remember for how many years, but it is pretty busy. It does do criminal work but, if I recall correctly, Patrick Layden is on his own at present and is having to do everything.

The Convener: I call Margaret Mitchell.

Margaret Mitchell: I think that we should deal with the red herring of the affirmative/super-affirmative suggestion that you have thrown into the pot this morning, cabinet secretary. All that it means is that the Government would use its parliamentary majority to force through a decision on something that is causing widespread concern.

One thing is not in doubt this morning. You and I agree that access to justice is crucial. You said this morning that 3,000 victims of serious sexual assault do not get access to justice. The other side of the coin is the hundreds and thousands of people who go through our criminal justice system every year and have a right to a fair trial. That is what is in jeopardy. You are also raising the prospect of many more unsafe convictions, and you are doing this, it seems, because Lord Carloway's report and your own experience as a prosecutor in the courts, which was some time ago now, have led you to believe that the case has been made on corroboration.

Your evidence this morning has been confusing. Early on, you suggested that the case for corroboration is not proven, but I suggest to you that that is the case. The people who have come forward are not saying that we absolutely must retain it. A lot of us feel that we should retain it, but many are saying, "My goodness, why shouldn't we look at it?"

I want to nail this. How long did Lord Carloway spend looking at corroboration? I remind the cabinet secretary that the bill covers arrest and custody, arrest by police, custody of persons not officially accused, investigative liberation, police liberation, rights of suspects in custody and police powers and duties—we have not come to corroboration yet—as well as breach of liberation conditions, common law and enactments, disapplication and interpretation of parts, sentencing, appeals by the SCCRC and miscellaneous provisions. How long did he spend looking at corroboration?

Kenny MacAskill: I think that, rather than taking hearsay evidence, you would have been better to ask Lord Carloway that when he was here.

Margaret Mitchell: With respect, cabinet secretary, you are saying that the case has been made on corroboration because Lord Carloway has convinced you, yet you are asking me to go back and ask him how long he spent on it. Did you not ask him that?

Kenny MacAskill: It is not a matter of going back. You had him here before as a witness. You should probably have asked him the question.

Margaret Mitchell: Should you not have satisfied yourself before—

Kenny MacAskill: I have to say—

The Convener: Now, now. Can we not have a barney and talk over each other? Passion is wonderful, but can we have civility?

Kenny MacAskill: It was difficult to understand what the question was.

Margaret Mitchell: Do you know, cabinet secretary—

Kenny MacAskill: I think that the question was what period of time, in the one year in which Lord Carloway carried out his review, he spent on corroboration.

Margaret Mitchell: Yes.

Kenny MacAskill: I have to give you the answer, Ms Mitchell, that I cannot answer that. I do not know how long he had for coffee breaks or how long was applied to anything else. He was asked to carry out a review. He was appointed not by me but by the Lord President. He took time off from sitting on the bench to go away and investigate—

Margaret Mitchell: You have answered the question. You do not know, cabinet secretary.

Kenny MacAskill: I do not know. You would need to ask Lord Carloway—

Margaret Mitchell: Right. Well, I think that that is material if we are talking about evidence that he has produced that has convinced you overwhelmingly that the case on corroboration has been made. I turn to the Carloway expert review group. Do you know what it recommended?

Kenny MacAskill: It was split. Some did not agree and some did agree.

Margaret Mitchell: But do you know what the group recommended?

Kenny MacAskill: It was a reference group to Lord Carloway. It is Lord Carloway's report that is put to me.

Margaret Mitchell: You do not know what it recommended. I will tell you, then, because we heard evidence on it. It recommended—

Kenny MacAskill: It was a reference group.

Margaret Mitchell: —that corroboration be put to a law commission. Okay?

Kenny MacAskill: It was a reference group to Lord Carloway.

Margaret Mitchell: Yes, and that is what it recommended to Lord Carloway.

Kenny MacAskill: And Lord Carloway made a report—

Margaret Mitchell: It seems that you did not know that, cabinet secretary.

The Convener: Please do not talk over each other. Please talk one at a time, because I am having difficulty hearing.

Margaret Mitchell: Did you know that information?

Kenny MacAskill: Lord Carloway made a report to me. I asked the Lord President for a judge to carry out a review after the Cadder decision. The Lord President appointed Lord Carloway, who had a reference group to give him support and advice. Lord Carloway produced the report, which he submitted to me. I am aware that many members of the reference group did not agree with his position on corroboration, but others, including the former chief constable of Lothian and Borders Police, David Strang, did. The report came to me and I support it, as I have said.

It is fair to say that what has persuaded me most that corroboration requires to go is not the eloquence of Lord Carloway or any other legal practitioner but the testimony of Colette Barrie. She has not given evidence before the committee, but she would be happy to do so or to give evidence directly to you.

Margaret Mitchell: Let us not go off at more of a tangent—you are an expert at doing that. You owe it to the hundreds of thousands of people who go through the criminal justice system every year, who expect a fair trial, to take the issue seriously and not go off at tangents.

The Convener: In fairness to the cabinet secretary, I do not think that he is not taking the issue seriously. I know that you and he are at opposite ends of the spectrum.

Margaret Mitchell: He should not go off at a tangent.

The Convener: The suggestion is most unfair. I accept Margaret Mitchell's position, but I ask her to test more questions.

Margaret Mitchell: The question is about the fact that the cabinet secretary has said that the need is immediate and that we must get justice for the victims now. At the same time, he has said that it is important to take time to get this right.

The Scottish National Party Government has a majority. Surely any reasonable person would consider the weight of expert opinion that we have heard. There has been a damaging attempt to polarise opinion by placing the judiciary and the legal profession on one side and victims on the other, which does a huge disservice to victims, as we know from the evidence of the cross-party group on adult survivors of sexual abuse, for example, whose firm opinion is that the accused's rights must be protected to get a fair trial for victims and ensure that justice is done. It does victims a disservice to use a numbers game and polarise opinion.

Given all that, your testimony today that you want to get this right and the fact that you have no clue how long Lord Carloway spent on looking at corroboration, is it not reasonable to give the issue not to the Law Commission, which we accept that you say is far too busy, but to a royal commission set up to look at the law of evidence, as Lord Gill suggests? It is clear from the evidence that we have heard and what you have said that that law is not being applied properly in court. Your evidence is contradictory—you say that corroboration has been whittled down to almost nothing, but it is also supposed to be a barrier. Given all that, surely any reasonable person would say that, while we look at possible safeguards, we should look at whether to retain or abolish the corroboration requirement.

Kenny MacAskill: No.

Margaret Mitchell: I did refer to any reasonable person.

The Convener: I am not having that, please—let us contain our emotions.

I have a question for completeness. A petition has been lodged to ask that, if the mandatory corroboration rule is abolished, that decision will have retrospective application. Will you address that point?

Kenny MacAskill: I do not think that retrospectivity can be brought in.

The Convener: Will you develop that a little? That would be helpful, as somebody has taken the trouble to bring a petition to the Parliament on the issue.

Kenny MacAskill: Retrospectivity would cause great difficulties for prosecution. I appreciate the sensitivity, because people have suffered injustice. However, there must be clarity and certainty. I say to Ms Mitchell that that comes back to the point that the law must be understandable. People must know whether the law applies to them. Retrospectivity causes difficulties with that. Our position is that retrospectivity would not be possible, although I have sympathy for those who seek to bring it in.

The Convener: I call John Finnie.

John Finnie: Has Margaret Mitchell finished?

Margaret Mitchell: I am finished.

The Convener: I did not just wade in.

John Finnie: I asked in case you thought that I had a supplementary question, convener.

The Convener: I did not think that.

John Finnie: My question is about Romano-whatever law—Romano-Greco law?

Kenny MacAskill: Romano-canonical law.

The Convener: Romano-Greco—that sounds like a restaurant.

John Finnie: Cabinet secretary, you said that a lot has changed since people were being charged with horse thefts and the like. That is the case, because we now have CCTV, IT, mobile phones, forensic science, DNA and a record number of police officers—we are able to use all those resources. That is all the more reason to acquire corroborative evidence, many would say.

Kenny MacAskill: It is about justice. One of the interesting discussions that I had with the chair of the Scottish Human Rights Commission and his colleagues was on that point. As we know, because of ECHR, a victim might choose eventually to go to Europe to challenge the system because they are not getting access to justice. People have gone to Europe frequently about convictions or whatever.

At some stage or other, it is possible that a victim would go to Europe and Scotland could face significant difficulties if we were challenged—we have the UN report relating to sexual offences. We have to prepare for that possibility and certainly the SHRC accepts that it is within the bounds of credibility that such a challenge could come. Perhaps, as in other instances, such a challenge has not been brought so far because the poor and the victims tend not to have access to the lawyers.

One of the other aspects of the proposal is about ensuring that Scots law is fit for purpose, can sustain challenges from the ECHR or wherever and provides that correct equilibrium for the scales of justice.

John Finnie: So the Scottish Government's position is that Scots law as it stands, with the requirement for corroboration, is challengeable under the ECHR.

Kenny MacAskill: It could be challenged, yes.

John Finnie: That point does not feature in any of the previous representations, explanatory notes, policy memoranda and so on that we have had. When did it come to light, cabinet secretary?

Kenny MacAskill: I have discussed the matter with past Lord Advocates.

John Finnie: And yet we have nothing in our papers to suggest that and I would have thought that it is of great significance.

Kenny MacAskill: The Lord Advocate has expressed concerns. I have certainly had discussions not simply with the current Lord Advocate but with past Lord Advocates about the possibility that, ultimately, we could face difficulties if a challenge was brought.

John Finnie: What changes would there be in work practices and attitudes were the requirement for corroboration to be removed from the Scots law system—in particular with regard to police officers? I asked Mr Graham about the amount of effort a police officer would put in with regard to someone who was the subject of a single witness accusation, perhaps with some CCTV evidence or whatever. Would the police be going out looking for evidence that would support the assertion of the accused that he had not committed the offence?

Kenny MacAskill: Yes—if we accept the position of the Lord Advocate, the police would always look for additional evidence. Probably the easiest way, once they had heard from one witness, would be to try to get a second or third witness. It would only be in cases where the police were restricted in terms of witnesses that they would not try to get that evidence from witnesses and they would look for additional evidence.

I think that the work practices of police would remain exactly the same. If there was an incident and a large number of witnesses were there, the police would get as many witness statements as possible. They might cite only a few of them, but that is probably the situation at present. You probably know of instances yourself in which there might have been 100 people who saw an offence. That does not mean that all 100 of them would be called—the police would probably just have noted their details—but it would help to make sure that charges were brought. I do not think that the proposal will make any difference to the work practices of the police.

The proposal will ensure that we avoid duplication of resources in matters that are not fundamental to the case—as in the example of two officers having to go down to London to collect a CD-ROM. You have probably experienced such situations yourself. The kernel of the matter comes back to what Lord Carloway was saying: it is about the quality, not the quantity, of evidence; it is about making sure that the case is proven; and it is about making sure that there is a sufficiency of evidence.

That is why we are looking at building on the qualitative and quantitative test by the Lord Advocate—the evidential and prosecutorial test. Is there sufficiency there? Is it in the public interest? Is there not just a single source but additional evidence? If there are several sources, that is what you want. If it is a situation with only one eye-witness, what additional evidence can you get? Is it that the pants of the perpetrator look the same as the description given by the young girl? Is it that she was able to identify a locus that she does not know? Is it that she is clearly able to express all those things? Those are all additional pieces of evidence but, at present, because of the arbitrary rule of corroboration, such a case cannot go to trial. However, in any other western democracy, it would proceed and it would be for the jury to decide. I do not think that the measure will change the practices of the police, apart from getting rid of the duplication that I think everybody concedes is unnecessary.

11:15

The Convener: Can I stop you a minute because everybody is chipping in again? I will let the discussion be exhausted but, just for enlightenment, I will tell members who is waiting to ask questions. Alison McInnes is indicating that she has only a small question, but I have a lot of members doing that. I have questions from Roderick Campbell, Sandra White, Elaine Murray, Christian Allard and now Alison McInnes. I am happy to take you all, but let us not go over old ground—let us pick up new things. I ask John Finnie whether he has finished. I see that he is perched and ready to go.

John Finnie: I have a question on one further issue.

The Convener: Okay—as long as it is new.

John Finnie: It is regarding domestic violence. There has been a welcome change of approach, certainly since I was in the constabulary a long time ago. As I understand it, following the Lord Advocate's guidelines, perpetrators, who are overwhelmingly male, can be arrested on uncorroborated evidence and detained in custody, only for the case not to proceed to court when the fiscal gets the papers in the morning. I understand that another dimension is the growing practice of counter-accusations through which the initial alleged victim finds themselves the subject of an accusation, and both parties are arrested. Under Cadder, both parties summon solicitors, who give advice that it would be inappropriate to say anything, which results in a logjam. That is in no one's interest. Were we to remove corroboration, do you fear that there would be more counter-accusations? That is happening with corroboration.

Kenny MacAskill: No. The issue that you raise relates to the policy that is operated by the Crown and the police. That relates to a zero tolerance policy and to better training for police officers in relation to what they are looking for. I do not think that the law of corroboration makes any difference to that, so I do not think that the change would affect police policy.

Roderick Campbell: Just for good order, I refer to my entry in the register of interests, which shows that I am a member of the Faculty of Advocates.

To follow on from the point that John Finnie made about the ECHR, I think that I am right in saying that Dame Elish Angiolini made a speech on the issue last year. That might not be in the policy memorandum, but it is certainly something that previous Lord Advocates have talked about.

The Convener: What did she say?

Roderick Campbell: She talked about the risk of challenge under the ECHR if corroboration was not abolished.

The Convener: That is helpful.

Roderick Campbell: Again for good order, I want to refer to a comment by Lord Gill, who said:

> My suggestion is that there should be an examination of all the various safeguards in the criminal system in the round. There could be, for example, reconsideration of the admissibility of certain statements, a re-examination of the use that can be made of confessions, a re-examination of the right of the accused not to testify, an examination of the right of the accused to withhold his defence at the earliest

stage of a prosecution, and so on.—[*Official Report*, *Justice Committee*, 20 November 2013; c 3720.]

In considering safeguards, will you take on board the Lord President's comments?

Kenny MacAskill: Yes. Some of those aspects might be for other reviews, but all of them would at least have to be considered initially as to whether they would be appropriate. It is becoming clearer to me that the issue is not simply about safeguards and the number of them; it is also about the operability of the systems and other aspects, such as those that the Lord President raised, which you have correctly touched on. We are happy to take the appropriate steps to ensure that we consider those.

Sandra White: I have a small point of clarification that is similar to the point that Rod Campbell made earlier. Perhaps the clerks could check this, but I seem to recall that, in evidence to the committee, Lord Carloway said that he was protecting the Scottish Parliament against someone taking a case to the European Court of Human Rights, which could happen if we still had corroboration.

The Convener: In considering our report, we can go back to look at the evidence.

Sandra White: John Finnie said that he had not seen any evidence on that, but I am almost certain that it was part of the evidence.

John Finnie: If that is the case, I accept that.

The Convener: We will deal with that issue when we look over the evidence that we have received. Members are beginning to exchange with one another and we are getting evidence from members.

Sandra White: Sorry—I just wanted to point that out.

Elaine Murray: I return to the possibility of the requirement for supportive evidence being put into the bill. That would change it from being a bill that abolishes the requirement for corroborative evidence to one that replaces it with a requirement for supportive evidence, which is quite different.

I am quite attracted to that idea on the first glance, but we would need time to take evidence on it to see whether it would satisfy some of the concerns that have been raised with us. We received a lot of evidence—a big file of it—from people on both sides of the argument. Would you, on behalf of the Scottish Government, be prepared to give time for that as the bill goes through the Parliament? Secondly, and importantly, why did you not put that provision in the bill in the first place before it was introduced to Parliament?

Kenny MacAskill: We consulted on safeguards. It is becoming clear to me that the issue is not only safeguards but the operability of the system. We seek to get as much consensus as possible. Sometimes, it is not possible to get consensus. We have, on one side, those who say that corroboration can never go and, on the other, those who think that it has to.

We are persuaded that corroboration has to go. We recognise the need for safeguards, which is why we have collaborated on a few. We are aware of continuing concerns, which is why we have always said that the door is open. We have even had discussions within the past fortnight or so. The Faculty of Advocates raised dock identification, to which we were perfectly happy to give consideration. Roderick Campbell made a good point about other aspects, so we are happy to consider that.

It is about getting the balance right, as Sandra White said, within time. We are happy to take time to try to ensure that we get it right. We think that the principle is established that corroboration is past its sell-by date and archaic. Equally, you make a good point. With the removal of corroboration, we have an opportunity to decide what is necessary to prove a case. We can take time to ensure that we set that out.

The Convener: Would that be incorporated in the prosecutorial guidance that, if I have kept my bearings during the discussion, you are now considering putting into the bill?

Kenny MacAskill: The prosecutorial test would go into the bill. Prosecutorial guidance is a matter for the Lord Advocate.

The Convener: I understand that; sorry, that was my mistake. The prosecutorial test—

Kenny MacAskill: That could go into the bill.

The Convener: Would that be a place to put something like that?

Kenny MacAskill: Yes, that would be the place to do it.

The Convener: Before I get any more confused, I call Christian Allard to be followed by Alison McInnes. After that I want to have a suspension before we move on to the next set of questions, if that is all right with members.

Christian Allard: Thank you, convener. I do not want you to be more confused about that matter, but I am confused about something that I heard. It concerns the number of prosecutions and convictions that there will be if we remove the requirement for corroboration.

At the start of the debate, the people who did not want to remove the requirement for corroboration claimed that there would be no increase in the number of cases brought to prosecution. When I asked Lord Gill about that, he

answered no, there would not be an increase. When I pushed him on it, he answered that it might increase the number of prosecutions. Again, we are not sure whether the numbers will or will not increase.

We heard from Margaret Mitchell that many more unsafe convictions could arise if we remove the requirement for corroboration, but Lord Gill said that he was not convinced that it would increase the number of convictions. I would like your views, cabinet secretary: what would it be?

The Convener: I do not think that Lord Gill said that it would increase the number of convictions. Do you have that in front of you?

Christian Allard: He said:

"I am not convinced that it would increase the number of convictions."—[*Official Report*, *Justice Committee*, 20 November 2013; c 3727.]

The Convener: That is correct.

Christian Allard: That does not add up to many more unsafe convictions.

Roderick Campbell: The issue is the number of cases in which there might be a miscarriage of justice, not the number of convictions per se.

The Convener: Yes. The evidence from the SCCRC was that it thought that there would be more unsafe convictions and, therefore, that more appeals would go to it. That was another point, so there were two points there.

Christian Allard: Nevertheless, my question is on the number of convictions.

Kenny MacAskill: I do not believe that there would be an increase in the number of miscarriages of justice, as Lord Carloway made clear, and certainly not when the appropriate safeguards are in place. We already have an SCCRC, unlike many other countries, excepting England and Norway.

The removal of the corroboration requirement will increase access to justice, and it is likely that increased access to justice will lead to more convictions, but we cannot confirm or guarantee that any particular offence that is prosecuted as a result of that increased access would result in a conviction. As Sandra White said, it is likely that more people who might previously have pleaded not guilty despite the evidence or in the hope that the evidence would not hang together, thinking that they would be able to evade justice, might plead guilty and acknowledge their offending.

The Convener: We will move on. Alison McInnes will have the last word.

Alison McInnes: Mr MacAskill, you said in response to John Finnie's question about police practice following the abolition of the corroboration requirement that there would not be many changes apart from a reduction in the duplication of resources. Have you quantified the savings that might be made in police and forensic services if they did not need to have all those double resources?

Kenny MacAskill: Her Majesty's inspector of constabulary was going to do some work in that area, but he has not yet reported on the costs of duplication, which are hard to quantify. The abolition of duplication will not create financial savings as such, but it will mean that two officers who have to go down to London to pick a CD-ROM—

The Convener: We do not need to hear about two officers and a CD anymore; I think we all know about that by now.

Kenny MacAskill: I got the example from the federation—

The Convener: I know—forgive me, cabinet secretary. We accept the example of the two officers and the CD, but I think that the point has been made.

Kenny MacAskill: To conclude, rather than having two officers going to London—I do not need to expand on that—perhaps one officer will go while the other will stay on the beat in Aberdeen, Glasgow or wherever. That is replicated so that, in future, rather than two forensic scientists doing something, one of them could get on with some analysis. They would be able to do the work that they are paid to do rather than simply having to sign a chitty to say, "I was there too."

The Convener: I appreciate that. I am beginning to wonder what was on that CD-ROM, but we will park that subject.

We have finished this session, and I suspend the meeting for a five-minute break, which is much needed by the convener and possibly by others, including the cabinet secretary.

11:27

Meeting suspended.

11:34

On resuming—

The Convener: We are back, refreshed and energised, and we move to the second set of questions, on the sheriff and jury proposals in part 3 of the bill. The cabinet secretary and his officials are still with us. I seek questions from members, although I do not see the flurry of hands that we had in the previous session—I do not know why.

Margaret Mitchell has a question.

Margaret Mitchell: On the proposal to increase the majority that is required for a conviction in jury cases, is there not a problem with considering that as a safeguard?

I am wondering whether I am on the right subject here.

The Convener: I do not think so.

Margaret Mitchell: No, I am not—my apologies.

The Convener: That issue is related to corroboration, and that moment has passed.

I hope that your point was not about a CD. You are not one of those two policemen, are you? No.

Margaret Mitchell: My apologies.

The Convener: That is okay. John Finnie will go next.

John Finnie: Cabinet secretary, the bill contains some wide-ranging proposals to improve the business management of the court system. In the past, the introduction of intermediate diets was intended to serve a similar purpose. Why would such a change work this time if it has not worked previously?

Kenny MacAskill: It has worked in the High Court. We are discussing sheriff and jury cases, and the proposals are predicated not so much on bringing back the intermediate diets that were introduced in the 20th century as on Lord Bonomy's report at the start of the noughties, on which the changes to the High Court were based. The change has worked remarkably well there and, given the nature of the High Court, it should work reasonably well in sheriff and jury cases. It is different from what has taken place in summary cases, and the changes in the High Court are the main comparator.

John Finnie: I acknowledge that my experience in relation to such matters is from a previous century.

Kenny MacAskill: As is mine.

John Finnie: Yes. With regard to the secure email system and the question of ownership that was discussed, will that provide challenges given the additional number of sheriff and jury cases in comparison with the number of High Court cases?

Kenny MacAskill: We face challenges with the IT system at present, so we know that there will be challenges, but we have to make those changes anyway, and I am confident that Crown prosecutors and everyone else will be able to resolve the issues. That will take time, but we already know that the IT systems require to be improved across the justice domain. New systems bring challenges, but we are changing the system to get it right.

Roderick Campbell: We heard in our second evidence session on the bill from representatives of the Faculty of Advocates and the Crown Office. There was discussion about whether, under section 46, the written record of the state of preparation should be a joint statement, or whether the prosecution and defence could both sign and prepare their own statements, in which case the bill would require to be amended. Do you have any comments on that?

Kenny MacAskill: We are aware of the concerns about who will do what, so we are happy to review the issue and see how we can resolve it.

Roderick Campbell: Secondly, do you have any comments on the resource implications of those proposals?

Kenny MacAskill: We have set out those details in the financial memorandum. There will be increased costs through legal aid that we will have to address, but there will also be savings in the systems as a result—it is hoped—of having fewer citations not just for witnesses and jurors but for specialist witnesses. We know that there are issues to be addressed, but we have quantified the costs and worked with the relevant agencies, and we believe that we can manage them.

The Convener: When you say that you will go away and look at the issue of the written statement about the state of play in a trial, I take it that you are sympathetic to the submission of separate records by the prosecution and the defence. I can recall there being difficulties with a civil minute of agreement, where one party got the blame when it was the other party that was dragging their feet.

Kenny MacAskill: I am happy to try to ensure that we get that right. Perhaps Kathleen McInulty can comment on that.

Kathleen McInulty (Scottish Government): Yes. The issue needs to be considered and given further thought because if there are separate schedules it is likely to take sheriffs longer to assimilate the information. Indeed, because of the volume of cases, it is likely to have a more significant impact on the sheriff court rather than the High Court.

The Convener: But you take my point that if the Crown or the defence were dragging its feet you would at least know that if each side had to have the schedule in within the appropriate time.

Kathleen McInulty: Yes.

The Convener: I will press the point no further but will simply say that such an approach would be fairer to both parties.

Margaret Mitchell: On section 67 and compulsory business meetings, the Government has decided that such meetings could be held by

electronic means and—contrary to the Bowen review, which recommended that they be held before indictment—that they should be held after indictment but before the first trial. Why was that decision taken and will the timing make the business management meeting any less effective?

Kenny MacAskill: The defence and prosecution both preferred the meeting to be held post service of the indictment because it would give them the opportunity to focus on the matter. I understand that when Sheriff Principal Bowen gave evidence to the committee he indicated that he was happy and content with such an approach. Everyone is happy for the meeting to be held at that point. I can certainly see the logic in that; when the indictment is served, it focuses minds on the charge that is being faced while, prior to that, some edging around goes on. We have simply gone with what all those involved seem to have wanted.

Margaret Mitchell: What has the Scottish Government done to ensure that resource pressures do not hamper the reform's effective implementation?

Kenny MacAskill: We seek to fund all the agencies and parties involved from the Scottish Legal Aid Board through to the Crown Office and Procurator Fiscal Service and the Scottish Court Service and each is aware of the challenges. We have taken account of all this; in some areas, there will be savings while, in others, there will be expenditure but we have prepared for all that and believe that we are capable of dealing with it.

Margaret Mitchell: Are there any lessons to be learned from the High Court reforms, which introduced something very similar that has worked well?

Kenny MacAskill: The lesson to be learned is that the sheriff and jury procedure is much more akin to the procedure in the High Court. We know that the volume of cases in the sheriff and jury system is greater but you are quite correct that there is good practice in the High Court, including the earlier resolution of cases, and that the reforms have worked well. Sheriff Principal Bowen looked at that and we are seeking to expand it. The challenge is that there are more cases in the sheriff and jury system but the principles, such as taking an early focus, minimising what has to be discussed and debated and ensuring that we inconvenience people as little as possible if they do not have to be cited or called, are the same.

Margaret Mitchell: Thank you.

Elaine Murray: I am reasonably content with most of the provisions in this part of the bill but I want to probe the approach taken in section 65, which changes the pre-trial time limits, and the Scottish Government's analysis of the responses to the Bowen report. For example, some people felt that there was no strong justification for change and I wonder whether you can give us any information on the proportion of sheriff and jury custody cases in which the court agreed to extend the current 110-day limit.

Kenny MacAskill: We do not have that information because it is not recorded. However, we know how things are operating in the High Court following Lord Bonomy's review and that Lord Bonomy himself said that

"the real jewel in the crown"

of solemn procedure was the requirement for someone on remand to have their indictment served within 80 days. That remains sacrosanct and the extension of the limit from 110 to 140 days puts solemn procedure in the sheriff and jury system in line with that in the High Court. We have retained the principle that the indictment has to be served within 80 days but the change simply takes into account the complexities of many cases as a result of forensics and other aspects.

Elaine Murray: The limit can be extended at the moment but we do not know how many cases have required such an extension.

Kenny MacAskill: No.

Kathleen McInulty: Those figures are available for High Court cases but, as I understand it, they are not recorded in the management information systems for sheriff and jury cases. Instead, that information is recorded in the written minute of the court proceedings.

The Convener: Do we have the figures for High Court cases?

Kathleen McInulty: According to the Scottish Court Service's 2012-13 annual report, it was normal for there to be at least one extension of the 140-day rule in cases.

Elaine Murray: The 110-day rule.

The Convener: The 110-day rule.

Kathleen McInulty: I am sorry—it was 140 days in the High Court.

Elaine Murray: Of course.

The Convener: Of course. [*Laughter*.] It is like a duet.

Elaine Murray: Will you consider monitoring the extension of the limit in sheriff court cases to get some idea whether the 140 days is appropriate?

Kenny MacAskill: We are happy to do so, but the fact is that High Court cases are by their very nature likely to be more complicated than sheriff and jury cases. However, as we stated in response to Sheriff Principal Bowen, we intend to monitor the implementation of the proposals.

When the limit was 110 days, any extension was granted reluctantly and, with the change to 140 days, the situation will have to be monitored to ensure that any extension is granted only with good cause. There are checks and balances and there is, of course, the opportunity to seek bail in some instances.

The Convener: I am not going to look at the rest of the committee but I do not think that anyone else has put up their hand to ask a question. I therefore thank the cabinet secretary and his officials very much for their attendance.

As agreed earlier, we now move into private for item 3.

11:46

Meeting continued in private until 12:50.

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