The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Wednesday 20 November 2013

Session 4

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JUSTICE COMMITTEE
33rd Meeting 2013, 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:

Professor Andrew Coyle (International Centre for Prison Studies)
Catriona Dalrymple (Crown Office and Procurator Fiscal Service)
Joan Fraser (Association of Visiting Committees for Scottish Penal Establishments)
Lord Gill (Lord President)
Lisa Mackenzie (Howard League Scotland)
The Lord Advocate (Frank Mulholland QC)
Graeme Pearson (South Scotland) (Lab)
Diego Quiroz (Scottish Human Rights Commission)
David Strang (HM Chief Inspector of Prisons for Scotland)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Wednesday 20 November 2013

[The Convener *opened the meeting at 09:30*]

Criminal Justice (Scotland) Bill: Stage 1

The Convener (Christine Grahame): Good morning. I welcome everyone to the 33rd meeting of the Justice Committee in 2013. I ask those who are present 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.

We move on to our fifth evidence session on the Criminal Justice (Scotland) Bill at stage 1, with two panels of witnesses today. We will consider provisions on corroboration and related reforms—we have got to it at last, committee—and will hear evidence from the Lord President and, later, from the Lord Advocate.

I welcome our first panel: the Rt Hon Lord Gill, Lord President of the Court of Session; Roddy Flinn, legal secretary to the Lord President; and Elise McIntyre, deputy legal secretary to the Lord President. Good morning to you all.

I understand that the Lord President wishes to make a brief opening statement.

Lord Gill (Lord President): Thank you, madam convener. I will make three brief points. I am here today to give you the view of the judges. Different judges have different points of emphasis, of course, but I would like to convey the judges' general feeling on this controversial issue.

First, in my view, the abolition of the rule of corroboration is a matter of constitutional importance. In my opinion, the rule is not simply a technical rule of the law of evidence that can be changed as part of a discussion of evidence; it is part of the constitution of this country and one of the great legal safeguards in our criminal justice system. Therefore, a change of such profound importance, if you are contemplating making it, should be made as part of a much wider consideration of criminal evidence and not simply as an ad hoc response to one particular decision of the United Kingdom Supreme Court, which is the situation in which we find ourselves.

Secondly, there is a remarkable degree of opposition to the change across the entire legal profession. I am not suggesting that that, in itself, is a conclusive consideration against the abolition of corroboration—please do not misunderstand me on that—but such a degree of opposition across the entire profession should give us all pause for thought. Those are the views of people with considerable experience in the practical operation of the criminal justice system.

Thirdly, time and again throughout the controversy the point has been made that other countries can do without the rule of corroboration, and it is asked why Scotland is out of step. I think that that is the wrong way to look at it. We should, in fact, be proud of the fact that we have something that other jurisdictions do not have. It is one of the great hallmarks of Scottish criminal law.

We are all privileged to live in a just society in Scotland, the reason for which is that our criminal justice system is rooted in the idea of fairness. Corroboration is, in my opinion, a critical element in that. I am not here to apologise for the fact that we have corroboration; I think that we should all be grateful that we do.

Those are the three main points that I wanted to make, madam convener. In the course of the committee's questions, I might be able to suggest other ways out of the problem, but that is the general view of the judiciary. In preparation for the response of the judges to the Scottish Government's consultation, I asked every judge to express their view individually to me. With the exception of my colleague the Lord Justice Clerk, all the judges were opposed to the abolition of corroboration.

The Convener: Wow! You have cheered me up, I can tell you. My position on abolishing corroboration is well recorded, although that may not be my colleagues' position. We will now take questions from members.

Elaine Murray (Dumfriesshire) (Lab): Lord Gill, I appreciate what you are telling us about the views of the judiciary on the issue, but organisations that support sufferers of domestic abuse and sexual abuse take a different view. They make the argument that, if corroboration were abolished, there would be more prosecutions of domestic and sexual crimes and that the verdict would rest on the quality of the evidence that is presented in court rather than on the quantity of evidence, as happens at present under the requirement for two pieces of independent evidence. How would you respond to those two points?

Lord Gill: Obviously, it is a matter of concern to ensure that sexual crime and domestic abuse are properly and effectively prosecuted. It is in the nature of those types of crime that proof is difficult to produce—that is just a fact of life. We should be careful of the risk that, by legislating in an attempt to cure one perceived problem in one corner of the

criminal justice system, we make a reform the consequences of which are completely unknowable across the whole spectrum of the criminal justice system.

Elaine Murray: Is there an alternative that would address the problems with domestic and sexual crimes? It has been suggested to me that there could be a pilot in which we abolish the need for corroboration for those particular crimes to see how successful that is. Alternatively, we could further amend what is considered to be corroboration to make it easier to prosecute those crimes.

Lord Gill: I think that that would not be a wise method of legislation. If you legislated specifically for one type of offence and relaxed the evidential requirements in respect of it, you would create, in a sense, a privileged class of complainers for that type of crime, which would have an unsettling effect on the rest of the criminal justice system. If you legislate on the matter, the legislation must apply across the board.

Elaine Murray: Would no further development of what is considered to be corroboration help to address the problems with those types of crimes?

Lord Gill: It is remarkable how corroboration has strengthened in my time in the legal profession and on the bench. When I was a young lawyer, corroboration often came in the form of a fingerprint, but we do not hear much about fingerprints nowadays. The advances in DNA testing have been quite extraordinary, with the result that many crimes that 20 years ago would never have been detected, or that would certainly never have been prosecuted, can now be prosecuted successfully. I realise that that is not entirely an answer to the point that you are making, Mrs Murray. However, I feel that corroboration works with deadly effect nowadays in the sort of cases that I am talking about.

Margaret Mitchell (Central Scotland) (Con): I appreciate your opening statement, Lord Gill, because there has been a feeling that it is a done deal that corroboration will be abolished, so we should look at the safeguards. It has been of particular concern that a third way has not been considered. A third way, whereby we retain corroboration but look at how we can improve the law of evidence, would be worthy of exploration. I know and have met representatives of Rape Crisis Scotland and we have had good conversations about their concerns—there is mutual agreement on some points. Adult survivors of abuse who have experience of court have come up with some excellent suggestions as to how a third way could be achieved.

You mentioned progress in the quality of evidence, which should, in theory, make corroboration easier. Others have mentioned the fact that, in court, a time limit is often applied in relation to the application of the Moorov doctrine. If that were relaxed, it would help to achieve convictions in interpersonal-type cases. We could also provide more training for procurators fiscal to enable them to understand why it might take three days for a rape victim to come forward, so that that can be explained to a jury. Do you think that it is worth looking at a third way?

Lord Gill: I do. It is not wise to assume that if you abolish corroboration you will increase the conviction rate. I am sceptical of that claim. What you are doing is giving the defence the chance to make a really powerful speech. Instead of having to face a corroborated case, the defence can go to the jury and say, "Would you convict my client on the word of one person with nothing else to support it?" That could be a very powerful line to take with juries. I am not persuaded that if you abolish corroboration that will increase the conviction rate.

To return to your main point, Mrs Mitchell, I do not think that we should just take one brick out of the wall, as it were, and say, "We'll change this. It's a rule of evidence, so we can change it." You have to think about the effect on the whole system. The system that we have today is quite coherent and logical. It consists of a series of checks and balances that attempt to achieve not just fairness to the defence, but fairness to the prosecution as well. The overriding principle in all our trials is that justice should be fairly dispensed.

If you are going to consider a change of such profound importance, it must be looked at against a wider picture. 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. Those are the various tensions within the system, and the problem must be looked at in that context.

The Parliament's legislative record over the past few years shows an openness to change and an open-mindedness to consider the issue in a wider context to reach the wisest outcome. I think that we are looking at the issue in much too narrow a context.

09:45

Margaret Mitchell: The other concern is that the committee is under pressure. It is scrutinising a lot of legislation—indeed, not only is this the

second time that we have met this week, but we had to meet twice in a week very recently—and there is a concern that we are not giving these important issues the time that we would like to give them. Is there an argument for considering the third way of retaining and trying to improve the current system, looking at very complicated issues such as the rights of the accused, which are paramount, and defence evidence, but taking this particular issue out of the bill and getting some other body to examine it properly in depth? Would that be a sensible way forward?

Lord Gill: I would suggest as much myself. In the past, the Government has appointed royal commissions, departmental committees and so on to examine such issues, and I think that such an approach would be a good way out of our difficulty. An examination of all the various facets and their interaction would allow a balanced judgment to be reached.

Margaret Mitchell: That is very helpful.

Lord Gill: I do not think that that would necessarily take a lot of time or cause a great deal of delay. The public in Scotland are very knowledgeable, as is the profession, and we have academic support from the law schools. As the issues are pretty well known, it should be possible to come to a wise conclusion by looking at the matter overall.

Margaret Mitchell: That would allay the fear that, by getting a commission to examine the issue, we would simply be knocking it back. That would certainly not have to be the case. A commission could deal with the issues, which, as you have said, are well known.

Lord Gill: It would not be a way of avoiding the problem; it would be a positive way of getting a better outcome.

The Convener: You say that the process would not necessarily take a long time. Can you give us some idea of a timescale for it?

Lord Gill: I do not know, but I cannot imagine that it would take years, if that is what you are worried about.

The Convener: That is what I wanted to know.

Lord Gill: I do not think that it would take that length of time.

The Convener: You have opened up the issue of the different ways in which evidence is used in court. You might not know the answer to this, but has there been any inquiry or academic research into why, when the Crown thinks that it has a terrific case, juries do not convict or, indeed, into how juries think about things? I realise that the anonymity of the juries would have to be maintained in such research.

Lord Gill: That is a big question. The restrictions on one's access to the views of juries are so tight that it has never been possible to carry out proper academic research on how juries reach their verdicts. I am afraid that jurors cannot be interviewed.

The Convener: Should there be some academic research that maintains the anonymity of juries but which still examines certain issues? After all, we sometimes get perverse decisions. We would not be seeking to blame jurors; the point is that we do not know how, on the basis of the evidence presented, juries reach their verdicts. Of course, I realise that that is part of the whole drama of the courtroom.

Lord Gill: I have no developed views on the subject and have not gone into it in my own mind in any great detail. However, my experience has been that, by and large, juries get it right.

The Convener: That answers that question.

John Finnie (Highlands and Islands) (Ind): Good morning, Lord Gill. Like my colleagues, I have been very reassured by your comments and have three questions for you based on the evidence to the committee. First, can you comment on the suggestion in the written and oral evidence that we have received that, given the terms of reference of Lord Carloway's review, the proposal to abolish corroboration is a "rebalancing" act?

Lord Gill: I would put it more strongly than that. You have to think very carefully about the consequences of the move. It is not a rebalancing act at all, but a major change that will have consequences, many of which are unknowable at this stage. It is not just a piece of law reform in the narrow area of the law of evidence, but something that would affect our society's whole approach to justice and which could have very serious consequences.

By and large, we do not have many miscarriages of justice in Scotland and when they are discovered we put them right. We have very few at the moment, but my fear is that there would be many more if corroboration were to be abolished.

John Finnie: Another point that has been raised by many sources and which you have touched on briefly is that with advances in DNA testing, and with closed circuit television and other covert surveillance, more corroboration is available.

Lord Gill: Indeed. If the prosecution does not need corroboration, the risk is that in some cases it might take the view, "Why go looking for it? We've got the complainer and their word might be good enough." My other worry is that looking for

corroboration can be costly in terms of police time and resources and it would be unfortunate if, at a time when resources are scarce—and if corroboration were available—economies were to be made in that direction.

Finally, what happens if a prosecution is brought without corroboration? If the defence can show that corroboration might have been available, it would be a very powerful defence point.

John Finnie: Thank you very much. You have covered my points.

Alison McInnes (North East Scotland) (LD): I, too, welcome your comments. I am very concerned about this profound change and have been calling for a royal commission on the matter for some time now.

I want to pursue the likelihood of wrongful convictions and fears that you have expressed in that respect. Other reforms have been galloping through our system—changes to double jeopardy and the proposals on admissibility of evidence of bad character and previous convictions. When the change on corroboration is taken with those, will the accumulated changes bring great risks?

Lord Gill: That comes back to my point that corroboration has to be seen in that much wider context. If a change of such importance is to be considered, those other considerations are exactly what must be taken into account.

Alison McInnes: That was helpful.

We know that England and Wales has a lot of checks and balances that we do not have. However, I am not sure how useful it would be to get into a discussion about whether it would be a little bit better if we had this instead of that, given your position that we should set the matter aside and look at things in the round. Is that right?

Lord Gill: Yes.

Alison McInnes: Thank you.

The Convener: Are you alluding to the size of juries and the three verdicts, which no one has raised yet?

Alison McInnes: Yes.

The Convener: Should we be considering those matters as well?

Lord Gill: The moment you say, "If we're going to abolish corroboration, let's change the majority from the necessary 8-7 to 10-5 or whatever", you are actually conceding that by abolishing corroboration you are creating a greater risk of a miscarriage of justice. To bring in that kind of safeguard would be, I think, an acknowledgement that abolition of corroboration would bring a greater risk of things going wrong.

The Convener: Should the three verdicts, including not proven—the whole thing—also be considered?

Lord Gill: That could usefully be looked at too, as part of the general survey of the criminal law.

Sandra White (Glasgow Kelvin) (SNP): You mentioned that you are looking at corroboration, and we are looking at the Criminal Justice (Scotland) Bill in the round. Jury changes, double jeopardy and other parts of the law have been touched upon. Are you saying that the Justice Committee should go ahead with the Criminal Justice (Scotland) Bill, but that corroboration should be taken out and looked at as a separate entity?

Lord Gill: That would be a wise course.

Sandra White: I just wanted clarification on that point. Following what John Finnie said, Lord Gill mentioned advances in corroborative evidence, including DNA testing. You said that there is now more corroboration available, and I think that you also said that, if there is corroboration available and you have other witnesses, why go looking for it? I was concerned by that remark, because you have mentioned that the majority of judges are not in favour of abolishing corroboration, but we are also talking about victims here, not just the judicial system. Victims do not always get justice in some aspects of the law—for example, in domestic violence cases, in rape cases, or in offences against older people or offences against children in children's homes, when there is not a person who can corroborate. If there is other corroborative evidence there without another person, why would you not go looking for it? You said, "Why go looking for it?"

Lord Gill: Forgive me, but I—

The Convener: I do not think that that is what Lord Gill was saying.

Lord Gill: I do not think I said that.

Sandra White: I wrote down exactly what Lord Gill said. I would like him to clarify that point.

Lord Gill: I am sorry if I have not expressed myself clearly enough. I am as concerned as anyone if a crime of a sexual nature, a crime against a child or a case of domestic abuse goes unprosecuted or unpunished. That would plainly be a matter of concern. However, in attempting to provide a solution to that problem, we must be careful not to make a reform that spreads across the entire criminal justice system. Abolition of corroboration would not apply only in cases such as you mentioned; it would apply in every criminal case. It would apply, for example, if any of us were to be involved in an accidental misunderstanding in a shop, if the shop assistant said, "I saw you

picking up something and putting it in your pocket."

The Convener: I wish you had not been looking at me when you said that.

Lord Gill: If any of us found ourselves in that kind of situation, we would begin to see the value of the law of corroboration. It applies widely.

Sandra White: You have not quite addressed the point that I was making. Maybe I have picked you up wrong, but you certainly said that even if you did not go looking for it, the defence would ask, if they had corroboration from another person, why they should go looking for it.

The point that I am trying to make is about corroboration by DNA, video cameras—as were mentioned by Mr Finnie—and other forms of corroborative evidence. On the example that you gave, most shops have CCTV cameras, which would supply corroborative evidence of whether a crime had been committed, although I do not particularly want to go down the road of discussing somebody being accused of taking something from a shop. What I am asking is whether justice is served if defence lawyers do not bother going looking for other corroborative evidence if they have another person.

Lord Gill: I was thinking more about a case in which the prosecutor who has to make the decision whether to bring a prosecution has the word of one witness, and decides that that is enough and that they can go ahead with the prosecution, thereby failing to follow up other lines of corroboration. That might present the defence with quite a good argument—that other evidence was there if the prosecution had looked for it but it did not bother. That was really the only point I wanted to make.

Sandra White: You were looking at the question from the other angle.

10:00

The Convener: I might get myself into trouble now, but here goes. One of the things that I heard the cabinet secretary say—I have heard it said before on behalf of Rape Crisis Scotland and Scottish Women's Aid—is that we are not talking about securing more prosecutions, but about access to justice. I do not know what that means, so would you comment on that? I thought that the purpose of putting the proposal into the legislation was to secure more prosecutions but, apparently, that is not the case and it is about securing access to justice. I remember hearing that clearly on a television interview, and I have heard it subsequently.

Lord Gill: The only rational justification for the proposal must surely be to increase the rate of convictions. It must be. What other reason could there be?

The Convener: I agree with you, but I was allowing you to corroborate what I think about it. That statement was quite extraordinary, because I thought increasing the number of convictions was the driving force behind the proposal, even if we narrow it down just to cover sexual and rape offences, although it will apply across the piece.

Alison McInnes: Following on from that, we know that the number of rape convictions in other jurisdictions is still very low and the rates are not improved by their not having a requirement for corroboration. Other forces are at work that prevent juries from coming to conclusions about those cases. We are in danger of moving from prosecuting in the public interest to prosecuting in the victim's interest. I wonder whether the cabinet secretary is moving towards allowing the victim to have their day in court. How would you respond to that?

Lord Gill: That is not the basis on which our prosecution system works. It works on the basis that the Lord Advocate decides whether, in the public interest as he sees it, a case is to be prosecuted. It is a marvellous feature of our criminal justice system. The privileged position of the Lord Advocate as the head of the prosecution system is one of the things that makes it so fair. He makes an independent, unbiased decision by looking at the case and deciding whether it is in the public interest to prosecute it. If he says that he will not prosecute a case, no one can gainsay that decision. It is not for the complainer to say that they want the case to be prosecuted.

Christian Allard (North East Scotland) (SNP): I have looked at the papers and evidence from a different background because this is only my second meeting at the Justice Committee. After hearing what I have heard this morning, I would like to hear you develop the point about the problem of access to justice. At one point you said that there were problems with the justice system and that we should somehow find solutions to change it. Will removing corroboration improve access to justice, in your view? Will it be more about the quality of evidence than the quantity?

Lord Gill: I do not think that removing corroboration will improve the quality of justice in Scotland in any way. There is a serious risk that there will be even fewer convictions, for the reasons that I have already given. I also think that if we make this change in isolation without looking at the wider picture, we might find that there will be consequences that are unknowable at the moment but that could be adverse to the system.

Christian Allard: So, you think that we should not start by removing corroboration. We should establish something else.

Lord Gill: No. To remove the requirement for corroboration is to start in exactly the wrong place.

Christian Allard: On access to justice, would abolishing corroboration increase the number of cases that would be brought to prosecution?

Lord Gill: No.

Christian Allard: Definitely not?

Lord Gill: It might increase the number of prosecutions, but I am not convinced that it would increase the number of convictions.

Roderick Campbell (North East Fife) (SNP): I declare an interest as a member of the Faculty of Advocates.

Good morning, Lord Gill. I have listened carefully to what you said, which has to a degree pre-empted a line of questioning on which I was going to embark.

To be fair to Lord Carloway, when he gave evidence on 24 September, under questioning from me he basically accepted that it is not necessarily the case that there would be more prosecutions under the proposed new prosecutorial test. One does not need to be too harsh on what he suggested.

I take your point on what the purpose of the change would be if there were not more prosecutions or convictions and have taken on board everything that you have said so far, but let us speculate for a moment. The Scottish Human Rights Commission regards corroboration as performing a "quality control function". What other quality-control functions are there in the system? What kind of quality-control functions would you like to see in a different system that did not rely on corroboration?

Lord Gill: I do not know, but I am pretty certain that changing the majority rule is not the answer. It is illogical, actually. 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.

Roderick Campbell: Should statutory provisions to exclude evidence such as those in England under section 78 of the Police and Criminal Evidence Act 1984 be considered in Scotland, or are you happy with common-law powers?

Lord Gill: No. I make it clear that I am not here to suggest that the status quo in Scottish criminal law should be preserved immutable and unchangeable. Every legal system must constantly renew itself because it must adapt to changing needs and circumstances. Therefore, it is perfectly right and proper that Parliament should reconsider corroboration among many other questions in the criminal law. I am not suggesting for a moment that the subject is off-limits for discussion—far from it. We can all benefit from reconsidering our most comfortable assumptions and examining them to determine whether they are still valid in modern conditions. However, one ought not to make an ad hoc response to one decision of the Supreme Court and say that we can change that particular rule of evidence. That is not the path of wisdom.

Roderick Campbell: In a nutshell, considering things in isolation is the wrong way. Is that your view?

Lord Gill: There are other rights of the accused that could usefully be looked at. For example, the fact that the accused can withhold his defence until a fairly late stage in the prosecution could usefully be re-examined, as could the vexed question of the use of statements, which has been a constant source of trouble in the courts. That can all be seen as part of one general problem, which is how to keep the law just, fair and up to date.

The Convener: I see that members have supplementaries but I think that we have pretty well established the position and do not want to have Lord Gill repeating himself over and over again. Are you bringing something new to the discussion, John?

John Finnie: Yes, convener.

The Convener: Well, we'll see.

John Finnie: We will—and I am sure that you will keep me right.

In advance of our evidence session with the Lord Advocate, from whom we will hear next, we have received supplementary written evidence from the Crown Office and Procurator Fiscal Service, which says:

> "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. It is about improving access to justice for victims".

The submission then cites a Supreme Court of Canada ruling from 1954, which states:

> "It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime."

Are there any frailties in that approach?

Lord Gill: I think that that is a rather simplistic statement from the Crown. What is the point in bringing a prosecution unless there is a reasonable prospect that it will succeed? Surely the criterion for bringing prosecutions is that it is in the public interest for the person in question to be prosecuted in order to be convicted and punished for the crime that has been committed. 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.

John Finnie: And clearly such a premise would not result in justice for the accused.

Lord Gill: If your case is unlikely to succeed, I am not convinced that you are doing the complainer any favours by bringing it. After all, it is an ordeal for them.

The Convener: I would not have thought that court would be therapy for anyone.

Alison, did you wish to ask a question?

Alison McInnes: No. I think that Lord Gill's counsel has been very wise and that he has covered most of the points.

The Convener: I do not think that John Pentland has had an opportunity to ask a question yet.

John Pentland (Motherwell and Wishaw) (Lab): I just have a supplementary.

The Convener: Please ask it. I think, however, that we have clearly established the position.

John Pentland: I certainly think that Lord Gill's remarks have raised the bar with regard to the contentions associated with the bill.

You told us that one should not assume anything, but should the Government get its way are you satisfied that the proposals provide sufficient checks and balances to protect witnesses and combat a culture in our courts with regard to the rights of the accused? So far most of the comments that I have heard have come from professional bodies and agencies; I have not heard that much about witnesses. Do you foresee any pitfalls or downsides, should the bill get the go-ahead? Do you think that the bill contains the required protections for those who appear in court?

Lord Gill: Altering the majority rule is an exercise in damage limitation. It might do some good but my feeling is that the issue has not been fully thought through and that there could be some adverse consequences.

The Convener: That has taken my breath away. I think that Lord Gill has underlined—indeed, double underlined—his position; I do not think that, with phrases such as "damage limitation", you can ask any more of him.

That said, Lord Gill, do you have any final comments?

Lord Gill: I would like to leave you with one thought. The controversy that has resulted from Lord Carloway's review has actually served quite a useful purpose in bringing out into the open a great many things that, over the years, we have just taken for granted. It is always useful to re-examine one's assumptions and see whether they are keeping up to date with a very fast-changing world. However, although it has been a useful exercise, it all points to the need for a wider and more general re-examination of all the checks and balances that apply.

The rule of corroboration is not some archaic legal relic from antiquity. We did not get where we are by accident. The fact that our law has this rule—a rule that I regard as one of its finest features—is the result of centuries of legal development, legal thought and the views of legal writers, politicians and practitioners down through the ages. It has been found to be a good rule. I simply ask the committee to listen to the wisdom of the ages—it has a lot to tell us.

The Convener: Thank you very much, Lord Gill.

10:16

Meeting suspended.

10:24

On resuming—

The Convener: Our second panel of witnesses comprises the Rt Hon Frank Mulholland QC, the Lord Advocate, and Catriona Dalrymple, the head of the policy division in the Crown Office and Procurator Fiscal Service. Good morning—it is still morning.

As with the Lord President, I offer the Lord Advocate the opportunity to make a brief opening statement.

The Lord Advocate (Frank Mulholland QC): Good morning, everyone. The committee is concerned with the proposal to abolish the corroboration rule, which has exercised most of the debate on the bill. I will make a few opening remarks about that.

I support abolition, for a particular reason. Prosecutors and I see the acute effect of the rule of corroboration in certain areas of criminal offending—particularly sexual offending, including rape, and domestic abuse. As women and children are very much in the majority of victims in those areas of criminality, the effect of the corroboration

rule is disproportionate on them. That is why I support the abolition of corroboration.

Witnesses have raised a number of matters with the committee, and I will deal with two of them. I am of course happy to answer any questions that members have. It has been said that the abolition of corroboration is intended to increase the conviction rate for rape or other sexual offending. I have never seen that as the purpose and I have never ever said that it was all about increasing the conviction rate.

I see abolition as being about access to justice for victims of domestic abuse, rape and other sexual offending. Any modern criminal justice system should have that. It seems that a class of victims in those areas of criminality are denied access to justice, particularly because of the legal requirement for corroboration. I will illustrate the point with figures. In 2012-13, 2,803 domestic abuse charges could not be taken up because there was insufficient admissible evidence. I suggest that it is a real concern that we are not providing the possibility of access to justice for a sizeable proportion of victims in those charges.

Yesterday, I asked the Crown Office and Procurator Fiscal Service's policy division to give me the figures for the rape charges that could not be taken up in the past two years because of insufficient evidence. The information is not statistically robust, as a full double-checking exercise was not undertaken, but I wanted an indication of the number of charges that could not be taken up because of the requirement for corroboration. About 13 per cent of rape charges that were reported to the Crown were affected—that was about 100 in one year and 70 in the other year, which makes 170-ish over two years. I suggest that that is a cause for concern for anyone who is interested in delivering justice in Scotland.

I accept that we must ensure fairness in any criminal justice system. All Scotland's prosecutors—certainly those whom I work with—are imbued with that notion of fairness. I can speak in due course about the checks and balances, which I have no doubt that I will be asked about.

The suggestion has been made that, if corroboration is abolished, the police and the prosecution will look for only a limited amount of evidence and will not look for additional evidence. I refute that suggestion. If it were correct, we would expect the police and prosecution currently to stop at corroboration from two sources of evidence. They do not do that. Under the Human Rights Act 1998 and the European convention on human rights, we have a duty to deliver effective criminal sanctions, which includes an effective investigation and effective prosecution. A raft of case law, particularly Smith v Her Majesty's Advocate in 1952, sets out the duties of the police under common law.

10:30

On the suggestion about limited evidence, I think that the chief constable has already commented that that will not happen; it certainly will not happen under my watch as Lord Advocate. I do not subscribe to the notion that we would wish to bring cases with limitations on the amount of evidence that could have been available and present that to a court and jury.

I am happy to take questions from members.

The Convener: Thank you very much. That is very useful.

Elaine Murray: Lord Gill advised us that he surveyed the justiciary on its views on the removal of corroboration, and all but one were opposed to that. Has a similar survey been undertaken with procurators fiscal to ascertain the views of the people on the ground?

The Lord Advocate: No; we have not surveyed all COPFS members of staff. When Lord Carloway's review was published, we had quite an extensive meeting in the Crown Office, which was attended by most senior civil servants and procurators fiscal, including the three federation heads, the Crown agent, the head of operations and the deputy head of operations. We had quite a robust chat about the Crown's position and, at the end of the meeting, I did not detect any dissension among the leaders of the COPFS.

The answer to your question is that we did not have a full and comprehensive survey, but that was an indication.

Elaine Murray: So that is not the view of the service overall; it is the view of senior people in the service.

The Lord Advocate: I think that that must be the case.

Elaine Murray: I want to go on to the effects on victims, which is obviously the primary consideration in the suggestions. You say that you do not think that there would be a larger number of successful prosecutions and that this is about access to justice. I wonder about the victim who does not get to go to court and there no longer being the view that that is because of corroboration but because they were not believed, or somebody who goes to court and the jury does not believe them. There are all sorts of reasons why people do not believe women when it comes to domestic violence or rape; it is about prejudices in the jury and so on. Will not there be an even more deleterious effect on the victim? They may go through the process, in which it is her word

against his, and at the end of the day the jury may not believe her and it is basically perceived that she has lied. Is not that even worse for a victim than being told that they cannot go to court because there is no corroboration?

The Lord Advocate: I have many years of experience as a prosecutor and have been involved in many difficult conservations with complainers about charges of sexual abuse and rape to explain to them why we cannot take up the case, and in all my time as a prosecutor, I have never known anyone to express thanks for our not being able to take up a case. On the contrary, in my experience, people have wished for the opportunity for their version of events and account to be heard in a court of law with the possibility that the jury, with the burden of proof and all the protections, would reach a verdict on that.

Elaine Murray: Admittedly, people may not give thanks for a case not being taken to court, but could it not be even worse if a person went to court, went through all the process, and was not believed at the end of the day?

The Lord Advocate: I am not saying that there might not be some validity in what you say. All I am saying is that, from my experience of having those difficult conversations, I have never known that sentiment to be expressed. Can I just take your point one stage further? It is a matter for the Parliament, but if corroboration is abolished, the prevailing view among procurators fiscal is that it will lead to much more difficult conversations with complainers and victims because rather than say that there is insufficient evidence within the law to take up the case, we will need to explain the reasons why the evidence is not credible or reliable. That will be much more difficult than explaining to a complainer or victim that there is insufficient evidence. However, we do not shy away from that. We think that it is a point of principle to give greater access to justice for victims. We think that that is the right thing to do, particularly in the two areas of criminality that I spoke of.

Christian Allard: Good morning, Lord Advocate. You referred to access to justice in your opening remarks. You made your point clearly and gave us a lot of statistics. I am not keen on statistics because sometimes they do not tell the whole story. You gave us a number of case studies in your supplementary evidence. Would you like to tell us more about one of those?

The Lord Advocate: Yes. They are anonymised real cases, and there are many more. I can speak from personal experience about where the effect of Cadder is most acute. In a rape case prior to Cadder, it was fairly common that the victim or complainer stated that she was raped by a named person. The requirement for corroboration requires us to corroborate the crucial facts, and in a charge of rape there are three crucial facts: first, we need to corroborate penetration; secondly, we need to corroborate lack of consent; and thirdly, we need to corroborate mens rea, which is the accused's intention. Those are the three crucial facts that we must corroborate.

Elaine Murray referred to the dynamic of the type of offending that is rape. It is fairly common in rape cases—we refer to it as counterintuitive—for victims to think about whether to report an allegation of rape to the police. The victim might want to think about it and talk about it with their family or friends, or it might not dawn on the victim what happened, or they might be unsure about precisely what happened, so there is commonly delayed reporting of rape allegations. We are told by the experts that that is normal behaviour and we will explain that to the jury in rape prosecutions.

In pre-Cadder cases, it was fairly common during interviews for an accused person to say, "Yes, we had intercourse, but it was consensual." In those circumstances, we have corroboration of penetration because we have the complainer's evidence that she was penetrated and raped and we have corroboration from the accused's statement under interview by police officers. However, post Cadder, the effect of Cadder in many such cases is that, on advice, accused persons are saying nothing. I am not being critical of that option being taken; it is just a fact that, in many such cases, we do not have that source of evidence now.

The effect of Cadder in many rape cases is that we do not have corroboration of penetration because, by the time the alleged rape is reported, forensic opportunities are lost and gone. There is no point in taking intimate samples one or two weeks after the alleged rape, so we will not get corroboration from that source. Where prosecutors had sufficient evidence pre Cadder, we do not have that now, and therefore we cannot take up many rape cases. That seems to me a matter of real concern.

I will give you an example of a case that I dealt with about three weeks ago, which I will anonymise. I heard Margaret Mitchell speak on the extension, or perhaps redefinition, of Moorov. However, we can never get away from the fact that Moorov requires two victims as complainers. I had a case in which two sisters had been horrifically sexually abused as children over many years by a member of the family. The girls were told that no one would believe them or love them if they spoke up, so they did not do so. Eventually, as adults, they got the courage to speak up and make a complaint to the police because, quite

simply, they were concerned that their relative had access to children of the same age.

We took up the case and indicted it in the High Court, and we were prepared to proceed to trial. However, one of the victims could not, mentally, go ahead with it. We tried to give the woman as much support as was necessary throughout the process, and we got medical reports on whether it would be too detrimental to her health, but we could not force her to give evidence. That meant that the whole case fell, because it was a Moorov case. The Parliament, the committee and the public at large should be concerned about that.

I respect the views of people in the legal profession, judges and police officers. Everyone who is involved in the criminal justice system and beyond has an opinion on the matter. However, they do not see the cases that cannot be taken up because of the requirement for corroboration. Police and prosecutors are seeing that class of case.

The abolition of corroboration would have a disproportionate effect on women and children. I have heard others say that, although there are people who oppose that view. The United Nations Committee on the Elimination of Discrimination against Women, which is a powerful voice, supported that view in a report published in July this year that called for the abolition of corroboration.

The Convener: I think that I speak on behalf of the committee in saying that we would wish those prosecutions to be successful; we are not at odds on that. Our concern is that, given the substantial evidence that we received earlier from the Lord President on behalf of all the High Court judges bar one, it seems that abolition may be counterproductive for those victims, for whom we share your huge concerns.

Lord Gill suggested a review of all the rules of evidence, some of which you have mentioned, such as the right to silence. He made it plain that he does not view corroboration as set in aspic, but he suggested that we look at everything so that the difficulties that you find as a prosecutor might be overcome in a different way. I would like your comments on his proposal because, although we would all wish for successful prosecutions, we are concerned that abolition will not achieve for those victims what you and I, and the public, would wish it to achieve.

The Lord Advocate: I have a couple of points on that. First, on the hypothesis that corroboration is abolished, how would the Crown approach its work in deciding whether to take up a case? In my two written submissions to the committee, a distinction is drawn between corroborative evidence and supporting evidence. I am sure that everyone here understands that. I would not—and prosecutors would not—take up a case without any supporting evidence. However, that is different from a legal requirement for corroboration. Of course, when reaching a decision, we would want to look at evidence that supports what the complainer or victim is saying and we would apply the reasonable prospect of success test and look at issues of credibility and reliability. I hope that that gives the committee some reassurance.

10:45

On your wider point about a review, which was maybe the principal thrust of your question, I completely respect Lord Gill, as I do Lord Carloway and all the judges in Scotland. They have a difficult job and they have a view. However, I have a view as well, and the prosecutors have a view. In the past couple of days, I read Lord Carloway's review report, which seems a major piece of work. It took a year, there was a review group and a reference group, there were four or five roadshows, there were visits down south and to the continent, the review group spoke to experts and visited the Scottish Criminal Cases Review Commission and Glasgow sheriff court and there were various other matters, all of which are in Lord Carloway's report. It was an extensive piece of work, and what we are discussing is his recommendation, although it is not his only recommendation, as the report covers a raft of areas.

My view is that it is not necessary to go down the road of having a royal commission or having the Scottish Law Commission look at the issue. However, I respect other people's views, and if that is the view of the Parliament and the Scottish Government, I will be happy to go along with it. We will contribute to any review, but I reiterate that I do not think that one is necessary given the extent of the work of the Carloway review.

The Convener: I will let other members pick up on whether Carloway's view on corroboration was thorough. That could be—if you will forgive me—open to challenge. If members want to pick up on that, I would be very pleased.

Alison McInnes: I absolutely agree that no one should be beyond the reach of the justice system and that we need to strive to do all that we can to help victims of rape and sexual assault, but is it not the case that conviction rates are poor across many jurisdictions and they are not significantly different in, for example, England?

The Lord Advocate: Do you mean conviction rates for rape?

Alison McInnes: Yes.

The Lord Advocate: It is well recognised that there are issues. Elaine Murray hit on a number of public perceptions, such as that a woman who wears a short skirt is asking for it. I completely disagree with that, but such views are out there and it is important that we counter them in the presentation of cases. Through the national sexual crimes unit, we have been using expert evidence on many of what I will call the rape myths to educate the jury as part of the trial process, and that work will continue.

The statistic is often quoted that 3 or 4 per cent of rape allegations that are made to the police result in convictions. In Scotland, of the charges that are taken up, the conviction rate is running at about 48 to 50 per cent. However, I would say—I feel strongly about this—that the justice system is not about conviction rates; it is about delivering justice. My concept of justice is that it is for the accused, the victim and the public. The conviction rate is a barometer of how we are doing; it is not the be-all and end-all of matters.

Alison McInnes: Can we be clear that you think that it is important for a victim to have their day in court, as it were, whether or not it is in the public interest to prosecute?

The Lord Advocate: No. It is important in cases in which there is supporting evidence and an account or allegation that can be regarded as credible and reliable by a jury. There should not be any barrier to justice for such victims in situations of horrific allegations—rape is a horrific crime. Circumstances in which there is supporting evidence that can be regarded as credible and reliable are the circumstances in which a complainer should have access to justice.

Alison McInnes: In your introductory remarks, you said that, because of a lack of corroboration, 2,803 domestic abuse cases and about 13 per cent of rape cases had not been taken forward. You have also said clearly that there will need to be rules on sufficiency of evidence. How many of those cases in which there was no corroboration would not have been taken forward because there was not a sufficiency of evidence?

The Lord Advocate: We have done shadow marking exercises to ascertain the proportion of those cases that would be taken up if we applied a reasonable prospect of conviction test and where there was supporting evidence. Catriona Dalrymple was in charge of that exercise so, if you do not mind, I will hand over to her to give you the figures.

Alison McInnes: Can I just check whether the answer will relate to the figures that the Lord Advocate gave earlier or to an earlier piece of desktop work that was done for Lord Carloway?

Catriona Dalrymple (Crown Office and Procurator Fiscal Service): It is an earlier piece of work—

Alison McInnes: So you are not comparing the same two things this morning.

Catriona Dalrymple: No. The shadow marking—

Alison McInnes: So I am not sure that that answers my question. It does not help me much at all.

The Convener: The issue that Alison McInnes is raising relates to the Lord Advocate's remark that Lord Carloway did a thorough piece of work. That would embrace corroboration, although we appreciate that there are other issues that are far less contentious.

Paragraph 7.2.31 of the Carloway report talks about the cases that were looked at by the Procurator Fiscal Service. I understand that the work was done by two procurators fiscal, one of whom was active and one of whom was retired. Pronouncements were made in relation to the number of cases that would have gone to prosecution and that would have been successfully prosecuted. It has since transpired that the work, which was part of the empirical basis for getting rid of corroboration, was done over a three-week period by two PFs. I think that that is what my colleague is asking about. Obviously, Lord Advocate, you are entitled to bring other evidence as a separate matter. I will pass my copy of the report to Alison McInnes if she wishes to follow up the point.

Alison McInnes: No, thank you. I am well aware of that, and I note that the desktop exercise was brisk and not very thorough. I was referring to the Lord Advocate's evidence this morning. He gave us figures and suggested that we should be shocked that 2,803 domestic abuse cases were not taken forward because there was no corroborating evidence, but he cannot tell me how many of those would have been knocked out with the new rules on sufficiency of evidence, and therefore—

The Lord Advocate: No, I can.

Catriona Dalrymple: We can.

The Convener: We will hear that, then.

Catriona Dalrymple: It might be helpful if I explain the broad shadow marking exercise that the Procurator Fiscal Service conducted and thereafter explain how we narrowed that down and did an additional exercise in relation to domestic abuse cases.

The purpose of the exercise was to assess the impact of the abolition of the requirement for corroboration on the prosecution service. We

consulted statisticians and identified a relevant and random selection of cases. That was about 950 cases that had been reported to the Procurator Fiscal Service. The statisticians were confident that the sample size that was chosen provided an accuracy of plus or minus 5 per cent, so the results are designed to have a 95 per cent accuracy and confidence level. Members will have to excuse me, because I am not a statistician—I am a lawyer.

The Convener: Neither are we, although we might have one here.

Catriona Dalrymple: I am glad.

The Convener: If you get bamboozled, we will get bamboozled.

Catriona Dalrymple: The cases had previously been marked. They were real-life cases that had been reported to the Procurator Fiscal Service between October and November 2012. We selected six present procurators fiscal—we conducted a selection process to choose the individuals—and they were provided with draft guidance and the new prosecutorial test.

With the six people who were identified, we tried to replicate a normal team within the fiscal service that would make decisions on cases, so we had a broad range of experience. We had some people who are relatively recently qualified and in whom the corroboration mindset is perhaps not so ingrained, and we had other individuals who have in excess of 30 years of experience of working in Scottish criminal law.

The six markers looked at about 160 cases each. To avoid any contamination of decision, they were given access to the police reports and they were not aware at all of the initial case marking decision. It was all done offline and they did not know what had happened to the cases previously. There was no impact in relation to the forum, or where the case would be prosecuted, because ultimately the exercise was designed to assess whether more or fewer cases would be prosecuted. The forum does not come into the equation when you are looking at the abolition of the requirement for corroboration.

In the exercise, the prosecutors were given 160 cases each and they were given their own time to do the work. We then analysed the results. In essence, the impact of applying the new prosecutorial test to the business was a mid-range 1 per cent increase in summary cases, which would mean about 1,227 new cases being reported. In solemn cases, there was a mid-range 6 per cent increase, which would mean an extra 721 cases.

You might ask how that compares to Lord Carloway's exercise. It is kind of like comparing apples and pears, but we have managed to do some comparison. Annex A of Lord Carloway's report looked at 458 cases and an extra 141 sexual cases. The percentages that are quoted there are percentages of the cases that they looked at. When Lord Carloway's figures are multiplied out, looking across all solemn business, our statistician worked out that they demonstrate within the range of a 9 per cent increase.

The shadow marking exercise that we conducted with the six prosecutors who were identified and selected is in no way inconsistent with Lord Carloway's exercise.

The Convener: Just to clarify, is that 9 per cent of cases that are taken to court?

Catriona Dalrymple: It is a 9 per cent increase in the amount of solemn business that is taken to court.

The Convener: Were there any predictions of how many cases would have been successful? That is the issue.

Catriona Dalrymple: No. That is a jury question, not a job for the prosecutors.

The Convener: Yes, it is, but Lord Carloway's review makes predictions about how many cases would have been successful.

Catriona Dalrymple: It should be borne in mind that our test is based on a reasonable prospect of conviction. We make an assessment of the credibility of the allegation based on whether there is a reasonable prospect of conviction before we decide to mark a case for prosecution.

The Convener: That is a very important piece of evidence. Could we have that in written form?

Catriona Dalrymple: Yes. We have written to the Finance Committee because this information is in the financial memorandum, but we can follow that up with a letter to the Justice Committee.

The Convener: It is in the financial memorandum?

Catriona Dalrymple: Yes, it is in the financial memorandum on the Criminal Justice (Scotland) Bill.

The Convener: I missed that. My apologies.

Catriona Dalrymple: We were concerned because we have to look at the impact of the business that is also reported to the COPFS. We needed to work with the Police Service of Scotland to identify what increase in business is likely to be seen in the reports. I am sure that the Police Service of Scotland will provide its own evidence on the exercise that it conducted, but it might reassure the committee to know that we conducted our exercise in tandem. We offered

guidance to the police as the Lord Advocate would in relation to the reporting of cases to the COPFS.

In that exercise, the police had a similar sample size and the increase in the number of reports was about 1.5 per cent, which equates to another 3,720 cases being reported.

The Convener: We see it now. It is on page 44 of the explanatory notes.

Catriona Dalrymple: That is right. We have to look at the increase in the number of cases that the police receive, which was likely to be 3,720. In planning for the legislation, we thought that the 1.5 per cent increase was quite low, so I sent one of my team out to the police station to review what the police had decided to report for the exercise. It became apparent that the police had made correct judgments in most of the cases, and there was little in addition to that that we thought would meet the reporting test to the COPFS. We are therefore relatively confident about the exercise that the police conducted.

11:00

Ms McInnes followed up on the issue of domestic abuse. The other exercise that we conducted internally was an exercise to look at domestic abuse cases, because we were acutely aware of the barrier that prevails there as far as access to justice is concerned. We looked at an additional 328 cases that had been marked no proceedings because of insufficient admissible evidence and we applied the new prosecutorial test to them. We thought that an additional 1,000 domestic abuse cases per year could be prosecuted in the light of our new prosecutorial test.

Given that we have demonstrated an increase of 1,227 in the summary cases in the shadow marking, it is clear that our assumption is that the majority of the increase in the number of cases that we are likely to take to court—on the summary side—will be in domestic abuse cases. That is the evidence that we have to date from the exercises that we have conducted. I hope that that is helpful.

The Convener: For the avoidance of doubt, will you clarify exactly what the new prosecutorial test is? There might be more to it than simply not having corroboration.

The Lord Advocate: The test is one that is applied in other jurisdictions, and it is whether there is a reasonable prospect of conviction. In other words, the test is whether it is more likely that, if the evidence were presented to a reasonable jury, it would result in a conviction. Obviously, there are component parts of that test.

The Convener: I see. Alison, do you want to follow up on that?

Alison McInnes: When did the Lord Advocate first come to the view that corroboration needs to be abolished?

The Lord Advocate: I have always thought that, but I have never said it because, as someone who worked in a system that had corroboration in it, I did not think at the time that there was much support for its abolition, so I kept my own counsel. I have always been of that view—I have not recently had a conversion on the road to Damascus.

The Convener: Or on the road to the Criminal Justice (Scotland) Bill.

Margaret Mitchell: Good morning. I would like to tease out which other jurisdictions the reasonable prospect of conviction test was based on. What factors were taken into account? What was applied?

The Lord Advocate: We visited and spoke to senior prosecutors at the Crown Prosecution Service in England and Wales. We also spoke to the Director of Public Prosecutions in the Republic of Ireland and others. I was recently at a heads of prosecuting agencies conference that was attended by heads of prosecution from Commonwealth jurisdictions around the world.

Margaret Mitchell: Could you be a bit more specific? What precisely was in the tests that you looked at and applied to the cases that we are talking about?

The Lord Advocate: We looked at others' tests and their component parts. In applying the reasonable prospect of conviction test, it is necessary to look at the principal allegation, so the complainer's version or account is considered. Factors are looked for that tend to suggest that her or his account is credible and reliable. Among the factors that are assessed is whether there is supporting evidence for the complainer's account, whether it is circumstantial evidence and what evidence there is against that account—in other words, is there any counterbalance? Then a view is reached on the totality of the evidence.

In Scotland, we do not look at complainer or victim-centric evidence; we look at the allegation and whether there is supporting evidence for it. If we considered that there was sufficient independent supporting evidence for the allegation, we would reach the view that there was a reasonable prospect of conviction.

A load of factors are taken into account. The decision depends on what the evidence is—it might be eye-witness evidence, forensic evidence or medical evidence. It is difficult to talk about the generality of cases; the test depends on the facts

and circumstances of each individual case. An attempt is made to ascertain—on the basis of an objective assessment of the evidence as a whole—whether there is a reasonable prospect of conviction.

As part of the process—on the hypothesis that the conclusion has been reached that there is a reasonable prospect of conviction—the public interest test would be applied: is it in the public interest to raise proceedings? We would take into account various factors, such as the seriousness of the charge, the antecedents of the person who is accused and any mitigation that was apparent from the information before us, in deciding whether it would be in the public interest to raise proceedings. That is how we would go about it.

Margaret Mitchell: I am still struggling to understand what is going to be introduced in the law of evidence—the nitty-gritty of it, the quality of evidence or whatever—that will be different from the system just now and which you saw in the Northern Irish, Welsh and English systems. Am I correct in saying that this is based on how things are done in England, following the Carloway report and the two PFs that looked at cases for that?

The Lord Advocate: No.

Margaret Mitchell: In the research that the procurators fiscal did for the Carloway report, did they make a comparison with the outcome if the cases had been prosecuted under the English jurisdiction?

The Lord Advocate: What we needed to do was—

Margaret Mitchell: Can you answer my question, please?

The Lord Advocate: I will endeavour to answer it. We looked at what test—

Margaret Mitchell: I am asking about Carloway specifically. We can return to the research that you have just done.

The Lord Advocate: The test did not come from the Carloway report. What we—

Margaret Mitchell: I know, but I am asking you just now about Carloway. You mentioned other jurisdictions in talking about the new test that you used after the Carloway report test was found lacking. I am asking what the Carloway fiscals' research was based on—was it the English system, in which there is no corroboration?

The Lord Advocate: I think that it was the English system—was it?

Catriona Dalrymple: Yes, I think that that is right.

Margaret Mitchell: Did either of those procurators fiscal have any experience of the English system?

The Lord Advocate: No, I do not think that they had experience of the English system, but they have experience as—

Margaret Mitchell: In your opinion, then, would it—

The Convener: Please let the Lord Advocate finish. You can then come back in.

Margaret Mitchell: Certainly.

The Lord Advocate: They have many years' experience as prosecutors, so they know how to apply a test and assess the evidence. They know how to look for evidence in support of or against an allegation and they know how to apply the public interest test.

Margaret Mitchell: Would it not have been better to have passed the cases to prosecutors who are au fait with and have experience of the English system, to get their opinion? Similarly, in the exercise that you have just carried out, in which you looked at Wales and Northern Ireland, would it not have been better to have passed the cases to those jurisdictions for independent and objective analysis from their experience? Would that not have been better than taking the Scottish experience and saying, "We think that this would have made a difference"? Would that not have provided more conclusive evidence?

The Lord Advocate: No, I do not think so. It would have been possible to send the cases to CPS prosecutors. There is no doubt that that could have been done, but those involved were very experienced prosecutors with years of experience. They know how to apply a test and analyse a case—they know what to look for. I do not think that, had the cases been passed to prosecutors down south, the results would have been different.

Margaret Mitchell: I beg to differ.

You are the Lord Advocate for the whole criminal justice system—for every accused. Today, we have heard startling, compelling and welcome evidence that there would be unintended consequences from the abolition of corroboration. Your remarks have almost totally concentrated on the victims of sexual crimes. What about other victims and the unintended consequences in their cases? Given the weight of concern that exists and the Lord Advocate's comments this morning—

The Convener: It was Lord Gill.

Margaret Mitchell: I am sorry—I mean the evidence of the Lord President, Lord Gill.

Corroboration has not stood still; it has changed over the years. We have the wisdom of the

institutional writers and court practice over the years, which have been passed down in Scotland and of which we should be proud. Does all that give you any pause for thought that you might be wrong and that there might be another way than abolishing corroboration that could be looked at to help the victims of sexual abuse, to make it paramount that the accused's right to be presumed innocent is not compromised, to ensure that we have no more miscarriages of justice and to provide a better system for everyone?

The Lord Advocate: I am not saying that I am always right. I fully accept that other people may have a different view. Other people may be right and I may be wrong—I do not know. However, I think that I am right.

You mentioned alternatives and other possibilities. In a recent article in *Holyrood* magazine, Lord Hope was asked whether we should relax corroboration for the category of cases that we have talked about—sexual offending, sexual abuse and domestic abuse. His view was that we should not. When Lord Gill was asked a similar question, he said that it would not be appropriate. I agree with their views on that.

I have heard Margaret Mitchell speak about the possibility of developing the law of evidence or corroboration. We have developed things over the years—for example, in relation to Moorov. In the Moorov case, a four-year gap between two allegations was held to be insufficient for the application of the Moorov approach. Recently, we had a case where we argued generational abuse and the court applied a gap of about 13 years in applying Moorov. We have greater corroborating lesser, and we have argued that an attempt corroborates a completed act. It seems to me that prosecutors have been pretty creative in legal arguments to try to place cases before the court.

However, the law of evidence has a limit. It is a legal requirement to have evidence from two independent sources that the crime was committed and the accused was the perpetrator and on the crucial facts of the case. We can never get past that if we have the requirement for corroboration.

Can I tell you what effect corroboration has? We have to corroborate the taking of buccal swabs from alleged offenders, so two police officers are required for that. We have to corroborate the taking of intimate swabs from a complainer in a rape case. That may involve a child and injuries to the sexual parts. We have to corroborate—

Margaret Mitchell: Can I stop you there?

The Convener: No—let the Lord Advocate finish. We have plenty of time.

The Lord Advocate: In the case of child pornography, we need to corroborate that children are under the age of 16, so that must be done by two witnesses. We have to corroborate forensic analysis, so two forensic scientists have to speak to the results of forensic examination, and transmission of samples is required to be corroborated. That seems completely unnecessary. That is where I am coming from.

Margaret Mitchell: We seem to be back to sexual offences. I am looking at the whole system and every accused who comes into the criminal justice system. My question is whether you are prepared at least to look at a third way, in which corroboration is retained. We are looking at all aspects of the law of evidence.

You mentioned the need for two witnesses. Without corroboration, if a case comes down to a witness's credibility, it is likely that vulnerable witnesses—who at present can give evidence via videolink or under special measures—will be required to attend, because judging their credibility will be all important. That is perhaps a downside, in contrast to the other things that you say are positive.

We are looking at the matter in the space of a couple of hours this morning. We have spent time on corroboration, which is one aspect of a huge bill. Given the importance of getting this right, would it be more sensible to take the abolition of corroboration out of the bill, to look at the third possibility of retaining and improving corroboration, as well as the other possibilities of retention and abolition, and to have a commission to properly hammer this out so that we are sure that we are being transparent, that justice will be seen to be done and that the right answers have been decided on?

11:15

The Lord Advocate: I have two points. You mentioned the effect that the abolition of corroboration might have on alternative means of giving evidence, such as by CCTV. You suggested that, rather than give evidence from a remote site, witnesses would have to come to court to give evidence. You used the example of assessing a witness by seeing them. I do not think that giving evidence by CCTV or remote link in any way affects the assessment of credibility and reliability. In my humble opinion, I do not think that that should or would be the effect of the abolition of corroboration.

To go back to your principal question, which was about giving the issue more detailed consideration, you may have it in mind that a royal commission or the SLC would look at it. I have heard and respect all members' views. Ultimately,

the decision is for the Scottish Parliament and not for me. I am only giving you my view. Given the extent of the work that Lord Carloway did in his review, I do not think that more consideration is necessary.

Margaret Mitchell: Given the pressure on the budgets of Police Scotland and various others, can you micromanage to avoid the kind of situation that Lord Gill said could possibly happen in which, if you do not need to establish corroboration, you do not go the extra mile to incur the costs of looking for corroboration, and the effect of that is unsuccessful prosecutions?

The Lord Advocate: I touched on that in my opening remarks. The police are under a common-law duty to investigate a case fully. The case of Smith v Her Majesty's Advocate sets out those duties. As prosecutors and police, we are under a duty, in the European convention on human rights, to properly and fully investigate cases and bring forward all relevant evidence. We are also under a duty in our disclosure obligations to ensure that cases are properly investigated and that any evidence that is in favour of or adverse to an accused person is properly disclosed.

Prosecutors are under duties to ensure that a trial is conducted fairly. The notion that we would not want to bring to court the strongest case that we could is alien to me. The work done by police and prosecutors can sometimes result in an accused person being exonerated—not being taken to court. That is perhaps sometimes overlooked. There are plenty of examples of good investigative work carried out by police and procurators fiscal that results in no prosecution at all.

I can give a serious example of that from way back in the early 2000s when, just before hogmanay celebrations, a number of people were accused of terrorist offences. They were arrested when living in a flat in Easter Road in Edinburgh. Some sinister productions or exhibits were found in the flat, one of which looked like a diagram of where a bomb would be placed in Jenners and the Edinburgh Woollen Mill on Princes Street.

I know for a fact that the police, with support from the procurator fiscal, traced all the flat's occupants. One of them was traced to Perth in Australia, and he said, "Yeah, that's my work. I work for Glenmorangie whisky company and I prepared that diagram. It was where I was having a whisky display in Jenners and the Edinburgh Woollen Mill." As a result of that investigation, the case went nowhere and was—quite properly—not taken up. That is an example of the determination and the morality—the notion of the right thing to do—required to investigate a case fully, which could exonerate someone who is accused of very serious offences.

To answer your question directly, what I am saying is no, not on my watch, and I suspect not on the watch of any future Lord Advocates or chief constables in Scotland. We would always want to bring the best case that we could to court.

Margaret Mitchell: The point is that you cannot micromanage every case. We know that there will be pressures; there is no doubt about that. If you do not need corroboration—I rest my case.

The Convener: She has rested her case. That is good, because I have a lot of people waiting to ask questions.

Lord Advocate, you gave examples of when two police officers need to speak to something in which it appears to me and other committee members that corroboration is over the top. Is there a way in which, under a review procedure, we could look at dispensing with the requirement for corroboration in such instances, unless a challenge is made? I am not an expert, but you seem to have made a fair case for its being too much. However, we have not been able to examine the issue, and I suspect that Lord Carloway did not have time to look at it. We are talking about getting rid of corroboration across the piece and not in a particular set of circumstances. Could it be useful to examine that as part of a review of the whole area of evidence?

The Lord Advocate: That might be useful and I do not demur from the suggestion. However, when work is being carried out on corroborating the taking of samples, we do not know whether we will be required to lead corroborated evidence. In a homicide case, for example, the body has to be identified. The way in which that happens in Scotland is that family members have to attend a mortuary and identify their loved one—thankfully, by looking at a screen—prior to a post-mortem examination. I suggest that nothing could be more horrendous than having to do that.

That identification must be corroborated. The Criminal Procedure (Scotland) Act 1995 says that, if the identification of the deceased referred to in the post-mortem report is not challenged within six days of the trial, that evidence is presumed and evidence of identification does not need to be led. However, at the time when identification is required, we do not know whether there will be a challenge six days from the trial, so police officers require a double identification to comply with the rule for corroboration. The rule could be looked at again, but I am giving examples of how it applies in practice.

The Convener: That is helpful but, having raised the issue, we have moved from corroborating evidence in court to what is corroborated in gathering evidence and what happens in transferring and transmitting

evidence—moving it from one place to another. I simply wanted to follow up on whether the issue could form part of any review of what does and does not require corroboration in court. That is it.

The Lord Advocate: Of course it could.

The Convener: Thank you.

Sandra White: I was going to ask you about the requirements and technical burdens, but you have already answered that question.

I have no doubt that all of us around the table want justice for victims, although we may go about it in different ways. We have been looking at court cases and at the prosecution and defence, but we must remember that there are victims who want access to justice, and there have been 2,803 domestic abuse cases and 170 rape cases that have not even gone to court. To me, that is a dereliction of justice for those victims. The statistics highlighted by Ms Dalrymple show a possible increase of between 1 and 7 per cent in the number of such cases going to court. We would all welcome that, but getting to that point involves the issue of corroboration.

In his evidence, Lord Gill was very much of the view that we should not get rid of corroboration and that the judiciary were very much opposed to doing so. I broached the question of guidelines, as we are looking at the Criminal Justice (Scotland) Bill in the round, and he seemed to say that corroboration should come out and that other aspects, such as the not proven verdict, should be looked at again.

What is your view of Lord Gill's opening comments on that issue? Members of the committee have talked about evidence going forward to prosecution, and Elaine Murray mentioned juries. If corroboration is abolished and more such cases go to court and before juries, so that access to justice is opened up, it may be that juries' attitudes, and social attitudes, will change and that we will see more justice done for victims.

The Lord Advocate: That is a good point. Social attitudes change over time. I frequently give the example of the social attitudes to drink-driving in the 1960s or to racial abuse in the 1970s compared with now.

There have been studies throughout the world into what are called jury myths—how jurors throughout the world view certain evidence, such as delayed reporting, a lack of physical resistance or the way that a woman is dressed. Prosecutors and police must recognise that.

We hope that, over time, the public—or some members of the public; not all members of the public subscribe to those views, although a proportion do—change their attitudes. That would be a good thing. We recognise those views and, in certain cases, lead expert evidence that, for example, delayed reporting is normative behaviour.

Sandra White: Convener, could I follow that up?

The Convener: Of course. I do not want to curtail the discussion. I will certainly take the other members who are down to ask questions, but we should bear in mind the fact that we have another panel of witnesses and they have to be away by 12.45. I alert members to that and ask for short questions, if possible.

Sandra White: Thank you very much.

Lord Advocate, my other question is, obviously, about corroborative evidence. That is what it all comes down to. I asked Lord Gill about that, and he mentioned the prosecution. In regard to the defence, if there are two witnesses in a case, one could be someone's friend—they could be a witness on behalf of the defence, not necessarily on behalf of the victim—and they may not tell the truth. We still have two witnesses. You have made it plain that the police and procurators fiscal do their utmost to get corroborative evidence.

I am probably wrong about this—I am not accusing anyone—but is it more likely that the defence would not necessarily push so hard for the case to go ahead because there were only two people there without looking at the corroborative evidence that could be obtained? I am talking not about the prosecution or the victim, but about the accused.

The Convener: I am completely lost.

Sandra White: Perhaps everybody is lost, but in my head that seems to be—

The Convener: I am completely lost.

The Lord Advocate: Let me answer it this way—

The Convener: You are not lost. That is good, because, to be frank, I did not understand the question.

The Lord Advocate: I will answer it from the accused's point of view. The accused is not required to corroborate anything. That is a rule of law and a good one. I do not have a problem with it.

Defence counsel and solicitors do a very good job in Scotland. To have a fair trial, counsel and solicitors are required to be at the top of their game to challenge and test the evidence. My experience from many years in the criminal justice system is that that is what happens. It is part of the suite of legal protections to ensure a fair trial that we have legal representation, that we have robust testing of the evidence, that the defence is able to

carry out its own investigations and lead its own witnesses if it wants to and that the accused is able to make a statement during interview on legal advice and to give evidence if they want. There are many more protections.

The accused does not need to corroborate anything. That is a fundamental rule of law in Scotland.

John Finnie: Lord Advocate, you alluded to the Cadder case and, if I noted you correctly, said that you were not critical of it. You also outlined for us that, as a result of Cadder, one of the three essential requirements in relation to corroboration in a rape case—namely, penetration—is lost.

A number of people have suggested that the removal of corroboration is a rebalancing of Cadder. Will you comment on that? Is that your view or your rationale for supporting the proposal?

The Lord Advocate: Yes, and it is not only my view; it is also the view of Lord Rodger, who was one of the Supreme Court justices in the Cadder case. In his judgment, he recognised that, as a result of the Cadder judgment, the balance would be tilted against the police and prosecution and the implication of that was that a rebalancing may be needed to ensure justice for both the victim and the accused.

11:30

Every criminal justice system is about checks and balances to ensure that the guilty are convicted and the innocent acquitted. Part of the argument with regard to Cadder was that there was a whole suite of balances including corroboration but there was no right of access to a solicitor. Once that right was introduced, the system's delicate balance was disturbed and a rebalancing exercise needed to be carried out.

I agree with Lord Rodger, for whom I have the utmost respect. Indeed, I worked for him for many years.

John Finnie: The term "the public interest" has been used a lot. From one to three, can you rank for me the accused's interest, the public interest and the victim's interest? I point out that I have listed them alphabetically to avoid any issue in that respect.

The Lord Advocate: There is no league table—they are all part of the consideration of the public interest.

Let me give you an extreme example of how the public interest would be determined. A 65-year-old woman who has recently lost her husband and has never been in trouble in her life suddenly shoplifts in Asda. It is clearly a cry for help more than anything else and I would suggest that, even if the case had rock-solid evidence that, when placed before the court, would be bound to result in a conviction, prosecuting that woman would not be in the public interest. In that case, you would reach that view having had regard to the accused's interest overall. All those considerations are in the mix.

John Finnie: I appreciate that one could come up with examples from the margins of extremity at either end but how would you rank the various interests with regard to, say, a standard uncorroborated allegation of rape or sexual offence?

The Lord Advocate: I do not think that there would be a ranking—they would all form part of the consideration. If there were sufficient credible and reliable evidence to place a case of rape before a jury, it would be inevitable that, given the seriousness of the charge, you would take proceedings, because that would be in the public interest.

John Finnie: You have already acknowledged that, as a result of Cadder, there has been a rebalancing with regard to the accused, who is now entitled to see a solicitor. That will normally result in their not saying something that would have provided some of the evidence that in the past would have supported your bringing a prosecution. You are saying that that has now been removed.

The Lord Advocate: I will try to answer that question with reference to a situation in which a woman displays counterintuitive behaviour and delays reporting. As a result, there are no forensic opportunities to corroborate—

John Finnie: That would be like example 1 in the Crown Office's supplementary submission.

The Lord Advocate: Yes.

There might still be supporting evidence. There might, for example, be powerful evidence of recent distress; the woman might say that her pants were ripped and—lo and behold—she has retained them and they are indeed ripped; and there might be forensic evidence that is consistent with her account. However, you can never fill in the gaps in such a case because there would be no corroboration of penetration. In those circumstances, no matter the quality and quantity of the supporting evidence, you would never have sufficient evidence to take up the allegation of rape.

John Finnie: So where, apart from a suggestion from the accused that the act was consensual, would the corroboration of penetration ordinarily come from?

The Lord Advocate: It would ordinarily come from the forensic evidence, if there was the

opportunity to get that. If you could not get that evidence, it would in most cases be difficult to obtain corroboration. It may be, for example—

John Finnie: So your conclusion in example 1 is a statement of fact rather than a summary of the outcome of the particular set of circumstances that it narrates.

The Lord Advocate: I am sorry—I do not appreciate the point.

John Finnie: The outcome of example 1 is

"As there is no corroboration of penetration, we cannot prosecute the charge of rape."

The Lord Advocate: Yes. That is the case.

John Finnie: But, in any case, that is just a statement of fact.

The Lord Advocate: Yes, but if you abolish corroboration, there is still supporting evidence that would require you to take up that case. It is a matter for the jury whether, having tested the evidence, they find the case to be proven beyond reasonable doubt. That is an example of a case that we cannot take up at present with the rule requiring corroboration. If corroboration is abolished, that is the type of case that we would take up, as there would be supporting evidence as well as the complainer's account.

John Finnie: The information that is outlined in the supplementary written submission does not say whether there was a medical examination—possibly a delayed medical examination.

The Lord Advocate: Such a medical examination would not provide the evidence to identify or corroborate the identification of the perpetrator.

John Finnie: We will move on.

You discuss the reasonable prospects of conviction in the supplementary submission. You cite a Canadian case, Boucher v The Queen, from 1954. The Supreme Court of Canada stated:

"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction".

Does that conflict with anything that you have said—namely, that you would proceed only if there was a reasonable prospect of conviction?

The Lord Advocate: No, I do not think that it does. If a person is innocent, I want him to be found innocent. I do not want a miscarriage of justice, and I do not want someone to be wrongly convicted. In assessing whether there is a reasonable prospect of conviction, a gateway test is used to determine whether the case is to be indicted. In those circumstances, the case is put before the court and is properly tested. Ultimately, it is for the jury to decide.

The requirement for corroboration has an effect, as the gates are shut for many victims of rape, sexual abuse, domestic abuse and other crimes predominantly involving those categories of criminal offender.

John Finnie: I wish to ask about false allegations. In your supplementary written evidence, you provide what might be reassuring commentary for

"police officers, teachers, social workers, health professionals and prison officers"

regarding the depth of scrutiny that is applied to false accusations. What about joiners, van drivers, shop workers or unemployed youths?

The Lord Advocate: We must recognise that teachers and other professionals, including police officers, are perhaps in a more vulnerable position in relation to false allegations. There are currently procedures in place for allegations against teachers, for example, before a decision can be taken whether to prosecute. The matter must be referred to Crown counsel so that the case is thoroughly looked at. The same applies to cases involving police officers.

I would like to think that procurators fiscal throughout the country apply their common sense. They are trained, they analyse a case and they look at the evidence. They look for any indication that an allegation may be false. Ultimately, if proceedings are raised, the evidence will be rigorously tested before a court of law. That is the same for a joiner as it is for a teacher or a police officer.

The Convener: John Finnie should not look concerned. We must move on to the next agenda item, but—I have discussed this—we will have a further opportunity, if required. I will let Roderick Campbell in, because he has been sitting there waiting, but anybody who has not come in—

John Finnie: I have concluded, anyway.

The Convener: Excellent—I just do not want anybody to worry that I am curtailing this evidence session, as it is a very important analysis. We might invite you back at some point, Lord Advocate, if we have further questions. The same might be true for Lord Gill or other witnesses on this issue. I do not want members to feel that I am suppressing debate and questions on the matter. I want to hear the last question, which is from Roderick Campbell. I know that Alison McInnes is on the list, but we can come back to her later, if that is all right.

Roderick Campbell: I wish to follow up on the differences that the new prosecutorial tests will make. I have read paragraph 15 of your additional submission, Lord Advocate. As regards the qualitative assessment, can you clarify the

difference that the new test will make in comparison with current practice?

The Lord Advocate: Current practice does not have that test. We will be applying the test across all our consideration of criminal allegations. When we consider a case, the primary focus—an undue focus, in my view—is currently on quantity. Is there corroborated evidence? If the answer is yes, we then consider credibility and reliability, but no test of reasonable prospect of conviction is currently applied by prosecutors.

To give some reassurance to the committee and the Parliament, I am saying that, if the Parliament chooses to abolish corroboration, we will apply a reasonable prospect of conviction test where there is supporting evidence for an allegation. I hope that that will reassure the committee and the Parliament.

Roderick Campbell: There might not be a formal test currently, but you consider credibility and reliability.

The Lord Advocate: Yes, but we do not consider credibility and reliability against a reasonable prospect of conviction test.

Roderick Campbell: I am just about with you, I think.

The evidence of a victim's distress is a comparatively recent addition as a corroboration tool. Could you explain to the committee some of the difficulties that it gives rise to?

The Lord Advocate: Do you mean in relation to the evidential value of recent distress?

Roderick Campbell: In addition to corroboration as it was in centuries gone by, how that operates in practice and the difficulties that it causes.

The Lord Advocate: Recent distress is obviously a piece of evidence. In a non-forcible rape, it only corroborates the lack of consent; it does not corroborate penetration and it does not corroborate mens rea. It will only take you some distance regarding the three crucial facts that you must consider or corroborate in a charge of rape.

There are conditions in relation to distress. It must be recent, and it must be displayed to the first natural confidante. There is a raft of case law regarding the gap in time between an allegation being made and distress being displayed and whether that can be taken into account by the jury.

To return to the example that we have been discussing, the effect is that distress does not corroborate penetration and cannot be used to that effect.

Roderick Campbell: My final point—given the time—is in relation to the two written submissions from the Crown Office. There is no comment on what might be described as safeguards if corroboration is removed. Is that because you did not want to get drawn into that debate?

The Lord Advocate: Yes, in the sense that there is also the question whether the not proven verdict should be abolished. The Scottish Government has announced that that will be considered by the Scottish Law Commission, which I welcome. I do not have a problem with that.

There are many safeguards in the trial process, and I have alluded to some of them today. I did not think that we were being asked about those particular additional safeguards. If that is something on which the committee wishes further information, however, we can respond in writing.

Roderick Campbell: I am quite interested in that. In view of the time, I am happy to leave the matter there for the moment.

The Convener: If you could follow that up in writing, Lord Advocate, that would be very helpful.

I bring this evidence session to an end, simply because we must now move on to other business. Thank you very much for your evidence, Lord Advocate and Ms Dalrymple. I suspend the meeting for five minutes to allow the table to be set up for a round-table session.

11:43

Meeting suspended.

11:49

On resuming—

Proposed Subordinate Legislation

Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 [Draft]

The Convener: This is a round-table session, so committee members get to sit back a bit; rather than asking a lot of questions, we will throw a question into the pot and let the panel debate the ins and outs, the dos and don'ts and the yesses and nos for reform of prison visiting committees.

I thought that a good way to start would be to ask the witnesses to say—we can see who they are from their nameplates—who they represent.

Professor Andrew Coyle (International Centre for Prison Studies): I do not represent anyone. I was asked by the Scottish Government to carry out a review of independent monitoring of prisons.

David Strang (HM Chief Inspector of Prisons for Scotland): I am the chief inspector of prisons for Scotland, a post that I took up in June. As you will see from the Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 [draft], responsibility for the oversight of independent prison monitors will fall to my post.

Diego Quiroz (Scottish Human Rights Commission): I am Diego Quiroz.

The Convener: Quiroz. I like saying that.

Diego Quiroz: Good morning, and thank you for the invitation. I am from the Scottish Human Rights Commission.

Lisa Mackenzie (Howard League Scotland): I am the policy and public affairs manager at Howard League Scotland. I am a very last-minute substitute for John Scott QC, our chair. He is sorry that he cannot be here but unfortunately a family member of his is in hospital.

The Convener: I am sure that you will be brilliant.

Joan Fraser (Association of Visiting Committees for Scottish Penal Establishments): I am from the association of visiting committees and a member of the Polmont visiting committee.

The Convener: Who wants to start us off and throw a question into the pot?

Elaine Murray: Professor Andrew Coyle was commissioned by the Scottish Government to undertake a review of the independent monitoring of prisons. However, I note from his submission that he does not feel that the Government accepted his recommendations and that he has significant concerns about the proposals in the draft order. Will Professor Coyle say a little bit more about the work that he was asked to do and the Government's response?

Professor Coyle: Thank you for the opportunity to do so. My terms of reference were to review the extent to which the Scottish Government's then proposals were in conformity with its obligations under the optional protocol to the convention against torture. At one level, the terms of reference were quite narrow, but I agreed with the Cabinet Secretary for Justice that I could interpret them fairly broadly.

I was asked to carry out the review because the current arrangements for independent monitoring, which is done through visiting committees, do not conform to OPCAT. It is important to understand that that is solely because the budget for their work sits with the Scottish Prison Service; it is not any judgment on the independent monitoring that they do. Under the draft order, control of the budget will be taken from the Scottish Prison Service and given to Her Majesty's chief inspector of prisons. Since that was the bar to conformity, it is true to say that the new arrangements will satisfy the minimum OPCAT requirements. That is to be welcomed. However, there is a difference between the irregular cyclical inspections that are done every three or four years by the inspectorate of prisons and the regular continuous monitoring that is done by visiting committees or independent monitors. That distinction is important and should not be confused.

The cabinet secretary says in his foreword in the response to my review that he wants Scotland to have a "gold standard" for the oversight of prisons. As it stands, the draft order does not achieve the standard. It would be possible to meet that standard with some relatively straightforward amendments, the first of which would be to remove the distinction between prison and lay monitors. That distinction, which was not in my review—I have no knowledge about where it came from—muddies the water and creates a new tier of unnecessary bureaucracy. All we need is a single tier of independent monitors for each prison.

The second tweak to the draft order would be to replace the power of the chief inspector to instruct monitors, which is an unhelpful description, with a requirement for the inspector and the monitors to co-operate in their work. If those two changes were introduced, the order would be significantly improved.

Under the current arrangements, visiting committees are not part of the United Kingdom national preventive mechanism, unlike the two

partner bodies in England and Wales and in Northern Ireland. The irony is that that exclusion is likely to continue under the proposed order, because the independent monitors will be represented by the chief inspector. Unlike their colleagues in the two other jurisdictions, the monitors will not have a place at that table.

The Convener: I ask the witnesses to indicate to the clerk when they want to speak. I will bring in Mr Quiroz first because he put his hand up first.

Diego Quiroz: I will clarify three points that the commission wants to present to the committee. The points are interlinked and relevant—the first relates to OPCAT, the second is about the minimum requirements that OPCAT asks state parties to comply with and the third is about the proposed draft order.

As members know, the optional protocol is an international human rights instrument that aims to prevent torture by establishing a system of regular visits to places of detention. Visits are to be undertaken by independent experts at two levels—nationally, through the NPM, and internationally, through the sub-committee on prevention of torture. There is a state obligation that must be taken seriously.

OPCAT does not dictate the form that the mechanisms should take. In the UK, the NPM has taken a different form, because 18 bodies make up the NPM. As Professor Coyle said, in prisons, the NPM has taken the form of independent monitoring boards in the rest of the UK—in Northern Ireland and in England and Wales.

Scotland has chosen a different model, which is okay. However, it is clear that the new structure must comply with the minimum guarantees that are set out in OPCAT, which concern the body's mandate and power, the appointment process for staff and members, autonomy in funding and lines of accountability that ensure operational independence.

The proposed draft order is silent on most of those issues or explores them only partially, so the commission considers that the proposed order could be improved by creating a clear and comprehensive legal framework, which would enable monitors and the chief inspector to conduct their functions, provide greater legal certainty to the system and ensure confidence in the system.

The Convener: I welcome Graeme Pearson, who apparently cannot leave us alone and is missing us so much.

Graeme Pearson (South Scotland) (Lab): It is fascinating to be here.

The Convener: Are we not wonderful?

I call Mr Strang.

David Strang: The scrutiny of places of detention is important. Often, our most vulnerable citizens are in prison, and the state puts them there after due process. It is hugely important to have independent scrutiny of how prisoners are cared for, their treatment in prison and their conditions in prison. That is why we have an independent inspectorate of prisons in Scotland and why we have the chief inspector's post, which I hold. When I was appointed, it was stressed to me that my post is independent of the Government and the Scottish Prison Service. I can go in to visit and inspect anywhere in a Scottish prison.

Diego Quiroz mentioned the requirement for monitoring under the national preventive mechanism. There should be monitoring by lay, local people and inspecting as two separate functions, although they are clearly connected. Andrew Coyle made the point in his report that the activities are complementary, although separate. Inspection is done infrequently; the inspectorate does a deep inspection of every area of a prison, which involves a team of 10 for 10 days and the production of a report, and that might happen every two or three years in an establishment.

12:00

Monitoring is done continuously. People from the local community go in and monitor. They speak to prisoners and staff, and report to the governor. They also report annually to the Cabinet Secretary for Justice. The monitoring is a continuous process, but it consists of an outsider going into a place of detention, forming a view and reassuring us all as citizens that our prisons are properly run or, if there are grievances, that they can be taken up.

I have read through all the submissions that the committee received and it seems that the new arrangements in the proposed draft order are broadly welcome because they will provide more of a structure for independent prison monitoring, although there will be little change to inspecting. As the committee knows, until now independent monitoring has been done by visiting committees that are attached to each establishment. What has been recommended—it was also recommended in a review eight years ago of visiting committees—is about greater co-ordination, better training and recruitment and so on.

I think that the proposed new arrangements will allow the two sides of scrutiny to be better co-ordinated. I absolutely support the independence of prison monitors—the language that we have been using is about independent prison monitoring—and they will continue to monitor independently. However, those whom the order calls "prison monitors" will perform a function on my behalf, for which they will be paid, of assisting

with recruitment, training, appraisal and co-ordination. They will be expected to go into prisons as monitors.

Within the world of independent prison monitoring, the order will therefore create two levels. There will be lay monitors, who will be local volunteers and will do very much what current visiting committee members do; and paid co-ordinators, who will be called prison monitors.

In response to what Diego Quiroz said, there are four points to make on the new arrangements for monitors: they will be independent; they will be appointed for a certain time; their funding will not come through the Scottish Prison Service; and they will be accountable through the inspectorate, which is an independent body.

There are lots of things that are not in the order, but I am told that it is a legal technicality not to include too much detail about, for example, the selection process or the training package. The committee will have seen my comment that I was surprised and disappointed that the order does not require the establishment of the advisory group. However, all those things will be part of the implementation if the order is passed.

The Convener: You have not dealt with the distinction or separation between your role and what the prison visiting committees do. I note that you will have powers to instruct prison monitors and that they will be able to instruct lay monitors. That is a key point in Professor Coyle's submission, but you have not touched on it. Perhaps you can do so.

David Strang: I thought that my comments had made it very clear that there is a distinction, that inspecting is one thing and independent monitoring is something different, and that I see the two as separate. The order will give me personally a new responsibility not just to head the inspectorate, but to oversee and be responsible for independent prison monitoring through co-ordination. I see that being done through the paid prison monitors.

I know that in legal terms the order refers to instructing, but I do not anticipate wagging my finger and telling the paid monitors that they will do something, and that they will wag their fingers and tell the lay monitors likewise. I do not disagree with Andrew Coyle's comment about a duty to co-operate and work together, because that is very much the style of how it must work. If the approach is to be successful, it must be co-operative and the prison monitors need to offer support.

In the reports that I have read, one criticism of prison visiting committees is that they are almost too independent. I do not mean that they are too independent in principle, but they are off doing different things, they are not co-ordinated and their reports are quite different. If we are to get the best from monitoring and inspecting, there needs to be some co-ordination.

That duty of co-ordination will fall to the paid monitors, who will report to me as the chief inspector. In legal terms, yes, I can instruct the paid monitors and, yes, they can instruct the lay monitors, but the change is much more about ensuring that there is co-ordination and good communication. When a set of monitors find issues in a prison, their findings could be communicated to the inspectorate, which in turn might, for example, undertake a thematic inspection as a result of what they have found.

Therefore, I do not see things quite so hierarchically. I know that it reads in a very hierarchical way in the proposed draft order, but that is a legal point. In the way in which the new system is implemented and managed, things will be much more co-operative.

The Convener: The trouble is that "instruct" is the word used in the proposed draft order.

David Strang: Indeed. I do not deny that. That word is used, I am told, for legal reasons.

The Convener: We might come back to that and to Professor Coyle. We will hear first from Ms Fraser and then from Mr Quiroz—I think that I am getting his name wrong already.

Diego Quiroz: No, that was okay.

Joan Fraser: What is actually in the order is absolutely crucial. As far as the so-called "lay monitors" are concerned, all that the proposed draft order says about their duties is that they will "assist" a paid monitor. On an extreme view, that could mean carrying the paid monitor's briefcase, or it could mean having the full range of monitoring duties—it is absolutely unspecified. The proposed draft order also says that the lay monitor

"must ... comply with any instructions issued by a prison monitor".

To me, that is not independent. The lay monitor could be instructed not to do certain things because they would be awkward or embarrassing.

I am not suggesting that the current chief inspector has any intention of doing such a thing, but the order needs to be future proofed and person proofed. We do not know whether, in five, 10 or 20 years' time, a chief inspector might say something that all of us around this table thought was fettering the independence of the lay monitors. The proposed legislation is completely silent on the role of the lay monitors.

The role of the paid monitors is described in some detail in the proposed draft order, but all the protections that would come from having a proper,

transparent and effective appointments system—for example, the conditions under which monitors could be dismissed—and all those things that would produce a robust and independent monitoring system are completely absent. Instead, we are to rely on guidance, which could be altered without ever coming back to Parliament.

On the hierarchical nature of the relationship of the lay monitors to the paid monitors, the chief inspector and the advisory group, the proposal is very complicated. My question is: what will the paid monitors add? Where is the added value? To have someone providing co-ordination, support and training, which prison visiting committees currently need to organise in the free time given by members, would be absolutely fantastic, but the role of that person should be made explicit in the legislation. That role should not be one of monitoring and oversight—almost a fettering role—as is currently described in the proposed draft order.

Diego Quiroz: Let me make a couple of points. The commission considers that human rights standards should be on the face of the legislation. Human rights standards apply in all circumstances and at all times, so I totally agree with Ms Fraser that the legislation should be as future proofed as possible. We need to build a system that serves not only today's circumstances but unknown circumstances. I have no doubt about the personal integrity and professionalism of the chief inspector, whom I have had the pleasure to meet a couple of times, but the issue goes beyond that. We need to build the best system—a gold standard, as was mentioned before—for the monitoring of prisons.

Secondly, the technical nature of secondary legislation is that it is specific, so there is nothing wrong with containing all the elements that have been mentioned on the face of the legislation.

I will give a brief example. I am an independent expert on human rights institutions for the European Commission. In our missions to European states that are applying for European Union membership—I will not mention the names of those states—we ensure that they comply with the EU values of human rights, the rule of law and democracy, or the so-called EU acquis. When I travel, I take just a copy of a piece of legislation that was drafted and enacted by the Scottish Parliament: the Scottish Commission for Human Rights Act 2006. When Governments of those applicant states ask me what legislation to establish a national human rights institution should look like, I simply show that act to them. That is a gold standard; it is the best-in-class legislation. It contains a detailed account of the powers and mandate, the annual reports, immunities and privileges, membership, independence, disqualifications, terms of office, staff, the sources and nature of the funding, accounts and audit. It is possible to have all that in a piece of legislation. Why should that not be replicated in the order? Having a legal framework and being specific would guarantee both the independence and effectiveness of the new structure for today and tomorrow.

David Strang: I do not know whether it is an either/or or an and—

The Convener: Your integrity has been vindicated. You do not need to defend.

David Strang: I am very grateful to Mr Quiroz for that. I think that we will include in the implementation of the order all the points that he has made that should be a feature of it; it is just that they are not in the order.

I want to respond to Joan Fraser's comment about the lack of definition of the lay monitor's role. I understand where that comes from. I do not know whether members have the order in front of them, but proposed new section 7A of the Prisons (Scotland) Act 1989, which lays out what the paid monitors will do, is very clear and specific. The order is less specific about the lay monitors, but we can get there through proposed new section 7B(3)(a), which says that they must

"assist prison monitors ... in carrying out the duties specified in section 7A(4)".

It would be clearer if those duties were specified for lay monitors, but I do not think that it is as arbitrary as Joan Fraser suggested. Their duties are only to assist and monitor in prison monitoring. The notion that they could be instructed to carry someone's bag is completely outside that.

Part of my duties in proposed new section 7A(1) of the 1989 act is to evaluate the performance of paid monitors. If I hear that any paid monitor is instructing a member of the community to carry—

The Convener: I think that that was a metaphorical and flippant—

David Strang: I know, but I am making the point that it is not unfettered, unlimited and arbitrary. The duty is to assist in the monitoring of prisons, and prison monitors are appraised on that by me, as lay monitors will be appraised.

Professor Coyle: The convener made the point that the order says "instruct". There is no way round that. It is very clear that it says that the chief inspector will instruct the prison monitors, and the prison monitors will instruct the lay monitors. That does not need to be interpreted. It also says that the lay monitors will assist the prison monitors. That is not an equal partnership.

I want to make a specific point. I have worked in prisons for many years. Some people in prisons welcome independent monitoring and some do

not. I also know that both staff and prisoners need to have clear orders. They need to understand, and there needs to be no dubiety, because if there is dubiety, they will drive a coach and horses through it.

One example of the lack of clarity that will result from having a two-tier system of monitors concerns prisoners' complaints, which is an important part of the monitoring. According to the order, the prison monitors will talk to prisoners, but only the lay monitors—and not the prison monitors—will take complaints. That is a fine distinction that prisoners will find very difficult to cope with.

The committee should note that the Scottish Public Services Ombudsman states in his written submission that he believes that he has a specific role—as indeed he does—in dealing with complaints. We will confuse people, and that is always a bad thing to do in a prison setting.

12:15

The Convener: I will take Ms Mackenzie first and come back to Ms Fraser.

Lisa Mackenzie: Andrew Coyle has made my point. The complaints issue is an obvious one, and we share his concern that the situation would be confusing for prisoners.

There are two possibilities with regard to the lack of parity between the duties of paid and lay monitors, as set out in the proposed draft order. One is that not replicating the duties was a genuine oversight. Another is that it would not be practical to expect paid monitors to handle complaints because they will be in a prison fairly infrequently. We are talking about three individuals who work part time; possibly—although it is not clear—two and a half days a week covering 16 establishments. It is not practical for a monitor to go into Saughton and to hear a prisoner say, "I'm really concerned about my relationship with my prison officer—I feel like I'm being bullied", and for the monitor then to say, "Well, I can't take up your complaint. Wait until the lay monitor comes in."

That leads us back to the question of why we should have paid monitors. Ultimately, the proposed system will just be very confusing for prisoners. We concur with Andrew Coyle and the AVC that the proposed draft order would create a needless hierarchy and an extra layer of bureaucracy, and it is not clear what it will achieve. We completely agree that the inspectorate, with that oversight role, needs extra resource. That resource could be provided in the form of a couple of members of staff who take a co-ordinating and supporting role in order to help to mete out the training programme and to help with recruitment. Perhaps they would go out and visit prisoners in the course of that work to support the independent monitors in the community. For us, the big question is what value there is in having paid monitors on such a scant basis.

The Convener: Are you suggesting that they be given a different name, for example?

Lisa Mackenzie: They could be called co-ordinators, or something similar. That is not a huge distinction, but it would certainly be important in the legislation.

Joan Fraser: I will pick up on that last point first. It is not a question simply of changing the title from "paid monitor" to "co-ordinator"; that would also require changing the duties in the text of the proposed draft order to make it clear that those people are there to ensure proper operation of independent monitoring by lay monitors.

I will make two points. The first is about complaints being heard by visiting committees. The current legislation on prison rules refers to "requests", and very often what we deal with is not actually a complaint but a concern of some kind. A prisoner might have been confused about a particular matter and tried to get information, but was unable to do so.

Secondly, complaints—or requests—can, in direct opposition to the formal internal process, be made orally. A prisoner can stop the monitor as they are going round the prison and ask to speak with them. If the prisoner is illiterate—as approximately 80 per cent of the prison population are—they can get a friend to fill in a form for them asking to see a member of the visiting committee. That is confidential and would be followed up and resolved within a few days.

There is a further area of confusion. If lay monitors are to deal only with complaints, the situation that I have just outlined would be the reverse—the mirror image of what Lisa Mackenzie just said. If a request turns out to be a search for information or a concern and not a complaint, the lay monitor would, as the proposal stands, have to say, "I'm sorry—that's not for me." The prisoner would have to wait until the paid monitor came along, which might not be until the following month.

I am also very sure—I think most of my visiting committee colleagues are—that another problem with paid monitors, whether they deal with complaints or not, is that prisoners simply will not trust the system. With all due respect to David Strang, prisoners do not trust the inspectorate. It is not a personal thing—they just see it as part of the bureaucracy—life has taught them that the bureaucracy is in the business of doing them down, putting them in prison or whatever. Things that they do not like happen to them when they come up against bureaucracy.

Prisoners do not see lay monitors, on the other hand, in those terms. In fact, I think that they sometimes question our sanity when they are told that we do this in our own time and for no pay. Nevertheless, they trust the current lay monitoring system. I think that a hierarchy in which paid monitors oversaw the activities of lay monitors would result in prisoners not trusting any of it.

The Convener: I see that you want to come in, Mr Strang, but I should say that although I want to hear from the witnesses first, I have a list of committee members who want to ask questions. Just to keep them happy, I will let them know who they are: Margaret Mitchell, Roderick Campbell, Graeme Pearson and Sandra White.

David Strang: What Joan Fraser has just articulated demonstrates why lay monitors are so important. They will be in and out of the prison much more frequently than paid monitors, and prisoners will get to know and speak to them. I have to say that I do not think that 80 per cent of prisoners are illiterate—some of them are, but I do not think that the figure is as high as that—so I found the SPS's comments in that respect interesting.

I have heard questions about how my successor will behave, but one question is how the independent monitors will behave. Of course, we all hope and expect them to behave well, but if the current prison monitor role is purely about co-ordination and is voluntary—in other words, one can take note of what they say or not—there is a possibility that some monitors might say, "Well, we hear what you say but we are going to do it this or that way." Our ambition is to ensure consistent and high-quality monitoring and good recruitment and training, and the proposed draft order as it is written would simply give monitors the authority to implement a good system across the country.

Margaret Mitchell: Whatever the faults of the current system, no one has ever doubted monitors' independence. Indeed, that independence is crucial—particularly with regard to the four paid monitors. Where did that idea come from and what evidence did you get to substantiate the idea that it would be a good move? If, as you have suggested, it might help your department out, might not another option have been to put the finance into providing more support for the inspectorate? Surely that would not compromise independence with the introduction of paid monitors, who by virtue of the fact that they are paid, immediately make the prison community and prisoners suspicious.

David Strang: It is interesting that you say that the monitors' independence was never in doubt. You are certainly right with regard to their personal integrity but, as Andrew Coyle has pointed out, they did not meet OPCAT compliance because their funding came through the state prison provider. Because the Scottish Prison Service paid them, they were not seen as being independent of it. I was not in office at the time, but I presume that the attraction of giving oversight of prison monitoring to the inspectorate—which was one of Andrew Coyle's recommendations and the option that was chosen by the Scottish Government—was that despite what some prisoners might think, the inspectorate is independent of the Scottish Prison Service and the Government—notwithstanding the fact that, ultimately, our funding comes from there—and inspection reports and so on are independent. That is why the proposed draft order says that the chief inspector will provide oversight and co-ordination.

There must be people. I cannot personally co-ordinate 16 groups of prison monitors monitoring 16 prisons—or 15, as it will be next year; we need people to do that. The proposed draft order sets out that they will be the prison monitors and it sets out the functions that they will have. There are suggestions that those people should be purely administrative, but I think that there is strength in having them as monitors. They will understand the prisons. Because they will legally be prison monitors, they will have the power—as the lay monitors will have—to go into any prison to which they are assigned at any time, speak to anyone and look at records. They will have a higher level of credibility and better awareness and knowledge of the business of monitoring, which will be their job, because they will be in and out of prisons. If they are left with a sort of co-ordination role, sitting in an office somewhere in Edinburgh, there is a danger that they will be too remote and distant from prisons.

Professor Coyle: I will refer briefly to the budget. The reality at the moment is that there is no budget. Governors, almost with grace and favour, will pay the expenses of visiting committee members. I say "grace and favour" because, in carrying out my review, I discovered much inconsistency. Governors could be supportive or not supportive of the work of visiting committees. The total amount that is expended in a financial year by the SPS on visiting committees seems to be about £70,000, although no one is very sure. That is the total for all monitoring of prisons. It is reckoned that local authorities top that up to the tune of about 20 per cent, so the total is about £90,000.

Mrs Mitchell asked where the idea of having paid monitors came from. I lived with the issue for three months a year ago. One of the initial and continuing difficulties that I had was the dynamic nature of the Scottish Government's proposals, which seemed to develop over a period of months. The Scottish Government started from a position of abolishing visiting committees and replacing

them with an advocacy service. I will not go through all the details, because I am sure the committee knows them. Following debates in Parliament, the Government moved from a position of abolition to saying that there would be three paid monitors for the whole country.

When I asked the previous chief inspector how that came about, he told me that he was approached by the Scottish Government, which asked him how he might arrange the system if he was asked to take on responsibility for it. He said that, had he been given a blank sheet of paper, he would have come up with a different model, but he was presented with the fact that Parliament had been told that there would be three paid monitors, and he was then asked how he would manage that, so he came up with the proposal.

Following consultation in the summer of 2012, the Government moved to a proposal for four paid monitors. Initially, the assumption was that the three paid monitors would be former Prison Service people, but the proposal then moved to four monitors, who would not necessarily be Prison Service people. By the time I came on the scene last September or October, the Government had moved on to say that there would be four monitors plus lay people to assist them.

The process has been incremental and there has been no real strategic thought given to it. I made it clear in my report that with an appropriate number of lay monitors—I stress that that would be for each prison—there would be no need for the four paid monitors. However, I recognised the points that the previous chief inspector made—that he could not support or introduce consistency in the system with his present staffing and that he would need to increase his staffing. There is no argument about that, and it is for the chief inspector to say what that increase might be. The problem is that the proposal has been growing and growing without much strategy.

The Convener: I will, bearing it in mind that we have to finish at 12.45, let some members in.

12:30

Roderick Campbell: I want to switch the emphasis to inspection and monitoring of prisons being complementary but distinct. The SHRC submission points out that if the proposal goes ahead, Scotland will be the only part of the UK in which those functions are combined in one body. What are the panel's views on how that might work? Professor Coyle suggested in his report a protocol, but that suggestion has not been taken up.

Professor Coyle: In the course of my review, I interviewed the chief inspector of prisons for England and Wales. I had discussions with him primarily in his capacity as the lead member of the UK national preventive mechanism, but we moved on to his relationship with independent monitors in England and Wales. He made it very clear that he and his predecessors have had a much closer relationship with the independent monitoring boards in England than has been the case in Scotland up until now. He thinks that that relationship is important. At the moment, the boards have their own co-ordinating committee—their own secretariat for the whole country—which deals with recruitment, training, payment and so on. He said that, in these straitened times, he would not necessarily be against his office taking over the secretariat part, but would resist any suggestion that he take over direct authority for the independent monitoring boards, because he sees the two functions as being different.

Diego Quiroz: That is an important point. Monitoring and inspection are two distinct mechanisms. The proposed draft order is not very clear about that distinction; it should be explicit about the existing prerequisite in OPCAT. The SPT 2010 guidelines, which clarify the expectations regarding the establishment of national preventive mechanisms, make it very clear that the national preventive mechanism should complement, rather than duplicate or replace, the control and inspection functions of the Government, as the chief inspector of prisons mentioned. Taken together, the two separate mechanisms—inspection and monitoring—provide an effective means of preserving human rights and preventing abuse in prisons. It is important to note that, in Scotland, the chief inspector of prisons carries out an inspection role as a statutory duty. Therefore, it is vital that the monitoring function does not get lost or subsumed within the inspection work.

David Strang: I agree whole-heartedly with those comments. In my opening comments, I talked about the difference between inspection and monitoring. In the new world, people who work in the inspection function will not monitor and people who work in the monitoring function will not inspect. The risks of having them in two different organisations are that we might get duplication, information might get lost and communication might not be good. The advantage of having them in one organisation is that they will be co-ordinated and engaged in good communication.

The inspectorate might be concerned about a particular issue across Scotland's prisons—for example, complaints about healthcare—so it would be possible in regular meetings with monitors to say that, when they go into their prisons, they should take a close look at healthcare because it has been raised as an issue in a number of prisons. It will be possible to inform and co-ordinate without encroaching on their

independence—they will still be able to inspect, visit and monitor wherever. Similarly, if lay monitors were concerned about, for example, the quality of food in a number of prisons, action on the issue could be co-ordinated across all 15 prisons so that all the monitors look at that, which could be fed into the work of the inspectorate.

I accept entirely that inspection and monitoring are different functions, but there would be real benefit in better communication and co-ordination of activity than we have at the moment.

Joan Fraser: In the justification for the changes, there is quite a lot of reliance on removal of organisational barriers, but there is absolutely no information about what those barriers are perceived to be.

At the moment, when a prison inspection is carried out, one of the first things the inspection team does is set up a meeting with the visiting committee to talk to it about any concerns that it has about the prison. Before the Government's involvement in changing the independent monitoring system derailed the process, the AVC was in the early stages of developing a protocol with the chief inspector, because the visiting committees, the chief inspector and the inspectorate team recognised that we had information that we could share better. There is absolutely no reason why we could not develop that into a proper protocol, as Andrew Coyle's report suggests. To achieve that, we do not, however, need a massive piece of legislation that will turn the whole thing upside down.

Nor do we need legislation—to pick up an earlier point—to change the way in which the budget for visiting committees is managed. The Scottish Government could have done that at the stroke of a pen; it does not require legislation. It was the Government's choice to make the Prison Service responsible for the budget or the expenditure of visiting committees.

The Convener: I am conscious that I have only nine minutes left, so I ask Graeme Pearson and Sandra White to ask their questions together, and I will then let the panel answer them. I will take ladies first, if you do not mind, Graeme.

Graeme Pearson: Of course not.

The Convener: I ask for short questions.

Sandra White: Thank you, convener. Good morning, or afternoon, or whatever it may be just now.

I think that everyone has said that there is a need for change. You said that yourself, Ms Fraser. The arrangements have to be OPCAT compliant, as Professor Coyle mentioned. I think that there are two issues that people disagree about, which are paid monitors and exactly what the functions are to be. What would we do if we do not have paid monitors? I heard what Lisa Mackenzie said about bringing in prison officers, but I also picked up on what Ms Fraser said about prisoners not being inclined to trust paid monitors—

The Convener: This is not a short question. It is a narrative. I want a question, because I only have a few minutes.

Sandra White: I am sorry, convener. If we do not have the proposed set-up, what set-up should we have?

The Convener: Excellent. What do you propose instead? I now call Graeme Pearson.

Graeme Pearson: Thanks for giving me the luxury of asking this question, convener.

Having given evidence in a previous life to an OPCAT committee, I think that there are four aspects: the importance of independence, the effectiveness of the arrangements, the way in which transparency in the arrangements is demonstrated, and regular reporting that the general public can access. Mr Coyle outlined the misty history of where we are just now, and I note that, rather than general support for the proposals, there are very different approaches.

Language is important—

The Convener: Can we have a question, please? We have five minutes—

Graeme Pearson: Yes. This is an important issue, and that is why I came.

The Convener: It is important, but—

Graeme Pearson: OPCAT pays a great deal of attention to the language of the legislation. The wording of proposed new section 7B of the 1989 act is interesting. Subsection (3) states that lay monitors must "assist prison monitors". That has been discussed. Subsection (4) states that lay monitors must

"comply with any instructions issued by a prison monitor"

but only

"take account of any guidance ... published by the Chief Inspector."

The absence of discretion on the part of the lay visitor to fully report how they see things is a serious issue. Also, a conflict of interests might occur where lay visitors identify issues that have impacts for the inspectorate visitors, and that needs to be dealt with.

The Convener: "Discuss," is what I say, and you have exactly six minutes to do so.

Who wants to pop in with comments on an alternative regime or solution, and on conflicts of interests?

Professor Coyle: The alternative is on the table, as it were. If the chief inspector is going to co-ordinate and support, he will need additional resources to do so. He will undoubtedly have a view on what those additional resources should consist of. He is quite right to say that we might be talking about more than just light-touch co-ordination. There needs to be a degree of ensuring consistency, but that could come from within the inspectorate. It is the paid monitors bit that is causing all the problems.

In relation to Mr Pearson's point, as I said in my opening comments, the proposed draft order complies with OPCAT. As Mr Quiroz said, OPCAT is not prescriptive—it tells a state party what it should do but not how it should do it. The point is that we have an opportunity to have what the cabinet secretary has called the gold standard in prison visiting, and it would not take much to do that.

Lisa Mackenzie: Andrew Coyle's mind is running a minute ahead of mine—or else he is quicker on the buzzer—but that is what I would have said, more or less. Our main point is that we do not see what the paid monitors will add, but we absolutely agree that the inspectorate must have extra resource. We are open to persuasion about exactly what form that might take.

I want to make a quick point about the link with local communities, which we regard as being vital. Currently, prison visitors are drawn from local communities and most prisoners in our prisons will go back into those communities, so having advocates and others who know what it is like inside the prison walls is vital. That is why it is important that that is continued.

Diego Quiroz: I would like to pick up on Professor Coyle's point about OPCAT compliance. Our statutory duty is to identify and promote the best human rights standards. That is what we have done in our submission and it is what I am trying to do now. We have some recommendations in specific areas. We have some human rights concerns that have not been discussed today because of lack of time. The frequency of the visits of lay monitors is not expressed in the proposed draft order and we think that that needs further consideration. The same is true of independence, the membership selection process, operational autonomy and security of tenure. The draft order is silent on most of those issues and it does not mention the use of the Paris principles—which are human rights standards that are extremely important in this area—the immunity and privileges that are necessary for the independent exercise of the function of the monitors, or the reprisals.

Joan Fraser: What is proposed is a system that is more expensive, less independent and less effective than the present one. It will cost at least £250,000 a year to run, whereas the present system costs £70,000 or so, and I do not see what we will get for that.

As far as what I would like to see is concerned, the AVC has repeatedly presented to the Scottish Government a robust and independent model that would be operated by lay monitors and connected with the local community. It would be properly supported and would involve properly trained people and a consistent approach to monitoring. All those things have been supported by the AVC since the review of 2005, which, regrettably, was never implemented by the Government, despite its commitment to do so.

Overall, what we want is something that meets the gold standard of independent monitoring, which is not what I and many other people think the Government's proposal—which is a sort of grudging compliance with international law and human rights—will do.

The Convener: You have been pretty firm about that.

I am sorry, Mr Strang—you will have to be quite quick.

David Strang: I will take 30 seconds. The Government's proposal is more than "grudging compliance". No one is arguing for the status quo. We have had lay visiting to prisons for more than 100 years. The proposed change is about saying that we can improve what we are doing through consistency, co-ordination, better training and all the things that Diego Quiroz listed to do with appointment and so on.

Andrew Coyle mentioned the independent monitoring boards. I met the head of the secretariat of the independent monitoring boards in London last week, and one of his frustrations is that some independent monitoring boards—he did not name them, so I cannot—go off and do their own thing and take no notice of the guidance and instruction that that office provides. There is that risk with a purely advisory and co-ordinating role. I think that the Government's solution is a neat one, in that it combines the role of monitoring with provision of support and co-ordination. However, as I said, I do not expect that instructions will have to be issued; we are talking about guidance and how we can work together to ensure that our prisons are properly scrutinised.

The Convener: You have done really well. We are just 46 seconds over.

We are talking about a proposed draft order, so the committee will have an opportunity to consider it and to report on it. We could even bring it to the cabinet secretary's attention.

I thank the witnesses very much for their patience and for their accelerated evidence. Although that concludes the evidence session, it does not mean the end of the meeting for the committee.

The next meeting will be held on Tuesday 26 November, when we will continue to hear evidence on the Criminal Justice (Scotland) Bill. We will also hear from a panel on the forced marriage provisions that are covered by the supplementary legislative consent memorandum on the UK Anti-social Behaviour, Crime and Policing Bill.

In addition, as members know, we deferred consideration of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, and we will have two or three Scottish statutory instruments to deal with. Members can add those items to the mêlée of next week's meeting, which will start at 9.30. Members will be glad to know that there will be only one meeting next week, because they have been so good.

Meeting closed at 12:46.

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e-format first available
ISBN 978-1-78392-152-2

Revised e-format available
ISBN 978-1-78392-165-2

Printed in Scotland by APS Group Scotland