The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 3 December 2013

Session 4

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JUSTICE COMMITTEE
35th 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:

Sandie Barton (Rape Crisis Scotland)
Felicity Cullen (Scottish Government)
Assistant Chief Constable Malcolm Graham (Police Scotland)
Lily Greenan (Scottish Women's Aid)
Tony Kelly (Justice Scotland)
Shelagh McCall (Scottish Human Rights Commission)
Alan McCloskey (Victim Support Scotland)
Chief Superintendent David O'Connor (Association of Scottish Police Superintendents)
David Ross (Scottish Police Federation)
John Swinney (Cabinet Secretary for Finance, Employment and Sustainable Growth)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 3 December 2013

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Christine Grahame): I welcome everyone to the 35th meeting in 2013 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system even when they are switched to silent. No apologies have been received.

Under item 1, the committee is invited to agree to consider in private item 6, which is consideration of our approach to a legislative consent memorandum on the Offender Rehabilitation Bill. Is that agreed?

Members *indicated agreement.*

Subordinate Legislation

Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2013 [Draft]

The Convener: Item 2 is consideration of a draft affirmative instrument that will make changes to the powers of the Office of the Scottish Charity Regulator in relation to Scottish charitable incorporated organisations. I welcome to the meeting the Cabinet Secretary for Finance, Employment and Sustainable Growth, John Swinney, and his officials Susan Gilroy, who is a senior policy manager, and Felicity Cullen, who is from legal services. It is nice to have a different cabinet secretary instead of the usual suspect. I have made John Swinney laugh—that is good.

I invite the cabinet secretary to make an opening statement, once he has stopped giggling.

The Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney): I am delighted to be here. Thank you for that unexpected welcome. I am slightly concerned about the linking, at a meeting of the Justice Committee, of the title “cabinet secretary” with the word “suspect”—I will share that with Mr MacAskill later this morning.

I welcome the opportunity to discuss with the committee the draft Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2013. The framework under the Charities and Trustee Investment (Scotland) Act 2005 to enable organisations to become Scottish charitable incorporated organisations was commenced back in 2011. The Scottish Charitable Incorporated Organisation (Removal from the Register and Dissolution) Regulations 2011 (SSI 2011/44), which were made under the 2005 act, set out how a SCIO could be dissolved and removed from the Scottish charity register.

We took our time in developing the SCIO legislation because we wanted to get it right. We wanted it to be of value to Scottish charities, and we wanted it to be something that would allow the Scottish charity sector to flourish.

Under the 2011 regulations, we adopted different dissolution approaches for solvent and insolvent SCIOs, and we tried to develop processes that were designed to meet SCIOs’ circumstances. For solvent SCIOs, we developed a scheme that allows SCIOs to quickly wind up their affairs and be dissolved by OSCR. The process is similar to the voluntary winding up of a company, but it is not handled by an insolvency practitioner. That approach provides SCIOs with a

cheap and simple method for ceasing to exist. In allowing representations to be made, the process affords protection to creditors and any other person who may have an interest in the SCIO.

The 2011 regulations have now had more than two years to become embedded and it appears that we have achieved what we set out to do. However, there is a slight omission, in that if OSCR issues a direction to a SCIO to change its name and the SCIO fails to comply with that direction, there is no provision in the 2011 regulations that allows OSCR to require the SCIO to be dissolved. The only option that is currently available to OSCR under the 2005 act is to remove the SCIO from the charity register. That is at odds with the original policy intention of the 2011 regulations, which was that a SCIO should always be wound up prior to its being removed from the register. No other exit route from the charity register should be available. That is particularly important, as it ensures that the interests of beneficiaries, creditors and other third parties are protected. All outstanding debts and liabilities should be transferred, and any surplus assets should be transferred, to another body or bodies, the charitable purposes of which are the same as, or resemble as closely as possible, those that are set out in the SCIO's constitution.

The draft instrument will amend the 2011 regulations to ensure that that happens for SCIOs that have failed to comply with a direction to change their name so that in future, regardless of the situation, a SCIO will be required to be dissolved before it is removed from the charity register. Together with the other sets of SCIO regulations, the instrument will create a package that is designed to meet the needs of Scottish charities now and in the future.

The Convener: Thank you very much, cabinet secretary. Are there any questions?

Margaret Mitchell (Central Scotland) (Con): Good morning, cabinet secretary. Have any charities not been wound up before being removed from the charity register? If so, what happened to the assets?

John Swinney: What has given rise to the position is essentially a situation where OSCR wished an organisation to change its name and the organisation did not take that forward. I suppose that I would describe the situation as something of an impasse. That highlighted an anomaly in the original regulations, which were at odds with the policy intention. The policy intention of the 2011 regulations is exactly the same as the policy intention that I am setting out today. It is just that we have unearthed an anomaly that we now wish to resolve.

Margaret Mitchell: There was one incident, then.

John Swinney: That is correct.

Margaret Mitchell: What happened to the assets in those circumstances?

John Swinney: OSCR concluded that it was unlikely that the SCIO was operating or that it had any assets or liabilities so, in a sense, the issue took care of itself, but it highlighted a weakness in the regulations that we seek to amend.

Margaret Mitchell: Thank you.

The Convener: If a charity does not change its name, it does not come off the register until such time as it is wound up. I understand that. However, I think that you said that the assets and liabilities would be transferred to a charity with a similar purpose. What if that charity does not want the assets and liabilities transferred to it, for example because there are more liabilities than assets? What would happen then?

John Swinney: The regulations are essentially about ensuring that there is an orderly process for dealing with all arrangements and connections with assets and liabilities. That was not properly and fully provided for in the original regulations. There will be no obligation for the assets and liabilities to transfer to another organisation, but there will be an obligation to resolve all questions of assets and liabilities before a SCIO is wound up and removed from the register. The regulations put in place an orderly process for dealing with circumstances where a SCIO cannot remain on the register in advance of its being removed from the register.

The Convener: I take it that an insolvency practitioner will come in. Is that the case? I understand what you are doing, but where there are assets and liabilities, will it be for the insolvency practitioner to offer whatever there is—say, if there are quite a lot of assets and they outweigh the liabilities—to a similar charity? Who will do that?

John Swinney: I ask Felicity Cullen to comment.

Felicity Cullen (Scottish Government): The regulations give OSCR the ability to go to the Court of Session. If a SCIO is not playing ball with the request to go through the dissolution process before it is removed from the register, OSCR can go to the Court of Session and ask the court to do it on behalf of—

The Convener: So OSCR is a legal entity in its own right. It can pursue something.

Felicity Cullen: Yes.

The Convener: I did not realise that. Thank you. That clarifies the position.

Felicity Cullen: That process reflects what already happens where a SCIO is failing the charity test. In that situation, again, OSCR can go to the court and say, "This SCIO is not co-operating. We want to resolve it in this way."

The Convener: Thank you.

John Pentland (Motherwell and Wishaw) (Lab): I note from our papers that a full public consultation has not been undertaken. Is there any reason for that? I also note that there will be associated costs for OSCR as a result of the process. Can you give us a ballpark figure for what the costs might be?

John Swinney: Our judgment on consultation was driven by the fact that a full consultation was undertaken around the 2011 regulations. As I explained in one of my earlier answers, the policy intent has not changed. It is simply that we have identified an anomaly in the regulations that requires to be addressed. We did not feel that there was any necessity to consult because the policy was not changing. We are satisfied that adequate consultation took place in the public consultation on the 2011 regulations, which ran from November 2009 to February 2010 and included consultation with stakeholder groups in various locations around the country.

On the costs, maintaining the register is a core function of OSCR and it incurs costs in fulfilling that role and responsibility. I do not envisage that the regulations will involve OSCR incurring significantly more costs than are already associated with winding up a SCIO and removing it from the register.

The Convener: As there are no other questions, that concludes the evidence session.

Item 3 on the agenda is the formal debate on the motion to recommend approval of the instrument that was considered under item 2. I invite the cabinet secretary to move motion S4M-08390.

Motion moved,

That the Justice Committee recommends that the Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2013 [draft] be approved.—[*John Swinney*.]

Motion agreed to.

The Convener: Thank you very much, cabinet secretary. Brief, but pleasant—I am talking about us.

As members are aware, we are required to report on all affirmative instruments. Given the deadline, are members content to delegate authority to me to sign off the report?

Members *indicated agreement.*

The Convener: I suspend the meeting for a couple of minutes to allow witnesses to take their seats. Members should stay put.

10:10

Meeting suspended.

10:12

On resuming—

Criminal Justice (Scotland) Bill: Stage 1

The Convener: I welcome to the meeting Assistant Chief Constable Malcolm Graham of Police Scotland; Chief Superintendent David O'Connor, who is president of the Association of Scottish Police Superintendents; and David Ross, who is vice-chairman of the Scottish Police Federation.

This is our seventh day of evidence on the Criminal Justice (Scotland) Bill at stage 1. We will hear evidence on corroboration and related reforms.

Good morning. I thank all the witnesses for their written submissions. We will go straight to questions from members.

Christian Allard (North East Scotland) (SNP): Good morning. Let us start with corroboration. The Scottish Police Federation's written submission states:

"The abolition of corroboration will inevitably result in the lower end cases being subject to appeal."

There will be a great difference in relation to corroboration. On the same page, the federation says:

"there should be no blanket abolition of the requirement for corroboration."

That is the exact term, as opposed to removing corroboration altogether. What are your views on that? In the debate out there about corroboration, is there perhaps a mistake in the language? We are talking about the removal of the requirement for corroboration as opposed to the removal of corroboration, and saying that removing the requirement for corroboration does not mean that corroborative evidence or corroboration will be taken out altogether.

The Convener: I appreciate that you have not been on the committee for long, Christian, but I think that everybody on it understands that we are not talking about abolishing corroboration per se, but about the mandatory requirement for corroboration.

Christian Allard: Indeed.

The Convener: We can put that on the record. That is clear for us and it is probably absolutely clear for the panel. Nevertheless, the question was put to Mr Ross. If any others wish to self-nominate, they should let me know; I will then call them.

10:15

David Ross (Scottish Police Federation): As discussion and debate around corroboration has moved on, the intention of what is contained in the bill has become clearer. Our view is that we are now talking about the removal of the requirement for corroboration of every strand of evidence in favour of checks and balances across all the evidence and other safeguards. In truth, our view is now that those checks and balances mean having other evidence that supports the evidence of an eye witness, rather than there being two eye witnesses.

The Convener: I am afraid that we have always known that it was never two eye witnesses, Mr Ross. We have been aware of what it is. Perhaps you can clarify what you mean by "every strand". Are you talking about the ingathering of evidence rather than the court process? It would be helpful if you could analyse what you mean in that way.

David Ross: By and large, the gathering and reporting of evidence is done using two police officers or two forensic scientists, for example. Our view has always been that that is unnecessary and costly and does not provide any great benefit to the criminal justice system. That view of corroboration was part of our response, so we were always opposed to its blanket removal.

The most recent comments from the Cabinet Secretary for Justice and the Lord Advocate suggest that we are talking about checks, balances, safeguards and other evidence. In truth, we are talking about corroboration from different sources rather than, for example, each eyewitness's account being corroborated by another eyewitness's account, or, indeed, forensic evidence being corroborated by some other form of evidence. If that is what we are talking about—I understand that absolutely it is—we have moved to a position where we are quite supportive of it.

The Convener: That still sounds like corroboration to me.

David Ross: Absolutely; it sounds like corroboration to me, too.

We have the requirement for corroboration now. In every case the police have always gathered and reported, and will always gather and report, as much evidence as is available. It was never the case that we would stop as soon as we had a sufficiency of evidence and that will not be the case, irrespective of the outcome of the passage of the bill.

Assistant Chief Constable Malcolm Graham (Police Scotland): It is helpful that you have provided clarity, convener, that we are discussing the removal of the absolute requirement for corroboration. We are very clear: although we

understand that particular facts must be corroborated before any proceedings would commence—for instance, identification and certain elements of the essential facts in a crime—that is often done irrespective of the weight or quality of other supporting evidence that would not be considered to meet the technical requirement of corroboration. That is an unfair bar to justice for many victims of crime, particularly in crimes in which vulnerable people have been exploited and in which, in the commission of the very offences that perhaps we would most seek to address, there is an intention on the part of the perpetrator to exploit some of the technical rules that prevent proceedings from taking place.

Chief Superintendent David O'Connor (Association of Scottish Police Superintendents): Our association has taken time over the past year to look at and engage in the debate and the consultation. At the outset of the debate, we had concerns about the wholesale abolition of corroboration, but some clarity has been brought to the debate recently. We were concerned that we could end up with a situation in which we would have cases with a suspect or an accused and a victim, and that we might move from the criminal burden of proof to something that looked more like the civil burden of proof. A key safeguard for us is that we are retaining the criminal burden of proof—that is, we have to prove a case beyond all reasonable doubt.

The Convener: That was always the case, so I am surprised that it took you a year to work that out. I am sorry to be rude, but what you were concerned about has never been on the agenda.

Chief Superintendent O'Connor: Absolutely, but there has also been a great deal of debate and discussion. Over the past year, we have been seeking some reassurance that some of the safeguards with regard to corroboration of the different strands of evidence that David Ross referred to are going to be put in place.

The Convener: I believe that Christian Allard has a question on this matter.

Christian Allard: Do you think that the removal of the requirement for corroboration will lead to more prosecutions?

Assistant Chief Constable Graham: The intention behind our support for the proposal to remove the absolute requirement for corroboration is that a larger number of victims will get access to justice, which might mean more prosecutions. We have conducted some exercises on the police's current role in carrying out thorough investigations to gather the available evidence—I am sure that we will come back to that later—as well as, over the past two years, exercises that show a small increase in the number of cases that we would report to the procurator fiscal based on our understanding of what the change in the law would mean if Parliament were to pass the bill.

That small change would move things disproportionately towards more solemn procedures, which would mean a larger increase in cases reported to the Crown that, under the current system, would not be reported and which would likely be heard by a sheriff and jury or in the High Court. A number of those cases would be serious sexual crimes and the types of cases that I mentioned earlier, in which the particular dynamic with which the crimes are committed and the ways in which the perpetrators often target victims result in a lower likelihood of the technical barrier of corroborating every essential fact being overcome. When we looked across that large valid data set, we found that, with the proposed changes, there would be an increase of around 2 per cent in the number of cases that would be reported, which equates to almost 3,000 additional victims being given access to justice. At the moment, the police assess those cases and conclude that there is not a technical sufficiency of corroboration to allow us to report them to the Crown Office and Procurator Service.

I am also aware that the Crown Office and Procurator Fiscal Service has conducted similar exercises based on what we report to them and the new prosecutorial test. Indeed, I believe that the Lord Advocate has already submitted evidence on that.

The Convener: Given the difficulty that the committee has had with the term "access to justice", it might be helpful if you could define it for us.

Assistant Chief Constable Graham: Access to justice is a broad term. There are different stages at which victims can access justice. First of all, I should stress that one of the areas that Police Scotland is focusing on is our clear role in keeping people safe; one way of doing that is to prevent people from committing crime, and one way of preventing people from committing crime is to ensure that they are brought to justice for the crimes that they have already committed.

The term "access to justice" would include people reporting to the police that they have been the victim of a crime. We will do everything that we can to investigate such reports thoroughly; indeed, I would be very happy to describe what I mean by that because it is clear from the wider speculation around the debate that some of the people who are commenting on the matter perhaps do not understand the rigours of police procedure and the investigatory process. In broad terms, however, "access to justice" would mean giving the people the opportunity for their case to be considered by the Crown Office and Procurator Fiscal Service

and the prospect of its being taken to court. Our assessment is that if the law were to be changed as proposed an additional 3,000 victims would have the opportunity to have their case considered by the Crown Office and Procurator Fiscal Service. At the moment, those victims do not have that opportunity at all.

I would be very happy to supply some specific examples of cases—

The Convener: I think that the committee now understands the police perspective with regard to access to justice. The problem is that each panel of witnesses that gives evidence has a different line on it because the people concerned are at different points in the process. However, what you have said has been very helpful.

I have a list of members who wish to ask questions. John Finnie is first up.

John Finnie (Highlands and Islands) (Ind): I have some questions for my former colleagues and friends Mr Ross and Mr O'Connor on what might be perceived as the staff associations' changing position on this matter. The Scottish Police Federation's submission says:

"Corroboration is also particularly important in maintaining public confidence in the criminal justice system."

In fairness, though, I should note that earlier in the submission the federation says:

"The SPF are not opposed to making some amendments in relation to ... the service of legal documents or ... the transportation of productions".

That said, the federation says in the same submission:

"Blanket removal of corroboration would risk exposing"

not only police officers but every other member of the public

"to more spurious and malicious allegations which would be harder to refute".

What, if anything, has changed in this debate? I certainly hope that nothing has.

David Ross: In truth, I think that you are quoting from our response to Lord Carloway's report rather than our response to the bill. [*Interruption*.]

The Convener: Just bear with us while we confirm that.

Roderick Campbell (North East Fife) (SNP): The comments are actually on page 2 of your written submission, which says:

"Blanket removal of corroboration would risk exposing police officers to more spurious and malicious allegations which would be harder to refute and similarly so for every other member of the public."

David Ross: Our position is and remains that the blanket removal of any requirement for corroboration would potentially expose the criminal justice system to all of those things.

The Convener: Forgive me, but that is exactly what the bill is proposing. It is proposing the blanket removal of the mandatory requirement for corroboration.

David Ross: Coming back to the clarity that I mentioned earlier, I do not think that that was necessarily our understanding when the submission was written. We were responding to the notion that corroboration was being taken out of the system altogether. Our view was predicated on comments from many different sources but the notion that evidence from one source, whether from an eyewitness or whatever, could be sufficient to convict someone was, for us, a step too far with regard to this debate. It has been made clear that that will not be the case. If we are talking about the general requirement for corroboration of each strand of evidence as opposed to the requirement for corroboration across the whole of the evidence, our position would be that we would support the latter but not the former.

John Finnie: For the avoidance of doubt, I must point out that the function of the committee is to scrutinise the specifics of the legislation, and I have been referring to your response to that.

More than one witness has referred to clarity in the debate. I do not know what the source of that clarity has been; perhaps it was Lord Gill, whose position was unequivocal. However, notwithstanding where either of you believes that that clarity has come from, we are scrutinising the legislation—not what you might think it is, but what it is—and I have quoted from your written evidence on the proposals in that legislation. Does your submission still stand or should we expect a further submission from the Scottish Police Federation?

David Ross: Given all the discussion and debate that has already taken place, it is very difficult for me to answer your question. I do not consider our position to have completely turned from one of resistance to one of support. As our understanding has grown about what we are talking about in the legislation, our position has moderated to the extent that we would support the removal of the general requirement for corroboration in favour of a sufficiency across the whole of the evidence to prove guilt beyond a reasonable doubt.

John Finnie: I will come on to Mr O'Connor in a moment but, Mr Ross, has your evolving position—if I can put it that way—been influenced by the Crown Office and Procurator Fiscal

Service's supplementary written submission? In paragraph 33, it refers to false allegations against professionals and the measures that would be put in place for

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

which would be that

"proceedings in such cases would not be taken up without strong supporting evidence."

Has that reassurance altered the federation's response?

10:30

David Ross: I would not say that it is just that reassurance that has done so; it was partly that and partly general comments about corroboration by the Cabinet Secretary for Justice, the Lord Advocate and the Solicitor General. However, it was specifically about the Lord Advocate's comments to us regarding, for want of a better description, checks and balances, and safeguards for complaints about professionals.

John Finnie: I fully understand your obligation to represent your members' interests and that that reassurance would be helpful, but I return to the SPF's statement that

"Blanket removal of corroboration would risk exposing police officers to more spurious and malicious allegations which would be harder to refute".

You might have gained some reassurance with regard to that, but your submission stated that the case would be

"similarly so for every other member of the public."

I presume that it is not your view that there should be a higher threshold.

David Ross: Absolutely not. Our view is that there should be the same threshold for everyone, irrespective of what position they do or do not hold.

John Finnie: Okay. Thank you.

Mr O'Connor, your written—

The Convener: Mr Graham wanted to come in. Do you still wish to do so, Mr Graham?

John Finnie: I will come to Mr Graham.

The Convener: Are you working your way along the line?

John Finnie: I am indeed.

The Convener: Go for it.

John Finnie: Mr O'Connor, the ASPS's written submission states that, with regard to the abolition of corroboration,

"it remains not wholly convinced—"

which I would have as being unconvinced—

"of the case for complete abolition."

Can you comment on that in the light of the questions that I posed to Mr Ross, please?

Chief Superintendent O'Connor: Yes. We have had a great deal of debate, and one of the things that we keep coming back to from a police perspective is that in terms of policing nothing will change, because police officers will continue to go out there and conduct very comprehensive investigations and gather all the evidence. They are bound by disclosure in terms of the gathering of evidence and will report the facts and circumstances to the Crown. Nothing will change and full, detailed and comprehensive investigations will continue in the police service.

John Finnie: You have been a senior investigating officer dealing with very serious crimes.

Chief Superintendent O'Connor: Yes.

John Finnie: We heard that there have been two murder cases in which no body was recovered but convictions were obtained and that the basis of the convictions was the collation of huge tracts of circumstantial evidence, for want of a better phrase. Is that correct?

Chief Superintendent O'Connor: Yes. Circumstantial evidence can be a strand in the chain of evidence, as can many other parts of evidence. During the debate on corroboration, we have found that it can mean different things to different people. It is not just about having two eyewitnesses but about the whole gamut of evidence, and the science has moved forward considerably in recent times.

John Finnie: Yes, indeed. I do not think that you would find anyone who would dispute that Police Scotland will pull out all the stops for a serious crime such as murder. It will often do that at the direction of the Crown Office and Procurator Fiscal Service, which will lead the investigation.

Chief Superintendent O'Connor: Yes.

John Finnie: However, I do not think that you can give such an assurance for, say, a minor breach of the peace or a minor assault. They can be very traumatic events for the victim, but there will not be the same level of energy or chasing forensic examination for such offences, because—as you know—there are many of them and they are particularly frequent at weekends.

Chief Superintendent O'Connor: As I have said, evidence can come from a variety of sources. I have absolute confidence that the police service will continue to seek corroboration from whatever source; thereafter, it is a matter for the

Crown to look at the veracity, sufficiency and competency of the different strands of evidence.

John Finnie: But I am not talking about the initial response; I am talking about, if you like, the supplementary response. We know that follow-up inquiries will take place, often at the direction of the Crown Office and Procurator Fiscal Service. However, that will not happen with the run-of-the-mill breach of the peace in which it might be a single individual, who is a credible witness, who is accused, or with an assault or something of that nature.

Chief Superintendent O'Connor: I would certainly have confidence in the service that whether it is a matter of public disorder, a minor assault or whatever, the investigating officers would seek evidence from eyewitnesses, closed-circuit television or mobile telephones. There is a variety of modern ways by which evidence can be drawn in, even for minor matters. Barely an incident goes by for which there is not access to mobile phones or CCTV.

John Finnie: It is for those very reasons—we have all those additional sources of evidence that were not available historically—that we have been told that there is less requirement than ever before to remove the requirement for corroboration.

Chief Superintendent O'Connor: Yes—each of those different parts can corroborate. To return to where I started, I have absolutely no doubt that the police service will continue to carry out investigations and to draw in evidence from whatever source it takes to put together a case to allow the matter to be reported to the Crown Office and to allow it to make the decision.

John Finnie: What is the position of the Association of Scottish Police Superintendents on the proposal to abolish the absolute requirement for corroboration? Are you for it, or agin it?

Chief Superintendent O'Connor: At this time, we are more content with the proposals provided that, as we move forward, we are quite clear about what the marking rules will be. Indeed, we have heard a great deal about looking for not just the quantity but the quality of evidence. To return to my starting position, the criminal burden of proof will remain the same in as much as a case must be proved beyond all reasonable doubt against the accused.

Assistant Chief Constable Graham: John Finnie is seeking assurance on Police Scotland's position were the law to change. I am in a position to offer that assurance: with neither hesitation nor qualification, I can say that the standard of investigation across the board would not change, were this law to be brought in as proposed. There is an absolute requirement on the police to undertake investigations, with diligence and rigour, to an evidential standard that is established through case law, which would not change as a result of any of the bill's proposals.

I will go through what some of those requirements are in the case law. In Smith v Her Majesty's Advocate in 1952, it was opined that it is the duty of the police to put before the procurator fiscal everything that may be "relevant and material" to the issue; in McLeod v HMA in 1998, it was opined that

"all material evidence for or against the accused"

must be disclosed; and, more recently, under McDonald, Dixon and Blair v HMA in 2008, all material evidence that either materially weakens the Crown case or materially strengthens the defence case must be disclosed, so the evidence must be disclosed whether it shows that the suspected party is innocent or guilty. The police must supply all that information to the Crown.

The police's position, whether an offence is minor or serious, will not change the rigour and diligence with which we will investigate crimes and gather all available best evidence.

I must address very strongly the contentions from a number of quarters. You referred to Lord Gill's fear that the police may not go seeking corroboration. We do not set out to seek corroboration; we set out to investigate the circumstances of an offence or crime that has been reported to us or has come to us by other means. That means that we need to establish whether a crime has occurred; if it has, we need to establish who has committed the crime.

John Finnie: You will of course rely on what is termed a credible witness; someone can appear to be a credible witness—

Assistant Chief Constable Graham: We do not set out to gather evidence that corroborates or otherwise one or two stands; we set out to gather all the evidence available. In some cases, multiple strands of evidence will corroborate the same fact; in other cases—the ones to which I referred—we know that that is extremely unlikely. That is because the nature and dynamic of the offending means that some of the essential facts will be corroborated in a higher proportion of cases.

It is clear from international perspectives on the current corroboration laws in Scotland that that is deemed to be discriminatory against some of those who are most likely to be victims of certain crimes. It is clear from the police perspective that, in some cases, an assessment of the quality and sufficiency of the evidence as a whole is prevented because of a technical barrier in one of the facts of the charge not being corroborated technically in the way that the law is constructed.

John Finnie: Could one of those characteristics be penetration? That is one of the three characteristics that we heard would be required to prove the crime of rape.

Assistant Chief Constable Graham: If it is an essential fact in any crime—penetration is an essential fact to be proved for rape—it can be difficult, at times, to provide corroboration of that fact. It is highly likely that we are talking about circumstances in which eyewitnesses, with the exception of the victim, are unlikely to be present. Therefore, we must find supporting evidence that is consistent with the account of the victim. However, meeting the artificial and technical barrier in law of corroboration is not always possible. My contention in relation to our experience of dealing with victims is that, in a large number of cases in which there is credibility and a large amount of quality evidence, the failure to get over that technical barrier can prevent, in the terms that I have previously explained, victims of serious and less serious crimes getting access to justice.

John Finnie: I am aware that "access to justice" is the current buzz phrase, and it has featured strongly. Has Police Scotland made any assessment of the likely increased level of charges of false accusation of crime or wasting police time that might be associated with any proposed change?

Assistant Chief Constable Graham: We have not made any assessment of that, and I can explain why. It is interesting, when we are trying to focus on the victims of serious and less serious crimes, that the debate is sometimes brought back to the issue of false allegations. We have done work on the number of false allegations that are currently made, and we have seen that the level is extremely low. I would prefer that we focus our attention on dealing with the large number of victims of crime who, at the moment, do not have their needs or expectations met by the justice system.

John Finnie: It would be entirely wrong to paraphrase questioning of this nature in a way that suggests that it was not supportive of victims. You would not want anyone to be the victim of a false accusation, I presume.

Assistant Chief Constable Graham: Absolutely not and, at the moment, if that were the case—

John Finnie: Can I ask about policy formulation?

The Convener: Let the witness finish, please.

Assistant Chief Constable Graham: We absolutely would not want anyone to be the victim of a false allegation and, as you are aware, there are cases in which, when someone is falsely accused of an offence, that is investigated thoroughly to the same standard that I have described and, occasionally, that results in proceedings being taken and prosecutions being made through the justice system. That is an extremely small number of cases compared with the overwhelming and rising number of reports that we are receiving about serious sexual crime, which is a far bigger issue to focus on.

John Finnie: It is certainly an important issue.

We have heard from a number of witnesses that the proposal is about rebalancing after Cadder. We heard from the Lord Advocate that Cadder brought about challenges connected with the investigation of the crime of rape, as an accused who formerly might have indicated that the event was a consensual act is now saying nothing, which means that one of the three characteristics that is required to prove the crime is removed. Could you comment on that? Is it a rebalancing?

Assistant Chief Constable Graham: Following Cadder, there was a requirement to examine whether a rebalancing was required. My understanding is that Lord Carloway was asked to do that piece of work. As a result of his widespread and in-depth examination of the legal issues that arose from the Cadder case, he came up with a number of recommendations.

I do not feel that the proposal is a response to the rebalancing of Cadder, because the issues that I am describing were present in police investigations, and had subsequent consequences in the justice system, before the Cadder decision was made. That issue notwithstanding, the Cadder decision provided a different balance in the legal considerations of those cases and, therefore, following Lord Carloway's examination of the impact of the decision, it is entirely right and proper that he should come up with a number of recommendations to ensure that there is an equal focus on the rights of everyone who is involved in the justice system.

John Finnie: May I ask one more question, convener?

The Convener: I will let you back in, but you have had a good run and we have a big queue.

John Finnie: I appreciate that.

Can you advise us how policy formulation is done by Police Scotland? How do you come to a point at which this view is agreed to be Police Scotland's view? Is it Mr House's view, or is there engagement and consultation with staff associations and operational officers before the view is formulated?

10:45

Assistant Chief Constable Graham: Ultimately, I am here as a representative of the chief constable, so it is the view of the Police Service of Scotland, which is endorsed by the chief constable, albeit that—as the committee will accept—he cannot personally be here to offer that view on every occasion. I am not sure what your question was intended to infer. If you are asking whether we just take a view from the chief constable and then replicate it in any forum that we attend as his representatives, the answer is no.

A large amount of work is done on developing an informed and comprehensive position on issues that are extremely important not just for Police Scotland but across Scottish society. We consult the staff associations, as I am sure my colleagues will confirm; other agencies, to allow us to take account of their perspective; people with whom we work and on whom our work impacts; and—in this case in particular—some of the organisations that represent victims. At times that work involves us asking police officers to do specific pieces of work to develop proposals, which would then be endorsed by the governance forums of Police Scotland and ultimately by the Police Scotland executive team that is led by Sir Stephen House.

The Convener: I think the point of the question was that it seemed that Police Scotland and the SPF had different views at one point.

If John Finnie is going to pull that face, I will let him back in later.

Margaret Mitchell: There seems to have been quite a movement in the SPF's position. The issue is obviously quite complex, and we as a Justice Committee are very concerned that we do not have enough time to scrutinise a decision on an issue of such magnitude in the way that we would like. In view of that, would you be in favour of taking the issue out of the bill and moving it to, for example, a royal commission so that it can be looked at thoroughly to satisfy everyone? That option was not considered in the Carloway review, which looked only at abolition or retention. I would like to hear the panellists' views on that suggestion.

Assistant Chief Constable Graham: I am happy to go first on that. On the question of time, I go back to the points that I made about the other decisions that were made and implemented very quickly in the justice system. John Finnie referred to the Cadder decision, which in effect came from the Salduz case in the European Court of Human Rights. The timescales for the decisions and in particular for the implementation of the changes that resulted were extremely tight, and posed considerable challenges for the justice system.

Lord Carloway was given a substantial period of time in which to make his considerations and report to the Scottish Government. The long time since that report was made has allowed us all to consider the matter carefully. I have described what Police Scotland has done; I am sure that colleagues can speak about what they have done to formulate their views and perspective, and how their position may have evolved as more information and clarity from some of the key agencies that are involved has entered the public domain.

I do not think that we need more time to look at some of the issues, or indeed to look at any of the issues that we have covered today in some detail. There are a large number of victims of serious crime who are not having their expectations of the justice system met in this society.

The Convener: Whatever the committee's views are—I think that I speak for us all—about the retention of mandatory corroboration, we are absolutely on the side of those victims you are talking about who are not having their day in court or having the Crown consider whether their case ought to be prosecuted. That is not the issue for the committee. The issue is whether this change will deliver justice and bring fairness for the victims. The reason why we are—and John Finnie is—testing you on the matter is that, although it may appear that we have had sufficient time, we have already had the SPF changing position in the course of its evidence to this committee.

I apologise to Margaret Mitchell—I just wanted to make that plain. You must not portray us as somehow not wishing to see those cases dealt with. What I have described is the position of everyone on the committee, whatever their position is on corroboration. That must be put on the record. We have got people coming before us next who represent victims and so on, and I want them, too, to know that. Sorry—it is not the case that because we are testing you we are somehow agin them.

Assistant Chief Constable Graham: Thanks for the clarification, convener. It was not my intention to suggest that you were not supportive of victims. It is incumbent on me to present the perspective of Police Scotland and to try to balance some of the corroboration arguments that have been made by some members in the debate that has been going on more widely than in this room.

Margaret Mitchell: It is still unclear to me what you are saying, Mr Graham. I think that you are saying that Police Scotland would implement the provisions tomorrow because you are perfectly happy with them. I am asking you to consider the fact that, regardless of how long Lord Carloway took to come to his opinion, it was the opinion of

just one judge. There has been a weight of opinion expressing real concern about the abolition of corroboration as proposed by the Carloway report. Does that give Police Scotland any pause for thought? Do you totally rule out taking the provisions out of the Criminal Justice (Scotland) Bill, so that they will quickly go into law next year without being properly tested by something like a royal commission? That might not take very long but would ensure the depth of scrutiny that the issue deserves.

Assistant Chief Constable Graham: The depth of scrutiny that the issue deserves has been addressed in Lord Carloway's report and the consideration that has taken place thereafter. The process of parliamentary scrutiny will enhance that consideration, and we are delighted to be providing evidence in that process, as we do for many bills. I do not think that there would be any enhancement of the position as we understand it or that there would be any change to the Police Scotland view should we delay the proposal as it currently stands.

Margaret Mitchell: Thank you. That allays all my worst fears about a single police force.

Chief Superintendent O'Connor: You talk about deferring the proposal and other ways of scrutinising the bill, but those are matters for the committee. I return to where I started. Whether or not you defer the proposal now and implement it in a year's time, nothing will change about the way in which the police go about their business of gathering evidence and reporting the facts and circumstances. We will continue to conduct thorough, professional investigations and report the facts and circumstances to the Crown.

Margaret Mitchell: That is not the question, Mr O'Connor. My question is whether you think there would be merit in fully discussing the proposal and having it looked at inside out to make sure that we get it right for your police officers and for the ordinary man in the street who goes into the courts. Would there be some merit in putting the proposal to a royal commission so that every aspect of it is looked at thoroughly by those from all walks of life who are in the best position to contribute to that?

Chief Superintendent O'Connor: I believe that the scrutiny that is being applied by the committee today, which is raising the important issues that have been raised to date, is part of that scrutiny. There may be merit in taking it forward to a full royal commission and bringing other professionals and other views into the equation for a full discussion, but that is a matter for others. From a police perspective, I hope that the level of scrutiny that is being applied just now will inform the debate.

Margaret Mitchell: But you would not rule out a royal commission looking at it.

Chief Superintendent O'Connor: That is very much a matter for others.

David Ross: Our view is probably similar to that of our colleagues in the ASPS. If you asked me whether our current position is the unanimous view of the Scottish Police Federation, I would have to say no. It is our view, on balance, that we support the removal of the general requirement for corroboration. However, irrespective of whether we have a royal commission, I do not think that that will ever be the unanimous view of the Scottish Police Federation nor of the whole service. There are a wide variety of views not just in the Police Service but across the whole criminal justice system about whether the removal of corroboration is the right or wrong thing to do, and a lot of people's views sit somewhere in the middle. I genuinely do not know whether a royal commission would bring more clarity and afford people more opportunity to make up their minds about whether they support the proposal. I tend to think that the more information people are provided with and the more scrutiny is applied, the better, because it is important that, whatever we do, we get it right and that the criminal justice system is not damaged by progressing the bill.

I take the same view as David O'Connor on what we would do as a service. We will do the same as we are doing now irrespective of whether the bill is passed as it is or not.

Margaret Mitchell: Could I pin you down, please, Mr Graham? Police Scotland's submission says:

"corroboration of all material facts will always present significant challenge."

What do you understand is required just now as the very basics of corroboration in the criminal justice system?

Assistant Chief Constable Graham: As the committee has heard, and as Lord Carloway explained in his report, the current law in relation to corroboration in different cases is extremely complex. That is one of the issues that are under examination. The complexity is based on the legal developments over the years, from the starting position, which was identified by Lord Carloway as dating back to some principles from the Old Testament, to a position where the "corroboration fiddles", as some commentators have described them, have twisted and adapted it to fit in with developments in society, legal process and evidential availability, and the original concept in very simple terms has perhaps been overtaken by all those changes and developments. If your question is, "What do you understand by the current law under corroboration?", my answer is

that there is a complex set of case law that lies underneath that and it would take some time to go into it.

Margaret Mitchell: That is an amazing answer. Are you saying that, given that complexity, you do not think that there is a case for the issue being taken out to a royal commission?

Will I tell you what the basic requirement is? It is really quite simple. Two essential facts require to be established: did an offence occur, and did the accused do it? Both of those essential facts require to be corroborated, nothing else. That should not be too difficult, should it, Mr Graham?

The Convener: Now, now. I know that everyone is passionate about the matter, but could we keep the tone polite, please?

Margaret Mitchell: I will keep the tone, with great difficulty.

The Convener: I know, but you will manage it. She is good at that.

Margaret Mitchell: We are looking at a tenet of Scots law that has been passed down by the institutional writers, which has been flexible and which has not only provided justice for victims but, crucially, protected the rights of the accused. Once imprisonment is imposed on someone unjustly, you can never get that back, which is why the standard of proof is beyond reasonable doubt.

So I ask you again, given the complexity that you have talked about, whether there is not a case for taking the matter out? Have the views and evidence that you have heard today not changed your mind in the very slightest?

Assistant Chief Constable Graham: I will go back to where you started by describing the current legal position that the essential facts require to be corroborated. I had already covered that in my evidence and I understand that position clearly.

Margaret Mitchell: You clearly did not.

Assistant Chief Constable Graham: I had thought that your question was what corroboration—

The Convener: In fairness, Mr Graham, you said that there has been a crime and there has been identification—or words to that effect. I appreciate that members are concerned about the matter.

Assistant Chief Constable Graham: Could I perhaps finish my answer?

Margaret Mitchell: Convener, I sought clarification specifically on the comment about all material facts needing to be corroborated way down the line, which is simply not the case.

Assistant Chief Constable Graham: What I was trying to provide in my answer was some exploration of the depth of concern that there is about the complexity of what corroboration actually means in the huge variety of different cases. Although the test at a high level is simple, the interpretation of what corroboration means in different cases has been twisted and has developed through time.

Margaret Mitchell: I think that we prefer the word “evolved”, rather than “twisted”. You may not want to use the word “twisted”.

Assistant Chief Constable Graham: I accept that, but there is certainly a perception that that evolution has perhaps gone to a point where the original concept now needs to be revised in the way that is being proposed.

My answer to Ms Mitchell’s final question about whether I am not now convinced, based on what I have heard today, that further examination needs to be taken—in whatever terms that would happen—is that I am not convinced of that at all, for the reasons that I have outlined, which I will not repeat, noting the convener’s earlier comments. However, there needs to be a clear focus on what the justice system is there to achieve. The current law around corroboration is unclear to people and the proposal would provide clarification and simplification. It is very clear that there is a long history of the law evolving and developing to take account of changes in society, public values and so on. It is absolutely appropriate that the proposal that is currently in the bill is taken forward now.

11:00

Margaret Mitchell: On a different point, I have a question for Mr Ross and Mr O’Connor. Following on from John Finnie’s point about professional witnesses being susceptible to malicious allegations, the Lord Advocate has given some assurances—some guidance, almost—that proceedings in such cases would not be taken without strong supporting evidence. Does it give you any cause for concern that the Lord Advocate may change and a new Lord Advocate may have a different view?

David Ross: As we are the staff association that represents the vast majority of police officers, the proposal initially gave us quite significant concern because our members frequently find themselves in positions where they themselves are uncorroborated. They may be on their own attending an incident and dealing with several people who could make some sort of spurious allegation against them, corroborated by each other.

That has always been the case and, to date, such allegations have not resulted in a vast

number of police officers being prosecuted. The evolution of CCTV, mobile phones and so on—indeed, in some areas, our own cameras on police officers—has provided a degree of protection to prevent that. What the Lord Advocate has said in relation to measures that he would put in place regarding other evidence to support any such allegations has indeed provided some reassurance.

However, I am personally aware of significant numbers of individuals who have not been proceeded against for making false accusations of crime against police officers and wasting police time on the basis that it would not be in the public interest to do so. Certainly when I was a joint branch board secretary in Northern Constabulary, I had a drawer full of letters from the procurator fiscal in Inverness telling me precisely that. Although there might have been a sufficiency of evidence to prosecute an individual, it was not in the public interest to do so.

Chief Superintendent O'Connor: It is a fair and valid point. We have raised concerns and, over the years, we have seen false allegations and acts of what we would consider to be public mischief. It has been an issue of concern in the past. The Lord Advocate has given a reassurance, but I have to say—and I hope that David Ross would agree—that there would be some concerns among our members that it could be an issue.

Assistant Chief Constable Graham: It is important to stress—it was already hinted at, so my apologies if I did not pick it up properly—that I do not think that anybody would be seeking a different standard of investigation or legal process to be applied to people in different positions in society or in different professions.

We can agree on the point that was made about the burden of proof, which will remain as it is just now. The sufficiency of evidence that will need to be gathered for that burden of proof to be met will be changed slightly in relation to the quantitative assessment of the evidence that is put forward. Assessment of the quality of the evidence is absolutely key in relation to the final outcome in court and the sufficiency test being met—it is very important to emphasise that.

Sandra White (Glasgow Kelvin) (SNP): Good morning, gentlemen. I put on the record my thanks to Police Scotland for its work during the recent tragedy at the Clutha Vaults in Glasgow.

The Convener: You say that on behalf of the entire committee. We appreciate how involved not just the chief constable but the Scottish Fire and Rescue Service and the Scottish Ambulance Service have been.

Assistant Chief Constable Graham: Thank you.

Sandra White: I want to go over some of the issues that have been raised, more for clarity than for anything else. The convener was correct to say that we have been looking at the corroboration issue for quite some time and we all know about it but, for the general public out there and the press, will you confirm that, whatever your thoughts on the issue, it is vital for us to remember that it is the legal and technical aspects of corroboration that we are proposing to remove and not corroboration per se?

The Convener: I think that we have established that.

Sandra White: Convener, from speaking to the general public and the press, as we all do, I think that it is necessary to get it on the record that it is the legal and technical—

The Convener: In fairness, I think that I put it on the record clearly when Christian Allard asked his questions that we know exactly what it means, and I said clearly—

Sandra White: Convener, I am not disagreeing with you. I would just like it on the record, for the sake of the public and the press—

The Convener: You have said it again.

Sandra White: —that it is the legal and technical aspects that we propose to abolish and not the whole thing.

In Scotland, corroboration has a narrow technical meaning. In a recent article, Professors Chalmers and Leverick stated:

> "The Scottish law of corroboration has become technical and highly complex, and cannot simply be described as a 'two witness' rule."

You mentioned that, Mr Graham, and so did David O'Connor and David Ross, but will you elaborate on the point? You talked about evidence and said that this area is technical. We could talk about rape victims, but I am also talking about older people who are in nursing homes and children who are in care homes, where there may be no other witness. Will you elaborate on what evidence you would look for? Would evidence of distress be enough to be corroborative evidence?

Assistant Chief Constable Graham: I am grateful for the opportunity to provide clarification. We have already discussed the fact that we are talking about the removal of the absolute requirement for corroboration, but there is an important point about public consciousness. It is impossible to explain the nuances and technical complexity of the area in a short time. Even in the length of time that the committee has to examine the matter, I would not be able to articulate it in any depth given the case law from different cases and the different adminicles of evidence. Where

the standard of corroboration would be met is a highly complex matter and it has developed to such an extent that it is difficult even for those who practise law and indeed High Court judges to interpret it consistently, as we have heard.

On the examples that you raised, I think that I have already said that one of our key concerns is that the law as it stands is potentially discriminatory against particular vulnerable groups. We examined a case that involved what we would call bogus or fraudulent workmen and an elderly victim. An elderly woman was approached at home by some people who were looking to do roofing work. They offered to do the work for £500. She thought that her roof needed some maintenance and she gave them the money from her purse. They went away for a short time and came back later to say that they needed £300 for materials. She gave them the money for that as well, and they said that they would go to a builder's yard to get some materials, but they never turned up at the house again.

That case was reported to the police with detailed descriptions of the men and the registration number of the van. The two males who were in the van were stopped a short time later and they were wearing similar clothes. In addition, the ladders on the roof of the van matched the description that had been given, and a quantity of business cards were found that were similar to a business card that had been given to the woman. In all the circumstances, there was a high quality of evidence, but it was deemed that the essential facts of the case did not pass the test of sufficiency for each of the essential facts to be corroborated. That case is a good example because, despite the overall quality of evidence, it is the type of case that might not hit the bar at the moment. That case did not. In future, there will be an increased prospect that such cases will hit the bar.

I need to be clear that that is not to say that we will be able to resolve all such cases through the justice system. The part that the police play in that is just one of many. I think that it is illustrative of the point that I am trying to get across, which is that there is a technical barrier that prevents the overall quality of the evidence from being assessed and which therefore does not allow such evidence to be presented to a court and a jury in the justice system that we quite rightly have in Scotland.

Chief Superintendent O'Connor: Corroboration is a highly technical and complex subject. Over the years, as a commander and a senior investigating officer, I have seen many cases being reported to the Crown in which we believed that there was corroboration. For one reason or another, many of those cases were not proceeded with. We clearly believed that that there was corroboration, but the Crown took a different view. For me, that highlights the complexity of the subject.

Sandra White: Mr Ross?

David Ross: I have nothing to add, other than to say that the police's role is to gather the evidence and to report it to the Crown Office and Procurator Fiscal Service. It is a matter for the Crown and the courts to determine whether that evidence is sufficient and whether they believe the evidence that has been presented.

Sandra White: Is it not a fact that the International Criminal Court does not ask for what, in technical terms, is known as corroborative evidence?

Assistant Chief Constable Graham: I am less qualified to comment in detail on international law or jurisprudence than many other witnesses who will appear before the committee.

As I said earlier, without trying to articulate international law, I understand that it has been reported fairly widely that the technical barrier of corroboration in Scotland, as it is now deemed, is seen as being potentially discriminatory in comparison with what happens in other legal systems internationally.

Sandra White: To clarify my point, I will quote the International Criminal Court's rules of procedure and evidence. They say:

"a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence."

Corroboration is not a legal requirement of the International Criminal Court. People might get fed up hearing this, but I say again that we need to remember that it is the abolition of the legal and technical requirements for corroboration that we are talking about.

Can I ask about the test for prosecution, or should I come back to that?

The Convener: I do not know whether that is relevant to this panel. Quite rightly, we are looking at the issue from the point of view of the police, and I do not know whether that question falls within that box. The witnesses can answer it if they would like to, but I do not know whether that is an area that they want to wander into.

Assistant Chief Constable Graham: Clearly, I would not wish to speak on behalf of COPFS or the Lord Advocate. However, we will be working with them to develop the proposals to ensure that the guidance that the Crown provides to the police remains appropriate. I think that the Lord Advocate has outlined some of the measures that would be

put in place to ensure that there was a clear understanding that—to echo what has already been said—in essence, there will be no change to the standard of police investigation. That is an extremely important point to make.

The Convener: I do not think that we challenge that.

Can I move on, Sandra?

Sandra White: Yes—thank you, convener.

The Convener: I do not want to shorten questions, but I am conscious of time and we have had a good bite at the issue and have resolved quite a lot—or perhaps not.

Elaine Murray (Dumfriesshire) (Lab): My first question is for ASPS and the Scottish Police Federation, which are organisations that represent police officers of particular ranks—I assume that is correct. I just wonder whether the change in position on corroboration has been discussed with your membership.

David Ross: Indeed it has been. We consult our members through our joint central committee on almost all decisions that we make. Ultimately, our position is determined by that committee, which is representative of the whole of the country. Every police officer in Scotland who is a member of the Scottish Police Federation has had the opportunity to comment on the matter, but they have not all chosen to do so, and the view is not the unanimous view of the Scottish Police Federation. Indeed, our previous position was not the unanimous position of the federation; it was our view on balance. Our view now is our view on balance, based on how the debate and our understanding have developed.

11:15

Elaine Murray: What do you think changed your membership's view on the matter?

David Ross: Probably a better understanding of what we are talking about. The initial fear when people talked about the blanket or wholesale abolition of corroboration was that corroboration in all its forms would no longer exist. I absolutely understand that that was not the intention, and those who sit at the helm of the Scottish Police Federation understood that, too, but it was not necessarily our members' understanding as the debate came out, broadly because a number of them had read Lord Carloway's report and that is not what it said. It seemed to indicate that corroboration in the criminal justice system would simply be completely eradicated.

Elaine Murray: Obviously, we are discussing the bill, not Lord Carloway's report. The bill says:

"If satisfied that a fact has been established by evidence in the proceedings, the judge or (as the case may be) the jury is entitled to find the fact proved by the evidence although the evidence is not corroborated."

The bill does not talk about different strands; it says that the fact can be

"proved ... although the evidence is not corroborated."

That has always been the position in the bill; it has not changed.

David Ross: Yes. The word "corroboration" is probably a misnomer, because we are talking about a sufficiency of evidence to prove beyond reasonable doubt that somebody committed an offence.

The Convener: We know that. We know about the burden of proof and the standard of proof, and we have always understood that. I think that that is what Elaine Murray is driving at.

Elaine Murray: I appreciate that the police are often frustrated by presenting a case to the procurator fiscal that is then not taken forward. Police officers have said to me over the years that it is an extremely frustrating experience for them to have done the investigation and then to find that the case is not taken forward.

I think that Mr Graham made a case around the 3,000 additional victims who would be able to have their cases taken to court.

The Convener: No—to the Crown.

Elaine Murray: Yes, to the Crown. The Crown would then decide whether to take the case to court.

The evidence from England is that the conviction rates for sexual offences and domestic abuse, for example, are no higher there than they are in Scotland. Therefore, are we not just talking about people's ability to go to court to be disbelieved rather than their being told that their case cannot be taken to court in the first place? Do the proposals mean greater justice for victims, or will people just get further down the process before their case is kicked out?

Assistant Chief Constable Graham: I would be happy to address that.

Eventual outcomes in the whole justice process and outcomes in court cases are very difficult for the police to predict and comment on, and a comparison with England and Wales is perhaps not a straight comparison, because there are a large number of differences in legal procedures and criminal law that might have an impact beyond the changes that are proposed in the bill. Indeed, my understanding is that the conviction rates for certain types of crime that I have covered are currently higher in England and Wales than in Scotland.

There have been many fairly significant changes in how some crimes are approached. You mentioned serious sexual crimes. Since Police Scotland was created, we have fairly dramatically changed our approach to investigating and working with victims and victim support agencies on serious sexual crime. We work very closely with the Crown Office and Procurator Fiscal Service to ensure that we all work together to take advantage of any opportunities where there is quality evidence. Therefore, if the law is changed, it will be very hard to determine what impact that will have alongside all the other changes that are currently going on.

I already mentioned the increase in reporting of serious sexual crime to the police, which is an extremely positive development that in part is down to the proactivity of the police in tackling domestic abuse and working with victims groups. Overlaying that, some of the measurement and assessment will make it very complex to unpick and understand what has had the impact on the eventual outcomes.

What is important is that we are doing everything that we can to demonstrate that support and outcomes for justice are extremely important for the victims of such serious crime. Elaine Murray said that the police are frustrated at times when a case is not taken forward. In such times, the organisation has a sense of frustration regarding the mission that we are here for: to keep people safe and to act in the interests of victims of crime who have come forward and expect that we will do everything that we can to meet their expectations.

Elaine Murray: Mr Ross referred to checks and balances. Of course, one is the prosecutorial test, which we have already discussed. The other two are the judge's ability to dismiss a case and the change in the jury majority, which we were told would not affect something like 96 per cent of summary cases and so will not be a check or a balance. Are those checks and balances sufficient?

David Ross: We are probably more persuaded of that element now than we were when we responded on the bill initially. The checks and balances across the whole case—not just by the Crown but by the court—are sufficient that whatever evidence is presented will still need to meet the burden of proof.

Elaine Murray: There was never any intention of changing the burden of proof, was there?

David Ross: I do not think that there was, but there was a widespread perception that there was.

Elaine Murray: Really?

The Convener: I am flabbergasted that anybody in the criminal justice system, from the police onwards and upwards to the High Court, ever thought that we were looking at touching the burden of proof or the standard of proof.

David Ross: That is not what I said. I am talking about corroboration. If we had talked about a sufficiency of evidence, rather than used the word "corroboration", and explained the intention in those terms, it would have been easier for everyone to understand.

Roderick Campbell: I have an anorak question for Malcolm Graham, I am afraid. We heard from the Crown Office about an exercise that looked at the number of cases that the police might refer to it. Its evidence was that

"the increase in the number of reports was about 1.5 per cent, which equates to another 3,720 cases being reported."—[*Official Report*, *Justice Committee*, 20 November 2013; c 3741.]

You may have been talking in global figures earlier, but do you agree with those Crown Office figures? Do you want to write to us to confirm the slight differences?

Assistant Chief Constable Graham: I could write to you with a greater level of detail. We have done two exercises and the Crown did a separate exercise that came out with broadly similar but slightly different figures. The Crown used different case samples and in at least one of the exercises there was a distinction between solemn procedure and summary procedure. I would be happy to write with the details of all the figures.

Broadly speaking, the overall figure was a 2 per cent increase in cases, and that is where the figure of 3,000 victims came from. I am happy to clarify that in writing.

Roderick Campbell: I am happy to leave the question there.

In his report, Lord Carloway did not recommend that any safeguards would be necessary if the requirement for corroboration was abolished, on the basis that in his view the principle safeguard is the requirement to prove a case beyond reasonable doubt. I am now confused as to what appropriate safeguards the SPF thinks have emerged in the system that they were not aware of before. Can you clarify what safeguards you believe will be necessary if the requirement for corroboration is removed?

David Ross: In truth, as I have already explained, I think that there was an issue of perception rather than reality in our understanding of what was initially meant in Lord Carloway's report regarding the removal of the requirement for corroboration.

As I have already articulated, it has always been our position that we gather and report as much evidence as is available and that it is for the court to determine whether there is a sufficiency of evidence to prove beyond a reasonable doubt whether somebody is guilty.

I do not think that our position has changed, but our understanding has changed in terms of what we are talking about here. If we are talking about corroboration being achieved across the whole of the evidence, I think—as I have said—that we are sufficiently persuaded that that will continue. We have talked about checks and balances, the whole of the evidence, special measures and so on. All those things taken together still mean corroboration for me.

I suppose that, in terms of perception, that was not our initial understanding. There was, rightly or wrongly, a perception among us that the evidence from one single source could provide sufficient proof to take a case to court and to convict somebody, and that was a step too far for us.

Roderick Campbell: In your written submission, you state that the

"link between corroboration and low conviction rates ... needs further detailed research".

I assume that you now do not want to carry out "further detailed research". Your submission went on to say that you believe that the

"majority verdict of juries would ... have to be reconsidered".

Is either of those points relevant to you now?

David Ross: I think that the research has already been done to some extent by Police Scotland. Whether the issue would benefit from more research, I genuinely cannot comment on. I am mostly content to accept the figures that Mr Graham has put forward, which I am sure are accurate.

I do not think that the majority verdict is a matter for us to form a view on; it is a matter for those in the legal profession.

Roderick Campbell: Finally—I am conscious of the time—we talked earlier a bit about penetration. Presumably you would accept that, if the only evidence in the absence of corroboration is the complainer's evidence that there has been penetration, the case might be sufficient to pass to the Crown Office but might present difficulties for it in deciding whether to proceed further.

Assistant Chief Constable Graham: If we are speaking about rape and serious sexual crime, the complexities of not only the essential facts that need to be proved for the different offences that now exist under more recent statutes but the circumstances in which corroboration would currently be considered would take some time to work through.

In relation to the specific point that you made, the easiest way in which to address that is to point out that the Lord Advocate has been very clear that he would not expect a case to be received with solely the testimony of one witness and no supporting evidence. In your example of a serious sexual crime, it is highly unlikely that that would be the case, but it is not impossible. I therefore reiterate what I have already said, which is that we will continue to do everything that we currently do to investigate thoroughly and professionally all such crimes and report matters to the Crown.

In relation to cases of serious crime, I think that the point was made at the start by Mr Finnie that it is more likely that we would report to the Crown where there is a higher level of doubt on our part that there might be a sufficiency. Quite understandably, such cases come under more scrutiny in terms of whether the evidential sufficiency test is met.

Alison McInnes (North East Scotland) (LD): What a very strange morning. We have been told repeatedly that we are removing corroboration but we are not removing corroboration. There is a lot of Newspeak going on here, which concerns me immensely. Let us be clear: the bill will remove the need for corroboration. There is no point in trying to fudge that, but I think that that is what has been going on this morning. I am really rather disturbed by that.

There has rightly been a great deal of focus on the victims, whom you have said might well have access to justice. However, Elaine Murray pointed out that access to justice might not be well served if the requirement produces more prosecutions but not more convictions. We have heard a lot of evidence in this committee that the removal of corroboration will mean the likelihood of many more miscarriages of justice. I would like the panel's view on whether we should pay no heed to that evidence.

11:30

Assistant Chief Constable Graham: I do not think that you should pay no heed to it. Everyone who comes before the committee presents a valid view for assessment and it is certainly not for me to say otherwise.

I am not sure of the basis of those views and, in monitoring some of the positions that people have held, I have not seen terribly much evidence to support the position that there would be more miscarriages of justice. I have represented our current position in comments that I have already made, and I note a previous caution about repetition.

The Convener: But have there not been some high-profile miscarriages of justice—the Birmingham six, for example?

Assistant Chief Constable Graham: What I was saying is that I am not clear that the people who have presented the position in Scotland—

The Convener: A member of the Scottish Criminal Cases Review Commission gave us that evidence.

Assistant Chief Constable Graham: I am genuinely not clear about the link between those cases and the question of whether there was corroboration, because I have not examined the matter. I just do not think that there is any credible evidence to suggest that there would be more miscarriages of justice in Scotland. What I was going to say—without repeating myself—is that I think it a travesty of justice that so many people are not being given access to what they would expect because of the technical barriers that remain in place.

Alison McInnes: So you are not concerned at all about protecting the rights of the accused.

Assistant Chief Constable Graham: I would be concerned if I thought that there would be an enhanced chance of miscarriages of justice as a result of these proposals, but I have no evidence—and I do not believe—that there is such an enhanced chance. As we have said, it is clear that the burden of proof, the test of sufficiency put before the court and all the other measures for carrying out a qualitative assessment of the inadmissibility and so on of evidence are in place.

Alison McInnes: But they will not be in place when this legislation goes through.

Assistant Chief Constable Graham: Well, I disagree with that.

The Convener: You made the interesting comment that people are not being given access to what they would expect. I appreciate the difficulties that the police face in meeting the expectations of, say, victims of rape, sexual abuse or domestic violence when they cannot take their cases to the Crown Office, but what do you think those people will expect if this legislation goes through and there is no requirement for mandatory corroboration?

Assistant Chief Constable Graham: I deliberately used a phrase that lacks clarity and definition because what victims expect is different in different cases.

It was suggested earlier that it would not be a better outcome if this change in the law merely resulted in more victims' cases being taken to court without any increase in convictions. However, that is not the case with all victims. Some might feel that it is far better for them to have the opportunity to take their case to court, even if the outcome is not a conviction, than for there not to be a court case at all. I cannot generalise about this because my long experience of dealing with victims of serious crime is that their expectations in coming forward and reporting it to the police are very broad and different.

The Convener: I wonder whether you can expand on that answer a bit more, because I think that we are getting to the nub of our concerns.

What are the expectations of victims in these cases? Do they expect the police to take the matter to the Crown, which might then decide that there is no sufficiency of evidence for it to be taken to court? We are concerned that such a situation would be very damaging to victims. Indeed, what happens if the Crown decides to send the matter to court, where the victim has a hellish time and might find out that they are not believed?

This is all part of the background to our concerns on the matter. Given your comment that everyone's expectations are different, is it enough for some people that the matter is reported to the Crown Office—end of story?

Assistant Chief Constable Graham: For some victims of serious crime, it is sufficient that it is reported to the police because their intention in coming forward—

The Convener: I appreciate that, but then it has to go from you to somewhere else. Do you sometimes decide not to take a case to the Crown Office because you consider that you do not have a sufficiency of evidence?

Assistant Chief Constable Graham: That will be the situation in some cases at the moment. Even if this law were to be passed, that would still be the situation in some cases in future. I have already addressed that point.

The point that I am trying to make is that the expectations of people who have been victims of serious crimes vary. It is not for me to generalise that all victims would have an expectation that the best outcome would be a successful prosecution. Clearly, that is the expectation of a large number of victims who come forward. From the assessments and exercises that we have done, I am very clear about what the proposals are and that they would be likely to increase the number of victims who would see a successful prosecution in their case.

Alison McInnes: I have one question for Mr Ross. I might have picked you up wrongly but, when you explained your shifting position, did you say that you met the Lord Advocate?

David Ross: No, I was talking about comments made by the Lord Advocate.

Alison McInnes: That is fine.

John Pentland: Mr Graham, on behalf of Police Scotland you have welcomed the proposal to abolish the requirement for corroboration. Unlike some, you have outlined the reasons why. However, this proposal comes at a time when Police Scotland will face significant financial pressures. Is there any connection? Has your support for the proposal perhaps been financially driven?

Assistant Chief Constable Graham: I agree that the proposal comes at a time when there are substantial financial pressures on Police Scotland and indeed the wider public finances. That has been well reported through the parliamentary committee structure. However, it is absolutely not the case that our support for the proposed changes to the law on corroboration is driven in any sense by financial pressures.

Indeed, members may be aware that the financial memorandum that accompanies the bill demonstrates that our assessment was that there would be a slight increase in costs associated with the changes that are proposed. That is because we anticipate that, as I have already said, we would have to report a slightly higher number of cases to the Crown. We would have to support for longer a slightly higher number of solemn cases, which would require a greater capacity in our information technology systems and greater resource.

The cost increase is not substantial, but I want to make it clear that, in our assessment, what is being proposed in the bill would cost us a little more money. There are no cost savings associated with the law change as it is being proposed.

The Convener: I have one final question. This is something that we have not touched on: investigative liberation and section 14, "Release on conditions", in which the person not officially accused—there is that expression again—is released before the 28-day period has expired.

Let me give you the opportunity to put your response on the record. That approach might be seen as helping the police when they do not have any corroboration: the police already have a "person not officially accused" but they are releasing them on conditions so that they can go and find the evidence that they perhaps should have had in the first place—I am not saying that that is your position—before the person was taken in as "not officially accused".

How do these things interact?

Assistant Chief Constable Graham: If I may challenge the phrase "perhaps should have had in the first place", it is a wild assumption—

The Convener: No, that is not my position. I am saying that that proposition might be put to you.

Assistant Chief Constable Graham: Okay. Is the question whether there is a link between the proposed change in corroboration and the investigative liberation proposals in the bill?

The Convener: Yes. That is the question.

Assistant Chief Constable Graham: I do not think that there is a link between the two proposals, because I think that the position that we have taken on corroboration relates to all the circumstances of all the cases that we deal with.

There is a continuum that covers many situations, from long-running investigations in which, for very good reasons, we are trying to gather evidence—we know that a crime has occurred; it might be a serious crime or a less serious crime, but it might be many weeks or months before we identify who is responsible or get what we feel is a sufficiency of evidence to report to the Crown; and such a case would not necessarily fit within the requirements of the investigative liberation sections of the bill—to a position in which we arrest somebody in the commission of a crime and there is sufficient evidence at that point.

We have taken our position on the proposed change for corroboration out of principle, and we have supported the proposals on investigative liberation out of practicality.

The Convener: Actually, the test is

"reasonable grounds for suspecting that the person has committed an offence".

Some might say that "reasonable grounds for suspecting" is quite a light test.

Assistant Chief Constable Graham: That is the current test for somebody being detained and has been since 1980.

The Convener: So there is no change.

Chief Superintendent O'Connor: Not in terms of investigative liberation. I take on board the point that has been made about finding evidence against the accused, but the investigation should draw in all evidence. Some of that evidence may clear the accused, so the investigation has to be very balanced. That is what the time needs to be used for.

The Convener: Thank you. You do not need to add to that, Mr Ross. I simply put the point to the panel as part of the test of the legislation.

I thank you for your evidence session, which, for reasons that I think I understand, has been far longer than anticipated.

11:41

Meeting suspended.

11:50

On resuming—

The Convener: Okay—we are back in the saddle.

I welcome to the meeting Shelagh McCall, commissioner at the Scottish Human Rights Commission; Tony Kelly, chair of Justice Scotland; Alan McCloskey, acting deputy chief constable of Victim Support Scotland—wait, acting deputy chief constable? That is what it says here. I did not write this script. What would you like to be?

Alan McCloskey (Victim Support Scotland): Acting deputy chief executive.

The Convener: Then that is what you shall be.

I also welcome Sandie Barton, helpline manager and national co-ordinator at Rape Crisis Scotland; and Lily Greenan, manager at Scottish Women's Aid.

I am sorry that you have all had such a wait, but you will appreciate that we really wanted to dig into the evidence from the previous panel. We will do the same with you.

I thank you all for your written submissions. Some of you have been here before and some have not. If you wish to make a comment or answer a question, indicate that desire to me and I will call you. Your microphone will come on automatically, as mine has done—it happens even when I have been saying indiscreet things, so I have to watch what I say.

Alison McInnes: I draw members' attention to my entry in the register of members' interests, which notes that I am a member of the council of Justice Scotland.

The Convener: Do you want to ask a question? You could get in first, if you wanted to.

Alison McInnes: All right, I will do that.

We are focusing entirely on corroboration at the moment. We have heard a lot this morning about access to justice and whether access to justice is increased if removing the requirement for corroboration results in more prosecutions, even if it does not necessarily lead to more convictions. I would be interested to hear panel members' views on that.

Tony Kelly (Justice Scotland): Access to justice would be facilitated by the removal of corroboration. The problem is that that is a skewed view of things, and there are much greater things at work than increasing access to justice for victims and complainers. The problem is that, as Lord Carloway correctly identified, corroboration is at the foundation of every aspect of the criminal justice system, so the removal of the requirement for corroboration would operate at the stage of the reporting of crime to the police, the stage of the police reporting to the procurator fiscal's office and the stage of the matter being taken to court, which is where the issue of access to justice is being invoked. Corroboration also acts during the course of the trial at present, and that safeguard would be removed. Most importantly, the power of the judge to rule on the question of the evidence that is being led would be wholly removed if the provisions were brought into force.

Sandie Barton (Rape Crisis Scotland): The issue of access to justice is important, although it has been spoken about in an almost derogatory way. The provisions are about improving the situation in relation to cases such as those involving domestic violence or sexual abuse, where there are real difficulties in gathering corroborative evidence. In the discussion with the previous panel, the confusion around corroboration was highlighted. It is not corroboration that is being removed but the quite high bar that requires every element of the case to have corroborative evidence.

There is no suggestion that the police will not look for supporting evidence to back up a report. That is a crucial point. The measure is about improving access to justice, whether that relates to reporting to the police or the number of cases that proceed to prosecution. The Lord Advocate gave compelling examples of cases in which there was a high level of supporting evidence. Most people would look at those cases and think that the supporting evidence corroborated the report that was given. The measure is about giving such cases access to court in a way that does not happen at present.

Alison McInnes: To clarify, I do not think that anyone has spoken in derogatory terms about access to justice or about the issues that you refer to, but it has been suggested in earlier evidence sessions that people somehow have a right to have their day in court, as if that in itself was important. I am interested in the other panel members' views on that.

Alan McCloskey: From our perspective, access to justice is a wide-ranging term, but it starts with the victim being believed in the first instance that something has happened. They need access to information and support and they need justice to be done. In the simplest terms, they want justice to be done. They want the police and the Crown to help them to get access to justice. Yes, there are absolute rights for the accused, but victims and witnesses also have rights. That forms part of it. I take it to be a very simple concept.

The Convener: Does anybody else wish to comment on that?

Shelagh McCall (Scottish Human Rights Commission): I will zoom out slightly and say that, from the perspective of human rights, the Parliament has to ensure that the bill does two things: first, that it provides a right to effective investigation and prosecution where appropriate for victims of serious crime, which undoubtedly includes rape and domestic violence; and, secondly, that it ensures that, when an accused is brought into the investigation and prosecution system, he or she receives a fair trial.

Mr Kelly is right that the effect of corroboration plays differently in those two respects. I agree with him that, if we remove the legal requirement for corroboration, more cases will potentially get to court, although I pause to sound a note of caution about just how many more. I listened to the evidence from the Lord Advocate and the head of policy at the Crown Office. As I understood Miss Dalrymple's evidence—members will have a better recollection of it than I do—she said that a review of 2,803 domestic incidents that were reported to the police found, I think, that 1,000 would have proceeded to court under the bill. The point is not that there will be an open door and everything will get through, because the prosecutorial test will have an impact. However, there will no doubt be an increased opportunity to get to court.

Once a case is in court, access to justice for an accused person includes there being the proper means by which to challenge the quality of evidence against him. At present, corroboration serves that function as a means of quality control. If we abolish it without reassessing the system and seeing what other safeguards might be needed, there will be nothing, apart from the ability to cross-examine, to provide the proper means to challenge the reliability of evidence. The European Court of Human Rights recognises some areas of evidence as inherently problematic, such as dock identification and hearsay evidence. We have to keep both perspectives in mind when we talk about access to justice.

Lily Greenan (Scottish Women's Aid): I would like to add something about evidence. We should be clear that, with crimes of violence against women, whether it is sexual violence or domestic abuse—with respect to Shelagh McCall, I point out that domestic abuse is on the whole dealt with not as a serious crime but at summary level, although corroboration is still required to get it there—the evidence is not usually the driving force for whether there is a conviction; instead, the driving force is attitudes, assumptions and prejudice. The notion that removing the requirement for corroboration will in any way change that situation is false.

12:00

I represent the interests of a particular group of victims in the criminal justice system, although they are a substantial number—30 per cent of the cases that go through Glasgow sheriff court involve domestic abuse, so the workload is not insignificant. In relation to that group of victims, removing the requirement for corroboration will provide the opportunity for the kinds of discussions that happen in backrooms at the moment to be heard in the court.

That is an important part of the process of moving towards justice. We will not get there by removing the requirement for corroboration, but we will open up the discussions about the evidence that really exists about violence against women by having them in the courtroom rather than before anything gets near a sheriff—it is mostly sheriffs in our case.

It is important that the committee takes account of the fact that evidence is sometimes secondary to attitudes and prejudice in decision making, whether that is at shrieval level or in solemn proceedings.

The Convener: I am interested in comments from others on the panel.

Tony Kelly: It is an interesting recognition that the proposed abolition will not be a panacea that cures all the criminal justice system's ills—perceived or otherwise. I completely agree that the conviction rate for incidents of violence against women is scandalous, but the focus of abolition seems to be on getting cases into court. No one concludes that getting all such cases into court will deal with the appalling conviction rate. I completely agree that at the root of that appalling rate are prejudices and attitudes. Further consideration and work will be needed before we get anywhere near addressing that.

Sandie Barton: I know that a lot of the debate has focused on whether removing the requirement for corroboration will make the difference. I agree that it will not do so of itself, but a number of other important measures are being considered as part of this bill and the Victims and Witnesses (Scotland) Bill.

For example, we are talking only now about automatic rights to special measures. Having a screen can make the difference in whether somebody feels able to give evidence. Not having female forensic examiners can be a massive barrier for some.

Of itself, removing the corroboration requirement will not make the difference, and none of us believes that it will. However, as an important step forward, alongside other important measures, it could make the difference.

The numbers might be small, but the cases are significant to the people involved. The impact on public safety also matters. When there is a large amount of good-quality evidence that indicates that someone is guilty of an offence but the case is not taken forward, that has a massive implication for the victim and for the safety of the public in Scotland.

Alan McCloskey: I echo those comments. This goes wider than corroboration and involves the whole system. If victims, witnesses and the public have more confidence in the system, they will be more likely to come forward to say, "This happened to me. Can somebody do something about it, please?" That is entirely reasonable.

Removing the requirement for corroboration contributes to that. If that allows more cases to be considered and potentially taken forward on the basis of a reasonable prospect of conviction—beyond that, the beyond reasonable doubt test will still apply—that will allow confidence in the system. Removing the corroboration rule forms an important part of that.

The Convener: I put to you the proposition that removing the requirement might have the opposite effect. We hear about the need for a change in attitudes and so on. The Crown might feel that it must take more cases forward and might lower its test of a reasonable prospect of success because corroboration is no longer a necessity in court, but the result might be that victims have a harder time in court because their credibility is challenged more. Do you have any concerns that the proposal might backfire?

We have spoken in private to people who have been through the court process in cases in which the accused has been acquitted, and they feel that they have been let down. Years later, that pain is still there. Do you have concerns that this might not work out how you think it will?

Alan McCloskey: As I said, it goes wider than corroboration. It about the whole system, the Victims and Witnesses (Scotland) Bill and the journey that victims and witnesses go through, and it is their experience—

The Convener: I want you to focus on the Criminal Justice (Scotland) Bill and the essential requirement for corroboration at court level. We have looked at the Victims and Witnesses (Scotland) Bill and have a good idea of what that is about—indeed, it has many good proposals in it.

Are you concerned that the proposal might not work out how you think that it will? It might have a deterrent effect, because people might think, "I went through that all for nothing and to be not believed at the end of the day."

Alan McCloskey: That is a potential outcome, but our view is that the removal of corroboration is positive.

Tony Kelly: I bow to the greater expertise of the witnesses from Scottish Women's Aid and Rape Crisis Scotland, but it is crucial that, as Mr McCloskey said, witnesses must appreciate that they will be believed. That is, first off, what causes them to decide whether to report the matter. If, after going through the whole process, the verdict is one of acquittal and the witness has not been believed, the trauma is added to. That is my experience and that of the other people whom I have spoken to. Is that end in itself—that airing of the case and that access to justice—worth in and of itself the abolition of corroboration, regardless of the outcomes? No one seems to be focused on what those outcomes will be, or perhaps they are disregarded because we do not have to concern ourselves with them. However, they may well be crucial for the victims of crime.

Sandie Barton: On the convener's point about the Crown Office feeling that it should put cases forward, the Lord Advocate was clear in outlining that there would be a determination about whether it is in the public interest to put a case forward and whether the quality of evidence is there, so I do not think that the Crown will feel under pressure to make a decision based purely on the victim's needs if the supporting evidence to back up the decision is not there.

Court can be a very harrowing experience for people, regardless of whether there is corroborative evidence. I have worked with many women in cases in which there is an overwhelming amount of evidence, but the evidence is not the defining factor in how those cases play out in court. My point is a bit like Victim Support Scotland's point—it is about changing the culture.

We are doing a bit of research with people who have gone through court. On judicial protection, some people say that there was clear monitoring of the questioning, and that the point and relevancy of the questioning were looked at. As I say, court is often a very traumatic experience, but are we saying that we cannot put victims forward because they might have a hard time and that we are doing that ultimately to protect them? The Lord Advocate highlighted that not many people would be thankful to be told not to go to court because it might not be a good place for them to be. That is not the answer.

The Convener: Victims always have a hard time, but they will have a harder time.

Sandie Barton: Victims have a very hard time at the moment, and dealing with that is about changing the culture of the courtroom. We have talked about judicial training with Mr MacAskill.

There is something in there about how victims are treated in a courtroom, but I do not know that removing the requirement for corroboration will impact on that in any way.

Lily Greenan: I echo what Sandie Barton has said: court cannot be any harder for victims in rape or sexual violence cases, who get grilled and ripped to shreds in court. That is perhaps less the case with domestic abuse cases because many of them go to summary court, where an awful lot of the technicalities of the case happen much faster, so there is not the playing-to-the-jury element.

I do not think that court is a pleasant experience for victims. Certainly, for victims of interpersonal crimes such as domestic abuse, rape and sexual assault, I do not see how it could be worse or how we could get a worse conviction—or failure—rate. I therefore do not accept those arguments as a reason not to consider abolishing the requirement for corroboration.

The police and the Crown Office will still look for the best evidence that they can find and we will get away from some of the more technical drudges that go on in the system, which prevent cases from going to court simply because there is no piece of DNA that says that a certain man was in a certain place at a certain time, although there is plenty of other evidence to link him to the crime. In recent times, we have been accused online of using anecdotal evidence. We have done that, but if 40 years of anecdotal evidence is not good enough for the committee and the Parliament, I do not know what is.

Anecdotally, we know of a woman who was beaten so badly by her husband—

The Convener: I am sorry to stop you, but I do not know what that is about. I am not online, you see.

Lily Greenan: No—that is fine.

We deal with the issue outwith the committee, and it has been interesting to read the suggestions that the arguments made by Scottish Women's Aid and Rape Crisis Scotland, in particular, are irrelevant. If a woman who has been so badly beaten that her neighbours fear for her life and who runs into the street with her clothes hanging off her is unable to get into court because there is no corroboration that it was her husband who did it this time, there is something wrong with our system. That is the kind of situation that we want to address. Although that evidence is anecdotal, it is fact—that is what happened: the case could not go to court because there was insufficient corroboration in relation to his presence in the house at the time of the assault.

Yes, it is an emotive subject. Yes, it is about anecdotes and stories, but these are real people. I have some strong views on the need to remove the requirement for corroboration.

The Convener: Lord Gill mentioned the idea of a review of evidence in Scotland, looking at all the facts and circumstances that might have applied if we had had a different evidential base. For some committee members, the issue is that we perhaps need to look at the broader evidential base in court rather than narrow it down. That might have applied in that case, given that there was a history of such incidents. Would you like to comment on Lord Gill's proposal that we look at the broader aspects?

Lily Greenan: We could and should do that whether or not the requirement for corroboration is removed. Investigators and prosecutors should always consider the full range of evidence that is available. I am concerned that, because we have a corroboration rule, there is not a tendency but a temptation to say, "We've ticked the two boxes—we can put that one forward." That is not a criticism of how the fiscal service operates as a rule; it is just a recognition that, when people are pressured, they do the minimum that they need to do to move on to the next thing on their list. There are some concerns about how the system is working currently.

Alison McInnes: I would like to go back to Ms McCall's point about the right of the accused to a fair trial. Justice Scotland and the SHRC have concerns about the removal of corroboration. We have also heard compelling stories from Police Scotland and Ms Greenan about people who are unable to access justice at the moment. In the interests of understanding both of the tests that need to be done, it would be useful if you were able to elaborate on your concerns about the miscarriages of justice that might occur if the need for corroboration were removed. Can you talk about the issue of less credible witnesses and accused people to help us to understand your concerns?

Shelagh McCall: I make it clear that the commission is not opposed to the abolition of corroboration as a matter of principle—it is not a requirement for a fair trial under the European convention on human rights. However, we are opposed to its abolition in the terms of the bill without proper consideration having been given to the unforeseen and unintended consequences of that or to how that will play out against what the Lord President described as centuries of legal development and a finely calibrated system. Undoubtedly, persuasive arguments are made—and rightly so—about more cases getting to court in which guilt is particularly difficult to prove. We have absolutely no difficulty with that; the issue is whether we are properly exploring what happens

when we are in court, which brings me to your question.

12:15

First of all, let me pose a scenario. I listened carefully to the Lord Advocate's comment that, with regard to the prosecutorial test, a case would not be brought to court without supporting evidence. I welcome that. As I understood the Lord Advocate, if a case comes to the Crown Office without supporting evidence, he or his representatives will need to have a difficult conversation with complainers and tell them, "We will not take your case to court because there is no support." The difficulty arises when the case gets taken to court with supporting evidence that the Crown Office had and, during the trial, that evidence does not materialise from the witness box. It happens all the time—witnesses do not speak up, there is some flaw in the process or the evidence has been undermined in some way—but if, for whatever reason, the supporting evidence does not pass muster, the judge will have absolutely no power to do what the prosecutor would have done had he known the situation before the case came to court. We suggest that that problem could be addressed by giving the judge a no-reasonable-jury power to allow him to say, "The evidence in this case is of such poor quality that it cannot bear the weight of a fair conviction."

As for the other part of your question, which was about the types of evidence that cause us difficulty, the court in Strasbourg has made it very clear that certain types of evidence are inherently unreliable and, when cases with such evidence come to Strasbourg, the first thing that the court does is look for corroboration as a matter of fact, not as a legal requirement. Those types of evidence include hearsay evidence; indeed, in a case in which the Lord President, Lord Gill, issued the opinion, he said that the protections in England with regard to the quality of hearsay evidence admitted to a trial are not present in Scottish legislation and common law and that it would be "prudent" to introduce them.

Another example is dock identification. In evidence to the committee, Lord Carloway said that there were, of course, other safeguards in place in that respect. However, when the Judicial Committee of the Privy Council told us that dock identification was convention compliant, it said that the other safeguard was corroboration, which is what is being taken away. This is why such evidence is not allowed in England. Strasbourg is also concerned about evidence from anonymous witnesses and undercover witnesses, because it is very difficult for the defence to challenge its quality and ensure its integrity.

As we have listed all those types of evidence in our written submission, I need not rehearse them all with you. Although they are far removed from the types of evidence in the domestic abuse, sexual violence and other such cases that the other panellists deal with day and daily, they are nevertheless an example of the breadth of the implications of abolishing corroboration across the system. The committee's focus has for much of the time been understandably directed at such very difficult cases, but the fact is that this proposal will cover everything, which is why we are concerned that time be taken to examine the matter properly.

I agree with the Lord President that such work need not take a long time. This is not a case of kicking the matter into touch. The work could be done relatively quickly and in a participative way to allow everyone with expertise to input into the considerations and to ensure that a proper view is taken on whether this is the right way to do this or whether there is, in fact, a better way.

Sandra White: Can I ask a question, convener?

The Convener: I have got a lot of people waiting to ask about the same stuff, Sandra.

Sandra White: But it was on that particular issue.

The Convener: You will have to forgive me, but I think that others will follow up that particular issue.

Roderick Campbell: I refer to my entry in the register of interests as a member of the Faculty of Advocates.

On the no-reasonable-jury test that Ms McCall mentioned, we heard evidence last week from the Faculty of Advocates that Lord Carloway had made two points in opposition to it, the first of which was that it might slow the process. The faculty's evidence was that we have a similar situation now in relation to no-case-to-answer submissions, where an appeal court can be convened quite quickly if it is thought that the decision that an individual judge made was wrong. The faculty therefore did not accept the point about delay. In the Government's second consultation, Victim Support Scotland and Scottish Women's Aid, I think, were against the proposal. Could you expand, or would the panel generally like to comment, on what has been said on the no-reasonable-jury point?

The Convener: Who wants to comment first?

Roderick Campbell: In the policy memorandum, the Scottish Government indicated that one of the reasons that it had not proceeded with the safeguard was opposition from victims groups, so I am giving you the opportunity to expand on that point.

Lily Greenan: Sorry, can you clarify which safeguard you are talking about? I missed it.

Roderick Campbell: It is the safeguard of a judge having the opportunity to withdraw a case from the jury when he thinks that no reasonable jury could convict on the nature of the evidence as it is being presented. It was one of the three safeguards in the second consultation.

Lily Greenan: I am on record as suggesting to the committee previously that shrieval education and judicial education should be quite high up the list of things that we need to do in terms of safeguards for victims. There is a concern from our perspective that decisions are sometimes made based on attitude, assumption and prejudice not just by juries but by judges and sheriffs. That would be our concern about giving that discretion to judges.

Roderick Campbell: Do you have any comments, Mr McCloskey? You were opposed to the safeguard in your written submission to the second consultation.

Alan McCloskey: That would remain our position on that.

Roderick Campbell: You have nothing else to say on it?

Alan McCloskey: That would remain our position.

Roderick Campbell: Mr Kelly, do you wish to comment?

The Convener: You are doing a Margaret Mitchell now, Roderick.

Roderick Campbell: Sorry.

The Convener: I really do not mind. I can go to sleep and pass the list over. It is okay. Mr Kelly?

Tony Kelly: Without that safeguard in place, as Ms McCall correctly points out, once the case gets to court, there is no judicial input whatsoever to determine the questions of sufficiency, quantity or quality. The matter will then go to the jury. The only safeguard—if it is one—will be that the prosecutor can decide to pull the case. If the factual scenario that Ms McCall described played out, perhaps the evidence appeared satisfactory initially but the case would not have been proceeded with if we had known what was going to happen in the trial. Absent that decision to pull the case, the matter will proceed to the jury without the safeguard in place of the judge being able to determine that no reasonable jury would return a conviction.

The Convener: I take it that now the defence cannot say that there is no case to answer? Can you explain what the defence can do in those circumstances?

Tony Kelly: I am talking about post-abolition.

The Convener: Yes, so am I.

Tony Kelly: There would be no question of there being no case to answer, because the question of sufficiency would fly off. There is no way that we can judge sufficiency in the absence of corroboration because that was the only test for sufficiency.

The Convener: For the record, can you explain what can happen?

Tony Kelly: At the end of the Crown case, the defence can make a no-case-to-answer submission saying that the Crown case, at its highest, does not meet the minimum test of sufficiency of corroborated evidence and that therefore the case cannot proceed to the jury. If you abolish corroboration, no case to answer must fly off. If you do not put in a further safeguard about no reasonable jury, the judge has no power whatsoever after the trial starts—post-abolition—to rule on the question of sufficiency or the matter going to the jury.

The Convener: Ms Greenan, I hear what you are saying about judicial training and shrieval training. Can that not be done in a way that is detached from the bill? Should that not be happening anyway?

Lily Greenan: It is on-going—it is a work in progress. As with everyone else in the system, the awareness of judges and sheriffs changes over time. It is a long game. This is not something that will be fixed in a year or two years or five years. A generational culture shift is required in order to address the particular issues of violence against women differently in the justice system.

I want to pick up on what Tony Kelly said about "no reasonable jury". That makes the assumption that juries are reasonable. I do not intend to be contentious about this—

The Convener: But you are going to be, anyway.

Lily Greenan: I am going to be contentious. I have only one experience of being on a jury. It was a long time ago.

The Convener: I must caution you. You cannot discuss having been on the jury or what took place.

Lily Greenan: I will not discuss what took place. Am I allowed to say something very general about—

The Convener: I would caution you against doing that.

Lily Greenan: That is fine. From my experience of the past 35 years of working in the field of

violence against women, I can say that juries have sometimes made decisions that beggar belief. Without adequate research on how juries function—as I understand it, we still do not have legislation in place that would allow that to happen, although I have heard from Sandie Barton that there has been some research in England and Wales—we do not actually know what a reasonable jury is. It is a jury of our peers, which in practice appears to mean a particular demographic of people who are available during the day.

The Convener: In fairness, people have to leave their work to do jury duty. It is not just for people who are available during the day. I do not think that you are allowed to get off jury duty that lightly.

Lily Greenan: That comment is based on the research that was done around the establishment of the domestic abuse court, when there was a bit of side research on the make-up of juries. It was not about how juries function, but just about the make-up, so I will take that out. However, it raises a question about what a reasonable jury is and how that is assessed in law.

The Convener: Tony Kelly looks as if he is at the starting gate.

Tony Kelly: I am just about to start, if that is allowed. I am using a shorthand when I say "no reasonable jury". The full safeguard would allow the judge to arrive at a decision in law that no reasonable jury properly directed would return a verdict of conviction. Of course, the response to that point in all the submissions that I have come across is to ask whether it is being suggested that a particular jury was unreasonable, and that takes us into a another discussion about that.

The Convener: That is not what we are talking about.

Tony Kelly: What I am talking about is judicial input, and the test is that no reasonable jury would return such a verdict. I am not questioning whether juries are reasonable, or asserting that they always are. I am talking about a judicial input that represents a minimum safeguard post-abolition.

Roderick Campbell: I would like to raise a couple of other points. First, something that we have not touched on this morning is the question of jury size. Mr Kelly, in your written submission to the second consultation, Justice Scotland posed the question of what proof beyond reasonable doubt means in terms of the size of a majority jury verdict. What is the panel's view on the proposals in the bill?

Tony Kelly: Justice Scotland's view was that there was nothing particularly sophisticated or scientific about plucking a magic figure out—pushing the majority figure up and then tweaking it in the event of jury members falling out. That did not attach a magical significance that would ensure proof beyond reasonable doubt. In the absence of any research or further work, we thought that that was quite a blunt way to deal with the removal of corroboration. I agree with Lord Gill that, as soon as we recognise that there must be a tweaking of the majority verdict, we recognise that what we are doing post-abolition is completely changing the field.

Sandie Barton: In his review, Lord Carloway did not think that there needed to be a change in the majority. In some ways, it feels as if it is being suggested in response to popular opposition to the removal of corroboration. We were opposed to an increase in majority partly, as Lily Greenan said, because of what we know about prejudicial views, particularly in cases of sexual violence.

I know that there are limitations on the research that can be conducted with juries, but there has been research conducted in England using real transcripts of court cases, to look at how decisions are arrived at, and much of it is not really down to legal fact and argument but based on myths such as, "If it were me, I would have fought to the death," and, "If it were me, I would have told straight away." All those great myths are played out in jury decision making. Research that the Scottish Government commissioned highlighted the fact that a quarter of people still believe that a woman is partly responsible if she has been drinking or if she has been wearing revealing clothing, so we have concerns about what increasing the size of the majority would mean for the likelihood of reaching agreement, and also given what we know about the use of the not proven verdict, particularly for sexual crimes, where its use is disproportionately higher than for other crimes.

12:30

The Convener: Surely, according to what you say, if the requirement for corroboration is abolished, that will make things worse. Given that you say that juries are often perverse, they will have nothing other than credibility to go on, which will make an acquittal or a not proven verdict more likely.

Sandie Barton: There is corroboration and there is the jury majority, which the bill proposes should be increased.

The Convener: I am talking about the way that juries think. If there is corroboration of a sexual offence such as a rape, the jury must at least deal with that, but if there is no corroboration, what concerns me about what you say is that the jury would be even less likely to convict.

Sandie Barton: I suppose that that is what has concerned me about much of the discussion on the issue. There seems to be a view that either the corroboration requirement is totally met or there is no supporting evidence at all. In the vast majority of cases, there is supporting evidence. In the examples that the Lord Advocate gave, it is clear that there was a lot of supporting evidence but there was no corroboration in a particular element of the case. Of course that will be the case if there was only one witness. There has been much mention of that issue. Some of the underlying discussion has been about false allegations and the misconception that women make up stories. I think that that has underpinned some of the debate, but in the vast majority of cases that we, the Crown Office and the police are talking about, there is a significant amount of evidence, but they are still not getting to court.

The Convener: I do not think that we have heard a great deal about false allegations. The issue has been dealt with, but I do not think that it has dominated the discussions on corroboration. I am looking at other members of the committee. The point has been raised, as it ought to have been, but it has certainly not dominated the discussions.

Sandie Barton: It has not necessarily dominated the committee's considerations; I am talking about some of the media reporting.

The Convener: We do not care about the media. The committee has integrity. We just look at the evidence as it is presented to us.

Roderick Campbell: We have dealt with two of the proposed safeguards in the Government's consultation. Does the panel have a view on whether other statutory changes should be made, such as the insertion of a provision equivalent to section 78 of the Police and Criminal Evidence Act 1984? The bill does not include any additional safeguards in relation to summary cases in the event that corroboration is removed. Would the panel like to comment on that, too?

Tony Kelly: My view is that all those potential safeguards indicate that this is such a big topic that, rather than make amendments that tinker with how the criminal justice system as a whole operates, we need to study in greater detail the effect of those safeguards. There is some controversy about the effect of the abolition of corroboration and the effect, post-abolition, of the proposed safeguards—a provision equivalent to section 78 of the 1984 act, the no-reasonable-jury test and majority verdicts.

In the Government consultation paper, there was only very brief discussion about two of those safeguards. As I said in relation to majority verdicts, no sophisticated analysis was done of their effect. As a whole, those potential safeguards suggest to me that the matter is worthy of further investigation and further analysis.

Shelagh McCall: As Mr Campbell knows, we said in our written submission that the introduction of something like section 78 of PACE—which, put short, is a power for a judge to exclude a piece of evidence if allowing it would compromise the fairness of the trial beyond the point at which that would be tolerable—would be a good idea.

Lord Carloway suggested that Scottish judges already have a power whereby, if the trial is going to be unfair, they can exclude evidence. I do not necessarily agree with that. I think that the Scottish power is much narrower. In support of that view, I point to the fact that the commission can find only two reported cases in which the court considered that power and exercised it, and they were both appeal cases that involved Lord Gill. That is one thing that could be done.

I hark back to where the whole process began—Cadder and the emergency legislation. The committee will know that the Scottish Human Rights Commission is on record as criticising the Government for legislating in haste and potentially repenting at leisure. We are potentially about to do the same again with regard to the abolition of the need for corroboration, because while there is no objection in principle to it, no one has yet done a proper analysis of how it will impact on the rest of the system and how that might impact on fair trial rights.

We can sit here and give you examples of alternative safeguards from other systems, but I cannot possibly suggest that they are the answers to all the problems—one needs to do the proper scrutiny. More important, the question of a fair trial is a legal matter and a question of law, so we need to give a judge the tools to fulfil his duty to meet the requirements of the law. Without going through the exercise of asking what tools a judge will need if we take away the corroboration tool, we might increase the risk in real terms of unfair trials.

Christian Allard: We have talked a lot about the removal of corroboration, but I would like to have your thoughts on a particular point. The debate in the media so far has been about the removal of corroboration as opposed to the requirement for corroboration. Do you think that, given the evidence that we have received from the police this morning, very few cases would come forward without corroboration and that cases would have corroborated evidence? Do you think that it would be an incentive for cases to go forward—I am not talking about the isolated cases that we have discussed but solemn cases and so on—without corroboration just because the requirement for that will have been taken away? Can you quantify that?

Shelagh McCall: I cannot quantify that. I did not hear all the police evidence this morning. I came in at the end, but I think that I got the gist of what they were saying. Let me put it this way: as I said at the beginning, there seems to me to be no doubt that removing the technical requirement for corroboration will increase the number of cases that the police can report to the Crown and that the Crown can take to the court. There is no doubt about that and I do not think that anyone would suggest that there is any doubt about it.

In terms of whether ultimately cases will come forward from the police to the Crown without supporting evidence, I do not know. That is a matter for whatever the directions of the chief constable are at the time. Whether the Crown, through the Lord Advocate—not the present incumbent of that office, but a future one—would change the guidelines, I do not know. What is meant by the term "supporting evidence", I do not know. What level that will reach, I do not know. Until we test all that, we do not know exactly what it will look like.

One might say that in a rape case, for example, we will have all the supporting evidence that we would normally expect now and that the only thing that we will not have to do is corroborate penetration, which I accept is a very difficult thing post Cadder. That might be so and might be fine, and we might always be in that position. However, when we are at the other end of the criminal justice system and we have a 16-year-old boy who is charged with breaking into a car, will the police investigate as thoroughly? I do not know the answer to that; it is a question for the police to answer.

I therefore do not think that any of that is quantifiable. However, with respect, I do not think that the issue is about what gets to court; I think that the issue is about what happens once an individual is in court. Those of us who work in court know that, day and daily, the supporting evidence does not always come up to snuff and that the judge has no power to do anything about it—that is the point that we are making.

Christian Allard: So you think that the quality of corroborative evidence is not always up to scratch.

Shelagh McCall: I think that every prosecutor, defence lawyer or judge will tell you that day and daily in courts witnesses' evidence is not what it is expected to be on paper. If that happens and the remaining evidence in the case that we are left with, whatever it might be, is of poor quality, we are not giving our judges the power in the course of the trial to do anything about that to ensure a fair trial—that is the problem. Currently, they have some power through the corroboration requirement.

Christian Allard: Do other panel members have a comment?

Sandie Barton: In terms of the quality of—

The Convener: It is a Margaret Mitchell moment. I do not mind. We are adopting it now. I am just laughing because I usually get to call witnesses, but the members are all doing it themselves now. That is all right; I am devolving power to them. Right. Ms Barton.

Sandie Barton: I was just going to say, with regard to the collection of evidence beforehand and the decision about whether there is sufficient evidence to get to court, that however that is played out and whatever materialises—something may be anticipated that does not happen—if the decision is that no reasonable jury could convict, but the case is already being heard in front of a jury, perhaps it should be left to the jury. If the case has passed the bar in getting into the court, it will be in the court process, and it is up to the jury to make a decision. The bar is beyond reasonable doubt, which is a fairly high bar to meet.

The Convener: I am being asked whether some photographs can be taken for press reasons. I will certainly not agree to that, unless you agree. I will allow that only if you are not unhappy about it.

Lily Greenan: That is fine.

The Convener: Is Roderick Campbell unhappy about that? Do you want to comb your hair first?

Roderick Campbell: I presume that they will not be photographs of the committee.

The Convener: I do not know who they will be of, but I am asking the witnesses the question. They are quite content, so the photographer may proceed.

Shelagh McCall: I would like to follow up on the particular point that was being discussed.

The artificiality is that the appeal court overturns verdicts of juries on the basis that no reasonable jury that was properly directed could have come to a conviction. We are saying that, rather than go through the entire appellate process to the same outcome, that power could be given to the judge the first time round. If the Crown wants to appeal, that can be facilitated; it is facilitated now with no-case-to-answer submissions. If the defence wants to appeal, it can appeal at the end of all the proceedings in the usual way. I appreciate that there are often verdicts by juries that surprise everyone, but we are talking about a legal test that already exists and putting it into a forum in which it can be utilised at the right time.

The Convener: I think that we have tested that. If the committee will forgive me, we will move on. I think that we have got the gist of the test that will not be there.

We would like to finish by 2 o'clock. That will concentrate minds.

Roderick Campbell: Sorry, but I will be in the chamber this afternoon.

The Convener: I know you will. That is why I am moving along.

Elaine Murray: We have heard about some of the problems that corroboration creates for one-on-one types of crime in particular, such as rape and domestic violence, but the removal of the requirement for corroboration will affect the entire criminal justice system. Is another option the possibility of reforming what is considered to be corroborative evidence? Corroboration has changed over the years anyway. Things such as the Moorov doctrine have come in, so what is considered to be corroboration has changed. Is a possible alternative looking at further reform to corroboration to deal with some one-on-one crimes, such as domestic abuse or sexual violence crimes, to allow, for example, the victim's distress to be considered as corroborative evidence in those crimes without having to change the system for everything, including shoplifting? Somebody could accuse me of shoplifting, and I may have lost the receipt. If there is no further evidence, I could be taken to court.

The Convener: Is that a confession?

Elaine Murray: No.

The Convener: I was just checking.

Elaine Murray: The removal of corroboration will affect a whole range of other crimes. Is it possible to reform corroboration so that victims of domestic abuse or sexual violence have greater access to justice without the whole of the rest of the justice system being affected?

Lily Greenan: Can I clarify something? Are you suggesting that an alternative would be to remove the requirement only for crimes such as sexual violence?

Elaine Murray: No. I am suggesting that the definition of corroboration could be reformed. The alternative has been suggested to us that it could be removed for certain crimes but not for the entire system.

Lily Greenan: We have argued that we should not look at removing the requirement only for certain categories of crime. The justice system should be for everyone on an equal basis. It is a bit of an all or nothing for us on that one.

On what else might be done to broaden the definition, I am not a lawyer, but my understanding is that corroboration now is not what it was when it first came into common use; that it evolves over time; that bits and pieces of it get tinkered with; and that there are different ways to look at the technical corroboration of evidence. It is in a constantly evolving state. I am not sure whether one can quantify that in statute and say, "We'll do it this way and add this in" or, "We'll allow this", although I do not know enough about how that would work technically.

12:45

Elaine Murray: In principle, though, would it be an alternative to the blanket removal of the notion of corroboration?

Lily Greenan: Yes, it is perhaps worth considering, but I am not sure how it would be done in a way that is different from the way in which it has been evolving over the past couple of hundred years.

The Convener: Does anyone else wish to comment?

Sandie Barton: I know that the cross-party group on child sexual abuse has argued for a third way and looked at such reforms. In some ways that is unfortunate because, while the group's ultimate goal is the same as ours, in some ways it is at odds with the rest of the victim organisations. The group's submission states clearly that it would like the opportunity for justice and for more people's cases to be heard.

There is an opportunity here. Our proposal is not about abolishing corroboration, but about considering how we apply the notion as widely as possible, looking at the supporting evidence. As Lord Carloway said, the narrow definition at present is so narrow as to be an impediment to justice. There has been a lot of discussion about miscarriages of justice that might happen, but we are concerned about the miscarriages of justice that are currently happening.

Lord Gill suggested some other areas of evidence that we could review. That would be helpful; I know that there are other provisions and other plans—to look at the not proven verdict, for example. I do not think that this bill is the only opportunity for looking at our criminal justice system and getting it right. However, we support the abolition of corroboration and the idea of looking at much wider supporting evidence in cases.

Shelagh McCall: Our concern is that, if the bill is passed and corroboration is abolished, what would happen in the interim to those people going through the trial process while the other changes are made and the law of evidence is reviewed? There is not an issue in principle, but the way in which the bill addresses the issue is a potential problem. Time should be taken to do precisely what has just been suggested by the witnesses and by Lord Gill and others, which is to review

properly the implications and the other adjustments that may advance the system.

Elaine Murray: Do you think that the possibility of redefining what counts as corroboration might be part of that?

Shelagh McCall: I do not see why that should be off the table if the review covers the whole system of evidence. We need to look at future-proofing the system too, and the committee should guard against making a change now that will later need to be adjusted in some other way. I have made the commission's position quite clear: we do not object in principle to the abolition of corroboration, but proper consideration is needed.

The Convener: Mr Kelly, are you at the starting block again?

Tony Kelly: No, I am not.

The Convener: You are not keeping apace with us here. I will take Sandra White followed by Margaret Mitchell and John Pentland, and then I will bring the session to an end, because we have other business—I am sorry.

Sandra White: Ms McCall said that the commission is not against the abolition of corroboration and that it had put forward a number of ideas. However, the reason that the Government did not pick up on the idea of the withdrawal of a case from a jury was that the judiciary and other groups were very much against it. I think that she is on her own on that particular aspect.

The Convener: Was that a question?

Sandra White: I am coming to my question. I am allowed to comment, surely.

The Convener: I just wanted to clarify whether members of the judiciary were against it as well. I cannot remember whether they were in favour.

Sandra White: No, they were not—it is in the report.

Roderick Campbell: The majority of the judiciary were against it; a minority of judges supported the line that Mr Kelly and Shelagh McCall have taken. Of the submissions, 20 were in favour of the judge having the power, and only three were against it.

The Convener: Thank you for that—I just wanted clarification.

Sandra White: Yes, absolutely—I am sure that Ms McCall would have clarified it herself.

I want to raise a point about the Strasbourg court, as Ms McCall mentioned its approach to corroboration. The Supreme Court of Canada, the United Nations Committee on the Elimination of Discrimination Against Women and the International Criminal Court also say that there is no requirement for corroboration. You picked the Strasbourg court because it is in favour of corroboration, but would you disagree with those other courts that say there is no requirement for it?

Shelagh McCall: No, I would not. You must understand that those other systems have other safeguards to ensure the quality of evidence. I understand that the International Criminal Court has a rule about the admissibility of evidence of insufficient quality and so on. It also has the equivalent of a no-reasonable-jury test. The difficulty with looking at other systems and saying that they do just fine without corroboration is that you are comparing apples and pears. All the checks and balances in those other systems are unseen. For example, in England, from the point of investigation, there are all the guidelines in the Police and Criminal Evidence Act 1984 about how evidence is gathered, recorded and disclosed. There is then the prosecution test and the safeguards of the trial. I do not disagree with those other systems, but they have other safeguards in place that prevent or guard against the dangers that we are identifying.

The difficulty for Scotland is that, in recent years, the safeguards that we had that allowed some quality control have gradually been abolished. For example, the no-reasonable-jury test existed at common law in Scotland until the Criminal Justice and Licensing (Scotland) Act 2010 was passed. It seemed to me that judges had no difficulty in applying that test, and I am not aware of a flood of appeals suggesting that idiosyncratic decisions were being made by judges in such cases. That was a relatively limited power that was rarely used; nonetheless, it was there. We have now abolished that and one or two other powers that could be cited if necessary.

Sandra White: Certainly, safeguards have been put in place. The Government has also asked groups such as yourselves and experts to suggest other safeguards, so I do not suppose that you are saying that there will be no safeguards if the legal and technical requirement for corroboration is abolished.

Does anyone else have a comment about that? I would like to open up the discussion.

Shelagh McCall: We are saying that to some extent. One has to think about how corroboration acts as a safeguard. Yes, it is a quantitative issue—we all know that. However, in its essence as a safeguard it is a measure of quality control. It allows a fact finder, a jury or a judge, in deciding whether to believe a main piece of evidence, to determine whether there is something that supports it that they accept—something that backs it up and gives them confidence in the quality of

that main piece of evidence. That is how corroboration operates as a safeguard currently.

If corroboration is taken away, we will have no means of preventing evidence of extremely poor quality from ending up as the basis of a conviction because we do not have the no-reasonable-jury test or a proper exclusionary rule such as section 78 of PACE. From the point of view of quality control, once we remove corroboration there is nothing obvious that remains. There may be safeguards in jury majorities, the standard of proof and so on. However, Strasbourg says that it is important to give an accused person an effective and proper means to challenge the reliability of evidence and have it excluded if appropriate. That is what will be lacking.

Sandra White: In previous evidence sessions we heard about miscarriages of justice in England but not in Scotland. However, something like 3,000 people are not getting access to justice. Is that not against their human rights?

Shelagh McCall: That is why I said, right at the beginning, that the challenge for the Parliament is to provide the right to an effective investigation and prosecution for people who are victims of serious crime. Going back to Ms Greenan's point, I mean serious crime in the European convention sense, not in how it is treated domestically; offences against a person and so on would tend to fall into that category.

The Parliament must achieve that, and we have acknowledged that there is a problem for victims of particular types of crime in getting their cases into court. One of the answers to that is the abolition of the requirement for corroboration, which will undoubtedly increase the opportunity for cases to go to court. However, we are concerned about what happens in court and the lack of adequate safeguards at that point to protect the fairness of trials. That is why I said that we are not opposed to the abolition of the requirement for corroboration in principle, but we believe that it needs to be thought through.

Tony Kelly: I echo those comments. The Strasbourg court does not require corroboration. It looks at the matter in the round and considers whether there has been a fair trial under article 6 of the convention. It is not a requirement of article 6 that there be corroboration, but whenever Scottish cases have gone there, or even when Scottish cases have been discussed by analogy with English cases and article 6 has been analysed, the first stop has been corroboration.

If you take that away, as is proposed, with nothing in its place other than the one safeguard of majority verdicts from juries, which would not apply in the vast majority of cases, which go before a sheriff, it is difficult to see what the argument would be when Scotland goes to the European Court of Human Rights to respond to an accused person's complaint that he has not had a fair trial. A discussion of the safeguards in a summary case would be a very brief discussion because there would be none. The safeguard that we constantly harp on about is corroboration—that is our first stop. If we do not have that, and in a summary case there is nothing else, the irresistible conclusion would seem to be that there will be an unfair trial and a breach of article 6.

One way in which to avoid that is to introduce the other safeguards that have been proposed in a wider context. That would involve a wider appraisal of what the criminal justice system is about and what those safeguards are intended to ensure post abolition.

Alan McCloskey: Sandra White made a couple of points about the quality of evidence. The issue is about the quality of evidence and not necessarily about the quantity. Quality is the overriding principle. The criminal justice system must be human rights compliant for all—that is, for victims and witnesses as well as people who are accused. There are safeguards in the system. As I said, there will still need to be a reasonable prospect of conviction, and the jury or the judge will have to consider that the matter is beyond reasonable doubt. Those absolute cornerstones of our system will still be there, and they should remain.

The Convener: The Crown might rightly think that there is a reasonable prospect of conviction given the statements and the evidence, but it does not always turn out like that in court. The witness that we think is going to say something may say something completely different when they are challenged. I am not saying that the Crown does not apply the test, but once a case gets to court, things can sometimes unravel. I think that Ms McCall's point is that, at that stage, there should be the prospect of saying that there is no case to answer, or certainly the prospect of the judge saying that no reasonable jury would convict on the evidence because it has turned out differently. Do you see that that can happen?

Alan McCloskey: I see that that could happen, but what we have now sometimes fails victims and witnesses. There are miscarriages of justice where the offender has walked away free and the victim is left—

The Convener: I am specifically testing you on the business of the judge being able to say to a jury that there is insufficient evidence given that the evidence that the Crown has quite rightly taken has not turned out as expected in court. Do you see that there would be a purpose in that?

Alan McCloskey: Yes.

The Convener: Do you think that we should have that?

Alan McCloskey: That is something that could be considered.

The Convener: I think that that is the point that was being made. I hope that I have understood.

Sandra White: I want to pick up on what Sandie Barton and Lily Greenan said. We should consider the issue in the round because, as we have heard, corroboration is just one part of it. My question is about the culture of the judicial system. I asked the Lord Advocate this question as well.

Sandie Barton gave an example involving a woman who has drunk too much or who is dressed in a certain way. If we get rid of the legal and technical form of corroboration and the Crown Office and Procurator Fiscal Service deems that more cases will go forward, that will be noted by juries and judges. Eventually, as more cases come forward, the culture will surely change, because people will be confronted with sometimes horrific evidence that they would not necessarily have heard if those cases had not gone into the judge-and-jury trial system. I would say that people will not be quite so blasé—I hate to use that word, but sometimes some of the decisions seem quite blasé.

In the long term, will there be a change in attitude to people who have suffered from sexual abuse and domestic violence?

13:00

Shelagh McCall: Others are perhaps better placed to comment on that than I am. You mentioned the observations by the UN Committee on the Elimination of Discrimination against Women about the problem with corroboration. The commission made a submission to the treaty body in which we said that there needs to be a comprehensive strategy for tackling violence against women, as well as an action plan for how to put that strategy into place. One part of that is undoubtedly the criminal law, but there are other parts that others are better placed to speak about than I am. It is important to understand that the reasons for the appalling conviction rate are wider than the existence of corroboration, as has been acknowledged. Undoubtedly, corroboration is an impediment to getting cases to court for some types of crimes, but we need a much wider strategy to try to shift those cultural norms, if they are norms.

Sandie Barton: Unfortunately, I think that they are norms.

I echo that point. Our focus on moving towards the abolition of the requirement for corroboration is part of a much wider drive. We do a lot of work jointly with the police. It was heartening to listen to Malcolm Graham, who echoed a lot of our thoughts on corroboration. We do a lot of training with the police. We have prevention workers across Scotland who look at how to change values and attitudes. The measure would be part of a much wider cultural shift that we need to make, but it is an important part in relation to the criminal justice system.

The Convener: I want to move on. Time is moving on and we have more work to do on our agenda that I cannot park.

Margaret Mitchell: The provision on corroboration has been introduced because of the lack of convictions in interpersonal assaults and crimes. The assertion has been that if we get rid of corroboration we will get more prosecutions. I want to turn that round and see whether there is another way to look at the issue. Current court practice does not allow consideration of evidence that could be used to establish corroboration, such as circumstantial and hearsay evidence and the testimony of expert witnesses. That could be changed. It could help victims immensely if those rules were changed and cases were brought to court with the prospect of conviction because of the certainty that the evidence was corroborated, which would therefore make the conviction more secure.

Another view that has been expressed is about quality and sufficiency of evidence, but those are subjective matters and much more subjective than considering whether something has been corroborated, yes or no.

Do you rule out retaining corroboration and looking at those rules of evidence to make convictions more secure and, in doing so, guarding against the very real danger that Mrs McCall has expressed of the accused being able to cite not having access to a fair trial?

Sandie Barton: I welcome some of those suggestions on what should be included. Our concern is that, if we have rules, we have exclusions. If the requirement is removed, there will be flexibility in building up the case and the picture of supporting evidence, but there would be less flexibility if we were prescriptive and exact about what evidence would and would not count under the rule of law. As much as possible, the police and the Crown Office look at the broadest picture that supports the complainer's version of events, and I would welcome the widest application of that. However, the requirement in its technical form needs to go.

Just to clarify, this has not been brought about as a result of the low conviction rates, because conviction rates have been pretty abysmal for a very long time. This has come about because of

the Cadder ruling. There has been a real focus on the rights of the accused. Their rights have continued to increase without any commensurate increase in the rights and protections afforded to victims.

Margaret Mitchell: The point, according to the evidence today, was not that the police would not look for anything. They have all this circumstantial evidence but the Crown does not take it into account. In the compelling example that you gave earlier, Ms Greenan, the circumstantial evidence would be taken into account, it would help the case to go to court and it would be counted towards establishing corroboration.

Without getting into the nitty-gritty of every single thing that could be done, is there not a case for at least considering retention and looking at the law of evidence to improve corroboration? It is so much easier to say, "Yes, we have a conviction because we have corroboration, and corroboration has been made easier."

Lily Greenan: It sounds as if you are proposing something similar to Elaine Murray's earlier proposal on looking more widely at what counts as corroboration and what supports it. I have already answered that point.

When we are talking about solemn proceedings, anything that makes the process more complicated is going to be harder. Technical directions to juries are problematic in terms of what counts and what does not count. I have a concern about adding more layers to something that is already problematic when it comes to getting cases into court. I am not sure in what way what you suggest is different from what was suggested earlier.

Margaret Mitchell: I suppose that I am looking at the subjective element that you have already said exists in juries. I might think, "That is quality evidence", whereas someone else might not. Therefore, it is not as clear-cut as asking, "Was there corroboration? Yes or no." It is much more difficult for a jury to be subjective about corroborative evidence.

Lily Greenan: It is still going to come down to how it is played by the prosecution and the defence and the extent to which the evidence is not the issue in such cases. Attitudes such as whether the woman consented or not play their part in the defence case. The issue is to do with notions of consent and what women are responsible for and what they are not responsible for. In relation to domestic abuse, it is about attitudes such as, "If it's that bad, why is she still there?" The attitudinal stuff that can come into play overrides some of the evidential requirements.

Margaret Mitchell: My fear is that, by going to sufficiency and quality of evidence and not looking at the quantity that establishes corroboration, that will only continue.

The Convener: John Pentland has the last question, as usual.

John Pentland: I think that this is the first time that we have seen witnesses for and against. I congratulate them on that interaction. I have a question for each of you individually and for the organisations that you represent. What would be the consequences of corroboration if it were removed?

Lily Greenan: Do you mean if the requirement for corroboration was removed?

John Pentland: Yes.

Lily Greenan: I believe that the figure for domestic abuse incidents that did not proceed beyond police reporting was 2,800. A small proportion of those—about 1.5 per cent—would pass the new prosecutorial test. That is not a huge amount.

Being able to have the debates in the court with the solicitor, rather than in the fiscal's office, opens things up. For me, it is about looking at the longer term. Sandra White mentioned the contribution that removing the requirement would make to a longer-term cultural shift. A greater opportunity to have the discussions and probe the issues in the courtroom, using quality evidence rather than a technical number of pieces of evidence, is the way forward.

It is part of a long strategy. I agree with Shelagh McCall that we need a violence against women strategy that addresses some of the issues in the justice system and an action plan to support that. My understanding is that that is on the way.

The question is how such a move can support a long-term shift in the justice system's response to those issues. It will not be a magic fix, it will not sort stuff in the short term and it will not lead to more convictions. Previous witnesses talked about victims getting their day in court but that is not what it is about; it is about ensuring that people can be heard and that issues that are not reaching court at the moment can be discussed in court in Scotland. It is all about fairness.

Sandie Barton: I very much echo Lily Greenan's comments. For us, the removal of the requirement for corroboration is part of a long-term picture that includes access to judicial training, some of our wider prevention work on changing values and attitudes and the introduction of female forensic examiners, which will present huge opportunities for those who previously have been unable to access the very crucial DNA evidence that can make the difference.

It is also about changing the culture of the courtroom and affording rights to complainers. Much of the discussion about miscarriages of justice has focused on the accused, but what about complainers' rights? I know that amendments with regard to independent legal representation have been proposed to the Victims and Witnesses (Scotland) Bill, but we need to think about complainers' rights and privacy. When you are raped, your medical records can be accessed and your mental health, sexual history and so on are fair game in court. This is all part of a much bigger push with regard to victims' rights. This is not an either/or—you can strengthen the rights of both the accused and the victim to access to fair justice.

Alan McCloskey: We believe that the removal of corroboration will improve and strengthen Scotland's criminal justice system. Although the issue is linked to the need for wider public confidence in the system, its removal will put victims and witnesses in a better position.

Tony Kelly: We just do not know what the consequences will be. I am sorry to sound like Donald Rumsfeld but there are probably too many known unknowns. We can point to areas of concern but we do not know what effect removal will have on the overall fairness of trials in relation not just to victims of sexual crimes but to victims in general and accused persons in Scotland.

Shelagh McCall: We can probably all agree that we want a system in which the public is confident that the innocent will be acquitted and the guilty convicted through a fair process. In our view, abolishing corroboration without looking at the system in the round increases the risk of unfair trials and miscarriages of justice and loses the opportunity to do just what Sandie Barton has talked about and find a way of increasing the rights of the victims of crime to an effective remedy and the rights of the accused to a fair trial.

The Convener: May I end on that comment, John?

John Pentland: Yes.

The Convener: Thank you very much. I thank the witnesses for waiting their turn and for their interesting evidence. You must forgive me, but we have to move on and I am going to keep talking.

Subordinate Legislation

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

13:13

The Convener: Our next item of business is consideration of one negative instrument. The regulations amend fees payable to solicitors for carrying out legal aid work in relation to solemn proceedings with a view to ensuring compliance with the European convention on human rights. A letter from the Law Society of Scotland, which has written to the committee stating that it cannot support the regulations on various grounds, can be found in annex A of paper 3.

As it appears that members wish to make comments, I will set out the various options. A member can lodge a motion to annul, which will be considered next week; we can invite the minister or cabinet secretary to give evidence next week; we can write to the Scottish Government and consider the matter next week alongside the issues raised with regard to legal aid, in respect of which the regulations have been called a cost-saving exercise; or points can be noted on the record today. Can I quickly hear your objections—which I have probably already set out—and suggestions about what you want me to do?

Alison McInnes: The Law Society makes a number of very strong points; in particular, it points out that the shift in resources might give rise to further ECHR issues. We need to examine that in detail.

The Convener: I think that the issues have been raised. Do we want to do this by letter, by evidence taking or what?

Sandra White: We should write to the Government.

The Convener: And ask for a reply from the minister.

Margaret Mitchell: Should we not hear from both sides on the Law Society's concerns?

The Convener: The Law Society makes its concerns quite clear in its letter.

Margaret Mitchell: So let us write to the minister, then.

The Convener: We will write to the minister, asking for a response, and then it will be for members to decide what they want do about the process.

Roderick Campbell: Just for clarification, when does the 40-day limit expire?

The Convener: At the beginning of January.

Thank you very much. We now move into private session.

13:15

Meeting continued in private until 13:16.

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e-format first available
ISBN 978-1-78392-263-5

Revised e-format available
ISBN 978-1-78392-279-6

Printed in Scotland by APS Group Scotland