OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 31 January 2024

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 31 January 2024

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CRIMINAL JUSTICE COMMITTEE
5th Meeting 2024, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Sharon Dowey (South Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*John Swinney (Perthshire North) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

The Lord Advocate (Dorothy Bain KC)
Sheriff Andrew Cubie (Sheriff of Glasgow and Strathkelvin, Appeal Sheriff and Temporary High Court Judge)
The Rt Hon Lord Matthews (Senator of the College of Justice)
Seonaid Stevenson-McCabe (Glasgow Caledonian University)
Dr Andrew Tickell (Glasgow Caledonian University)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 31 January 2024

[The Convener opened the meeting at 09:00]

Victims, Witnesses, and Justice Reform (Scotland) Bill: Stage 1

The Convener (Audrey Nicoll): Good morning and welcome to the fifth meeting in 2024 of the Criminal Justice Committee. We have no apologies.

I welcome the Rt Hon Dorothy Bain KC, the Lord Advocate. Thank you for taking the time to attend—it is much appreciated. We have already heard from Crown Office and Procurator Fiscal Service officials and have had written evidence, but the committee felt that we needed to ask you specifically about a few very important issues, so we are grateful that you are able to join us today.

I intend to allow up to 60 minutes for this evidence session, and I propose that we focus our questions to the Lord Advocate on the proposal for a victims commissioner, then on trauma-informed training and then, finally, on the abolition of the not proven verdict and changes to jury majorities.

I understand that you do not want to make an opening statement, Lord Advocate, so I will open with a question about the bill's provisions on the proposed victims and witnesses commissioner. We understand that you have concerns that those provisions might unintentionally interfere with your independence. Will you outline those concerns and the changes that you consider are needed to address them?

The Lord Advocate (Dorothy Bain KC): I understand that Laura Buchan and Alisdair Macleod gave evidence on that matter and focused those concerns for the committee.

The Crown Office and the Scottish Government have worked together on the issues that are outlined in the written submissions. I did not—and do not—consider that the bill is incompatible with my independence. The proposals in the Crown's written submissions did not impact on the intended powers of the victims and witnesses commissioner, nor on the accountability of the Crown Office and Procurator Fiscal Service or the Lord Advocate in relation to the experience of victims and witnesses.

The concern was raised that those who read the bill might consider that the victims commissioner could make recommendations that impinged on the Lord Advocate's independence on prosecutorial decisions and prosecution policy. However, we are reassured that that is not the intention of the bill and, in light of the further discussions between the Scottish Government and the Crown, it is no longer submitted that any amendment is required to the proposals in the bill.

The process of sharing the written submissions to the committee, the exploration of the issues that are before the committee and further work with Scottish Government officials have resolved any of the issues that were of concern previously.

The Convener: That is a helpful update and clarification.

The bill sets out a number of proposals on the victims commissioner's role. In general, beyond what is set out in the bill, is there anything else that you feel would be relevant to include in that role, or are you supportive of the provisions as they stand? From your previous answer, I think that you are.

The Lord Advocate: The Crown is supportive of the aims of the legislation to improve the experience of victims and witnesses, and of the establishment of a victims and witnesses commissioner. The Crown recognises the importance of a single body that can promote and support the rights and interests of victims and witnesses in relation to criminal justice agencies and third sector organisations. If the role is established, the Crown will engage and collaborate with the commissioner.

It is clear that the commissioner would not have the power to interfere with the Lord Advocate's independence on prosecutorial decisions or prosecution policy but would be influential in bringing a voice for victims and witnesses within that area of work, which would be welcome and informative. That would be a radical step, which would require the Crown to respond to an influential body with the recognition that the victims commissioner would be given.

The Convener: I will open up the discussion to members. Pauline McNeill wants to pick up on the matter of a victims commissioner.

Pauline McNeill (Glasgow) (Lab): Lord Advocate, you are correct, in that we have heard evidence from witnesses whose reading of the bill is that it would somehow give powers that could cross over the independence of not just the Crown Office but other agencies. That is clearly not the case. You have addressed that issue, but do you agree that, should the bill be passed into law, the Government probably needs to do a bit more work to ensure that everybody understands the role of the victims commissioner in relation to that point?

The Lord Advocate: With any new role—and this is such an important role that would be granted—it is critical that the manner in which the role will be operated and the powers of the role are clearly defined. They must be made clear in legislation, in any policy memorandum and in any further guidance that is issued on the development of and appointment for the role. As with everything new, there requires to be education for all who are involved in or around the issue.

You are quite right, Ms McNeill, about the restrictions on the role, but it is an important role and one that will, I hope, reflect well on the prosecution system in the future.

Pauline McNeill: We have heard quite a bit of evidence, and I was really interested in the evidence of one witness who had a very positive experience in recent times. One strand of their good experience was that they had access to the advocate depute. That raises a question for me in relation to the bill. Would it take considerable resource to set up the commission? Can I guess that it will take about £20 million? John Swinney is in the room, so he can correct me if I am wrong.

John Swinney (Perthshire North) (SNP): It would be closer to £1 million, I would say.

Pauline McNeill: Okay, it is closer to £1 million, but that resource could perhaps be used elsewhere, which is a consideration for the committee.

Lord Advocate, if the Crown Office were to provide victims more access to advocate deputes so that victims have a better experience, would that require additional resource? Would it be fair to consider doing that instead of spending money on a victims commissioner?

The Lord Advocate: The choice of spending is not for me. The choice of spending and where resources should be applied are first and foremost for the committee and ultimately for Parliament.

You ask a very good question. Perhaps I could be allowed to give a reasonably extensive answer, because it puts into perspective a lot of what the committee is looking at.

I read the evidence that you are referring to, including the evidence of Ms Stakes, Ms Yaseen, Ms Wilson, Ms Ashby and the victims in the Logan Doig case. Three of those cases—Stakes, Yaseen and Wilson—were indicted well before my time as Lord Advocate. The case of Wilson, I think, came to trial in May 2022, but that was on the back of a very long period of closure for the courts, and I am sure that her case was heavily impacted by the Covid pandemic.

Ms Ashby's case was tried in 2023. That was the case in respect of which positive evidence was given about the interaction of the advocate depute with the victim before court and about the support that she got in relation to court visits and the like. She described a real sense of support and how that helped her to be prepared for giving evidence in court.

As I have previously said, that is a very important part of the role of the advocate depute, and it is of enormous importance that we properly support victims of that type of crime, from the point of reporting all the way through the justice system.

What is relevant to the availability of an advocate depute for that support, and to the support for a victim before trial, is the resource that we can apply. When I was appointed Lord Advocate in June 2021, only 32 advocate deputes were in post. That is not because it was not recognised that more were needed, or because there was no budget for such individuals; it was because there was a real challenge, coming off the back of the pandemic, in encouraging individuals to take up that very formidable role.

When I was appointed Lord Advocate, I identified the enormous challenges in the numbers of advocate deputes who were in post, and the huge pressures that that put on the serving advocate deputes in dealing with the level of work that they had. For example, they were dealing with 25 to—sometimes—30 preliminary hearings per cycle, despite the fact that the maximum that can be done well is around 12. We were asking far too much of a very small group of people. The availability of individuals to consult before trial and to be given a case in good time before a trial was heavily compromised.

On appointment, I set about trying to encourage people to become advocate deputes. That was an important part of the work that I undertook immediately. I identified the huge pressure on the rota, as I said, and, in addition to that, the enormousness of the evidential challenges in sexual crime. I had in mind the Lord Advocate's reference in relation to evidence rules over distress.

Through the work that I had done in private practice, in promoting victims' rights—for example, in the cases of WF v the Scottish ministers and RR v HM Advocate—I recognised that what was being provided for victims of sexual crime was simply not good enough. I have therefore set about seeking to improve the number of advocate deputes. We now have 70.5, but we should have 77.5, so we are still challenged in and around those numbers.

I took Lord Advocate's references, and we have further references to take this year. I worked very hard on the rota with my very dedicated principal Crown counsel team and have been able to develop opportunities for the early allocation of

work. I have sought to inspire those in the service to recognise that prosecution in the public interest encompasses the supporting of victims through the process and ensuring that they can give their best evidence. In 2023, there have been positive developments in all the work that is being done. That is an enormous way in which we can improve matters.

That is going to take more resource. Ultimately, the need for the early allocation of cases, for more and better-trained prosecutors and for better support systems in the Crown Office and Procurator Fiscal Service will take resource that we do not have at the moment.

Russell Findlay (West Scotland) (Con): Good morning, Lord Advocate. I was going to ask you about the victims commissioner, but you have pre-empted my question by saying that the initial concerns that the Crown raised in its written submission, about the need to amend sections 16 and 17, have been allayed by conversations with the Scottish Government.

Just for clarity, is it the case that the initial concern was that a requirement on the Crown to respond to the commissioner's annual report might have been seen as meddling in the Lord Advocate's independence?

The Lord Advocate: You have got it. It was exactly that.

Russell Findlay: You now accept the provisions. What was the nature of the conversation with the Scottish Government? Was the concern premature, or was more explanation provided by the Scottish Government?

09:15

The Lord Advocate: There was a better exploration of the issue and a shared understanding of the legislative provisions. There was a desire to understand what the Scottish Government envisaged from the legislation. There is always a desire in the Crown Office and Procurator Fiscal Service to ensure that we continue to protect the independence of the Lord Advocate. Those are very important issues.

People were concerned to ensure that the protections enshrined in the Scotland Act 1998 were not in any way compromised. All the discussions and concerns originated from a good place and those matters have been resolved. I know that the senior executive team at the Crown Office discussed the issue and also indicated contentment with what is proposed.

Russell Findlay: Convener, can I ask about other parts of the bill now?

The Convener: Yes.

John Swinney: Convener, could I come in before that?

The Convener: Yes.

John Swinney: I am grateful. I would like to follow up on Mr Findlay's question and the Lord Advocate's answer.

What the Lord Advocate has put on the record is very welcome, but it raises the question in my mind of whether any of that needs to be formalised beyond the basis of what has been agreed by the Government and the Crown. We have reached a place of welcome understanding, and the independence of the Crown has been clarified and assured. Does the Lord Advocate believe that any degree of formalisation is required, beyond what has been arrived at so far?

The Lord Advocate: Perhaps I could reflect on that point. I understand that there is contentment with the legislation as drafted, but perhaps I could take that away and come back with a specific written answer to the question. It would be worth my exploring that issue with Crown Office and Scottish Government officials, because it is an important one.

John Swinney: I am grateful for that answer. It may be that we require not legislative change but rather a memorandum of understanding, or something of that nature. It would be helpful if that could be explored; we can also explore it with the cabinet secretary when we see her next week. I am grateful for that clarification.

Russell Findlay: Part 2 of the bill deals with trauma-informed practice. The Crown Office is in the process of implementing "Trauma Informed Justice: A Knowledge and Skills Framework for Working with Victims and Witnesses". That raises the recurring question of whether we need legislation to enshrine trauma-informed practice, given that it is already happening in the Crown Office at your behest

The Lord Advocate: The embedding of trauma-informed practice, as is proposed in the bill, is critical to developing a criminal justice system that properly meets the needs of victims. That trauma-informed practice relates to not only the role of prosecutor but the roles of all those who work within the Scottish Courts and Tribunals Service, from court staff to those who have responsibilities for listing and managing business. It also extends to the responsibility of the judiciary who oversee very sensitive cases.

Although people say that they now realise what trauma-informed practice is and that they are committed to it, and although we are providing training on that, embedding it in legislation will mean that it is there and that people will recognise it as a statutory responsibility that must be

adhered to and cannot be ignored. It is not something that people sign up to because they want to; it is a compulsitor that is critical to the development of the sort of sexual offences courts and prosecution system that those who are advocating for change really desire.

Russell Findlay: In what practical way does the framework differ from what the proposed legislation will achieve?

The Lord Advocate: I can talk only about what the Crown is doing in relation to trauma-informed practice. We have been highly influenced by the work of the agencies that are involved in providing the Scottish Government's reports on those matters. I can talk about what the Crown is doing and what the framework means for the Crown, but I cannot really go much further.

Russell Findlay: I am not fully up to speed on the contents of the framework, what it will achieve and how that might differ from what the legislation will seek to achieve.

The Lord Advocate: I can talk only about the Crown's response. It is important to recognise that we work within a prosecutorial system that is adversarial, which means that there are certain constraints upon the extent to which we can offer victims and witnesses a choice. Prosecutors act in the public interest: they do not represent individual victims or witnesses. That means that, although prosecutors will take account of a range of factors, including a victim's views, when reaching a decision, those views will not necessarily determine the decision that we take.

We also prosecute within the rules of evidence and the procedures of the Scottish legal system, which enshrines the rights of an accused person to a fair trial and places responsibility on the prosecutor for proving the charges against that person beyond reasonable doubt. Many of the cases that we are involved in require us to lead evidence from witnesses. An accused person is entitled to cross-examine those witnesses during a trial, which will inevitably involve asking the victim to recall and to speak about events that may be very traumatic.

That said, many of the current processes already enshrine trauma-informed principles. Those include the use of special measures to help vulnerable witnesses to give effective evidence; rules of evidence that protect complainers from irrelevant and inappropriate questioning; a better understanding of the need for courtroom advocacy to take into account the communication needs of vulnerable witnesses; recognition by the courts that, where a party wishes to recover sensitive personal records relating to a witness, that witness should be given the opportunity to make representations; and the ability to take evidence from children and from particularly vulnerable witnesses at a commission hearing before trial.

All those processes are in place. However, the way in which we go on to train prosecutors and those who deal directly with victims throughout the service necessitates the development of a level of understanding that was previously absent. The compulsitor on us to do that is a very important one and it is one to which we have reacted responsibly.

I hope that that answers your question. I am not quite sure if it does.

Russell Findlay: I have a general question, if that is okay.

We have a submission from the senators of the College of Justice, some of whom support the proposed pilot scheme for juryless rape trials and some of whom are opposed to it. Those who are opposed say that it may not comply with article 6 of the European convention on human rights and may not be within the legislative competence of the Scottish Parliament. They cite what the Scotland Act 1998, which you referred to in your initial answer, says about the independence of the Lord Advocate. Has the Crown Office assessed that warning about potential legislative incompetence? If so, how real is that threat, what, if anything, is being done to address it and how seriously should the committee take it?

The Lord Advocate: Like many other parts of the profession, the judiciary was split. I am not sure what proportion of the judiciary indicated concern in the most recent submission about the proposal. The highest concern that it expressed was that the pilot of juryless trials might breach article 6 and it might not be within the legislative competence of the Parliament. I did not read the College of Justice's submission as saying that it had carried out a full legal analysis of that. At least, that is my reading of it, Mr Findlay.

I know that, in the prelude to all the work that has been done by the committee, the concerns about article 6 were considered with great care, as was the legislative competence of the bill and the view of the senior legal adviser to the Scottish Government. The head of the prosecution service and those within the service who support me say that the provisions of the bill are within the legislative competence of the Parliament and there is no breach of article 6 in relation to the suggestion that a trial could be held without a jury.

There is sound case law across the board and, indeed, in the European Court of Human Rights, that indicates that there is no need to have a trial by jury to have a fair trial.

Russell Findlay: In its warning, the College of Justice specifies section 29(2) of the Scotland Act 1998. Does that relate to trial by jury?

The Lord Advocate: I do not have section 29(2) of the Scotland Act 1998 in front of me. I think that the point is that it might breach article 6, which is the right to a fair trial, and it might impact on the legislative competence of the bill, but those matters were looked at.

Russell Findlay: Are you satisfied that that is not the case?

The Lord Advocate: Well, I was, yes.

The Convener: I remind members that we are looking at parts 1 to 4 of the bill.

Sharon Dowey (South Scotland) (Con): I want to follow up on the points that Pauline McNeill raised initially about the varying experiences of witnesses, as well as Russell Findlay's point about the requirement for legislation. We have heard from witnesses about the different experiences that they have had. The Crown Office's submission says that, when decisions are made about how a witness provides evidence,

"there should be sufficient time for a court visit and meaningful discussions between the witness and the prosecutor about special measures."

In another part, it says:

"prosecutors act in the public interest and do not represent individual complainers or witnesses."

Do all advocate deputes support spending extra time with complainers to explain the processes, or does it come down to what you said earlier about resources?

The Lord Advocate: My instruction to all the advocate deputes is that they must meet a victim before they give their evidence in court. Since my appointment, I have developed a system in which, in some of the very serious cases, we allocate an advocate depute at the point at which the case is reported to the Crown Office for the Crown to then initiate proceedings. We cannot do that in every case, but in some of the very difficult cases that we have had—stranger rape cases, cases with very vulnerable victims and cases involving children—at the point of report, I have allocated an advocate depute, they have met the victim and talked through how the victim is going to give their evidence and how their evidence would best be taken. The advocate deputes have supported the victims in court visits, and they have met them at least twice before they give their evidence in trial. That is how I would like all the cases to be done, but we simply cannot do that. We simply do not have the resource.

It is quite right to point out that there is a distinction between the role of the public prosecutor, who prosecutes in the public interest, and the role of a victim's lawyer, which is what the independent legal representation provisions are about. The role of a public prosecutor is to prosecute in the public interest. In my view, the public interest is a wide concept and, within that, it must mean that victims who come to court to give evidence in such very difficult cases are properly supported. That proper support must be through the sort of engagement that you highlighted and which the evidence sessions indicated was necessary: support in the pre-trial process, support in deciding how the victim is going to give their evidence—one of the most important decisions in the case—support in giving evidence and preparing the victim for court, and support thereafter, in the form of meetings and discussions about the case.

09:30

We do all those things, as much as we possibly can, but we do not do it in all our cases because we simply do not have the resource. If there are many cases listed for trial, and some of those are floating trials—we do not know the date that they will start on—it is very challenging to organise a rota that means that all those individuals who come to court get the sort of support that they need. I would like to be able to do more.

I have highlighted some of the work that I have done as Lord Advocate, but one of the most exciting things that are happening, which I hope will lead to significant transformation, is the review by Susanne Tanner. It is the most significant review that has ever been undertaken into the work of the Crown Office on sexual offences. I am sure that you will hear more about it but, just to give you a sense of this, I commissioned it at the end of 2021, not long after I was appointed. The terms of reference, which were agreed with me, are broad and have demanded a large-scale inquiry, using mixed methods of approach to evidence gathering, including seeking personal views from more than 400 contributors in individual interviews, group interviews, focus groups, questionnaires and round-table events to consider the proposed recommendations. There has been an enormous engagement with the Crown Office and Procurator Fiscal Service about those types of cases. There will be significant recommendations from the review, and I am very excited about it. It will highlight everything that I have ever spoken about in relation to the challenges with such cases and what we do not get right at the moment.

Sharon Dowey: On the point that Russell Findlay raised about legislation, you seem to be doing an awful lot of work already, so is the reason for having the bill the fact that it comes with a

financial memorandum that will give you resources to be able to implement it?

The Lord Advocate: That is a very big part of it. You make a very important point, Ms Dowey. Such a change does not come without the need for significant resource. We are here today discussing this issue because it has been a terrible burden on the Crown Office and Procurator Fiscal Service for as long as I can remember. We want to make it better. In order to make it better, we need to change things. Part of that change involves a recognition that we try to do all that we can at the moment, but we cannot do everything. You see that in the varying reports that you got from victims who came to give evidence here. Some of what they spoke about is just unacceptable and some of it was really encouraging—particularly Ms Ashby's experience in 2023. However, a lot still needs to be done in order to be able to provide to every victim what Ms Ashby had. Not every victim is the same. They all need to have their needs recognised and, as far as possible, bespoke packages of support to ensure that they give their best evidence and have a good experience of the system, which is just not delivering at the moment.

Sharon Dowey: Finally, with the current and expected future resources, do you think that trauma-informed practices can be implemented meaningfully?

The Lord Advocate: I think that the indication in our response to the financial memorandum was that we would need further resource in order to deliver the training that is necessary for trauma-informed practice. Ms Buchan gave evidence about that. The figure for the resources required is in the region of £600,000, and we previously gave evidence that the resource required would exceed current resource provision. Our response to the financial memorandum stated that we could advise that the cost to the Crown

"for all existing staff to undertake a day of training in relation to trauma informed practice would be approx. £600,000 if the resource requirement fell within 2023-2024. Should the requirement fall in future years then an adjustment for appropriate pay award uplifts and inflationary rises would require to be applied."

The Crown Office anticipates incurring costs from developing and delivering training in trauma-informed practice with its staff. As is the case with other agencies, irrespective of the bill's proposals, we have already committed to the skills framework, and we envisage adapting the framework to make it more trauma informed. Again, that will have resource implications. All that we can say is that we cannot do that on the existing budget.

John Swinney: I have questions on part 4 of the bill in relation to the composition of juries. Will you share any issues that you believe that the committee needs to be mindful of in the consideration of the parts of the bill that relate to the change to the jury majority provisions from a simple majority to a two-thirds majority? What should the committee consider in relation to that proposal?

The Lord Advocate: I consider that the changes that are proposed will make it more difficult to get a conviction in the type of cases that we are talking about. We need to recognise that our system operates with interconnected concepts of three verdicts and corroboration, which are very important in understanding what needs to be considered when changes are being made.

Our system requires corroboration, unlike the system in England and Wales, for example. The Crown Office's concern is that the proposals legislate for only a guilty verdict to require the identified two-thirds majority and that no similar requirement is imposed in relation to the return of a not guilty verdict. Jurisdictions that operate a qualified majority or a requirement for unanimity apply those requirements to the returning of both guilty and not guilty verdicts, and the provisions in Scotland would be unique in requiring a majority only for guilty verdicts.

In previous evidence sessions and in written submissions, the Crown identified the potentially unsatisfactory situation of a jury reaching a decision when seven of the jury returned a guilty verdict and five returned a not guilty verdict but, in the absence of a requirement for a majority in order for a verdict of not guilty to be returned, a not guilty verdict would result, despite the fact that the minority of the jury reached that verdict.

I suggest that that situation is more undesirable than the existing difficulties that are caused by the not proven verdict and would be unsatisfactory for both the accused and the complainer. Although the individual verdict of each juror is not provided at the end of a trial and there is no requirement to establish the number of each verdict reached by the jury—beyond whether a verdict is unanimous or by a majority—experience has shown that juries often return to the court seeking guidance as to what verdict should be returned when the required majority has not been reached.

That is seen often. Juries seek guidance where, for example, eight votes have not been reached and there are seven for guilty, five for not guilty and three for not proven. It is anticipated that, notwithstanding clear directions from presiding judges and sheriffs, juries under the proposed system may seek guidance from the court where the verdicts returned are seven guilty and five not guilty or where the jury is split six six. The Crown's position to the committee is that, if Parliament is considering changing the majority, it might be worth considering whether a majority should

remain for both guilty and not guilty verdicts, and whether there should be a provision for retrial.

John Swinney: Thank you, Lord Advocate—you have provided the committee with a substantial and important answer in that respect.

I want to explore a couple of details in your answer. The first relates to the question that you raised, understandably, about what happens in a 12-member jury where the decision is reached by a majority of seven to five, and the two-thirds majority that is proposed in the bill is not reached.

Can you spell out to the committee what you, and the Crown, would consider to be the dangers for public confidence in the criminal justice system as a consequence of the proposed change? For all time, in the Scottish courts, simple majorities have resulted in convictions. We would suddenly be embarking on a position in which a simple majority would not be good enough, but there may still be a majority. What are the Crown's thoughts on that with regard to the implications for public confidence in the justice system?

The Lord Advocate: I think that it would erode public confidence in the justice system if we were to go ahead with the two-thirds majority proposal without the type of safeguard for which the Crown is asking, which is a provision for retrial.

The system that we currently operate is one of a simple majority. There are 15 jurors, and a decision by 53 per cent of the jury is required in order to return a guilty verdict. Under the bill, we are going to increase the percentage that is required of the jury for a guilty verdict. We will, therefore, be in a situation in which, even where the majority has not come down in favour of a guilty verdict, there are still, in a jury, five people who have voted for a verdict of guilty. The required majority has not been reached, and the case no longer continues—it is lost. That would be the wrong way to proceed. We have profound concerns about what is proposed, for the reasons that have been set down in our written submissions and in the evidence that we have previously given.

John Swinney: My last question relates to your comment that Scotland would be in a unique position if we were to embark on these proposals. Of course, Scotland is in a unique position just now, because we have three verdicts. I am not yet persuaded that replacing one unique situation with another in that respect is much of a step forward, in particular given the serious issues that you have placed on the record today.

Given your formidable track record in the prosecution of crimes in the area that is of concern to the committee, what do you consider to be the standard and the scale of the challenge that corroboration, as a unique feature of the Scottish criminal justice system, places in the prosecution of crimes of this nature? Comparatively, how much greater is the hurdle to get a conviction given the requirement for corroboration, which is not being challenged or changed in any way by the legislation that is before us? How high is the hurdle resulting from corroboration that needs to be overcome? What do we need to be mindful of in addressing the implications of the height of that hurdle, in respect of the sensitive decision on which we have to comment to Parliament?

09:45

The Lord Advocate: The Parliament has looked before at the issue around corroboration. There has been Lord Carloway's review, and I know that many survivors in relation to sexual crime talk about corroboration as being a barrier to justice. I think that, in the judiciary's response to the consultation exercise, it moved away from previous opposition to the removal of corroboration to supporting its removal, because it described it just as such—a barrier to justice.

There are profound issues around the rules of corroboration that are not part of what the committee is looking at. From the perspective of prosecutors, in every case, we have to see whether there is corroboration and, in cases of sexual crime, which are often committed in clandestine circumstances, we struggle to identify corroborative evidence because it is the type of case that is committed in secret between the assailant and the victim and there are not often eyewitnesses. There is always a challenge in such cases to look for and find corroboration.

The committee knows a little bit about the Lord Advocate's reference that I took, which overturned the long-standing authority of Smith v Lees, which was a case from the 1990s that set down the rules that, for corroboration in cases of sexual crime, you are required to prove each element of the crime—that is, that the accused committed the crime, the accused was responsible, the complainer was sexually assaulted and, in a case of rape, she was penetrated. Those separate elements of the crime required corroboration—penetration, lack of consent and identification of the accused.

The Lord Advocate's reference that I took—which was a big part of why I took the role of Lord Advocate in the first place—challenged that authority and relooked at all the historical authorities, the institutional writers. The court of appeal overturned the five-judge bench decision in Smith v Lees and ruled that, in cases of sexual crime—indeed, it relates to other cases—all you need is evidence that the crime was committed and the accused committed it, and you need

corroboration of the fact that the crime was committed and the accused committed it.

In relation to corroboration of the crime, we now look to the evidence of the complainer and still have to find independent evidence that supports her account. For example, in Smith v Lees, it was ruled that distress only corroborated lack of consent, but the new ruling, which overturned Smith v Lees, says that distress corroborates the complainer's account of the fact that she was sexually assaulted and the manner in which she was assaulted. Previous understanding of the need for separate corroboration of penetration was ruled as a misunderstanding and a wrong application of the law.

That is a long answer to your question, Mr Swinney. The biggest challenge for prosecutors in the prosecution of such crimes is to obtain corroboration.

John Swinney: Is it fair for the committee to assume, Lord Advocate, that your view is that, were we to enact the changes to the jury majority provision, we would be making the challenge of securing convictions greater—given that your success with the Lord Advocate's reference has improved the prospects—and that it could be characterised as one step forward and two steps back?

The Lord Advocate: Your characterisation is sound. We have profound concerns about it and have provided submissions.

Given our concerns, and to ensure consistency with other jurisdictions that require unanimity or a qualified majority, there should be provisions for the Crown to seek the authority of the court for a retrial where a majority is not reached. Such provisions are not unknown in Scots law. For example, we have double-jeopardy provisions, and we have the power of the appeal court to order fresh prosecutions.

Fundamentally, however, if we are going to increase the percentage of individuals that we require to vote for a guilty verdict, we will make it far more challenging to secure a guilty verdict in a system that requires corroboration.

The Convener: We have about 10 minutes left, so I will bring in Rona Mackay.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, Lord Advocate. To follow on from John Swinney's line of questioning, I note that, in your previous evidence to the committee, you said that only 20 per cent of single-complainer rape cases resulted in convictions. Setting aside corroboration, as it is not in the bill, do you think that the removal of the not proven verdict would improve that situation?

The Lord Advocate: I just do not know the answer to that question. Juries are currently directed that not proven and not guilty are both verdicts of acquittal. I know that there is discussion in case law in and around sheriffs and judges saying to juries, "Well, it's just a different emphasis," but the fundamental point is that not proven is a verdict of acquittal, and juries know that.

I cannot honestly say that I think that we could reasonably deduce what you suggest from the fact that juries are told that those are verdicts of acquittal. It might make no difference at all.

Rona Mackay: If I understand you correctly, with regard to the not proven verdict, you are saying that, if we get the balance right with regard to jury size and majority, it would work. With regard to your point about retrials, would that not be an enormous burden on an already overcrowded court system?

The Lord Advocate: The Crown operates within the structure of a criminal justice system that is created and determined by the legislature, but there are some potential consequences of the proposed changes and the ancillary reforms that were indicated as necessary following removal of the not proven verdict.

We urge caution in extrapolating from previous research that the removal of the not proven verdict would require to be balanced by an increase in the majority that is required for a guilty verdict. We have indicated that it is unclear why the removal of not proven would result in an increase in conviction rates. We think that no logical argument can be made that a properly directed juror who was discharging their oath and who found, after hearing evidence, that a case had not been proven beyond reasonable doubt and returned a not proven verdict in the three-verdict system would, on hearing the same evidence, decide that the case had now been proven and return a guilty verdict in the two-verdict system. That is the concern.

I recognise the point that you make about provisions for a retrial, but my point is that, if we go with the proposals, we have to be able to provide some form of safeguard for the situation that will arise in which there is a seven-to-five split in a jury. My submission is that it would be appropriate that, following the failure of a jury to reach the required majority, the Crown could seek the authority of the court to re-raise proceedings. There would not be an automatic right to re-raise. We would give careful consideration to the issue, including the public interest in undertaking a second trial, and the court would have to be satisfied as to the appropriateness of granting any such application.

I think that we can take some confidence from the way in which the system works in England. Research indicates that there are hung juries in about 1 per cent of cases. I think that evidence has been given that that might include a single charge among other charges. However, a murder charge could be in an indictment of smaller assaults, so the charge might be significant. Even at the rate of 1 per cent, that would still amount to in the region of 20 trials per annum, based on current projections of 2,100 jury trials in which evidence is led in 2023-24. I do not think that that would place the burden on the system that has been highlighted.

Rona Mackay: I assume that that is not a road that you would want to go down if we could get the balance right with what you consider to be a fair jury size.

The Lord Advocate: Yes. Everything is so interconnected. As has always been said, the whole system is balanced out by various checks and balances. We have inherited our system from our forefathers, and we have been working in it. However, it is only right that we look to change, challenge what has gone before, and ask whether it was right. In doing that, we need to recognise the strengths of some of what has gone before as well as some of the weaknesses that we deal with day in, day out. We have to change.

The Convener: I will bring in Fulton MacGregor. We are just coming up to the end of the evidence session, so I ask you to be brief, please.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning, Lord Advocate. You have given a fulsome response on part 4 of the bill, so my question will be brief.

I know that this is primarily a question for the Scottish Government, but I want to know your views on why the proposals have been put to us. I am trying to understand where the link between getting rid of the not proven verdict and changing the size of the jury came from. I am sure that the Government will not call it this, but it is almost some sort of compromise—those are my words, not the words of the committee or the Government. I am trying to understand where that link might have come from, because every witness whom we have asked does not seem to have an answer to that.

The Lord Advocate: I am here as the Lord Advocate and the independent head of the prosecution service who is responsible for the investigation of deaths in Scotland. I am not an elected member of Parliament, and I am not involved in the development of policy, which is a matter for the legislature and Executive of the day.

It is often said that the Lord Advocate is the Government's adviser on legal issues, with the separate role of independent head of the prosecution service. That is genuinely the approach. The development of policy is a matter for the Cabinet Secretary for Justice and Home Affairs, the elected parliamentarians and the elected party that is in power on the day. It is not for me to comment on that, and I would never do that, because I protect the integrity of my office at all costs. I am not going to be drawn on that question. I cannot answer it.

Fulton MacGregor: Okay. I apologise for asking the question in that manner. I was thinking more about whether you see any benefits from removing the not proven verdict and changing jury sizes. I know that you have spoken clearly about jury sizes, but if the not proven verdict is to be removed, do jury sizes need to change? What I am asking is whether you would rather leave the jury sizes as they are.

The Lord Advocate: The question about the not proven verdict is whether it should be removed. I have been asked whether removing it would mean more guilty verdicts. I have said that I just do not know the answer to that question, but it is reasonable to suggest that, if juries reach the stage at which they are not satisfied of the guilt of an individual beyond reasonable doubt—whether they characterise that in their own mind as not guilty or not proven—they will not get over the hurdle and get to a guilty verdict. That is my answer to the question about removing the not proven verdict.

10:00

The possible changes to the jury size and to the majority are very concerning. To my mind, those changes would make it far more difficult to achieve convictions in the type of cases that we are concerned with. For example, we know that the current conviction rate disguises the very low level of convictions in single-accused, acquaintance-type rape cases. I think that one of the young women who spoke to the committee about her experience said that, even in her case, in which she had a recording of an admission to the offence by the accused, the verdict was only a majority one. What she said echoes some of what I am saying. She gave very powerful evidence on that.

Fulton MacGregor: I agree.

The Convener: As ever, a number of members would like to ask supplementary questions. We are dealing with a really important part of the bill. I will bring in Pauline McNeill and then John Swinney. I ask them to be as brief as possible.

Pauline McNeill: My question is about a specific point, Lord Advocate. You have given the committee a lot of food for thought about the implications of having a majority of seven to five

rather than two thirds. You previously told the committee that you thought that the Crown should have a right—not an automatic right—to a retrial. Do you agree that there should be clear rules about that or transparency about what the grounds would be? I would have thought that, naturally, you would be pressurised by victims and their families to use that right in every case. Do you think that the Parliament should legislate for retrials?

The Lord Advocate: That would be protected by the fact that there would not be an automatic right to re-raise proceedings. In any case, the Crown would give careful consideration to the public interest in undertaking a second trial, and the court would have to be satisfied that it was appropriate to grant any such application.

If the committee were to look at that issue, members might be further informed by an exploration of the way in which things are currently undertaken in England and Wales. There are numerous examples of cases that can be looked at in which the Crown in England and Wales has sought a retrial. For example, a recent high-profile case was the Lucy Letby one. Some of the charges were returned as guilty, but the jury could not return a verdict on some of them, and the Crown went again on those charges. However, that was after very careful consideration.

If it would help the committee, the Crown could put in a further submission on the case law on the issue that has developed in England and Wales and the significant issues that could be looked at, in the context of our assessment of the public interest. The question of what is in the public interest can encompass many different things, including the age of the case, the impact on the victim, and the way that the evidence came out at trial. All those things might be relevant to the public interest decision.

Pauline McNeill: That would be very helpful.

The Lord Advocate: We will undertake to do that.

The Convener: John Swinney is happy not to come back in. Katy Clark has a question.

Katy Clark (West Scotland) (Lab): I would like to ask one question, if that is okay.

Lord Advocate, I completely understand that I am asking you to speculate on this. You have already indicated that you believe that the current proposals would be likely to make it more difficult to get convictions. In your view, what would be the likely impact on convictions if the not proven verdict was simply abolished without any changes to the size of juries or verdict majorities? I appreciate that I am asking you to speculate.

The Lord Advocate: I would speculate that removing the not proven verdict but retaining everything else as it is would still make it very challenging to get convictions in the type of cases that we are concerned with today.

In my view, one significant factor that would change the rate of convictions would be giving far better support to victims and witnesses who come to court. If victims were better prepared, ready for court and prepared for the court process and had the confidence to deal with that and confidence in the system, and those who are involved in eliciting evidence and taking the case to court were properly informed in respect of trauma-informed practice, that, to my mind, would be one of the biggest and most significant improvements in what we do. I think that that would really help.

In my own experience, the better prepared you are for anything in life that requires you to perform or talk, such as being interviewed for a job or having to come to a committee room in the Parliament to give evidence, the better you will do. Your answers will be prepared, and you will be more confident. To my mind, that is the single biggest improvement that we could make.

I took this job to try to make that difference. I am Lord Advocate so that I can make that change. Everything that I have done since my appointment, from the ordering of the review to taking the Lord Advocate's reference to going out to speak to young fiscals and members of the senior staff, has been done to encourage a change in culture and to embed in people a desire to secure justice for victims in such cases. I would really like to see a significant improvement during my time in office.

The Convener: On that positive note, I thank the Lord Advocate for joining us. That has been immensely helpful.

We will have a short suspension to allow for a change of witnesses.

10:06

Meeting suspended.

10:12

On resuming—

The Convener: I welcome our second panel for today: the Rt Hon Lord Matthews, senator of the College of Justice; and Sheriff Andrew Cubie, sheriff of Glasgow and Strathkelvin, appeal sheriff and temporary High Court judge. Welcome to you both; we are very grateful that you have been able to give up time to join us this morning.

I intend to allow up to 90 minutes for this panel. I propose that we focus our questions initially on the proposal for a new sexual offences court, before

moving on to jury majorities, the proposals for a pilot for judge-led trials in certain rape cases, the proposals for independent legal representation for complainers, and, finally, anonymity for victims of sexual offences.

I understand that neither of our witnesses wishes to make an opening statement, so I will open up with a couple of general questions.

The first is on the proposals for the specialist sexual offences court. I will come to Lord Matthews first and then to Sheriff Cubie. What are your views—I mean, rather, what are the views of the judiciary—on the idea of creating a specialist sexual offences court? Is it supported, and if so, why?

The Rt Hon Lord Matthews (Senator of the College of Justice): I am glad that you took out the reference to my views, because I am not here to represent my own views, as you know.

The judiciary is, broadly speaking, in favour of the proposal for a sexual offences court. We agree with the thinking of and the conclusions drawn by Lady Dorrian's review group, for the various reasons that she has set out. Despite a number of statutory interventions over the years and the best efforts of everyone involved, the pace of change has been glacial, and we have not been able to effect the cultural change that we think is needed, because reform has been piecemeal. We need to get away from practices that are rooted in the Victorian era and to develop a modern approach.

As you know, a number of statutory interventions have been made over the years, in 1985, 1995, 2002, 2004, 2014 and so on. Each of those has brought about a useful but piecemeal change. We think that it is important that we start with a clean slate—although, if we had a clean slate, we would not invent the court that we have now.

A specialist court would have its own rules and procedure, albeit that we would start off with the practices and rules for the High Court. As time goes on, I hope that those will be refined and developed. The court and all the practitioners in it—the judiciary, the clerks and everyone else—would be trauma informed.

10:15

Specially trained personnel can be expected to develop best practice at the pre-trial stage and during the taking of evidence. We have recognised the benefits of specialism in a number of areas. It can increase efficiency and reduce trauma. We have had the experience of the preliminary hearing judges—a small coterie of judges who have developed best practice in preliminary hearings—as opposed to the approach that was taken previously, where the approach in pre-trial hearings was not consistent.

For example, we have heard that some lawyers have not understood the rape shield legislation and that perhaps some judges have not understood it or have not followed it properly. In recent years, the appeal court has taken great steps to explain exactly what the rape shield legislation means. A big cohort of specialist judges in the sexual offences court will understand that better than people who are just flitting in and out of such cases.

In my experience, I was a sheriff in Glasgow and we started off the Glasgow drug court. We saw how that specialist court worked, and domestic abuse courts have also been shown to work. Different types of crime affect perpetrators and victims in different ways and call for different approaches. When the Human Rights Act 1998 came in, it brought about a culture change and we looked at things through a completely different lens.

Consistency can be delivered in a specialist court in a way that has not been done so far. As an example, one idea just came to me a while ago. What is the point of putting the defence case to a witness, as is often done, by saying, "You did this, you did that" when the answer is always no? What is the point of doing that? It just increases the trauma. We could develop practice by not doing that, for example. That is just one area in which a new court could start off with a clean slate and not go down the same sort of route.

Generally, a court with national jurisdiction that is separate from the High Court should be able to make greater and more efficient use of the court estate and the judiciary. From all that, you can see that we are in favour of it.

The Convener: Thank you very much, Lord Matthews. You have set out a very comprehensive and well-articulated position. I will bring in Sheriff Cubie on that same question.

Sheriff Andrew Cubie (Sheriff of Glasgow and Strathkelvin, Appeal Sheriff and Temporary High Court Judge): You will be aware from the consultation that the Sheriffs and Summary Sheriffs Association made no comment about the policy choice of a sexual offences court, but I associate myself with what Lord Matthews has said. Tinkering with existing courts would not necessarily achieve the kind of impetus that a new discrete court would have through having a trauma-informed, complainer-centred set of procedures that can evolve in a more focused way, given the focus of the court. Unless there are any particular questions arising from what Lord Matthews has said, I associate myself with that.

I have experience as a specialist sheriff in the domestic abuse and the family court, and I can speak of the particular benefits of specialisation and expertise and the consistency that arises from specialisation, which would be one of the benefits of a sexual offences court that has a discrete jurisdiction.

The Convener: I have a follow-up question for Lord Matthews. I am interested in the views of the judiciary on what the Scottish Government is proposing for how the new court might operate and what it would look like, given that it is not being proposed as a new division of the High Court.

Lord Matthews: In Lady Dorrian's review, she saw it as a separate court. It is a particular court, not just a High Court sexual offences division or anything like that. It would be a separate court that uses the same estate as we have at the moment and the same judiciary, which is made up of judges and sheriffs, as well as sheriffs who would also normally sit as temporary judges, I would think.

To that extent, there would be no moving around or building of new buildings—at least, not in the initial stages. Some of the estate might have to be adapted in due course—for example, if there was a problem with complainers coming across the accused as they walked into the building. However, a lot of the estate has been modernised, in any event. For example, courts in Inverness and the Saltmarket have separate entrances. Aberdeen is not ideal, however, but those matters can be looked at and addressed.

As far as the court itself is concerned, I imagine that it would have wigs and gowns and the normal, formal processes, but I hope that the complainer would not normally give evidence in the court at all, because we are in favour of the use of pre-recorded evidence. That will be a crucial part of this, if it is to succeed.

The Convener: Thank you. Sheriff Cubie, do you want to add anything before I open questioning to members?

Sheriff Cubie: I do not think so, because it is anticipated that the same estate will be used.

Lord Matthews talked about the potential problem of complainers seeing the accused. That will be less of an issue when the complainer's evidence is captured in advance. Some of the issues of the estate and the buildings are less likely to be a problem in circumstances in which complainers will not be there on the day of the trial, their evidence having been recorded at an earlier stage.

It is not anticipated that a new court building will be required, nor much modification to the existing estate—in which, all over the country, trials with juries already take place.

The Convener: Thank you. I know that members will want to come back to look at that a lot more closely.

Rona Mackay: Good morning. On the point about pre-recorded evidence, we have heard from some survivors that they would prefer to have a choice. Do you agree that they should have such a choice?

Lord Matthews: They have a choice. The bill provides for that, I think.

Rona Mackay: So, in the new court, it would not be mandatory and people could choose not to submit pre-recorded evidence.

Lord Matthews: We cannot force them to. In cases that I have been involved in, when a complainer has said that they did not want something—for example, that they did not want a screen—I have asked, who said that they had to have it?

Rona Mackay: That is fine. I just wanted to clarify that.

Lord Matthews: There will be no issue with that. Obviously, they will have to be told that the process can be daunting. In some cases, people have wanted to come in, then thought, "Oh God, I don't want to be here. I want to go," which is fine—we can deal with that as well.

Rona Mackay: That is great.

Sheriff Cubie: There is statutory provision for the variation of special measures at any time, depending on the view of the complainer. As has been recognised, sometimes the complainer will think that they want to give evidence in court but will change their mind; at other times, they will arrive to give evidence remotely but decide that they want to go into court. The variation of any special measures can be made at any time. I am sure that that will be the same.

Lord Matthews: The choice must be informed. They have to know.

Rona Mackay: The bill provides that judges of the sexual offences court will be appointed for a period that will be set by the Lord Justice General, who will also have the power to remove them. What are your thoughts on that? Last week, we heard evidence from the Faculty of Advocates casting doubt on the seniority and experience of the judges who could be appointed to the court. They were dubious about that. Will you set out how it will work in practice? There is fear that, when rape is involved, a sexual offences court could be a downgrading from the High Court.

Lord Matthews: The appointment of those judges is a matter for the Lord Justice General rather than me. However, I cannot imagine there being any issue about the seniority of those judges. The Lord Justice General is not in the business of appointing people who are not senior enough to do the job. Such a thing cannot be said.

Senators will have been appointed as judges through the normal processes. They will be people of experience and skill that have been acquired over the years. The sheriffs, too, who are appointed as temporary judges are people of vast experience and skill. I am not sure where the Faculty of Advocates is coming from in that regard. Generally speaking, the appointment of judges is done on the basis of skill and experience. I struggle to see where the concern of the faculty arises from.

Rona Mackay: The Faculty of Advocates was very insistent on that, and I was also struggling to understand. That is why I am keen to ask for both your views.

Sheriff Cubie, do you have a view on that?

Sheriff Cubie: Again, I would associate myself with what Lord Matthews said. There was some concern—in both the senators' response and the Sheriffs and Summary Sheriffs Association's response—about the tenure of any judges that were appointed and about the mode of appointment, which has been described as cumbersome, as well as about the mode of removal. Therefore, it might be preferable to have some level of tenure and for there to be more formality. However, given the model that we already have for the appointment of temporary judges, which does not seem to have given rise to any specific concerns, it is a bit difficult to understand why there is now thought to be a difficulty in relation to the appointment. As Lord Matthews has said, that will remain in the control of the senior judiciary.

Although some matters in relation to appointment, removal and tenure might have been raised in evidence, I do not think that it would be appropriate for me to comment on them, other than to say that it is difficult to see what particular grounds would give rise to disquiet about appointments to the sexual offences court, as opposed, for example, to the role of a temporary judge.

Rona Mackay: Do you have concerns about any perception that a sexual offences court would be downgraded, because it would be less—shall we say—sombre and serious than a High Court, which, traditionally, has dealt with rape and murder cases?

Sheriff Cubie: No. The Lord Advocate made the point in an earlier evidence session that, in the sheriff court, there are solemn cases at jury level and some very serious crimes are dealt with, so I have no reservations about the degree of solemnity or downgrading as a result of characterising some offences as being part of the sexual offences court.

Lord Matthews: I do not have any concerns about that. For example, when it comes to sentencing, as you know, Lady Dorrian's suggestion—with which we agreed—was that there should be a limit of 10 years, but the bill does not have that limit, and it is a matter for the Parliament to decide whether the sexual offences court would have the same sentencing powers as the High Court.

I do not agree that there is a downgrading. Instead, there is an upgrading, if you like, by giving those particular cases a special court to deal with them, rather than their simply being part of the day-to-day business of the High Court. I would have thought that the formality of the court would be exactly the same as that of the High Court. There is no good reason to think otherwise—except that, although it would still be an adversarial situation, if witnesses are giving evidence in court or commission, I would hope that it might be less confrontational.

Rona Mackay: Thank you. I appreciate that.

Pauline McNeill: Good morning. Lord Matthews, I will start by asking about a point that you made in answer to my colleague about not putting the accused's statement to the victim, because it always results in an answer of "No". The committee has had a lot of exchanges about the culture and the way that some defence counsel question victims. Would you have to agree that with the defence's solicitors in order not to have to put the statement to the victim? How would that operate?

Lord Matthews: Nowadays, when a commission is to be fixed, we go through a checklist at the preliminary hearing. One of the questions on the checklist is, "To what extent is it necessary to put the defence case?" The English have more experience of that than we do. I do not know how the idea—that we must put the defence case to give the witness an opportunity to comment—developed in Scotland. However, in most cases, it is pretty obvious that, if the defence is going to say, "You did this and you did that," we know fine exactly what the witness will say and what she would say, were she asked about it.

We have to bring people on board, so that we know in advance; we can discuss at a preliminary hearing whether it needs to be done. The Crown is quite content not to do it. The thinking behind putting the defence case was that, if a witness went into the witness box and said X, Y and Z and

was not asked about something else, and the accused subsequently went in and said it, without that having been put to the complainer, the first question that the Crown would ask is, "Did you tell your counsel that or have you just made it up?" Whatever the answer to that was, it was generally a reasonably cheap shot because, most of the time, it did not have much effect. People put the defence case to make sure that they could not be criticised in that way, but if it was understood that they did not have to do it, that sort of thing would not come into the equation.

I have seen people getting upset when they have been asked about things that they say did not happen. They say, "Why are you asking me this? I've already told you what happened. Why are you asking me about this, which didn't happen?" That sort of repetitive questioning about what people did gets them upset. I have seen it, and I do not see the need for it. If we could develop a practice in the sexual offences court whereby we do not have to do that, and people understand that nothing will be made of it, that would be a good thing, and it would shorten the length of any cross-examination.

10:30

Pauline McNeill: My next set of questions is about the specialist court. Your written evidence has been really helpful. If we get this right, it could be transformational.

You will be aware that the provisions in the bill do not mirror Lady Dorrian's recommendations, in a number of ways. The sentencing powers of the specialist sexual offences court are the same as those for the High Court, but the specialist court is not the High Court. My personal view is that what we read in the bill is not what Lady Dorrian envisaged, because rights of audience will change, and there is the oddity—in my opinion—of the fact that if murder is the plea of the Crown and there is a sexual element, the case could be tried in the specialist court or in the High Court. There does not seem to me to be any real need for that. You have referred to that in your submission.

Do you think that the Government has thrown the baby out with the bath water? There seemed to be a consensus around the need for a specialist court to be a parallel court to the High Court, but what we are seeing in the draft legislation does not mirror that at all.

Lord Matthews: I am not going to make any comments about what the Government has or has not done, but that was a good try.

The judges are of the view that murder should stay where it is, in the highest court in the land. There are constitutional issues about having two courts with parallel jurisdiction running alongside each other. What is the High Court for? It is not for treason, abuse of power by magistrates, arson in naval dockyards or any of those other cases that we do not get any more. It seems constitutionally anomalous to have two courts with the same powers.

I am not saying that just because we are High Court judges. As you know, we are in there as judges only for a short period of time. The High Court has been the supreme court in Scotland for centuries, and a major constitutional change that involves running another court has to be thought out very carefully. I am sure that you will think about it very carefully, but we think that murder should stay where it is, because it is the most serious crime, and the High Court has to be the one that deals with that. Whether the baby is in the bath or not is not something that I want to discuss.

Pauline McNeill: You say in your submission, in relation to rights of audience, that

"the requirements on legal practitioners should match those in the High Court and that legislation should require them to be specially trained".

I think that we are all agreed on that. Do you want to add anything to that?

Lord Matthews: As I understand it, everyone will be trauma informed. That is a new thing, and it is good. However, the people who appear in the sexual offences court will be either advocates, who have rights of audience in the High Court anyway, or solicitor advocates, who have rights of audience in the High Court. They will have to be solicitor advocates or counsel if the case involves rape or murder, as I understand it. For cases other than rape or murder, there will not be a requirement to have rights of audience in the High Court, because solicitors do not need rights of audience in the High Court for the sheriff court anyway, if they are dealing with cases other than rape or murder. I am not convinced that there is a real change in the rights of audience.

Pauline McNeill: I am not sure myself. Not being a practitioner, I am trying to understand the issue. If the specialist court hears a whole range of cases, including rape, that means that it will be parallel to the High Court, as Lady Dorrian envisages it. However, the crimes that will be indicted in the specialist court include crimes that would previously have been in the High Court and the sheriff court. Is it not the case that there are going to be some differences there?

Lord Matthews: Yes. The High Court can deal with any crime, but rape and murder cases would not previously have been dealt with in the sheriff court. If the indictment involves rape and/or murder, it will have to be someone who has rights of audience in the High Court who deals with it.

Pauline McNeill: For crimes that are not rape or attempted rape—

Lord Matthews: Even attempted rape—

Pauline McNeill: Some of those cases would have been tried in the sheriff court.

Lord Matthews: Yes.

Pauline McNeill: But they will all come together in one specialist court. Is that your understanding?

Lord Matthews: They will—but the nature of the indictment will determine who can appear to defend the case.

Pauline McNeill: Is there a grey area in the sense that some cases that do not involve rape or attempted rape would still be indicted in the High Court, if the Lord Advocate thought that the offences were severe enough—

Lord Matthews: Yes. If someone has committed—

Pauline McNeill: —and that they would attract rights of audience of counsel? Are those cases potentially not provided for in relation to the specialist court because they are not ring fenced by being represented by senior counsel or counsel in relation to rape? Do you see where I am going with this question?

Lord Matthews: Yes. Sometimes, you might have a case that involves five or six cases of attempted rape with different complainers. The Crown would normally put such a case into the High Court, where someone with rights of audience would have to appear. In theory, such a case could go into the sexual offences court, if the bill is enacted in its current form. In such a case, if the indictment did not include murder or rape, someone who did not have rights of audience in the High Court could appear to defend that, as I understand the bill. It is obviously for the Government to explain what the bill means, but that is my understanding of the position. Whether that is a good thing is perhaps not for me to say.

Pauline McNeill: That is my understanding—thank you.

Is it your position, as per your submission, that the legislation should reflect Lady Dorrian's recommendations, as they were?

Lord Matthews: Yes. That was the position of the judges or the senators.

Pauline McNeill: Sheriff Cubie, Lady Dorrian made a point to the committee about the tenure of temporary judges. As a layperson listening to that, I thought, "Temporary judges are temporary judges; they aren't permanent judges." There is a difference between temporary judges and judges who have sat for many years as permanent judges in the High Court. When you say that we perhaps need to look at the question of tenure, do you mean that there would be a fixed term so that the question of the independence of the judge and the appointment by the Lord President would not be compromised?

Sheriff Cubie: Temporary judges receive a commission for a period of five years. That commission will be renewed automatically, unless the temporary judge does not want it to be renewed or there is some reason for it not to be renewed. There is a degree of structure to that, and it was the absence of that structure that caused some concern in relation to the appointment.

In relation to Lord Matthews's answer to your first question about putting the defence case, it is important to recognise that the act embodies a ground rules hearing in advance of any commission taking evidence. That is a particular ring-fenced hearing simply about how the case is to be put to the complainer. The hearing can involve—up until now, in relation to children, the hearing has involved—seeing questions in advance and the questions being approved and agreed.

Therefore, there is a good opportunity for the kinds of concerns that have been expressed—about whether the case needs to be put—to be looked at in detail by specialist judges in relation to the provision of a ground rules hearing, which would take place in advance of every commission. In that way, the kinds of concerns that are expressed by complainers will be addressed in advance of any attempt to take evidence from complainers.

Pauline McNeill: That is very helpful.

Russell Findlay: Good morning. I am not sure whether this is declarable, but I have previously been a witness in Lord Matthews's court—

Lord Matthews: A very good witness, as well.

Russell Findlay: —on three occasions, I might add, and I have no complaints about the trauma-informed experience.

Lord Matthews: I have no complaints, either.

Russell Findlay: Good, good. Scotland is a very small place.

The senators' submission to the committee says that there were "different views" on the juryless rape trial pilot. Can you give me a sense of the breakdown of those views? Of the 36 senators, roughly what were the proportions of those views?

Lord Matthews: I cannot really do that—we did not take a straw poll. All I can say is that I think that there were significant numbers on each side

of the argument, if that helps. We did not take a note of the numbers.

Russell Findlay: Did you have a meeting or did you use a form?

Lord Matthews: We had a meeting of a small committee, in effect. In the first instance, I was part of it. In the second instance, when the bill was introduced, I chaired it. It was made up of about half a dozen judges—I cannot remember exactly, but there were about five, six or seven. That opinion was split, and we know from some emails that came in that the opinion of the wider judiciary was split. I am afraid that I do not know the numbers.

Russell Findlay: I ask because I think that that information would help the committee to understand the judicial thinking. In respect of some of the other proposals, there is a lot more certainty or specific detail on the breakdown of opinion. For example, the vast majority oppose the not proven verdict being retained.

In the senators' 2022 submission to the Scottish Government, the breakdown is two to one in respect of abolition of corroboration, which is no longer on the table. From your evidence earlier, the senators' view in respect of not hearing murder cases in the proposed new sex crime court seems to be unanimous.

Lord Matthews: Yes—as far as I can see.

Russell Findlay: Is that correct?

Lord Matthews: Normally, when we submit something, anyone who wants to can comment. The problem is that we put in two sets of answers on the pilot court business. People may have been quite content with one or other of them but not told us, so it is hard to say what the figures are.

As far as murder is concerned, I do not think that anyone has commented adversely by email or otherwise on what we say about murder. If it is not unanimous, it is a fairly strong majority.

Russell Findlay: On that particular issue, which Pauline McNeill spoke about, that seems to be the case throughout the system, from the Scottish Courts and Tribunals Service to the Crown and the judiciary.

The proposed juryless rape trials seem to be the most contentious issue across the board. Last week, we heard from Tony Lenehan KC, who said:

"The fact that someone sits on the bench and takes the oath is not a guarantee of an absence of hidden bias, or an absence of character defect; there are recent examples of people who have clearly smuggled character defects through the Judicial Appointments Board for Scotland to end up on the bench."—[*Official Report, Criminal Justice Committee*, 24 January 2024; c 66.]

He was referring to the case of a sheriff who trains and judges judges, and was appointed to do so by the First Minister, but was latterly convicted of a criminal offence. He also said in his evidence—I will summarise here—that certain sheriffs are known to be more likely to convict or to impose lighter or heavier sentences. That appears to be, according to Mr Lenehan, common knowledge among defence practitioners.

My question is, given those realities, is that not an argument against getting rid of juries?

Lord Matthews: My problem is that, as you know, the judges are divided. That would undoubtedly be a concern of some of the judges who are against the pilot. I cannot do much more than point to our submissions and say that that may be a legitimate concern on the part of some. Others would say that everybody has a character defect of some kind and that juries may be biased. Who knows what people bring into a decision-making process with them? We have all come across judges who we thought were biased, horrible or nasty.

Russell Findlay: Name names.

Lord Matthews: You could probably work out one or two, whom I appeared in front of when I was a boy.

It is different in this day and age, even though I say so myself. When I was a boy, when you went into the appeal court, for example, you used to have to go in with a tin hat on, but we have pussycats now, compared with who we had before. There has been a sea change, because people were not prepared to put up with the sort of nonsense that we had to put up with when we were younger. Maybe it is a circular thing, and the next generation will be like the last one, but I hope not.

I am not sure that I can go much beyond what we said in our submission, which is that there are views either way. I am not here to represent my view; I fall into one of the categories, but I cannot say which, because that would not be fair on someone who is not here from the other category to give his views. However, those concerns are obviously legitimate.

Russell Findlay: This is more of an observation and an extension of Mr Lenehan's point. The senators' submission is candid in accepting that the make-up of the senior judiciary is quite homogeneous, which might be an argument for maintaining juries.

Lord Matthews: I think that that argument is made by the half of the senators who oppose the pilot.

Russell Findlay: If it is half.

Lord Matthews: The make-up of the judiciary is simply a reflection of the pool from which the judiciary has been drawn. When I started as an advocate, I think that there were 170 practising advocates, about eight or nine of whom were women. The difference now is huge—it is just gradually working out that way. I may be wrong, but I think that more women than men now study law, so I hope that, in the years to come, those figures will change and better reflect our society.

Russell Findlay: I want to pick up on your earlier answer about the evolution and the developments that you have seen in your time on the bench and in the profession. The committee heard some evidence from rape complainers who all waived their anonymity because they were moved to do so because of—in most cases—the poor experiences that they suffered in the justice system.

I do not know whether either of you saw their evidence, but it is worth seeking out the transcript of the committee meeting. What they seem to want from lawyers on all sides—whether Crown prosecutors, defence solicitors or members of the judiciary—is clear communication and, essentially, basic standards of respect and courtesy.

Given that there have been so many horror stories spanning so many years—albeit that you say that things have improved significantly—why does that not already happen? Why do we need to legislate to ensure that trauma-informed practice becomes standard?

10:45

Lord Matthews: I think I know which case you are talking about. As it happens, I have read the transcript of the court proceedings. I do not want to address individual cases, but, generally speaking, things have improved.

We could move towards trying to make such practice standard in the High Court. However, the problem is that the first effort to do something about the issue was made in 1985, and 39 years later, we are still talking about it. I think that the time has come to wipe the slate clean, move on and say where we will go from now, with a clear statement of intent. Trying to change things gradually—as could be done in theory—has not worked so far, and I have no confidence that it will work.

We go on courses and so on, but we cannot really control lawyers; we can stop them when they ask a question, but at that point the question has already been asked. However, I think that we are getting better at that.

Russell Findlay: That is actually very pertinent to another point about section 275 applications. Some of the rape complainers said that, in their cases, the defence had not formally sought a section 275 order, but that they introduced character or sexual history evidence by stealth, by simply stating it. The presiding judge then told the jury to disregard it, but the complainers were of the view that the damage had already been done at that point.

Does that happen frequently? Is there any sanction for doing that? Do you think that, if independent legal representation in relation to a section 275 application became enshrined in the law, there would be more likelihood of such tactics?

Lord Matthews: I have not seen it to that extent. Obviously, some lawyers push the boat out as far as they can push it, but it is our job to stop that. Nowadays, the situation is not as bad. The section 275 applications are all dealt with at preliminary hearings, so lawyers know full well what can and cannot be asked. Any lawyer who tries to do something that has already been prohibited by the court, or for which he has not asked permission, should be slapped down immediately.

I had a case involving a particular lawyer who put in a 275 application, and the evidence that he sought to lead was completely inadmissible; it was against all the principles that have been established in the Criminal Procedure (Scotland) Act 1995 and in recent authorities. He told me that he did not agree with the appeal court, and that he was waiting for the day when all those convictions would be overturned and he could say, “Look, I started it.” I told him that that was wrong and that he should not be doing it, and I had a word with a faculty officer, who spoke to him and told him to mend his ways, which I think he has done.

There are ways and means of telling lawyers not to do that. At the end of the day, if they persisted in doing that kind of thing, they would be open to discipline. I have not seen it to a great extent, but I think that things are better now than they used to be.

The case that you spoke about was a particularly egregious example of a lawyer who did not seem to want to do what he was told. However, I will not say too much about that, because the matter is still being looked at.

John Swinney: I hope that I will not fall foul of the convener, but I am going to ask about part 4 of the bill, if that is okay.

I am interested in the contribution from the senators of the College of Justice on the question of jury size. Based on the response to the Government’s consultation paper, the senators are not supportive of the changes to jury size. Lord Matthews, could you explain the senators’ position

and the concerns that they have about the Government's proposals?

Lord Matthews: We thought that, although a jury of 12 is common in other countries, it gives greater opportunity for one juror, who might be recalcitrant in one way or another, to influence the jury. When the jury is reduced because of illness or whatever, we can go down to 12 anyway.

If you start with a jury of 12, that might be reduced to nine or 10. The proposal in the bill is for seven out of nine or 10 to be enough for a majority. That is quite a high hurdle for the Crown to reach. We thought that 10 out of 15 would be an appropriate majority for a verdict. We are not convinced that the case for change has been made. That is how we approached that.

John Swinney: I am interested in the language that you used. You said that you feel that this represents a greater hurdle for the Crown. I am interested in your perspective on a point that I put to the Lord Advocate earlier, which was about confidence in the criminal justice system. Sheriff Cubie might also want to comment. An individual can be found guilty today by eight votes to seven. We would never know that that was the result, but it can happen. We could find ourselves in a situation in which there is a seven to five vote in a jury of 12 but the person is acquitted on the basis that the two thirds majority threshold has not been reached.

I am interested in the view of the judiciary on that, and in your perspective on what it does to confidence in the criminal justice system. For all of our time, a simple majority has been judged by members of the public to be sufficient to convict an individual of a crime. Suddenly, even an actual majority will not be enough and the verdict will have to be what I might call a supermajority. What does the judiciary think about the risk of that provision to confidence in the criminal justice system?

Lord Matthews: That is not something that we have discussed. As you know, the size of the majority is never revealed, so we do not know what it is. The simple majority, which we have had hitherto, is eight out of 15, in a system where there are two acquittal verdicts. We will be on a completely different playing field if we abolish the not proven verdict, as we are in favour of doing.

I know that a lot of people do not have confidence in the notion of a simple majority in a system that has only two verdicts. That is a different approach and we are looking at it through a completely different lens. I am not sure that we are comparing like with like when we look at what the bill would entail and the current position.

John Swinney: The senators' submission goes on to make a point about a connection between the abolition of the not proven verdict and a change in jury size. I will explore that in a moment.

What are the judiciary's points of anxiety about a simple majority in a two-verdict trial? We are all told—and all the evidence that we have heard tells us—that, in effect, we actually have a two-verdict system already, but with two variants on the not guilty side.

Lord Matthews: Logically, that is the case. It is almost as difficult as trying to explain what not proven actually means. The idea that there are two acquittal verdicts has always been seen as the counterbalance to the simple majority. It is debatable whether that is logically right, but, nonetheless, some people will go for not proven as opposed to not guilty.

When they do not have that choice, there is a stark choice between two verdicts. Therefore, if there is a simple majority and one vote either way can swing that, it might be difficult to say that the case has been proved beyond reasonable doubt when so many people on that jury have found that there is a reasonable doubt or are not satisfied.

How can it possibly be said that that is a safe conviction, to use an English phrase? That is the anxiety, which is why we are a bit concerned about a majority of one. We have said that we want to see a two-thirds majority rather than a simple one. We think that that might relieve the anxiety that any one vote can sway it.

John Swinney: Is it the position of the judiciary that, if we abolish not proven, we should retain 15 as the jury size and a threshold of 10 should be arrived at for conviction?

Lord Matthews: That was the thing. At the end of the day, the size of the jury verdict is a policy matter, but that was the figure that we arrived at. England, for example, requires unanimity at first, and then the judge can tell the jury that they will take a majority of 10 to two or whatever. We do not want to go down the route of having to explain to the jury, "You've got so long, and then I'll tell you that you don't need to be unanimous". However, it does not strike us as right to have two thirds and a simple majority where one vote can swing it, because of the anxiety that we talked about earlier. It tends to indicate that reasonable doubt has played a very big part in the minds of a very large minority of the jury. We do not know what the majority is in any particular case, but we do know that it could be only one vote.

John Swinney: I wonder whether Sheriff Cubie has a perspective on these questions.

Sheriff Cubie: I do not think that I have anything to add. When Lord Matthews was speaking, I jotted down that the simple majority was seen to be counterbalanced by the two

alternative verdicts of acquittal and that, if we are to be left with simply guilty or not guilty, a qualified majority might be appropriate. However, I do not have anything useful to add to what has already been said by Lord Matthews on what is essentially a policy matter.

John Swinney: The submission from the senators makes the point that

"Given the standard direction that a jury can only convict where the Crown has proved its case beyond reasonable doubt, and where there is the requisite majority for guilty, votes for not proven would not logically transfer in whole or in part to guilty."

The way that I read that observation, I think that it helpfully lays the emphasis on the remaining necessity for the Crown to prove its case beyond reasonable doubt, whatever we do in these circumstances.

What is underlying a lot of the motivation behind the bill is a recognition that it is already difficult to secure convictions in cases of a sexual nature. Given the absolutely central principle in criminal cases of the necessity for the Crown to prove its case beyond reasonable doubt, is that not sufficient assurance for the preservation of the simple majority?

Lord Matthews: The anxiety would be that, if there is a simple majority of seven to five—although, I suppose that that would require a swing of two votes—one vote could change that easily. How confident can the public be that the right decision has been made in any particular case, when it depends on just the one vote?

There are two schools of thought about the jury. Is it a single body, or is it a collection of individuals? I am not sure that it is helpful to try to work out the right answer to that. With a qualified majority, we can be more confident that the right decision has been reached, whatever it is. It might be that, as you say, if a qualified majority is needed, it will be a higher hurdle for the Crown to reach.

John Swinney: The point that I am trying to get at is that the necessity—which nobody is trying to change—of the Crown having to prove its case beyond reasonable doubt is, as I think we all acknowledge, a big hurdle. In the absence of three verdicts and with the potential scenario of two verdicts, I am trying to get at what would materially change about that requirement, because it still feels to me like a big hurdle to get over.

Lord Matthews: It always is, whatever the majority is. In every single case, that is the standard that the Crown must reach. There has been a discussion about whether a single judge should sit, and one of the criticisms of that is that a single judge will bring a bias. However, here we are talking about a simple majority, and it could be a single juror who decides the verdict, even after a full jury discussion.

11:00

I come back to the point that, if it were to be decided on one vote, it is difficult to see that that would be justifiable and give people confidence. I know that, logically speaking, it is exactly the same as it is now, because one vote could decide it—either the Crown has proved it or it has not. However, the existence of the not proven verdict has always been thought to counterbalance that, as Sheriff Cubie has said. Whether in sheer logic that is the case is doubtful, but I think that it probably does counterbalance it. In logic, jurors should return a verdict of acquittal if they are going for not proven, but it is hard to say that that will always be the case.

Ultimately, it is a matter for the Parliament to decide which of these majorities they want to enact. We can only say that there is a concern that a simple majority where there are only two verdicts will possibly be conducive to miscarriages of justice in due course.

John Swinney: Are there any other safeguards that the Parliament could consider putting in place that, in the judiciary's view, would be compatible with abolishing not proven and maintaining a simple majority on a two-verdict outcome? Are there other safeguards that the Parliament could consider to address some of that anxiety, without opening up what I certainly air in this committee as a question—I do not think that the public is that engaged with this—that, under the bill's proposals, we could actually have a majority in favour of conviction, but not a good enough majority?

Lord Matthews: I am not sure that there are. It is not something that we have particularly considered, and I am here to speak on behalf of the judges, so anything that I have to say in answer to that would be off the top of my head, which might not be very helpful and might be wrong.

I cannot think of anything offhand. There are root-and-branch ideas, such as ensuring that juries return written reasons, but going down that route would be hugely impracticable. Each one of the jurors might have a different reason; they might all coalesce and be good ones but some of them might be bad ones. You could end up opening a huge can of worms, which would cause more difficulty than it solved.

I am not sure that I can think of anything that would ameliorate that. That is why we thought that a qualified majority is possibly the safest and best approach.

Sharon Dowey: My colleague Russell Findlay mentioned section 275 applications earlier. Do you support the principle that complainers should have access to independent legal representation when there is an application to use sexual history or character?

Lord Matthews: Yes, we do, and I hope that we made that clear in our response. We do, because we have sometimes found that the Crown has not opposed applications that should have been opposed. In the old days—if I remember correctly, it was introduced in 1985—there was a broad interests of justice test at the end, which we do not have now.

It is a pure question of relevance. Even if the evidence is relevant, what is its probative value? Is it good enough evidence to counterbalance the attack on the dignity of the complainer? The Crown's approach is better now, but occasionally in the past it has not been good. We still have cases in the appeal court where we have occasion to say that the Crown should have opposed the application. In fact, the Crown sometimes opposes it at appeal stage, not having opposed it at the preliminary hearing.

It is important that the complainer has the benefit of independent legal representation. Apart from anything else, there is not enough communication and the complainer should be given the opportunity to know what the defence is going to say about her.

It might also be that the complainer says, "Yes, that is true. That is what happened, and I am quite happy to have evidence led about it, because of X." That is fair enough, if that is what she wants. We will still decide on whether it is relevant, but at least she has been given the opportunity—I keep saying "she"; the complainer could be a male, but we know that it is normally a woman—and that is important. We made that clear in our written submission, and we made it clear in the case of RR that the complainer should be told by the Crown as soon as an application comes in.

Sharon Dowey: Earlier, the Lord Advocate said that one of the single biggest improvements that could be made was to have witnesses better prepared and keep them properly informed. Does the bill go far enough? Should complainers have independent legal representation throughout the process?

Lord Matthews: There is nothing to stop a complainer from having a lawyer, but we do not think that their lawyer should be in court during their trial. We are not going that far. We do not have the partie civile process that is in other jurisdictions, and we are not sure what role the complainer's lawyer would have in a case. For example, we cannot have two sets of cross-examination of an accused person, if he chooses to give evidence. That would be unfair.

Prosecution is a function of the state—of the Crown—not of the individual complainer. We have to make sure that the complainer is treated properly, that she knows what is going on, and that she is given every opportunity to participate in so far as is compatible with the trial process. I am not sure what the role of another lawyer would be, other than to take on objections that the Crown should have made.

Sharon Dowey: Will you tell me more about your concerns about further delay being caused in the system? Is there anything that we could do to modify that?

Lord Matthews: I am a bit concerned about the delays that are built into the bill. We are happy with independent legal representation if a section 275 application is made. We are concerned at the notion that the Crown has to ask the court for permission to disclose evidence to the complainer's representative. That will cause delay. There is no reason why the Crown cannot just do that off its own bat without involving the court. If the defence objects to that, it could doubtless apply to the court, but we cannot imagine any circumstance in which the court would say, "No, you are not going to tell the complainer's lawyer about a particular piece of evidence."

We have to make sure that people are not coached, because lawyers cannot coach witnesses in what to say. However, there is no reason why a complainer should not know what is happening or be put on notice of the likelihood and type of the questions that will be asked and how the defence will approach them.

The committee might have heard evidence about defence statements, which are really not worth the paper that they are written on. We cannot have complainers being completely surprised when they come in. I have had complainers who are taken aback because nobody seems to have told them that they might be cross-examined and challenged. That is awful. They should be told that there might be questions that suggest that something else happened, rather than what they said had happened.

I am not sure. I do not want to impugn the people who look after witnesses, but I wonder whether they should at least give the complainers better information, because communication is important to trauma-informed practice.

Sharon Dowey: Sheriff Cubie, do you have any comments on that?

Sheriff Cubie: The Sheriffs and Summary Sheriffs Association unequivocally supported independent legal representation for complainers

in relation to section 275 applications. The observations were limited to the practicalities, some of which Lord Matthews has addressed.

It is fair to add that I had not considered whether there should be longer-term involvement for that independent legal representation. I had not anticipated that. However, there is no doubt that there is widespread support for legal representation of complainers in relation to section 275 applications, subject, perhaps, to the procedure being looked at to avoid the kinds of delay that Lord Matthews talked about.

Lord Matthews: I would also support legal representation in connection with applications to recover medical records and that kind of thing. The appeal court has already made it plain that that should be done.

The Convener: Before I bring in Pauline McNeill, I will ask a couple of questions about the proposals for the rape trial pilot. As we know, the judiciary's submission reflected different opinions on the proposal, which were well set out and helpful. However, we recently took evidence from Professor Vanessa Munro who said, in relation to the proposal for a time-limited pilot:

"In our written submission, we have tried to say that a judge-only pilot would not be an unreasonable move for gathering more evidence, and that is akin to what Lady Dorrian said in her testimony to the committee on the importance of developing a stronger evidence base for comparison."

She went on:

"Part of the reason for having a pilot would be to learn more about what that alternative would look like and what change it may or may not result in."—[*Official Report*, *Criminal Justice Committee*, 24 January 2024; c 17.]

Given that we have heard different views on the proposals for a pilot, I wonder whether you, on behalf of the judiciary, have a thought or opinion on how we take that information together—both sides of the coin, if you like—and what a pilot could look like, perhaps with some different thinking around the proposal as it is set out in the bill, if that makes sense.

Lord Matthews: In a sense, if I answered that question, I would be going out on a limb by giving my own view and I am conscious that it is really up to the Parliament to work out what to do. You know what they say about not teaching your granny to suck eggs.

The Convener: I will ask the question in a different way. As a committee, what should we be thinking about with regard to what a pilot is seeking to achieve? Again, the judiciary has a range of views on that.

Lord Matthews: As I understand it, the purpose of the pilot is not to increase the conviction rate but, with a judge giving reasons for an acquittal or conviction, to work out whether there are trends, what the reasons are for particular decisions being made, to what extent the decisions have been influenced by the nature of the evidence in that case, and whether there are any indications that rape myths have played a part. I understand that that is the sort of thinking that Lady Dorrian had to analyse. It is not just a question of looking at numbers of acquittals or convictions. For all I know, they may be exactly the same—I have no idea, because of the nature of the evidence—but I think that the pilot's purpose is to look at the underlying reasons for the decisions and whether anything can be done to address those reasons in the future.

When it comes to rape myths, for example, the jury manual committee has recently issued new sample directions to be given to juries at the start of the trial. If the pilot finds that there is an issue of rape myths, what do you do after the pilot has finished? For example, in Northern Ireland, the use of videos was suggested in order to set out an example without tilting the balance in favour of conviction, because we cannot do that. Any video would have to be neutral, but it could point out to jurors that there are reasons why people do not complain right away and why people do not resist, so that the jury understands that at the beginning of the trial. Maybe a video would be better than a written direction in making sure that the decision—whatever it is—is based only on the evidence and not on any prejudices that people bring with them. That is what the pilot is designed to flesh out.

The Convener: Sheriff Cubie, would you like to come in on that?

Sheriff Cubie: I do not think so. The committee has obviously received a lot of information on the consultation, including Lady Dorrian's review in the first place and the senators' response. I am not sure that I can pluck out of thin air some magic answer that would allow resolution between the competing sides and I do not think that it is helpful to give a personal opinion.

11:15

The purpose of the pilot is to gather evidence and there is a value to that. The committee will know that jurors cannot be asked about why they have reached decisions or what they have done, which means that there is a dearth of evidence. The review thought that the pilot might be some way of filling that vacuum.

I do not have anything to add regarding what you should be thinking about that has not already been part of the major consultation exercise that has taken place.

Lord Matthews: It is not for me to say, but it may be that the Parliament could think about

legislating in more detail, rather than leaving it to subordinate legislation. An act that set out the parameters of any pilot and said what should happen might be better and might carry more weight than subordinate legislation. That is a personal thought.

Fulton MacGregor: I was going to ask about the pilot of juryless trials, but you covered a lot of that in your response to the convener, so I have only one further question.

A couple of weeks ago, we heard evidence that perhaps shocked us, when witnesses discussed juryless trials. Some indicated that they would have preferred that, but others said that they would rather have 12 or 15 people—multiple people—making the decision, rather than one.

Sometimes, when we legislate, or make changes to the justice system, we are doing things that we think will help victims and witnesses. What input should victims and witnesses have to any pilot as we look for the best way forward?

I will tie all my questions together. I do not know whether it would be far too difficult to do—the idea has just come to me between meetings—but should victims, witnesses and complainers have a choice? Juryless trials could be piloted, but people who want a jury could have one. We heard clear evidence from some witnesses who said that they would have wanted a jury and would not have wanted a single-judge trial.

Lord Matthews: That is ultimately a matter for the Parliament. We have not discussed that particular issue. It is for the committee and the Parliament to decide whether they want to consult victims organisations or individual victims. I have no doubt that you will take, and have taken, evidence from victims and witnesses and I cannot add much to that.

In general terms, it is not normally for a victim to choose whether a case is prosecuted at summary level or at jury level. The judiciary has not thought about introducing a choice, but it is no doubt something that the committee will think about. I do not have an answer.

There are a number of people that you might have to ask. Is the accused going to choose whether to have a judge alone, rather than a jury?

Fulton MacGregor: I am asking about victims and witnesses because this is the victims and witnesses bill. A pilot of juryless trials seems like a good idea, but I am trying to take into account the fact that there might be different views on that.

I am not thinking about a choice further down the line; I am thinking about the pilot. That pilot would involve real victims and witnesses and real accused people, so we must be careful about seeing it just as a pilot. Given that this is the victims and witnesses bill, is there scope for saying to people who are part of the pilot that they could still choose to have a jury trial?

Lord Matthews: That is a matter for the Parliament and there is scope for the Parliament to discuss and decide on that. Justice should not be done at people; it should be for people. I cannot give you an answer because that is not my decision to make, but it is worth making that point.

Sheriff Cubie: Historically, in Scotland the Crown determines the forum in which matters are prosecuted—for example, summarily or on indictment, or in the High Court or otherwise. In England, some accused have the opportunity to make such a choice. As Lord Matthews has already said, to consider giving victims an option would then give rise to the question what right the accused would have to object to that or to make their own representations about the forum. That would be a matter for legislation.

If, in a pilot of juryless trials, the victim were to be given the right to say, “I want a jury”, that would begin to undermine the value of the pilot. That would give rise to a number of other questions. It seems perfectly legitimate for victims to give the view that they would rather have had a jury than a single judge, but it would open up other areas for questioning and consultation.

Lord Matthews: For example, halfway through a case, a witness could say, “I have had enough. I would like to have a jury now” or “I would like to have a single judge now.” All those possibilities would have to be considered, but those are matters for the Parliament to iron out.

Fulton MacGregor: Thank you. As I said, I had more questions on that subject, but I think that you have covered them.

Pauline McNeill: Lord Matthews, you are quite right to say that those are questions for the Parliament to decide, but from where I sit it is not easy to make decisions on controversial matters. We are not practitioners, so your insights are really valuable. I thank you for the evidence that you have given so far.

On juries and the single-judge pilot, Fulton MacGregor is quite correct to say that it is perhaps not appropriate use of language to call it a pilot, because the Parliament could decide on a live trial.

It would be helpful if you could provide your insights and opinions on this scenario. The single judge would be writing up the evidence in the trial, but normally it would be left to the jury to decide what they do or do not believe. How straightforward would that process be? In any case, the law would be determined by the judge, but it would normally be for the jury to decide on

the evidence. How would those written reasons be arrived at?

Lord Matthews: We do it all the time. For example, in civil cases we have to assess witnesses as they go along and write down their evidence. The most tedious part of any case is doing that and telling people to slow down while we write. Therefore that is not a new thing in any sense. It also happens all the time in sheriff court summary cases, which can be just as complex, if not more so, than some jury trials. From that point of view, therefore, I do not see it as being an issue.

Pauline McNeill: That is helpful to know.

Lord Matthews: As it happens, a while ago we had a demonstration of new technology that allows speech to come straight up on to a screen. If a witness speaks into a microphone their words are automatically downloaded, and it also translates speech. We are looking into how we could roll that out into court, if possible, but who knows how long that will take? It would save judges from having to look down. It is not always easy to work out what a witness is like, because if you are trying to note the evidence you are not looking at them at the same time—at least, I am not, because I am not capable of doing both at one time—so such measures would help. We no longer have a stenographer or a shorthand writer to do that.

Pauline McNeill: That is interesting.

Lord Matthews: Later on, we can ask, "What did that witness say?". However, we have to note the evidence ourselves anyway—in court, it is we who are doing that.

Pauline McNeill: So you are doing that anyway.

Lord Matthews: Even at the moment, we do that in the course of a trial. We have to refer to our notes if we write a report later on about the case—for example, if there is an appeal or if we give a report to the Parole Board of Scotland. Also, if we want to go into it when we address the jury, we need to know what that evidence was. We do all that already, so I do not think that it is a particular issue.

Pauline McNeill: I envisage that, as the trial progresses, the judge will have to determine which witnesses' stories they believe or do not believe.

Lord Matthews: In any case, we might form a provisional view. We should not really form any view until we have heard all the evidence, because things can change quite rapidly, depending on what the next witness says. Therefore we try not to form a view, although we might have provisional ideas.

Pauline McNeill: I come to my final question. You are quite correct to ask whether there should be more primary legislation on juryless trials. That is a controversial issue, as we know from the evidence that we have taken, and it has split views among members of the judiciary.

Should clear parameters be set as to what is being assessed? Let us say that the pilot—which is what it is called in the bill—is run for a year. As you have said, the Government is quite clear that we are not assessing the conviction rate. To be honest, I am not clear about how the Government will assess the pilot at the end of it and determine whether it is good or bad. I know that you cannot answer that but, in your opinion, should the criteria for assessment be clearly set out?

Lord Matthews: We have not considered that as a judiciary, so I cannot answer on behalf of the judiciary. Generally speaking, however, I would have thought that any clarity is always helpful. It might be difficult for the eventual act to set that out—aside from how we go about setting up a pilot—but perhaps the policy memorandum could set out what is expected.

It should be made clear that the decision in any particular case is not something that should be evaluated of itself, as we are not considering conviction rates or acquittal rates. We do not want individual judges to think that there is some sort of league table, and we do not want the public to think that there is a league table of judges who acquit or do not acquit or whatever.

Pauline McNeill: Do you not think that that might happen? It has been suggested that the results could be seen as a league table. If the pilot is run for a year and you look at the conviction rates—

Lord Matthews: Exactly. If it could be made clear that that is not what the pilot is about, that would be helpful. You are quite right to call it a pilot with real people in it. That is an important point to make. It is not something that is going to go away. It is not a study, with mock jurors.

The Convener: That helpfully leads into a question that I was going to ask. Staying with the rape trial pilot, this concerns a point that has come up in evidence, which I was very interested in. During previous evidence, it was suggested that some of the concerns about the pilot without juries might be lessened if there were more than one judge involved in a ruling. I am interested in whether the judiciary has a view on that proposal, as a hypothetical. I will also bring in Sheriff Cubie on that.

Lord Matthews: We did not discuss that, as such. Apart from anything else, if there are two judges, that will effectively require doubling the number of judges that we have.

Lady Dorrian's review considered various models and came up with the idea of one pilot, one judge. The choices that we discussed were to have a single judge or the status quo. We have not thought about any other issue. That is a matter for the Parliament in due course, however.

Sheriff Cubie: Like Lord Matthews, I had not considered that.

To respond to something that Pauline McNeill said, it would probably be useful, in advance of the pilot, to have some kind of metrics for its success or otherwise. That is one of the concerns that the Sheriffs and Summary Sheriffs Association raised in relation to success and whether a crude measurement of acquittals or convictions would be used, whereas that is not the purpose of the pilot. Some clarification of that would be helpful.

As for any development of a single-judge pilot court, I am afraid that that is not something that I have given any consideration to—and nor has the Sheriffs and Summary Sheriffs Association.

The Convener: That is understood.

I will close this part of the evidence session. Thank you both for your attendance, which has been hugely helpful to us.

11:28

Meeting suspended.

11:36

On resuming—

The Convener: I welcome our final panel today. They are Dr Andrew Tickell and Seonaid Stevenson-McCabe, who are both lecturers in law in Glasgow Caledonian University's department of economics and law. We are very grateful that you have been able to join us. I intend to allow about 45 minutes for this session, in which we will primarily focus on the proposal to grant automatic lifelong anonymity to victims in sexual offences cases.

I will open with a broad question. Will you outline the work that you have done as part of the Glasgow Caledonian University project on complainer anonymity, and the main findings of that research?

Dr Andrew Tickell (Glasgow Caledonian University): Sure. It is great to be with you this morning.

Our project began in 2019 as a result of a conversation that I had with a newspaper editor about the right to anonymity. One of the most common phrases in reporting on that issue, in the Scottish media and beyond, is that victims—complainers—of sexual offences have a "right to lifelong anonymity". In 2019, I believed that that was true in Scotland, but then I discovered that it is not. Following up on that comment by the newspaper editor, I thought, "I'm a law lecturer. Surely I can find out where in Scots law that right is enshrined." To my shock, it transpires that such a right does not exist. The legislation does not extend the right to anonymity to complainers. Every time the media says that they have such a right, it misrepresents the situation—in a legal context, at least.

In part, that revelation caused me initially, in 2020, to publish a piece concerning how Scotland compares with the rest of the United Kingdom. Everywhere else in the UK protects the right to lifelong anonymity. Scotland is alone on that score. However, above and beyond that, I wanted to look at how international jurisdictions have dealt with the issue.

Internationally, a lot of reporting restrictions were adopted before social media, so the regulatory assumptions that underpin them are often based on assumptions that publishers are newspapers and television and radio broadcasters. That is no longer the reality.

I looked at 20 different jurisdictions in the common law tradition, including Ireland, Canada, the United States and a range of Australian states, to try to understand what international best practice in the area looks like—in particular, how countries have tried to change the law after the advent of social media. I discovered that, to get the best legislation, we should not simply replicate the English provisions but learn the best lessons from international examples—in particular, from Australia, whose legislation, although well intentioned, has generated a range of unforeseen consequential problems.

To pull all that together, I think that there are three broad questions. First, what offences does the right to anonymity extend to? Secondly, when does it begin and end? Thirdly, who decides? Those are the fundamental policy questions that the Government has to address in the bill, and our research has largely spoken to each of those issues. It might be more helpful if we talk about them individually, rather than have me summarising at this point.

The Convener: Thank you. We will come back to that. Seonaid Stevenson-McCabe, would you like to add anything?

Seonaid Stevenson-McCabe (Glasgow Caledonian University): We were very fortunate in that, at Glasgow Caledonian University, we were able to work with our students as part of our work on what we called the campaign for complainer anonymity.

Andrew Tickell omitted a key part of the story: when he told me the position in Scots law, I told him that he was wrong. I said, "No, no, there is legislative provision, although I can't bring it to mind." That was my first error, because Dr Tickell is very rarely wrong.

I, too, was ignorant of that fact. That played out again and again. We asked our students whether a complainer in a sexual offences case could be named, and they said no. Now that I had that insight, I could say, "Show me the bit of law that says that." They could not do so. That helped the students to think about how they could contribute to public legal education on the issue. They have been involved in research and in building our campaign website, they wrote articles for the *Journal* of the Law Society of Scotland and for *Legal Women* magazine, and they assisted in preparing the consultation submission that we provided. Our students have been a big part of the process, and I publicly acknowledge that today.

Again and again, the narrative is that the right to anonymity is already the law, so what is the problem? Andrew Tickell summed up very well that many of the problems have come to light in the age of social media. For our students, who have grown up as digital natives, that really rang true. Working with them on the campaign has been a really enriching process for both of us, and I put my thanks to them on the record.

The Convener: Thank you. I found your written submission fascinating. I had not known that there was quite so much in and around the subject, so it was really interesting to get your perspective. From your very informed and expert perspective, what are your general views on the provisions that are set out in the bill?

Dr Tickell: They are very good—extremely positive—in general. There might be some areas of continuing controversy, which we can discuss, but, overall, I think that the provisions reflect the best lessons from international practice, which is what we were aiming for as a result of the project.

Over the course of our engagement on the issue, we recognised that all political parties had committed to it, so it was important to give the Scottish Government the information that it needed about international practice, because, as you said, convener, it sounds simple—it does not sound as though it should consume a lot of time, given all the political and policy choices to make. That was my view, too, up to about 2020, when I got into the issue, but it is much more controversial, and there are important choices to be made.

In Victoria and Tasmania, well-intentioned legislative reform has caused people significant problems. When I discovered and unearthed that experience in Australia, I was hugely keen for us not to do the same in Scotland. We shared our findings with the Scottish Government at a fairly early stage, so it is fair to say that the proposals largely reflect, or improve on, the suggestions that we articulated in our academic work.

The Convener: Thank you. I will ask a couple of other questions later, but I now open the discussion to members.

John Swinney: I thank the witnesses for being here today and for their important and valuable work.

Lady Dorrian, when she appeared before the committee, made an important point in respect of what we are talking about. She said that, until the age of social media, the common assumption was that an anonymity provision existed, because it was, in essence, voluntarily respected by what one might call the established media, but we are now in a very different era.

Following the convener's line of questioning, I am interested in whether you believe that the bill's provisions cast the net wide enough to address not only the current media that we know about but the media that we might not know about, which might be yet to come.

11:45

Seonaid Stevenson-McCabe: That is an interesting question. When we talk about the established media, we often say that, generally, it has regulated itself very well. That is true, but there have been incidents in which it has not done so. Those incidents are not historical but quite recent. In 2023, there was a case involving the *Greenock Telegraph* in which a complainer could be jigsaw identified. There was no statutory basis on which a case could be brought to court to challenge that, but a complaint was upheld. In 2015, there was a case involving the *Daily Record* in which a gentleman was identified in a report, and his family found out that he had been involved in the case by reading the paper.

Although, generally speaking, the press has regulated itself well, the editors' code of practice is not law. That is an important starting point, and I am heartened to see that such provisions exist in the bill so that they will be put on a statutory footing. That is important for the mainstream press, as well as in the social media age.

I think that the bill deals with the point about social media very well. The definition of "publication" covers

"any speech, writing, relevant programme or other communication in whatever form".

That captures social media. We are all now publishers every time that we send a tweet or put

up a Facebook post, and the bill captures that. It does so in a nuanced way, because it also recognises that, although we are all publishers, we are not all journalists—we have not all had media training, and we do not all understand the effects of publication.

The public domain defence in particular deals with that issue very well. It acknowledges that social media exists and that we do not want to criminalise people incidentally. However, under the current provisions, I could not put up a post on Facebook—my students would probably cringe at me referring to Facebook; it could be TikTok or whatever—in which I named someone. That is a good thing. The bill does not make a distinction between the various types of publication. We cannot anticipate what new platforms will exist, and the bill does not try to do so. As a result, it is broad, and it covers what it needs to cover.

John Swinney: In a sense, therefore, the fact that the bill is predicated on the assumption that publishing is the preserve not of institutions but of individuals gives you confidence, with regard to the research work that you have undertaken in looking at other jurisdictions, that it represents what one might describe as the strongest foundation for providing lifelong anonymity.

Seonaid Stevenson-McCabe: It is interesting to look at other jurisdictions, because we are very late to this issue. Many other jurisdictions, including England and Wales, where the current provisions were introduced in 1992, were not thinking about Twitter, Facebook and the like when they legislated. Although, generally speaking, those aspects are captured by the rules in the other jurisdictions that we have looked at, we have the benefit of coming late to the issue, which means that we can think about how we deal with social media.

I am not concerned that the provisions in the bill would not capture social media publication. When we initially responded to the consultation, we were not concerned that the bill would not capture social media, because it is quite easy to do that just by making it broad. Our concerns were more about what would happen if someone shared a post in which a complainer had shared their experience; would that be a criminal offence? However, now that the public domain defence exists in the bill, that aspect is dealt with well. I think that the bill represents the best lessons from international comparators.

John Swinney: There is then the question of awareness. There have been examples that relate to your assessment of the current position. In some circumstances just now, people will be able to publish information because there is no lifelong anonymity protection in place. However, the point that I am interested in is how people will become aware of the obligation on every one of us who decides to impart anything in the public domain, which will carry should the legislation be enacted? What have you learned from international best practice about how that can be most effectively communicated?

We have before us, as you will have observed, a complex bill with many different elements. You are very experienced in respect of the particular element that we are discussing. What can we reflect on, in our feedback to Government, with regard to the importance of ensuring that people know what the law will be if the bill is enacted?

Seonaid Stevenson-McCabe: That is a very important point. It is interesting that many people currently believe that the position that the bill proposes is already the law, so, in general, people self-regulate quite well in this space. However, that is not the position, so there needs to be public education on the provisions. We need good, strong public understanding of the law. That is true in particular when we think about young people who are active on social media. Public legal education could be a good opportunity to make sure that the provisions are well understood, and schools are a good place to do that.

It is often said that the internet is like a legal wild west, as if the rules do not apply there, but that is not true. The rules still apply on the internet, for example, if someone is inciting violence, committing hate speech or whatever it might be. There is generally, in the public's mind, sometimes a disconnect between the real world and the online world. However, that view is starting to dissipate, and I am not too concerned that people will be incidentally criminalised, for the reasons that we have outlined.

Dr Tickell: We did some opinion polling on public understanding of the issues back in 2021, for which we received some funding from Glasgow Caledonian University. The results were very interesting; they disclosed that the public did not really understand the current situation. A lot of the respondents tended to confirm our anecdotal suspicion—that is, they believed that such provisions were already in place. People are told that by the media every day; I have counted more than 100 references to waiving anonymity in the Scottish media since the start of January. If people already believe that that is the case, they will act in that way, even if they are not subject to legal or journalistic obligations.

More generally, a good aspect of the bill is that it is informed by the reality of social media. I am always worried, when we talk about the regulation of social media, that it is presented as a big bad thing that is a universal menace to people who use it. Of course it can be, and there are online harms, but people use social media for a range of things.

For example, as is so important in this field, it enables people to tell their story and say what happened to them, and other people can learn from their experiences. That includes the global #MeToo campaign and, in Australia, the #LetHerSpeak campaign, which was about the very issue of anonymity.

If we want to see where things can go terribly wrong, we can look at modern Scottish law that deals with children. For example, it is illegal for newspapers and broadcasters to identify a child who is involved in a criminal case but not for random people on Twitter to do so. Why is that the case? It is because, in 1995, the Government legislated in a technologically specific way, with regulatory assumptions about what was being regulated. In contrast, a broad publication approach means that that does not happen.

Equally, what is good about the bill relates to, as Seonaid Stevenson-McCabe discussed, the provisions on secondary publishers: what happens if I share your content? The bill is realistic about the fact that young people and adults will share their experiences, and other people will share them, and we should not criminalise that behaviour. The bill is about not just protecting people's privacy and dignity, but giving people autonomy to decide for themselves, without reference to the courts, that they want to tell their story or, indeed, that they do not want to do so. That is a real strength of what is being proposed in the bill.

The Convener: Before I bring in Russell Findlay, I have a slightly left-field question. Should the provisions on anonymity be extended to the accused? I do not know whether you have looked at that issue in the scope of your work, but, in any case, I would be interested to know what, if any, views you have on that.

Dr Tickell: One is very often asked that question in this context, and a number of submissions to the committee on the bill from members of the public made that point. That was not the focus of my research. However, in each of the 20 jurisdictions that I considered, I looked at whether it is the case that, if a complainant or a complainer gets anonymity, the accused does, too. The answer is no. In fact, there are now only three jurisdictions where that applies. In New Zealand, accused people have anonymity, which the legislation says is for the complainer's interest, not for that of the accused. The Republic of Ireland has had that provision for some time, and more recent changes in Northern Ireland have introduced it.

Those international examples tell us that it is not an "If, then" question. Internationally, complainer anonymity is not regarded as necessitating anonymity for people who are accused of crime. If you look at how that works in practice, you will see that there are substantial problems with it. I will give you one rather graphic example. If there are provisions that say that you cannot identify someone accused of sexual offending unless they are charged or convicted, it would be a crime for anyone to say that they were sexually abused by Jimmy Savile. That is a particular example but a very clear one.

When we are talking about reporting restrictions, it is absolutely incumbent on us—and, I would argue, on you as legislators—to remember that that is criminalising speech. That is not something to be done lightly; it is something to be done thoughtfully, realistically and proportionately.

That is one consequence of extending anonymity to people who are accused of crime. We know that many people are not prosecuted, which, in Scotland, is sometimes because of a lack of corroboration. One would in effect be saying that it would be a crime for those complainers to say that they were victimised by a named person. That would be problematic.

The Convener: That is interesting. I will bring in Russell Findlay.

Russell Findlay: If I extend that point, defamation laws also protect individuals who may be accused of something.

I find the research to be fascinating. As a former journalist, I was guilty of the presumption that you describe—I hold up my hands. The media did and do take the issue very seriously—in fact, the legal advisers to the media effectively give the impression that, even if the words "legal right to anonymity" are wrong, the right to anonymity exists almost by convention. However, I see the need, since the advent of social media, to legislate for that. I see no argument against it.

Given that you are quite satisfied with the bill as drafted, did you have any input into the drafting of or advising in relation to that respect?

Dr Tickell: No, not in relation to the drafting. However, the article that we published in 2022 in the *Edinburgh Law Review*, entitled "How Should Complainer Anonymity for Sexual Offences be Introduced in Scotland? Learning the Lessons of #LetHerSpeak", gave a series of specific arguments about approaches that could be adopted. We also had meetings over a number of months on that with the cabinet secretary and officials, but we had no direct input into the drafting.

Russell Findlay: The bill creates a criminal offence for those who breach the new measure on anonymity. It struck me that one of the defences seems broad: that a person did not know that they were breaking the law. I do not think that that

applies in many circumstances. Are you satisfied with that defence?

Dr Tickell: A lack of knowledge or awareness of a restriction is quite common in cases in which someone did not know and had no cause to be aware that they were potentially making a disclosure about someone.

Russell Findlay: Incuriosity is almost a defence.

Dr Tickell: I do not know whether that is exactly right, in the sense that you might not know something and publish something in good faith that incidentally identified somebody. In many cases, I imagine that your challenge to that is the challenge that the Crown would make to someone who puts information such as that in the public domain.

Russell Findlay: The measure is a significant change to the system. There are potential repercussions, as we have seen in other parts of the world. We have seen what can happen if such a measure goes too far, and that there can be a backlash in that respect. The bill seeks to avoid that.

Given that complainer anonymity is now part of a bill that includes many other huge and contentious changes—for example, the removal of the not proven verdict, the juryless rape trial pilot, and changes to the size and majority of a jury—and that those are getting all the attention, would it have benefited from being a separate piece of legislation?

Seonaid Stevenson-McCabe: I have not considered that, to be honest. Given that we are dealing with sexual offences, the bill seems a perfectly natural home for complainer anonymity to be discussed. I appreciate that this issue seems uncontroversial compared with some of the others. Dr Tickell and I would say that there are controversies in complainer anonymity, although they might not be getting the attention that some of the other issues are.

Russell Findlay: That is the point: complainer anonymity is not getting the attention that it should. It is when we start thinking and talking about it that a lot of stuff comes to the fore, and the committee has, understandably, spent much of its time talking about the other issues that I mentioned.

Andrew Tickell, do you think that complainer anonymity might have benefited from stand-alone scrutiny?

12:00

Dr Tickell: I started researching the issue in 2019; it is now 2024. Making a change was urgent in 2019, so any further delays would be problematic.

It is also worth saying that the bill will amend many different elements of existing law. Working in parallel to this committee, the Education, Children and Young People Committee is considering changes in relation to very similar issues involving children. There has been a degree of mismatch at governmental level—I am not sure whether that has been at the committee level—in that a number of the points that we have made to you about what the Scottish Government got right on this bill were not mirrored in the provisions about children. I am pleased to say that they do now, following amendments that the Government has lodged.

Russell Findlay: Victim Support Scotland seeks to have the right of anonymity given to child homicide victims, which is similar territory. Do you have any views on that? Have you looked at that?

Dr Tickell: Yes. One of the major surprises from the international research that we did related to the impact of death. Intuitively, on a human level, people can understand the reasoning for anonymity. Why should someone lose their anonymity simply because they were a victim of homicide, whether they are an adult or a child? That sounds really compelling, and it is a really important point on a human level, but when we get into the practicalities of it, strange things have happened elsewhere.

I will use an example from Victoria, Australia. The example involves adults, but maybe I can come on to say more about the situation involving children, which is a bit different. There were a number of high-profile cases in which women had been killed in sexually motivated homicides in Victoria. Under the rules there, victims of sexual crimes could waive their anonymity themselves, and, if that did not happen, the matter had to go to court. That does not sound unreasonable, does it?

However, family members discovered that, in the immediate aftermath of their daughters and sisters being killed, it was a criminal offence for them to speak publicly and say that it was their daughter who had been killed. In Victoria, victims' organisations and families who had been bereaved came forward and asked why the families should have to go to court. Doing that takes time—going to court always takes time—money and lawyers. They asked: "Why should we have to do that in order to speak about the fact that we have been bereaved?" That also happened in other places that introduced provisions that extend anonymity beyond a complainer's natural life.

Russell Findlay: That might be why Rape Crisis Scotland is of the view that anonymity should not continue after death.

Dr Tickell: As I understand it, that was its initial position. I think that Sandy Brindley referred to talking to survivors about that aspect and they said that they were concerned about it. However, that is an inevitable consequence if the only way that a person can waive anonymity is to go to court. We know that other people have suffered economically, socially and personally as a result of that reporting restriction. It underscores the fact that it makes it a crime for someone to say, "That is my daughter."

The issues concerning children who are bereaved are being scrutinised at the moment. They raise slightly different issues. Death is a public fact; it has to be registered in public and causes of death must be identified. Equally, I am not sure that the discussion around that recognises some of the terrible realities about who child homicide victims are killed by. Sixty-three per cent of them are killed by one of their parents. If we anonymise a child who is killed by their parents, we are anonymising their parents. That might be worth doing, and I imagine that Victim Support Scotland might say that, if doing that helps surviving siblings, we should give anonymity to their parents. However, we are not intending to give anonymity to perpetrators of crime, so there is a range of moving parts that fit together. That is why the issue of someone's death has proven so complicated.

Russell Findlay: It has just occurred to me a potential consequence is that issuing a death certificate would be breaking the law.

Dr Tickell: There is potential for that to happen, if it was unlawful to publish the death certificate.

I also worry because who we criminalise is an important issue. The fact that someone has been the victim of sexual crime is usually a private matter that can remain private. However, if someone—an adult or a child—is the victim of homicide, their death is a social fact not simply on paper but in the communities to which they belong, because they disappear, or the child will disappear from school or be posted as missing. There is a significant risk that the people whom you criminalise by passing such legislation are not intrusive members of the media who are publishing gratuitous stories but are the well-meaning people on Facebook who post "RIP" and then insert the child's name. None of us wants to criminalise those people.

Russell Findlay: No.

Dr Tickell: To be frank with you, I have had engagement with Victim Support Scotland about the issue, and I will be doing my best to find a constructive way forward. However, the challenges around that are so much more profound than have been fully brought out so far in Parliament.

Russell Findlay: Yes. Thank you very much for that.

The Convener: You have spoken about children in response to Russell Findlay's line of questioning. I will read out what you have written in your submission.

> "It is critical that Scots law respects the legitimate autonomy of complainers in these cases and facilitates their decisions to share—or not to share—their experiences, without imposing additional legal or economic costs".

You go on to say:

> "Finding the right balance ... may be particularly challenging in terms of child complainers".

Could you outline a wee bit more about your research, specifically on the issues that have an impact on children?

Dr Tickell: Yes. There is a range of things. Internationally, the age at which children are able to identify themselves is different in different jurisdictions. In some, it is as young as 16. In some of the states that I looked at, it is as young as 14; in others, it is older than that.

For adults, our fundamental goal was to say that someone should not have to go to court to identify themselves. Everything that I just said about families applies even more powerfully to living complainers. A couple of weeks ago, you heard from panels of complainers, all of whom told you that their experience of court was a profoundly disempowering one. In Australia, the #LetHerSpeak campaign was founded by a woman called Nina Funnell, alongside Grace Tame, who was subsequently named Australian of the year. They made all those arguments for us—that survivors should be able to tell their own story if they choose to.

Clearly, other issues are raised when it comes to children, and most jurisdictions have different provisions in dealing with them. It is important not to criminalise children for sharing content online, and we should not pretend to be shocked that they might do so. Nothing is more foreseeable, frankly, than somebody putting information on the internet, even if it is to a limited friendship group or to a section of the public on the internet.

Is a court-based approach appropriate? That is perhaps implicit in your question. At this stage, I should probably say that I am not a children's rights expert. We make the point, but others, such as the Children and Young People's Commissioner Scotland, may be better placed to

give you a critical judgment about whether the proposed mechanism is appropriate.

Seonaid Stevenson-McCabe: I am equally glad to see that it will not be a criminal offence for children to identify themselves. The provision that applies is proposed new section 106C of the Criminal Justice (Scotland) Act 2016. Subsection (4) of that proposed new section applies to children and adults, who can identify themselves, and that plays into the idea of autonomy, which we have talked about again and again in relation to such cases. Such paternalistic approaches have been taken in some international comparators, and that can be something that we as adults often feel in relation to children. There is, of course, a degree of paternalism when it comes to the court process, but we are talking about other publishers; we are not talking about the child themselves.

It is a difficult balancing act—autonomy versus paternalism. I am much more in favour of giving adults significant autonomy, and I am heartened to see that there is no suggestion that an adult would have to get a court order in order to share their story with a newspaper. There are other concerns with children, and the tension between autonomy and paternalism is balanced differently in relation to children. That is a good thing.

Pauline McNeill: Your evidence so far has been really helpful. Bear in mind that we have only been aware of the proposals since they were published. Russell Findlay is quite right to have said this, and you said it yourself, Dr Tickell: some things are not necessarily as straightforward as we first think. The issue of anonymity is a good example in that respect.

I will start with Seonaid Stevenson-McCabe. Under the proposals, what exactly are the differences between children and adults in relation to how anonymity is lifted?

Seonaid Stevenson-McCabe: This is not to invert your question, but we could start by setting out what is the same. Both children and adults can waive their anonymity. That is a good thing, and it is empowering for all complainers. The difference is that there is a court process for allowing children to share their story more widely with third parties. That is an extra safeguarding layer when dealing with potentially vulnerable young people, who could be open to manipulation. There is a process by which that would go through the court. I think that the relevant section is—

Pauline McNeill: Are those two things tied together?

Seonaid Stevenson-McCabe: Which two things?

Pauline McNeill: You said that the similarity is that children and adults can waive their anonymity. What is the difference between them when it comes to telling your story? Do you have to go to court in order to tell your story?

Seonaid Stevenson-McCabe: I was referring to a child telling their story to another publisher—a third-party publisher. If a child creates a TikTok video in which they speak about their experience, they have told their own story.

Pauline McNeill: Right. I understand.

Seonaid Stevenson-McCabe: If someone else is telling that child's story, we can dispense with the restriction in relation to child victims under proposed new section 106D of the 2016 act, which sets out the process that is involved.

For adults, there is no court process. For adults, it is possible to consent. What are the requirements for consent? There has to be written consent from the adult complainer, and that is sufficient; one would not need to go through a court process.

That is a real strength of the provision. It might have been tempting, in the bill, to replicate for adult complainers the system that is proposed for child complainers, but I do not think that that would be a good balance of autonomy and paternalism.

Pauline McNeill: It would seem so.

Seonaid Stevenson-McCabe: Prior to being an academic, I was a solicitor; I trained in litigation and worked in that field subsequently. Often, litigators try to discourage people from going to court, as it can be costly and can result in delay. In general, not just in the criminal justice system but for justice in general, "Try to avoid going to court" is a good motto for a young lawyer. I think that that holds true in this respect, so I am glad to see that, in the bill, we do not have a truncated system whereby adult complainers have to go to court to get an order so that they can share their story with the press and the press can run it. That would be unnecessarily complicated.

Pauline McNeill: I understand.

Seonaid Stevenson-McCabe: However, children are different. There is a difference, as we have potentially vulnerable young people who could be open to manipulation, so having an extra safeguarding layer in the form of the court is a good thing.

Pauline McNeill: I just want to check that I have understood how the provision applies.

A child under the age of 18 can go on TikTok and talk about their experience as a child victim. That can be shared, presumably, because they are sharing it themselves. Are there any lines there between publishers and other people being able to use that content?

Seonaid Stevenson-McCabe: That is an interesting point, which we raised as a potential problem in our submission. When it comes to the defences, one of the requirements for the public domain defence is that you have to believe that the person was over the age of 18. For example, if your auntie, who knows that you are not 18, reshares your video, the public domain defence does not apply to her. That is potentially problematic.

In our submission, we say that, "Police and prosecutorial discretion" could be used in order not to prosecute the auntie who shares that content. Would there be public interest in pressing ahead with such a prosecution? I think that that is very unlikely. The reality is, however, that the public domain defence would not apply.

Pauline McNeill: That is where I am having some difficulty. Russell Findlay raised this question.

My understanding of Scots law is that not knowing is not generally a defence. You cannot say, "Oh—I didn't know what the law was." I do not know how the law can make a distinction between your auntie and anyone else.

I know what you are trying to say; the auntie should have known that the person was under 18, so yes, that would be the ordinary understanding of it. However, we are legislating here, and we need to get these bits right, so it exercises me a little bit that the defence seems to be extremely broad. My concern is that other people with an interest might use that defence more widely.

Seonaid Stevenson-McCabe: Two defences are being slightly conflated here. In proposed new section 106 of the 2016 act, there are essentially three defences at play. There is the defence of written consent, which is separate. There is the public domain defence, which is where the information is in the public domain and certain conditions apply. Those conditions include having

"no reason ... to believe that"

the person had not given written consent or that they were not over the age of 18. That is to stop incidental criminalisation of people sharing content.

Let us imagine a circumstance in which a newspaper runs a story, and I see the story and think, "That's terrible and wrong—I would like to reshare that." I am not a journalist, and we should not expect citizens to do due diligence as to whether a newspaper had the correct written consent or that, when it reported that the individual was 19, it was wrong and the person was actually 16. That is too much of a burden to put on individuals. That is the public domain defence.

The other defence, which I think we are talking about here, is that, in proposed new section 106F(5) of the 2016 act,

"A person charged with an offence ... has a defence if it is established that they were not aware, and neither suspected nor had reason to suspect, that the publication included relevant information."

What we are thinking about there is not ignorance of the law; it is not about saying, "I didn't know you couldn't share the name of a complainer in a sexual offence case". It is that they had no "reason to suspect" that there was "relevant information" there that could lead to identification.

12:15

We are dealing here with jigsaw identification as well as with naming an individual. Someone could easily share something and, in the wider context, that might create a situation in which a person could be identified. That is what the provision is trying to deal with.

I do not think that Dr Tickell or I have concerns that those defences are too broad. I think that they are sensible. They do not mean that all of us could actually—

Pauline McNeill: You do not think that a good lawyer could drive a coach and horses through that last defence, because it is extremely broad.

Seonaid Stevenson-McCabe: I do not.

Pauline McNeill: My understanding with regard to jigsaw identification is that that is why we are legislating for anonymity in the first place: so that you cannot piece things together and say, "It must be that person". We are talking about the defences. You are clear that you do not have any concerns that a good lawyer could drive a coach and horses through the last defence that you described.

Seonaid Stevenson-McCabe: No, I do not. We are legal people ourselves—as a qualified solicitor, I do not have concerns about that provision, and I do not think that Dr Tickell does, either, but he might want to add something.

Dr Tickell: No, I do not share that concern. It is not a case of ignorance of the law being no excuse—it is ignorance that you have put something in the public domain that could give rise to someone's identification.

I think that we need to discriminate, as the law always does, with regard to intention. Mens rea—as all "Legally Blonde" fans know—and other forms of intentionality have to be proven in court, so I do not see that defence as significantly problematic. We need to have adequate defences to ensure that we do not sweep into criminalisation people whom we do not intend to criminalise.

It is fair to say, however, that what counts as jigsaw identification, and what kinds of information can give rise to identification, is an issue on which, until very recently, there were no Scottish judgments. There are judgments in England about that, but they are often rather fact sensitive. We know that, in the previous parliamentary session, the Parliament itself was faced with some of the challenges of identifying whether information could give rise to the identification of individuals.

With regard to international practice, all the states that I have looked at adopt that approach. They all have something similar that says that we need to avoid publishing information that would give rise to someone being identified. As Lady Dorrian said in the solitary Scottish judgment around the matter, that is not a test of whether the average punter on the street would be able to apprehend who the person was; it would have to be, for example, someone who worked with the complainer.

That can be difficult to judge in any given case because it is so context specific. The safeguard is that individual courts would have to decide these questions; the Crown would have to determine that it was worth bringing proceedings against the publisher who had done that; and, if they were going to make good those defences, they would have to provide some account that made them out.

Pauline McNeill: I have one final question. On the issue of a child who wants to share their story, which would mean going to court, can you give us any evidence as to what the court might consider?

If you are a publisher—a newspaper, for example—you might want to offer someone money in order for them to lift their anonymity. One might say, "Oh well, it's up to the person if they want to do that", but have they thought through all the consequences of sharing their story when the money looks good? Can you give us any evidence of what you think that the court would look at with regard to whether to allow anonymity to be waived in that case? Might they take what I have just described into consideration?

Seonaid Stevenson-McCabe: The bill is also really good on that, because it sets that out quite clearly. It says that the sheriff would have to take into consideration whether

"the child ... understands the nature of an order"

being made—for example, by which their story would be shared—and

"appreciates ... the effect of making such an order ... and gives consent".

In addition, the sheriff would have to consider that

"there is no good reason why an order ... should not be made."

There are criteria there that have to be worked through. I think that they are thoughtfully drafted. It is not just that the child understands the order, but that they understand the nature of the order; they appreciate the effect; they have given consent; and there is no other good reason why an order should not be made.

There are safeguards in place that deal with exactly the situation that you describe, so I think that it is a positive piece of drafting in that respect.

The Convener: I will bring in Sharon Dowey in a moment. First, following on from Pauline McNeill's final question, the issue that has come into my head during the session is victims' autonomy. We have spoken about their choices and the extent of their control. Which factors should be considered in how we inform a victim about their choices on anonymity, so that we balance the legislative provisions with aspects such as their welfare and their right to autonomy? It is more of a practical question about what that would look like. How do we tell them what anonymity is and what it means for them?

Seonaid Stevenson-McCabe: Organisations have done that really well. In particular, I am thinking of Rape Crisis Scotland, which has worked closely with survivors—for example, Miss M, who was involved in the civil rape case and who has maintained her anonymity. It has also worked with survivors who spoke to the committee and who have therefore identified themselves publicly—I will not say that they chose to waive their anonymity, because we know that that is not legally the case. Organisations out there are doing that work in an important and impactful way.

It is difficult, though, because, as the Lord Advocate said earlier, not all complainers are the same. We wish that we could give complainers bespoke individualised support. However, the truth is that the lack of resource in our criminal justice system and our rape crisis centres means that we cannot always do so. However, organisations such as Rape Crisis Scotland are doing that, and doing it well.

It is important that survivors can speak out. When Hannah McLaughlan spoke to the committee, she said that we should not be pushing for everyone to remain anonymous. That is absolutely not what we want to do with this campaign, and I am heartened to say that it is not what the Government wants to do with the bill, either. We want survivors to have the choice; how it is made should, of course, come down to the individual survivor. However, there are organisations that can provide such support.

Sharon Dowey: I want to go back over something that Pauline McNeill said, to ensure

that my understanding of the point is right. Paragraph 38 of your joint submission says:

> "As drafted, the Bill would criminalise a family member, friend—or stranger—who shared a child victim's social media post disclosing they were the victim of a sexual crime. They would not necessarily benefit from the public domain defence already discussed".

Would that take account of a case in which, for example, someone's auntie, who should know that they are under 18, has shared their post? Would we be legislating to criminalise the auntie for sharing a post that the complainer had made of their own free will?

Seonaid Stevenson-McCabe: If the complainer was under the age of 18, yes—that reflects how the bill currently reads. I see confusion on your face, which I can understand. The public domain defence is there to deal with exactly such a situation in relation to complainers. It is because a distinction has been made between complainers over the age of 18 and those under the age of 18.

Our submission also asks whether, realistically, we think that someone such as that auntie would be prosecuted. There is always prosecutorial and police discretion. Would it be in the public interest to press ahead with such a prosecution? Nevertheless, you are correct to say that that is our reading of the bill—that, although, under the provisions as they stand, the individual themselves could waive their own right, sharing such a post in the media could be problematic. Perhaps that point should be considered through amendment as the bill progresses.

Sharon Dowey: So, even if the child did not bring a complaint, the auntie could still be prosecuted for sharing the post.

Seonaid Stevenson-McCabe: Do you mean if the child complainer themselves opposed the police's decision?

Sharon Dowey: I mean if the child did not make a complaint but they put out the post and it was shared by their friends and family. If the person who shared the post was over 18 and they knew that the child who put out the original post was under 18, could someone other than that child just go in and prosecute them?

Seonaid Stevenson-McCabe: There are a couple of things there. The first is that, even if another child shared the post, that other child under the age of 18 could be prosecuted, even if the child who originally posted did not go to the police and report the offence—that is the nature of our criminal justice system. It is not always the victim who takes forward a prosecution.

However, would that happen in reality? Would the police say, "Your auntie did that, which breached the law, and we have done our detective work to get to this point"? That is very unlikely. If someone else were to make a complaint, there would be police and prosecutorial discretion about whether a prosecution would go ahead. However, on a black-and-white reading of the law, the current position is that it could be a criminal offence.

Sharon Dowey: So, it could happen.

Seonaid Stevenson-McCabe: It absolutely could happen.

The Convener: That is an interesting point.

Russell Findlay: I have a quick point for clarification. As the bill is drafted, someone under 18 could put their own experience on social media—they have that autonomy—and it could get 10 million or 20 million views. It could go viral, but if the BBC wanted to report it, it would have to go to court and get a sheriff to say that that was okay.

Seonaid Stevenson-McCabe: Yes.

Russell Findlay: And a sheriff could say no.

Seonaid Stevenson-McCabe: Yes.

Russell Findlay: The phrase was that the child has to be deemed to understand the nature of such an order. You could end up with an anomaly whereby something goes viral and everybody on the planet knows about it but mainstream media, because of that barrier or requirement, are unable to report it. Is that problematic, or do you think that it will work itself out through application?

Seonaid Stevenson-McCabe: It could be problematic. The tension is because we want individuals to be able to share their story in the way that they choose to share it, and their video going viral is them speaking via that particular medium. Pauline McNeill made the interesting point that there is no money involved there and there is no commercial interest at play.

You are correct to say that the BBC would not, without going to court, be able to run the story under the public domain defence in the way that it could if the person were an adult. That safeguard is there to protect children in situations in which they could be manipulated. It is a bit of an anomaly in the drafting, and I am not sure that it was picked up.

Dr Tickell: You can explain this by comparing and contrasting what is proposed with what happens elsewhere. Elsewhere, in general, it is a crime for children to identify themselves as being involved in a case. That makes it much more straightforward, on one level, because it is a crime for them to put out a video about it, it is a crime for anyone to share that video and it is a crime for anyone to publish it.

On the thinking that underpins the bill, the Government does not want to criminalise the child who shares the content. That is the right impulse, but, as you correctly point out, that is in tension with the realities of social media sharing. The provisions on children allowing third parties to publish content about them are clearly based on the assumption that we are talking about a major Scottish newspaper or a major concern sharing the story with the nation, as opposed to whatever international community might engage with it on social media. That is problematic for the reasons that you have identified, but that is the reason why we have that tension. The only reason we have it is because it is not a crime for the child to identify themselves.

It is probably useful to think about it in that way, because the bill does not say that children have a right to waive their anonymity; it says that they do not commit a criminal offence if they identify themselves, and that is why we end up where we end up.

However, I think that it is problematic, and it shows you why the regulatory assumptions that we make and the language in our legislation have to graft on to reality. There is a potential risk of overcriminalisation in that area, but how do you square that? How do you form a provision that does not criminalise a child but, at the same time, has mechanisms in place to protect children from being exploited by cynical media organisations?

Russell Findlay: I have a very quick question. The bill picks the age of 18, but the age differs in other jurisdictions. You say in your submission that that is potentially the most contentious element of the proposal, and you suggest—colleagues may agree—that we should seek further evidence from children's rights experts. That brings me back to the earlier point about the need for greater scrutiny. I know that you do not want to delay anything, but, given that you are not settled on 18, if I understand you correctly, do you believe that we should take more evidence on that?

Dr Tickell: We certainly recommended that you should take more evidence on the issue. As we have seen in a range of different criminal justice contexts, there is a degree of incoherence in our thinking about age thresholds. What you can do when you are 16, 17 or 18 feels rather all over the place, but that is not necessarily a bad thing. Lawyers generally tend to say that we should have clarity and consistency, but, in fact, we know that childhood and the evolution into adulthood are things of steps and stages and that the law frequently has to draw hard bright-line rules that do not graft on to reality well.

You might make an argument that 18 is too old, to be frank. If we allow 16-year-olds to choose whether you should be an MSP, why should we not allow them to—

Russell Findlay: I think that the proposal that 16-year-olds can stand as MSPs has been binned, but yes.

12:30

Dr Tickell: In that context, if we are making those kinds of choices, many 16-year-olds will feel robust enough and will potentially resent the restrictions on their right to go public. I have been mindful of that while going through the bill.

Almost all of the jurisdictions that I have looked at say that children are handled separately in some sense, but it is perfectly legitimate. If a young person came to you and said that they were 17 and should be able to go public, I would be inclined to support that, personally.

The Convener: We have spoken a lot about social media, and I was interested in your response about how it appears that there are greater restrictions on broadcast media than there are on social media. Many social media platforms sit outwith the UK. How difficult would that make our scrutiny of how social media companies are upholding anonymity for victims?

Dr Tickell: There are a few different points in that. One is about how old people should have to be to access the platform under the standards of service, which seems to be honoured more in the breach than in the observance in many cases.

In reality, the question is about who is most likely to publish material that identifies a complainer in such a case. It is someone who knows them and potentially someone with a grudge or who disbelieves them. Therefore, the social issue, if you like—the social knowledge about people—is likely to be in Scotland, not elsewhere. Given the private nature of the offence, because most sexual offending happens behind closed doors, the people who could breach those rules are likely to have a demonstrable connection to Scotland. We have seen that in recent prosecutions for contempt orders. One of the individuals who was prosecuted for contempt in a recent case had shared material while he was abroad, thinking that that was likely to preserve him from any consequences. It did not, because he had a connection with Scotland and was back in the country.

Sometimes, we can envisage the internet, wild west as it can be, as being much harder to regulate than it is. The case that I mentioned is a good example of why the provisions will not be ineffective, not least because they build on a real foundation of social consent. Our polling shows, public attitudes suggest and media practice

underscores that people in general accept the principle that they should not face broader social consequences for taking the very difficult step—which many people do not take, and I do not blame them for that—of coming forward and speaking about what they say happened to them.

The proposals will serve a range of interests—not only privacy, dignity and autonomy, but the administration of justice. All of those are important values that will benefit from the core provisions that are set out in the proposals.

The Convener: Thank you for that nice round-up. It is most helpful.

I will close the session now. I thank the witnesses very much for attending. It has been fascinating evidence.

Next week, we will return to the Victims, Witnesses, and Justice Reform (Scotland) Bill with two meetings. The first is on Tuesday with the Scottish Solicitors Bar Association, and the second is on Wednesday with the Cabinet Secretary for Justice and Home Affairs. That will be our final evidence session on the bill.

12:33

Meeting continued in private until 13:05.

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