OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Tuesday 6 February 2024

Session 6

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CRIMINAL JUSTICE COMMITTEE
6th 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:

Simon Brown (Scottish Solicitors Bar Association)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Criminal Justice Committee

Tuesday 6 February 2024

[The Convener opened the meeting at 12:00]

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

The Convener (Audrey Nicoll): Good afternoon, and welcome to the sixth meeting in 2024 of the Criminal Justice Committee. We have apologies from Pauline McNeill.

I welcome Simon Brown, vice-president of the Scottish Solicitors Bar Association, and thank him for taking the time to attend today's meeting, which is very much appreciated.

Simon Brown (Scottish Solicitors Bar Association): Thank you for having me.

The Convener: Mr Brown is here to answer questions on the SSBA's views on the pilot for juryless trials. I intend to allow up to 50 minutes for that, which will be our main focus today.

I have a couple of questions about the proposal to pilot juryless trials. Please outline your main reasons for opposing the provisions in the bill that would lead to a pilot of rape trials without juries. When I say "you", I am referring to the association and to its position.

Simon Brown: At a very basic level, there is a general view that such trials are not fair, not in the interests of justice and a move away from what is ordinarily perceived as being a fair trial.

The issue is far more complex than that. We do not believe that moving away from having juries would necessarily address the rape myths that the move is intended to address. Scots law, particularly Scots criminal law, is not a very diverse profession, so the jury is the most diverse part of the process. It is our view that the best way to combat rape myths is to have 12 or 15 people from different parts of society in a room together sharing their different opinions.

I know that we will go into this in more detail, but my final general point is that there is no proof that individual judges are any less susceptible to rape myths than jurors are.

The Convener: I will stay on the topic of rape myths and juries. You say in your submission that there is no evidence that juries act on those myths or that they fail to try the accused on the basis of the evidence presented. Will you please expand on why your members believe that to be the case? What evidence are you referring to?

Simon Brown: The proposal is based on a study by James Chalmers and Fiona Leverick. They are esteemed academics, and I have a lot of time for both of them, but the particular difficulty with that type of study is that it is based on mock juries, not people in real situations. The research was also based on a sample of students, which again means that it did not look at a cross-section of society.

We can compare that with the study by Professor Cheryl Thomas, whom the committee heard evidence from. Her study was based on real jurors who had taken part in real rape trials, and it came to different conclusions. We think that the oft-made assertion that there is overwhelming evidence about rape myths may be an overstatement of the case.

The Convener: I have a question about the jury manual. In your evidence, you refer to the fact that juries are now specifically directed regarding rape myths. It is our understanding that a specific additional provision was inserted into the jury manual last year.

Simon Brown: That is right.

The Convener: Are you aware whether any work has been done to look at or evaluate the impact of having that additional guidance in the manual?

Simon Brown: We are not aware of any such work. It would be a good place to start.

If we look at rape myths more widely, as not just a criminal issue but a societal issue, we see that the only way to prevent them is to educate the general public. A good starting point for that would be for those who deal with rape cases—jurors and members of the public—to have clear and accurate directions on what rape myths are and how they can view and perceive them.

I am not aware of whether there has been any study of the impact of the additional guidance, but we definitely think that there should be such a study.

The Convener: I have a final question on rape myths. I am sure that your members have followed the evidence that the committee has taken on rape myths, not just in committee meetings but in written submissions and in research that we are aware of. A strong body of evidence appears to suggest that rape myths exist and are problematic. As you will understand, we are working with a broad church of views. Given the evidence that we have received—that there is such a thing as rape myths—what would be your members' position on what the committee should consider in addressing that issue?

Simon Brown: First, we do not in any way suggest that there are no rape myths. There is a clear body of evidence that such assumptions or preconceptions exist, to an extent. However, our position is that the way to deal with that is not through the removal of the jury but through education. That might be a wider remit than the committee's, but the only way to change the impact of rape myths is to change the views of the public, through education. You cannot educate a citizenry by removing it from the process.

The Convener: Thank you. I will bring in members now.

Russell Findlay (West Scotland) (Con): Good afternoon, Mr Brown. Your organisation's written submission to the committee says:

"We are not prepared to take part in this scheme"—

that is, the juryless rape trials. When I asked the Law Society of Scotland about that, it indicated that some of its members might take part in such trials. The Faculty of Advocates told us that its members, if instructed by a solicitor, would be unable to refuse to do so, because that might be a disciplinary issue. I am trying to establish how real the threat of a boycott is.

Simon Brown: Our current polling is that more than 97 per cent of our members—over all of Scotland—are refusing to take part.

Russell Findlay: Presumably, you have raised the issue directly with the Scottish Government.

Simon Brown: Yes—albeit that we cannot boycott a pilot that does not yet exist. Any formal polling of our membership, or opposition, has to follow the introduction of a pilot scheme. However, there is no doubt at all about the strength of feeling among the legal profession.

Russell Findlay: Even if such numbers reduced, an accused would presumably have the right to instruct a solicitor of their choosing. Is that correct?

Simon Brown: Yes. For example, when the Public Defence Solicitors Office scheme was introduced, Edinburgh sheriff court initially directed accused persons to the PDSO based on their month of birth. There is a precedent for that type of thing happening. That is a good example of law being in place that allows the state, for want of a better word, to direct an accused person to a solicitor. There is no such law that says that a solicitor has to take those instructions.

Russell Findlay: So, the situation is that, in all likelihood, even if nobody formally calls it a boycott, that might be what comes about.

Simon Brown: I think so. Criminal law is a very vocation-led part of the profession, and nobody comes into criminal law for the money. That is a whole different argument, which we have had in different committees. However, even people such as me, who have been doing the job for a quarter of a century, know that nobody enters it specifically to defend rape cases or sex offenders. Those are difficult cases and difficult circumstances. To be frank, it does not take a lot of persuading for members of the profession to say, "Do you know what? This is too much hassle. I don't want to do this." We are already pushing at an open door in that regard, given all the various changes that have taken place in rape trials over the past few years.

Above all, it is our job to advocate for those who cannot speak for themselves and to ensure that people receive a fair trial. If we look at a court such as the pilot court, and we are of the view that it does not constitute a fair trial, it would not be appropriate for us to represent clients in it.

Russell Findlay: In the Government's response to your feedback and explanation, is there any sympathy or willingness to somehow compromise?

Simon Brown: We have had meetings. The president of the SSBA, Stuart Murray, and I had a meeting with the justice secretary about the pilot scheme. To be fair, we went into that on the back of having already discussed the matter with the membership and finding that the membership did not want to take part in the scheme. We cannot see any avenues through which the criminal legal bar would be prepared to take part in such a pilot scheme.

Russell Findlay: I will move on to the purpose of the pilot. It is not clear how the scheme will be assessed as a success or a failure. The Scottish Government appears to be saying that it is not about increasing conviction rates, but your submission says:

"Whilst the Scottish Government Ministers have made contradictory statements whether the purpose of the pilot is to increase conviction rates, the only objective criteria for assessing the success of the proposed pilot appears to be the conviction rate."

Can you expand a bit on where those contradictions have been made? So much has been said already about the legislation that it is quite hard to see the wood for the trees, frankly.

Simon Brown: I think that that is true. If we drill down to basics, the pilot is a response to a perception that the conviction rate for rape trials is too low. Therefore, by any objective test, the pilot can be a success only if it increases conviction rates. If it does not increase conviction rates, what is the point of it?

Russell Findlay: Presumably, the Government is reluctant to put that up front as an explanation,

because that would effectively be saying that the system is broken and does not work.

Simon Brown: One of the things that has come across in all of the dealings is that people do not perhaps recognise the interconnectedness of criminal law and the ways in which different parts influence one another. I do not want to stray too far from the point, but one of the reasons for the lower conviction rate in Scotland is the Crown Office policy on prosecution, which takes the view that, in most cases, if there is a sufficiency of evidence, the Crown Office will prosecute. I am not necessarily saying that that is a good thing or a bad thing but, if you compare and contrast that with England and Wales, where there is a test of a reasonable chance of conviction, you will see a much higher conviction rate, because the Crown Prosecution Service will only take forward cases for which it thinks that it can get a conviction.

To come back to the original point, if the pilot does not increase conviction rates, I cannot see by what other criteria it could be judged a success.

Russell Findlay: That opens the can of worms about the judges presiding over those cases being expected, or whatever the phraseology would be, to come to the right—I say "right" in inverted commas—verdict.

Simon Brown: We are talking about unconscious bias—that is the whole point of the pilot. If there is an unconscious bias and the message is, "You have been selected to take part in a pilot, the purpose of which is to see why conviction rates are too low," it will be hard to argue that there will not be an unconscious bias towards conviction.

Russell Findlay: Okay—thank you. I will not take up any more time.

The Convener: John Swinney, do you want to come in with a supplementary question, or are you happy to wait?

John Swinney (Perthshire North) (SNP): I am happy to wait.

The Convener: I will bring in Sharon Dowey.

Sharon Dowey (South Scotland) (Con): Would your preference be for part 6 to be taken out of the bill altogether?

Simon Brown: Are you referring to the section on juryless trials?

Sharon Dowey: Yes.

Simon Brown: Yes, that would be my preference.

Sharon Dowey: We have mentioned some of the other measures that have already started, such as juries now getting direction on rape myths. There was also the recent reference from the Lord Advocate. Should we wait until we see the results of those measures being implemented—and whether they affect the conviction rate—before we take any more decisions?

Simon Brown: Yes, and that point has already been well made to this committee by Tony Lenehan, who was speaking for the Faculty of Advocates. He made the point that, because there have been so many changes in recent years in rape trials, it would perhaps be prudent to look at the impact of those changes before we take a decision. Having juryless trials would be a very significant change in the law, so it would be prudent to wait.

Sharon Dowey: The bill has a lot of significant changes.

12:15

Simon Brown: There are a lot of good things in the bill, but juryless trials is the aspect that I am here to talk about today.

Sharon Dowey: At the moment, the bill does not have the full details on juryless trials. It will give the powers to ministers to bring in that type of trial with secondary legislation. Should we have more details in the bill, or is it fine to bring that in with secondary legislation?

Simon Brown: There have to be clear criteria for how judges are to be appointed and removed. We have already seen, in wider terms, the Scottish Parliament's regulation of the legal profession in other legislation. The independence of the judiciary has to be maintained. If there are judges who can be appointed and removed by this body, there have to be questions about their independence.

Sharon Dowey: I have one last question. Could juryless rape trials lead to unintended consequences, such as delays in the process and increases in appeals?

Simon Brown: They would certainly lead to an increase in appeals, because one of the criteria, as I understand it, is that judges would be required to give written reasons for their verdicts. We do not have that now. We cannot say why a jury reached a particular verdict. If a judge has to give their reasons, that, by a process of elimination, will give more things to look at and to pick apart, and that will inevitably lead to more appeals.

Sharon Dowey: Thank you.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, Mr Brown. I go back to the first question that you answered. You admitted that there is a lack of diversity in the profession. Your submission says:

"Judges are picked from a very small section of society: they are all middle-aged, ... predominately male, often privately-educated and almost exclusively members of the Faculty of Advocates."

That sounds like an old boys club to me. Does that not say a lot about the profession?

Simon Brown: Again, we are straying into much wider factors. Remuneration for legal aid is an issue that keeps people out of the profession. That is not an argument for this committee and I am not going to rehearse it, but we have already pointed out the demographic cliff edge that we are facing. At present, the legal profession is perhaps 60 per cent or 70 per cent made up of guys like me—men in their 50s who have been in it for 25 years—and there is not a body of people coming after us.

Because of difficulties in remuneration, you tend not to get women in criminal law after a certain age. After they have families, the demands on their time are too much for them to keep doing this type of law. More people from ethnic minorities are coming into the profession—that is definitely happening—but there is a chasm at present relating to the number of new solicitors coming into this branch of the profession, so judges are being drawn from a limited pool. A facetious comment was made at the Edinburgh Bar Association dinner, but it is true: in the inner house of the Court of Session, there are more judges called Colin than there are women.

That situation can be addressed only over time and with a broader and more diverse criminal bar feeding in. However, it is an issue at present, and it is an issue that, to an extent, is balanced by the use of juries.

Rona Mackay: Do you recognise that a judge would be specifically trained and trauma informed, and that therefore bias and the belief in rape myths would not be as great?

Simon Brown: Judges are trained—there is no doubt about that. The High Court judges are at the peak of our profession, but that does not mean that they do not make mistakes. We had a recent case that had a lot of public attention in which first a young man was convicted and given a community-based disposal, then his conviction was overturned on appeal. The mistakes in that case were by the judge, not by the jury. Judges make mistakes, and, to an extent, the collective wisdom of the jury can overcome a misdirection or an error in the statement of the law.

Rona Mackay: I will go back to conviction rates. Your submission says:

"if the Scottish Government wishes to increase the convictions . . . we simply ask, what is the correct conviction rate?"

You quote someone called Tommy Ross KC, who said that

"the correct conviction rate is the number of cases that are proved beyond a reasonable doubt. I believe we are achieving that at present."

Do you think that a 20 per cent conviction rate for single rape complainers is acceptable?

Simon Brown: That would depend on what figure you draw the 20 per cent from. Is it 20 per cent of cases that go to trial or 20 per cent of cases that were reported?

Rona Mackay: As I understand the matter, that is the conviction rate.

Simon Brown: The point that I am making is that the statistics are viewed in a number of different ways, as we have seen throughout the study. My understanding is that the conviction rate is around 42 per cent. That is not particularly far away from the conviction rates of other serious crimes.

There has to be recognition of the peculiar difficulties of rape cases. Rape is a very difficult charge to prove. There is very rarely any independent evidence, and cases are almost entirely dependent on hearing evidence from a complainant and evidence from an accused. The independent evidence tends to be neutral.

In other cases that are exclusively in the remit of the High Court, such as murder, there is a starting point, because if there is a murder, there is a body and there is criminality that has to be explained. That is lacking in rape cases. There is not an obvious pointer towards criminality other than the statement of the complainant, so they are more difficult cases to prove.

Rona Mackay: I understand that, but the Lord Advocate, Lady Dorrian and women's organisations that deal with women victims of rape every day want this to happen. They have all said that there needs to be radical change. If you do not accept what is proposed, what proposals would you put forward for radical change, or indeed, for any change?

Simon Brown: As I have already said, there is clearly a lack of education of the public. If the studies are correct and the rape myths are what they are, the way to resolve that is by educating the public. That is a wider remit than that of this committee.

Rona Mackay: Does that have anything to do with the legal profession wanting to carry on without any changes?

Simon Brown: I do not see how the conviction rate is necessarily affected by the legal profession, other than by us doing our job in trials. We put forward the client's position, we cross-examine

witnesses and we make legal submissions, but ultimately the decision is in the hands of the jury.

One of the points that I made earlier is that if the Crown were to consider putting forward cases for which it thought that it had a better chance of achieving a conviction, rather than putting forward everything on which there is sufficiency to try, that could influence the conviction rate.

There are undoubtedly a number of cases that are called in the High Court in which a rape has taken place in the context of a relationship and, essentially, the evidence that is before the court is that the complainer says, “I was raped,” and the accused says, “It was consensual sex,” and the only corroboration is distress on the part of the complainer and nothing else. That is a difficult decision for a jury to make. There will, inevitably, be lower conviction rates when we are dealing with cases of that type.

John Swinney: Could you explain to the committee the association’s understanding of the role of the Scottish Parliament in our constitutional structures?

Simon Brown: The role of the Scottish Parliament is to create laws for Scotland. That is how I would put it, broadly. Members obviously have to listen to their constituents and do what they think the public want them to do, and they have to do that in a manner that will be seen to be fair. I would think that that is it, broadly.

John Swinney: Thank you for that answer. Does the association acknowledge that the Scottish Parliament has the constitutional power to legislate on the issues that are in the bill?

Simon Brown: Yes.

John Swinney: Does the association believe in the rule of law?

Simon Brown: Yes.

John Swinney: If the association believes in the rule of law, on what basis do your members have the right not to follow the rule of law?

Simon Brown: We are not not following the rule of law; we are choosing not to take on particular types of work.

John Swinney: If Parliament supports the bill, it will make it the law of Scotland that there should, on a pilot basis, be judge-only trials for rape cases. That will be the law of Scotland. I am intrigued to understand on what basis your members have the right not to follow that law, when you have told the committee that it is the job of the legal profession to do its job in trials.

Simon Brown: That is its job. As I said earlier, it is our job to see that an accused person gets a fair trial. If we are faced with a forum in which we do not think that an accused person is getting a fair trial, we can decide that we do not want to be part of that. We are all self-employed individuals, we all run our own businesses and we all have the right to pick and choose what work we do. I have colleagues who do not deal with road traffic work at the justice of the peace court. I know of colleagues who do not deal with proceeds-of-crime work. If someone decides that a certain type of work is not worth the difficulties that it is going to cause them, they are not going to do it.

John Swinney: I am interested, philosophically, in how members of the legal profession can, in essence, say that they will not follow the rule of law, if Parliament agrees to the legislation.

Simon Brown: Again, we are not saying, “We are not following the rule of law.” We are choosing not to take part in a process. That is a different thing.

John Swinney: You are picking and choosing what law you are going to follow, are you not, Mr Brown?

Simon Brown: We are picking and choosing what tribunal or forum we follow or deal with cases in. That is a different thing.

John Swinney: Surely there is an obligation on the legal profession in its entirety. The committee has heard evidence from the Faculty of Advocates that it has no right of discretion in the handling of cases. However, I am interested in what the stance that the association is taking will say to the wider audience in Scotland, and what it says about the legal profession—if the legal profession is not prepared to engage in what has been defined as the law of Scotland.

Simon Brown: First of all, I would say that our stance would be that we do not believe that our clients would receive a fair trial in those circumstances and that we are not prepared to take part in that.

On the wider responsibilities, you talked about the Faculty of Advocates, which has specific regulations. It has the cab-rank rule and there are good reasons for that. That circles back to what I said earlier about the wider implications. So much in criminal law proceeds on the good will of the criminal bar and our obligations to the court and so on. We do not swear a Hippocratic oath such as doctors do. We do what we feel is right; we do what we feel is in the interests of justice.

John Swinney: You will understand my confusion here, Mr Brown. You have just said that there is a good reason for the rules that are in place for the faculty. The process is not concluded yet, but Parliament may well legislate for juryless trials in this bill. I want to understand what message the association’s stance will send to the

wider public in Scotland, when members of the legal profession are not prepared to adhere to the rule of law, although you have told the committee that there is good reason for advocates to be under the obligation that they are under.

Simon Brown: The perception of the public is a matter for the public and how they perceive it—

John Swinney: That rather matters to Parliament as well, and especially to those of us who believe in the rule of law.

Simon Brown: One does not enter my profession without believing in the rule of law. I have to go back again to what we said. We must also be cognisant of our clients' best interests and what we believe to be fair. I would say that one interpretation of such a stance, were it to happen, would be that criminal solicitors would be viewed as standing up for the rights of their clients.

John Swinney: I do not follow the point that you have made in this argument. You have accepted that Parliament has the right to legislate in those areas. If that is the case, and if Parliament has decided that that is to be the structure of our criminal justice system, that is the definition of the law. I do not understand how members of the profession, who will do as you have done today and profess that they support the rule of law, can actually fulfil that and hold the position that you have set out, if the democratic institutions have decided that that is an appropriate step for us to take.

Simon Brown: I cannot add to what I have said already. Our position remains that we do not think that such a tribunal would be fair. Our position remains that we do not think that our clients would receive a fair hearing in such a tribunal and, on that basis, we would not be prepared to take part in it.

John Swinney: That answer rather suggests that your view should prevail and not the view of the democratically elected Parliament of Scotland, which has the constitutional power to make the law.

Simon Brown: If you are talking about the Scottish Government making such a significant change to the law, first of all, there must have been acceptance that such a change would not occur in isolation and without consequences. Secondly, I presume that the Scottish Government has plans or legislation to deal with such a refusal by the criminal bar.

12:30

John Swinney: I am no longer an advocate or spokesman for the Scottish Government. I am here as a member of the Parliament, trying to understand how, in a constitutional democracy, if the Parliament legislates for something, those who believe in the rule of law are allowed to say, "We are having nothing to do with the rule of law" in that respect; whereas there is good reason why others in the profession—for example, as you said, the Faculty of Advocates—must participate in the process.

Simon Brown: The Faculty of Advocates uses the cab-rank rule. The reasoning behind that is that people who are charged with serious heinous offences, such as murder and rape, must not go unrepresented. There is an argument for that. Its purpose is to ensure that fair representation takes place in a fair tribunal. That is the point that we will have to keep coming back to. The tribunal in which such cases would take place is objectionable to us.

John Swinney: Surely, that is the very point of your proposed boycott. You are saying that judge-only trials will somehow not be fair—

Simon Brown: Yes.

John Swinney: —despite the fact that they happen on countless other issues, around the country, all the time. They will be happening at this minute.

Simon Brown: They happen, but on countless other far less serious issues. In judge-only summary trials, there is a maximum sentence of 12 months' imprisonment. This very Parliament brought in a presumption against short sentences. I do not know the exact figure, but in at least three quarters of summary trials there is very little prospect of an accused person receiving a custodial sentence. That is not the case in rape trials, in which sentences are measured in years.

John Swinney: But—

The Convener: I will have to move on and come back to you, Mr Swinney, if we have time.

Katy Clark (West Scotland) (Lab): Mr Brown, do you accept that another potential criterion for the success of a pilot might be the experience of complainers? One of the issues that the committee has been very concerned about over a long time is the experience of complainers. Rape victims repeatedly say that they find it retraumatising to go through not just the process of the actual trial but the whole justice system. Do you accept that it is possible that taking the jury out of the process might impact on complainers' experiences, and that that might be a criterion that we should consider?

Simon Brown: I accept your initial point that there is definitely a difficulty in the process for complainers. I watched the evidence that rape victims gave to the committee. All of them spoke very bravely and eloquently. It is interesting that a number of them are not convinced that removal of

juries would be necessary. My understanding from reading the documentation that they submitted is that the bulk of their complaints relate to delays in the system and to not being informed of what was happening. I stand to be corrected, but I do not recall any of them saying that their issues with the system had anything to do with the jury decision. I cannot see how removing a jury would make any difference to the difficulties that are faced by rape complainers.

Katy Clark: You referred to a conviction rate of 42 per cent. I appreciate that there are different ways of looking at that, but I will take that as the figure. We know that the figure is slightly, but not massively, higher in England, and that the conviction rate for rape is significantly lower than the rate for many other types of offence. I appreciate that many other cases will be summary cases, which will not involve juries, and that those are different, but you specifically made a parallel with other serious crimes, which is not an argument that I have heard being put to the committee before.

Will you elaborate on that? If you are saying that we are making the wrong comparison because we are comparing the conviction rate in rape cases with other forms of crime, what types of crime would make a fairer comparison? Would it be, for example, complex fraud or murder? What direction would you point us in, to look at those kinds of conviction levels?

Simon Brown: First, we do not think that there should be comparisons. That is the problem. It is facile to compare rapes with sheriff court cases. They are two entirely different things.

Katy Clark: Let us exclude them, then. What kind of cases do you think we should be comparing them with?

Simon Brown: The only cases that you can compare them with in terms of levels of seriousness are murder trials and some attempted murder trials. Even then, in most murder trials, the amount of evidence that is available before the jury is of a magnitude of 10 greater than that of an average rape trial. Therefore, it is difficult in our submission to compare rape trials with any other trial.

Katy Clark: Surely, in a murder case, which is a very serious case, the Crown will proceed if there is sufficiency of evidence. That would be the test that it would apply in a murder case.

Simon Brown: As I said, in most murders—although, I accept, not all—the starting point is that a crime has definitely been committed, because there is a body, but that is not the case in a rape trial.

Katy Clark: I understand that often the issue in a rape trial is consent.

Simon Brown: Yes.

Katy Clark: I think that we understand that. However, we know that, in Scotland, the way that the Crown marks cases is based on sufficiency of evidence—

Simon Brown: Yes.

Katy Clark: —which means that if the jury believes the evidence, there should be a conviction. That is what you would expect if the evidence is accepted by the court. Is that correct?

Simon Brown: If the Crown evidence is accepted by the court, yes.

Katy Clark: So, yes—if the Crown evidence is accepted, there should be a conviction. We understand that many judges believe that they have been involved in sexual offences cases in which there could have been a conviction and it would have been justified, but the jury acquitted. Is it possible that we might get different outcomes if such cases were heard by a single judge? Given that this is a pilot—it is not changing the whole system; it is simply a pilot—do you think that that is worth looking at?

Simon Brown: There are a number of assumptions in that. First, there is a difference between sufficiency of evidence and proof beyond reasonable doubt, and you have to accept that the jury has accepted the evidence beyond reasonable doubt. You also have to exclude any evidence that was given by the defence and assume that the jury has not accepted it in any way. Both those are factors in acquittals. Although there might be a sufficiency of evidence, the jury might not believe the complainer, or the jury might be relatively satisfied with the evidence of the complainer but the evidence of the accused raises a doubt.

There are a number of different reasons why acquittals come about, which is one of the problems. We do not have a definitive study from speaking to jurors. I do not see how—

Katy Clark: You seem to be saying that it often comes down to who is believed in court.

Simon Brown: It does, very often.

Katy Clark: Given that we know that there are rape myths—we perhaps do not know exactly how they impact on every case or how often that is a massive factor—it is surely easier to educate and select judges, who are a relatively small group, in order to try to address rape myths in their decision making, than it would be to educate a new jury in every single rape case.

Simon Brown: First, there is nothing stopping the education of judges in the current system, and the jury manual directions on rape myths go a long way towards doing that, so that is already under way. As I said earlier, if you do that, it does not change the problem, because if you exclude juries—if you exclude the public—from the system, you say, "You cannot deal with these cases because you are not clever enough to understand the law."

Katy Clark: That is not what is being said. I have one final question. You said:

> "There will, inevitably, be lower conviction rates".

Are you saying that there will be similar conviction rates whether you have a jury or a judge-only case?

Simon Brown: I think that that is the case.

Katy Clark: Is it generally the case that jury trials tend to lead to more acquittals than non-jury cases?

Simon Brown: No.

Katy Clark: Summary cases tend to lead to convictions, do they not?

Simon Brown: There tends to be much more evidence in summary cases. I cannot remember whether the solicitor advocates gave evidence, but I know that the Faculty of Advocates did; it is also our experience that juries make the right decisions. In cases where we would expect them to convict, they convict; in cases where we would expect them to acquit, they acquit.

Katy Clark: Is it your view that, if juries heard summary cases, conviction levels would be similar to those that exist at the moment?

Simon Brown: Summary cases are different: they involve things such as shoplifting that has been caught on closed-circuit television, fights outside pubs where there are 10 witnesses or road traffic offences when police officers stop a car. Those cases are different. That is why so many summary trials result in guilty pleas.

Katy Clark: You are saying that you do not think that single-judge trials are the solution. Is there any solution if you believe that it is inevitable that conviction rates will be lower for rape? Is there anything that this Parliament should do to change how the process works in order to improve conviction rates, given that we know that there is a sufficiency of evidence in the cases that are taken forward by the Crown?

Simon Brown: The solution is what you have done already: education and better direction for juries about rape myths. The way forward is to educate the public.

We talk about rape myths. Some studies of jurors have found that one reason that has been given for acquittals is that jurors do not believe that they have heard enough evidence. One of the particular difficulties for the criminal bar at present comes from the fact that section 275 of the Criminal Procedure (Scotland) Act 1995 is implemented by the High Court in such a way as to restrict the questioning of rape complainers. No one is saying that that provision is in place without good reason, but it has been increasingly narrowly interpreted. I know that two current appeals to the Supreme Court deal with interpretation of that section.

I can also speak anecdotally. I live and practise in the small town where I grew up, and I occasionally bump into people who have served on juries. I do not, of course, discuss cases with them, but I have twice heard comments such as, "We didn't hear the half of that, did we?" Those situations arise because of section 275. A complainer magically appears in the bedroom of the accused and you do not know anything about what happened before that. Juries can be reluctant to convict because they think that information is being held back from them, which is nothing to do with rape myths. That should be studied.

Fulton MacGregor (Coatbridge and Chryston) (SNP): My question follows on from points made by others, including John Swinney and Katy Clark. Sheriffs across the country already preside over sexual offence cases. I appreciate that they are not as serious as rape cases, which is our main subject, but some sheriffs deal with very serious accusations or offences. That is like having a single judge so, on that basis and in light of what has been discussed today, is there an issue with sheriffs doing that? Do you believe that sheriffs are making the right decisions on the cases—even just the sexual offence cases—that go to the sheriff courts?

Simon Brown: Even in the sheriff courts, most sexual offence cases are tried at sheriff and jury level, rather than at sheriff summary level. Only very low-level cases would be dealt with by a sheriff alone.

A number of factors are at play. Although it perhaps should not be a factor, there is inevitably a view that those courts deal with less serious crimes and the consequences are less significant. If I feel that a sheriff has convicted when he should not have done and that my client has a £500 fine that he should not have got, that is different from having a High Court judge convict when he should not have done and my client getting six years that he should not have got. That should not be the case, but it is.

Some cases are less serious. Most cases that go through the sheriff courts are hugely different from rape trials and, almost inevitably, there is significantly more evidence in those cases.

Fulton MacGregor: I am trying to make this clear for myself. The main issue for you and your association is the seriousness of cases, not the ability of a single judge. It is about the seriousness of the consequences and you believe that a jury is more likely than a single judge to provide a fair trial for the accused.

Simon Brown: Yes. The seriousness is a factor in the idea of a pilot. We can talk all day long about how the proposals are for just a pilot scheme, which is about exploring things, but it involves real people and, if they are convicted, they will have real convictions. That is an issue. It involves experimenting with people's lives, effectively.

12:45

Our view is that the best defence against rape myths is to have 15 different and diverse people pooling their points of view. That will result in the dilution of any particularly strong erroneous belief that is held by any one particular member of the jury. As I said earlier, there are studies that show that single judges are not immune to unconscious bias, for whatever reason.

There are also bigger issues. Why do we say that jurors cannot be trusted to put aside rape myths, but they can be trusted to deal with sectarian, class or race issues? If juries are felt to be able to cope with any of those, why are cases involving rape in any way different?

Fulton MacGregor: I wanted to come on to discuss the pilot, as others have done. As a number of people have pointed out, the Government papers refer to the proposal as a "pilot", but you are right to say that, if it takes place, it will be very real for complainers and the accused. The recommendations do not suggest that either the accused or the complainer should have any say on whether they should be part of the pilot. That is not to say that that will not be the case, but we do not have the details. Focusing on complainers—as it is a victims and witnesses bill that we are considering—what are your thoughts on that? Do you think that the victim or complainer at the trial—or even the accused—should have a say on that?

Simon Brown: I would counter that with a question. How would you put that to a complainer? If you ask a complainer, "Would you rather have your case heard by a single judge or listened to by a jury?" and the complainer asks, "What's the difference?" do you explain to them, "Our pilot study says there's more chance of you getting a conviction with a single judge than with a jury"? In that case, they will elect for a judge every time.

To return to what I was saying in my response to Katy Clark, my understanding is that the bulk of the complaints that are made by victims, survivors and complainers have little to do with the deliberations of the jury; they are about the system in general.

Fulton MacGregor: The reason why I asked that question goes back to something that you mentioned earlier, which I have brought up in previous evidence sessions. A few of us on the committee were surprised at some things that we heard from victims who came before us. I agree with you that they gave fantastic evidence. However, some of those victims, or complainers, who had gone through the process said that they would have preferred to have had a jury. That has led me to think about what complainers' rights will be if the pilot goes ahead. Some people would choose to have a jury if they were offered that in the pilot; others would choose just to have single judges. What are your thoughts on that?

Simon Brown: You will appreciate that there is a lot of interaction about this on social media. It was put to the bar association by a legal commentator on England and Wales just a week or so ago that there is apparently a prevalence in Canada and, I think, South Africa, where a rape accused can choose, for them to opt for judge-only trials, because they believe that they will get a fairer trial in some cases. There was no evidence to back that up, however, nor any submission about it. The argument was along different lines, which goes back to what Mr Swinney said about the right of the profession to pick and choose what cases it does.

Why do we say that the system that works so well for everything else does not work for this particular type of case? I still do not see what it is that overwhelmingly says that we must diverge from a system that has worked so well for every other type of case.

Fulton MacGregor: I have one final question. Returning to your exchange with John Swinney earlier, I hear what you are saying about the process and 97 per cent of your association not being comfortable. I want to ask the question in another way, however. I do not know how the pilot will work, but it will probably be carried out in a specific area. If you are representing an accused who is in that trial area and they say to you, or one of your members, that they want to go ahead as part of the pilot, where do you stand on that?

Simon Brown: That is a difficult ethical question. You are balancing your obligations to your client and what your client wants with what you think is right. Week in and week out, I have

conversations with clients where they say, “I want to plead guilty to this,” and I say, “I don’t think you should, because I do not think there is evidence to prove that.” Equally, I have conversations where they say, “I want to go to trial,” and I say, “I don’t think you should go to trial, because I think if you go to trial you are going to get found guilty of this, this and this, and there is a deal to be done.” I understand what you are saying, but if my job is to give legal advice to clients, that legal advice has to extend to, “My view is that I don’t think you’ll get a fair hearing and I don’t think you should do it.”

Fulton MacGregor: Okay, thank you.

The Convener: A number of members want to come back in with supplementary questions, so we might have to work on for another five minutes or so, if that fits for you, Mr Brown.

I have a practical question. How many members does the association have at the moment?

Simon Brown: At present, we have just north of 400 members.

The Convener: Okay. You might not know this off the top of your head, but how many criminal defence lawyers are there in Scotland?

Simon Brown: In the whole of Scotland, there are 933 on the criminal register, but a freedom of information request made by us indicates that the number who actively practise—who make more than £6,000 a year from Legal Aid, which is one case a month—is about 600.

The Convener: Do people become members of the association on a voluntary basis?

Simon Brown: Yes. It is a representative body.

The Convener: Just for my understanding, can you outline the difference between the Scottish Solicitors Bar Association and local bar associations? What are their roles and functions?

Simon Brown: We are, in effect, an umbrella organisation for the local bar associations. Back during the legal aid negotiations, rather than having the bar associations from Edinburgh, Glasgow and Aberdeen coming to forums like this, we felt that it would be more effective to have a committee drawn from those various bar associations and one representative body, which arose out of discussion between bar associations.

The Convener: Thank you. That is helpful background information.

I will bring in Sharon Dowey and then Russell Findlay. I ask you to make your questions fairly succinct.

Sharon Dowey: Fulton MacGregor covered a lot of what I was going to ask. Are there any circumstances in which you might support a pilot? We have heard that some of the complainers or survivors are not in favour of juryless trials, but some will be in favour of them. Following on from what John Swinney said, if you had a complainer and an accused who were both in favour of taking part in the pilot—because, as you said earlier, we are talking about real lives, real situations and real convictions—would you be supportive of that?

Simon Brown: Our position on the process as a whole would have to stay the same. I do not think that we could pick and choose based on individual case criteria. If we did that, the obvious thing to do would be to look at cases where we felt that the evidence was particularly thin and to pick those to go before a single judge to make the conviction rate go down. I do not think that we could do that.

Russell Findlay: I have two quick questions. The first is probably just a yes or no. It picks up on John Swinney’s line of questioning. As drafted, does the legislation contain anything that would legally compel or require your members, or any solicitor, to take part in those non-jury trials?

Simon Brown: We cannot be compelled to do that.

Russell Findlay: The next question, which we have not touched on yet, is about the provision for independent legal representation in the event of a section 275 order being made. That provision has been universally supported. However, the Crown Office, the Scottish Courts and Tribunals Service, the Law Society of Scotland and even Lady Dorrian have all expressed concerns that, as drafted, it would result in more churn and delays, contrary to the interests of a complainer.

Simon Brown: That is inevitable.

Russell Findlay: Do you have any proposals for how that particular problem might be addressed?

Simon Brown: The bulk of section 275 applications are made at preliminary hearings. I imagine that, in the new system, if there is a case in which the defence lodges a section 275 application, the judge will fix a specific hearing and, at that stage, a solicitor will be appointed for the victim or the complainer. I do not see there being an issue with that.

However, section 275 issues can arise during a trial. I do not see how that would be dealt with. There is then the difficulty of saying, “That section 275 application merited her being represented but this one doesn’t.”

Russell Findlay: I think that the Crown Office suggested that the timescale should be increased. The bill as drafted allows X days for the process to be completed.

Simon Brown: We agree with everyone else that that is definitely an area that is worth exploring. Our concerns are practical, and they are twofold. First, as you have pointed out, it will inevitably lead to delay. Secondly, as I have already pointed out, we are a very small number of people, and that will be an extra layer of work when we are already struggling to cover the work that is in front of us.

Russell Findlay: I do not want to put words in your mouth, but there is no easy or obvious fix to the issue.

Simon Brown: Off the top of my head, there is no obvious fix that would not lead to an appeal. The only way of dealing with the issue that I can think of is making it the case that section 275 applications would have to be dealt with at a primary hearing and could not be heard later on. However, given that we do not know what evidence will come out in a trial, I do not see how we could do that.

Russell Findlay: Thank you.

Rona Mackay: In answer to my colleague Fulton MacGregor, you said that you could not understand why sexual crimes should be dealt with differently from other crimes, yet you have spoken at length about how difficult it is to get convictions in such cases and about the uniqueness of such crimes. What I am getting from you is that you do not want to see any change at all. Would that not be letting women down?

Simon Brown: No. Our view is that the fairest way of dealing with such cases is for a jury to hear them. If complainers are being let down, it might be that they are being let down earlier on in the process. Perhaps they are not being given proper advice on what the process entails and what the likely chances of a conviction are.

I do not think that the jury system lets down women—that is not the case at all. I think that there are other factors within the whole trial process of rape cases that let down complainers, but that is outwith my control.

Rona Mackay: Will your members come up with any constructive alternative proposal?

Simon Brown: The Government makes laws that are brought into courts. Invariably, we find ways to make them work. That always happens.

Rona Mackay: But you have said that you are not going to do that in this case.

Simon Brown: In this particular case, we cannot see a way that would make the proposed system work fairly, or in a way that is fair to our clients.

The Convener: John Swinney has a brief final question.

John Swinney: The answer that you have just given is slightly different from the ones that you gave me. Rona Mackay put to you the nature of the proposition, and you said that it is your job to make laws work, but you told me that you will not do that if the bill is enacted by Parliament. That is quite a contradiction of what you said to me in your earlier answers.

Simon Brown: I will explain what I meant. I was saying that, in general terms, laws are made, they come into the courts and then, through the process of trials and appeals, they are inevitably filtered and refined. That is what happens. However, in relation to the particular proposal that we are discussing, I was saying that I do not think that we can see a way that would make it work.

John Swinney: That exchange rather says to me that the association is picking and choosing what it is engaging with. That is where I have a difficulty with the association's position, because that relates directly to the rule of law.

Simon Brown: Well, it does, but, again, I think that our position in relation to that would be that what is proposed is such a fundamental change to the Scottish legal system that it must be opposed.

The Convener: We have run out of time, so I must bring the session to a close. Thank you very much indeed for attending, Mr Brown.

Tomorrow morning, in what will be our final evidence session on the Victims, Witnesses, and Justice Reform (Scotland) Bill, we will take evidence from the Cabinet Secretary for Justice and Home Affairs.

12:59

Meeting continued in private until 13:09.

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