OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 4 December 2024

Session 6

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Pàrlamaid na h-Alba

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CRIMINAL JUSTICE COMMITTEE
38th Meeting 2024, Session 6

CONVENER

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

DEPUTY CONVENER

*Liam Kerr (North East 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)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Pauline McNeill (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Sandy Brindley (Rape Crisis Scotland)
Simon Brown (Scottish Solicitors Bar Association)
Michael Meehan KC (Faculty of Advocates)
Stuart Munro (Law Society of Scotland)
Kate Wallace (Victim Support Scotland)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 4 December 2024

[The Convener opened the meeting at 10:00]

Victims, Witnesses, and Justice Reform (Scotland) Bill: Stage 2

The Convener (Audrey Nicoll): Good morning, and welcome to the 38th meeting in 2024 of the Criminal Justice Committee. We have no apologies this morning.

Our main item of business is evidence taking on the Scottish Government's intentions in relation to stage 2 amendments to the Victims, Witnesses, and Justice Reform (Scotland) Bill. We have agreed to hold today's evidence sessions in the light of the importance of the proposed changes to the bill. We want to understand what various organisations think about the proposed changes before we look at the detail of those changes in the new year.

Our first panel of witnesses consists of organisations that represent victims of crime. I am pleased that we are joined in the committee room by Kate Wallace, who is chief executive of Victim Support Scotland. We are joined online by Sandy Brindley from Rape Crisis Scotland. Regrettably, Louise Johnson from Scottish Women's Aid has had to submit her apologies this morning, as she is unwell. However, we are advised that Scottish Women's Aid has indicated that it will provide a written submission.

I refer members to papers 1 and 2. I intend to allow around 75 minutes for the first panel of witnesses. I will try to group questions and answers around the different parts of the bill, and I will begin by asking an opening question about part 4.

The Scottish Government is now seeking support for a jury reform model that would have only two verdicts—in other words, no not proven verdict—and that proposes 15 jurors and a two-thirds majority requirement for conviction. I am interested in your organisations' views on the proposed changes compared with what was in the bill at stage 1. I will come to Kate Wallace first and then I will bring in Sandy Brindley.

Kate Wallace (Victim Support Scotland): We support the abolition of the not proven verdict, and there is significant support for its abolition from victims, who feel that the verdict is very unclear. That has been proven across the evidence that the committee has gathered.

We totally recognise the issues around jury size. We would have been okay with dropping the number to 12, because Scotland is a bit of an outlier in having a jury size of 15, but we recognise, too, why the Cabinet Secretary for Justice and Home Affairs has indicated that the plan is to retain the jury size of 15.

I am sure that Sandy Brindley will have more to say on this, but changing the majority is the biggest issue. We understand from the jury research that was done by James Chalmers and Fiona Leverick that it is all wrapped into the not proven verdict change, but we have significant concerns about moving from a simple majority to a two-thirds majority. However, as I say, Sandy will probably have more to say on that. We think that it will be more difficult and will potentially erode the good work done by getting rid of the not proven verdict.

The Convener: Thanks for that. I will go straight to Sandy Brindley with the same question and then come back in with a follow-up question.

Sandy Brindley (Rape Crisis Scotland): Good morning, everyone. Our organisation continues to support the removal of the not proven verdict. It is used disproportionately in rape cases, and, in general, rape survivors say that it is a verdict that they cannot understand and which leaves them feeling without an ending or a proper closure to their case. The Government's intention to continue with removing the not proven verdict is the right decision.

We have significant concerns about the proposed jury majority change. Our fear is that the overall impact of the bill, particularly with the proposed removal of the judge-led pilot, could be that there are fewer convictions. We know that jury members can be particularly reluctant to convict in rape cases, and any change to jury majority would potentially make it harder to get a conviction. Given how low conviction rates are already, it would be a tragedy if that were to be the impact of the bill, particularly given how hard survivors have worked on the bill and on the campaign to remove the not proven verdict.

The Convener: The Government has been very clear that the proposed change in jury size and majority would be a balancing measure. If the not proven verdict is removed with no corresponding change to jury size and majority, that could introduce an imbalance relating to risk around conviction. Do you accept that there is a need for a balancing measure to be included in the stage 2 amendments, as the Government has proposed?

Kate Wallace: We would really want to try to explore that further, because, as Sandy Brindley has laid out, we worry that introducing a balancing measure would bring with it other unintended

consequences. It is proposed that the not proven verdict is removed because it is unclear and it is not understood by anyone—jurors, victims or the family members of victims. We would seek to have a further discussion to reassure ourselves, because we think that the change to jury majority could result in a reduction in conviction rates. Let us be honest: Scotland is already different from the rest of the world as it has not changed the jury size from 15 to 12—it is all tied into that. We would be seeking assurances through further conversations, because we worry that the proposed change in jury majority and size would not be a balancing measure, but would overstep and go the other way.

Sandy Brindley: The Government seems to be heavily reliant on the concept of balance and the link between the not proven verdict and the need for the jury majority to change, which is based on the mock jury research that Professors Chalmers, Munro and Leverick produced. I do not think that that is a substantive enough basis to support the link that has been made. The research demonstrated that there was a slight increase in the propensity to convict in two specific scenarios. I do not think that that gives us sufficient evidence to be confident of the suggested link between the removal of the not proven verdict and an increase in convictions. I also think that the research asked the wrong question. The question that we need to ask is how we achieve the correct verdict based on the evidence, not how we carry out a numerical exercise to try to ensure that rape convictions stay as low as they are currently. The Scottish Government's approach does not make sense to me.

The Convener: I will open up the discussion to other members who want to come in on part 4.

Pauline McNeill (Glasgow) (Lab): I am not going to go over ground that the witnesses have already given evidence on, because I know their views on those aspects. It feels as though, once the not proven verdict is removed, Scotland is going to be an outlier whichever way you look at it—unless we adopt the English position, which I know that the witnesses are opposed to, of having all 12 jurors, or possibly 10, agree on a verdict.

How could Scotland remove its not proven verdict, which is one of the few elements that there seems to be quite complete agreement on, without being an outlier? I am really interested to know how the witnesses think that we could fix that. Sandy, do you want to go first?

Sandy Brindley: It is really difficult to compare the Scottish system to, for example, the system in England and Wales, because they are such distinct legal systems. One of the key differences that we have in Scotland is the requirement for corroboration. I know that there have been changes to that through recent judgments in cases brought by the Lord Advocate, but it remains the case that two sources of evidence are needed to get a prosecution in Scotland, which is not the position in England and Wales. To me, our requirement for corroboration is the key distinction between the Scottish system and the system in England and Wales.

Kate Wallace: As Sandy is alluding to, for Scotland not to be an outlier, you are talking about a fundamental root-and-branch review, all the way through from looking at definitions, evidence and investigation to, as Sandy said, the threshold for prosecution. That would be significant, but it is not what has been proposed in the bill.

We know that the not proven verdict was an accidental verdict and that it was not really meant to happen in the way that it did. It certainly was not imagined that it would be in existence for this length of time, so that seems to me to be something that can be addressed. We know that, as you said, there is widespread support for the removal of the not proven verdict.

However, in addressing your question, Sandy is alluding to the need for a significant undertaking right through the entire justice system. I guess that there has been significant work done previously on elements of that, too.

Pauline McNeill: My question is, how do you resolve the situation if you are worried that Scotland would be an outlier? Do we just be the outlier and adjust our system, bearing in mind that removing the not proven verdict would apply not just to sexual offences cases, but to all cases that go before the court? Surely England must have some equivalent to corroboration.

Kate Wallace: Not that I am aware of.

Pauline McNeill: Do they not have any system of evidence that would be comparable to Scotland's system to prove a case?

Kate Wallace: Yes, they do, in that there will be evidence that is corroborated, but it is not done in the same way as in Scotland. It is not necessarily the case that you will not get a prosecution without corroboration down south. On the not proven verdict and your point about other crimes that are not sexual crimes, we have a support service in Victim Support Scotland for families bereaved by murder and culpable homicide and I can say that the not proven verdict is just as problematic for that group of victims and for the family members of those victims.

Pauline McNeill: We will have to vote on this pretty soon. What I am trying to understand from both organisations is what you would like us to argue for in relation to the jury size. Give us some guidance on that. That is what I am trying to get to,

because if we do not want to be an outlier, we either go with the English position or we do something that is completely unique to Scotland, which is what we have.

Do I conclude that you would prefer the bill not to go through? I am just surmising. There has obviously been a lot of discussion behind the scenes. That has concluded with the Government changing its position to a jury majority of 10 to five, which is what the senators had asked for; it is not what the committee had concluded. I am just trying to understand where you would like the committee to be at stage 2. If you cannot change the Government's position, is that fatal enough for us to vote against the bill?

10:15

Kate Wallace: From the point of view of Victim Support Scotland, the absolute priority is abolition of the not proven verdict. We are less concerned about jury size and majority, although we have some concerns about jury majority. Obviously, Sandy Brindley's Rape Crisis Scotland perspective is different from ours. I am sure that members will move on to ask about our response to the removal of the single-judge trial pilot; again, our organisational view on that issue is that it is not significant enough for members not to vote for the whole bill. The absolute priority is removal of the not proven verdict because that is what causes the most distress.

Pauline McNeill: Thank you—that is helpful.

Sandy Brindley: I do not think that removing the not proven verdict makes us an outlier. It depends on how you view the function of the not proven verdict.

Pauline McNeill: I am not meaning that. It is about the jury numbers. It has been suggested that, if we go for a majority of 10 out of 15, we would be an outlier. However, we were already an outlier under the original proposals in the bill. My question is whether we should accept that we are going to be an outlier or whether we try to bring ourselves into line—I do not like using the term "into line", but you know what I mean. Should we mimic another jurisdiction, so that we are not an outlier? That is what I am trying to get at. Does that make sense?

Sandy Brindley: Yes. The committee was correct to say in your stage 1 report that, if the Government is asserting a link between removing the not proven verdict and needing to change the jury majority, you need more evidence from the Government, so that you can make an evidence-based decision. I noted that the letter from the Cabinet Secretary for Justice and Home Affairs to the committee did not provide further data.

It is reasonable for the committee to anticipate from the Government some further data that would give a basis for your decision on that issue. I appreciate the manner of the decision that faces the committee. These are fundamental changes to our legal system, and no one wants to be involved in something that will make the situation worse for rape complainers, for example. Obviously, all of us want to make sure that we have a system that is also fair to the accused. It is reasonable for the committee to continue to ask for data from the cabinet secretary so that you can make a more informed decision.

Liam Kerr (North East Scotland) (Con): Good morning. I will throw this question to Sandy Brindley straight away, because that was a really important point that she just made. I will follow on from Pauline McNeill's questioning. The uniqueness of the system in Scotland involves the three verdicts, the jury size and corroboration. If the system is not considered holistically and, in the absence of the evidence that Sandy Brindley rightly flagged in her previous answer, if the bill were to proceed with the removal of the third verdict, is there a risk of unintended consequences that would make the system unbalanced or, indeed, worse for the people who you are talking about?

Sandy Brindley: The removal of the not proven verdict could make things worse if it is linked to a change in the jury majority. That would make it harder to get a conviction, particularly in rape cases. I note the Lord Advocate's evidence at stage 1 about her concerns with regard to the change in jury majority.

The difficulty comes from the Government's assertion that the removal of the not proven verdict necessitates a change in jury majority. I have not seen sufficient evidence to substantiate that link.

Previously, Lord Carloway did a review of whether corroboration should go. Subsequently, Lord Bonomy carried out a post-corroboration safeguards review, which suggested that the jury majority would have to change if corroboration went, but we still have corroboration in Scotland. The not proven verdict means the exact same as the not guilty verdict, so I fail to see how it is a safeguard.

Liam Kerr: Kate Wallace, do you want to add to that?

Kate Wallace: With regard to what you outlined about the key features that are different about the Scottish system, the risks of having a not proven verdict, as opposed to the risks of abolishing it, are very clear from our perspective. People—including jurors—do not understand what a not proven verdict is. Having jurors who do not understand

the verdict that they are about to give is hugely problematic and needs to be addressed. At the end of the day, a not proven verdict is an acquittal.

From our perspective, the removal of the not proven verdict is necessary and long overdue. I agree with Sandy Brindley's points—we would ask for further work to be done so that we could be assured on jury majority size, including a look at the more widely available evidence on that. However, from our perspective, it is riskier to keep the not proven verdict than it is to abolish it.

The Convener: Given that there are no more questions on part 4, we will move to part 5, which relates to the proposals for a sexual offences court. In the cabinet secretary's letter to the committee, she sets out her commitment to

"a standalone court that has the freedom to operate in a manner that enables it to both identify and develop changes in practice and procedure that will deliver meaningful improvements to the experience of sexual offence victims."

The correspondence from the Government sets out a number of areas in which it proposes to lodge amendments at stage 2, such as legal representation for an accused, security of tenure for judges, and choice in how vulnerable witnesses can give their evidence. There is quite a lot of detail on what is being proposed for stage 2. What are your views on those proposals?

Kate Wallace: As you will know from the evidence that we gave previously, we are supportive of a stand-alone specialist sexual offences court. It is really important to have a group of people who are very highly trained and who specialise in sexual crime. We are very supportive of that. We also recognise, and have been involved in, the subsequent conversations on representation and on ensuring that the accused get a fair trial and are represented properly.

Our understanding is that the amendments at stage 2 will address the issues that you have just outlined in a way that I hope the committee will be satisfied with. As I said, we have been involved in those conversations and we are reassured by the amendments that will be brought forward at the next stage.

Sandy Brindley: I reiterate Rape Crisis Scotland's support for a stand-alone specialist sexual offences court. I will focus on two areas in relation to the Government's proposed amendments. The first is around legal representation. The committee was rightly concerned about the rights of audience in the specialist sexual offences court. It is really important that the rights of audience should be the same as they currently are in the High Court. My understanding from what the Government proposes is that the amendments will ensure consistency of rights of audience. That is the correct approach to take in the bill, and the committee was correct to raise it as a concern.

The other area that I will comment on is special measures. The ability to give evidence by commission is a valuable and welcome option for many survivors of sexual violence, given how traumatic it can be to give evidence in a rape trial. However, it is important that complainers have agency and can make informed choices about how they give evidence. Complainers say to us that the lack of control that they often experience in the justice process can mirror the lack of control that they experienced during the rape, and that adds considerably to the trauma of going through the justice process. The more that we can give complainers choices and control over the court process, the more likely we are to make it a process that does not totally retraumatise them.

Special measures are one area where complainers can and should have control, so I support an amendment to the bill that removes the requirement for a judge to decide whether it is in a complainer's interest to not give evidence by commission. The bill currently provides that, if a complainer wants to give live evidence, a judge would need to decide whether doing so is in her or his best interest. Although that is well intentioned and is about protecting vulnerable witnesses, it veers into a paternalism that removes agency and control. The committee was right to highlight that in its stage 1 report, and it is correct that the Government is looking to address the issue. The amendment to the wording of the bill that I would like to see would remove the requirement for a judge to make the decision about what is in the best interest of a complainer.

The Convener: That is a really helpful and detailed response.

Kate Wallace: On Sandy Brindley's last point, my understanding is that there are plans for amendments around exactly that point, to make sure that complainers have a choice on special measures. I am certainly reassured by that—there is reference to it in the letter that the cabinet secretary sent the committee.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning to both witnesses. My question follows on from Sandy Brindley's point about the evidence of vulnerable witnesses. The cabinet secretary has said that she proposes to lodge an amendment around the opportunity to give prerecorded evidence. What exactly would you like the amendment to say? What should it look like? It is an important amendment, which will come before us quite soon. It is important that we get it right—the sexual offences court will not work if it is a sexual

offences court only in name; it must have all the right stuff around it.

Sandy, what should that look like, and where should the choices be for victims and witnesses? We were beginning to touch on that a minute ago.

Sandy Brindley: It is right to have a presumption of prerecorded evidence in the specialist court. That is one of the elements that could make the court substantially different from the High Court and from how cases are currently prosecuted. We hear overwhelmingly from rape survivors that the experience of giving evidence on commission can be positive—it can be less traumatic and there is more certainty about when it will happen, rather than having to navigate floating trial diets.

Where we have negative feedback about evidence on commission, it is primarily around the lack of ability to make informed choices; for example, complainers not being told that the accused can see them when they are giving evidence on commission. That is an implementation question rather than a legislative question.

For the committee, in looking at the bill, it is about removing the specific provision that says that a judge must decide whether giving live evidence is in a complainer's best interest, which would mean that there is the possibility of a judge overriding a complainer's wish to give such evidence. How they want to give evidence is a really big and important decision for complainers. It should be an informed decision, and the Crown has a fundamental role in talking through with complainers what the different options entail. There is also a role for independent legal advice if a complainer wishes it, to help them to make informed choices.

I do not think that our legislation should have written into it such a paternalistic notion that judges can override a complainer's wish to give live evidence because they think that it is not in her best interest. The amendment should be made to the bill to ensure that we have a presumption of prerecording but that there is some choice and agency for complainers within that.

Kate Wallace: I agree that it should be an assumption that evidence will be prerecorded, but a choice should be given. As I said, my understanding is that the amendment that will come at the next stage will address the points that Sandy Brindley has raised around removing judges' ultimate decision-making power.

On the point about how the sexual offences court will work, we have discussed that with the committee previously. It is important to have a trauma-informed approach with a presumption in favour of prerecorded evidence. As Sandy Brindley pointed out, the learning that we have from what is in operation shows that some implementation issues have arisen. I also note that things are operating slightly differently across the country, and it is important to look at that. However, those are matters of implementation.

10:30

The overarching point for the committee to note is that prerecorded evidence is less traumatising for victims. That is what they overwhelmingly say. It is about rolling out that approach much more, expanding it across the country and having the facilities to allow that. Ideally, we want a model whereby there is a videolink, with the complainer giving evidence on commission. In some cases, it feels very intimidating for a complainer to sit in a room with a lot of people round the table. We know that there are places around the country that operate the videolink model. Again, that is a matter of implementation, but we have the learning that we can feed in.

Fulton MacGregor: Do you ever get an indication or feeling from the victims who you deal with that prerecorded evidence could be less effective, so it is important to give evidence in person? If that is the case—I am not sure whether you are going to tell me that you have found that, but I saw Sandy Brindley nod a wee bit—could an amendment to the bill be lodged to try to alleviate that concern?

Kate Wallace: The point is that complainers need to have choice and agency over that. Some people will want to give their evidence live in court, for whatever reason.

Fulton MacGregor: My question is a wee bit different. I probably did not explain it right. The complainer should have a choice as to whether to give evidence in court or not, but do you ever come across a situation where a complainer would prefer to give prerecorded evidence or evidence on commission—in this example, it would probably be prerecorded evidence—but feel that they are more likely to be believed, for want of a better term, if they do it in court? My question was more about that. If that is an issue—we do not want to go back to the stage 1 evidence, as the convener will probably remind me, so I link the question to today's discussion—could an amendment be lodged to address that?

Kate Wallace: We have worked with people who have that view, but it is really important to keep looking at the evidence on all this. Our understanding, certainly from other jurisdictions, is that there is no evidence of that. Some research was done in England and there was a very early indication that there was potentially a difference in conviction rates between cases with live evidence

and cases with prerecorded evidence. However, my understanding is that, as that research has developed, that has no longer been the situation. The unfortunate thing is that it was picked up at the time by the media, even though those were very early results. Some victims read that in the media and have that view. Our understanding from other jurisdictions, such as Northern Ireland, is that there is no detrimental impact on conviction rates in the way that was discussed.

Sandy Brindley will probably talk about this in more detail, but there is a conversation about how the whole culture needs to shift. I have spoken to the committee about that before. We are retraumatising victims and putting everything on them to secure a conviction in a situation that they know will be detrimental to them—that is not good enough. We should be using all the tools that we have available.

In the Netherlands, there is no live evidence from any victim. They just do not do it. When I talk about live evidence happening here, they think that we are barbaric. They do not have it. They recognise and completely understand that it is too traumatising. Judges in courtrooms in the Netherlands look at computer screens and that has had no impact on their conviction rates.

You raise an important point, because there is a lot of myth and legend around this. All of us who work in the criminal justice system, including the Crown, have to address those potential perceptions, because we do not want a victim to think that, if a verdict is not what they wanted, it is all on them.

Sandy Brindley: Whether there is a link between prerecorded evidence and the likelihood of conviction is a really important question. I have not seen the update to Cheryl Thomas's research that Kate Wallace mentioned, so I cannot comment on that. However, I have spoken to some complainers who gave prerecorded evidence and had some regret afterwards, because they wondered whether the outcome would have been different if they had given live evidence. For some complainers, giving live evidence would never be an option; the only way that they can give their evidence effectively is through prerecorded evidence.

It is important that we do not lose sight of the fact that most people are going through this process because they want to see justice at the end of it—they want to see a conviction. If there is any suggestion that prerecorded evidence could have an impact on conviction, we need to explore that, so that complainers can make an informed choice.

In its stage 1 report, the committee referred to the need for Scotland-specific research. It is really important that the Scottish Government progresses such research, so that, as Kate Wallace alluded to, complainers are not left wondering whether the outcome would have been different if they had given live evidence. Further, is there any link between somebody giving evidence on commission and a lower possibility of conviction? That is something that we should know. I would absolutely support some Scotland-specific research on the issue. That does not mean that we need to change the bill as it stands, or the presumption in favour of prerecorded evidence. Rather, it is about enabling complainers to make informed choices, and they can only make informed choices if we have evidence that tells us whether there is a link.

The Convener: There is a very quick point from Kate Wallace, then we will have to move on.

Kate Wallace: I find this conversation interesting. The assumption that we work on is that prerecorded evidence will impact negatively on conviction rates. There is never a conversation where it happens the other way round. Some people who give evidence live in court feel as though they have not done that justice, because of the level of trauma that they have been under. If we are looking for evidence, we need to be really balanced about what it is that we are looking for and at. It is not as straightforward as live evidence always being better, because, as Sandy Brindley said—we are aware of it, too—there are some people for whom, A, live evidence is not possible, or B, live evidence would simply be too traumatising. What impact would that have on conviction?

The Convener: You have made some interesting points.

Sharon Dowey (South Scotland) (Con): You both said that you support a stand-alone specialist court. I am still trying to get my head around all this. We are talking about giving all victims more choice in how they give evidence. Everybody is different. We heard in evidence that there are some people who still wanted their day in court—they wanted to be there live—and others who wanted to give evidence on commission. We are basically saying that the people who are prosecuting—who are working in the courts—need a higher standard of training. We want to make physical adjustments to courts so that it is easier for victims when they go to court—so that, if possible, they have a better experience of going to court. A lot of people said that they wanted more access to advocate deputes. Those are issues that we could address when we are considering the bill. However, it will still be the same estate, and a very high percentage of cases that are being heard will continue to be sexual offence cases. In effect, courts are already sexual

offences courts, but we just need to make them better for people when they give evidence.

I am trying to work out what you think is the biggest benefit of creating a stand-alone sexual offences court. We talked earlier about rights of audience. I am concerned that a stand-alone court could end up creating further backlog, and that creating such a court would cause more confusion in the justice system. I know that you support such a court, but what is there about it that will make a big difference?

Kate Wallace: We have spoken about the issue previously, but the biggest benefit would be the recognition of the significant amount of sexual crime that our courts deal with. We need to think about how best to equip courts and complainers for such cases and how we do things in a trauma-informed way. That is the best way to summarise our view.

In relation to the benefit of a specialist sexual offences court, originally, we saw it as being a centre of excellence, with everybody associated with the court having a really high degree of training not just in trauma-informed practice but in sexual crime. There should be a group of people who can be identified as having been trained to a really high degree, and every step in relation to how the process unfolds should be improved from the perspective of the complainer. I saw the benefits as primarily relating to training, skills development and so on. As I said, issues were identified, which is why Sandy Brindley and I were clear that we wanted the specialist stand-alone court to have unlimited sentencing powers. From that point of view, it is really helpful that the issue with rights of audience will be addressed through amendments.

I would like the committee to keep it in mind that, as far as we are concerned, the specialist skills, knowledge and training are the key elements.

Sharon Dowey: If we are saying that people would not be able to take part in a trial unless they had had specialist training, why would we need to have a stand-alone sexual offences court? Nobody—including advocates, people working in the court and judges—would be allowed to take part unless they had had specialist training, so why would we need a specialist court? We would not need to change the rights of audience, because such cases would be heard in the estate and system that we already have.

Kate Wallace: I do not quite understand what you are asking. To me, you are answering the question for me by the way in which you are asking it.

Sharon Dowey: We would be changing the system by creating a stand-alone court. However, if all that we need to do is to ensure that everybody who takes part in such trials has that extra level of training, so that they are all specialists, we could do that within the current estate and system, so why do we need a specialist stand-alone court?

Kate Wallace: Sandy Brindley looks like she can answer that question better than I can.

The Convener: I am conscious that we are perhaps revisiting what we discussed at stage 1, which I completely understand. I will bring in Sandy Brindley if she wants to comment on that.

Sandy Brindley: It is certainly an apt question. What is the fundamental difference that the specialist court will make for complainers? I was rereading the stage 1 report, and I think that I said, at stage 1, that it should not just be a room in Glasgow High Court with a sign on the door saying, “Specialist Court”, with folk having had only one day of training. Lady Dorrian was really convincing in her evidence when she talked about the need for a complete culture change within the court.

A specialist court would also give us the opportunity to have bespoke elements, because sexual offences are different—many of the issues that come up are different. We could consider bespoke elements such as, for example, the complainer being able to remotely view the rest of the trial. Complainers say that that is what they want, but that can be really difficult in sexual offences cases, because they would need to sit in the public gallery. There could be dedicated rape crisis advocacy workers for support, and we could consider how access to legal advice could be built into the system. A specialist court would provide a lot of opportunities for complainers to have a bespoke experience.

The point about the physical estate is a good one, because I have real worries in that regard. There is talk about such cases being heard in the wider estate, including sheriff courts as well as High Courts. Some rape cases have been heard in sheriff courts, but a lot of the buildings are completely inappropriate for cases of that nature. Complainers have had to have discussions with advocate deputes in corridors because there have been no suitable rooms, and entrances have not been suitable for discreet entry and exit. There are lots of issues about the physical estate in which the court will be heard, but the principle of a bespoke specialist court is the right one.

10:45

The Convener: We got there in the end—thank you. I will bring in Rona Mackay and then Liam Kerr.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Thanks, convener. I will be brief, with a couple of wee follow-up questions.

Good morning. This is a really helpful session. I should say at the start that I am very much in favour of the sexual offences court. Have you had any sort of pushback from victims about the idea of such a court? Will they have the choice, unlikely as it might seem, to say that they do not want to be categorised in that way by using the court?

Kate Wallace: We have not had any negative feedback from victims about that. That is the answer to the first part of your question.

On the second part, I am not sure that choice will be built in to that extent. Sandy Brindley will probably have more detail on that than I do.

Sandy Brindley: I do not think that there will be a choice about whether or not to have your case heard in the specialist court.

On survivors' feedback, I looked back at evidence from one rape survivor and she had concerns about whether a case would be seen as less serious if it was not heard in the High Court. The most important thing is that it is not seen as a downgrade if a case goes to the specialist court, if that is set up. That is where the equivalent sentencing power to the High Court is really crucial. That was articulated by one of the rape survivors who gave evidence to the committee at stage 1—they were anxious to make sure that the court was not seen as a downgrade.

However, apart from that concern, people are really supportive of the idea of a specialist approach to sexual offences—the idea that everybody involved has been through training, particularly trauma-informed training, and that the setting is perhaps just a little bit more sensitive to the evidence or the case that you are going to give evidence in.

Liam Kerr: On the prosecution of murder, I recall that, in its stage 1 report, the committee recommended amending the bill to ensure that any case involving a charge of murder is still prosecuted in the High Court. However, the cabinet secretary's letter does not indicate that the Government plans to amend the bill in that way. Do either of you take a view on that? If so, do you prefer the committee's suggestion or the Government's apparent direction of travel?

Sandy Brindley: I do not have a view on that. I will pass to Kate Wallace, because Victim Support Scotland runs the support project for people who are bereaved by murder.

Kate Wallace: It was partly through our intervention that murder was included in the first place, because we felt that murder that occurred in a sexual crime context should be heard in a specialist sexual offences court, as long as that court had the same sentencing power as the High Court and there was no downgrading. Due to the particular nature of murder that occurs in the context of sexual crime, we felt that the specialist court was the right place for it and that that high degree of specialism was really important. It also goes back to the question about rights of audience. That is why murder was included in the first place; we were involved in the Lady Dorrian review group and that was part of the discussion and the debate. We will see what the Government comes up with in terms of stage 2 amendments around that.

Liam Kerr: Forgive me for interrupting, but, just to be absolutely clear, would it be Victim Support Scotland's position that a case involving a charge of murder should be prosecuted in the sexual offences court and not be retained by the High Court?

Kate Wallace: For cases that are murder in the context of sexual violence, our position is that the national specialist sexual crime court would be the best place for those cases to be heard, if the court develops in the way that we anticipate.

Liam Kerr: That is clear—thank you.

The Convener: Before we move on to part 6, some aspects of which we have touched on already, I have a question about double jeopardy. The Scottish Government is proposing that the double jeopardy rule would not apply to the types of crimes that would be prosecuted in a specialist sexual offences court. That would be a new provision on which the committee has not taken evidence. Do your organisations have a view on that?

Kate Wallace: We have not been asked about that specifically, so I am probably not best placed to answer that just now. We have an in-principle perspective on it, but the Government has not discussed it with us in any detail.

The Convener: That is fine.

Sandy Brindley: Can I just check: is this in relation to the Crown's proposal about the possibility of a retrial?

The Convener: For clarity, I will read out the point that the Government made in its response:

> "applying the new evidence exception as set out in the Double Jeopardy (Scotland) Act 2011 to cases that are prosecuted in the SOC - this will make it possible to reindict an accused in relation to the same crime that they had previously been acquitted of where new evidence comes to light which was not available at their original trial".

Do you have a view on that?

Sandy Brindley: I cannot understand why the general principle of double jeopardy—and

exception to it—would not also apply in the specialist court. I am not sure whether that is what the Government is suggesting, but it seems to me that, if new evidence comes to light, the standard processes should apply, as they apply across all crime where the Crown has the possibility of applying to retry the case. I do not understand why that would not apply to a rape case.

The Convener: That is helpful. Do you wish to add anything to that, Kate?

Kate Wallace: No.

The Convener: Okay—thank you.

I am watching the time. Let us move on to part 6. I will start with the Government's update on the provisions around a pilot scheme for criminal trials of rape or attempted rape—in other words, a juryless trial pilot. The intention was that the pilot would take place in the High Court or in the specialist sexual offences court. It would involve a single judge delivering a verdict following a trial and providing written reasons for that verdict. That would be followed by a review and publication of a report on how it had operated.

You will both be aware that the Government indicated in its response that it would not go ahead with that proposal. It has indicated that it would instead be

"working on a range of legislative and non-legislative measures to explore and address the underlying issues the pilot was seeking to address."

Over to you. I am interested in your responses to that update.

Kate Wallace: We are obviously disappointed that the proposal for a single-judge trial pilot has been removed. We felt that it was really important, primarily for sexual crime, because of the evidence around jury myths. Although we are disappointed, we recognise and are pragmatic about the situation and the lack of consensus around the matter.

We do not think that that is enough reason for the whole bill to fall. A lot of victims groups have been involved in lobbying for elements of the bill, and they have been fighting for that for years. We are pragmatic about the single-judge trial pilot being dropped—I cannot say that we are wholly surprised.

We are working with the Government on its work with juries on rape myths. You have heard me speak before about research evidence indicating that you need to take real care in this area because by trying to address or challenge rape myths you can sometimes perpetuate them. More research evidence has come out about effective ways to approach that. We are involved in conversations with the Government on that, as that would be our main concern.

Sandy Brindley: I think that the reasons why Lady Dorrian recommended the judge-led pilot are still there. They involve concerns about the integrity of decision making in rape cases, and the weight of evidence about the impact on juries' decision making of false assumptions around rape and, in particular, women's sexual behaviour and how women should react after rape. We all want a system where juries are enabled to make decisions based on the evidence and not on assumptions that are incorrect, so I was disappointed when the pilot was ended.

However, I welcome the commitment from the cabinet secretary to seek changes to the Contempt of Court Act 1981 to enable research to be carried out with juries. With regard to mock-jury research, there is a weight of international research on this issue, including some research with actual jurors, which I think is convincing. Some direct research with jurors in rape trials in Scotland could be helpful for making sure that we have as clear and solid an evidence base as possible to inform the future direction of this work.

The Convener: My follow-up question was going to be on the proposals that have been made in relation to the 1981 act and the proposals for research into jury deliberations, so it is helpful to have your views on that on the record. Kate Wallace, do you want to add any more on that?

Kate Wallace: We are also supportive of the changes to the 1981 act, which we think would be helpful.

The Convener: Are there any other questions on part 6?

Liam Kerr: Yes. With regard to section 63, on anonymity for victims, the committee raised a couple of issues around the public domain defence and the application of a definition of "victim". The cabinet secretary's letter suggests various amendments to address those points. Will they be sufficient, or could they have gone further?

Sandy Brindley: The amendments look helpful. The first thing to say is that the introduction of a statutory right to anonymity is a really important provision in the bill. There are still on-going discussions about whether it goes far enough in terms of its applying after death, and I think that there is scope for further consideration in that regard. However, the amendments that the Government is proposing look sensible.

Liam Kerr: To be clear, though, you would prefer it if the cabinet secretary's amendments were to go further, particularly with regard to anonymity after death. Is that right?

Sandy Brindley: I think that there are arguments for going further. The evidence that we have heard from survivors suggests that it is difficult for them to understand why their right to anonymity should end when they die, because the crime that has been committed against them is such a personal and intimate one.

Liam Kerr: I understand. Kate Wallace, do you have a view on that?

Kate Wallace: Similarly, we welcome some of the amendments that have been proposed, but, as you know, we have been campaigning quite strongly for anonymity to last beyond death. Primarily, that concerns protecting the identity of children in the family, who will automatically be identified when anonymity is lifted. We think that there are lessons that can be learned from other countries that have tried to do this, with regard to the issues of choice and control, and of people being able to waive the right to anonymity if they so wish.

We think that some of the concerns that have been raised around anonymity after death can be overcome. For example, a death certificate is a public document, but we have a separate approach to birth certificates in relation to adoption, so there is the potential to consider taking a different approach. Our organisation has a service that supports families bereaved by crime. The challenge here is that, if someone was a victim of a sexual crime, they would be anonymous, but if they were killed as part of that crime, their identity would be known. Families really struggle with that—understandably. It is important that the Government looks again at anonymity beyond death. My understanding is that it is not looking to amend in that area, but we really want it to.

11:00

The Convener: A number of proposals have been made for stage 2 amendments on independent legal representation, which also sits within part 6 of the bill. They might be procedural and technical amendments, but I am interested in whether you have any comments or views on what is being proposed in part 6.

Sandy Brindley: There was some force to the arguments that were made during the stage 1 evidence sessions that the provisions in the bill are overly cumbersome and time-consuming, and that they get in the way of what we want them to achieve, which is quick access to legal representation when somebody needs it in relation to a sexual history or character application.

The proposed revisions look sensible. It is correct to give such a much-needed right to complainers, but the last thing we want is a procedure that is so difficult that it extends an already lengthy justice process. It would be interesting to hear whether the committee's second panel of witnesses think that the proposed amendments will help to make the process quicker and smoother.

Kate Wallace: We support the proposed amendments and we think that they are beneficial.

The Convener: As there are no more questions on part 6, I propose that we zoom back up to part 1, which relates to the proposal for a victims and witnesses commissioner for Scotland. I will pick that up and refer back to the cabinet secretary's correspondence, which provided an update.

In October, the Government published its response to the independent review of the victim notification scheme, which I know is an area of interest to both witnesses. The cabinet secretary indicated that the Government intends to use the Victims, Witnesses, and Justice Reform (Scotland) Bill to deliver the recommendations that need primary legislation. The Government obviously wants to ensure that the work on the reform of the victim notification scheme is done as quickly as possible, but it recognises that legislation can often take time to develop and introduce.

I will just open it up to you both for your views on that update.

Kate Wallace: As you know, we have been very supportive of the proposal to establish a victims commissioner. We have overwhelming evidence from victims who we support that they want a victims commissioner, and in 2020 we published a report making the case for it. A commissioner would have an important role to play in the Scottish criminal justice system around accountability and holding criminal justice agencies to account.

We are still strongly in favour of a victims commissioner. We are less concerned about the concerns that have been raised about adding in a layer of bureaucracy. We do not think that that will be the case and we would work closely with a victims commissioner on it. An overwhelming number of victims have asked for a commissioner and my job would become about making that work well for them, so I am not looking to stand in the way of that.

Some members of the committee have raised questions about budget and finances, but it could be done in a way that would not impact on victim support service budgets. I think that there is an opportunity to make the office of a victims commissioner as lean as possible. The committee has explored the possibility of sharing back-office functions; it is even possible that offices could be shared. There is scope for that to happen.

We think that it is really important that the powers of the victims commissioner are made clear to victims so that they know what the commissioner can and cannot do. We should follow the Australian model, under which clear information is provided to victims about what the commissioner there can do.

We still strongly support the establishment of a victims commissioner. If anything, we have been getting more evidence from more victims on their support for that. We appreciate that a review is being undertaken of the role of commissioners generally in Scotland, but I understand that, in theory, where the setting up of a commissioner is in train—this includes the victims commissioner—that should be able to continue. We await the outcome of the Parliament's review, which I think is due in June. That is our position on a victims commissioner.

I think that it was Liam Kerr who made a point about the definition of a victim. We would strongly support the idea of family members who are bereaved by crime being defined as victims, which does not always happen. We are very supportive of that proposal, too.

Do you want me to move on to the victim notification scheme?

The Convener: Yes. One of the reasons why I mentioned the VNS update was that, although the committee absolutely recognises the spirit in which the commissioner role has been proposed, we also recognise that a lot of work is already done in that area, not least by organisations such as yours and Rape Crisis Scotland, which strongly advocate for victims. Some members questioned whether we need a commissioner. A lot of work is also done in relation to the victim notification scheme. In other words, given that there is already a lot of provision for victims and witnesses, might that negate the need for a commissioner? That is where I was coming from with my initial question.

Kate Wallace: Thank you for your kind comments to all of us about the role that we play in helping to transform the justice system to ensure that the experience of victims and witnesses is vastly improved. We do that, but my main job is to run an organisation. That is primarily what I am paid to do. It is true that we do work to influence the wider system, but that is in addition to the work that we do in running large national organisations of not insignificant complexity.

The other thing to say is that, when it comes to accountability within the system, victims organisations are not always in the right places at the right level. We do our best to hold organisations to account through things such as the standards of service, but the criminal justice board, for example, does not have any victims organisations represented on it. The criminal justice board is the main decision-making body for criminal justice in Scotland. There is a gap in relation to accountability, and there is a gap in relation to the Government's role in that regard. Criminal justice organisations are independent of Government, and there is an issue there around accountability.

In Northern Ireland, the commissioner designate for victims of crime is making huge headway in keeping the criminal justice agencies accountable. That is in addition to the work of the other organisations.

I see our role as being to work alongside and support a victims commissioner. A similar model worked with the Children and Young People's Commissioner Scotland role. I do not see the commissioner as replacing part of what we do. I have said before that I do not feel professionally threatened by the commissioner role. For me, the creation of that role is about having a senior figurehead who can hold organisations to account.

The Convener: Thank you for that. I bring in Sandy Brindley.

Sandy Brindley: On the victims commissioner, there are, in my experience, certainly for sexual offences, processes in place for strategic accountability, in the sense of being able to bring up themes. What are the issues facing complainers in general with justice agencies? I think that we are good, or solid, on strategic accountability, and as a result, we are starting to see changes in the feedback that we get from complainers about their experience of the prosecution process.

The biggest gap is in case-specific accountability. In my view, the best way of achieving that—I am talking about sexual offences—is to give complainers access to a lawyer and to legal advice. It is very hard for someone to assert their rights, and hold justice bodies accountable in relation to those rights, if they do not have access to legal advice or representation.

If it comes down to a choice, my worry about having a victims commissioner is that they cannot become involved in individual cases. If we are looking at accountability in individual cases, which is where I think that the biggest issue is, my preference would be to spend any available funding on providing access to legal advice for complainers in sexual offence cases. People cannot assert their rights if they do not know what those rights are and if they have no recourse to a lawyer.

On the VNS, it is welcome that the Government is legislating quickly, but I am aware that this is a really big bill that deals with substantial change to

the justice process, so I would not want that to stand in the way of proper scrutiny of what is being proposed. There is no doubt—I hope that Kate Wallace will agree with me—that the VNS system needs reformed. It is positive to see a move to more of a single-point-of-contact approach, because the current system is confusing for complainers in that it operates between the roles of the Scottish Prison Service and the Parole Board for Scotland.

Moving forward on the recommendations of the review is positive, but that adds more to what is already a significant bill in terms of its scope.

The Convener: Thank you for that.

I remind members—this may be of interest to our witnesses, too—that the Minister for Victims and Community Safety is coming to the committee to give an update on the progress on the review of the victim notification scheme. That will be helpful for members ahead of stage 2 of the bill.

I am conscious of the time, as we have a couple of other parts to cover. Part 2 relates to trauma-informed practice and part 3 is on special measures in civil cases. The Cabinet Secretary for Justice has provided one or two updates on those parts.

I will open up the questioning to members, if there is anything that they would like to raise around those two parts of the bill. I also ask our witnesses whether they would like to come back on anything in part 2 or part 3, in particular given that stage 2 is coming up. I will come to Sandy Brindley first, and then Kate Wallace.

Sandy Brindley: I have nothing to add to my contributions during the stage 1 evidence session.

Kate Wallace: I had not touched on the victim notification scheme—I just want to say that Victim Support Scotland welcomed the independent review of the scheme. As the committee will know, we had been calling for such a review for a number of years, because that aspect is—certainly in my experience—one of the most traumatising areas of the criminal justice system, and it absolutely needs to be overhauled.

I agree that the bill before the committee is very long, but I also see the need for urgency in addressing some of the legislative issues, which I believe will be primarily around information sharing, with the victim notification scheme. It would be helpful if those could be covered in the bill.

As I have said previously, Victim Support Scotland would also be looking for other amendments, with regard to some aspects of the way in which the Victims and Witnesses (Scotland) Act 2014 was written that are not helpful in enabling victims to get a referral for support from organisations. If we see the bill in terms of improving the situation for victims and witnesses, it makes it easier. In addition, we are losing the section on the single-judge trials pilot, so the bill is getting a bit smaller in that respect.

11:15

The amendments that will be made to the VNS in relation to information sharing will be really welcome. However, the one area of the victim notification scheme review that we have some concern about is the proposal for an in-house contact team. We want to see what that looks like because, in a trauma-informed framework, when organisations such as Victim Support Scotland, Rape Crisis Scotland, some Women's Aid groups, ASSIST and others are already potentially working with victims, bringing in another group of different people seems counterintuitive, potentially costly and potentially unnecessary. We are keen to discuss with the Government what the contact team would look like and to ensure that any information sharing provision in the bill is holistic and includes organisations such as ours. If the proposal is for Government officials to run the contact team, we would have concerns about how trauma informed that would be.

Liam Kerr: Kate Wallace, you have cued me up nicely by talking about the victim notification scheme. I recently asked a written question of the Government about the contact centre, the answer to which suggested that money for any developments would need to be found from existing budgets for the sector. In that context, do the changes to the bill that the cabinet secretary is proposing make any difference to the resources that your organisations might need in order to continue to carry out your work effectively? If so, do you get the sense that the cabinet secretary is seeking funding for that?

Kate Wallace: Are you talking about the VNS and the contact team?

Liam Kerr: I am, but I am speaking more widely, too. The cabinet secretary has made proposals in her letter about changing certain aspects of the bill as it was introduced. When you were looking at that, did you think, "Hang on, that will have a cost implication for our organisation or the sector more generally," and, if so, do you think that that will be factored in by the cabinet secretary?

Kate Wallace: How the victim contact team is constituted will determine the resources that might be required. There is resource in some criminal justice agencies at the moment. For example, I do not know whether the plan is to remove resource from the victim contact teams in existing criminal justice agencies and to pool that in a central

resource. There has not been a conversation with me directly about any additional resource that might be required as a result of the victim notification scheme changes or the wider aspects that you refer to. Therefore, I cannot really answer the question because nobody has had a conversation with me about that, and I do not know what the approach will be.

However, looking at the issue from the perspective of victims, if the victim contact team is going to be an in-house Government resource, I would have questions about how trauma informed that would really be and whether that would be a duplication of the work that goes on in organisations that already work with victims. Those issues need to be teased out. However, my understanding is that decisions have not yet been made on that.

Sandy Brindley: One of the bill's key functions is to implement the recommendations of Lady Dorrian's review of the management of sexual offence cases. One of her recommendations was that every sexual offence complainer should have access to advocacy support. In its evidence sessions, the committee has heard directly from sexual offence survivors about how life-changing advocacy support was in helping them to navigate the justice process. I have not seen any concrete action by the Government on providing further resource to support the Rape Crisis advocacy project that works across Scotland to support people through the justice process.

If you are taking the trauma-informed principles seriously, a key function that you need to consider is how advocacy support is being funding across the country and whether it is being resourced in such a way that every complainer has access to it. How the Government is taking forward that recommendation from Lady Dorrian is still an open question for the Government, because I have not seen anything on that.

Liam Kerr: I am very grateful for that.

The Convener: We are a wee bit over time. Thank you both for joining us today and for providing a really helpful update on your views on the proposed stage 2 amendments.

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

11:20

Meeting suspended.

11:27

On resuming—

The Convener: Our next group of witnesses are representatives of the legal profession. I am pleased to say that we are joined by Simon Brown, president of the Scottish Solicitors Bar Association; Michael Meehan KC, from the Faculty of Advocates; and Stuart Munro, convener of the criminal law committee of the Law Society of Scotland. I thank you all for joining us.

I intend to allow around 75 minutes for this session. We will begin with part 4 of the bill, just to confuse you, and I will open with a general question on jury reform. You will know that the Scottish Government is now seeking support for a model for jury reform that would have two verdicts of guilty or not guilty, removing the not proven verdict; 15 jurors; and a two-thirds majority requirement for conviction. What are your views on the revised proposal in comparison with what was in the bill at stage 1? I will start with Stuart Munro.

Stuart Munro (Law Society of Scotland): Thank you for the invitation to address the committee. The Law Society's position has, of course, been set out in some detail in our earlier consultation responses and in the evidence that was given to the committee at an earlier stage. We recognise that there is little prospect of the not proven verdict remaining, as the Parliament has expressed a fairly clear view as to its utility, and that, in the circumstances, there is little more that can be said in its defence.

That having been said, it is critical that the committee has regard to the fact that the criminal justice system is a complex system that is more than just the sum of its parts, and that there are connections between different parts that are not necessarily obvious.

I refer the committee to a document from about 10 years ago, called the "Post-Corroboration Safeguards Review: Report of the Academic Expert Group". That report came about in the context of an earlier proposal, which was ultimately not taken forward by the Parliament, to abolish the corroboration rule that is part of the Scottish criminal justice system.

A very esteemed group of experts was put together to look at what the implications of that would be. If I may, I will read from the executive summary of that report. The authors identified that the "distinctive Scottish approach"—in this case, the approach taken to jury sizes and jury majorities—

"has consistently been justified on the basis that Scotland applies a unique set of practices in jury trials—corroboration, three verdicts and simple majority verdicts—which, taken together, represent a proper approach to the

criminal justice system's key goal of acquitting the innocent and convicting the guilty. Corroboration's removal, however, means that this justification no longer holds, and so the other two distinctive features of the Scottish jury require reconsideration."

11:30

The point was being made that, although we might build our house in a different way from how other jurisdictions build their houses, when we take away one of the cornerstones from our house—when we dig up some of the foundations—it can have an impact across the board. If we take away one of those key cornerstones—in this case, the not proven verdict—there can be implications that need to be considered.

We can look at it from the other direction. The Scottish system is very unusual in allowing simple majorities—for example, allowing conviction on the basis of eight votes for guilty out of 15. No other common-law jurisdiction does it that way. Virtually every other common-law jurisdiction has 12-person juries and requires unanimity or something very close to it. The Scottish system is very much an outlier and that outlying has always been justified on the basis that we have other bits in the system that act as counterbalances. The authors of the expert report, when they were looking at the possibility of a foundation stone of the system—in that case, corroboration—being taken away, were of the clear view that something needed to be done about the other two bits of the system. One of the recommendations that they made at that point was the need to change jury majorities.

Fundamentally, what we come back to is that the removal of the not proven verdict is a fundamental change—a fundamental removal of a cornerstone of the Scottish system. Again, it is a cornerstone that you might not design today if you were designing a system from scratch, but it is one that has been part of our system for a long time. If you take it away, you have to do something else.

That also has to be seen in the context of what has been happening in our courts in relation to corroboration. We have had decisions of the appeal court, including a very recent decision by nine judges in the Lord Advocate reference case of HMA v PG and JM. I appreciate that that is very technical, but the effect, as generally understood, is to significantly reduce the protection that is given by the corroboration rule. Theoretically, corroboration still remains, but what it means is something very different from what people understood relatively recently. Although corroboration has not been entirely taken away, that foundation stone has been moved, at the very least. That in itself also justifies a need for very great care to be taken with the simple majority verdict.

Our view, ultimately, is that if we are planning on a fundamental shift of our system—a fundamental removal of cornerstones or parts of the foundations—a safer way of approaching it would be to try a system that works. We could take the jury system that, for instance, is operated south of the border—a 12-person jury and a requirement for unanimity or something close to it—and so on, rather than tinkering around the edges with jury majorities. Even in what is proposed by the Government, we are still left with a simple majority. We are still left as the only jurisdiction in the common-law world that allows conviction in serious cases by a simple majority, and we do not see the justification for that when those cornerstones are taken away.

The Convener: Thank you. That was very comprehensive. I will check back on the proposals in the bill on that final point, but I now bring in Michael Meehan KC.

Michael Meehan KC (Faculty of Advocates): The faculty set out its position in detail at stage 1, so I do not propose to repeat that. However, I will touch on what Stuart Munro mentioned, which is that, very recently, the High Court considered the matter of corroboration. In doing so, it made observations about other jurisdictions. What was said was that

"The court should be cautious before grafting concepts from other jurisdictions onto the Scots law of evidence."

Of course, that is correct. It also recognised that Scots law has "unique concepts". During this morning's evidence session, Scotland has often been described as having outliers, so we do have unique concepts. However, with reference to the institutional writers, who informed the court's view on corroboration, Lord Carloway went on to say that,

"Nevertheless, the Institutional Writers and Dickson"—

another writer—

"relied on reported cases from England in framing their works."

He went on to say that,

"Looking at other systems ... can operate as an important check on whether Scots law is keeping up with modern thinking".

The view that the faculty endorses and has expressed is that modern thinking is that one should have either unanimity or a majority of 10 out of 12.

I noted that, in opening her evidence today, Kate Wallace said that the majority jury number is all wrapped up in the not proven verdict. We will come to the issue later, but the not proven verdict should not be regarded in isolation—it is part of the safeguards. The faculty says that the size of the majority is an important safeguard and that, if

one accepts that the not proven verdict has operated as a safeguard and if that is to be taken away, closer scrutiny must be given to the remaining safeguards and a decision must be made about whether a simple majority is too fragile a safeguard.

Simon Brown (Scottish Solicitors Bar Association): I will be brief because I agree with everything that Stuart Munro and Michael Meehan have said, and the points are well made. The law is a complex thing, and the thing that has happened in this committee that was perhaps unforeseen is that the outside force of the Lord Advocate's reference very much comes to bear on everything that is said here, because it attacks another fundamental cornerstone of the system.

All that I would point out in addition is that the deliberations of a jury are obviously secret for a good reason—we will touch on that later—but that all of us who practise in cases that have juries have experienced occasions when a jury has come back with a verdict after five or 10 minutes. Therefore, there must be circumstances in which a juror has said, "Okay, quick poll—what do we say? Nine to six say guilty. Right, okay, they're guilty—fine." That must happen. If you require unanimity, juries have to discuss the case—they have to discuss the facts of the case and they will therefore inevitably come to a better conclusion. When we discussed juryless trials at stage 1, with regard to conviction rates, the Scottish system was compared unfavourably with England and Wales, where they have rules for juries requiring unanimity for conviction.

The Convener: Thank you for those helpful insights. I will come back to Stuart Munro as I might have misheard you towards the end of your evidence. I want to clarify that, with regard to this particular issue, the cabinet secretary's letter says:

> "After careful consideration, I believe that the most prudent approach, best able to maintain balance and confidence in our system, is to seek support for a model with two verdicts, fifteen jurors, and a two thirds majority requirement for conviction."

I want to be clear about that. Perhaps I misheard what you said, Stuart.

Stuart Munro: If I caused confusion, I apologise—I did not intend to. I recognise that that is now the cabinet secretary for justice's proposal.

The Convener: Thank you.

Liam Kerr: Good morning. I remind the committee, witnesses and anyone who is watching of my interests, in that I am a practising solicitor and I am regulated by the Law Society of Scotland.

At stage 1, the cabinet secretary told the committee—these are my words—that the system needs to be considered holistically, such that, if you remove the not proven verdict, you need to do something with the jury size, for example. That view was reflected in Stuart Munro's opening remarks.

Now, of course, the cabinet secretary is winding back on jury size but increasing the majority that is needed for a conviction. Michael Meehan, in the faculty's view, does adding two to the majority provide sufficient safeguards in light of the removal of the verdict? Is there any evidence to suggest that a two-thirds majority is appropriate in a two-verdict system?

Michael Meehan: The faculty's position was that the increased majority should be 10 out of 12. When he was before the committee previously, Ronnie Renucci—now Lord Renucci—indicated that Scotland might take a distinctive view that it should perhaps be nine out of 12. As a matter of general common sense, one can say that the greater the number that is in favour of something, the greater the confidence in a decision, as more people are persuaded by it.

However, as was discussed earlier, because of the contempt of court rules, there is no evidence on what juries do in relation to their decision making. It is complicated. Even if one was to conduct research with real juries, it would be with one jury of one size; as has been pointed out, there could be an academic exercise to test things with one group and then with another. There is always going to be that tension. We can find out what real juries think by adjusting the rules on contempt of court, but we can have only one jury trial of a case. We cannot have, behind one glass screen, a jury of 12 and a jury of 15. We will only have one jury of one size.

In answer to your question, therefore, we can look to other jurisdictions, such as England, where the jury is smaller in number and a greater proportion is required for a majority. As Stuart Munro has observed, there is still a greater conviction rate in England.

Liam Kerr: Simon Brown, on that point, the burden of proof in a criminal case is beyond reasonable doubt, such that, if there is any reasonable doubt, the accused must be acquitted. Are you aware of any other two-verdict system in which it could be suggested that 10 out of 15 jurors would mean that the decision met that burden?

Simon Brown: No, I am not. My research is not as exhaustive as that of others, but, in the limited research that I was able to do, I found that, by one of those evolutionary flukes, the number seems to have settled independently at 12 in almost every jurisdiction throughout the developed world. I saw one study that said that the ideal jury size is

11.8—I am not entirely sure how you get 0.8 of a juror—but that was based on mathematical models where, with too many jurors, the jury becomes unwieldy and with too few, there are not enough to provide a proper verdict. In answer to your question, no, I am not aware of anywhere else where there is a two-thirds majority.

Liam Kerr: Stuart Munro, in your opening remarks you talked about a significant judicial ruling in October that seems to have had far-reaching consequences for the court's view of corroboration in criminal cases, such that a number of cases that would previously have had insufficient evidence might progress to prosecution. That is my reading of it, but you will tell me if I have reflected that wrongly. To pick up on your earlier comments, what impact does that decision have on safeguards, and what impact might it have on taking away what you describe as the key cornerstone of not proven?

Stuart Munro: The logic of the corroboration rule is that nobody can be convicted on the evidence of one person alone, so that is a safeguard. If a complainer who makes an accusation has, for any reason, given an account that is not correct, whether they believe it to be correct or otherwise, the protection is that something else has to point in the same direction before somebody can be found guilty.

The ruling in the case that you are referring to changed the understanding of that. It would probably take too long to explain the practical effect in detail, but it is all to do with situations where a complainer makes an early report, or makes what is called a de recenti statement about what happened and who was responsible for it, and how that evidence can tie in with, support and corroborate the account that they give at a later stage.

Obviously, if the corroboration rule is weakened, it is less of a safeguard. I go back to the point that was made earlier about the three distinct features of the Scottish system and their impact on one another. If the corroboration rule is weakened, that potentially increases the requirement for other things to be in balance in the system.

11:45

I wonder whether I could come back briefly on a question that you asked Simon Brown, on evidence for a simple majority, or a weighted greater majority, in any other jurisdiction. The answer is that, as far as we are aware, there is no evidence. The expert group that I quoted earlier did an analysis of all the comparable jury systems around the world—in places such as Australia, New Zealand, Canada, the United States, England, Ireland and so forth—and the position is similar pretty much everywhere. Generally, there are 12-person juries. Generally, there is a requirement for unanimity—12 to nil—or some supermajority, which I think is often explained in those jurisdictions as unanimity with outliers taken away, so that people on the extremes are removed and then you have unanimity, if you like, among everyone who is left.

One of the really interesting points about that is that juries are always told that they have to try to reach a unanimous verdict. We talk about proof beyond reasonable doubt. In those jurisdictions, it is the jury that has to have no reasonable doubt, whereas in our system, because we allow, at the moment, simple majorities and we do not require juries to go away and try to come to a single unanimous position, we are effectively asking jurors, as single entities, whether they consider the case to be proved beyond reasonable doubt. Our system effectively deals with juries in a rather different way from systems in other countries. In our view, in so far as there is a lack of evidence about what the effect of the proposed changes might be, the safest course is to look at systems that, on the face of it, work.

Liam Kerr: For the avoidance of doubt, is there any way that 10 out of 15 could be considered a supermajority?

Stuart Munro: It is more of a majority than eight out of 15, but it does not deal with the fundamental objection to that kind of model: how do you reconcile that simple majority—whatever it might be weighted as—with the obligation to find the case proved beyond reasonable doubt?

Rona Mackay: I want to go back to Stuart Munro's opening argument, which was really comprehensive and which I understood. Obviously, the committee has wrestled with the issue of not having evidence for changing jury size. Am I right in thinking that, with the removal of not proven, you would prefer us to move to the English system? Is that really what you are saying?

Stuart Munro: Yes, in essence. If we are going to fundamentally change the basis of our system, and the removal of not proven does that, one is left with the question of what to do. You need to do something, and you either take a shot in the dark, as it were, and make changes without an evidence base, or you take a system that has been shown to work.

Rona Mackay: Right. I think that the problem that we have been struggling with is the lack of evidence. You probably heard that the previous witnesses have concerns about a two-thirds majority. They think that that raises the bar for convictions, particularly in sexual offence cases, for which, as you know, the rate is very low at the

moment. Is there anything to say in favour of the provisions in the bill and the proposed amendments?

Stuart Munro: To go back to the earlier point that Simon Brown made well, we have to tread carefully when it comes to looking at statistics, because statistics are always subject to the way in which they are calculated and are not necessarily transferable. The position seems to be that there is a higher rate of conviction in England and Wales than there is in Scotland, and that is despite the requirement for unanimity. It is probably a false conclusion to think—

Rona Mackay: Has that not got to do with corroboration, which still exists despite the—

Stuart Munro: It still exists in a very different form from what it may have been understood to be previously. The higher rate might be to do with the decision making by the prosecution in England and Wales compared with that in Scotland. It might be that, in England and Wales, there is more of a qualitative assessment before a case is brought to court than takes place here. There could be a whole range of reasons for it. There are, no doubt, a number of other ways in which conviction rates could be affected. Again, we need to be careful about assuming that there is a right level of conviction rates because, ultimately, we do not know, in individual cases, beyond what a jury verdict might be, what the underlying truth of an allegation is. Part of the problem is that, in many of these cases, the evidence is lacking, so it is very difficult to know exactly what happened.

However, there are no doubt countless things that could be done to affect that. Complainers' experience of the process could be better. We could invest in the system to avoid the chronic delays that we have, and there could be practical engagement with complainers in a way that gives them more advice and more support—for instance, the legal support that Sandy Brindley talked about towards the end of the earlier evidence session. Many things could be done to try to improve complainers' experience that may have an effect on conviction rates. However, it is very difficult to say why the differences exist.

Rona Mackay: The Government has tried to balance the removal of the not proven verdict by moving to the two-thirds majority, as opposed to a simple majority, but in your opinion, that is not acceptable—is that correct?

Simon Brown: It does not go far enough. We have to recognise that things move on and that things are developing a lot, and the big difference has been the Lord Advocate's reference. That is a big change in terms of corroboration, and it has to have an impact on this.

Rona Mackay: Is there a danger of you overthinking all this?

Simon Brown: I do not think so. Stuart Munro made a good point. One of the differences in England and Wales is that a qualitative test is imposed when bringing a case to prosecution: is it likely to get a conviction? That has an impact on conviction rates. However, if you are in effect taking away two of the three safeguards, our view would be that you have to significantly strengthen the one that remains.

Michael Meehan: If there is one thing that we should overthink, it is preventing miscarriages of justice, and that is what we are seeking to do.

The Convener: Ben Macpherson has a brief supplementary question, and then I will bring in Fulton MacGregor

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Before I ask my question, I remind everyone that I am registered on the Law Society of Scotland's roll of Scottish solicitors.

Building on the previous questions and the opening remarks, as a point of clarity, if the not proven verdict is removed, are you stating that 10 out of 12—a five-sixths majority—or unanimity would be your optimum position? Is that what you are arguing for, rather than a two-thirds majority?

Simon Brown: I think that we are saying that, in virtually every other system in the developed world, it is 12 jurors and unanimity, failing which, it is a supermajority, which is usually considered to be around 10 out of 12. That is the practice that has been adopted in most of the rest of the world, where they do not have the not proven verdict and they do not have corroboration. That would seem to be the appropriate way forward.

Ben Macpherson: Thank you. I just wanted clarity on that.

Fulton MacGregor: Good morning. This is giving me flashbacks to stage 1 and the enormity of the decision. As you heard earlier, it is clear that victims groups feel that moving to the proposed 10 out of 15 would be worse for victims. That is a compelling case, but we have heard another compelling case from you that other systems work effectively with near unanimity. Where do you think the Government got that suggestion? From a lay perspective, it feels like—I am sure that when the Government speaks to us about this, it will tell me that I am totally wrong—it is trying to please both points of view but is running the risk of not satisfying anybody. What is the thinking behind that, from a legal point of view?

Michael Meehan: It is referenced in the cabinet secretary's letter that 10 out of 15 is the thinking of the senators. The High Court judges would have informed that view. On whether one is able to work

out the reasoning, that is the only evidence that I can refer to: what the judges have said that their view would be.

Simon Brown: It seems to be a compromise. That is the obvious reading. It seems to be, "We need to change something, so we will increase the number needed for a conviction." However, I do not see any statistical basis for it.

Fulton MacGregor: To go back to Rona Mackay's question, is it such a bad thing? Could such a set-up have really negative consequences, or could it work and be a fair justice system? Do you know what I am getting at?

Simon Brown: Again, it is all supposition and guesswork. I do not think that increasing the majority for a conviction is likely to lead to many miscarriages of justice. However, as Michael Meehan pointed out, you have a unique opportunity to reform a system as we go into the 21st century. If you are going to do it, you should do it properly.

Fulton MacGregor: You said something earlier, Simon, about the comparison of the conviction rates in Scotland and England. In England, there is a "better"—I put that in inverted commas—conviction rate. Is there a risk of Scotland's not having a similar rate? Could having unanimity lead to more convictions and alleviate the concerns of victims organisations?

Simon Brown: I made my view on conviction rates clear earlier: the difference is substantially explained by the likelihood-of-conviction test. As an aside, applying that in Scotland—giving complainers an honest assessment at the start of where their case was going—might go a long way towards alleviating a lot of those organisations' misgivings.

The rape trial system in England and Wales seems to function adequately. It does not seem to lead to regularly reported miscarriages of justice. They seem to get a conviction rate that, largely, they are satisfied with. That is not just in England and Wales—it is in Australia, Canada and New Zealand. A number of developed countries apply the same system. That would therefore seem to be the effective way forward.

The Convener: Ben Macpherson does not want to come back in. Does any other member want to come back in on part 4?

Pauline McNeill: This question is on jury size—obviously, I have other questions.

I agree with Simon Brown and Fulton MacGregor when they say, "If we are going to do it, let us do it properly". "Flashbacks" is probably the right word, because coming down on either side seems to be an enormous decision. I probably favour a majority of 10 to five, but I still do not feel comfortable that we have reached the point—although we are not back where we started with the not proven verdict—where we remain an outlier, without the appropriate balances.

Forgive me if you have already answered this, but I want to be sure—I think that Ben Macpherson asked the same question. What we are understanding—and what we did not understand previously—is that the English system is different. Simon Brown spoke to one of the key differences—I did not really appreciate this until our work on the bill—which is that, in England, it is on the likelihood of conviction that the Crown Prosecution Service determines whether a case goes to trial. We heard evidence that, proportionally, there are fewer rape trials in England because of that. However, in Scotland, that is not the test: the test is whether the prosecution service has evidence to prove the case. That implies that more cases go to trial.

The question is how to balance a system that is different. Stuart Munro explained the system very well. In Scotland, these are the safeguards: there being three verdicts, the need for a simple majority and the system of corroboration, notwithstanding the changes that have been made to that. However, England does not have the system of corroboration that we have. Other systems have that other test. It is a whole system. In Scotland, we are breaking down the whole system that we had by removing one verdict. We now have to determine how to balance the system.

12:00

You said to Ben Macpherson that you prefer the English model's jury size, which is 12. That seems to be the number in other jurisdictions, too. Is it your position that, to accommodate the fact that we still have corroboration in the Scottish system, we do not have to have unanimity among the 12, as in England, in order to balance the system? Or, should we get rid of corroboration in Scotland?

Do you see where I am going? I am looking at how we are going to balance our system. I take the point that the only two ways in which we can do that is to use the English position, which is to remove corroboration and go to a unanimous jury of 12, or to keep corroboration, which is the system that our lawyers have been operating under. I cannot see a scenario in which we would just go to the English system. I presume that you would need to retrain the legal profession on a different evidential system, although I do not know that. Does the fact that we require corroboration mean that, if we go for a jury of 12, a verdict does not need to be unanimous? I apologise if you feel that you have already answered that, but I just do not really understand.

Stuart Munro: If I might start, I entirely agree that this is an issue of brain-stretching complexity. It is a very difficult area for everybody to address.

I have a few points to make. First, going back to what I said about the expert group a decade ago, it was clearly understood at that point that the justification for the simple majority—the majority of eight to seven—was the fact that we had the other parts of the system that make Scotland unique. The Government is very keen to remove the not proven verdict, so that would be one of those parts gone.

"Corroboration" does not mean what it meant 10 years ago, so we could say that that is another part that, if it has not gone, is certainly not what it used to be. Ultimately, we are much closer to the position of not really having any of the essential elements that make us different from England and Wales. Therefore, there is no great reason why the England and Wales approach to jury sizes should not be adopted.

It is a fair point to make that we still have a rule of corroboration. The likelihood—I think that everybody has agreed on this—is that the decision that was made in the case in October will mean that many more cases that once would not have been capable of being prosecuted might be capable of being prosecuted. As Simon Brown said—I think that Michael Meehan touched on this, as well—in England, there is a test of whether there is a reasonable prospect of a conviction. The prosecutor has to weigh up, at the beginning, the likelihood that the evidence will be accepted by a jury and there will be a conviction. That means, inevitably, that some cases are not prosecuted that might be prosecuted if the test were simply whether there is enough evidence to put a case before a jury.

If, in Scotland, the approach is that we prosecute cases in which there is enough evidence to put before a jury, the effect of the decision in October will be that more cases will be capable of being prosecuted. If the question is about the difference between those two approaches—that there is enough evidence to put before a jury, or there is a reasonable prospect of a conviction—the gap is going to get wider. The danger, in one view, at least, is that we will end up with greater divergence between conviction rates in Scotland and rates in England and Wales.

Just in case the committee feels that we can proceed simply on the basis that the only practical distinction between England and Scotland is the corroboration rule, I point out that that is not quite right. In England, judges, in effect, have the ability to throw out cases in which they have concerns about the quality of the evidence. We do not have a similar arrangement in Scotland, so it is not quite correct to say that, in effect, we have a higher hurdle to get over and that, therefore, convictions can happen only in more limited circumstances.

Michael Meehan: In some respects, the requirement for corroboration makes it harder to understand the difference in conviction rates between England and Scotland. If, in Scotland, more evidence is required, one would think that there would be more convictions in Scotland, particularly when the majority is smaller.

Corroboration can often affect whether the case gets to the jury, but the real test is the application of the "beyond reasonable doubt" standard. If the view of any person who perceives themselves to be a victim—whether we call them a complainant or a victim—is that they have been raped, the application of the "beyond reasonable doubt" test will be hard for them to accept, because a jury could well take the view that the accused probably did it but, nevertheless, in accordance with their oath or affirmation of office, they would be obliged to acquit. That is a stark choice for a jury to face and it has real long-term consequences for a victim.

In many respects, it is the "beyond reasonable doubt" test that is hard. The view is that it is better to have near unanimity when that test is applied than it is to have a majority of eight to seven. That is the view that is followed in other modern jurisdictions and with which we collectively say that Scotland has been out of step, so far.

Pauline McNeill: I am trying to make sense of what you said. I cannot conceive of a situation in which there would be any support for the English system of unanimity of 12, given that we have corroboration. Albeit that you are suggesting that the October decision has changed that somewhat, we still have it. If the Government had come up with the scenario of a majority of 10 out of 12, would that fulfil the requirement for balance?

Simon Brown: It would go further. It would be better.

Pauline McNeill: But you do not think that it—

Simon Brown: Well no, I think that it would go further.

To touch on what you said about corroboration, although it is correct that, technically, we still have it, if you ask any legal professional, they will tell you that there is one direction of travel, which is towards removing it. Corroboration has been limited more and more with each successive year, and that will only continue.

Pauline McNeill: Is that for sexual offences cases?

Simon Brown: It is for all offences.

Pauline McNeill: For all offences?

Simon Brown: The case that we are talking about was a sexual offences case, but the law applies to every type of case.

Pauline McNeill: Right.

Michael Meehan: As Stuart Munro correctly said, the judgment is lengthy, but one of the things that was set out in it was that, in recent decades, judges had applied corroboration incorrectly. Although there has been a change, it could be argued that, in the judgment before the court, there was a rebalancing in the treatment of what is called a recent statement. Although the law from that judgment is different from what it was a year or two ago, the judgment sets out in detail that there has been a rebalancing, by looking at institutional writers who were informed by English cases, and that the balance has been restored, in effect.

Pauline McNeill: I did not fully understand, Michael, what you meant when you addressed the question of reasonable doubt. The point was made to the committee recently that, if possible, we want a jury to act as a collective in coming to a conclusion. That is what we are aiming for, rather than it being a set of individuals who all vote. I had not considered that point previously, but now I think that it is really important.

Will you explain a bit more what you meant when you talked about what would happen if the jury thought that the accused probably did it, but there was reasonable doubt? I did not fully understand that point.

Michael Meehan: Of course. Within the written directions that are now given to a jury in advance, and within the directions that were always given to a jury, the jury is told that the "beyond reasonable doubt" test refers to the type of

"doubt that would make you pause or hesitate before taking an important decision in the ... conduct of your own"

affairs. Parties will always say that they can see why that is, because they will be making an important decision in somebody else's life. A judge will emphasise that, if the jurors think that an accused possibly did it, they will not convict and, if they think that an accused probably did it, they will not convict. The jury will pause at that point, because that could mean that even if they take the view that it is more probable than not that the accused committed the crime they should not convict. That test is harder to apply the more serious and heinous the crime is; nevertheless, we demand that of our juries. That is the point. Even if the jury thinks that the person probably did it, unless it is satisfied beyond reasonable doubt that the person did it, its duty is to acquit them.

The Convener: Katy Clark wants to come in, but we will have to move on after that, because I am keen that our questions also cover parts 5 and 6 of the bill. I will also allow Liam Kerr to come in, if it is a very tiny question.

Katy Clark (West Scotland) (Lab): Do you agree that the problem that parliamentarians have in this area is the lack of evidence? Due to the Contempt of Court Act 1981, we do not really have any jury research in Scotland—we do not know what the split in juries is. It might be that the changes to jury size and majority would make very little difference to conviction rates, or they could make a considerable difference in specific cases.

I do not necessarily expect you to know the answer to this question, but it would be really useful if you could provide any information. With regard to other jurisdictions, are you aware of any evidence on jury splits where there is a not guilty outcome? In cases in which a unanimous decision is required but the jury cannot reach that or a supermajority, there will be a split. It might be that the split is such that there is a majority in favour of conviction but that, because of the system, that does not lead to a conviction. I appreciate that this is not your day job and that you would not necessarily look at this, but have you been able to get information on jury splits when you have been considering the issue? I suspect that the information might not be available.

Stuart Munro: I think that the committee heard previously from Professor Cheryl Thomas from University College London. She attended a round-table meeting that the Law Society held in April—as, I think, did a couple of members.

Katy Clark: Yes. I was at that meeting.

Stuart Munro: I am sure that it was Professor Thomas who said, in essence, that juries in England and Wales generally reach unanimous verdicts—that that is much more common than not. Sometimes, a judge will allow a majority. When a jury is sent out in England, it is told that it has to try to reach a unanimous verdict. After a day or so, it might be told, "Okay, we can take a majority, but no less than 10 to two." Majorities are pretty rare—they do not happen very often—and unanimity is much more commonplace. The number of cases in which the jury is hung, which means that it cannot reach a majority either way, for guilty or not guilty, is very low—it is something like 1 per cent of all counts. In other words, 1 per cent of all charges result in a jury being unable to reach a verdict.

Katy Clark: That suggests that the changes would not make a significant difference. However, we simply do not know because we do not, because of the Contempt of Court Act 1981, have evidence. Is that correct? We are being asked to proceed on the basis of a guess rather than on the basis of evidence.

Stuart Munro: Indeed, but you are also being asked to remove the not proven verdict on the basis of a guess—

Katy Clark: Yes, that is right.

Stuart Munro: —and it is important to remember that. As we see it, the discussion about jury majorities arises because one of the cornerstones of the system—the not proven verdict—is being taken away. We should not proceed on the basis that the not proven verdict is a goner, but should instead say that we are not going to do anything about majorities because we do not have the evidence. If Cheryl Thomas were here, I am pretty sure that she would tell you that, as far as she is concerned, the issue is not really to do with the Contempt of Court Act 1981, because she was able to carry out very extensive jury research in England and Wales prior to the act's being amended south of the border, as it has been.

Katy Clark: We covered all this at stage 1.

Stuart Munro: Indeed. If the question is whether we would all benefit from having much more research on the issue, the answer is yes—absolutely. I think that everybody would support that.

Katy Clark: That is the question, really—whether we should take the decision before we have more evidence.

Stuart Munro: Indeed, but the final point is that that applies across the board in relation to the changes to the fundamental aspects of the system—not just to jury majorities.

The Convener: Please be very quick.

Liam Kerr: On that exact point, with regard to making decisions and the lack of evidence, you mentioned that the powers available to judges in England are different to those that are available in Scotland in relation to evidence and the ability to deal with the matter. Stuart Munro, I presume that it cannot be as simple as mapping the English system, say, on to the Scottish system without consideration of the wider powers that are available to judges. If that is right, is there a more general risk that this Parliament is being asked to legislate on cornerstones of the system without fully appreciating those wider powers, such as are available to judges in England but not to judges in Scotland?

12:15

Stuart Munro: That is fair. I made the point at the beginning of the evidence session that the criminal justice system is a complex system. It is like the human body—you can take one part away and that can have an effect that you did not anticipate somewhere else. It is important that whatever is done with the system is done with the fullest foreknowledge of the likely consequences. Inevitably, you cannot know everything, but you should always be as sure as you can be about the potential implications.

I take the point that simply grafting on something from elsewhere cannot ignore various other aspects that might arise in the system; it will not necessarily work in exactly the same way. The point about grafting on the English jury model is simply this: if something is going to change, we either make changes without any real evidence base and without any real understanding, or we try our best to take something that is reasonably well established elsewhere. It is a good point.

Liam Kerr: I am very grateful.

Michael Meehan: I will make one point to follow up on the points made by Katy Clark and Liam Kerr. In April 2016, which was before the academic mock jury research was conducted, the Law Society had a round-table meeting, which I attended for the faculty. The Law Society had persons there, and James Chalmers and others were there. One of the points that was made was about the importance of having real research with real juries. That point was made eight years ago, and is as important now as it was then.

In answer to the question that Katy Clark asked, we are being asked to make an important decision, or to give you evidence about an important decision, without evidence. That is why it is so important to have the contempt of court rules relaxed, so that real juries can be asked about how they went about reaching their verdicts: for example, did false assumptions play any part, or do the new jury directions on false assumptions help? We do not have any evidence about that just now, but the point was made eight and a half years ago that it is a decision that should be made based on evidence.

If I might make one final point, my submission is that it is quite telling that the justice secretary wanted to seek consensus on an important matter. That is, in a nutshell, what our respective submissions are. When something is so important, one should seek consensus, where possible.

The Convener: Thank you for that. That is incredibly helpful.

I note that we have taken almost 45 minutes to explore one part of the bill, but I think that it was absolutely appropriate to do that. I would now like to move on to part 5 of the bill, which relates to the proposal on a stand-alone sexual offences court. In the cabinet secretary's correspondence, she reaffirms her commitment to

"a standalone court that has the freedom to operate in a manner that enables it to both identify and develop changes in practice and procedure that will deliver meaningful improvements to the experience of sexual offence victims."

She sets out some of the areas where she is proposing amendments, including legal representation for accused, security of tenure for sexual offences court judges and offering more choice to vulnerable witnesses with regard to giving evidence. I would like to hear our witnesses' views on that provision and the amendments that have been proposed at this point.

Michael Meehan: The faculty's view is that solemn cases should be tried in a solemn court. That is what is being proposed with the removal of the pilot.

Having had the benefit of listening to the earlier evidence session, particularly the answer to Sharon Dowey's question about the big difference that having such a court would make, the issue seemed to be distilled down to one of culture change. It seems to me that, if judges require there to be a culture change, that desire will be met. The Lord Justice General can introduce a practice note. It is not, therefore, apparent to me what having a differently named court within the existing court estate would achieve.

In many court buildings, one might find the High Court, the sheriff court and the district court. If we have to shoehorn another court into that footprint, the question will be, who gets pushed out? The proposal was to have 39 courts instead of the existing eight, but I wonder whether the facilities would be available throughout those courts.

To give a recent example, last week I did a case in Edinburgh where a witness who was not a complainer was anxious. On the day, she was able to give evidence remotely from a room in the Lawnmarket building to the courtroom in Parliament house where I and the jury were. If a witness at one of the more remote facilities suffers from anxiety and wishes to have that option, it might not be there.

Although I can understand the idea of specialist courts, if we are all within the same buildings, the culture can still be changed. If rules need to be changed, they will be changed and the lawyers must work within those rules.

The Convener: Do either of the other witnesses want to come in on that?

Stuart Munro: I do not think that I can add much to what Michael Meehan said. One thing that I would like to make clear is that the Law Society represents solicitors from across the profession, not just those who act in criminal defence. It represents procurators fiscal and those who represent the interests of complainers. We ultimately support any measures that make the system work better.

There is a bit of a concern that the creation of a distinct court with new rules, new geography and so on might cost quite a bit of money without necessarily delivering much more in the way of change than would be achieved in any event. I echo Michael Meehan's comments in that respect, but I do not seek to add anything else.

Simon Brown: I am in total agreement. What seems to be being proposed is essentially High Court-level cases being prosecuted in front of a High Court-level judge with advocate deputes and advocates defending. That does not seem to be particularly different to what we have just now.

There is also the question of cost and of a legal system, particularly a High Court estate, that is already creaking at the seams and already has cases delayed by two years. If another layer is added in, it will only make that worse.

Rona Mackay: I fundamentally disagree with the opinion that a sexual offences court is not necessary. With the greatest of respect, we have been hearing for years about the journey of victims of sexual offences, and nothing has happened and nothing is happening. I have been on committees dealing with this for eight years, we talked about it eight years ago and the position for victims has not got better.

We are talking about a trauma-informed, specialist court that, as you probably heard our earlier witnesses say, is very much wanted by victims. I do not think that it should come down to logistics or money. If we can make it work, we should make it work. That is my view. It is necessary and long overdue.

My question picks up on something that Sandy Brindley said about her misgivings about a judge being able to decide whether a victim should have special measures and whether that should be up to the victim to decide. What are the witnesses' opinions on that?

Michael Meehan: The question about whether the system is trauma informed should apply to all court proceedings. I do not want to repeat my submission, but having a specialist court does not change that.

I completely understand Sandy Brindley's point about a veto effectively being applied to the wishes of a complainer. As I recollect her evidence, she talked about the court taking a paternalistic view. For six years, until recently, I was an advocate depute, and one of the things that I was anxious about during that time—it has been raised in the discussion—is a complainer feeling that they should go through the process of giving live evidence because they felt that it might

reflect badly on them if they did not. I would take the time to meet the complainer in advance to say to them that such a view would not be formed, and that special measures are there to support them. Ultimately, however, I take the view that it should be their decision.

I would swap the word "paternalistic" for "caring", because sometimes one would know, from the supporting evidence that has been given, that a witness's mental health is very fragile. The advantage of commissioned evidence means that the evidence can be taken in advance, and the process can be stopped at any time—the witness can come back another day, or a week later; I have done that. In a trial, we cannot say, "We can stop the trial and come back in a week's time."

Those are some examples of the care and support that is given. Ultimately, I completely agree that, if a complainer says that they wish to give evidence by a certain route, as long as that is an informed decision, it is their decision. Nevertheless, professionals should take care to ensure that a decision that might cause retraumatisation is not made because of a false assumption on the complainer's part that not coming into the courtroom, for example, will reflect badly on them.

Rona Mackay: That is quite encouraging, but I am sure that you understand the point that Sandy Brindley was making about agency being taken away from the victim if she is told, "Yes, you have to" or "No, you can't". That is traumatising in itself as, again, she is powerless.

It sounds like you understand that. An informed choice is exactly the point—it should be all about choice.

Does anybody else want to comment?

Simon Brown: I want to come back on that. I fully accept the points about the difficulties that victims and complainers have had. It is worth pointing out, however, that one of the main gripes from complainers is about delay, and that is due very simply to an issue with funding. There are not enough lawyers, advocates or prosecutors, and that means that the courts run too slowly.

By setting up a specialist court, however, you run the risk of saying, "We recognise there is a problem—we will sort it for this group of complainers, and we will just ignore everyone else". Instead, you should be recognising that there is a problem with victims' rights, and a need for trauma awareness training to be applied more widely across the system as a whole.

Rona Mackay: Again, with respect, we know that sexual offences are, by their nature, unique. Witnesses have told us of their terrible experiences because there is no uniformity in the way that they are treated. A sexual offences court would surely address that. Again, that is what they want.

Michael Meehan: I will just make this point. If we were to have the proposed sexual offences court and it sat in 38 locations, as compared with eight locations, that would present a challenge in itself. At Glasgow High Court, there is a victim information and advice service, and it is a struggle for that service to cover Glasgow sheriff court as well as the High Court—that is a stretch.

If, as is proposed, the specialist court sits in even more locations, specialist support will be needed. The VIA service does a fantastic job, but if we multiply the number of locations by four or five, we would have to increase the number of specialist people. One of the real strengths of the VIA service, in my view, is the experience that the staff have. To upscale the service very quickly would inevitably result in people who are less experienced being involved in that role.

Rona Mackay: There is a bit of hypothesising going on there, but okay.

The Convener: I call Pauline McNeill, followed by Liam Kerr. I ask for succinct questions and responses, because we still have a wee bit to cover.

Pauline McNeill: I will do my best, convener.

The Convener: I know that we are discussing very important parts of the bill.

Pauline McNeill: I hope that this does not need to be said, but I think that we all agree that the treatment of victims in our court system is completely unsatisfactory and we need change—that is my view, anyway. The question is what kind of change is going to make a difference. We have specialist courts—we have the drugs courts and domestic abuse courts, which were introduced without legislation. Do you agree that we could, in theory, set up a specialist court of the High Court and the sheriff court without legislation? We have done that previously.

Stuart Munro: That is exactly what we said in our consultation response.

Pauline McNeill: Is it also fair to say that there has already been quite a bit of change, even as we have been discussing the bill? We have heard about the change to corroboration, for example.

12:30

In my experience of the justice system, change often happens through decisions that are made in court. For example, the supreme court is currently looking at section 275 of the Criminal Procedure (Scotland) Act 1995. Whether change should

happen in the courts or in Parliament is perhaps a moot point, but it does happen in the courts.

Is it fair to say that there has already been quite a bit of change? I would include in that the fact that the Lord Advocate herself, and some of the victims in their testimonies in evidence to us, have said that they see a bit of a change in the Crown's approach to involving victims a bit more in their cases.

I suppose that my question is a yes-or-no one. Do you agree that you can get quite a bit of change without legislating for it? That is really what you have been saying, I suppose.

Stuart Munro: To add to what I have said, one of the difficulties concerns where those changes are taking place as things stand. For instance, Michael Meehan talked about commissions. In general, complainers will, in the High Court at least, give their evidence long before a trial takes place. The experience of a complainer in doing that is different from the experience of a complainer who faces cross-examination in a trial courtroom.

We need to ensure that the impact of all the proposed changes is properly understood and evaluated. The danger is that, if we do so many things at the same time, we do not really know what it is that is working.

Pauline McNeill: My next question—

The Convener: I remind members that I am asking for questions to remain on stage 2 amendments; I know that it is very easy to drift into other areas. Thank you.

Pauline McNeill: My primary concern—as you might have read—about the setting up of a specialist court is that I do not believe that the Government can fix the problem of rights of audience, which it accepts is a problem. I put that specific question to the Government at stage 1, with regard to how it would ensure that the representation that currently exists in the High Court and the sheriff court would remain as is. The Government said that it would lodge an amendment to address that, but I do not see how it can be done. I seek your view on that.

When we changed the sentencing powers of the sheriff court from three years to five years, a promise was given that it would still attract counsel for those cases that would previously not have been heard in the sheriff court. Obviously, if cases are heard in the High Court, they automatically attract counsel.

That is where I think the flaw is with regard to rights of audience. If we set up a specialist court as part of the High Court, it is quite clear that the rights of audience remain the same. If we set up a specialist court of the sheriff court, the rights of audience remain the same. I would like you to answer that point.

I will conclude with this. I recently learned of a case that was, I was told, indicted as assault with injury to life, and it went to the sheriff court. As you will know, if it had been indicted to the High Court, the representation would have been different—the practitioner's view was that it was an attempted murder and not an assault with injury. The Crown is deciding how it is indicting these cases, and where cases do not go to the High Court, they do not get the representation that the system intended.

I have serious concerns. Do you have those concerns, and do you think that the issue can be fixed? That is the fundamental question. Is there a way of ensuring that those cases that would be likely to attract more than a five-year sentence would still attract representation by counsel, or not?

Simon Brown: Yes, it is a problem, but the only way in which it can be fixed is to fund the system properly. There are currently fewer than 500 criminal solicitors in Scotland working at any meaningful level. Those criminal solicitors of today are the advocates of tomorrow and the High Court judges in the next step after that. For every one criminal solicitor who is under 30, there are two over 50, and the ratio of females to males is about 30:70. It is a dying profession. You have to fund that profession. If you fund that profession and bring the new bodies in, the fact that there are more solicitors will mean that there is more capacity to deal with cases.

I can use myself as an example. I am a solicitor advocate—I have rights of audience in the High Court. The last time I appeared in the High Court was in 2019, because I cannot get away from my sheriff court practice for long enough to have the time to appear in the High Court. That is because I no longer have anyone else working with me, because there are not enough of us. If there were more of us, that would go a long way towards answering your questions.

Michael Meehan: The way to ensure that the appropriate level of rights of audience is maintained is not to have the separate court.

I will touch on a point that was explored with Liam Kerr this morning, with regard to the proposition that a murder case could go before the sexual offences court. This year, I acted as senior counsel in the case of a murder that was sexually motivated. The idea that that case would not be tried in the High Court is quite remarkable. Any murder is serious, but if it is sexually motivated, it is even more serious. The proposition that, somehow, a sexual element would take such a case out of the High Court would seem to go

against the whole grain of a case being a High Court case.

Another issue that was touched on in the previous evidence session concerns sentencing powers. I am perhaps showing my age here, but when I was a fiscal from 1990 to 1992, and until relatively recently, there was a stipendiary magistrates court in Glasgow, and the stipendiary magistrates had the same sentencing powers as sheriffs. However, back then, the procurator fiscal took the view that there were some offences, such as drink-driving and housebreaking, that should not be prosecuted before stipendiary magistrates, even though they had the same sentencing powers.

The Faculty of Advocates makes the point that solemn cases should go before solemn judges, and cases that are High Court cases—and rape clearly is a High Court case—should go before the High Court.

Liam Kerr: I will be brief. I have a question on section 40—I will put it to Michael Meehan, but the other two gentlemen can come in if they wish.

Section 40 concerns the appointment and tenure of judges, and section 40(7) to 40(9) concerns the removal of judges. That can currently be done without reasons being given. The committee raised concerns about the proposed changes in that regard at stage 1. In your view, is there a concern that the threat of removal without reasons could risk impacting the independence of decision making?

In any event, given that the cabinet secretary has signalled a willingness to lodge amendments to the removal process, what would those amendments need to look like, in your view, to ameliorate any risk?

Michael Meehan: I cannot give a clear answer to that, because it would depend on the detail.

What is very important in the criminal justice system is confidence—it is not simply about justice being done but about justice being seen to be done. If we are to have the type of procedure whereby, for example, people are made to be temporary High Court judges, are we looking at checks and balances that work in other situations and have been tried and tested?

To answer your question, the devil would be in the detail, and one would really want to know what the detail was. At the end of the day, one would want to be confident that there would be transparency there so that people would have confidence that, where decisions were being made, those were reasoned decisions and could, if appropriate, be challenged.

Liam Kerr: I understand—thank you.

The Convener: We have taken a lot of helpful evidence on the key parts of the bill that would be of particular relevance and interest to the witnesses.

I move on to part 6 of the bill, which contains a number of provisions. Specifically, it contains a proposal for a time-limited pilot of juryless trials. The witnesses will be aware that the cabinet secretary has indicated her intention not to proceed with that provision. However, she has set out in her letter that she is

> "working on a range of legislative and non-legislative measures to explore and address the underlying issues the pilot was seeking to address."

We have covered quite a bit of what that would look like in terms of proposed amendments that would, for example, allow research to be carried out into jury deliberations. We have spoken about that already this morning. Would our witnesses like to add anything else with regard to the update on the pilot, given that we have explored some of what the cabinet secretary has proposed in that respect?

Simon Brown: I think that we have all agreed that jury research is a good thing, but care has to be taken that it does not focus solely on rape myths. Section 275 of the 1995 act was touched on earlier—for those not in the know, it concerns the restriction on the evidence that can be taken from a complainer. There is strong anecdotal evidence that juries come to an acquittal verdict because they feel that they have not heard the full facts in a case. I think that any research on jurors has to cover, as well as rape myths, the impact of section 275.

Stuart Munro: The committee will be aware that the supreme court is currently considering an appeal that loosely touches on the question of sections 274 and 275 of the 1995 act—what is currently known as the rape shield, which is, I should add, a provision that the Law Society supports.

To be clear, the focus of the supreme court's consideration is whether that provision is being applied by the courts, or whether other restrictions are being put in the way of judges being able to properly assess what evidence ought to be admitted in trials. The supreme court is not looking at whether we should have sections 274 and 275—everybody agrees that we should, and we do. The question is whether the other rules around the hearing of evidence allow that process to take place effectively.

The Law Society has always been, and remains, supportive of any reasonable measure to improve the experiences of people in, or the efficiency and throughput of, the criminal justice system, and—fundamentally—of anything that makes it more

likely that we correctly convict the guilty and correctly acquit the innocent. I do not think that anybody can meaningfully disagree with that.

The Law Society certainly stands ready to co-operate with the Government and Parliament in any meaningful discussions as to how the system can be improved. Fundamentally, however, it has to be appreciated that there have been a lot of initiatives that are likely to have had an effect on complainers' experiences. Commissions are one of those initiatives, and judicial directions to juries are another, in respect of what are sometimes termed "rape myths". Those are all changes that are already happening and do not require legislative change, and which are likely to have had a practical effect.

Michael Meehan: I will simply repeat what Kate Wallace said in the previous session. She said that, when one is seeking to explore or to educate, care has to be taken, because there is a risk of reinforcing. I thought that that was a very telling point.

I would defer to persons who are closer to that type of research, recognising the great care that has to be taken. A point that I would make—I make this point to juries, whether I am prosecuting or defending—is that great care has gone into the written directions that are now given. It seems to me that, if that spirit is carried on, either in research or in further jury directions, that is the system continuing to move in the correct direction.

The Convener: Thank you for that.

Some of the other provisions in part 6 specifically establish legislative protection around anonymity for victims of sexual offences, and there are provisions around independent legal representation for complainers in sexual offences cases where there is an application to use evidence relating to the sexual history or character of the complainer. We have touched on that a little, but if you would like to bring in anything specifically around anonymity for victims at this point, you are welcome to do so.

Stuart Munro: Again, the Law Society dealt with that in its original evidence to the committee; it is broadly supportive of the codification of the rules that is proposed in the bill.

With regard to independent legal representation, again, the society takes a very supportive approach to that. I heard Sandy Brindley say, at the end of the previous session, that there is not much use in having a right if you do not know that you have the right or how to enforce it. I could not support that view more. I think that the experience of many complainers is that they simply do not understand where they stand in the system, so it is important that they have the ability to get advice, and if necessary legal advice, about that.

12:45

One of the difficulties that arise in that regard goes back to Simon Brown's point about the profession. If we have a denuded profession in which there are barely enough people to cover the criminal courts, who is going to be giving the independent legal advice to complainers? How does the complainer know which door to knock on to get advice from somebody who knows what they are talking about in that area?

That is a real problem. We can identify the need for the right, but how we turn that into reality for complainers is a key consideration.

Simon Brown: On what Stuart Munro said, representation is important and it should be provided, but there must be additional funding—it cannot come at the cost of other pressures. I have regularly had people make appointments to say, "I'm a witness in a case and I don't know what's going to happen—can you explain it to me?" I do—but again, that is pro bono work, because it is not covered by legal aid. Such representation needs to be funded.

Michael Meehan: I will make three points. With regard to anonymity on a statutory basis, that is important because, in the modern world, everybody is a potential publisher. One might say that an informal code is not fit for purpose in the world of social media. Secondly, anonymity should be for a lifetime—it is clear that, as we heard in the previous session, victims are concerned that their loved ones may find out about something, or it may be published, upon their death. That is a matter of principle, and it is a important point that should be respected after death.

With regard to independent representation, that is important not only in respect of the question of sections 274 and 275 but because it touches on what Rona Mackay said about people's journey. If people do not know about their rights, and their right to insist on the way that they give evidence or how the system works, that is an issue. That proposal is correct, and the Faculty of Advocates is very supportive of independent legal representation, for the reasons that have already been given today, and which have also been set out in our written evidence.

The Convener: Thank you very much. I will draw the session to a close. I am very much aware that we have not touched on parts 1 to 3 of the bill, but I think that it was right that we focused on parts 4 to 6 with these particular witnesses.

If there are any burning issues that you would like to bring in on parts 1 to 3, now is the time to do so. If not, I will bring the session to a close.

I see that no one has anything else to add. In that case, I thank you very much indeed—this has

been a very helpful and worthwhile session. That completes our business in public this morning, and we move into private session.

12:47

Meeting continued in private until 13:09.

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