OFFICIAL REPORT
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Criminal Justice Committee

Wednesday 10 January 2024

Session 6

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Pàrlamaid na h-Alba

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CRIMINAL JUSTICE COMMITTEE
1st Meeting 2024, Session 6

CONVENER

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

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

The Lord Advocate (Dorothy Bain KC)
The Rt Hon Lady Dorrian (Lord Justice Clerk)
David Fraser (Scottish Courts and Tribunals Service)
Danielle McLaughlin (Scottish Courts and Tribunals Service)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 10 January 2024

[The Convener opened the meeting at 09:32]

Management of Sexual Offences Cases

The Convener (Audrey Nicoll): Good morning, and welcome to the first meeting in 2024 of the Criminal Justice Committee. We have no apologies this morning and our first item of business is an evidence session on the work of the review into improving the management of sexual offences cases in Scotland.

We are pleased to be joined today by Lady Dorrian, Lord Justice Clerk and Senator of the College of Justice. I refer members to papers 1 to 3. Lady Dorrian chaired the review that produced a report on improving the management of sexual offences cases. It is fair to say that the ideas in her report underpin many of the provisions of the Victims, Witnesses, and Justice Reform (Scotland) Bill, on which the committee is currently taking stage 1 evidence. We are pleased that Lady Dorrian is joining us this morning to speak about her report. I intend to allow up to 75 minutes for this session.

I invite Lady Dorrian to make a short opening statement.

The Rt Hon Lady Dorrian (Lord Justice Clerk): Thank you, convener. The Lord President is grateful to the committee for accepting his offer that I come today to speak about the report of the review group.

As you know, members of the judiciary do not often attend Parliament to comment on proposed legislation and the fact that the Lord President has agreed that I should do so shows the support of the judiciary for many of the reforms that are proposed in the bill, particularly those that were foreshadowed in the review group report.

Improving the experience of victims and witnesses in the criminal justice system has been of primary importance to me since I became a judge. Both before and after I became Lord Justice Clerk, I have either initiated or participated in a number of initiatives that have contributed to an improving picture. Those include the practice notes that I hope the committee members have been given, which I arranged to be sent yesterday—I thought that they might be useful.

The 2017 practice note was designed to encourage greater use of commissions and to give guidance about the issues on which the court would expect to hear submissions when asked to grant an application. The 2019 practice note was aimed at getting written questions in advance when children were giving evidence, and to simplify the process.

The evidence and procedure report is a process that started in 2013, but the 2015 report of the review was transformative. I was a member of the steering group chaired by Lord Carloway that was calling for new ways of thinking to transform existing procedures that were rooted in the Victorian era. As members will know, it focused on the benefits that would come from pre-recording the evidence of children and vulnerable witnesses and looking at what constitutes best evidence.

That was followed up in 2016 with a next-steps report to develop those proposals, and a recommendation was made that all vulnerable witnesses should be able to give their evidence by pre-recording. A further report in 2017 made a large number of recommendations about enabling the wider use of audiovisual recordings. That was enshrined in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, but it gave scope for further development.

All those various measures drove a more than twentyfold increase in the number of applications for commissions that were granted between 2017 and 2023. They went from 33 in 2017 to 750 in the year to November 2023. Even in the year following the 2017 practice note, there was a very substantial increase. Pre-recording is the single most effective measure, whether it is done by commission, or preferably at an earlier stage by pre-recording police interviews, to enable the witnesses to give their best evidence.

The sexual offences review group that was commissioned by the Lord President followed on from all that and conducted a comprehensive cross-justice sector evidence-based exercise, producing the suite of recommendations with which I am sure committee members are familiar. It was designed to bring about a sea change in the management of sexual offences cases and focus on what seemed necessary to improve the experience of complainers without, of course, compromising the right to a fair trial. As the convener pointed out, the report foreshadowed many of the provisions in the bill.

It is worth pointing out that we found that, despite reforms stretching back 40 years to the first rape shield legislation, at the time of our report, complainers were still reporting unsatisfactory experiences. We felt that that was partly because the reforms had taken place on a piecemeal basis—a bit here and a bit there—

without focusing on how they fitted into the overall picture of the prosecution of serious offences. The review group sought to review that by approaching it in a holistic manner, making the six principal recommendations that are designed to develop a more complainer-centric system and to improve their experience significantly.

With that introduction, I am very happy to try to answer questions about my report.

The Convener: Thank you, Lady Dorrian. That was a helpful opening overview of the backdrop to the review and the amount of work that has been done over a number of years. I am interested in what you said about trying to introduce new ways of thinking to transform procedures that are rooted in the Victorian era.

I will open with a general question about the second recommendation in the report, which relates to the establishment of a sexual offences court. It sets out a wide range of key features, including pre-recorded evidence, judicial case management and many others. I am interested in whether the review considered, from a practical perspective, whether similar benefits might be achieved through the implementation of specialism in existing court structures, in particular given that the number of sexual offences cases that are reported to the Crown Office is steadily increasing.

Lady Dorrian: We did, and one of the reasons why we rejected it concerned the very point that you make about the number of cases, given the increase that there has already been. Cases are continuing to increase year on year and, as far as I can see, that is not going to stop. There are a lot of reasons for that, which we address to some extent in the report. Those include different ways of investigating by the police, and the effect of numerous investigations and inquiries going on elsewhere, which reveal abuse that then becomes the subject of prosecution. There is a whole raft of reasons.

Our view—although the review group was not unanimous on everything, it was unanimous on this—was that an approach was necessary that would go beyond tinkering and creating a little specialist group within the overall judiciary. There would need to be more than one such group anyway; we could create a group in the High Court, but that would not touch on solemn prosecutions of sexual offences in the sheriff courts, which are also bound to be on the increase. We were concerned that the piecemeal reforms that had taken place—which had largely been focused on the High Court, although there were others—had not achieved the overall improvements that we felt were necessary.

We recognised that there was a benefit in putting the work in the hands of specialist judges. We can see that in other areas, but those are smaller areas such as the commercial court. One of the big successes has been the focusing of work for preliminary hearings in the High Court in the hands of a small group of judges. Until that happened, the Bonomy reforms never really took root, but that has had an effect.

However, we felt quite strongly that simply creating another division of the High Court, for example, would not achieve the necessary end. What was needed was a court of full national jurisdiction, with trauma-informed practices embedded; common training of individuals across the court; procedures that are uniformly applicable to the sheriff court and the Court of Session, which is not currently the case; and uniformly applicable practice notes and directions, which, again, is not currently the case. High Court directions apply only to the High Court, whereas the sheriff court and the sheriff principals in each sheriffdom are responsible for issuing directions in that sheriffdom. Uniformly applicable procedures, expectations and case management, with uniformity from Dumfries to Wick, are therefore required.

We also felt—this was important, given the huge increase in the number of cases—that a national court of that kind would also enable greater and more efficient use of the whole court estate and the judiciary across the country. We thought that that was very important, for a raft of reasons. Those included delivering local justice for individuals, and minimising the effects on the judges who deal with many such cases. There was a concern about the knock-on effects of trauma in that regard, whereas if the work is spread more widely, that is less of a risk.

We were also conscious of the fact that, as far as the High Court is concerned—as we have been told on more than one occasion by the Crown Office—there is an increase coming our way in serious organised crime; we have already started to see it. That will also be a drain on the High Court's resources. There were a number of factors behind our view, but the main point was that there would be a court of national jurisdiction with procedures uniformly applicable across the country. I could go on at length about that, but it will no doubt come up in other questions.

09:45

The Convener: Thank you for that helpful and comprehensive answer.

One of the things that I have certainly grappled with a little bit is the practical application of a specialist court in a national context. You have helpfully set out a lot of the model's benefits, if you

like, but did the review consider the challenges with regard to its practical application?

Lady Dorrian: As far as the challenges are concerned, the fact is that there is no option to do nothing. Either you embed this in a new culture in a court of uniform practice across the country, or you try to embed it piecemeal in sheriffdoms and the High Court. Either way, there is going to be a requirement for specialist training for judges, staff, clerks—everyone. That is going to be necessary, however you do it.

You will probably get more detailed answers to this question from the Scottish Courts and Tribunals Service, but we were not of the view that there would be significant issues in that respect, because one of the benefits would be that we would be able to make greater use of the court estate. We would have many more courts available for use by the sexual offences court than are available at the moment, for example, in relation to the High Court. I have figures somewhere, if you will give me a moment to find them. The idea, though, is that we would have much greater use of the court estate and of the judiciary.

If I may say so, one of the issues might be that the bill's provisions are, to some extent, quite complex in relation to the new court's creation, and they seem to have been based on the creation of the Sheriff Appeal Court, which is a completely different model—a completely different animal. For example, some of the structural requirements and concepts, including the possibility of the president of the new national sexual offences court being someone other than the Lord Justice General or the Lord Justice Clerk, seem to be overcomplicated—and, if I may say so, counterproductive, especially given that the holders of those two offices have driven all the reforms over the past 10 years.

Another example is the complicated formal process for the appointment and removal of judges. We had in mind a much more straightforward amendment procedure of the Criminal Procedure (Scotland) Act 1995 to achieve the same objective without that somewhat cumbersome framework.

The Convener: Thank you. I am sure that other members will have some follow-up questions on the court model.

I now open it up to questions from members. I call John Swinney, to be followed by Sharon Dowey.

John Swinney (Perthshire North) (SNP): Thank you very much, convener.

Lady Dorrian, one of the remarks that you made just a moment ago was, I thought, of enormous significance, and I would like to develop the thinking a bit further. You talked about the concept of embedding "a new culture".

Lady Dorrian: Yes.

John Swinney: I think that, for the committee's benefit and to serve our understanding of the thinking that has underpinned your work, we would like to hear just a little bit more about that. Having listened to the evidence on the bill's other contents, I find that what has really resonated with me is that culture issue and the necessity of changing the dynamics and the nature of the process that is under way. If I understand you correctly, you are telling us that cannot really achieve that by tinkering with what, for argument's sake, is a Victorian set of procedures. Instead—and I was struck by this in your report—you need to go in with a blank sheet of paper. I think that your response to that would help us understand the cultural point that you are making.

Lady Dorrian: You are quite right that my comment was linked to the point in the report that piecemeal reforms do not achieve cultural change. I think that that is abundantly clear.

In my report, we deal with the issues in relation to the rape shield legislation, which is now 40 years old—the first iteration of it was 40 years ago. The legislation did not work, partly because of the way in which it was written and partly because of the way in which it was interpreted. It was firmed up and revised, and it still did not take hold sufficiently, for the reasons that we address in the report. I do not suppose that I need to go into the reasons, but it was only with a concerted effort by the senior judiciary—the appeal court—in a number of cases, to focus on what should be being done in relation to those cases, that we got past a tipping point. There are still instances of cases where something has not happened as it should, but they are much fewer than they were. That has happened, after 40 years, only as a result of an enormous amount of effort, because the culture was not changed at the outset.

That is only one area. There are a whole load of others that really require to be looked at. It is one of the reasons why we are recommending that trauma-informed practice and training for everyone should underpin all of this, because once people understand what it is all about, the culture will start to change. That is also why we think that this should be embedded in legislation, because it will provide the legislative impetus towards creating that necessary culture change.

John Swinney: That is a very helpful explanation. Will you reflect further on the cultural change that needs to be undertaken or achieved to make the process effective? Parliament may well be able to legislate for that, but the issue is

how it will become a meaningful change of practice.

One of the points that you have made very powerfully is that judicial leadership has been crucial in taking us thus far. What else is required to make sure that, when we look back 10 years down the track, we see this as a significant moment in changing the experience of those who happen to be involved in the work of a sexual offences court?

Lady Dorrian: In large degree, that would be because of the training and educational requirements, which would be a necessity for the operation of the new court. The court would be operating according to trauma-informed practices. Its procedure would be developed in the light of trauma-informed practices.

In the report, the whole idea was to find ways of minimising the trauma experienced by a complainer or a witness when giving evidence and going through the process in such cases. If cases are in the hands of judges and court staff who have all been trained thoroughly and in depth, assisted by prosecutors and defence lawyers who have similarly been trained to standards that are set by the Lord President, and they are applying rules developed by reference to trauma-informed practices, that should achieve a change of culture, because everyone will understand what is behind that approach and where we are going.

When we first started this journey and were trying to improve and change the number of commissions with the 2017 practice note—and, I think, with the rape shield legislation—it was clear that practitioners had not come as far as we in the judiciary had. They did not understand why we were doing what we were doing and why we were saying what we were saying. That has substantially changed, because the lawyers involved—both prosecution and defence—have had better training. I think that we are now at a stage at which practitioners fully understand the rape shield legislation and why it operates as it does.

The same thing, I think, has happened in relation to commissions, following on from the 2017 practice note. It is usually the Crown that makes the application for the witness to give their evidence by special measures or by commission, but there was a lack of thought about what the requirements were of the witness. What are their communication requirements? What are they afraid of? What can we do to make the process easier for them? All those things were addressed in the practice note. If you start from a common base, with everyone understanding that, you have a far better chance of changing the culture.

John Swinney: My last question is about an issue that we have discussed in previous committee meetings, which is the role of defence counsel in the questioning of witnesses—although this can sometimes also apply to the actions of the Crown. Is that questioning conducted in a fashion that is compatible with the legitimate aspirations of trauma-informed practice, which I entirely endorse?

One line of argument that has been put to us is that we must be satisfied that the right questions are being asked, and in the right fashion, to ensure that a fair trial is being delivered. Obviously, I want trials to be undertaken fairly, but I am concerned that trauma-informed practice might be disregarded in the name of ensuring a fair trial. That relates particularly to the conduct of defence counsel and defence agents. I would be interested to hear your observations about what the court and the judiciary can do to ensure that we have fair trials that are conducted in a fashion that is not damaging to witnesses who come forward in good faith.

Lady Dorrian: There is little risk that trauma-informed practices would be set aside or ignored in the way that you suggest. We have already had a lot of judicial training on that: all judges and temporary judges in the High Court have had trauma-informed training. The training has been developed exponentially and improved as we have gone on, and more courses are coming up that will improve the situation.

The Lord President and I could not have been any plainer, in a series of cases, about the responsibilities of judges and about what is expected of lawyers. That is working, but that is because we have been insistent about that for some time and because the other judges have accepted and adopted that culture.

No system is 100 per cent foolproof, but the matters that were a cause for concern at the time of the report have improved enormously. Judges are far more interventionist than they used to be and lawyers are generally behaving better. There are instances of bad practice, but we are aware of that and are dealing with it. For example, some time ago, I asked all judges to bring to my notice any egregious examples of bad practice that they encounter so that I can take them up with the Law Society or with the dean, depending on what might be necessary, and I would have absolutely no hesitation in doing that.

John Swinney: Have you had to do so?

Lady Dorrian: I have had occasion to do so in the past but have not had occasion to do so in the past year.

Yesterday, I asked for some figures about appeals from preliminary hearings, because the

rape shield legislation is dealt with at the preliminary hearing in about 97 per cent of cases. If either the Crown or the defence is not happy with the decision in relation to that legislation, they can seek leave to appeal and to have the High Court deal with it. There is a very quick process for those appeals. Until about 2020, we had a fair number of appeals that were to do with dissatisfaction about the way in which the judge had decided on the rape shield legislation. Those appeals usually involved the defence saying that the judge was wrong not to allow questioning, although there were occasional Crown appeals.

I have not been able to get very detailed figures, and I just asked my colleagues to provide figures for a couple of years, but they confirm my impression that such appeals have reduced quite substantially. In 2020-21, 63 per cent of appeals from preliminary hearings related to dissatisfaction with rape shield legislation. In 2021-22, the figure went down to 43 per cent. I strongly suspect that it will now be even lower, which, to my mind, shows that control is being exercised by the judiciary, and that the profession now accepts and understands the position. That conforms with the evidence that the committee received from Stuart Munro in an earlier session.

10:00

The Convener: We have quite a bit to get through and we are half an hour in already, so I ask for fairly succinct answers, Lady Dorrian.

I will bring in Sharon Dowey and then Rona Mackay.

Sharon Dowey (South Scotland) (Con): The review group concluded that a specialist sexual offences court should be set up that adopts the routine pre-recording of complainers' evidence and uses trauma-informed practice. You said earlier that there was a requirement for specialist training, however we did it. With the bill obliging all courts to comply with trauma-informed practice, is there a need for a new court to be set up?

Lady Dorrian: I think that I answered that question when the convener asked me about it. A new court is really only one part of it. We need to make sure that the whole court adopts pre-recording throughout the country. The rape shield legislation, for example, applies to all the courts across the country and has always done so by virtue of the legislation, but it has not embedded as a practice. This is only one part of embedding the practice. It is a way of helping to change the culture, but it is only the start, and much more is needed.

Sharon Dowey: When you recommended setting up a specialist sexual offences court, did you envisage a new purpose-built court for that, or do you think that it can be done in the current estate?

Lady Dorrian: I had no conception of there being a new purpose-built court. My idea throughout was that we would be able to utilise to a much greater extent all the resources across the estate and that we would be able to spread those cases so that they could be dealt with more locally. Local justice is an important issue.

I had no notion that we would be looking at a new court building. That would be completely unnecessary, in my view.

Sharon Dowey: Is that what you meant when you said in your report that

"The specialist court would have access to a much wider pool of venues than currently available to the High Court."?

You were talking about using all the courts that are available to us.

Lady Dorrian: Yes.

Sharon Dowey: The report recommends that the sexual offences court should have sentencing powers up to 10 years' imprisonment. What is the basis for that limit, considering that there is no limit on the length of prison sentence when someone is convicted of rape in the High Court?

Lady Dorrian: The report explains that in some detail. It was based on our understanding of sentencing practice in the High Court. The vast majority of cases do not end in sentences of more than 10 years. We recommend that cases that are likely to result in a life sentence or, more likely, an order for lifelong restriction, be identified in advance and dealt with either in the sexual offences court by a judge of the High Court, who would be able to give a higher sentence, or that they should be remitted to the High Court. That is a very familiar practice in sentencing. For example, a sheriff could remit to the High Court for sentencing in a case in which they think that their powers are inadequate.

Sharon Dowey: Do you anticipate that the setting up of the court will cause further delays in the judicial system?

Lady Dorrian: No. I would hope that it would have the opposite effect.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, Lady Dorrian. In your report, you say that the review group was divided on rape trial pilots.

Lady Dorrian: Yes.

Rona Mackay: The report recommends that

"Consideration should be given to developing a time-limited pilot of … rape trials"

without juries. Could you expand on that? What level of support was there within the review group for a pilot of that nature?

Lady Dorrian: The group was divided. I think that it is fair to say that it was reasonably evenly divided. I do not have the exact figures of how the division went, but my recollection is that it was relatively evenly divided.

The rationale behind the recommendation was that the real benefit would be that we would then have evidence of what happens in a judge-only trial, and we would be able to compare that with what happens in jury trials. We would be able to compare the experience of a complainer in one compared with the other. We cannot do that at the moment. We would be able to compare the outcome, how the questioning was handled and how long the trial took. We would be able to compare all those things. At the moment, it is all speculation, because we have nothing to compare it with.

Rona Mackay: Would the evidence related to rape myths be taken into account, and would that be part of the consideration for having jury trials?

Lady Dorrian: That was one of the underlying reasons for considering that it would be a benefit. We went into some detail about the issue of rape myths. I will not give you the details—5.34 and 5.40 to 5.42 are the relevant paragraphs in the report. Judges would not be affected by those, so that would definitely be a difference. Given that we now instruct juries about rape myths, we would be able to compare and see whether people who said, "It is not necessary. It will be enough just to give juries better instruction on that" were right.

Rona Mackay: You say that the pilot would be time limited. Do you have any indication of what timescale that would be?

Lady Dorrian: I had in mind something like a couple of years, probably, to obtain sufficient material, but that is something that would have to be considered carefully.

Rona Mackay: Do you know of any other jurisdictions where juryless trials are happening?

Lady Dorrian: There was some reference to it having been tried in a number of jurisdictions, or that it was going to be tried. I think that New Zealand was one. Perhaps New Zealand was thinking about doing it and South Africa had tried it. It is in the report. I am sorry, but I cannot recall the international evidence.

Rona Mackay: On the review group's division on the pilot, I am obviously not asking for figures, but would you say that the majority would be in favour of it?

Lady Dorrian: I could not say. All that I can say is that they were divided. There was no majority, otherwise a majority view would have been put across. They were divided in general terms, and that is all I can say. There were some who were vocally strongly against, there were some who were strongly in favour, there were others who could see a more nuanced way of looking at it and there were others who thought that there might be some benefit in some elements and not in others. It is impossible to say other than that. It is an issue upon which the review group was unable to reach a concluded view.

Rona Mackay: Thank you.

Pauline McNeill (Glasgow) (Lab): First, I commend you for the work that you have done and the way that you have presented it to the committee.

Lady Dorrian: Thank you.

Pauline McNeill: It is clear that there is a need for change—I am absolutely clear about that. I want to give some context to my question. You have made the case for a specialist court, but I am interested in where it would sit in the hierarchy—excuse my terminology, but that is the way that I see it as a layperson. I am interested in what the status of the specialist court would be and whether you think that the bill as drafted reflects what you had intended in your report.

For example, the report says that the rights of audience in a sexual offences court should be limited to advocates and solicitor advocates, but that is not reflected in the bill. Given that I convened the committee at the time, I can go as far back as the reforms when Lord Bonomy not only produced the report on preliminary hearings but proposed extending the sentencing powers of sheriff courts. There is a parallel here for me. What sticks in my mind is that, when he proposed extending the sentencing powers of sheriff courts to five years, he was clear that the sanctioning of counsel for serious cases should still be allowed. You will know that it is now very rare for counsel to be sanctioned in the sheriff court.

I think that there is a very good case for having the specialist court, but my concern is about the change in the rights of audience if the court is created. Under the bill, solicitors would be able to represent an accused person not in cases of rape or murder but for serious sexual offences. Do you have any concerns about whether the bill reflects what is said in the report about maintaining the high status of the court? How do you see the status of the specialist court in relation to the High Court?

Lady Dorrian: I have already said that I do not think that the bill reflects what I had in mind. It seems to be trying to create some sort of new and

different structure, as opposed to fitting what I had in mind into the existing structure.

What I had in mind was, in a sense, a parallel court, but with the Lord Justice General as the head of that court and the Lord Justice Clerk as the deputy head, as is generally the case across the court system. The court would be able to use all of the court estate and all of the judicial resources, as necessary, as long as properly trained people were in place.

You have picked up on the fact that we recommended that the court should have rights of audience equivalent to those in the High Court, because we wanted to ensure that its importance would be understood and that serious matters would be dealt with at a particular level. That was why we said that the right of audience should be for solicitor advocates with extended rights or for advocates. That is in the report. The justification is there.

Pauline McNeill: If the bill were passed, the rights of audience would change. That would mean that sheriffs could sit in the specialist court, although they cannot sit in the High Court at the moment—

Lady Dorrian: Sheriffs do sit as temporary judges in the High Court at the moment. A very significant number of them do that, and they do a very good job indeed, so that is not the issue. The issue is with those who appear and who question and cross-examine witnesses. We are concerned with ensuring that those people go through the necessary additional training. I am not talking only about trauma-informed practice; I am talking about the additional training in court craft and in court processes, procedures and behaviour that someone gets if they become an advocate or get extended rights of audience.

Pauline McNeill: My final question relates to that. There have been many discussions in the Parliament about how we tackle the crime of rape, for which there seems to be a low conviction rate. It looks as though the specialist sexual offences court would not have the same status or the same rights of audience as the High Court. I assume that it has been designed that way to reflect the status of rape as a serious crime that, as a plea to the Crown, can be tried only in the High Court. If the bill does not reflect your recommendations about rights of audience, will you be concerned that the specialist sexual offences court will look like a lower court?

Lady Dorrian: We made it very clear that the main driver of the whole idea was to improve the experience of complainers and that the way to do that was by properly setting up a specialist court, with proper training and with serious rights of audience for those who can appear there. That was done specifically to make it clear that we were not, in any way, diminishing the importance of such cases—quite the reverse. I refer you to paragraphs 3.41 and 3.42 of the report, where that issue is dealt with.

10:15

Russell Findlay (West Scotland) (Con): Good morning. I have a few questions, the first of which is about juryless trials. Your review group consists of all the key players in the Scottish justice system, but they could not reach a consensus on the issue, as you have told us. Given that that is perhaps the single most contentious part of the bill, I would be interested to know what your position on the matter is.

Lady Dorrian: I took the view that it was worth looking at juryless trials. My position is simply that the idea is worth examining. It is worth having a pilot, because, as I have said, that would mean that we would have the evidence. The review group that considered the idea was not in any way looking at it as a long-term plan, at this stage; it was looking at it as an evidence-gathering exercise to enable us to address the issue properly and with an evidential base. All our report was based on evidence. This is an important area, and we do not really have the evidence to be able to assess whether a complainer would have a better experience with a judge-alone trial compared with a jury trial.

Russell Findlay: Did the review group foresee the reaction that has come from many in the legal profession? In asking this, I am perhaps straying into issues relating to the bill and what happens next, but if practitioners do not participate—as they have threatened—how could that then happen?

Lady Dorrian: Well, with respect, that is more a matter for you and not so much for me to grapple with.

The answer to the first part of your question is obviously yes, because, as I have already explained—to Ms Mackay, I think—some people were very vocal in speaking out against the idea and others were fairly vocal in favour of it. There was definitely an obvious dichotomy there, which it was clear would be carried through into the wider world.

Russell Findlay: In respect of the sexual offences court proposal, some people have already asked about who will be able to practise there and so on. One issue relates to the bill extending the court's proposed remit to other crimes, including, for example, murder. The Scottish Courts and Tribunals Service says that that could result in much greater cost than is suggested in the financial memorandum. On the

basis of your review, do you think that the sexual offences court should deal only with crimes of a sexual nature?

Lady Dorrian: I think that it is difficult to go quite that far. However, we said that crimes such as murder should continue to be tried in the High Court, even if there is a sexual offence along with them. I do not think that one could go as far as to say that the sexual offences court should deal only with sexual offences, because it is frequently the case that an indictment includes, for example, a dozen charges, 10 of which might be sexual offences, one of which might be a breach of the peace and one of which might be a drugs offence. Therefore, it is not practical to suggest that the court should not have jurisdiction over other crimes. The issue is dealt with in paragraph 3.36 of the report, under "Jurisdiction".

Russell Findlay: Your review also recommends that complainers should have access to independent legal representation in the event of a section 275 application. However, concerns about how that would work have been raised by many, including the Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service, the Law Society of Scotland and even your senior judicial colleagues. In their submission to the committee, the senators of the College of Justice say that the measure

"will create a considerable amount of extra work"

and

"considerable potential for delay and churn".

The Crown Office and the SCTS also use the word "churn", and the Law Society cites a risk of potential extra cost. Given those concerns, did the review group perhaps not give adequate consideration to the potential unforeseen consequences that are now being warned about?

Lady Dorrian: To some extent, I think that the so-called unforeseen consequences are a result of section 64 of the bill and the way in which it is envisaged that it should operate. On the face of it, it seems somewhat cumbersome and time consuming, and a procedure of that kind may have the sorts of consequences that you are talking about. I would have thought that a much simpler procedure could be developed.

Russell Findlay: Four pages of the Crown's submission to the committee related directly to the practicalities of dealing with section 275 issues and independent legal representation. In essence, would you say that you are supportive of the proposed changes, but that you take the view that the bill could potentially be amended or streamlined?

Lady Dorrian: My view is that a more streamlined way of dealing with it could be found. I strongly support the proposal for independent legal representation. In fact, I think that there is an unanswerable case for independent legal representation, given the experience of complainers and our experience over the years in cases in which the Crown did not object to section 275 applications when it was blatantly clear that every paragraph of the application should have been objected to and should have been refused.

There have been a number of cases of that kind, and it is quite clear that in some cases, the Crown has not represented the complainer's interests. There can be a conflict between the interests of the complainer and the interests of the Crown as the prosecutor. There are all sorts of other reasons, which are dealt with in detail in the report.

Russell Findlay: Even if the bill is fixed and streamlined, surely the very nature of there being an additional voice in the court will potentially result in more delay.

Lady Dorrian: That is not necessarily the case. Section 275 applications are dealt with at preliminary hearings. As long as the notice period is sufficient to enable that still to be done, there is no reason why they cannot continue to be dealt with at the preliminary hearing. It is one hearing, and it takes place anyway as part of the process of the combined ground rules and procedural hearing. There would be an additional voice. A lot of the stuff is dealt with in writing, because a detailed application has to be made. Very often, parties will submit a written note of their views, and the court will then make a determination.

At the moment, there is scope for an appeal. I have already given you the figures about that—there were about 11 last year, and 20 two years ago. Of course, they were not all on section 274, but a significant proportion of them will have been. It is a small number. Allowing the right of appeal to the complainer should not have a major effect.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I was going to ask about independent legal representation, but Russell Findlay got in there before me, so I will ask about another area.

To go back to John Swinney's point, we have heard concerning evidence about how victims and witnesses—or rather, complainers—have felt during their trial, particularly during cross examination, with regard to the practice of bringing up their character or, perhaps, sexual history. Is the recommendation for legal representation to protect people on that particular aspect?

Lady Dorrian: That is only what it is for.

Fulton MacGregor: Personally, I think that independent legal representation is a really good

idea. I welcome the proposals on that in your report and in the bill.

Going back to what Russell Findlay said, if it is not workable for whatever reason, is there another way to deal with defence lawyers bringing up the issue of character and sexual history as part of their defence? Did the group look at any other way that that could be addressed?

Lady Dorrian: The only other way of addressing it is the way that has failed.

Fulton MacGregor: Is there any way to strengthen the current arrangements to ensure that they do not fail?

Lady Dorrian: The court has been trying to do that, by requiring the Crown to confirm that it has notified and sought the views of the complainer and so on, because it was clear that that was not happening. That was meant to be happening before, but it was not.

When, in the course of an appeal in another case, we discovered that it was not happening, we changed the preliminary hearing sheet, where all the information must be provided to the court beforehand, to ensure that the Crown confirmed in writing that the complainer had been told of the content of a section 275 application, had been invited to comment on the accuracy of any allegations within it and had been asked to state any objections that they might have to the application being granted, which would be put to the court when the application was dealt with.

The unanimous view of the review group was that independent legal representation is the best approach. If the committee feels otherwise, steps would have to be very clearly set out, identifying what the obligation on the Crown was and what would happen if it failed in its obligation.

Fulton MacGregor: Thank you. You have made a compelling case about how you and the review group came to your decision.

Katy Clark (West Scotland) (Lab): Did the review consider whether complainers might be provided with independent legal representation in a wider range of circumstances? You may be aware that, in other jurisdictions in recent decades, legal representation has been introduced throughout the process in some cases. Did the review group consider that, or have you given any thought to it?

Lady Dorrian: We did consider that. We thought that independent legal representation in relation to section 274 was the critical thing. We were also conscious that, where there is an application for recovery of medical records, for instance, that is a separate process. There is already the ability for a complainer to enter that process and oppose the recovery of medical records, psychiatric records or anything like that. We felt that the limit of what should happen within the criminal trial was independent legal representation at the section 275 stage, and that anything else was likely to derail the trial, cause additional delay and put out the time limits—all the concerns that Mr Findlay and Mr MacGregor have been voicing this morning.

Katy Clark: Have you looked at other jurisdictions, or did you not do that in any detail? Did you consider whether some of the consequences that we have been discussing have transpired in other countries where independent legal representation has been brought in?

Lady Dorrian: There is one jurisdiction in the United Kingdom where there is independent legal representation: Northern Ireland. I do not think that we were able to consider what the consequences had been, however. The measures had possibly not been in place for long enough, but I cannot recall. That is addressed in our report.

Katy Clark: As you know, one of the major concerns—

Lady Dorrian: Sorry—I thought that independent legal representation was available in Northern Ireland, but it has just been recommended there; it is available in the Republic of Ireland. That is covered in paragraph 4.43 of the report.

Katy Clark: It happens in many parts of Europe, and indeed in parts of South America and in other jurisdictions, but I appreciate that you may not have looked at those.

Lady Dorrian: I do not think that one can make those comparisons, because those places do not operate the same kind of legal system. Those systems have a partie civile involved in the criminal proceedings throughout, for instance, so they have an entirely different kind of provision. I do not think one can make that comparison. The proper comparison is with common law jurisdictions—Ireland is one and Northern Ireland is another.

10:30

Katy Clark: As you know, one concern that is raised repeatedly by survivors and victims organisations is the lack of power and information that many rape victims in particular feel throughout the process—not only during the court process but from the very early stages.

Lady Dorrian: We made detailed recommendations about improving the quality of the information that is given to complainers and of the communication. We made a recommendation for a one-stop shop—a single point of contact—for

that, because we recognised the validity of the point that you are making.

Katy Clark: Thank you.

John Swinney: I would like to raise with you an issue that follows on from Katy Clarke's point about the flow of information. You chaired a whole-system review group, which was in recognition of the fact that whole-system issues are involved. Will you share with the committee what else you think needs to be improved to get us to a position in which we can look back on the reforms as a seminal moment in improving the experience of complainers and ensuring that the process operates in a more timely fashion, given the premium that you have attached to evidence being gathered in a timely fashion, so that recollections can be tested in the most effective way and when they are strongest during an individual's experience.

Lady Dorrian: In the report, we spent quite a lot of time talking about the communication issue and complainers' experience of feeling that they were not being listened to and that they did not have someone to contact who could give them adequate and accurate information, notwithstanding the Victims and Witnesses (Scotland) Act 2014. We noted quite a lot of information about that in the first chapter of the report, and specified the kind of information that we think should be given to complainers through a single point of contact. It was suggested to us on a number of occasions that that was extremely difficult to achieve, because different organisations are involved, but we could not see why that would be the case. I see no reason why those organisations could not all have a single point of contact working with an additional one, who would be the point of contact for the complainer. That is one of the issues.

We addressed the issue of delay at various stages—the investigation stage, when it gets into the hands of the Crown, and then when it is in court—and we made recommendations. I think that quite a few of those have been acted on by the police and by the Crown—the courts have certainly acted on them.

Another aspect is the pre-recording of evidence at a much earlier stage. The timing is the key thing—it should be done at a much earlier stage. Even at the time of the evidence and procedure review, our thinking was that evidence in chief should effectively be the first interview with the police. It should be done by a skilled interviewer. Given that police will be wearing body cameras—that is being rolled out—that is how the evidence should be captured at the beginning. That would make it much more likely that any additional commissions or cross-examination could take place at a much earlier stage as well. That was key to the evidence and procedure review.

On the assumption that we continued with juries, we made a whole raft of recommendations about the changes that should be made in relation to how juries are instructed, directed and so on. We have not had to wait for legislation to introduce those recommendations; we have introduced every one of them.

John Swinney: Great—thank you for that.

My last question is about the issue, which we have long debated, of whether part of the reason for the successful or unsuccessful prosecution of sexual crimes has been about quality of evidence. I am interested to know your thoughts. Do you consider that there is any danger that your suggestions could lead to a reduction in the quality of evidence that is available? Is there a sense that evidence by commission is not as sturdy as evidence that is gathered in some other fashion?

Lady Dorrian: No—I have heard that canard on a number of occasions and it is just incorrect. There is evidence, which we refer to in the report, to show that it is incorrect. In Scotland, we have the best evidence possible to show it is incorrect because, for three years, we operated trials in which juries saw no live witnesses at all, and the conviction rates over that period were not, in any way, incomparable to conviction rates prior to that period. For three years, juries did not see a single live witness—all they saw was witnesses on screen.

There is another thing to bear in mind, which is dealt with in quite a lot of detail in the report. Our experience of commissions is that the evidence is much more focused and compressed, because there is no jury. A lot of repetitive questions are asked for the benefit of the jury, and I am not criticising that as a practice, because sometimes it is necessary, but that happens a lot less with commissions. There is a much greater focus on what needs—and does not need—to be asked of the witness.

With regard to the length of time that the commission takes, at the time of the report, people's experience was that it took about half the time that it took for the witness to give evidence in court. It is probably a lot less than that now—it is probably down to a matter of hours compared with a matter of days. Of course, there are complicated cases that are slightly different.

It also has to be borne in mind that commission evidence is taken in a much clearer, more focused way than happens at trial, and that, too, is a benefit.

John Swinney: That strikes me as being absolutely consistent with the aspiration for

trauma-informed practice to minimise the negative experience for a witness.

Lady Dorrian: Absolutely—it is key to it.

John Swinney: Thank you very much.

The Convener: I am closely watching the time. I will come in with a couple of final questions.

In response to questions from Russell Findlay on the rape trial pilot, you used the phrase "evidence gathering" in relation to the purpose and objective of the pilot. I am interested in knowing whether the review considered the risk that the pilot could impact or influence the outcome of a case, just by virtue of the fact that a case was being heard as part of a pilot. Another issue is that an accused person who is convicted might have a right of appeal, again by virtue of the fact that their case was heard as part of a pilot. Did the review group consider those points?

Lady Dorrian: In relation to the first point, I do not think that there is any risk of that. The pilot cases would be presided over by experienced professional judges, who would only decide the case according to the evidence. We are used to having pilots of one kind or another, such as drug courts, and they do not seem to have caused problems in the past.

As far as the appeal is concerned, the one big advantage of judge-alone trials is the obligation to give reasons, so the reasons are there. I am not convinced that the pilot would result in more, rather than fewer, appeals.

The Convener: Thank you—that is helpful. I know that Pauline McNeill wants to come in, so I will ask my final question, which is on the anonymity of victims. The report recommends "express legislative protection" for the anonymity of victims of sexual offences. I am interested in hearing about the reasons for that recommendation. What difference do you think that such protection would make to victims?

Lady Dorrian: For a start, it would give them a degree of comfort, because they would know that it was clearly set out in legislation that they had anonymity. It would also reflect the position in other jurisdictions where such protection is set out in statute. At the moment, there is no statutory protection. It is all based on common law and, effectively, a gentleman's agreement with the press.

In that respect, the mainstream press has shown itself to be trustworthy and that it is able to abide by the convention that it does not identify complainers. However, we do not live in an era when the mainstream press is the only source of reporting. We now have to deal with blogging, social media and citizen journalists—I think that that is what they call themselves. A trend also seems to be developing of proper reporters reporting trials in podcasts as the trial goes on. There is nothing wrong with that, but it is a different way of presenting material to the public.

In order to provide a real safeguard against the risk of inadvertent disclosure by a professional or mischievous disclosure by a non-professional, we felt that that protection should be made clear in statute.

Pauline McNeill: Lady Dorrian, I will put this question to the senators when they come, but given that the convener asked about juryless trials, I will ask you. Am I right in saying that, normally, the jury would decide the evidence that it believed but that the judge would decide the law? Does that mean that, in a juryless trial, the judge would also decide on the evidence? Does that mean that there is a different process for a judge to go through in a juryless trial because they would not normally decide the evidence and the jury would make those decisions?

Lady Dorrian: No, not really. Every day in the sheriff court, judges make decisions on the facts and the law when they sit as a sheriff without a jury and decide criminal cases. They are doing that all the time.

Judges are also used to dealing with quite complex legal and factual cases in civil matters where they are responsible for making the decision themselves. In fact, during the past few years, we have had a number of cases in which the allegation in the civil case is one of rape, and the judge has not had any difficulty in dealing with the matter.

The Convener: I will squeeze in one final question very quickly.

Russell Findlay: It is a very quick question about the proposed sexual offences court. You said earlier in your evidence that you did not think that tinkering would be sufficient. However, the Faculty of Advocates submission to the committee is quite robust. It says that

"there is no single feature of the proposed court which could not be delivered rapidly"

through existing mechanisms. What are your views on that?

Lady Dorrian: We have, of course, managed to bring in the changes in the way in which juries are directed and so on, but even if they were brought in rapidly, they are still being done in a piecemeal way. They are not being done in a principled way, with the underpinning of a whole court that is dedicated to trauma-informed practices.

One of the things that we said in the report was that, if we do not seize the opportunity to create the culture change from the ground up that Mr

Swinney spoke about, there is every risk that, in 40 years, my successor and your successors will be in this room having the same conversation.

Russell Findlay: Thank you.

The Convener: Thank you Lady Dorrian. We appreciate your taking the time to join us this morning. We will now have a short suspension.

10:45

Meeting suspended.

10:50

On resuming—

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

The Convener: Our next item of business is the continuation of our stage 1 evidence taking on the Victims, Witnesses, and Justice Reform (Scotland) Bill. Today, we start phase 3 of our scrutiny, focusing specifically on parts 5 and 6 of the bill, which cover the establishment of a new sexual offences court, anonymity for victims of sex offences, independent legal representation for complainers and the proposal for a pilot for judge-led trials in certain rape cases.

We are joined by the Rt Hon Dorothy Bain KC, the Lord Advocate, who I welcome to the meeting. I refer members to papers 1 to 3. I intend to allow around 75 minutes for this evidence session.

I have an opening question for the Lord Advocate. The Crown Office submission expressed support for the creation of a specialist sexual offences court but detailed some concerns about the practical application of such a court. What are your reasons for supporting the idea of a specialist court? Will you expand on some of the concerns that were raised?

The Lord Advocate (Dorothy Bain KC): It is clear from the submission that the Crown is fully supportive of the creation of a specialist sexual offences court. That is because of the identification of the need to transform the way in which sexual crime is prosecuted in Scotland. It will require a determined effort by all of those in the criminal justice system to accept that there is a need for change and to engage in a radical rethink of what the rule of law requires. For the Crown, the introduction of the proposed specialist sexual offences court would play a critical part in the type of change that is required.

I just heard the Lord Justice Clerk speak about why the need for the specialist court is so profound, and I agree with her on that. Underpinning all this is the fact that sexual violence against women and girls is now recognised as a worldwide endemic problem. The World Health Organization and the United Nations have identified violence against women as a global problem of pandemic proportions, and statistics that were produced in 2021 estimated that, worldwide, one in three women have experienced either physical or sexual intimate partner or non-partner violence in their lifetime. In those statistics, the identification of intimate partner violence is very troubling.

That is the background. It has also become recognised across the profession that the effective

prosecution of sexual crime requires specialisation and that complainers require the most careful consideration of their needs and the provision of effective support. I consider that the proposed court reforms offer the opportunity for a complete rethink and redesign of the court process in order for the court to deliver both for the complainers and for the accused who appear in it.

The creation of a new court with new procedures and practices presents an opportunity for positive, radical change in the way that the criminal justice system approaches sexual offending. I say that because the level of offending, the volume of casework and the current system that is operated by our courts mean that we simply do not have the ability to support victims of sexual crime and commit our prosecutors to those complex cases in the way that such cases deserve and require.

The fact that so many victims of sexual crime report that they have no confidence in our system is easy to understand, and one can see why that would trouble the Crown Office and Procurator Fiscal Service deeply. The problem is not isolated to Scotland; it is an international problem that is present in the United Kingdom—in England, Wales and Northern Ireland—and across the Commonwealth. For those reasons, we need specialisation. We need a root-and-branch recreation of the court system that is directed specifically towards those types of crime.

The Convener: Thank you, Lord Advocate.

To follow on from the final point that you made, on specialism across the court system, we asked Lady Dorrian about the option whereby benefits that are similar to those of a bespoke sexual offences court could be delivered through the existing court structure. Lady Dorrian set out her thinking on that and the findings of the review. What are your views on the notion of having a bespoke sexual offences court as opposed to an arrangement within the existing court structure?

The Lord Advocate: It is easy to say that we could do all of this with what we have. Why has that not happened? That is the simple answer to the question. We really need the principled creation of a specialist court in respect of which we look to see what is necessary from the ground up—in the way that deals with every aspect of the administration of the court, the provision of justice, the support for those who come to court, and the specialisation that is needed from prosecutors, defence counsels and judges—and build what is required. The creation of a specialist court with that aim in mind is the way forward.

What is happening at the moment is just not good enough. All the efforts that have been made over the years to bring in changes, such as the rape shield provisions, changes in relation to specialisation in the way that evidence is taken, changes in evidence by commission, and supportive measures for vulnerable witnesses, have not shifted the dial on the basic problems that remain, which are complainers' anxiety about becoming involved in the criminal justice process in any way, the retraumatisation in the process that is currently in place, the lack of understanding, the lack of support that complainers have, and the feeling that they are abandoned and that justice is not there for them.

We have a section of society that says, "Justice is not there for me." Let us go about changing that radically and creating a court that is just for that purpose. That is what is needed. It would help the Crown enormously if we had a specialist court that dealt with sexual crime only. That would assist enormously with our management of those cases.

The Convener: Thank you. I will open up questions to members.

Sharon Dowey: Good morning, Lord Advocate. Does the Crown Office have the resources that it needs to adapt to a new specialist court being set up, in respect of prosecuting in the sexual offences court?

The Lord Advocate: We have touched on the financial consequences of the proposals, which I can look at with you. The significant issue is the increase in cases that the specialist sexual offences court would deal with. What is currently dealt with in the High Court is just a proportion of the sexual offences work that the Crown does. Serious sexual offending prosecution work is done at summary level, at sheriff and jury level and in the High Court.

11:00

It is important to recognise that we operate within a budget that is provided by the Scottish Government, and so we take a pragmatic approach to operational decisions in relation to how we prepare and prosecute cases that are reported. Consequently, currently, our resources are focused on the most serious offending. Cases that call on the High Court require a greater level of resource to account for the increased preparation and engagement that occurs in those cases. We put a greater level of resource into the High Court in relation to preparation, presentation, dedication of victim support and dedication of advocate deputes' time. It is very different from the situation in the sheriff and jury court.

I will give a practical example to help you understand. A trial that is to be prosecuted in the High Court is allocated to an individual advocate depute, who prepares for and conducts the trial. The trial is fixed at a floating or dedicated trial diet

for a specific date. At the sheriff and jury level, the trial prosecutor may be responsible for all the trials that have been fixed across a one or two-week period, and so that prosecutor may be responsible for the preparation for and conduct of five or six trials during that period, as opposed to just a single trial. To allow for the same time for the preparation for trial as in the High Court, the prosecutor would have to have only one case for each jury sitting.

You can see why, if we were to shift the level of cases from the sheriff and jury level to the specialist sexual offences court—which I think is a good idea—we would have to have far more resource. We have provided figures for our estimate of what that would cost. At this stage, it is only an estimate, and we have done our best to explain that. The sum and substance of it is that we would not have the resource available to conduct the specialist sexual offences court in the way that the ambition requires.

Sharon Dowey: Are you talking about staff resource? Is it staff resource that you do not have enough of?

The Lord Advocate: No, I am not talking only about staff resource. I am talking about a variety of resources. We would need a greater number of prosecutors and a greater number of those who are involved in supporting victims of sexual crime if we are going to be able to replicate what we do in the High Court in the specialist sexual offences court and bring within that the very serious casework that is prosecuted at the sheriff and jury level. It is about resource across the board. In our response to the financial memorandum, we have explained what we think, at this stage, would be the additional resource that would be required.

Sharon Dowey: Do you think that the financial memorandum reflects the actual costs that would be required?

The Lord Advocate: Let me see what we have said about the costs. We did come back on that. I think that the financial memorandum recognised the potential resource implications for the Crown, and I think that the cabinet secretary has responded to that. However, I can only say what we have said previously, which is that we would need a significant increase in our resource.

It is important to remember that the Crown is a demand-led organisation with responsibility to meet state obligations to deliver justice, and we operate within a complex criminal justice system. The volume and complexity of our casework continue to grow, and there continues to be an increase in complex cases that require longer investigations and court hearings. Sexual crime has increased to make up almost 70 per cent of High Court cases, and there has also been a significant increase in domestic abuse cases.

In our High Court, there are many very serious domestic abuse cases that have sexual elements that demonstrate profound levels of sexual violence being perpetrated in the context of domestic relationships. Violence against women and girls, sexual crime and domestic violence crime will form the bulk of our casework for many years to come.

We looked at the number of High Court indictments and the number of sheriff and jury indictments in a year that would meet the criteria for indictment in the specialist sexual offences court. That indicated that there would be an 86 per cent increase in sexual offences cases that would be indicted and prosecuted in the specialist sexual offences court, equating to the High Court level. Therefore, we are talking about a significant increase in sexual offences cases, which would have a significant resource implication for the Crown.

We have based our calculations of the potential financial impact of that on the average cost per case at each corresponding level of prosecution. It is important for the committee to know that the average cost per case for prosecution is around £75,000 in the High Court; it is £7,234 per case at the sheriff and jury level. The cost differential reflects the different processes and practices in the High Court, as opposed to the sheriff court level, and the nature and type of preparation and presentation that are required to be undertaken by the Crown at each level.

We have projected that it would be reasonable to assess the increased cost of the cases that we would call in the specialist court, as opposed to the sheriff and jury court, as being set at a level of perhaps half the average High Court case cost, which is £37,157 per case. That would mean an additional cost of about £17 million per annum—if the cases were moved from the sheriff and jury level into the specialist sexual offences court.

I repeat that we prosecute some very serious and complex cases at sheriff and jury level. The issue is not just about moving business around. It is about a profound change in practice that will have enormous implications for the Crown.

Sharon Dowey: Should the proposed specialist sexual offences court have exclusive jurisdiction to hear sexual offences cases, or can you envisage circumstances in which a case of that nature would still be tried in the High Court?

The Lord Advocate: I think that you have to ask the question of what the purpose is of the specialist sexual offences court. The purpose is to resolve the situation that is described by victims of crime and specialists in the field as a problem that

is creating an absence of justice and an absence of access to justice for victims of sexual crime. If we are going to have a specialist court, it has to be there for the victims of sexual crime.

There are some situations in which, in the specialist sexual offences court, we would probably try cases involving—I think that this was set out in the material that is available to the committee—some sexual offences charges in combination with some very serious other charges, such as murder charges. However, if we are going to have a specialist court, it must deliver for the required purpose, so I do not see why we would have a specialist court and then opt to put the specialist cases in the High Court, which deals with more general work.

Rona Mackay: Good morning, Lord Advocate. Would a specialist court eliminate the need for floating trial diets, which cause a lot of distress to victims?

The Lord Advocate: The Scottish Courts and Tribunals Service has indicated that the use of floating trial diets is essential in order for it to properly administer its business. Lord Bonomy's review in relation to the High Court, which recommended the preliminary hearing system for sexual offences trials, recommended that we should not have floating trial diets for rape victims, because of the uncertainty that those bring.

I would hope that, in order for the specialist court to operate in a trauma-informed way, people would very much bear in mind the impact that floating trial diets have on a victim, and would recognise that it is inconsistent with trauma-informed practice to have floating trial diets that float from one period to another without the case starting.

I know that the Scottish Courts and Tribunals Service has identified figures indicating that, within a float, more than 90 per cent of cases start within a four-day period, but we have expressed anxiety to the Scottish Courts and Tribunals Service about whether those statistics are sufficiently robust. That is against a background of a challenge for the whole of the Scottish criminal justice system to get data that is reliable across the board on those cases.

Our assessment is that the figures produced by the Scottish Courts and Tribunals Service take into account only cases where the trial actually commences during the float. They do not take into account cases that do not proceed to evidence being led due to a plea, desertion or, more commonly, adjournment. Our figures for the year 2022-23 indicate that only 64 per cent of trials commenced within the float; 35 per cent of cases do not proceed to trial, and only 61 per cent of complainers will give evidence during a float. I hope that the specialist court could assist in the move towards doing away with floating trial diets. That would be work in progress, in fairness to the Scottish Courts and Tribunals Service.

From personal experience of prosecuting cases of a sexual nature in the High Court, I can say that it is very traumatic for the victim to be waiting to find out when they are going to be called to give evidence—waiting for a phone call at 4 o'clock in the afternoon and being on the edge of their seat all day. For that to be the process that essentially sets you up before you come to give evidence—the most important part of the case—is just not the way to proceed at all. I recognise that we might come on to the benefits of early recording of evidence, but some victims do not want that; some victims want to come to court and see their accused in court.

There is no one-size-fits-all approach for the process, but floating trial diets are a profound problem. They are deeply upsetting for victims who are waiting for their case to be heard, and challenging for the prosecutor who is waiting for the case to come in and is aware of the strains and stresses on the victim. Floating trial diets are also challenging for the people in the criminal justice system who are responsible for delivering the message that a case is not starting today, or tomorrow, or the next day. The process is just not conducive to trauma-informed practice.

Rona Mackay: Thank you—that is helpful.

Russell Findlay: I have a fairly general question to kick off with. Over the past few weeks and months, we have heard some very strongly opposing views in relation to the proposed legislation. The head of Rape Crisis Scotland told us that it is

"obvious to anyone—guilty men are regularly walking free."—[*Official Report, Criminal Justice Committee*, 6 December 2023; c 9.]

The Faculty of Advocates, of which I assume you are a member, said that the system works "ostensibly".

You have been very clear today about the need for radical and profound reform, and about legislation being the only way to achieve that. Do you think that the proposed legislation will achieve the reform that you believe is needed?

The Lord Advocate: I start by saying that I remain a member of the Faculty of Advocates. I was an independent counsel at the Scottish bar. I have been in practice at the Scottish bar for 30 years and I have been a silk—a Queen's counsel and now a King's counsel—since 1994.

In my period of private practice, unusually, I dedicated a significant proportion of my career to public service, prosecuting in the public interest. I

was a prosecutor for eight years, and I was successful in being the first woman to be appointed to principal advocate depute, which is the most senior prosecutor in the country. I was very proud to hold that position.

11:15

In my period of practice as a prosecutor, I identified all the problems that Rape Crisis has reported on and all the problems that are reflected in Lady Dorrian's review. I experienced all those issues first hand as a prosecutor. They are issues that are not made up. They are profound problems, and they have been in existence for all the time since I became a prosecutor. Unless we change radically, we will not make any difference. As Lord Advocate and with my experience, having dedicated a significant proportion of my career to prosecution in the public service, I believe that we need legislative change and we need changes to be brought about by specialisation.

It has come to be appreciated that the ordinary adversarial system is not well suited to the prosecution of such cases. It requires specialisation. The victims require the most careful consideration of their needs and the provision of effective support. They require special measures in the manner in which they give evidence. The existence of rape shield provisions have not resolved the issues. Scotland, the UK and other countries across the Commonwealth are considering and consulting on further developments, such as independent legal representation and judge-only trials, because many of the victims of these crimes are plainly not receiving justice.

I think that we need the sort of change that this Parliament is interested in. In addition, we must, as a society, overcome the cultural attitudes that allow prolific abuse of women and girls to occur in plain sight. We need change here, but we need societal change, too. It has to be a combination of both.

Russell Findlay: It is incredible to think that it was 1996—two years after you became a QC—that the first female Scottish judge was appointed, which is, of course, less than 30 years ago. It has perhaps taken women being in those positions to drive a lot of the change.

The Lord Advocate: As lawyers and parliamentarians who are trusted with the administration of justice, we must find a method of ensuring justice for the victims of appalling acts of sexual and physical violence. We need a properly functioning judicial process that delivers that. That is all that is being asked for—a judicial process that delivers for victims of crime.

The need for that is exemplified by the very serious crimes that we are now seeing prosecuted at High Court level. To give you one example, last year we saw a case prosecuted in the High Court in which the accused had been a prolific domestic abuser from the age of 14. He murdered his partner after an 18-month relationship that included physical and emotional abuse. Six of his previous partners gave evidence in the High Court of the most extensive level of domestic and sexual violence, which had escalated over the period between the age of 14 and the age of 30, when he committed that very serious crime.

He seriously assaulted the complainer on the day prior to her death, and she was admitted to hospital. He attended the hospital and persuaded her to discharge herself, against medical advice. He then drove her to a garage, where he dealt drugs, and during that night he beat her to death with a tyre iron. He faced 33 charges in total, six of which involved serious previous partners. That is an exemplar of the type of cases that we are seeing in the High Court. It tells you why we need to ask ourselves, as lawyers, as parliamentarians and as those who serve the public—because we are public servants—what we can do to sort this out. We need to make a radical change. It is not good enough to say that everything is fine. It simply is not.

Russell Findlay: The bill proposes anonymity for victims. The Crown Office's submission to the committee makes what appears to be an important point about a potential oversight relating to the proposed anonymity measure. As drafted, it seems that anonymity might not apply in cases where the outcome is acquittal. That might result in victims being deterred from reporting crime, which is completely at odds with the intent of the bill and trauma-informed practice.

Since you made the submission to the committee, has the Scottish Government had any communication with the Crown about that?

The Lord Advocate: Yes, it has. It has taken on board a lot of the issues that we raised and is considering the point. The matter is not being ignored and is being worked on. You can see the logic in remedying the deficiency.

Russell Findlay: So, in all likelihood, there will be an amendment from the Government.

The Lord Advocate: I understand so.

Russell Findlay: I also want to raise an issue about judge-only rape trials that we have not yet touched on. Judges would be required to provide written reasons for their decisions, which is unusual in the Scottish criminal courts. The Scottish Criminal Cases Review Commission has warned that that might generate a significant number of appeals and it said that the measure

risks adding to victims' distress. Again, that would be at odds with the bill's trauma-informed intent. Does the Crown Office have a view on that?

The Lord Advocate: The starting point needs to be that the proposed pilot represents an integral part of the recommendations of Lady Dorrian's review. She recommended a suite of measures, of which the pilot is an integral part. I hope that its being delivered will allow an evidence base for further consideration of what problem with the current system results in such a divergence between levels of conviction in other types of crime and those in sexual crime.

The review was split halfway in relation to whether to recommend a pilot, but the purpose of it is to give a basis on which to develop a reasoned approach to the future way of dealing with sexual offences cases.

Russell Findlay: Hence the need for the written reasons.

The Lord Advocate: The written reasons will be an important part of the pilot, because they might remove a perceived deficiency in the current system. The suggestion is that the pilot will provide an entirely altered experience in court for the victims of crime and, crucially, will provide for all concerned—the accused and the victim—a reasoned and written decision explaining why a particular outcome was arrived at. The public have confidence in the judiciary, which would be reinforced by the provision of written reasons.

We should be proud of the judiciary in our country and we all fiercely protect its independence. Day in, day out, judges in our Court of Session and in sheriff courts sit on their own dealing with serious matters and issue written reasons. They sit on their own in criminal matters and in very complex Court of Session matters. I am yet to hear a suggestion that that is inconsistent with the rule of law and with a fair judicial process. The benefit of the pilot would be the provision of written reasons to inform why the conviction rate is as it is.

The important point is that the pilot is for a time-limited period only and for a special section of cases, which we call acquaintance-type cases. Those are cases in which there is one complainer and one accused. In our experience as prosecutors, and on the basis of the current statistical analysis that we have been able to do—although, again, we are concerned about our data collection—there are very low levels of conviction in acquaintance-type rapes. The current overall conviction rates that are reported disguise the fact that, in acquaintance-type rapes, conviction rates are at about 20 to 25 per cent. That is why the selection of cases was identified. The pilot is time-limited, and the written reasons will allow us all to move on and to understand whether rape myths are the cause or something else is going on.

Russell Findlay: That makes sense. Thank you.

John Swinney: Lord Advocate, a comment that you made in response to Russell Findlay's questions this morning—in relation to your point about the difference between the views about the system that have been expressed by Rape Crisis Scotland and the Faculty of Advocates—was that, in your judgment, the ordinary adversarial approach is not suited to cases of this type. I will explore that comment, because, in a sense, it gets to the heart of some of the points that I explored with Lady Dorrian about court culture. I am interested to know the nature of the changes that need to take place in a specialist sexual crimes court and what approaches are necessary for living up to the challenge that you set out in your comment that the ordinary adversarial approach is not suited to such cases. What needs to be different?

The Lord Advocate: A good place to start is the fact that, only in 2020, in the case of Gavin Watson Macdonald, the Appeal Court in Scotland criticised the trial judge, the Crown and the defence for a number of serious deficiencies that resulted in the young woman who had been attacked being paid damages because of the effect on her of the trial process. She was severely traumatised and suffered exacerbation of her mental health problems.

The Lord Justice General—the most senior judge in Scotland—said:

> "This trial was conducted in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law. It ignored a number of principles which have been laid down and emphasised in several recent decisions of this court. If justice is to prevail in the prosecution of sexual offences, it is imperative that those representing parties abide by these basic rules. If they do not do so, the judge or sheriff must intervene to remedy the matter. During her cross-examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became extremely distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable."

That was in 2020. That statement was made by the Lord Justice General because of the way in which a trial had been conducted. The trial was at sheriff and jury level, but involved a very serious sexual offence against a young girl.

It was against that background that Lady Dorrian's review was conducted and she made her recommendations. The situation requires root-and-branch reform and requires that everybody across the board recognise that such cases require specialisation.

Lawyers need to train themselves to understand what is needed to prosecute or defend such cases properly, and the judiciary needs to understand that there is in that field a whole specialisation that needs to be understood and on which judges require training. To my mind, it is an area of prosecution work that is in its infancy. The beginnings of a real way to deal with all the problems are in the creation of a specialist court.

11:30

When it comes to practices in the court—the way in which we deal with evidence in the court, the way that justice is administered and the way in which people are dealt with, supported and respected—the humane aspect needs to be uppermost in everybody's mind, so that we develop a progressive and humane justice system that delivers justice to everybody, across the board. That profound level of change is required. We need to reflect on the fact that the Macdonald case was in 2020.

John Swinney: Thank you for that. That strikes me as an acknowledgement that there are cultural questions that need to be addressed. The words of the Lord Justice General on the Macdonald case illustrate some serious failings in the protection that all of us would expect to be in place for a witness—that a member of the judiciary can step in to make sure that things are done properly. The Lord Justice General's conclusions in the appeal obviously demonstrate that that was not the case.

There is the cultural element about ensuring that leadership and practitioners are operating effectively, but are there also procedural questions that need to be addressed about the operation of the courts in relation to the handling of such cases?

The Lord Advocate: I think that Lady Dorrian's review made recommendations in relation to directions to juries and how matters could be improved. The most fundamental procedural improvement has to be the elimination, as far as possible, of delay in such cases in order to bring about a system that is supportive and provides prompt decision making. Delay needs to be eradicated as far as possible.

The way in which victims are supported in court could be improved. The review touched on independent legal representation in relation to applications under the rape shield provisions. I see those as an important step forward.

Procedurally, the biggest factor could be the eradication of delay and taking away the sense that the process is not capable of being relied on. The procedural changes must be able to deliver, to those who have been victims of a crime, confidence that the process will be supportive and capable of delivering what is required. I see those procedural changes and an increase in confidence in the prosecution system ultimately increasing the confidence of victims of sexual crimes in the process, across the board.

We know that a major issue is that the majority of sexual crime is not reported, because people do not have faith that the system will give them what they require. I think that that issue is present in Scotland, and it has been touched on in England and Wales in two very recent reports. In its eighth report, on the investigation and prosecution of rape, the House of Commons Home Affairs Committee reported that

"Public confidence in the ability of the criminal justice system to respond to reports of rape, to support victims and survivors, and, ultimately, to bring perpetrators to justice, is at what could be its lowest point. Police forces in England and Wales recently recorded the highest ever number of rapes within a 12-month period, yet only 1.3% of the recorded rape offences that have been assigned an outcome resulted in a charge or summons."

The percentage of cases that were actually taken up was very low.

That was reflective of what the Victims Commissioner for England and Wales reported: that people are worried about reporting cases. Three quarters of those who went to court said that their cross-examination was traumatising, and the vast majority of people agreed that the whole process was as invasive as the actual offence.

Furthermore, 95 per cent of survivors who did not make a report to the police cited fear of being disbelieved, and said that they had heard negative things about the trial process. I hope that the proposed fundamental change in the trial process could go some way towards ameliorating the wider problem—that, in Scotland, England, Wales and Northern Ireland, and across the Commonwealth, the majority of people do not report sexual crime, because of the lack of confidence in the system.

John Swinney: Your answer opens up a wider question. Much of this concerns how court proceedings are handled, but an awful lot of it is about a whole-justice-system approach: it is about the actions of Police Scotland, the operation of the Scottish Courts and Tribunals Service and the roles of the Crown, defence agents, the Faculty of Advocates, the Law Society of Scotland and, ultimately, the judiciary, in shepherding the process. There are quite a number of players.

I am struck by how, in order to eradicate delay in the system, everybody needs to improve their performance and to act more quickly and more effectively. What is the best means of driving that? It strikes me that all those organisations—Police Scotland, the Scottish Courts and Tribunals Service, the Crown, practitioners and the

judiciary—are self-governing institutions, so who drives the process? The Government will be criticised if it drives it too aggressively, because that would be interference. Where, within the system, will the necessary drive to eradicate the delays come from?

To put it in a better way, how can we ensure that those various players, who are all critical in the process, are focused on eradication of delays?

The Lord Advocate: We obviously have an enormous challenge with court delays at the moment because of the Covid backlog, and we have to bear that in mind. It is a matter of streamlining processes, making it easier for victims to report and allowing cases to be brought to court more quickly. We can individually seek to improve things in all our areas of work, but it requires an overriding, overarching overseer to bring it all together.

That is difficult, because the various parts of the justice system operate independently of each other, and for good reason: it is in order, quite rightly, to protect the interests of the accused, to protect the independence of the judiciary, and to respect the independence of the investigation authorities and the prosecution service. That can come about only through a common understanding of what is required, and through people working together towards a common goal. I envisage the development of specialisation and the creation of a single court, where everybody is working towards the processes that have been developed by that court, as a significant part of bringing matters to a better place.

Addressing the delay has to come about through resourcing police investigation appropriately and resourcing the Crown's work appropriately, with proper management of that work and of the court process.

On support for victims of crime, I recognise that the Crown can do only so much. The Crown operates in the public interest, which I view as a wide concept. Within that public interest, it is important that the Crown does what it can to support victims of crime through what is a very challenging process.

In addition to that, the development of a one-stop shop—a system whereby victims can go to one resource to get a full explanation of all the different parts of the criminal justice process and what those can deliver for them—is a very important part of what can be done to improve matters. Addressing delays will require transformation in how we deal with the processes in and around reporting and prosecution of such cases.

John Swinney: My final question is about the procedures of a specialist court. I am going to raise specific material from the bill, although I acknowledge that it is not for the Lord Advocate to argue for the bill. Section 55 states:

> "The provisions of the 1995 Act apply to proceedings in the Sexual Offences Court as though the proceedings were taking place in the High Court of Justiciary".

My reading of that, as a layman, makes me a little worried that that means that we will not have a fresh start. Reassure me on that point.

The Lord Advocate: Obviously, the judiciary is responsible for administration of the courts. Ultimately, the Lord President, as head of the court justice system, is responsible for the way in which the courts administer their business.

The Criminal Procedure (Scotland) Act 1995 provides the ability for very significant case management to be undertaken by the judiciary at the stage at which a case is indicted. The preliminary hearings system that we have in the High Court, which was recently taken over to the sheriff and jury court, allows for very strong judicial management of cases. The judicial management process enables a case to be looked at in a very robust way, and can put the prosecutor and defence counsel on the spot in relation to all that is needed in relation to witnesses who are being cited—for example, in relation to how questioning of children should be done—whether the defence needs more time to explore areas in the case, what the case is actually about, what the defence is in the case and what can be agreed.

The case management system that is adjudicated by the presiding judge in the court is a very significant way in which the court processes can be applied in a way that would be beneficial to the overall administration of justice. I think that the benefit of a specialist sexual offences court, in which specialist judges will deal with the cases that come before it and will see the same type of cases regularly, is that they will begin to appreciate where, from a case management point of view, improvements can be made, and how trauma-informed practice can be applied appropriately to the way in which cases progress through the court system.

Case management, which is provided for extensively in the Criminal Procedure (Scotland) Act 1995, and all the requirements in and around disclosure, defence statements and all the rest of it, are the tools that are available to the judiciary. I think that those tools, combined with specialisation, will mean that we will see an improvement in the management of such cases. I very much hope that that will be the case.

Pauline McNeill: Good morning, Lord Advocate. Thank you for being so vocal on the importance of doing something in Parliament

about the scandalous increase in the number of sexual offences cases.

I am interested in the mechanics of the specialist court. You and the Lord Justice Clerk have made a good case for it, but my questions relate to how it would operate and how it would fit in with the current court system. You gave the committee some useful figures earlier on the cost of cases being prosecuted in the High Court and in the sheriff court. Does the Government fully appreciate what the resource implication of the specialist court would be?

11:45

I am trying to get my head around what the specialist court would look like. It looks as though it would be a substantially large court with a substantially large number of cases, and it would not be part of the High Court. It would be separate from the High Court, although as Lady Dorrian said, her vision is very much that it would be a parallel court. That is not enshrined in the proposed legislation, and I questioned Lady Dorrian on that.

That aside, does the Government fully appreciate the resource implications for setting up such a court?

The Lord Advocate: That would be a matter for the Government to respond to. I am here as the Lord Advocate and the independent head of the criminal prosecution service that is responsible for the prosecution of crime and the investigation of deaths.

I can say what the impact would be. It is not just about moving business. If you are going to make the change, you need to apply the resource. The figures that I am able to provide show the big challenges at sheriff and jury level and what we ask our prosecutors at sheriff and jury level to do in cases that are just as complex as those that are prosecuted in the High Court.

Whether to prosecute at sheriff and jury level, as opposed to in the High Court, can come down to very fine decisions. It is the nature of the offence that is relevant to the forum, not the complexity of the case. We see very complex institutional abuse cases being prosecuted at sheriff and jury level, and we see high sentences of five years being handed out regularly at that level.

As I said, it is not the complexity of the case but the nature of the offence that determines the forum. Moving sheriff and jury business in sexual offences cases to the High Court will not mean that we bring in less complex or less serious cases. Sometimes, it is just a simple difference—between whether there has been a penetrative act as opposed to a non-penetrative act, in a sexual case—that determines the forum, because of the possible exposure to sentence. Those are fine distinctions that victims of serious sexual crime probably would not understand, whether there was penetration or not. Through the evidence from the Scottish child abuse inquiry, which is a very important piece of work, we found that, sometimes, non-penetrative acts in really nasty and sadistic types of conduct are far more impactful on and damaging to victims of such crime than penetrative acts are in a different context.

We need to appreciate that it is not just about moving business. We are dealing with very complex areas of work, and the combination of that with the increase in levels of pre-recorded evidence will have a profound impact on our budget. We cannot meet that without the necessary resource, and we cannot do it with the current resource.

Pauline McNeill: I suppose that the fine line that you mentioned is about where cases go. Currently, they go to either the High Court or the sheriff court. You said that, in the case of the High Court, an advocate depute has a single case and you talked about the cost of that. Will that fine line disappear with the specialist court? In other words, who will you instruct to take on those cases? Will ADs take them on? How will you decide on that, if there is no distinction between cases, as there is at the moment, which means that you decide to send them either to the High Court or to the sheriff court, if you see what I mean?

The Lord Advocate: I see the specialist sexual offences court as being the supreme court, sitting alongside the High Court, in the prosecution of sexual crime. In our High Court, with my commission, advocate deputes prosecute those cases and I certainly would not see any diminution in the quality, training and standard of the prosecutor. Therefore, for the specialist sexual offences court, from my perspective I do not see it being anyone other than an advocate depute prosecuting, with extended rights of audience. It would not be someone who did not have extended rights of audience to prosecute in the High Court who would be prosecuting those cases. They are very serious cases and if we are going to deal with them appropriately and give them the recognition that they deserve, I foresee it being advocate deputes prosecuting the cases, because it will be part of the High Court.

Pauline McNeill: Thank you. I think that that is what those interested would expect. In the many proposals in this Parliament over the years about how we should deal with rape cases, maintaining the seriousness of rape, which currently can be prosecuted only in the High Court, has been really important. It is important to me, certainly, and, I

know, to many others. Should we legislate to ensure that, because a future Lord Advocate might take a different view? That would be my worry. I am very content with your answer, but I am interested in protecting that fine line. I can think of cases that should, in my opinion, have gone to the High Court, but that fine line—because of the seriousness of the offence—has not been understood. I completely take the point that there are many factors to consider, but I feel really strongly that there should be no change to who prosecutes, who has rights of audience and who represents the accused, even if we are changing the nature of the court. Could you respond to that?

The Lord Advocate: Yes. I recognise the distinction in our roles, Ms McNeill. You are an elected member of the Parliament, representing your constituents and the voice of the Scottish people. All that I can do is to seek to inform you as to what the current prosecutorial view is across Scotland in relation to those types of offences. It is this: they are the most challenging and difficult cases that we prosecute; they concern us greatly; they are the thing that we talk about most; and they are the issue that gives us the greatest cause for concern.

I have not met a single member of the prosecution service who joined it in order to do such cases badly. Everybody wants to do them well and to the best of their ability. I see the prosecution of such cases as of critical importance to the whole of the criminal justice system and I would see no diminution at all being applied to the standard of prosecutor that would be taking the cases. If the sexual offences court were part of the High Court, it would be High Court prosecutors.

As I have said previously, I consider the issue to be the challenge of our generation of prosecutors. We need to resolve the issues in and around sexual crime. They have a profound impact on the victims. They ruin lives. We have to do something about it. We have to have a better system.

Pauline McNeill: Thank you very much. Some of us attended a round-table discussion with Rape Crisis Scotland. As you would expect, and as you have said in your evidence, we heard that the experience of rape and sexual offences victims is just appalling. However, one survivor who came to the round table had had a completely different experience, which was very recent. She talked about how she got some time with the advocate depute and her positive experience. I take from that that perhaps there are already some changes in the system.

I appreciate all the implications for resources in asking this question, but is being able to have a meeting with the advocate depute prosecutor a standard practice? I have heard of cases where victims have sat in complete frustration in the court because they feel that the prosecutor has not mentioned something that is really important. I fully appreciate the independence of the practitioner and realise that that is an important principle, but should there be more exposure of victims in relation to the prosecution of their cases?

The Lord Advocate: In my time as an advocate depute, I always met a victim of sexual crime before he or she gave evidence in court. From early on, I was a great supporter of that and I have never changed my view. It is the practice in the High Court that advocate deputes meet victims of those types of crimes before they give their evidence. I would like to do that better, and I hope that our current review of sexual offences will deliver on that.

There is a greater challenge in the sheriff and jury courts, where you can see the pressures on the prosecutor and the greater burden of casework that they have. The resources available in those courts are very different. However, I think that I can say this: I know how to do such cases. It requires significant support for the victim of the crime; it requires meeting the victim of the crime in order to give them the necessary confidence that the prosecutor understands them and their case, and to give them some assistance in preparing to give evidence.

I will give you one very important example. I put my skill and experience—I do not make out that I am anything particularly special—to critical use in the trial of a man called Mark Adams. He had an OBE. He was a 54-year-old businessman, a graduate of the University of Cambridge and a former private secretary to John Major and Tony Blair. He was convicted of the rape and sexual assault of an 18-year-old student in Edinburgh city centre when she was on her way home from a night out during the festival in 2019. The case demonstrates that that type of offending is not restricted to any particular class of person. The accused was a man of outstanding intellect and he had been honoured by the monarch.

With the support, understanding and careful guidance that was given in the meetings that I had with the young woman pre-trial, supported by a member of the Procurator Fiscal Service, she was able to overcome her fears and give evidence in court with the use of a screen and a supporter. When I first met that young woman, she was shaking so much that she could barely get into the room. With support, proper guidance and direction, and without any impropriety on my part, she was transformed into someone who was able to come into court and give her evidence with a screen and a supporter. She gave powerful and compelling evidence and the jury returned a unanimous guilty verdict. We know how to do such

cases and we would like to do them in that way, but we need the resources for it.

Fulton MacGregor: Thank you for your powerful evidence so far, including what you have just said.

I will ask about the same subject that I asked about in the previous evidence session—I do not know whether you saw it. What are your views on independent legal representation? What I am getting from your submission is that the Crown Office is generally supportive of the idea and the provisions for it, but that it envisages some problems. You have outlined some ways in which those problems might be resolved. Could you expand on that?

The Lord Advocate: The Crown is not the victim's lawyer, and that is part of the fundamental problem. Although we can do some things that are within the concept of the public interest, we cannot do everything that an independent lawyer would be able to do. That is what underpinned the recognition that you need independent legal representation on the issue of the rape shield provisions because of the impact on the victim's article 8 rights under the European convention of human rights. The victim also has individual rights in relation to the issues that arise in and around the section 275 application. That application is made in court, and before it is granted, the defence is required to set out whether evidence should be

"admitted or elicited; the nature of any questioning that is proposed; the issues at the trial to which that evidence is considered to be relevant; the reasons why that evidence is considered relevant"

in the trial, and

"the inferences which the applicant proposes to submit to the court that it should draw from that evidence."

There is very clear statutory provision.

A properly drafted section 275 application should contain sufficient evidence to enable the parties to be able to identify what the evidence is within the case that is relevant to the evidence that should be elicited. What is it within the case that the defence needs to cross-examine the complainer on in order to properly pursue their defence case? To determine whether that is right, there must be a question mark over the extent to which the Crown would be responsible for receiving the application and, thereafter, identifying the evidence that would be necessary for it to properly advise the complainer and her lawyer to prepare the relevant arguments.

12:00

If you have an independent legal representative in this area of the criminal justice process, they must be able to understand what the evidence is and how they could oppose the application, so they must have access to the material in court. We have to have a process by which that material is disclosed. We are anxious to ensure that that process of disclosure is overviewed independently, properly protects the rights of the accused and does not draw the Crown into difficulties in relation to whether it is acting consistently in its independent role.

In relation to the way in which the ILR operates, the court is in a position to hear submissions from the parties on whether the section 275 application has merit and thereafter understand what within the case requires to be disclosed. Thereafter, the court should oversee the process. It is dangerous to put in the hands of the Crown all the responsibility for deciding what evidence should be disclosed and for the disclosure. There has to be a proper sifting mechanism in the section 275 process. The application should be made, the court should consider whether it has merit and whether it should be intimated to the complainer—we know that the intimation of such documents can be profoundly traumatising for victims—and there should be a proper consideration of what material the independent legal representative must have access to in order to properly frame any opposition.

It is important that we look at the matter with care and not just say that it is the Crown's responsibility to administer the process. We need to have a proper process in court that protects the rights of the accused and the independence of the Crown, delivers a proper process for the victim and ensures that the process is trauma informed. We should not open up a can of worms and allow applications to be sent to victims of sexual crime without their being properly administered using a trauma-informed lens before the victims receive them.

We do not always get it right in the Crown, but we have set down careful safeguards for the way in which we speak to victims about the fact that there has been an application in relation to the rape shield provisions. We have many vulnerable individuals to whom giving that information would cause severe mental health problems. We deal with some of the most vulnerable people in society, and we do not want a system that is going to make it worse. We do not want a system that puts an unnecessary burden on the Crown or that is not properly adjudicated and administered by the court.

Fulton MacGregor: To go back to your submission, my understanding is that you are supportive of the proposal but think that it is not fair to put all the responsibility on the Crown and

that how the process would work in practice needs to be thought out.

The Lord Advocate: Yes, it really needs to be thought out. The profession at large would take on the ILR role and I would be concerned to ensure that there was a proper process of accreditation for solicitors who become involved in such work, have no experience of prosecuting in the public interest and operate in private practice. As I said, we do not always get it right in the Crown and we are trying hard to make improvements. We do not want to take that away and give it to an area of the profession that is not properly trained and does not realise the profound implications of being involved with very vulnerable complainers in relation to an issue as sensitive and important as an application to pierce the rape shield provisions.

Fulton MacGregor: My questioning so far, and in the earlier evidence session, has focused on independent legal representation in relation to the rape shield provisions—as Lady Dorrian said, she recommended ILR for that purpose only. What are your thoughts on independent legal representation being provided for complainers in a wider context, perhaps when they first make a complaint?

We have heard a lot of evidence—I am sure that you have heard it as well—that when somebody makes a complaint to the police in these situations, that is it for them until they are next contacted by the criminal justice system. Is there a role for the provision of independent legal advice at an earlier stage, so that somebody could go through with people making a complaint how things might pan out?

The Lord Advocate: That would be worthy of consideration, but it is certainly not something that I have given consideration to before today. If we had a system that was properly trauma informed, the police engaged with victims of crime appropriately, the victim support services operated in a way that provided the necessary holistic wraparound care and the Crown did what was necessary in relation to engagement with victims, I do not see the need for that.

My view of the Crown's engagement with victims is that we could do a lot more and do it a lot more effectively. Susanne Tanner KC's sexual offences review will report in February and will make recommendations in that regard. The example that I gave you of the case that I prosecuted is an example of what we can achieve. I know that the victim in that case was supported properly and, from the reports that I received afterwards, that she felt that justice had been served. The tools are available at the moment, but we need better management, greater understanding and a drive to improve. Better resourcing is also required.

Rona Mackay: I just have a quick question. I am thinking back to the first evidence session that we had with you at the start of the parliamentary session. You said that radical reform would be needed to tackle men's violence against women and girls, and I think that we are coming to that now—this could be the start of it.

You support a pilot of single-judge rape trials. Do you have any concerns about that?

The Lord Advocate: I support the pilot for the reasons that have been expressed. My anxiety is to ensure that when the Parliament takes a decision on that, it is done against the background of a properly informed, reasoned debate. I do not say that anybody's voice should be discounted. The review itself was split down the middle. There were powerful arguments for and against, and lawyers are sometimes good at presenting powerful arguments, so I am afraid that it is over to the parliamentarians now. It is about what you believe to be appropriate in the interests of the people of Scotland. You are the democratically elected legislature and you now have your place to do what you think is the right thing.

The Convener: Sharon Dowey is indicating that she wants to ask a very short question.

Sharon Dowey: Should the Scottish ministers have laid out provisions for juryless rape trials in the bill, rather than laying out a power to pilot them using secondary legislation?

The Lord Advocate: That is not a matter for me.

The terms of the bill and decisions about the way forward for the legislation are matters for ministers and not for the Lord Advocate. However, it is the case that everyone within the system requires to understand that there needs to be a change in culture and views. Legal change is not enough.

The Convener: On that note, we will bring this part of the meeting to a close. I thank the Lord Advocate for joining us for what has been a very interesting and useful session.

There will be a short suspension to allow for a change of witnesses.

12:10

Meeting suspended.

12:14

On resuming—

The Convener: We move to our next panel, and I welcome to the meeting David Fraser, executive director, and Danielle McLaughlin, head of the Lord Justice Clerk's review, from the Scottish

Courts and Tribunals Service. I intend to allow about 40 minutes for this session.

I will open with a general question, and it will come as no surprise that it is about the proposal for a specialist sexual offences court, on which we have already taken quite substantial evidence from the Lord Advocate and Lady Dorrian. Given that the Scottish Courts and Tribunals Service has expressed support for the creation of a sexual offences court, will you outline what, in your view, would be the main benefits of such a court as well as some of the challenges that could be faced?

12:15

David Fraser (Scottish Courts and Tribunals Service): The Scottish Courts and Tribunals Service very much supports the creation of a new specialist sexual offences court. The committee has heard from Lady Dorrian and the Lord Advocate about the benefits that the court will bring. Potentially, it will be a sea change in how sexual offences cases are dealt with; it has the potential not only to encourage the population to see that we take those offences very seriously in Scotland but to create—dare I say—additional business as a result of people having greater confidence in the system.

Pulling it down to the organisation, and some of the benefits that I see, I would point out that at the moment we very much have a two-tier system, and I think that the Lord Advocate referred to the level of resource given to each tier. A single national specialist sexual offences court would create a level playing field to deal with what has become an increasing amount of cases by removing about 47 per cent of the business from the High Court and about 11 per cent of the business from the sheriff and jury court. Once the specialist court is created, it will deal with more High Court business.

Such a court would have a lot of societal benefits; indeed, Lady Dorrian touched on that. There are other options that could be seen as tinkering around the edges. We have done a number of those in the past and, as I think Lady Dorrian classified it, it is time for the clean-sheet approach of a brand new court that will encompass a lot of new things. Some of those things have already started. For example, the committee has considered the trauma-informed aspect and how that will be very much part of the court.

Finally, from my perspective—I think that Mr Findlay talked about this, too—this is all about a change in culture in which the focus will be very much on the experience of the complainer as they come through the system. The Lord Advocate said that she has been in the judicial system for some time; so have I, as an administrator in the Scottish courts. We are now seeing a change in attitude, and a recognition among those in the system that it is paramount to have the experience of the complainer, as they come through the system, as the centre and focus of attention. That was certainly the basis of Lady Dorrian's review, and it informed how she conducted it. That was a long answer, but in short, I am very supportive of the new court. It will have a lot of benefits.

As for the challenges that I envisage, Lady Dorrian has already covered the issue of how the legislation has been drafted as opposed to the views and vision in the report that she produced. There are nuances, if you like, in the legislation as currently drafted when set against her vision, but I will not go over what Lady Dorrian has already said.

The Convener: Thank you. I do not know whether you would like to come in on that question, Danielle McLaughlin.

Danielle McLaughlin (Scottish Courts and Tribunals Service): I would merely reiterate everything that David Fraser has said. As he mentioned, our appearance before the committee comes after Lady Dorrian's, and she is the person who can speak with the utmost authority on the matter. David and I supported Lady Dorrian in the course of her review and, as David has said, we are now operational colleagues in the SCTS organisation.

The court's fundamental feature is the provision of uniformity. At the moment, we have a two-tier system; with this approach, we will see increased case management at PH, or preliminary hearing level, which, as Lady Dorrian referenced, does not happen at sheriff court level. As David Fraser has said, 11 per cent of current sheriff court business can be categorised as sexual offences crimes, and that equates to a total that is higher than the number of cases that are currently in the High Court. With the uniformity provided by the court, the management of those cases will change, and most important of all, there will be increased focus on the experience for complainers, the accused and the vulnerable witnesses who are involved.

A key aspect of the court is the pre-recording of evidence. The Lord Advocate and others referred to delays in the system. The purpose of pre-recording evidence is to take evidence significantly earlier, which is particularly key, given the unfortunate environment of extended delays that we are in as a result of the pandemic. Commissions can take an average of 16 weeks from the start of a High Court trial, and the latest data from SCTS shows that the wait from preliminary hearing to trial is 49 weeks. This change would reduce a complainer's waiting time to give evidence by 36 weeks.

Moreover, that key aspect—the earlier provision of evidence—will also allow the case to be disclosed and heard by the defence, too. That, in turn, should help reduce the number of matters that are in dispute, assist with the preparation of trials, reduce the length of trials and improve the efficiency of case business generally.

The Convener: That was helpful.

Mr Fraser, we asked the Lord Advocate and Lady Dorrian about putting in place a specialist approach in the existing court structure, so, in the spirit of consistency, I note that early in your contribution, you articulated the fact that the current system has two tiers. We have heard it argued that the current system should become more specialised instead of our going to the bother of creating a bespoke court. Is there anything further that you would like to add on that point?

David Fraser: As part of Lady Dorrian's group, I supported her during the discussions that formulated her report. The question whether we could create a trauma-informed specialism within the High Court was discussed, as was the question whether we could create a separate specialism in the sheriff court. However, it was felt that that would just be tinkering with the current system, and Lady Dorrian has already referred to the fact that an absolutely new approach is required. Set against that context and background and the fact that the volumes that are coming through the courts are increasing, a long-term solution to how we address offending of that type is needed.

The Convener: Okay—I am now going to open it up to members. I call Pauline McNeill, to be followed by Sharon Dowey.

Pauline McNeill: Thank you very much for your insights. I know that you have been involved with this for a long time, and I thank you for that, too.

I was surprised to hear you talk about a two-tier system. Could you elaborate a bit more on that? In my lines of questioning to the Lord Advocate and Lady Dorrian—and I was very content with their answers—I was suggesting that an important distinction would still have to be made with regard to the seriousness of crimes. Indeed, that is why we have a High Court and a lower court—that is, the sheriff court. My understanding is that cases go to the lower court, because they do not require to go to the High Court. When you talked about the system being two-tier and the proposed court creating a level playing field, were you referring to the trauma-informed aspect? It would concern me if it were being suggested that we wrap up all the crimes into one court, given that some are more serious than others.

David Fraser: In essence, the new specialist court takes the sexual offences out of the High Court. In which court the cases are prosecuted will be a matter for the Lord Advocate, and the level in the system at which they are prosecuted will be a matter for the Crown Office.

The expectation is that more serious crimes go to the High Court and less serious crimes go to the sheriff and jury court. However, as we have already heard this morning, some very complex and difficult cases are going to the sheriff and jury court. The new specialist court would create the ability for people who are trained specialists—not just the judiciary, but clerks of court, prosecutors and the defence—to look at that type of offending through a specialist trauma-informed lens. There will be an element of consistency in the new court for all sexual offences cases.

I do not know whether I have answered your question, Ms McNeill.

Pauline McNeill: I think that you have, in relation to the trauma-informed aspect. However, I would like some more clarity. An important distinction—we have had this exchange previously—is that rape cases can go only to the High Court. In a sense, therefore, a two-tier system is a legislative necessity, because of the seriousness of those kinds of cases. I worry that it is being suggested that there is something wrong with having two tiers of crime, as is currently the case. I think that you are saying—if I have understood you correctly—that the level playing field approach concerns the specialist nature of the crime.

David Fraser: Yes.

Pauline McNeill: I will not go into this today, but aspects such as rights of audience and who prosecutes will, by necessity, involve the creation of two tiers.

David Fraser: Yes. Let me—

Pauline McNeill: You know that I have very strong views on that—

David Fraser: I will clarify that and, I hope, put your mind at rest. The creation of a specialist court does not remove the need for certain cases to go through the remaining High Court and for other non-sexual cases to go through the remaining sheriff and jury system. Those tiers would still remain—and rightly so—for the different levels. This is about the specialism that the new court creates—I think that we agree on that.

Pauline McNeill: Thank you.

You have given the committee some helpful figures: around 11 per cent of such business will come from the sheriff court, while 47 per cent of business will come from the High Court. That is a significant difference. What will the High Court

look like in the new circumstances? Will it just be quieter?

David Fraser: As the committee is aware, when we talk about 47 per cent of cases, we are talking about indictments that go through the High Court. Sexual offences cases actually translate to more trials than other types of business, so the figure for those that proceed to trial comes out at about 73 per cent. The answer, though, is yes—the High Court will be a very different creature once the sexual offences court has been created.

Pauline McNeill: I said this to the Lord Advocate, as I was trying to envisage in my own mind what the court would look like. Given the rise in sexual offences that we know about, the new specialist sexual offences court will be substantially large. Does that suggest that there might be a shift in resource to it? What discussions have you had with the Government about the resource implications of its proposal?

David Fraser: As we set out in our submission on the financial memorandum, there would be costs involved for the Scottish Courts and Tribunals Service. They would mainly be initial set-up costs, but there would also be an on-going running cost with the creation of the single court.

We are not creating new business as a result of the new court. In essence, we are taking the existing business in the sheriff court and in the High Court, while also looking at the resources in those two different courts, to create the new specialist sexual offences court. The resources in what would remain the High Court would be very much reduced, with the resources required for the specialist sexual offences court being part of the new court.

Pauline McNeill: Forgive me, but I like to visualise things. It could be, then, that the specialist sexual offences court could meet in what would be Glasgow High Court, but it would be called something else. It could still involve judges that would have presided over those cases in the High Court. Am I right in saying that?

David Fraser: One of the key things that the new specialist sexual offences court will give us is that it will sit in a vastly increased number of locations in comparison with where the High Court currently sits.

Pauline McNeill: I understand that.

David Fraser: It is envisaged that the specialist sexual offences court will sit in the key areas where that type of business is predominant. That does not necessarily preclude the need for the specialist sexual offences court to sit beyond that in any of our locations. Again, Lady Dorrian alluded to the fact that we are not creating new court accommodation—we are simply utilising the court accommodation that we have. The answer to your question, therefore, is yes; there could be a judge—

Pauline McNeill: So it could be in Glasgow High Court, but it would be called something else.

David Fraser: A senator might sit as a High Court judge, but they will also be ticketed and be able to sit in the specialist sexual offences court, and they may sit in both courts. We would not create a system so inflexible that that would not be allowed. There would be flexibility to ensure that the resources would be wherever the business is.

12:30

Sharon Dowey: Pauline McNeill touched on some of the things that I was going to cover. I have looked at the financial memorandum and the costs of the bill. We have heard throughout about the resources that it will take to create the new court. Do you think that table 14 in the financial memorandum still accurately reflects what it will cost to set up the court? I thought that the recurring costs looked quite low.

We have also heard throughout about how recordings from body-worn cameras could be taken as evidence. Obviously, that is another cost implication. They still have not been given out. Have you had any conversations with the Scottish Government about the costs? Do you have an updated estimate of how much they would be?

David Fraser: I will start on that and let Ms McLaughlin conclude the answer, if you do not mind.

We have most definitely had conversations with the Scottish Government. The information that we set out was based on what we anticipate the court will look like. It does not take account of any potential increase in the level of business as we go forward if the trajectory is such that sexual offending continues to increase year on year.

Is there anything you would like to add to that, Ms McLaughlin?

Danielle McLaughlin: In our response to the Finance and Public Administration Committee's call for views on the financial memorandum, we set out that, in addition to those costs, there are the invariable pulls and pushes of the current financial environment. For example, the costs for staffing are based on our 2022-23 pay deal. Inevitably, if we seek to recruit 24 clerks, those costs might increase slightly because of pay deals or changes in the environment. We rely on the flexibility of reorganisation and recruiting from our internal pool of staff to gain expertise and specialisms, but if we have to go to the market, there will be some changes in the costs.

One of the areas that is probably missed out relates to training in trauma-informed practice. That is part of our organisational response to our commitment to trauma-informed practice. We are looking at how we will roll out that training across the whole organisation, and that might impact on the costs that are specifically associated with training staff.

To cut my answer short—I apologise for the elongated response—we believe that what is in the financial memorandum, supplemented by what is in our response to the call for views, is broadly our anticipated costs. There might be some increases due to matters that are outwith our control, such as the costs of training or of staff, for example.

Another proportion of the costs relates to developing an information technology system. That will depend on the final provisions in the bill, because our system will have to adapt to whatever parliamentarians approve, and some parts of that will have to be outsourced to third parties.

I hope that that answers your question.

Sharon Dowey: That is fine. Thank you.

John Swinney: Can you share with the committee any data on the level of spare capacity in the court and tribunal infrastructure in Scotland? What is the utilisation level of the court infrastructure in the country?

David Fraser: That is a very good question. If you want specifics, I will have to come back with that information.

Utilisation varies from court to court, because it is very much based on the individual programmes of all the different courts and what is programmed, as opposed to what actually takes place. I know that utilisation is very high in the High Court, but as we come down the different tiers, through the solemn, summary and justice of the peace courts, it varies. However, I do not have specific figures on that.

John Swinney: It would be good if you could provide that information to us with as much detail as possible, Mr Fraser, because it is material to some of the questions that I will come on to about improving the throughput of the court system and addressing some of the issues about delays that I aired with the Lord Advocate, which you might have heard, earlier on. It also gets to the nub of whether we need to build a new infrastructure for this. I am profoundly sceptical about that, given that I imagine that there is spare capacity, albeit that it might be in the wrong place to suit particular schedules, if you see what I am getting at.

David Fraser: I can give you a little bit of detail. We have found capacity to run the recovery programme within the existing estate in lots of different ways. We are now utilising a lot of virtual hearings on the civil side, which has released courtrooms to be converted to criminal courtrooms. We have the physical capacity to do more business within the court estate, if that is where you are coming from.

John Swinney: That is what I am getting at. The ground that you have covered in that supplementary answer, which is very helpful, addresses some of what I am keen to air as part of the evidence for the committee. It does not have to be about the building of new buildings, because court processes have changed dramatically as a consequence of Covid. Changes will have taken place that people have been trying to make for 50 years, but nobody has been interested in them. They had to happen because of Covid, and, thankfully, they have been retained. Some of the emergency legislation that some people in the Parliament complain about, and which is still in force, is actually quite helpful in addressing some of those challenges. The more you can write to us about that, Mr Fraser, the better.

David Fraser: I am sorry to interrupt, Mr Swinney, but can I give you one other thing that probably adds a little to that?

John Swinney: Please do.

David Fraser: The new specialist sexual offences court would look at taking really good things that happen in the High Court. I will give an example. During Covid, we introduced virtual preliminary hearings in the High Court as one of the necessities that were required as a result of the pandemic. As we came out of the pandemic, we were asked to return to a physical environment. We did that, and we then found that the practitioners saw reintroducing the physical environment as a retrograde step, and they asked us to go back to virtual hearings, which we now do. We would take those things forward with the new specialist sexual offences court.

John Swinney: You understand exactly where I am coming from. I would be keen to see that further information.

The only other thing that I would like to explore is the question of delays, which I discussed with the Lord Advocate. I do not know whether you were here for the question that I raised with the Lord Advocate, but it strikes me that the solution to delays will not rest in the hands of one organisation. There should be a joint effort involving Police Scotland, the Scottish Courts and Tribunals Service, the Crown, practitioners and the judiciary, for example. I am interested in hearing from you what steps you feel that you can take as part of that collaborative effort to address the issues that are contributing to some of the very

poor experiences that complainers have because processes are taking so long.

David Fraser: That is a very big question for the Scottish Courts and Tribunals Service, but I will do my very best to answer it.

We are fully committed to reducing our delays. I absolutely sympathise with complainers and victims, because of the time and difficulties that they face as a result of the fact that it is taking much longer now to go through the court process than it did pre-pandemic.

We are working through the recovery programme and programming everything that we possibly can. We are working over capacity to create the ability to claw back the time that it takes to go through the court system, and we are making inroads in that regard. We are also working collaboratively with our justice partners.

I do not think that there is anyone in the justice system who is not acutely aware of the need to get us back on an even keel. I very much hope that we will have reached that position in time for the creation, potentially, of the sexual offences court. I anticipate and hope that we will have our recovery programme done and dusted in the timeframe that it will take for the introduction of the new specialist sexual offences court, and that those will dovetail together. For me, that would be a wonderful achievement.

John Swinney: Do you see progress being made in eroding the delays that exist?

David Fraser: Yes, I do.

John Swinney: Is there data that you can share with the committee on that point?

David Fraser: There is indeed. We publish projections, which are developed in consultation with our Crown colleagues, of what we see coming into the system, how the system will behave, and how long it will take us to recover. We also publish quarterly reports on performance. I will make those available to the committee.

John Swinney: That would be helpful. Thank you.

Danielle McLaughlin: If it would help, Mr Swinney, I have some data in front of me. As David Fraser has said, we work in collaboration with the Crown Office and Procurator Fiscal Service and other justice partners to support the recovery programme. An updated modelling paper was produced just before Christmas. Since the start of the recovery programme, the backlog has been reduced by 16,344 cases, with 27,262 scheduled trials at the end of November 2023. Waiting periods, which were up to 63 weeks at the start of the recovery programme, had been reduced to 49 weeks as at November.

We are robustly reporting and working with our justice partners, and we are committed to supporting the recovery programme and continuing to further reduce the backlog. We are working towards a new baseline of 20,000 cases towards the end of the recovery programme.

The one challenge that we have is that we face an increased volume of cases as we go forward. The backlog is no longer a backlog per se; it is what is left from the pandemic and as a consequence of the new, increased volume of cases, as well.

I hope that that helps.

John Swinney: That is very helpful. Are there particular areas in which you think that there could be further improvements that would help to accelerate the progress that has been made?

David Fraser: We are moving a little bit off the issue of the sexual offences court. I will talk more generally.

Other things are happening in other parts of the system. I refer to the very healthy progress that is being made on pilot courts in relation to summary business and how that is managed. That has the capacity to make greater efficiencies within the system. Summary cases are the largest volume of business that goes through the court system, and that is where the greatest impact will be. However, some of the lessons that are learned there can equally be applied across other parts of the system.

Russell Findlay: Lady Dorrian's review recommended the creation of a specialist sexual offences court, and the Scottish Courts and Tribunals Service is supportive of that. I will pick up on some of the questions that Pauline McNeill put earlier. Your submission says that the inclusion of other crimes up to and including murder could add to much higher costs being borne by the court service. Given the unpredictability—we heard from Lady Dorrian today that she still believes that the crime of murder should not be tried in the new court—what is your position on that? Do you have any more information on what the costs might look like in that scenario?

David Fraser: I absolutely support the position that Lady Dorrian put forward. In the model that we looked at, it was never envisaged that murders would be included in the sexual offences court. You have to ask yourself what the purpose of the High Court becomes if some of the privative jurisdictions of cases that go through that, such as murder, are moved into the specialist sexual offences court. I would follow the line that Lady Dorrian gave the committee this morning.

Is there anything that Ms McLaughlin would like to add on the financial aspect?

12:45

Danielle McLaughlin: Yes. That was the main point that we were trying to make in our response. For all the reasons that David Fraser and Lady Dorrian have alluded to, the expansion of business to include murder would create a duplication with the High Court and would have impacts on resources. The provisions as currently drafted have the benefit that the Scottish ministers would have the ability to amend the list of offences so, obviously, there is the potential for murder or some other cases that others might have challenges about being added in the future. Lady Dorrian's review acknowledged that we need to focus the most serious life-impacting cases in one uniform court and use the finite resources that we have in a better and more manageable way. That was our main concern.

Russell Findlay: The Lord Advocate referenced a particularly horrific case that took place just six months ago in Fife. It involved an individual who ultimately murdered his female partner, but the evidence that was led was a huge catalogue of violence and abuse against her and many other female partners. Would your position be that that sort of case should remain a High Court case rather than a sexual offences court case?

David Fraser: If there is a sexual element, it should go into the specialist sexual offences court, for the very reasons that you talk about—it was not an isolated incident. I do not want to talk about specific cases but, from what I have heard, there can be a build-up in previous behaviour, so that should be in the specialist sexual offences court.

Russell Findlay: I raise that case because the Lord Advocate did so, and it seems pertinent to the potential fault line here. Is it your view that, even though murder is the primary charge, a case such as the one described would find itself in the sexual offences court?

David Fraser: I beg your pardon. I will backtrack, because ultimately in that case there was a deceased victim as a result of the offence. In the vision that Lady Dorrian set out, that case would remain in the High Court, because it was predominantly a murder case. I am going out on a limb here, but I think that the vision for the sexual offences court was that it would predominantly deal with the complainers—they would be part of the process—as opposed to the deceased.

I have probably gone out on a limb there. Ms McLaughlin is going to correct me.

Danielle McLaughlin: No. I think that Lady Dorrian envisaged that, if that sort of case remained in the High Court, we would ensure that relevant provisions were in place whereby a High Court judge who was trained in trauma-informed practice and who might be a judge of the sexual offences court would preside over the case.

I apologise if you might interpret our initial view as being not to include murder cases in the specialist court, but there are these extreme examples. There are transfer powers in the bill that would allow applications to be made and the potential for a case to go into the specialist court to be discussed and determined.

Russell Findlay: In which case, if there is the ability to impose the trauma-informed best practice of the sexual offences court on a High Court murder trial, does that not make you ask why we would bother with the great cost and effort of creating sexual offences courts in the first place?

David Fraser: The fundamental point of doing this is to look at what happens in our system currently through the lens of those who come through the system—from the complainer's perspective. From my involvement in the various reviews, there is absolutely a need for and room for improvement in what we currently have in the Scottish jurisdiction. Creating specialist courts is one way in which we can make a fundamental change in what we do to try to make improvements.

Danielle McLaughlin: We also have to look at the case volumes. Although just under 50 per cent—or 50 per cent on average—of indictments to the High Court equate to sexual offences cases, that increases to 74 per cent of trial courts. That means that 18 of our 22 trial courts are already dealing with sexual offences whereas, as you would appreciate, a smaller proportion deal with murder. Therefore, as expressed by David Fraser and Lady Dorrian, we need a clean-sheet approach.

Although exceptions could be made to support exceptional cases that involve a combination of murder and serious sexual offences, in a large proportion of cases, we need something more than that. You will note that, in our written submission, we strongly support the creation of the court.

I apologise if I have gone over time.

Russell Findlay: The proposed judge-only rape trials are, arguably, the most contentious part of the bill. The SCTS supports those. It supports the creation of a sexual offences court, the anonymity of victims, legal representation for victims and, indeed, judge-only rape trials. Given your role as almost a neutral party in many respects and given the opposition to judge-only rape trials in particular, has any consideration been given to the courts service being seen to be less supportive of

a Government or establishment view on the need for all those radical measures?

David Fraser: The Scottish Courts and Tribunals Service, as an organisation, exists to support the judiciary and deliver the best that we possibly can in running, and supporting the running of, the courts. From our perspective in the organisation, the creation of a single-judge or juryless court is something that we can do, and we support it for the reasons set out—namely, that there is no evidence base to determine some of the things that were talked about at the time of the review and beyond. From my perspective, it creates an opportunity, if you set it within the parameters of a time-limited pilot process rather than a normal pilot, which we would start and just continue. We would do it for the purposes of gathering the information to have the debate about what is best as we move forward. There are benefits to doing that.

Fulton MacGregor: Good afternoon. I will stick to the line of questioning that I followed with the previous two panels of witnesses, which is on the issue of independent legal representation. Your submission is different to those of Lady Dorrian and the Lord Advocate, in that you raise concerns about the resource implications and the possibility of delays to cases. Can you expand on those concerns? Is there any merit to the suggestion and, if so, how could it be achieved, if not through the bill?

Danielle McLaughlin: In the first instance, I stress that we support in principle the creation of independent legal representation to support section 275 applications. As a member of the review, we supported Lady Dorrian through those recommendations. To clarify, our criticisms and our concerns about delay and churn are a consequence of aspects of how the provision is presented in the bill—the procedures and practices suggested in the bill. Those are our main concerns. I can articulate them fully, if that would help.

Our particular concern relates to what we refer to in our submissions as the disclosure process, whereby a new process is created in the bill to allow documentation to be given to the complainer's independent legal representative. From our perspective, that is a rather convoluted process that will increasingly require additional judicial resource and result in an increase in judicial court time. Most importantly, contrary to the intentions of Lady Dorrian's review and the bill, it will build in churn and delay for complainers. That is because an additional process to disclose information to complainers before the decision on an application can be made has been built in to the process.

A lot of other steps that depend on the outcome of a section 275 application also impact on the complainer. If an extra hearing is needed before the section 275 decision, we cannot then have the ground rules hearing. A decision on the section 275 application is needed to allow the ground rules hearing to take place to allow a commission to take place. Therefore, it builds in unintended consequences—I stress that they are unintended. I said that the process is convoluted, but it is clearly unintended delay. From our perspective and, as Lady Dorrian alluded to, the process that the bill would create could be greatly simplified.

It also fails to address some of the key parts of Lady Dorrian's recommendations. There is no certainty or clarity in the bill as to what will happen if a section 275 application is made during a trial. The inference is that we will have to stop and delay the trial for an indefinite period, which will inevitably cause complainers, the accused and all involved in the process concern and delay.

I can provide further clarity, if that would help. The key point of the disclosure process, as I understand it, is to allow the complainer to have additional information to respond to the section 275 application. Currently, the engagement with the complainer is by the Crown. As I understand it, that additional information is not necessarily part of the information that the Crown needs to give to the complainer, to advise the court of the process and to allow the court to make its decision.

David Fraser: I will just clarify that we are supportive of independent legal representation, as we have stated, for all the reasons that have been discussed. It is purely in relation to the mechanism of how it is envisaged that it would work that, as an organisation, we think that the process needs to be streamlined and perhaps revisited. We are happy to work with the Scottish Government to look into that dimension, if that would be of assistance.

Fulton MacGregor: That was my next question. It sounds like you are supportive of the principle but, like the Lord Advocate, you perhaps have concerns over how the arrangements might work in practice.

My next question, then, is: how do we make the process work more easily? What is the answer? It may not be so simple, but you are saying that you would be happy to work with the Scottish Government. At this stage of scrutiny of the bill, it would be helpful for us to understand how things could work.

David Fraser: That is an excellent question, to which I do not have an answer, to be absolutely honest. We need to consider the alternative. It is not really for the SCTS to develop the policy, and you are asking me to do that. We are happy to

give our input as to how, from an operational perspective, we would view a system that would introduce independent legal representation, avoiding some of the churn that we currently envisage. We are happy to have discussions on that.

That is probably as far as I could go.

Fulton MacGregor: I am not really asking you to develop the policy. You have been clear that you have issues with the proposals as they are set out, and I was asking whether you had any thoughts or suggestions as to how they could be rectified and how the policy might work better in practice. However, I accept your point that this will take further discussions.

Danielle McLaughlin: To supplement David Fraser's comments, we are open to discussion and to working with justice partners. The key areas would be the disclosure exercise and identifying some of the key aspects that Lady Dorrian recommended that are not currently in place around what is to happen regarding trials. What needs to be dealt with? How are applications under section 275(9) of the 1995 act to be dealt with? Some matters are just not addressed, and some timescales, which would give the court and all parties greater certainty, are not identified in the bill.

I have probably gone out on a limb in stating those points, but you asked the question, Mr MacGregor, and those are the areas where we are happy to have further discussions with the Scottish Government to allow for a more efficient process to be developed for all concerned. That is the point: we support the provisions, but some of the mechanisms that have been put in place in the bill as drafted will unintentionally delay complainers getting their evidence taken, and they will delay the journeys of all partners involved.

Pauline McNeill: I am looking for some clarity from you, Danielle. The proposals that we have to scrutinise are huge, so it is really important to understand what the measures would look like if they were passed into law. I am sure that you will tell me if you are the wrong person to respond to this.

Something is confusing me about an answer that you gave to a question from Russell Findlay about a murder case. At the moment, murder can be tried only in the High Court, because it is the most serious crime and it attracts the highest sentence. If there is a sexual element, it will attract an even higher sentence. That is where I need clarity. Surely there could be no change to that. I am concerned about there being some grey area, such that murder cases could go to a court that is designed for sexual offences. I do not understand why there is any grey area for cases where the victim is dead. Will you explain?

Danielle McLaughlin: I think that Lady Dorrian did not want that grey area. She wanted murder cases to remain in the High Court. If there was a charge or element of sexual offence to a murder case, that could be addressed by ensuring that the relevant court staff and judiciary were there. The bill and the provisions—

Pauline McNeill: Would a murder case with a sexual element go to the High Court?

Danielle McLaughlin: That is what Lady Dorrian recommended.

Pauline McNeill: Is that your evidence?

Danielle McLaughlin: Yes.

Pauline McNeill: I misunderstood what you said to Russell Findlay.

Danielle McLaughlin: I apologise.

Pauline McNeill: That is clear. Will that change?

Danielle McLaughlin: No, but the bill as drafted allows a murder case with a sexual element to go to the sexual offences court.

Pauline McNeill: That is exactly the point. Who do I need to address that question to? I do not understand why that would be consistent with what the bill is trying to achieve. Do you see what I am saying? We have heard evidence about—

The Convener: I will come in on that to provide a wee bit of clarification. We have quickly looked at the policy memorandum for the bill. Paragraph 282 says:

"For the avoidance of doubt, the decision as to whether any individual case, including those involving rape or murder, is to be prosecuted in the Sexual Offences Court, will be a decision for independent prosecutors acting on behalf of the Lord Advocate. The Bill permits, rather than requires"—

Pauline McNeill: The point, convener, is that at the moment it is not a decision for the prosecutor. Murder is automatically tried in the High Court. No Lord Advocate or prosecutor can take it to any other court, because it is the highest court. My concern remains.

I realise that my question should be directed to the Cabinet Secretary for Justice and Home Affairs, because the bill leaves it open for a prosecutor to allow the prosecution of a murder in the sexual offences court. That is a matter for the cabinet secretary.

The Convener: On that note, we are running out of time, so I thank our witnesses for attending. The session has been helpful. That completes this agenda item.

I remind members that we are meeting again tomorrow at lunch time to look at the management of transgender prisoners and two related Scottish statutory instruments.

Next week, we will return to the Victims, Witnesses, and Justice Reform (Scotland) Bill with evidence from survivors of sexual offences cases and then from victims and survivors organisations. I am sure that it will be a powerful and important session, and I pay tribute in advance to those who will attend. We now move into private session.

13:02

Meeting continued in private until 13:06.

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