The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 9 June 2015

Session 4

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JUSTICE COMMITTEE
20th Meeting 2015, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bruce Adamson (Scottish Human Rights Commission)
Laura Ceresa (Law Society of Scotland)
Ronnie Conway (Association of Personal Injury Lawyers)
Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab)
Charlie Irvine (University of Strathclyde)
John Lamont (Ettrick, Roxburgh and Berwickshire) (Con) (Committee Substitute)
Dr Anthea Martin (Medical and Dental Defence Union of Scotland)
Geraldine McCann (South Lanarkshire Council)
Dr Gordon McDavid (Medical Protection Society)
Paul McFadden (Scottish Public Services Ombudsman)
Patrick McGuire (Thompson's Solicitors)
David Stephenson QC (Faculty of Advocates)
Graeme Watson (Forum of Insurance Lawyers)
Dr Sally Winning (British Medical Association Scotland)

CLERK TO THE COMMITTEE

Tracey White

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Justice Committee

Tuesday 9 June 2015

[The Convener opened the meeting at 09:33]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 20th meeting in 2015 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices as they interfere with broadcasting even when switched to silent.

No apologies have been received. I welcome John Lamont, who is substituting for Margaret Mitchell for item 2.

For agenda item 1, I ask the committee to agree to take in private item 4, on our work programme. Are we agreed?

Members *indicated agreement.*

Apologies (Scotland) Bill: Stage 1

09:33

The Convener: Agenda item 2 is to begin taking evidence on the Apologies (Scotland) Bill, which is a member's bill that has been introduced by Margaret Mitchell. Standing orders prevent Margaret from being involved as a committee member in the scrutiny of her bill, but she can of course participate in evidence sessions as an ordinary member. You are at our mercy at last, Margaret.

We will have two round-table sessions on the bill today. Before we start, Roderick Campbell wishes to make a declaration.

Roderick Campbell (North East Fife) (SNP): I refer to the declaration in my entry in the register of interests that I am a member of the Faculty of Advocates.

The Convener: I welcome the witnesses in the first round-table session. Has anybody been to a round-table session of the committee before? No. Well, it is a bit more informal than the usual panel format for witnesses, so it is really your show. We are kept pretty silent in these sessions, which is wonderful. It is about your interaction on the bill that is before us.

The microphones will come on automatically. To indicate that you want to speak, just look at me and I will call you. If I have a list, I will read it out so that you know where you are in the running order.

I think that it would be a good idea—certainly for me, because it has been a bad start to the day so far—for everyone to introduce themselves. I am Christine Grahame, convener of the Justice Committee. My name is on a nameplate in front of me to remind me.

Elaine Murray (Dumfriesshire) (Lab): I am deputy convener of the Justice Committee.

Ronnie Conway (Association of Personal Injury Lawyers): I am the Scottish co-ordinator of the Association of Personal Injury Lawyers.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I am John Lamont MSP.

David Stephenson QC (Faculty of Advocates): I am a member of the Faculty of Advocates.

Roderick Campbell: I am the MSP for North East Fife.

Graeme Watson (Forum of Insurance Lawyers): I am from the Forum of Insurance Lawyers.

Gil Paterson (Clydebank and Milngavie) (SNP): I am the MSP for Clydebank and Milngavie.

Margaret Mitchell (Central Scotland) (Con): I am an MSP for Central Scotland.

Christian Allard (North East Scotland) (SNP): Good morning. I am an MSP for North East Scotland.

Laura Ceresa (Law Society of Scotland): I am from the Law Society of Scotland.

John Finnie (Highlands and Islands) (Ind): I am an MSP for the Highlands and Islands.

Paul McFadden (Scottish Public Services Ombudsman): I am from the Scottish Public Services Ombudsman.

Alison McInnes (North East Scotland) (LD): I am an MSP for North East Scotland.

Charlie Irvine (University of Strathclyde): I am a senior teaching fellow at the University of Strathclyde.

Jayne Baxter (Mid Scotland and Fife) (Lab): I am an MSP for Mid Scotland and Fife.

The Convener: Thank you all very much. I will start by asking a question in the way that my history teacher used to do it. The Apologies (Scotland) Bill: a good or a bad thing? Who would like to discuss? Who would like to come in first and break the ice? Mr Conway, you looked energetic there.

Ronnie Conway: The original proposal by Ms Mitchell seemed to me simply to reflect the common-law position on apologies, namely that an expression of sorrow, benevolence or regret does not attract liability. In that regard, the proposal seemed similar to the English legislation in the Compensation Act 2006.

I can understand the idea that we should be in a kinder, gentler world, and there can be arguments that people are reluctant to apologise because of fear of litigation. Ms Mitchell's proposals would have addressed that, although there is a point of view that says that we should legislate for substantive law matters and educate in other ways. In any event, if we had followed something like the Compensation Act 2006, that would have been absolutely fine. However, we have gone far beyond that now with the bill. I am afraid, Ms Mitchell, that I think that there are two particular aspects of the bill that would make it bad law.

The Convener: You said it so nicely.

Margaret Mitchell: It does not mean that it is true.

Ronnie Conway: My first point is that I think that borrowing legislation from other jurisdictions means that the bill addresses a problem that does not exist. I know that some of you might already be thinking, "He's a claimant lawyer, so he would say that."

The Convener: I was actually thinking that.

Ronnie Conway: Well, I know your history as well, madam convener.

The Convener: Oh, good grief—see me later. On you go.

Ronnie Conway: I will refer to a matter that recently proceeded under the Courts Reform (Scotland) Act 2014, namely the "Taylor Review—Review of Expenses and Funding of Civil Litigation in Scotland", and particularly the foreword, where Sheriff Principal Taylor refers to the so-called "compensation culture". He stated that it was not his place to decide whether a compensation culture existed in any other place in the world but that it did not exist in Scotland. He produced figures for claims recognised by the compensation recovery unit and showed that the number of medical negligence cases in Scotland is about one thirtieth of the number of such cases in England and Wales.

There are various reasons for that difference. In fact, Sheriff Principal Taylor had a bit of fun about it in his foreword, as he said that he did not think that it was because doctors and the medical profession in Scotland are any more efficient than those in other parts of the world. That carries over to the number of road traffic cases and employer liability cases in Scotland compared with the number in England and Wales. My first point then is that there is no litigation crisis here and no compensation culture monster that the bill is seeking to address—that is not opinion; it is arithmetic.

Next, what seems to me to be absent from almost all the discussions and the written submissions on the bill is the issue of access to justice. As far as I can see, the only time that the subject of access to justice—in the sense of getting the right result—is approached is in the Scottish Government's memorandum, which I saw only recently.

I will use a specific example, which comes hot off the press. It is something that my associate asked me about yesterday, concerning a road traffic accident. The person at the scene said, "I'm sorry. It was my fault. I was daydreaming." Let us deconstruct that. The first part is the expression of regret. I do not have a problem with that being excluded from admissible evidence. The second part, saying "It's my fault," is not a factual statement, but it is certainly an indication of the state of mind of the person at the time of the accident. If he were to come to court or to attempt to give evidence later, saying instead, "It was your

fault," that would be a powerful piece of evidence against him. The final critical point is the comment, "I was daydreaming," "I wasn't looking," or whatever. That is a statement of fact.

Under the old law, all kinds of hearsay were excluded. In both criminal and civil cases, however, such admissions were allowed, precisely because people would not make them unless they were true. That is dismissed in a sentence—it is said that it is a fallacy—but, in every common-law system or, to be accurate, in England and Wales, in the United States and in the Commonwealth countries, admissions against interest have been accepted as exceptions to the hearsay rule for the simple reason that they are likely to be true. The first thing that any justice system has to do is to get at the truth. It has to find the factual matrix and then apply the law to it. To remove, "It's my fault," and, secondly, "I was daydreaming," is to remove an extremely powerful and persuasive piece of evidence.

On reading the papers, it almost seems that reduced settlements are to be an aim in themselves. There is nothing about fair settlements, but there is an idea that reduction of damages is something to be achieved. If my organisation has a vested interest, it is to see that people get fair compensation—no more and no less. This place has a very powerful history of legislating in that regard, including the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 and the Damages (Scotland) Act 2011. The proposed legislation would, in my view, be a retrograde step.

My next point relates to an issue that is going on elsewhere and which will be dealt with in this building: the pre-action protocols. It is accepted that we should aim for early and fair settlements. There are specific codes of practice that claimants and insurers must deal with. The critical point is that the insurer should admit or repudiate within a certain period, which is five or six weeks in a normal situation. At common law, it is possible to resile from that repudiation or admission of fact. Someone can say that they have changed their mind, for instance. However, under the protocol, people will be unable to resile from it. If the proposed legislation is passed as introduced, it would strike directly against that.

I appreciate that I have gone on for a bit, but I will just make one final point.

The Convener: You have said some interesting and controversial things—controversial for some people—which means that I will get responses, or that you will get corroboration and support.

I love using the word "corroboration"—I throw it about willy-nilly.

09:45

Ronnie Conway: I come to my final point. The statement of fact and the statement of fault are attached to the apology. Let us think that through. The minute the apology is made, neither the statement of fact nor the statement of fault can be used as evidence. However, if the apology is not made, they can be used. That means that, with regard to the protocol, an insurer could say, for example, "We accept liability. It was our insured's fault. Our insured says he is sorry," and, immediately, all of that would disappear.

I applaud Ms Mitchell's intentions. If we had stayed at the original proposals, the bill would have increased public perception of the idea that an apology is not an admission of liability. However, I am sorry to say that I have the misfortune to disagree with her and believe that, if this is passed, it will be bad law.

Graeme Watson: Mr Conway's starting point is that this is a problem that does not exist. In part, I agree with that, in that there is no crisis or floodgate of litigation, regardless of what the perception might be.

However, there is a real perception among those on the receiving end of claims that they must not or indeed cannot apologise because, in doing so, they will be seen to have admitted their liability. I realise that there is a good argument that that does not represent the common law. However, that is not the perception, and that perception is, of course, heightened by the existence of the Compensation Act 2006 in England. I have frequently been contacted by clients within and outwith the personal injuries sphere who have been told by the ombudsman to apologise and who say that the ombudsman does not seem to understand that, although that would be protected in England, it is not protected in Scotland.

Again, I agree with Mr Conway that there is a job of explanation to be done. However, straightforward legislation that made it clear that an act of apology, of itself, did not amount to an admission of liability would have great merit.

The committee might be aware that, last week, the Government published its Health (Tobacco, Nicotine etc and Care) (Scotland) Bill, which will legislate for the duty of candour. Section 23 of the bill deals with apologies and, in effect, mirrors the Compensation Act 2006, as it provides that an apology in the context of the duty of candour will not, of itself, be an admission of liability.

By way of practical outcome, if not of starting point, Mr Conway and I are largely in agreement. However, I would say that legislation of some form has a definite role to play. It might be an educative one, but it is also a practical one with a legislative

effect in making it clear to those on the receiving end of claims that there is a proper role for an apology that does not bind them to an admission of liability. There is a significant gulf between saying that one is sorry for an event happening—and, indeed, that one is sorry for one's role in it—and, as a matter of law, saying something that amounts to an admission that there has been negligence or a breach of a statutory duty. It is correct that the law recognises that.

Mr Conway has, of course, taken as his starting point the role of claimants. However, I suggest that the proposed legislation would also have a deleterious effect on defenders. It is quite common that, after an accident, the injured party will say, "I am sorry; that was my fault," and will find themselves on the receiving end of a plea of contributory negligence. The bill might strike at that and therefore, equally, might strike at what would otherwise be the defender's interest.

Mr Conway also raised the question of compensation and whether an aim of lowering the value of compensation payments is an end in itself. Again, I accept entirely what he has to say, but the role of an apology may also be to shorten the course of a dispute; it may avoid the matter going to litigation in the first place or, if there is litigation, it may settle more quickly. Accordingly, the outcome may be that the costs of solicitors are reduced and, therefore, the total cost of the settlement and, indeed, the burden on the court service are reduced. That is an appropriate end.

The role of an apology is very important, perhaps particularly in the medical and clinical setting but also more widely. There is a role for promoting that within appropriately formed legislation. I echo the sentiment that that is reflected more properly in the wording in the English legislation, whereby the fact of an apology may be taken into account, but it is not of itself an admission of liability.

Laura Ceresa: Along with Mr Conway of the Association of Personal Injury Lawyers, the Law Society of Scotland supports the intentions of the bill but, as he said, the concern is that it does not necessarily add anything to what already exists.

I am looking from the perspective of medical negligence law. A mechanism already exists, through the national health service internal complaints procedure, for a party who feels aggrieved to approach the hospital or clinician involved and request an investigation, which could embody an apology. However, the internal complaints procedure is separate from a legal claim for damages in respect of medical negligence. The admission through the NHS internal complaints procedure that something went wrong does not meet the legal test for medical negligence, so it is entirely separate.

By the time someone comes to see a solicitor with a concern over treatment that they had, the question of an apology does not really arise. The test is totally different and is embodied in a case from 1957 called Hunter v Hanley. The experts have to decide whether there has been negligence.

An apology is entirely separate. Although getting an apology might be part of what the client wants to achieve by coming to see a solicitor, it does not form part of an investigation for medical negligence. An apology might be helpful in some way to the client in understanding what went wrong, but it does not form part of the investigation for compensation in legal terms.

As I understand it, compensation is supposed to put the injured party back in the position that he would have been in had there been no negligence, so the apology is secondary to that. I do not see that compensation will be reduced in any sense or in any way if an apology has already been given.

David Stephenson: If we are talking about the broad principle of whether this is a good thing or a bad thing, we have to start by acknowledging that the purpose of the bill if enacted would be to take away from people rights that they currently have. People who wanted to rely on admissions of fault or fact or simple apologies would no longer be able to put them before courts, and courts would no longer be able to take into account evidential matters that they currently take into account.

If enacting the bill would disadvantage certain people, where is the balancing advantage and how confident can we be that there would be a benefit from depriving people of rights that they currently have? The Faculty of Advocates is concerned that although similar laws—they all tend to be a bit different—have been introduced all round the world, beginning in Massachusetts in 1985, no one anywhere seems to have good evidence that they work.

I do not want to labour the point, but I will mention a paper from last year that was written by Professor Robyn Carroll, who is an Australian academic. Professor Irvine and Professor Vines cited it in their submissions, and it is cited in the Scottish Parliament information centre memorandum for the committee. At page 18, towards the end of the paper, Professor Carroll says:

> "The limited research available does not show that apology legislation has worked as a 'magic wand'. To the contrary, the little data that exists as to the shift in behaviour of potential apologisers, from the field of medical practice, tells us that the legislation has been relatively ineffective."

That paper was a 2014 review of world literature and of the impact of laws that have been

introduced in America, Canada, New Zealand and Australia. If that was the conclusion in 2014, after 30 years of such legislation—starting with Massachusetts in 1985—why and on what basis are we to be convinced in Scotland that sufficient benefit would accrue to justify taking away existing rights from people and limiting what courts may look at when they try to determine the truth of what happened?

The Convener: Professor Irvine, as you were named, would you like to comment?

Charlie Irvine: I acknowledge the rhetorical direction in which we seem to be travelling—far be it from me to spoil the party.

I was sceptical in 2012 when the initial bill was published, largely on the grounds that it looked as though it protected partial apologies. Partial apologies are likely to do more harm than good—they are the classic, "I'm sorry you're unhappy and I'm sorry that something's happened to you, but it wasnae me." I felt that such apologies, to some extent, are already protected and that the bill would not be particularly helpful.

The conversion to a full apology has won me round. My reasoning is a wee bit broader and I have probably been persuaded on three grounds.

There is value in setting a tone for the country. I do not know whether any of my colleagues has come across research by Tamara Relis in Canada; she found fascinating evidence that lawyers for plaintiffs and defendants on the one side and the people who were involved in medical negligence claims on the other side saw the world differently. She regarded them as living in parallel worlds. In particular, on what clients wanted from their interaction with defendants, she found—interestingly—that lawyers consistently underestimated people's wish for an apology. Lawyers even more strongly underestimated their clients' wish for the other side to admit fault, to give an explanation, to hear the clients' perspective and to discuss quality improvement, so it looks as though there is a range of things to consider.

People might well go into a lawyer's office and think that they ought not to say that, so I am not pointing the finger at anyone in particular. However, the evidence chimes with some common sense that there may well be elements in the giving of an apology that the legal profession overlooks. The bill sets a tone and may persuade a number of people in a number of settings, who are not daft, that giving an apology is the right thing to do.

We tend to forget that people who give apologies are aware of the law. The risk of the current situation is that, by and large, most parties get neither the evidence nor the apology. There is an idea that we might be depriving people of best evidence, but there are many situations, and I appreciate that the moment of an impact is one particular situation.

10:00

I have been affected by being involved in the human rights interaction for survivors of historical abuse. That is a different setting, in which it was clear to me after meeting some of the survivors that there is a powerful wish for an apology. Such apologies appear to be inhibited by the fear of litigation. That setting, which is quite different from the prang that we might be talking about otherwise, has had an impact on me. There is a large group of people in Scottish society who would welcome an apology, whether or not it turns into financial compensation. I am not saying that compensation is not important, but it is not the only factor in those people's minds.

It is worth saying that, although there is little evidence of the benefits of apologies acts, there is also little evidence of the harms that our colleagues are describing to us. There is some evidence from Canada of the judiciary beginning to nuance the way in which the acts are interpreted. In a recent case in British Columbia, it looked as if the judiciary was allowing elements of statements to be used in an explanatory fashion and not to determine liability. That does not look terribly far from the approach that Scottish courts might want to develop.

For those reasons, I have come to believe that an apology act would be a broadly positive step for Scottish society, although some tweaking may be wise and useful.

The Convener: Proceed with the tweaking, if you wish.

Charlie Irvine: I am not sure that that is for me; it is perhaps not the purpose of today's meeting. I would say that the magic wand statement is accurate. For the bill to be effective, it would need to be combined with other steps, particularly in the health sector.

Some very interesting evidence from Michigan has been referred to as showing that what was much more significant was ending deny-and-defend approaches to medical negligence and taking a proactive approach. In that state the legislature placed a six-month embargo on the raising of actions, to allow face-to-face contact among all parties.

Other steps may be required. They might not be for today's business, but that is important to say.

Laura Ceresa: I will go back to something that Mr Irvine said about clients' instructions and about understanding or misunderstanding between

solicitors and clients. It is important for a solicitor to find out from the outset what the client wants to achieve by coming to see them. We form a wish list of what the client wants to achieve, and usually at the top of the list is an apology. Compensation usually comes quite far down on the list.

The solicitor has to work out what the vehicles will be for the client to achieve all the outcomes. If an apology, an understanding or an explanation of what happened is on the wish list, there are other vehicles. Making a claim for compensation does not provide a client with an apology.

As I said, the NHS internal complaints procedure already exists, and the client is sent down that route before any investigation of a civil claim for damages is commenced. From a solicitor's point of view, it is important to take that stance.

Ronnie Conway: I agree with Mr Irvine that people are not daft. They intuitively recognise the difference between being paid in feelings and paid in money. I have a question for the proponents of the full-bodied legislation, so to speak. When they talk about research—I agree with Mr Stephenson, who is clearly much more on top of the research than I have been able to be, that it seems to be all over the place—what is the definition of success?

Under the bill, the measure seems to be reduced settlements and fewer legal actions, but to the constituency that I represent, that is not a good thing. When catastrophic injuries have occurred, reduced settlements would mean no accommodation, no care equipment and a lower quality of life for people who deserve more. May I ask what definition of success is applied in the research?

Charlie Irvine: I do not purport to summarise world research. Ho and Liu's research is interesting, although I know that it has been criticised and that it is US based. Broadly speaking, their findings were that apologies legislation appears to bring more claims through the system initially but also to speed up disposal times quite significantly. They think that the costs to the system are neutral over the long term—10 to 15 years. That is a numerical analysis.

The Convener: More claims do not mean more settlements; they are just more claims.

Charlie Irvine: Indeed.

The Convener: Does Professor Stephenson want to comment?

David Stephenson: "Professor Stephenson"—thank you very much. [*Laughter*.]

The Convener: I knew that this was going too well. My head went in another direction. I am happy to call you "professor", anyway.

David Stephenson: The Faculty of Advocates goes into Ho and Liu's papers in some depth in our submission. One has to recognise that they use a specific American model of costs. In most states in the US, plaintiffs pay their own costs whether they win or lose, so it may be better for a plaintiff to settle for less money in damages now than to wait two or three years and get a bit more but have spent more than the difference.

The Convener: So we are talking about apples and pears.

David Stephenson: Yes. We have to be cautious in looking at Ho and Liu. In footnote 5 of Professor Vines's submission—it is paper A16—she can cite only two pieces of research in support of apologies legislation being effective. One is a paper of her own and the other is a paper by Ho and Liu. She then puts in brackets that it is important to be careful in applying that outwith the US context.

The Convener: Okay. Before the dissertation goes any further, I invite Mr McFadden to comment, as he has not been in yet.

Paul McFadden: Our experience as an ombudsman comes not from the legal perspective that my colleagues on the panel have but from our experience in dealing with people who have experienced, or feel that they have experienced, failings in the system of public services, and from dealing with public sector workers who deliver and manage front-line services, through our training, outreach and other engagement with them. We have been broadly supportive of the bill from an early stage because we think that it is important to make a clear statement and give a clear signal to those public sector staff and to people who deliver our public services that saying sorry is okay when things go wrong.

Our experience of what complainants want when they complain about public services mirrors some of what has already been said. When something has gone wrong and they have brought a complaint to us, we ask them what outcome they want, and top of the list is always that they want an apology. They want someone to say sorry. People say, "I want recognition that I was right and something went wrong, and an assurance that it will not happen again to someone else." They might want various other things but, by and large, they do not say that they want compensation. It is very much about repairing a relationship, often with an organisation that they have an on-going relationship with. They are not consumers in the broader sense, as they cannot choose to go to another local authority or another health board, so repairing the relationship is at the heart of this.

We have a constructive dialogue with public sector providers through our work on helping them

to improve how they handle complaints and respond to things that have gone wrong, and our experience is that they tell us that they are frightened to say sorry. They are told, or they feel individually, that saying sorry is automatically an expression of liability in the sense of negligence. That common misconception is raised at almost every session that we deliver to public sector staff. There is a culture of fear. There are other reasons for that, but that misconception is the number 1 reason.

We work hard on delivering training to a range of bodies that generally covers apology, but we also have a specific course on the power of apology. We have developed guidance on the power of apology, which has been very widely shared. Professional bodies, the Scottish Government and regulators all say in their in guidance to various parts of the public sector that saying sorry is the correct thing to do.

However, in complaints that come to us, we still see a reticence from public bodies to saying sorry. From a very early point in the journey of many of the complaints that we see, it is clear that, if a simple, timely and human or empathetic apology had been given, the complaint would not have escalated. The failure to make that apology results in a breakdown of the relationship between the individual citizen and the public body, which then escalates, builds and exacerbates the situation—it grows arms and legs.

We put a lot of onus on, and a lot of work into, encouraging early resolution and early apology, but the culture of reticence remains. We think that the bill gives a very important statement that there is a safe space—that it is okay to say sorry when things have gone wrong. It is important that we explain very clearly that a simple admission that something did not go the way that it should have gone, or that something went wrong, does not automatically lead to an admission of liability. That is a very common misconception among public sector bodies. The bill would give a very strong statement that addressed that misconception.

I agree that the bill is not going to change the culture on its own—we have been quite clear about that. There is a whole range of other things that need to be done. In addition to a clear statement in the bill that an apology is okay, we need further guidance and clarity about what makes a good apology. An apology that is framed around professional regret or one that says "I'm sorry you feel that way and that the ombudsman agrees with you" is likely to exacerbate the situation further.

What is needed is genuine apology at the earliest point, usually at the closest point to the incident or the point at which the service was delivered. A lot of training and guidance is needed to support the bill that tells people that a human, empathetic response is needed, and that it should be genuine—the sort of apology that is made outside professional life—and aimed at trying to rebuild the relationship. That is, fundamentally, what apologising is all about. The bill is just one step towards the change that is needed, but it is a very important first step.

The Convener: I am going to take Roddy Campbell next. Do not look worried, Roddy—you were on my list, but out of courtesy we hear from witnesses first.

Roderick Campbell: I want to ask Mr Irvine about the Michigan model that he referred to. What has been the impact of the non-admissibility point in Michigan, if any?

Charlie Irvine: Michigan is not an apologies act state, so their model—

Roderick Campbell: It is a voluntary model. Okay.

Charlie Irvine: The model is entirely about managing adverse events proactively. There are lessons to be learned from that.

Roderick Campbell: I do not think that we have seen any research or other papers about the impact of section 2 of the Compensation Act 2006, which applies in England and Wales. We are a bit bereft of useful empirical evidence.

Charlie Irvine: It would be fair to say that it is difficult to measure cause and effect in large societal matters. That is probably a very simplistic statement, but to attribute an effect to one cause is always daunting.

I am not particularly taking the position that having less compensation or fewer actions is a good thing. However, more apologies would be a good thing. That would be the tone of my contribution.

The Convener: I have a question about the definition of an apology, which I think is the point that Ronnie Conway raised. At section 3, the bill defines an apology as

"any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains—

(a) an express or implied admission of fault in relation to the act".

That is the bit that bothers me, given the arguments that have been made that it would be deleterious, whether to the claimant or to the other party. What bothers me is that the subsection concludes the definition—it cannot be detached. Does anybody else think that that is an issue? Professor Irvine, is that an issue? Does the argument propounded by Mr Conway have merit?

Charlie Irvine: Yes—significantly. Wherever the line is drawn, we will eventually depend on the judiciary to help us with definitions. The line could be drawn, as was done originally, such that any expression of fault is excluded from the definition, but then you would get very narrowly-drawn apologies.

Even if you draw the line more broadly, there have been examples of absurdity, where lengthy explanations—or confessions, if you like—have the words "I'm sorry" tacked on to the end. We can all think of absurd examples. I presume that we expect the judiciary to impose a degree of sense on that at some point.

10:15

The Convener: Except that the bill says explicitly:

"includes any part of the statement which contains".

I do not know how the judiciary would have any leeway.

Ronnie Conway: Once of the submissions mentioned the King v Quarriers case, in which a public apology about child abuse was made—in the Parliament, as I recollect. Mr King claimed that he had been abused. The apology was in general terms; it was an expression of regret and no more. The judge made it perfectly plain that that was not an admission of liability.

I fully take the point made by Charlie Irvine and Paul McFadden that there may be a perception problem here, in which case the legislation as initially proposed by Margaret Mitchell fits the bill.

I also say to Mr McFadden that the constituency that I deal with does not generally have that on-going relationship. It is what they call "one-shotters" versus repeat players, so—

The Convener: That is almost gangster language.

Ronnie Conway: My daily work is taken up dealing with insurance companies, which are the classic repeat players. Quite frankly, an apology from them would hardly be worth the paper on which it was written.

The Convener: Mr Stephenson wants to come in. I have demoted you from professorial rank.

David Stephenson: Quite appropriately, convener.

There is a great concern on the part of the faculty about the definition of "apology" and its extension to cover admissions of fault and of fact. You must recognise that there is fairly good evidence that unless you protect admissions of fault, there is no prospect of the bill having any beneficial effect. Unless people get with their apology some acknowledgement of responsibility, they do not regard it as psychologically satisfying. The proponent would have to argue that an admission of fault should be part of the definition.

However, why include "a statement of fact"? Professor Prue Vines is very good on that point in her submission, which is A16. She is against including admissions of fact and she explains why. It would take me a long time to go over what she said, so I just refer you to the submission.

I have another simple example. The law would apply not just to personal injuries, although this has been a very personal injuries-related discussion. A husband writes a letter to his wife: "Dear Senga, I'm sorry I broke your nose last night and beat the kids on the way out. Genghis." Does anybody seriously believe that because that letter starts with the words "I'm sorry" it should be inadmissible in legal proceedings relating to the matrimonial situation, the care of the children and the protection of that woman from her husband?

One can multiply these situations; there is nothing uncommon or strange in them. Why are we seeking to protect admissions of fact?

The Convener: So you would detach section 3(b)—or rather delete it?

David Stephenson: Yes. Alternatively—Charlie Irvine alluded to this example—a court in Canada has, in a recent commercially oriented case, redacted parts of a letter that ends with an apology. It left in the statements of fact—they were something to do with security that had not been recorded properly—but took out the apology. It would be possible for a court to do that if admissions of fact were not to be protected or not to be rendered inadmissible.

Graeme Watson: Reference has been made to the case of King v Quarriers and whether the court would place any weight on the apology that had been made on behalf of the Scottish Government. The Scottish Government was not a party to the action, so the pursuer was seeking to rely on an apology made by another body, which puts it in something of a different camp. The bill focuses on admissibility rather than on the probative weight of an apology or, indeed, of an admission of fact.

Frequently, as disputes progress and more investigations are undertaken, an insurer who may at the outset have intended to settle—or indeed may have admitted liability—discovers that their admission was incorrectly made. Again, the common law as it stands has found a means of dealing with that by which the court may be appraised of the full circumstances and may then reach its own conclusion as to how much weight, if any, to place on the earlier admission. That takes us back to the question whether the apology should be inadmissible as evidence, as opposed

to the question whether it ought not of itself to be probative of fault.

The Convener: I am a bit confused. Are you quite happy that section 3(b) is included in the bill?

Graeme Watson: I agree that, if one is going to have legislation that is framed in this way, it would become extremely difficult unless the definition was broad. It is easy to imagine satellite litigation and endless debates about precisely what does and what does not fall within the scope of a protected apology.

If this is the form of legislation that is to be adopted, I would suggest that a broad definition is required. However, rather than having this form of broad legislation, it would be better to follow the model in the Compensation Act 2006, which simply makes it explicit that an apology is not of itself an admission of liability.

Paul McFadden: I want to make a point about the inclusion of "a statement of fact". I understand David Stephenson's point, which was an issue on which we reflected in our earlier submissions. However, on reflection, we have said in our latest submission that it could be quite difficult to try to define and explain to someone who is delivering a public service what constitutes an admission of fault, an admission of regret or a statement of fact.

We have a clear sense that the definition should be as broad as possible, and that it should be as simple as possible to explain so that we do not reach a position in which people are nervously trying to determine whether something is a statement of fact or an admission of fault. People should feel free to give an open apology without feeling that they are acting in the context of a tick-box list, as that might have the perverse effect of making the apology seem legalistic and may mean that it is framed in less human and less empathetic language.

The Convener: I take your point, but we cannot just focus on the point with regard to public bodies—the provision applies to everyone.

Paul McFadden: I appreciate that, but you appreciate that I am speaking for the SPSO.

The Convener: I know—I take your point, but the provision applies overall, and we have to consider whether it will cause the problems that Mr Conway and Mr Stephenson have elucidated.

Ronnie Conway: Absolutely. The example that Mr Stephenson gave would of course attract criminal liability. The firestorm that the word "corroboration" caused in this place would be a storm in a tea cup in comparison with what you would hear if you suggested that confessions—which of course are hearsay—were to be excluded from the criminal system.

Confessions are in many ways the queen of proofs. Why would people admit something—a factual matter—that was adverse to their interest if it was untrue? We have had about 200 years of legal jurisprudence that is based not on some technical legal point, but on common sense. The legislation before us, in its current format, throws all that away.

Charlie Irvine: We risk forgetting that—as I have already said—at present, most of the time, we get neither the apology nor the evidence, and an apology is not a significant part of determining liability. I am sure that my colleagues would agree with that. An apology is certainly not the only show in town when it comes to determining liability.

Because people know about the issue, the received wisdom on the street appears to be, "Never apologise—don't say sorry for anything." We hear that time and time again, and that is the mischief that the bill is intended to address, rather than simply addressing the technical legal points.

The Convener: Just to come back to your point, Mr Conway, the bill does not apply to criminal proceedings.

Ronnie Conway: Indeed: those are excluded—

The Convener: So you might confess to something that was a civil matter, but certainly not if it was a criminal matter.

Ronnie Conway: Yes, indeed—

The Convener: But then it might transmute into a criminal matter. Someone might apologise for something—"I'm sorry I crashed into your car"—and it then becomes a criminal matter.

Ronnie Conway: It might come under section 3 of the Road Traffic Act 1988.

The Convener: I see that, yes.

Ronnie Conway: I do not for one minute suggest that this should be extended to criminal practice; I am asking why we should have a two-tier system. To return to what I said at the start, the basic duty of a justice system is to get at the truth, and then to apply the law to a factual matrix. Why are we giving up an extremely powerful source and an extremely powerful weapon? I say to Mr Irvine that there is no evidence to say that apologies are not used. They have to be pleaded specifically, and they are a paradigm piece of evidence in road traffic litigation. Despite advice from insurers never to apologise, people apologise all the time—"I wasn't looking. I didn't see you." Those are matters of fact and they can be critical. I am speaking from experience, not research, but many people apologise at the scene. They say something that is witnessed, but they then go back, discuss the matter with their significant

other, and suddenly have a change of mind about whose fault it was.

The Convener: I think that we have all been there. I am speaking for myself, not for the team, but I think that everybody has experienced saying that they are sorry to some extent, even if they are not at fault. It could simply be, "I'm sorry that it happened".

Does anybody else want to contribute? Have we exhausted the debate?

Christian Allard: I just want to raise one point. As has been pointed out, perhaps this legislation would be better not standing alone but incorporated with other legislation, as it is in England and perhaps as the Scottish Government is proposing. Does anyone who has not yet contributed to the debate wish to say anything on that point?

The Convener: Which legislation are you talking about?

Christian Allard: I am asking whether we should have stand-alone legislation.

The Convener: I understand, but which Government legislation are you thinking of? Do you mean the health bill?

Christian Allard: Yes.

The Convener: Does anyone wish to contribute? This is about section 23 of the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill, which states:

"(1) For the purposes of this Part, an 'apology' means a statement of sorrow or regret in respect of the unintended or unexpected incident.

(2) An apology or other step taken in accordance with the duty of candour procedure under section 22 does not of itself amount to an admission of negligence or a breach of a statutory duty."

That bill has just started its journey.

David Stephenson: The Health (Tobacco, Nicotine etc and Care) (Scotland) Bill was introduced only last week, so there has not been much opportunity for the faculty sub-committee to discuss it. I do not have a faculty position, but the measure is pretty much in line with my personal practice. On a personal rather than a representative basis, I suggest that there is an obvious inconsistency between the Apologies (Scotland) Bill and the health bill. The health bill adopts the definition of an apology from the UK Compensation Act 2006; it says nothing about excluding admissions of fault or statements of fact.

When looking at the health bill, one immediately scratches one's head and asks what impact the Apologies (Scotland) Bill would have on the provisions and how they would be changed or altered by it. I suggest that there is a risk that the Apologies (Scotland) Bill would substantially undermine the duty of candour procedure that is proposed in the health bill. I assume that people will think that that is not a good idea, because duty of candour provisions are potentially important for individual citizens who have suffered from adverse events as a consequence of healthcare. It would be a bad result if the Apologies (Scotland) Bill had a deleterious impact on duty of candour provisions.

10:30

Graeme Watson: I echo that. However, an apology is defined in section 23(1) of the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill as

"a statement of sorrow or regret",

and section 23(2) refers to

"An apology or other step taken in accordance with the duty of candour procedure".

That might be wide enough to encompass an admission of fault; it is certainly wide enough to encompass a recitation of the underlying facts, which is what the intention of section 22 seems to be. The procedure in the health bill may or may not cover an admission as to the factual background, but it would certainly sit ill with the Apologies (Scotland) Bill as it is drafted. At a minimum, the law of unintended consequences would apply. The courts would have to marry the two.

David Stephenson: I do not think that the duty of candour procedure, which is defined in section 22 of the health bill, would extend to admissions of fault—that is not part of the duty of candour procedure.

Graeme Watson: I base my view on the provisions in sections 22(2)(f) and 22(2)(e), which relate to

"the form and manner in which information must be provided,"

and to

"an account of the incident"

and

"information about further steps taken".

All that we are told is that regulations will be provided. The procedure might be broad enough; we do not know. That is the issue.

The Convener: There will be an interaction, however. We do not know enough about that. It will be interesting to learn what the Health and Sport Committee finds out about the interaction of the health bill with the Apologies (Scotland) Bill.

I will take Alison McInnes before Margaret Mitchell so that Margaret Mitchell can ask the

round-up questions at the end, which would be helpful.

Alison McInnes: I ask Mr McFadden to respond to something that Mr Conway said. He seemed to imply that the proposal would inadvertently create a greater imbalance in the system. At the moment, the citizen usually faces a fairly powerful organisation. Is there a danger that the organisation would act cynically and use the Apologies (Scotland) Bill to reduce the rights of the citizen?

Paul McFadden: That goes back to what I said about the need for supporting guidance and training on what a good apology is. The way in which an apology is made will be very important.

As far as the balance is concerned, in our experience, free and good-quality apologies benefit the complainant—the citizen—and members of staff and the organisation. The bill provides a balance—it recognises the fact that members of staff often feel bad about things that have gone wrong and allows them the freedom to express that feeling and make it clear to the complainant.

Margaret Mitchell: I thank everyone for their contributions.

I say at the outset that it is important to emphasise that the primary purpose of the bill is to provide legal certainty and to change the law on admissibility. There has been a lot of discussion about whether the bill will reduce costs—it has been said that there is no evidence of that—but the primary intentions of the bill are to provide legal certainty and to change the law on admissibility.

Does the panel feel that an apology is more prejudicial than probative? That certainly seems to be the direction in which case law is moving, which is why the bill seeks to provide legal certainty.

I would be interested to learn whether the Law Society feels that the NHS guidelines and the bill's provision of legal certainty would be mutually exclusive.

Much has been made of the Compensation Act 2006, but it does not define an apology. There is still a fear and a perception that, if someone makes an apology, that is equivalent to saying, "I am liable," and that compensation will be triggered as a result. Dealing with that issue is at the heart of my bill.

The Convener: You have raised quite a few issues. Who would like to take them up? Please be brief.

Ronnie Conway: "Prejudicial" is an interesting word because, if I say something that is adverse to my interests, it is prejudicial against me, but it is not prejudicial in the sense that there is some kind of unfairness or bias, as some articles seem to suggest.

To return to the point about confessions in the criminal sphere, of course they are highly prejudicial—that is why the law spends so much time ensuring that they are fairly obtained. "Prejudicial" in the sense of there being some kind of unfairness or bias is not the right word to use in this context. A confession is a potent and persuasive piece of evidence. If a confession has been freely given—the courts are astute in recognising situations in which a confession has not been freely given—it should be part of the factual matrix.

The Convener: Except that the Apologies (Scotland) Bill does not apply to criminal proceedings. We must always emphasise that.

Ronnie Conway: I appreciate that.

Graeme Watson: Ms Mitchell mentioned the fact that there is no definition of apology in the Compensation Act 2006. That is correct, but "apology" is a well-understood word with an ordinary and natural meaning, and it is in that context that the courts would be expected to construe it.

The Apologies (Scotland) Bill defines an apology as a statement that

"indicates that the person is sorry about, or regrets, an act"

or an "omission". Those are both equally ordinary words in the English language with natural meanings, and I do not think that their introduction makes our understanding of whether someone is giving an apology any more straightforward. I suggest that whether something is an apology is fairly easily construed.

Laura Ceresa: From the Law Society's point of view, apologies and civil claims for damages are not mutually exclusive. As I see it, they are entirely separate, and there are different vehicles for each of them. It seems that if factual evidence that is embodied in, for example, the NHS internal complaints procedure or information that is gleaned from reports by the Scottish Public Services Ombudsman is not available to be utilised to support a civil claim for damages, that might tend to prevent access to justice for claimants and people who are aggrieved.

The Convener: That is it. I was about to say, "I apologise," but that is just cheesy and awful.

Thank you very much for your evidence; I feel as if I have been at another legal seminar. Thank you for your attendance and for sharing your views with us.

I suspend the meeting for five minutes to allow us to set up for the next panel.

10:37

Meeting suspended.

10:44

On resuming—

The Convener: I welcome the witnesses for our second round-table session on the Apologies (Scotland) Bill. As before, I will go round the table clockwise and invite members and witnesses to introduce themselves.

I am the convener of the Justice Committee up to this moment—who knows what will happen tomorrow?

Elaine Murray is next.

Elaine Murray: Sorry?

The Convener: Sorry—I meant anti-clockwise. That was a deliberate mistake to see whether you were listening. If it is so important, we will go round the other way. Is that my left hand? Yes. On you go.

Jayne Baxter: I am an MSP for Mid Scotland and Fife.

Geraldine McCann (South Lanarkshire Council): I am the head of admin and legal services at South Lanarkshire Council.

Alison McInnes: I am an MSP for North East Scotland.

Bruce Adamson (Scottish Human Rights Commission): I am the legal officer at the Scottish Human Rights Commission.

John Finnie: I am an MSP for the Highlands and Islands.

Dr Gordon McDavid (Medical Protection Society): I work for the Medical Protection Society.

Christian Allard: I am an MSP for North East Scotland.

Margaret Mitchell: I am an MSP for Central Scotland.

Gil Paterson: I am the MSP for Clydebank and Milngavie.

Roderick Campbell: I am the MSP for North East Fife.

Dr Anthea Martin (Medical and Dental Defence Union of Scotland): I am the joint head of the medical division at the Medical and Dental Defence Union of Scotland.

Dr Sally Winning (British Medical Association Scotland): I am the deputy chairman of the British Medical Association Scotland and I work as a psychiatrist in Aberdeen.

The Convener: I may need your help. [*Laughter*.]

Elaine Murray: I am the MSP for Dumfriesshire and the deputy convener.

The Convener: I do not know whether any of the witnesses were in the public gallery for the previous session but, as I said then, a round-table discussion is very different from other evidence sessions. It is for you to speak up and tell us what you think about the bill. If you give me a look, I will put you on my list and then call you to speak. Your microphone will come on automatically when I call your name.

As before, like my old history teacher, I start by asking: the Apologies (Scotland) Bill—is it a good or a bad thing? Discuss. He did not know that he would be going down in the annals of history, but that is what has happened to him. Who would like to start?

Dr McDavid: I work for the Medical Protection Society, which is a worldwide organisation and the leader in protection for healthcare professionals throughout the world. We have 300,000 members worldwide who come to us for support with things such as clinical negligence claims, complaints, referrals to the regulator and disciplinary proceedings. We therefore have quite a lot of experience of what happens to healthcare professionals when things go wrong.

The short answer is that we very much support the bill. We think that what it does is a good step in the right direction to allow an open discussion to take place and an appropriate apology to be offered when things go wrong. For a very long time, we have engaged with our membership to encourage that openness and to ensure that the opportunity is taken for a considered and appropriate apology to be given early in the process.

When something goes wrong, a doctor is faced with a dilemma. They feel awful about it and wonder what on earth they can do to put right whatever has gone wrong. One of the main concerns is that they may be scared of reprisals against themselves—that they are fearful that a claim might follow if they say sorry. That stifles the natural interaction that people would expect between individuals when something goes wrong. The bill gives us an opportunity—in statute—to reassure our members that what they say in the heat of the moment because they feel that it is appropriate is protected and will not result in their being sued.

The Convener: Dr Martin is next—there are a lot of doctors in the house. There is Dr Murray as well, but she has dropped her title here.

Dr Martin: I work for the Medical and Dental Defence Union of Scotland, which is a very similar organisation to the one that Gordon McDavid works for. We provide indemnity for about 95 per cent of general practitioners in Scotland.

I do not disagree with Gordon McDavid's perspective or the MPS's view—it is obviously very supportive of the bill. However, one thing that the MPS may have omitted to consider, which you might want to think about, is that doctors fear not only litigation but their regulator. As we are discussing a Scottish bill and the General Medical Council is a United Kingdom regulator, we wonder whether the cultural change that is proposed, partly through the bill, can be achieved by the implementation of the bill alone, because it will not allow doctors in Scotland the freedom to apologise without fearing the fact of that apology being used by their regulator to pursue or adjudicate on an investigation.

Bruce Adamson: The Scottish Human Rights Commission has a general duty to promote human rights and, therefore, is supportive of the bill. When the commission conducted its initial mapping study of the human rights situation in Scotland, access to justice emerged as one of the key themes. Under Scotland's national action plan for human rights, significant work is being done on access to justice, including by the committee. We acknowledge the hard work that the committee has done to try to improve access to justice.

The commission is also required by statute to have a focus on groups in society whose rights are not sufficiently promoted. Since its earliest days, the commission has worked closely with survivors of historical abuse—I know that that came up in the committee's previous evidence-taking session. In that context, we developed a human rights framework on acknowledgement and accountability, and we facilitated a number of interactions with survivors, care providers and the Government.

An apology law was one of the key commitments that came out of that process and was part of a wider commitment to acknowledgement and accountability. Survivors told us that the lack of such a law was a barrier. The Scottish Government agreed that it would consider Margaret Mitchell's bill or other ways of ensuring that apology could be part of an effective remedy.

I share Dr McDavid's point that it is not only about victims but about providing assurance to those who provide care that they can give an apology that they want to give without undue restrictions. In relation to historical abuse, it came out strongly that care providers often wanted to give an apology but were given legal advice or told by insurers that they could not do so.

I would be happy to talk about the wider human rights framework once we develop the discussion.

Dr Winning: On legal matters, I defer to people with much more legal expertise than me—the defence bodies in particular. When I read about the bill, I considered it in the context of the journeys that I go on with my patients.

In psychiatry, many of the conditions are chronic. GPs have very long-term relationships with their patients and, like any other relationship, there are times when things go to plan and go smoothly but there are times when unexpected or, sometimes, predicted but low-chance occurrences happen. We need to continue the journey with the patient through those difficult times. That might involve an apology—I hope that it does when things go wrong—but it is about problem solving and working through those matters. Therefore, the principle of the bill is extremely laudable and I like to think that it is something that most of us do in practice anyway.

The big worry, which Anthea Martin mentioned, is about the GMC, which is a UK organisation and our regulatory body. Every year, we do an appraisal in which we are expected to discuss occasions when things went wrong or in which a patient made a complaint. That information is then fed through a national UK system. My concern is how we could protect doctors and fulfil the bill's intentions on legal certainty and admissibility on a UK basis with the GMC.

Geraldine McCann: Local authorities are supportive of the bill because, over the years, they are faced with many people who only want somebody to say, "Sorry, we got it wrong." If that was done at an early stage, it could negate the need for future litigation. By the time that we reach court, everyone's views are entrenched and no one says sorry. The victim might be left with an award but they are left feeling less than satisfied.

Working in a regulatory framework in a local authority, I share the concerns that others have that some professionals would face their regulatory bodies and that there would be further action. I am also concerned about council insurers, who, if there is any potential for litigation, will stand back and advise us not to apologise, because an apology might raise expectations of compensation to follow when that might not necessarily be the case.

Dr McDavid: I absolutely take the point that has been made. We need to give thought to what a meaningful apology is. When we get entrenched in civil proceedings and someone is instructed—

indeed, almost prodded or forced—into giving a partial or even a complete apology, it does not have the same effect on the person who has been wronged.

We very much need to bear in mind that the bill seeks to address in the healthcare service a culture of fear and of feeling unable to take appropriate action. In MPS's recent survey of 500 of our members, 67 per cent said that there was a culture of fear in the healthcare sector, and that is really stifling the ability of staff to interact appropriately with patients. That cannot be right. It would be much better if MPS could use this sort of legislation to pass on to the profession the message that staff are safe and will be able to take appropriate steps—either give the facts, if they have them at the time, or an assurance that they will look into the matter—without fear of recrimination or leaving themselves liable.

Dr Winning: I wonder whether I can ask a question. Ms McCann said that from her point of view an apology is about explaining why someone got something wrong. In my experience, most of the time things go wrong because there was a risk in the first place, and that risk will usually have been explained to the patient. For example, I have never prescribed medication that does not come with some risk of side effects. Usually, when something has gone wrong, it has been predictable, and the patient will have given informed consent and will have understood the risk. However, having read the bill, I am not clear whether the committee considers that to be an occasion for an apology. Would the provisions apply in those circumstances?

The Convener: Thankfully, I am not here to answer questions.

Dr Winning: In that case, I simply raise the question, because the issue is not clear in my mind and it poses problems for us clinicians in interpreting where and when an apology is appropriate and required. For example, I might explain to a patient that, if I prescribe a certain medication, there is a 10 per cent risk of their getting high blood pressure; if I set out the alternatives, we agree on the basis of probabilities that the 10 per cent risk is worth taking and, in the event, the patient happens to get high blood pressure, I will of course be sorry and regret that the patient had that side-effect, but is that an apology? I do not believe that that is an occasion where something has gone wrong; it is a known risk that has been knowingly run.

Elaine Murray: My question is on the fact that the GMC is a UK-wide organisation. In the previous evidence session, we heard that the Compensation Act 2006 already contains a definition of an apology that is replicated in section 23 of the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill, which was introduced last week. I wonder, therefore, whether the concern with this bill is that the definition of apology is different, whether there is a lack of awareness of the definition in the 2006 act or whether the definition does not adequately protect medical personnel.

Dr Martin: I have not read the 2006 act, but having read this bill and spoken to my in-house legal team I do not think that it offers adequate protection with regard to a UK-wide regulator using the fact of an apology in its own investigations. Obviously, given where we are, that view is untested, but along with the BMA we would be looking for some kind of reassurance that it offers the full protection that the MPS, too, is looking for to reassure its members.

After all, doctors fear not just litigation but the impact on their reputation of having to apologise and admit to a patient and their colleagues that something has gone wrong. They also fear the actions of the regulator, which can completely remove their ability to earn a living, and action by their employers.

The MDDUS is not unsupportive of the bill; we are very supportive of an open culture that allows doctors to apologise and lets organisations learn from errors and mistakes. There may be other ways for that to be achieved, for example through the proposed new duty of candour provisions.

The main issue with the bill for MDDUS is its limits—the fact that it deals with protection for litigation only. I say that particularly noting the UK context and the fact that we have a UK-wide regulator.

11:00

The Convener: The difficulty for the committee is that we have probably not had the time to properly consider the relevant part of the Health (Tobacco, Nicotine etc and Care) (Scotland) Bill. The incident that Dr Winning raises relates to section 21, "Incident which activates duty of candour procedure". One of those, under subsection (2)(a), is when

"an unintended or unexpected incident occurred".

However, it is not unexpected in this case, as the patient has been alerted to the fact that there may be side effects. It may be that that particular case would be dealt with under that bill, which states that

"an 'apology' means a statement of sorrow or regret in respect of the unintended or unexpected incident."

That would cover the fact that there had been an open discussion with the patient regarding the consequences—good, bad or whatever—of pursuing a specific line of treatment.

That is probably an issue for those of us who are considering the issues from a medical point of view, and we perhaps need to consider those provisions in the health bill in tandem with the provisions in the Apologies (Scotland) Bill.

Bruce Adamson: Like colleagues, I am not competent to comment on the health bill, but it is interesting to consider that bill and the Compensation Act 2006 together with the definition or treatment of "apology" in England and Wales.

The Scottish Human Rights Commission's strong view is that the more limited definition is not deficient in human rights terms but there would be value in having a broader, more robust definition. It is probably helpful to consider the wider human rights context and the duty to provide an effective remedy.

As I am sure everyone is aware, that is an essential element of the human rights framework that is contained in article 13 of the European convention on human rights as well as in international covenants such as the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child. There must be an effective remedy if a person's rights are breached.

The UN's guidelines on the right to a remedy and reparation set out the need for

"equal and effective access to justice",

which I referred to earlier, as well as access to information about rights and reparation for violations. Importantly, the UN guidelines also cover

"Adequate, effective and prompt reparation".

A lot of work has been done internationally on what "reparation" can mean, which includes restitution, compensation, rehabilitation and—very importantly—guarantees of non-repetition. There is also an element of satisfaction, which includes apology.

Returning to an earlier point, there is real evidence that any barrier to apology can influence the overall holistic view of whether there has been an effective remedy. Although we can have discussions about whether to have a limited or more robust definition of apology, what matters in the end is whether the individual victim can have an effective remedy. An apology is part of that, which is why we support having a broader, more robust definition that would maintain that overall holistic view of the right to remedy. Apology is very much one tool among many.

Going back to my original point about historical abuse, the action plan covers seven different commitments and apology is just one of them. That applies across the board.

The Convener: You are content that, when the apology contains

"a statement of fact in relation to the act, omission or outcome,"

as section 3(b) of the Apologies (Scotland) Bill says, that cannot be founded on in any proceedings.

Bruce Adamson: Yes.

Alison McInnes: I will press you on that point, because we heard some strong evidence on that from our previous panel. The witnesses felt that, although a remedy could be gained, on one hand, that would mean people losing quite a lot of rights that they already had in that they could not found on those things in court and get the compensation or reparation that you have also referred to as important.

Bruce Adamson: Absolutely. It is important that the person is able to access that reparation. I thought that it was very important that your previous panel clarified that the provisions would not impact on criminal liability. It is important to make that clear.

When we talk about the right to remedy and the restriction, it is the evidential element of it that is restricted, as someone cannot rely on it—

The Convener: Yes, we know that that is the problem. Are you happy about that?

Bruce Adamson: We are happy that the bill will promote apology and alternative dispute resolution as well as providing a way of coming up with an holistic view of a remedy. What we have heard, particularly from survivors of historical abuse, is that the way in which the common law currently operates acts as a barrier. They are interested in what the purpose of an apology is as part of the overall picture. If its purpose is to allow people to set up the facts in a safe environment, come to a common understanding and provide satisfaction, that provides real value for the victim. I am not sure what the purpose would be of someone choosing to disclose facts that they were not compelled to disclose, unless they were trying to provide some satisfaction for the victim. I am not sure that the bill would take away evidence that would otherwise have been available to found a civil case on, because I am not sure that people would voluntarily disclose that evidence but for the protection that is provided.

The Convener: The legislation must provide for all circumstances, not the generality, and the exceptions might prove the rule. If the provision

was included in the bill and there was a circumstance in which somebody apologised and a statement of fact that was really quite telling formed part of that apology, which they made willingly and freely at the time, but it could not be founded on in civil proceedings, would that not be a problem?

Bruce Adamson: It comes down to a balance and whether you go with the more limited or the more robust definition. One of the big questions that the committee and the Parliament will have to wrestle with is whether the value of the cultural change that the bill seeks to promote, given the clear view that we have heard from survivors that they need that change, outweighs the specific circumstance of the unintended consequence that you have mentioned.

The Convener: We might be able to take section 3(b) out and leave sections 3(a) and 3(c) in.

Dr McDavid: I think that you are looking to subdivide the protection that the bill seeks to offer, which could cause difficulties for those who seek to convey an apology. How can we have a truly open and transparent health service—which MPS thinks should exist—if doctors or other healthcare workers have to second guess what they can say as part of their apology? The mischief is in saying that they can offer information at the time of an incident and give that in a meaningful and appropriate way but that, in saying sorry, they cannot give any facts. That would make it difficult for our members to feel confident in offering an apology.

The Convener: The person might say, "I'm sorry that this happened to you. The nurse should have done X, Y and Z but she didn't." The person might implicate somebody else, and that would be pretty unfair. I know that such a statement could not be founded on, but it would be pretty unfair to the nurse. The person would be passing the buck, and that could be part of an apology. Someone could say, "I'm sorry. I should have been paying attention, but the nurse should have done this," and somebody else would be involved in the chain.

Dr McDavid: In civil proceedings, there will be time and opportunity to give careful consideration to the facts. In the medical profession, notes are taken regularly and there are witnesses.

The Convener: We understand all that, and I understand civil proceedings. I just wonder when it would be appropriate to include or exclude a so-called fact that may or may not be a fact—the person who was stating it would be the one who was saying that it was a fact.

The other subsections of section 3 seem fine. They refer to

"an express or implied admission of fault"

and

"an undertaking to look at the circumstances",

which seems a good thing to do. Nevertheless, there might be issues for me with section 3.

I have a list of people who want to speak now—I have provoked something. I will let Elaine Murray in first.

Elaine Murray: My question is on the same point. What if, in the course of the apology, a statement of fact was made that gave the victim the grounds for a civil action? The victim may not have been aware of the statement of fact until it was made and may then have thought that it contained the grounds on which they could get some form of compensation, but they would not be able to pursue that.

The Convener: That question is out there. We will focus on section 3(b).

Geraldine McCann: I share the convener's concerns. A pointer would be given to the person and they would be directed towards litigation. There would be an indication to them of where to seek the evidence from. They would then target an individual, potentially using freedom of information laws to get information in advance that would allow them to raise proceedings.

Sections 3(a) and 3(c) are more appropriate because, particularly at an earlier stage, if someone had got something wrong, the person who was complaining would want to know what steps they would put in place to ensure that that did not happen again. They would want to see that the other person had not ignored their complaint, had looked at the facts and circumstances and had tried to do something so that someone else would not have to undergo the same trouble that they had had to undergo.

Dr Martin: I entirely endorse what Ms McCann has said. What the convener described happens now. Every day, 20 to 30 complaints come into my office that we help doctors to respond to. There can be a lot of finger pointing, and that is a real concern.

I will put the issue in context. We currently advise doctors that an apology is not an admission of liability. I echo what Ms McCann said—people who look for a resolution look for not only an apology but a reassurance that the incident has been looked into properly and that there is a reduced risk of its happening again. Although I am not unsupportive of the bill, the difficulty with it is that it potentially puts obstacles in the way of that and will not create the open culture that we really want to have in the health service.

Dr Winning: I will illustrate the convener's concerns with the example of an in-patient having received the wrong medication. That sort of thing would usually come to light before any ill effects or adverse consequences occurred. In that situation, there would need to be an apology and proper steps would need to be taken even before the facts of the matter were known. It would be very easy to say, off the cuff, "A nurse gave you the wrong tablets." That would be a statement of fact, but the problem would need to be addressed first, and the person would not have been able to do that. Such situations are usually dealt with locally. They are reported through the Datix system and are dealt with appropriately and swiftly. Usually, complaints do not even arise because matters have been dealt with swiftly and appropriately. If statements of fact are required at the stage of an apology, that could be to the detriment of the patient never mind the process and remedying the problem.

The Convener: Statements of fact are not required, but the definition says that, if the apology contains a statement of fact, it cannot be founded on. There are two ways of looking at the matter. The first is that it ought to be possible for the statement to be founded on; the second is that there might be something in a statement of fact that is mischievous or malevolent—Dr Martin called it "finger pointing". Something else could follow on from that, but there would be no redress for the person who made that part of their apology and there would be no redress for the third party who was mentioned. All those little strands of unintended consequences may occur, despite the good intentions. That is the issue that I want to probe.

Bruce Adamson: I will reflect briefly and possibly uninformedly on the example in which a third party is named. That person may have recourse to the law of defamation if their character is defamed, although that is obviously excluded from the bill.

The Convener: Civil proceedings cannot be founded on the statement.

Bruce Adamson: That excludes defamation proceedings.

The Convener: Does it really?

Bruce Adamson: Yes.

The Convener: I am sorry. I beg your pardon—it does.

Bruce Adamson: So, a third party who was defamed in the context of an apology would have recourse to the law of defamation.

The Convener: Who would raise defamation proceedings? What ordinary person raises them? Only pop stars do that. Even politicians do not do that, because there is no legal aid for it and the process is costly. It is not worth the paper that it is written on.

11:15

Bruce Adamson: I return to my wider point about the human rights framework. In human rights terms, there is no requirement to have section 3(b) in the bill. However, in my view it adds something in allowing an apology to include a statement of the narrative of what has happened. If that is missing from the bill, the gap must be filled in some other way.

Again, I reflect on the situation for the survivors of historical abuse. There are other ways, through the national confidential forum and the national inquiry that is being set up, in which their narrative may be told so that they can help to establish the facts.

The Convener: Will you respond to Dr Winning's point that the chain of facts may not be known at the time when the apology is being given? The statement of facts is not obligatory, but is there any good reason for not making such a statement?

Bruce Adamson: It is not obligatory, but it would be a useful addition. It would be useful for the victim if an apology were to include a statement of facts. They should not just be told that there is an admission of fault or that there will be non-repetition. Although those are both important, the victim needs to understand what has happened, and without that statement of facts we would lose something. It could be included elsewhere in the bill, but we support its inclusion in that section. If an apologiser chooses to add to the narrative, that will add something for the victim.

Christian Allard: I want to talk about the General Medical Council's "Good medical practice". There are lots of things in it that address points that have been made. For example, it includes a need to give full and prompt explanations to the patient about what has happened. I have read that doctors do not always adhere to the principles that are outlined in the GMC's guidance, although their registration can be called into question if they do not do so. Does that happen? Is the guidance that strong? It was also said that this is a reserved matter. Does regulation sit better at UK level?

The Patient Rights (Scotland) Act 2011 introduced a different way of dealing with complaints in the NHS. Will the introduction of a duty of candour for the NHS fit perfectly with current legislation?

Dr Martin: That is our point. For many years, the GMC has advised doctors that they should

offer an apology and full explanation when something has gone wrong, and it is seeking increasingly for doctors to advise on what they or their organisation have learned from the error. That may be done early or it may be done later. It depends on the investigations and the complexity of the complaint; some are straightforward, but others are complex and involve various individuals.

Ultimately, we have the GMC's guidance and the new duty of candour—the duty has been implemented in England—but the Apologies (Scotland) Bill is more limited, because it deals mainly with civil litigation. In addition, it is a Scottish bill, so it would not necessarily protect doctors from investigation by a UK-wide regulator.

It is an interesting dilemma. Our organisation assists doctors with claims, and here we are promoting an open culture. Equally, we assist doctors when they face their regulators. Therefore, we must have an eye on both.

I have personal experience of cases in which doctors have not made apologies—by that I mean a genuine apology and not an apology given because a piece of legislation tells them that they must give one. Where an apology has not been given, for whatever reason—sometimes, it is not the doctor's fault—the complaint can be escalated and the doctor might end up at a GMC hearing, because they have not had the opportunity to say that they are sorry to a bereaved relative, for example. That can be very sad.

We would not object to anything that promotes apologies, but we feel that the bill is quite a blunt tool for doing that, that it has possibly been superseded by things such as the duty of candour, and that there are existing vehicles to promote apologies, including GMC guidance, the NHS complaints procedure and advice that is given by the ombudsman.

Dr Winning: I will explain how things work in practice. In my experience, apologies are required reasonably often and there is remediation, but it is very rare that an apology is required as the result of a complaint being made. A problem has arisen in the relationship with the patient if it gets to the stage at which a complaint is made. Formal complaints are few and far between, so in a case where there was a formal complaint followed by a formal apology because the bill had been passed, something would still have gone wrong way before that stage.

With regard to "Good medical practice" and the principles therein, I am appraised annually—as is every doctor—and part of that appraisal involves a very explicit discussion of any complaints that have been made, not only in my personal practice but within my wider team, and which includes discussion of the outcome and actions that were taken. That is reported on form 4, which is the form that goes to the GMC. There is already a robust system in place, and there is an absolute requirement on every doctor to comply with the principles in "Good medical practice".

At the moment, it is unclear to me where the Apologies (Scotland) Bill interfaces and interlinks with the duty of candour, and how it fits with the GMC as a UK body. A bit more work probably needs to be done on those things before I, as a practising doctor, would be clear about how the bill might fit with my clinical practice.

Dr McDavid: I echo what has been said. I have here a copy of the GMC's "Good medical practice". It is a document that doctors refer to, and it gives straightforward guidance on what should happen when things go wrong. It states that an explanation should be offered and, specifically, that an apology should also be offered. We are slowly beginning to see that practice filter down to create more of a culture of openness in the NHS. The MPS would like to see that work being continued and extended. Allowing doctors to offer a full apology at an appropriate time is a much better way to achieve helpful interaction with patients. Apologies at the outset should be facilitated in order to prevent situations from escalating to complaints. That is definitely something that we would advocate.

The interface will be interesting, because there is different legislation for the different areas. Doctors are obliged to look into things that go wrong, and I hope that they would want to do that. Doctors' feeling when things go wrong is that they want to apologise to and engage with the patient who has been wronged so that they can put things right. To put in statute a duty that says that they must do X, Y and Z would ensure that they do that. The Apologies (Scotland) Bill, which the MPS supports, will protect doctors from subsequent litigation, unlike the duty of candour, which is merely a prod in the back to make the doctor give an apology under duress.

The Convener: I understand that.

Bruce Adamson: I am not an expert in medical matters, but I will reflect on the positive duty on the state to put in place systems to prevent violation and to ensure effective remedy. We think that the bill will add an important element to that.

In the wide consultation that Margaret Mitchell and the committee have undertaken, much of the evidence has been on personal injury or medical practice, but the issues that we are looking at are broad ones—in particular, the positive duties that the state has to ensure protection from ill treatment and to ensure respect for the right to a private and family life. We are talking about a wide

variety of settings—not just health settings, but care settings and detention settings—as well as personal autonomy and personal integrity. The bill is broadly drafted and applies to victims in all circumstances as well as to the people who provide services, for whom it will allow another tool with which to provide effective remediation. I would reflect on the evidence from the Scottish Public Services Ombudsman—both in writing and in the committee today—on the wide scope of the bill and its usefulness.

Roderick Campbell: Will the bill and the provision of greater protection for doctors, or anybody else, necessarily improve the culture around apologies? Can we improve the culture around apologies without legislation?

Dr McDavid: The bill is a step in the right direction, but legislation is a blunt instrument and it is just one tool. If it can help to bring about change, that is great. The Medical Protection Society can offer to take the bill to the profession and say, "Here is what your Parliament has to say. Here is the tool to protect you from the consequences of being sued if you apologise." That is a strong message and it will move into—

The Convener: And you make a statement of fact which could be founded on—which is what the bill does.

Dr McDavid: Say, from that, yes—

The Convener: I am saying that if they apologise and make a statement of fact that could be founded on in civil proceedings, they might just say it but that cannot be founded on. You will be able to tell the profession that, as well.

You have gone quiet on me.

Dr McDavid: I am agreeing with you.

The Convener: It is a fact, is it not?

Dr Martin: Maybe I can help my colleague out slightly. One of the difficulties is, I think, that that statement of fact could still be founded on by a UK-wide regulator. I have to confess that I do not agree with the MPS on the protection that the bill offers.

Dr Winning: I am not convinced that the bill will offer the all-round protection that a medical or nursing council would feel that they need in order to be fully protected by their own regulator. The principle of apologising and the philosophy behind that is absolutely laudable, and it is one that we would want to foster.

Part of the problem, if we take it out of the GMC, is about relationships within the organisation itself among medical staff, nursing staff and their employers. That is another potential source of reprisal or recrimination when someone is making an apology or admitting to faults. Some work could be done on that. I am not sure that the bill will address organisational issues concerning employer-employee relationships.

Bruce Adamson: Cultural change is something that we are very interested in. A human-rights-based approach to changing culture involves a lot of things, including participation of everybody, ensuring that duty bearers understand their accountability, empowering victims, and there being a strong legal basis. The Scottish Human Rights Commission is certainly not suggesting that the bill is a panacea, but it will play an important role in helping to change the culture.

John Finnie: From the policy memorandum it is very clear that

"The Bill is intended to encourage a change in social and cultural attitudes".

As all legislation is, the bill is assessed in terms of human rights, and we have been told that there are no problems around compatibility. The main relevant article of the ECHR is article 6 on the right to a fair hearing. I would like to ask Bruce Adamson about a particular passage in the human rights assessment section of the policy memorandum, which states:

"Established legal systems do, routinely, set out rules about what evidence can, and cannot, be admitted. They might, for example, exclude potentially relevant evidence on account of broader reasons of fairness and public policy."

That seems to cover circumstances such as we are talking about. What is the balance of rights between the individual wishing to pursue an issue and the collective good as determined by public policy? There will, on occasion, be tension in that respect.

Bruce Adamson: Yes, there will be such tension. The first point to make is that it is very useful that there is a requirement for the human rights impact to be set out in the accompanying documents. The Scottish Human Rights Commission has for some time been seeking to improve such documents through proper human rights impact assessments, in order to allow committees to have more information on that.

Article 6 of the ECHR about ensuring a fair hearing and, in particular, ensuring the right against self-incrimination is obviously important here because the bill does not apply to criminal law. We need to be sure that people can avoid being forced into incriminating themselves. There is a balance in the system of evidence to ensure that people not only do not incriminate themselves but can fully seek a fair hearing and get a remedy. The courts are very well used to dealing with such situations. I do not think that the bill impacts on that.

11:30

The Convener: Surely the bill will remove judicial discretion over whether an apology is admissible or not, because section 1, which relates to the effect of an apology in legal proceedings, says:

"an apology made (outside the proceedings) in connection with any matter ... is not admissible as evidence ... and... cannot be used in any other way".

There is no judicial discretion.

Bruce Adamson: No. A properly formed apology within the context of the bill would be excluded from civil proceedings, notwithstanding fatal accident inquiries or defamation and criminal law—

The Convener: That is the point.

Bruce Adamson: There might, however, on that basis be discussion of whether something fits within such a properly formed apology.

The Convener: There is bound to be: wherever there is a law, there is litigation.

Margaret Mitchell: Again, we have had a very interesting discussion. The bill seeks above all to give legal certainty when an apology is made and to make it crystal clear that an admission of fault is not an admission of liability or negligence. It is unfortunate that, in the previous evidence session, the Law Society did not pursue the concerns about the law of negligence that I know it has. Often, the person who gets an apology thinks that that is an admission of liability or even negligence and so goes through lengthy and costly legal proceedings only to be categorically told that that is not the case. I hope that the bill offers some redress in that respect.

One of the most important things that the bill is trying to achieve is full disclosure to ensure that when something happens people are able to say what happened, what the facts are, that they are sorry and that they will look into the matter and ensure that it does not happen to anyone else. That is why I have included in the bill the provision for a statement of fact, which I realise is probably the most contentious aspect of the bill. As we know—and as Ms McCann, I think, pointed out—nine times out of 10, a matter can be proved in another way. If it can be proved in another way and if the fault is so bad that it constitutes negligence, one would, of course, want that to be founded on in proceedings. It is a question of balance, and I take the convener's point entirely—

The Convener: I believe that you are giving evidence now, Mrs Mitchell. I was almost tempted to ask you a question about your reference to

"nine times out of 10"

and whether you think that that is good enough.

Margaret Mitchell: I will turn it round, convener. If there was room to amend the statement of fact to give judicial discretion over whether evidence should be admitted—in other words, whether there was an attempt to hide behind the legislation or whether the evidence was actually germane to the apology—that would change people's point of view on the matter.

My final point is on the duty of candour, which relies heavily on the Compensation Act 2006. Some people seem to be going in that direction, but I understand that that particular provision was added at the last minute and without much discussion in the House of Lords. If the definition of "apology" was not there, would that go far enough in giving people confidence and allaying the fears that they have just now about apologising?

The Convener: Our eyes met, Dr Winning, but you do not have to respond.

Dr Winning: I have to say that I am feeling a bit more confused. The definition of "apology" must be absolutely clear, so for me the suggestion that at a later point discretion could be exercised as to whether a fact was admissible just muddies the waters in respect of what I would say and when, when all I would want to do is step in very quickly, preserve my relationship with the patient and fix the problem. If the definition is not there, that will trigger a cascade of thoughts that might jeopardise my immediate response to a patient's needs at the time.

The Convener: You do not have to answer, Dr Martin. If I look at you, that does not mean that you have to speak. Such is my power, though, that it seems to be working.

Dr Martin: I was just going to agree with Dr Winning—which I know is an easy thing to say. We help doctors to respond to complaints, so if things are confusing for our organisation, we will find it difficult to advise our members.

I believe that the duty of candour is still out to consultation. It has been implemented in England, but not in Scotland. I think that if you are looking for full disclosure—

The Convener: I think that it has passed its consultation phase.

Dr Martin: Has it?

The Convener: Yes. It has been introduced and it is going before the Health and Sport Committee.

Dr Martin: If you are looking for full disclosure, openness and learning from organisations, the duty of candour should be your tool—not the bill.

The Convener: I am going to keep my eyes down, because when I say, "I don't think anyone else wants to ask a question", hands go up.

A quick glance around the table has confirmed that we have exhausted our questions. I thank the witnesses very much for their evidence, which, as usual, has been interesting.

11:35

Meeting suspended.

11:42

On resuming—

Inquiries into Deaths (Scotland) Bill: Stage 1

The Convener: Item 3 is an evidence session on the Inquiries into Deaths (Scotland) Bill, a member's bill introduced by Patricia Ferguson. Members will see from their papers that the Scottish Government provided written views on the bill in advance of this evidence session.

Margaret Mitchell is back with us in her capacity as a committee member for this and the other items on the agenda—welcome back, Margaret.

I welcome to the meeting Patricia Ferguson MSP and Patrick Maguire from Thompson's Solicitors. As usual—Patricia, you are aware of this as you have sat here before—we will go straight to questions from members.

Margaret Mitchell: Good morning. As is clear from your bill, delays for fatal accident inquiries are a huge problem. Can you talk a bit about your idea of the timescales and comment on the Crown Office and Procurator Fiscal Service's intention to publish a milestone charter?

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab): First, thank you very much, convener, for having us at the committee today.

The issue of timeframes goes to the heart of the changes that we want to see made, because we think that the balance needs to be corrected and that bereaved families and those with an interest in the possibility of a fatal accident inquiry should be central to the entire process, but they feel that they are not in that situation today. The issue that seems to generate the most concern and discussion with regard to fatal accident inquiries is the length of time that it takes for a decision to be made about whether an FAI can be held. We are probably all aware of at least some of the cases that have been talked about in the press and elsewhere in that regard.

Our view is that we need to specify a time when the Lord Advocate will formally communicate to families and those with an interest the decision that he has made or the likelihood of his decision. We are suggesting six months for that, where there have not been criminal proceedings, and three months where there have been criminal proceedings. We are not being completely rigid about that; rather, we are saying that the Lord Advocate can give an explanation as to why that is not possible.

In my personal experience, families understand that, when there are complex issues or matters that require particular kinds of investigation, it might take a while—a year, 18 months or even longer—to be able to come to the decision. However, the families want to know at an early point what the discussion is, what the hold-ups might be and why they are occurring. That is why we have said six months, but with the Lord Advocate having the option to say at that point that it will now take him a further 18 months or that he might come back at a later point and ask for another extension. It is important that the Lord Advocate's reasons are given to those with an interest at an early stage.

11:45

Having a charter is a new idea that the Crown Office has come up with and which I read with a great deal of interest. It might help. However, as far back as 2013, the then Cabinet Secretary for Justice told me in answer to a parliamentary question that the Crown Office and Procurator Fiscal Service had largely implemented all those elements of the Cullen review relevant to it and that that did not need legislation, although legislation would ultimately follow, so it seems to me that the Crown Office could have done that a long time ago.

I welcome the fact that the Crown Office has now got to that point. However, it should be underpinned by legislation to give it the credibility and importance that family members expect it to have.

Patrick McGuire (Thompson's Solicitors): The only thing that I would like to add is that the proposed charter of milestones and timescales is relevant to other aspects of this bill. There is a recognition that the current system is not fit for purpose and there is a competing bill, but we also have practices and procedures being put in place by the Crown Office and Procurator Fiscal Service, including the proposed charter. It seems that it is being said that we should rely on informal policies and procedures, rather than putting something in statute. My response to that would be that if it is already doing something and is striving to achieve the best for victims, it should have no fear about, and should embrace, putting that on a statutory footing.

The Convener: We will have sight of that "charter" before stage 2, at which point the committee can take a view on whether reference might be made to having a charter in legislation—whichever bill it is—and then the charter would sit beside the legislation. That is always a possibility. At that stage we can examine how powerful and useful such a charter would be.

It is a move forward by the Crown Office, as I am sure that Patricia Ferguson would admit.

Patricia Ferguson: There has been movement from the Crown Office over the past couple of years. However, we are at the point where there are two bills being considered by Parliament that seek to reform or change the system and one of them suggests mandatory timeframes, underpinned by law. I have not seen the charter, so I cannot comment on how good it would be, but Patrick McGuire is absolutely right to say that, if we think that something needs to change, why not change it? Why wait for a new idea of a charter just to avoid something being laid down in law? That seems to be counterproductive.

Margaret Mitchell: Could you comment on Lord Cullen's recommendation that there be an early hearing and say whether you think that would help? Would it complement your mandatory timescales?

Patricia Ferguson: We considered at a very early stage whether it would be possible to have some kind of early hearing, perhaps about the facts of the case, but we did not see how that could fit with the kind of inquiries that we have in Scotland. As the sheriffs pointed out when they gave evidence to the committee a couple of weeks ago, until the point at which the Lord Advocate has decided that there will be a fatal accident inquiry, they have no jurisdiction. I think that it would be against the Scotland Act 1998—it has been changed over time, but not in this area—to try and do something different in the meantime. I would honestly struggle to know who would have the jurisdiction to do that. Until such time as sheriffs are told that there is to be an FAI, they have no role. The proposal seems slightly out of sequence, although I have a lot of sympathy for the aim and the idea of having an early inquiry.

Roderick Campbell: The Solicitor General for Scotland gave evidence on the opt-out in section 9(5) for fatal accident inquiries relating to industrial diseases and on relying on the discretion of the Lord Advocate. In your financial memorandum, you say that your bill would lead to only about one or two additional fatal accident inquiries per year. Why are you agin discretion?

Patricia Ferguson: We are absolutely not against discretion. In fact, we have made discretion a key element of the bill. However, we think that the balance has to be changed. As I said earlier, we think that the deceased individual and their family should be more part of what we do. All through the changes that we are proposing and the elements that we are introducing, we have tried to make that the case.

I will not read out what we have said about industrial diseases, but I will tell you what I think

the provision should mean and does mean. In the circumstances that the conditions that have led to a particular industrial disease have not yet been explored and found, there could be a fatal accident inquiry. That could also happen if there is a new technology or process.

I know that committee members have an interest in asbestos-related diseases. We all think that we know how people contract lung disease and other illnesses through exposure to asbestos, but there is evidence in England and Wales of very young people becoming ill with diseases that are normally associated with that kind of exposure, and we do not know why that is the case. If there were to be a case like that in Scotland—we hope that there will not be—it would be possible for the Lord Advocate to decide to hold a fatal accident inquiry into that case. He would have to consider it, however. That is the important point—the onus would be on him to look into it.

Patrick McGuire: From my perspective, having dealt with far too many families over the years who have lost loved ones through industrial accidents and industrial disease, it is a truism that the victims and the families who are left do not see any distinction between losing a loved one to an industrial disease and losing them to an industrial accident. At the most primary level, I view the provisions of the bill as putting those two types of victim on an entirely equal footing, treating victims of accidents and victims of industrial disease the same, and viewing those victims as the same under the law, which has not been the case until now.

Achieving that is a starting point. Thereafter, it is a matter of examining how a balance might properly be struck in the exceptions for holding inquiries. On a personal level, it comes down to the simple fact that, in the minds of the families, there is a difference between having a right to something that can be taken away with a full written explanation—which is what we are looking for in relation to both categories—and not having a right at all, until the Lord Advocate decides that the matter is sufficiently serious for there to be an FAI. For us, it is simply about striking that balance fairly.

Roderick Campbell: I hear what you say, but are you in no way reassured by the Solicitor General's evidence as to the kind of situations in which she would envisage that a fatal accident inquiry would take place? What will the practical difference be?

Patricia Ferguson: The practical difference is that there will be a presumption that there will be an FAI until it is decided that there will not be. The Lord Advocate would exercise that discretion. As Patrick McGuire said, it is about changing, or improving, the balance for those who are most affected by these incidents or diseases.

Roderick Campbell: But the Lord Advocate would still get a discretion under section 9(5), so somewhere in the equation, the Lord Advocate is exercising a discretion.

Patricia Ferguson: Yes, but at the moment the Lord Advocate can exercise their discretion to hold an inquiry. We are saying that it should be the other way round—they should have to exercise their discretion not to do so and explain why they came to that conclusion. They should have to explain that they were satisfied that the matter had already been thoroughly explored elsewhere or that no additional information could be gleaned from having an inquiry at that stage.

Roderick Campbell: Can I move on to the issue of the force of sheriffs' recommendations? You will have heard the evidence from Lord Cullen and others on that point.

The Convener: Sorry, Roddy—I just want to clarify this. We would have three categories: mandatory FAIs; cases where there is a presumption that there should be an FAI; and cases where it is just down to the discretion of the Lord Advocate.

Patrick McGuire: No. There are only two.

The Convener: There are two at the moment, but you are talking about where there would be a presumption—it would not be mandatory in those circumstances—which must be rebutted by the Lord Advocate. Am I not correct?

Patrick McGuire: Not entirely. There are currently two categories.

The Convener: I know that there are two at the moment, but does the bill create three?

Patrick McGuire: It will be exactly the same. There will be two categories—

The Convener: Mandatory and discretionary.

Patrick McGuire: Indeed. Under the mandatory category, as is currently the case, the Lord Advocate may exercise their discretion not to hold an FAI if certain conditions are met—

The Convener: I understand that.

Patrick McGuire: We are simply expanding the mandatory category beyond accidents to industrial diseases. The factors that the Lord Advocate will take into account to determine whether—

The Convener: So within these categories, there will just be a presumption. That is the difference that you outlined to Roddy Campbell. The presumption will be that there should be an FAI into a new or unexplored industrial disease unless otherwise—

Patricia Ferguson: Which is the case at the moment.

The Convener: A different test.

Patricia Ferguson: Yes.

Roderick Campbell: We heard evidence from Lord Cullen and others about sheriffs' recommendations and the difficulties that would be involved were their recommendations to be legally binding. What are your comments on that?

Patricia Ferguson: I thought that it was very interesting that one of the arguments used was that we would be turning what was an inquisitorial process into an adversarial one. Actually, if you have ever been at one of these inquiries—I am sure that you have—you will know that they can be quite adversarial. The fact of the matter is that there will be representation on both sides and there will be argument about the facts of the case. Different cases will have different submissions and different evidence to back up any claims or assertions made. I do not think that that is a fair assessment of what we are suggesting.

However, maybe changing to that setting is the right thing to do, because at the moment there are cases in which sheriffs cannot make recommendations and, therefore, vital points are not being implemented, which may cause further loss of life or injury down the line. That is not an uncommon thing to happen.

My view is that we need to be in a position where we prevent loss of life and injury as well as find out the reasons for it. Knowing the reason is worth less—not worthless—if you cannot do anything about it. That is the situation that we are in at the moment and I would like to see that change.

When I have been at the committee, asking questions of other witnesses, I have mentioned the Bellgrove and Newton train disasters. Those are two examples. However, I have personal experience of the Stockline investigation and inquiry. That was not even an FAI—it was a hybrid inquiry. At the end of the day, the reason for that accident was that a pipe transmitting liquefied petroleum gas into a building had been buried accidentally under a car park at an earlier period and therefore could not be inspected for signs of erosion. The pipe eroded and gas leaked into the company offices. Someone switched on a light and the building exploded, with the tragic loss of nine lives.

12:00

Lord Gill, who presided over that inquiry, highlighted that that was what had caused the accident and, because it was a hybrid inquiry, wrote to both secretaries of state about it. However, to my knowledge, there has been no change in legislation as a result. It cannot be the only workplace or setting where there is a buried pipe somewhere that is transmitting LPG. We really need to start properly learning lessons from such inquiries. Again, the sheriff does not have to make it a mandatory recommendation, but if the sheriff feels strongly enough about it, he or she may do that.

Patrick McGuire: I would only add that, if we were to distil down one purpose for the bill, it would be to make Scotland safer, not just in industrial settings, and to ensure that, in any incident from which lessons can be drawn, those lessons are drawn and steps are taken to make things safer. We believe that the only way in which that can properly be achieved is by going beyond simply recommendations and making them enforceable.

It came through clearly in the responses to the consultation document that all those who were in favour of the sheriff's recommendations becoming enforceable, such as trade unions, supported that strongly because they saw it as an important objective to be achieved. To the contrary, the objections of people who expressed less enthusiasm were of a more technical nature. We look at the big picture—the primary purpose—and believe that, if the bill is to do anything, it should be to make Scotland safer, which would be achieved if recommendations were enforceable.

Roderick Campbell: I hear what you say, but would you agree that, if we were to adopt that line, the bill would, in broad terms, need to be much more radical and we would require a complete revamp of the existing system?

Patricia Ferguson: I think that the bill provides a complete revamp of the existing system. We have been very careful. We have not called it the "Fatal Accident Inquiry (Scotland) Bill"; we have called it the Inquiries into Deaths (Scotland) Bill, because we think that what we are proposing is as radical as you can be with a member's bill, given that there are limitations on what an individual member can do. We have tried to be as radical as possible, starting with Lord Cullen's recommendations and building on those to get to the point at which we can, as Patrick McGuire says, make Scotland a safer place.

Elaine Murray: On the issue of deaths while in legal custody, you seem to go a bit wider than the Government bill, which, for example, does not extend to a child who is detained in secure accommodation. Do you think that your proposals are more in line with Lord Cullen's original recommendations?

Patricia Ferguson: Yes. The proposals are also based on the consultation exercise, where the

point was made to us quite forcibly that certain areas need to be covered. It is important that we regard such unfortunate and tragic circumstances as worthy of this kind of inquiry. I absolutely think that the bill is more in the spirit of Lord Cullen's suggestions.

We are also conscious that some of the tribunals and investigations that can be held into some categories of deaths, particularly on the mental health side of the issue, do not really conform to the provisions of the ECHR. We were keen to try to offer an alternative that would conform and would give more opportunity for proper investigation of these kinds of deaths.

Elaine Murray: Evidence that we took at stage 1 of the Government's bill suggested that there could be instances in which the cause of death is fairly obvious and a fatal accident inquiry is not really required because, for example, the person died in secure accommodation. How is that reflected in your bill?

Patricia Ferguson: As with any other FAI, at the end of the day, the Lord Advocate can use a certain amount of discretion. We expect that he would use that discretion where it was obvious that the death had been the result of natural causes or where a post mortem had confirmed that, which is often the case with other deaths, too.

Elaine Murray: How does your bill sit with the Government's bill? Is it an alternative? Could we have both? Does it amend the Government's bill or do we have to have one or the other?

Patricia Ferguson: My bill came out of some frustration on my part about the slow pace at which Lord Cullen's recommendations were being implemented. The recommendations have been on the table since 2011, but only now, in 2015, has a bill resulting from them been introduced. I tried to pursue that through the usual process of questions and answers, but it seemed to me that we were not getting very far. That is why I spoke to Patrick McGuire about what we could do to push it along. We had a shared experience of the Stockline inquiry and the disaster itself.

We published a draft bill three—or it might even have been four—years ago because we felt that that was important. It is not normal to publish a draft bill at the point at which you are issuing a consultation, but because it was technical, it proposed change and it was about legal matters, we felt that it was important to issue the draft bill. I was quite intrigued by the comment in the Government's response that we replicate certain sections of its bill. Actually, I think that the Government has replicated many sections of ours. We will take that as flattery and be pleased about it.

My bill undoubtedly seeks to go further than the Government's bill. It is a matter of judgment whether the two bills should go through separately or whether there need to be amendments to one or the other to bring the two closer. We have said all along that we are open to discussion with the Government, and we have had about four meetings with various Government ministers. Although we have common ground on much of the territory that we and the Government are looking at, there are some areas where we think that the Government is not going far enough. I would want to pursue those areas to the nth degree.

Patrick McGuire: I echo all of that. It is entirely a matter for the member to decide whether she wishes to continue to pursue the bill. From a technical perspective, my view is that she can certainly do so. To refer to Roderick Campbell's point, I add that we believe that the bill is radical. It does things far more radically than the Scottish Government's bill and it will have a more profound impact on the safety of people in Scotland than the Government's bill. From a technical perspective, it is telling that, standing orders notwithstanding, the Parliamentary Bureau agreed that the bill could go forward because it is so different.

Echoing Patricia Ferguson's point, I note that the inquiries that are set out in the bill are very different from those that are dealt with by the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and the Scottish Government's bill. That is why the bill is named as it is—it is different and, importantly, it will do something different and will therefore make a difference.

Elaine Murray: The Government bill could be amended to be a lot more like yours. Is that a possibility as far as you are concerned?

Patricia Ferguson: I am not sure whether the scope of the Government's bill would lend itself to as much amendment as I would like. That would have to be tested with the parliamentary authorities. As Patrick McGuire said, the fact that I was allowed to introduce my bill even though the Scottish Government had its own bill suggests that the two are sufficiently different. I am not sure whether there is enough similarity between the proposals to allow the Scottish Government bill to be amended as radically as it would need to be to suit my purpose. I would need to take guidance on that from the parliamentary authorities.

John Finnie: I do not know whether you have had sight of the correspondence from the Scottish Government dated 4 June, which takes 10 pages to take what many would consider to be a very negative approach to a lot of your recommendations. I want to pick up on one in particular, which is the legal enforceability of the sheriff's recommendations.

The committee heard some compelling evidence from the families against corporate killers network about the implications of delay. Something had been highlighted as being responsible for causing a death, and several other deaths ensued as a result of a failure to act. Public perception is important and I take the view that it undermines the system if a sheriff's recommendations are not acted on. However, surely you recognise that, if many issues are about health and safety and that remains a reserved issue, there will be challenges around that.

Patricia Ferguson: Yes. We had sight of the Scottish Government letter only recently, so we have not had a chance to properly digest it. My first assessment would be that it is not nearly as hostile as the consultation on the Government bill was in relation to my bill—perhaps there is a bit of rapprochement there, which would be nice.

You are right to highlight the problem with delays. I have a genuine concern that, if a death relates to an issue around an industrial practice and four or five years pass before there is a fatal accident inquiry that discovers that there was a problem with that way of working, those are four or five years in which we have not been able to act on what has come to light and other people may have been exposed to danger or injured or killed as a result of our not moving on. Delay is a contributory factor in that progression.

I understand what you say about the Health and Safety Executive. The fact that it is reserved is undoubtedly an issue, as is the case with a number of other aspects of both bills, because we can put into any bill only what is legally competent. That is what we have tried to do. We have tested that to the limits in a number of areas, which is partly why the bill was introduced rather later than I hoped; we tried hard to ensure that, where there was an issue of competence, we tested it as far as we could.

Ultimately, we have to make the bill compliant and that is what we have done. There is not much that we can do about that problem. However, we can make sure that lessons are learned, that matters are explored and that, where the sheriff wants to make a recommendation and can do so within devolved competences, they have the power to do that. It is about giving people as much power as we can in the current situation.

John Finnie: We heard from someone from the Health and Safety Executive. I do not recall how I framed the question, but I gained the impression that there is no unwillingness to act if necessary. Where is the problem? Do protocols need to be in place? Is there something short of something that is legally binding that would still work?

Patricia Ferguson: We have looked at that and argued back and forward. I do not think that there is a way round it without including legal enforceability. The HSE is very good. It will help wherever it can and it is proactive about many issues. It prevents deaths and accidents that might otherwise have been the subjects of FAIs. It does what it can, but if we consider that the proportion of deaths in industrial incidents in Scotland is so much higher than that in the rest of the UK, it is clear that we have an obligation to do as much as we possibly can. By making the sheriff's recommendations enforceable, we can help with that process and make some progress.

12:15

Patrick McGuire: I agree with everything that Patricia Ferguson has said. The HSE does everything that it can, but it is extremely stretched, especially in this time of austerity.

The issue is more closely allied to the problem that is section 69 of the Enterprise and Regulatory Reform Act 2013, which came from Westminster—God knows what will be next. The statistics show that the HSE is only able—I use that word deliberately, because it is about resources—to prosecute in 0.5 per cent of breaches of health and safety regulations, so we do not think that it is enough to rely only on the HSE.

We recognise the issue with matters that are reserved under the Scotland Act 1998, and we have reflected that—as we have had to do—in section 25(5), where we recognise that the sheriff's recommendations as they relate to reserved matters, including health and safety regulations, cannot be enforceable. However, many other recommendations will be enforceable, and they could make a difference. As Mr Finnie said, perception matters, and I think that, when it is clear to people that they will be prosecuted if they do not follow through on the recommendations, we will certainly see things change.

The bill provides a framework so that, when health and safety is devolved to the Scottish Parliament—which is something that everybody in the Scottish Parliament would now embrace, although perhaps not this time round—we will be able to make a slight amendment to the legislation and those recommendations will also be enforceable.

John Finnie: You mentioned that it is a public safety issue. Whose portfolio should it come under? Would it be Mr Wheelhouse's portfolio? Should the Government be more proactive, whichever party that is?

Patrick McGuire: Yes. Public safety should be one of the single biggest priorities for any Government.

Alison McInnes: Would it be appropriate for sheriffs to be involved in the process, in terms of monitoring and holding hearings, after the FAI has finished? Will you talk a bit more about that?

Patricia Ferguson: Under natural justice and the ECHR, if we say that a sheriff's findings are enforceable, we have to offer a right of appeal to those against whom a finding might be made, and we do that in the bill. Similarly, it is only right that the sheriff can set a timeframe against which the recommendation must be implemented and can call back the person or organisation to whom the recommendation was made and find out what action has been taken to implement it. At that point, the person or organisation might say that it has not been possible to implement the recommendation in that timeframe but that they can do it in another six months or a year and that, in the meantime, they can give details of the progress that has been made. It is only right for the sheriff to be able to review that, listen to what has been said and take whatever action he or she thinks appropriate at that point. Those two sides of the exercise need to be in place.

Alison McInnes: Have you quantified the workload that that might generate and the impact that it might have on other sheriff court business?

Patricia Ferguson: There is a separate issue about the resourcing of fatal accident inquiries. I have been told that a problem that sometimes occurs is that there is nowhere appropriate for the inquiry to be held; one week of the inquiry might be held in one location and another week in another location. One of the jobs that the Crown Office and Procurator Fiscal Service might want to do is to look at all of that.

In the Stockline inquiry, a community hall that had been used to house the people who were waiting for news of their loved ones was in part converted into an inquiry venue, and it was also subsequently used for the Penrose inquiry. It is possible to make small adaptations to venues to make them appropriate. Not enough of that happens and there is too much reliance on using Crown Office and Procurator Fiscal Service premises. Looking at all of that—whether there is a way of making the process of FAIs more streamlined so that they happen more smoothly—would be part of the discussion.

Patrick McGuire: I entirely agree with the member that there will be a cost and that sheriffs will be spending more time, particularly when the bill first passes into law. I would say that that cost is well worth paying, for two reasons. First, it will bring to book people who flaunt a sheriff's recommendations, and secondly, that will start to have an impact on behaviour.

At the heart of the part of the bill about the enforcement of recommendations, with sheriffs keeping an eye on things and bringing a prosecution if that is necessary, is the changing of behaviour. After the first, second or, perhaps, third prosecution that is brought under the bill—no more than that—word will filter out that people who have flaunted the recommendations have been brought to book, and we will start to see behaviour changing. We hope that the flaunting of recommendations will become a thing of the past, and any associated cost is a price worth paying.

Patricia Ferguson: Taking my example of the Bellgrove and Newton train disasters, I add that, if the initial recommendations had been enforced, that would have prevented a fatal accident and reduced the number of fatal accident inquiries that were required. In the longer term, we hope that the bill will reduce the number of FAIs that have to be held because lessons will be learned and action will be taken to ensure that there are no similar incidents in the future.

The Convener: I have a couple of points to raise about the sheriff's recommendations being enforceable. That is an attractive idea and I understand why it has been proposed, but difficulties arise.

One difficulty, which Patricia Ferguson referred to in one of her answers, is that many FAIs are already adversarial, so what difference would the proposal make? In my view, making the sheriff's recommendations enforceable would make the process more adversarial. Not all FAIs are adversarial, but the measure might change the culture and nature of all FAIs. I know that the bill is on inquiries into deaths but, if that proposal proceeded, it would make inquiries—whatever they were called—more adversarial.

The second point concerns what looks like a lengthy and pretty cumbersome appellate procedure. Not only is it long—it would involve going from the sheriff to the sheriff principal, possibly from the sheriff principal to the Court of Session and, you never know, going on from there to the Supreme Court—but, while the procedure is being followed, recommendations are suspended. The procedure would be cumbersome and might be counterproductive to what the bill wants to achieve.

Making the recommendations enforceable seems to be a really good idea, but it is difficult to sort all the issues that the sheriffs raised and all the other issues without ending up with something that is not what was wanted. The appellate procedure could take years.

Patricia Ferguson: The corollary of that is that the recommendations could ultimately be enforced, whereas at the moment that is not the case.

The Convener: I am making the point that the recommendation would be suspended and could not be enforced while the appellate procedure was going through. It is not that I disagree with your purpose, but I ask whether that would be helpful. More and more things are going as far as the Supreme Court and some cases might go to the European Court of Justice. There are issues that extend beyond our jurisdiction—we just need to look at the battle over minimum unit pricing to see how things can go on, long past legislation.

Patricia Ferguson: At worst, the issues would be in the public eye. There would be an onus on the person against whom the recommendations were made to consider that. Ultimately, the opportunity would arise to bring the recommendation to the fore and to give it the force of law.

There is a balance of opportunities. Either nothing is done—things are left as they are and the sheriff's recommendations have no force—or we develop an appeals process, which is needed because of natural justice and all the other things that we need to think about. That is my way of looking at the matter.

The Convener: Judicial review is also thrown into the pot, if a party is subject to a recommendation but they knew nothing about the inquiry or FAI going ahead. The extent of legal battles that could follow becomes almost Dickensian.

Patricia Ferguson: I hope not.

Patrick McGuire: I echo Patricia Ferguson's comment that this comes down to a straight choice. Do we or do we not want a system where recommendations are enforceable? If we do, that comes with a price.

I do not accept that the bill will result in appeals and judicial reviews left, right and centre. I am confident that the appeals process will be used very much as the exception rather than the rule.

The Convener: On what basis?

Patrick McGuire: On the basis that—

The Convener: If I represented a major company with pots of money and I did not wish to comply with an enforceable sheriff's recommendation, whatever it was—it could be a minor or major recommendation, but it would have ramifications for my business—I might fight it, like Donald Trump might do, up hill and down dale until the end of the road. At the end of the day, the recommendation would have no force—or it would sit as it would now, as a recommendation that has been challenged, which it was not previously.

Patrick McGuire: The Parliament has a proud history of not being browbeaten by big business. There is no finer example of that than the pleural plaques legislation—the Damages (Asbestos-related Conditions) (Scotland) Act 2009—which was appealed all the way to the UK Supreme Court. The Supreme Court put big business and the insurance industry in their place.

If a company such as the one that you described appealed a matter all the way, the recommendation would indeed, pro tem, be on ice. However, if we assume that the court—whichever one the case got to—supported the sheriff's recommendations, the recommendations would become enforceable at that point.

Companies would have a big choice. An appeal would not kill the recommendation; it would delay it coming into force. When it came into force, it would be a worthwhile exercise.

The Convener: Prior to that, if the recommendation is not enforceable—although enforceability has attractions—it is not able to be challenged in the same way as one that has been made enforceable, which can be challenged in litigation through all the courts. The sheriff's recommendation could be challenged thoroughly in such a case, so it could have even less force.

Patricia Ferguson: The alternative, if the recommendation is not enforceable, is that it can be ignored.

The Convener: I appreciate that. It is not easy to cure this; I am just saying that I see difficulties.

Patricia Ferguson: The situation of a recommendation being ignored is what we are trying to avoid. Even if a recommendation were appealed, ultimately it would have the additional force of having been taken through a process, and it would be all the more remarkable for that.

We are not suggesting that every FAI will result in the sheriff making such enforceable recommendations. The sheriff might wish to highlight something and draw something to someone's or an organisation's attention. They might recommend that the Scottish Government introduces legislation. A sheriff could do a range of things in the current situation.

When the sheriff's view is that recommendations that they can make could make a difference and could prevent incidents or accidents from arising in the future, they will have the right to make those recommendations. As Patrick McGuire and I have said, that will ultimately be challengeable. To be frank, there is not very much that any of us can do about that. In the end, the choice is between something that might be challenged and

something that might be ignored. I come down on the side of the thing that might be challenged.

Patrick McGuire: The companies that the convener painted a picture of, which would run an appeal all the way, are undoubtedly the same companies that would ignore the recommendations anyway. All paths lead to the same result except that, ultimately, we hope that the court would support the sheriff's recommendation.

I will pick up on the comment, which I hope would apply only for a period, about health and safety being reserved. There would be no enforceable recommendations in relation to health and safety matters, so that perhaps removes a contentious aspect where there might be appeals.

12:30

Elaine Murray: Patricia Ferguson has gone a long way towards addressing the point. Section 22 enables the sheriff to make recommendations, but it does not mean that every recommendation or statement that the sheriff may wish to make about the results of an inquiry has to be legally enforceable. It is only if the sheriff believes that a recommendation ought to be legally enforceable that it would be.

Patricia Ferguson: That is absolutely right. We have endeavoured as much as we possibly can to allow flexibility. We recognise that there are FAIs and there are FAIs. Some are on weighty and serious matters. All of them deal with a serious issue, in that they involve the death of one or more individuals, but the outcomes, the recommendations and the decisions that might follow vary according to the circumstances. We have been at pains to build in flexibility so that we do not end up taking a one-size-fits-all approach.

The Convener: I can see grounds for dispute. Somebody who was making a challenge could ask why one recommendation was made enforceable when they think that it ought not to be.

This is difficult—for me and for some of our witnesses, who see the laudable purpose of your bill. It is a matter of finding a way not to create unintended consequences that take away from the purpose. I do not know whether I have got there yet.

Gil Paterson: I was wondering about recommendations being enforceable on third parties. I think that Patricia Ferguson spoke about an LPG pipe being buried underground. That is the kind of area that I work in, and I suspect that the problem was not that the pipe was buried underground but that it was not protected so as to be placed underground. If a recommendation was enforceable in such a case, it could be picked up by the Health and Safety Executive but, when it comes to a third party in some other place, I find it difficult to believe that it would be possible to stop LPG pipes being buried. How would the proposed provisions kick in? A third party that was not directly involved in the case might challenge the recommendation.

Patricia Ferguson: I am not sure that getting into the technicalities of that example helps us, but my recollection of the Stockline inquiry—Patrick McGuire will be able to correct me if I am wrong—is that it was entirely about the pipe being buried underground, because there was already guidance, if not legislation, to say that such pipes should not be buried underground. The fact that the pipe had been buried at some point was relevant. That had been done accidentally, not deliberately. The level of a car park was raised, and the pipe was tarmacked over and forgotten about, basically. That is my recollection of that point.

From memory, I believe that there were disputes about who was responsible for that, about who should have been responsible for ensuring that that situation did not arise and about who was responsible for considering the whole LPG issue. Those disputes had been discussed elsewhere, because a criminal case preceded the inquiry. In the end, the two companies that were responsible were fined in court.

As I said, I am not sure that that case helps us to progress the issue that you are asking about.

Gil Paterson: I am speaking more about how an enforceable recommendation from a sheriff impacts on a third party that is not involved in the case. It is not always the case that a safety measure in one location is adhered to somewhere else. The measure might not apply because of a particular situation.

Patrick McGuire: We gave the issue quite a lot of thought and I hope that it is sufficiently covered in the bill. There are two stages to a recommendation becoming enforceable and, if we take a step back, there could be a third stage.

I assume that, in your question, the people involved are truly a third party. The reality is that parties other than the deceased's relatives and employer can be brought into inquiries and are allowed to take part fully. It is perhaps slightly distracting but, to use Stockline as an example, Johnston Oils was a party throughout the inquiry and was able to lead evidence and cross-examine witnesses. There is an opportunity for other parties to be involved and therefore to make submissions on whether recommendations should be made, even if they are truly third parties that have not been involved at all.

The first stage would be for the sheriff to make recommendations—at that point they would be no more than recommendations—that went to the third party. Under the bill, the third party would have the opportunity to respond. If the sheriff believed that the recommendations were not being sufficiently followed through, the third party would be asked to explain itself and at that stage it would no doubt make the points that Mr Paterson just raised. Only at that point, if the sheriff was not convinced by the argument, would he or she go to the point of making the recommendation enforceable. That would happen seldom. We drafted the bill carefully to ensure that those safeguards were in place.

John Finnie: I will go back to the format that recommendations might take. There seems to be a perception, which is followed through in the minister's response that I mentioned earlier, that there would be other difficulties in making the sheriff's recommendations legally binding, such as Lord Cullen's suggestion that that is currently unconstitutional.

The minister said:

"Recommendations are made as to how deaths in similar circumstances may be avoided in the future."

We all understand that that is the recommendations' purpose. He continued:

"They do not bestow legal rights or obligations on anyone. A sheriff cannot be considered to be an expert in all fields"—

I think that we agree with that—

"and it is surely better that a sheriff's recommendations are considered by the regulatory and safety bodies in the relevant field".

Is it your understanding that the sheriff's recommendations would be based on evidence that he had taken from those very bodies and that there would be not a layperson's notion but an informed and evidenced recommendation?

Patricia Ferguson: Absolutely. We have been at pains to make the point that that is exactly what would happen.

Patrick McGuire: A sheriff's determination—to use the term in the broadest sense—has to be rational, which is to say that it has to be based on the evidence that was led. It would be utterly irrational for a sheriff to make recommendations that were based on something that was not led in evidence. I do not accept that criticism at all.

Christian Allard: Patricia Ferguson said that the sheriff could recommend that the Scottish Government should introduce legislation, but she also said that a third party could be called to explain why it was not taking on the sheriff's recommendation. Is there a constitutional issue about a sheriff having such a power? Do sheriffs really want to have the power to ask the Government to introduce legislation and to take on a Government that has not followed their recommendations?

Patricia Ferguson: I was not suggesting that one of the enforceable actions that a sheriff might suggest would be that the Government should legislate. I was making the point that, with or without my bill, a sheriff could recommend anything that they thought was relevant. Right now, a sheriff could say to the Scottish Government, "I think that you should do this." However, there is no onus on the Government to take that on board at all.

Christian Allard: Should there be an onus on the Government if the sheriff wants to make such a recommendation?

Patricia Ferguson: When there is an inquiry of the kind that I have seen take place under the current FAI legislation—never mind anything that might come in the future—the Government should take seriously any recommendation that comes from the sheriff who heard the inquiry. The sheriff will have considered the matter deeply and, if they go to the length of suggesting that the Scottish Government or anyone else should take action, they must feel strongly about it.

Christian Allard: The sheriff might or might not want to do this, but the question is whether they should have the power to go back to the Government and ask it to take forward the recommendation. Is that not a constitutional problem?

Patrick McGuire: I see no constitutional problem with going back to the Scottish Government and asking whether it will legislate. I can see that forcing the Scottish Government to legislate could be a separation of powers issue, but that is not what the bill recommends. I have no difficulty with asking why the Government is not legislating.

The Convener: I am not quite clear about what sections 34(2)(j) and 34(2)(k) mean. Section 34(1) starts:

"The Court of Session may by act of sederunt make provision for or about—"

and section 34(2)(j) talks about

"the financial assistance which may be given, on such conditions as may be specified in the rules, to enable such representation to be given".

Is that to do with legal aid? Section 34(2)(k) refers to

"the expenses payable to persons attending inquiry proceedings".

I think that the expenses bit is fine, but I do not understand the bit about financial assistance.

Patrick McGuire: The section is no more than an enabling provision that allows rules to be created whereby, if it was thought to be politically expedient, parties to an FAI could receive expenses so that they could be legally represented or recover costs for appearing. That is similar to legal aid, but it does not come under the legal aid provisions. It is more closely aligned to the provisions that exist under the rules on public inquiries, which include procedures whereby a party to a public inquiry can be legally represented.

The Convener: Who pays for that?

Patrick McGuire: The state would pay.

The Convener: Through what? Would it pay through the legal aid system? How would it pay? I do not understand.

Patrick McGuire: That is exactly why the section is no more than an enabling provision. The bill does not say that the Scottish Government must go down that road; it simply creates a framework whereby, if it was considered politically expedient to do so—

The Convener: Would legal aid rules have to be changed?

Patrick McGuire: That was not done for the Inquiries Act 2005 or the inquiry rules, which is why the bill follows that analogy. The money would be state money but it need not come out of legal aid funds.

The Convener: I just do not know what pot the money would come out of.

Patrick McGuire: It would come from where any other money that the Government commits comes from.

The Convener: There would be a special pot of money.

Patrick McGuire: That would be a political decision.

The Convener: I was just testing, because I did not understand.

Patricia Ferguson: The money would come from the same pot as money for inquiries comes from at the moment.

The Convener: A fund would be created.

Patricia Ferguson: It is already there.

The Convener: I just wanted to know about that and whether there would be legal aid.

The committee's questions are finished, so I thank you for your evidence.

12:43

Meeting continued in private until 12:52.

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