The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 3 November 2015

Session 4

Tuesday 3 November 2015

CONTENTS

JUSTICE COMMITTEE
30th 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)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Margaret McDougall (West Scotland) (Lab)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Andy Bruce (Scottish Government)
Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab)
Arlene Stuart (Scottish Government)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 3 November 2015

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the Justice Committee's 30th meeting in 2015. I ask everyone to switch off mobile phones and other electronic devices. No apologies have been received. I welcome Patricia Ferguson, who is with us for agenda item 2.

Item 1 is a decision on taking business in private. Do members agree to consider in private item 4, on a draft stage 1 report on the Community Justice (Scotland) Bill, and item 5, on our work programme?

Members *indicated agreement.*

Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill: Stage 2

10:00

The Convener: Item 2 is stage 2 proceedings on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill. I remind members that our aim is to complete stage 2 today. Members should have their copies of the bill, the marshalled list and the groupings of amendments for today's consideration. I welcome Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, and his officials.

I will move straight on. Amendment 1, in the name of Margaret Mitchell, is grouped with amendments—[*Interruption*.] I beg your pardon. That is a bad start. The clerk has pointed out that I first need to put the question on section 1. You did not notice that, did you, team? No. You would have let that go by, and it is a whole big bit.

Section 1 agreed to.

Section 2—Mandatory inquiries

The Convener: Amendment 1, in the name of Margaret Mitchell, is grouped with amendments 56, 2, 2A, 57, 3 to 5, 5A, 6, 58 and 7.

Margaret Mitchell (Central Scotland) (Con): During stage 1 consideration, the committee came to the conclusion that there was no need for mandatory fatal accident inquiries into the deaths of those who are detained under mental health legislation, because some deaths of such people are straightforward. The decision was influenced by the Mental Welfare Commission for Scotland's comments about the number of deaths of detained patients that are a result of natural causes.

However, in preparation for the stage 1 debate, I revisited Lord Cullen's review and note that he stated:

> "even investigations into deaths by natural causes may reveal unsafe conditions."

He continued:

> "it is in the public interest that an FAI should be held into the deaths of those detained by the state, especially those who are most vulnerable."

I am therefore not convinced that the monitoring and investigation of cases by the Mental Welfare Commission are adequate safeguards for protecting some of the most vulnerable people in society, particularly when such individuals have no family members to advocate for them. It is that scenario that prompted amendment 2, which would provide for mandatory FAIs into deaths of those who are in mental health detention or those

who are receiving treatment voluntarily, although there would be an opt-out provision.

The Mental Welfare Commission and the Royal College of Psychiatrists expressed concern that having mandatory FAIs for the approximately 73 deaths a year of patients who are detained under mental health legislation would vastly increase the number of FAIs. However, that fails to take account of the effect of my amendment 5, which would put in place an opt-out provision for the Lord Advocate, provided that he gave the reasons why he considered that no FAI was necessary. As the authorities are confident that the vast majority of such deaths are easily explained, the provisions should not be onerous.

Crucially, the opt-out and the compulsory explanation that would be required would ensure that, where patients who were detained by the state had no family members to advocate on their behalf, the conditions and circumstances of their death were properly scrutinised. That would ensure complete accountability and transparency regarding such deaths.

Furthermore, in England and Wales, all deaths of patients in compulsory mental health detention are subject to an inquest by the coroner, unless it has been ascertained that the death was from natural causes.

To put the necessity for my amendments in perspective, in 2013-14, there were 60 deaths of patients in formal detention under mental health legislation in Scotland, but there were six times as many deaths—364—of informal or voluntary patients.

Given that, my amendments not only provide important safeguards but ensure compliance with article 2 of the European convention on human rights, on the right to life. The state has a general duty to protect life, and it is therefore only right that deaths of those detained by the state are thoroughly scrutinised.

However, I have taken on board the comments about the number of cases that that approach may involve, and although that is not a reason in itself to exclude the deaths of individuals who have voluntarily received treatment for a mental disorder, I consider that the amendments in the name of Alison McInnes, which complement the amendments in my name, strike the right balance at this time.

I move amendment 1.

Alison McInnes (North East Scotland) (LD): I welcome the chance to speak on the amendments to section 2.

Section 2 sets out the circumstances under which mandatory public inquiries into certain deaths are to be held. The bill as it stands fails to include a number of Lord Cullen's recommendations, as Margaret Mitchell said. I believe that when the state has the responsibility for someone's health, safety and, ultimately, life, there should be an inquiry into what went wrong, should they die. We are talking about the most vulnerable in society, such as older people and patients with mental health problems.

The Scottish Human Rights Commission has said that steps need to be taken

"to ensure that systems of investigation meet the Article 2 requirements outlined above and to remedy the current gaps and confusion"

in the system.

I know that Richard Simpson did some sterling work on the Mental Health (Scotland) Bill. I also note that a review into how the deaths of those detained under mental health legislation are investigated will take place, but I understand that the timescale for that is up to three years. It is good to have the review, but I think that we need to deal with the issue in the interim. I will therefore support Margaret Mitchell's amendments.

Ms Mitchell's amendment 2 is her main amendment in the group. I am concerned that it goes too far by including mental health patients who have been admitted to hospital voluntarily; my amendment 2A removes that requirement. My amendment 5A removes the Lord Advocate's discretion not to hold an FAI if the patient who has been detained is receiving compulsory treatment.

Similarly, my amendment 57 introduces a requirement to hold a mandatory FAI for patients with dementia who immediately before their death received prolonged treatment using psychotropic medication. That type of medication causes sedation, confusion and movement difficulty. Overuse of those drugs in such situations has been implicated in an increased risk of stroke. A number of organisations, including the Mental Welfare Commission, have raised concerns about the widespread use of those drugs in care home settings. The most vulnerable people in our society deserve our attention.

There have been a number of high-profile cases in which families have raised concerns about the circumstances of what appears to be death from natural causes. It should be the responsibility of the state to investigate and learn, in an open and transparent way, from any mistakes made.

My amendments 56 and 58 are consequential.

Roderick Campbell (North East Fife) (SNP): I have listened carefully to what both members have said.

Margaret Mitchell referred to Lord Cullen's report, but I think that it is fair to point out that the

report did not deal with the question of voluntary admissions. Alison McInnes accepts that by proposing to delete that bit from Margaret Mitchell's amendment.

We should also remember that, at present, the Lord Advocate has discretion to hold a fatal accident inquiry in any event if he has concerns. It is not quite a black-and-white situation.

Reference has also been made to section 37 of the Mental Health (Scotland) Act 2015, which imposes a duty on the Government to review, within three years, the arrangements for investigating the deaths of patients. It would perhaps be helpful if the Government could expedite that review, but I do not think that it is appropriate to use the bill to review and change the current position.

I am very sympathetic to the issue of deaths of people who have been treated with psychotropic drugs. I think that there is an issue about the use of psychotropic drugs and whether the guidelines for their use, which are now nine years old, are still appropriate. However, I think that that is a wider issue and not something that we should seek to encapsulate in the debate on these amendments.

John Finnie (Highlands and Islands) (Ind): For me, the issue is about the relationship between the state and the individual. It is also about perception, and I think that any member of the public who is listening in would find the comments of Margaret Mitchell and Alison McInnes very measured. I will certainly lend my support to the amendments.

Christian Allard (North East Scotland) (SNP): Mr Campbell is absolutely right: the Lord Advocate has the discretion to have an inquiry. More to the point, I do not think that the Lord Advocate would make any judgment to hold an inquiry because of pressure from families; the Lord Advocate would decide to have an inquiry regardless of whether the victim had family around them.

Elaine Murray (Dumfriesshire) (Lab): I, too, have a lot of sympathy for the amendments in the names of Margaret Mitchell and Alison McInnes. On what Roddy Campbell said, having the discretion to hold an FAI and not using it is not the same as being required to have an FAI and being able to opt out because, under the amendments, if the Lord Advocate decided not to hold an FAI, some sort of explanation would be given. Given the vulnerability of the people whom we are discussing—particularly in relation to those who are compulsorily detained—people would welcome the reassurance of knowing why an inquiry was not to be held.

Alison McInnes's amendment 57, on people who have been treated with psychotropic drugs, addresses an important issue. I am not sure whether such a provision needs to be in the bill, but it would be helpful if the minister were able to give us some sort of assurance that the issue is being considered seriously.

The Convener: I am sympathetic to the arguments but I take a fairly plain view of things: something is either mandatory or not mandatory. As has been explained, there is discretion about whether one holds an inquiry in certain circumstances. What sustains me in keeping that position is section 8, on "Reasons for decision not to hold an inquiry". I think that we made progress on that, because family members will not need to request reasons; reasons will be issued in any event. There are, quite rightly, pressures on the Crown Office, given that quite a lot of people—including not only the Mental Welfare Commission or the Care Inspectorate but the press—would police the Lord Advocate if there was a decision not to hold an FAI in any of the circumstances that my colleagues described. In addition, the giving of reasons will be embedded in the bill.

Although I accept the arguments that have been put forward, I come back to the point about an FAI being either mandatory or not mandatory. Where there is discretion and one feels that that discretion has not been exercised properly, the Crown Office must give reasons for its decision, which would be subject to a wide range of scrutiny. I am satisfied, as long as section 8 is amended in line with our request.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): The group includes amendments in the name of Margaret Mitchell that would require mandatory FAIs into the deaths in hospitals of patients receiving compulsory or voluntary mental health treatment. Mental health patients who die while receiving treatment in hospital for something that is unrelated to their mental health condition, such as a heart attack or cancer, would be affected by the proposal. It is difficult to see how the public interest would be served by holding an FAI in such circumstances.

Currently, the Mental Welfare Commission is automatically informed of the deaths of detained patients and has the discretionary power to carry out its own independent investigation and inquiry, and it already liaises with the Crown Office on cases that it feels may merit an FAI. Therefore, if there was any suspicion or suggestion that a death was the result of inadequate or inappropriate treatment, a death would already be investigated by the Mental Welfare Commission and/or the Crown Office.

The Crown Office is also updating its guidance to medical practitioners to ensure that all deaths that occur while the person is subject to compulsory treatment under mental health

legislation are reported to the procurator fiscal and are, therefore, investigated as appropriate, in common with all other sudden, suspicious or unexplained deaths, of which only 50 to 60 finally result in an FAI.

It is highly significant that neither the Mental Welfare Commission nor the Royal College of Psychiatrists supports mandatory FAIs for detained mental health patients. They believe—and we agree—that the provision would be disproportionate and could, as I have said previously, lead to unnecessary distress for the family of the deceased person. In response to the proposal, the Royal College of Psychiatrists said:

"it is stigmatising to suggest mental health care and treatment should be subject to special scrutiny in relation to patient deaths, bearing in mind the commonality of mental health problems and physical illness prevalence. We would oppose any amendment seeking to change this at Stage 2 and we urge the Committee to reject any such amendments."

The committee will be aware of a new provision under section 37 of the Mental Health (Scotland) Act 2015 that requires ministers to carry out within three years a review of the arrangements for investigating the deaths of patients who at the time of death were detained under either the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedures (Scotland) Act 1995, or who admitted themselves voluntarily for treatment for a mental disorder.

10:15

The Mental Welfare Commission for Scotland has said that it

"believes that this review is an important opportunity to create a system of investigation of deaths of psychiatric patients which is proportionate, streamlined and effective"

and that

"the priority should be for the review to be established and for its work to begin".

I reassure committee members and other members who are present today that the review of the arrangements for the investigation of deaths of mental health patients will commence as soon as possible, and that initial discussions are already taking place with stakeholders.

The Scottish Government will consider with stakeholders the scope of the review and whether it is possible to ensure that there are safeguards to protect against alleged deaths of patients as a result of covert treatment, compulsory electroconvulsive therapy or other treatment, which I know is of concern to Alison McInnes. I do not believe that it would be appropriate or sensible to legislate to extend the mandatory category in relation to deaths of mental health patients in advance of the work of the review that is required under section 37 of the 2015 act.

Amendment 5, in the name of Margaret Mitchell, would provide discretion for the Lord Advocate not to hold a mandatory FAI where there has been an investigation or inquiry by the Mental Welfare Commission. Such investigations are, however, carried out by the commission only where there has been apparent ill treatment, neglect or deficiency in care. The amendment would therefore require that FAIs be held for deaths from natural causes and expected deaths.

Amendment 7, in the name of Margaret Mitchell, would amend section 8 of the bill, which will place a duty on the Lord Advocate to provide written reasons when it is decided that an FAI is not to be held, but has been requested by the nearest relative. As the convener said, amendment 7 would require the Lord Advocate to give written reasons in all cases in which it has been decided that there will be no FAI for a death in hospital of a patient who has been receiving mental health treatment. In such cases, written reasons would have to be given without, crucially, a request having been made by the nearest relative, as the convener indicated. For all other types of cases, a request is needed before the Lord Advocate's duty takes effect. There is simply no good reason to make the rule for mental health cases different from that for all other cases. What is important is that the Crown Office maintains with the bereaved family the level of contact that they have indicated they want; we believe that there are better ways of achieving that than amendment 7.

The need for support and guidance that is tailored to individual family circumstances is exactly the sort of thing that will be provided for in the Crown Office's proposed family liaison charter. I agree with the committee's observation in its stage 1 report on Patricia Ferguson's Inquiries into Deaths (Scotland) Bill that, if the scope of mandatory FAIs were to be extended to include the deaths of those who are detained under mental health legislation, the numbers of inquiries would rise significantly and the financial impact would be significant. It would, of course, be even more significant if voluntary patients were included.

Although I take the point that Alison McInnes's amendment 2A would remove voluntary patients from amendment 2, the Scottish Government still cannot support mandatory FAIs into mental health-related detention or compulsory treatment. Data from the Scottish Government and the Mental Welfare Commission suggest that there are each year approximately 78 deaths of patients who are subject to detention or to compulsory mental health treatment. If mandatory FAIs were to be held into all of those deaths, that would at a stroke

more than double the number of FAIs in Scotland per annum. At least 39 of those 78 patients died from natural causes, in cases where death was expected; those deaths would trigger mandatory FAIs under the proposed arrangements.

There were in 2013-14 424 deaths of psychiatric in-patients, including voluntary patients. Amendment 2 could therefore increase the number of FAIs sevenfold. It is important to consider that the proposals may not be welcomed by bereaved families of mental health patients, who may not wish to have the death in psychiatric care of a loved one become the focus of a fatal accident inquiry in public.

We have similar concerns with regard to the amendments in the name of Alison McInnes, which would require a mandatory FAI into the death of any patient suffering from dementia who was receiving treatment in a hospital or care home service, or who was being treated with psychotropic drugs for the three months leading up to their death.

As is stated in the recent letter from the Mental Welfare Commission, patients suffering from dementia often die while receiving treatment in hospital for, for example, heart attack or cancer, which are unrelated to mental health conditions, including dementia. I note the point that Alison McInnes made about strokes and take it on board; I hope that the review will be able to look at that issue. Similar to what would happen under Margaret Mitchell's amendments, deaths from natural causes would be affected by Alison McInnes's amendments. It is, in my opinion, difficult to see how the public interest would be served by holding an FAI in such circumstances.

The amendments incorrectly imply that use of psychotropic medication for people with dementia is a bad thing and requires extra scrutiny. I take the point that Alison McInnes has made, however. It is my understanding that patients with dementia often experience aggression, agitation, loss of inhibitions, delusions and hallucinations, which can, regrettably, require psychotropic medication. I further understand that clinical guidelines and safeguards are in place on the appropriate use of antipsychotics to help to manage those distressing symptoms.

The committee will be aware of the upcoming review of treatment of learning disability, autism spectrum disorder and dementia under the Mental Health (Care and Treatment) (Scotland) Act 2003. Scottish ministers committed to that review during the passage of the Mental Health (Scotland) Act 2015. The Mental Welfare Commission will consult key stakeholders in early 2016 to scope the content and detail of the review. In view of the fact that there will be that review and the statutory review of the arrangements for investigating the deaths of mental health patients under section 37 of the 2015 act, I firmly believe that it would be premature and inappropriate in advance of the reviews' work and recommendations to legislate to extend the mandatory category to deaths of dementia patients.

Amendment 5A in the name of Alison McInnes would amend amendment 5 by ensuring that the deaths of mental health patients who are subject to compulsory treatment under part 7 of the Mental Health (Care and Treatment) (Scotland) Act 2003 would not be an exception under section 3 of the bill, which would mean that an FAI would be mandatory in every such case. We do not have exact figures for the number of deaths that could be captured by the amendment; however, we have been assured that the impact would be so fundamental that it would overload the system of fatal accident inquiries as well as leading to unnecessary distress for families and, potentially, staff.

Although we, as the committee's members do, understand and sympathise with Alison McInnes's concerns regarding that group of vulnerable people, the Scottish Government does not, for the reasons that I and both the Mental Welfare Commission and the Royal College of Psychiatrists have set out, support the amendments, but believes instead that there being discretionary FAIs for such cases strikes the right balance.

For all those reasons, I ask the members to not press their amendments.

The Convener: It is really for Margaret Mitchell to wind up, but Alison McInnes is writing something, so I wonder whether she wants to respond to any of that, first.

Alison McInnes: I am grateful for the opportunity to do that. I am also grateful to the minister for the assurances that he has put on the record today, particularly in relation to my amendment 57, about the concerns that even Roderick Campbell acknowledged are live issues at the moment. I am grateful that the review is already in the process of being commissioned. On that basis—

The Convener: You do not need to say anything about that at the moment.

Alison McInnes: Okay.

The Convener: Hold us in suspense on that. Margaret Mitchell will now wind up and press or seek to withdraw amendment 1.

Margaret Mitchell: I will address the stigma that the minister suggested will somehow occur if there were mandatory FAIs for detained mental health patients. I refer the minister to comments from Enable Scotland in response to the Cullen review:

"We think that the deaths of people detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 should be included in the mandatory category. Those individuals who have been deprived of their liberty should have the same protection as those detained in prison or police cells."

That quite conclusively explains that there would be no stigma, but that there are definitely issues of fairness and justice.

The convener's comment that an FAI is either mandatory or not fails to take account of the fact that under my amendment 1 an FAI would be mandatory, but with an opt-out: the change of emphasis gives added protection to the group of vulnerable individuals. I also argue that it would ensure compliance with article 2 of the ECHR—the right to life. The minister has made much in his comments—which I have taken on board—about the concerns that have been expressed by the Royal College of Psychiatrists about the number of cases that could be added to the FAI workload if amendment 1 were agreed. However, it is for that very reason that I have provided for the Lord Advocate an opt-out from a mandatory FAI, if he considers that such a course of action is not necessary and also gives his reasons for that decision, which is important for transparency and accountability. If the death is from natural causes, that will be so obvious that the Lord Advocate will not find it onerous to give his reasons, and the measure will not add substantially to the number of deaths that fall into that category.

On the review of the arrangements for investigating the deaths of patients who have been receiving treatment for a mental disorder, which Alison McInnes and the minister referred to, the timetable seems to have been moved forward, although it is still due to report within three years of the Mental Health (Scotland) Act 2015 coming into force. However, I also note that last year there were 424 such deaths, 60 of which were in the compulsory detention category and a concerning 364 of which related to voluntary admissions. As a result, that issue must be revisited in the future.

In the meantime, I will press amendment 1. I urge committee members to support my amendments which, in conjunction with Alison McInnes's amendments, strike the right balance and provide the right protection for mental health patients who are, by any standards, a very vulnerable group of people.

The Convener: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 1 agreed to.

The Convener: Amendment 52, in the name of Alison McInnes, is grouped with amendments 53 and 54.

Alison McInnes: This group of amendments also refers to section 2. The main amendment is amendment 53, which introduces the requirement to hold a mandatory FAI as a result of the death of a child who was looked after by the state, even if they lived with their parents or guardians at the time of their death.

When social services are involved, there is usually a good reason for that involvement, and it becomes our responsibility to keep these children safe. Although we acknowledge that there is a limit to what a social worker can do, we must also recognise that lessons need to be learned from any mistakes that might have been found to have been made in these tragic situations.

Although not a great many cases are covered by what is described in amendment 52, I hope that we all agree that even one child who dies while being looked after by the state is too many. I believe that it is important to have a mechanism in place that would require any such cases to be considered in the open and transparent way offered by an FAI. Indeed, in its written submission to the committee, Together, otherwise known as the Scottish Alliance for Children's Rights, argued this position and said that the proposal for mandatory FAIs for

"children in secure accommodation ... is welcomed ... but should be widened to include all looked-after children. The Scottish Government has a direct responsibility for all looked-after children—regardless of whether they are in secure care, residential care or foster care—and as such any death of a looked-after child must be investigated, regardless of placement type."

I move amendment 52.

Roderick Campbell: I have listened to what Alison McInnes has said, but we need to bear in mind that we already have the Looked After Children (Scotland) Regulations 2009, which provide that in the event of any death local authorities are required to report to Scottish ministers and, indeed, the Care Inspectorate within one day. One assumes that once the Care

Inspectorate gets that report it will carry out an inquiry and that, if it has any concerns, it will in turn report to the Crown Office, which at that point could decide to launch a discretionary inquiry.

Moreover, we did not take much oral evidence on this point. We had some written submissions on the matter, and I note that, in a recent letter to the committee, the centre of excellence for looked-after children in Scotland argued reasonably strongly against the idea of having mandatory inquiries. There is by no means a uniform view among the professionals in this area.

10:30

Paul Wheelhouse: This group of amendments in the name of Alison McInnes seeks to require mandatory FAIs into the deaths of children who were looked after by a local authority. Given that the provision would affect all natural-cause and expected deaths of looked-after children, many of which happen as a result of life-limiting conditions, it is difficult to see how the public interest, including that of the families, would be served by holding an FAI in such circumstances.

The amendments also fail to recognise that a judicially led inquiry is not the only means of investigating the deaths of children in the care of the state. As Glasgow City Council confirmed during stage 1, the deaths of looked-after children are already provided for in the reporting requirements of the Looked After Children (Scotland) Regulations 2009, which require local authorities to notify Scottish ministers and the Care Inspectorate of a death within one working day. That reporting responsibility has been further extended by the Children and Young People (Scotland) Act 2014 to include the reporting of deaths of any care leaver up to the age of 26 and any young person in a continuing care placement.

Deaths of children in residential establishments, half of which happen as a result of life-limiting conditions and other health issues, are investigated and reviewed by the Care Inspectorate, which identifies any lessons to be learned and makes recommendations on the review of legislation, policy or guidance. Such deaths are already the subject of investigation by the procurator fiscal, and the Lord Advocate has discretionary power to hold an FAI into such deaths when that is considered to be in the public interest. The Crown Office liaises with the Care Inspectorate and refers to its reports in order to inform decisions on whether to hold a discretionary FAI.

The committee will also be aware of the child death review. Ministers agreed that Scotland should set up a national child death review system to review the deaths of all children and young people, not just those in care. Between January and June, a steering group met to develop a model for the system, and its report and recommendations will be submitted to ministers very shortly. I do not believe that it would be appropriate or sensible to legislate to extend the mandatory category to include deaths of looked-after children in advance of the review's work.

The Care Inspectorate reported that, in the three-year period from 2009 to 2011, there were 30 deaths of looked-after children in Scotland, which means that, as a result of this provision, there could be an additional 10 FAIs per year. Of course, the resource impact is not the only consideration. At stage 1, both Glasgow City Council and CELCIS did not support extending the mandatory category in this way. Glasgow City Council considers the current arrangements that I have just described for the reporting and review of deaths of looked-after children to be suitable and sufficient, and CELCIS did not recommend making this a mandatory category, because it felt that there was no certainty that it would lead to improvements in services for looked-after children and those leaving care. In its letter of 19 October to the committee, it reiterated its view that it was not necessary to extend the provision for mandatory FAIs to all accidental or sudden deaths of looked-after children in residential care.

On that basis, the Government does not support these amendments, and it agrees that the combination of the provisions in the 2009 regulations and the Children and Young People (Scotland) Act 2014 and the proposal to have discretionary FAIs in such cases strikes the right balance. We believe that the proposals in these amendments would not be welcomed by bereaved families of looked-after children. Some looked-after children continue to live in the family home following involvement with the children's hearings system, and 11 of the deaths from 2009 to 2011 were of children who were living at home or with relatives. Others live away from their family home—for example, with a foster carer or in residential accommodation—and 12 of the deaths reported were in residential care, while four were in foster care. Children usually become looked after to promote their care—for example, respite care for children with complex difficulties or disabilities—and to protect them from neglect and abuse. Families and those known to the child might not wish to have the death become the focus of a public inquiry. I also remind the committee that, under the bill as it stands, the death of a child in secure accommodation would trigger a mandatory FAI.

For all those reasons, I ask the member to withdraw her amendments.

Alison McInnes: I caution the minister against making a case on the basis of the resource impact, because I think that that is the weakest argument that can be made. If a number of cases need to be investigated, they need to be investigated.

The Convener: I agree with you. I do not like to hear resources being brought in—the argument should be based on the principle.

Alison McInnes: That aside, the minister has set out a detailed reason for not supporting amendments 52, 53 and 54. I considered them to be probing amendments to test the Government's position, and I am grateful to have heard more about the review.

In the circumstances, I will not press amendment 52.

Amendment 52, by agreement, withdrawn.

Amendment 56 not moved.

Amendment 2 moved—[Margaret Mitchell].

Amendment 2A moved—[Alison McInnes].

The Convener: The question is, that amendment 2A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 2A agreed to.

The Convener: The question is, that amendment 2, as amended, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 2, as amended, agreed to.

Amendments 53 and 57 not moved.

Amendment 3 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 3 agreed to.

Section 2, as amended, agreed to.

Section 3—Mandatory inquiries: exceptions

Amendment 4 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 4 agreed to.

Amendment 5 moved—[Margaret Mitchell].

Amendment 5A not moved.

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 5 agreed to.

Section 3, as amended, agreed to.

Section 4—Discretionary inquiries

Amendment 6 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 6 agreed to.

Amendments 54 and 58 not moved.

Section 4, as amended, agreed to.

Section 5 agreed to.

Section 6—Inquiries into deaths occurring abroad: general

The Convener: Amendment 8, in the name of the minister, is in a group on its own.

Paul Wheelhouse: Amendment 8 seeks to remove the requirement for a body to be repatriated to Scotland before a fatal accident inquiry may be held into the death of a Scot abroad. The bill as introduced included that requirement mainly because Lord Cullen recommended as much in his review of the FAI legislation but also because it mirrors the practice in England and Wales. The coroner's duty to investigate a death abroad arises only if the body is returned to the coroner's district and the circumstances are such that an inquest would have been held if the death had occurred in England and Wales.

When she gave evidence to the committee at stage 1, the Solicitor General for Scotland indicated that repatriation of the body might provide crucial evidence of the cause of death. Repatriation obviously opens up the possibility of a post mortem being held in Scotland. When a body is repatriated from abroad, it might be accompanied by a death certificate from the foreign authority that might also provide useful evidence. Depending on the standard of the examination that was carried out abroad, that might or might not confirm the results of examination of the body.

However, it is accepted that, in certain instances, it might simply not be possible for a body to be repatriated. The body might not be available because it might have been destroyed in the accident that caused the death, or the body might have been lost at sea, for example. It might simply not be possible to repatriate a body on grounds of cost. The advice from the Foreign and Commonwealth Office is that bereaved families might wish to consider cremation of a body in the country where the death occurred. That is partly because of the significant expense of repatriating a body, but it means that a family might have a body cremated before they became aware of the possibility of a death investigation and FAI in Scotland. The Scottish Government is liaising with the Foreign and Commonwealth Office with a view to its guidance being updated with these new arrangements, which will come into operation as smoothly as possible for families.

I know that the committee raised the issue of repatriation of the body as an area of concern very early in its consideration of the bill and has consistently pressed the point, including in the stage 1 report. I am happy that the Government and the Crown Office have been able to take on board those concerns and are now able to agree that repatriation should not be required.

The important discretion that is afforded to the Lord Advocate in paragraphs (b), (c) and (d) of section 6(3) will remain in place. That means that the Lord Advocate would have to consider that

"the circumstances of the death have not been sufficiently established in the course of an investigation in relation to the death"

and

"there is a real prospect that those circumstances would be sufficiently established in an inquiry"

and decide that

"it is in the public interest for an inquiry be held".

We should also be careful not to raise unreasonable expectations among the bereaved family that an inquiry will definitely be held and of what an inquiry in Scotland might be able to achieve. The Crown Office will have to rely on the Government and legal authorities of the country in which the death occurred and standards of investigation and co-operation vary across the world.

It is expected that only in exceptional circumstances would the Lord Advocate decide that a death investigation and possible FAI were merited in the absence of repatriation of the body, but it is a very important advance that that possibility should exist, particularly as that is not the case in England and Wales.

I move amendment 8.

The Convener: Are you saying that repatriation of the body is not required in England and Wales?

Paul Wheelhouse: It is required in England and Wales. We have gone beyond the practice in England and Wales.

The Convener: So the committee has done a good deed.

Christian Allard: I want to show my appreciation for the fact that the Government has listened to the committee, particularly on behalf of many families in the north-east of Scotland who have members working abroad, many of them offshore. They will be delighted to hear the news that, in exceptional circumstances, there is the possibility of having an FAI without the body being recovered.

Paul Wheelhouse: I thank Mr Allard for those comments.

The Convener: It is a commonsense amendment.

Amendment 8 agreed to.

Section 6, as amended, agreed to.

Section 7 agreed to.

After section 7

The Convener: Amendment 59, in the name of Patricia Ferguson, is in a group on its own.

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab): A sudden death in a family is a traumatic experience and the sudden death of a family member in circumstances that might require a fatal accident inquiry is likely to be particularly traumatic. We have all heard of instances when that experience is exacerbated by the time lag between the death and the decision about whether an FAI is to be held. Many families have felt uncomfortable about the way in which information is communicated to them.

My member's bill, the Inquiries into Deaths (Scotland) Bill, sought to introduce time limits within which that decision should be made and provisions on communication with families affected by that decision. However, those ideas did not meet with universal approval. In the meantime, the Crown Office and Procurator Fiscal Service had begun to draw up a charter detailing how communication with bereaved families will take place and when it will take place. I believe that the charter is an improvement on the current situation, so I am content to support the idea. However, it seemed to me that the provision of such a charter should be underpinned in this legislation and that, although the Lord Advocate should retain the right to revise the document from time to time, he or she must lay before Parliament the charter and any revision that might be made.

I am grateful to the minister for facilitating this amendment and I hope that the committee will support it.

I move amendment 59.

Roderick Campbell: I support amendment 59. Anything that increases the families' understanding of the system and how it is supposed to operate is to be welcomed.

The Convener: I congratulate Patricia Ferguson on pursuing the issue. It is a bewildering process for families; any court process can be bewildering, but in an FAI, people can be coping with the loss of a close family member and the process is carried out in the public interest, which means that families sometimes feel as though they are on the sidelines. Patricia Ferguson has made important progress on that. I do not mean that to sound patronising—members' bills are useful in facilitating such steps.

Paul Wheelhouse: At stage 1, I welcomed the commitment by the Solicitor General to consult on, and produce, a charter of investigation milestones, which will address concerns over keeping bereaved families informed about death investigations and complement the provisions in the bill to make the FAI system more efficient. I acknowledge Patricia Ferguson's role in raising that agenda.

I welcome the committee's comment in its stage 1 report that

"the publication of a milestone charter should help address the delays in the FAI process".

Bereaved families must be kept better informed of progress throughout death investigations and, although the Crown Office has made great strides in this area in recent years, particularly since the establishment of the Scottish fatalities investigation unit, the charter will provide a clear and easily understandable guide for families of what to expect from the investigative authorities at the Crown Office at a time of great strain and stress for those families.

10:45

The charter aims to provide guidance on what the bereaved family should expect from the Crown Office by way of the provision of information about death investigations and the timescales within which that information will be provided. The Crown Office will communicate with families in the manner that the family prefers, such as in face-to-face meetings or by letter or phone call.

It is proposed that, in cases requiring further investigation with a view to deciding whether criminal proceedings should be instigated and/or whether an FAI should be held, the Crown Office will make contact with bereaved families three months after the date that the death has been reported to the COPFS. The Crown Office will offer the family a personal meeting within 14 days to give them an update on the progress of the death investigation, as well as an idea of the likelihood of criminal proceedings and the possibility of an FAI.

It is also proposed that the charter will explain the different stages of a death investigation and set out the commitments of the Crown Office in terms of keeping in touch with relatives. It is proposed that it will contact the families every six weeks after the initial contact. The charter will also include a frequently asked questions section and links to further information.

I am therefore delighted to welcome this proposal by Patricia Ferguson to give the charter statutory underpinning. The amendment places a duty on the Lord Advocate to prepare and publish the charter and specifies what should be included in it, though it will be subject to occasional review. The charter must be laid before the Scottish Parliament.

I take this opportunity to thank Patricia Ferguson again for all her work on FAIs and for agreeing to discuss areas of potential common ground, as recommended by the committee in its report. We had an open and constructive discussion on areas where there was common ground for collaboration to improve the FAI system by strengthening the Government's bill, and amendment 59 is one of two that we have agreed with the member.

The Government is happy to support amendment 59, in the name of Patricia Ferguson, and I ask the committee to do the same.

Amendment 59 agreed to.

Section 8—Reasons where inquiry not held

Amendment 7 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 7 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 7 agreed to.

The Convener: I have been told to slow down.

Section 8, as amended, agreed to.

Section 9 agreed to.

The Convener: Amendment 9, in the name of the minister, is grouped with amendment 55.

Paul Wheelhouse: Amendment 9 is a technical drafting amendment that is intended to bring a reference in section 10, which relates to persons who are entitled to participate in a fatal accident inquiry, into line with that in section 2(3), for reasons of consistency and clarity. The provision in section 10 ensures that the employer of someone who is killed in the course of their employment is entitled to participate in the mandatory FAI, as was the case under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.

Amendment 55, in the name of Elaine Murray, would give a statutory right of participation in a fatal accident inquiry to a trade union or staff association representative if the deceased was a member of that trade union or staff association at the time of death and if they died in Scotland as the result of an accident in the course of their

employment or occupation. The committee's stage 1 report stated:

"We believe it is imperative that families, trade unions and staff associations are able to participate in a meaningful way in an FAI and that families are represented appropriately and are kept informed throughout the process."

The Scottish Government agrees with that statement.

As the convener has noted,

"Section 10(1)(e) says that

'any other person who the sheriff is satisfied has an interest in the inquiry'

may participate in inquiry proceedings in relation to the death of a person."—[*Official Report, Justice Committee*, 12 May 2015; c 23.]

The Scottish Government considers that section 10(1)(e) would permit the sheriff to allow a trade union or staff association representative to participate in an accident at work fatal accident inquiry, if he or she thought it appropriate. Nonetheless, in light of the committee's stage 1 report, the Government is content to support amendment 55 in principle, subject to exploring with Dr Murray whether any adjustments to the wording should be made at stage 3 to ensure that the bill gives full effect to the policy intention.

I move amendment 9.

The Convener: I think that that is a semi-victory.

Elaine Murray: I thank the minister for making most of my case for me. Many of the things that I was going to say no longer require to be said.

The Convener: It is not mandatory to contribute.

Elaine Murray: I am happy to consider the wording. It was a bit difficult to phrase amendment 55 so that it referred to someone being at the time of their death a member of a trade union that is relevant to the occupation—for example, they might have been a trade union member with some other employment or because of some previous occupation.

The way in which the amendment is written is maybe slightly clumsy, but I am pleased that the minister will accept it. It is important that trade union and staff association representatives have a right to be there, not only because they might have information that could be of assistance but because they could provide significant support to victims' families.

The Convener: I feel a tweak coming on. Tweaks are very fashionable. Does the minister wish to wind up?

Paul Wheelhouse: I am happy to leave it at that, convener.

Amendment 9 agreed to.

Amendment 55 moved—[Elaine Murray]—and agreed to.

Section 10, as amended, agreed to.

After section 10

The Convener: Amendment 60, in the name of Patricia Ferguson, is in a group on its own.

Patricia Ferguson: As the committee is aware, the bill had its genesis in the review of fatal accident inquiries that Lord Cullen undertook at the Scottish Government's request. One of his recommendations, which has not so far found its way into the bill, relates to the availability of legal aid.

My Inquiries into Deaths (Scotland) Bill explored that area, but I acknowledge that it went considerably further than Lord Cullen suggested. He made two particularly important points about legal aid. The first relates to the fact that relatives often believe that the procurator fiscal attends an FAI to look after their interests, particularly if they are unrepresented. The Crown Office and Procurator Fiscal Service's guidance makes it clear that that is not the case and says that the procurator fiscal's role is to represent to the court any matter that affects the public interest.

Lord Cullen's second point was that an FAI can take place whether or not relatives consent to it. If relatives want to participate, their ability to do so without representation is limited, and they can be at a considerable disadvantage in comparison with other interested parties. The Faculty of Advocates stated in evidence to Lord Cullen that

"It is impossible for relatives to participate effectively in important inquiries without legal representation."

Sheriff JP Murphy observed that relatives

"should not be expected to be capable of self-representation in the traumatic situation of an FAI. I have never seen a lay person do it adequately".

Amendment 60, in my name, seeks to disapply the normal test of reasonableness and the normal financial conditions and thresholds and to require ministers to produce a special scheme of conditions for relatives who are involved in FAIs. I have deliberately not been prescriptive about those regulations and I have instead left that decision to ministers. However, I do so in the context of a presumption that legal aid will be available and that families will be able to be represented throughout the process—that has been an issue—and will not find that cash runs out part of the way through an FAI. That is a basic

principle and I hope that the committee will support it.

I move amendment 60.

Margaret Mitchell: I support what Patricia Ferguson said, which is backed by the evidence that the committee heard when we considered the issue. As she rightly said, the COPFS represents the public interest, and the interests of relatives are not represented. It is therefore only right and fair that legal aid should be available to ensure that those interests are represented. I am very much in favour of amendment 60.

Roderick Campbell: I am interested to hear what the minister has to say. I accept that Lord Cullen reported in those terms in 2009, but I do not think that the committee quizzed him further on that in taking evidence, so I do not know whether that has remained his view given the circumstances in which we now stand. Comments have been made about resource implications, and we should have regard to the amendment's resource implications. I am interested to hear from the minister on that point.

The Convener: I am in a similar position. I am sympathetic to the arguments. I do not think that I will support the amendment at this stage but, if it fails, I would like to hear further reasons for such a provision at stage 3.

There is an issue for FAIs, which are very different from criminal proceedings, in that in certain circumstances the deceased's family and relatives have no legal support of any kind. I have concerns about a special case being made, were there to be no financial test, but I note that the amendment says that

"The Scottish Ministers must by regulations make provision for the financial conditions to apply to a person to whom subsection (2A) applies."

I would like that to be developed. I will not at this stage support the amendment, but I would like further inquiry and investigation by the Government into whether there might be something in regulations, perhaps subject to financial tests of a certain kind, to provide support for relatives.

There is an issue. FAIs are a very grey area. Although FAIs are held in the public interest, bereaved families—for whom an FAI will open everything up again—are sitting there.

We have previously made changes to the communications that the Crown has to make so that people are involved in the process more and get some support, which might just be in the form of explaining the legal process to them. There is an issue that I would like the Government to explore further. I will not at this stage support the amendment, but I would like it to be considered.

Paul Wheelhouse: I note the comments that the convener has made.

I am aware that a number of groups support Lord Cullen's recommendations that the reasonableness test should be removed and that financial eligibility levels should be increased when relatives seek civil legal aid for FAI proceedings. Amendment 60 aims to implement that.

I fully acknowledge that relatives are in a terrible situation when they experience the death of a family member. It is important that they should be able to participate appropriately in an FAI when there is one. However, that does not automatically require legal representation in every case.

The purpose of a fatal accident inquiry is to investigate in the public interest the circumstances of a death, to try to avoid any future incident of the same kind. The procurator fiscal leads evidence to establish the cause of death.

Procurators fiscal therefore have a public duty to fulfil at the inquiry. They meet the family to discuss the witnesses and evidence that they intend to produce at the inquiry and the questions that they intend to ask. Often the fiscal asks the family whether there are any particular questions that they wish to have answered. Sometimes, families have questions that the fiscal does not feel that it would be appropriate to ask, since they are representing the public interest. Families might wish to ask questions that are intended to establish whether there are grounds for civil proceedings following the FAI. In such cases, they might consider that they require their own legal representative to do that.

If the family cannot afford to pay for such legal representation, they might be eligible to receive legal aid. The Scottish Legal Aid Board can make legal aid available when a person who is entitled to be represented at a fatal accident inquiry can show that they have concerns that the procurator fiscal is not going to raise at the inquiry. I hope that the charter process will improve openness about what the procurator fiscal is going to do, which will help to inform the family's actions. The reasonableness test will be satisfied if the family can show that they have legitimate concerns and questions that the procurator fiscal cannot ask in the public interest.

If the amendment was agreed to, legal aid would become available more or less on demand for fatal accident inquiries. I note the point that the convener made. I understand that point fully and sympathise with much of what was said. Many FAIs result in purely formal findings from the sheriff on the basis of the evidence that is led by the procurator fiscal. It is difficult to see the case for a guarantee of legal representation in all such cases.

If legal representation became universal, the likelihood is that FAIs would become more adversarial, longer and, potentially, more costly. I understood that that was one of the key points that Patricia Ferguson wished to avoid.

In the current financial climate, during which the Scottish Government's budget has remained broadly unchanged in cash terms, controlling legal aid expenditure is necessary. Statutory tests of probable cause and reasonableness apply to any application for civil legal aid, although anyone who is eligible for legal aid will be granted it, and the Government has prioritised maintaining the wide scope of matters for which legal aid is available in order to protect access to justice.

11:00

Removing the reasonableness test for relatives in FAI cases would have a price tag. Legal aid expenditure on such cases varies widely from year to year, but we could expect an additional cost of at least £500,000 per year. I appreciate the earlier comments about not wishing to reduce the debate to a discussion about resources, but resources have a significant bearing on the Government's position, and that money would have to come from somewhere.

In England and Wales, there have been serious and swingeing cuts to civil legal aid to save money. People there can no longer access legal aid to help with certain types of family, medical, housing and welfare benefits problems. In certain cases, people have to provide evidence that they or their children have been victims of domestic abuse or violence in order to access legal aid. I put it on the record that I do not want to go down that route in Scotland.

As I have explained, if a family have concerns that the procurator fiscal cannot address in the public interest—again, I stress that the charter will help to improve transparency on that and engagement with the family—the likelihood is that the reasonableness test for legal aid will be satisfied. When a death has occurred in prison, it will also be likely that the reasonableness test will be satisfied.

Legal aid will be focused on the cases that deserve it, so that access to justice can be maintained. The extension of entitlement to legal aid at fatal accident inquiries that the amendment proposes would be not only unaffordable but unnecessary. A balance has to be struck; I regret saying that, because I appreciate the points that have been made about resources, but I hope that the committee will appreciate that we are not in an easy position. Therefore, although I have a great deal of sympathy with the intention to make legal aid eligibility more certain, unfortunately I cannot support the amendment.

Patricia Ferguson: I say in response to Mr Campbell that I am not aware that Lord Cullen has repudiated his view. I would have thought that, if he had changed his mind, he would have said so when he gave evidence to the committee. In my view, this is a matter of principle and we should not focus at all on the amount of money that the proposal might cost, but I will return to that in a second.

To take that point of principle, relatives are also capable of being pragmatic. I point to the example that I know best, which was not a fatal accident inquiry, although it was in some ways similar—the Stockline inquiry, where there were 10 bereaved families but only three representatives, because eight of the families came together and agreed to have one representative for all the people in that group, while two of the families decided that that was not the way that they wanted to go. That example shows that families can be pragmatic.

With regard to the role of the procurator fiscal, the guidance that the Crown Office and Procurator Fiscal Service is giving families indicates

"that it is unlikely that [he or she] will be able adequately to represent their interest and concerns at the Inquiry and that separate representation is considered appropriate".

It seems strange that the state makes that suggestion to people but does not provide them with a methodology that allows them to access the representation.

I have deliberately said that the Scottish ministers should come forward with a financial contributions scheme. I have not left that as an open-ended blank cheque, but I have left it open for ministers to work out a formula that would be acceptable. As matters stand, the Scottish Legal Aid Board automatically treats the condition of reasonableness as met without question in the case of deaths in prison, for example. What I propose is a provision that in the interests of fairness—and, more important, in the interests of justice—has to be taken forward. I hope that the committee will see fit to support the amendment.

The Convener: The question is, that amendment 60 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Ind)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)

Abstentions

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

The Convener: The result of the division is: For 5, Against 3, Abstentions 1.

Amendment 60 agreed to.

Sections 11 to 13 agreed to.

Section 14—Initiating the inquiry

The Convener: Amendment 10, in the name of the minister, is grouped with amendments 11, 19, 20, 22 and 23.

Paul Wheelhouse: Amendment 10 is a technical amendment that clarifies what information the procurator fiscal must provide to the sheriff when giving the sheriff notice that a fatal accident inquiry is to be held. Under section 14(1), the fiscal must provide the sheriff with

"notice that the inquiry is to be held ... a brief account of the circumstances of the death so far as known to the procurator fiscal, and ... any other information required by an act of sederunt"

made under the bill. Section 14(2) requires the sheriff to make an order to fix the date and place of a preliminary hearing, if one is to be held, and the date and place of the inquiry. At present, it refers to the sheriff doing so only on receipt of notice that the inquiry is to be held under section 14(1)(a). It does not refer to the requirements of paragraphs (b) and (c) of section 14(1) and the question arises as to what the sheriff should do if he or she does not receive that information.

Amendment 10 removes that uncertainty by making it clear that the sheriff should receive all the material that is set out in section 14(1). If the sheriff does not receive that material, he or she will not be required to order the inquiry. Amendment 11 is consequential on amendment 10.

Amendments 20 and 22 are concerned with what material the procurator fiscal must provide to the sheriff if further inquiry proceedings are to be held under section 28 in light of new evidence in relation to the circumstances of the death. Amendment 22 requires the fiscal to provide the sheriff with a copy of the determination from the original inquiry into the death or deaths, as well as notice that further proceedings are to be held. Amendment 20 requires the notice of the further inquiry proceedings to include the material that is mentioned in paragraphs (c) and (d) of section 30(1).

Amendments 19 and 23 are consequential.

I move amendment 10.

Amendment 10 agreed to.

Amendment 11 moved—[Paul Wheelhouse]—and agreed to.

Section 14, as amended, agreed to.

Sections 15 to 25 agreed to.

Section 26—Dissemination of the sheriff's determination

The Convener: Amendment 12, in the name of the minister, is grouped with amendments 13 and 14.

Paul Wheelhouse: The amendments in this group are technical amendments to section 26, under which the sheriff can redact or withhold all or part of their determination from publication.

Amendment 12 amends section 26(2), which sets out the Government bodies that should be given a copy of the determination and related documents on request. The intention is to put devolved non-ministerial departments in the same position as United Kingdom departments. The amendment therefore changes "the Scottish Ministers" to

"an office-holder in the Scottish Administration".

The Scottish Administration includes the Scottish Government, so there is no longer a need for separate reference to the Scottish ministers. The Scottish Housing Regulator and Food Standards Scotland are within the Scottish Administration.

The purpose of the amendment is also to ensure that future devolved departments, such as a Scottish health and safety department, are covered by the provision, so I commend amendment 12 to the committee.

Amendment 13 removes the reference in section 26(5) to a sheriff having to look to provision made in an act of sederunt made under the bill when considering redacting sensitive or other material in a determination at the conclusion of a fatal accident inquiry.

The Lord President has recently issued guidance on redaction of judicial decisions generally, including FAI determinations, and the amendment is consistent with the principle that redaction is a matter for judicial discretion and guidance. Sheriffs will therefore continue to use their discretion in relation to redacting determinations, guided by the framework provided by the Lord President.

Amendment 14 ensures that the Lord Advocate and participants in the inquiry will receive full unredacted copies of the sheriff's determination at

the conclusion of an inquiry. The reason for drawing a distinction in terms of different recipients is that the persons who may receive unredacted copies of determinations are either participants in the inquiry or public authorities, including Governments and the Health and Safety Executive. By contrast, the sheriff will be able to exercise discretion, using the guidance from the Lord President, when sending to a person to whom a recommendation has been addressed, to ensure that their copy contains all the material relevant to them while omitting sensitive material that they do not need to see, such as material affecting children or national security.

I move amendment 12.

Margaret Mitchell: Will you clarify the purpose of the amendment to ensure that future devolved departments, such as a health and safety department, are covered by the provision? How are such issues normally dealt with, in advance of that happening?

Paul Wheelhouse: Amendment 12 provides the ability for any future devolved departments, such as a Scottish health and safety department, to be covered by the provision. The amendment is meant to avoid the necessity of coming back to the legislation to amend it. It is purely a practical measure and there is no particular agenda underlying it, if that is Margaret Mitchell's concern. It is just meant to allow flexibility and avoid the need to come back to and amend legislation.

Margaret Mitchell: I was just trying to clarify whether, at present, such cases are dealt with as and when the eventuality arises.

Paul Wheelhouse: I believe that that is normal. The amendment is a practical measure to avoid us having to come back to amend legislation retrospectively.

The Convener: Margaret Mitchell has her suspicious face on.

Paul Wheelhouse: I do not have any suspicious agenda here—that is all that I can stress.

The Convener: Was that was your winding up, minister?

Paul Wheelhouse: It was indeed.

Amendment 12 agreed to.

The Convener: Are you agreed, Margaret?

Margaret Mitchell: I may as well.

The Convener: That is a semi-victory.

Amendments 13 and 14 moved—[Paul Wheelhouse]—and agreed to.

Section 26, as amended, agreed to.

Section 27—Compliance with sheriff's recommendations

The Convener: Amendment 15, in the name of the minister, is grouped with amendments 16, 17, 31 and 32.

Paul Wheelhouse: This group of amendments is intended to clarify how the process of dealing with responses to sheriffs' recommendations will be dealt with by the Scottish Courts and Tribunals Service.

In its stage 1 report, the committee welcomed the bill's proposals to require sheriffs' determinations to be published and to require parties that were involved in the inquiry and to whom a recommendation is addressed to respond to the recommendations. The committee considered that those proposals struck the correct balance in seeking compliance with recommendations. The Scottish Government believes that the proposals will have the effect of ensuring that sheriffs' recommendations are respected and that the whole process becomes more transparent.

However, there may sometimes be good and justified reasons why part or all of a response should not be published. Amendment 15 makes it clear that it will be possible to withhold from publication the whole of a response to a sheriff's recommendation and not just part. It is expected that requests for the withholding of the whole of responses will be very rare, but a party may have good reasons for doing so, such as commercial confidentiality or the protection of vulnerable persons.

Amendment 17 will ensure that the SCTS website will make it clear whether all or part of a response has been published. If part has been withheld, a note will explain that fact and if, unusually, the whole of a response has been withheld, an appropriate note will signify that fact. Under the new subsection (7), notice will be given if no response is received.

Although the SCTS may withhold part of a response for data protection or other reasons without a request being made to that effect, it will withhold all of a response only if a request to that effect is received. The final decision will, of course, always be with the SCTS, which has experience of redacting judicial opinions under formal guidance that is issued by the Lord President.

The experience of the equivalent procedure in England and Wales is that responses have been received in 100 per cent of cases, and thus far there have been no representations for part or all of a response to be withheld. Parties seem anxious to demonstrate compliance with any recommendation that is directed towards them. There is no reason to suppose that the response

rates and reaction in Scotland will be different from that experience in England and Wales.

The Crown Office has previously indicated that there is no evidence that parties fail to implement sheriffs' recommendations, and in many cases remedial action has been taken by the time an FAI is held.

I move amendment 15.

Amendment 15 agreed to.

Amendments 16 and 17 moved—[Paul Wheelhouse]—and agreed to.

The Convener: Amendment 18, in the name of the minister, is in a group on its own.

Paul Wheelhouse: It is an essential aspect of the Scottish Government's policy that fatal accident inquiries should remain inquisitorial and not adversarial in nature. By endorsing the general principles of the bill, the Justice Committee has endorsed that particular principle.

Section 6(3) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 protects the inquisitorial principle by providing that the determination of the sheriff is not admissible in evidence and cannot be founded on in any future judicial proceedings, of whatever nature, that arise out of the death or any accident from which the death resulted. That provision will be re-enacted in section 25(6) of the bill.

The rationale for that provision is that the sheriff should not be inhibited from explicitly or implicitly criticising a party that was involved in the death, since the function of the determination is to record the result of the examination of all the circumstances of the death and to permit the sheriff to make recommendations as to how deaths in similar circumstances may be avoided in the future.

11:15

Equally, it is reiterated that the FAI process is not designed to be a foundation for subsequent civil litigation. The bill contains express provision for sheriffs to make recommendations in their determinations at the conclusion of FAIs; a new requirement for participants to whom recommendations are addressed to respond; and a statutory regime for the collation and publication of responses to recommendations. An interested person will in future be able to find on the SCTS website both the sheriff's determination and responses to the recommendations. The question then arises as to the admissibility status of the recommendations.

The Government is concerned that, if a recipient of recommendations were to engage with recommendations directed to them in good faith and offer a full and open response, explicitly or implicitly accepting criticism, a pursuer's agents might seek to found on the response as the basis for civil action. That could have the effect of inhibiting recipients of recommendations from responding fully and openly—or at all. They may feel, having taken legal or communications advice, that a note on the SCTS website stating that they have not responded is preferable to, and a lesser risk than, a response that could invite civil proceedings, or at least hamper prospects of a defence.

Responses to sheriffs' recommendations should therefore be inadmissible in other judicial proceedings. We strongly believe that that will help to foster a culture of respondents making a virtue of having constructively addressed sheriffs' recommendations.

I move amendment 18.

Amendment 18 agreed to.

Section 27, as amended, agreed to.

After section 27

The Convener: Amendment 61, in the name of Patricia Ferguson, is in a group on its own.

Patricia Ferguson: Amendment 61 requires ministers to prepare annually a report of recommendations that are made by sheriffs in relation to FAIs. The report would contain information regarding the number of recommendations made, the number requiring a response and the number of responses received. The amendment also requires such a report to be laid before Parliament.

As members know, my bill went further than is now proposed, but I am conscious that my preferred way of working might have resulted in such recommendations becoming the subject of appeals that were designed to delay the introduction of a recommendation, which was not my intention. It is to be hoped that the alternative will reinforce the importance of such recommendations by making them the subject of such a report and that that importance is emphasised by ensuring that they are laid before Parliament and published. I am again grateful to the minister and his team for their co-operation in making that element of the proposed new section possible.

I move amendment 61.

The Convener: No one else wishes to comment, except for me, and I just want to say, "Well done again, Ms Ferguson." There is hope for us all on the back benches.

Paul Wheelhouse: I am aware of the concerns that have been expressed by the committee and

others about ensuring that recommendations that are made by sheriffs at the conclusion of FAIs are respected. I thank Patricia Ferguson for working so hard on that.

The view of the Crown Office and Procurator Fiscal Service and the Health and Safety Executive is that, where sheriffs make recommendations as to how deaths in circumstances similar to those of the death that is the subject of an inquiry can be prevented, they are passed on to the relevant parties and regulatory and other authorities and they are taken very seriously. The COPFS and the HSE have commented that remedial action has often been taken by the time that an FAI is held. That should not, however, be taken as a reason for complacency.

The bill now formally obliges the SCTS to give a copy of a determination to each person to whom a recommendation is addressed and to any other person whom the sheriff considers has an interest in a recommendation. That will obviously include any regulatory or Government body at Scottish or UK level.

In its stage 1 report, the committee stated that it welcomed the proposal in the bill to require sheriffs' determinations to be published and to require parties that were involved in the inquiry and to which a recommendation is addressed to respond to the recommendations. The report also said that the committee considered that the proposals struck the correct balance on improving compliance with the recommendations. The committee noted the view of witnesses that there could be difficulties in placing a duty on a particular body to monitor the implementation of sheriffs' recommendations, and it considered the proposals in the bill to be sufficient.

I believe that the proposals in the bill for requiring responses to sheriffs' recommendations will foster compliance. That is based on the evidence that I have outlined from England and Wales, where there has been a high degree of compliance. Publication of the response or notice that no response has been received will make the system more transparent. That mirrors the procedure that is used under the system of coroners' inquests in the south. However, as I have said, we should not be complacent in this regard.

Amendment 61 in the name of Patricia Ferguson places a duty on the Scottish ministers to publish and lay before the Parliament an annual report of responses to recommendations that are made in sheriffs' determinations. The report will indicate the number of such responses received alongside the number of inquiries and the number of recommendations requiring a response that were made during a reporting year. It will also indicate the number of failures to respond.

The Ministry of Justice reports that there has been a 100 per cent response rate for the similar rules that are in effect for coroners' inquests in England and Wales, and there is no reason to believe that a similar rate of response would not be achieved under FAI legislation in Scotland. Persons to whom recommendations are addressed are usually only too anxious to demonstrate their compliance, and recommendations are made in only a third of FAI determinations—an average of 20 per year—so reporting the number of responses and non-responses should not be onerous or expensive, and having a record of non-responses in an annual report will allow trends to be identified over time by interested bodies.

I agree with the principle of Patricia Ferguson's proposal and I again thank her for her work on that area of the bill. I hope that the committee will support the amendment.

Amendment 61 agreed to.

Sections 28 and 29 agreed to.

Section 30—Initiating further proceedings

Amendments 19 and 20 moved—[Paul Wheelhouse]—and agreed to.

The Convener: Amendment 21, in the name of the minister, is grouped with amendments 24 to 30.

Paul Wheelhouse: This group of amendments is intended to clarify the procedure for reopened and fresh fatal accident inquiries when there is a need for further proceedings following new evidence in relation to the circumstances of a death.

Lord Cullen recommended in his review that it should be possible for further inquiry proceedings to be instigated if new evidence came to light that would, in the opinion of the Lord Advocate, mean that a finding or recommendation from the original inquiry would have been materially different. However, Lord Cullen expressed the view that it would be rare for new evidence to render so much of the original determination unsafe that a completely fresh inquiry would be necessary.

The Scottish Government agrees that it will be rare for a new inquiry to be necessary and that, if new evidence is brought forward, which may be rare in itself, the norm will be that the original inquiry will be reopened and continued. I would like to clarify that the proposed provisions are not meant to assist parties who are dissatisfied with the handling or outcome of the original FAI. The appropriate remedy in such a case would be a

judicial review, were there any legal flaw in decision making.

Amendment 21 requires the Lord Advocate's opinion on whether the form of further proceedings should be a reopened or fresh inquiry to be included on the notice to the sheriff under section 30(1) that further inquiry proceedings are to be held. It is entirely appropriate that the view of the Lord Advocate should be known to the sheriff who is to take the final decision on whether an inquiry is to be reopened or a fresh inquiry held. It is also appropriate that the Lord Advocate should express such a view, since he or she has taken the original decision that the new evidence merits further judicial consideration.

Amendment 24 requires the sheriff to hold a hearing when a notice is given under section 30(1) that further inquiry proceedings are to be held. That hearing will allow the sheriff to hear representations of the procurator fiscal and the participants in the inquiry in order to permit the sheriff to reach an informed decision about the form that the inquiry is to take. The purpose of the amendment is to meet the rationale behind Lord Cullen's recommendation to allow further proceedings.

In his review, Lord Cullen said:

"It should be for the sheriff to whom the application is presented, after hearing the procurator fiscal and the interested parties, to decide which form of proceedings is appropriate in the particular case."

However, Lord Cullen went on to say that in general he favoured having reopened inquiries, since a rehearing of the whole evidence may be unnecessary, although he conceded that there may be cases where a fresh inquiry is necessary.

Amendment 26 will oblige the sheriff to consider whether there is a public interest in a fresh inquiry being held rather than reopening the original inquiry. That will be assessed on the basis of the circumstances of the particular case. There are clearly potentially substantial resource and cost issues to holding an entirely fresh inquiry and it is right that the sheriff should have regard to the public interest in deciding whether the original inquiry should be continued or a new inquiry held.

Amendment 25 is a drafting amendment that provides consistency in the provisions of the bill, and amendments 27 to 30 are consequential on amendment 24.

I move amendment 21.

Amendment 21 agreed to.

Amendments 22 to 26 moved—[Paul Wheelhouse]—and agreed to.

Section 30, as amended, agreed to.

Section 31—Re-opened inquiries

Amendments 27 and 28 moved—[Paul Wheelhouse]—and agreed to.

Section 31, as amended, agreed to.

Section 32—Fresh inquiries

Amendment 29 moved—[Paul Wheelhouse]—and agreed to.

Section 32, as amended, agreed to.

Section 33—Further inquiry proceedings: compliance with recommendations

Amendments 30 to 32 moved—[Paul Wheelhouse]—and agreed to.

Section 33, as amended, agreed to.

Section 34 agreed to.

Schedule 1 agreed to.

Sections 35 to 37 agreed to.

Schedule 2—Modification of enactments

The Convener: Amendment 33, in the name of the minister, is grouped with amendments 34 to 51.

Paul Wheelhouse: For reasons that I will explain in a moment, I do not wish to move amendment 33.

The Convener: I think that you have to move it and then we decide whether or not we are happy for you to withdraw it.

Paul Wheelhouse: Right. I will proceed as planned.

The Convener: I think that that is correct. Am I correct? [*Interruption*.] I can do it either way. I think that I will just make the minister a bit uncomfortable and get him to move his amendment first.

Paul Wheelhouse: The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 is nearly 40 years old and has served Scotland well. It follows that there are a number of cross-references to the 1976 act spread across the Scottish statute book, for example in the Scottish Public Services Ombudsman Act 2002. The amendments in this group are technical and are purely consequential amendments to existing legislation, to replace references to the 1976 act with references to the bill. Schedule 2 to the bill will be expanded from three paragraphs of consequential modifications to more than 10 such paragraphs.

Amendments 37, 40, 41, 47 and 48 repeal redundant provisions that had amended the 1976 act.

Where related amendments require to be made to UK-extent statutes in the law of England, Wales and Northern Ireland, they will be taken forward in an order under section 104 of the Scotland Act 1998.

If it is okay with the convener, I do not move amendment 33—

The Convener: We are inventing a new procedure here. [*Laughter*.]

Paul Wheelhouse: Amendment 33 would repeal section 38 of the Administration of Justice (Scotland) Act 1933. After further researches by the bill team, it transpired that the redundant section has already been repealed and there is therefore no need for amendment 33.

I move amendment 34.

The Convener: We are not at that yet. I will go through this again. You are not moving amendment 33, which we are all quite happy about. [*Interruption*.] What? Bear with me a second.

Amendment 33 moved—[Paul Wheelhouse].

The Convener: Because I made you move it, you have to seek to withdraw it.

Paul Wheelhouse: I seek to withdraw amendment 33.

The Convener: We are all feeling charming today, so we say yes.

Amendment 33, by agreement, withdrawn.

Amendments 34 to 51 moved—[Paul Wheelhouse]—and agreed to.

The Convener: We are coming to the end. You will be glad to know that the finishing post is in sight.

Schedule 2, as amended, agreed to.

Sections 38 to 41 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and his officials. An amended reprint of the bill will be published overnight. I know that committee members will be glad about that, as they will be able to get busy with lodging any stage 3 amendments with the legislation team.

I am going to give us a seven-minute break, because the minister is coming back again for the next item.

11:29

Meeting suspended.

11:36

On resuming—

Community Justice (Scotland) Bill: Stage 1

The Convener: Item 3 is an evidence session on the Community Justice (Scotland) Bill. Last week we requested a written response from the Minister for Community Safety and Legal Affairs, Paul Wheelhouse, on how two related policy developments might interact with measures in the bill. One of those developments is the Scottish Government's current consultation on whether the presumption against short periods of imprisonment should be extended or whether a more radical review of the use of short-term imprisonment is required. The other is the final decision to be taken on the future configuration of women's prisons, which arises from the commission on women offenders 2012 report.

I thank the minister for providing a response at short notice. I note that he is here to answer questions on the response. I welcome the Scottish Government officials. Andy Bruce is the deputy director of the community justice division; Arlene Stuart is head of the community justice operational unit; and Carolyn O'Malley is from the directorate for legal services.

Do members have any questions? They may have been battered into submission in the last session. Alison, stir your stumps; let us have you going.

Alison McInnes: As the convener said, we are particularly interested in the interplay between the Community Justice (Scotland) Bill provisions and two major pieces of possible reform—one related to the women's prison estate and the other on the possibility of extending a presumption against short-term sentences, which I welcome.

I think that the committee is seeking some assurance that the bill is not running ahead of itself, given that those other reforms are happening. Is the bill fit for the purpose of bringing about the kind of radical change that is proposed in those other measures?

Paul Wheelhouse: I believe that it is. If it would be helpful, convener, I will set out some reasons why I believe that that is the case. I hope that that will reassure Alison McInnes and others.

The Convener: Yes, so long as it does not reiterate your entire response, as we have that.

Paul Wheelhouse: No. We have set out before, so I will not go over again, the vision for fairer justice in Scotland. That vision reflects the values

of a modern, progressive nation; I think that all of us around the table want to achieve that vision.

The bill places a stronger emphasis on robust community sentences, which is focused on actively addressing the underlying causes of offending behaviour. The bill provides the legislative basis for the new community justice model for Scotland. It establishes a new body, community justice Scotland; it places specific duties on statutory partners; and it introduces a national strategy and performance framework for community justice in Scotland. The new national framework for outcomes performance improvement will, we believe, enable the consistent evaluation of progress in delivering community justice outcomes.

Specifically, the new model has been designed to be sufficiently flexible to respond to new policy developments and opportunities at both local and national levels. I am confident that, for example, should the use of community sentences increase in the future, perhaps as a result of the consultation on the presumption against short sentences or other measures, our new model could support that.

As I have said, we have a consistently high imprisonment rate. The Government is determined to change that by reducing the use of custody. We have a clear desire to reduce the use of short-term prison sentences in particular, as they are largely ineffective and do not achieve a reduction in reoffending. We are of the view that the presumption against shorter sentences of three months or less has had limited impact so far, and that is why the consultation has been taken forward on proposals to extend the presumption.

The central message is that we believe that the model that has been developed is sufficiently flexible that it can be adjusted to take account of any policy direction that we take. If there are resource implications, we will reflect on them. The key issue, however, is that the structure is sufficiently robust to cope.

Do you want me to talk about the women's prison estate at this point, convener, in response to Alison McInnes?

The Convener: When the figures in your response are added together—29 per cent for zero to three months and 37 per cent for three to six months—we get 66 per cent for sentences of six months or less, which is a lot. If you go down that route, which many of us would welcome, our question is whether the money will follow the people. If you save money in the prison service, will the money move into community justice?

On page 3 of your letter, you say:

> "That shift is already being seen with resources transferred from the Scottish Prison Service (SPS) to invest in community-based services."

How much is that? That is really the question—will the money follow the change?

Paul Wheelhouse: I will bring in Andy Bruce on that point, but we would look closely at the resource implications of any decision that we take on extending the presumption against short sentences. The key point is that the bill will deliver the structures that will apply in both scenarios. Whether or not we extend the presumption against short sentences, the structures can be the same.

The Convener: I understand, but—

Paul Wheelhouse: I appreciate that there are resource implications, and perhaps—

The Convener: But you have precedent here, and that is what we want to know about: have resources already moved as a result of the earlier shift?

Paul Wheelhouse: I appreciate the point and, if I may, convener, I will bring in Andy Bruce on that.

Andy Bruce (Scottish Government): The paragraph that the convener referred to relates to the money that is transferred from the Scottish Prison Service to the community for the women's base services. That was the £1.5 million that the Scottish Government originally invested and which we have now made sustainable as a result of a permanent transfer from the SPS to the community. That is a statement of intent. As the minister said, implicit in these developments is the view that we want to see a shift from custody to community.

We are about to enter a spending review period and that makes it difficult to be explicit at this stage. We recognise the principles that the committee has referred to around a shift in resource to support the wider vision.

Alison McInnes: The wider provision of consistent and effective community justice services that we need will require significant development. Can you elaborate a bit more on how community justice Scotland will ensure that there is proper provision?

Paul Wheelhouse: The diagram that was attached as an annex to my letter to the committee set out the range of bodies that are involved with the delivery of community justice. It also highlighted the relationship between community justice Scotland and the justice board and, indeed, between the justice board and ministers.

We want to give non-custodial solutions parity of esteem with custodial solutions. Having community justice Scotland represented on the justice board, where such matters as the balance

of resourcing and the implications of policy as it develops for other functions of the justice system are routinely discussed, is a good way to ensure that any resource implications are addressed. It also ensures that ministers are thoroughly informed of the steps that need to be taken to ensure that adequate resources are provided to deliver the policy intention.

I hope that the general diagram clarifies the structures and the relationships between the different bodies that will be involved in the delivery of community justice under the model that is envisaged. It states quite transparently that community justice Scotland will have a role in the justice board, where such matters are already discussed. Discussions are being taken forward about the women's custodial estate in that context already.

The justice board provides a balanced way of looking at the issues and implications for community sentencing options and their resourcing. It is the appropriate forum and allows good engagement on the issues that arise.

Alison McInnes: That clarification was helpful.

One of the drivers for change was that Audit Scotland said that the landscape was very cluttered. There is a real risk of it being further cluttered. We have had some supplementary written evidence from the conveners of community justice authorities. They say:

"However we remain very concerned that issues around authority, responsibility, accountability and leadership remain unresolved."

They raise concerns about the minister talking about

"'the potential' for improvement ... 'an opportunity' for change ... 'in the hope' that better outcomes will follow".

Do you not think that we need to be more direct than that and that we need to have more clear assurances?

11:45

Paul Wheelhouse: I can accept those points. I know that Alison McInnes has a genuine interest in trying to ensure that the quality of services that are delivered is enhanced, if possible, rather than just maintained, so I take her comments in the spirit in which they are meant.

In annex B to the letter, diagram 2 tries to set out clearly how an improvement process would be put in place. I am not a huge fan of management diagrams, but in this case it helps. The triangle on the right of the diagram makes clear the process whereby targeted support and improvement activities would be provided by community justice Scotland to the local agencies that are involved in delivering community justice in each of the 32 areas. Recommendations might arise for ministers and for local government leaders, but as we go up through the pyramid there is the potential for multi-agency inspection, which is not a small measure, and that would look in greater detail at any perceived failings in the local delivery of community justice, which ultimately could lead to a rescue task group being deployed to ensure—

The Convener: Is that what "potential escalation action" means?

Paul Wheelhouse: Indeed. There would be some teeth to community justice Scotland; I suppose that that is the way to put it. I genuinely believe that there are opportunities and we hope that there will be improvements, but the proposed model also has the opportunity for multi-agency inspection and for a rescue task group to be deployed to ensure that services at local level are brought up to the appropriate standard.

Alison McInnes raises an important point, and I hope that that clarifies that it is not a woolly process but one that has teeth. We all want to work in partnership with local partners where we can, and that is why it is important not to jump in with the tackety boots at the start, but rather to work with local partners to deliver targeted support and improvement to help them to deliver good services at a local level if they can do so. However, if they are ultimately not able to do so, we can intervene in an appropriate way.

The Convener: That is helpful. Can you remind me where the business of the rescue task force and beefing up fits in? I understand about having tackety boots ready at the side if you need them, but that is not part of the primary legislation, so where does it come in?

Paul Wheelhouse: Through a process of secondary legislation we could propose to deploy those measures, and Parliament will obviously have the opportunity to consider the detail of that in due course. I guess we were trying to address members' concerns that we were dealing with enabling powers at this stage but were not providing sufficient detail about our intent. I hope that that clarifies where we intend to go.

The Convener: That is correct.

Roderick Campbell: To what extent will the national strategy and performance framework be a living document that will reflect changes in penal policy? Will it be a bit less flexible than that?

Paul Wheelhouse: The strategy will clearly be a hugely important document that will, in line with other measures, provide parity of esteem for non-custodial sentences and community-based solutions. A strategy with some buy-in and power from stakeholders needs to be developed.

At previous meetings we discussed the national strategy and performance framework and the draft outcomes that are being considered to see how they could be deployed and piloted at local level. That work is under development at the moment to inform the performance framework that will be published. Those documents will be published as soon as practicable after the bill has been passed, so I cannot subvert that process now by coming up with suggestions on exactly what will be in the strategy. However, the strategy will be an important document that will provide clarity on what the Government and stakeholders are trying to do together to deliver robust and effective community sentences to reduce reoffending. That might not be quite the answer that Mr Campbell was looking for.

Roderick Campbell: Will it be flexible to cope with changes that may come in relation to short sentences?

Paul Wheelhouse: I hope that it will not be a static document that will sit on a shelf forever and not reflect changes in policy as we go forward. It can be reviewed, brought up to date and kept up with best practice as we develop our knowledge of that. It may help Mr Campbell if I bring in Arlene Stuart at this point; she has been looking at that.

Arlene Stuart (Scottish Government): We have formed a steering group for the national strategy that has representatives from different partners and stakeholders who have an interest in the matter—Social Work Scotland, the third sector, the Scottish Prison Service, Police Scotland and others. That group is steering the development of the national strategy at present.

The bill allows for the national strategy to be developed and it has to be published within a year of the bill being enacted. However, the bill also allows for the strategy to be refreshed to allow for exactly that kind of thing—changes in policy, context and so on. Community justice Scotland will have a role in monitoring the efficacy of the strategy and asking whether it is still fit for purpose. It will be able to make recommendations to ministers as and when it is required to do so.

On the development of the strategy, we have come up with a broad range of themes. Lots of different working groups are looking at it, as you can imagine with the development of any national strategy. Some of those groups focus around communities, because the model is community based; it is about empowering communities. It is also about ensuring effective interventions; that goes back to the discussion that we have already had.

We have had the first of four regional events to engage with people on the ground about what they will need to see in the national strategy in order to make a difference. The first event was held in Aberdeen last week; the next is coming up this week in Glasgow and then we go on to Dumfries. The final event will be held in Edinburgh. It is really important that the people who will have to make reference to the national strategy when they produce their plans have the most input to its development.

There will be an implementation plan that will come forward with the strategy and that will be worked through as well.

Roderick Campbell: Thank you.

Margaret Mitchell: I thank the minister for the diagram that was included with his response to the committee. It is helpful even if it does raise more questions. When the bill was first mooted at an informal briefing, it was stated that community justice Scotland and the local authority community justice partnerships would be a partnership. However, from the diagram of the new model for community justice it appears that community justice Scotland would take the lead. We wanted someone to take the lead but also to ensure compliance.

We are talking about a national strategy the detail of which we do not know at present. In many ways what we are being asked to do is just to look and see how it works, which is perhaps not ideal. Can you comment on the concerns that there does not seem to be any emphasis on preventative measures, early intervention and, particularly, on third sector involvement? Rather than just being consulted, the third sector should perhaps be more of a partner in delivering some of the services and objectives.

Paul Wheelhouse: I will reiterate points that I have made before to put them on the record, in case I have not done that formally in Parliament. We recognise the very important role of the third sector, not just through its engagement in consultation but as a key partner in delivering community justice. I have put on record before the fact that about a third of activity is delivered through the third sector, so it has a hugely important role to play. I take Margaret Mitchell's point that different views can be taken on the balance between the centre and local partners, depending on which version of the evidence we look at.

As I touched on in my response to Alison McInnes, we see the necessity of having the ability to step in and sort out problems if they present and cannot be resolved by local partners. However, we would want to work with local partners to support them in the fullness of time to deliver change, if that is required, to deliver against outcomes. If performance is not to an acceptable standard, we must take steps to

ensure that that is addressed, starting to do that, initially, in partnership with local partners—we would provide the support and resources that they need to bring it up to the appropriate standard. If that is not possible, there might be more of an interventionist role for community justice Scotland, and that role would be informed by dialogue with the local partners.

I emphasise that we are trying to empower local partners as much as we can, within the framework that we have set out, so that there is flexibility. We have not been directive as to who should be the lead body, partly because we believe that all parties at local level should have responsibility for delivering the outcomes. The bill allows flexibility for local partners to determine themselves how they work together and across local authority boundaries. There is also flexibility in respect of commissioning, depending on which approach needs to be taken.

We have a mixture of structures that provide some solidity, but also flexibility in the system. It is important to maintain a degree of local accountability, as well as flexibility to suit different circumstances.

I appreciate that the diagrams are not perfect; it is never easy to come up with a diagram that summarises the position neatly. I would not want to suggest that the relationship is in any way directed from above, but we do need to have the ability to step in and support where necessary and, if there are failings against delivery outcomes, to put in place either a multi-agency inspection, or a rescue task group, if that is necessary.

We are striking the right balance between local and national influence and providing some degree of certainty—to speak to the point that Alison McInnes made. We are providing some teeth if that is what is needed, but only deploying that when it is absolutely necessary, rather than at the very beginning.

Margaret Mitchell: If penal reform goes ahead and the presumption of not just three months, but six months, comes into force, clearly the community justice partners will have a substantial increase in their workload. Are you confident that they will still have the flexibility and resources to prioritise locally and to look at the prevention and early intervention that we all agreed was germane to the whole proposal?

The Convener: We have not finalised our stage 1 report on that, but there is a sentiment that the focus should be on early intervention.

Paul Wheelhouse: On the preventative agenda, Mr Finnie raised the definition of community justice when I first gave stage 1 evidence on the bill and we will say more about that in due course.

The Government has in place a range of preventative strategies, which complement what we are doing in community justice. As I said at the previous committee meeting, there are frameworks in place for early years: the draft national improvement framework for Scottish education, getting it right for every child, and the Children and Young People (Scotland) Act 2014 all deal with prevention at the earliest stage, to try to prevent people from committing crimes in the first place, and giving them the support that they need to have an equal chance in life.

We also have a grouping of strategies that we might say come under secondary prevention, with which community sentences and the Community Justice (Scotland) Bill fit. There is a whole range of other strategies that I will not go through just now. The point is that the bill deals with reducing reoffending. There are already strategies that support targeting to reduce offending in the first place, in particular support for young people to get the best start in life and to reduce their chances of committing an offence.

As we go forward, we are considering the definition of community justice and trying to reflect the committee's and wider stakeholders' sentiments on prevention.

The bill is not to be seen in isolation; the Community Justice (Scotland) Bill sits alongside a number of very well prepared and highly regarded strategies, which deliver preventative measures at an earlier stage in someone's life. The bill aims to reduce the risk that someone will reoffend, once they have already offended.

We take on board the point about prevention and we will try to do what we can to reflect that in due course.

The Convener: Early intervention is very broad—it could start in the pram. We were thinking more of diversions from prosecution and ensuring that people do not go into the system in the first place. We would narrow it down to that.

Paul Wheelhouse: I accept that diversion from prosecution can be very helpful. Indeed, we are taking that forward in the context of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, to try to reduce the need to criminalise someone in the first place.

12:00

John Finnie: Thank you, minister, for your response to our letter. There will be tensions regarding national and local strategy agencies and

the third sector, but if they are dealt with positively they should not create a difficulty for us.

In your response, you talk about proposals on

"strengthening the presumption against ineffective short-term sentences and for female offenders"

and you allude to the transfer of resources to the Scottish Prison Service

"to invest in community-based services and work by the SPS to transform its role"

with reference to throughcare and the integration of people back into the community. Surely that is an example of how we can learn, on an on-going basis, about the transfer of resources from the institution to the community.

Can you explain about your work and SPS's work to transform its role? Maybe its role does not extend to the community. I am supportive of it, but should not the SPS be a facilitator, rather than a deliverer? What would the relationship be with the third sector, which might see the community as its traditional ground? Where among all that would community justice Scotland sit?

Paul Wheelhouse: I accept Mr Finnie's point that we should not be prescriptive of the SPS. On a number of fronts we are seeing—I have seen evidence of this myself—that the SPS is trying to get more engaged in ensuring appropriate employment for people who have convictions when they leave the prison system, to try to reduce reoffending. It is being much more proactive in education and it is working with partners outside the prison service to ensure that there is appropriate housing for people when they come out. Those are all important measures.

I would maybe flip the question around. We would not want to be in a situation in which we cut the SPS loose from the very important work that increasingly it is getting involved in.

John Finnie: No.

Paul Wheelhouse: That work is very positive and helps to provide as much certainty as possible to those who unfortunately have to spend time in the Scottish prison estate, so that they have a viable future ahead of them and are supported to resume a normal way of life, which will reduce their risk of reoffending.

If there are opportunities that do not involve the SPS, they are okay, too. The third sector might be a more appropriate partner to work with in such situations. We should not be prescriptive and I take Mr Finnie's point. We are trying to reflect the fact that the SPS is trying to become much more proactive in supporting those who come through the prison system to re-engage in society and in ensuring that they have the support that they need to reduce their risk of reoffending.

Andy Bruce might want to give Mr Finnie some examples.

Andy Bruce: I will expand on the throughcare support officer role. We absolutely see the transition from custody to community as really important. People who make that transition really benefit from having someone alongside them to provide advocacy and support as they make their return to the community. The TSO's role sits alongside the role of the mentors, who we supported through the public support partnerships, which are primarily third sector.

We want to ensure that we provide the best support for people. If someone has developed a really good relationship with their prison officer, there is no reason for the end of the prison sentence to be the end of that relationship, if that suits them. However, continuing that relationship might be the last thing that they want, because of their experience. In that situation it is probably appropriate that someone looks to a mentor from the third sector. A mixed economy should be available.

The approach that we are trying to support is one that looks at the particular needs of the person who is leaving prison and what the best support package to put alongside them would be. It should be third sector support if that is best for them, but if it makes sense for there to be continued support from a prison officer, the system should be able to support that.

John Finnie: How does that actually work on the balance sheet? Someone must hold the resource. I am greatly reassured by your saying that there will be individual, tailored support, but where does the funding come from? Jimmy, or Mary, might want support from their prison officer, or not; but I presume that the resource would be there so that the prison officer could give that. Would community justice Scotland deal with that? Would it express a view?

Paul Wheelhouse: We are looking at how we can formally reflect the role of the third sector in the bill—I reiterate that point. There is an important delivery relationship between all the statutory partners and the third sector. As regards the funding, we will have a transitional period in which there will be on-going examination of the resourcing that is required. We are working on some assumptions at the moment and we have undertaken to reflect on any pressures that arise during that process.

I accept that in the longer term we need to think about how we work with the third sector. The commissioning arrangements that we have outlined try to give more clarity and stability to the third sector partners. I appreciate that that is a separate issue from the one that Mr Finnie raised,

but within that we can look at how funding mechanisms work. If there is a person-centred approach, we will have to reflect that in how we resource that activity.

We can come back to the committee with further information and thinking about that if that would be helpful.

John Finnie: It would be. I am not batting for any particular side—whatever is appropriate. It will not be as simple as reduced admissions to prison meaning other reductions; there will still need to be a certain cohort of prison staff regardless of the number of prisoners.

Paul Wheelhouse: Yes, indeed, for health and safety reasons and a raft of other operational reasons.

The Convener: Can you just remind us of the cost per annum of somebody being in prison?

Paul Wheelhouse: It is significant but it varies. I have a figure in my head that is probably incorrect; I should refer to Andy Bruce for that.

The Convener: It is just out of interest. I appreciate what you say about the staffing levels.

Paul Wheelhouse: Convener, if the point that you are raising is that by not having someone in custody you release resource, that is absolutely correct.

The Convener: Do we have an idea of the amount—a ballpark figure for it?

Andy Bruce: The figure is somewhere around £32,000 to £34,000—something like that.

The Convener: It cannae still be that. That is what it was 10 years ago when I was getting it quoted, surely.

Andy Bruce: I do not have an up-to-date figure for you.

The Convener: From the public's point of view, it is helpful to have that, but I know that that was being quoted a way back, and I do not think that it will be static.

Paul Wheelhouse: I had a slightly higher figure in my head but I am glad that I did not use it.

The Convener: What was the slightly higher figure in your head, minister?

Paul Wheelhouse: I thought that it might be nearer £40,000 but that might be incorrect.

The Convener: I tend to agree with that, Mr Bruce.

Paul Wheelhouse: I will try to come back to the committee with a more accurate figure.

The Convener: Either that or you have been very economical in the Scottish Prison Service, given that everything else in life is costing more, including salaries.

Paul Wheelhouse: On one of the variables, we should acknowledge, as Mr Finnie did, that there is a fixed number of prison staff—a fixed prison estate. As the number of offenders in custody drops—we have had great success in delivering our youth justice approach, so that we have fewer offenders in Polmont, for example—the cost per prisoner actually increases. To be fair to Mr Bruce, it is a bit of a moveable feast, but we will try to find a more accurate figure for the committee.

The Convener: There are savings to be made, obviously.

Paul Wheelhouse: That is acknowledged.

Christian Allard: On the point about a mixed economy that Andy Bruce talked about, we have talked a lot about the third sector but I did not see anything in your reply about the private sector and how much it is doing to help. Can you give us some idea about that and make it clearer? There is a mixed economy involving not only the SPS and the third sector but another part as well.

Paul Wheelhouse: I apologise if that is a failing in the response, given that that is a very important issue that Mr Allard has raised before.

The Convener: We did not ask about it in our letter, Monsieur Allard.

Christian Allard: It was just in the conversation.

Paul Wheelhouse: I am happy to address it if I can, briefly, to give some reassurance to Mr Allard.

We are doing some work looking at how we change the environment for private sector employment of people who have convictions. The committee will be aware of the proposed changes to the system of disclosure of spent convictions, which aims to make it easier for individuals whose conviction is not relevant to the job that they are going for not necessarily to declare an old conviction. We have some good, proactive employers both across the UK and in Scotland who are working with local authorities and the SPS to try to provide employment opportunities for individuals who leave the prison estate, ensuring that they have viable employment options.

Reducing reoffending is not just about housing or the other issues that I have discussed; employment is one of the most important ways in which we can prevent people from reoffending. If they have a stable job and a home to live in there is a very good chance that they will not reoffend. I take on board Mr Allard's point, which we can address in the subsequent debate.

Christian Allard: Thank you, minister.

The Convener: The devil finds work for idle hands—we are reminded of that. Not that Margaret McDougall has idle hands, so we will hear her question.

Margaret McDougall (West Scotland) (Lab): You might not be saying that once I have asked my question because I want to ask about victims, although I know that that was not part of the letter that we sent to the minister.

Community justice is essentially about communities and, obviously, justice for all; that includes victims. If there were no offenders, there would be no victims but there is very little mention of victims in the bill. I thank the minister for the flowchart that was attached to his response. It is very useful, but where are the victims represented? They do not seem to be represented at all.

Paul Wheelhouse: I respect the point that Margaret McDougall has made. I know of her strong interest and experience in the area.

Margaret McDougall: It is not personal—I am trying to be objective.

Paul Wheelhouse: No, but I appreciate the point and it is important. It is not one that I have addressed in the parliamentary debate so far, regrettably, but externally these questions have been raised.

At local level, in the 32 areas, we are looking at an opportunity for engagement with representatives of victims and wider communities on the kinds of community sentences that might be most appropriate. Community sentences might help not only by reducing reoffending but by delivering some collateral benefit to the local community in the process—they might be targeted at a particular need and do something that is seen as being helpful to the community. There are opportunities for that in the proposed structures, but rather than being prescriptive about the form that it should take, we see that kind of engagement as happening at a local level. There may then be examples of best practice that can be taken forward, publicised and rolled out through the efforts of community justice Scotland as well.

Work with local groups—such as that done with Scottish Women's Aid and other third sector organisations in relation to those who have survived an abusive relationship—can look at the kind of things that would help at local level, and engagement with community councils and other community groups can identify meaningful community sentences that might provide reassurance to the community. If the sentences are not only providing a robust alternative to custody but delivering something that is perceived to be of benefit to the community, that is good.

We can reflect further on how we represent the interests of victims as we take forward the bill. I take that point in full.

The Convener: That concludes the evidence session. I thank the minister for making himself available today, pretty well single handed. We now move into private session.

12:12

Meeting continued in private until 13:08.

Published in Edinburgh by the Scottish Parliamentary Corporate Body

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

Information on non-endorsed print suppliers
Is available here:

www.scottish.parliament.uk/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk