



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 23 January 2018

Session 5



The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 23 January 2018

CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	1
SUBORDINATE LEGISLATION.....	2
Regulation of Investigatory Powers (Covert Human Intelligence Sources - Code of Practice) (Scotland) Order 2018 [Draft].....	2
Regulation of Investigatory Powers (Equipment Interference – Code of Practice) (Scotland) Order 2018 [Draft].....	2
Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2018 [Draft]	2
Firefighters’ Pension Scheme (Amendment and Transitional Provision) (Scotland) Regulations 2017 (SS1 2017/435)	4
Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 (Relevant Third Party) Order 2017 (SS1 2017/461)	4
DEFAMATION	5
POLICING.....	17
JUSTICE SUB-COMMITTEE ON POLICING (REPORT BACK)	50

JUSTICE COMMITTEE
3rd Meeting 2018, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*John Finnie (Highlands and Islands) (Green)
Mairi Gougeon (Angus North and Mearns) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Susan Deacon CBE (Scottish Police Authority)
Deputy Chief Constable Designate Iain Livingstone QPM (Police Scotland)
Michael Matheson (Cabinet Secretary for Justice)
Graham McGlashan (Scottish Law Commission)
Lord Pentland (Scottish Law Commission)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 23 January 2018

[The Convener opened the meeting at 10:04]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's third meeting in 2018. We have apologies from Mairi Gougeon.

Under agenda item 1, does the committee agree to take in private item 8, which is consideration of our work programme?

Members *indicated agreement.*

Subordinate Legislation

Regulation of Investigatory Powers (Covert Human Intelligence Sources - Code of Practice) (Scotland) Order 2018 [Draft]

Regulation of Investigatory Powers (Equipment Interference – Code of Practice) (Scotland) Order 2018 [Draft]

Regulation of Investigatory Powers (Covert Surveillance and Property Interference – Code of Practice) (Scotland) Order 2018 [Draft]

10:05

The Convener: Agenda item 2 is consideration of three statutory instruments. I welcome the Cabinet Secretary for Justice, Michael Matheson, and his officials from the Scottish Government: Graeme Waugh from the defence, security and cyberresilience division, and Lauri Mitchell from the directorate for legal services. Lauri is particularly welcome as she is my niece. I can update members: she never writes or phones, but she does occasionally text. It is nice to see you, Lauri.

I refer members to paper 1, which is a note by the clerk. Do you wish to make a short opening statement, cabinet secretary?

The Cabinet Secretary for Justice (Michael Matheson): Yes. Thank you, convener, and good morning.

Three affirmative orders that are being made under the Regulation of Investigatory Powers (Scotland) Act 2000 are before the committee today.

The purpose of the first two orders is to bring into force the revised codes for covert surveillance and property interference and covert human intelligence sources and to revoke the existing codes.

The third order seeks to bring into force the first code of practice for equipment interference. Equipment interference is the power to obtain a variety of electronic data from equipment, including computers and computer-like devices such as tablets. That activity could previously take place under the property interference provisions of the Police Act 1997. The United Kingdom Government decided to clarify provisions on equipment interference. The Investigatory Powers Act 2016 sets out a statutory framework for equipment interference for the purpose of obtaining data and prevents such authorisations

from being made under the 1997 act. Those provisions required and were given the consent of the Scottish Parliament.

With regard to the revised codes, the main changes reflect the new oversight regime for all investigatory powers, which comes in the form of the Investigatory Powers Commissioner. The IPC is, in effect, an amalgamation of three former commissioners: the chief surveillance commissioner, the interception of communications commissioner and the intelligence services commissioner. Again, consent for those provisions was granted by the Scottish Parliament.

We received a small number of responses to our 12-week consultation. Where we have been able to do so, we have taken comments on board and made revisions to the codes. Those include the addition of a new paragraph in each code to remind public authorities of their data protection duties, and ensuring that the safeguard chapters in each code are consistent, while acknowledging that there are differences between regimes. What we are unable to do, which was requested in some of the responses, is to make provision in the codes that is inconsistent with the provisions that are set out in the parent acts.

The Convener: Thank you. As members have no comments or questions for the cabinet secretary, we move on to agenda item 3, which is formal consideration of the motions on the affirmative instruments. The Delegated Powers and Law Reform Committee has considered and reported on the draft orders and made no comments. The motions will be moved, and there will then be an opportunity for a formal debate if that is necessary.

Motions moved,

That the Justice Committee recommends that the Regulation of Investigatory Powers (Covert Human Intelligence Sources - Code of Practice) (Scotland) Order 2018 [draft] be approved;

That the Justice Committee recommends that the Regulation of Investigatory Powers (Equipment Interference - Code of Practice) (Scotland) Order 2018 [draft] be approved;

That the Justice Committee recommends that the Regulation of Investigatory Powers (Covert Surveillance and Property Interference - Code of Practice) (Scotland) Order 2018 [draft] be approved.—[Michael Matheson]

Motions agreed to.

The Convener: That concludes consideration of the affirmative instruments. The committee's report will note and confirm the outcome of the debate. Is the committee content to delegate authority to me as convener to clear the final report?

Members indicated agreement.

The Convener: It only remains for me to thank the cabinet secretary and his officials for attending. I now suspend the meeting to allow them to leave.

10:11

Meeting suspended.

10:12

On resuming—

Firefighters' Pension Scheme (Amendment and Transitional Provision) (Scotland) Regulations 2017 (SSI 2017/435)

Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011 (Relevant Third Party) Order 2017 (SSI 2017/461)

The Convener: Agenda item 4 is consideration of two negative instruments, which are Scottish statutory instruments 2017/435 and 2017/461.

I refer members to paper 2, which is a note by the clerk. As members have no comments or questions, does the committee agree that it does not wish to make any recommendations in relation to the instruments?

Members indicated agreement.

The Convener: Some volume would be good to make sure that there is somebody out there.

Defamation

10:13

The Convener: Agenda item 5 is a briefing on defamation. I refer members to paper 3, which is a note by the clerk, and paper 4, which is a private paper. Before I welcome our witnesses, we will have a declaration of interests that will cover this evidence session and the subsequent one on policing.

Daniel Johnson (Edinburgh Southern) (Lab): My wife is a practising solicitor.

Liam Kerr (North East Scotland) (Con): I am a member of the Law Society of England and Wales and the Law Society of Scotland and I am a practising solicitor.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I am registered on the roll of Scottish solicitors.

John Finnie (Highlands and Islands) (Green): In relation to the next item, I declare that I am in receipt of a police pension and I am a member of the Retired Police Officers Association.

The Convener: Thank you. It is my pleasure to welcome Lord Pentland, chairman of the Scottish Law Commission, and Graham McGlashan, project manager and solicitor with the Scottish Law Commission.

I thank the witnesses for their written evidence, which is always very helpful for the committee to receive. Lord Pentland, do you wish to make a short opening statement?

10:15

Lord Pentland (Scottish Law Commission): It might be helpful if I said just a few words. First, it is a pleasure to be back here and I thank you for the opportunity to come along today and brief the Justice Committee on our recently published report on defamation. Graham McGlashan is the project manager and a solicitor seconded from the Scottish Government legal department. He and I have been the team on this project.

I will keep my opening remarks as brief as I can so that we have the maximum possible time for questions and discussion. I am very happy to try to answer any questions that members might have about the law of defamation, what our proposals entail and the overarching themes that have informed our work. As the committee will know, we have set out the background to the project, the case for law reform and a summary of our main proposals in the written submission that the convener mentioned.

I reiterate that the project was inspired by a number of responses that we had to the public consultation on our ninth programme of law reform. We have just come to the end of that and are about to start the 10th programme. From stakeholders such as the professional legal bodies—the Law Society of Scotland and the Faculty of Advocates—media stakeholders such as BBC Scotland and campaign groups such as the libel reform campaign, there were quite a number of suggestions that we should examine the law of defamation. They were all supportive of a project to examine potential reforms in that area of the law.

One of the main reasons why respondents suggested examining the law of defamation was that major reforms, as members will know, had been made to the law of defamation in England and Wales by the Defamation Act 2013. Those reforms were largely, but not entirely, excluded from Scots law. The message that we got from stakeholders was that the law of defamation was an area of Scots law that was in need of review to establish whether similar reforms or, indeed, different ones might be appropriate here.

As we have explained in the written submission and in the report, much of Scots law in this area is contained in the rather antiquated decisions of the courts and a number of statutory provisions—not very many, as it happens—scattered across the statute book, all from a time that predates the modern era of mass communication and the internet. As the committee will have seen, that has thrown up particular challenges for the law of defamation.

In terms of our approach, most members will be aware of the way in which the Law Commission works in practice. Early on, we established an advisory group consisting of legal practitioners, academics, media representatives and others to assist us in understanding how the current law works in practice and in developing and shaping our ideas for possible reform of the law. It is a very important aspect of the Law Commission's work that we try to understand and take account of the law in other parts of the world. That is something that we looked at in this project as well. Although our closest comparator was the reforms that were made to the law of England and Wales in 2013, there is also a recent body of work comprising a consultation paper and subsequent report on reform of the law in Northern Ireland.

We published a discussion paper for public consultation in March 2016. More recently, with the assistance of parliamentary counsel, with whom we work closely, we prepared a working draft of a bill, which is appended to our report. We had a second round of public consultation on the bill provisions, which attracted a very high level of

interest and response—we had 111 responses, including a significant number from members of the public.

The theme that runs through our ideas—I suggest that this will be the litmus test for the committee when it is assessing what it makes of our proposals and how it wants to go with them in due course, assuming that there is a bill—is striking the right balance between two values that sometimes pull in opposite directions. The first is freedom of expression; the second is protection of reputation. We have made 49 recommendations, and I suggest that the report and draft bill constitute the most substantial proposed reform of defamation law in Scottish legal history. They include proposals to introduce a serious harm threshold, to give greater protection to secondary publishers, to reduce the limitation period for defamation actions from three years to one and to introduce a statutory defence of publication in the public interest.

If they are implemented, the proposals will set out the law in this area in clear and straightforward terms in modern and accessible statute.

The Convener: Thank you for that comprehensive opening statement.

Liam McArthur (Orkney Islands) (LD): I thank Lord Pentland for his introduction. I will focus on the latter points and recommendations. The reduction in the time period from three years to one, the serious harm threshold and the single publication rule all seem to shift the balance from pursuer to defender; was that a deliberate move by you and the advisory group?

Lord Pentland: It is important to look at the package of reforms as a whole. A number of proposals might be seen as pro-claimant or pro-pursuer. For example, the proposals about stronger and more effective powers for the courts and the idea that the courts could be empowered to order the publication of a summary of the court's judgment might be seen as steps to promote the right to obtain effective vindication when one's reputation has been damaged.

As I said earlier, we have tried to strike the right balance between two fundamental rights. The serious harm threshold that you mentioned is a key principle of the package of reforms. We feel that it could have important potential effects, not least in making it more difficult for powerful interests to use defamation law as a tactic or weapon to try to silence unwelcome criticism. Therefore, I am not sure that I would agree that the proposals, including those that you have mentioned, are necessarily pro either side. The whole idea is to try to get the balance correct. No doubt when you as parliamentarians come to assess the ideas, you will want to consider

whether you are satisfied that they get the balance right.

I apologise for a rather long answer. A challenge of describing this body of work is that it is quite technical on one level.

Liam McArthur: That answer is helpful. It strikes me that the intent, in some respects, is to reduce the overall quantum of cases that are brought forward but to have a greater degree of certainty about what will happen when cases are brought forward legitimately. Is that a fair point?

Lord Pentland: That is true. A message to us from a range of publishers, including people who work in new media, was that dealing with a threat of defamation proceedings can be a difficult and intimidating challenge and that such threats can be used as a tactic or weapon to stifle debate and the free flow of information. We are keen to give the courts effective tools to sift out unmeritorious claims at the earliest possible stage. The courts do not really have the power to do that at present, so we would like to move in that direction. It is being done quite successfully in England and Wales under the 2013 act, and we have tried to learn some lessons from that.

Liam McArthur: Notwithstanding the reassurance that you give about the balance that you have sought to strike, are you confident that you have been able, either within the advisory group or through the process of consultation, to take the views of those who routinely represent pursuers?

Lord Pentland: Absolutely. We had a number of submissions from those who habitually act for claimants. We involved them in the advisory group and they attended some seminars that we arranged. I am confident that we have taken account of those views. We have not always agreed with those representations, but it is our job to come down and make an assessment in the end of where we think the right direction for the law to go is.

Liam McArthur: Given those areas of disagreement, it might be impossible to satisfy the demands of everybody in such a process. What are the concerns of those who represent pursuers about the balance that you have sought to strike?

Lord Pentland: Two such concerns spring to mind. One is the suggestion that the serious harm threshold will constitute an additional barrier to bringing defamation claims and make it more difficult for people to do so. That has not been the experience in England and Wales. I do not think that it can be said that any serious claim has not been allowed to be pursued. The English courts have been very keen to emphasise that a pragmatic approach should be taken towards this new test and that it should not be allowed to

develop into an elaborate, expensive procedure at an early stage in an action. Usually it ought to be quite simple and straightforward for a court to assess, just by looking at the statement that is complained of, whether it is likely to have caused serious harm. Neither the team nor I were persuaded that that representation was sound. At the level of principle, we find it difficult to see why it would be right for a claim to be allowed to be pursued where serious harm to reputation had not been caused.

Liam McArthur: I know that other colleagues want to touch on that, so I will leave it at that question.

Daniel Johnson: I will ask about that very point. Obviously, the introduction of the threshold of serious harm is one of the key proposals. Can you bring it to life for us? It is a phrase that is open to interpretation and is potentially subjective. What is meant by it and how do you propose to codify it in legislation?

Lord Pentland: I suppose that each case will depend on its own particular facts. The court will have to decide, on the basis of looking at the statement first, whether it is likely to have caused serious harm to the claimant's reputation. For example, if it is an allegation of serious crime, child sexual abuse or paedophilia, or something of that nature, I do not think that any court would have difficulty in quickly coming to the view that that is likely to have caused, and to continue to cause, serious harm. Off the top of my head, I would say that a minor allegation about misconduct on a small scale in a private relationship might not be thought to give rise to serious harm.

Daniel Johnson: To clarify what you just said, it sounds as though, when you talk about serious harm, you are talking about serious harm to an individual's interactions with other people, whether from a work or an interpersonal standpoint. Is that correct? Secondly, as a supplementary, to what extent could serious harm refer to one's personal demeanour, wellbeing or indeed mental health? Obviously, that would not have any impact on interactions—or, at least, not directly. Would that sort of thing be taken into account?

10:30

Lord Pentland: The key thing to bear in mind is that defamation law is concerned with protecting and providing redress for unjustified damage to reputation. What the courts will look at, therefore, is whether the allegation that is complained of—the statement that is the subject of proceedings—is likely to cause serious harm to the reputation to the person who is doing the complaining.

Another factor that might come into this is where very little damage to reputation can be shown to have been caused in the jurisdiction where the proceedings are brought. That takes us into the realm of so-called libel tourism, which was one of the factors that gave rise to the 2013 act south of the border. Proceedings were being brought by wealthy and powerful interests in the courts of England and Wales on the back of minimal publication or perhaps a relatively low number of downloads in that jurisdiction. Before the statutory reform was put in place, the courts in England and Wales had been developing a common-law abuse of process jurisdiction to try to give greater scope for weeding out such claims at any early stage. To some extent, therefore, the statutory reform in the 2013 act and what we are now proposing build on that work. However, I do not think that it is at all likely that the courts will strike out anything that looks like a serious, well-founded, arguable claim.

Daniel Johnson: With regard to the time limits that you are proposing, it strikes me that, in this day and age, the date of publication can sometimes be in doubt, and extensive republication is going on in a number of ways, whether through copying and pasting, retweeting or whatever. How will the one-year cut-off be interpreted? Moreover, how big is this shift? My understanding is that, currently, the time starts from when the individual first becomes aware of a statement being made. Can you clarify the extent to which we are moving away from that and the extent to which you have looked at republication and other such issues?

Lord Pentland: What we are proposing is that the clock should start to tick when a person first publishes a statement to the public or a section of the public. As for republication, we heard a lot of representations from consultees to the effect that, whatever the limitation period is, the clock should not be reset every time there is a further publication, often by way of a fresh download perhaps many years into the future.

This is quite a clear example of defamation law having to rely on concepts that were developed perhaps more than 100 years ago, when publication meant something far more serious, substantial and difficult to achieve than it does now. Indeed, it is for that reason that the project came to us in the first place and that we decided to take it up. What we at the commission are interested in is those areas of the law that are perhaps not of great political sensitivity but where, for whatever reason, society has moved ahead of the law and the law needs to catch up.

Daniel Johnson: That throws up the issue that if something is published in a relatively obscure place on the internet, such as a website that does not have much traffic and is not being observed,

and is republished many years later somewhere that has huge traffic, would that subsequent publication not constitute defamation? Is such a situation not potentially quite unfair on the individual, who has had no reason to be aware of the initial publication?

Lord Pentland: If I may say so, that is an extremely valid point. There could be minimal publication and then, many years later, mass publication—say, on a celebrity's Twitter feed or something of that nature. That would be addressed by application to the court's discretionary power to override the time limit where the circumstances of the particular case justify that being done. That is the case across the board in limitation issues: the courts retain a discretionary jurisdiction to disapply the strict application of a limitation period where the particular circumstances of the case justify that in order for justice to be done. Something being published on a remote, obscure website and then republished years later—say, by a national newspaper—could be quite a strong set of circumstances for the one-year limit to be disapplied. However, it all depends on the circumstances of the individual case, of course.

The Convener: Ben Macpherson has a follow-up question.

Ben Macpherson: Daniel Johnson asked for elaboration on the definition of serious harm. In a similar vein, could you elaborate on your proposal on the other side of the argument, which is the for introduction of a statutory defence of publication on a matter of public interest and the test for that?

Lord Pentland: What we are doing there is putting on to the face of the statute book a common-law principle that has been developed by the courts, over the past 20 years or so, for the purpose of protecting responsible journalism in the public interest even where it might not be possible for the statement to be defended on the ground of truth. It was developed by the courts in the leading case of *Reynolds v Times Newspapers* and has become known as the *Reynolds* defence. Albert Reynolds, the former Taoiseach of the Republic of Ireland, brought defamation proceedings against *The Sunday Times* that went to the House of Lords, where the case ultimately failed.

The House of Lords developed the doctrine, which has now been recognised in most jurisdictions across the world, to protect responsible journalism—particularly investigative journalism—where it can be shown that the publishers have acted responsibly, have conducted an open-minded and fair investigation and have given the subject of the report the opportunity to answer it. Even though it might not be possible, for whatever reason, for the publishers to prove the truth of the allegations by

evidence, nonetheless the defence of publication in the public interest can apply. That is seen by the media as being particularly important. As yet, the defence has not been explicitly recognised in any case in the Scottish courts, but the understanding in practice among those who work in the field is that it does apply. We propose that the question should be put beyond doubt by introducing that provision. I hope that that explains it.

Ben Macpherson: Thank you.

The Convener: That was certainly of interest. Perhaps no one is willing to dip their toe in the water just yet, but if we had statutory provision it would be absolutely clear that there was a public interest defence. There is an issue there that I know is of concern to investigative journalists.

Lord Pentland: While you raise that point, convener, and in case I forget to mention it, when it comes to an area of the law such as this, which is important not just to lawyers and newspapers but to the general public, there is a lot to be said for putting the key principles into modern language in an accessible statute. I am not suggesting that everybody will rush off and read the defamation and malicious publication (Scotland) act, if this is enacted. However, we heard, for example, that representatives of the new media would like to be able to go quickly to the statute law database and find out what the law is, in a provision that everybody can understand, when they receive a letter of complaint that is written—as they always are—in extremely strong and rather intimidating terms by the claimant's lawyers.

The Convener: You said that what attracted the Law Commission to the matter was that social media and other forms of communication have moved on quite substantially, but that the law on defamation has not moved with them. The bill does not cover those who only provide equipment. Under the notice and take-down procedure, for which the Defamation Act 2013 makes provision, if a complaint is received about a post, a website operator must identify the person making the post—if it is not possible for the complainer to do so—and remove it. That also happens in the USA. The bill proposes a different course of action. What is that course of action and why has it been taken?

Lord Pentland: Yes. This is a very difficult area. We have discovered that pretty much every legal system across the world has been wrestling with how to deal with the question of secondary publication or publication by internet intermediaries—people who, on one view, are simply providing a platform or a means of access to information that is already in the public domain. Ideally, I suggest that those issues should be addressed on a supranational level, as they are to some extent by existing European Union rules—

although those have been the subject of quite a bit of criticism. The issues should at least be addressed on a UK-wide basis, because the internet obviously does not recognise national borders and information flows freely from one jurisdiction to another.

What we have proposed is essentially an interim solution, pending what we hope will be that type of wider review. It tries to cut through and recognise a distinction between those who are originators of information and those who are not, so that in principle those who fall into the latter category, whom we describe as secondary publishers, would not be liable in defamation for republication. We have learned that what most complainers want is for offensive material to be removed from the web quickly. We propose that the focus should be on that, conferring on the courts stronger and more effective powers to order take-down or removal at an early stage of proceedings, where appropriate. That, in the proverbial nutshell, is where we are coming from.

The Convener: The difficulty with that is that it involves court procedure, whereas the notice and take-down procedure, as it is outlined in the 2013 act, requires someone just to do that and not to have to go to court with all the expense and delay that that may involve.

10:45

Lord Pentland: That is true. We looked closely at the model, which the convener described, that is provided for in the 2013 act. We took evidence from people in England and Wales who have experience of it, and we got the rather strong message that that system has not worked. It is too elaborate and bureaucratic, and it is largely ignored by the internet companies. They do not like being put into the position of censor and they say that that has a chilling effect on freedom of expression, because an intermediary who has not originated the statement will very often not be in a position to defend or justify its accuracy as they will not have access to the information on which it was based.

We are trying to find a way to cut through those problems, and that is the scheme that we have come up with. Ultimately, it might involve court proceedings in some cases. However, when it becomes known that the courts have more effective powers that can be exercised right at the start of an action, that might have an influence over how publishers react in practice to complaints.

The Convener: You mentioned that the scheme should perhaps not just be Scotland-wide, that the rest of the UK should look at having the same kind of law and, more importantly, that it should be on a

supranational basis. That resonated when it was talked about by members of the Commonwealth Parliamentary Association. The feeling was expressed that if there were more politicians and legislators looking at having the same solution, that would probably balance the kind of influence that internet providers have in being able to just ignore the issue.

Lord Pentland: I have a couple of brief thoughts on that. It would be good if Scotland could take the lead; our proposals on that area, in particular, have already attracted interest. Different solutions have been devised in different jurisdictions. There is quite a lot to be said for our solution because of its simplicity and straightforwardness, and because we are relying on established concepts of authorship, editing and so on.

The international dimension is important, but I do not necessarily feel that that should hold this Parliament back from trying to devise an appropriate solution that will work in this jurisdiction, even if it is seen as an interim solution that will be built on in the future. That is my thinking on the international dimension.

The Convener: That is very helpful.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. I want to ask about how the bill would prohibit public authorities, such as universities and housing associations, from suing. Would that not adversely affect them in protecting their reputation? What was your thinking behind that?

Lord Pentland: It is a proposal that we developed following an initial consultation exercise. Some stakeholders, such as the libel reform campaign, represented to us that we should do that and we have decided to go with it. Essentially, we are putting on to the statute book the existing law. Under the present law and the Derbyshire principle—after the case in which the principle was developed by the House of Lords—public authorities are not entitled to sue for defamation. The justification is that it should be for public authorities to defend their reputation through political means or in the public sphere, rather than through the courts.

Rona Mackay: Has the Derbyshire principle been upheld so far? Has there been no deviation from that?

Lord Pentland: Yes. That is well settled.

Rona Mackay: So this is just putting it into a legal framework?

Lord Pentland: Yes. Again, we got the message that transparency, clarity and accessibility of the legal rules were important.

Liam McArthur: I understand the rationale behind the exclusion of public authorities. I suppose that universities would argue that they are entities that are autonomous of Government. There has been quite a lively debate about that in the Parliament over recent years. Reputational damage for universities would be seen as a serious risk, particularly for those that compete in the international marketplace for students and staff. Is a distinction to be made between universities and public authorities in a more traditional sense?

Lord Pentland: Whether a particular organisation is a public authority is not a straightforward question. Essentially, it involves consideration of whether its functions include functions of a public nature. I would have to give some thought to whether a university constitutes a public authority for the purposes of the provision. I cannot remember whether we looked at that specifically, although we must have done so at some stage.

Graham McGlashan (Scottish Law Commission): One of the get-outs that we have written into the draft bill relates to

“a non-natural person which ... is a charity or has purposes consisting only of one or more charitable purposes”.

As Lord Pentland has said, a tricky balance is involved in deciding whether a body is defined as a public body. What we have come up with may not be perfect, but we are certainly open to ideas about how to draw the line. It is quite a hard line to draw.

Lord Pentland: It is. I recall that we got quite a lot of feedback on that at the bill's consultation stage. Essentially, we have taken the definition of a public authority from human rights case law and human rights legislation.

I am not sure that I would like to express a conclusive view now on the position of universities. Perhaps I could think about that. We would be happy to come back to the committee on it.

The Convener: I have a final question, Lord Pentland. In your written submission, you said:

“The draft Bill attached to our Report constitutes the most substantial proposed reform of defamation law in Scottish legal history.”

You also said that in your opening statement. You will be aware that the Delegated Powers and Law Reform Committee's role has been extended, so that it can look at certain bills. Given that the proposals raise public interest issues and all the issues that you have covered relating to investigative journalism and the internet, would it be more appropriate for the Delegated Powers

and Law Reform Committee or the Justice Committee to look at them?

Lord Pentland: I am not sure that it is necessarily for me as the chairman of the Scottish Law Commission to express a view on parliamentary procedure. I suppose that that is a matter for the Parliament and the Parliamentary Bureau.

The Convener: Yes, it most certainly is.

Lord Pentland: We have had a number of measures with the Delegated Powers and Law Reform Committee recently, which have been successful. My recollection is that the criteria for the admission of bills to that procedure are quite narrow, and there has been discussion about whether they should be widened. They include the Parliamentary Bureau being satisfied that there is wide consensus among key stakeholders on the need for reform and the recommended approach. Obviously, some flexibility is inherent in that.

In view of the interest that the draft bill has generated and the strong views of stakeholders, it might perhaps be thought that it is more suitable for the Justice Committee to consider it but, as I said, it is not really for me to say. We are happy to support the draft bill wherever it goes.

The Convener: There are other criteria, such as the bill not relating directly to criminal law reform, not having significant financial implications and—this one is a bit dodgy—not having significant European convention on human rights implications.

Lord Pentland: That is a good point. There is the human rights aspect, as well. As I said, wherever the bill ends up—I very much hope that it will end up in some committee—we will be more than happy to continue to support it.

The Convener: Thank you very much. That concludes our evidence session. Obviously, the bill is very important. I thank the Scottish Law Commission for its work and for appearing before the committee.

I suspend the meeting to allow a change of witnesses and a brief comfort break.

10:54

Meeting suspended.

11:10

On resuming—

Policing

The Convener: Agenda item 6 is an evidence session on policing in Scotland. I refer members to paper 5, which is a note by the clerk, and paper 6, which is a private paper.

We will be hearing from Deputy Chief Constable Designate Iain Livingstone QPM and Professor Susan Deacon CBE, the chair of the Scottish Police Authority, on a range of policing matters. As everyone knows, the Police Investigations and Review Commissioner is conducting on-going live investigations concerning the chief constable and others, which are proceeding under statutory process. I therefore remind members to be careful to avoid exploring issues that could impinge on those investigations.

I welcome Iain Livingstone and Susan Deacon. Thank you both for your written submissions; it is always helpful to receive them.

Mr Livingstone is content to move to questions but, as this is Susan Deacon's first appearance before the committee, I invite her to make an opening statement.

Professor Susan Deacon CBE (Scottish Police Authority): As members are aware, I took over as SPA chair last month, so I very much welcome this early opportunity to engage with the Justice Committee. The SPA is one of our nation's most important public bodies and it has oversight of one of our nation's most important public services, so I regard it as a real privilege to have taken on this role.

The SPA has made significant progress in some areas over recent years, not least in developing the policing 2026 strategy, a 10-year strategy for policing in Scotland that was developed jointly with Police Scotland. However, it is also the case that the SPA has been criticised over many aspects of its leadership, its governance and its practices by this Parliament, by Government, by Audit Scotland, by Her Majesty's inspectorate of constabulary in Scotland and others.

I share the concerns that have been raised and have made clear, since coming into this post, that I am determined to do all that I can to drive forward improvements in the way in which the SPA operates so that the public, the Parliament, the police service and others can have full confidence in the work that we do. I think that the role of the body, as the key body that oversees and scrutinises Police Scotland, is of fundamental importance. I also believe that the job of work that needs to be done in developing policing in Scotland over the years ahead is significant. We

have an excellent police service of which we can be proud. However, like every police service in every part of the world, it needs to adapt to changes in demands and expectations. The SPA must be fit for purpose if it is to play its part in driving forward that process of improvement and change in the future.

In my written submission, I set out a number of early guiding principles that I have been adopting in my early weeks as chair and which I am seeking to embed in the way in which the organisation works. They include increased transparency and clarity around governance, more robust decision making, a stronger public-service ethos, better trust in relationships and engagements and a process of continuous improvement. I have made some early changes that I hope that members will agree are steps in the right direction, but there is a job of work to be done. I will continue to work hard with members of the board and colleagues in Police Scotland to ensure that we continue to drive forward improvement in the period to come.

One of the relationships that I hope that we can develop and build on is the relationship with this Parliament and its committees. I hope that, in the months and years to come, there will be various opportunities to engage at different levels with MSPs, this committee and others, because I think that our relationship with this Parliament is important.

Again, I thank you for the invitation to come here today. I look forward to the discussion.

11:15

The Convener: Thank you very much for that opening statement.

My first question is directed at both of you. You have acknowledged that improvements could be made and both Police Scotland and the SPA have recognised initial difficulties with regard to particular roles and responsibilities as set out in the Police and Fire Reform (Scotland) Act 2012. Are you both confident that the 2012 act is still fit for purpose, or could it be amended—or some other way found—to provide greater clarity and ensure greater understanding of the roles and responsibilities of each organisation?

Professor Deacon: I think that, fundamentally, the legislation is right. Like everyone else, I watched from the outside in some of the early debates over what the respective roles and responsibilities of the SPA and Police Scotland should be, and I think that many of those matters were resolved and have begun to bed in. However—and we might come back to this; I am not sure that DCC Livingstone agrees with me—there is still much work to be done to get the right relationship in place between the SPA and Police

Scotland to ensure that we deliver the effective scrutiny function that I referred to earlier.

As for the structure, I believe that, again as someone who watched from the outside in a few years back and speaking as someone with a significant interest in public services in Scotland, the creation of Police Scotland was an important and significant step forward. To be honest, since I have come into this role, I have become ever more convinced that, fundamentally, we have a structure in place that is good for Scotland and good for policing in Scotland, and which ensures that we have the best possible specialist operations and that we can flex that national capability to deliver effective local policing across the country.

Is there still work to be done? Absolutely. A big integration and reform process has been going on in order to bring eight legacy forces into one single service. That is still very much work in progress and, again, I am sure that DCC Livingstone has more to say on that. Fundamentally, though, I think that the overarching legislative framework and structures are right, but we all need to work together to ensure that they work as effectively as possible in the public interest.

Deputy Chief Constable Designate Iain Livingstone QPM (Police Scotland): I agree. The 2012 act is there and, from my perspective, makes it clear that to ensure the effective delivery of policing, all its elements, such as the people, the money, the responsibility for information and communications technology and so on, have to be under the chief constable's direction and control. The role of the authority, therefore, is to provide a governance function of scrutiny and accountability. In the early days, there might have been a little bit of confusion about the authority somehow being involved in service delivery; however, with hindsight, I think that that was perhaps because it was seen as the successor to the Scottish Police Services Authority, which was an entirely different animal that was about the delivery of shared services. Although some of the SPSA's elements came over to the SPA, it took a bit of time to properly understand that the SPA was a governance board and that, with the exception of forensic services, service delivery rested with Police Scotland.

Having read the 2012 act more often than I have wished to at different times over the past few years, I think that the structure that it sets out is the right one. Our challenge—indeed, our duty and responsibility—is to allow the intent of Parliament and the act to take shape, and we and the authority need to make it very clear between ourselves how that will happen as we go forward. I already feel that there is a different atmosphere with the new chair and operating officer; the level

of engagement, communication and openness is very different from what it has been in recent months and years, and I think that that approach to our work is just as—if not more—vital than the actual words in the legislation.

Daniel Johnson: Yesterday morning, former SPA board member Moi Ali appeared on “Good Morning Scotland” on Radio Scotland and said that the board had a long history of poor decision making, that there was a failure of genuine independence and that board members were unwilling to challenge each other. Professor Deacon, do you recognise those characterisations? If so, what do you feel needs to be done to put them right?

Professor Deacon: Obviously, my primary focus is on looking to the future. I said when my appointment was announced that I want to learn lessons from the past but very much apply those to how we develop in the future. I believe that it is absolutely fundamental that the SPA board works effectively as a board in the space that it needs to be in.

If I may, I will elaborate on what I mean by that. As I said, the SPA board and its members have done a lot of good work and have worked very hard. However, as I believe, and as I have heard expressed in the Parliament on many occasions, it has not fully moved into the role of being a national oversight body that is very open and outward looking and that, within that, has decision-making processes that stand up to scrutiny and in which everybody can have trust and confidence. I have looked carefully at work such as last year's HMICS report on matters of openness and transparency, and I have already made some early changes to the way that the board meets. It previously had a practice, which also has been discussed in Parliament, of having public meetings, closed meetings, members meetings, committees and working groups, and variations within that relating to issues such as when officers were and were not present. In my view, the decision-making process was not always as effectively supported and recorded as it should be.

We now have in place a single board meeting and, within that, at the end of the agenda, we will take items in private, as is normal practice in any public body—in local authorities, the Parliament, the national health service and so on. When we take matters in private, that will be for good reason, and members will appreciate that there are many good reasons why certain business has to be conducted in private. There will be occasions when members meet less formally, but rather than those being, or being seen to be, meetings, I have already started to develop a different approach. We had a session with Police Scotland two weeks ago or last week—it was recently, anyway—in

exactly that space. I have made those less formal meetings more workshops than strategy sessions. The next one will be on board development, with the aim of ensuring that board members are absolutely fully versed in all their roles and responsibilities as part of that public body.

There is a lot more work to be done. On the SPA website, there are, I think, 10 framework documents of various types under the heading of governance, some of which are more up-to-date than others. There is certainly a real clutter there. Another piece of work that I have initiated, with the support of HMICS, which as I said has already looked at these matters in detail, is to start to reshape some of those governance frameworks. I want people, whether it is MSPs, the public or anyone else with an interest, to be able to look into the SPA and see clearly how it functions and operates and to be able to engage in our decision-making processes and understand them as far as possible.

I recognise a number of the criticisms that have been made, but my focus is to try to learn from them and change things in the future.

Daniel Johnson: That is helpful. In your written statement—indeed, you repeated this in your opening statement—you describe the work that you need to do as being around “simplification, transparency, and clarity”; developing a “strong public service ethos”; and building public trust. If you do not mind me saying so, those are rather fundamental points for a body such as the SPA. Given that you say that there is a job of work to be done, will you outline what you think the nature of that work is? Because those things are so fundamental in nature, they cannot be addressed piecemeal, so it sounds to me as if you require to do a fundamental review. If such a review is a requirement, what form should that take and within what sort of timelines do you expect to conduct it?

Professor Deacon: I could not agree more that the principles are absolutely fundamental, which is why I am crystal clear that I want to ensure that the SPA lives up to the standards that should be expected of such an important public body as soon as possible.

On timescales, where I can make changes quickly, I am endeavouring to do so. We have a new interim chief officer in place who began just a couple of weeks before me and he has also been looking at the executive functions in the organisation to make sure that they work effectively.

There is a job of work to be done, and I say openly to members that it will take many months for the SPA to operate in the way that it needs to in terms of systems, culture, practice, governance structures and so on. There are particular issues

regarding how the board itself functions. The Cabinet Secretary for Justice has written to me this week seeking my assurance that I will use the performance review process, which I am obliged to carry out anyway as chair, to ensure that board objectives are clearly stated, not least to achieve some of the principles that you have highlighted, and that individual board members and their objectives are aligned with the direction of travel that I have outlined. I am pleased that the cabinet secretary has indicated his willingness to work in partnership with the SPA to ensure that we make progress as quickly as possible in the areas that we have touched on.

You are absolutely right that those things are fundamental. To be honest, having looked at the SPA over the months leading up to my appointment—I looked at a lot from the outside in during the selection process—and having looked at the organisation from the inside over the past number of weeks, I, too, am asking why some of those fundamentals have not been better developed. However, as I said, what I need to do now is to ensure that they are developed and that that is done at pace. I will happily keep reporting back to this committee and to the Parliament more generally about what we are doing in that regard.

Daniel Johnson: I just wonder whether a specific piece of review work needs to be done and whether there should be a single published review. The issues involved are so fundamental and comprehensive that they need to be addressed in the round publicly if we are going to instil the sense of public trust that you rightly alluded to in your written submission and your opening statement.

Professor Deacon: I smiled when you mentioned the word “review” because I am tempted to say that I have rarely seen an organisation that has been subject to so many different reviews. There is a range of work that gives us a very good basis on which to act, including the deliberations of several parliamentary committees, the work of HMICS, and the work of Audit Scotland and its observations in successive section 22 reports. I therefore do not think that there needs to be a single review process. There needs to be a process of sustained and accelerated continuous improvement that puts into practice the kind of standards that I have talked about today and that have been identified in the various reports. From the scrutiny of the SPA that has already taken place, we have a very good evidence base on which to build. We need to drive change forward.

Daniel Johnson: My final question is for DCC Livingstone. Can you tell me how many times since you assumed your role as acting chief constable that you have met the cabinet secretary

and whether you are aware of those meetings having been minuted?

Deputy Chief Constable Designate Livingstone: Sitting here, I could not tell you how many times I have met the cabinet secretary. However, I meet him at different locations and we often speak at events, conferences or award ceremonies, such as for bravery awards. I also have a series of regular meetings with him as diaried in the chief constable's diary. In general, I will easily have seen Mr Matheson a dozen times and I have spoken to him more frequently by telephone.

I do not personally take a minute of the meetings. They are much more informal and have been about reflecting on where policing is and, at times, where I was in terms of support or further resilience that was required to sustain Police Scotland through the current situation.

Daniel Johnson: Were you aware of any minutes being taken?

Deputy Chief Constable Designate Livingstone: No.

The Convener: I put the same question to Susan Deacon.

11:30

Professor Deacon: I have had several meetings with the cabinet secretary and various Scottish Government officials—some that were prearranged and some that took place in the course of events and so on, because Scotland is a small place and we all interact in different ways and in different forums. There have been more of those meetings than I would expect to have when we get into a better shape as an organisation. I am very comfortable with the communications that I have had.

As I said, convener, when I met you and the clerk—and as I have said to other MSPs, as well as during my interview for the post I now hold—I believe that it is really important to have an open flow of dialogue and communication. It is right and proper. There are occasions—and this is a matter of judgment for everyone involved—when discussions should be treated and recorded more formally, such as in relation to decision making, which is an area that really needs to be improved in the SPA. However, it is very important that there is a regular flow of communication if we are going to work effectively.

That does not detract in any sense from my ability as chair of the SPA to assert the appropriate boundaries between the organisation, the Government and others. Good, open dialogue and communication makes it easier to enforce and

manage those boundaries effectively and with the appropriate trust and respect.

The Convener: Sometimes it is important to put things in context.

I have a direct question for DCC Livingstone. In relation to the former chair of the SPA and the SPA's decision that the chief constable should return to work, was there any conversation or meeting between the cabinet secretary and you? If so, is there a record of that meeting and were any officials present? Is there anything that can be looked at to see what took place, if it did take place?

Deputy Chief Constable Designate Livingstone: No. I had no conversations with the cabinet secretary regarding the fallout from the meeting of 7 November. I had some communication with the then chair of the SPA. On the evening of Tuesday 7 November, I asked Andrew Flanagan for an update on the Police Authority's meeting. I knew that there had been a meeting and I felt that it was important to get that update because I had a responsibility to the men and women, officers and staff within Police Scotland, should there be a change in Phil Gormley's circumstances. I did not get a reply to that, and on the Wednesday I was told that deliberations were on-going. I left the matter there. I was surprised that I had not had a briefing and that there was no involvement of the Police Authority. I had no discussion at all with the cabinet secretary.

George Adam (Paisley) (SNP): The meeting of 7 November when the decision was made has been much publicised. When that decision had been made, were you then informed about welfare programmes for your officers or for people who had made complaints? Was anything explained to you about how that would be taken into account?

Deputy Chief Constable Designate Livingstone: No. That was why I asked the then chair for a readout, because my responsibility is to ensure that everyone's interests are maintained, including in relation to where they work, its proximity and the circumstances of that work. Whatever the decision was, we would have implemented it and taken steps to ensure that it was implemented as smoothly as possible. However, I was not party to the decision by the SPA, and my advice or views were never sought, and because I was never asked to make any welfare provision, none was made. I was told on the Friday afternoon that the board had decided to continue Phil Gormley's leave. That was the update that I received. No welfare or wellbeing measures were put in place because I was never told that they were necessary.

George Adam: That is a classic example of what Professor Deacon said about a correct relationship between the SPA and Police Scotland and about communication. It sounds basic, but in that scenario such communication would have made all the difference.

Deputy Chief Constable Designate Livingstone: Absolutely. It is about openness about the decision, and a realisation that we would have to take certain steps if we were going to change the operating environment within Police Scotland. We would have been able to do that. We do not need weeks on end to make changes, but we would certainly have needed more than a few hours to take steps to tell the people who had made complaints and who had an expectation that their and their families' rights and interests would be protected, and to make arrangements for their working circumstances, just as we would have made arrangements for Phil Gormley to return. There would have had to be that discussion, and there would have been accommodation made around his working circumstances, as well. However, none of that took place, because I was never told that the decision had been taken.

George Adam: Okay. Thank you.

The Convener: To follow up on that point, I note that, in the interview that you gave to *Holyrood* magazine, you again stated that you were not personally aware that the chief constable was going to resume his duties. Can you say categorically that no one in Police Scotland was aware of that?

Deputy Chief Constable Designate Livingstone: To my knowledge, no one was aware of that. Given that I am, in the chief constable's absence, in the role and must discharge the responsibilities, duties and accountability of the office, I would be very surprised if anyone else in the organisation had been aware of the decision. Actually, I would be extremely annoyed and disappointed if others in the organisation had been aware and I was not, given the responsibilities and accountability that I was carrying and continue to carry.

The Convener: However, you cannot rule out the possibility that others may have been aware.

Deputy Chief Constable Designate Livingstone: I cannot be categorical about that, because I do not know what everybody else knows, but I would be extremely surprised if anyone else was aware. I would feel that it was a real breach of protocol and extremely discourteous to me, given my current position.

The Convener: I will ask one more question before we move on to supplementaries. In the same interview, you said that you were mentioned in the press release that was put out, and I think

that you challenged its content and said that you had not seen it beforehand. Is not it the case that the press release was merely thanking you for stepping in to your duties? It mentions acknowledging

"DCC Designate Iain Livingstone for the reassurance, stability and direction he has given to officers, staff and partners in the Chief Constable's absence".

Given that it mentioned you in that way, there would be no reason to inform you in advance. It was very complimentary.

Deputy Chief Constable Designate Livingstone: I would not have expected that. My point was that I had not seen the draft press release, but was mentioned in it. It is not uncommon—as committee members will be aware—that people who are mentioned in such drafts are given a copy. A number of people were involved in preparing it. I just clarified, because I was asked a direct question, as I am being asked questions here, that I had not seen the draft press release despite my being mentioned in it. However, you are absolutely right that a nice remark about me was included.

John Finnie: I was going to pick up on the points that Mr Adam picked up on. Staff welfare is very important.

Given the rank structure and the way the police operate, there would be significant implications if you were unaware of something because information was not passed on. Can you explain some of the implications that could arise for on-going operations?

Deputy Chief Constable Designate Livingstone: Under statute, there are certain operations that only I—or any individual in the role of chief constable—can authorise. The structure of responsibility, as recut in Phil Gormley's absence, was that DCC Rose Fitzpatrick would discharge the discipline function and the conduct duties, again under a statutory code. The roles and responsibilities within the senior team cannot be moved around casually—they are a matter of law. I often write formally to Rose and other colleagues regarding their duties and functions, and I am obliged to authorise sensitive covert activities, which would be carried out in my name.

All those matters can be accommodated and, if there are changes to circumstances, as in the past, we will adjust and move forward. If there is another change, we can make adjustments again. However, effecting change needs time and the involvement of senior police officers, including me.

John Finnie: I presume that clarity would be required not only within the organisation but in liaison with other agencies.

Deputy Chief Constable Designate Livingstone: That is entirely correct. In the absence of the chief constable, I received formal intimation from the Lord Advocate that he, the Solicitor General for Scotland and the Crown Agent would see the chief constable's accountability and responsibilities as being vested in me. Therefore, should the Lord Advocate, or people acting on his behalf, see fit to issue a direction, as the Lord Advocate can in law, that direction would come to me and Mr Wolffe would hold me accountable for discharging the chief constable's responsibilities.

Those matters cannot be addressed by a snap of the fingers. They can be, have been and will be adjusted, but there are constitutional issues that need consideration. None of that was done in early November.

John Finnie: I have a brief question about separation of functions. You highlighted the disciplinary matters. Given absences, is there adequate resilience at chief officer level?

Deputy Chief Constable Designate Livingstone: At this stage, there is adequate resilience. The authority supported my proposal for an additional two assistant chief constables: we have introduced those posts, with two qualified individuals in them. One specifically has a portfolio that includes professionalism and assurance. That approach looks to ensure standards not only in officer and staff conduct, but in our information handling, retention and storage, as well as the assurance work that is required in the organisation. An additional assistant chief constable supports the crime work.

The additional work at assistant chief constable level has supported the senior team, but the team is not overly fat. When I became an assistant chief constable in Lothian and Borders Police in Edinburgh in 2009, the then Association of Chief Police Officers in Scotland had more than 30 members, of whom I was one. There were eight chiefs, eight deputies and a number of chief officers performing particular functions. They were all committed and all busy. I am currently operating with 12 chief officers, which is clearly a significant reduction. Those chief officers are busy, and the work gets pushed down to superintending ranks and federated ranks. We have enough chief officers, but I keep my eye on resilience and would go back to the chair of the authority if I felt that we needed to build that resilience further.

John Finnie: You will forgive me for seeing losing a lot of those chief officer posts as being one of the benefits of a single service, but I am reassured that you feel that the chief officer team is resilient.

The Convener: I will take you back to the press release and the dispute about the

"necessary steps with Police Scotland"

having been taken

"to ensure suitable arrangements are put in place to support the welfare of all involved parties until the alleged conduct issues are concluded".

You said categorically that you were not involved in that. Can you say equally categorically that no one in Police Scotland had any discussions about that issue?

Deputy Chief Constable Designate Livingstone: I can say categorically that to my knowledge no one had any discussions about it. I reiterate that I would be extremely surprised and disappointed if there had been such discussions without my knowledge, given the position that I was and am in.

The Convener: However, you cannot rule out the possibility that there may have been discussions that you did not know about.

Deputy Chief Constable Designate Livingstone: No, I cannot.

Liam McArthur: You have always struck me as a calm individual, DCC Livingstone, but the sense of disappointment, bordering on anger, at what happened on 7 and 8 November did not escape anybody's notice. Although you left it at that following your conversation with Andrew Flanagan, can you assure the committee that nobody, on your instruction or independently, then had conversations with the Cabinet Secretary for Justice's officials about concerns that you might have had about what you had heard from Mr Flanagan on 7 November?

11:45

Deputy Chief Constable Designate Livingstone: I heard nothing from Andrew Flanagan on 7 November. On the morning of 8 November, in response to my request for an update, I was told that deliberations were ongoing—it appears that that was not the case, and that a decision had actually been taken on 7 November—and that I would be briefed in due course.

Liam McArthur: Right. So, at that stage, you left it at that.

Deputy Chief Constable Designate Livingstone: I responded. I said thank you and that, given my role, I was surprised that I was not involved in any of the discussions. However, I left it at that. The next I heard from Andrew Flanagan was a text message on the Friday of that week and then, when I called him back, I was told that the authority had decided to extend the chief

constable's leave. However, I was not told that there had been a decision, then reconsideration and another decision.

On the Thursday evening, Paul Johnston, the civil servant who is the head of justice, phoned me and told me that there had been a meeting involving the cabinet secretary and the then chair, and that the then chair had put it to the cabinet secretary that the chief constable was to return to work at 8 o'clock the next morning. He checked with me whether I was aware of that, and I again confirmed that I had no knowledge of that.

Liam McArthur: I will go back to the line of questioning that Daniel Johnson pursued with Professor Deacon on governance issues.

I welcome a number of the assurances that you gave about your intentions in the role of chair and where you see the SPA going. At various stages, you have laid deliberate heavy emphasis on the opportunity that you have had to examine the organisation from the outside in. To some extent, we could argue that Andrew Flanagan was in the same position when he came into the organisation in 2015 and undertook the previous review.

Are you concerned that an internal review of governance by the SPA will not necessarily challenge the structures and working practices within the authority, and between it and the other main actors, in the way that an independent review would likely do? I recognise that other bodies, including the committee, provide a challenge function from outside, but they will not necessarily provide a strategic, across-the-board, independent assessment of governance, with recommendations about how it can be improved.

Professor Deacon: Let me be clear that, as chair, I am determined to examine the issues strategically and comprehensively. One of the early steps that I have taken, in conjunction with the interim chief officer, is to bring in additional support to enable us to do that. You will need to give us a few months to work on the matter, but I am more than happy to report back to this or other parliamentary committees, as we continue to make changes.

I must stress again that there is a considerable accumulation of external review, observation and criticism of the SPA, but it has not been translated into the improvements that need to be made. I refer in particular to the HMICS report from June last year: I want to act on all of that. That is the right thing to do to drive forward change. I have a strong view that I have expressed in many roles over the years that it is important not to get stuck in continuous and perpetual review and that it is necessary to drive improvement and change.

As a matter of urgency, based not least on my observations of the decision-making processes

that were followed, for example, at the meeting of 7 and 8 November, I changed and strengthened how we deal with complaints and conduct issues, which is fundamental.

My predecessor as chair had adopted a practice whereby decisions were dealt with either at full board level or through delegated authority to the chief executive. He had removed decision-making powers from committees and had removed the previous complaints and conduct committee that was in place to deal with such matters. As many members will be aware, it is important to have a proper body that considers complaints and conduct issues. That body should comprise a smaller group and should build up expertise on decision making. There must be proper advice and support in the room, proper papers and proper consideration of options. There must also be appropriate handling strategies for taking forward decisions.

It is precisely because I observed very early on that those processes were not in place that I took early steps to reinstate the complaints and conduct committee. That decision was approved at the December board meeting, which was held in public. The complaints and conduct committee is now meeting, and it is through that committee that such matters will be considered in the future.

That is a case in point of where you cannot wait for another review. We are dealing with important live sensitive issues. I want to ensure that whatever process is in place on my watch is robust and stands up to scrutiny. In this case, making early changes was absolutely critical. The committee, the Scottish Government and others could rightly ask me, as the chair, what I am doing now to make the organisation more robust, rather than wait for further review and analysis. I stress that we are, particularly the chief officer and I, with the support of others, including HMICS, examining the organisation comprehensively and not in a piecemeal way.

Liam McArthur: You have mentioned the additional skills that you are looking to bring to the board, which you refer to in your submission, too. What are those skills? Will there be additional capacity over and above the board members that are in place? Will it be a bit of a mix, with new board members being brought in while existing memberships are brought to an end?

Professor Deacon: The legislation provides that the authority can have a maximum of 15 members. Under the previous chair, three positions had, by choice, remained unfilled, and, in the recent period, two other members have stood down, so we have five vacancies.

I have accelerated the appointments process, working closely with the Scottish Government's

public appointments section and the office of the Commissioner for Ethical Standards in Public Life in Scotland to make sure that we fill those vacancies as quickly as possible but absolutely in accordance with the relevant codes and so on, and in a way that would be expected of a robust public appointments process.

The appointments process is live. The vacancies are being advertised on the Scottish Government's public appointments website and the SPA's website, which you might be interested in looking at. The deadline for applications is 31 January. The new appointments will provide us with another early opportunity to strengthen the board.

On the skills and capabilities that we will bring in, we trailed the appointments before Christmas and said unashamedly and clearly that we want to reach out to some of Scotland's most able and committed people to get them to join the board. As I have said, the SPA is one of Scotland's most important public bodies. We are looking for people who might come from a range of backgrounds but who all have a passion for policing and public service and will bring to the table the capabilities, the experience and, to be frank, the resilience to operate effectively at that strategic non-executive board level in a front-facing, publicly accountable organisation.

Liam McArthur: What you have described is, one would assume, a skill set that is contained in the current board. What additional skills that are not currently reflected—or not reflected adequately—in the board are you trying to get through the additional appointments?

Professor Deacon: I do not want to bore members with too much detail on the appointments process, although I am happy to share more information about it at any stage.

The skills matrix that was developed for the board under the previous chair placed particular emphasis on bringing into it a range of technical and specialist skills. Many such skills are very important, and the individuals who have joined the board have applied them in a range of different ways. However, I have identified that we need to bolster the board's capacity and its capability to function at a broader strategic level and in a very publicly accountable environment, which is the landscape in which we reside. I hope that new members who join us will have good experience of operating in that environment and will help to drive the kind of change that we have talked about today.

In addition, as I mentioned, it is my responsibility to carry out a performance review of existing board members, and I have outlined that we will continue to drive change through the process of

setting objectives and aligning them with the direction of travel.

It is the nature of any public body that different board members will have different tenures of office. Therefore, over the months and years ahead, just through the natural process of things, there will be further change on the board. As with any process of open public appointments, it is incumbent on me and others who are involved to identify the needs of the board at that moment and to bring in an appropriate capability. I stress that that is being done through a very open process and absolutely in accordance with the codes laid down by the commissioner and others.

Liam McArthur: Do you see it as being important that the board has a geographic reach as well as a skill set reach, given that we are talking about a national force and a national board?

Professor Deacon: Over the years, I have done an awful lot of work in the sphere of governance in different sectors and organisations, and I passionately believe in the need for a balanced board. Balance is achieved in a range of different ways—we have a lot of discussions around equality, diversity, gender balance and the like. I want to address that, as the board could be better balanced in that respect.

Geographical spread is important, too. On a board of 15 people, we are never going to get absolutely every part of the country or every perspective or interest around the table, so it is important that the board knows how to engage widely and effectively and how to address the range of interests that people have in different parts of the country and in different communities.

Critically, in order to have a balanced board—this relates to some of the points that Daniel Johnson raised earlier—we also need what is sometimes called cognitive diversity, which is about people being willing to think differently from one another and to challenge each other in discussion. What needs fostering on the SPA board is more of a culture in which there will be such constructive challenge, which is vital for any board or organisation if it is to function effectively.

Ben Macpherson: DCC Iain Livingstone mentioned the meeting on 7 November 2017. Professor Deacon, in the interests of parity and mindful of the PIRC investigation that is going on under statutory process, as the convener has mentioned, I want to give you, as the new chair, the opportunity to comment on the decision-making process on 7 November 2017 if you feel that to be appropriate.

Professor Deacon: Obviously, that meeting predates my being chair, but I am aware of it. My initial insight into and understanding of that

meeting and previous decision making in a range of areas came directly from my predecessor as chair, in the handover briefing that he gave to me in the week before I started in my post. It is precisely because of the concerns that I had about the way in which that meeting and others were being handled that, on my first day, when I had an informal meeting with board members, I indicated that, particularly in relation to complaints and conduct issues, on my watch we simply would not handle such matters in the same way in the future. I have already outlined the changes that I have made by putting in place both a committee to deal with that and an appropriate process around it.

12:00

I believe that it is fundamental for any organisation, but particularly a public body, to have really robust and effective decision making, proper recording, proper handling strategies and proper expert advice. Having those things not only enables decisions to stand up to scrutiny but means that, when those decisions are put into practice, they are likely to be more effective. Indeed, if an organisation has good processes, it is more likely to get good outcomes from the decisions that it has reached.

I have looked carefully at the meeting that has become the subject of considerable public attention, and I have found its process wanting in many ways. Moreover, given that it has also been a matter of considerable debate, I add that, had I been in the cabinet secretary's shoes—I have walked in such shoes in the past—I would have asked questions about the process as to how that decision had been made. Personally, I think that the cabinet secretary would have been failing in his duty had he not asked those questions. I also say for the record that, if, at any stage in my tenure as chair of the SPA, the processes that I follow require to be questioned in that way by a cabinet secretary, I will regard myself as having failed in my duty as chair.

Liam Kerr: My questions follow on from Liam McArthur's line of questioning. Professor Deacon, I know that you have been asked in some depth about the board, but can you tell us whether you are, as HMICS has recommended, specifically recruiting someone with specialist railway experience to the board?

Professor Deacon: No, after considerable consideration of what the board needs at this time, we have not specified any area of specialist background of that nature. It is, however, possible that we might receive applications from someone with that background, and it might come to pass, through the proper appointments process, that that sort of background is represented on the board.

I want to make a really important point about boards that relates to one of the ways in which the SPA board has not been developed effectively in the past. A board's role is to make sure that the right expertise is available to take decisions, but all of that expertise is not put in place through board appointments alone. The role of a board member, in reaching a decision, is to reach out for the appropriate advice, guidance and expert input. In my view, that is one of the areas in which the SPA board has not operated effectively enough.

In the area that you have mentioned, for example, there are different ways of bringing in expert knowledge and advice, and I would expect the committee—indeed, anyone who is scrutinising us—to ask me in what ways I ensure that I have the right advice, the right evidence, the right data and the right expert knowledge as part of the decision-making process. Some of that might come from board members, but it can come from external advice, too.

Liam Kerr: Perhaps I can put that very question to you, then. If you are not recruiting a railway specialist to the board, given what is going on with British Transport Police, how will the SPA ensure that that sort of expertise is available?

Professor Deacon: I have already answered quite fully the question about the different ways in which we ensure that we have the right expertise to make decisions. The integration of BTP is one of a number of significant areas of development both in policing and for the board more generally. DCC Livingstone will be able to say more about the integration process, given that it is being led by Police Scotland, but I can tell you that the SPA already has a working group that is looking at BTP integration. Even in the time since I came into post, a lot of work has been done to ensure that the SPA is sighted on the work that Police Scotland is leading on the integration process and that we put together a clear understanding of what the process will look like and the costs that are likely to accrue from it.

DCC Livingstone and I have a meeting with the chief constable of BTP and the chair of the British Transport Police Authority, respectively, coming up in a couple of weeks. I assure you that the matter is being looked at carefully. However, I also stress—as I have before—that it is only one of a number of significant areas of change and development in policing. I am committed to developing and strengthening the role of the SPA in its oversight, understanding, scrutiny and monitoring of those developments; to our reporting effectively, both to our board and, when necessary, to Parliament and others, on how those processes are moving forward; and to doing so at all times in a way that is as open as possible, in order to build public confidence and trust.

As I have said, Police Scotland is leading on this area of work. If the committee wants to consider it further, I would defer to DCC Livingstone to speak in more detail about it.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I have a quick supplementary question to ask DCC Livingstone. Do you believe that we are still on track to complete integration by April 2019?

Deputy Chief Constable Designate Livingstone: I think that we are. The chair of the authority said that we are now leading on the policing element of integration, which is a relatively recent change. The authority sat on the UK-wide programme board, but we assumed responsibility last autumn. In that time, we have identified significant issues related to ICT, terms and conditions and pre-existing third-party contracts that, in my judgment and in that of my team, will not be resolved by 1 April 2019. However, we are determined to resolve that the operational direction and control vests in the chief constable of Police Scotland on that date. After 1 April 2019, we will continue to resolve those other matters.

We have identified those matters and are, as Professor Deacon mentioned, working closely with both the British Transport Police Authority and the British Transport Police. We will continue with the significant amount of energy that we have, and we are determined to give effect to the legislation on 1 April 2019.

Fulton MacGregor: I have a very brief supplementary question based on what you have just said. Do you not think that there is a need to pause the current plans for integration?

Deputy Chief Constable Designate Livingstone: At this stage, I think that we will have an effective integration in place by 1 April 2019. However, if matters arise that cause difficulty, we will not mask it or in any way say that things are fine when they are not. I will let the authority know and, given the legitimate interest of the people around this table, I will let the committee know about it for the purposes of public debate.

Maurice Corry (West Scotland) (Con): Good morning. My questions follow on from Liam Kerr's questions about the changeover of BTP officers. There have been concerns about the employment status of BTP officers and their terms and conditions once they transfer into Police Scotland under the Transfer of Undertakings (Protection of Employment) Regulations 1981. Where are we on that issue? I know that it is a significant one, as I have heard from bobbies on the beat in my own area who are quite concerned. Can you give me any comfort?

Deputy Chief Constable Designate Livingstone: I share your concern. It has become clear that it is not a merger of like with like. The merger that brought Police Scotland into being involved, in essence, eight entities that were of the same nature and status, from their having an office of constable to their working practices and terms and conditions. As you have alluded, BTP is different. We need to protect BTP officers' status and entitlements as they come forward but, at the same time, give them the flexibility to move fully into the full body of Police Scotland.

I cannot give you comfort that we have resolved the issue, but I can give you an assurance that we are working extremely hard on it and that we recognise the challenges that come with the difference in status between a BTP officer and a police officer in Scotland.

Maurice Corry: What are the challenges that you refer to?

Deputy Chief Constable Designate Livingstone: The challenges are around pensions and certain entitlements regarding status. BTP officers have employee status as opposed to the office of constable that is vested in police officers in Scotland. To bring that element of the organisation into policing needs some legal work and some work around human resources, and it needs everybody's support and involvement. It is entirely right and legitimate to highlight that as a significant issue that needs to be resolved. It is one of the key elements that need to be resolved between now and April 2019.

Maurice Corry: Among your ranks, is there a feeling or perception that there is a difference in the status of members of Police Scotland and members of the BTP as the amalgamation comes closer?

Deputy Chief Constable Designate Livingstone: I do not think so. Over the years—

Maurice Corry: I am talking about the other ranks.

Deputy Chief Constable Designate Livingstone: It has not been brought to my attention that there is an inherent tension at the constable, sergeant or inspector level. As for the 220-odd BTP officers, like lots of things in life, it depends on the individual and where they are in terms of their length of service and so on. Some may feel that Police Scotland will bring them greater opportunities whereas others will feel that they joined transport policing and they want to stay there. We have said that absolutely nobody will be moved away from transport policing against their will, and we will honour that.

The operational relationships with the BTP, over the years, have been extremely strong—both for

the legacy forces and, now, for Police Scotland. On a day-to-day basis, whether it is for a Hearts v Hibernian match on a Sunday or international events at Murrayfield, for all the movements, all the events and all the incidents that happen on the rail network in Scotland, there is a very close operational relationship, which is something that I want to build on.

If there are any tensions, I will look to resolve them and will work with my colleague, the chief constable of BTP, to do that.

Maurice Corry: I am pleased to hear that.

Liam Kerr: Very briefly, on this point, DCC Livingstone talked about integration but said that the terms and conditions, third-party contracts and ICT issues will not be resolved by 1 April 2019. To me, it is not integration if those matters are outstanding. If they will not be ready by 1 April 2019, when can we expect terms and conditions, third-party contracts and ICT to be integrated?

Deputy Chief Constable Designate Livingstone: I cannot answer that specifically. Again, although Police Scotland is involved in the management of this piece of work, it sits as a joint board with the Department for Transport and the Scottish Government. That is the overarching structure to give effect to this change.

As the Police Service of Scotland, we will clearly be working very hard to make sure that we are in a position to receive the officers and staff and to receive the statutory responsibility that the Railway Policing (Scotland) Act 2017 has mandated. I am being absolutely clear that the issues involved have such a level of complexity that they will not be resolved by 1 April 2019. We are working to give operational effect to the intent behind the legislation and then deal with the other issues in a considered and appropriate manner.

Liam Kerr: But if I am a BTP officer transferring across, I will know that on the date that I become part of Police Scotland, my pension and my terms and conditions may not be resolved. Is that really the assurance that we can give to BTP officers?

Deputy Chief Constable Designate Livingstone: It is not me personally who gives that assurance. As I have said, this is a Government-led programme that sits—

Liam Kerr: Professor Deacon said that you were leading on this.

Deputy Chief Constable Designate Livingstone: In terms of the police response in Scotland, yes.

I have said to Mr Corry that I absolutely recognise the importance of issues such as the pension provision. That is core to any individual police officer, whether in the BTP or Police

Scotland. I am committed to doing everything that I can within Police Scotland to resolve the matter. Not everything to do so is in my gift, and I agree that there are significant challenges. We are trying to make sure that we can give effect to the parliamentary intent and that the chief constable of Police Scotland will take operational direction and control. A number of issues, which we have identified and called out, will need to be resolved some time after 1 April 2019.

12:15

Liam Kerr: Does it concern you that transferring BTP officers will see the situation and hear that response, and say, “I want no part of this,” and retire?

Deputy Chief Constable Designate Livingstone: It concerns me, and I have said that previously. I know BTP officers and I know how committed they are. They are close colleagues who train with us at Tulliallan; when they go through their training, there is already a closeness. If they have concerns, I want to do everything that I can to allay them.

John Finnie: My question is about ICT. The i6 contract was scrutinised in this building, so we know about that and about the challenges with integration in Scotland. There was a lot of discussion when we scrutinised the legislation about integration and the different systems. You have spoken about the collaborative working at the moment. Are there issues with ICT that we do not know about or that have not been discussed in the process? Information technology is a huge part of modern policing. We know about the lack of compatibility between some legacy forces and, likewise, across the UK. Is there anything that we do not know about?

Deputy Chief Constable Designate Livingstone: You have expanded on the challenges; we do not have a single operating base for our different systems in Police Scotland. Significant progress has been made in our command and control and area control rooms. Undoubted errors were made that we have learned from and moved on, which you will know from our discussions about ACRs in the north. That period of change will give us a more stable base. Integrating BTP into crime, HR and finance systems, payroll and supplementary systems for intelligence is not insignificant. I do not seek to minimise the challenges in any way; it is right and proper that members highlight them.

Rona Mackay: I will go back to a previous line of questioning. Has it been helpful for recent events regarding the chief constable to have played out so publicly?

Deputy Chief Constable Designate

Livingstone: I do not think that it has been helpful for the public perception of, and confidence in, policing and Police Scotland. I will not comment on the specifics, because everybody has rights, such as privacy rights, and families to look after.

I am absolutely clear in my professional judgment that there is no crisis in policing. Police Scotland has issues to do with governance and accountability and it is right that we are having today's discussion. Specific cases need to be addressed and resolved. However, policing in Scotland is not beleaguered. I am not just asserting that; we have just come through a really busy festive period and I have specific evidence of it. We are not sitting here in the new year with undetected murders, critical incidents that went badly wrong or public events that led to injuries to officers or breakdowns in communication. We deal with such matters very effectively, as we do in our responses to domestic violence, road policing, and rape and sexual crime. The level of service that men and women provide daily is extremely high, as you know in your communities. Since Police Scotland came into being, every murder has been detected. I would be interested to know whether any other jurisdiction can say that over such a period of time—I do not know, as I have not done comparative work.

We in Scotland have an extremely committed and dedicated workforce of police officers and police staff. In Police Scotland we have undoubtedly had difficulties as we have brought the legacy organisations together, but I genuinely think that the policing is strong. On the level of focus that there has been, when there is a sense of adversity or misrepresentation, if anything the esprit de corps gets even stronger and people continue to focus on doing their duty, serving the public and discharging the public duty that is core to policing. These issues need to be discussed. We must be clearer when it comes to accountability, scrutiny and public confidence, but policing in this country is strong and we should be proud of it.

Rona Mackay: You must have read my mind, because I was going to ask you to reassure the committee and the public that on the front line it is business as usual and that policing has not been affected by what has been going on further up the tree.

Deputy Chief Constable Designate

Livingstone: People are working extremely hard, because policing is their job and their vocation. The level of focus that there has been is disturbing every day and there are some issues that need to be resolved, but it is not for operational police officers and staff to do that; they are focusing on working closely with their communities. I have said

before that, in the early days, everything was not ideal. That was inevitable in bringing together such a complex organisation in a compressed timeframe, which was probably overly rigid. We put greater store on achieving consistencies and common standards than on looking at the flexibility that was needed, whether in devolving finance or allowing for localism. We recognise that one size does not fit all. We have been saying that and we mean it. We are introducing different elements right across the country, such as initiatives in Ayrshire and the north-east that allow local police officers to work with elected members, communities and the people whom they police, who know what their needs are, to develop a policing model that works for them, with all the benefits that a national structure provides. We have the capabilities and the access to safety and security that having a single force provides.

If, to use a health analogy, your child is diagnosed with cancer or if your mother is murdered, those would be atypical scenarios, but everybody in the country must have access to the capabilities to support those things, as well as access to the general day-to-day policing that exists. We now have that capability, but we need to develop further. We need to extend the level of devolution that I have been introducing, but policing in this country is strong. It has been tested, but it is strong, resilient and committed to doing its duty.

Rona Mackay: That is reassuring. Thank you.

The Convener: Susan Deacon mentioned complaints and conduct issues and said that there was room for improvement. DCC Livingstone, you just talked about some of the advantages of the single force, such as the ability to respond to things. When the legislation was passed, there was concern about complaints. Under the legacy forces, the way to deal with a complaint was to get a neighbouring force to look at it. What is your view of how that worked generally? Do you have any specific or personal experience about how the complaints system worked?

Deputy Chief Constable Designate

Livingstone: You are absolutely right, convener. Under the previous structure, there was a clear demarcation. If it was felt that there was a need to review or investigate a set of circumstances in Glasgow, for example, for reasons of public confidence and visibility we could have a conversation with seven other chief constables to ask whether they could dedicate resources to that.

That arrangement still exists. At the moment, we have been asked to investigate a historical and complex set of circumstances in Northern Ireland, and we have a dedicated team for that, which is paid for by the chief constable of the Police Service of Northern Ireland. For those reasons of

public confidence and perception, and because the matter involves legacy officers of the Royal Ulster Constabulary, Police Scotland was asked to carry out that investigation. That distinction is very visible and clear. However, with the single service, it is harder to show that distinction, which is where the independent role of the PIRC is critical.

We have a strong and open relationship with the PIRC and we recognise the commissioner's independence. Increasingly, over the past years as Police Scotland has evolved, I have seen the PIRC being asked to take forward more investigations. For example, the Crown now directs the PIRC to take a number of investigations that previously would have stayed within Police Scotland. As you suggested, with complaints, under the single service, it is not as easy to give reassurance around independence, which is where the role of the PIRC is crucial.

The Convener: I have a question for Susan Deacon on the role of the PIRC. The present investigation involving the chief constable has dragged on for seven months now. In the previous financial year, the PIRC undertook 30 new investigations, which was a 34 per cent increase in work, and 350 police incidents were referred to the PIRC. Are you concerned about the length of time that it is taking to deal with complaints? Is the PIRC properly resourced to handle the complaints?

Professor Deacon: It is not for me to comment on the operation and resourcing of the PIRC; that is for the PIRC and others to do. In relation to the allegations that have been made about the chief constable, as you said at the outset, convener, I will not comment on any of the specifics, as that would be entirely inappropriate, but I can say that I spoke yesterday to Kate Frame, the commissioner, and she has given me an absolute assurance that she will provide a report to the SPA as soon as she can. She has also given me a clear assurance that her office is working hard to investigate a number of allegations contained within the various complaints that have been referred to her, and that that has involved interviewing a substantial number of witnesses. She also stressed that it is entirely appropriate—in fact, it is right and proper—that those various statements should be ingathered before the chief constable is interviewed. The PIRC has now asked the chief constable to provide dates for interview and is currently working to facilitate that with him. I hope that that is helpful as an update on the current situation.

I will turn to wider questions of complaint handling more generally, which I would like to link to the wider point that Rona Mackay raised a moment ago about the current public debate that is taking place, because obviously those things

are connected. On the wider public debate, I completely understand that these are matters of legitimate public interest and interest to Parliament. It is critical that all of us who are engaged in discussion on the matters ensure that we do not, even inadvertently, call into question the operation of our police service or undermine public trust and confidence in the police service. I endorse everything that DCC Livingstone said about how the police service is performing and the work of the more than 20,000 men and women who do that job.

I will make a further point, because it is maybe not for DCC Livingstone to say it. The other thing that has been called into question as part of the debate is whether there is currently effective leadership in Police Scotland—people have even made suggestions about the force being leaderless. Nothing could be further from the truth. DCC Livingstone and his team are working tirelessly to maintain and develop the police service. I have had early opportunities to meet the senior command team and the wider leadership team of Police Scotland, as well as some of the divisional commanders in different parts of the country and I have been nothing other than impressed and reassured by the leadership that they are undertaking at the present time—I want to put that on the record.

12:30

As I have already said, it is always important to learn, reflect and improve. The arrangements that are in place for dealing with complaints, allegations, conduct issues and so on in the police service are all part of the new landscape that was put in place by this Parliament just a few years ago, which emphasises the need to learn and reflect and to think about how things can be improved in the future.

I share the view that I have heard the cabinet secretary express in the past that it is particularly important to think about how confidentiality is better protected both for those who complain and for those who are complained against. I have had early discussions, collectively, with Scottish Government officials, HMICS and the PIRC about how we might reflect on the experiences that we have had so that we can work together to continue to improve and develop the system in future, not least with regard to the need to take account of matters relating to confidentiality. Much of what was put in place within that system has been done in a way that genuinely has attempted to ensure that it is transparent, but there is a balance to be struck in these kind of processes between transparency and the protection of the privacy and confidentiality of any parties who are involved in them.

The Convener: Were the discussions that you mention minuted?

Professor Deacon: The discussions that I have had with colleagues in those other organisations were part of the normal business discussions that I would expect to have, both internally within an organisation and with partners and stakeholders, so they were not minuted. In those discussions, we explored and considered ways in which we can work better together in the public interest.

What I have done is reach out through HMICS to see whether this is another area in relation to which we can bring in additional support. The PIRC published an audit of the SPA bit of the complaints process just before the new year, so that is another report that contains a series of recommendations and areas for improvement. Again, that shows that I am not waiting to continually improve and develop.

One of the factors around the process that we have is that it has a certain amount of complexity in it. That is probably because people, including policymakers, were working hard to put in place a system that was robust. However, for the public and the police service to have trust and confidence in, and a shared understanding of, any process, it needs to have a certain clarity around it. I think, therefore, that there is scope for us to consider ways in which we can, at the very least, make that process clearer and better understood in relation to where the different responsibilities lie. If there are ways in which we can make the process more streamlined and effective in future, we should seek to pursue them.

To answer to your question, I have conversations and discussions with all sorts of people all the time. I assure you that, where I think that it is necessary and appropriate to have a formal record of a meeting, I will ensure that there is one. However, more often than not, the kinds of discussions that I am talking about take place in what I would call the improvement space and are exploratory discussions that involve people thinking about ways in which we can work together and develop issues.

I stress again that I am always happy to come back to the Parliament and report on what we have done as an outcome of those types of discussions.

The Convener: You have said that you are working in partnership with the cabinet secretary and other people, which can be a good thing. However, you also have an independent role as the chair of the SPA, which involves protecting the independent deployment of police officers.

You are already on record as saying that you think that the cabinet secretary was right to ask questions. However, there has also been a

question about situations in which the cabinet secretary should use his special powers. What is your understanding of when special powers should be used?

Professor Deacon: As you said earlier, convener, it is often much easier to discuss issues in relation to the specific situation rather than to do so generically or hypothetically. I assume that the power that you are referring to is the ministerial power of direction, which exists across a wide range of areas in the public sector landscape and, in the 18 years of the Scottish Parliament, has rarely been exercised. I guess that, ultimately, it is a power that resides with any minister.

As I said, I take very seriously the responsibilities that are vested in me as chair of an arm's-length body of Government. All my experience, including from my former life as a minister with responsibility for more than a couple of dozen public bodies, tells me that the best way to keep public bodies at arm's length is to have bodies that are led effectively and which function effectively. It is when those aspects are called into question that ministers need to shorten the arm's-length control, intervene and ask questions.

I am working hard to ensure that we have the right relationship with the Scottish Government, which is a combination of regular communication and having a clear separation of roles and functions, as is appropriate for the body's statutory functions and the terms that are laid down in a raft of codes and governance frameworks on the operation of public bodies. However, I know that the best way in which we can do that—the best thing that I can do—is to ensure that the SPA is operating effectively, such that ministers and Government officials do not have to call into question our processes or lack confidence in what we do.

Daniel Johnson: Following on from that, you said in a previous answer that if you had had the sort of request—to use the cabinet secretary's language—that your predecessor received in November 2017, you would have treated that as a sign of failure. If you received such a request, would you want to make a formal record of it?

Professor Deacon: Again, we are into the realms of the hypothetical, but I return to what I said earlier because I think that it answers your question and is incredibly important. If there is a good, effective decision-making process in place around, for example, the matters that were considered at the meeting of 7 November 2017, almost by definition, all the process that comes before, during and after that meeting will be well structured, well planned, well organised and well recorded. If those things have not been done properly, there is no audit trail of things being done in the required way. For my part, if I were dealing

with a comparable situation in the future, I would expect that there would be proper communication that, as appropriate, could be tracked prior to the meeting, and that soundings would be taken from a range of different parties and stakeholders with a view and an interest—DCC Livingstone has talked about the Police Scotland dimension of that at some length. Again, if we are following through on a decision that has proper communication and handling around it, we are in a different place, frankly, and the process is better and more sound.

Daniel Johnson: I am not sure that I entirely follow you. I agree that those measures are important and need to be followed through as a matter of procedure, and that the procedures need to be recorded. However, if there is a failure of those procedures and there needs to be some sort of intervention, given the sensitivity and the need for a record, surely that intervention needs to be recorded.

Professor Deacon: To be honest, I do not think that I can add a great deal to what I have said already.

Liam McArthur: DCC Livingstone has recognised certain governance issues that need to be addressed, and he quite rightly paid tribute to the on-going work that officers and staff are doing day and daily. However, in a succession of reports, Audit Scotland has highlighted weaknesses in financial management. Indeed, in the most recent report, the Auditor General states that the audit

“identified a number of instances of poor governance and poor use of public money ... This is unacceptable.”

The report then points to the need for greater effectiveness and transparency. Do you accept that financial management and oversight by the SPA has been, to date, haphazard at best? What needs to be done to put that situation right?

Professor Deacon: A series of section 22 reports from Audit Scotland over the past few years has highlighted what, in its view, is a range of shortcomings with regard to the SPA’s financial management and stewardship and by extension, given the nature of the relationship, the financial management of the wider Police Scotland budget, which is in excess of £1 billion. As a result, the matter is of considerable public interest.

However, it is important to note that, as Audit Scotland acknowledged in its last report to Parliament on the subject just before Christmas, there have been improvements in financial management and stewardship, and a lot of that has been to do with strengthening the financial management capability in Police Scotland. Indeed, this was the first year in which the SPA’s accounts were not qualified. It is important to note that progress has been made, and I hope that that that

gives some assurance to members and the wider public.

Liam McArthur: That is certainly a fair point, and it has been made in the evidence to the Justice Sub-Committee on Policing, too. However, if that assurance is to lead to delivery of the improvements that we need, the Auditor General has also suggested that a good deal of work needs to be done on detailed implementation strategies. What assurance can you give us that those strategies will be forthcoming in the coming months?

Professor Deacon: I am happy to give an assurance that that is an area of significant attention both for me and for Kenneth Hogg, the new interim chief officer. Indeed, we have had discussions with Audit Scotland precisely to ensure that we address the issues that it has identified in various reports. Of course, the chief officer of the SPA is also the accountable officer, so particular functions fall to him, and I know that one of the things that he is looking at is to ensure that he can fulfil those functions effectively.

The Parliament’s Public Audit and Post-legislative Scrutiny Committee is also meeting this week to look further at the issues raised in the section 22 report, which again pre-date my being in this role. The report also highlights a number of important points about how to improve not just financial stewardship but financial decision making—and, again, a lot of the issues that I have raised today come down to decision making. I again give an assurance that the areas raised in the section 22 report form part of the evidence base that I and the chief officer Kenneth Hogg are looking at to see where we need to prioritise improvement.

Liam McArthur: One of the issues that has drawn most public attention and, I think, anger has been the payments made out for relocation, tax liability and expenses, and to the outgoing chief executive. The cabinet secretary informed the Parliament that the SPA had no discretion, but it has transpired that it certainly did with regard to a certain element. I would welcome your comments on that and, in particular, an assurance that steps have been taken. You have talked about early action being taken in other areas, but is early action being taken to ensure that such payments and instances cannot be repeated in future?

Professor Deacon: The examples that you highlighted are, of course, the very matters that the Public Audit and Post-legislative Committee will be considering this week. My predecessor as chair, the previous chief executive and two current board members involved in those decisions will be appearing before the committee, and the matters will be explored further.

I am interested to see what we can learn from the experience in order to do, as you suggest, everything in our power to ensure that decision making around financial matters is better and stands up to scrutiny more effectively in the future. I give an assurance that we will work very hard to make those improvements. I am sure that we will not get everything right—I have never known of an organisation or a human being that gets everything right—but we will work as hard as we can to ensure that the arrangements work as effectively as possible and that the SPA itself has the processes, procedures and capability in place to be able to manage such matters effectively.

12:45

The Convener: I have a final question for DCC Livingstone. We regularly have representations from the Scottish Police Federation about some of the pressures on front-line policing. One of the pressures comes from the introduction of legislation and coping with the changes as a result. Most recently, the Criminal Justice (Scotland) Act 2016, which introduces the police station duty scheme, has come into force. We understand that the solicitors and bar associations of Edinburgh, Aberdeen, the Borders, Falkirk and Dunbartonshire have indicated that they will not take part in the scheme and that the Glasgow Bar Association is thinking about it. That amounts to a quarter of all the duty solicitors in Scotland. Can you comment on that specifically and also more generally on the impact of legislation and how it affects the day-to-day job of the police?

Deputy Chief Constable Designate Livingstone: The change to criminal procedure is the most significant since 1980. Section 2 detention—which became section 14 detention—of six hours for the purposes of an investigation has now been discarded, following Lord Carloway's review. The build-up to the change has been significant. We have had to train and retrain for implementation a couple of times because of issues outwith our control. Preparation for Thursday, which is when the provisions come into force, has been significant. The police service, through the custody division, has carried out preparation to ensure that there is someone on call and on duty 24/7. There are several individuals who can be contacted if an officer or a member of staff has a query regarding the implementation of the new legislation and the interpretation of the duties. We have experts who can provide that insight. We have been working very hard towards that.

I discussed the recent changes with the Crown Agent, Colin Lancaster—the chief executive of the Scottish Legal Aid Board—and Neil Rennick from the Scottish Government, on the back of a justice

board meeting that was held last week. That was very dynamic because the scenario that you have described was just emerging. For the avoidance of any doubt, that conversation was not minuted: we sat together after the meeting concluded, and it was brought to my attention how significant the challenge would be, given the position of the bar associations.

My understanding today is that there is still confidence that the legislation can be implemented and that, if required, the Scottish Legal Aid Board, which has primary responsibility for ensuring that there is access to solicitors and that a sufficient body or stable of solicitors is available, has several contingencies in place. We, too, will support and facilitate that if required. That might mean moving an individual prisoner from one area to another in order to facilitate their access to the legal advice to which they are entitled—if the case was of a magnitude to merit that or if, based on risk or various other factors, there might be a case for liberation. A whole series of contingencies are being built around that and we will not know whether those will come into play until the final hour.

In another role in the justice system, I have been working with the legal aid review that Martyn Evans has been leading—I am a member of the review board. We can contribute to making progress on the legal aid system. Access to legal rights is critical.

There is an issue with the 2016 act, but I understand that the measure will be implemented nevertheless. We hope that that happens because we have been up to the edge a couple of times before. We need to move forward to the new system of criminal procedure that the act is there to implement.

The officers and staff of Police Scotland have been through an enormous amount of organisational change, including increased scrutiny and focus, and legislative change. Speaking for myself, I think that we have a very good relationship with the Scottish Police Federation. I listen to its representatives and have enormous respect for the work that they do, and they have raised a number of issues about wellbeing and working conditions on which I have taken action.

We have three-year and 10-year strategies, but there are some very practical things that we can do to improve working conditions and how people feel about their work. We can take steps towards doing simple things, such as introducing sat navs in vehicles and looking at the quality of the trousers that we issue, which sounds like a very mundane issue. There is also the very fact that we are prepared to listen and to try to adjust some of our practices.

In terms of our ability to flex with new legislation, policing is very good at dealing with unexpected things and responding quickly. Another benefit of the national service is that we can concentrate resource. We do not need eight policy or governance units to do some of the background work; we do it once, to a high standard, and then we make sure that all officers and staff get it. The federation is absolutely crucial, as are the superintendents associations and the trade unions. Their involvement is absolutely vital for building the organisation into the one that we want it to be.

The Convener: You mentioned the movement of prisoners, but we will not go into that again because it has been raised with the federation and I believe that it will continue to be raised.

That concludes our questioning. I thank you both very much for attending the committee today.

Justice Sub-Committee on Policing (Report Back)

12:51

The Convener: Agenda item 7 is feedback from the Justice Sub-Committee on Policing on its meeting of 18 January 2018. Following the verbal report, there will be the opportunity for brief comments or questions. I refer members to paper 7, which is a note by the clerk, and invite John Finnie to provide that feedback.

John Finnie: As the convener said, the Justice Sub-Committee on Policing met on 18 January. There were two items on the agenda. One was the appointment of the convener, and I am grateful to the members for electing me. I am also very grateful to Mary Fee for her work and would like the record to show that. She worked in a very consensual way, and I hope to carry that forward.

The other agenda item was a discussion in private of our work programme. Looking ahead, we hope next Thursday to cover the issue of undercover policing with Her Majesty's inspectorate of constabulary in Scotland.

I am happy to take questions.

The Convener: We also welcomed Daniel Johnson to the sub-committee, and he duly declared his interests.

As there are no questions, we now move into private session. The next meeting of the Justice Committee will be on 30 January 2018, when we will hold two round-table evidence sessions, one on Brexit and family law, and the other on Brexit and civil, commercial and consumer law.

12:53

Meeting continued in private until 12:59.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@parliament.scot



The Scottish Parliament
Pàrlamaid na h-Alba