OFFICIAL REPORT
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Finance and Public Administration Committee

Tuesday 27 May 2025

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CONTENTS

	Col.
CARE REFORM (SCOTLAND) BILL: FINANCIAL SUMMARY	1
SCOTTISH PUBLIC INQUIRIES (COST-EFFECTIVENESS)	22

FINANCE AND PUBLIC ADMINISTRATION COMMITTEE
18th Meeting 2025, Session 6

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*Michael Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Ross Greer (West Scotland) (Green)
*Craig Hoy (South Scotland) (Con)
*John Mason (Glasgow Shettleston) (Ind)
*Liz Smith (Mid Scotland and Fife) (Con)
*Michelle Thomson (Falkirk East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ryan Anderson (Scottish Government)
Michael Clancy (Law Society of Scotland)
Laura Dunlop KC (Faculty of Advocates)
Lee Flannigan (Scottish Government)
The Rt Hon Lord Hardie
Dr Emma Ireton (Nottingham Trent University)
John Paul Liddle (Scottish Government)
Richard Pugh KC (Compass Chambers)
Maree Todd (Minister for Social Care, Mental Wellbeing and Sport)

CLERK TO THE COMMITTEE

Joanne McNaughton

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Finance and Public Administration Committee

Tuesday 27 May 2025

[The Convener opened the meeting at 09:00]

Care Reform (Scotland) Bill: Financial Summary

The Convener (Kenneth Gibson): Good morning, and welcome to the 18th meeting in 2025 of the Finance and Public Administration Committee.

The first item on our agenda is evidence on the latest cost estimates for the Care Reform (Scotland) Bill from Maree Todd, Minister for Social Care, Mental Wellbeing and Sport. She is joined today by John Paul Liddle, deputy director, national care service; Ryan Anderson, head of the digital health and care policy and strategy unit; and Lee Flannigan, head of national care service finance at the Scottish Government. I welcome you all to the meeting and invite the minister to make a short opening statement.

The Minister for Social Care, Mental Wellbeing and Sport (Maree Todd): Good morning, and thank you for inviting me to speak on the financial aspects of the bill after stage 2. I have provided a summary paper of those costs in response to the committee's request.

The national care service is moving forward with a revised approach. Parts 2 and 3 of the bill are going ahead, which will ensure that vital reforms are made relating to information records and standards, procurement, Anne's law and a right to breaks for unpaid carers. Stakeholders have told us time and again that all those areas need to be improved. However, as a result of the removal of part 1 of the bill, the anticipated costs, savings and changes to revenue that were expected to arise are no longer relevant.

Part 2 of the Care Reform (Scotland) Bill, as it is now named, relates to health and social care information, with provision giving ministers the power to set up a statutory scheme to permit data sharing and produce information standards. Part 3 relates to reforms connected with the delivery and regulation of social care, with provision for a right to breaks for carers; rights to visits to or by care home residents—that is, Anne's law; powers for the Scottish Social Services Council to require information; protection of adults at risk of harm; a national social work adviser and agency; and independent information, advice and advocacy.

I firmly believe that the provisions in the bill, as amended at stage 2, are highly reasonable and balanced reforms to the existing system. As politicians, we must ensure that we effect the real change and improvement that people who use social care services require and, more important, deserve.

Financially speaking, the bill will cost far less to implement than it would have done when introduced. Our forecasts to the end of 2031-32, as per the previously revised financial memorandum, are now between £329 million and £545 million, of which £306 million to £512 million is directly related to breaks for carers. The previous range of costs prior to the stage 2 amendments, as presented in December 2023, was £843 million to £2,149 million over the same time period.

We already spend more than £6.1 billion a year on social care, as per the 2023-24 local finance returns data, but that spend is not transparent and it is not clear to people who need social care who is accountable for the service that they receive. However, we cannot think about the financial cost of care reform in isolation; we must think, too, of the many plausible benefits to people that will be delivered. For example, improving information sharing or independent advocacy and advice in care and support services could help to reduce the barriers to an individual's ability or opportunity to work, to increase their working hours or even to take up a new job, thus enabling more people to contribute to the economy.

My financial summary of 20 May 2025 sets out those changes, which will substantially reduce the cost of the bill since the removal of part 1. There are costs associated with introducing a right to breaks for carers, independent advocacy and the establishment of the national social work agency and Anne's law, as set out in the financial summary and the revised FM, but overall costs are greatly reduced.

As the committee will be aware, we are now driving some of that work forward on a non-statutory basis. We have set up the interim national care service advisory board, which met for the first time last week and comprises people with lived experience of accessing care, social care workers, care providers, the national health service and local government, with the ultimate aim of improving the sector.

The Scottish Government has worked enormously hard to reach a consensus with stakeholders and MSPs ahead of stage 3 scrutiny, and I am confident that we are in the best position from which to move forward. I hope that I have given you an overview of where we are with the NCS and social care reform, and I am happy to take any questions that you might have.

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

I have to say that it is quite difficult for the committee to have confidence in the figures that the Scottish Government provides when we were given a set of figures last week and already—only this morning, in fact—they have been altered quite substantially.

In the letter that you sent to the committee this morning, the figures in the "Information, advice and advocacy" and "Carer's Breaks" rows have been revised downwards, so the totals now range from £97.1 million to £160.9 million. Previously the range was between £114.2 million and £189.6 million. I understand the reasons that you gave in your letter for those revisions, but these projections go up to 2032 and the figures have already been changed since we were issued with the papers, only last Thursday.

Maree Todd: I apologise for that. There was an error in one table in the letter that we sent to the committee last week, and it was quickly spotted and corrected. Do you want to say more about that, Lee?

Lee Flannigan (Scottish Government): That was my fault. The letter said, in error, that the phasing of implementation started from 2025-26; for carers' breaks, it should start from 2026-27. That was our fault—it was a mistake in the phasing.

The Convener: The central point remains, though: how can the committee have faith in the Scottish Government's projection of figures? We received the original financial memorandum in June 2022 and an updated one in December 2023, but they have been altered monumentally in the time that has passed since. How can we be confident that this is where we actually are and that this is the way that we will go?

Regardless of that, there are still huge differences—we are still talking about the difference between £97.1 million and £160.9 million in one area alone. Those are huge variations in cost.

Maree Todd: I agree. The changes in the financial memorandum over the years largely reflect the changes to the bill. The bill has been refined and we have, as the committee will be aware, substantially changed course a number of times, and each time we have provided the committee with fresh estimates of what the bill will cost to deliver, according to what is intended by it.

We are getting very close to delivery point. There are still some unknowns about what refinements might occur at stage 3, but we have greatly narrowed the range and are pretty confident about the direction of travel.

The reason that the numbers were different in the letter that I sent last week—and the reason for the correction that I have sent today—was simply human error. A box in a table was completed and, as a result, the phasing started one year earlier than it should have, which knocked the whole table out of sync. The error was quickly spotted and corrected.

The reason for the range in the figures is that we are projecting 10 years in the future and the ranges get broader the further they are from the moment in time at which we start. Therefore, we are taking into account the projected increase in the number of carers and things like that, but we cannot know specifically how many carers will use the service in 10 years.

The Convener: The supplementary FM states:

> "The amended section does not specify the sort of provision that regulations are to make about independent information, advice and advocacy in relation to social care and therefore the potential cost implications of those regulations are wide".

How wide?

Maree Todd: We have given you a range, which is the best estimate that we can give at this stage. We are expecting some stage 3 amendments on that provision, and it depends on them.

You will forgive me, convener, but I am trying really hard to be as open as possible with the committee. I have said since my first day in this job that I will try to ensure that you are well informed and are able to scrutinise the bill. However, it is quite unusual for a bill going through the Scottish Parliament to experience such financial scrutiny between stages 2 and 3. Part of the reason for the range in those figures is that we expect some refinement at stage 3 that will narrow the cost.

Do you want to say more on that, John Paul?

John Paul Liddle (Scottish Government): Part of the reason for the range in the independent advice and advocacy figures is the need to work with the independent advocacy sector and the services to which an advocate might make representations on behalf of people to ensure that appropriate capacity is built up in the system over time. That work with providers and public sector partners will be on-going after the bill passes.

Maree Todd: As John Paul has said, the costs that we have provided are at the top end of what we predict, based on what we have heard from our co-design work and engagement with people who access social care. We are keen to work with small-scale local providers, because they know their communities best and can often link better to other local supports and networks. We are looking

at this as a possible expansion of capacity over time and are pretty keen to ensure that we deliver a sustainable increase in capacity by working with those small local providers.

The Convener: I appreciate your commitment to transparency. However, the committee is keen to look at this again, because there is virtually no resemblance between the bill as it was when it was first presented to us, in 2022, and the bill as it is now. It has been monumentally changed, which is why we have to look at it, given the amount of public money that we are talking about.

The supplementary FM says:

"At this stage it is not possible to provide a position on the total cost or how the costs will be phased."

That uncertainty is a cause for concern.

Maree Todd: I agree that we are in a difficult situation, and I do not really want to say more about when we expect to get clarity on the figures, but it is a function of the bill being at stage 2 rather than stage 3. The bill has not yet been finalised; Parliament will amend it and we will then be able to provide you with figures. At the moment, we are in negotiation with Opposition parties that are proposing amendments and talking about hypothetical figures for what it might cost to deliver on those amendments.

The Convener: One of my concerns is that what the bill originally set out to do—which it is still keen to do—was to ensure the same quality of service in my constituency of Cunninghame North as in your own constituency, in Caithness. That was the worry that preceded the development of the bill.

There are already huge staffing problems. For example, in Arran, in my constituency, the Scottish Government helped to build a new facility called Montrose house. It was opened by Shona Robison some years ago, cost £6 million and had a capacity of 30, but it is now half empty because we cannot get staff to work in it. The ferry issues make it difficult to bring people in from the mainland, and that should be seen alongside the demographic change in rural areas and the many opportunities to work in hospitality and other businesses.

How will you be able to deliver the staff, especially when that is likely to become more, rather than less, difficult as a result of Brexit restricting the number of people who can come into the country? How will we be able to deliver on the ground? We have gone through a huge process, which, I have no doubt, has kept you up many nights, but what difference are we going to see on the ground? Where will we get the staff to deliver on the Scottish Government's ambitions?

Maree Todd: You are absolutely correct to point to the issue of staff, particularly in rural areas. There is variability across Scotland, and when we dig into that, we find different underlying reasons.

In remote and rural areas, including where I live in the Highlands and in Arran, in your constituency, there are challenges in finding a workforce. There are labour shortages across the board. As you have said, that has been the case since Brexit, which Scotland did not vote for, and there has been an impact on Europeans, many of whom have left Scotland. Many of those people worked in hospitality, and others have since moved from social care into the hospitality sector. There are labour shortages right across the board, and we certainly feel them acutely in remote and rural parts of Scotland.

The United Kingdom Labour Government's most recent announcements on immigration will be catastrophic and devastating for rural communities. I can think of examples in my own area of communities that have very few young people, and that ageing demographic is hitting our rural Highland villages harder, faster and earlier than the rest of Scotland. There is no bank of young people who are waiting for jobs to walk into. Until recently, the problem was solved by immigration, but the Labour Party's announcement that it is stopping immigration for social care workers will undoubtedly be problematic in that regard.

09:15

We need to increase investment in social care, and the Scottish Government is doing that, despite the financial constraints that we have faced over the past few years. Everyone in our workforce is professional; they are regulated by the SSSC and are paid at least the real living wage, an investment that now costs the Scottish Government nearly £1 billion. It is significantly more than their counterparts are paid in England and Northern Ireland—I should say that Wales pays the real living wage, too.

However, we need to do more. We need to work from where we are now towards parity, and we need to invest in our social care workforce. Of course, there are challenges all over. I do not feel quite as nihilistic about it as you sound, convener; I think that we can rise to some of those challenges, and—

The Convener: I am not sure that "nihilistic" is the right word. Perhaps "pessimistic"—or, more likely, "realistic".

The Scottish Government is providing a really good offer for carers. We are talking about an average of four weeks' respite care per carer per year, of which 65 per cent is assumed to be

residential care for the person being cared for, with the remainder being intensive home care at 22 hours a week. However, how many staff will that require by 2031-32, and where will we find them? It brings us back to the very beginning and what the bill is all about. As I mentioned a few minutes ago, it is trying to ensure equitable delivery of services across Scotland to the requisite standard. However, we cannot do that without people. How many people are you expecting to recruit over the next six years?

Maree Todd: Do you mean the number of people simply to deliver the breaks for carers? Is that what you are specifically discussing?

The Convener: Yes, because that is quite a substantial part of the update that you have provided—your table shows that that element will cost between £97.1 million and £160.9 million a year. We are talking about needing quite a few people.

Maree Todd: That is why we have begun work already with the providers and stakeholders who will be involved in delivering that commitment, and it is why the introduction is being phased over 10 years. We recognise that there is a need to build capacity between now and when it is fully delivered.

The Convener: Right, but do you have any specific numbers for the people whom you would be looking for?

Maree Todd: I do not think that we have specific numbers.

Lee Flannigan: The number of new carers—

The Convener: How can you work out how much it will cost if you do not know how many people you will need to spend money on?

Lee Flannigan: We have taken the number of carers who are currently in the system and looked at the number of people who would require a break and the number of hours that are to be delivered. There are four different categories in that respect: less than 20 hours; 20 to 34 hours; 35 to 49 hours; and 50 hours and above. We have also looked at the percentages in the Carers (Scotland) Act 2016 to see what the target percentage would be for each of those tiers. Furthermore, we have engaged with stakeholders on what the potential number of weeks in replacement care would be and the associated costs per hour driven by that.

Although we have not looked specifically at the number of carers, we have done a lot of calculations to work out the hours that would be required, the number of carers who would be involved and the replacement care time that would be required, and we have tried to come up with what we think is a reasonable estimate of the total cost for carers' breaks. However, we have not specifically related that to the number of carers who would be required in the system.

The Convener: I do not quite follow that—it seems illogical to me. However, I will move on, because colleagues want to come in and we have a heavy workload this morning.

On the number of people who will be required, uptake of the service is expected to increase sevenfold between 2026-27 and 2031-32, according to your figures. If people are being offered the residential and weekend care that the bill intends to provide, surely there will be a much greater demand than is being anticipated. Why would you expect demand to peak in 10 years and then reach a steady state, which is what is being suggested? I think that there is an issue about the availability of staff and facilities, obviously, but surely that just means that there will be a huge pent-up demand that is not being met by the service.

Maree Todd: Lee Flannigan can come in if I do not cover this adequately, but our trajectory is based on our experience with the Carers (Scotland) Act 2016. There were similar concerns when that legislation was introduced that there would be huge pent-up demand and that delivery would require far greater capacity early on, but that was not what actually happened.

There are challenges. Carers often do not identify as carers, and they struggle to find out what is available to them. We are fairly confident in our trajectory, because of our experience with the 2016 act.

Lee Flannigan: There was a target for uptake of care assessments in the Carers (Scotland) Act 2016—it was about 34 per cent. The total number, therefore, should have been in the region of 256,000. At the minute, though, only around 6 per cent of the adult population have an assessment—the figure is 42,000—so we are currently significantly under the estimate made under the 2016 act.

We considered the percentages under the 2016 act—that is, 34 per cent for adults and 64 per cent for children and young people—and tried to reach that target population. Because we are so far under that level at the minute, we have phased things over a 10-year period. Given the slower uptake so far, we think that that should allow enough time to reach full delivery, as was intended under the 2016 act; it is based on the fact that the level is currently so much lower than where we had expected it to be. The 10-year timeframe will allow us to reach that target proportion of carers with assessments, which would entitle them to breaks.

The Convener: I know that colleagues are keen to come in. First up will be Michael Marra.

Michael Marra (North East Scotland) (Lab): For clarification, minister, is it correct that the bill no longer establishes a national care service?

Maree Todd: Yes, and its name has been changed to the Care Reform (Scotland) Bill to reflect that.

Michael Marra: That is useful. There is already some language in terms of civil servants, names of departments and so on. I understand that changing those might not be a priority, but, for clarity and for the public, I note that you started out by saying that you want there to be transparency as to those who are accountable. It is important to recognise that.

Maree Todd: It is still the Government's intention to deliver a national care service, and there will be national aspects to how we deliver social care. We have created an advisory board that will have some national oversight functions. We are still aiming for a national care service, but the bill will not deliver it—you are correct.

Michael Marra: So, this bill does not do it.

Maree Todd: Not in its whole sense.

Michael Marra: Okay. That is useful.

In your opening remarks to the convener, you said that the state of the financial projections is a function of the bill being at stage 2 rather than at stage 3. You have to recognise that we cannot evaluate a financial memorandum on that basis. Financial memorandums are presented at the start of the scrutiny of a bill, with projections. We look at them and consider whether they are realistic, and we ask the kind of questions that the convener has been asking. We cannot just have a blank cheque, waiting for what might happen at stages 2 and 3. That is not a reasonable position, is it?

Maree Todd: No, it is not reasonable, and that is why we have been in front of the committee quite so many times. With each substantial change to the bill, we have come back with financial information for you to scrutinise. I am keen for Parliament to do the job of scrutiny effectively.

Michael Marra: There are other reasons why you have been back in front of the committee. One of your predecessors, Kevin Stewart, objected to the idea that the bill might cost up to £1.2 billion. We then had evidence from civil servants and from you that it could cost up to £3.9 billion. The range of figures that you have brought to the committee over the past several years has been staggering, given the difference between them and the lack of clarity. We are still in a position, now, where we are referencing three different sets of documents across different timeframes in trying to understand what the variety of cost impacts might be. Do you think that that is being transparent to the public?

Maree Todd: I think that it is reasonable. The bill has been substantially refined since its introduction and, at each step of the way, we have provided fresh financial information. I think that it is reasonable and allows scrutiny by the Parliament.

Michael Marra: You started by saying to the convener that you have to be accountable to the public. Do you think that the public could understand that variety of different documents and the fact that we are comparing them? For instance, the original financial memorandum was extrapolated over 10 years, with a sum of £1.8 billion to £3.9 billion, but the new financial update covers seven years, with a cost of £436.6 million to £724.8 million. Even the timeframes over which you are undertaking the analysis are not comparable. Is there a reason for that?

Lee Flannigan: When we drafted the revised financial memorandum, back in December 2023, we kept the same essential timeline up to the end of 2031-32, to provide some level of consistency instead of extrapolating it further. You will recall that the first financial memorandum covered a five-year timeframe. To provide a greater deal of information to the committee, we extended that out to a 10-year timeframe, but that did not allow for comparability between the two. In subsequent issues, we decided to keep it extended out to the year 2031-32, to allow for some comparison between the figures that were presented previously and the current figures.

Michael Marra: Do you think that the explanation that Mr Flannigan has just given would be understandable to the public, minister?

Maree Todd: A member of the public with an interest in finances and who is used to looking at financial memorandums would understand it perfectly well.

Michael Marra: Really?

Maree Todd: Yes.

Michael Marra: Okay. I have my doubts.

Let us go back to the first point, about the accountability side, and also to your point that you still do not know what the costs will be across different parts of the bill, including from any amendments that might be made to the bill at stage 3. You said that new sections 37A to 37E, on information standards,

"do not significantly alter what was said in relation to costs"

in the original financial memorandum and that

"Costs do not arise from the primary legislation, they will arise from the information standards created under it."

Going back to the point about co-design, there are significant areas of the bill that just cannot be costed—is that correct?

Maree Todd: Yes, some significant areas will be delivered by secondary legislation. There will be some areas in which the final format has not yet been decided.

Michael Marra: Okay.

As of January 2024, there were 170 civil servants working on the bill at a monthly cost to the taxpayer of approximately £1 million. Is that still the case?

Maree Todd: Is the team still the same size, John Paul?

John Paul Liddle: It is a slightly smaller team now. This year, the budget for the national care service central team is £11 million, so it is slightly less than £1 million a month, if that was the right figure.

Michael Marra: So, it costs about 10 per cent less than it did. However, the bill is a fraction of the size that it was and its ambition is significantly less than it was—part 1 was deleted entirely. I understand that there is no direct relationship between the number of words in a bill and the number of civil servants who work on it, but the bill is a significantly different beast from what it was. Could the committee have clarity on that monthly cost? It would be fine for that to be given in writing.

Maree Todd: Yes, that is fine—I will certainly provide you with more information. As I have said nearly every time that I have been in front of the committee, the national care service team works with social care as well, and, at the moment, we collectively spend £6.1 billion per year on social care.

Michael Marra: I will leave my questions there. However, as a genuine point, minister, although I consider myself to be pretty well versed in financial memorandums—I have higher-level degrees in economics and other areas of finance—there are big parts of this financial memorandum that I find difficult to understand, because we are not comparing the same things. We are not comparing apples with apples; there are different timescales and approaches. Would it not be better to start again with a proper bill and a proper costing, so that we could understand what it is meant to do?

Maree Todd: It would not be appropriate to start again. The parts of the bill that remain are the parts that everyone has agreed are required to fundamentally improve social care. It is time for us to crack on with that.

Michael Marra: But you cannot tell us how much big parts of the bill will cost.

Maree Todd: As I said, and as you have stated yourself, the changes that have occurred relate largely to differences in approach. The most substantial change in the figures is because the approach in the bill has changed. We are settled now, in the main, on what will be delivered by the bill, and the range of potential costs and our confidence in those costs have improved greatly because of that. There is a settled position, and I think that the public would like us to get on with delivering it.

Michael Marra: I am glad that your confidence has increased.

09:30

Craig Hoy (South Scotland) (Con): Good morning. The document makes reference to the savings that carers currently provide to Scotland. The estimate that the Scottish Government has come up with is £13.9 billion per year, which totals £14.3 billion when healthcare costs are taken into account. Where does that figure come from and what confidence do you have that that is the net saving at the moment?

Maree Todd: Lee, would you like to answer that?

Lee Flannigan: Our economic colleagues arrived at that figure by assessing the number of unpaid carers in Scotland at the moment, attributing a value to their time and working out what it would cost if the state were to provide that care.

Craig Hoy: Footnote 11 says that the estimate is based on a

"Scottish government calculation of replacement care and hospital days avoided"

that used data from between April 2022 and March 2025. However, it then says that the estimate also used results from 2014 that are set out in "Weaver et al". A lot rests on that modelling, but, if you look up the Weaver study, you see that it involves data that was gathered in Switzerland between 2004 and 2007. Therefore, effectively, the savings estimate is based on census data from Switzerland in those years. From talking to people in the care sector, I know that, since that time, there have been significant changes in, for example, models of care, treatments, the need for hospitalisation and technology in relation to care. Going back to an earlier point, that does not give us much confidence in the estimate. The central element of the proposals is that, presently, unpaid care in Scotland saves £14.3 billion, but that estimate rests on data from Switzerland in 2004, so we should not have a huge amount of confidence in that number.

Maree Todd: Would you like to respond to that, Lee?

Lee Flannigan: I will need to check with my economic colleagues who did the calculation, but, overall, we are talking about a notional saving. It is a figure for what the cost would be if the state were to bear the burden of all the care that is provided by unpaid carers. We are not stating that that sum is a saving that would be realised in any system. However, I will talk to my economic colleagues about the calculation.

Craig Hoy: I want to go back to a point that Michael Marra raised. Minister, you said that the costs of preparing for the national care service were £1.6 million in 2021-22 and £12.3 million in 2022-23. A written answer that I got from the Government on 1 October last year said that the total cost to that point was £28.7 million—that is, effectively, £30 million for a project that, in large part, is not going to happen. Can you provide the committee with an update today on what that figure stands at?

Maree Todd: I do not think that we have that figure.

Lee Flannigan: We have a figure up to the end of the financial year 2024-25. At that point, the cost of the NCS programme was £35.5 million.

Craig Hoy: What is it projected to be by the end of 2025-26?

Lee Flannigan: The projection for 2025-26 is currently sitting at around £11.4 million.

Craig Hoy: As per the earlier remarks. To go back to Mr Marra's point, given that the scope of the bill has been reduced and the national care service initiative has been set to one side, why are we still looking at a run rate of more than £1 million a month?

Maree Todd: As I said, the national care service team does not work entirely on bill delivery—bill delivery is a great deal of what they do, but the ambition behind the national care service initiative, which is to reduce variation in the level and quality of care, is greater than the bill. The bill team delivers a large amount of work in that regard outside the work on the bill itself.

To put those costs into context, that £30 million over three years relates to work on understanding a system that costs £6.1 billion a year. That means that less than 0.2 per cent of the cost of the system is being spent on understanding how it works, on consultation and on the creation of ways of achieving improvements in the system.

Over the past few months, I have raised many concerns in the chamber about some of the changes that have hit us in social care in Scotland, such as the increase in employer national insurance contributions, which has had a devastating impact and will undoubtedly lead to some care providers going under, and the changes to immigration arrangements. I wish that all Governments spent time understanding the sector before making substantial changes.

Craig Hoy: With due respect, minister, the work on understanding was done by the Feeley review, with the Government then introducing a bill, so the money has not been spent on developing greater understanding. It has been spent on the pathway towards the creation of a national care service that you are no longer pursuing, so you could argue that a large chunk of that £30 million is taxpayers' money down the drain.

Maree Todd: I do not agree with that. A great deal of the spend by the bill team has been on co-design. Perhaps John Paul would like to say a little bit more about the work of the national care service team of civil servants.

John Paul Liddle: Some elements of the work done by my team were previously part of the bill but no longer feature in it, but we still intend to make improvements in those areas, either on a non-statutory basis or under existing legislation. For example, the team that was previously working on the aspects of the bill that relate to creating a new public body are now supporting the work of the national care service advisory board, which met for the first time last week. That is driven by the co-design work that we have carried out over the past two years around how people with lived experience can be supported to be represented and to participate in a decision-making forum. That work has directly informed and supported the establishment of the advisory board, which started meeting last week, as I said.

Similarly, there were provisions in the bill on improving how complaints in the social care sector are handled, and, although those are no longer in the bill, there is work that we can do under existing legislation—working alongside the Scottish Public Services Ombudsman and in partnership with local government, Social Work Scotland and a range of other stakeholders—to consider ways in which the existing system for complaints can be made easier for people to access and to progress through. Again, that draws on the co-design work that has been carried out over the past couple of years.

Craig Hoy: It almost sounds as though you are making the case that a national care service is not required, if all those things could have been done by simply reprofiling existing workstreams. Surely the huge monolithic national care service is not actually necessary, minister.

Maree Todd: You will understand that we substantially changed our approach to the national

care service. The original bill, as introduced, is no longer happening, but it would have involved lots of staff changing employer, and the Government would have had direct control. We changed to a shared accountability agreement, but, as you will understand, last year, the shared accountability agreement broke down, with the Convention of Scottish Local Authorities publicly stating that it no longer supported that.

This was not my intended approach. I believed that this level of substantial change required to be underpinned by legislation in order to deliver the change that people need to see. However, our partners—in local authorities, for example—have persuaded me that the changes can be made, and nobody is saying that the status quo needs to persist. What local authorities have told me loudly and clearly is that they can deliver the change that we want to see without legislation and without structural reform, so that is what we are doing. The work is continuing, as you say, on a voluntary basis, but a great deal of the current work on improving social care sits outside the bill.

Craig Hoy: I think that you are making the point that it is unnecessary. Let us look at one element that will happen, which is the creation of the national social work agency. There are quite significant costs in relation to building the organisation and creating dedicated human resources, finance and business management functions. On a point of clarification, the financial memorandum notes:

"The costs will be met by repurposing the existing budget allocated to the Office of the Chief Social Work Adviser".

Are you saying that all the costs will be met by making a saving from the office of the chief social work adviser, or do you anticipate the creation of the new body incurring additional administrative costs?

Lee Flannigan: Once everything is up and running and established, we assume that, in 2031-32, that will add costs of about £950,000, taking over the existing budget of the office of the chief social work adviser in addition to that. We think that the total cost of the body in 2031-32 would be around £14 million, of which £13 million would come from the existing budget.

Craig Hoy: For clarity, will the existing body be removed completely? No sponsoring element in the Scottish Government will remain, so there will be no duplication.

Lee Flannigan: No, the understanding is that the office of the chief social work adviser will no longer exist and everything will be transferred to the new agency.

Craig Hoy: Okay. Thank you.

Liz Smith (Mid Scotland and Fife) (Con): The Government has made great play of the co-design principle—which, I note, is still one of the underlying principles behind the change. At the start, minister, both you and your predecessor, Kevin Stewart, made a great play of the co-design. What went wrong that led to such a substantial change being made to the proposed legislation?

Maree Todd: I would disagree with the premise of that question. I do not think that anything went wrong with the co-design. It has been absolutely vital for the Government to listen to individuals who access and work in social care and to learn from them about the changes that they want to see.

One challenge that we have faced over the course of the bill is that there are strong stakeholder interests, not all of which are aligned. When the decision was made by local authorities to walk away from the shared accountability agreement, I said repeatedly that the voices that we were not hearing in the public debate at that time were those of the people who were accessing care.

Liz Smith: Minister, you are correct in saying that, at the time, there was substantial stakeholder engagement—obviously, the bill has a substantial impact for the country. However, by and large, those stakeholders were telling you that what was proposed in the initial bill was not at all satisfactory and that, on a cost basis, it was going to be unaffordable. That is what was coming back and, as you know, four committees of the Parliament had considerable concerns about the original bill.

My question is about the co-design principle. If co-design is to work well, surely the stakeholders with whom the Scottish Government is engaging must be able to flag up those concerns early doors, so that we do not get into this kind of situation, in which there has been a very substantial change—part 1 of the bill has completely gone—and we are repurposing four attempts at a financial memorandum. Do you accept that the principle of co-design has not worked in this instance?

Maree Todd: No, I do not. I will bring in John Paul Liddle to speak more about the value of co-design. The member is oversimplifying the stakeholders' feelings about the bill. As I have said, the people who access social care particularly loved the first version of the bill. They thought that it was the most true to Feeley's recommendations. However, local authorities and the unions were very strongly against it.

The stakeholders who access social care were less comfortable with the shared accountability agreement. They were concerned about the power resting with local authorities, the NHS and the

Government. They went with it as something that was workable, but it was not necessarily their first choice. Then, without coming back to the table to discuss it with the Government, the local authorities made the decision to walk away from the shared accountability agreement. Local authorities and unions were very strongly against the shared accountability agreement that they had jointly signed up to.

In the co-design work with individuals who access social care, those people said very strongly that they would have liked the first version of the bill. So, I think that you are misunderstanding the level of complexity—there is no one view from stakeholders on what they want to see in improvements to social care. There is no single view; there are a lot of strong, powerfully expressed different views. My challenge is to bring everyone with me as we make improvements to social care in Scotland.

Liz Smith: But that did not happen with the first iteration.

Maree Todd: It did not happen with the first iteration—that is correct. It did not happen with the second iteration. The core elements of this third iteration are the issues that everybody is agreed on and the changes that everybody wants to see.

Liz Smith: My point is that the principle is one thing, but the workability and the delivery of whatever is going to take place are a different issue. As I understand it, having read the *Official Report*s of the various committees that were involved at the time, the principle was generally pretty well accepted, but how workable the Government's proposals were was a completely different issue. That is where the opposition came from.

We started with one bill, which no longer exists, and we now have a second attempt at a bill that is based on what is seen to be more acceptable. Why are you confident that, when it comes to stage 2 amendments and possible stage 3 amendments, the on-going co-design will make the new bill much more acceptable to people?

09:45

Maree Todd: I am confident because, for a number of years, I have worked closely with all of the stakeholders involved. I am confident about where we are and what we are planning to do, and I am confident that we will find an impactful way forward. We all agree that the status quo is not acceptable and that change is needed, and we see the bill as containing the elements of change that are largely universally agreed upon.

John Paul Liddle: The continuing work on co-design is moving into a more detailed phase of work. The earlier co-design work was around the principles of establishing a national care service and what that might look like. The work that is now under way is a natural evolution from that. For example, there will be co-design work around any development of a record, to see how individuals would access and use that. The aim is to ensure that the development work that is carried out is informed by the experience of a real person trying to access the system. Similarly, the work that we will be doing on independent advocacy will involve individuals who have accessed advocacy support in the past or who have worked as advocates. We will ensure that the more detailed changes that we make to improve and increase advocacy support are informed by that experience.

Liz Smith: Given that on-going co-design, can I ask the minister what kind of amendments she is expecting at stage 3?

Maree Todd: I am working closely on the amendments with Opposition parties and stakeholders with an interest. On Anne's law, for example, I am very proud of the amendments that we lodged at stage 2. We worked closely on those with care home relatives Scotland, whose input I am very grateful for, and we think that they delivered a substantial improvement. Care home relatives Scotland has said that it wants further refinements that would ensure that the balance of power is appropriate between care homes and relatives. We are also working with Opposition parties to reach agreement on such amendments.

Liz Smith: The convener was asking about the possible costs. Do you predict that the stage 3 amendments may push up costs?

Maree Todd: In relation to Anne's law? I do not think so. As was clear at stage 2, some Opposition colleagues, including your Conservative colleagues, have lodged amendments that, should they be passed at stage 3, would have significant financial costs, but we are working together to find a satisfactory resolution. As was committed to at stage 2, we are working to reach agreement and to understand your colleagues' objectives and aims, so that we can achieve them in a way that is affordable and sustainable.

Liz Smith: Okay. So, there is the potential for some increase.

I have one final question. In an answer to Michael Marra, you said that you think that the new bill is, in the main, fairly settled. What evidence do you have for that?

Maree Todd: As I said, the bill team and I have a great deal of engagement with stakeholders with an interest, as we have had since day 1. I am now confident that the elements of the bill that remain are ones that everybody is agreed on and that will deliver the changes.

We have spoken a lot about whether those changes could be delivered in other ways than primary legislation. What is left in the bill are the things that absolutely need primary legislation to be changed and that everybody agrees on—I am very confident of that.

Liz Smith: And secondary legislation, too?

Maree Todd: There will be secondary legislation as a result of the bill, yes.

The Convener: That has exhausted questions from the committee. I have only a couple more. The first is about Anne's law, which you touched on. You said:

"It is expected that there will be some costs for care home providers and those supporting care homes, to promote and champion Anne's Law through staff and provider awareness sessions, formal training, updating visiting policies including the identification of the Essential Care Supporter and for printing leaflets and other administration."

You then went on to say those would be

"absorbed within the usual costs of following current guidance around named visitor policy"

and so on. Surely, if there are additional responsibilities and training, additional costs will be involved.

Maree Todd: As I have previously explained during various committee appearances and in the chamber, a great deal of Anne's law has already been delivered by secondary legislation—indeed, many of the changes that we need to see have already happened on the ground. The Care Inspectorate is a passionate advocate for Anne's law now, so I think that the cost that will be associated with the final iteration's introduction will be insubstantial, because much of the cost has accrued already in the course of normal work.

The Convener: Okay. Thank you. In relation to data, you have said that there is

"an associated 'integrated health and social care record' technical development which will"

make it

"easier to specify what information should be fed into the 'record' by what organisation. However, the Scottish Government considers the scope of the information sharing and information standards provision to be broader than this. For the avoidance of doubt Section 36, as drafted, will not in itself legislate for the creation of an 'integrated health and social care record'".

Why not? The committee was in Estonia last year, where we looked at X-Road, which is a tremendously integrated health data record in which everyone can look back through their individual health data, as can professionals. There are real issues about data interoperability. Will the data that the bill creates be interoperable?

Maree Todd: I ask Ryan Anderson to respond to that question.

Ryan Anderson (Scottish Government): Sections 37A to 37E, on information standards, are all about creating interoperability across our system, so that data is able to flow neatly and in forms that allow the different systems to talk to each other.

Section 36 then gives you the legal gateway that allows that information to be shared. Through section 36, we are seeking the ability to share the information in order not only to create a record but to do various other things that we must do across the health and social care sector in order to share information appropriately.

Sections 37A to 37E are where we will be able to set out an information standard that sets the format and the means by which that kind of information is transmitted, so that there is better interoperability of systems in Scotland, thereby improving the flow of data.

The Convener: How much is that likely to cost to deliver, and when will it go live?

Ryan Anderson: Information standards can be a multitude of things. I could not give you one specific cost today, because a variety of information standards are in existence.

The Convener: To make the changes that you have just discussed, how much are we looking at?

Ryan Anderson: Those changes would be rolling. The rate of technology change is such that new information standards come and go all the time. I can give you a figure for a large information standard and a figure for a smaller one, to set some context. The outline business case cost for the systematised nomenclature of medicine clinical terms over the course of 10 years, including optimism bias, is £33.4 million, and the Scottish Government is already investing in that. We are not likely to have to adopt many large international standards like that. In 15 years, we might have two to deal with: the 11th revision of the international classification of diseases—ICD-11—is the other one that is on the horizon.

The Convener: In the previous memorandum, there were specific sections on IT. Mention has been made of the fact that we are somehow expected to read the two previous financial memorandums in conjunction with the financial update. Would it not be easier to have one comprehensive document that laid out all the costs, as the committee requested some weeks ago? What is the point in looking at what the costs were projected to be in 2022 or 2023? That needs to be put to one side. We want to know what the position is as we go forward, and one

comprehensive, easy-to-access document that included IT as a component would provide that.

Ryan Anderson: When we bring forward secondary legislation on each of the information standards that we seek to bring forward, we will do impact assessments on them at that point. At this stage, it is not possible to say which information standards we will bring forward, because they change so rapidly. They need to be developed over time to ensure constant interoperability. Interoperability is not a static thing, so, at this point, it would not be reasonable for us to measure the cost of that over the course of a number of years.

The Convener: That is a worry, but I shall leave it at that.

I will give the minister the final word. Are there any further points that you wish to relay to the committee before I wind up the session?

Maree Todd: No, thank you. I am very grateful for the committee's time and its on-going scrutiny of the bill. I think that the changes that the bill proposes are ones that everyone in Scotland is now agreed upon, and I am keen to crack on and deliver.

The Convener: Thank you very much for your very helpful evidence. We will now take a break until 10 o'clock, to allow for a changeover of witnesses before we move on to our next agenda item.

09:56

Meeting suspended.

10:01

On resuming—

Scottish Public Inquiries (Cost-effectiveness)

The Convener: Our next agenda item is the second evidence session in our inquiry into the cost-effectiveness of Scottish public inquiries. I welcome to the meeting the Rt Hon Lord Hardie, who is the former chair of the Edinburgh tram inquiry, and Dr Emma Ireton, associate professor at Nottingham law school, Nottingham Trent University.

We will move straight to questions, because there is so much to dig into. Lord Hardie, you said that public inquiries often reinvent the wheel. Will you say a wee bit about your concerns in that regard?

The Rt Hon Lord Hardie: I made that point in relation to the setting up of the inquiry. In my case, the then First Minister approached me through the Lord Advocate and the solicitor to the Scottish Government to inquire whether I would be prepared to do the inquiry. When I said that I would be, a discussion took place about the terms of reference. An announcement was made in Parliament, in which the then First Minister referred to it being a swift and thorough inquiry, which raised expectations that the outcome would be determined quickly, without either the First Minister or me having any knowledge of what was involved or of how many documents, witnesses and so on we were talking about.

There was also an expectation that, immediately after that, I would walk into an office that was fully equipped and fully staffed and start work. I did start work, but the work involved finding an office. When we found an office, it was one that the Government was already paying rent for but was unused. It was in a good location for witnesses because it was near the station, so it seemed ideal. It also had portals in the floor for IT and what have you, so the assumption was that everything was hunky-dory, as it were. However, once we got started, it became clear that the IT system did not work. We had to rely on Creative Scotland, which had been the original tenant, to assist us with IT.

We then decided to have our own IT system. That was considered essential. The report sets out Vodafone's various attempts to install a cable—I think that it made three attempts before it got a cable. In the meantime, it had installed the internal data cabinet. However, without the cable, the effect of installing that cabinet was that we were cut off from the original Creative Scotland system. We needed to have temporary devices, which kept crashing. There was about six months of

frustration on our part and on the part of staff, and it was obviously a waste of money.

What I advocate is that, just before an inquiry is set up, there should be a unit—I suggested one within the Ministry of Justice—that deals with inquiries and has the necessary access to accommodation and knows what accommodation is available in the public sector. If there is not enough accommodation available in the public sector, the inquiry could go out to the private sector, as some inquiries do. The unit could identify the accommodation and satisfy itself that the IT systems that are in place are adequate for the task of the inquiry. It could also give guidance to the secretary as to what he or she has to do to establish the administration.

In fact, what happens each time there is an inquiry is that the chair has to start from scratch. That is a waste of money and also a waste of experience, because the chair—unless he or she has conducted an inquiry previously—will have no experience of setting up an inquiry. I mention in my submission that the 2014 House of Lords report on public inquiries made a similar recommendation. However, it is clear from the 2024 report that the Government did not accept that recommendation. It said that its reason for rejecting the recommendation was that there were not enough public inquiries to justify it. However, it set up a unit in the Cabinet Office that performs at least some of those functions.

I would still advocate for that function to be in the justice department. Even if there was not enough work on inquiries to keep civil servants occupied all the time, they could have other functions within the department. It is a bit like the police. My son-in-law is a police officer and he has a ticket for public order issues. If a public order issue arises, the phone call will go out from different police stations and officers will be picked out to rally at particular points and to get kitted up. There could be different officials in different parts of the justice department. There would not be one unit working all together; there could be one person in this unit and one in that unit. When an inquiry is about to be set up, the whistle would go and people would be seconded into a unit to set the inquiry up.

Dr Emma Ireton (Nottingham Trent University): There are two aspects that you need to think about in relation to the point on reinventing the wheel. The administration, IT, logistics and so forth absolutely are issues when an inquiry is set up from scratch. Every time an inquiry is set up, it also starts again with regard to procedure. The cost of an inquiry is not only due to the logistical and administrative side of how it is run; it is also due to the procedural way in which it is run. In the same way that many chairs do not have experience of setting up inquiries, they also do not have experience of running inquiries or of the relevant procedure. The current situation is that inquiries are set up, they complete their task and they then cease to exist, so a lot of the institutional knowledge of how they are run is lost. We do not have a central repository of best practice on the way in which inquiries are run.

The inquiries and investigations team in the Cabinet Office is a small team, but it has a very important role. It supports secretaries to inquiries in relation to some of the logistics, but it does not have the resources or the funding to capture lessons learned from how inquiries are run, such as what has worked well and what has worked less well, so as to create a repository of information to inform the decisions of future inquiries.

When there is a new inquiry and a chair is appointed, there is also no indication of and no discussion about how different inquiries are from other processes. There is no information available to inform people so that they can see what has been done in the past, what has worked and what might work well for a given inquiry. Every inquiry is different, and it is important that every chair has the flexibility to determine the most appropriate procedure. I am not suggesting that there should be prescriptive guidance, but there is currently no bank of information to draw on to inform decisions on the basis of the efficiency and cost-effectiveness of an inquiry. That is really needed.

The Convener: One of the issues, and the reason why we are taking this look at public inquiries and their costs, is that the costs seem to be astronomical. Not only does the timescale often run away from people, but there can be a concern that justice not only has to be done but has to be seen to be done. If inquiries take five or 10 years, or even longer on some occasions, there is an issue about that.

Lord Hardie, you have raised the issue of putting a specific budgetary limit on an inquiry. You wrote:

> "This approach might undermine public confidence in the Inquiry."

Surely every other area of public life has a set budget to which it must operate, and indeed a timescale, although the parameters can contain an element of flexibility. You are concerned that public confidence in an inquiry might be eroded if limits were set, but surely public confidence is eroded if public inquiries seem to go on and on, year after year. People might think that an inquiry will last one, two or three years, but they might still be waiting for an outcome after five, six, seven or eight years.

Lord Hardie: I understand that. If you were to indicate or set a budget and a timescale for an inquiry, that would have to be an informed decision. The problem is that nobody knows at the outset what is involved. The First Minister did not know that and neither did I. Just before we sat down in front of the committee today, I was speaking to Dr Ireton about when I started and we got a secretary in place. That is another delay: when a civil servant is appointed as secretary to an inquiry, there is a time lapse, because he or she must be transferred from their department, and the department will not readily give up a civil servant, particularly when they are not being replaced.

Once our secretary was in place, one of the first things that I asked her to do was to meet the interested parties—those who had been involved in the project—and ascertain the number of documents that each of them had. She came back to me with a first report, saying, "There seem to be about 2 million." I asked her to go back and ask the question again, saying that we did not accept that figure. The figure then came back as 20 million. I said, "No—go back to them." When she next came back, the final figure was 500 million documents.

Of course, that was unmanageable—nobody could manage that—so we had to devise a strategy for whittling that down to 3 million documents to put into a database. For the inquiry, I think that we used about 17,000 of those documents. The point is that, in whittling the large number down, there is a risk that you will miss something. We told the core participants that, if they thought that there were documents of relevance missing, they had to submit them.

10:15

Until you know what you are dealing with, it is not possible to fix a budget—that would be totally unrealistic—or a timescale. Those issues must be addressed if you are going to fix budgets. I am not against doing that but, if you fix a budget of £5 million or £6 million without knowing what you are dealing with, there is no way that you are going to deliver. If you have built up public expectations that they will get an inquiry for £5 million within three years, they and the media will start complaining when that does not happen.

The Convener: Dr Ireton, do you think that people are wildly optimistic when they set out the timescale and the cost of inquiries? I have rarely seen an inquiry come in at a cost that even approximates what was initially budgeted for in either time or funding. However, that does not seem to be the case in other jurisdictions. For example, Australia, which I do not think is wildly different from Scotland as a country, had a Covid inquiry that began in September 2023, finished 13 months later and cost £4 million, whereas the UK inquiry has cost well over £160 million already and has been going on for four years, while Scotland's Covid inquiry has cost £34 million and has been going on for three and a half years. Surely we can learn from elsewhere how to deliver these more effectively and efficiently in order to have a less debilitating impact on taxpayers.

Lord Hardie: Yes, of course I accept that—

The Convener: Sorry—that question is for Dr Ireton.

Lord Hardie: I am sorry.

Dr Ireton: There are two points to make about that, the first of which is about costs and budgeting. There is no transparency with regard to how the costs are calculated or how the length of the inquiry is estimated. However, there is also no consistency in how inquiries record their costs, so there is no meaningful way to do a comparison and make accurate estimates. If you are too precise about the figure, you will sometimes be setting up an inquiry against a figure that is almost pulled out of the air, given the data that you have to work with.

A much more important point—the difference between here and other jurisdictions comes down to this—is about the focus of the inquiry and, therefore, the way that it is set up. In other jurisdictions, there is a clearer focus on the purpose of an individual inquiry. We have had that focus in the past, but it has been drifting, and we have had massive mission creep.

If the subject matter of an inquiry was a tragedy, such as a boating disaster, you could have a very forensic inquiry that looked into the past, worked out what happened and on what date, who was there and the details of what went wrong, to prevent that from occurring again. Where there have been a number of similar incidents, you could have a policy inquiry—a higher macro-level inquiry—that would look at the macro level at what went wrong in the checks and balances and what systemic failures in administration and regulation enabled those disasters to keep occurring. To me, that higher level should be the primary purpose of inquiries.

There are also truth-telling inquiries. We have fewer of those in this jurisdiction, but there are more in other jurisdictions, such as Australia and South Africa. To keep using the example of the boating disasters, if there had been a series of disasters, historically, that were caused by past practices and systemic failure, a truth-telling inquiry would acknowledge past wrongs, correct the historical records and create testimonies and societal learning.

Increasingly, when asked what an inquiry does in the UK, the public, participants, members of Parliament and so forth say that it does all those things. If you are going to have inquiries that take a very forensic approach as well as looking at the systemic macro failings and producing a record of testimonies about what went wrong, you will inevitably have long, expensive inquiries. That is why ours are different—we are not comparing like with like. We might see that inquiries overseas are cheaper but those inquiries are either forensic inquiries to understand what went wrong, systemic inquiries to inform policy reform or truth-telling inquiries.

The Convener: What are the differences in terms of outcomes?

Dr Ireton: The outcomes are very different. Do you want a backward-looking inquiry that understands the detail of what went wrong? Is it sufficient to recognise that those things have gone wrong, or do you need to know what went wrong in the checks and balances? The outcome of a policy inquiry involves recommendations to inform Government decisions and consideration of how we change those checks and balances to ensure that something does not happen again.

The forensic inquiry looks at the detail of the incident and how we can stop that incident happening; the second type, which is about checks and balances, considers how we change policy to prevent that incident from occurring; and the third type acknowledges past wrongs and corrects the historical record—a lot of inquiries in Australia, for example, are First Nations inquiries, which involve correcting the public record.

A decision must be made about what the inquiry is for and how much time and cost you are prepared to invest to achieve the outcome. If you want a cheaper, more efficient, cost-effective inquiry, you decide what the priority is. To be clear, all inquiries do all those things—every inquiry will have elements of forensic investigation, truth telling and policy examination—but the issue is about what the core focus and the purpose are.

To be clear, the core participants—the survivors, the bereaved and so forth—are central to all those types of inquiries. I am not saying that there is a difference there. They are central to informing a forensic inquiry with regard to what went wrong, because they have the knowledge—

The Convener: Yes, but, in other jurisdictions, how are the inquiries received by the people on behalf of whom an inquiry is established? They are looking for justice, and there is a perception that they have not received it. My understanding is that, if an inquiry drones on for five or 10 years, the initial impetus is lost. As you will be well aware, once an inquiry report is delivered, the Government of the day, whether it is the UK Government or the Scottish Government, might agree to implement a host of recommendations, of which a proportion, at best, might be implemented a year or two—or five years—later.

There surely must be an element of frustration when an inquiry has taken years and cost a fortune and has resulted in an outcome that might not necessarily be better. Do you think that the UK's approach results in a better outcome than the punchier inquiries that have cost less and been delivered in a timescale that most laypeople—normal people, if you like—think is realistic? If someone says that they are really keen for a public inquiry to look at X, Y or Z, they do not expect to be told, "Okay, we might have a result for you in five or 10 years." Even though inquiries can drag on for years, people do not think that that will happen at the start; they all think that a public inquiry will come up with an answer perhaps in the next year or the year after.

How do those shorter inquiries deliver? Following the Australian inquiry into what happened during the Covid pandemic, is there still a level of dissatisfaction, or have people put that to bed and moved on with their lives? Do you get what I am trying to say here? What are we getting as a result of our different approach?

Dr Ireton: There are lots of different things in there. I would say that, in the UK and Scotland, we have lost focus on what inquiries are and that there is a better, clearer understanding elsewhere. In other jurisdictions, when an inquiry is convened, statements in the press and so on will say, "This inquiry is to inform policy reform," "This inquiry is to change policy to make sure that this doesn't happen again," "This is a forensic inquiry so that we can understand what went wrong," or "This inquiry is to correct the public record." That ensures that there is a better understanding of the purpose of the inquiry. We have created a problem that is not seen at the same scale elsewhere because we expect inquiries to do all those things as well as addressing issues of justice, redress, accountability and catharsis.

To come back to some of the points that you raised, you asked about those for whom the inquiry is convened. Well, it is not convened for them. A public inquiry is to address a matter of public concern, and it is the role of the Government to address matters of public concern.

The Convener: But they often come about because the Government is pressed to hold an inquiry by members of the public who feel that they have been wronged through a specific incident or a series of incidents—that is what I meant by my question. I understand the wider picture, but it is the people who are directly affected who press for the inquiries.

Dr Ireton: Absolutely—it is about those people, and they are the ones who end up having to push for the inquiries, but the inquiries are about them, not for them. There are all sorts of reasons why our inquiries have lost focus and got complicated, and that is one of them. We talk about the survivors and the bereaved as if they are a single homogeneous group, and they are not. Some of them want very detailed answers; some of them want a quick inquiry to make changes so that no other family has to go through what they have gone through; and others really want the public record to be corrected.

There is never consensus in any jurisdiction over what an inquiry should be, because those purposes all conflict with one another and a decision has to be made at the very beginning by the minister who is looking at all those balancing competing interests. They need to ask, "In this situation, what is needed from this inquiry? What do we, as the Government, need to inform us in order to address this matter of public concern? What is most pressing?" You can either say that all those things are needed—and accept that you will have massive inquiries where, by the time they report, it is probably too late to bring about meaningful change, or the incidents have been repeated and so forth—or you can accept that decisions need to be made and that some people will be disappointed and some people will be happy. That will always be the case.

In other jurisdictions, such as in Australia, when a quick inquiry is convened to inform policy, there will be people who push to say, "No, we need answers," and they are not wrong. I am not saying that any of those views are wrong. They are all absolutely justifiable, but they conflict with one another, so a decision has to be made about what the purpose of the inquiry will be. Everything that follows is affected by that decision. You cannot convene a huge inquiry to deal with everything and then say, "But we want it completed in two years."

The Convener: Okay. I will let colleagues ask questions in a second, because I know that everyone is keen to come in, but I have a further question for Lord Hardie. You have said that a direction advising participants that there would be no opening statements would avoid extra time being taken up at public hearings, as well as reducing time and effort on the part of legal representatives, and could also save money. Will you explain why the opening statements are such a lengthy and costly process that they impact on an inquiry?

Lord Hardie: For a start, the process is alien to Scotland. It is what happens mainly in court proceedings in England. As I understand it, the interested parties decide what their position is and they then involve solicitors and counsel in the preparation of an opening statement. That work could last half a day or a day, sometimes, depending on what they are talking about, so it is an expensive exercise. When we talk about the costs of inquiries, we must bear in mind that the costs that the Government pays to the chair and to all the officials of the inquiry do not represent the total cost of the inquiry, because there are core participants.

In my case, the City of Edinburgh Council was a core participant. It says that it spent £2 million on its representation. A similar amount—probably more—would have been spent by the contractors, and more by the designers of the operating systems and what have you. If you had opening statements, each of those people would probably spend weeks preparing for their opening statement to present their case in the best light, as it were, at the opening of the inquiry.

10:30

However, if you look at the Scottish rules, rule 10 gives the chair discretion as to whether there should be opening statements, and I issued a notice fairly early on that there would be no opening statements—not even by counsel to the inquiry—and that we would go straight into the evidence. The UK rules from 2006 do not give the chair that discretion. In England, it is mandatory to let everyone have their shot at an opening statement. To my mind, that is a waste of time and money, because, in an inquisitorial situation, it is for the chair to investigate and to indicate what evidence he is interested in hearing to satisfy his remit.

The Convener: That is interesting. I said that that was my final question, but I actually meant to follow up with another, which is about the Maxwellisation process. Rule 12(7) prohibits the inclusion of any criticism of a person unless the chair has sent that person a warning letter and the person has been given a reasonable opportunity to respond to it. That process takes a considerable amount of time. How long does it take? Those of us in the real world might think it would take days or perhaps weeks, but I get the impression that that is not the case.

Lord Hardie: It is not. You know who you are criticising, but the criticism is not all on one page or in one chapter; it will be threaded through the final report and you have to identify it. If you are dealing with one topic, you may be criticising individual A, but that individual might come up and be criticised again in connection with another topic. It is quite easy to know whom you are criticising, but you have to go through the report and identify all the points of criticism. Then you have to write to the individual and, because you

are dealing with their reputation, they must be given a fair opportunity to respond. You might allow a month, or even two, depending on the extent of the criticism. You will get their views or comments back and must consider those. As I indicated in my note, the responses that I got were substantial—one was several hundred pages long.

You have to do justice to the process. I suppose that you could say, "That's fine; we'll just carry on with it as it is," or you might find that you can adjust part of the report to reflect one of the individual's concerns, while still leaving some criticism of him or her, but that takes a long time.

In his response, Mr Mullin writes about the problem of Maxwellisation. Since I wrote my note, I have looked at the 2024 House of Lords report, which has a table at the back. That report seems to say that it is not necessary to alter the warning letters, because there is evidence that improvements to the warning letter process are possible within the existing rules. Unfortunately, I read that just last night and have not had time to identify the evidence that was before the committee. However, if there is evidence regarding how the rules can be used more effectively without contravening the right of an individual to comment in advance—I have no reason to doubt that that is the case—that should be explored. Maybe some of your researchers could find out what the evidence was.

Dr Ireton: That is not quite right. The way in which the rules are currently drafted makes it mandatory to serve warning letters if you are going to criticise someone in the report. That is the problem. The only change that needs to be made is that that needs to be discretionary rather than mandatory.

We need to look further back to understand what the problem is. Everybody is in agreement on common law duties of fairness—people need to have the opportunity to respond when criticisms are put to them. However, two approaches to inquiries have evolved in parallel. That takes me back to my point that we need a centre that understands what is going on in different inquiries and shares that learning.

Warning letters are not the only way to put evidence to witnesses. We have two kinds of inquiry. Inquiries that are more inquisitorial take the evidence themselves. They put adverse evidence to the witnesses when they are taking evidence and, if something new comes up, they can take a supplemental statement and put it to the witnesses during the oral hearings. In those cases, it is often entirely unnecessary to send everybody warning letters, which adds months and millions of pounds unnecessarily to inquiries. A number of inquiry chairs will have given evidence to that effect. They will say that they were forced to follow a process that had no purpose, created work and wasted money.

In other inquiries, what seems to have happened is that, to reduce the initial cost to the inquiry and cut back the inquiry team slightly, the gathering of evidence has been pushed out to participants and to the witnesses. Those doing the inquiry say, "Give us the evidence that you have got," and that situation becomes adversarial. It means that, immediately, witnesses are telling the inquiry what they want to say, and not necessarily what the inquiry wants and needs to have. The result is that you get quite patchy evidence. It can ultimately be much more expensive, because the inquiry has to go back and fill in the gaps. In that case, warning letters would need to be sent to everybody to ensure that everybody has had the chance to respond. There are certain circumstances in which it is right that everybody receives a warning letter, because of the way that inquiry has operated, but in other circumstances it is an absolute waste of time. By simply making it discretionary, chairs who said that they had no need to do it simply would not have to follow that process.

The Convener: Thank you. I will now open up the session to members.

Liz Smith: Based on the very interesting comments that you have just made, Dr Ireton, do you feel that there is a case for judge-led inquiries, to ensure that there is public trust?

Dr Ireton: It depends on the subject matter, the focus of the inquiry and what it needs to do. I do not think that there is a single answer as to whether inquiries should be carried out by judges.

Liz Smith: What criteria would you use in deciding that an inquiry should be judge led?

Dr Ireton: There are two ways of looking at that. If there is a more forensic inquiry or a huge volume of information and it plays to the skill set that judges have, it can be appropriate. If the inquiry is more policy focused, it will often be better to have an expert in the subject matter and the implementation of policy changes.

The individual makes a big difference as well. Each inquiry process is very different. They require people to approach the process in an innovative way and recognise that it is a different sort of process, to which they cannot just bring their previous experience. The work is much more team based, so we want people who work well in a team. It is about selecting the right person. Sometimes that might be a judge, because they are the right person due to their personality and skill set, and sometimes it might not be.

Liz Smith: In your experience, would that discussion be had between the Scottish Government and a proposed chair?

Dr Ireton: Yes, and, at the point of appointing a chair, more thought needs to be given to the individual and how they will fit in with that type of process, as well as to whether they are a judge.

Liz Smith: That is helpful. Lord Hardie, the terms of reference of any public inquiry are primarily for the Scottish Government to decide. In some inquiries, those who are affected by the inquiry, plus the chair of the inquiry and their team, will have input to those terms of reference. I think that I am right in saying that we have had three inquiries—Penrose, child abuse, and Covid—in which the terms of reference have changed over time because certain evidence has come out and there has been a case for making a change. Are we often under pressure to change the terms of reference, because of the difficulties with some public inquiries?

Lord Hardie: I am aware of some inquiries in which there have been attempts to extend the terms of reference. It did not happen in the tram inquiry.

It is important to get the terms of reference right at the beginning, and that is a matter for discussion between the Government and the chair who is about to be appointed. When I was about to be appointed, I was given the draft terms of reference, which indicated what the Government was looking for. I think that I suggested a minor adjustment to them and they remained like that.

I am aware that there was a request to extend the terms of reference in the Sheku Bayoh inquiry, but the minister refused. I could see that that inquiry was seeking to find out what happened and who, if anybody, was responsible.

Liz Smith: If evidence that has not been foreseen comes to an inquiry, is it appropriate to change, extend or modify the terms of reference, to allow that evidence to become a critical part of the inquiry?

Lord Hardie: If such evidence comes in, it is presumably because the chair has indicated that he or she is interested in hearing it, and, once they have heard it, it can form part of the report. It is difficult to see how, having allowed such evidence in, they can simply ignore it or try to accommodate it by saying that they have heard the evidence but it is not within the terms of reference. That should have gone through the chair's mind before they allowed the evidence.

Liz Smith: Just to be absolutely clear, am I correct in thinking that, if evidence is forthcoming that was not foreseen at the start of the inquiry, it is for the chair to go back to the Scottish Government for any amendment or adjustment to the terms of reference?

Lord Hardie: Yes. It would be for the chair to do that. Part of the difficulty with that is what happens once the terms of reference have been extended. Does that open the floodgates to another chapter of evidence that has not been anticipated? Do you then send your inquiry team out to see whether there is any further evidence within the extended terms of reference? That would, of course, extend the time taken for the inquiry.

Liz Smith: Before I ask my next question, I put on the record that I am involved in the Eljamel inquiry through my casework.

If it transpires during the inquiry that other jurisdictions might have some influence on determining what evidence is relevant and what might apply, how would the chair of the inquiry in Scotland take that on board in their discussions with the Scottish Government?

Lord Hardie: Do you mean—

Liz Smith: If it were to be the case that the terms of reference had proven not to be sufficient to allow evidence from another jurisdiction to be taken into consideration, would that matter have to come back to the chair of the Scottish inquiry, to be discussed with the Scottish ministers?

10:45

Lord Hardie: If you are speaking about taking evidence from someone in a foreign jurisdiction then that is a problem, because the chair would have no power to require that. That actually came up in the Edinburgh tram inquiry. We were fortunate that we had had discussions with the relevant core participants and they agreed that their witnesses would come over from Germany.

Liz Smith: That is why I am asking the question—I was aware of that. In the Inquiries Act 2005, it is clear that there is limited scope for such evidence. As I understand it, not even recommendations can be made to other jurisdictions. Nonetheless, some evidence from foreign jurisdictions might be relevant to a public inquiry. It is just a question of what process can be used to open that up.

Lord Hardie: We thought about that long and hard, and I reached the conclusion that the only solution was to have a discussion with the relevant core participants and to persuade them that it was in their interest for their witnesses from Germany to come and give evidence. The alternative would have been for me to comment in the report that we had made that request of the core participants and that they had refused. That would be the sanction, particularly for a major company that would be hoping to get contracts in the future.

Liz Smith: That is very helpful, thank you.

Michelle Thomson (Falkirk East) (SNP): Good morning, and thank you for joining us. I just want to finish off on couple of things. I think that it was you, Lord Hardie, who said that it would be up to the chair to go back to the Scottish Government if they were to seek an augmentation of the terms of reference. In one of the inquiries that is currently under way, there has been an intensive media campaign by one of the lawyers, rather than the chair, to press the Scottish Government for an augmentation of the terms of reference. Is that unusual, in your experience?

Lord Hardie: It is unusual for a professional person to do that when the chair has the necessary ability to do so. Ultimately, the chair may well have approached the Government.

Michelle Thomson: Okay—I am not certain about that.

I will also finish off the discussion about Maxwellisation. I disclose an interest, as I once ran a small business in primary research with Roger Mullin, who gave evidence about Maxwellisation. I read his submission with interest. One thing that is implicit rather than explicit relates to a power balance in going through the process of giving people the right to respond. I suspect that, inevitably, the people who have that right will have deeper pockets, and they may be representative companies. Has that power balance ever been considered in relation to Maxwellisation?

Lord Hardie: I do not think so. In my case, some of the people who received letters were in institutions, but some were individuals who were not legally represented, as far as I know. They were not core participants, and they may well have sought legal representation privately. Regarding the power balance, it is quite an exercise for an individual to respond. That is also part of the reason why you have to give them sufficient time to respond.

Dr Ireton: That issue is not specific to warning letters, though. Often, the warning letters will come out and there is nothing further to add—in a lot of cases, people come back and repeat their points. Those witnesses will already have prepared their submissions, however, and decisions will already have been made on whether they will get funded legal representation. Organisations that can afford to do without will not have funded representation. When those letters are required, they are required as part of the overall gathering of the evidence. The question relates to the whole process of whether somebody should have legal representation; it is not additional.

Michelle Thomson: I want to go back to where we started. If you do not mind my saying so, Lord Hardie, I had a little titter to myself when you made the quite reasonable point that nobody knows the scope of such a piece of work. You might have a better recollection than I do, but I distinctly remember the people undertaking the tram inquiry saying, "Frankly, we didn't know how much uncertainty and complexity there was once they started digging underground."

That speaks to the need for a proper, comprehensive approach. Although "project" is not quite the right terminology, because it is business focused, inquiries are projects in that they have a defined start and end, as well as all the other things that we have talked about: terms of reference, scope, purpose and budget. Last week, when Professor Cameron was in front of the committee, I asked him whether there was

> "any other arena that you have dealt with, in the course of your career, where there is no cost control whatsoever although millions of pounds are involved; where the terms of reference do not ordinarily contain a budget; where there are no stage gates or phasing of the inquiry; and where there is no active monitoring? Have you ever come across that in any other walk of life in your career?"

He said:

> "No, I have not."—[*Official Report*, *Finance and Public Administration Committee*, 20 May 2025; c 41.]

Are we getting a bit confused by what I fully accept is the uncertainty and complexity? Public inquiries are, in and of themselves, the only project in any public sector or private business work that would not adopt a project methodology. Perhaps the question is better for you, Dr Ireton. Are there compelling reasons why we do not put some proper methodology in place?

Dr Ireton: No. Methodology should be in place. It is about the two areas that I talked about earlier, and there should be a central repository.

Cabinet Office guidance, which goes back to 2012, requires all UK inquiries to produce a lessons-learned report, which must include what they have learned in their processes and what they would recommend to inquiries in the future. Such reports have, almost without exception, not been produced, but they would be incredibly valuable. The reports need to go to a central body and be analysed, and the information needs to be publicly available. Some inquiry teams have produced small case studies as they go along, which are actually very helpful, but as they go to the Cabinet Office team, I have never seen any of them and do not know anyone who actually has.

We need the information from every inquiry, as it runs, in terms of what has worked and what other inquiries could learn from it. We also need to embed evaluation into the inquiries, rather than just waiting until an inquiry ends and then saying, "What would you have done differently if you did it

again? Well, we would not have gone down that route."

We need periodic evaluation with insight from those who are engaging with the inquiry, such as core participants, witnesses in various categories, counsel and everyone else. We need to ask, "What is this inquiry? What are its aims? What is it meant to achieve? Is it achieving that?" The feedback should go to the chair, so that the inquiry can improve its efficiency and cost-effectiveness as it goes. The inquiry team can learn and check as they go, and at the inquiry's end, the lessons learned should go to a central repository and be available to all future inquiries, so that inquiries continuously improve as we go forward.

We are not getting that. We have pockets of excellence and little examples of innovation in inquiries that are working really well, but the lessons are not being gathered and disseminated, so we are losing them, and it is almost chance how each inquiry conducts itself.

Michelle Thomson: We have had quite a lot of media interest that perhaps suggests that the problem is uniquely Scottish, but you are making it quite clear that it actually appears to be UK-wide.

Dr Ireton: Yes.

Michelle Thomson: I want to explore the potential for conflict of interest a wee bit. Last week, I brought that up with Professor Cameron, who made it clear that the potential for such conflicts was actively considered. Today, we have had several examples of that: I declared an interest, as did my colleague Liz Smith.

We have, however, seen the example of a solicitor who takes on or prospects for a very high-profile case and then actively advocates for—and lobbies their best friend for—a public inquiry. In that particular instance, the best friend happened to be the justice secretary in the Scottish Government. A public inquiry was then confirmed. This may be a question for you, Lord Hardie. Surely, in such instances, there must at least be the potential for a significant and disclosable conflict of interests. Is that a usual approach? Have you have seen such a conflict of interest? We have a small network of relationships in Scotland and that is certainly a consideration in Jersey, which is smaller again. Would you actively consider that or hope that it would be considered?

Lord Hardie: That might ultimately be a question for the Parliament. I gather from your question that there may be some suggestion of impropriety if someone is lobbying the appropriate minister for his or her own benefit. I think that that would ultimately be a parliamentary issue.

A conflict of interest arose in a different way in the tram inquiry, because the solicitors who had acted for the City of Edinburgh Council during the building project amalgamated their practice with that of the solicitors who had acted for the contractors. At the preliminary hearing, I raised the question of whether there was a conflict of interests, but they said that their respective clients had insisted on their continuing to represent them and that they had Chinese walls.

If the chair is aware of the question of a conflict of interests, he should at least raise that with the inquiry, so that it can be addressed.

I also indicated in my note that the advantage of setting up a unit within the justice department would be that that would avoid any conflict of interest. There is not always an actual conflict, but there can be a perception. In my case, the sponsoring department was Transport Scotland, which also put up Chinese walls to keep things separate. I was always a wee bit uneasy about the perception that the department that had been actively involved in the tram project was sponsoring and funding the inquiry into it. Such work might better be channelled into the justice department, which would be accustomed to dealing with litigation against the Government and would be more apparently independent.

Michelle Thomson: A question that would often be asked in such a case is who would benefit from any course of action. An example that I gave involved someone calling for an increase in the scope of a public inquiry while, at the same time, representing the core participants and therefore potentially being a significant beneficiary. As you say, that can often simply be about perception. We know that the chair can choose to take action, but are you aware of any formalised process that allows those questions to be asked?

Lord Hardie: No.

Michelle Thomson: Do you have anything to add, Dr Ireton?

Dr Ireton: Not specifically.

The Convener: We move to questions from Craig Hoy, to be followed by John Mason.

Craig Hoy: My question is about cost control, Lord Hardie. You have set out your concerns that imposing cost controls or a timeframe threatens an inquiry's independence. Setting that to one side, given that the funding comes from the public purse, what spending controls would be necessary to uphold public confidence while maintaining the independence of the chair? In practical terms, what could be done to control costs?

11:00

Lord Hardie: At the moment, discussions take place between the secretariat and the sponsor

department at the outset, and an annual budget is fixed and a timescale is set on what you hope to achieve with that in that year. That is reviewed within the year—I think that there are monthly reports on expenditure and on where we are in the process. The following year, another budget is adjusted. Clearly, that has the risk of cost creep unless the department is exercising significant control over the budget and asking the secretariat sufficient questions. That would then come back to me, obviously. I was not aware of any serious challenge of our budget or of our timescale.

Craig Hoy: In his written evidence, John Sturrock KC suggested that

"some sort of oversight and support"

for public inquiries might be necessary. He continued:

"The balance between chair independence from external interference and value for public money is a delicate one."

There is potential to have an oversight function. Could that be carried out by an independent organisation, such as Audit Scotland, or by somebody who is independent of Government but maintains reference to the public purse?

Lord Hardie: Yes. If you are going to have oversight, it should be from somebody who is independent, such as Audit Scotland.

Craig Hoy: The other element in relation to value for taxpayers' money is what is done with an inquiry report. In your submission to us, you argued that, effectively, the reports can

"sit on ministers' shelves gathering dust".

What could be done in the future, either by the Parliament or by an external body, to ensure that the lessons that should be learned are acted upon?

Lord Hardie: The responsibility for that falls to the Parliament. The Parliament should hold the Executive to account and say, "We've seen that the report on the Edinburgh tram inquiry has been submitted. There are so many recommendations. What is the Government's response to each of these recommendations?" The Parliament should keep on about that and then, once it knows that the Government accepts some of the recommendations to be well founded—if it does accept that—it is for MSPs to say to the Government, "What are you going to do about it?" They must keep up the pressure, because, unless that happens, they will be ignored. Even past recommendations in UK inquiries that have been accepted are not necessarily implemented. The Government might say, "We don't have the time for the legislation," or what have you. It is up to MSPs.

Craig Hoy: Dr Ireton, are there international examples of Governments putting in place a better mechanism to ensure that lessons are learned and then implemented?

Dr Ireton: Yes, there are. We are looking at two things here. First, there is oversight, and, secondly, with oversight you also need scrutiny. If you just have an oversight mechanism, it is not uncommon for there to be slightly inaccurate or exaggerated recording of implementation, so you need scrutiny.

For example, in Australia—this seems to be working well—certain royal commissions, which are pretty much the same as our statutory inquiries, as part of their recommendations have appointed an implementation monitor. Sometimes they name the implementation monitor, and sometimes they recommend that an implementation monitor is appointed. It is the implementation monitor's role to scrutinise implementation. The monitors are subject specialists, they carry out proper evidence-based scrutiny of implementation and they report directly back to Parliament. Therefore, everybody has an accurate oversight of implementation.

Another thing that is used in other jurisdictions—I am not aware of it working fully well, but it is in parts and it seems such an obvious and simple thing to do—is a central resource that anyone can go to—a website where they can find out what inquiries there have been in Scotland and which inquiries are currently operating, with links to their websites and information on when they are completed, their reports, the responses and updates on implementation.

Currently, there is no transparency. We need scrutiny by the public, by the people who campaigned for the inquiries in the first place and by the media. However, it all disappears behind closed doors and it is then very difficult for anybody to understand what has happened with implementation and whether the inquiry has been followed through.

Craig Hoy: I go back to the role of the legal sector in relation to cost control, mission creep and so on. In his submission to us, Roger Mullin says:

"The unintended consequence of this is that individuals and legal firms, paid on the basis of their time involved in an inquiry, have no incentive to be as efficient as possible and indeed will get rewarded from the public purse by maximising their time involved."

Based on your experience, Lord Hardie, is there a risk that, given that the whole mechanism has been built up and people are paid on a daily basis, there is some incentive for things to slide?

Lord Hardie: The chair of the inquiry should takes steps to avoid that. As has been said in

other responses, the approach that is taken is an inquisitorial one. It is not within the control of lawyers acting for core participants; it is within the control of the chair to say that they are interested only in evidence of a particular type. It is up to others to comply with those decisions.

It is also for the chair to fix strict timetables for hearings and so on, so that they are not allowed to extend beyond the allocated time. There are various ways of doing that. I refer to the decision in our inquiry not to allow opening speeches. Also, cross-examination is not allowed, because that is an adversarial approach.

We, of course, respect the right of core participants to participate meaningfully, but I said that, seven days in advance of a witness appearing at a hearing, the core participants must give notice of the questions that they want asked of the witness, even if the witness is their witness. The questions would come to me and they would be passed to counsel to the inquiry. I would say that I was interested in one question but not another question, and counsel to the inquiry would then take upon himself the responsibility of asking the question. It was only in very exceptional circumstances that we allowed counsel for a core participant to ask questions—if there was a complicated issue and we thought that it would be quicker for them to ask two or three questions.

The chair has the power and the ability to control time spent by lawyers on the inquiry, at least in the public hearings. I gave a direction that closing submissions had to be in written form. Each core participant was allowed no more than a morning or an afternoon to elaborate on what had been weeks of evidence.

Craig Hoy: In her submission, Dr Ireton states that one of the core elements of cost effectiveness is

"Transparent cost and timetable management".

If you will forgive me for asking a question that relates to you personally, Lord Hardie, Transport Scotland was very resistant to the figure of the fee that you were paid for chairing your inquiry going into the public domain. Did it consult you on the issue, and do you think that that meets the requirement of transparent cost management that Dr Ireton mentioned? The matter should not have needed to be taken to the Scottish Information Commissioner before that information about money being used from the public purse entered the public domain.

Lord Hardie: Yes, I was consulted about that and I indicated that I thought that that was unreasonable. However, I have accepted the position that it is in the public domain and that it should be in the public domain.

Craig Hoy: Did I hear you correctly? Did you think that it was unreasonable that Transport Scotland did not release the figure or that it was unreasonable that the figure was released?

Lord Hardie: I thought, at one point, that it was unreasonable that it was released, because I—wrongly—anticipated that it would result in the media attending my house and pestering us, but they did not do that.

Craig Hoy: Would that have been good enough reason not to have put that important information into the public domain?

Lord Hardie: Without going into my personal circumstances, yes, because of health and other issues.

John Mason (Glasgow Shettleston) (Ind): Dr Ireton, you say:

"There is a strong case for greater use of shorter, focused statutory inquiries, which deliver thematic learning and policy recommendations within 12 to 24 months."

That sounds quite positive—is it actually possible?

Dr Ireton: Yes. That is done in other jurisdictions. It comes back to the point about deciding what you want an inquiry to do. If you convene an inquiry and the terms of reference are focused on a policy-type inquiry—thematic learning, checks and balances and so on—you can have a quicker, cheaper inquiry. If you make it very broad and cover all aspects, you will inevitably get and expensive, lengthy inquiry.

John Mason: Lord Hardie, if you were given, say, 24 months to do the best that you could either for the tram inquiry or for any inquiry, would that be a better way of doing things?

Lord Hardie: I would not accept the challenge.

John Mason: You would not do it?

Lord Hardie: I would not do the inquiry. If I were not able to do a proper job, I would not be willing to undertake a job that I felt was less than satisfactory. I would leave that for someone else.

Dr Ireton: Can I clarify my point? I was not suggesting that you could take an inquiry and put a two-year limit on it. That would be a different inquiry altogether. You have to make sure that the task that is being set for the inquiry can be done properly, thoroughly and well within the timeframe. That means that, inevitably, you must make the task much smaller and more focused.

John Mason: That is fair enough.

Lord Hardie, you used the word "proper" in your response. I wonder about other professions: for example, a general practitioner has to assess somebody in 10 minutes. I accept that that is far too short. I am an accountant—accountants have

to audit a company in, say, nine months. People in most professions—and in other jobs as well, such as the cleaner of this room—have a time limit and are expected to produce not a perfect result, but the best that they can, within that time limit. Would that not be a better model?

Lord Hardie: No. The cleaner of this room knows what he or she has to do. He or she can weigh up the size of the room, the number of surfaces, whether to clean the floor and what have you, and they would, no doubt, give you a quotation on that basis.

I accept that there are some inquiries that can be dealt with very quickly. John Sturrock's inquiry into a situation in the Highlands is an example in which it would have been inappropriate to have had a judge-led inquiry. However, say you are talking about an inquiry that involves looking at several hundred pages of contract documents, the possibility of whittling down 3 million documents or getting statements from 50 or 100 witnesses. In my view, it would not be professional for me to say that I would provide an investigation into that and a report within two years.

John Mason: I do not want to labour the point too much, but let us look again at other professions. If accountants, for example, are new auditors to a business and it is completely unknown to them, they will focus on the risk and look at the areas where there is likely to be a problem; they will not go over the 3 million documents that I am sure that most companies have. All of us lived through Covid—we know 95 per cent of what happened. Should the Covid inquiry not focus only on the 5 per cent of what happened that we do not know?

11:15

Lord Hardie: I do not know what the Covid inquiry is doing or what its terms of reference are. I go back to the point that, clearly, if you are going to carry out an inquiry, the terms of reference will determine what is required. The Government decided what it wanted and, to satisfy that, one must do a proper job.

It is all very well to make comparisons—lawyers are equally able to quote for clients on the basis of assessing what is required, but they are basing that quote on their experience of having done something similar with a house or a company's sale or purchase. However, in an inquiry, you are in the dark; the terms of reference are the first that you know. If, at that stage, somebody asks you how much it will cost and how long it will be, you would be dishonest if you were to say that it would take three or four years.

John Mason: Could you limit the number of witnesses or core participants? For example, could you say that you would take just the best 10?

Lord Hardie: Then what would you do? Would you tell somebody who had a legitimate interest that you were sorry but they were not allowed to be part of the inquiry? You would be in the Court of Session quicker than you could say Jack Robinson.

John Mason: This committee carries out inquiries. We invite anybody to send written information, but, for example, today we have invited to come to us only two witnesses this morning and three later on. Is that not reasonable?

Lord Hardie: It is reasonable for the committee but not reasonable in the context of a public inquiry.

John Mason: Is that because we have a wrong idea of public inquiries—that they are too legal and that they are too much like courts?

Lord Hardie: No—they are not too much like courts, because, as has been said, that process is inquisitorial, and the chair can control the actions of the various core participants by not allowing them to ask questions other than through counsel to the inquiry.

Inquiries are not too legal, either. It depends on the subject matter. The subject matter here was a public scandal in relation to a public contract that had gone completely astray—not that it is the only public contract to have done so—and the Government of the day wanted to find out what had happened, why, and what could be done in the future.

Reading the report, I was appalled at some of the evidence that I heard of officials misleading councillors—I never dreamed of such a thing. If somebody had said to me at the outset that the matter would involve public officials deliberately changing reports or telling councillors, as a result of a business case, that it was a fixed-price contract—that we would be talking about people misleading the elected body—I would have said that they were talking nonsense.

John Mason: Okay. Dr Ireton, I will ask you the same question: is the inquiry process too legal?

Dr Ireton: I will not talk about the specifics of inquiries—

John Mason: That is fine.

Dr Ireton: —but, yes, I think that there are examples of their being too legalistic and involving too many lawyers. When you have powers of compulsion in a statutory inquiry, you need to allow some element of legal representation in order to ensure fairness. People who are exposed to potential future liability, damage to their

reputation and so forth need legal advice, which will be funded where necessary.

John Mason: Can I push you on that point? Does that not lead to people hiding things? If we want people to be frank and open so that we can see why they made their decisions, do the lawyers not curtail that process?

Dr Ireton: It is all about balance. The predecessor to the Inquiries Act 2005, the UK-wide Tribunals of Inquiry (Evidence) Act 1921, had powers of compulsion but with no provision to allow for legal representation. There were some very extreme examples of reputations being destroyed and of damage being done to people who had been compelled to give evidence on oath without any form of legal protection. Given the common-law duties of fairness, it is appropriate that legal representatives are involved. Also, the role of core participants is to assist the inquiry in doing its job—they are not parties to the processes—but a lot of them will need legal assistance to advise on what is an unusual process, to deal with the quantity of work involved and so forth.

However, nobody has an entitlement to be a core participant, and some inquiries have done a better job than others of controlling the number of core participants or, indeed, legal representatives, which are a huge cost to an inquiry. There are two kinds of lawyers involved in an inquiry: those who work for the inquiry—the solicitor and the counsel to the inquiry—and those who represent the core participants and witnesses. Over time, an awful lot of lawyers can get involved, which can make the whole process very legalistic, and the inquiry can lose its focus and inquisitorial nature, and you might have more of a process in which one side's position is put to the other side—in other words, more like a court process.

Therefore, there is definitely scope for learning best practice from those who have appointed fewer core participants. That does not mean that those people cannot be witnesses or that they cannot assist the inquiry, but you do not have to make everybody who has an interest in the outcome of the inquiry a core participant. There are things that can be done in that respect.

Lord Hardie: During the tram inquiry, I refused two core participant applications because I was not satisfied that they would advance the inquiry.

John Mason: That was helpful. Thank you.

Dr Ireton, are people generally satisfied after a public inquiry? I realise that a lot of different bodies are involved, but are victims or victims' families generally satisfied? Indeed, do we even know whether they are satisfied?

Dr Ireton: That depends on the inquiry, how well the purpose of the inquiry has been communicated and how well expectations have been managed. You need to accept that there will always be people who are not satisfied with the outcome of an inquiry, because there will always be some who want a broader or more detailed inquiry or one that has a different focus.

However, you can compare inquiries that have been held here with those on the same topic in other jurisdictions. I am thinking of an example in Australia, where the participants were more satisfied with that inquiry than the equivalent one here. In Australia, they took longer at the beginning to engage with the participants and to ensure that everybody understood the inquiry's purpose, so that everybody was pulling in the same direction. They managed that process better than our equivalent inquiry, where that investment was not made at the beginning and nobody was quite in agreement about the purpose of the inquiry or whether it had achieved its purpose at the end.

John Mason: That was very helpful.

Michael Marra: Thank you for your evidence so far, which is invaluable to the committee. I want to touch, first of all, on the appointment of inquiry chairs, so I will come to you, Lord Hardie. Your CV is one of many decades of distinguished service to Scottish public life. This follows on from Mr Mason's questions. If somebody had said to you, "This inquiry will take up nine years of your professional life," would you have said yes to chairing it?

Lord Hardie: I think that I would have preferred to spend my time with my grandchildren.

Michael Marra: Indeed.

Like Liz Smith, I must declare an interest because of my involvement with the Eljamel inquiry. I have constituents who are involved in that, and I have had conversations with ministers about the setting up of the inquiry. Some of the delays in that respect are to do with finding a chair—that is, waiting for the Lord President to find somebody of standing, such as you, to take the inquiry on. Is there not a risk that nine-year inquiries result in more people saying, "I would love to do this, but no thanks. I'd also like to spend the time with my grandchildren"?

Lord Hardie: That is for others to decide, but, certainly, if anybody asked me now to do even a one-year inquiry, I think that I would just go back to my grandchildren.

Michael Marra: I suppose that that is part of the issue with Dr Ireton's position. I understand the tensions that arise in relation to the freedom that inquiries have, and in your evidence this morning,

you have been a stout defender of the need for judges to be led by the evidence as it is presented—

Lord Hardie: If I may interrupt, I am speaking from the perspective of a judge-led inquiry, but I agree with Dr Ireton that not all inquiries have to be judge led, just in case anyone got that impression from me.

Michael Marra: Of course, and that is useful. However, with regard to the inquiries that are being set up in Scotland, there seems to be a preponderance—almost a monopoly at the moment—of judge-led inquiries. You are saying that other options are available, so can you speculate as to why so many inquiries are judge led?

Lord Hardie: I think that it is horses for courses. A very good friend of mine, Lord Laming, was, as Herbert Laming, previously director of social work. He chaired the inquiry into the death of Victoria Climbié, a child who was known to the social work department and who, sadly, as happens all too often, was ultimately murdered by her relatives. I think that it was appropriate that he was the chair of that inquiry, because, as a former director of social work in one area, he had the expertise to deal with social workers and to ask them why they did not take the child into care and what checks they had carried out. There are times when it is appropriate for an inquiry to be chaired not by a judge but by someone with appropriate experience.

Michael Marra: Are you aware, through conversations, of members of the judiciary having turned down requests to chair an inquiry on the basis of how long it might take?

Lord Hardie: No, I am not aware of that.

Michael Marra: You described the situation that led to the tram inquiry as a "public scandal". Some of the fallout of your inquiry has been that people think that part of the issue with the trams in the first place was the huge delays and cost overruns, and then they look at the inquiry and say, "It's gone on for nine years, with huge delays and cost overruns." Does that slightly undermine the inquiry's credibility? Were you concerned about that?

Lord Hardie: I was always concerned about the views that were expressed about the length of time that the inquiry was taking, but there was really nothing else that could be done, given the challenges that we faced.

Michael Marra: In your written evidence, you identified that you were restricted partly by your inability to command evidence, particularly from commercial firms, which would not provide you with such evidence. Would it have been better if the inquiry had had full statutory powers from the outset?

Lord Hardie: Yes, I think so. To begin with, it was not just an issue with companies. The then First Minister reassured the Parliament that the minister for veterans, I think, had liaised with the City of Edinburgh Council, which had assured him of its total support. However, the reality was that the council could not provide that, because of the Data Protection Act 1998. The only way around that was to have statutory powers to require the City of Edinburgh Council to give me the data about former employees, whom the inquiry could then pursue and interview. Even when we had that power, it was sometimes quite difficult to get hold of them.

Michael Marra: Dr Ireton, you set out what one might call your inquiry taxonomy, when you talked about forensic, policy and truth-telling inquiries. Have you looked at the issues of commercial interests and what happens when a firm, or a set of organisations, refuses to give full evidence due to commercial interests and the need to protect their firm or organisation? Are statutory powers required for that?

Dr Ireton: Yes, there could be statutory powers in all three types of inquiries. Statutory powers are important, but they are not always used. It is often sufficient for an inquiry to have those powers; they are actually used quite infrequently, but it is all about knowing that those powers are there. It is not always the right thing for an inquiry to have statutory powers; I could give you examples of inquiries that worked better because they were non-statutory and others that were better because they were statutory, depending on their subject matter and nature.

However, having statutory powers and the power to compel is often important for public inquiries, especially when it comes to public perception. There is currently a perception that inquiries that have those powers are the gold standard or the most serious type of inquiry, because they can compel people to give evidence.

11:30

Michael Marra: Okay. My final question for you, Dr Ireton, is on the tension between the freedom that an inquiry has and public trust. The issue with an inquiry that has a more limited remit, particularly within your taxonomy, is how it relates to the views of victims, related parties and the public more generally. Are there other things that could be done to build public trust in a more limited form of inquiry?

Dr Ireton: It is all about public understanding. The focus that I am talking about is not theoretical; it is used in other jurisdictions and it works. The

difference is the context. For various reasons, our focuses have drifted and we have allowed expectations of inquiries to become huge—that is, it is expected that they will deliver everything and that, when everything else has failed, an inquiry will come in and solve it all. However, a public inquiry is not the solution to something; it is convened to inform the Government in addressing a matter of public concern. There is poor understanding in that respect.

There is an issue with narrative. Inquiries—and I am talking UK-wide here—will often be announced with terms of reference that clearly envisage a systemic policy-related approach that will examine checks and balances. At the same time, someone will make a statement such as, "We will leave no stone unturned—we will give justice to the survivors and the bereaved." That sort of language tells people that it will be a full forensic inquiry.

Because of that narrative, inquiries are often put off track before they even start, and there are debates in the Parliaments between MSPs and MPs and so forth. If the language used reflects the idea that we need a public inquiry for individuals to get justice and answers to everything, it just muddies the waters.

Improvements in efficiency and in the length of time taken must happen at every step of the inquiry. That sort of thing has to come from the focus that the minister in question takes in setting the terms of reference, from the narrative that goes on around the inquiry and from what the media says. There must be public education, and there must be an induction process for the chair so that they understand the nature of what they have become involved with. We have not talked about this yet, but legal representatives will sometimes come to an inquiry as if preparing for future litigation.

Expectations need to be managed all the way through to Government departments. They need to accept that they must actively engage with a public inquiry rather than sit back and wait to see what happens, as that, too, adds to the cost and causes huge delays. The Government also needs to recognise that, when it convenes an inquiry, it does so not to solve everything but to provide what is needed to address a matter of public concern.

That must happen every step of the way, and it relates to the narrative, to public education and, indeed, to the education of everybody involved at every stage.

Michael Marra: Thank you.

Michelle Thomson: I want to ask a tiny question to help build my knowledge. I have read the criteria that determine who a core participant will be, but do such participants pick their own lawyers or do they have one allocated to them if the inquiry gets extended or something else happens, as when, for example, the Scottish Covid inquiry was linked with the UK one? How does the approach with lawyers work?

Dr Ireton: The core participants might already have legal representatives—inquiries recognise such representatives. They can have their own lawyers, but, when it comes to funding, the involvement of other core participants and so forth, inquiries can decide that there will be joint representation and on who will be recognised as the legal representative. Numbers can be limited in that way and the chair has an involvement in that.

Michelle Thomson: That is the point that I am getting at. There could be a situation in which the chair would determine which lawyer would represent the core participants. I have already pointed out that who becomes a core participant is subject to criteria, but I think that you have confirmed the issue for me.

Lord Hardie: Coming back on that point, I think that it is right that, if several core participants and the chair were to consider that their interests could be dealt with as a unit, the chair could decide that there should be representation by one person. However, whether the chair would actually choose which lawyer was to provide that representation would be another matter, because each of them might have their own. The prudent thing for the chair to do would be to say, "You three core participants are to be held together, but it is up to you to decide who represents you." The core participants should decide that, rather than have somebody forced on them that they might not want.

Dr Ireton: To clarify what I said, if that decision has already been made, the chair can refuse to allow someone from having another legal representative. The chair can say, "No, that is the legal representative for this group of core participants."

Michelle Thomson: Okay. It was worth confirming that, because that is a useful detail. Thank you.

The Convener: That was helpful.

That concludes our questions for this panel. Are there any final points that either of you wishes to make at this juncture?

Lord Hardie: No, thank you.

Dr Ireton: No.

The Convener: Thank you very much for your very helpful evidence. As we have another panel of witnesses, we will have a five-minute natural break and then reconvene.

11:36

Meeting suspended.

11:43

On resuming—

The Convener: This is the second part of our evidence session on the cost effectiveness of Scottish public inquiries. I welcome Michael Clancy, director of law reform at the Law Society of Scotland; Laura Dunlop KC, convener of the law reform committee of the Faculty of Advocates; and Richard Pugh KC, from Compass Chambers.

Thank you for your submissions. I will begin with a question for Michael Clancy, which is based on his paper, although others can come in as they wish. You have said that cost control

"should not be judged on rules which apply to business enterprises."

However, those costs are not being imposed on business enterprises—the cost is to the public sector.

I will take you to a live case. The Scottish Parliament information centre has told us that operation tarn, which supports the on-going public inquiry into the death of Sheku Bayoh, has so far cost Police Scotland £17 million in legal costs. Police Scotland says that it

"has been involved in a number of high-profile public inquiries in recent years which have had significant legal and administrative costs, redirecting both financial and human resources away from other critical areas of policing."

If there are no cost controls and costs are just allowed to rise almost exponentially, as seems to be happening in that case, that must have an impact on other public services. One has to wonder about the value of a public inquiry in the light of the greater public good, as the police seem to indicate.

11:45

Michael Clancy (Law Society of Scotland): First of all, you should understand that the Law Society of Scotland is a core participant in the Scottish Covid-19 inquiry.

You are quite right to raise those very important issues. All the reading that my colleagues and I did in advance of this evidence session indicated that there was a methodology to the establishment of public inquiries in Scotland under the Inquiries Act 2005, which included ministers perceiving that there is some requirement to have an inquiry into a matter of public concern. Ministers went through a process in advance of the commissioning of the Covid-19 inquiry, which I have set out to a certain extent in the paper that we submitted relating to that inquiry. That process involved not only speaking to those who were affected by the subject matter of the inquiry and to the prospective chairs; it also involved consideration of time and cost.

I do not think that I was trying to imply that such inquiries should have free rein to spend any amount of money that they want over such period as is available, because there are already statutory elements to the control of costs in the Inquiries Act 2005. You will have been considering such things already, but section 17 of the act says:

"In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost".

I think that—

The Convener: I am sorry to interrupt. That is what the legislation says, but I have raised concerns in the committee that, in the inquiries that we have been looking into, there does not seem to have been anything to restrict costs, as far as we can see.

In the Scottish Covid-19 inquiry, for example, the senior counsel, whether they were a member of the Faculty of Advocates or a solicitor, was limited to £200 an hour in fees. I do not know what the fees are for the Bayoh case, for example, but we know that it would not be £200 an hour, because the junior counsel would be a lot less expensive. That would involve 85,000 hours of legal fees just for the police. That is like everyone in Hampden being interviewed for an hour, and there would still be 30,000 people left over.

Laypeople looking at inquiries do not see any cost control. They see that things grow arms and legs. They see that that particular inquiry is costing tens of millions of pounds and that it has lasted five or six years. Other inquiries have lasted longer. Where is the justice at the end of that, from whichever perspective you are looking—from the Police Scotland perspective or from the other perspective? It seems to be a phenomenally expensive process. Can there be any possible positive outcome at the end of it, one wonders, relative to how that money could be spent elsewhere, as the police say?

Michael Clancy: That is why the committee's inquiry is so important in shining a light on such aspects. It is fair to say that anyone who has been looking at the news over the past 20, 30, 40, 50 or 60 years, as some people around this table might have been doing, will be well aware that there are high costs to such inquiries.

It takes a parliamentary committee to focus precisely on costs and on time spent. In distinguishing between the nature of businesses and inquiries, I was trying to suggest that there might be things to learn from businesses about

cost control. For example, I suggested that there should be proper project planning with a Gantt chart and regular reporting on the milestones that are met. That would give the chair, the other people who are involved and Parliament the opportunity to think about what is happening with inquiry X, Y or Z.

You might say that one of the major issues to come out of that is that lawyers cost too much.

The Convener: Amen.

Michael Clancy: That will, undoubtedly, result in there being one less employee at the Law Society of Scotland.

It is, however, fair to say that certain services cost a lot. Certain services are worth a lot, but some are not perceived to be worth the cost. Why, therefore, should ministers not look at setting out cost arrangements for inquiries that they are about to commission that would mean fixed costs for the lawyers who are involved and for the other people or experts who might be called to give evidence?

Ministers should also think about the costs that are below the surface of the inquiry and cannot be seen, such as the cost to the commissioning department or the cost to the court service because a judge has been assigned to the inquiry and there are issues relating to how that judge's ordinary work is done. It is important to raise those issues at the beginning, as ministers, who commission inquiries on a completely discretionary basis under section 1 of the 2005 act—they do not have to commission inquiries; they may exercise their discretion to do so—ought to be thinking about costs. That is because they have also been acquainted with the experience of the country at large and have seen inquiries that were perceived at the beginning would be concluded within a matter of months and at low cost being extended to one, two, three or five years, and more in certain circumstances, and at requisitely greater cost—the fee or charge to the public purse is greater. In this day and age, when there are significant deficits in government to be considered, we all have to be aware that the public purse should not be unduly taxed when, if there had been a bit of control at the beginning, it would have resulted in a lot of control by the end.

The Convener: Thank you for that. Ms Dunlop, in your statement you say that

"the Piper Alpha and the Dunblane shootings Inquiries had succinct, general statement of purpose and were not subject to significant cost or overrun."

Those were horrific incidents and we all remember them very well, but the inquiries seem to have been delivered much more timeously and effectively. You then go on to say that, in your view,

"producing a high-quality report within a relatively short timeframe may lead to more challenges in managing costs."

I do not know what you mean by a "relatively short timeframe", so you might want explain that.

You also say:

"There is often a trade-off between time, cost, and quality. It is generally understood that prioritising two of these factors can reduce control over the third."

That seems to almost contradict what you said about Piper Alpha and Dunblane. I imagine that those inquiries were not only done timeously and for a reasonable cost. Those were also quality inquiries, were they not?

Laura Dunlop KC (Faculty of Advocates): Before I answer, I will put on record that I have experience of a number of inquiries—I have participated in four inquiries and one non-statutory review—but I am not involved in anything at the moment.

The first point to make about those inquiries, both of which were carried out by Lord Cullen, is that they were done a long time ago. I reflected prior to today's meeting, and I feel that it was altogether a simpler time. Those were largely pre-internet inquiries. In addition, there was not nearly so much by way of other regulatory requirement as there is nowadays.

We have spoken quite a lot about legal costs, but there are other aspects of an inquiry in the 2020s—IT, records management, different policies, communications and so forth—that add immensely to the complexity of undertaking it. In one of the papers, there is reference to the inquiry secretary being like the chief executive of a business, which is how it can appear.

I first encountered the triangle of time, cost and quality during the inquiry into the cost of the Parliament building. During that, an architect said that, if you want a high-quality building and you want it at a certain fixed cost, you might lose control over the time and so on. You can see how one element would adjust the other elements. That is how I framed it in my submission.

I take your point about the Dunblane and Piper Alpha inquiries. They both reflected a huge amount of work put in by people during what now seems to be a relatively short time. The report on Piper Alpha has been commended, but it did take quite a long time and quite a lot of intense involvement, and I do not know what the cost of that would be today.

The Convener: More than 160 men died in that disaster, so it was a major focus at the time. One would have thought that technology would have made things easier rather than more difficult and complex.

I should have put on record the fact that the Scottish Parliament information centre has said that, on average, legal costs account for 35 per cent of the cost of an inquiry, so we are not saying that it is all about the lawyers.

Our paper from SPICe also says:

"After the Chair, the inquiry secretary is probably the most important person for the running of a successful inquiry. The secretary is usually recruited from the civil service; however, this is for the chair to decide."

Should experience of controlling budgets be considered when selecting an inquiry secretary?

Richard Pugh KC (Compass Chambers): Yes is the short answer. If it is designed to make the inquiry proceed efficiently as it is required to do, that can help the inquiry chair, who will often not have a significant history of trying to balance budgets, as they might have been a judge for a number of years, for example.

The Convener: You mentioned efficiency. In response to question 5, the Faculty of Advocates' written submission says:

"Having an inquiry team of sufficient size to allow conduct of hearings into one topic to take place at the same time as preparation of the next topic"

is important.

How many people are needed for a sufficient team in a standard inquiry? I know that they are all different.

Richard Pugh: I am sorry, but I did not declare at the outset that I am instructed in three inquiries at the moment.

The Convener: My God—you will be all right for a tap.

Richard Pugh: I am instructed in the Scottish child abuse inquiry and on behalf of participants in the Scottish Covid-19 inquiry and UK Covid-19 inquiry.

To answer that question, one can see the progress that the UK Covid-19 inquiry has made on a number of topics so far. It took a modular approach and has had hearings on a number of its modules. An entirely different team was responsible for the collection of all the evidence and the presentation for each of those modules.

The Convener: Indeed, but what are the parameters? Is it five counsel? Is it 50?

12:00

Richard Pugh: In general, that depends on the scale of the module and on the length of the hearing—for example, module 3 of the UK Covid-19 inquiry, which was the investigation into healthcare, was heard last year for close to three months. It had a team of eight or nine counsel, and I do not know how many solicitors were behind the scenes focusing entirely on healthcare. When we dealt with modules 4 and 5, on personal protection equipment and on procurement, it was a smaller team of three or four counsel. It depends on the size of the topic and the volume of the evidence. Ultimately—this takes us back to the IT point—the quantity of documents that you get nowadays in these inquiries is astronomical. There are hundreds of thousands of documents.

The Convener: Indeed, but, as Mr Mason pointed out to the previous panel, every document has to be looked at. We are trying to conduct this investigation, if you want to call it that, in a matter of weeks as well as doing all the other things that we have to do as MSPs and so on. One issue that the committee is considering is that time does not seem to be much of a factor in these inquiries. Lord Hardie talked about an inquiry that he chaired that lasted nine years, for example. The Scottish Covid-19 inquiry, which you are involved in, Mr Pugh, has already taken three and a half years, and the UK inquiry has taken four years. More than £200 million has been spent in total, with no end in sight. The Australian Covid-19 inquiry lasted a year and cost £4 million. Was what was delivered any less impactful for the people who had concerns about what happened to their loved ones?

Richard Pugh: I heard Lord Hardie's evidence when I came in at the end of the earlier evidence session. The questions often take you back to the terms of reference. If the terms of reference are set broadly and require the chair to carry out a forensic examination, the short answer to the question of whether you need to read all the documents is yes. If the terms of reference do not require that same forensic examination of all the documents, the short answer is no. The answer will always come back to what the terms of reference have set as being the purpose of the inquiry.

The Convener: Other colleagues will ask about that in greater detail, so I will not touch on that.

Do you accept that when people see senior counsel at the Covid-19 inquiry being paid £200 an hour and being able to charge up to 60 hours or £12,000 a week, or inquiries that go on for years, it seems like the vested interest of the legal profession is to keep things as they are? Rightly or wrongly, an inquiry is seen as a dripping roast for lawyers. Does that perception, which some people have—I am one of them, and the rest of the committee members are part of that, too—concern the Faculty of Advocates?

Richard Pugh: To answer the question from a more personal perspective, I would say that part of my job when I am advising the bodies that I advise is to make sure that they are not spending money

on things that they do not need to spend money on. For example, the chair of the inquiry into child abuse is very good at explaining exactly when a witness is going to be relevant to you, and it is my job to attend only for evidence that is going to be relevant and necessary for the body that I am advising to hear. That is not limited to inquiries. My job across the board is to make sure that I am not incurring unnecessary expense.

Plainly, I cannot comment on the particular job of counsel to the Covid inquiry. They have the papers in front of them and have to do their job to present them. Do you know what I mean?

The Convener: What kind of oversight is there of fees? Do people just put in an invoice? Who checks that the invoice is correct, for example?

Richard Pugh: That depends on who is responsible for the payment of the fee. If a representative is being paid by inquiry funds, plainly, the inquiry would have the power to control that question. As is evident in the UK Covid-19 inquiry, for example, quite often, people are named as core participants in some modules but not in others. The inquiry ultimately controls that. Bodies that are not funded by the inquiry—this is an important distinction—would pay the fees themselves and, for counsel, it would be the instructing solicitor who would send the papers and ask counsel to do the work.

The Convener: Ms Dunlop, since 2019,

"the Cabinet Office has run an Inquiries Unit, whose remit is for the whole of the UK, including Scotland, to help share best practice. "

How has that impacted the sharing of best practice among on-going public inquiries?

Laura Dunlop: I am not in a position to answer that. I do not know what, if any, information has been sent from the Cabinet Office to any of the inquiries that are currently running.

The Convener: To be fair, that was in Mr Clancy's submission, so perhaps it was an unfair question to ask you. I will go to Mr Clancy.

Michael Clancy: Well, I wish I knew. I tried to find information about what the UK inquiries unit was doing, but it is very difficult to find that information in any reasonable timeframe.

If we intend to go on commissioning inquiries into matters of public concern after the committee has reported on its work, the Scottish Government ought to establish some kind of Scottish inquiries unit that can look at the issues that I suggest in my submission. For example, we could create a bank of people who have expertise. I slipped out of the room for a moment when Lord Hardie was giving his evidence, so he may have talked about this. When a secretary for the Edinburgh tram inquiry was hired, a significant amount of time had to be allowed for that individual to learn how to use the computer system and so on. Why do not we have a bank of people who are skilled at running inquiries and who can be called on to service any future inquiry? Why do not we have protocols for the hiring or letting of appropriate accommodation for an inquiry, so that we are not, as Lord Hardie put it, reinventing the wheel every time that an inquiry is held? There could be a significant chunk of real estate somewhere in an accessible place in Scotland that could become an inquiry centre, and we could time our inquiries so that they did do not collide with one another. There are other efficiencies that could be brought to bear, too.

I will pick up on an aspect of your reference, convener, to the Australian Covid-19 inquiry. During a short conversation with Ms Ireton, we spoke about the Yoorrook inquiry in Australia, which was a very extensive inquiry into the depredations that colonial rule visited on the indigenous people who were living in the state of Victoria.

The Convener: I am familiar with it.

Michael Clancy: Remarkably, that inquiry has brought people together who otherwise would not, in any way, have been expected to be in the same room at the same time.

One of the aspects that I have looked at is reports from inquiries. The Yoorrook inquiry is still to report—I think that that will be done in June this year.

Recently, the Australian Covid inquiry reported. When it was set up, there were extraordinary outpourings of concern about the limitations in its terms of reference, particularly the extent to which it did not deal with human rights matters or the unilateral actions that states or territories could take on Covid. A significant aspect of how Australia dealt with Covid was not in the inquiry's ambit or scope. That might be an answer to your question—I do not know, but I offer it as a suggestion—as to why the Australian Covid inquiry could do its work in a shorter time and at a lower cost than the UK or Scottish inquiries.

I do not know whether making such a comparison is valid, but if one compares the TORs of the different UK inquiries, the Scottish Covid inquiry certainly seems to have taken human rights on board, and sessions will be heard on human rights matters in the coming weeks and months. Under the Human Rights Act 1998, any public authority has to comply with the European Convention on Human Rights in order to ensure that no rights are contradicted. We have to be cautious in using comparative analysis, but, if I am given enough time, I might be able to do such a comparison. I only draw that to your attention so

that you know that those were two significant differences.

The Convener: It is clear that the terms of reference were different, but how long people have to wait for justice is also an issue. People wait year after year, and many die waiting for these things to conclude.

Michael Clancy: Oh, I know.

The Convener: Once you get to the end of the process, you get the recommendations. Ms Dunlop, would the Faculty of Advocates like to see any changes to the UK's legislative framework in order to make recommendations more impactful? Are there any other areas in which you feel that the legislation could perhaps be tweaked in order to deliver more for the people whom the inquiries are set up for?

Laura Dunlop: One point that I want to make—just in case nobody else asks about Maxwellisation—is that the wording of the inquiry rules needs to be looked at. You have to send warning letters to people who are the subject of significant or explicit criticism. The reference to "explicit"—I am speaking from experience of looking at it with puzzlement—suggests that criticism can be explicit but still insignificant, yet you still have to send a warning letter.

I can give an example of that. We had to send a letter to somebody who had completed a death certificate, and we said in the report that the death certificate should have included hepatitis C as a cause of death. As the person was named, it was "explicit" criticism, although not necessarily particularly "significant" criticism. However, because the "explicit" box was ticked, that person had to get a letter. In one inquiry, when those letters were sent, more than 85 per cent of the recipients responded. That might be human nature, because if you receive text that is critical of you, it is quite likely that you will want to make some response to that. I very much agree that that piece of legislation needs to be looked at, and the threshold perhaps needs to be changed.

The Convener: Dr Ireton suggested that serving such letters should be at the chair's discretion, rather than being mandatory.

Laura Dunlop: Yes—it should be discretionary.

The Convener: Before I open the discussion to colleagues around the table, I have one final question for you, Mr Pugh. The actions of Government departments, public bodies and others who engage with a public inquiry play a significant role and can contribute significantly to rising costs and extended timelines, which undermines inquiries' effectiveness and public confidence. In the inquiries that you have been involved in, have you experienced that at all?

Richard Pugh: No, I genuinely do not think so. The public bodies that I have acted for have considered that it is their job to try to assist the inquiry. To be clear, the first thing that the chair wants to know when you apply for core participant status, particularly as a public body, is whether you will be in a position to assist the inquiry. I have always considered it my job to provide that assistance, so I guess that the answer is no.

12:15

The Convener: Okay, thank you. Let us open up the session. The first to ask questions will be Michelle Thomson.

Michelle Thomson: Good morning and thank you for joining us. My first question is for you, Richard, or for Laura Dunlop. How many times in your participation in a public inquiry has the chair challenged the costs that you have submitted?

Richard Pugh: The bodies for which I have acted have not been funded by the inquiry, so the answer is zero.

Michelle Thomson: Is it the same for you, Laura?

Laura Dunlop: My experience of being paid by the inquiry on which I worked was of fixed rates. In relation to cost control, there is a difference between fixed rates and fixed costs, because if you fix only the rates, the time is left, obviously, which can make the costs spiral. I am speaking about one inquiry for which the invoices that were prepared and submitted were checked by the solicitor team. I did not have any queries raised with me—you are expected to detail on your invoice what you have been doing and how long you spent doing each task.

Michelle Thomson: It is useful to know that the question of querying the costs for lawyers who represent core participants does not apply to you. Obviously, I am in no way inferring anything by asking the question, but the fact that costs, even if they were detailed, were not subsequently queried could suggest a throwaway acceptance of "Yes, that's fine." I am trying to get a sense of how actively the costs are monitored, in comparison with an implicit process—as part of the culture of how inquiries operate—of, "Well, an eminent KC submitting this, so of course it's right. It's all detailed and that's good enough for us." Would it be fair to say that costs from eminent KCs are usually accepted because that is the culture?

Laura Dunlop: That is a very broad question. I have quite a lot of experience of situations—and, as we all talk to one another, I know of situations that colleagues have faced—where expenses are rigorously or vehemently opposed and challenged,

and a whole process of taxation goes on in relation to lawyers' fees.

To go back to the inquiry in relation to which I have most knowledge of that particular aspect, there were regular challenges of some of the accounts that came in for legal fees that were being paid. In fact, I can remember some of the items that were challenged, so it was not a rubber-stamping exercise in any way.

Michelle Thomson: Michael Clancy, in your submission, you said that

"inquiries are not-for-profit bodies."

Can you explain what you mean by that? I take it that you mean that it is in their nature that they are not for profit, because it is clear that a lot of money flows through them.

Michael Clancy: It is about their nature. They are not set up to produce a product that will then be sold in the marketplace or some such thing; they are set up to examine the questions that ministers put to them because there is a matter of public concern. The inquiry chair, who operates within the framework of the terms of reference, then sets out the track that the inquiry will take to produce a report at the end of the day.

I hesitate to say anything that will make the convener even more concerned about asking me questions, but the product of a report is not necessarily about the allocation of blame, liability or criminal responsibility. Rather, the report is about what we have found happened and what changes we think are necessary so that the outcome will be different when we get to the next occasion. If we can get to that point, it could be a pearl without price.

Michelle Thomson: I will interrupt you there. I just wanted to check that point about inquiries being not for profit because, clearly, quite a lot of profit is being made.

With the earlier panel—I know that Richard Pugh joined us later during that—we discussed the general theme of inquiries being seen as, in effect, a type of project that have different pathways through them. There could be properly scoped terms of reference, with an indication of a budget—even if that was then subject to change control, as would be normal—and with reporting. Potentially, there could be the equivalent of a project management office.

To what extent is that feasible? Does any of you accord with the view that that route would not be effective only in the case of public inquiries? That approach is not perfect in businesses or in any other public sector piece of work.

Richard Pugh: You can see examples of that, although it is not reporting of the same nature. One inquiry that is very close to home has taken a modular approach and has produced reports as it has gone along. The Scottish child abuse inquiry has taken a fixed modular approach and regularly publishes case studies, although I cannot remember how many have been published. Essentially, that inquiry shows its working and has a product as it goes.

That approach might not be suitable for all inquiries—in fact, I can say quite easily that it probably will not be suitable for all inquiries. However, at least in that situation, it is an appropriate way to look at, and then report on, an institution. The inquiry has done a good job, which allows an on-going assessment of what it is producing.

The UK Covid-19 inquiry has also taken a modular approach and, although only the module 1 report has been published so far, the reports will come out more regularly rather than waiting until the end of the process. I think that the intention of the child abuse inquiry is to produce a thematic report at the end that looks back on everything that has gone before.

There are different models to use, but the problem is that not all inquiries would be suitable for that approach. Only the chair of an inquiry can determine the approach, once they have seen the terms of reference. I do not mean to keep coming back to that, but the thing that lies at the end of it all is what the chair feels can be done with the terms of reference.

Michelle Thomson: We heard from the earlier panel that there might be a type of toolkit, in which some things would be suitable and some would not, but that, as things stand at the moment, there is no central collection of lessons learned. Those lessons could include a pathway, based on previous inquiries, that would support chairs who, although they are extremely experienced judges, are not experienced in budgetary control or in managing large projects. That could assist chairs in determining a possible pathway, subject to various significant uncertainties and complexities.

Laura Dunlop: I want to go back to what Sandy Cameron said at last week's meeting. That is a very powerful quote—that there is no control over costs, no control over time and no stage gates, and that it is the only type of project without any project methodology.

It is actually difficult to defend starting something that has a seemingly limitless budget and no timeframe for delivery. I am not sure whether all my colleagues in the faculty would agree, but it seems to me that some setting of at least one of those, even as an indicative start, is warranted. You said that there is sometimes a need to change these things as a project

develops. I mentioned earlier the cost of this place—the Parliament building. As a project develops, you need to revisit some of those things, but that does not mean that you should not put something in place at the start, because the alternative is probably worse.

Michelle Thomson: I want to pick up on another point. I asked some questions earlier about the potential for conflict of interest. What is your experience of being asked to disclose any potential conflict of interest? Often, as we know, that does not necessarily mean that there is such a conflict. However, where there might be, or where there is even the illusion that there could be, or any hint at all, people will often disclose that information, because propriety is so important.

Are you aware of any processes in inquiries that you have dealt with in which the option for disclosure was given?

Laura Dunlop: What may come up are connections that people do not know about. I can think of one instance in which it turned out that somebody had, in a previous job, worked for someone who was important in the inquiry. That was dealt with as soon as it came to light.

If there is a formal process, people have to apply their minds to the question. For legal teams, the connections are more likely to be personal than financial or patrimonial.

Michelle Thomson: You said that that instance was dealt with as soon as it came to light, but my point is about whether you would ordinarily expect some kind of declaration of interest up front. There are many fora in which people would declare something up front, rather than when it came to light, which is potentially after the horse has bolted.

Laura Dunlop: In that instance, it was not a lawyer but somebody in an administrative role. To be fair to members of the public, a lot of people struggle with what the term “conflict of interest” means. In my current role, people contact me and ask about what they think is a conflict of interest, and often I do not think that it actually is.

People can be very anxious about these things, and the converse is probably true as well: it may not necessarily occur to somebody that, because they worked for person X 10 years ago, they need to tell everyone about that. I do not know whether having a formal process would make people more likely to spot something that they should disclose—perhaps it would.

Michelle Thomson: As MSPs, we are all given guidance on these matters when we join the Parliament. Where we think that there could be a perception of conflict, we are duty bound to disclose it, even if it is subsequently deemed not to be a conflict. If we are expected to do that, it would seem not unreasonable for highly paid lawyers to do likewise.

Richard Pugh: There are potentially two issues. With regard to a pure conflict of interest, it is part of the regulation of the legal profession that we would have to deal with that, because we cannot act in a situation where there is such a conflict. In a situation where I am conflicted at the point at which I am instructed, I have to deal with that—there is a professional obligation on me to do so.

A disclosure of another interest that is not a conflict of interest is a slightly separate issue, and is probably more akin to what has to be disclosed by you all as MSPs. There is a slight difference there. To be clear, if we are talking about conflict, there is a professional obligation on us to disclose that, as none of us could act in a situation where there is a conflict.

Michelle Thomson: Perhaps I should bring in Michael Clancy. The example that I gave earlier involved a solicitor acting on behalf of core participants in an inquiry who had been calling vigorously, via the media, for a public inquiry and was also best friends with the justice secretary who granted the inquiry. In that example, what kind of action would you anticipate from the solicitor, under Law Society regulations, to set out at least a potential, if not an actual, conflict of interest?

Michael Clancy: First and foremost, that individual, in lobbying a minister directly, would fall within the scope of the Lobbying (Scotland) Act 2016 and would have to declare the lobbying to the lobbying registrar. We have a system in the office whereby if I have a meeting with an MSP—or even with an MP, even though the 2016 act does not apply in that regard—I will produce a note that is then sent off to the lobbying registrar at the necessary time. I believe that it is a criminal offence to engage in lobbying without declaring that. My first reaction to someone who is lobbying a minister or an MSP would be to make sure that they comply with the lobbying regulations.

12:30

We, too, have a practice rule on the issue of conflict of interest, which prohibits solicitors acting where there is a conflict of interest. It is in that context that Richard Pugh described the conflict of interest of gaining from something personally as a result of some action. That could be something that someone could complain about; if you know that the actions have taken place, the Scottish Legal Complaints Commission is the gateway to receive complaints against solicitors. That would be the answer that you might be looking for if you are seeking guidance about what you should do.

Michelle Thomson: I was just asking a general question. Thank you.

John Mason: Going back to the triangle of time, cost and quality that you mentioned, Ms Dunlop, we all understand the tension between those three things. For example, an inquiry might have been going for five years and give a fair picture of what has been happening. If it goes for another five years, we might get better quality but it is not that much better. Is there a balance to how far we go with quality? I said in my questions to the previous panel that people in other professions do the best that they can in the time available, but it is never perfect—whereas Lord Hardie wants to do a proper job.

Laura Dunlop: You are right that, if an inquiry drags on and on, there start to be losses. At the most basic level, people may die, or there may be a loss of faith or trust. It does not seem right to use the expression "sweet spot", but there must be an optimal point at which an inquiry should finish its report and wind up. I agree that, if you miss that point and keep going, all sorts of things start to go wrong and you start to lose focus and people.

As lawyers, we are used to the sorts of things that are said about how expensive lawyers are and so on. However, speaking from experience, being in a long-running public inquiry is a very demanding gig. You are working huge numbers of hours and working every evening. If you are doing hearings, you are working every night. It does not take terribly long before you hope that it will not last too much longer.

We all want the inquiries to finish. I cannot speak for Richard Pugh, although I see that he is nodding. It is not that you think, "Great, I'll be doing this for the next 10 years." It is quite the reverse—you would quite like your life back.

John Mason: I suppose that that ties into the rule in the legislation about avoiding "unnecessary cost". That is quite a subjective term, is it not?

Laura Dunlop: Yes, and it is open to lots of different judgments. Also, it can be very difficult to say no to people. If you are dealing with people who have suffered something tragic and who are very distressed, it is very difficult to say, "We're not going to have this extra witness or spend some time looking at this particular issue." That is hard in practice.

Richard Pugh: That has been a repeated theme in the UK Covid inquiry. For example, the inquiry has set a three or four-week diet in relation to personal protective equipment, and there have been core participants, particularly those who have been aggrieved by what they see as a lack of personal protective equipment, who think that four weeks is not long enough. Time and again in the preliminary hearings, the chair has had to say, "No, I have to get this inquiry finished, so four weeks is going to have to be enough." Such balances play out in real life in a way that, as Laura described, some people might find difficult. However, those are the balances that have to be struck if you are chairing an inquiry.

John Mason: When the chair says no to that, is it because of their sense of personal responsibility, or is anyone going to ask the chair about those unnecessary costs later?

Richard Pugh: I do not strictly know the answer to that in the sense that I do not know what the process is behind the scenes. Ultimately, I suspect that it is because the chair has a duty to do that under the statutory regime.

To pick up on a point that was raised earlier, it is not the case that all witnesses have to come and give oral evidence at an inquiry. In the Covid inquiry, we have hundreds of statements from witnesses we will never see other than on paper. The inquiry team and the chair determine who comes to give evidence and for how long. Witnesses who have important things to say are limited to an hour, because that is all the time that the inquiry can devote to that.

I do not envy the job of balancing all those various interests. It is far easier sitting in my seat than it would be sitting in that seat, but we see inquiry chairs having to do it day and daily.

John Mason: To an extent, we, too, have to choose who we want to come in front of our committee. There was some good evidence in writing that we are not going to have the chance to speak to people about.

If you cannot answer this, you do not have to, but are inquiries erring one way or the other? Are too many people coming who inquiries do not need to hear from, or are people being missed out who inquiries should hear from?

Richard Pugh: As with everything, there are probably two ways of looking at that. Someone from an institution that has provided its evidence in writing might not feel the need for a public hearing, whereas someone who has been aggrieved by events might. To see that, one need only think of the Post Office Horizon system inquiry from the perspective of a sub-postmaster. If the Post Office's witnesses were not going to come and give evidence, sub-postmasters would be aggrieved by that, even if the Post Office was content for the evidence to be taken in writing. As ever, there are many tensions in how all these various interests are balanced.

John Mason: Okay. There are a few different lines that we could go down at this stage.

Covid has been mentioned. Everyone here lived through Covid. My feeling is that we know about

95 per cent of what happened—the decisions that were made and roughly why they were made—and what we do not know about is relatively limited. I would have thought that the inquiry would focus on that bit, but the inquiries just seem to cover everything. Does that bring us back to the terms of reference, Ms Dunlop?

Laura Dunlop: I was interested in what Dr Ireton said about being clear at the outset about what an inquiry is seeking to achieve. That is not about terms of reference, which are an art in their own right. They have got longer and people spend a long time framing them, and so on. The overarching question about what the inquiry is really for is interesting—perhaps we need to focus more on that.

I am not involved in either Covid inquiry, so, as a completely disinterested spectator, it seems to me that the two purposes that Dr Ireton described are important. Looking at policy for the future is important, because we are all acutely aware that something like Covid might happen again, but so is hearing from people who are aggrieved, distressed and upset. Having those two important primary purposes will inevitably mean that the inquiry will take a long time and be very expensive. Whether they could be separated in some way and undertaken by different groups of people is something that we could reflect on in future.

John Mason: Preventing a recurrence is impossible, is it not?

Laura Dunlop: I am not talking about preventing it; I am talking about having better policies to deal with a recurrence.

John Mason: Mr Clancy, I am sorry, but I have not asked you many questions so far.

Michael Clancy: That is exciting.

John Mason: Is the provision in the legislation about avoiding unnecessary costs enforced in any way? Are you aware of that?

Michael Clancy: I have not tracked that, so I am sorry to say that I cannot answer your question.

John Mason: To follow on slightly from Michelle Thomson's line of questioning, I note that, in the introduction to your submission, you state:

"We represent our members and wider society".

I should declare that I am a member of the Institute of Chartered Accountants of Scotland; we have something similar, and over the years, we have had some debate about that, as there can be a tension between those two elements. Do you think that there can also be a tension in that regard for the Law Society?

Michael Clancy: There can, but we have two acts of Parliament that deal with that. One is the Solicitors (Scotland) Act 1980, which states in section 1—repeating provisions from the Legal Aid and Solicitors (Scotland) Act 1949, in fact—that the Law Society is established to promote

"the interests of the solicitors' profession in Scotland; and ... the interests of the public in relation to that profession."

In addition, the Legal Services (Scotland) Act 2010, sets out regulatory objectives whereby we are to advance "the public interest" as well as to promote

"the constitutional principle of the rule of law ... access to justice",

equality in the profession and compliance with the rules. The listing of all those factors tells us that Parliament has thought that we should be given those jobs to do, and I am not going to argue with a group of parliamentarians and say that they were wrong.

There is sometimes an occasion on which there will be some kind of conflict between what the Law Society is thinking and what the public at large think. However, in matters relating to the law, we all want the same thing—we want good law that is accessible, consistent and effective, and which works. There is convergence on those desires between the public and the profession, not divergence or conflict at all.

John Mason: But with regard to public inquiries, there could be divergence, if the legal profession was gaining from longer public inquiries and the public might be losing out.

Michael Clancy: How, necessarily, are the public losing out?

John Mason: By having to pay for it.

Michael Clancy: Well, everything that we do, including this meeting, is being paid for by the public purse. We have to be appreciative of that and not waste the committee's time with daft things that I write, so I do not write daft things.

The important thing is for us to recognise that the inquiry is being designed to set up a way of gathering information and evidence so that it will inform future action by Government, because it is a Government creation—that is the other point. At the bottom of the process, there is a group of ministers who are thinking, "We have got to do something about this matter of public concern."

The Covid-19 pandemic was more than a matter of public concern—it was a matter of public danger, and many people suffered loss and harm as a result of it. It is right, therefore, that we should look at what the pandemic did to our law and our political structures; at why ministers took certain decisions at certain times; and at why we were not

able to get the information when the inquiries asked for it because the WhatsApp messages had been deleted.

John Mason: It is difficult to tell what is going to happen in the future, and whether the public will be satisfied by the inquiry. Nevertheless—I put this question to any of you—do you think that there is, in general, an acceptance of inquiry results? Sometimes, the results of an inquiry are announced and we see the family out the next day, complaining bitterly that they did not get what they wanted. On the whole, however, do you think that the public, and the victims, are being satisfied?

Michael Clancy: We live in a very developed society, in which we are—I think—collectively trying to be open with the public about matters. Some people will not be satisfied by the actions that are taken by ministers or MSPs in the creation of the inquiry.

12:45

That is not the answer to your question, but when, for example, the Covid inquiries come to an end and we see the results of them, and when issues such as the closure of cinemas, churches or supermarkets and the transfer of people from hospitals to nursing homes who are unwell and who then spread the illness, causing grief and harm to families, are explored, we can look forward to those things being better handled the next time. Not that long ago, I was in hospital—I spend a lot of time in hospitals—and there was a poster on the wall advising us to watch out for Mpox, which is the new name for monkeypox. There are diseases, such as norovirus, that could be either pandemic or epidemic, which is why the World Health Organization is working on and coming close to finalising a worldwide treaty to deal with aspects such as people moving from one country to another when they are suffering from the relevant disease, as well as vaccination requirements and things like that. That is all in preparation for the next occurrence of the next ailment.

John Mason: Are you optimistic that the Covid-19 inquiries will help us with those other things, or will they just be ignored?

Michael Clancy: I have hope that they will help us.

Lord Bonomy's inquiry, which is also referred to on page 1 of my submission, just below the paragraph that you referred to, investigated issues relating to infant cremation. The inquiry was not held under the 2005 act, but it was conducted under ministerial authority. It is important to consider the timeline.

John Mason: I saw that—it was quite limited.

Michael Clancy: Lord Bonomy was given the commission and he produced a report within a year. Within two years, the Parliament enacted the Burial and Cremation (Scotland) Act 2016. The inquiry was commissioned in April 2013 and reported in June 2014, and it is an example of something that worked. The inquiry was held, information was gathered, the wrong was recognised and legislation was enacted in order to correct the wrong. I do not know whether I can hope that the recommendations from the Covid-19 inquiries will be implemented as quickly as that—

John Mason: I suspect not, but that is my opinion.

Michael Clancy: —but, if we do not conduct inquiries into these things, we will not progress. I am sorry that the inquiries will not satisfy everyone, but they may satisfy the majority.

John Mason: If either of the other witnesses wants to comment on that, they are very welcome but, bearing in mind Mr Clancy's warning that I am using taxpayers' money with my time, I will finalise my contribution with a question about Ms Dunlop's committee. What is it called?

Laura Dunlop: It is the law reform committee.

John Mason: Do you have three major points that the law reform committee would want to see changed with public inquiries?

Laura Dunlop: No. The paper is short and it is not as long as a standard inquiry report. Everything in it is the work of the committee. I wrote a lot of it, but I am not sure that I could pick out three things from it and respond spontaneously to your question. I agree that some sort of control at the outset for either cost or budget is indicated. I have also suggested changing the Maxwellisation process. We could also explore Dr Ireton's suggestion of being clear at the outset about what an inquiry would be seeking to achieve, as a separate question from the terms of reference.

Liz Smith: I would like to ask two questions, if I may. First, in some situations, the terms of reference of public inquiries have changed—I think that that has happened in three out of 10 inquiries since 2007—and, therefore, there has been a potential for costs to increase. Is it your understanding that those terms of reference changed because the chair of the inquiry found unforeseen evidence that led them somewhere else and, therefore, they had to go back to the Scottish Government to ask for an amendment to the terms of reference?

Laura Dunlop: I can think of two specific changes. One of them, perhaps surprisingly, was that we asked for something to be removed from

the terms of reference, because, on investigation, it was discovered that it was not connected to the theme of the inquiry. That was agreed to.

I would need to look back and see what other changes there were. However, I can think of a change where there was an expansion. That was because we realised, as we got deeper into the subject, that we had neglected something. The chairman in the inquiry that I am speaking about, which is the Penrose inquiry, had made a lot of contribution to the framing of the terms of reference, but it turned out that there was something that we had all overlooked, because we were all ignorant of the subject matter of the area.

Liz Smith: That was generally accepted to be a perfectly acceptable endeavour.

Laura Dunlop: Yes.

Liz Smith: The costs that go alongside that extra work are something that we would find very difficult to control, I presume.

Laura Dunlop: Yes.

Liz Smith: My second question relates to some of the evidence that we have taken prior to today: namely, that there is concern that the growing demand for public inquiries—with some exceptions; not in relation to Covid, for example—is coming about because there is a perceived failure of Government agencies to address specific problems. Therefore, it is convenient for a Government to push the issue aside and say, "The inquiry will look after that," when, in fact, there is a role for Government, which should be sorting the delivery of our public services a bit better. Do you agree with that?

Laura Dunlop: I noted the comment that, if a public inquiry comes to seem the gold standard—as I think that it has to many people—and someone is told that the thing that has affected and distressed them, and perhaps caused bereavement, is not going to generate a public inquiry, then there is a terrible negativity around that, because it is as though they are being told that their suffering does not matter as much as somebody else's. I can see that it has become the case that, if they do not achieve a public inquiry, people feel a slight, or a wound, attached to that. That is unfortunate, because some situations could be well addressed by a review that is slightly different in nature, especially the one that Michael Clancy talked about in relation to the crematoria issue, which was a very focused and targeted investigation. You would obviously want to speak to the people who are directly affected, but the idea that you would have public hearings and lots of lawyers and so on is really over the top for something such as that.

Richard Pugh: There are other good examples of that approach being taken.

I know that the committee has received evidence from John Sturrock, whose review into NHS Highland was very targeted and, in the context of what the committee is considering, I suspect very speedy.

There is a review going on down south by Dame Elish Angiolini into the case of Wayne Couzens and the Metropolitan Police. The information for that will all be with the Metropolitan Police, so somebody can go in and carry out that investigation much more quickly than having all the oral hearings associated with a full-blown inquiry. There are other ways to do it.

To pick up on a point that Michael Clancy made, I note that, if the starting premise is that this is an inquiry under the 2005 act, the starting premise is that the public interest is so high as to justify an inquiry under the 2005 act. If that decision has already been made, that is, in essence, a democratic decision. It is not about anything further down; it is a democratic decision that that is what is required to address something of such a high degree of public concern.

Michael Marra: Given the evidence that we heard in the previous session, I wonder whether the three of you might agree that it is not really appropriate for a very eminent member of your profession, appointed to this position, to spend a large amount of time looking for an office and internet connections. Is that a waste of public money?

Richard Pugh: It is certainly suboptimal. They should not be spending that time. That should be sorted.

Michael Clancy: I commented on that very thing. No, it is not appropriate.

Michael Marra: Mr Pugh, how would you describe your role in relation to acting on behalf of health boards in the Covid inquiry? What are you attempting to achieve for your clients?

Richard Pugh: Primarily, it is to assist the inquiry. Secondly, it is to address, from their perspective, the fairness of the procedure.

Michael Marra: When you talk about the fairness of the procedure, is that about the liabilities of a health board for decisions that it might have taken and wanting to keep it aware of how the issues and evidence that are raised might pertain to future legal action?

Richard Pugh: I will steer away from the specifics and say that yes, in a situation where your client might face other potential processes, it is about ensuring the fairness of the overall way in which the system works. Any core participant in

any inquiry—certainly from an institutional side—might face other processes.

Michael Marra: We have been hearing about the adversarial nature of some of these inquiries, where there is an eminent KC standing in front of what is, in essence, a courtroom and asking for evidence from an individual and putting them on the stand about decisions that might have been made and where those might have flowed from. It is about whether that is the right model. If we have people like you who are employed—rightly, within this model; I do not deny that—to protect the interests and liabilities of a set of people as they may pertain to future legal action, as well as the inquiry that they are in, does that not run against some of your first premise, of assisting the inquiry?

Richard Pugh: I do not think that it does. However, I will start by saying that I do not accept that it is a particularly adversarial process. For example, the bodies that I act for would have to put in a request well in advance of the hearing to ask any questions that they might want to put to any witness. Whether they then get permission to do so is the decision of the chair. Further, even where that decision is granted favourably—and, in my experience, it is discouraged as much as anything else—it is not a cross-examination; it is about points of clarification that arise. I therefore do not accept the premise of it being adversarial.

You have to look at the instruction in a different way in this. When you look at it from that perspective, it is my job to identify what is perhaps lacking in clarity, and then to further clarify that. That assists the inquiry. I also have to have an overall eye to the fairness of the process. There are two elements to the job, but those two elements are there in every case that I deal with.

Michael Marra: I would have thought that a lot of the public who were viewing the Covid inquiry would have found it to feel quite adversarial, with Jamie Dawson KC standing there and asking very pointed questions of a variety of different people. I am not denying the part about getting to the truth, but if you have lots of interested parties who are fighting for their own protection, does it really help us to get to the truth?

Richard Pugh: But my point is that you do not have many parties doing that. Yes, there is a counsel to the inquiry, whose job it was in that particular case to get that evidence out. However, what you did not see, and what you would see in an adversarial process, is other people with other interests then following up and trying to undo bits of that or to clarify other things. It is the counsel to the inquiry's job to get that evidence out, and it is not then turned into a case of everybody else having their shot to get what they want from a witness. That is how I would primarily look at an adversarial process.

Michael Marra: My definition or interpretation of "adversarial" is probably not the strict legal interpretation. "Aggressive" might be another way to describe it. I will rest on that.

The last area that I will ask about is the application of artificial intelligence in these kinds of inquiries. We have heard so far in evidence about the huge amounts of documentation that are involved. Have you seen AI triaging of large document sets in public inquiries?

13:00

Richard Pugh: The inquiries that I have been involved in have used a package called Relativity. The UK Covid inquiry certainly uses Relativity, which has an AI model, as I understand it, built in to assist with that filtering. I have not been behind the scenes, so I do not know the extent to which it is successful at doing that, but the problem is often that, if you do not put the stuff in in the right way in the first place, what the AI churns out is perhaps not terribly useful. I do not know how that is working in practice, but when you are dealing with hundreds of thousands of documents, reading every single page of them is not a practical solution to all this, so finding some technology—

Michael Marra: I tend to agree with that. Have you seen any other examples of the use of AI in public inquiries?

Laura Dunlop: I do not think that I have seen the use of AI, but, in the Penrose inquiry, we had objective document coding followed by subjective document coding. The subjective document coding assigned a level of importance to a document—I think that the scale was from 1 to 6—but, during the hearings, you would suddenly realise that a document that was only a 4 or a 5 on the scale was crucial, so those ratings are only ever provisional.

It is probably true of all inquiries with large numbers of documents that there are multiple copies of the same document. I think that our record was eight copies, but it will turn out that one or two of them have manuscript additions, which are very important, so you cannot discard any of them. All kinds of practical issues such as that crop up.

AI could play a role in the future, but it, too, will miss things that, in context, are quite important.

Michael Marra: As do lawyers.

Laura Dunlop: Yes.

Michael Marra: Those systems are much more commonly used in commercial disputes in relation

to contracts, negotiation and analysis. Is that right?

Richard Pugh: I do not know specifically. I know that they are increasingly used in big litigation cases in London, and I think that Relativity, which is the programme that the UK Covid inquiry is using, is one of the platforms that is used in that context. There is definitely cross-learning by the legal profession about how you can take such technologies from one area into another.

Michael Marra: Have you seen any of those systems being used for redaction? Lawyers might have to do large-scale redaction across many thousands of documents, and we have heard in evidence that there are significant resource implications of AI being used to identify names and particulars and to carry out redaction on a mass basis. Have you seen that, Mr Clancy?

Michael Clancy: No, I have not, but I used Relativity when I gave evidence to the UK Covid-19 inquiry in January last year. In relation to a document that was partially about Covid and partially about something that had nothing to do with Covid, I made an application for the paragraph that was not about Covid to be redacted. It took about a week—perhaps even slightly less than that—for the decision to come down saying, "Yes, that is an irrelevant inclusion, and therefore we will redact it." The paragraph also contained some comments of a personal nature.

It is possible to do that under systems such as Relativity, and I dare say that it is possible under other systems, too.

Michael Marra: Other packages are available. Thank you.

Craig Hoy: This question has partly been answered, so I will not dwell too long on it. Ms Dunlop, you identified public inquiries as becoming "the gold standard", but there is an issue now. Even in relation to the tragic events in Liverpool last night, we can see that levels of public distrust, scepticism and anger are at a relative high, historically. The British social attitudes survey last year showed that the level of trust in Government and institutions is at a historic low.

Is there a case for going back and looking at the Inquiries Act 2005 or the guidance on when the act can be used to trigger a public inquiry in order to find a way that can perhaps better serve the public, rather than the public asking in this atmosphere of distrust for a public inquiry because that is the gold standard? As you rightly identified, we could look at John Sturrock's review of NHS Highland or Lord Bonomy's report on infant cremation, for example. Do we need to level with the public and say that there are better ways of doing this, or is it time to go back to the original legislation and the guidance to set a new threshold for the triggering of a public inquiry?

Laura Dunlop: The idea that you are presenting—saying to people who are very keen that there should be a public inquiry that there is a better way of doing things—will be hit by the kind of distrust that you are referring to. Are people going to believe you, or will they think that it is just an evasive tactic? There is a significant presentational problem in that regard. In preparing for today, I have found that there seems to be consensus that the system has not turned out quite as might have been anticipated in 2005, but I do not know whether that issue can be addressed by revisiting the 2005 act. We have non-statutory reviews, which, by definition, are not codified in legislation, and I suppose that we might lose the flexibility that is given by having that alternative. Persuading people that, for their particular situation, such a review would be as good as, if not better than, a public inquiry would be quite a challenge and would take time.

Richard Pugh: I could not find it before coming here, but I have a memory of there being quite positive polling, certainly in 2023, on the public's perception of public inquiries. In part, that is because, in relation to the issue with distrust, public inquiries are seen as not falling into that category.

On the question of whether to amend the 2005 act, not many public inquiries have reported yet, so amending the act without having got to that stage might be quite an extreme solution. In the first instance, we could at least attempt to persuade people that a non-statutory inquiry is a perfectly good option in situations in which the full force of a public inquiry is not needed. That is my take.

Michael Clancy: The House of Lords carried out a post-implementation review of the 2005 act and came up with a number of potential amendments in its 2024 report, which I reference on page 7 of our submission in relation to the types of things that ministers should consider.

If part of the issue is that ministers, when exercising their discretion to commission an inquiry, have to capture things at the start of the process so that they can make everything better from that point, ministers should be required to consider whether a statutory or a non-statutory inquiry would be best, whether it should be led by a judge or by somebody else, whether it should have a chair who sits on his or her own or whether there should be a panel on a case-by-case basis. We should build those issues into ministers' thinking, because ministers frequently come to these things when they are new in post, and there will certainly be different ministers in different

posts in a year's time. One of them will be handed a memorandum saying that there has to be an inquiry into X, and the minister might say, "Can I just do it myself, with utter discretion?"—to which the answer is yes—without thinking about other things. We can rely on the civil service to tell ministers that there are other things to think about, but it is better if that is set out in law.

I will not read out the other items—a to d—on page 7 of my submission, but they could perhaps be incorporated into whatever thinking is done in the future.

There is another issue. An inquiry is set up when ministers think that there is a matter of public interest that needs to be inquired into, but what about the occasions when they think about setting up an inquiry but decide against it? We do not see that, and we do not know what ministerial thinking is at that point in time. It would be useful to know that, rather like the situation with the Covid legislation about benefits. Under that legislation, ministers could order urgent subordinate legislation to be made, but there was no requirement for them to say, "We have considered urgent legislation, but we have decided against it," until the legislation was amended. That is an interesting area, which would be of public interest for sure.

The Convener: That has exhausted questions from committee members, but I have a brief question for each of you on areas that we have not touched on. The first is for you, Mr Pugh.

Interestingly, the Scottish Parliament information centre briefing that committee members received states that 45 per cent of an inquiry's time is spent on producing the report. Is there any way in which that process could be expedited?

Richard Pugh: I have not had to write such a report. Ultimately, though, that is where all of this comes home. It is for the inquiry, in undertaking the job of writing the report, not only to take what it has heard in oral evidence but to read the witness statements—in some cases, a statement from one witness can be 400 or 500 pages long. If an inquiry tries to distil all of that and take it all in, the job of producing the report will plainly take a long time.

The Convener: If there is a 10-year inquiry, we are talking about it taking four or five years to produce a report—that is a long, long time.

Richard Pugh: It is a long time. I suspect that that could be addressed only by curtailing the extent to which matters have to be looked at forensically, which takes us back to the question of what the expectation is at the outset and what the terms of reference are.

The Convener: My second question is for you, Ms Dunlop. Should Government departments and public bodies be required to respond formally to recommendations within a set timeframe?

Laura Dunlop: I find it difficult to see a downside to that. With regard to responding to recommendations, I suppose that one has to allow bodies to say that they do not think that a recommendation is feasible or practicable and to explain why not. However, if that is not the case and they plan to take the recommendations forward, saying, "We're going to do this," and setting out a framework as to how that will be done would seem to be prudent.

The Convener: What might be a reasonable timeframe in which to respond to a report?

Laura Dunlop: I suppose that you might just be looking for an initial response in which the body says whether it will take forward the recommendation. It is difficult—I am not equipped to set a timeframe, but it would perhaps be months at most.

The Convener: Indeed.

Laura Dunlop: We have not mentioned fatal accident inquiries—

The Convener: Do not worry—I will give you all an opportunity to make a final point at the end. I always do that, just in case we have missed anything out. That will be your opportunity.

My next question is for Mr Clancy. My colleague Michelle Thomson talked about conflict of interest. Is it appropriate for a legal firm that is involved in a public inquiry to go to the media asking for that inquiry, in which it has a direct pecuniary interest, to be deepened and broadened?

Michael Clancy: It is not appropriate for me to make a judgment on that without knowing the full facts. I am not the person who would make the judgment; other institutions in this country are better qualified to make that judgment.

The Convener: But does that sound to you like a conflict of interest?

Michael Clancy: Perhaps it could be a conflict of interest in a very specific way. I do not know whether it is a conflict of interest for someone to exercise their freedom of speech. Why they exercise their freedom of speech in a particular instance might have something—

The Convener: If I am involved in an inquiry in which I am paid and I am calling for that inquiry to be deepened and widened, that is surely a conflict of interest. I would have a direct interest in the inquiry being broadened. Is that not the case? Is that in any way appropriate?

Michael Clancy: I do not know, because I do not know whether the broadening and deepening of that inquiry would result in the individual being paid more.

The Convener: Okay. I turn to Mr Pugh.

13:15

Richard Pugh: Is there not another point here, though? If the relevant conflict of interest is with your client, and if the client wants the inquiry to be extended or broadened, acting to advance your client's position does not represent a conflict of interest. Our job is always to take instructions from a client and advance their position. Therefore, we need to be careful to define what conflict of interest we are talking about.

The Convener: That is why I specifically talked about making such a call in the media, as opposed to, for example, speaking to the chair of the inquiry and providing evidence as to why the inquiry should be broadened and deepened, or not, as the case may be.

Richard Pugh: That is just the methodology that you use to advance the aim; it does not create a conflict of interest. The question is whether you, as the lawyer, are in conflict of interest with your client. That is important. As I said, there are other disclosures of interest that might raise a different question, but, if we are focused on conflict of interest, it is that conflict that is relevant.

The Convener: That is interesting. Thank you.

As I said earlier, I will give each of you the opportunity, as I always do at the end of evidence sessions, to raise any issues that you wish to raise and have not had the opportunity to do so.

Laura Dunlop: As I said a moment ago, I am conscious that we have not spoken about FAIs. I am not going to start that discussion now—I just want to say that those inquiries can be extremely helpful and, as far as I am aware, they enjoy significant levels of public trust. I know that there are backlogs and that there can be delays in commencing them. However, notwithstanding that, such an inquiry is a useful way of looking into something that is plainly of great importance.

I want to say something else, with slight regret. Having listened earlier to the focus on lessons-learned documents and so on, I think that there has been a bit of a problem with nomenclature. In the Penrose inquiry, we were conscious that we wanted to document in our report how we had gone about certain things, but we just called that an appendix—we did not call it a lessons-learned report. Perhaps that needs to be given a formal title, as a concept that could be looked at after every inquiry, so that we all know what we are looking for.

Michael Clancy: I do not have anything to add.

The Convener: Good. Thank you very much. Mr Pugh?

Richard Pugh: I am fine, thank you.

The Convener: I thank you all for your evidence this morning and, indeed, this afternoon. It has been very helpful for our deliberations.

Meeting closed at 13:17.

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