JUSTICE 1 COMMITTEE

Tuesday 12 September 2006

Session 2

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JUSTICE 1 COMMITTEE
29th Meeting 2006, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Bill Aitken (Glasgow) (Con)
Karen Gillon (Clydesdale) (Lab)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED

Mr Kenneth Macintosh (Eastwood) (Lab)
Des McNulty (Clydebank and Milngavie) (Lab)
Alex Neil (Central Scotland) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Colin Boyd (Lord Advocate)
Jim Brisbane (Crown Office and Procurator Fiscal Service)
Leanne Cross (Crown Office and Procurator Fiscal Service)
Richard Henderson (Scottish Executive Legal and Parliamentary Services)
Cathy Jamieson (Minister for Justice)
Christie Smith (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Tuesday 12 September 2006

[THE CONVENER *opened the meeting at 14:13*]

Item in Private

The Convener (Pauline McNeill): Good afternoon and welcome to the 29th meeting in 2006 of the Justice 1 Committee. All members are present, so we have no apologies.

Once again, I welcome Alex Neil, Ken Macintosh and Des McNulty to our meeting. In addition, I welcome the committee's adviser, Jim Fraser, and staff from the Parliament's directorate of legal services who have joined us for this afternoon's proceedings.

Item 1 is to invite the committee to agree to consider the possible contents of the report of our Scottish Criminal Record Office inquiry in private at a future meeting. We normally consider such items in private. Is that agreed?

Members *indicated agreement*.

Scottish Criminal Record Office

14:14

The Convener: Item 2 is our Scottish Criminal Record Office inquiry. This afternoon's meeting is our eighth oral evidence session for the inquiry. At previous meetings, I have made a short statement about the terms of the inquiry and I will repeat my remarks today.

This is a parliamentary inquiry; it is not a judicial inquiry. No witnesses who appear before the committee are on trial, but the committee expects all witnesses to co-operate fully, to focus on the lines of questioning, to answer questions in good faith and to the best of their knowledge, and to answer questions truthfully. Although I have the power to require witnesses to take the oath, I do not intend to use that power at this stage. However, I put it on the record that if the committee considers that witnesses are not giving us their full co-operation or answering our questions truthfully, the committee can recall them. In those circumstances, I will use my powers under standing orders and section 26 of the Scotland Act 1998 to require those witnesses to give evidence under oath.

The overriding aim of the inquiry must be to help to restore public confidence in the standard of fingerprint evidence in Scotland. I expect that the report that we produce at the end of the inquiry will contribute to that process.

I welcome our witnesses: Lord Boyd of Duncansby QC, who is the Lord Advocate; Jim Brisbane, who is the deputy Crown Agent; and Leanne Cross, who is the legal assistant to the deputy Crown Agent. I thank all three of them for appearing before us this afternoon.

We have an hour or so for questions and we will go straight to them.

Marlyn Glen (North East Scotland) (Lab): As Lord Advocate, what was your first involvement in the Shirley McKie case?

The Lord Advocate (Colin Boyd): It was probably when a report was made to the Crown Office in respect of the allegation of perjury against Shirley McKie. I cannot recall the date.

Marlyn Glen: You are reported to have made a public statement about the case during a lecture to the Howard League for Penal Reform at the Playfair Library in the Old College at the University of Edinburgh on Tuesday 9 February 2002. Allegedly, you praised the BBC programme "Frontline Scotland" by stating:

> "it helped uncover what were at best serious defects in the analysis of fingerprinting at the Scottish Criminal Records Office and forced the authorities, including myself, to act to ensure that such a case would not happen again."

Is that statement correct?

The Lord Advocate: Yes. Largely, I think that that is right.

Marlyn Glen: On what basis did you conclude that there were serious defects in the analysis of fingerprinting at the SCRO?

The Lord Advocate: Principally, it was on the basis of the HM inspectorate of constabulary report. On the instructions of Jim Wallace, HMIC was asked to look at the issues surrounding the Shirley McKie case and to bring forward an inspection that had already been scheduled for later on in that year.

Marlyn Glen: Was your conclusion, then, based on the HMIC report rather than the "Frontline Scotland" programme?

The Lord Advocate: The totality of the matter is that the "Frontline Scotland" programme—if my memory serves me correctly, there were two "Frontline Scotland" programmes—was followed by a number of processes, one of which was the report by William Taylor.

Marlyn Glen: My concern is about reacting to the media in a perhaps uncritical way. I realise that the media can investigate different aspects of justice, which is what happened in "The Secret Policeman". The issues that were raised in that documentary were taken up in England and Wales, but they were not taken up in the same way in Scotland, where the issues were analysed and a conclusion was arrived at that it would be more appropriate to go forward in another way. Was any thought given to the difficulty that might result from praising the media in that way, given that the "Frontline Scotland" documentary might have been one-sided?

The Lord Advocate: In that lecture, which was on the role of the media in the criminal justice system, I was attempting to find examples of how the media can have a positive and beneficial effect. Whether or not one accepts the whole analysis of the "Frontline Scotland" programmes—and it is a long time since I watched them—the fact that they highlighted issues led to a chain of events that, I suppose, has culminated in the committee's inquiry. Nevertheless, I believe that the media have a role in exploring issues in the criminal justice system and elsewhere.

Margaret Mitchell (Central Scotland) (Con): In the light of that statement, do you think that it is appropriate for the Lord Advocate, as head of the independent prosecution service in Scotland, to criticise publicly criminal justice agencies in the way that you did?

The Lord Advocate: It is appropriate to make comments when I think that there are issues, and I think that there were issues in the SCRO, which are being addressed.

Margaret Mitchell: Do you think that that was the correct forum in which to have made those comments?

The Lord Advocate: As I said, the lecture was about the role of the media. When one is talking about the role of the media, it is important not simply to indicate the areas where one might have issues but to praise them when they do good work.

Margaret Mitchell: At that point, you stated that there were "serious defects". You did not seem to have any difficulty with that. I believe that you then commissioned the Mackay report, a synopsis of which you subsequently released to the committee.

The Lord Advocate: The Mackay report came about first as a result of the Association of Chief Police Officers in Scotland taking the view that there had to be an investigation. When Mr McKie made allegations of criminal conduct, it was decided that there should be an investigation. Given that Mr Mackay had already been commissioned, as it were, to conduct an investigation, the Crown Office took that over and directed it. That is how Mr Mackay became involved. You are right that, at the committee's request, I provided it with excerpts of the report.

Margaret Mitchell: Is it correct to say that the Mackay report looked into all the circumstances surrounding the identification or otherwise of the Y7 fingerprint, which was in dispute?

The Lord Advocate: Mr Mackay conducted an investigation, which was then given to the Crown Office. Then there was the investigation by Bill Gilchrist, who was the regional procurator fiscal for north Strathclyde. He precognosced for the case and, on that basis, it came to me as Lord Advocate.

Margaret Mitchell: As part of the Mackay investigation, was the role of the Crown Office and Procurator Fiscal Service looked into?

The Lord Advocate: The issue was criminality in the SCRO.

Margaret Mitchell: Was the role of the Crown Office and Procurator Fiscal Service looked into as part of the Mackay report?

The Lord Advocate: Given that the issue was criminality in the SCRO, it follows that the role of the Crown Office was not looked into. There were never any allegations of criminal conduct by any procurator fiscal or anyone in the Crown Office.

Margaret Mitchell: So, as part of the Mackay report, no mention was made of how the perjury case had been prosecuted, whether there were any defects in how it had been prosecuted and the role of the procurator fiscal in that.

The Lord Advocate: It would not be the role of a police officer to investigate how the Crown had prosecuted a case unless there were allegations of criminal conduct, and there was none.

Margaret Mitchell: Do you think that it is satisfactory that the committee has a partial report, with so much left out? From my point of view, that seems fairly valueless.

The Lord Advocate: I have made my position on the Mackay report perfectly clear to Parliament and the committee, both in writing and in conversations with the convener. A police report that is produced for the purposes of prosecution is a highly confidential document for a whole host of reasons, which are: to protect the integrity of the criminal prosecution system; to protect the independence of the prosecutor; and to ensure that witnesses can give their evidence in the knowledge that it will not be communicated further, unless in a court of law. I also take the firm view that the state should not accuse individual citizens of criminal conduct unless it is going to try them in a court of law. That is a fundamental principle of our democracy. The Mackay report was a confidential report to the procurator fiscal and, ultimately, to the law officers. Unauthorised disclosure would be entirely wrong.

Margaret Mitchell: William Gilchrist assisted Mr Mackay. Are we to take it that his report is also confidential and that the committee will not have access to it?

The Lord Advocate: Mr Gilchrist did not assist Mr Mackay. Mr Mackay's report came to the Crown Office. In any complaint against the police or a police employee, a report is made by the regional procurator fiscal—that is a precognition exercise that is done after any police inquiry. You are right that that information is confidential. I have never been asked to hand it over, but if I were, it would fall into the same category as Mr Mackay's report.

Margaret Mitchell: Let me put the matter another way: did Mr Mackay assist Mr Gilchrist?

The Lord Advocate: Mr Mackay acted under the direction of Mr Gilchrist. Mr Gilchrist probably waited until he had the report—there must have been communication between them. However, I do not think that Mr Mackay was given specific directions about what to do. Mr Gilchrist then precognosced the case. You will understand the precognition exercise that the Crown Office carries out in serious cases. Mr Gilchrist saw the main witnesses, including the expert witnesses, and made a report to me, with recommendations.

Margaret Mitchell: Have you at any time felt there to be a conflict of interest in your role as a Government minister and head of the independent Procurator Fiscal Service, given some of the aspects surrounding the investigation of the SCRO and the withholding of certain reports in their entirety?

The Lord Advocate: A conflict of interest would arise if I had a personal interest in the outcome. I do not have a personal interest in the outcome. I can go into the constitutional position of the Lord Advocate, although I am not sure whether you want me to do that. I was always conscious of any possible conflict of interest and avoided it.

Margaret Mitchell: During all the time when the investigations were going on and when you commented on the BBC "Frontline Scotland" report, the four officers in question were in effect gagged and unable to put their case.

The Lord Advocate: I am not responsible for the management of the SCRO. I do not know what instructions were given to the SCRO officers.

Margaret Mitchell: Once the criminal investigation was undertaken, did you have any say in whether they could comment?

The Lord Advocate: No.

The Convener: I have a brief question about the role of the Crown in relation to its presentation of evidence. I concur with your response to Margaret Mitchell that, so far in the inquiry, there have been no allegations about the Crown's role. However, when I read the excerpts of the transcript of the trial, I was surprised that the advocate depute did not make the court aware of the existence of Peter Swann, an expert from whom we have heard. I cannot expect you to know what was in the mind of the AD on that day, but are there any circumstances in which the Crown reviews its presentation in such cases?

The Lord Advocate: A lot has changed in the Crown Office since 2000, particularly as a result of the modernisation and reform programme that I put in place in 2002. It is fair to say that the right decisions were taken, given the evidence and information that we had at the time. I have spoken to the advocate depute about the conduct of the trial. As someone who has been a prosecutor and who has been at the bar for 23 years, I can honestly say that, at the time, I would probably have handled the trial in exactly the same way. That is not to say that one does not look to see whether lessons can be learned from the way in which investigations or trials are conducted. In this day and age, we are rather foolish if we do not review cases, even when they appear to go exactly to plan. If we do not learn from experience—especially in large cases—we do ourselves a disservice.

14:30

The Convener: Are you confident that the serious defects in the SCRO have been rectified?

The Lord Advocate: Yes. The report by William Taylor was the foundation for that. It was followed by individual reviews—the review by the president of ACPOS and the updates. The plans that David Mulhern is now working on also address the issues.

It seems to me that issues arose to do with the hierarchical structure of the SCRO and with training. It is right that we have now moved to a non-numeric standard, which has been generally welcomed. Issues also arose to do with presentation in court and the ability of officers to explain to a court—to lay people in particular—the method that they had adopted in making an identification. All those issues are crucial, as are benchmarking, the ISO system and the review process.

We have come a very long way since 2000. I am confident that the product that we get from the fingerprint service is good. From talking to advocate deputes, I am not aware of significant challenges to fingerprint evidence in court.

The Convener: Has anyone in the service expressed concern about the work of the SCRO?

The Lord Advocate: No. The issue of the Sutherland case was addressed, as was the issue to do with Mark Sinclair. Those issues have already been dealt with in evidence that the committee has heard, and I would not want to go into them, unless you wanted to ask me about them.

The Convener: During the inquiry, there has been discussion about the way in which evidence has been presented in court. Until recently, that seems to have been inconsistent across the country. How important is it to ensure that evidence presented on behalf of the Crown is presented consistently? For example, charts were used in Glasgow that perhaps were not used in other places. We have now been advised that that process has stopped, but the issue of consistency remains.

The Lord Advocate: Historically, different fingerprint bureaux might have presented evidence to the Crown in different ways. That is being addressed in discussions between the Crown Office and the fingerprint service. For example, Jim Brisbane has had discussions with Mr Mulhern on these issues.

Jim Brisbane (Crown Office and Procurator Fiscal Service): We want to support the presentation skills of fingerprint officers and we have said to Mr Mulhern that, if we can, we will play a part in any training that is required.

We need to be aware of best practice in the display of evidence. I was struck by the simplicity and effectiveness of the CD-ROM that the SCRO prepared for folk in the criminal justice system to explain the move to the non-numeric standard. There was an example of how to use presentational skills to illustrate findings.

We would like to continue to develop best practice in that area with the SCRO, and I agree that practice might have been inconsistent. Many of the officers themselves have not had the opportunity to give evidence for many years because, invariably, fingerprint evidence, once intimated, is not the subject of dispute.

The Convener: You said that you are confident that the serious defects that you referred to earlier have been resolved. Is there anything at all that leaves you with an issue with the service? Is there any specific issue that you would like to raise?

The Lord Advocate: For my part, and from speaking to advocate deputes, I am not aware of any such issues. Jim Brisbane may have something to add from a departmental perspective.

Jim Brisbane: Mr Mulhern flagged up the issues that remain to be resolved at last week's committee meeting. From our perspective, it has been helpful to have that clear line of leadership in the organisation, which has allowed us to develop the material around the launch of the non-numeric standard and to develop our thinking about how we can support that and continue to develop our internal guidance, as we are doing at the moment. It has been important to have direct dialogue and to get to know some of the concerns, and that clarity of senior management, if carried through in the developing process of the Scottish police services authority, will be helpful to us.

Stewart Stevenson (Banff and Buchan) (SNP): Lord Advocate, you said that you were not aware of significant challenges to fingerprint evidence in court. To what time period is that statement applicable? Is that from the ending of the McKie perjury case to the present day?

The Lord Advocate: To be honest, I was not taking it from any specific period. I am generally not aware of significant challenges.

Let me explain what I mean by "significant challenges". It is certainly true, as I know from speaking to prosecutors, that, from time to time, if a fingerprint officer is giving evidence, counsel might raise the issue of Shirley McKie, particularly if there is a jury, and say, "Well, you've heard of Shirley McKie." Often, that is not backed up by any other expert evidence saying that the print is wrong, so it is, in a sense, dragging the McKie issue into the case. I am not aware of such a challenge succeeding, but of course I am not aware of every case in Scotland, so I could never put my hand on my heart and say that there had been no case in which such a challenge had

succeeded. Often, we would not know—in fact, we could never know—what factors are in the jury's mind when it reaches a verdict.

Stewart Stevenson: So, when you use the word "significant", you are really using that as a surrogate for successful.

The Lord Advocate: No, I am not. I mean significant in the sense of being backed up by evidence that says that the SCRO, or other fingerprint officers, got it wrong.

Stewart Stevenson: Essentially, such challenges as you are aware of have been speculative rather than evidence driven, or driven by another expert being brought to court to dispute findings.

The Lord Advocate: That is a very good way of putting it, if I may say so.

Stewart Stevenson: Thank you.

The Convener: Before I call Bruce McFee, I would like to ask a question about the process by which the Crown receives information. You will know from the papers that, in the process of checking in relation to the Shirley McKie case, there was an officer, Alister Geddes, who still identified the mark but who did not see the 16 points. Would the Crown be made aware of that, or is that not something that you would be advised of?

The Lord Advocate: We were certainly never aware of the blind test, for example, which I know has been referred to. However, I think that that will now be different. Let me tell you why. As part of the process that we have called solemn renewal, to improve the quality of the precognition exercise, we took the decision that every expert who was talking to a material piece of evidence should be precognosed. In the past, such experts were not precognosed and we relied very much on the expert's formal report. In such cases nowadays, we would precognosce the witnesses and that kind of information would come out.

There have also been changes in the process. The manner in which any internal SCRO dispute is managed has changed, and we would now know about that. In particular, we would know whether somebody in the organisation had disagreed with an identification that had been put forward to the procurator fiscal.

The Convener: It will be helpful to have what you have said on the record. The evidence that has been given is clear that Mr Geddes never said anything other than that he identified the mark—the issue was simply that he could not see the 16 points of comparison. You seem to be telling the committee that the existence of precognition statements in the future will at least alert the Crown to such matters so that there can be further questions if there is an issue. Is that right?

The Lord Advocate: Yes.

Mr Bruce McFee (West of Scotland) (SNP): You told us what the procedure would be now, Lord Advocate, but the question was whether the Crown Office was aware of that at the time.

The Lord Advocate: No, it was not.

Mr McFee: Okay.

David Asbury was convicted of the murder of Marion Ross. For the record, what is the current status of that conviction?

The Lord Advocate: The appeal court quashed the conviction some time ago.

Mr McFee: What is happening in the inquiry into the murder of Marion Ross?

The Lord Advocate: Officially, the murder is unsolved. The matter is really for the police to deal with, but as far as I know, they do not have any new lines of inquiry and are not pursuing any new lines. Obviously, if there is a new line of inquiry, they will pursue it.

Mr McFee: So who murdered Marion Ross?

The Lord Advocate: I cannot answer that, of course.

The Convener: You do not have to answer that question.

Mr McFee: The one person who has been forgotten in what has happened is Marion Ross. That is an important point. Nobody has been convicted of her murder and it appears that there has been no on-going investigation for some time to try to determine who murdered her. Will you confirm whether that is the case?

The Lord Advocate: As I said, whether the police will reopen an investigation is primarily a matter for them. I do not know of further matters that have been brought to their attention which would give rise to the investigation being reopened, although I should say that if new information or evidence comes to the Crown Office, we might decide to instruct them to carry out an investigation.

Mr McFee: That is interesting. Thank you.

In November 2001, Shirley McKie served proceedings against Scottish ministers, which were settled earlier this year. We understand that the Executive initially argued that the action should be dismissed, which suggests that it believed that the SCRO fingerprint experts enjoyed absolute immunity in their role as witnesses in a criminal prosecution. That argument appears to have been rejected by Lord Wheatley. Will you elaborate on the position that the Executive took and whether an accusation of malice would have removed any immunity? Was there simply no immunity in the first instance?

The Lord Advocate: Perhaps I should outline my responsibility in the matter. As Lord Advocate, I am the principal law officer in Scotland. I am responsible for prosecutions. I also have superintendence of the office of the solicitor to the Scottish Executive and the parliamentary draftsmen's office. The conduct of civil litigation is the responsibility of the individual minister. The office of the solicitor to the Scottish Executive advises the minister. As Lord Advocate, I am aware of the existence of litigation and I have general superintendence in that I often see the advice that goes to ministers and I am occasionally directly asked for advice but, as I said, the conduct of litigation is for the individual minister. Therefore, it is probably better to direct such questions at Ms Jamieson.

14:45

Mr McFee: I understand that you cannot answer for someone else's brief, but were you asked for advice on the matter and was the matter discussed at Cabinet?

The Lord Advocate: On the second matter, the McKie case was not discussed at Cabinet—certainly not in that detail.

On the first matter, I cannot recall whether I was asked for advice on the aspect of the immunity of the SCRO officers. It is true that, from time to time, I was asked for advice on the technical aspects of the civil case. For example, I was asked whether the Executive should accept vicarious responsibility for the actions of the SCRO. In telling the committee that, I am going further than law officers would normally go. Usually, we reveal neither that law officers were consulted nor the content of the advice. Essentially, the conduct of the litigation was a matter for the Minister for Justice at the time.

Mike Pringle (Edinburgh South) (LD): My question follows on from those that my colleague Bruce McFee put on the Marion Ross murder. In effect, in the Shirley McKie case, the single print was the only evidence against her. Can you think of any other case in which somebody has been prosecuted on the basis of one fingerprint and virtually no corroborative evidence?

The Lord Advocate: I can think of one case where a prosecution for murder was made on that basis. You are right to say that it is unusual for a case to rely exclusively on a fingerprint.

Stewart Stevenson: In developing our questioning, I want to look forward to the introduction of the non-numeric standard. Is there anything that you can usefully tell us about the difficulties that the prosecution service experienced with the 16-point standard that may, in part, have justified the move to the use of the non-numeric standard?

The Lord Advocate: Sixteen was very much an arbitrary figure. Other fingerprint services and jurisdictions used different figures; they used 14, 12 or even, I think, 10 points—I may be wrong about that but, in any event, the figure was arbitrary. The justification for using 16 points was that that protected the integrity of the system. However, the prosecution service often found that it did not have access to perfectly good evidence—if it did not reach the 16 points, it was excluded. I remember being frustrated on occasions when we did not get access to that kind of information.

For example, in a case involving robbery, there might be an object on which there were fingerprints, which might or might not be linked to the accused. The fingerprint officers would be asked whether they had checked the object for fingerprints and whether they had found any marks. The answer would be yes, but the officers might then have to say that they had found none that satisfied the identification process. The mark might well have been put on the object by somebody who had a perfect right to come into contact with it, but the matter would be used by the defence to say, "Well, ladies and gentlemen, you have heard that fingerprints were found, but we do not know to whom they belong. Perhaps somebody else was involved." That was particularly the case if incrimination or something of that nature was involved.

From my perspective as a prosecutor, I welcome the move to the non-numeric standard. In cases where there is confidence in the identification process, the mark can now be used.

Stewart Stevenson: For clarity, is it the case that you are not aware of circumstances in which a mark that did not meet the 16-point standard would be used as part of the prosecution's case?

The Lord Advocate: That was the case under the old system, but the new system uses the non-numeric standard, so whether there were 16 points of comparison would not be considered.

Stewart Stevenson: David Mulhern has issued instructions to fiscals on the introduction of the new, non-numeric standard. How is that affecting the way in which you do your business? What do the instructions include?

The Lord Advocate: The SCRO has provided us with materials that will help us to develop a case. There are instructions to procurators fiscal on fingerprint evidence in the handbook. Jim Brisbane might have more information on that.

Jim Brisbane: We are carrying out a comprehensive review of the existing guidance to accompany the introduction of the non-numeric standard. The contributions from Mr Mulhern and Joanne Tierney have been extremely helpful. In

essence, there will be a requirement to understand more about fingerprint evidence. In the past, it has often simply been a case of producing the report and the evidence on how the 16 points were obtained. From now on, it will be necessary for everyone who deals with such cases to have a greater understanding of the way in which the fingerprint officers have come to their conclusions, which will be based on examination of the detail of the print itself.

Stewart Stevenson: A distinction has been made. Although you have given instructions to the fiscals, I take it that, essentially, they were written by David Mulhern. Notwithstanding that, the imprimatur is yours rather than David Mulhern's.

Jim Brisbane: We worked on them jointly; it has been an overall process. We have been able to set out for the fingerprint service what the new form of report should look like—it will be different from the previous one. The report is served under statutory procedure in a case to invite the defence to agree with it or to challenge it. We have done quite a lot of work to explain that the report will be set out in a different way and will indicate the nature of the material that has been examined. That is the basis on which we have worked. We are now replicating our guidance to fiscals on how to approach leading that evidence in court.

Stewart Stevenson: I want to be absolutely clear. Is it the case that regardless of the fact that what is in that set of instructions has been derived from various sources, the responsibility for them is yours? Perhaps it is the Lord Advocate's. With whom does the responsibility lie?

Jim Brisbane: The content of the report has been designed with the Crown Office. That is necessary because we are the report's end users. We want it to come to us in a format that we think is appropriate for service and use in court proceedings.

Stewart Stevenson: I emphasise that I am talking only about who has management responsibility for the instructions, not about their content. Are the instructions your responsibility? It is perfectly reasonable for that to be the case; I am not asking a trick question.

Jim Brisbane: Are you talking about the instructions on the move to the non-numeric standard?

Stewart Stevenson: No. I am referring to the instructions that have been given to fiscals on how to deal with fingerprint evidence in future.

Jim Brisbane: Those instructions are our responsibility, although we could not have drawn them up without the input that we have received.

Stewart Stevenson: I understand that you have to draw from many sources; I just wanted to know who gets fired if they are duff. I think that I now know the answer.

The Lord Advocate: I think that I am that person.

Mike Pringle: When fingerprint experts are to give evidence in court, how much direction do advocate deputes give them before they come to court? Do advocate deputes decide which bits of the fingerprint evidence they want to use?

The Lord Advocate: We must avoid coaching. A prosecutor will not coach a witness, but it is perfectly proper for a prosecutor to ask that, for example, the visual evidence that backs up an expert's oral evidence be presented in a certain way.

An expert witness can also be seen by an advocate. In this case, I know that the advocate depute met the SCRO officers before they gave evidence. Things have changed considerably over the past few years and, for example, Crown counsel now have more of an input into the list of witnesses who might be called. Indeed, a serious, complex or sensitive case might be assigned to an advocate depute very early on—even, perhaps, before it has been formally reported to the Crown Office—to allow the prosecutor to work at an early stage not only with the procurator fiscal but with the police. Those changes have taken place since 2000.

Mrs Mary Mulligan (Linlithgow) (Lab): Most of my questions about the use of the non-numeric standard have been answered.

You said that you are not in the business of coaching witnesses. This question might be more appropriate for Mr Brisbane, but has the Crown had any input into training fingerprint experts in giving evidence in court?

The Lord Advocate: Before I ask Jim Brisbane, who has recently had discussions on this matter, to comment, I should point out that this is important with regard not only to fingerprint evidence but to other expert evidence. Because, historically, fingerprint evidence had never been challenged, the skills that other police officers and expert witnesses had built up as a result of giving evidence simply did not exist.

Jim Brisbane: We frequently offer to contribute to training for professionals such as doctors and others who give such evidence, and it has come as some surprise that we have not contributed more to training in the fingerprint world. A couple of years ago, when I was the area procurator fiscal in Lanarkshire, I was approached by the SCRO to take part in that training. Although I was not able to do it myself, one of the senior fiscals in Lanarkshire, who is also a senior advocacy tutor at the University of Strathclyde, took part in a day

event at the police training college at Jackton. I am not sure whether we have been asked to do that again—and, of course, because there has not been a substantial turnover of staff, we cannot justify holding such an event regularly. However, I raised the issue with David Mulhern, who expressed concern about whether the current training focuses clearly enough on Scottish procedure and the Crown's expectations. In the past week, I have confirmed to him that we are more than happy to contribute if necessary to any further training that is organised.

Mrs Mulligan: That is helpful.

The Convener: I understand that the officers involved in the Shirley McKie case have not given evidence since the trial. That is quite a long time. Will you confirm that the Crown does not intend to call them as expert witnesses in future?

The Lord Advocate: The matter is under discussion, but it is fair to say that there are considerable difficulties in that respect. Frankly, the situation has not been helped by the unauthorised disclosure of Mr Mackay's report. I have enormous sympathy with the SCRO officers, some of whom are very experienced and have given very good service. However, my job is to ensure that criminal trials are properly conducted and that people have confidence in our criminal justice system. I have a concern that must be addressed. The position of the officers is now so notorious—I do not mean that in a pejorative sense, but the views that have been taken on them are well known—that if any of them were called as a witness, the trial concerned might well become a trial of the officer, rather than of the accused. I want to avoid that.

15:00

The Convener: I put on record that, from the beginning, my position has been that it is not for us to challenge the decisions of the Lord Advocate or the prosecution. I have put on record on behalf of the committee that we think that, under the circumstances, we should have been able to see the whole Mackay report. Your view on that issue is clear, and you have agreed to provide us with excerpts from the report, which has been helpful in informing our recommendations. Notwithstanding that, can you understand the apparent unfairness of our being unable to challenge or question what is in the public domain in relation to the officers who, as you say, have been at the centre of this case from the beginning?

The Lord Advocate: I have had to proceed step by step, adhering to certain principles in which I believe strongly and which I have set out previously. It is important that the confidentiality of the documents is maintained. I will make no accusations about who was responsible for unauthorised disclosure of the report, but I will illustrate the seriousness of the issue. Were a police report to the procurator fiscal to be the subject of an unauthorised disclosure by a police officer, I would expect that officer—regardless of whether they had compiled the report—to face serious disciplinary charges.

The Convener: That is the problem. Unfortunately, the information has not remained confidential. In some ways, that would have protected the officers who are the centre of the case.

The Lord Advocate: I gave consideration to the fact that part of the report—the executive summary—appeared to be in the public domain. However, it seemed to me that if I were simply to say that the report was in the public domain and that I would, therefore, release it, I would have sold the pass for the future. That would have encouraged others to go down the road of unauthorised disclosure, which I strongly deprecate.

The Convener: The Crown's position is that there are on-going discussions in relation to the officers, and you are concerned that they would be at the centre of any trial that you would conduct. Should we conclude that, for that reason, the Crown will not call them as expert witnesses if they remain in the service?

The Lord Advocate: I would need to be strongly convinced that the issues could be dealt with appropriately at the trial. At the moment, I cannot say that it would be appropriate for the officers to be called.

The Convener: Is that the only reason? I will clarify why I am asking the question. It is of concern to me because we heard evidence from Mr Taylor, HM chief inspector of constabulary, that in his view there were serious management failures and serious failures in the process. There were many matters with which he was dissatisfied. It seems to me to be disproportionate and unfair for six people to be perceived to be taking all the blame for the trouble in the SCRO.

The Lord Advocate: On a human level, one can have every sympathy with the position in which the officers find themselves. Some will say that it was of their own making. Nevertheless, on a human level, it is a matter of regret. I have a wider responsibility to ensure that trials in this country focus on the real issue, which is the guilt or innocence of the accused—not whether or not an SCRO officer has, in the past, acted in a way that was malicious or criminal, or something of that nature. That is my real concern.

Des McNulty (Clydebank and Milngavie) (Lab): I am interested in your comment that it is

your responsibility to ensure that criminal trials are conducted properly. I presume that it was also a responsibility of your predecessor.

Going back to the original circumstances, we have evidence in Robert Mackenzie's precognition of a meeting that took place involving Harry Bell; the prosecuting advocate in the case, Shaun Murphy; deputy Crown Agent Frank Crowe; Superintendent Gorman, the deputy director of the SCRO; and the fingerprint officers in the case.

Mr Murphy was asked,

"Did fingerprints lose this case?"

We are told that

"he replied an emphatic 'No'."

The precognition continues:

"There was apparently other evidence in the case which was problematic. Despite his efforts to introduce evidence which was clearly supportive of the SCRO Officers' evidence, he was unable to do so."

That is interesting. It was not possible to introduce evidence beyond the single fingerprint, and nobody has ever suggested that Shirley McKie had done anything wrong in relation to the original case. If the worst thing that could have happened was that she could have been pursued for a disciplinary matter, why was a charge of perjury—a very serious charge—preferred against her? Were the duties of you and your predecessor in ensuring that the appropriate action was taken—that the charge was pursued to that level—carried out properly or correctly? There is a duty-of-care issue. Somebody must have made a decision that it was appropriate to pursue a charge of perjury against Shirley McKie. If the only evidence that could be admitted was a single fingerprint about which there was doubt, why was that hammer used to crack what was, potentially, in procedural terms, a small nut?

The Lord Advocate: As I made clear in my statement to Parliament, I took the decision to prosecute Shirley McKie. The evidence on which the decision was taken was based on the fingerprint. It was the right decision at the time. The case went to the jury, which meant that there was sufficient evidence. As for its being a disciplinary matter or a criminal matter, perjury in a murder trial is quite serious. The case was prosecuted in the High Court because of its seriousness.

Des McNulty said that there was doubt about the mark, but when the decision was taken to prosecute, there was no doubt about the mark.

Des McNulty: According to the evidence, the first 10 or 11 people to look at the mark had confirmed it. Mr Wertheim was the first person to take a contrary view. However, the point remains.

I am not a lawyer and do not have a full background in the subject, but I would have thought that before a serious decision is taken to pursue somebody on a grave charge, which perjury undoubtedly is, somebody must do pretty serious work to establish the basis of evidence and the likelihood of securing a conviction. I find it difficult to understand why a single fingerprint was seen to be sufficient evidence in itself to pursue that charge. It was said about the meeting with Mr Murphy that

"There was apparently other evidence in the case which was problematic. Despite his efforts to introduce evidence which was supportive of the SCRO Officers' evidence, he was unable to do so."

What you said and what Mr Murphy is reported to have said seem to me to be quite different.

The Lord Advocate: I do not know about the particular passage of evidence to which you refer. I emphasise that this was a matter for my independent judgment as Lord Advocate. I was faced with evidence from the SCRO, which had not, at that stage, been controverted. Evidence of a fingerprint is evidence of presence at the scene where the print is found unless, of course, the print is on a moveable object. Shirley McKie's position was that she had not been in the house. Case law is explicit that a fingerprint is in itself evidence of presence. The decision was a legitimate one to take, although it is fair to say that if I knew then what I know now, my decision might well have been different. At the time, I was satisfied that it was the only decision that I could take. Were I to go back now and take the decision again on the basis of what I knew then, I would take the same decision.

Des McNulty: Are you making the point that in another case in similar circumstances you would no longer be reliant on a single fingerprint to make a decision of that seriousness?

The Lord Advocate: No—

Des McNulty: Perhaps as a second point, given that the convener is—

The Lord Advocate: The reason why I would not take that decision now is that the conflict of expert evidence is so unbridgeable that we could not go to the jury and say, "You can accept the SCRO evidence beyond reasonable doubt." Mr Zeelenberg, who is respected internationally and has been intimately involved with Interpol, has challenged that evidence. Regardless of whether you come down on the side of the SCRO or Mr Zeelenberg and others, the fact of the matter is that we would have to say to a jury, "You can accept the evidence of those witnesses, rather than the other witnesses." A conviction on the basis of that conflict would be unsafe, so we simply would not have prosecuted in that situation.

Mr McFee: I want to get to the nub of this. Is it your opinion that the perjury case against Shirley McKie stood or fell on the basis of the fingerprint evidence that was presented?

The Lord Advocate: As it turned out for the jury, that is right. I do not want to go into this, because the matter did not come out in the trial, but it is fair to say that the advocate depute believed that there was other evidence that was supportive. It is not the aspect to which Mr McNulty referred, but another piece of evidence. The evidence did not come out as was expected.

The Convener: You said that it "did not come out". Is there a legal aspect to that? Did the advocate depute attempt to get the evidence in, but the judge would not allow it?

The Lord Advocate: I think it is fair to say that the evidence that was given was not in accordance with what the advocate depute's understanding of it was.

15:15

Mr Kenneth Macintosh (Eastwood) (Lab): It has been interesting hearing about decisions that you took. For example, you said that you accepted vicarious liability for the conduct of the SCRO officers. Did that decision enable the McKies to drop the action against the SCRO officers?

The Lord Advocate: I believe so.

Mr Macintosh: Would you say that you acted in the best interests of the public servants themselves—the SCRO officers?

The Lord Advocate: The decision was as much a pragmatic legal decision as anything else. It was as much a matter of pragmatism as an analysis that there was a legal duty on the Scottish ministers to accept liability. One of the main problems was that the governance of the SCRO was, frankly, unclear. I think that the move to the Scottish police services authority will probably address that. However, at that time, the governance issues were unclear, as was who employed them and was responsible for them. I think it was regarded as a pragmatic decision that we could accept liability.

Mr Macintosh: Do you think that you, as Lord Advocate, or the Executive ministers in general have a duty to deal even-handedly with the SCRO officers? Do you think that you have done so?

The Lord Advocate: I am not sure that that is particularly a question for me; perhaps it is for Cathy Jamieson. What I would say however, from my own observation, is that ministers were always conscious of the position of the SCRO officers and wanted to do what was right by everybody. Whether that was an achievable aim is another matter.

Mr Macintosh: The committee has been frustrated by the fact that the précis of the Mackay report was leaked and is in the public domain, but we have been unable to challenge or cross-examine Mr Mackay about the matter. The synopsis that you have now released is a very interesting document in that it seems to be based on a bit of the Mackay report, but has also been updated, using evidence from the Justice 1 Committee's inquiry. The synopsis actually quotes evidence that witnesses gave in this forum.

The Lord Advocate: I confess that the synopsis went to the committee while I was on holiday and I did not see it before it went, so I cannot comment on it. Perhaps Mr Brisbane can do that.

Mr Macintosh: A document is already in the public domain, although the Executive did not release it, but this synopsis was released—

The Lord Advocate: The Crown Office did not release the document.

Mr Macintosh: The Crown Office released this synopsis. It has been enhanced—as I would describe it—using evidence from this committee. It is a very strange document because it is not the Mackay report and it has been updated since that report's publication. The evidence has been updated, but have the conclusions also been updated and enhanced?

Leanne Cross (Crown Office and Procurator Fiscal Service): I might be able to assist on this. The Justice 1 Committee is referred to in the synopsis only in relation to the anonymity of witnesses. Where somebody was referred to in the Mackay report who had already given evidence to the committee, we were able to leave in their names, because there were no confidentiality issues. However, in cases where somebody was mentioned in the Mackay report who had not given evidence in public, we felt that we had to anonymise because the Lord Advocate had said from the beginning that we would not compromise confidentiality. Therefore, the committee's evidence was cross-referred with the information that we produced from the Mackay report, in terms of the headings that were requested.

Mr Macintosh: Were the conclusions that are quoted in the synopsis lifted from the Mackay report?

Leanne Cross: Yes.

Mr Macintosh: So they are not new conclusions.

Leanne Cross: No.

Mr Macintosh: Another interesting aspect of what is obviously a very strange document is that it contains no reference to the evidence of independent experts such as Peter Swann, who is

quoted in the Mackay report. The synopsis is unbalanced, in my view: not only is it not the Mackay report, it is an unbalanced synopsis of that report. I am just trying to work out how it is helpful to anybody.

The Lord Advocate: I was asked to address particular issues that were dealt with in the Mackay report. Therefore, the excerpts relate to those particular issues.

Mr Macintosh: On whether as Lord Advocate you have been even-handed in this matter, I take it that a similar report would have been presented to you to allow you to take a decision on whether to prosecute Shirley McKie. Why did not you release that document? You decided that the Mackay report provided no evidence to support a prosecution, but when you received the report on the McKie case, you decided that there was evidence on which to pursue a prosecution. Why did you release a one-sided document containing allegations against four individuals who have already been cleared by several inquiries when you have clearly not done that for every other party in this case?

The Lord Advocate: I take issue with that, Mr Macintosh. I was clear that I would not release the Mackay report and that I certainly would not release the allegations of criminality and so on. At a meeting with the convener, who spoke on behalf of the committee, it was made clear to me that the committee wanted the whole Mackay report—indeed, the convener has confirmed today that that remains the committee's position. However, having made it clear that I would not release the Mackay report, I then received a letter from the convener asking whether I would consider releasing the parts of the Mackay report that deal with the particular issues that were itemised in the letter. I complied with that request because I thought that it was the right thing to do in order to assist the committee on the issues of, for example, training and organisational culture.

Mr Macintosh: Was that fair to the SCRO officers?

The Lord Advocate: It certainly was. I am here not to be fair to one side or another but to assist the committee as much as I can. I do not see anything unfair in releasing the aspects of the Mackay report that deal with those issues. I would not have thought it fair to release a police inquiry report into allegations of criminality, but I have not done that.

Mr Macintosh: I have a final question, which is on a separate matter. Mr McFee asked whether you would look into whether there was any new evidence in the Asbury case or any other case that is connected with this case. What has happened to the examination of the blood that was found on the two watches that were found in the Asbury house? Given the advances that have been made in DNA testing and the suggestion that further testing should take place, will you undertake to conduct a DNA test of the blood that was found on that evidence?

The Lord Advocate: As you are aware, there is a civil litigation concerning Mr Asbury.

Convener, I am being asked about DNA testing of blood in the Asbury case. I am wary about answering a question on that issue because of the civil litigation of which I am aware.

The Convener: Yes—I think that you would probably stray into sub judice issues if you were to answer that question.

We have just a few final questions for the Lord Advocate.

Alex Neil (Central Scotland) (SNP): Convener, I have a question.

The Convener: You did not indicate that.

Alex Neil: I thought that I had.

The Convener: If you can make the question brief, I will be grateful. However, you did not indicate that you had one.

Alex Neil: It is only fair that I should be allowed to ask a question to balance things out—

The Convener: Yes, but you did not indicate that you had a question. I tried to strike a balance. When I looked at you and you did not look back, I thought, "Alex is unusually quiet." However, I was mistaken.

Alex Neil: Convener, I would not want to break the habits of a lifetime.

Lord Advocate, you have discussed the future credibility of the SCRO officers as expert witnesses, but is not your credibility as a public prosecutor at stake? You took the decision to prosecute Shirley McKie. In answer to Bruce McFee's earlier question, you said that the jury's decision hung on the fingerprint issue. However, as Lord Johnston's charge to the jury makes clear, that is not the case at all. Three separate reasons were given—Lord Johnston described them as "hurdles": one was the issue of the fingerprint; the second was the forensic question, which could have been checked beforehand, of when the fingerprint was taken—the timing of the black powder or aluminium powder; and the third was the testimony of every single police officer who guarded the house at the scene of the murder, every one of whom went on oath to say that there was no way that Shirley McKie could have been in the house.

In addition to the issue of the fingerprint, surely you interviewed all those officers, checked the

issue of the black powder and the aluminium powder and ascertained that it was physically impossible for the print to belong to Shirley McKie. You said that it had not, when you took the decision to prosecute, become clear that there was a dispute over the fingerprint. Once that became clear, surely you should have revised your decision to continue with the case.

The Lord Advocate: In the first place, I have to exercise independent judgment on whether there is sufficient evidence to prosecute. As I said to Parliament and the committee, I exercised that judgment; based on the evidence at the time, the decision was the right one. The case went before a jury; it was a jury decision.

When the evidence from Mr Wertheim and Mr Grieve came in, the advocate depute saw the SCRO officers and formed a view as to their professionalism, credibility and reliability. He also formed a view on the basis of the information that he had about Mr Wertheim and took the right decision to continue with the case. If I were to have my time in court again, based on the knowledge that we have now, we would certainly have taken different decisions at different times. For example, we now know that Mr Zeelenberg and others also supported that. We could not have gone to the jury and asked for a conviction based on that. The right decision was taken at the time. I do not intend to discuss every aspect of the decision with the member, as that would be improper. I stand by the decision that I made at the time. However, as I said, in the light of what I now know, we would have taken a different view on whether Shirley McKie should have been prosecuted. Moreover, we would have taken a different view of the way in which the case would have been prosecuted from beginning to end. That is partly the result of the experience that we have gained, but in the main it is because of the changes that I have put in place since 2002.

Alex Neil: I realise that you do not want to go into too much detail, Lord Advocate. However, did the Crown Office check and interview the police officers who were on duty guarding the house? Did they confirm that Shirley McKie was at no point in the house?

The Lord Advocate: I cannot recall what evidence was available and what was not. I cannot recall whether the police officers were precognosced or gave statements. We know that five officers went into the house, but that they were not logged.

The Convener: I will allow one further brief question from Alex Neil.

Alex Neil: Right. You keep saying—you said this in the debate—that you will not go into detail to justify the decision to prosecute, or not to prosecute. However, on 28 August this year, you issued a detailed statement on your decision on the Celtic goalkeeper Artur Boruc. Why is there one rule for Boruc and another for everybody else? You are totally inconsistent.

The Lord Advocate: No, I do not believe that we are. The warning letter to Mr Boruc was a confidential matter, but that confidentiality was breached. It became clear that there was a great deal of public concern around the misinformation that was given that the making of a sign of the cross—that religious observance—was an offence. That is clearly not right. It was important to put the record straight and to allay people's concerns.

Alex Neil: Is not it correct to put the record straight in the Shirley McKie case as well, as Mr Macintosh said?

The Lord Advocate: We have done that.

Alex Neil: No, you have not.

15:30

The Convener: We have a few final questions and one brief one from Margaret Mitchell.

Margaret Mitchell: Shirley McKie gave evidence in May 1997 and there was a not guilty verdict for David Asbury in June 1997, yet she was not charged until March 1998 and a trial followed in 1999. Why was there such a gap?

Having decided that there was sufficient evidence to sustain a perjury charge, do you now have any reservations about the performance of fiscals in courts, vis-à-vis very experienced Queen's counsels acting as defence agents so that, at times, there is not a level playing field? Do you think that fiscals are overworked and that they are not getting the information that they require to convince the jury about the standard of evidence?

Those are huge questions, but ones that I think have to be addressed.

The Lord Advocate: On the delay, an investigation was carried out prior to Shirley McKie being charged. The trial was delayed at the instance of the defence on more than one occasion. One of the problems that we had at that time was delays in the High Court. As you know, as a result of the Bonomy reforms, much of that has been addressed. It is fair to say that we would not adjourn trials now; we would adjourn preliminary diets, without the inconvenience to witnesses that used to attend the trials.

Margaret Mitchell: Can I ask you about the charge? It was not brought until March 1998.

The Lord Advocate: The matter was investigated after Shirley McKie gave evidence. That sort of time lag was not unusual.

As for your question about procurators fiscal, there was, because the case was tried in the High Court, no procurator fiscal but an advocate depute. He is a very experienced advocate depute and one in whom I have enormous confidence. He conducted the trial professionally and appropriately. I was an advocate depute and I used to teach advocacy. I have talked the matter through with him, and I would probably have taken the same decisions that he took in the case. That is not to say that I would not learn from the experience; I always think that if I have not learned anything from something that I have gone into, I have not done my job properly and I am not acting professionally.

We have invested a huge amount of money and resources in the improvements that have been made in the Crown Office and Procurator Fiscal Service over the past few years and in Crown counsel advocate deputes. The fruits of that are now becoming apparent, and it is something in which I take a good deal of pride. The Crown Office and Procurator Fiscal Service is one of the most professional, hard-working and dedicated services that we have, and it provides an excellent service to the people of Scotland.

The Convener: Jim Wallace MSP gave evidence to the committee last week. He was the Minister for Justice at the time of the Shirley McKie case. He has written a letter to me, which the committee has seen, in which he states that, when Mr Taylor started to conduct his inspection, as HMIC,

"I was advised by my officials that if, during the inspection, HMIC encountered allegations of impropriety they would be referred to the relevant Chief Constable and/or Procurator Fiscal, as appropriate."

If you were able to tell me now or later, I would be keen to know whether that is your recollection of Mr Taylor's remit.

The Lord Advocate: I am sorry—I would have to check that, as I do not remember. I have no reason to doubt the evidence that Mr Wallace gave. It was him rather than me who was involved with Mr Taylor. I do not recollect whether I discussed the matter with Mr Taylor at any stage.

The Convener: I would be grateful if you cleared that up, if you can. The question is quite important, because when the committee heard from Mr Taylor last week, he repeated that he conducted an inspection, but it now appears that he had a remit to report to the

"Chief Constable and/or Procurator Fiscal"

if he felt that an investigation was warranted. If that is correct, I presume that someone in the service must have been aware that they might receive a report from Mr Taylor. If you can assist us in establishing the facts, the committee would be grateful.

I appreciate that you have come before the committee in the spirit of giving us as much information as we feel we need to conduct the inquiry. As you are aware, we cannot compel you to appear, so I am pleased that you came to the committee willingly.

It remains the committee's view that, given the extraordinary nature of the inquiry—our position remains that the circumstances are very unusual—and the responsibility that we feel in the circumstances, we would have preferred to challenge Mr Mackay on some of what is in the public domain, in the interests of the inquiry and the service. I respect your position, but we must agree to disagree. We welcome the fact that you released some of the Mackay report, which may assist us in considering the way forward. I thank the Lord Advocate, Jim Brisbane and Leanne Cross for appearing and giving evidence as frankly as they can.

I welcome our second panel of witnesses, which includes Cathy Jamieson, the Minister for Justice, and Christie Smith, who heads the Scottish Executive division that is responsible for police common services and information technology and for crime prevention—that is a mouthful of a title. Also with us we have Richard Henderson, from the office of the solicitor to the Scottish Executive. I thank you for appearing at what is for the moment our final evidence session in the inquiry; whether you are our final witnesses remains to be seen.

We have several questions and I will begin. When did the Scottish Executive Justice Department first become directly involved in the Shirley McKie case?

The Minister for Justice (Cathy Jamieson): The officials can give you a detailed timeline. My responsibility started when I took over the justice portfolio. From then on, my aim has been to try to move things forward and to use my powers to bring the issue to a close at the same time as respecting the rights and opinions of all the individuals affected by the case. I will ask Christie Smith to give a brief overview of the Justice Department's role in the time that predated my appointment as Minister for Justice.

Christie Smith (Scottish Executive Justice Department): On 14 January 2000, we became aware that the Shirley McKie case was to be the subject of a BBC "Frontline Scotland" programme on 18 January, and we briefed the then Deputy First Minister and Minister for Justice. We also had a copy of a letter from Mr Iain McKie to the Lord Advocate dated the same day, alerting us to the issues that were to be raised in the programme. As I said, we briefed Mr Wallace about that and the case developed from there.

On 7 February, following the broadcast of the programme, the executive committee of the SCRO invited HM chief inspector of constabulary for Scotland, Mr William Taylor, to bring forward his inspection of the fingerprint service. The committee has had Mr Taylor's evidence about the process from then on.

The Convener: When you are giving us dates, could you also give the year?

Christie Smith: We are still in 2000.

The Convener: What was important about 18 January 2000?

Christie Smith: That was the date of the first "Frontline Scotland" programme.

The Convener: Minister, can you remember when you took over as Minister for Justice?

Cathy Jamieson: It was immediately after the election in 2003. The Justice Department has been my responsibility from that time on. Prior to that, it was the responsibility of my predecessor.

Mr McFee: I am sorry for butting in, but I have a supplementary to that first question. Christie Smith's answer says to me that if there had not been a "Frontline Scotland" programme, the investigation would not have taken place early and things would have trundled on as if everything was all right.

Cathy Jamieson: My officials were asked for a factual record of the information. That has been provided and the information is as has been given. That is the point at which the Justice Department was first notified that there were any issues.

Mike Pringle: Following the report of HMIC's 2000 primary inspection, the Minister for Justice, Jim Wallace, informed the Parliament of the report's conclusions. In so doing he apologised to Ms McKie for the suffering that she had endured. Do you agree with that decision? Do you agree with the First Minister's later statement about "an honest mistake"?

Cathy Jamieson: My predecessor has given evidence and a fairly full explanation of what he sought to do at the time. He was seeking not to admit any liability; rather he was recognising in human terms the position that Ms McKie and others were in at that stage, and he made his statement to Parliament accordingly. I am sure that we will want to tease out in further detail the questions around the final settlement. It is quite important for me to say early in the proceedings that we attempted to move to settlement on the basis that we accepted that there had been a misidentification. We did not accept that there had been malicious intent on the part of the SCRO officers, so we were prepared to arrive at a settlement by mutual agreement that allowed us to maintain our position that there had not been malice while accepting that there had been a misidentification. That is the position that we have held.

The Convener: We have heard from Jim Wallace that he made his apology but he did not regard that as being an issue as far as the legal process was concerned. Will you confirm that there is no issue about liability when a minister apologises in relation to a civil case?

Christie Smith: I think that Jim Wallace said that he regretted the effect that the events had had on Ms McKie. The expression that he used did not, I think, concede any liability in any proceedings.

15:45

The Convener: I just wanted you to confirm that as the legal person in charge of the case.

I pursued with Jim Wallace whether he was at all concerned that one of the allegations in the public domain is that there might have been malicious intent. Will you confirm, broadly speaking, what the civil case against the Executive was?

Cathy Jamieson: It would be helpful to have Richard Henderson, from the office of the solicitor to the Scottish Executive, deal with that.

Richard Henderson (Scottish Executive Legal and Parliamentary Services): The civil case started out with a writ in 2002, I think. As you will know, it was discussed in the opinions of Lord Wheatley and Lord Hodge. The Lord Wheatley opinion cleared up the basis for the action. Although it was founded on negligence, in effect it was founded on an allegation of malice. It was quite clear that it was not properly pled. That is not to suggest anything against those who were pleading the case—the pleadings on both sides were not as they should have been.

The matter went to a debate when the pleadings were clarified. That resulted in a minute of amendment from the pursuer, which completely clarified the basis of the action.

The Convener: Does that mean that the original legal case was predicated on malice?

Richard Henderson: It was not clearly so predicated.

The Convener: It was not?

Richard Henderson: Otherwise, there would have been no need for—

The Convener: I hear you saying that later on, in court, when the pleadings were presented, there were flaws on both sides, and that a change was made through a minute of amendment. When did that start off? It is important for the committee to

know the answer in some detail. When a minister apologises to someone during an on-going civil case and we, as members of the public, hear that there is an allegation of malice, is that minister admitting that there might indeed have been some malicious intent? I want to be clear about that issue.

Richard Henderson: My understanding is that there has never been any admission of malice in this matter.

The Convener: It is not about admission; it is about the McKie side. What was the McKie side's case against the Executive? I appreciate that the Executive would deny it, but what were the McKie side's initial averments before the matter went to pleadings?

Richard Henderson: The averments are complex. I have them before me. Lord Hodge and Lord Wheatley both said that the case was very complicated.

The Convener: Was malice mentioned in the original case against the Executive?

Richard Henderson: I think that there is a reference to malice, but it is not the basis on which the action proceeded at that point.

The Convener: On what basis did the case proceed, eventually?

Richard Henderson: Eventually, it proceeded on the basis of malice. That was the case that would have been pled if the proof had proceeded.

The Convener: From a layperson's point of view, does that mean that the McKie side would have had to show that there was malicious intent on the part of the SCRO?

Richard Henderson: Yes. To have succeeded at the proof, they would have had to show that there had been malice.

The Convener: Why was the Executive not in a position to defend its case in relation to malicious intent?

Richard Henderson: I do not think that it comes down to whether the Executive could or could not have defended the case. It is quite clear that there was competition in the evidence that was available. There was evidence from the SCRO officers and experts and there was evidence from the other side. The matter was exceedingly complex. The Executive had an expert report. That report was sufficient to suggest that the standards of care—

The Convener: No, can I stop you there? We will get to that issue; we have a question on it. What I want is for you to talk me through the early stages.

You are saying that the McKie side presented a case against the Executive. It was a civil action but I am not really clear what it was. You are saying that the action rested on the McKie side having to show that there was malicious intent.

Richard Henderson: That is correct; that is my understanding.

The Convener: I am trying to understand why the Executive would settle in a case that was based on there having been malicious intent. It suggests to me that you did not think that you could defend your position in court. If the complexities of the legal argument changed—from malice to something else—I would like to hear about that. Do you understand what I am trying to get at?

Richard Henderson: I will not say that litigation is a lottery, but litigation depends on the way in which evidence comes out. It depends on judgments being taken, as a case develops, on what the optimum course of action is. In a case such as this one, that judgment will not depend only on whether the advice is, "Yes—you can win." There might be what one might call equities in play as well.

The Convener: I am not really sure what you mean by that. At some point the Executive settled the case. Will you talk us through the issues that arose in the discussions on why you should settle as opposed to go to court?

In our inquiry, we have heard no evidence that there was malicious intent—we have heard suggestions of other things, but not malicious intent. However, if the allegation against the Executive was that there was malicious intent, I want to know what the issues were that made you decide to settle the case.

Cathy Jamieson: Convener, I wonder whether I can help. I know that you will be coming on to this issue, which was one that unfolded over time. As a non-lawyer, I will try to use simple layperson's terms—like the terms that I used in trying to understand the process.

Prior to the Wheatley decision, there was a considerable amount of to-ing and fro-ing on the legal side, which Richard Henderson has attempted to explain. Clarity followed on from that. However, although the case might have been presented in terms of having to prove or disprove malicious intent, it was clear from reports that the Executive commissioned that we had to take certain other factors into account when considering whether the whole process could be substantiated and stacked up, and whether we could justify everything all the way through the process.

That is probably the best way in which I can explain it without going into detail about the further reports that I am sure people will want—

The Convener: Therefore, it may have started off with the other side saying, "We can prove malice," then you considered other issues that came out through a report that we will want to talk about later. One of those issues was that there might have been negligence. You are saying that there was a whole pot of issues that you had to negotiate over.

Cathy Jamieson: Some of those issues were around in the initial pleadings. I think that that is the point that my colleague, Mr Henderson, was making. In legal terms, there was a fair mishmash of things—I think that that was how it was described somewhere. There were a number of things in the initial pleadings, including the question whether there had been malicious intent, or negligence, or due care and attention. All those things were in the pot.

As I understand it, at each stage of the legal process, people were trying to pin down exactly what the case against the Executive was. Over time, that became refined to the point at which we had very specific things that could have gone to court had we not made moves to settle.

I hope that that was helpful.

The Convener: It was.

Mrs Mulligan: I want to go back to the point that was raised in relation to Mr Wallace's evidence last week. He said that stating his regret about what had happened was a human response. Am I to understand that that was the advice that was given to him at the time, so as to avoid any responsibility being placed on the Executive at a later stage?

Cathy Jamieson: I think that Mr Wallace is on record as saying that he felt that it was important to give that human response, but he perhaps went further than the advice that he was given by his officials, who perhaps would have been more comfortable if he had not made any comment. Again, I am speculating on that and reading between the lines of what Mr Wallace said. Clearly, he felt that some public recognition had to be given to the position that Ms McKie had been put in.

Stewart Stevenson: Mr Henderson said:

"the pleadings on both sides were not as they should have been."

What were the deficiencies in the Executive's pleadings?

Richard Henderson: I am not in a position to go into that. We can go through the papers and come back with a response, but I cannot answer that question just now. I simply know from reading Lord Wheatley's judgment on the procedural debate that he criticised the pleadings of both sides.

Stewart Stevenson: When you remarked that pleadings on both sides were not what they should have been, were you reporting someone else's opinion rather than giving your own opinion?

Richard Henderson: Yes, I was reporting the opinion of others.

Stewart Stevenson: It would have been useful if you had explained that at the outset.

Richard Henderson: I am sorry if I did not make that clear.

Stewart Stevenson: For the benefit of good administration on the part of the Executive, it is probably important to understand in what regard the pleadings were defective, particularly to any material extent—obviously, I am not referring to minor details. That would be useful to know.

Mr McFee: In Lord Wheatley's judgment, to which the minister and Mr Henderson referred, were the pleadings deemed to have been not as they should have been in part because of the Executive's belief that the SCRO officers enjoyed immunity from prosecution?

Cathy Jamieson: Richard Henderson will be able to comment on the legal position. Many of these events took place during my predecessor's time, but my understanding is that the lack of clarity surrounding the employment status of the SCRO officers was an issue. Lines of accountability and of management were unclear, with some people being secondees into various different organisations. At that stage, ministers took the view—with the best of intentions and, I think, correctly—that it should be for the Executive rather than for any individual public servant to bear the brunt of the proceedings and to take that on. Therefore, the Executive took it on in order to be able to defend the case.

Mr McFee: I understand that and I can understand that reasoning, but is it not the case that the Executive's position was that the officers enjoyed immunity from prosecution, but Lord Wheatley said, "You're not on?"

Cathy Jamieson: Richard Henderson will be able to provide more information on that.

Richard Henderson: The general proposition is that there is an immunity from liability; otherwise, in effect, the criminal justice system could not work. However, there is also a boundary to that immunity and a litigant is not to be prevented from pursuing a matter in which the alleged conduct is on the other side of that boundary.

Mr McFee: In other words—as a non-lawyer, I am in the same position as the Minister for Justice,

so I will try to put this in punterspeak—if the officers had been accused of acting maliciously, they would not have enjoyed any form of immunity that they might otherwise have enjoyed.

Richard Henderson: That is the basis upon which the action subsequently proceeded. It is fair to assume that, if the pleading had been made clearly in that form in the first place, that ground of challenge from ministers, which led to the procedural debate, would not have been available.

Mr McFee: We are clear, then, about why we had the procedural debate and why a position was taken on the ground of immunity.

You went on to talk about the further report—— although, for other reasons, the convener cut you off at that point—which was provided by John MacLeod. What process did you go through to identify John MacLeod? How long did his work take? What was his remit?

Cathy Jamieson: Perhaps I can give some information on that. Obviously, legal advice was given to ministers at that stage. In 2002, ministers were advised that it would be necessary for the Executive to get an independent expert's report to inform the Executive's case. Even at that stage it was pretty clear that there would be a number of issues that might not provide definitive answers. My understanding is that in August 2002 John MacLeod was suggested as an appropriate person to take that forward. He was subsequently appointed and asked to provide a view on the particular fingerprints and a number of other issues.

16:00

Richard Henderson: The terms of reference for the report are set out in the report itself.

Mr McFee: Let me make this easier, then. Was John MacLeod specifically asked to give his opinion on whether the SCRO experts had been negligent in identifying mark Y7 as Shirley McKie's?

Cathy Jamieson: I am looking to the legal advice from people who were involved at that stage, but my understanding is that we as an Executive—I speak collectively—required that information at that stage to consider how best to proceed. That was certainly part of the remit that he was given. He was asked to consider the mark and to give us some advice and form an opinion on that basis.

Mr McFee: For the record, what was Mr MacLeod's opinion on whether negligence was a factor?

Cathy Jamieson: One of the reasons why I made information available to the committee—the report is, of course, available—is that, in his opinion, it could not reasonably be assumed that all due care and attention had been paid in how matters had been conducted. That was his opinion.

Mr McFee: In the two reports that he provided to the Executive, did he express any doubt about whether the proper processes had been gone through? Did he express any doubt about whether there was negligence?

Cathy Jamieson: There are perhaps two questions there. Having read the reports, as I understand it, he did not express any doubt over his conclusions. The question of whether he would have described what happened as negligence is open to interpretation. If you look at the wording in the reports, you will see that he talks about there not necessarily being the due care and attention that would have been expected.

Mr McFee: Correct me if I am wrong, but you have stated that you agree with the introduction to David Mulhern's action plan that mark Y7 was misidentified.

Cathy Jamieson: The Executive accepted that, yes.

Mr McFee: Having done so, you settled out of court. Did you come to that conclusion solely as a result of John MacLeod's findings or were there other contributing factors?

Cathy Jamieson: Like everyone, I, as the minister, was aware that the case was a very high-profile case with strongly held views on all sides. I have mentioned that in previous parliamentary statements and debates. I felt that it was my responsibility to consider all the evidence and advice that could be presented to me and to make a decision on the best way forward. On the basis of the advice that was provided to me, including the expert report and the range of other issues that I had to consider, I took the decision that the best thing was to try to make the settlement, especially given the length of time that had elapsed, and to move on.

I did that for a number of reasons—partly because I was concerned about all the individuals involved in the situation and partly because I was concerned about the future of the Scottish fingerprint service and how we should move on. I did not think that it was in anyone's interests for the process to continue and for no one in the situation to be able to move on. When I took the decision, I recognised that it would not necessarily be popular.

Mr McFee: I have another issue to raise, but I understand that some of my colleagues might want to ask supplementary questions.

The Convener: Yes—we are sticking to the MacLeod report.

Margaret Mitchell: My question is for Cathy Jamieson, as Minister for Justice: exactly what was the remit? Did you start with the assumption that there had been a misidentification?

Cathy Jamieson: You ask about my role as Minister for Justice, but obviously I am speaking for the Executive collectively because some of the decisions were taken earlier. However, my understanding is that, at that stage, Mr Wallace, in his capacity as Minister for Justice, had accepted that there had been a misidentification. The report was therefore to consider whether that could be confirmed or otherwise.

Margaret Mitchell: Let me put it another way. Jim Wallace having said that in the chamber, did you feel that the Executive was, to an extent, compromised? Given that he said that there had been a misidentification, the Executive could not go back and see whether it was really a matter of misidentification or a difference of opinion. At the end of the day, the perjury trial centred on the credibility and consistency of the witness, and not necessarily the fingerprint evidence.

Cathy Jamieson: If you are asking me whether the fact that Jim Wallace made a statement in Parliament and issued an apology influenced the decisions that I then took on the basis of the evidence in front of me, I have to say that I had to weigh up very carefully everything that was put in front of me. I had to weigh up the fact that there were strong opinions on all sides and the fact that almost every MSP had an opinion and was not slow to voice it to me. I had to take the decision that I thought was right in the circumstances.

I did not feel that my ability to make a judgment was compromised by what Mr Wallace had said previously. However—this may come up later in relation to the length of time that it took to arrive at a decision—I was keen to take advice myself and to be able to ask officials to review and go over in detail all the information that had already been looked at in order to assure myself that, when I came to make a decision, I was able to make it on the basis of the proper advice.

Margaret Mitchell: You have said that you considered all the available evidence and advice. Yet, when Mr MacLeod gave evidence, it was clear that he had not spoken to someone who had positively identified the mark as being Shirley McKie's.

Cathy Jamieson: I looked at all the information that was presented to me, and I considered the advice of our legal team and of officials who had reviewed all the paperwork in the case. I also had to consider the report that our expert witness, Mr MacLeod, supplied to us. He was asked to do something specific in that report, and he provided us with information.

Margaret Mitchell: Did it occur to you that it might have been good to hear an alternative point of view from someone who disagreed?

Cathy Jamieson: The alternative points of view were put to me. Many people wrote to me and many MSPs spoke to me on the matter. I met many MSPs and we went through a range of different views. I was well aware of all the alternative points of view.

I came to the conclusion that, whatever decision was taken in relation to the case, one side or the other—perhaps everybody—would be unhappy with it; however, I felt that I had to do the right thing in order to move the process on. I was keen to ensure that we got a resolution to the process that allowed Ms McKie to move on, recognising the damage and suffering that had been caused to her. As the Lord Advocate mentioned in his evidence, I also tried to recognise the difficult position that the SCRO officers were in and to ensure that individuals there did not suffer because of failings in the system that it was our responsibility to sort out. That is why I was so keen to move on to the action plan.

Margaret Mitchell: Nonetheless, no evidence was included in the MacLeod report from anyone who had positively identified the mark, despite the fact that Mr MacLeod told the committee, in evidence, that he would have liked to talk to the four experts. We have been steeped in this for some time and know that differences of opinion are resolved by experts discussing the matter and pointing things out to one another. Yet not only did Mr MacLeod not talk to them, although he would have liked to; he told us that he was not allowed to talk to them.

Cathy Jamieson: I ask Christie Smith to comment on that.

Christie Smith: Mr MacLeod was appointed to give ministers his own expert opinion, not to provide a resolution or to adjudicate between the fingerprint experts. Our legal advice was that it would have been improper for the ministers' expert witness to discuss his opinion with, in effect, the officers whose work he was being asked to comment on. That was not a matter of neglect; it was a specific instruction. Mr MacLeod was to provide an expert report to ministers, not to engage in debate with either the SCRO officers or the other experts who had examined the fingerprint. He was to look at the materials that they had to make the identification, to come to his own view and to give expert advice to the ministers.

Margaret Mitchell: I think that I am right in saying that Mr MacLeod told us that he had

contacted Mr Zeelenberg and had discussed the case with him.

Richard Henderson: The position is that it might compromise the evidence of witnesses to fact if they were to discuss their evidence with an expert witness. The expert witness is there to assist the court in arriving at an assessment of the factual evidence—in this case, the fingerprint and the questions relating to the levels of care that might have been exhibited in connection with a course of action that led to a different conclusion.

Witnesses to fact might be induced to alter their evidence through discussion with an expert witness. Therefore, both the witnesses to fact and the expert witness would be of less value and the evidence before the court could be compromised.

Margaret Mitchell: I am having a little bit of difficulty here. To an extent, it was, perhaps, seen as inappropriate not to talk over the case with the four experts, although I have reservations about that. However, I cannot see why it was perfectly okay to speak with Mr Zeelenberg and not someone else.

The Convener: Are you certain that that—

Margaret Mitchell: Yes, I have read the *Official Report* again today and can say that, when Mr MacLeod gave evidence, he confirmed that he discussed the matter with Mr Zeelenberg. Does that not turn on its head what you have just said, Mr Henderson?

Richard Henderson: Not in this particular case, no. The nub issue in this case relates to what actions were taken by the SCRO officers in 1997 in carrying out their examination and assessment of the evidence before them. The expert evidence that is being elicited through Mr MacLeod is to do with the first-hand evidence that they had available to them, the reports that they made and consideration of whether the conclusions in their reports could be founded on the first-hand evidence that was available to them.

The Convener: Before we go any further, I want to check this out. Margaret Mitchell says that she has a reference for this. It would be helpful if she could give us that. We have to know whether—either through his own decision or with the Executive's endorsement—Mr MacLeod spoke to one expert but was not allowed to speak to others.

Cathy Jamieson: We can look back at the records and try to find proper information for you.

Margaret Mitchell: I can give you the details. The information is from the *Official Report* of our meeting on 26 June 2006, which records me as asking John MacLeod:

"You went about your own analysis of the print. Did you look at other reports? I think that you considered Mr Zeelenberg's report, for example."

He replies:

"Yes, I did."

Cathy Jamieson: I think that we have to clarify whether Mr MacLeod looked at other reports and considered them. I understood that you were suggesting that he had spoken directly to Mr Zeelenberg.

Margaret Mitchell: The *Official Report* shows that I went on to ask:

"Did you consider Mr Swann's report as part of your inquiry?"

Mr MacLeod replied:

"No, I did not."

I then asked him:

"Given that you were considering the civil action, would it have been sensible to have considered a report from someone who had identified print Y7 as well as one from someone who had not identified the mark?"

Mr MacLeod replied:

"I received the material for examination from the SCRO, which had made an identification—that was one side and Arie Zeelenberg was on the other side, so I had the opportunity to see both."—[*Official Report*, *Justice 1 Committee*, 26 June 2006; c 3499.]

The Convener: That is a helpful clarification. However, for the purposes of our inquiry, it would be extremely helpful if the Executive could reflect on that point so that we can be clear about what is normal and allowed in terms of an expert's decision about what other material they are able to look at.

Cathy Jamieson: We can come back to you with that information.

Margaret Mitchell: I want to make a final point about the settlement. Clearly, the Justice Department and the Scottish Executive are custodians of the public purse. However, from his evidence to this committee, Mr Wallace appeared to have acted like a solicitor trying to settle as soon as possible. Further, minister, you have also said that you wanted this issue out of the way as soon as possible. Was there not an onus on you to ensure that the outcome was right and that, if a stout defence could be mounted based on a view that there had not been a misidentification but a difference of opinion, the Executive pursued that defence?

16:15

Cathy Jamieson: You raise a very important point. I was acutely conscious of the fact that it was taxpayers' money. This is certainly the first time that anyone has suggested that I rushed to a decision. There has been criticism because of the delay, but I did not wish to rush to any decision. That is why, when I became Minister for Justice, I

asked for further reviews and information throughout the various processes so that I could take a view. I also had to bear in mind the potential costs of going to court and all the associated costs. I had to take account of the longer-term possibility that that would not be the right thing to do and that it might cost the taxpayer further money.

As I said at the time, it is very important to recognise that it was not a question of rushing to a settlement or settling at any cost. People rightly ask about how we arrived at a figure at which we were prepared to settle. I had officials undertake a considerable amount of work to look at what might be reasonable in the circumstances, given that Ms McKie had been out of employment and the potential for future loss of earnings and pension rights and a whole range of related things. The figure we reached was not arbitrary. As I said, it was also not the case that we were prepared simply to settle at any cost.

Mrs Mulligan: You might feel that you cannot win this one, minister. You have said on a number of occasions that you wanted to see the matter resolved as quickly as possible for clear reasons. Why then did it take so long?

Cathy Jamieson: You are probably right. Part of the job of the Minister for Justice is not being able to please some people all the time or, perhaps on some occasions, not being able to please anyone at all. I have to do what I believe to be the right thing and I have to be held accountable for that—I have no difficulty with that.

It is important to recognise that even at the points when it might have looked to the outside world as if nothing was proceeding, there were still a number of complexities around some of the legal arguments and other pieces of litigation with which Ms McKie was involved at various stages. I do not wish anyone to get the impression that I wanted to get the matter out of the way because it was an inconvenience. I was acutely conscious of the fact that we were talking about people's lives—not only the lives of Ms McKie, her family and immediate circle, but those of the SCRO officers and people in the wider fingerprint service. I was firmly of the view that although we had to arrive at a resolution, it would not please everybody and it had to allow the SCRO and the wider Scottish fingerprint service to move on. I wanted to try, if at all possible, to come to a position whereby all those things could be addressed. That is why it took longer than others might have liked. Many MSPs wrote to me about, and raised with me constantly, the fact that they felt there was an undue delay.

Mrs Mulligan: Do you think that lessons have been learned and that if the Executive had to deal with a similar circumstance in future, those lessons would ensure that the situation did not drag on in the way in which the McKie case did?

Cathy Jamieson: Looking back, it is undoubtedly the case that lessons have been learned. I hope that similar situations do not arise in the future.

I will give an honest and personal view, as people would expect me to, looking back over the whole process and the length of time involved. There was a new Parliament, and various new procedures were in place. With the benefit of hindsight, we can always say that things might have been dealt with differently, but that is not to say that we could have speeded up the legal processes, although that might have been possible. I certainly hope that lessons have been learned about how the fingerprint people at the centre were supported, managed and dealt with. That is one of the issues about which I felt very strongly.

The Convener: We are still on the subject of the MacLeod report and the settlement. I will allow some brief questions on that. There will be other questions thereafter.

Mr Macintosh: Mr MacLeod's judgment was clearly shown up just before he gave evidence to the committee. He joined the McKie campaign, Mr Neil and others in claiming that the current SCRO had made another mistake in another case, but it was proven swiftly that he was wrong. Minister, what did you think about that crucial figure in this investigation having such poor judgment?

Cathy Jamieson: One of the difficulties all the way through this is that people have perhaps been quick to come to conclusions. The important issue is that we examined those circumstances and matters were resolved. People understood that perhaps a mistake had not been made and were able to move on. However, I must refer back to the very thorough report that I received and point out that, as people will be aware, Mr MacLeod was asked to do further work. It was perhaps unfortunate that a considerable amount of hype about certain issues arose at a point when we were trying to move matters on. However, given that people on all sides feel so strongly, I can see why that happened.

Mr Macintosh: When you took the decision to settle, you thought that the QD2 fingerprints in the Asbury case, which had been sent to Denmark for investigation, were also inaccurate.

Cathy Jamieson: At this point in time it would not be correct for me to comment on anything in relation to the Asbury case.

Mr Macintosh: My point is not about the Asbury case. It is just that earlier this year—a long time after the settlement—the Danes got back in touch with the Executive to admit that they were wrong. When you settled the case, you had information that suggested that the SCRO officers had got it

wrong on QD2. MacLeod, whom you trusted because you had no reason to think that he was incompetent—as he has turned out to be—

The Convener: I am a bit concerned about this line of questioning.

Mr Macintosh: All that I am saying is that the minister's decision was made in the light of information that, with hindsight, has turned out to be inaccurate—it is a bit like the Lord Advocate saying that he would not make certain decisions now that he made in the past. I am just confirming that the decision to settle was followed, later on, by an admission that the Danes had got it wrong on QD2.

Cathy Jamieson: It is important to recognise that it would be wrong for me to stray into matters that have still to be dealt with. I had to make the decision on the balance of probabilities and on the basis of a number of reports. Mr MacLeod's report formed part of that and it was quite important to me, but it had to sit alongside a lot of other advice that I received from officials and from our legal team.

Ken Macintosh has represented his constituents thoroughly and faithfully throughout the process and rightly raises questions on those issues. As has been said in the committee, there has been a move towards a greater degree of openness and transparency in the Scottish fingerprint service and a move towards the non-numeric standard, which means that people will have to explain and justify their positions. I hope that that will make it much less likely that we find ourselves in such a situation in the future.

Alex Neil: You and the First Minister have on many occasions described this as "an honest mistake". How do you know that it was honest?

Cathy Jamieson: If you check the record, you will find that the First Minister used that phrase. In my comments, I have preferred to focus on the fact that we accepted that there had been a misidentification but did not accept that it had been made with any malicious intent. The First Minister used the phrase "an honest mistake" in good faith, on the basis that we had reached an agreed settlement. Nothing in all the information and all the reports that have come to me suggested to me that there was any malicious intent on the part of the SCRO officers. That was the basis on which we made the offer to settle and that was the basis on which the settlement was accepted.

Alex Neil: Have you read the Mackay report?

Cathy Jamieson: Like members of the committee, I have not seen the full copy of the Mackay report—I have seen the synopsis. It would not be correct for me to have the report, as the Lord Advocate outlined in his evidence.

Alex Neil: But you are aware that the Mackay report included an allegation of criminality.

Cathy Jamieson: It is not for the Minister for Justice to investigate allegations of criminality. As Colin Boyd outlined, that is rightly and properly a matter for the police and for the prosecution services.

Alex Neil: From what you have just said, can we take it that there is no evidence of an honest mistake? Clearly, there is evidence that there was a mistake, but there is no evidence that that mistake was honest.

Cathy Jamieson: If you want to try to prove a negative, you could also say that there is no evidence of malicious intent. That is what I took to be the case.

Alex Neil: The information that we have indicates that, according to the Mackay report, it was not an honest mistake. There is evidence that the mistake was not honest, although there was no prosecution.

Cathy Jamieson: There is such an opinion. I am not sure that that constitutes evidence.

Alex Neil: It is the opinion of a deputy chief constable. Normally, as the Minister for Justice, you would pay some regard to that.

Cathy Jamieson: I am sure that Mr Neil would be one of the first people to pull up any Minister for Justice who tried to interfere in an independent prosecution service.

Alex Neil: I am pulling up ministers for saying that there has been an honest mistake when they have no proof that it was honest.

Cathy Jamieson: I took the view that there was no evidence to suggest that it was malicious. That was the basis on which I took the decision.

Des McNulty: You have confirmed that there is no evidence of malice on the part of the four SCRO officers. I presume that that statement is based not just on your judgment but on the judgment of the Lord Advocate, who has looked at the evidence of Gilchrist as well as that of Mackay. That is a definitive position. Can you confirm that, although there are issues of system failure in the SCRO, there is no evidence of professional incompetence or a lack of integrity on the part of the SCRO officers?

Cathy Jamieson: When I looked at the matter in the context of the action plan, I was keen to ensure that we double-checked and triple-checked that all the issues that had been raised both in the report by HM chief inspector of constabulary and subsequently had been addressed. It is right and proper that the action plan was put in place and that we addressed some of the system failures in the SCRO to which you refer. A considerable

amount of work was done on that issue, on the back of the Taylor report and recommendations. It is important that, in looking to the future, we try to go further. We must ensure that the culture of the organisation is such that people can discuss problems openly and take issues forward. There must be a clear style of leadership and management and all the recommendations must be implemented.

Des McNulty: You have danced around my question a wee bit. At the heart of this case, there is a disputed identification. I understand that the work of the four officers has been extensively and exhaustively tested. Their integrity has been probed to a greater degree than that of any other group of public servants in my experience. Will you confirm explicitly that, on the basis of all the work that has been done, there is no stain of lack of integrity or lack of professional competence on the four people concerned?

Cathy Jamieson: You raise two separate issues. In reaching the decision to settle, on the basis that there was no evidence of malice, we clearly accepted that there was no lack of integrity on the part of the officers, as there was no malicious intent. However, I point out that Mr MacLeod's report raised the issue of whether appropriate care had been taken. People may or may not disagree with that. There may be questions around the subtleties of what the MacLeod report said. Does it mean that people did not pay proper attention, does it mean that they were not trained properly or does it mean a range of other things? However, that was Mr MacLeod's opinion in his report.

Des McNulty: The point that he was making concerned the system as a whole. I was focusing on the actions of individuals. You have accepted my point in relation to integrity—there is no stain of lack of integrity on the four officers. As far as I am aware, there is also no evidence that would stand up in any industrial or workplace environment to say that those people are not sufficiently competent to do their job.

Cathy Jamieson: One of the issues of which I had to take account was the fact that there was a disciplinary investigation. A range of matters were investigated, and it was found that disciplinary action was not required. It is not for me to intervene between employees and an employer, but I had to take account of such matters when coming to a decision.

16:30

Des McNulty: So, in other words, those people's competence has been tested in the same way that their integrity has been proven, and their competence has been found to meet all the criteria against which they could be judged. In that context, how do you see them as individuals moving on—

The Convener: I am trying to box in this set of questioning and tie it to the MacLeod report and the settlement. If members do not mind, we will deal with staffing issues later.

Cathy Jamieson: Do you want me to answer the question, or will you return to it later?

The Convener: Please answer it as briefly as you can.

Cathy Jamieson: I understand where Mr McNulty is coming from. A disciplinary process and an investigation were undertaken. At the end of that process, it was decided that the officers should not be disciplined and that no action should be taken. That is a matter of fact, and I have to take account of it. Other issues relating to staffing and how people move on are involved, some of which it is not appropriate for me as an individual to discuss at committee. Nonetheless, I want to reassure the committee that those issues were very much on my mind in terms of the action plan and the way in which to move forward the Scottish fingerprint service.

The Convener: Thank you. We will return to the issue.

I will round off this part of our questioning on the MacLeod report and the settlement. I seek clarity on whether the MacLeod report was the only information that the Executive used to inform its decision to settle the case.

Cathy Jamieson: No. I had to take on board a range of advice. I took legal advice and advice on, for example, the basis of the history of the case and the likely implications of settlement or non-settlement—Margaret Mitchell pointed out the implications for the public purse. On the basis of that range of advice, I took the decision on the best way forward. I stand by that decision.

The Convener: On the reports that informed your decision, did any report other than the MacLeod report lead you to the conclusion that you reached?

Cathy Jamieson: Officials may want to say something about the strenuous process that I tried to put in place to get the correct advice that I needed on which to base the decision. I asked officials to go back over the various reports, correspondence and pieces of information that had come to the Executive over a period of time. I asked them to provide me with advice on the best way forward, both from a legal point of view and bearing in mind the policy agenda with the action plan. That was a fairly extensive piece of work. In addition, a number of officials who had not been involved at the beginning of the process came in

to review some of the work that had been done and to give me further advice. Christie Smith may want to say something briefly on that.

Christie Smith: A range of reports and expert advice were taken on board before the settlement decision. We had to take account of, for example, the outcome of the criminal investigation and the disciplinary investigation, Mr MacLeod's report and other expert reports that had been published or referred to but which had not come directly to the Executive. We had to take a view on misidentification and whether reasonable care had been taken.

Given that compensation can be paid only on the basis of evidence of loss, we also had to investigate the extent to which Miss McKie had suffered loss. Advice was therefore taken from medical experts, actuaries and Ms McKie's colleagues and seniors. Discussions on the available evidence were held with her legal people. In the end, all of that had to be brought together to support the decision that a payment of compensation was justifiable in terms of the public purse, legal precedence and all of that.

The Convener: The figure that you finally settled—I am sorry, Richard Henderson wants to say something.

Richard Henderson: I simply wanted to add that ministers were, of course, represented in court by senior and junior counsel throughout the process. As with any litigation, in order to assess the options that were open and the risks that were involved, counsel's opinion was regularly taken at significant points.

The Convener: So, the MacLeod report was one of a number of issues that you considered.

Minister, was the final settlement that you arrived at—the £750,000—short of the figure that Shirley McKie had sued the Executive for?

Cathy Jamieson: Ms McKie had sought a figure that was in excess of £1 million. As is common in such situations, the Executive made an initial offer, which was rejected, after which further discussion took place. Eventually, the figure of £750,000 was reached. That was less than what Ms McKie sought; she had sought £1.1 million—

The Convener: So when you settled, you were being sued for more than £750,000.

Cathy Jamieson: Yes.

The Convener: Do you know what the figure for which you were being sued was?

Christie Smith: It was £1.2 million plus interest backdated to 1997, which would have amounted to approaching £2 million.

The Convener: You settled for less than you were sued for.

Christie Smith: Yes.

Cathy Jamieson: Of course, Ms McKie, or her agents, also settled for that figure. The arrangement was mutual.

The Convener: In some exchanges in the Parliament, it has been suggested that the McKie lawyers had adjusted their figure to £750,000. Is that not the case?

Cathy Jamieson: There were several situations. It is fair to say that, over the course of all the proceedings, the McKie agents initially asked for £750,000 plus interest and costs. Amended requests were made, which eventually took the figure up to £1.2 million, but that happened over time. I understand that the sum that was sought at the point of settlement was £1.2 million plus interest and costs.

The Convener: I see that lots of members' hands are up, but if it is okay with members, I would like to finish my point. I do not have much time, as it is 25 minutes to 5, so I will take questions only if they raise burning issues that relate to my question.

Minister, before I move on—members are all distracting me—I will say that the issue is important, because if you settled for the figure for which you were sued, that would suggest that you were not prepared to go to court. I want the matter to be crystal clear. You have answered the question already but, for the record, on the day when you settled for £750,000, was the figure that you were being asked for much greater?

Cathy Jamieson: We are just checking that the figure was £1.2 million plus interest. When I started the process of trying to reach a settlement, I was always clear that, ultimately, it was entirely possible that the matter would go to court. Until the last moment, it might have done.

I have just been given the actual court paper, which says:

"For payment by the second defenders to the pursuer of the sum of ONE MILLION TWO HUNDRED THOUSAND POUNDS … with interest thereon at the rate of eight per cent per year from 18 February 1997 or such other date as to the court shall seem appropriate."

That provides confirmation.

The Convener: Okay. I want to move on. I will take one question only—not a statement—from Bruce McFee.

Mr McFee: I will only ask questions. You specifically referred to £1.2 million plus interest at 8 per cent.

Cathy Jamieson: That is what the document says.

Mr McFee: You said that Shirley McKie sued for £750,000 plus interest and costs.

Cathy Jamieson: No.

Mr McFee: Did the £1.2 million include costs?

Cathy Jamieson: No. Can we be clear?

Mr McFee: Please.

Cathy Jamieson: I did not say that we settled for £750,000 plus interest and costs.

Mr McFee: I did not accuse you of doing that.

Cathy Jamieson: I am sorry—I just wanted to be clear. The figure that was sought was £1.2 million plus interest at the rate of 8 per cent. I quoted directly from the court paper.

Mr McFee: I understand that, but when you settled for £750,000, did you also pay costs? If so, how much were they?

Cathy Jamieson: Some costs have been paid, but some matters are still being settled. We will know about them when the auditor of court has dealt with them. Perhaps Christie Smith can clarify that.

Christie Smith: Costs would be added to whatever figure was agreed or awarded by the court, so the issue is neutral. Whether the figure was £1.2 million plus costs or £750,000 plus costs would make no difference to costs.

The Convener: The committee has a copy of the statement that was made at the time; that is about three or four months old.

Mr McFee: Several times the minister has mentioned moving on, which we must do. I do not know whether you have been heartened by the fact that, during the inquiry, fingerprint experts have said to us, "I got it wrong." Perhaps that is part of the process. However, staff at the Glasgow fingerprint bureau—or, more accurately, some staff at that bureau, because I understand that only a small number have seen mark Y7—remain convinced that no misidentification took place. They have maintained that position although staff in Aberdeen, Dundee and Edinburgh disagree with them. How can a Scottish fingerprint service hope to move forward as a united organisation while such dispute remains? That seems to be fundamental in every report that we have had about it.

Cathy Jamieson: The committee has done a thorough job of taking evidence and has brought in a number of witnesses to look at the issue of fingerprinting as well as at the McKie case, and to scrutinise the action plan. I welcome the fact that people recognise that the action plan is in place and that we must move on. I have no doubt that that will be difficult, because people have had strongly held positions for some time, but if Scotland is to have a world-class fingerprint service it is important that we no longer see the service as a number of different fingerprint bureaux in competition with one another, but that we see it as part of an integrated whole. I believe that the moves that have been made as part of the establishment of the SPSA will assist in that.

That does not take us away from the fact that the process involves people and that their situations need to be taken into account. Getting the culture in the new organisation right—for individuals who have worked in the service for some time and for those who will work there in the future—will be of fundamental importance. We must recognise that, in any profession and any form of employment, things will go wrong and mistakes will be made. I hope that we will have an organisation in which people can deal with such issues and that staff will be supported and enabled to move on appropriately.

Mr McFee: If, heaven forbid, fingerprint experts make a mistake in the future, is it important that they should feel free to discuss and admit that mistake without being called incompetent or failed experts?

Cathy Jamieson: It is not helpful to personalise such situations and the move to the non-numeric standard should help the organisation's professionalism. There will have to be a culture in which people are expected to give their reasons and to explain the rationale for their decisions. It is important to recognise that the people who are involved in the service are accredited and that there ought to be proper support, training and supervision for them. I certainly expect to see all the points in the action plan implemented on that basis.

Mrs Mulligan: Back in March of this year, you asked David Mulhern to draw up and develop the action plan. Why did you choose David Mulhern and what was his remit at that stage?

Cathy Jamieson: David Mulhern was the interim chief executive who was dealing with matters relating to the SPSA. I wanted to have someone who would be able to draw up the action plan in the first place, who would have a degree of credibility in the police service and among wider organisations, who would be able to put in place the kind of leadership that would be needed to move things on, and who would be able to take some of the tough decisions that needed to be taken. At the same time, I hoped that he would be able to gain the respect and trust of the staff and to manage people in that process. He drew up a comprehensive action plan and it was important that he was not afraid to bring in people from outside—in fact, he welcomed that—and that he welcomed a range of views and opinions.

Mrs Mulligan: When David Mulhern gave evidence to the committee last week, he gave a

thorough account of the action plan at its various stages. Are you satisfied that the action plan is moving on at the rate that you expected? Are there any issues that you still wish to see resolved?

Cathy Jamieson: In general, I am satisfied by the way in which the action plan was introduced and by the way in which information has been given to the Parliament, and I hope that the committee recognises that. I certainly want the process to continue and, as I said at the outset, if the committee has any specific recommendations for including further points in the action plan, following either Mr Mulhern's evidence or the evidence from the wider inquiry, I will be more than happy to hear those recommendations.

16:45

Mrs Mulligan: Do you have an end date by which you expect the action plan to have been implemented?

Cathy Jamieson: We have a note of progress to date. The new SPSA comes fully into being in April of next year and I would certainly want the majority of measures to have been implemented by then, but issues may arise along the way that result in further timescales having to be set. That should be a continuing process.

Mrs Mulligan: Finally, do you keep in touch with David Mulhern? If so, what does that involve?

Cathy Jamieson: Yes, I keep in touch with Mr Mulhern and get reports on the progress of the action plan. I am particularly keen to ensure that we keep a close eye on whether the timelines that we gave for delivery are met and that if any issues come to light, we report on them to the committee and keep the committee up to date, as we said at the outset that we would do. I have had meetings with Mr Mulhern to discuss progress.

Marlyn Glen: I asked you at question time last week about the change to the non-numeric standard. Is there now consensus on the need for that change and confidence that Scottish fingerprint experts will be able to operate to the new standard, which will help to restore confidence in the service?

Cathy Jamieson: As I have said in response to parliamentary questions and questions asked in committee meetings, it is right to move to the non-numeric standard, which, as we have heard, is recognised internationally. That system has been used elsewhere, for the reasons that I outlined earlier, and it is right for us to adopt it.

From my point of view, it was important to ensure that the new system was introduced properly, that people were involved in appropriate training and that any discussions that were necessary took place with the Crown Office. The committee heard from the Lord Advocate and Jim Brisbane about how that work has been advanced. The material that has been produced for staff has been well received and there has been wider recognition that we have made the right move and that it will have a positive effect.

Marlyn Glen: I agree that there is consensus on that. The question that arises is why, given that the adoption of the non-numeric standard is such a positive move, it was not made sooner. Will the consequences of that change be monitored and, if so, how?

Cathy Jamieson: The answer to why the change was not made sooner is that it is always important to ensure that all parts of the system are geared up for such a change. I know what happens—I am sure that the committee does, too—when some bits of the system might be out of step with other bits and changes are introduced without people being properly prepared. That is why I was keen to ensure that, when the fingerprint service and the Crown Office were ready to make the move to the new standard, that was done in a properly planned way and people had sufficient time to make the transition.

We will monitor progress because ensuring that the transition goes smoothly is an important part of the action plan. At this stage, I have no reason to suspect that it will not go smoothly, but of course monitoring will be important.

Marlyn Glen: You mentioned the people and the culture in the Scottish fingerprint service. Concerns have been raised, notably in the Independent Counselling and Advisory Services report, about a number of aspects of the service's operation. The report highlights serious concerns about the management of the organisation and its morale. Are you confident that the steps that the action plan outlines will rectify the situation?

Cathy Jamieson: I was keen that the action plan would allow David Mulhern to have a panel of experts or external advice on which he could draw, not just in relation to fingerprints and the fingerprint service, but on issues to do with human resource management and best practice in organisational culture.

Marlyn Glen: The action plan and the update on it are quite light on that aspect. Last week, Deputy Chief Constable Mulhern told us that he would expect work on a risk management assessment to begin when the two organisations talk to one another next week. In my view, the action plan still has a long way to go.

Cathy Jamieson: I agree that there is still some way to go. In taking on his task, it was important that David Mulhern recognised the problems of the past, but I think that he has done that. He has

made changes or instituted new ways of doing things—for example, managing sickness and absence levels, which, as members know, can signal that there are difficulties in an organisation. Some changes might not be universally popular, but I think that David Mulhern has shown that he has the leadership qualities to take matters forward.

Stewart Stevenson: Would you be minded to have further plans for the development of the fingerprint service? In particular, now that the basics have been addressed by the plan that Mr Mulhern has put in place, will you look at activities in other disciplines to see how problems are dealt with? From my own interests and experience, I point in particular to aviation, in which all errors are published for all practitioners to see and discuss, and confidential reporting lines allow people to express concerns without putting their careers on the line. In addition, the Civil Aviation Authority has put in place processes and training to ensure that the relationships between very senior, experienced people and newly trained people do not result in one group unhelpfully imposing its will on the other.

Another relevant industry in that regard is the nuclear industry, which is safety critical. HM nuclear installations inspectorate has substantial methods for looking at things in a way that ensures that errors are caught before they deliver problems that may be unrecoverable. Should we consider a wide range of other disciplines and not simply look for other sources of expertise in the domain of fingerprint services?

Finally, given that we are integrating forensic services with the fingerprint service, we should consider how forensic services and laboratory technicians in general test the validity of their processes with material with a known result to ensure that the processes deliver the result, so confirming the validity of the processes; in other words, the test consists of putting dummy information into the system.

Cathy Jamieson: You raise a number of points, but I hesitate to get into a debate on whether risk management is an art or a science and the extent to which we can draw on other disciplines. As a point of principle it is always good to look at other disciplines and consider what can be learned, and I do not think that that practice should be restricted to the present situation.

However, having tried to follow the committee's deliberations, I am aware that the convener picked up on a number of issues about the culture of the fingerprint organisation and what happens in an organisation when new members find it difficult to question decisions that are made by the longest-serving and more experienced members of staff. Such situations in an organisation require good leadership from the top, but staff must also trust that their management will act on any concerns. The action plan is developing something that I was keen to see—ensuring that there is a way in which staff can report or highlight concerns without that necessarily coming back to harm them.

The Convener: I am aware that Mike Pringle must leave at five o'clock and that he has questions for the minister.

Mike Pringle: My colleague Stewart Stevenson just referred to the Scottish fingerprint service becoming controlled by the Scottish forensic science service. Are you confident that that is on course? Are you also confident, even now, that that is the right thing to do?

Cathy Jamieson: Yes. I understand that various people might be concerned about that, but I think that it is the right thing to do because things need to move forward. There will be a new environment around the SPSA and there are new methods of governance. Much critical comment in past reports was about the lack of clear lines of accountability in the former SCRO and the fingerprint bureaux. Accountability went through various channels to wherever it eventually ended up in the system, which was not a helpful process.

The new SPSA will have a convener and a board that will involve lay people as well as people with a professional background. That is a considerable improvement and it will enable people to have oversight. It would not be correct for me—however tempted I sometimes am—to be involved in micromanaging organisations. That is not what the minister is there to do. I must try to ensure that the right system of governance is put in place that allows people to practise their professions properly but which, at the same time, delivers for the public. I think that we have, generally speaking, adopted the right approach.

Mike Pringle: You mention micromanagement. Have you had much discussion with David Mulhern about the management of the new organisation? We have heard from different people that one of the problems from the beginning was the fact that the managers at the SCRO did not have expertise in fingerprints. The people at the top did not really know what the people on the ground were doing. Have you discussed with David Mulhern the need to have, in the future, somebody in the management team who understands the process and what is going on down the ladder?

Cathy Jamieson: There are two issues to consider. First, as you know, the fingerprint service within the SPSA will be managed as part of the new Scottish forensic science service, and each of the bureaux will report to a director of forensic science who will have clear responsibility

to ensure that the highest scientific standards are maintained across the service.

Secondly, although it is important to have people in management positions who have some understanding and knowledge of the work that is being done, it is equally important to have people in such positions who understand how to manage and oversee organisations and processes to ensure that the work of the organisation is done in the best possible way. We need to balance the two things.

The Convener: We have only a few minutes left, and I want to pursue the issue that Des McNulty was beginning to pursue with you. We have heard, in evidence, concerns about the way in which the organisation was governed. We have also heard issues about the way in which the organisation was managed and the processes that were followed. We will have to consider those things when we draft our report.

I am aware that there are on-going negotiations with some of the staff who were involved in the McKie case, although I know that that matter is not directly for you but is for the trade unions and the organisations concerned. I am also conscious of what the Lord Advocate said earlier. He is concerned that calling any of those members of staff to give evidence in a trial would result in the focus being on them rather than on the trial. I would like to hear your view—if you are prepared to give it—on whether it might look as though those officers, who are not in the fingerprint service and are not giving evidence in court any more, are being made scapegoats. If I was convinced that managers, processes and governance had all failed, it would concern me deeply that the service was unable to identify any other individuals to carry the can for all this.

I know that the matter is sensitive, but I wonder whether you could offer any view on it.

Cathy Jamieson: It is difficult for me to offer a view on what might happen in relation to the individuals concerned. We must look at the position of those individuals. They went through disciplinary investigations and no action was taken; therefore, they remain employees of the service. The Lord Advocate—as is his right—has made the decision that he would not be able to use evidence that was brought by them at this stage or, perhaps, in the future. However, it is important that the on-going work that is being done within the SCRO and in negotiation with the trade unions continues, so that some kind of resolution can be achieved. It would not be correct for me to say what that should be. I imagine that each of the individuals concerned has their own view about what they want to see for the future. I would not want to intervene in, or interfere in any way with, the proper on-going discussions between the trade unions and an employer.

17:00

The Convener: I understand that, but would you share my view on the matter if the impression was given that any ultimate settlement made it look as if the blame was being pinned on a few people whereas, clearly—although I am not trying to pre-empt what you think about this—the evidence shows that there are wider issues?

Cathy Jamieson: In general terms, whenever something goes wrong, it is a natural human reaction to look for an individual or a couple of individuals to whom blame for the particular matter can be apportioned. Often, a combination of circumstances leads to things going wrong.

I appeal to your good offices, convener. I hope that, having considered all the information and evidence that you have received, you will include in your report any recommendations on how we might deal with the issues that have been discussed, and I will be more than happy to look at them. It is important to get things moved on for the individuals concerned. Their position is very difficult at the present time.

The Convener: I wish to finish this session at 10 past 5. I will allow a few winding-up questions. It would be helpful if members could be direct and brief.

Des McNulty: Stewart Stevenson mentioned other areas of work in which something might have gone wrong and the ways in which such matters are resolved there. That was helpful.

The minister said that people should be able to practise their professions properly. Should not the four fingerprint officers be able to practise their professions properly in the new Scottish forensic science service? Has that been an issue of discussion with David Mulhern?

Cathy Jamieson: There are issues to do with an employee-employer relationship in which it would not be correct for me to intervene. My understanding is that the individuals concerned are still in the employment of the organisation at this point. I think that the Lord Advocate has made it clear that, at this stage, he would not be able to consider using them for presenting evidence in court. That is a matter on which, ultimately, the Lord Advocate must take the decision.

Des McNulty: Is there not a matter of natural justice here? Those four people have been investigated extensively. No wrongdoing on their part has been proven. Whether they work in the medical, legal, accountancy or aviation professions, people in such circumstances would be allowed to go back to work and carry on doing what they do. That has not happened in this instance. That does not seem to me to be reasonable or fair to those individuals. I appreciate

the Lord Advocate's difficulty here, but I find it hard to understand how what has happened is fair to those individuals.

Cathy Jamieson: I know about the amount of work that Des McNulty has done on this matter. I have made it clear that I cannot intervene in potential or on-going employee-employer negotiations that have yet to be resolved. Some of the parallels that have been drawn with other professions, in which there is some overarching professional body that might seek to ensure that people who have acted outwith professional guidelines are dealt with, lead us to issues that will perhaps need to be examined in the future. The situation is very difficult for the people who are involved in this matter at present. I do not have an easy answer, but I do not think that it would be correct for me to suggest what the employers and employees ought to do to resolve the issues. That must be a matter for them.

Alex Neil: On the same issue, would it not have been a lot easier for everybody if the officers concerned had admitted to their mistake? Then, their credibility and that of the fingerprint service would have been a lot higher than it is today. Their incompetence could have cost Shirley McKie her freedom—it could have landed an innocent woman in jail for a long time. Do you not think that a little bit of humility and an admission of their mistake would go a long way to restoring at least some of their credibility?

Cathy Jamieson: I am always in favour of a degree of humility; as a mere politician, I try to practise that. I cannot second-guess what has gone on in the past. I am not here today to apportion blame. I do not think that this inquiry is about doing that; it is about trying to find a way to move forward. At all stages in the process, I have tried to do the right thing; sometimes, that has not been the easiest thing. I tried to do the right thing in ensuring that Ms McKie received a fair settlement. I hope that we can move on with respect to the four officers at the centre of this matter, who also have particular issues and who, with their families, have no doubt also suffered a huge amount of stress and difficulty. I hope that the committee's inquiry will come to some conclusions that allow us to move on in the future.

The Convener: You suggested that we might make some recommendations. Who knows? As I have said, this is our final public evidence-taking session. Obviously, we must review everything that we have heard and make a final determination. Having come this far, we will have to satisfy ourselves that we have taken all the oral evidence that we need. I hope that this has been the final session.

It would be helpful if you could confirm that, following the publication of our report, you will be prepared to discuss it with us and that you will take very seriously anything on which the committee has reached consensus with regard to the way forward.

Cathy Jamieson: I can certainly confirm that. I have followed the committee's proceedings on the matter. I hope that people will appreciate that we have tried to be helpful and that we have gone the extra mile in providing some reports, for example the MacLeod report, which, for very good reasons, we felt—at first—it would not be correct in principle to put into the public domain.

I hope that the committee will be able to come forward with some recommendations. I would very much welcome that, particularly with regard to the action plan that I hope we can look forward to adopting in the future. I would certainly be more than happy to discuss matters with the committee once it has completed its report.

The Convener: That is helpful. We will meet in private session for the next few weeks to scrutinise the evidence that we have received over the past few months. I thank the three witnesses. I also thank the three MSPs who have attended our meetings consistently throughout our inquiry.

Committee Debate in the Chamber

17:07

The Convener: Does the committee wish to make a bid to the Conveners Group for a debate in the chamber?

Members: Yes.

17:07

Meeting continued in private until 17:12.

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