The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 28 October 2014

Session 4

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JUSTICE COMMITTEE
26th Meeting 2014, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*John Pentland (Motherwell and Wishaw) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Alison Britton (Law Society of Scotland)
Margaret Dekker (Scotland's Campaign against Irresponsible Drivers)
Chief Superintendent Gary Flannigan (Police Scotland)
Patrick Harvie (Glasgow) (Green)
Stephen McGowan (Crown Office and Procurator Fiscal Service)
Professor Alan Miller (Scottish Human Rights Commission)
Chief Superintendent Iain Murray (Police Scotland)
Dr Peter Rice (Scottish Health Action on Alcohol Problems)
Coral Riddell (Law Society of Scotland)
David Stephenson QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 28 October 2014

[The Convener opened the meeting at 09:32]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the 26th meeting in 2014 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with broadcasting even when switched to silent. No apologies have been received, and I welcome to the meeting Patrick Harvie, who is the member in charge of the Assisted Suicide (Scotland) Bill.

Before we go on to our business, I should say that, although I am delighted to welcome Patrick Harvie to the meeting, I know that he will agree that Margo MacDonald would have relished coming before the committee to pursue her bill, although I suspect that had Margo been here we would not have got many questions in ourselves. Nevertheless, as I have said, I am very pleased to welcome Patrick Harvie.

Patrick Harvie (Glasgow) (Green): Thank you, convener.

The Convener: Agenda item 1 is to seek the committee's agreement to consider in private agenda item 4, which is our work programme. Are we agreed?

Members *indicated agreement.*

Assisted Suicide (Scotland) Bill: Stage 1

09:33

The Convener: Agenda item 2 is an evidence-taking session on the Assisted Suicide (Scotland) Bill. The Health and Sport Committee, as lead committee, will examine the bill in its entirety; as the secondary committee, we have agreed to focus our scrutiny on the bill's criminal and civil liability aspects, particularly the legal and practical application of its provisions and human rights issues.

I welcome to the meeting the first of our two panels of witnesses. Professor Alison Britton, convener of the health and medical law committee, and Coral Riddell, head of professional practice, are from the Law Society of Scotland; David Stephenson QC is from the Faculty of Advocates; and Professor Alan Miller is chair of the Scottish Human Rights Commission. I believe that Professor Britton would like to make some kind of declaration of interests.

Professor Alison Britton (Law Society of Scotland): I do, convener. I want to make the personal statement that I was appointed as adviser to the Scottish Parliament committee that considered the general principles of the End of Life Assistance (Scotland) Bill in 2010.

The Convener: Thank you for that.

I thank the witnesses for their written submissions—and, my goodness, it took me ages to read the Law Society's. The faculty's submission was much shorter and crisper, perhaps because, as someone aptly suggested, time is money to its members. I also thank the commission for its submission.

Because we have those submissions, we can go straight to questions. If members indicate that they want to ask a question, I will put them on my list. Just to show that I am not vengeful, I will put Sandra White first on my list, and then I will call Elaine Murray, Roderick Campbell, Christian Allard and Patrick Harvie. Off we go.

Sandra White (Glasgow Kelvin) (SNP): Thank you very much, convener.

The Convener: You see—you get the opportunity to speak first and you are not ready.

Sandra White: Yes, that is how to start off a Monday morning—sorry, I mean a Tuesday morning; I do not even know what day it is.

I thank all the witnesses very much for their submissions, which, as someone without a legal background, I found enlightening, although I must

admit that it took me about two days, including this morning, to read through them all.

My first question is on the role of solicitor as proxy. One of the submissions states:

"We are of the view that solicitors should not undertake this proxy function."

It also mentions the Belgian model. Will you elaborate on that aspect?

The Convener: I think that that question is for Ms Riddell.

By the way, I ask the witnesses to indicate to me when they want to answer a question that is not specifically directed at them, and I will then call them. The microphones should come on automatically—you are being broadcast when the wee red light comes on, so do not say anything untoward that you do not want recorded.

Coral Riddell (Law Society of Scotland): Absolutely—I will keep that in mind.

The question probably does sit with me. I suppose that, broadly, it is not that solicitors should not act as proxy; the challenge presented by the bill is that underlying what looks like a very systemised process are some very significant professional obligations that potentially conflict with some of a solicitor's duties, whereas the Belgian model—I have some of the provisions here—does not necessarily require a solicitor. It anticipates a requirement where a person may need physical and mechanical aid and it identifies someone who perhaps understands the process better, or who understands the medical condition. It also requires a medical certificate.

The difficulty for solicitors is that, although they act daily as a notary or an agent, section 16 provides for something other than that, which goes beyond what is reflected in the current legislation.

I talked a little bit about the Requirements of Writing (Scotland) Act 1995 in our submission. I looked at the annotated commentary, and that anticipates just a mechanical aid; it does not anticipate an assessment of capacity. You might say that solicitors assess capacity every day, but the clear distinction is that they do not assess capacity in such a different situation, with such a significant outcome, as assisted suicide. That decision will be irreversible and terminal. That is the challenge for the solicitor, who would not ordinarily have the training, the experience or the knowledge to be able to assess whether a person understood the effect of such a decision.

The Convener: Why should what is being decided be different? A solicitor must do that for contractual matters—they will sign as proxy and make an assessment of capacity. Why should it be any different from entering into an accord just because the decision is about how one ends one's life? It is a matter of capacity.

Coral Riddell: It is, but the bill introduces significant ethical and moral interests that go beyond what happens when a solicitor looks at a transaction or a conveyancing sale. A solicitor would not generally have the experience. Also, because you are bringing a solicitor into the process, you must give some regard to their professional obligations, such as the obligation to act only in areas where they are competent and in the client's best interest. Assessing whether assisted suicide is in a client's best interest, and whether a solicitor is the appropriate person to make that decision, is a huge moral dilemma.

Sandra White: You touched on issues that I have written down, such as ethics and moral obligations, and you open up another area in that regard. Were the bill to pass with those provisions intact, would solicitors be obliged to act as proxy if they did not feel—morally or ethically—that they could?

Coral Riddell: A solicitor would be in a position not to accept the instructions and not to act—that would be a safeguard. We need to address the issue now, rather than have the bill go through as drafted, and my concern is that the matter is untested in the profession, so we do not know how it would react. There may well be solicitors who are well qualified to deal with the role, such as those who work in the sphere of mental health law. However, the average solicitor is not likely to come across such situations. The guidelines anticipate 27 requests a year, so it is not an area in which frequent requests and experience will be built up.

Sandra White: I will leave it at that for now, convener.

The Convener: I want to follow up on that. In some ways, it is a will—it is a very important decision—although it might be a rather strange will to make. Either the solicitor can say, "I'm not taking your instruction," or they can take it, having assessed capacity. I am still not convinced that there is a distinction between capacity when someone is making a will, where the solicitor has to make a judgment and can say no if there is any doubt, and capacity when someone is making a contract about life.

Does Patrick Harvie want to join in on that issue?

Patrick Harvie: I am very grateful, convener. I suppose that the question is whether the decision is interpreted as a medical assessment of capacity or a commonsense test of understanding, which is common in other contexts.

Coral Riddell used the phrase, which is also included in the Law Society's written submission,

that the decision is "irreversible and terminal". Clearly, the act of a person ending their own life, or the act of someone who is assisting them to do so, is terminal and irreversible, but none of the three documents that we are talking about here—the preliminary declaration, the first request or the second request—is irreversible. Throughout the bill, there are clear steps to ensure that those steps are all reversible; in fact, it is easier to cancel each of those steps than to take them in the first place.

I ask Coral Riddell to explain a slight ambiguity in the submission. It suggests the Belgian model, which allows the proxy to be anyone who is of a minimum age and who does not stand to gain from the person's death. However, two pages later, it argues that the proxy should be a medical practitioner. That seems odd, given that each of the three documents—the preliminary declaration, request 1 and request 2—already require approval by a medical practitioner, which includes an assessment of capacity.

Coral Riddell: Sorry, I have slightly lost your two points there. The last point—

The Convener: The first point was that the three documents—the intention and the two others—can be revoked. They are not irreversible.

Coral Riddell: Absolutely. Were the bill to proceed as it is, I would anticipate enhanced guidance for solicitors that, like the guidance for solicitors who draw up wills, power of attorney and so on, would include the opportunity to seek guidance from a medical practitioner. It is a significant responsibility, and the outcome of assessing a client's best interests in relation to something as significant as assisted suicide distinguishes it from some other transactions.

The Convener: I do not know whether I follow that either, Patrick. Elsewhere, the submission says that if a solicitor gives advice to a client and the client rejects that advice, the solicitor has the option of saying, "I think you should take advice elsewhere," or, "I've given you my advice and I've put it in writing, but if that's what you want, I will do it."

Coral Riddell: That is it, and a solicitor—

The Convener: This is a judgment about the right of the person to decide how they want to end their life. That should not be an issue for the solicitor, if they are satisfied that the person has capacity. I cannot see the distinction between that and other times when a solicitor or advocate acts as proxy.

Coral Riddell: I think—and there is some element of assumption in this—that some of the challenges might be around the condition that the relevant person has and how effectively they can communicate. A solicitor has a duty relating to effective communication and the best interests of the client. The solicitor might not know the person—they might not have met them before—and must try to establish a relationship and communication. The person may not be able to communicate verbally. That is challenging.

The supporting documents on the bill mention training and funding for other professions, but not for solicitors. To protect solicitors and the public, it would be fair if there was some acknowledgement that this is not necessarily something that every solicitor would be equipped or trained to assess, and that further assistance and training would be required.

The Convener: Does Patrick Harvie wish to pursue the proxy issue, or are we moving on?

Patrick Harvie: I ask to be allowed one final question on proxies.

The point is that solicitors would be entitled to act as proxy but would not be required to do so if they did not feel that they could meet what I would regard as a commonsense test of whether the person understood the effect of the document. However, I am still unclear about what you are asking for. Are you are proposing the Belgian model, in which anyone who does not have an interest and who is over a certain age can act as proxy, or would you simply suggest that we add medical practitioners but do not remove the right of solicitors to perform that proxy role if they felt able to?

Coral Riddell: I think that it is a matter that requires medical assistance. On reflection, it occurs to me that just because the requirement for a proxy is not reflected in the bill, that does not necessarily lead to the conclusion that there is not the opportunity, say in another jurisdiction, for a proxy to act. For example, it might be contained in common law or other legislative provisions. It is arguable whether section 16 of the bill would prevent someone from having a proxy act for them, because of the provisions that are available in the 1995 act. However, from the Law Society's point of view, the concern is that solicitors do not have the experience or knowledge to assess capacity. They see that as a significant decision, so they would seek some medical training or assistance to enable them to make it.

Patrick Harvie: That still implies a medical test of capacity, which I do not think is suggested in the text of the bill.

The Convener: We can come back to that, if members wish, but for now we will move on.

09:45

Elaine Murray (Dumfriesshire) (Lab): One of the differences that the Law Society's submission points out between the bill that we are considering and the United Kingdom Assisted Dying Bill is that the UK bill defines a maximum life expectancy of six months, whereas the bill that is before us refers to an illness that is "terminal or life-shortening". A number of illnesses could be life shortening, but the person could still have many years of life.

The Law Society makes the point that although some mental illnesses could be life shortening, they seem to be excluded by section 12(1)(a), which says that the person should not be

"suffering from any mental disorder".

Could you explore those issues a little more? Is it desirable to define a maximum life expectancy, or is that too difficult?

The Convener: There are two points: the time issue and the complexities of the term "life-shortening". Who would like to deal with those?

Professor Britton: I am quite happy to try to answer that question.

It is extremely difficult to attach a time period to a terminal illness. All illnesses manifest themselves in different ways. Rather than trying to be precise about that, it would probably be more sensible to try to ascertain why we would want to do that and what value would be had from attaching a time limit to a terminal illness at that point.

As far as mental illness and disease are concerned, other jurisdictions have taken the view that someone with a mental illness can request assistance to die and, in the Netherlands, that has already been forthcoming. The provisions in the bill do not take us down that road in the interests of protecting those who may lack capacity to make decisions at the time or be vulnerable. Our legal system places great responsibility on the state's obligation to protect life, particularly when it is vulnerable, and I believe that that is reflected in the bill.

Elaine Murray: The issue has been flagged up in evidence, but you do not think that there is a particular problem with the way in which the bill is written.

Professor Britton: In what regard?

Elaine Murray: In terms of the "terminal or life-shortening" terminology. Both the Faculty of Advocates and the Law Society flagged that up. I wondered whether you were flagging it up as an issue, or—

Professor Britton: I hope that I have answered the point about duration.

Elaine Murray: I accept that that is extremely difficult to define.

Professor Britton: As to whether a condition is life shortening or intractable, it is very difficult to come up with a clear definition—it is clearly a subjective decision in every case. It is not only the definition of "life-shortening" that might be problematic; there are many issues that the bill deals with in relation to which it is extremely difficult to come up with an objective definition.

Elaine Murray: Is the bill correct in the way in which it addresses the matter, or could it be improved? Is the terminology that is used in the bill as good as it can get, or are there ways in which it could be improved?

Professor Britton: We would always seek clarity. Given the implications of any outcomes of the bill's provisions, it would be advantageous to make them as clear as possible, not just for individuals who wish to use its provisions, but for those who have to interpret them.

Elaine Murray: Is the bill as clear as it could be?

Professor Britton: I think that it could be clearer.

Elaine Murray: In what way?

Professor Britton: I think that the definition of "life-shortening" could be made clearer.

Elaine Murray: You would like to see that on the face of the bill.

Professor Britton: Yes, and I think that whether a condition is life shortening is a medical decision, not a legal one. The law would be guided in relation to what the definition of life shortening would be within a medical context.

The Convener: You do not have a handy amendment with you then?

Professor Britton: Not today.

The Convener: Does anyone have one? What about the Faculty of Advocates, which also had concerns about the term "life-shortening"?

David Stephenson QC (Faculty of Advocates): The faculty has concerns about the way that that is defined. However, it is worth noting that, in addition to having a "terminal or life-shortening" condition or illness, the person would have to be able to show that they had an unacceptable quality of life. For the purposes of the bill, it is not sufficient that a life-shortening condition exists; it has to have a current impact on quality of life.

That might go some way towards restricting what is otherwise a fairly general provision in relation to the condition.

Elaine Murray: Is it not fairly subjective to say that someone's quality of life is unacceptable? What might be acceptable to one individual might not be acceptable to another. Is that not slightly unclear as well?

David Stephenson: Yes. There is a subjective element to that, but in the certificates that require to be signed by the medical practitioner, they have to confirm that there is nothing known to them that is factually inconsistent with the conclusion that the person's quality of life is unacceptable. It does not do to focus entirely on the phrases that are used in relation to the condition or illness; one also has to take into account that that is the first of a two-step test, and it is qualified by the second step.

Roderick Campbell (North East Fife) (SNP): First, I refer to my interest as a member of the Faculty of Advocates.

I want to expand on clarity in definitions and, perhaps, just take that further back to the question whether the bill would be improved by the inclusion of a definition of assisted suicide. What does the panel think?

Professor Britton: There is a strong need for clarity about what constitutes assistance in suicide. I am in danger of repeating myself, but I agree that it is a difficult thing to grasp. In the explanatory notes, the bill refers to the idea of a licensed facilitator to provide reassurance but not encouragement. That is just one example. It is difficult to know at what point reassurance ends and active encouragement starts.

Many cases that have discussed issues around assistance to die have been brought to the courts by people who have progressive neurological diseases—multiple sclerosis, Parkinson's disease and so on. For those people, the issue of assistance is very intense. They envisage a time when their capacity still exists but their physical ability to take their own life is no longer there. The demarcation lines on assistance—putting pills in someone's hand, or holding up their head to allow them to ingest tablets—are by no means clear. Given the responsibility of a facilitator or whoever is assisting a death, it has to be very clear where assistance stops and being complicit in homicide starts.

The Convener: Does anyone else wish to comment?

David Stephenson: Although I accept the point, there is also the other end of the chronological spectrum where, for example, somebody is prescribing the drugs that they know are to be taken to bring death about. Is that part of assistance and is it covered by the bill? There is enormous potential chronological scope in the bill's coverage from the initial act by people who simply do what is necessary to allow the process to take place, such as the dispenser or the prescriber, up to the person who might hand over the pills and provide the glass of water at the end of life.

The Convener: Roderick, do you wish to carry on?

Roderick Campbell: I would like to engage with Professor Miller.

The Convener: Are you moving on to something else?

Roderick Campbell: It is on the same point, convener.

The Convener: Okay. I know that John Finnie, too, has a question.

Roderick Campbell: I saw Professor Miller shaking his head when the witnesses were being drawn on the definition of "assisted suicide". Our second panel of witnesses this morning comprises representatives from the Crown Office and the police, but I note that Professor Miller's submission suggests that because there is no such definition and because under Scots law helping someone to commit suicide cannot be brought as a criminal charge

"there is no way of knowing how the prosecuting authorities might respond to a relative who assisted the death of another individual."

Can you expand on that?

Professor Alan Miller (Scottish Human Rights Commission): Yes. As many of you have, I have fond memories of discussing this issue with Margo MacDonald over the years. It is very strange to be discussing it without her.

Roderick Campbell has highlighted a challenging issue. I should say, from a human rights point of view and as a means of zeroing in on the question, that Parliament has a relatively free hand, because human rights law neither requires it to, nor prevents it from, legislating on assisted suicide. There is in Europe no consensus on the issue; it is up to each country to have its own public debate and to make its own parliamentary decision on it.

If Parliament decides not to approve the bill, there is still a problem that has to be tackled: the lack of foreseeability on, and of accessibility to knowledge of, whether any informal action that individuals and families might take to assist suicide would lead to criminal sanctions being taken against them. In the recent United Kingdom Supreme Court case involving Debbie Purdy, it

was decided that there was a lack of accessibility and foreseeability in the criminal law, and as a result the director of public prosecutions had to issue quite detailed directions that gave people a better understanding of where they were in a grey situation. Conditions are certainly ripe in Scotland for a challenge with regard to that lack of understanding in the current system. If such understanding does not exist, an individual will simply not know whether they will be in breach of the law. Given the very difficult set of emotional circumstances that such people are in, the last thing that they need is a lack of clarity on the legal position.

Roderick Campbell: In that sense, therefore, there is a positive case to be made for having a go at some legislation, difficult though that might be, instead of simply relying on guidance from the prosecuting authorities.

Professor Miller: Anything that makes things clearer and lets individuals know where they stand can be taken forward whether or not this bill is passed. What I am saying is that if Parliament decides not to pass the bill, it still needs to address another issue that is quite apart from it.

John Finnie (Highlands and Islands) (Ind): Professor Miller has just alluded to the Purdy case. A footnote in your submission says that

"the Commission is also concerned that there is a lack of guidance relating to the omission doctrine, whereby doctors may withdraw life sustaining treatment in the certain knowledge that this will bring about the death of the patient."

What, from a human rights point of view, can we learn from the current arrangements for withdrawal of such treatment or, indeed, from instances in which people seek an undertaking that they will not be resuscitated?

Professor Miller: No matter whether legislation in this or any other form is passed, we must recognise the need to improve palliative care in Scotland. That must happen for obvious reasons; if we are not looking after people in the way we should be looking after them, they are going to be placed in situations in which they will ask, "Is it worth carrying on?" Irrespective of the bill's merits, there is an obligation to improve palliative care.

Part of that is about recognising the human right to the highest attainable standard of health, which applies as much to older persons as to people at any other stage of life. There is a concern that certain practices are not recognising that right with regard to people who are in need of care, and that some health decisions do not respect people's free will to determine the kind of healthcare that they will be given. From my experience—I am sure that others around the table know this, too—the approach that we need is not being taken daily in hospitals: decisions are being made without proper consent, without instructions, without information and without free will being exercised by the patient herself, and families are very often being put in situations in which they are making decisions that they are ill equipped to make, for emotional or—as we have discussed—legal reasons. I agree, therefore, that families and legal professionals need much more certainty.

10:00

Patrick Harvie: I will pick up on some of the points that Professor Miller has made and ask one or two of the other witnesses to respond. He has raised questions about clarity and the definition of, for example, what counts as reassurance and what would be a step beyond that and would count as assistance. The seeking of clarity is understandable, but this is clearly a complex area. Difficult concepts will always be involved and it seems to me that guidance that would flow from the legislation—for example, on training, the responsibilities of licensed facilitators and even on what to do in the context of someone's having not requested assisted suicide or having not made a preliminary declaration—would leave medical practitioners with a clearer sense of what to do when it comes to some of the decisions that Professor Miller alluded to.

It seems to me that the questions of clarity are currently open and that the bill gives us the clearest opportunity to begin to fill in the gaps—in particular, through guidance on the role of facilitators. Do you agree?

Anyone?

The Convener: I was giving them a moment to gather their thoughts after that peroration, Patrick.

David Stephenson: My concern is that there would be a danger that individuals would fall through the gaps and would, due to uncertainty, find themselves exposed to prosecution. The reality at present in Scotland seems to be that there has historically been very little in the way of prosecution of people who have assisted suicides, and there have been very few such cases. We do not have a statutory offence such as there is in England, which is the focus of prosecution there. However, it seems to me that if the bill were to be passed and cases were scrutinised—as they would have to be were a new system to be introduced—individuals would suffer if you do not get it right. It would be better to get it right now than to get it right through a process of a series of criminal prosecutions in the High Court, when individuals would be at risk of losing their liberty.

Patrick Harvie: It is certainly better to get it right than to get nothing.

David Stephenson: Yes.

The Convener: Given that the bill is called the Assisted Suicide (Scotland) Bill, would it not assist to have a definition that people who might be involved in this at all levels could understand? If the answer to that question is yes, will you provide such a definition? I want Queen's counsel advice from the Faculty of Advocates for free. That will be a first.

David Stephenson: I do not currently have a definition. It would be silly to try and make one up—

The Convener: I understand that you cannot do so on the spot, but is it possible to produce such a definition?

David Stephenson: It should be possible to define the circumstances that are covered by the bill in much the same way as Lord Falconer's bill in England—which seeks to set up a different system—defines more clearly what is to be legalised and what will be permissible. I think that such a definition is not beyond the wit of man.

The Convener: Would that be helpful, Mr Harvie—depending on what the definition turned out to be?

I should not be questioning Patrick Harvie; he will give evidence another time.

Patrick Harvie: Not quite yet.

The Convener: Part of the problem is that everybody would like to know the parameters within which they will operate.

Christian Allard (North East Scotland) (SNP): Good morning. I will ask a specific question and a more general one.

I was surprised by the views, in the written submissions of the Law Society of Scotland and the Faculty of Advocates, on section 24, which is headed "Savings for certain mistakes and things done in good faith". The faculty said that section 24 as drafted might expose

"a person to the risk of prosecution."

Both bodies suggested that section 24 be changed. Can you elaborate a bit on what you mean?

Professor Britton: I am happy to start. I think that we are almost back to a discussion on clarity. As soon as sections such as section 24 are included, you leave room for a broad range of practices, whether they be actions or omissions. Anybody who is involved being left in uncertainty about what they have or have not done that might render them criminally liable, is not in the best situation. It is almost a catch-all provision that is trying to provide enabling or flexible legislation to deal with the complexities and the moral, personal and legal issues that the bill brings. To leave people uncertain until a mechanism is brought in subsequently might not be the best way forward.

Christian Allard: Yes.

I am particularly interested in whether it is possible that ignorance of the law could be a defence in relation to the bill.

Professor Britton: I am sorry. Can you say that again?

Christian Allard: Could ignorance of the law be a defence in relation to the bill if people are prosecuted?

Professor Britton: I think that ignorance of the bill could absolutely not be a defence. The law tends to state what is a crime, so it would not be a defence to claim ignorance of the law. However, one might not know what one might have to do in terms of assistance, actions or reassurance. Until one is actually in such a situation it is very difficult to measure responses. The nature of what one would be required to do in such situations might not provide latitude, so one could end up in the situation in which only afterwards was one having to try to account for, or respond to, what one had or not done in the circumstances.

Christian Allard: Would the Faculty of Advocates like to comment?

David Stephenson: We have a number of concerns about section 24. The first is that section 24 would considerably blunt the essential requirements that are set out earlier in the bill. That in itself is not necessarily a bad thing, because what is proposed is a complicated system, and you do not want to expose to prosecution people who have made simple errors. If you set up a complicated system, people will make mistakes. It therefore seems to me that there has to be some means of preventing the prosecution of such people.

However, I doubt that the balance has been properly struck here. We are trying to prevent the prosecution, for murder or culpable homicide, of people who assist suicide. For section 24 ultimately to make the test—of whether people will be exposed to prosecution—whether there has been carelessness on their part strikes me as being, at best, unfortunate. The dividing line between a prosecution for murder and a legalised assisted suicide here is, potentially, about carelessness. We are all careless from time to time, but is that to be the test of whether somebody is at risk of going to jail and having a life sentence for murder?

Section 24 needs to be looked at again and should, perhaps, have rather tighter definitions. Even if we are told what "careless" is to be, is it to be measured against the standard of care of the

ordinary reasonable man or of the medical practitioner who is involved day to day in the assisted suicide process, or would it be some other standard? I really feel that we have to be told.

The Convener: That would also absolve one from having to pass the lesser test of civil liability.

David Stephenson: Yes, it would. Let us say that someone is given pills to end their life, but the attempt is unsuccessful and they are left severely brain damaged and are no longer in a position to exercise any subsequent decision to kill themselves. If the person is relatively young, cannot earn income and will have care requirements for the rest of their life, are they to have no remedy against the person who has negligently given them the wrong medication or medication of lesser strength?

Professor Britton: I do not know whether this is helpful, but as an aside I say that I think that one should consider the consequences of any sanction. In England, the Suicide Act 1961 contains a sanction of 14 years' imprisonment for the charge of assisted suicide. Under Scots law as it stands, the sanction could be life for a charge of murder or culpable homicide. The consequences for people who are sanctioned under current Scots law are very serious indeed.

Christian Allard: The witness from the Faculty of Advocates mentioned pills. I have seen a lot of evidence—from the Law Society and the faculty—about the lack of clarity in the bill about the types of pills that should be administered, and who should decide how they should be administered. The bill also contains no indication of when such pills should be given. That seems to be a huge omission.

Professor Britton: I cannot talk about the pharmacology of pills, but we expressed concern about how such prescriptions would be looked after and kept safe when they are stored in people's homes, because there could be other people there.

There is also a stipulation that, even if the medication is or is not used, it must be removed from the person 14 days afterwards, but how will that be achieved? Will someone come and take it away immediately? Will someone come knocking on the door a matter of hours later? We cannot lose sight of the fact that any legislation that is passed must consider the individual at the centre of it. If they have not taken the medication or if they need, say, another hour or two hours, will that time be given to them or will the stipulation be very strictly enforced? If it is going to be enforced, how will that happen?

Professor Miller: The commission did not make a submission on any of those issues, but I have to say that I find them and the line that is being taken very interesting. No doubt I will be corrected if I have not seen something that is there in the bill, but with regard to the issue of mistakes and savings, I think that from a human rights point of view, we need to ensure that the opportunity for making mistakes is reduced as far as possible, while recognising that it can never be eliminated entirely.

From a human rights point of view, the real test will be whether the person exercised free will and whether the decision was based on information that was sufficient to satisfy us that the person who was seeking to bring an end to their life did so with free will. As we have heard, capacity has to be tested and, of course, medical conditions have to be satisfied. I come from a legal background, but I have to say that if, as a legal or medical professional, I was being asked on behalf of society to affirm that it seemed to be okay for a person to end their life, I would want to be satisfied that I had all the relevant background information and that no other pressure was, for whatever reason, being brought to bear on the individual. They might have capacity and a particular medical condition, but is what is happening really an expression of their own free will? It might well be, but before I made any such decision I would want to be very satisfied that I knew about anything that was lurking in the undergrowth. I do not want to overstate how often such mistakes might happen, but such a mistake need happen only once. After all, it is the most serious mistake that can be contemplated.

10:15

Christian Allard: I know that it will be difficult to answer such a general question at this stage, but we have talked a lot about clarity and, indeed, what seems to be a lack of it in this bill. Is it simply a matter of making some amendments to the bill, or is it the case, as different people have suggested in evidence, that the bill contains a lot of omissions and that a lot more should be drafted? I do not know whether the volume of the omissions can be addressed in amendments. Does the bill need to be redrafted altogether because it contains not enough clarity and too many omissions? I know that it is difficult to make such judgments at this time, but I would like to hear your point of view.

Professor Britton: As representatives of the Law Society of Scotland, we are not in a position to comment on the bill's aims and purposes. We confine ourselves to any legal and practical issues that might arise.

The Convener: Forgive me, but I think that that was Christian Allard's point. We are dealing not with the ethics but with the processes and whether

there is a real lack of definition in the mechanisms and legal tests.

Coral Riddell: The intention behind the bill is very much to set up a dignified, systematic process, and there is something to be said about its simplicity and directness. However, as the Law Society has found, the challenge is that once you start to probe beneath all that, you begin to understand that the absence of definitions does not give the certainty or meet the intention to provide the simplified, process-driven approach that I think the bill seeks to achieve. However, even if it does not provide all the answers or definitions, enhancing the bill with that clarity and certainty would take it a step further towards being effective.

The Convener: I take it that by enhancing you mean amending.

Coral Riddell: For the bill to be effective, it will require amendment. After all, the key to this is certainty.

The Convener: If no one else wishes to comment on that point, we will move on. Alison McInnes is next.

Alison McInnes (North East Scotland) (LD): Does the panel have any view on the fact that the bill contains no sanctions or penalties for any contravention of its provisions?

David Stephenson: I suspect that that is because its approach is not to create any offences but to provide freedom from risk of prosecution for common-law offences that stand outside it. An alternative approach would be that taken in the English Suicide Act 1961, which decriminalised assisted suicides subject to specific offences that were created in the legislation. That approach has not been taken, presumably because of the approach that was taken to drafting and structuring the bill.

Professor Britton: The provisions in section 1 are quite unusual and interesting in that they define what is not a crime instead of what is a crime.

Alison McInnes: I note that, in its written submission, the Faculty of Advocates thought it desirable to have some penalties.

David Stephenson: We could look again at the savings provision. Instead of throwing people back on to the criminal law of murder and culpable homicide, the bill could say that if people do not get this right—even if they have been a wee bit careless—they will be subject to punishment under the bill itself, rather than under the common law. I suppose that there would be a matter of degree in relation to the error that had been made.

Alison McInnes: That is helpful.

To go back to the idea of licensed facilitators, I note that the legislation as drafted suggests that anyone over the age of 16 could take on that role. That is rather young. Does the panel agree with the provision?

Professor Britton: It seems young when one considers the purpose of the role that they would be undertaking. I do not know whether this is a legal point, but one would hope that they would have experience of life and a certain empathy, so that they could understand the circumstances in which another individual might find themselves. Although many 16-year-olds might feel that they possess those qualities, they would more usually be found in someone older.

The Convener: On the question of a facilitator, section 21(1) says:

"A licensed facilitator may not act as such for a person in relation to whom the facilitator is disqualified under schedule 4."

Your submission raises the point that paragraph 2(g) of schedule 4 talks about

"anyone who will gain financially in the event of the person's death whether directly or indirectly and whether in money or money's worth".

That is an issue, as a person might not know whether they are in somebody's will. Is there an issue there, or would the fact of not knowing be sufficient?

Coral Riddell: That has not been tested so ignorance might not be a defence. It would just have to be tested against the facts and circumstances, the capacity in which the person acted and whether or not they were aware of being in the will.

That provision gives rise to another issue of a solicitor's proxy.

The Convener: We are back to that. You were not happy with me earlier.

Coral Riddell: It is a very small point, but a solicitor might be an executor for a will and that would exclude them from acting as a proxy. A solicitor would know that but it does—

The Convener: Yes. Someone would not do it if they were the executor.

Coral Riddell: But it creates further tension in relation to different responsibilities and roles. Going back to the previous point, people are not necessarily going to be aware. They will be uncomfortable asking whether they are in a will, and the solicitor will not be able to disclose that they are likely to benefit from anything in the will. The approach creates more uncertainty.

The Convener: Except, surely, that an executor would have sight of the will so they would know whether they were a beneficiary.

Coral Riddell: The executor would, but if a member of the family wanted to know whether they could act as proxy or whether they were going to benefit from the will, that could not be disclosed.

The Convener: I am not going to dwell on this. I think that I agree with you. The fact that someone might not know that they would benefit financially and is a facilitator might not be a huge issue, although it must put a certain unease in people who are facilitators if they think that they are going to be placed in a position of scrutiny, particularly when we go on to the next section about police reporting and so on. Is that something that we should bother about?

Professor Britton: I suppose that we have to look at the actual purpose of the provision, which is to prevent abuse. Most of these issues would be judged after the event, as Ms Riddell said, in terms of knowledge or the amount that someone would benefit. They are really not intended to pick up on an acknowledgement or a thank you bequest; they are there to prevent abuse, which is rarely picked up on until after the event.

The Convener: I appreciate that. Perhaps a statement could be made by the parties to the effect that the facilitator is not a beneficiary in any respect. If that could be done, it would be a belt and braces for the facilitator.

Margaret Mitchell (Central Scotland) (Con): Could the panel comment on the variation and inconsistency in how capacity is defined in the bill and how it is defined in other legislation? The Faculty of Advocates and the Law Society in particular made submissions on that.

David Stephenson: Section 12 deals with capacity and takes a two-stage approach. A person has capacity to make a request if they are not suffering from any mental disorder, as defined in the Mental Health (Care and Treatment) (Scotland) Act 2003, that might affect the making of the request, so there is a qualification there; and they must also be capable of making a decision, communicating that decision, understanding the decision, and retaining the memory of the decision. That is the reverse of the definition of incapable in the Adults with Incapacity (Scotland) Act 2000.

It is not clear, at least to the faculty, why the decision has been taken to yoke those two sources together if what is important is to determine whether an individual has capacity to make a decision. The first of the two tests—the requirement that the person not be suffering from a mental disorder—would exclude anybody with a mental illness, whether that mental illness was the principal focus of their desire to have assisted suicide or was just incidental.

I would have thought that it must be common for someone who believes that their life is of an unacceptable quality, due to a physical illness such as Parkinson's, MS or any of the other progressive neurological illnesses, to become depressed and therefore to develop a mental illness. We do not usually assume that everyone who has a mental illness of whatever severity is incapable of making decisions, yet that seems to be what the bill sets out to establish. That might be because whoever drafted it, or Margo MacDonald, was very keen to be seen to exclude people who are mentally ill. However, the committee might want to consider the consequence of that in some detail. Is it really the intention that all of those with any degree of mental illness are to be excluded from the provisions of the bill?

Margaret Mitchell: I suppose that the difficulty for us is that, as the Justice Committee, we are looking only at what can be put down legally without really going into the medical consequences. The depression might be short term in nature but would still be termed a mental health issue. A person might have a reversal in how they feel about something at another time. That goes to the heart of this particular provision.

I return to the 14-day time limit between the issue of a prescription and the act of suicide, if I have understood that properly. A number of submissions expressed concern about that. It was felt that it might be too short a time limit and that there might be pressure on the individual. In Oregon, figures associated with the Death With Dignity Act 1995 show that just over a third of people who initially get prescriptions change their mind and choose to extend their life. Do panel members have any comments on that? I know that there is a three-stage process. I am talking about the very last hurdle.

Professor Britton: Quite a lot of studies have been done in Oregon. It was shown that once people knew that the option of assistance with death was available to them, they almost took a step back and made other plans. Some went on to utilise the provisions and others did not.

I know that we have been arguing for clarity, but it is a difficult thing to measure. We need to get a balance. On the one hand, these will be very difficult times for the individual and there are things that he or she may or may not want to achieve. You do not want to rush them in any way. A time limit is a very arbitrary thing to try to impose. Some people will need a great deal of time; others may not have time, due to the nature of their illness and infirmity. Like most things, it is probably a case of trying to get a balance. One

would err on the side of protecting the individual's life, and we would want to ensure that any decision that is made is fully informed and that requisite time has been given to the individual to make the decision.

10:30

Margaret Mitchell: If no one else wants to come in, let us return to licensed facilitators. Should there be a definition of those, or the function performed by them, in the bill?

Professor Britton: This is a new role or function that an individual will undertake, so we need clarity around what the role involves and its parameters. You are moving responsibility for something that was originally very much the preserve of medical and clinical decision making. If the role is being entrusted to another individual, it must be made clear what the role involves for them.

Margaret Mitchell: Does anyone else want to comment on that?

Coral Riddell: I endorse that point. There are a number of points to make—some have been made already—about section 19, which talks about "comfort and reassurance" and

"such practical assistance as the person reasonably requests".

It is difficult to know what that means and what the parameters of that are. The role that a facilitator would undertake and its responsibilities would benefit from definition.

The Convener: Would you put that in the bill or in guidance for facilitators?

Coral Riddell: I think that, inevitably, it would be in guidance that would develop as practice and experience dictated the requests and assistance that were required.

Margaret Mitchell: That was my next question, convener.

The Convener: Sorry.

Margaret Mitchell: I would feel uncomfortable if that crucial role was developed by ministers after we had passed the bill.

I have another question on the functions of licensed facilitators. Should they have a duty to record what was dispensed and what happened thereafter? A lot of tidying up needs to be done around this crucial role.

Professor Britton: They should know the nature of the drug and how much was dispensed. However, there would be 14 days to remove any drug that had not been used, and how would it be disposed of? Who would have that responsibility? Would it go back to the pharmacist to be safely disposed of or would it be the responsibility of the licensed facilitator? In circumstances in which an individual has received assistance to end their life, the priority for the licensed facilitator at the time may rest elsewhere than worrying about what has happened to the pharmacology and writing reports about that.

Margaret Mitchell: Would it be onerous to have a duty to record when the drug was given and what drug was given?

Professor Britton: Not at all. It would be only right for licensed facilitators to have that duty to record what occurred, but they should be given a reasonable timeframe in which to do it. If they are there to provide reassurance, their priority at the time would surely be the individual concerned and/or any next of kin and family members. However, it would not be unreasonable to expect them to record what happened.

The Convener: I will take Sandra White next and Patrick Harvie last—he can be a sweeper up, as it were, of all the things that we have not asked or followed up.

Sandra White: Margaret Mitchell has asked a couple of the questions that I wanted to ask about the facilitators. Everyone has concerns about the facilitators being appointed by the Government or ministers. What experience is needed and what is the role? Those things are not written in the bill.

I have another question on the back of what Professor Miller and Mr Stephenson have said. If, by chance, a facilitator gave the medicine and the person ended up very disabled, would it be possible to prosecute the facilitator for criminal negligence if that was not written in the bill or part of the contract? The role of a facilitator is clear, but there is nothing in writing that would protect a facilitator if any careless action happened. Should that be looked at as well?

Professor Britton: I agree. We have alluded to the question of age and have said that 16 would seem very young to have that experience. Some facilitators may have some form of medical training and experience, but others will not. There will be great diversity in the experience of licensed facilitators, which may affect how they manage the situation in which an individual who is trying to ingest medication becomes distressed. Some might need to call for assistance from other medical sources, whereas others might have the ability to deal with the situation. We still come back to the issue of what form that assistance might take. If an attempt is made to ensure that the individual ingests substances with the least amount of distress, that certainly seems to me to involve the crossing of some line within the parameters of the bill as it stands.

David Stephenson: The question is a very good one. I do not have an answer. I suggest that we ought to be able to find an answer in the bill but, at present, we cannot.

I point out that, although someone has to sign a declaration that they have arranged to have the services of a facilitator, there is no express requirement in the bill that the facilitator be involved. Therefore, if someone has made an arrangement to have a facilitator but then decides, for whatever reason, that they will not bother having one, there seems to be nothing in the bill that would impose any consequence of that. To my mind, the bill does not set up a system that requires the assistance of a facilitator when the lethal drugs or the lethal injection are administered, and that is a matter of concern. Perhaps the process should involve a form of compulsory supervision, albeit that one can see why an individual might not like that sort of intrusion at what would be one of the most personal moments in their life, for them and their friends and family.

Elaine Murray: I have a quick query about the fact that the bill does not contain a conscience clause, which both the Faculty of Advocates and the Law Society commented on. Would I be correct in assuming that that is not necessary, as the bill defines what is not a crime? Therefore, if someone refuses to take part in what is not a crime, they are not committing a crime. Is that why it is not necessary to put a conscience clause into the bill?

Professor Britton: I am not sure that I have the knowledge to be able to answer that fully, but I believe that a conscience clause addresses more than criminal liability. It is called a conscience clause because it addresses someone's attitude towards their profession, their moral standing and their ethical beliefs and values. I do not feel able to comment on the criminality aspect, but I think that a conscience clause definitely covers more than just criminal behaviour.

Coral Riddell: The issue is more about certainty. From a solicitor's perspective, the person would be able to choose not to act, as would any of the parties. That is reflected in the Assisted Dying Bill. It is an option that people can elect to take. In practical terms, it would not change—

Elaine Murray: Basically, they would be saying that they were not prepared to take part in something that was not a crime, so there would be no chance of their being prosecuted.

Professor Britton: Yes, but there is a conscience clause in the abortion legislation. The primary consideration is not whether the individual is taking part in a crime, but whether they wish to be involved in the termination of a pregnancy, which is a personal preference.

Elaine Murray: Does the abortion legislation deal with the issue in the same way? Does it say that it is not a crime to take part, or does it create an exception from something that is a crime—the alternative approach that David Stephenson has suggested for the bill—if you see what I mean?

David Stephenson: No. An abortion that is undertaken under the terms of the abortion legislation is not an offence, but if it does not comply with that, it remains an offence.

Elaine Murray: So it takes the alternative approach.

David Stephenson: Yes.

A conscience clause could have two purposes. It could allow people to say that they are not prepared to participate. It could also go on to require them to say why they are not prepared to participate, so that the person who seeks assistance knows that they are being declined assistance not because they do not meet the requirements of the legislation, but because the individual whom they have consulted has a conscientious objection to involvement.

If the conscience clause goes on to say, as the faculty has suggested, that if someone is going to exercise their right of conscience they must then also tell the person that that is the ground on which they are refusing them assistance, that enables them to understand that they can go somewhere else and seek assistance from someone who does not have conscientious objections. So, that would be a second purpose of a conscience clause.

The Convener: Patrick, I will let you in now.

Patrick Harvie: Thank you very much, convener. An awful lot of ground has been covered, but I wonder whether it might be appropriate for me to write to the committee before it reaches its conclusions to cover some of the issues that there might not be time to cover.

The Convener: We are very flexible.

Patrick Harvie: Wonderful. Thank you.

I will just pick up on one or two of the issues that have been touched on. Briefly, on the conscience clause, it is a great convenience for those legislating in Westminster that they do not have to consider the question of devolved and reserved competences. Perhaps if there was a reciprocal legislative consent mechanism at some future time, we would have that flexibility as well. Clearly, however, there is a requirement for guidelines for professional bodies to address the issue of a conscience clause. Would that be an appropriate means of doing it, given that the regulation of

medical professionals is not something that we can legislate on in this Parliament?

Professor Britton: Yes.

David Stephenson: Yes.

Patrick Harvie: Okay. Thank you. On the question of the minimum age of licensed facilitators being 16, is it not clear that that is not simply a voluntary role that one can step up to and acquire the status? A licensing process would be undertaken that would take into account the skills, abilities and experience that people would require to have in order to undertake that role. That said, would it not seem reasonable that, for example, someone who might be very young but who has been a full-time carer for a relative for a long time—perhaps for many years—might have gained the required experience and have a commitment to palliative care and to the dignity and freedom of choice of people at the end of their lives at a surprisingly young age and be regarded by the licensing body as an appropriate applicant?

Professor Britton: I agree that it is about the quality of the person's experience and their ability to understand what they are about to undertake.

Patrick Harvie: Thank you.

The question around capacity and mental health has perhaps been misunderstood. It is clear to me from the way in which the bill was drafted—I undertook to promote it subsequently—that section 12(1)(a) does not rule out from the capacity test anyone with a mental health diagnosis, as it refers to someone who

"is not suffering from any mental disorder"

within the context of the 2003 act

"which might affect the making of the request".

Is that not a clear statement? That final clause is not a commentary on the nature of mental illness; it is part of the capacity test. So, someone who had a diagnosis for a mental health condition that did not affect their capacity to make a request would be able to make a request. Is that not clear?

David Stephenson: With respect, I do not think that it is, because the last part of section 12(1)(a) reads,

"which might affect the making of the request",

not "which does affect the making of the request." I suspect that in practice it is very difficult to exclude the possibility that any mental disorder might affect the making of a request.

Patrick Harvie: It does seem to me that this capacity test, which a medical practitioner with expertise in the field would be responsible for applying in approving a request, would also be applied normally by a medical practitioner in other contexts. For example, someone with a history of a recurring mental health condition that had not recurred for a long time could still have that diagnosis, but it would be reasonable to conclude that, there having been no recurring episodes for a long time, the condition did not affect their ability to make the request.

10:45

David Stephenson: That is possible. You would have to exclude it as a possibility and the decision would have to be made by someone with the appropriate level of qualification. One of the concerns that we expressed in our response in relation to capacity was whether the way in which it is phrased drives one to the conclusion that the only person who is properly in a position to make that judgment is a psychiatrist.

Patrick Harvie: My final question is a general one that applies to this section as well as the section on savings and several issues that have arisen over the course of the discussion. It is about the balance between specificity and flexibility, or the ability to take account of circumstances and case law, which is required with or without legislation in this area.

Several times today, people have said that there must be greater clarity. As the member in charge, I will be happy to discuss constructive amendments that are intended to improve the bill. However, is there not a danger that, if we get into that kind of discussion, at the other end of the spectrum, an overly rigid approach would also give rise to problems in applying the law and to an inability to take account of circumstances? We need a balance between clarity and an overly rigid approach. Is there not a danger that we might end up going too far in the other direction?

David Stephenson: A balance must always be struck. There is an advantage to having a simple system, if for no other reason than that people who are not lawyers or are not regularly engaged in the process of considering assisted suicide can understand it. I would suggest that clarity does not necessarily involve complexity. For example, Lord Falconer's Assisted Dying Bill seems to me, as a lawyer, to be more clearly expressed. I think that I understand it more easily than I understand this bill. However, it is no longer than this bill—in fact, I think that it is shorter.

The Convener: I thank our witnesses for their evidence. This has been an interesting issue to explore.

Because we are the secondary committee, Patrick Harvie will not be coming in front of us—

Patrick Harvie: Indeed.

The Convener: However, I suspect that he will be giving evidence to the Health and Sport Committee. Notwithstanding the fact that that committee meets at the same time as we do, members of this committee could ask for permission to attend any meeting of the committee at which legal issues relating to the bill arise, and they could question Patrick Harvie at that point—that is, if they do not wish to be here in our happy hunting ground.

10:48

Meeting suspended.

10:54

On resuming—

The Convener: I welcome to the meeting our second panel of witnesses on the Assisted Suicide (Scotland) Bill: Chief Superintendent Gary Flannigan, head of major crime in the specialist crime division, Police Scotland; and Stephen McGowan, procurator fiscal, major crime and fatalities investigation, Crown Office and Procurator Fiscal Service. As I said to the previous panel, I thank you for your submissions. We will go straight to questions from members.

Elaine Murray: The bill is drafted to define something as not being a crime in a variety of circumstances. Does the approach of defining something as not being a crime create any difficulties with investigation or prosecution? Are there any associated difficulties for you as investigators or prosecutors?

Stephen McGowan (Crown Office and Procurator Fiscal Service): If passed, the legislation would be unusual, because it defines something that has been a crime as not being a crime. It is the specifics of a piece of legislation that can cause difficulty. As a general principle, although the approach is unusual, we can deal with it if we have to. Its unusualness causes no specific issues in itself. It is knowing what the law is and applying that law that is important to us as prosecutors.

Elaine Murray: Is there sufficient clarity in the bill to enable you to know who you should not be prosecuting?

Stephen McGowan: There are specific pieces of the bill where further clarity might assist us in our job as prosecutors. The previous panel touched on some of them, and most of what I have to say would be fairly similar to what I heard from it, although I caught only the second part of that session.

The Convener: Just tell us which pieces you are talking about.

Stephen McGowan: The provisions are those on the definitional aspects of crime and on the essential safeguards and the savings section at the end. When we considered a case, we would have to look at those passages in the same context as we currently have to use. I am talking about sections 1, 3, 18 and 24.

Chief Superintendent Gary Flannigan (Police Scotland): Although the bill would decriminalise the current situation, it would not preclude a member of the public from raising a concern that might more than likely necessitate an investigation. In effect, engineering out a police investigation at the forefront would be significant for us, because there would be no police involvement unless something came from a member of the public or there was an instruction from the Crown to look at a particular circumstance. That is clearly helpful.

Elaine Murray: The Faculty of Advocates suggested that a different approach might be taken, which might be more common, with a definition of a criminal activity and exceptions in the context of that activity. Would that approach be easier?

Stephen McGowan: It would provide more certainty than we are looking at in the bill. I will give an example of what I mean about some of the tensions in the bill. As the earlier panel said, there is no definition of assisted suicide or assisting a suicide. I understand that the intention is to give as much flexibility as possible but, when we look at the interplay between that intention and section 18, which says that

"Nothing in this Act authorises anyone to do anything that itself causes another person's death",

that demonstrates to me that everything has to be looked at and dealt with in its own context. Various definitions could be brought to that.

What is something that itself causes suicide? I take the intention to be, for example, directly causing someone to ingest medication that they might be using, but the bill is not entirely clear that that is what is intended. Together with the lack of definition of what it is to assist suicide, that still means from my perspective as a prosecutor that there is perhaps a lack of clarity and that discretionary judgments would have to be made.

The thing to emphasise about the bill, as with the current law, is that I am sure that the cases would be very fact sensitive. The specific facts of any case would be important. However, the way in which the bill is set out does not provide a framework for what is and is not criminal. There is

still an extent to which that has to be read into the provisions.

11:00

Chief Superintendent Flannigan: If that were to remain the case, the likely consequence would be a police investigation, which would by its nature be intrusive. The driver for the bill is the dignity of the person's last wishes, but we might end up with the very people who assist in the process being investigated for their actions.

Elaine Murray: That would happen if a member of the public raised a concern.

Chief Superintendent Flannigan: Yes. I am sure that Stephen McGowan would agree with that.

The minutiae of the law would probably necessitate that that person was suspected of a crime and was therefore a suspect. Things might develop quickly and there might be an adverse impact on what was wanted in the first place.

Elaine Murray: Given the new terminology in the Criminal Justice (Scotland) Bill, that person could be arrested.

Chief Superintendent Flannigan: It has been mentioned a number of times that it would be hugely beneficial to have absolute clarity on those points so as not to end up with a police investigation on behalf of the Crown to safeguard the integrity of the process.

Margaret Mitchell: Could I ask Mr Flannigan about ensuring the compliance by licensed—

The Convener: Chief Superintendent Flannigan.

Margaret Mitchell: I am sorry.

The Convener: It took him a while to get there. He wants to keep the title.

Margaret Mitchell: Do you have any comments on the provisions in the bill on Police Scotland's role in ensuring compliance by licensed facilitators? Are you happy with that?

Chief Superintendent Flannigan: I am. I understand that everything might, in effect, be retrospective. If I am honest, I am not entirely clear about what the role would be. Are you saying that there is a defined role?

Margaret Mitchell: I think that that is one of the points at issue.

Chief Superintendent Flannigan: Are you asking me whether there should be a defined role?

Margaret Mitchell: No. I am specifically talking about the suggested role and whether you are unclear about it. The bill is there, but we are not quite sure. There has been some suggestion that the role should be in the legislation or that it could be left to guidance that was issued later by ministers. However, it would be up to Police Scotland to ensure that, whatever its role, that role is carried out properly and there is compliance. There is a big question mark about that.

Chief Superintendent Flannigan: I am not sure whether there is a precedent in our current role for having so much involvement in something of this nature. Police Scotland has no experience of such a pastoral role.

Stephen McGowan: Section 20 of the bill envisages that, when a licensed facilitator has assisted a person to end their life, the facilitator will have an obligation to advise the police of that fact. That section is slightly anomalous with current practice for what I would broadly call medical deaths. I know that this is not a medical death, but I am talking about someone who dies under medical care when there is a degree of supervision—that is why I characterise the situation in the same way.

Such deaths are reported to the procurator fiscal. There is a Scottish fatalities investigation unit, which deals only with such cases. I suggest that the role is not for the police but for that unit, which would be made aware of the situation. That is typically what happens in relation to a sudden death or a death when the person is under medical care and the death cannot immediately be certified. That would provide the necessary safeguard that the bill attempts to provide. I do not know whether that answers your question.

Margaret Mitchell: It sounds as though it would be more appropriate for the role to go somewhere else.

Chief Superintendent Flannigan: Yes—that would simplify matters and be consistent with the role of the police, which is to act on behalf of the Crown in investigating deaths and to take instruction. That approach would certainly be easier to adopt.

Margaret Mitchell: We have considered the issue in a medical context. Section 20 goes down a certain route, and it should be easy—well, it would not be easy, but the provisions should at least point to certain people who will be dealing with the issues. However, when a doubt was expressed, consideration would move to the possibility of a suspicious death. Will you comment on the savings provision and on the potential breaches and penalties?

Stephen McGowan: The savings provision is fairly broad. When we look at sections 1, 3 and 24, we see that the bill's intention is to ensure that someone is not penalised for a minor error in

paperwork, but I am not sure that that is explicit in the bill at present.

Section 24 refers to

"a person ... acting in good faith and in intended pursuance of this Act".

I am not sure what

"in intended pursuance of this Act"

means. Does it mean following the steps in attempting to follow the statutory scheme, or does it refer to someone who wants to end their life and knows that there is legislation that allows them to do so and allows someone to be assisted in that way? The definition could be tightened to facilitate the legislative intent—if I understand it correctly—and not be quite as wide.

It strikes me as a prosecutor that any step towards trying to comply with the act would cause a difficulty in a prosecution if we were to bring one. The bill may well be intended to do that, but the question for Parliament is whether it provides sufficient protection in the legislative scheme. The definition seems to be quite loose. There appears to be a slight difference between the legislative intent as I understand it and what is in the bill, which seems to be slightly wider.

John Finnie: I have a question for Mr McGowan, who I am not sure was present when I asked Professor Miller about the Scottish Human Rights Commission's evidence on the omission doctrine.

Stephen McGowan: I was not here.

John Finnie: The commission's evidence says:

"the Commission is also concerned that there is a lack of guidance relating to the omission doctrine, whereby doctors may withdraw life sustaining treatment in the certain knowledge that this will bring about the death of the patient."

That issue would not come to the attention of the authorities unless there was any dubiety around the writing of a death certificate. Is that correct?

Stephen McGowan: It would depend on the circumstances. As I said earlier, cases are very fact specific. Such cases have been brought to our attention, and we have dealt with them under the current regime.

John Finnie: You spoke about discretionary judgment. Would you envisage using that judgment in such cases?

Stephen McGowan: The current position is that the law of homicide applies to those cases, so we would look at a case in relation to that law. We look at whether a crime has been committed and whether it has caused the death. If a crime has been committed, the crucial element is the intention. If the intention is to kill, the case could be a homicide. If the intention is not to kill but to treat in terms of palliative care, that would potentially not be a crime.

John Finnie: There is a fine distinction between a conscious decision not to take an act that would sustain a life and actually seeking to end a life, is there not?

Stephen McGowan: Yes. There are very few crimes of omission in Scots law.

John Finnie: Can we learn anything from that in relation to the bill? I asked Professor Miller the same question.

Stephen McGowan: It is difficult to say specifically what might be learned. We are straying on to a slightly different topic—the treatment that is appropriate for those who do not want to take advantage of the proposals in the bill.

John Finnie: I am sorry—I should have stressed that I am not asking particularly about the medical aspect. I am asking about the proposal to report to a constable as distinct from the medical authorities reporting directly to you.

Stephen McGowan: If the death was sudden and the person was under medical care, depending on whether the treatment was a factor in the cause of death, and if there were concerns among the family, the nearest relatives or anyone else about the cause of death, I would expect matters to come to our attention.

John Finnie: Would there be any similarity with the situation in which a conscious decision is made not to resuscitate someone?

Stephen McGowan: That would depend on the circumstances. We have dealt with such cases that have been brought to our attention over the years.

John Finnie: How have they been dealt with?

Stephen McGowan: Off the top of my head, I cannot think of an example in which a crime has been committed.

Sandra White: I asked the previous panel about licensed facilitators. Mr McGowan has alluded to the fact that a criminal prosecution could be brought against a facilitator if a member of the public or a family were to raise concerns. That is a legal concern that we need to deal with. I asked the legal profession whether, if the medicine that was administered did not work completely and the person did not pass away in a certain manner, a criminal prosecution could be pursued against the licensed facilitator. Is there enough clarity on that in the bill?

Stephen McGowan: Under the bill as it is drafted and as I understand it, if a facilitator acted in good faith and intended pursuance of the act,

their conduct would have to be of a reckless rather than careless quality for a prosecution to be pursued. Carelessness is not defined in the bill but, given the definition of carelessness in other criminal contexts, I would say that the facilitator would have to be reckless for there to be any prosecution. I do not think that recklessness is protected by the bill.

Sandra White: That view is expressed in submissions that we have received.

Another issue that involves the police and the legal profession is whether specialised training would be required for the police on not just that part of the facilitator's job but the drugs that were made available, how they were stored, when they were collected or returned to the pharmacy and any records that were kept. Would the police need special training in those things?

Stephen McGowan: From a prosecutor's perspective, it is clear that any such case currently—and, I imagine, if the bill was passed—would be dealt with by specialists. At the moment, such a case would follow one of two routes to the Crown Office—it would come through either homicide teams or the fatalities investigation unit. Both those groups of prosecutors have specialist training. However, ultimately, any decision would be made by Crown counsel and would probably involve the law officers. In such cases, the decisions would be made by a small group of people. If the bill is passed, further training and internal guidance might be needed to ensure that prosecutors are au fait with the bill.

Chief Superintendent Flannigan: From a police perspective, awareness raising would be required at all levels. I imagine that, as Stephen McGowan has highlighted, the teams that I am in charge of—the major investigation teams—would need more in-depth training.

The Convener: On that point, Chief Superintendent Flannigan, are you content with the evidence that has been received so far on the provisions for recording processes? It seems to me that robust recording processes would make the police's job much easier. Are you content with what the bill says about recording?

Chief Superintendent Flannigan: Yes, I am. As Stephen McGowan highlighted, cases would always be treated on their merits, and we would need that particular scrutiny in order to see that conditions had been met. From the information that I have seen, I am content.

The Convener: The panel of legal witnesses did not seem to be quite so satisfied with the proposed recording processes.

11:15

Stephen McGowan: I wonder where the single repository of the documentation will be. In a medical case, we know where the medical records will be and what form they take. However, nothing in the bill specifies where the single record of a person's intention and the various steps that were taken will be. It is perhaps envisaged that the facilitator will hold that information, but the bill does not say that, so there perhaps is a gap, which could mean a police investigation. As Gary Flannigan mentioned, there is an element of invasiveness in any police investigation. I am not sure that that is what the framers of the bill had in mind when they drafted it.

The Convener: Yes—answers could be found more quickly if things were as you suggest.

Stephen McGowan: Absolutely.

Roderick Campbell: I have a question about the Lord Advocate's submission, which says:

> "If the Crown considers there to be sufficient evidence that a person has caused the death of another it is difficult to conceive a situation where it would not be in the public interest to raise a prosecution but each case would be considered on its own facts and circumstances."

That is fairly black and white. I think that you said that there have not been any cases in the past five years in which public interest considerations arose.

Stephen McGowan: The last case of this nature that I recall, in which we had to take a prosecutorial decision, was in 2006. It concerned a man whose brother had—I think—Huntington's disease. A prosecution was raised for culpable homicide, he was convicted and he was admonished by the court.

As far as prosecutorial discretion is concerned, the factors that we would take into account in applying the public interest test are set out in detail in the prosecution code. I think that there are 13 factors, one of which is about the gravity of the offence, and the others are about the impact on the victim. When we speak of the result being a death, the public interest in prosecution is very high. That is what is behind the statement in the Lord Advocate's submission.

Roderick Campbell: In its submission, the Scottish Human Rights Commission refers to the House of Lords decision in the Purdy case. It comments that a similar challenge could be made in Scotland and suggests that the Lord Advocate should issue interim guidelines. What is your view on that?

Stephen McGowan: That is not necessary because of the factors that are set out in the prosecution code. The Purdy judgment, which is not binding in Scotland, must be seen in its

context. The case was brought because Mrs Purdy wished to travel abroad to end her life, wanted her partner to help her in that and wanted to know whether she was vulnerable to prosecution under the Suicide Act 1961.

Mrs Purdy's case came shortly after another case. I think that it was the case of Daniel James, who was a 24-year-old rugby player with spinal injuries. His family was not prosecuted by the director of public prosecutions who, unusually, published the reasons for his decision not to progress criminal proceedings in that case. The factors on which the DPP relied in deciding not to take proceedings were factors that, for the most part, were outwith the code for Crown prosecutors in England and Wales. Therefore, when Mrs Purdy said that her rights to a family life under article 8 of the European convention on human rights were being interfered with, the question for the court was whether that was in accordance with law. Because the factors that the director of public prosecutions took into account were not covered by the code for Crown prosecutors, the court said that it was not in accordance with law, which is where the director's guidance in England and Wales came in.

The judgment is specific to that context in that there was a code that bore on the factors that were taken into account when the prosecutorial decision was taken in England and Wales, but they were not the factors that the director took into account in the James case, which caused Mrs Purdy's uncertainty as to what the law was in England and Wales.

Roderick Campbell: As a side issue, is either of you aware of any kind of statistical information on the number of people who might leave Scotland for the purpose of ending their life elsewhere?

Stephen McGowan: I am not.

Chief Superintendent Flannigan: No.

Christian Allard: I have just a couple of questions. I can see that there could be implications in respect of life insurance. Do you want more clarification in the bill regarding the consequences, particularly on whether the life insurance benefits could be for the licensed facilitator, which could happen without the licensed facilitator knowing about it?

Stephen McGowan: That is really a matter of Parliament's intention. I cannot, as a prosecutor, comment on whether people should still have the benefit of life insurance and whether there should be sections on that. I know that other jurisdictions that have similar legislation have clauses in their legislation that allow people to have the benefit of life insurance that must still be paid out in such circumstances.

Christian Allard: What about the police?

Chief Superintendent Flannigan: I simply add that I do not want to go into the legislative side of this, but clearly another family member might raise a suspicion if it was thought that someone would benefit from such events. Other than to say that, I would not like to comment.

Patrick Harvie: I thank the witnesses for their evidence. I emphasise again that where there are areas where evidence suggests that a simple amendment would be beneficial, I am very open to discussing that. The argument around reporting to the prosecuting authorities instead of to the police is certainly an example of where a change to the bill would be pretty straightforward.

The general question that I would like to put is one that I put at the end of the session with the previous panel, about clarity. I ask Mr McGowan, in particular, whether there is a lack of clarity for prosecutors in reaching decisions, given the absence of legislation and of guidance on how a system of assisted suicide ought to operate, and given the great complexity of people's individual circumstances and in relation to action or inaction? I can accept that perhaps we will never have crystal clarity given the inherently complex nature of the subject, but is it not reasonable to suggest that legislation would increase clarity for both prosecutors and individuals about what they are allowed to do and what is criminal?

Stephen McGowan: I am not sure that I accept that there is a lack of clarity at the moment. If a person takes steps to assist suicide, they may be liable to prosecution under the law of homicide, depending on what those steps were.

Patrick Harvie: "May be" implies a lack of clarity, surely.

Stephen McGowan: We can never be entirely certain about anything, but if someone takes steps, they may become—I can put it no higher than that—liable in terms of the law of homicide. If someone is so liable, the factors that would be taken into account are in the prosecution code, which provides a degree of certainty. Any departure from that is a matter for Parliament, and if it legislates for that, then clearly we will work in that system.

There are, in the bill, a number of areas in which I am not certain that it provides more clarity; I suggest that it gives slightly less clarity than is the case in the current position. That is not a comment on the legislative intent; it is simply to say that in the scheme that is set out there are one or two areas in which greater clarity and definition could be given.

Patrick Harvie: The question was asked earlier about the potential for medical failure in an

assisted suicide. Have you looked into that in preparing your evidence? I am not aware that that has been a problem in other countries, including Switzerland, that already operate assisted suicide. I am a little bit concerned that we might build up the potential for such a problem.

Stephen McGowan: That question would perhaps be better directed at those with medical or pharmacological experience, who know how the mechanics of assisted suicide work and how various medications and drugs work. My comments were simply in relation to my assessment of what the response would be from a prosecutor's point of view if there was a medical failure in an assisted suicide. I am not aware of any facts, circumstances or specific statistics in relation to that, but I do not think that it is really my area.

Patrick Harvie: Okay. Thank you.

Chief Superintendent Flannigan: Mr Harvie's point about decisions to prosecute is valid, but it is worth pointing out that there is a great likelihood that people would be subject to an investigation, which in the circumstances might be very traumatic and likely to introduce all sorts of difficulties and anxieties. It is worth saying that the issue is not necessarily just about the impact of the decision to prosecute; the associated investigation would be fairly significant for the individuals involved.

Patrick Harvie: I appreciate that, and I appreciate the context within which you raise that concern. I think that we are all concerned to minimise the risk of unnecessary stress or anxiety for such people. However, I again suggest that the small number of people who feel the need to assist in a suicide without a legal basis for doing so, and in the absence of legislation or a well-regulated system, are already subject to the possibility of prosecution. They will often anticipate that prospect in making the decision in what are difficult circumstances at the end of a loved one's life. People in that circumstance face that situation at present. In the absence of legislation, people are not protected from the possibility of investigation or prosecution: far from it.

Chief Superintendent Flannigan: Yes. I agree with that.

The Convener: Sorry, but are you agreeing—

Chief Superintendent Flannigan: I am not prejudging any individual circumstance. The point was made that, at the moment, people possibly anticipate investigation. I am saying that, in the spirit of the proposed legislation, it would be advantageous to recognise that and to avoid unnecessary investigation.

The Convener: I thought that Patrick Harvie's point was that, although the position now is sensitive and delicate, as we appreciate, and is usually handled accordingly by the prosecution services, if we had something in legislation that required that processes be gone through and recorded, that would surely assist the police and the Crown Office in deciding whether to go beyond a paper investigation and meet people face to face. I think that that is the point that Patrick Harvie was trying to make—we are talking about squeezing it down to processes and recording.

Chief Superintendent Flannigan: Yes, I agree with that. The intention is there, and that would be agreeable. Does that make sense?

Stephen McGowan: I am not sure that it does make sense, on the basis of the current drafting. As I said, some of the definitional elements have to be tightened up. In effect, the bill would introduce a regime of assisted suicide in Scotland, which might, because of some of the definitional aspects of the bill, mean an increase in the number of such investigations.

The Convener: The bill is in a pretty raw state, if Patrick Harvie will forgive my saying so. It has a way to go.

Stephen McGowan: Indeed. It is subject to amendment and further consideration by Parliament.

The Convener: Mr Harvie, do you want to say any more?

Patrick Harvie: I simply observe that, for someone who has been caring for a loved one in difficult circumstances through a life-shortening or terminal illness and supporting them in making that decision, and if they had confidence that they had taken proper steps in compliance with the law, the prospect of a conversation with an investigating officer might be the last of their worries, to be frank. It might be a fairly minor thing for people to contemplate if they feel that they have given their loved one the freedom to make on their own terms a decision that was profoundly important to them.

The Convener: That is a statement rather than a question, but it does not matter.

That brings us to the end of the session, so I thank our witnesses for their evidence.

I suspend the meeting for a couple of minutes, but members should stay put, because we will move quickly on to the next panel.

11:29

Meeting suspended.

11:31

On resuming—

Drink-driving Limit

The Convener: The next item of business is an evidence session on the reduction in the drink-driving limit proposed in the draft Road Traffic Act 1988 (Prescribed Limit) (Scotland) Regulations 2014. The session will inform next week's evidence session on the draft regulations with the Cabinet Secretary for Justice. I welcome to the meeting our panel of witnesses: Chief Superintendent Iain Murray of Police Scotland; Dr Peter Rice, chair of Scottish Health Action on Alcohol Problems; and Margaret Dekker, research secretary of Scotland's Campaign against Irresponsible Drivers. We have had you here before, Mrs Dekker—I remember your campaigns.

We have submissions on the proposed limit and the Scottish Government's original consultation, so we will go straight to questions. I will take Christian Allard first this time, then Elaine Murray and then Sandra White.

Christian Allard: Thank you very much, convener.

We have heard a lot in the media about people's reaction to the proposed change to the limit. I agree with some of the comments that have been made regarding the penalties for the offence. It looks like a lot of people out there think that it might be very unfair that people who are caught on the lower side will get the same penalty as somebody who is caught on the higher side. In particular, I am somewhat worried that the hard-luck stories might, over time, reduce the level of public support. Do the witnesses think that that is a concern?

The Convener: Excuse me, but I am a wee bit lost. Are you suggesting a variation in the penalties? We do not have the power to do that.

Christian Allard: I know that we do not have those powers.

The Convener: I beg your pardon. He knows the law. How terrible of me!

Christian Allard: We might end up doing it in another way. Is that an important part of the legislation? If we had the powers to do that, would the witnesses want us to use them?

Chief Superintendent Iain Murray (Police Scotland): To be honest, I would not support any variation in the penalties. The research suggests that individuals who drink alcohol before they drive, even at the new lower limit that is being proposed, are three times more likely to die in a crash than they would be if they had not taken alcohol before they drove. There is sufficient evidence out there that suggests that drinking any alcohol impairs the ability to drive and to concentrate; it impairs reaction times. With the existing limit, people are six times more likely to die in a crash. I do not think that you would want to vary penalties depending on whether somebody was three times or six times more likely to kill themselves or somebody else. My view is that people who drink alcohol before driving are putting other people and themselves at risk and, therefore, the penalty needs to be such that it has a deterrent effect.

The studies that have been done across the countries that already have the limit that is being proposed have shown that all blood alcohol level counts tend to drop, and that there is a deterrent effect that means that the whole picture of drink driving changes. That deterrent effect is what is being considered. The purpose of the proposal is to improve safety, and I think that lowering the penalty would suggest that we were not taking that seriously.

Margaret Dekker (Scotland's Campaign against Irresponsible Drivers): The court already has powers to sentence. We keep being told that it is up to sheriffs to decide what the penalties are. I think that it would be a matter that is outwith our remit to comment on.

The Convener: I think that it is mandatory that you lose your licence for 12 months.

I am about to be corrected by our resident advocate.

Roderick Campbell: The exceptional circumstance—

The Convener: Yes, there is an issue around exceptional circumstances, but the basic rule is that you lose your licence.

Does anyone else wish to comment on variation in penalties elsewhere in Europe?

Dr Peter Rice (Scottish Health Action on Alcohol Problems): The question also touched on the level of public support for the measure. There are high levels of public support for drink-driving action—there are also majority levels of public support for a range of other alcohol measures, which sometimes surprises people.

In some countries, drink driving is considered to be more on the level of a parking ticket. It is one of the distinctive things about the United Kingdom that it is regarded here as a serious offence. I do not think that there is a substantial risk that lowering the limit will lead to the public regarding the offence as less serious. I agree with my colleague from Police Scotland that the degree of impairment at 50mg remains significant, and I think that the public realise that.

Chief Superintendent Murray: The most recent road safety information tracking study that was carried out on behalf of Road Safety Scotland shows that 95 per cent of those who were surveyed believe that drinking and driving over the limit is a very serious offence, and a further 4 per cent believe it to be serious. That means that 99 per cent of the people who were surveyed believe that drinking and driving over the limit is either very serious or serious. That demonstrates public support for the measures and the public's perception of the issue.

Christian Allard: Could the issue of exceptional circumstances be extended to other cases?

Chief Superintendent Murray: I agree with Margaret Dekker that the courts already have the power to take into account the person's circumstances when making a determination. I think that there is sufficient scope in the system at the moment.

The Convener: I do not think that that power is used very often. Exceptional circumstances might be pled quite often but I do not think that such pleading is successful very often.

Margaret Mitchell: What is the resource burden on Police Scotland in terms of the anticipated increase in convictions?

Chief Superintendent Murray: We are still considering that. We will do some survey work over the next few weeks. Some of the data is slightly hard to come by just now.

We estimate that we are likely to catch around a third more drink drivers than we do at the moment in the initial phase. As I said, research shows that drink driving and alcohol counts across the board tend to drop following the introduction of lower limits. My hope, therefore, would be that the public would learn. A quite significant campaign will be ratcheted up through November into December to make people aware of the implications. We have been doing that through the drink-drive initiatives of last winter and summer. When we breathalyse people who are over the proposed limit but under the current limit, we make them aware of the situation.

The worst-case scenario could be that as many as a third more drivers will be caught, but I would like to think that it will be less than that.

Margaret Mitchell: Is there not a significant chance that there would be more convictions of people who drive the morning after they have been drinking? After the chief constable has answered that, the rest of the panel could say what advice they could give people who want to ensure that they are not over the limit the morning after.

The Convener: You seem to have promoted the chief superintendent to chief constable.

Chief Superintendent Murray: I was quite grateful for that. [*Laughter*.]

Margaret Mitchell: We will see what we can do.

Chief Superintendent Murray: Of the 434 detections that we made during the four weeks of last winter's drink-drive campaign, 10 per cent were after 6 o'clock in the morning, so there is the risk of a slight increase. Before my colleagues respond, I should say that my simple message is that anyone who is going to be driving in the morning should not drink the night before.

The Convener: But how will they know? That is what the general public want to know. After all, the situation is different for different people and depends on what they eat for their evening meal, their size, their metabolism and so on. When they get into their car the next morning, at whatever time that might be, how will they know whether they have waited long enough? I am not trying to make excuses, but I think that this is a genuine problem for the public. Of course, it is easy-peasy if all you have done is sit in the pub drinking, but if you had a meal the night before or shared a bottle of wine with a pal, how will you know that you will not be over the limit the next morning?

Chief Superintendent Murray: You just have to plan ahead and make yourself aware that you cannot take the chance.

The Convener: But my question is: how do you know? Are you saying that no one should have anything the evening before? I am not trying to be difficult, but what about people who do these things innocently?

Chief Superintendent Murray: I understand the point, but it is all about prioritising certain aspects, such as when you drink or do not drink, when you need to drink, and the importance of drinking in your life so that you can decide what you do and when you do it. I am sure that Peter Rice will be able to throw more light on that, but the simple message that we have always put across is: do not risk it. We are talking not just about a legal limit but about the concept of impairment itself. The fact is that your ability to drive could be impaired, and you have to be aware of that. You might be feeling fine, but the fact is that—

The Convener: That is not the point. We admit that there would be impairment, but the question is how we know whether we are over the current limit, let alone a lower limit. I wonder whether Dr Rice can assist in giving the public some guidance.

Dr Rice: I can. It is an important question. Although any response can be couched in caveats

about individual variability and so on, people need some relatively firm guidelines.

In your scenario of sharing a bottle of wine with a meal, if you start drinking that wine with your meal at 8 pm, your blood alcohol level will get back to zero at about 2 am the following day. I think that that provides some indication. If you drink more heavily than that—and this is the important point—your metabolising of alcohol will not speed up. Your alcohol metabolism system is like a shop with one checkout; it can go at only one speed. If you drink more heavily, there are no additional—

The Convener: I am just trying to think that through, but go on.

Dr Rice: If it takes you two minutes to put people through a checkout and someone comes into your shop every minute, you are going to end up with a long queue. Some shops will be able to call people through from the back to open another checkout, but your liver is not like that. It does not speed up. It chugs away at about 10ml or a standard unit an hour and nothing—not coffee, not sleep, not a shower, not exercise, not eating a full Scottish breakfast—will speed that up or make any difference.

The Convener: What happened to Irn Bru and a bacon roll?

Dr Rice: Those things have good marketers, but whatever magical properties people endow Irn Bru, bacon rolls or square sausage with, that is all they are. Basically, time is the only thing that clears alcohol from your system and, as I have said, an individual who started to drink a half bottle of wine at 8 pm would reach zero blood alcohol in the early morning. In fact, they might well wake up at pretty much the same time because that was happening to them.

I fully agree with the chief superintendent that the morning after thing is not an unintended consequence. It is intended, because people whose blood alcohol content is at such a level are significantly impaired and they are doing a risky thing. They would need to have been drinking fairly heavily or have had a very short sleep to run into that problem, but they still need to be aware of the rate of metabolism and calculate accordingly.

11:45

Margaret Mitchell: If that is the case, should there be an extensive education programme? I do not think that it is intended that a consequence will be that no one who is a driver should ever drink just in case they are over the limit the morning after. That is the extreme logical conclusion and that is clearly not the purpose of the legislation. Many people are absolutely law-abiding and would be appalled at the idea of driving when they are still feeling the effects of drink, but others have no regard whatever for such things and will be many times over the limit when they get into their cars. We want to ensure that we target the people who are a real danger, as well as educating the public and making sure that people do not fall into that category by accident.

Margaret Dekker: Road casualties have an emotional and financial cost for families as well as a ripple effect on the national health service, emergency services, insurance companies and so on. It is a privilege to hold a driving licence; lots of people forget that and feel that it is a right. To protect that licence, people have to abide by the law. We welcome the fact that the drink-driving limit is being reduced to bring it into line with those in other European countries.

Margaret Mitchell: My point is about how we advise the public. I do not think that you are suggesting that drivers should never drink.

Margaret Dekker: No. I am not suggesting that.

Margaret Mitchell: My point is about how people can be absolutely sure that, if they have been at a wedding or something and they get into the car the next day, they are not unintentionally going to be over the limit.

Margaret Dekker: I would go along with the British Medical Association and say that people should not overindulge—everything in moderation. I do not think that being at a wedding allows people to ignore the law if they have drunk until they are tipsy.

Margaret Mitchell: It could be about the time at which the person drives the next day, or it could be the person's metabolism. If we are going to do this, let us make sure that we are doing it for all the right reasons and that it is going to have the intended effect, which is to cut down on road-traffic accidents. We should not be putting valuable resources somewhere when they might be better deployed elsewhere. For example, what if the penalty of loss of licence for someone who is over the 50mg limit leads to a job loss? Are there other consequences that should be looked at and weighed up?

Margaret Dekker: As I said, a driving licence is a privilege, and to protect that licence people have to abide by the law. We are only too aware of the devastating consequences of loss of life and the financial impact that that can have on people's families. There is a balance to be struck. Lowering the drink-driving limit to 50mg per 100ml of blood is not unreasonable. It has already been proved in other European countries that it brings down the number of road casualties that are caused by drink driving. To my mind, it is only a start to eradicating the scourge of drink driving in Scotland.

Margaret Mitchell: I think it is about clarity.

The Convener: We are not disputing the level, and certainly it gets a person nowhere to tell the court that they might lose their job. The court hears that all the time. However, we are talking about people's knowledge.

The biggest issue is what happens the day or evening before. Dr Rice's information was very helpful; perhaps you should produce a wee booklet to give us an idea. I know that there are differences and people cannot rely on the information, but the public need guidance about when they should say to themselves, "I will err on the side of caution tonight", and decide that two glasses are sufficient. That kind of thing is helpful to people who might not know whether they are liable to break the law. They certainly would not want to break the law; that is the point that we are trying to get at.

I think that most of the questions will be on this issue. Am I correct?

Elaine Murray: Yes.

The Convener: Who is next on my list? It is Elaine Murray.

Elaine Murray: My question is really on the same issue. I think—[*Interruption.*] Excuse me—[*Interruption.*]

The Convener: Water, please. It is just water, by the way.

Elaine Murray: Unfortunately.

Most of us can see the case for the reduction; it will bring us into line with the rest of Europe. In fact, the UK stands out as having an exceptionally high limit. However, many of us do not know what it means for somebody who has been responsible the night before. When can they drive? If somebody has gone for a work night out on the Friday, at what stage on the next day can they go and do their Christmas shopping, for example? Is there a case for people being able to breathalyse themselves before they get in the car to make sure that they are not over the limit?

Margaret Dekker: Breathalysers are on the market.

The Convener: Are they? We had better not advertise them. We will just leave it to people to Google them.

Elaine Murray: The Association of Chief Police Officers in Scotland said that there should be a significant media campaign prior to any reduction coming into effect. The reduction is due to come into effect on 5 December. Is there really enough time to ensure that the public are fully aware of the consequences? I refer not just to the point that people should not drink if they are driving a car, which most of us understand, but the consequences for the following day even if people have been responsible the day before.

Margaret Dekker: It is all about taking responsibility. If people have any doubt, they can get the bus or a taxi. There are other modes of transport besides cars to get people to where they are going.

Elaine Murray: There are not, in some parts of the world.

The Convener: You are speaking to a rural MSP.

Margaret Dekker: What about a bike, then?

The Convener: Do you have a horse, Elaine?

Elaine Murray: No.

The Convener: She does not have a horse any more. There we are.

Elaine Murray: The chief superintendent rightly says that it is about impairment. Somebody who has a heavy cold is impaired and should not drive. I believe that a heavy cold can have the same effect on somebody's ability to react as being over the current limit can have, but nobody thinks that they had better not drive because they have a cold. In fact, the party whips would take a dim view of us not coming to work because of a heavy cold.

There are other issues about impairment that people should be aware of but are not.

Chief Superintendent Murray: On the point that I made about targeting and the one that you just made about impairment, bear in mind the fact that we stop the vast majority of vehicles that we stop for a reason. It is because an offence has been committed, there has been some risk-taking behaviour or because something about the person's manner of driving is drawing attention to them.

If we stop people the morning after, the likelihood is that they will have brought themselves to our attention. We are not setting up road checks on the outskirts of housing estates at 6 o'clock in the morning to check people who are going to their work. We find people who are already speeding or who are doing something else wrong—for example, there might be something in the way that they are overtaking. It is about anything that draws attention to them; if there is an element of risky behaviour, that is where we start to pick up impairment through drink.

Those who behave responsibly, take a considered approach the night before, consider in the morning when they drive and drive according to the law will not have to worry about coming to the attention of the police. As Margaret Dekker said, it is about taking responsibility; it is about

people being aware of what they are doing and how they are doing it.

Elaine Murray: Someone might be doing that and still be over the limit, might they not? Therefore, that is not the point. The point is whether or not they are impaired.

Chief Superintendent Murray: For me, it comes back to the point that they are putting themselves and others at risk because of that impairment. If a person is over the new proposed limit when they drive in the morning, there will be a degree of impairment whether they feel it or not.

Elaine Murray: My point concerns education and people being aware of when they are impaired, and not necessarily the police having noticed that they are impaired when driving. People need to be aware that certain things, such as having a bit of alcohol in their blood or having a heavy cold, mean that they should not drive. They need to be educated to know that they are impaired under those circumstances.

The Convener: Let us keep to the draft regulations, which are not about having a heavy cold.

Elaine Murray: No, but it is an analogy.

The Convener: I know what an analogy is.

Chief Superintendent Murray: A marketing campaign is about to kick in. Obviously, we need to tell the public when the reduction is going to happen, and it is vital that we get through the parliamentary process so that the marketing can kick in. There will be television advertising and all sorts of other marketing—all sorts of media stuff is waiting to kick in as soon as there is a green light. We are doing live education when we stop motorists; we are making them aware of the reduction.

There will be education. The question is whether the committee thinks that the time will be enough. That is for the committee to decide, but a significant amount of money is being spent through the safer Scotland initiative and Road Safety Scotland to make it happen.

The Convener: I have been teasing Elaine Murray a bit about heavy colds. If someone has taken medication that has alcohol in it—some medication for heavy colds and so on contains alcohol—as well as taking some alcohol, and they are tested and found to be over the limit, but only because of the additional alcohol in the medicine, will they have any kind of defence, if they can prove what happened? Would an examination of the blood sample permit a distinction to be made?

Dr Rice: The amount of alcohol in mouthwashes and cold remedies is not substantial—certainly, when compared with the alcohol that people consciously drink when they want to get the effects of alcohol. If you are asking whether someone could be over the limit because they had been overenthusiastic with the Night Nurse, my assumption would be that they had been overenthusiastic with something else.

The Convener: You are teasing me, now. If someone would not have been over the limit without the Night Nurse, would that be a defence, if they could prove it?

Dr Rice: No. My understanding is that it would not be a defence.

The Convener: In your booklet, you should say, "Don't rely on Night Nurse."

Dr Rice: May I return to a point that I made earlier? The problem about driving the following day will crop up only when someone has drunk a pretty substantial amount the night before. In my professional life, I spend a lot of time speaking to people who drink very substantially. For someone who has had eight hours sleep, we are talking about consumption of in excess of a bottle of wine, half a bottle of spirits, six pints of average-strength beer—

The Convener: All together, or separately? [*Laughter*.] I got a bit lost there.

Dr Rice: No. It is "or", not "and". I make the point that if people are drinking at that level they are running risks other than in relation to driving. In this country there are a considerable number of deaths and injuries of intoxicated pedestrians. In some estimates, the number of intoxicated people who are killed or seriously injured by sober drivers exceeds the number of people who are killed or seriously injured by drink drivers.

If someone turns up at their local accident and emergency department with a significant injury or trauma sustained because they were intoxicated, the staff do not say, "Fine, at least you weren't driving"; there is a significant injury that has to be dealt with. I make the point that the risk of being over the limit the morning after will apply to people who take considerable risks that are not related to driving, because of the amount that they drink. Many people take such risks and get away with it, but many people do not get away with it. We need to see the issue in that context.

John Finnie: Margaret Mitchell used the term "burden" in a question. Dr Rice eloquently explained the limits, but I think that people will more readily understand your comment about not drinking the night before. Do you get frustrated by all the "What if?" questions that are put to police officers?

Chief Superintendent Murray: To be honest, I am very much with Margaret Mitchell, in that I think that it is about personal responsibility.

Someone dies on the roads of Scotland every two days, and that is unacceptable. People engage in all sorts of risk-taking behaviour, including drink and drug driving. There is an attitude that leads people to say, "It was an accident and I didn't mean it", but people voluntarily put themselves at risk by getting behind the wheel or using the road in some other way, and our duty to each other and to ourselves is paramount.

I have little sympathy with the "I didn't know" argument; people have to know and they have to take responsibility. If we are at the stage at which people cannot not have a drink the night before, that is a sad indictment of our society. A person must make a decision, if they are driving in the morning. People must decide who is driving and who is not driving and they must balance their lives accordingly. That is my personal view.

Road safety and casualty reduction is a huge responsibility for us all. It is all about risk taking and how we interact with each other. We have a duty to ourselves and to others in the context of how we approach all aspects of use of the road.

John Finnie: As other witnesses have said, it is not simply a matter for the police; other agencies are involved, such as the health service and—more important—so is society.

It has been suggested that the proposed change could result in up to 17 lives being saved. What is the burden for Police Scotland of 17 fatal collisions involving drunk drivers?

12:00

Chief Superintendent Murray: The burden is huge. Margaret Dekker mentioned the cost to society of £1.9 million per fatal collision. With regard to operational time, a minimum of four officers will spend a minimum of five days working solidly on that fatal collision. Slightly less time will be spent on serious collisions, but they still require a significant amount of time. We lose a working month, if you like, with each fatality. That adds up to a significant amount over a year. That amount of time refers just to those who are directly involved in investigation of the incident, but others are involved. There is an impact on the Crown Office and the courts—it rolls on and on.

As Margaret Dekker said, there is also an impact on the health service, from the ambulance teams who attend in the first place to the hospital staff—especially if the person does not die at the scene and requires a protracted period of care thereafter. There is a significant burden on Police Scotland in responding to fatal collisions. If I have teams of officers dealing with fatalities, that impacts on our ability to target other areas of risk taking on the roads.

John Finnie: There is also trauma for the individuals who are involved in dealing with fatalities.

Chief Superintendent Murray: Yes—there is no doubt about that. There is cumulative trauma. Traffic officers deal daily with horrendous scenes. We have a duty of care for our officers. Over the past six to eight years, there have been an average of 200 deaths and 1,900 serious collisions a year. That is a lot of death, a lot of destruction and a lot of people injured unnecessarily on our roads.

John Finnie: I want finally to hear it confirmed that Police Scotland is more than up for this change.

Chief Superintendent Murray: We are. We support the change fully and we will be ready to implement it on the proposed date.

John Finnie: Thank you very much.

The Convener: I do not think it is an issue of whether we are up for it; we are looking at the difficulties for the public. I do not dissent from what John Finnie has said. Obviously, the effect on the people involved is appalling. We are just testing the impact on the public, because you must take them with you in enforcement. I call Sandra White, to be followed by Roderick Campbell.

Sandra White: Thank you, convener. It is just past 12, so I say good afternoon.

We know that one in nine deaths on the road and many more injuries from collisions are caused by drivers who are over the limit. I want to put what some people have been saying into perspective. I recollect that many years ago when there was not what you might call a limit, there was carnage caused by people drink driving. Drivers have to take responsibility.

I agree with what Margaret Dekker said about educating drivers. I always think that in the hands of someone who has had a drink a car is a lethal weapon. Perhaps people should learn about their responsibilities in that regard.

I assume that education campaigns will be run on the television and so on. When the legislation comes into force, we will have a different drink-driving limit to the rest of the UK. How is that going to be addressed? Will there be advertising down south or as people come over the border?

Chief Superintendent Murray: As I understand it, there will be national elements to the campaign in the media, including the broadcast media. It is being considered whether to extend the campaign to other modes of transport to make people think about whether they are having a drink on the train or a drink in the airport. That is being included in our consideration of how we engage with the

operating companies and those who provide services. We are considering whether to place adverts strategically at motorway services, so that drivers will be aware of the change as they head north or south. That is all being considered as part of the campaign. A number of agencies are involved. There will be a heavy reliance on social media to make sure that the message is out there. All the traditional media, which I am more acquainted with, as well as the new-fangled stuff, will be used to make sure that we catch as many people as possible. An extensive campaign is planned; there will be significant investment.

Dr Rice: In other parts of Europe, it is not unusual to have people driving across borders to countries where there are different limits. Systems have developed in other places, so there might be some benefit from international learning. It is not a great problem that we hear about from my colleagues in other countries. There are examples where similar policies have worked without any great difficulty.

Margaret Dekker: Scotland has led the way in lowering the drink-driving limit, and it is only a matter of time before the rest of the UK falls into line. At Westminster, a hand-held saliva device for detecting drugs has already been developed. Drug driving is as important as drink driving. Currently, the field impairment test is pretty basic, and it has been argued that there are more drug drivers than drink drivers on the roads. I hope that the Parliament will see that the next step is to implement a roadside drug-testing kit to enable the police to tackle casualties on the roads.

Sandra White: I agree with everything that has been said, especially by Peter Rice, about the differences in legislation in European countries. I was trying to make that point. Those countries have moved on, and it is time that we moved on, as well. We can learn from one another.

Roderick Campbell: Good afternoon, panel. Does anyone think that we are missing a trick by not going for restrictions on younger drivers and random breath tests?

Chief Superintendent Murray: That is a consideration. I think that those things were perceived previously as a step too far, from the point of view of public support and also perhaps in respect of mixed messages. There is certainly evidence to suggest that there is a greater risk with younger drivers in respect of their capacity, tolerance and maturity, never mind their driving skills. Some countries have therefore looked at lower limits.

I would personally have a difficulty if we were to say, “Well done. You’ve held your licence for two years. Now you can drink more.” I think that Margaret Dekker hinted at the idea of continuing to drive down the limit. Scandinavian countries are shocked that we are only now coming down to 50mg and that it has taken us so long to get there. I think that they are already sitting at a limit of 20mg or 30mg.

Everybody is affected by the reality and the argument around impact and impairment, but young people are disproportionately affected. That is my understanding, although I am sure that Peter Rice can again add more to that.

Dr Rice: Yes. I think that the British Medical Association and the medical royal colleges would fully support both things that have been mentioned. I think that they would support a graduated structure with lower limits for younger drivers simply on the basis of the demographics of the accidents that we see, including the fatalities, which are weighted very much towards younger people. Although there is often talk about the younger generation being better with drink driving than older people are, the numbers in respect of the profile of serious accidents and fatalities really do not bear that out.

Similarly, the level of public support and understanding of the importance of the issue of drink driving is such that I think that the general public would accept random breath testing. It has already been said that the UK has made a great deal of progress in reducing harm from drink driving but, compared with other countries, we still have a relatively low level of testing. I think that 15 per cent of French drivers are tested every year, but the numbers who are tested in the UK are in single figures.

Although other countries have much to learn from us about the various ways that drink driving has been approached, the testing-rate league is one league that we are not at the top of. Therefore, I think that you would find that the health bodies would support a process of random breath testing.

Margaret Dekker: To make any law effective, it has to be seen to be enforced. The penalties and enforcement must be seen to outweigh the risk of offending. In that context, we would support random breath testing and a lower limit for professional drivers such as taxi drivers, school bus drivers and anyone who drives in a care capacity. We would support an even lower limit of 20mg for those drivers.

The Convener: I do not know whether the police can answer this question, but is it ever reflected in the sentencing of people who have been found to have driven over the limit that they are a professional or commercial driver? I am not sure whether the courts take a harder view of that.

Chief Superintendent Murray: I am sorry, but I cannot comment on that. I am not aware of whether that happens.

The Convener: I wonder whether that is currently reflected in sentencing. I do not know.

Alison McInnes: John Finnie has covered most of my points. I support the reduction, because it will make things much clearer for people. The message is very simple: "Don't drink and drive". I am concerned that some of the questioning today might kind of encourage people to start trading off and tying themselves in knots. Can I have some assurance that the public education campaign that obviously needs to be run over the next month will be very clear?

Chief Superintendent Murray: Yes. I have seen the main television advert, and it is clear. The message is: "Don't do it—don't risk it." Peter Rice has given some clear advice, but the issue is how that is interpreted. If people start thinking about when they stopped drinking, how much they drank and how much they ate, that will potentially lead to their taking a risk. The simple message has to be that people have to balance it. People who are intelligent enough and can work it out for themselves will be able to find the information online—it is there. However, if we put out any messages saying that a certain amount is all right or telling people to leave so many hours after drinking, that could leave us open to all sorts of counter-challenges later.

Alison McInnes: Is there a sense that one wider health benefit to society might come from a knock-on effect of people reducing their alcohol consumption generally?

Dr Rice: I think that there is. Anything that encourages people to reflect on their alcohol consumption is a good thing. Driving injuries and fatalities represent a pretty small proportion of alcohol-related fatalities in Scotland—it is certainly much less than 10 per cent and probably nearer 5 per cent. A lot of harm from alcohol has nothing to do with driving. Of course, a lot of interesting and productive things have happened to try to reduce that harm, particularly in Scotland. If the measure is part of a broader education campaign that encourages people to reflect, that will be a good thing.

One important point is that education on its own is a less powerful tool than we would often like to think it is. A combination of education and enforcement is a powerful shaper of behaviour. We see that with issues such as drink driving and wearing of seat belts. Although we would love to think that the answer is to explain things clearly to people and then they will change their attitudes, any marketer will say that the product also has to be easily accessible and easily bought. The combination of education and legislation, as we are talking about here, is the optimum mix.

The Convener: I want to make it absolutely plain that I, and I think my colleagues who teased out the issues of drinking the day before, in no way support drink driving and absolutely support the limit. Obviously, if somebody is daft enough to be drinking late at night, they should not drive the next day, but there is a point at which someone does not know. It was fair to ask for guidance—not a get-out clause, because people still have to take responsibility for what they do—on the point at which people should err on the side of caution.

I just want to clarify that. It is fair to reflect that that was the point of the line of questioning that Margaret Mitchell, Elaine Murray and I followed. People will ask, "When do ah ken?" or, "Am I okay for tomorrow?" Obviously, at the extremes people will know that they are or are not okay, but there will be bits in the middle where people are not sure about the next day. That was an important issue to test. Dr Rice's information was helpful, and more of it would be very helpful. The public can then use that information to decide and to make judgments and take responsibility for what they are doing. They need information about what is liable to take them into the danger zone the next morning. However, it is not a get-out clause.

Elaine Murray: The impact can even be later on the next day. We perhaps should say to people that, if they have had a big night out, they should not drive at all the next day.

The Convener: Yes—exactly.

I just wanted to make that plain. I hope that Alison McInnes did not get the impression that we were in any way being frivolous or trying to give people excuses.

Alison McInnes: I did not mean to imply that, and I apologise if you took it in that way.

The Convener: I think that you did, actually.

Alison McInnes: Well, I apologise. One of the points about the 80mg limit is that people have tied themselves in knots thinking that it is okay to drive because they have done certain things, but they have—unintentionally, in their minds—been drink driving and have been caught out. The lower limit will make it much clearer that, actually, there is no point in trying to decide about that.

The Convener: It is not a defence for someone to say that it was yesterday that they were drinking. We appreciate that, but it is helpful to tease out the issue.

One issue that nobody has asked about is random breath tests—

12:15

Roderick Campbell: I asked about that.

The Convener: You asked about it, but Dr Rice said that the public support random breath tests, which I found interesting. What is your data for that, Dr Rice?

Dr Rice: I do not have data on that. I think that there was a YouGov poll, which I could look at. I was just basing my comment on my observations of the public, having been involved in debates on various aspects of alcohol. There is particularly solid public support for action on drink driving. I have heard the argument against random breath testing that it risks losing public support, but what I was saying was that my view, in summing all that up, is that the public support for action on drink driving is solid and I do not think that random breath testing would put it at risk. It would be a move in the right direction, and it has had long-term support from health bodies.

The Convener: I simply wanted to test the evidence base for that. I can see why intelligence-led breath tests might be acceptable to someone, but I do not know about random breath tests. I do not know the answer, which is why I am asking you. We have had the issue of policing using stop and search powers and alienating the public. I do not know; I just pose the question whether random breath tests might have a counterproductive effect.

Elaine Murray: I seek clarification on that. I thought that, with intelligence-led breath tests, if somebody reports to the police that a certain person was in the pub drinking and got into their car, the police can act on that.

Chief Superintendent Murray: Yes, we can act if there is a reasonable cause to believe. There are three circumstances: the committing of a traffic offence, a collision or reasonable cause to believe that someone has alcohol in their system. As part of the festive season safety campaign, we do a large number of roadside checks. We have the power to stop vehicles to examine them and ensure that they are roadworthy. Particularly in the dark, there are always issues with things such as lighting. When we speak to drivers, we can form an opinion—from the smell of alcohol, their demeanour or whatever else—that allows us to meet that reasonable cause requirement.

Studies have been done on random breath testing, particularly in Australia. Some of the data gathering has questionable elements, but most of the studies have shown a move towards support for random breath testing. Last year, we engaged with the University of Glasgow on a procedural justice programme on the explanation of what we are doing. That work is still not concluded, as follow-up work is on-going. It was about how we approach people and speak to them.

We have found a lot of support. There is an awareness that it is time for the Christmas drink-driving campaign, because we have been doing it for so long now. We find, from having done it at the coalface at 2 in the morning, that most people are supportive when we ask whether they mind providing a specimen. Some of the campaigns focused on breathalysing as many people as were willing, so that we could get that dramatic statistical perspective. I have never found anybody to refuse or decline to take a breathalyser test when offered the opportunity. When there is a need to do it, we can do it, and we can offer people the opportunity.

The Convener: That clarifies the position. We have gone into that.

John Finnie: I have one final point for Chief Superintendent Murray. Some people might think that the measure is an extra tool in the armoury, but there is nothing in your existing powers that inhibits your ability to rigorously enforce the legislation, is there?

Chief Superintendent Murray: No. We can stop vehicles travelling on the road at any time. At that point, we can speak to drivers, which allows us to form opinions. There are powers that allow us to do things from that point onwards.

The Convener: So you do not have to have cause to stop someone—there does not have to be a brake light out or something.

Chief Superintendent Murray: We have separate legislation for that, but anybody driving on the road can be stopped by the police at any time.

The Convener: I will bear that in mind.

That completes the evidence. I thank our witnesses very much indeed.

We now move into private session.

12:18

Meeting continued in private until 12:30.

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