The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 2 December 2014

Session 4

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CONTENTS

	Col.
INTERESTS	1
DECISION ON TAKING BUSINESS IN PRIVATE	1
SUBORDINATE LEGISLATION	2
Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 [Draft]	2
SERIOUS CRIME BILL	41

JUSTICE COMMITTEE
31st 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)
*Gil Paterson (Clydebank and Milngavie) (SNP)
*John Pentland (Motherwell and Wishaw) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bruce Adamson (Scottish Human Rights Commission)
Professor Andrew Coyle (King's College London)
Joan Fraser (Association of Visiting Committees for Scottish Penal Establishments)
Lisa Mackenzie (Howard League Scotland)
Dr James McManus (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment)
Graeme Pearson (South Scotland) (Lab)
Dr Lucy Smith (Scottish Government)
David Strang (HM Chief Inspector of Prisons for Scotland)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)
Pete White (Positive Prison? Positive Futures)

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 2 December 2014

[The Convener opened the meeting at 10:04]

Interests

The Convener (Christine Grahame): Good morning. I welcome everyone to the 31st meeting of the Justice Committee in 2014. I ask everyone to switch off mobile phones and electronic devices, as they interfere with the broadcasting equipment even when they are switched to silent. Apologies have been received from Alison McInnes.

Under item 1, I invite Gil Paterson, as a new member of the committee, to tell us whether he has any interests relevant to the work of the committee to declare.

Gil Paterson (Clydebank and Milngavie) (SNP): I have no relevant interests to declare. I refer the committee and the public to my entry in the register of members' interests, which is available for all to peruse.

Decision on Taking Business in Private

10:04

The Convener: Under item 2, the committee is invited to agree to consider our work programme in private at our next meeting and to consider draft reports on the draft budget 2015-16 and the legislative consent memorandum on the Serious Crime Bill in private at future meetings. Is the committee agreed?

Members *indicated agreement.*

Subordinate Legislation

Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 [Draft]

10:05

The Convener: With the leave of the committee, we move to item 4 because the minister has been delayed. Item 4 is evidence taking on the draft Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014, which we are considering under the affirmative procedure. The committee will recall that we considered an earlier version of the instrument under the superaffirmative procedure last year.

I welcome our first panel of witnesses. Bruce Adamson is the legal officer at the Scottish Human Rights Commission; Joan Fraser is a member of the executive of the Association of Visiting Committees for Scottish Penal Establishments; Lisa Mackenzie is the policy and public affairs manager at the Howard League Scotland; and Pete White is the national co-ordinator at Positive Prison? Positive Futures. Thank you for being so timeous, which means that we can start with you right away. We have received your written submissions—thank you very much for them—and will go straight to questions from members.

John Finnie (Highlands and Islands) (Ind): My question is for Mr Adamson, although other panel members may comment if they wish to do so. The submission that the Scottish Human Rights Commission made in October 2014 states:

"The independence of the monitors is central to their effectiveness."

You further state that that is a requirement of the optional protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Does the order that we have in front of us propose independence for the monitors?

Bruce Adamson (Scottish Human Rights Commission): That question cuts to the heart of compliance with OPCAT. OPCAT leaves scope as to how best to achieve compliance with it, but we now have a great level of guidance from the UN sub-committee on prevention of torture and other cruel, inhuman or degrading treatment or punishment, as well as from the work that our colleagues in national human rights institutions have done on how best to achieve independence. That is important, as the optional protocol refers to the Paris principles—the UN principles that relate to the status of national institutions, including

national human rights institutions. There is a great level of guidance for us now.

In relation to the order that is before the committee, in our view, best practice regarding independence dictates a different model, which would be accountable to and appointed by the Parliament. However, that is not the only way to ensure independence. Independence is not just a matter of legislation but a matter of policy and practice, and other safeguards could be put in place around the order to guarantee independence.

The commission welcomes, as a starting point, the reference to OPCAT; it also welcomes the commitment to OPCAT that the Government has made. However, we would like to stress that, unlike other international treaties, OPCAT is operational rather than standard setting and provides an additional framework around the existing obligations. Therefore, when we look at the order and at what we are trying to achieve in relation to the prevention of torture and the protection of prisoners' other human rights, we should consider what the best monitoring mechanism would be. A lot of progress has been made on establishing a statutory framework and putting in place protections around appointments, staffing and finances, but a lot more needs to be done to ensure functional and operational independence.

The Convener: Could you expand on your statement that a lot more needs to be done? You said that there should be safeguards.

Bruce Adamson: The guidance from the sub-committee on prevention of torture talks about "operational independence" and

"complete financial and operational autonomy".

We then look at the best practice guidance that has been developed through organisations such as the Association for the Prevention of Torture. The APT suggests that best practice in relation to being independent of Government is a link to Parliament. If we do not have that link but have appointment by ministers or a link to the Government, we need to ensure that additional safeguards are put in place in relation to appointments. That means having a process for appointments that is very clearly set out in legislation and which involves the legislature—the Scottish Parliament, in this case—and civil society through wide consultation on how to take forward the appointments process. It also means that staffing needs to be dealt with within the organisation, not externally. A link to Scottish ministers could be problematic in that regard.

There is a particular practice issue. In its most recent general observations on the United Kingdom, the Committee Against Torture commented on existing concerns about the secondment of staff from parts of the public sector that are involved in the detention of people into national preventive mechanisms and bodies. We need to put in place protections around staff secondments.

On financial autonomy, there must be adequate funding so that functions are fully fulfilled and expertise is assured.

That is a long answer, but I suppose that I am saying that if enough additional safeguards are put in place in relation to the operation of the process, it could work. Is it best practice? No, it probably is not.

John Finnie: Thank you.

Joan Fraser (Association of Visiting Committees for Scottish Penal Establishments): I will give a few examples of proposed practice that will illustrate the way in which the system in the order would be less independent, in terms of monitoring, than the existing system, and would certainly be much less independent than the system in the rest of the UK.

First, the monitors will be appointed, managed, evaluated and instructed by the co-ordinator. The rota for prison visiting, which at the moment is decided entirely by the monitors, will be decided by the co-ordinator, in agreement with the governor, which is a truly staggering proposition.

The rota visits will not be entirely unannounced, as they are at the moment. Unannounced visits will be in addition to visits on the rota that is agreed with the governor. In addition, the annual reports from the monitors will not be completed by them any longer; instead, they will be completed by the co-ordinators, who will be paid public servants.

The Convener: Does anyone else wish to comment? We have opened the discussion up to the general question of independence throughout the process. I know that other members want to come in. Margaret Mitchell is next, to be followed by Elaine Murray.

Margaret Mitchell (Central Scotland) (Con): Is John Finnie finished?

The Convener: I beg your pardon, John.

John Finnie: It is okay. I think that the discussion has opened up well and I am sure that other members will pick up on what has been said so far. I was going to expand on the unannounced visits aspect.

The Convener: I will let Margaret Mitchell come in on that. I think that we have opened up a discussion on how independent the system will be.

Margaret Mitchell: We will have three possible types of visit, whereas at present there is one and the visitor can go unannounced at any time. Therefore, what is proposed does not seem an improvement.

I want to ask in particular about the proposal in the order on how complaints will be dealt with, because there is real concern that the new provision will not gain prisoners' trust. I ask Joan Fraser to respond first on that.

Joan Fraser: Under the current complaints process, independent monitors—visiting committee members—must investigate complaints from prisoners and try to resolve them, after which they must go back and tell the prisoner what the outcome is. That process was deleted in its entirety from the previous version of the order, and it has been replaced in the current version by a provision that says that independent monitors "may" investigate matters brought to them by prisoners. Therefore, investigation will not be an absolute requirement, nor will there be a requirement to go back and tell the prisoner what the outcome is.

10:15

Prisoners will have a very old-fashioned means of access to the independent monitor—that should have been updated in the legislation. Prisoners will have to approach a Scottish Prison Service staff member and make a request to see an independent monitor. Alternatively, they will have to ask to write to an independent monitor, for which purpose the governor must provide paper. There is nothing that says that any of that is a confidential process, which it should be, and it will rely entirely on the SPS passing on the request.

We know from prisoners that, in the internal SPS system, they occasionally suffer reprisals for making a complaint. If they ask to see a member of the visiting committee, prison staff will sometimes make life a bit difficult for them. For example, if they want to go to the gym, they will find that the list is somehow full, or if they want to use the phone, they will find that that is not convenient. A prisoner in a prison that I visited recently referred to that practice as being "bammed up", which means being treated like an idiot. If a prisoner asks to see a member of the visiting committee or makes a formal complaint through the SPS system, there are consequences. Further, prison staff will routinely ask a prisoner who requests to see a member of the visiting committee why they want to do so, although they are not entitled to ask that.

At Polmont prison, we operate a confidential process in which a sealed envelope with the prisoner's request is put into a locked box and the sealed envelope comes directly to the visiting committee. That is similar to the system in England, where it is called the applications process. The order ought to make provision for such a system, but for some reason the Government has chosen not to do that.

The order proposes that, if a prisoner so requests, independent monitors should assist them with the SPS internal complaints system. We have no idea what that would amount to. There are 6,000 complaints in the SPS system every year—we know that only from a BBC freedom of information request, because the SPS does not publish those statistics. It is impossible to say in how many of those 6,000 complaints a prisoner would ask the independent monitor for help. It is entirely likely that there are prisoners in the system who do not use the complaints system because they have literacy problems. We do not know by how much the figure of 6,000 could grow, but the proposal could involve a considerable amount of work. Apart from the possible workload, it is also very worrying that prisoners might begin to view independent monitors as being somehow part of the SPS system. There is no doubt that that would undermine the monitors' independence.

The Convener: Thank you.

Pete White (Positive Prison? Positive Futures): Thank you for the invitation to be here today.

The process by which prisoners submit complaints has evolved quite a lot in the past few years. It might surprise the committee to hear me say this, but the way in which the SPS deals with complaints has improved a great deal. The idea of independent monitors being seen as people who will take complaints could be reviewed; it could become an opportunity for prisoners to have a confidential conversation to clarify matters and to ask for help if clarification does not work.

I think that the conduct of the independent monitors will determine how they are viewed by prisoners. They will have to develop a way of working that builds trust, but it sometimes takes a personality, rather than an order, to make that happen. The process of dealing with things as they arise is a good one—that process is supported by the order but it is not necessarily being laid down in law. The word "may" in the provision to which Joan Fraser referred can be seen in a positive way that suggests that someone can help, not that they must help. Prisoners will voice their concerns in different, sometimes slightly mischievous, ways, but in general they just want clarification on a point.

When it comes to filling in forms for people in prison, there is a good network of peer tutors who provide prisoner-to-prisoner literacy and numeracy

support unarranged by the SPS and helped by people on the flats, so some of the concerns that Joan Fraser mentioned might not be as severe as she suggests. However, I also realise that there will be some such concerns.

Margaret Mitchell: Can I ask specifically about—

The Convener: Can I just let Mr Adamson in before that?

Margaret Mitchell: Do you favour the Polmont system, which Ms Fraser mentioned, in which the request is in a sealed envelope and anonymity is guaranteed?

Joan Fraser: Absolutely.

Margaret Mitchell: What about you, Mr White?

Pete White: Yes, I would support that system.

Bruce Adamson: The system as exemplified at Polmont—it is the system in many other parts of the world—is good practice.

The commission had serious concerns about the previous version of the order, which seemed to treat prisoners' complaints in the same way as we would treat any other public sector issue—it did not acknowledge the particular vulnerabilities that prisoners have. It is useful that the new version of the order provides that independent prison monitors "may" investigate complaints, but we share some of the concern around the framework for that needing to be put in place clearly.

Article 21 of OPCAT requires that the communication between prisoners and the monitoring function be private and privileged. It is important that that is locked in place so that prisoners feel confident about privilege and privacy when they communicate with the various monitoring mechanisms.

That links to the perception of independence, which is one of the overriding issues on which we need to continue to focus. It is essential that we have a legislative framework, policy and practice that support independence but it is also essential that we ensure the perception of independence because, without that perception, the system quickly breaks down.

Margaret Mitchell: Ms Mackenzie, do you have any thoughts on that?

Lisa Mackenzie (Howard League Scotland): I echo many of the concerns that Joan Fraser raised. I also share Bruce Adamson's concern about the idea of the rota being agreed by the governor. Having worked on the issue for a couple of years, I know that some governors are more co-operative than others. I do not know why that provision is in the order.

Elaine Murray (Dumfriesshire) (Lab): Professor Coyle recommended a council of independent prison monitors, which would be able to discuss and progress issues. I believe that such a council exists in England and Wales. The draft order proposes an advisory group that would be appointed by Her Majesty's chief inspector of prisons. Do the witnesses have any comments on which approach is preferable for guaranteeing independence?

Joan Fraser: The advisory group has its merits. It is good to assemble a group of independent experts—if that is what they will be, but the order does not necessarily say that. It says they will be appointed at the chief inspector's discretion for as long as he decides and will be reappointed if he so decides.

The former Cabinet Secretary for Justice said that that body would person proof and future proof the structure of independent monitoring and replace the legislative rigour that we have at the moment. In fact, it seems to be unlikely that a group of individuals who owe their appointment to the chief inspector would always feel able to perform the necessary challenge function.

It is a good idea to have an expert body to which people can go for advice, but that is very different from a council, which is the model elsewhere in the UK for the body that enables independent monitoring to operate independently of Government.

The Convener: Do any of the other witnesses wish to comment on that? It looks as though they do not.

Elaine Murray: Is the fact that the advisory group is not independent an OPCAT issue?

Joan Fraser: I am not sure that I am sufficiently expert in OPCAT to answer that.

The Convener: I asked whether anybody else wished to comment on the fact that the prison monitoring advisory group is to be appointed by, and under the auspices of, the chief inspector of prisons. From what Joan Fraser states, it seems that the connection between the chief inspector and what we used to call prison visiting committees, but which will under the order be called independent prison monitors, will be too close. The system seems to be tightening up and not allowing independence to flow as it did before. Is the fact that appointment of the advisory group will be at the behest of the chief inspector—good though he or she may be—an issue for other witnesses?

Lisa Mackenzie: Yes—it is a concern and a disappointment that the order does not specify that the appointments to the advisory body must be made as open and transparent public

appointments. We said that in our most recent submission to the Government.

As we also said in the submission, if there are to be three independent prison monitors and three prison monitoring co-ordinators on that advisory group, our feeling is that they ought to be there as observers. If the majority of the people around the table are people who do the job, are they the best people to ask how the job is being done and to say whether they are happy with that, and to say maybe that they themselves are not doing it as best it can be done?

The Convener: They will be watching themselves.

Lisa Mackenzie: Yes. I am not saying that those people should not be on the advisory group, but perhaps they ought just to be observers on it with, ideally, the remainder of the group being appointed through an open process. However, that is not set out in the order.

Bruce Adamson: I agree with that in practical terms. In terms of OPCAT compliance, when we talk about independence, we mean independence from the Government and the state. The issue with the advisory group is more a conflict-of-interests point, in that people would be wearing different hats and undertaking multiple roles. That is important and possibly leads to questions about how broad and transparent the appointments process is, and how pluralistic we are being about bringing in different skills and expertise.

The Convener: I understand that.

Roderick Campbell (North East Fife) (SNP): I will roll back to unannounced visits. In its explanatory note to the order, the Government states that the draft order provides that the inspection and monitoring of prisons is

"in pursuance of the objective of OPCAT",

which is the establishment of

"a system of regular visits undertaken by independent international and national bodies".

Mr Adamson's submission says that

"The purpose of the OPCAT is to establish a system of unannounced and unrestricted visits to all places where persons are deprived of their liberty by independent international and national monitoring bodies."

How do you reconcile those comments?

Bruce Adamson: I reconcile them in the context of the statement that I was trying to make at the beginning. Our obligation—the purpose of the order—is to put in place a system that fulfils the state's positive duty to prevent torture and inhumane or degrading treatment and punishment. That is a multifaceted and complex process. The obligation existed far before OPCAT was put in place. It comes from international customary law and is exemplified particularly in the UN convention against torture and in the European convention on human rights. The obligation to prevent torture and the positive obligation to have structures in place already exist because prisoners are particularly vulnerable. We need systems to fulfil those obligations.

OPCAT sought to provide a dual layer of scrutiny through the sub-committee on prevention of torture and setting an obligation on national preventative mechanisms at state level. The minimum requirement under OPCAT is that those mechanisms be able to conduct their monitoring function unannounced. It is very useful to have other types of monitoring and inspection, but the additional thing that we get from OPCAT is a requirement for the state to provide the national preventive mechanism and the SPT with powers to visit unannounced.

Roderick Campbell: However, the order provides for three types of inspection, one of which is unannounced inspection.

10:30

Bruce Adamson: Yes—and my point is that that is the crux of OPCAT. That is what we are adding, although those other things are useful. Our concern would be that if resources were taken away from unannounced visits in order to do the rota visits and the other visits, that would create a problem in terms of the adequacy of resources that are required under OPCAT compliance and the requirement to have fully resourced unannounced visits. We are certainly not saying that those other types of visits are not useful, although we raised questions about the role of prison governors in determining the rota.

Roderick Campbell: The position under the existing prison rules is that at least two members of the visiting committee for a prison must visit the prison at least fortnightly, and that within that fortnight one member would visit the prison weekly or two members would visit the prison together, so to that degree regular visits are part of the current system. I am trying to get at the reality of the change. Does anyone else want to comment?

Pete White: When the process started a couple of years ago, I held discussion groups inside four prisons with four groups in each prison. Nearly everyone I dealt with, including staff, had never met the visiting committee in their prison. Regular visits are a good idea, but having the capacity to make unannounced visits is an excellent idea. The way in which people will manage their resources will still be quite flexible, as far as I understand the planning for the new system that is coming up. If extra unannounced visits are required, they will be

supported. I do not think that there will be a shortage of capacity for that.

My understanding is that the way in which things are being set up takes account of the fact that it is difficult to predict how things are going to be; setting things down in the order is not necessarily the best way, because it is more difficult to make changes to legislation than to guidance.

Joan Fraser: Before dealing with the issue of announced visits versus unannounced visits, I want to respond to Pete White's point about his discussion groups. VC members were excluded from those groups. We asked to be observers in those groups but we were not allowed. In fact, we had quite a lot of difficulty even finding out what questions were asked.

That said, there are 1,400 requests to visiting committee members a year. Clearly, therefore, a good proportion of prisoners know about visiting committees. Where there is a lack of knowledge, that might be not unconnected with the fact that notices, forms and information about VCs routinely disappear from notice boards and halls.

On announced and unannounced visits, at the moment, all visits are unannounced. The rota is set by the visiting committee. People are allocated either a week or a fortnight and they decide when they will go into the prison, and where they will go in that prison. The prison knows that the visiting committee will be in and out on a weekly or fortnightly basis, but it has no idea exactly when.

The proposal is to move to a kind of three-tier system of visits—not necessarily with increased frequency but with the requirement that there will be weekly visits on a rota, other visits that can be undertaken by the monitor, in agreement with the co-ordinator, and the unannounced visits that take place all the time at the moment.

One of my issues with that is in relation to practicality. An aim that is laid down in OPCAT is that the independent monitors should be representative of civil society in terms of age, gender, ethnicity and so on. At present, the members of visiting committees—the people who do independent monitoring—are in the main retired people, because they are the only people who have the time to devote to the job. If there are to be three layers of independent monitoring and additional monitoring duties are to be added in to assist with the SPS system—there is a new provision that nobody I have spoken to can tell me about, which involves monitoring temporary release of prisoners—I do not see how a cross-section of society could possibly cope in practical terms with the workload that would be required.

John Finnie: May I ask a question, convener?

The Convener: I will let Mr White comment first.

Pete White: I am sorry that Joan Fraser feels as though she was not given access to the discussion groups. That was not my decision. However, we had with us independent observers from outwith the civil service to ensure that we behaved ourselves and that the process was fair. Maybe your point should be made elsewhere, Joan. I am sorry.

The Convener: We have had the issue raised.

John Finnie: My question is for Ms Fraser, and is on monitoring by a group that is representative of society. In your most recent submission, you mention the abolition of

"the statutory requirement in the Employment Rights Act 1996 for monitors ... to be given time off by their employer to undertake their role."

I presume that the situation will only be compounded by that.

Joan Fraser: Yes, I believe so. It does not seem sensible to me that people who carry out an important role such as independent monitoring of prisons should not be entitled to time off work, which is available to members of independent monitoring boards in the rest of the UK. Indeed, if someone is a member of the General Teaching Council for Scotland, the Scottish Environment Protection Agency or a local authority, they would similarly be entitled to time off from employment.

The Convener: Is that the case for members of children's panels?

Joan Fraser: I do not think that children's panel members are on the list.

The Convener: The same issues must arise about having a balance of people coming forward in terms of ethnicity, age and so on for children's panels, I would have thought.

Bruce Adamson: Yes. I have been a member of the children's panel for the past 11 years, and that issue arose in the context of reform of the children's hearings system. There was a difference of opinion: some people said that as soon as such additional supports were are brought in, people would come on to the panel with the wrong motives. That is certainly not my view or that of the SHRC. As we state in our submission, we believe that providing at least the minimum support in relation to loss of income is an important safeguard.

If I may, convener, I will make a quick point about further support. As well as the regularity that we have talked about, the OPCAT requires expertise, and it is important that we recognise that that can be built up over time, through experience and good training, as well as through professional expertise. We need legal and medical expertise to be bought in as well, but the

requirement in the legislation and the policy that supports it is that we have a structure in place that supports the right people getting in and gives them the tools and resources to do regular expert visits.

The Convener: We need to move on. As Margaret Mitchell has been in already, I will take Christian Allard first.

Christian Allard (North East Scotland) (SNP): Thank you, convener.

Good morning. The Association of Visiting Committees for Scottish Penal Establishments tells us that the consultation was a bit too short. I would like to hear what other members of the panel think about the length of the consultation. Did you have enough time to make submissions?

Pete White: I understand that there is pressure to introduce the process. The consultation period could have been longer, but I think that sufficient notice was given. Given the importance of the process, I am satisfied that people were able to get on and make responses. I have no argument with the time.

The Convener: The committee looked at the issue before we reached this stage and heard quite a bit of evidence before changes were made following Professor Coyle's review.

Lisa Mackenzie: I certainly felt that the timetable was quite tight. In fact, I found out only last night that some schedules to the order had been changed on 19 November—I read them last night. It seems to be a moveable feast.

The Convener: I am told that the change is a minor technical matter, but sometimes such things turn out to be biggies.

Lisa Mackenzie: Absolutely—and I have not even had time to digest fully what the change means and what its practical implications will be, although the timetable has shifted two weeks into January. However, as I said, that came to my attention only last night.

Joan Fraser: You will have seen from the association's submission that I thought that the consultation period was wholly unreasonable. The day after the referendum, the Government published more than 100 pages of information—one document being its response to the consultation that had been conducted some nine months previously. The Government did not say for nine months what it thought of the comments that it had received.

At the same time, the Government published a revised draft order that was significantly different from previous proposals, and it allowed a three-week consultation, even though its own standards say that it would normally consult for 12 weeks and that only exceptionally would it shorten that period. I do not see any exceptional reasons, except for embarrassment that the matter has been dragging on for four years. It would have been better to allow a bit more time for people—many of whom respond to consultations in their own time and are not paid to do it as part of their day jobs—to reflect on 100 pages of text and respond. The fact that people were able to do it is a tribute to them.

Bruce Adamson: As a general comment, I say that it is a great credit to the Scottish Parliament that it holds the participation of the people as one of its founding principles. That is a continual challenge, given the rate at which legislation and policy come through the Parliament. An issue that we have raised on a number of occasions is that taking a human rights-based approach to anything means that one of the first principles must be participation, and that if you want the people who will be affected by decisions to participate, the process can take some time.

Christian Allard: What do the witnesses think about the inclusion in the order of a transition period of three months to allow the new system to bed in?

Joan Fraser: Three months seems to be a sensible length of time. The matter was discussed prior to that time period being put in the order; I do not see a difficulty with it.

Pete White: I am happy to agree with Joan Fraser.

The Convener: Oh, well. We will stop right there, I think. [*Laughter*.]

Christian Allard: I shall leave it at that.

Margaret Mitchell: I want to ask a little bit more about the additional duties. Maybe I am wrong, but the last-minute changes, in particular the provision on arrangements for monitoring temporary-release prisoners, raise two concerns. First, it will add to the practical difficulties of carrying out unannounced visits—one of three different types of visit that we want prisons to be subject to—and, secondly, it is an inspection function, as opposed to a monitoring function. Could you comment on that? Could you also comment on the detail that has been left to guidance, and on any solution that you think might help to deal with those problems?

Joan Fraser: I have no idea why the provision on temporary release is in the order. We do not yet have the Government's response to the consultation, so we do not know whether it contains something on the provision. I have looked at the responses from the previous consultation and I can see no reference to it. I asked officials what its origin is and was told that lawyers thought that it should be an inspection function and should therefore also be a monitoring function. That made

me wonder why, if inspection and monitoring are supposed to be separate, one would consider monitoring of a particular aspect of the prison system to be a natural counterpart of an inspection function.

I also have no idea whether the provision amounts to a review of policies and procedures or—as would be more appropriate to monitoring—oversight of the number of individual cases a year, how they are dealt with and so on. That is unknown.

I am sorry—what was your second question?

10:45

Margaret Mitchell: It was about whether there was too much detail in the guidance, and what your solution to those problems would be.

Joan Fraser: The point about so much detail being in the guidance is that guidance can easily be changed. As a general principle, guidance is useful, because it means that you do not have to come back to Parliament every time you want to change the system. However, with a matter as important as the human rights of prisoners, it is very important that there is a stable and clear legal framework against which the system can operate.

I do not think that there is a solution within the terms of the order. You would have to insert a provision to make it clear that the guidance was statutory, which would mean that the guidance itself would have to come before Parliament. That would require the order to be changed, which as I understand it cannot be done under this particular procedure. The solution would be to put far more of the structure of the system and the various requirements into legislation than is the case at the moment.

Margaret Mitchell: If the order were not to be withdrawn, could consideration of it be continued to allow for further reflection on some of these last-minute changes?

Joan Fraser: My understanding is that the legislative process does not allow the order to be amended at all. In that case, it would have to be withdrawn or not approved by the Parliament. That said—and despite the fact that we have been looking at this for a very long time—I think that it would be sensible to spend a few extra weeks to ensure that we have a system in Scotland that we could say leads the field and is the gold standard to which the Government has said it aspires.

The Convener: Mr White, are you going to agree with Ms Fraser?

Joan Fraser: Not twice. [*Laughter*.]

Pete White: I am going to divert from that slightly, convener.

The reason for giving monitors some responsibility in this respect or at least some opportunity to have dealings with the temporary release of prisoners is that, while they are on temporary release, they are still prisoners. I think that the access that the monitors would have to these people at that point would be very helpful and that it would continue the regime. It might seem strange for someone who is released from prison on a temporary order still to be a prisoner, but that continuity is important.

Bruce Adamson: First, I note that the scope of OPCAT covers all detention, including restrictions outwith the prison environment.

In answering this question, I want to refer very briefly to a number of core principles. OPCAT and the SPT guidelines that underpin it very clearly set out the preference for as much of this issue as possible to be framed in constitutional or legislative text. Given that we are in a subordinate legislation process, I think that, as far as guidance is concerned, the further we get away from constitutional or legislative protection, the less scrutiny is available and the more concerning the situation becomes with regard to ensuring that the system is working effectively.

The Convener: Not necessarily. A committee can ask to scrutinise guidance, even if it is not statutory as such. This committee or even the Parliament can decide to deal with the matter because the guidance contains such a substantial amount of detail.

Bruce Adamson: I absolutely take your point, and I know that the committee's remit extends to all of those things that fall within its scope and that you could require such scrutiny to be carried out. However, I think that, instead of the issue being left to your own best offices, a statutory requirement would be useful.

My other very quick point is about the link between having a clear mandate and clear responsibilities and having the necessary resources to support that. If any additional functions are going to be added in, they will need to be very clear at this particular level, and resources will need to be attached to them.

The Convener: I understand that.

There is only one question that we may not have asked, and Elaine Murray will ask it.

Elaine Murray: The order does not specify a minimum number of IPMs. Ought it to do so, or would there be disadvantages to specifying a minimum number?

The Convener: I feel that Joan Fraser carries a weight of responsibility in being the first to answer every time, so I will take Ms Mackenzie first this time.

Lisa Mackenzie: We have consistently argued for something on that to be put in the order. We accept that it may not be sensible to include a number for every institution, given that the Howard League's aspiration is for prison numbers to go down, but the implementation group came up with a formula that gave a baseline of numbers for the viability of a visiting committee. I am not sure why that has not gone into the order, given that we feel able to specify the number of prison monitoring co-ordinators.

It is good to see a reference to frequency in the order, which was not there before. To some degree, that will help to determine how many people might carry out the functions once we know the different types of visits and meetings that they might have to undertake in addition to the oversight of temporary release, which is as yet unclear in terms of capacity. However, we would have liked to see a formula if not a number. A formula was bandied around during the implementation group discussions, but there has been resistance to putting it into the order.

The Convener: Is the formula based on the population of a prison?

Lisa Mackenzie: Yes, and there might be an uplift in the numbers for young offenders and women because they are particularly vulnerable. When we last discussed the matter, we talked about a visiting committee having a minimum of eight members, but the number would vary. Barlinnie would have a larger number than, say, Low Moss or another of the smaller prisons.

Pete White: I agree with Lisa Mackenzie about the process. The reason for the numbers being omitted from the order is that the prison estate is changing all the time and a minimum number might be seen as the threshold for acceptance, whereas there is far more to be gained from experience as people find out what is required. The formula was a good idea, but I do not think that it can work given that the number of prisons and the number of people inside them are changing.

Joan Fraser: The formulas that we looked at were flexible enough to allow for that. The system that we have at the moment is out of date and is based on historical local government boundaries that existed two local government reorganisations ago, so it produces some very odd figures. At the moment, the legislation says that there should be six members on the visiting committee for Aberdeen but 28 on the visiting committee for Barlinnie. That does not make any sense, as there is an irreducible minimum number of things that monitors have to do.

The formulas that we looked at—we considered several—were all based on prison populations and having a minimum number of monitors per prison, with the numbers then adjusted upwards in the light of changes in prisoner numbers and the particular needs of the prison population. For instance, it might be argued that young offenders and female prisoners require more intensive monitoring than other prisoners, and there are so many people with mental health problems in Barlinnie that it could be argued that more monitoring is required there.

The Convener: The committee is aware of that. It is not simple.

Joan Fraser: I see no reason why there cannot be a formula that would offer some sort of guarantee. It is slightly worrying that there seems to be a feeling that we should keep the number of independent monitors as low as possible while, at the same time, resourcing all the paid staff to an extraordinary extent—possibly 10 times what it costs at the moment. It is good that the Government is willing to spend money on a new system, but I am not sure that the priorities are quite right.

The Convener: You do not need to say anything, Mr Adamson.

Bruce Adamson: I will say only—at the risk of incurring your wrath, convener, because of repetition—that we need regular monitoring and it needs to be resourced. The commission would accept the view of the experts on the number of monitors required.

The Convener: That concludes our evidence session. I thank you all for your evidence and for stepping in at short notice. I suspend the meeting for five minutes as we change the witnesses.

10:54

Meeting suspended.

10:58

On resuming—

The Convener: We are back with our second panel of witnesses, who I know listened in part to the previous panel's evidence. I welcome Professor Andrew Coyle, emeritus professor of prison studies at King's College London; Dr James McManus, member of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; and David Strang, Her Majesty's chief inspector of prisons for Scotland.

We will go straight to questions from members.

John Pentland (Motherwell and Wishaw) (Lab): Good morning, panel. The Scottish Government has stated that it is committed to

reforming the system for the independent monitoring of prisons, to meet its obligations under the optional protocol to the UN convention against torture—to save time we will call that OPCAT. The report is full of acronyms, which I find quite difficult to get my head round—

The Convener: Yes, I know.

John Pentland: —but we will get there. There seem to be some concerns about whether the Government's proposals are compliant with OPCAT. Are they?

11:00

Professor Andrew Coyle (King's College London): The United Kingdom's obligations under OPCAT are met through membership of its national preventive mechanism, which is made up of, I think, 20 bodies that are involved in monitoring places where people are deprived of their liberty. About five of those members are based in Scotland, including Her Majesty's inspector of constabulary, HM chief inspector of prisons, the Scottish Human Rights Commission, the Mental Welfare Commission for Scotland and the Care Inspectorate.

The current members of the visiting committees who monitor prisons in Scotland are not members of the national preventive mechanism. My understanding—HM chief inspector of prisons, who is here, will correct me if I have misunderstood—is that under the Government's proposals independent prison monitors will not be members of the national preventive mechanism. At most, they will be represented by HM chief inspector of prisons.

That is unlike the arrangements for England, Wales and Northern Ireland, where independent monitoring boards are represented directly on the national preventive mechanism. It is also unlike the arrangements for independent custody visitors to police cells, which were set in Scotland following the Police and Fire Reform (Scotland) Act 2012; they are members of the national preventive mechanism.

If I have understood the new order correctly, it will not change the arrangements. It will take us no further than we are at the moment, in terms of the national preventive mechanism of OPCAT.

The Convener: Should it?

Professor Coyle: Yes.

David Strang (HM Chief Inspector of Prisons for Scotland): My understanding of the order is that it will mean that the monitoring of prisons in Scotland will be OPCAT compliant. The chair of the UK NPM has expressed a view that the new arrangements for independent prison monitors will be OPCAT compliant.

Visiting committees were not OPCAT compliant, because their funding came from the Scottish Prison Service, which was the body that they monitored. Part of the reason for introducing the new system of independent prison monitoring was to ensure compliance with OPCAT.

Andrew Coyle commented on the national preventive mechanism and said, rightly, that I am one of the members; I represent Scotland on the UK national preventive mechanism steering group. At the moment, visiting committees are not in any way represented. They are not members of the national preventive mechanism because they are not OPCAT compliant.

As you know, the new arrangement will put responsibility for monitoring and inspecting prisons under my office. In a sense, visiting committees will have a voice at the national preventive mechanism, because as chief inspector of prisons for Scotland I will have responsibility not only for inspecting prisons, but for ensuring that they are effectively monitored.

Dr James McManus (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment): As you said in your introduction, convener, I am the UK representative on the Council of Europe's committee for the prevention of torture. One of our tasks, as we go round member states, is to look at the NPM established under OPCAT. We have no formal role in monitoring NPMs, but we have been asked by the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to do that as we work within the 47 member states of Europe.

Our experience is that the NPMs differ widely. Most of them are run by the ombudsman's office in the relevant countries, but their structure is quite different from one country to the other. When I looked first at the Scottish mechanism, I could see a strong possibility for the old-style visiting committee becoming the NPM because it brought together the people who are doing the job daily or weekly and such a model would mostly comply with what is going on in other countries in Europe.

When I first saw the structure that is proposed in the order that we are debating today, I thought that it did not do what I would have wanted to do. All it did was take away the financing from the current arrangement.

The Convener: You mentioned the national preventive mechanism, or NPM, did you not? It was not the MPM.

Dr McManus: Yes.

The Convener: We are so blurred with all these acronyms. I think that we are all right now.

Dr McManus: The one hurdle that has been identified by the UK NPM is the financing of the current visiting committees; it left them non-compliant. The order changes that, but the structure that it proposes does not achieve the ultimate objective of maximising the input of the NPM. It puts in professional co-ordinators, who will be the main mechanism through which the NPM performs its role. The people who actually do the work are further distanced from the NPM role by the creation of that new group of professionals who, of course, will also be salaried by the Government but not through SPS. That technical change is in danger of further reducing the impact of the people who are doing the work of the NPM rather than those who are defined as the NPM.

John Pentland: Does that create a conflict? If someone is being paid to do something, they might tend to provide a report that suits the payment.

Dr McManus: We have certainly not seen that in the office of the chief inspector of prisons in Scotland over the years. I do not think that we are talking about a fundamental compromise, but it just does not look like the conspicuous independence that is an essential element of an effective NPM.

The Convener: How would you change that so that independent prison monitors would be members of the NPM? How can you change that under this legislation? You cannot.

Dr McManus: Simply by specifying in the legislation that the actual independent monitors are the members of the NPM.

The Convener: You would put that in this affirmative instrument.

Dr McManus: Yes.

Margaret Mitchell: If you were in the room when the previous panel gave evidence, you will have heard some concerns about independence. Seeking to make the monitoring system compliant with OPCAT has had some unintended consequences, particularly about independence. I accept that some panel members have welcomed the frequency of visits being laid down, for example, but there will be three types of visit whereas previously anyone could go in unannounced. There is also a capacity issue with the new duties and the blurring of inspection and monitoring.

The Convener: There were a lot of points there, but it will be all right if you take them a bit at a time.

David Strang: Shall I start?

The Convener: Go for it, Mr Strang.

David Strang: Independence is clearly an important issue. The independence of the monitors rests on the independence of my office. As Her Majesty's chief inspector of prisons for Scotland, I am independent of the Scottish Prison Service and of the Scottish Government. In conducting my inspections and making reports, I comment on what I find out about the treatment of prisoners and the conditions in prison independently of those two bodies. If I have a criticism of, or praise for, the SPS, I include it in my report. Similarly, I am not constrained from commenting on Government policy.

Part of the duty of a state that signs up to OPCAT and the NPM is the funding of independent monitoring and inspecting. We have an arrangement by which the scrutiny and oversight of prisons, including inspection and monitoring, is funded by the Government. There is no conflict in having the state provide funds to enable independent inspection and monitoring to take place. That is an important principle: I do not feel that my independence is compromised by the fact that I am not doing that work voluntarily in my own time.

With regard to visits, the important element in the order is that prisons must be monitored regularly. It states that every prison must be monitored every week, so I do not think that there will be any confusion.

Margaret Mitchell referred to there being three types of visits, but I do not think that there are. There would be a monitoring visit that would take place in response to the rota that has been agreed, but, as the monitors might want to come back two days later to follow up on something, the order states that they are not restricted to coming in only in accordance with the rota. An independent prison monitor would be able to attend at other times, not just in accordance with the rota.

Ms Mitchell's third point, on resourcing, is very important; I will take up that issue in my discussions with the Scottish Government. If Parliament gives me a new duty, and there is a new scheme for independent prison monitors with co-ordinators, that will all need to be funded. A decision on the duties of the monitor will lead us to the number that we need—taking into account the fact that there will be a visit every week—with regard to the issue of resourcing.

The paid co-ordinator role is a response to the fact that, at present, the role of visiting committees varies among the 15 prisons and young offender institutions. The purpose of introducing that role is to ensure that there is a good standard of

consistent monitoring in every establishment throughout Scotland.

The Convener: Does anyone else wish to come in on that point?

Professor Coyle: I wonder whether I might answer Ms Mitchell's question by stating briefly how I came to be involved in this work. In September 2012, the Government asked me—as the committee is well aware—to review whether its proposals in this respect conformed with the optional protocol, focusing specifically on its obligation to establish a system of regular visits undertaken by independent bodies.

It was made clear to me from the outset that the Government's intention to abolish visiting committees in their present form was not negotiable, but it was agreed that I could interpret my terms of reference in a wide manner. I submitted my report in January 2013; the Government published its response in April and indicated that it had accepted 17 of my 21 recommendations and would further consider the remaining four recommendations.

The Government further announced its intention to establish a new independent monitoring system consisting of four salaried prison monitors, supported by an unspecified number of lay monitors to be overseen by HM inspectorate of prisons for Scotland. That was not an arrangement that I had recommended. It seems to me that much of the remaining confusion relates to both the appointment and the role of those prison monitoring co-ordinators. The four salaried monitors have metamorphosed into prison monitoring co-ordinators, but the order as I read it gives them more than a co-ordinating role; it also gives them the right to go into prisons to monitor.

I recommended the public appointment of independent volunteer monitors for each prison in sufficient numbers to enable them to perform their specified duties. I recognised that the monitors would need to have a supporting body, and I presented a number of options, one of which involved the prisons inspectorate. Over the past 20 months, the Government has responded, bit by bit, to the many concerns that have been raised, not least by the committee, by giving us a dynamic series of amendments that take us a good way down the road but still retain a complication that I suggested in my review was not necessary.

11:15

Margaret Mitchell: May I just be clear, Professor Coyle? The merging of the inspectorate and the monitoring was one of the options, but it was not your favoured option.

Professor Coyle: I was at pains to make a distinction between inspection and monitoring, which I think is generally accepted. I recognise that one of the difficulties in the past was that there was no sponsoring or supporting group for the visiting committees; indeed, in so far as that was provided at all, it was provided by the Scottish Prison Service itself, which was the body that was being monitored.

I gave a number of options, one of which was a small unit within the Scottish Government. That is broadly parallel to the model in England and Wales. Another option was the Scottish Human Rights Commission doing that work. Another option that I did not push but which would have been possible was the Scottish Public Services Ombudsman doing that work. The fourth option was the chief inspector of prisons. I recognised that that would be a proper option, but I was at pains to point out in placing it there, which I did not oppose, that great care would need to be taken not to elide the distinction between inspection and monitoring.

Margaret Mitchell: Is that the problem that has now emerged?

Professor Coyle: I have stated my view about the monitoring co-ordinators.

David Strang: I agree entirely with Andrew Coyle that the first order that the committee considered at this time last year needed to be amended, and clearly it has been. The notion that prison monitors would be the main monitors and would be supported by lay monitors was very confusing. What has changed is that responsibility for monitoring clearly rests with the independent prison monitor. Volunteer members of society—the representatives of civil society—will be in prisons every week. The change of title to "prison monitoring co-ordinator" indicates what that role will be about. It is clear that they have a power to go into a prison.

The committee's report earlier in the year commented on inspection and monitoring coming under the same organisation. It said that there are real benefits from that. I think that there are. I am very clear that inspection and monitoring are separate functions. One is professional inspection, which is done infrequently and in great depth. Monitoring involves regular visiting and scrutiny, and is done by local people who are familiar with the prison. There are real benefits from co-ordination so that the findings from monitors, for instance, can be fed into the inspection programme. I think that we will have a better sense of the monitoring and inspecting of prisons across Scotland as a result.

The Convener: Notwithstanding that there could be Chinese walls between the inspectorate

and the monitoring, do you not agree that the perception will be that the functions are blurred and have become one and the same, whereas previously the visiting committees seemed completely separate from the inspection and the inspectorate? We can see good reasons for the establishment of the hierarchy—to create uniformity, some kind of education and process and so on—but it could nevertheless be seen that, under that hierarchy, the independent prison monitors are just part of the inspectorate.

David Strang: Many people have expressed that fear, which I understand. I think that the separation of the visiting committees that you described led to isolation. I know from speaking to visiting committee members that there was frustration that their voice was not heard. If they had concerns, they might have taken them to the governor, but the governor might have ignored them. There were disadvantages from that isolation, whereas there will now be an avenue. Therefore, if monitors are unhappy with the response that they get from a prison, that can be escalated through the co-ordinator and can come to me. There is an avenue for a greater voice. Prisoners will have confidence in the independent prison monitors' work because of how they will conduct their business. If the monitors are there regularly, the prisoners will not particularly see the link through to the chief inspector.

Technically you are right that, from a bureaucratic organisational sense, that is how the governance is provided. However, the effectiveness of the independent prison monitors' work, whether they are in Inverness, Greenock or the new Grampian prison, will depend on what they are doing on the ground. I do not think that a prisoner will particularly make a link and think, "This person is trained by someone who works for the chief inspector."

The Convener: Professor Coyle proposed an alternative governance system that would have kept that clarity of separation between monitoring and inspection. Perhaps that would have made your position easier in some respects, because the system could, in a way, be seen to compromise you.

David Strang: I do not think that the system compromises me in any way. My independence is still—

The Convener: I am not saying that it does; I am not impugning you in any way.

David Strang: I did not take that in a personal sense; I just meant that my dual functions will enhance the oversight and scrutiny of our prisons because, rather than the two functions being completely separate and not particularly talking to each other, they will be co-ordinated. I had taken from your report that you had welcomed the fact that the two functions would be better co-ordinated. I imagine that is why the Government has continued to pursue the matter. In my view, neither the inspection function nor the independent prison monitoring will be compromised.

Margaret Mitchell: I am aware that others want to come in, so I just want to say that the concerns are about the detail that was added later and the need to look further at the implications of the co-ordination function. For example, the co-ordinator will have to seek permission to visit, with the rota approved by the governor, whereas the norm now is for monitors to decide alone when to make unannounced visits.

The Convener: That was a comment rather than a question, so we will move on.

Gil Paterson: My experience tells me that institutions are better kept on their toes when inspections or visits are wholly unannounced. On the purpose of the three types of visits, is it right to say that an unannounced visit might cause some matters to be raised, so that an announced visit then takes place to come to terms with what the earlier visit found? Is that why there are three different visit types? If not, will you explain what they are?

David Strang: Independent prison monitors are required to visit prisons every week. The reality is that a prison does not suddenly change how it does something when people know that the monitor is coming in on Wednesday afternoon. The regular independent monitoring means that the monitors notice change over time. They speak to prisoners and they can speak to staff. A prisoner will soon tell them if something is not right—if the prisoner has been mistreated or the food is poor.

The monitor's objective is not to catch red-handed the Prison Service doing something that it should not do; it is about regularly being aware of what is happening in a prison, what the facilities are like, how many prisoners are attending education, what the healthcare provision is and what the waiting time for the dentist is. The monitoring is more about that. A person cannot enter a prison completely unannounced, because they must be let in at the front door. We would not expect the monitors to be catching people red-handed.

The Convener: I once turned up to a prison unannounced. I had been told by Kilmarnock prison that I could come at any time, so I did, which was rather interesting, as it caused a bit of a stooshie generally, and all that I did was the security check. Sometimes it is useful to make such a visit.

David Strang: I am sure that you are right, but I am saying that visits being unannounced might make a difference if monitors went only once a year. However, monitors will go into prisons every week.

The Convener: I take your point.

Dr McManus: Both kinds of visit are important. My committee carries out both, which might involve our going into a country totally unannounced and visiting a prison. As you will understand, getting into that prison requires some negotiation to begin with.

Announced visits, in which information is asked for in advance, are also important, because that information enables us to monitor more efficiently what is going on. If we want to find out what is happening in a prison, it is important to vary the times and days of visits instead of simply having announced or unannounced visits. As a result, we might turn up on a Sunday, on Christmas day or on days when the routine is quite different from usual, or we might turn up in the evening or at night. Of course, such a visit has to be announced. There would be no point in ringing the bell at Barlinnie at midnight and asking to come in, because that would pose all sorts of difficulties for the place.

A balance needs to be struck in visits, which is what I think visiting committees were beginning to do. In a research project that I did way back in the 1980s on visiting committees, I found tremendous variation in practice. There were some very good committees but, among other committees, I remember that one had produced the same minute for its monthly meeting for five years. It said that it had visited all parts of the prison and had found everything to be in good order and perfect, and it simply signed things off. According to that committee, that prison—I will not identify it—had been in perfect condition for five years; in my view, it was certainly not in perfect condition.

It is a matter of getting the variation right and building up the professionalism of the people involved. However, that professionalism must be based not on professional monitors but on ordinary citizens, who bring an outside perspective to the prison world. That was the big value of the visiting committee, and we must not lose that under the proposed new arrangement.

Professor Coyle: I will expand on Dr McManus's comments in response to Gil Paterson's question. Inspection is sometimes described as a snapshot in time. That is not meant unkindly. The chief inspector and the inspectorate team go into prisons on a three or four-monthly rota, during which period they inspect it, having looked at all the paperwork, the reports and so on. However, that is very much a snapshot in time, which is of course informed by previous inspections and other information.

Monitoring, on the other hand, is carried out regularly and continuously. The people involved are in prisons continuously; they see and smell things and can think, "Something's wrong or different today." They pick such things up because they know the prison or hall.

That links back to Dr McManus's point that the strength of visiting committees in the past was that in principle—if not, sadly, always in practice—they were representative of the local community. If the prison in Dumfries is taking prisoners from Dumfries, the people on the visiting committee should be from that area and should be going into the prison regularly.

I have described the distinctions between the two functions of monitoring and inspecting. They absolutely need to be complementary, but they also need to remain distinct.

The Convener: Are you happy, Gil?

Gil Paterson: Yes, convener.

Elaine Murray: I will highlight a concern that Professor Coyle previously raised about the IPMs' ability to hear and pursue complaints. The draft order seems to concentrate more on their ability to assist prisoners in following the formal complaints process and less on their ability to raise issues with the governor or investigate any issue that a prisoner might raise. Does that represent a weakening of the current legislation as far as raising prisoners' complaints is concerned?

David Strang: That issue was raised when the first draft order was produced, because people felt that that aspect had been removed. However, I point out that proposed new section 7D(3) of the Prisons (Scotland) Act 1989, as inserted by article 2 of the current draft order, relates to the duties of the independent prison monitor and says:

> "An independent prison monitor may investigate any matter referred to the independent prison monitor by a prisoner."

When a prisoner raises a matter, the independent prison monitor will be able to investigate it. The draft order clearly allows—and expects—independent prison monitors to hear concerns from prisoners, to investigate them and to take whatever action is necessary.

11:30

On the reason for the emphasis on supporting prisoners to make a complaint through the formal SPS complaints system, I do not think that it is helpful to establish a parallel complaints system. Prisoners should be encouraged to use the SPS complaints system. The SPS needs to have a

complaints system that is fit for purpose. If there were constant complaints that the SPS complaints system was not working, the inspectorate might look into that, and we could perhaps do a thematic inspection on how well the Prison Service's complaints system is working, how well it is trusted by prisoners and so on.

We are right to avoid setting up an alternative complaints system, but it is clear in the draft order—and it will be clear in the guidance for monitors—that monitors will be expected to hear concerns about prisoners, to investigate them and to take whatever action they consider to be necessary.

Professor Coyle: The term "complaint" is a simple word for what can be quite a complex process. Joan Fraser mentioned that in the region of 1,400 complaints were raised with visiting committees last year.

As for resolving issues, one of the main objects of both the Prison Service and monitors is to reduce the prevalence of issues that can give rise to complaint. A prisoner might come to raise an issue and might not define it as a complaint because they have raised it with an independent monitor. Indeed, if it is properly dealt with, it will not become a complaint. It becomes a complaint only if it is not properly dealt with according to the prisoner's perception.

I understand that the Prison Service's complaints system deals with complaints. Much of the current work of visiting committees, in talking and listening to prisoners, lies in eliminating or preventing complaints. I suspect that what the draft order defines as a complaint encapsulates that wider idea, in addition to specific instances when a prisoner says, "I want to make a complaint about something."

Elaine Murray: Does the draft order give the appearance of wanting to escalate things into complaints, rather than providing mediation? Is there a concern that we are tipping the balance towards complaining rather than mediation?

Professor Coyle: I am not sure that I have a strong view on that. The next question might be: what is the alternative formulation? I am not sure what the alternative formulation might be.

The important thing is that the prisoner should retain the right to approach the independent prison monitor in a confidential manner, without having to go through a third party. There should be an arrangement for doing that, as there is at the moment.

Elaine Murray: Is that not clear from the draft order?

Professor Coyle: I suspect that the fact that we are talking about it means that we have questions. If we have questions, we can be pretty sure that prisoners on the landings will have questions.

Elaine Murray: The issue has been raised with us that prisoners might not have confidence. If they feel that they have to go through the formal complaints system and they fear that there might be retribution for having done so, they might be less willing to come forward with issues.

Professor Coyle: Confidentiality is essential.

David Strang: I agree entirely. The system absolutely needs to have the confidence of those who are detained in prison, so confidentiality is essential. That will be part of the system.

Before independent prison monitoring starts, guidance will need to be established. There will be confidential referrals. As the proposals state, prison monitors should be able to speak confidentially to prisoners. The referral system needs to be confidential, too.

Elaine Murray: Should the right to a confidential investigation be in the draft order rather than just the guidance?

David Strang: That is a technical legal matter. There has been discussion about whether lots of things should or should not be in the order. When we implement the order, we will ensure that prisoners are confident that their referrals are confidential. The situation is the same when a prisoner wants a referral to see a medical practitioner, such as a nurse or a doctor. A prison officer should not know why the prisoner wants to go to the health centre.

The Convener: I am trying to recall the evidence from Ms Fraser. At the moment, a prison visiting committee member can take a complaint directly to the governor. However, the process in the order is that a complaint would have to be made by the prisoner through the formal complaints procedure, assisted by the independent prison monitor. I might have that wrong, but that was my impression from Ms Fraser's evidence. It concerned her that, whereas the prison visiting committee member can in certain circumstances raise the complaint directly and have a response back to them to convey to the prisoner, that will not be able to be done in the future. We are talking about a complaint rather than an investigation.

Professor Coyle: You have put your finger on it, convener. There is a danger that the order will, by default, immediately raise many issues to the level of a complaint rather than prevent that from happening in the first place.

The Convener: That is what I thought. I like to know that I have been paying attention.

Dr McManus: I will repeat something that David Strang said. We have to be extremely careful not to subvert the SPS complaints procedure by allowing dual tracks. Jumping the queue by going through an IPM straight to the governor would not be effective in improving the prison complaints process. We have to bolster the SPS process rather than subvert it. As has been explained, I see the role of the IPM as being to raise issues that prevent complaints coming out, rather than to deal with complaints.

The Convener: Forgive me, but that does not cover the issue that Margaret Mitchell raised about confidentiality. Some of the evidence that we have heard is that, if the complaint is put through by the prisoner, there might be repercussions for the prisoner. I think that that is Margaret Mitchell's point.

Dr McManus: There is a confidential process in the SPS for raising matters directly with a governor. If a matter is confidential, it can be raised directly with the governor, and only the governor will then know about it.

David Strang: The order provides that the monitors may investigate any matter, so it is not confined to complaints. Proposed new section 7D(6) of the 1989 act says that monitors

"may, without prior notice ... speak in private with any prisoner ... who agrees to speak"

to them.

On reprisals, one of the principles of the national preventive mechanism is that a whistleblower or anyone who wants to make a complaint should not be subject to reprisals or further implications.

Margaret Mitchell: The Polmont system was mentioned as one that more or less guarantees anonymity. Could that be adopted in the order?

David Strang: There needs to be a mechanism, but I do not think that it should be in the order, because prisons are very different in size. Inverness has 140 people and Barlinnie has up to 1,400. Some prisons have electronic kiosks that prisoners have access to, which they could use to send an email to an independent prison monitor. That could not be demanded in the order, because not all prisoners can send an electronic message to a monitor, although I can think of two prisons where they could do that. That is best left to the implementation of the order rather than being specified in the order.

The Convener: That makes sense.

John Finnie: Good morning, panel. My first question is for Dr McManus. You have talked about people doing the job and, if I noted what you said correctly, you used the term "conspicuous independence". We also heard from the Scottish Human Rights Commission about the "privacy and privilege" afforded to prisoners.

The submission from the Association of Visiting Committees for Scottish Penal Establishments states:

"At present, all PVC visits are unannounced and this is more rigorous and consistent with OPCAT."

If I noted what the SHRC said correctly, it suggested that the unannounced element is what separates OPCAT from another bit of legislation. Will you comment on that? Are unannounced visits the gold standard?

Dr McManus: I think that we all agree that unannounced visits are important, but not all visits need to be unannounced. The two options are there and, as long as the balance is good, I do not see any issue.

John Finnie: A further concern that the visiting committees have raised is about the abolition of the requirement in the Employment Rights Act 1996 that frees people up to come forward. I agree with the suggestion that that will limit the type of people who come forward. We want monitors to be representative. Do you have a view on that?

Dr McManus: It is absolutely clear that, if we do not give people the right to time off work, we will get either people who are self-employed and able to give their own not-paid-for time or retired people. We will end up with a group of people who do not reflect the local community and who certainly will not reflect the age and class distribution of most prisoners.

John Finnie: On a practical issue, Mr Strang, you talked about visits and said that things might be uncovered through visits at times other than those on the rota. You suggested that it would be possible to go outwith the rota. What implications would that have?

David Strang: The order allows for visits outwith the rota—that is all that I was saying. To specify that there has to be a rota so that every prison is visited every week will not constrain an independent prison monitor from going in at another time. The order allows other visits to be made—unannounced, as we have heard—that are not in accordance with the rota. That is the point that I made.

John Finnie: If this is not a contradiction, could you rota unannounced visits so that, for example, a visit takes place in a certain week?

David Strang: I suppose that whether a visit is unannounced depends on who the rota is shared with. Within the inspectorate, we pencil in when we will do an unannounced inspection, but we do not say which establishment we will go to, so it is unannounced.

John Finnie: The word "perception" was used earlier, and I think that perceptions are terribly important. We have heard genuine concerns from the visiting committees about how things could change and, thereafter, how perceptions could change.

David Strang: The perception of whether the new independent prison monitoring system is successful will result from what it does and what changes follow. It will result from whether there is regular, weekly monitoring of prisons, which is what the order requires; whether monitors are seen to listen to concerns and report on what is going wrong; and whether those things lead to improvements. For example, if there are problems with healthcare or food and if prisoners learn that, when they raise those problems with the monitors, action follows, the system will have credibility and the governance issue will become less relevant.

John Finnie: Do you see a place for education and promotion of the system in the prison population? They are the customers, if you like.

David Strang: Hugely. At the end of the process, assuming that the system of independent prison monitors is implemented, there will need to be a huge amount of work to alert prisoners and prison staff to the new scheme. We have heard a couple of times that not all prisoners are aware of visiting committee members. We would absolutely want to raise the profile of monitors and their function, and as a result I would expect to see an uptake in requests to speak to them.

John Finnie: There seems to be a general feeling among people who have been involved in visiting committees that, as a result of the changes that are proposed, their work is not valued. Is there anything that you think could be done to reassure people that the public service that has been loyally given is appreciated?

11:45

David Strang: Yes. That view has been expressed to me and I can entirely understand that, if someone has spent a lot of time working in a visiting committee and then the Government announces that visiting committees are to be abolished, they will not feel that their work has been valued. When I was in Inverness earlier this year, I spoke to someone who had been on a visiting committee for 19 years, and that length of service is not unique across Scotland.

I also hear visiting committee members saying that they welcome the changes, because they feel that the current system is a bit ad hoc. They do not get the training, they are not supported and sometimes their voice is not heard. Although I understand the views expressed in the submission from the association of visiting committees, there are others who are keen to be new monitors. I expect and hope that a number of people who are currently visiting committee members will want to apply to become independent prison monitors.

In a way, you can see that, with the Government's stated intention and the Justice Committee's support, the notion of monitoring and visiting prisons is not being abolished or abandoned but is actually being enhanced. The reason for the change is to improve how monitoring is done, so in a roundabout way visiting committee members should realise that the work that they do is hugely important, being the eyes and ears of the community in a closed establishment such as a prison.

It is recognised internationally that people detained by the state are vulnerable to mistreatment, so the role of regular monitoring is hugely important. I hope that, before visiting committees end their responsibilities, there will be real acknowledgement of the invaluable work that they have done over the years.

John Finnie: Given the response that we have heard, would you acknowledge that there is perhaps some way to go with that aspect of the arrangements?

David Strang: There is a lot of uncertainty at the moment. Someone mentioned a period of four years. I have been in office for 18 months and I knew when I took up the job that independent prison monitoring would be coming in and that it would be my responsibility, because the Government announcement had been made. Here we are, 18 months on. The uncertainty has been unhelpful. Last week, I spoke at an event where I said that, a year from now, if all the changes go through, we will have everything up and running and it will be successful and will improve monitoring.

The Convener: You talked about letting prisoners know about the independent prison monitors, but Miss Fraser said that information about prison visiting committees was regularly removed from noticeboards so that prisoners did not know about them. Can you comment on that? Did that happen? If it did, do you know who took down the notices? Who let the dogs out? How did it happen?

David Strang: That does happen, and this is an area in which you can see the complementarity. When we inspect, we ensure that there are notices up about how to make a formal complaint or how to complain about the health service, along with information about the visiting committee, the number for the Samaritans and so on. We make sure that that information is up on all noticeboards, and Joan Fraser is absolutely right to say that we

will sometimes go into a place and find that the information is not there.

The Convener: She says that it has been taken down, not that it is not there—and saying that someone has taken it down is a bit different from saying that it is just not there.

David Strang: I was objectively stating that it is no longer there. You can infer that it has been taken down, rather than that it fell down by itself. One of the things that we would try to ensure is that information about the new independent prison monitoring is available and that it is given to prisoners on admission and through the induction process, and we would ensure that there were regular notices. It would be a regular check.

A co-ordinator's job is to make sure that that information is available. If it is not—if it is regularly taken down, and the suggestion is that it is done with malice on the part of prison officers—

The Convener: I never said that. I just wanted to know whether the information is being taken down and, if so, whether you know who is taking it down.

David Strang: If that were happening regularly, it is the sort of thing that a co-ordinator would raise with the prison governor, who will have a duty to co-operate with the inspection and monitoring process.

Professor Coyle: I want to say a brief word about Mr Finnie's earlier points about unannounced visits and the profile of independent prison monitors.

Mr Finnie asked about unannounced rotas. In effect, that system exists at the moment. Visiting committee members are statutorily obliged to go in twice a month, if my memory serves me. It is for them to decide when within the month they should carry out the visits. The committee will decide which of its members will go in during November and December, for example, and the members will decide on the days that they go in. In effect, that is an unannounced rota.

As an aside to that, my understanding is that the chief inspector of prisons for England and Wales now carries out all his inspections unannounced. He has decided to go down that road.

On equality, having been through all the pain that we have been through in the past few years, we are all hoping that we will come out better for the experience. There is agreement that we need to find a much more diverse membership of independent prison monitors. As the AVC said earlier, the reality, quite frankly, is that many of the current visiting committee members are retired people or people who have time, because that is in the nature of what is expected of us. If we are serious about wanting a diverse profile for independent prison monitors to cover all the issues that we are aware of and to reflect the clientele that are being monitored in prison, we need to take on board the implications.

In my review, I resisted the temptation to specify a number for each prison but I provided a calculation to say that it would be reasonable to expect an independent prison monitor to go in once a fortnight. Such consistency is necessary for the individual to get the feel for his or her prison. Once a fortnight is 26 days a year. If we are asking someone to volunteer to give 26 days a year, we need to make provision for all the consequences of that public service.

Christian Allard: I have a question regarding the comments by the association of visiting committees on the timescale for the consultation on the revised order. Do have any comments to make on that timescale?

Professor Coyle: One thing that I have found confusing during the past three years is—how does one explain this politely?—the dynamics of the Government's position.

The Convener: I think that your question spoke louder than anything else.

Professor Coyle: I submitted my evidence to the committee on the due date of 7 November, if my memory serves me right. On that day, after I had put in my evidence, the order was laid, but it was different from the draft order that had been circulated. I learned this morning that an amendment—and it might be a technical amendment, as the convener said—has since been laid.

I have to say that there is a sense of drift. We have gone from November 2011, when all prison monitoring was going to be abolished, to having three paid monitors and that was all, and so on. There is a degree of drift that is reactive rather than proactive, and it does not bode well for the future.

David Strang: The consultation period was tight but we waited a long time for it to come. The uncertainty is unhelpful, so I am looking forward to the process being concluded and then getting on with implementing whatever follows.

Christian Allard: You talk about a period of uncertainty if the order is passed. You have seen that the revised order now has a transitional period of three months. Is that long enough? Some on the previous panel said that some of the guidance should be statutory, but is a three-month period enough to embed everything in the guidance in the way it is laid out in the order?

David Strang: The transitional period relates to the time after the monitoring comes in while the responsibility of visiting committees continues. The

proposed start date is the end of August, which gives an eight-month period for guidance, recruitment, training and so on. I think that that is an adequate time.

Professor Coyle: I find myself in a bit of a dilemma as to what I should say to the committee today.

On the one hand, we have been running through this painful process—to repeat the term—for at least four years and arguably longer. I do not think that that serves independent prison monitoring, prisoners or visiting committee members any good. There is a part of me that says, "Let's get this signed off and get on with it, and hold the chief inspector's fingers to the fire and make sure that we get everything properly delivered."

On the other hand, I am conscious that, once the order is signed off, that will be it for a generation, as the man said, or longer. Therefore, there is an argument for trying to get it as good as we can at the moment. There are certainly weaknesses in the order as it stands, but I suppose that it is for the committee to square that circle.

The Convener: We know that the order cannot be amended. As I understand it, if changes were to be made there would have to be a fresh order. If I pinned you down—metaphorically speaking of course—and asked you whether the order should be passed, given that if it was not passed another order would have to be brought forward that would require further consultation, what would you say?

Professor Coyle: I was afraid that you were going to ask me that question, convener.

The Convener: That is why you are here.

Professor Coyle: If you had asked me that a week ago, you would have found that I had come to the conclusion that we should get this thing over—let us make it as good as we can and let the order go through. However, I sat up quite late last night, which is very unusual for me, reading all the submissions and going through the official position. I looked at issues such as getting the governor's approval for visiting rotas, and a variety of other issues that have been mentioned in the meeting. I have to say, with considerable regret, that it seems to me that the order needs further amendment.

I say that with great reluctance; fortunately, I do not have to make the decision. Either we sign off something now that, although it has failings, we hope will work, or, given that my understanding is that if it is signed off now it will be well into 2015 before changes happen, we consign it to even further in the future. My fear is that we will sign off something for which we will say later, "Well, we missed an opportunity there."

David Strang: May I respond to that, convener?

The Convener: Yes, of course.

David Strang: I think that the order is in a fit state and that if it were introduced it would provide a robust system for independent prison monitoring that would fulfil the purposes as stated in the order.

The Convener: Dr McManus, do you have a comment? You are not going to get away with just sitting there.

Dr McManus: I was going to try that. To be honest, I do not know whether the order should be passed. I am aware that there has been a long and painful process.

The Convener: So we have a for, an against and an abstention.

Dr McManus: I am tempted towards the chief inspector's position and to say, "Let's get this going." Perhaps we will have to come back in a couple of years and say, "Right—there are fundamental problems that require a new order," but at least we will have something working in the meantime. I can also appreciate Professor Coyle's approach of "Let's get it right first." Just and no more, though, I am with the chief inspector.

The Convener: That was helpful. Thank you.

Christian Allard: What should the role of the Justice Committee be in the years to come on the order?

Dr McManus: I think that the committee has to monitor the monitors.

The Convener: That is for us to decide, Mr Allard. Do not ask witnesses what our role is.

Christian Allard: You did give some reassurance to the first panel.

The Convener: I hear what you are saying.

Roderick Campbell: I will perhaps round things off by bringing us back to the question of inspection and monitoring being complementary but distinct. You are at the apex of what is in the order, Mr Strang. Indeed, the Government thinks that you are best placed to integrate scrutiny and monitoring effectively. Can you provide some reassurance on how you will approach the task of keeping those two elements distinct while bringing them together, if that is not contradictory?

12:00

David Strang: The distinction is partly that their functions are different. The inspecting side of the inspectorate is, as has been said, about taking a

snapshot in time and engaging in detailed in-depth scrutiny.

I began an inspection of Perth prison yesterday, so I have a team of 11 people in Perth for the next fortnight looking at every aspect of prison life. We have a set of standards and indicators that we measure against. We will then produce a report, which usually follows two or three months after the inspection and will include recommendations and areas of good practice. That information is then reported publicly, and we carry out follow-up inspections to hold the prison to account.

As well as the prisons inspectorate, I am joined by inspectors from Healthcare Improvement Scotland who look at the healthcare aspect; Education Scotland inspectors; and someone from the Care Inspectorate who looks at the social work aspect of life in prison. The process involves a professional, deep inspection.

Monitoring, on the other hand, is—as we have heard—a regular and continuous process. As Andrew Coyle said, monitors will see the changes that take place over time. They will get to know a prison: its environment, its staff and some of the prisoners who are there for a long time or who—sadly—go in and out. They will get a sense of how things change but only in that one establishment, whereas the inspectorate is good at comparing establishments, which monitors cannot do unless they happen to have been a monitor in another prison.

Those functions are different, but the work becomes complementary where issues of public concern are raised, perhaps during inspections, that I may ask the monitors to look at. Those issues might be to do with healthcare or the quality of food, or some particular aspect of education or exercise and recreation. I could invite a monitor to monitor a certain aspect of prisons for the next three months, and we would then get a picture of that one aspect throughout Scotland. It is invited monitoring, if you like, and that is where the co-ordination comes in.

We could also get reports from monitors that they are concerned about something in Glenochil, Grampian or Low Moss, and that information might feed in to the inspectorate's inspection programme. The inspectorate may therefore decide to undertake a thematic inspection. In spring next year, I am undertaking a thematic inspection on the use of segregation and isolation in prison, because that is an area of potential concern. As an inspectorate—I do not yet have responsibility for monitoring—we are doing a thematic inspection on that.

That is where the benefit of complementary working and co-ordination would come in, as information from monitors will be able to feed the inspection process and vice versa.

Of course, the order requires me to report annually on the condition and treatment of prisoners and on the effect of monitoring. In a way, that will give a new voice for monitors that the visiting committees do not have at present. They currently have to produce a report, but not much happens with it. The laying of an annual report before Parliament will give public view to the state of our prisons and how prisoners are being treated in a much more visible way.

The Convener: That concludes the session; I thank you very much for your evidence. On 16 December, the committee will take evidence from the Scottish Government before deciding whether to approve the order.

12:04

Meeting suspended.

12:07

On resuming—

Serious Crime Bill

The Convener: Agenda item 3 is our final evidence session on the legislative consent memorandum on the Serious Crime Bill. I welcome to the meeting the late Paul Wheelhouse—it is not your fault that you are late, minister—who is the Minister for Community Safety and Legal Affairs and, from the Scottish Government, Dr Lucy Smith, head of organised crime strategy, and Lesley Musa, human rights and third sector division. Having insulted Mr Wheelhouse, I congratulate him on his appointment.

The minister will make a brief opening statement.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): Thank you very much, convener. Good morning, committee.

I thank the committee for giving me the opportunity to discuss the provisions of the Serious Crime Bill for which we are seeking consent. As you will be aware, the Serious Crime Bill was introduced in the House of Lords the day after the Queen's speech, in early June. It has now progressed through the House of Lords to the House of Commons, where it had its first reading on 6 November. A number of provisions in the bill are reserved to the United Kingdom Parliament. I want to discuss those provisions that fall within the devolved competence of the Scottish Parliament and, in particular, the legislative consent motion that requires to be agreed to allow the UK Parliament to legislate on those matters.

The principal objective of the bill as a whole is to ensure that law enforcement agencies have effective legal powers to deal with the threat from serious organised crime. Much of that will be achieved by updating existing legislation. The LCM seeks approval for the UK Parliament to apply to Scotland provisions in four main areas of the bill: amendments to the Proceeds of Crime Act 2002; amendments to the Computer Misuse Act 1990; amendments to the Serious Crime Act 2007; and an amendment to the Prohibition of Female Genital Mutilation (Scotland) Act 2005. I will briefly outline each of those areas.

The Scottish Government has undertaken to strengthen the proceeds of crime legislation—which is also referred to as POCA—in the current session of Parliament. Committee members will be aware that, although criminal and civil law are generally devolved, POCA provides for the confiscation and civil recovery of the proceeds of reserved crime, such as drug trafficking and money laundering, as well as the proceeds of devolved crime. Because the majority of cases that come to court involve drug-related offences, the legislation is reserved.

Two of the clauses in the bill—clauses 19 and 23—provide for measures that relate to Scotland that will close the gap with the rest of the UK for default sentences and the civil recovery of assets. The bill includes provisions proposed by the UK Government that the Scottish Government agrees will strengthen the operation of the asset recovery process. The relevant provisions are contained in clauses 15, 16, 17, 18, 20, 21, 22, 37 and 38. The practical impact of the amendments in the bill is to reinforce the powers that are available to prosecutors and the civil recovery unit at the Crown Office by strengthening the existing legislation.

The criminal law relating to computer crime that is found in the Computer Misuse Act 1990 is generally a devolved matter, but clause 40 introduces a new offence concerning

"unauthorised acts causing, or creating risk of, serious damage".

It relates to reserved matters, such as national security, and devolved matters. Provisions in the bill also implement the European Union directive on attacks against information systems and reduce the threat and impact of cybercrime by ensuring that the legislation is robust and consistent with that in other parts of the UK.

Back in 2006, the Parliament agreed a legislative consent motion on changes to the Computer Misuse Act 1990 for the reasons that I have given. We consider that it is again appropriate for certain changes to be made in that way, and that the Serious Crime Bill presents the most efficient and effective way of transposing the directive's requirements in or as regards Scotland.

The bill amends part 1 of the Serious Crime Act 2007 to extend serious crime prevention orders—SCPOs—to Scotland. These are civil orders that will be used to protect the public by preventing, restricting or disrupting involvement in organised crime in Scotland. The practical impact of SCPOs is that law enforcement agencies will have an additional tool for tackling serious organised crime in Scotland. Amending the 2007 act to extend SCPOs to Scotland will ensure that the civil orders will be able to cover areas in which the Scottish Parliament does not currently have the appropriate legislative competence, which include areas such as drug trafficking, money laundering the proceeds of drug trafficking, counterfeiting and arms trafficking.

As there are significant overlaps between SCPOs and the financial reporting orders—FROs—that were introduced by the Serious

Organised Crime and Police Act 2005, the bill seeks to repeal the provisions on FROs in that act to provide for such orders to be imposed through serious crime prevention orders.

The bill seeks to extend the extraterritorial reach of the offences in the Prohibition of Female Genital Mutilation (Scotland) Act 2005 so that they apply to habitual as well as permanent UK residents. The practical impact of that amendment is the closure of an existing legal loophole. The provision has been included in the bill only for the purposes of speed. We want the identified loophole to be closed as quickly as possible, instead of having to wait to make the amendment through a specific piece of Scottish primary legislation. I hope that the committee agrees with that approach.

Although the Scottish Parliament can legislate on devolved matters, the legislation that is amended by the Serious Crime Bill covers a mixture of reserved and devolved issues. I believe that it is sensible for the provisions in the bill that amend POCA, the Computer Misuse Act 1990 and the Serious Crime Act 2007, and the provision that amends Scottish legislation to close a loophole on female genital mutilation, should be dealt with by the UK Parliament on this occasion.

I therefore ask the committee to support the draft legislative consent motion and will be happy to answer any questions.

Margaret Mitchell: Good afternoon, minister, and congratulations on your new appointment.

I would like to ask about the Proceeds of Crime Act 2002. I note that the practical effect of the proposed amendments in the bill will be to reinforce the powers that are available to prosecutors, the civil recovery unit and other law enforcement agencies. Is that likely to increase the workload of the Crown Office and Procurator Fiscal Service?

Paul Wheelhouse: We will be happy to come back to the committee in writing on the issue of workload. To date, we do not have any evidence to suggest that there will be an increase in the number of restraint orders or moves in that area. We are not aware of any particular issues that might arise in the future, but we will check with COPFS to find out whether there is any reason to believe that the justice authorities will face an increased workload as a result of what is proposed. I assure the committee that, at the moment, we do not have any evidence to that effect. We will write to the committee with a more definitive answer on that point.

Margaret Mitchell: Is there any empirical evidence for lowering the test for the granting of a restraint order at the pre-arrest stage?

Paul Wheelhouse: I am not aware of any evidence, but with your permission, convener, I will ask Dr Lucy Smith to deal with that.

The Convener: Of course—it is an evidence session.

Dr Lucy Smith (Scottish Government): Your question was about restraint orders specifically.

Margaret Mitchell: Yes—it was about the lowering of the test from "reasonable cause to believe" to "reasonable grounds to suspect" at the pre-arrest stage.

12:15

Dr Smith: My understanding is that this will not make a significant difference to the restraints that may be made. However, as Mr Wheelhouse has already alluded to, it would be helpful if I could check with my colleagues in the Crown Office and send a written response to the committee.

The Convener: Are the Crown Office supportive of these moves and/or POCA?

Paul Wheelhouse: I believe so. Certainly, since 2010, there has been a desire to find a legislative vehicle for introducing these measures. Unfortunately, when we raised the matter with authorities down south, they said that it was not possible to use the Crime and Courts Act 2013 as the vehicle as it would not be appropriate. We have taken advantage of the first legislative vehicle that was deemed appropriate. I know that Dr Smith and colleagues in the Crown Office and Procurator Fiscal Service are keen to have these powers.

The Convener: I just realised that I said, "Are the Crown Office" when I should have said, "Is the Crown Office". I am just being picky about grammar, but I had better correct that on the record.

John Finnie: Good afternoon, minister, and congratulations.

Has the effectiveness of serious crime prevention orders elsewhere in the UK been measured by the Scottish Government?

Paul Wheelhouse: In answering that point, it might be useful to cite the evidence of Keith Bristow, the director general of the National Crime Agency. He said:

"We've made very effective use of prevention orders—they will be increasingly important to the way in which we tackle organised criminals. It is certainly something that we have benefitted from in England and Wales. It has seen real benefits for us—it has enhanced our ability to disrupt criminals."

I am aware that, at a rest-of-UK level, in the past eight years, there have been 330 cases in which the orders have been used, and that many have

been used for up to five years. Anecdotal evidence suggests that, if the orders are used, and the individuals are forced to stay above the radar, others in the criminal fraternity find working with them a less attractive option and will shun them, because they realise that, if they associate with individuals who are being kept under close supervision, they might be caught themselves.

There have been a number of appeals, most of which have been successfully dealt with by the authorities, but some of which have gone the other way. However, even when an appeal has been lost, that has helped to tighten up the language of the SCPOs so that they are more defensible in future. We do not have any concerns that SCPOs will be damaging to the interests of pursuing serious crime; in fact, we believe the reverse. They are an important measure that will give the justice authorities in Scotland an additional tool to enable them to tackle serious organised crime in Scotland.

It is worth stating that only the Lord Advocate can apply for an SCPO and that the court must be convinced of the case for using an SCPO. Those safeguards will ensure that the orders are applied only in appropriate circumstances and are not used in a frivolous way.

John Finnie: The fact that only the Lord Advocate can apply for an order is an acknowledgment of their significance, and I note that application can be made to vary some of the terms of the orders.

Everyone would want to take the strongest possible action against organised crime, and these measures are draconian. Given that a lot of the respondents to the consultation were, quite understandably, concerned about the direct or indirect impact on third parties, what assurance can you give us that that will be monitored?

Paul Wheelhouse: It is important that we monitor the measure's impact. As we have uncovered in Keith Bristow's comments, a view has obviously been taken of the effectiveness of the measures in England, and it is beholden on the Government and the Crown Office and Procurator Fiscal Service to monitor the impact of such measures and to note any unintended impacts on or consequences for third parties.

I am happy to come back to the committee on how we might take that work forward, but the principle is that the measure can be used to deter people from getting involved in serious crime in the first place. Indeed, if they are already involved in such crime and are successfully prosecuted, we have a means of making it more difficult for them to commit similar offences in future. That is very important, but I take the member's point that we need to be mindful of the perhaps unintended impact on third parties who have not carried out any criminal activity or who have no criminal intent, and we will take that forward.

I do not know whether Dr Smith has anything to add about deliberations on the measure and how the Crown Office proposes to monitor the impact in due course.

Dr Smith: As the minister has suggested, we will need to keep an eye on this matter in any case. The information that we have received from south of the border is that when SCPOs that have been imposed have come to appeal, close note has been taken of any impacts on third parties. We have learned from what has gone on down south that the SCPOs need to be very specific about restrictions, which must not be disproportionate. This is intended to be a civil order; it is a preventive, not a punitive measure that seeks to prevent someone from getting involved in crime or criminality or to disrupt any impact that they would have. A court must consider the risk of harm, which will be the overriding principle in whether it agrees to impose an SCPO. The point that you raise about third parties is a key part of that.

John Finnie: On the mechanics of the process, will the individual who is the subject of the order be aware of it all in advance and have the opportunity to make representations? I can see how that could be a double-edged sword if you were trying to disrupt criminal behaviour or, indeed, perceived criminal behaviour.

Dr Smith: Yes.

John Finnie: So they will be aware of it in advance.

Dr Smith: The majority of SCPOs will be imposed post-conviction. In other words, a case will be going through the court, as part of which the prosecutor will make an application for an SCPO for the court's consideration. That information will clearly be shared with the defence, who will be aware of what is being requested and what the restrictions will be, and it will then be for the court to decide whether to impose the order.

Paul Wheelhouse: Going back to the point that Dr Smith made and to which I alluded earlier about hopefully refining the wording over time, I point out that the Crown Office and others will be able to refine the wording such that it is, as Dr Smith has said, quite specific. That will minimise the potential impact on third parties and, through the clear link between the SCPO and previous criminality, the potential success of any appeal.

John Finnie: Many thanks.

Roderick Campbell: Good morning, minister, and I congratulate you on your appointment.

The Convener: It is afternoon now.

Roderick Campbell: Well, it would have been morning. [*Laughter*.]

On the prohibition of female genital mutilation and the change that is being made to ensure that the test applies to individuals who are habitually as well as ordinarily resident in the UK, is this a belt-and-braces exercise or a response to evidence of an actual problem?

Paul Wheelhouse: In truth, Mr Campbell has hit on a point. At the moment, there is a weakness in that there is a lack of robust evidence about the prevalence or likelihood of female genital mutilation in Scotland. Indeed, that is probably a UK-wide issue, because relatively few cases have been taken forward. This is all about trying to minimise the risk of such activities being undertaken. Justifiably or unjustifiably, there has been a perception in the past that Scotland might be seen as a soft touch if our approach was not standardised with the UK's. We want to avoid any perception that Scotland is, in any way, a soft touch on female genital mutilation, and this measure addresses that perception.

We also want to improve our data quality. I believe that the Scottish Refugee Council is due to report on 17 December on a Scottish model of intervention to tackle female genital mutilation—the draft report is currently being prepared. It will hopefully set out how we can go about improving the data provision on the prevalence of female genital mutilation in Scotland, so that we have better data in future and are better able to monitor what is happening. There is not an enormous amount of evidence of it occurring in Scotland, which is reassuring, but we must be mindful of the fact that it might be hidden from view. Improving the data is therefore an important step to take.

Roderick Campbell: Thank you.

The Convener: I never thought that I would be asking Paul Wheelhouse, minister, about computing. I know as much about computing as I do about what happens under the bonnet of my car. However, it is interesting to see an extension of the law in an area in which so much crime is committed. I will not rehearse how the bill seeks to amend the Computer Misuse Act 1990, but one of the interesting things is the extraterritorial jurisdiction of offences—the fact that offences that are committed way beyond the UK or, indeed, Scotland can be prosecuted here. That could be resource intensive for policing, detection and enforcement. What resources will be required? If the legislative consent motion is to be worth the paper it is printed on—or the computer it is typed on—it should be shared between Scotland and the rest of the UK when a case is interjurisdictional. How will that be done?

Paul Wheelhouse: Clearly this is an important measure in its own right, but it should be seen in the wider context of the cyber strategy for Scotland that Mr Swinney, the Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy, will be taking forward on behalf of the Scottish Government. I am sure that Mr Swinney will look very closely at any resource implications for Scotland but we can come back to the committee in due course with an assessment of the financial resource impacts of policing these things beyond our borders and on how we work with our colleagues in the UK and across Europe. There is a clearly established international infrastructure for tackling international crime and we can come back to the committee to talk about how the legislation will work in the Scottish context.

The police and law enforcement agencies in Scotland collaborate on a number of cross-border issues. This is a reserved matter but there is a clear synergy in working together to address challenges that face Scottish companies and companies that operate across Scotland, England, Wales, Northern Ireland, Europe and the world and protect them from the threat of cyber crime. The provisions covered by the LCM will enable us to tackle those who intend to commit such a crime but who are beyond our reach.

The Convener: The bill does more than align Scotland with the serious crime prevention orders in the rest of the UK. It represents a fairly robust amendment to the Computer Misuse Act 1990. There is a bit in the LCM that mentions creating

"a new indictable offence of committing an unauthorised act in relation to a computer that results either directly or indirectly, in serious damage to the economy".

That is quite a difficult test. What would the defence be? Somebody might be completely unaware that they have put something into a computer that results in a significant risk to, for example, human welfare. Will the defence be subject to the beyond reasonable doubt test in criminal law? The rest of the amendments are easy but the use of the word "indirectly" means that someone might do something and not know what impact it has had. There is a law of unintended consequences.

By the way, I am not thinking about something I might do; I am not looking for a defence. How would the provision work?

Paul Wheelhouse: I understand the concern and the need to be clear about what can happen. If someone deliberately created a computer virus but did not intend for it to be used to take down the air traffic control system, but it did take down the air traffic control system and caused fatalities or massive economic damage, that would have to be taken very seriously.

I will ask Dr Smith whether she is aware of any specific examples that were considered when the legislation was being framed. The legislation will allow us to tackle activities that are designed to damage information technology systems but not to damage a particular economic interest, sector or user of technology, although it could have that impact and serious damage could result from it.

12:30

Dr Smith: Unfortunately I am unaware of any specific examples. The situation is as Mr Wheelhouse has explained, but I can come back with specific examples if that would be helpful to the committee.

The Convener: Yes, it would be. There must be thinking behind that provision. What is the defence for a 10-year-old child, for instance, who manages to bring down air traffic control? There will be a grey area and perhaps someone quite innocent will find themselves falling foul of the law, although I do not want to defend people who are up to mischief.

Elaine Murray: I also picked up on the bit about

"obtaining a tool for use in committing a CMA offence regardless of an intention to supply that tool"

and I know that that is a requirement of the European Union directive anyway. Somebody could, for example, write a piece of software that is benign in its initial use but is thereafter used by somebody else in a more malign way. What sort of protection will be available to the person who wrote a piece of software without any ill intention whatsoever?

Paul Wheelhouse: Are you talking about badly designed software perhaps?

Elaine Murray: Or a piece of software that is incorporated into something that has a more malign purpose.

Paul Wheelhouse: I take the point. From the number of comments that have been made, it is clear that the committee would welcome some clarification and we will seek some from UK ministers and the Crown Office and Procurator Fiscal Service. We will ask whether they are aware of any cases in which this legislation might have applied, or any cases that they have not been able to prosecute in the past but which they could prosecute under the amended legislation.

Many of the provisions deal with those who are illegally accessing or interfering with a computer system by hacking in or doing something of that nature rather than doing something completely accidental and designing something on their home computer that escapes and ends up in the wider system. I accept that, at the extreme end of the spectrum, someone could do something legitimately or accidentally, but the measures are designed to deal with situations in which there is at least some intent to cause harm and victims of that harm.

The Convener: I think that I am looking for a defence now, just in case.

Paul Wheelhouse: Duly noted.

The Convener: Seriously, it would be helpful to have the thinking behind an indirect result or what will happen when it is not obvious that the action was purposely damaging and criminal.

Paul Wheelhouse: That is a reasonable point, convener, and I am happy to come back to the committee on that.

The Convener: Thank you. That concludes this evidence session and I thank the minister for his attendance.

The committee's next meeting is on 8 December when we will consider draft reports on the bill—we will need a little bit of information prior to that—and on the draft budget 2015-16. We will also consider our work programme.

I remind members that the human rights debate will take place this Thursday afternoon. The motion has been lodged with the chamber desk and committee members are invited to support the motion before the debate. I will lead for the committee and John Finnie will sum up.

Meeting closed at 12:34.

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