The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 26 May 2015

Session 4

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.scottish.parliament.uk or by contacting Public Information on 0131 348 5000

Tuesday 26 May 2015

CONTENTS

JUSTICE COMMITTEE
17th Meeting 2015, 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)
*Jayne Baxter (Mid Scotland and Fife) (Lab)
*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)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Hamish Goodall (Scottish Government)
Michael Matheson (Cabinet Secretary for Justice)
Stephen McGowan (Crown Office and Procurator Fiscal Service)
Lesley Thomson (Solicitor General for Scotland)
Greig Walker (Scottish Government)
Paul Wheelhouse (Minister for Community Safety and Legal Affairs)

CLERK TO THE COMMITTEE

Tracey White

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Justice Committee

Tuesday 26 May 2015

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the Justice Committee's 17th meeting in 2015. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with the broadcasting system even when they are switched to silent mode. No apologies have been received.

Agenda item 1 is a decision on whether to take in private item 5, which is consideration of the evidence received on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill. Does the committee agree to take that item in private?

Members *indicated agreement.*

Prisoners (Control of Release) (Scotland) Bill: Stage 2

10:00

The Convener: Item 2 is an evidence session on the Scottish Government's amendments to the Prisoners (Control of Release) (Scotland) Bill. Those with an interest in the bill will recall that the committee agreed to take evidence on the amendments as they will, if agreed to, make significant changes to the bill.

I stress that this is an evidence session. We have another such session tomorrow, which will be followed by stage 2 proper, with amendments moved and so on. That is not happening today.

I welcome Michael Matheson, Cabinet Secretary for Justice, and Scottish Government officials Philip Lamont, head of the criminal law and sentencing unit, and Fraser Gough from the parliamentary counsel office. I understand that the cabinet secretary wants to make an opening statement.

The Cabinet Secretary for Justice (Michael Matheson): No, convener. I am happy to go straight to questions.

The Convener: That is excellent—you are winning friends. We will go straight to members' questions.

Alison McInnes (North East Scotland) (LD): Good morning, minister. I am grateful for how you have responded to the committee's report, but will you give us the thinking behind and more evidence on the six-month period for supervision that you have settled on?

Michael Matheson: The committee outlined in its report that it wants a period of community-based supervision to be provided at the end of someone's sentence. That view was based largely on the evidence that the committee heard about the impact of cold release. I gave an undertaking to the committee that I would consider the matter.

We have lodged amendments that will create a period of compulsory supervision in a prisoner's sentence when they are released back into the community. The suggestions on what the period should be in the evidence that the committee received varied from three months to a year. Clearly, there is a broad spectrum of views on how long the period should be.

I am conscious that I have received evidence that the six to 12 weeks after a prisoner is released are the period of risk in relation to ensuring that the prisoner is reintegrated into the community with the right services and support in place and the right connections made with

agencies and organisations. I have considered how we can achieve that in a three-month period and how to allow greater scope for prisoners who require a slightly longer period of support in the community and in which any additional issues can be picked up.

After considering the committee's evidence and the issues that the period is meant to address, we saw six months as a reasonable period in which to address those matters. However, the issue is about not just time but the quality of the work.

It is important to recognise that, even though someone will have a six-month period of compulsory supervision when they are released from prison, a significant body of work must be done for long-term prisoners before they are released. That work takes place in the prison estate and includes the reintegration plan. The right connections need to be made so that they are established prior to an individual's release.

Six months is a reasonable time to address any issues that arise when a prisoner is back in the community, alongside the reintegration plan, which the prison will have started in the build-up to their release.

Alison McInnes: Given that some of these people will be the most intransigent prisoners, who have not engaged at all, so the Parole Board for Scotland has felt that they could not be released, are you satisfied that your proposal is strong enough?

Do you envisage a softening from the compulsory period into further support in the community at the end of the six months? You might not see a clear break, but perhaps there could be a shading of the support that was available following the compulsory period of six months.

Michael Matheson: On your latter point, part of reintegrating a prisoner into the community—particularly a long-term prisoner—involves helping to re-establish them in the community. Some of that re-establishment does not involve the statutory services; it concerns other aspects, such as employment, and it might involve other support groups. There may be benefit from making local connections to support and sustain the individual.

The six months will be a statutory period in which that work can take place. That is a fixed period when such intensive work can be undertaken. It should be ensured that the approach and the connections that are made are sustainable and will live beyond the six-month period.

If the court has concerns about when an individual is to be released, for example, there is the option of an extended sentence. The six-month period should be used for creating connections so that, when someone goes back into the community, they make sustainable connections that are not just for the six months.

Could you remind me of your first point?

Alison McInnes: Some written evidence has suggested that prisoners who might be released in such a way might not have engaged with the Scottish Prison Service as they served their sentence. That would perhaps be why the Parole Board thought that it was not appropriate to release them under parole. That group of prisoners might be quite intransigent and not open to change. Are you sure that six months will be long enough for them?

Michael Matheson: Such prisoners would get automatic early release at two thirds of their sentence under the present arrangements, and the Parole Board has no control over the matter whatever. They will now be in the prison estate for an extended period beyond the two-thirds stage, and it will be clear that, if they wish to receive parole release, they will have to engage with the appropriate programmes to address any issues as the Parole Board considers appropriate. There will be an incentive.

I am conscious of some of the evidence that the committee heard at stage 1. If a prisoner knows that they will automatically be released at two thirds, why should they engage? Why bother participating in programmes? That factor will be removed. The Scottish Prison Service expects and believes that demand for programmes will increase as a result of ending automatic early release. It is working on that principle, given that prisoners will no longer have that automatic release. I understand the point that you make, but we also get a benefit from reducing the scope for individuals to be released automatically, irrespective of whether they have engaged.

It is open to a prisoner with an extended sentence—who, under the proposed provisions, will have to serve their whole sentence in custody, and who might then have another year, two years or three years of an extended sentence—to choose whether to engage with services while they are in prison. They cannot be compelled to do so.

I am conscious of the need, which the committee has raised with me, to ensure that programmes are readily available and that prisoners who want to engage with them, which they are encouraged to do, can participate in them. I know that the Scottish Prison Service is pursuing that work now, on the back of the inquiry that the committee undertook on aspects of the issue in 2013. We are removing the automatic element at two thirds of the sentence, which

means that, if the prisoners concerned want parole release earlier, they will have to participate in programmes to address their offending behaviour.

Alison McInnes: If I could ask finally—

The Convener: Is your question on the same issue?

Alison McInnes: No—I am going to talk about resources.

The Convener: Before you move on, I point out that, on one occasion when we had SPS witnesses in front of us, Colin McConnell made the point that the interaction with prison officers should not stop when the prisoner leaves prison. His view was that prison officers could have a role outside, just as social work could have a role inside, so that there is more of a melding, rather than a sudden break. Are discussions taking place with the SPS about prison officers' role in following somebody who has been on a programme in the prison when they continue with it outside, and vice versa—social work following people in the prison?

Michael Matheson: That is not only being discussed; some of it is already happening. For example, at the tomorrow's women centre in Glasgow, we have prison officer staff in the team in the community. They deal with women who have been in prison and who are back in the community—those staff work alongside housing, health and social work officials and the police to develop sustainable approaches to support those women back into the community.

Such work is going on, but we can certainly do more in that area. There is no doubt that prison officers recognise that their role is changing. As part of the work that we are doing in remodelling and taking a different approach to the female prison estate, we are looking at prison officers working in an entirely different environment from the one that they work in at the moment with female offenders. It will be a much more community-based environment, in which prison officers will be much more part of a multidisciplinary team.

Elements of that work are under way. Will more of it happen in the future? I certainly believe that things have to move in that direction.

The Convener: Thank you—sorry, Alison.

Alison McInnes: I will move on to resourcing. For the measure to be effective, criminal justice social work services need to be adequately resourced. What consideration have you given to that in the context of the proposed changes to the bill?

Michael Matheson: In response to the committee's recommendation, we have set out a range of figures that indicate the additional costs of the amendments for the prison estate, social work, the Parole Board and the other agencies that will be involved from the bill coming into force in 2016-17, say, right up to its being fully implemented in 2030-31. We have made it clear that we will meet any additional costs that are associated with the amendments.

However, as I have mentioned to the committee at least once, far too much of our resource in the criminal justice system is caught up in dealing with short-term offenders who go into and out of prison constantly. If we want to free up the resource in our prisons to allow them to deal much more effectively with long-term offenders—those who pose the greatest risk to our communities—we need to be much more intelligent about how we use our prison estate.

As Henry McLeish's Scottish Prisons Commission set out, the estate must be used much more effectively to deal with those who pose the greatest risk to our community. Therefore, I want to consider measures that will reduce the demand on the front end of our prisons, not just so that we release resource that can be better utilised in the prison estate but so that we can utilise resources in the community setting much more effectively.

It will take time to reset the balance. I mentioned the work on the prison estate that we are doing in relation to female prisoners. We are also doing work in relation to the prison estate for male prisoners, with a view to using prison much more effectively for those who pose the greatest risk. We want to use alternative disposals much more effectively for short-term offenders who could be diverted from prison or who could serve their sentence in a much better and more appropriate way that is less resource intensive than their doing so in the prison estate.

The Convener: Does Rod Campbell's question follow on from that? John Finnie and Gil Paterson want to ask supplementaries.

Roderick Campbell (North East Fife) (SNP): I am happy to wait.

John Finnie (Highlands and Islands) (Ind): Good morning, cabinet secretary. I understand that we are talking about a manifesto commitment and that you are prepared to put up the money to meet it. We have been told that the cost will be £16.724 million by 2030-31. That is more than half the present budget for community justice, which is £31.8 million. You talk about only the people who pose a risk being in prison, but you must have a projection for offsetting the cost of keeping those offenders in prison longer, if the bill goes through. Can you give us that projection?

10:15

Michael Matheson: The figures are based on the assumptions about what the bill provides for and they are purely to do with the bill. They do not take account of other changes that are to be introduced in the system, such as a presumption against short sentences, greater use of alternatives to custody, changes in sentencing practice, which the Scottish sentencing council will help us to address, and alternatives to the traditional custodial estate. The figures do not take into account a variety of things because they are purely to do with the bill.

I have a practical example of where we are. Polmont young offenders institution is sitting at half capacity because we are now much more effective at dealing with young offenders through diversions and alternatives to custody. That effectiveness will start to feed into the adult prison population and lead to progressive change in our estate. We could do other things to accelerate that and we are prepared to do them.

It would be overly simplistic to think that the figures that we have set out mean an additional cost that we will have to cover with additional money. With the other changes that we propose to make in the system, we will free up resource to be used better in delivering programmes for long-term offenders and more effective community disposals.

I cannot just switch off resource to the prison estate, because it requires that resource. I want the number of community disposals and alternatives used to increase, but we are in a period of financial restriction, so I have to find a balance. Some of the work that we are doing around the prison estate will release resource so that it can be used more imaginatively.

John Finnie: I certainly support that. I probably did not express my question properly. Is there any way for you to make a projection? For example, will we end up not requiring Polmont? Are there any implications that would ultimately reduce the top-line figure? We have had representations from organisations such as the Howard League, which says that we have been told that the direction of travel is to reduce the prison population. However, we are looking at a sum that is more than half the current sum for community disposals.

Michael Matheson: I was a wee bit surprised at the Howard League's comments; it appears to be looking at the issues in isolation.

John Finnie: With respect, is that what you are doing when you say that we are looking only at what the bill provides for?

Michael Matheson: I am saying that the Howard League's comments are based on the bill, but other aspects to our penal policy are about reducing the number of prisoners in the system. For example, our work on women offenders is about reducing the number of women in our prison estate.

We have to look at the whole issue rather than aspects in isolation. The figures that you have asked about were produced purely to illustrate what could happen if we introduced the bill and did nothing else, but we are not doing nothing else.

John Finnie: Are there figures on the horizon that would offset the cost? What sort of timeframe are we talking about?

Michael Matheson: It is difficult to say, because the figures are assumptions based on existing sentencing practice and current rates of offending behaviour. If those things change, the figures will alter. The prison estate has to work on assumptions and a range of variables around potential demand in the system, which it does not control. It is difficult to say that prisoner numbers will be at a certain level by a certain date, because there are many variables to take account of.

We can take forward the policy areas in a much more integrated way. We need to make sure that the provisions on community alternatives and diversions, for example, are much more closely linked to the way in which we pursue policy in the prison estate to utilise resource and apportion it to meet the different demands.

I am hesitant about getting into arbitrary figures because there are so many variables that it is challenging to come up with a specific figure that would be accurate in the long term.

Gil Paterson (Clydebank and Milngavie) (SNP): My question is along similar lines. In early release at present, housing, social work services, welfare and benefits are in place and budgeted for. It is not your budget but somebody else's—it is taxpayers' money. There is no reference to that in your tables to allow us to get a picture of the real costs. We can see additional costs for the Prison Service, but if people are not in the community, which is what the bill will mean, they will be in prison and the money will not be spent in the community. Do you have any figures for the cost of all the services that will not be provided in the community but will be provided in prison?

Michael Matheson: There is a challenge for us in being able to provide those figures. We can provide figures for the Prison Service and criminal justice social work, because those are pretty much fixed costs that we can identify. The cost for individuals who are in the community depends on their status at a given point and what services they are engaged with, so we do not have the same general fixed costs. If you are asking me about the costs of alternative disposals against those of a

custodial disposal, we all know that the cost of community provision is significantly lower than that of delivering services in the prison estate. However, because there are so many variables for an individual's circumstances before they end up in prison, it is difficult to estimate what those costs would be.

Gil Paterson: Some of the figures are quite significant when we add them up, such as provision for housing, which local authorities need to make. There is also social work, which is also the responsibility of local authorities, and benefits, which are reserved. When we want to make a change, people just see costs going in, but they are not the real costs. We know the costs for the Prison Service, but there are also savings—I hate to use that word; "offsettings" is the right one. It would be worth setting those out to sell the reform programme to the wider public, because we are not being given the real costs.

Michael Matheson: It starts to become a bit artificial when we try to determine the actual costs, but there is an element of offset cost associated with someone who is in the community, who might not be in touch with criminal justice social work if they get housing benefit and other support. However, because individual circumstances are so variable, it is extremely difficult to come up with clear figures whereas, in the prison estate, we have fixed costs that we can clearly identify for an individual.

It would be overly simplistic to think that the £17 million is what the additional costs will be. Those are the additional costs if we do not take into account the offset that you mentioned and if we did nothing else in the system. It is simply not the case that we are doing nothing else and that is why I was a wee bit surprised at the view of the Howard League for Penal Reform on the matter.

Gil Paterson: Thanks.

Roderick Campbell: Before I ask my main question, I have a small question on the six-month mandatory period of supervision. Some critics have suggested that, at the moment, we deal with automatic early release in a proportionate way and that moving to a six-month period would mean that we lose that proportionality and therefore distort sentencing. What are your comments on that?

Michael Matheson: I am not entirely sure that automatic release at two thirds of the sentence is proportionate because the Parole Board for Scotland does not have any control over it. However, parole release is proportionate. In considering an application for release, the Parole Board can determine whether it thinks that the person is suitable for release at that point, given their circumstances and, for instance, what programmes they are going through.

The six-month period is to ensure that we reduce the risk associated with someone reintegrating into the community and that we support them, because we know that there are particular risks when long-term prisoners move back into the community, particularly during the six-to-12-week period that was mentioned. The six-month period will allow them to re-establish themselves and allow for any individual measures that are necessary to support them in getting back into a community setting. I therefore do not view automatic early release at two thirds as being proportionate.

Roderick Campbell: On 20 January, we heard some figures from John Watt of the Parole Board, who said:

> "it is clear that those who are released on non-parole licence—at two thirds of the way through their sentence and without an assessment of risk—tend to be recalled in significantly greater numbers than those who are released on parole licence, where there is an assessment of risk."—[*Official Report*, *Justice Committee*, 20 January 2015; c 24.]

You subsequently gave evidence on 3 March, and that evidence is incorporated in the amended financial memorandum, at paragraph 34. More recently, we have also received evidence from Dr Monica Barry indicating that those released automatically pose fewer risks than those released by the Parole Board. What would you say to that?

Michael Matheson: I have not seen Monica Barry's research, so I cannot comment in great detail, although it appears to suggest that parole release is less effective than automatic early release, which I am somewhat surprised at. It seems to suggest that the Parole Board is in some way making things worse, and I would be surprised if that were the case. However, as I said, I have not seen the research in detail, so I cannot comment on it in depth. Once we have had an opportunity to look at it, we can consider those issues in greater depth.

The last time I gave evidence, we mentioned the figures for 2012-13, when 476 prisoners were subject to supervision in the community after parole release and 403 were subject to supervision in the community after non-parole release. The rate at which non-parole release prisoners breached their licence conditions was 37 per cent, compared with 5.5 per cent for parole release prisoners. That means that someone is in effect seven times more likely to breach their licence conditions if they receive non-parole release. Prisoners were five times more likely to be recalled to prison for breach of their licence conditions in that year if they had been automatically released rather than parole released. The figures for that year give a clear illustration of the difference, and you have also heard other witnesses refer to those differences.

Roderick Campbell: At the very least, Mr Watt's evidence suggests that, as far as recall to custody is concerned, both you and the Parole Board seem to be taking a different view from that of Dr Barry.

Michael Matheson: We are. As I say, I have seen only the headline figures, so I am a wee bit surprised, because Dr Barry's evidence seems to suggest that the Parole Board makes the matter worse. I think that most people would be surprised at that, given the level of detail and consideration that the Parole Board gives to prisoners prior to release. However, the figures for 2012-13 give a good illustration of the difference over the course of a year.

The Convener: I am getting a bit muddled here. The six months is compulsory, and people do the six months on licence as part of their sentence. Conditions will be attached to that licence, so if someone breaches them, they will be back in prison, I take it.

Michael Matheson: They would be recalled.

The Convener: I just wanted to make it plain.

Michael Matheson: The conditions will be set by the Parole Board as well.

The Convener: So what is the difference between that and parole?

Michael Matheson: It is similar to what happens when a person receives parole release. The board would consider what measures have to be put in place. For example, a prisoner can apply for parole after serving half of their sentence, and the reality is that the vast majority of long-term prisoners will receive parole release. In order to achieve that, there are certain things that prisoners have to go through before the Parole Board will come to a determination on whether they are fit for parole. When parole is allowed, the board sets conditions.

The difference with the six-month period is that it is to support prisoners' reintegration into the community. The Parole Board can also set conditions to support their reintegration into the community.

10:30

The Convener: A person does not have the option of serving their entire sentence and coming out scot-free, as it were, with no conditions.

Michael Matheson: No. That is for the very reason that the committee highlighted in its report—because of the risks associated with that.

The Convener: I understand now. Whoever a person is, if they do not have parole, they will come out after six months but will still serve a prison sentence under supervision out in the community.

Michael Matheson: They will come out six months prior to the end of their sentence, not after six months.

The Convener: No. The six months is part of their sentence.

Michael Matheson: Yes. It is part of their sentence, to address the risks of going back into the community.

The Convener: Yes, I understand now. A person will come out and not have finished their sentence. It will still be their sentence, but they will serve the six months in the community. They will not have the option of saying, "I'm just going to stay in prison for the next six months," and then coming out and it will not matter.

Michael Matheson: Yes. That is in the sentence because that creates the legal provision in which the Parole Board can set conditions. If that is not in the sentence, there is not the authority to do that.

The Convener: So it is about ensuring that there is reintegration.

Michael Matheson: Yes. It is mandatory.

The Convener: I understand, although I know that it does not sound like it—at least I think that I understand.

Is Roddy Campbell finished?

Roderick Campbell: Yes. I am happy to leave it.

Elaine Murray (Dumfriesshire) (Lab): The financial memorandum puts the cost of increased demand for prisoner programmes at only £171,000 by 2030-31, and the cost kicks in in 2019-20 at £43,000. Is it possible that there will be greater demand for prisoner programmes under the new regime, particularly if prisoners think that taking programmes will make them more likely to get parole? Are those sums really sufficient?

A question that my colleague Graeme Pearson posed some time back—I do not have the answer with me—indicated that around 100 sex offenders who had been assessed would have benefited from the sex offender programme, but they were not on it. Is it possible that, because of the changes, we will need to front-load the prisoner programme provision to ensure that there are not European convention on human rights issues, for example, because people have not been able to access programmes?

Michael Matheson: Those figures are assumptions that are based on a snapshot here and now of the implications. I think that the SPS

indicated in its evidence to the committee that it expected increasing demand for prisoners' participation in programmes as a result of the ending of automatic early release. The SPS has had its purposeful activity review, which identified issues with access to certain types of courses and psychological service provision, and it is about to commission work to look at taking those matters forward.

As I mentioned earlier, our biggest challenge in the prison estate is that so much of the resource is tied up in dealing with the churn of short-term offenders. Like any other public service, the Scottish Prison Service has to live within its budget, and that budget has grown ever tighter during this period of austerity. The SPS must deliver as many effective programmes as it can within its current budget. If we can release some of the significant amount of resource that is tied up in dealing with a lot of shorter-term offenders, that will release resources that will allow us to expand and develop programmes in the prison estate. There is a balance to be struck in trying to achieve that.

The figures are based on assumptions, and they could vary in-year and across several years. They are based on the present figures.

Elaine Murray: I hear what you are saying about short-term prisoners, but only around 10 per cent of the prison population consists of short-term prisoners at any one time. They go in and out, and the longer-term prisoners are there for longer periods of time. Even if we could deal with that situation, people will probably not participate in the prisoner programmes so much if they are there for only short periods of time. Would it address the balance if we could deal with that?

Michael Matheson: The proportion is smaller on a given day, but thousands of prisoners are in and out of the system over the course of a year. There is a big turnover. We should not underestimate the amount of resource that the SPS has to dedicate just to managing that. It has to be much more effective in dealing with it. As Henry McLeish said in the report of the Scottish Prisons Commission, that resource must be used much more effectively and be targeted at those who pose the greatest risk to our community. At the moment, a lot of the resource is tied up in dealing with those who pose the lowest risk, which means that we do not have the level of resource that we wish to have to help those who pose the greatest risk. That is not to say that a lot is not being done in that area, but of course we could do more. The resource could be used much more intelligently and effectively if we had less of that churn of short-term prisoners.

Elaine Murray: If the SPS review, which you refer to in the revised memorandum, identifies an increase in the need for provision of programmes—including psychology programmes, which are pretty important—that is considerably greater than we can provide for at the moment, will the resources be there for them?

Michael Matheson: If there are additional resource demands at some point, we will have to look at those and try to address them as effectively as we can, to ensure that the SPS can deliver the necessary programmes. That could be years from now, so I could be making a commitment that someone else may have to live with, but I am certainly committed to ensuring that we try to provide the necessary resources for the SPS to do its job as effectively as possible.

Christian Allard (North East Scotland) (SNP): When the bill was brought before us, we talked about its aim of public safety and ensuring that long-term offenders do not go through cold release. We learned that people are very often cold released in the present system and that there is a case for changing the system for the public's protection.

Sacro—formerly the Scottish Association for the Care and Resettlement of Offenders—talked about the balancing act and ensuring that we talk about public protection. It said that the mandatory supervision period could be only three months. It may make more sense to have a shorter mandatory period; it could make it easier to engage long-term offenders who do not want to engage if they are focused on a three-month period. I agree with Sacro that a shorter period may focus those people's minds.

Michael Matheson: The evidence that you received from Sacro would have been largely on the six-to-12-week period that is often considered to be key for a prisoner going back to a community, when there are significant risks to manage.

We have tried to strike a balance. You have also heard evidence from people who think that the period should be a year, and some people say that the period should be proportionate to the length of sentence served, although I do not agree with that. The reason why six months strikes the appropriate balance is that, although there might be prisoners for whom the three-month period is sufficient, there will be prisoners for whom it will not be sufficient. The six-month period will give a level of latitude that will, I hope, address the issue of those for whom three months is not sufficient to deal with matters when they move into the community.

Having listened to the evidence that the committee received and the views that have been expressed, I have considered what is a reasonable timescale to deal with these matters. Six months is our preferred option, which I believe

will be a sufficient period for reintegration into the community for the vast majority of prisoners.

Christian Allard: I understand that it is a judgment call. However, the bill will not be implemented before 2019, so there will be plenty of time to prepare for this. We would have thought that you could concentrate the minds of service providers to ensure that a three-month period, instead of six months, is effective.

Michael Matheson: In time, people might say that the six-month period could be shortened. It is important to note that the release of a prisoner is not dependent on just that six-month period; the preparatory planning work in prison is important as well. For example, we know that housing issues can prove to be a deal-breaker for how effectively a prisoner can move back into the community and sustain themselves there. The work that we are doing in Perth just now on managing that more effectively involves a partnership between the housing service and the Prison Service. The ministerial task force on offender reintegration, which I head, is about ensuring that health, housing and a range of services work in a much more joined- up and co-ordinated fashion.

Section 2 of the bill is informed partly by our wanting to have flexibility on days of release in order to support the reintegration of a prisoner into the community. It is in all our interests to do everything possible for a prisoner who has served their punishment in prison to reduce the risk of that individual committing other offences, and the reintegration element is a key part of that. The reintegration plan will start prior to a prisoner being liberated from prison in order to get things planned and in place before they move back into the community.

The six-month mandatory supervision period will give us the added security of being able to recall an offender if we feel that their behaviour is unacceptable, but it will also enable a clear focus on the type of support that is necessary during that period.

Christian Allard: This is my last question. Given the six-month mandatory period that will be delivered through the involvement of the Parole Board, can you say that you will have removed the word “automatic” from “automatic early release”?

Michael Matheson: The principal reason for the bill is to end the automatic right to early release after two thirds of a sentence has been served, and that is what the bill will achieve. However, we are also creating provision for a mandatory period of supervision in the community to support a prisoner’s reintegration into the community. As the convener correctly pointed out, it is not an optional but a mandatory period that a prisoner will have to complete. The long title of the bill needs to reflect that there is no automatic element to that, though.

The Convener: Gil?

Gil Paterson: My question has been covered.

The Convener: John?

John Finnie: Similarly, my point has been covered.

Elaine Murray: Finally, cabinet secretary—

The Convener: Not finally, because I might have something to ask.

Elaine Murray: Sorry, convener.

What sort of discussions have there been with the Convention of Scottish Local Authorities on the implications of the proposed changes for local government, cabinet secretary?

Michael Matheson: The discussions that we are having with COSLA just now are around the Community Justice (Scotland) Bill, the reshaping of community justice and the creation of community justice Scotland. Part of that will see significant reform of the way in which we deliver community justice provision in the future. Discussing the impact of the Prisoners (Control of Release) (Scotland) Bill will be part of that overall approach.

The Convener: Is that us? I did not have another question.

Elaine Murray: It was you being awkward.

The Convener: I am not known for being wicked.

I thank you very much for your evidence, cabinet secretary. I inform members that we will take further evidence on the amendments from Professor Fergus McNeill and Professor Cyrus Tata tomorrow morning from 10.30 and we will consider the formal amendments on 2 June. Thank you very much.

10:43

Meeting suspended.

10:45

On resuming—

Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill

The Convener: We move to item 3.

We are taking evidence today from two panels of witnesses. I welcome the first panel: Lesley Thomson is the Solicitor General for Scotland, and Stephen McGowan is a procurator fiscal in major crime and fatalities investigation at the Crown Office and Procurator Fiscal Service—and has a longer title. [*Laughter*.]

We go straight to questions from members.

John Finnie: Good morning. In a lot of the evidence we have heard, there has been reference to family interest. Families take varied forms nowadays—there are extended families and other different types.

What is the "family" that you have in mind when you make decisions? Will you also comment, please, on the balance between the family interest and the public interest?

Lesley Thomson (Solicitor General for Scotland): We use a wide interpretation of "family", because we have learned over the years not to be restrictive about that. In many families, there will be groups that we will require to meet and to provide information to separately. Although there is, in general life, what is understood to be a traditional family group, we do not apply that in-house.

We find on many occasions that families have different views on how much information they want, how they want to receive that information and, in fatal accident inquiries, whether they will attend or get their information via the Crown.

John Finnie: Regarding the public interest, what takes precedence?

The Solicitor General for Scotland: Are you asking whether the family interest takes precedence over the public interest?

John Finnie: Yes.

The Solicitor General for Scotland: The family interest is part of the public interest, and no decision is made on whether there will be an inquiry without the views of the family having been taken on board.

John Finnie: What would happen if the family said no to an inquiry, but the public interest was compelling?

The Solicitor General for Scotland: There would be a fatal accident inquiry. That does happen and it can be difficult—just as difficult as explaining why there is not to be an inquiry to families who want one.

John Finnie: We have received a late communication from Mr Marshall, who is the president of the Society of Solicitor Advocates. He writes about the different aspects of public interest—

"the public interest in the enforcement of the criminal law by prosecution and ... in lessons being learned for the future by the holding of an FAI."

Will you comment on that? Are there tensions?

The Solicitor General for Scotland: No, there are not tensions; rather, there are different decisions at different points. The public interest encompasses all those things at different times. Ensuring that someone who has been involved in criminality is brought to court is the public interest that takes precedence at that stage. That is why, if there are criminal proceedings, there is not always an immediate decision on whether there should be a further inquiry, because an inquiry relates to different aspects.

In the example that John Finnie gave—which we all have at the forefront of our minds—the question is what lessons can be learned.

John Finnie: There is a lot of work taking place in the background that is by nature confidential; the public will not be aware of it. Where there is a compelling public interest—say, about public safety—how is the public kept advised without procedures being compromised?

The Solicitor General for Scotland: Do you mean while the investigation is on-going?

John Finnie: Yes.

The Solicitor General for Scotland: If there were compelling issues while the investigation was on-going, the Crown would feel bound to share those with various authorities so that steps could be taken. It is not unusual during an investigation for remedial steps to be taken.

At the start, it may be thought that a matter will have to be inquired into in public by a fatal accident inquiry. By the time that all the investigations, reviews and remedial actions have been taken, there may be nothing left that requires to go into the public domain for further public scrutiny.

John Finnie: Are such remedial steps advised to the public as and when they happen?

Stephen McGowan (Crown Office and Procurator Fiscal Service): Such remedial steps are regular occurrences. During investigations, the Health and Safety Executive or accident investigation branches and bodies of that nature regularly put out material on public safety in order that any public safety aspects can be taken into account quickly.

We also have an arrangement with Healthcare Improvement Scotland so that similar things can be done in the medical sphere. Although a criminal inquiry may be on-going, steps can be taken immediately if a particular issue of public safety needs to be addressed. That is fairly routine and happens regularly in the types of case that I have described.

The Convener: I cannot recall whether John Finnie asked a supplementary on the family in cases where there will not be an FAI. Under the bill, when certain parties ask why an FAI is not going to take place, the Crown is obliged to provide an explanation. Should that be automatic?

The Solicitor General for Scotland: Do you mean in relation to putting in the public domain reasons why there will not be an FAI?

The Convener: Section 8, which is entitled "Reasons for decision not to hold an inquiry", says that the Lord Advocate must give reasons to a spouse, civil partner or nearest known relative, which basically means that relatives can ask why an FAI is not being held. I do not think that it is necessarily a public issue; whether it then goes public is another matter.

On the other hand, if you are not going to hold an FAI, you could just tell people why not, rather than have them request a reason. They may not be in a state to ask, or they may be unsure of things or unaware of their rights under the law.

The Solicitor General for Scotland: I have no difficulty with that.

The Convener: So you would not be unhappy if such a process was automatic.

The Solicitor General for Scotland: In practice, we currently provide the reasons. We have been considering other ways in which we could ensure that families are continually kept advised of progress.

The Convener: Do you mean keeping them advised in writing, which would be different?

The Solicitor General for Scotland: Yes.

The Convener: You have no problem with that being automatic: if you are not going to hold an FAI, you just tell the relatives.

The Solicitor General for Scotland: Yes. In practice, that is what happens.

The Convener: The bill does not need a section on a reason being requested.

The Solicitor General for Scotland: I do not think that reasons need to be requested—

The Convener: That is what the bill says at the moment.

The Solicitor General for Scotland: We do it automatically.

Stephen McGowan: Potentially, we would do that automatically to a wider group of people than the bill suggests. The Solicitor General described the dynamics of the family—

The Convener: The bill says:

"the Lord Advocate must give reasons in writing if requested",

but we do not need the words, "if requested".

One of my colleagues, Margaret Mitchell, who is not here, was chasing the issue of early hearings, which Lord Gill—very convincingly, obviously—swept to the side for various reasons. What is your view about early hearings to keep the Crown on its toes?

The Solicitor General for Scotland: I have been thinking about that. I, too, am of the view that it is not possible to use the court system for early hearings because it would require sheriffs to take control of cases that were never going to reach them. It is important—a lot of people have raised this—to have in place a set process so that families know what is happening at the various stages and so that there is an element of control over the timescale.

I have asked the Crown Office team in the Scottish fatalities investigation unit to produce a charter that would be in the public domain and would indicate the various milestones. In relation to early hearings, the equivalent at the investigative stage would be a hearing or a meeting—whatever you want to call it—set by the fiscal at a certain time. What I have in mind at the moment is three months from the date that the death was reported. At that point, the fiscal would be required to provide to the family specific information on the stage at which the investigation is and the timescale for it.

It would not be about saying, "This is the decision". It would be about saying what has been done, what needs to be done and when the next meeting will happen. It would be up to families whether to turn up. It is important that the Crown sets that. We are working on that—we will consult on that milestone charter with the various victims groups and a number of the groups that have given evidence, and we will publish the results of that consultation.

The Convener: Would it be possible for that information to be available before stage 3 of the bill? I appreciate the timescale, but that would mean that Parliament would have an idea of progress by the Crown on the charter.

The Solicitor General for Scotland: When is that?

The Convener: Stage 2 is not until after the summer. It would be good to have the information before stage 2, but that might be a bit of a push.

The Solicitor General for Scotland: I have it in mind that we will have the consultation done by the end of the summer.

The Convener: In that case, it would be handy to have the information before stage 2, when we will consider amendments.

The Solicitor General for Scotland: I can give that undertaking.

The Convener: Thank you very much. Rod Campbell is next.

Roderick Campbell: Thank you, convener. You asked one of the questions that I was going to ask—

The Convener: I am sorry about that. It was because John Finnie had left that area of questioning.

Roderick Campbell: I move on to evidence that we heard from trade union representatives. When Mr Tasker gave evidence on 12 May, he expressed the view that

"new diseases or exposure to new industrial processes should be subject to mandatory inquiry."—[*Official Report, Justice Committee*, 12 May 2015; c 8.]

If we accept for the moment that the bill does not provide for that, but provides for a discretionary inquiry, can you advise on how the Crown would approach a new disease or new industrial process? What reassurance can we have that discretion would be exercised such that there would be a fatal accident inquiry in respect of a death in a new process?

The Solicitor General for Scotland: That is exactly the type of situation where discretion would be exercised on whether to have an inquiry because, irrespective of whether it was a new type of industrial process or a new disease, there would be public concern about the issues surrounding its not having been aired before. Our holding an inquiry would fall into the category of erring on the side of caution because there had not been previous public scrutiny, especially if there were serious concerns about a new industrial process. I do not feel that it would be necessary to have such cases in the mandatory category because there are all sorts of difficulties around definition, but those are exactly the types of situation that would lead to discretionary FAIs.

Roderick Campbell: We have also heard evidence—the issue was highlighted particularly by the trade union witnesses—about the importance of a statement of fact. Will you comment on that?

The Solicitor General for Scotland: I am not entirely sure what they meant by that.

Stephen McGowan: I, too, was not entirely certain what the trade unions meant by that. If I recall, the example that they gave was that that happens in aviation accident investigations. I think that our nervousness in relation to that would be about how reliable the facts would necessarily be after three months. Any comment at that stage that goes further than saying that an accident has happened could set expectations for the investigation, or set public expectations, in a way that would not be helpful, in respect of what had happened.

I am not entirely certain what the trade union representatives envisaged. There is a unique set of circumstances in aviation accidents: to say that such accidents have general application to deaths when the causes of the deaths in an aviation accident may not be known, because of the complexities that are involved, may cause difficulties in terms of prejudicing future investigations and, more important, pre-judging where investigations may lead once they have run their course.

The Solicitor General for Scotland: At the point when a decision is made to hold a fatal accident inquiry, the Crown's petition now includes the issues that will be raised; it does not just say that an inquiry should be held. The practice has developed—I will ensure that it is embedded under the new preliminary hearings system within the Crown—of providing a list of issues at the earliest stage of the inquiry hearing, which will be the preliminary hearing, and all parties can then add to that. There is therefore, when the FAI starts, a clear understanding of all the issues that everybody wants to be covered.

Roderick Campbell: Thank you.

11:00

Gil Paterson: To return to Roderick Campbell's question about mandatory FAIs on deaths resulting from industrial diseases, would automatic referral impact on budgets? We know that lots of people who suffer from asbestos-related diseases require legal aid. Would that divert the finite justice budget and its resources? Is there a prospect that legal aid for other matters would be restricted?

The Solicitor General for Scotland: If FAIs on deaths from industrial diseases were mandatory, that would increase the number of inquiries. We consider that such a requirement would lead to a large increase, and that many would involve repetition of issues.

As far as legal aid is concerned, that is not a matter for the Crown Office beyond indicating that

were more demands to be made on the same resource, there would be a conflict.

Gil Paterson: It would have an impact.

The Convener: We are told that the issue is not about the money, but about having mandatory FAIs in respect of new industrial diseases. It is not to do with whether there would be more impact on funding; rather, it is to do with whether that would be appropriate.

The Solicitor General for Scotland: Yes—it is to do with whether that would be appropriate. I have talked about new industrial diseases or new industries. That is exactly the situation where we would anticipate that discretion to hold a fatal accident inquiry would be exercised.

Jayne Baxter (Mid Scotland and Fife) (Lab): Good morning. The committee has heard concerns that the systems for investigating deaths many not be human rights compliant. What steps does COPFS take to ensure that our obligations, under human rights legislation, to investigate deaths are met?

The Solicitor General for Scotland: The Scottish fatalities investigation unit, which is an independent unit in COPFS, investigates deaths. The unit ensures that all evidence is gathered, and that expert reports are prepared if necessary. Thereafter, if issues require public scrutiny, the matter would move to a fatal accident inquiry. Thus, the two strands of effective investigation and public scrutiny are ensured.

If there are issues that have been resolved and remedial action has been taken, the Crown Office would want to ensure that that action has been taken by the relevant organisation. I think that Mr McGowan made reference to our work with the national health service to ensure that any practices discovered during an investigation are taken forward. All that has the effect of ensuring that the investigation has been effective, that the matter has been scrutinised and that action has been taken, as a result.

Jayne Baxter: Should FAIs be mandatory for deaths involving looked-after children or people who are the subject of mental health detention?

The Solicitor General for Scotland: The balance in the legislation is appropriate. The purpose of mental health detentions is care of individuals. There would therefore not be the same public concern about, for example, people who are in police custody or prison, for whom there is an element of punishment as well as care.

If you look at deaths under mental health detentions, you will see that there are a large number of natural deaths. I expect that it would cause distress to families if an FAI were mandatory for all deaths. There must be an effective reporting system, such that all those deaths are reported to the procurator fiscal. We have been doing work to ensure that there is an effective reporting system.

Thereafter, there would be an independent investigation by the Lord Advocate, which would be independent of all the other organs of state. If there was also a review or some form of inquiry, for example by the Mental Welfare Commission, consideration would have to be given to ensuring that everything was in the public domain in order to ensure that the inquiry was human rights compliant. If not, it is for the Lord Advocate to ensure that the investigation and outcome are article 2 compliant. If the situation was not covered in any of the other ways, a fatal accident inquiry would be required. Ultimately, that is the final safeguard.

The Convener: I return to the subject of mandatory inquiries concerning

"a child required to be kept or detained in secure accommodation"

under section 2(4)(b). I posited to the Lord President a situation in which a child who was under state care by order of the court for their own good or for the good of the public might be out and about—they might not be physically within that secure accommodation. Would that provision apply in such a case? It refers to a child who is "required to be kept". Does the child have to be physically in the secure accommodation for the provision to apply?

Stephen McGowan: They have to be "kept or detained", so I think that a child who is otherwise with foster carers or who is elsewhere—

The Convener: No, I did not mean that; I mean a child

"kept or detained in secure accommodation"

who might be out and about and required to come back. Such things happen: the children are not kept in all day long. If they were out and about when something happened, would that provision apply?

Stephen McGowan: Do you mean out and about as in they go back and forth to school?

The Convener: Yes. They might have gone to school, for example, and might not have come back to the secure accommodation when they ought to have done. Would that provision apply?

Stephen McGowan: Section 2 talks about

"a child required to be kept or detained",

so, arguably, it would apply.

The Convener: Even if they were not physically within the building.

Stephen McGowan: Yes, even if they have left it on the day concerned. It would be helpful to have in the bill clarity about the legislative intent with regard to the situation that you describe, where the child may be out for the day, whether at school or elsewhere.

The Convener: So it is not clear. There would have to be some other wording.

Stephen McGowan: You could interpret it in the way that you describe, but there may be challenges. You raise a very fair point, and in order to have absolute clarity it would be better to—

The Convener: I am thinking of a case of a child who was kept in such accommodation for their own protection and who broke out and wandered about for two days before they were retrieved. If something had happened in that period, that would not necessarily have—

Stephen McGowan: If the child broke out, I would be comfortable in interpreting the provision as if they were in the accommodation. I can imagine a situation in which a child who was being kept in secure accommodation was in mainstream schooling and therefore travelled to or from school. There is a shade of grey around such situations that may be worth clarifying. If, however, the child broke out and absented themselves from the place where they were being kept—

The Convener: Or if a door was left unlocked or something like that.

Stephen McGowan: Yes—

The Convener: It would be different if a door was left unlocked.

Stephen McGowan: I think so.

The Convener: And if something then befell them.

Stephen McGowan: Yes. Technically, the child should have been in the place where they were being kept.

The Convener: Okay. I might pursue that further.

The Solicitor General for Scotland: I think that it is the child's status that is important.

The Convener: That is what I was thinking.

The Solicitor General for Scotland: I would like to think that we would interpret the provision in the way that you suggest. If it is necessary to amend the wording to clarify that, that should be done.

The Convener: Yes—I thought that the child's status, rather than the place, was important, but the wording is more about the place. As I said, I will pursue the point further.

Elaine Murray: I turn to the issue of sheriff's recommendations. As you will be aware, Patricia Ferguson's proposed inquiries into deaths (Scotland) bill would make compliance with sheriff's recommendations legally binding after a hearing to discuss any issues, whereas section 27 of the bill that is before us requires responses to such recommendations to be made to the Scottish Courts and Tribunals Service. I seek your comments on both proposed approaches.

The Solicitor General for Scotland: There would be a number of difficulties regarding sheriff's recommendations if they were legally binding. Legally binding recommendations would widen the scope of an FAI; they might end up being unenforceable, given that the sheriff would have been looking at the particular circumstances of the death, or deaths, before him; and there is the danger that the inquiry would turn into an adversarial process. The important thing is that the recommendations are out there in the public domain and that those who are on the receiving end of them are required to say what they have done about them.

Elaine Murray: We have had evidence from witnesses who felt that the Scottish Courts and Tribunals Service was not necessarily best placed to publish the recommendations and that perhaps Scottish ministers should have responsibility for doing that, because if the recommendations required legislative change it would be ministers who would be responsible for bringing forward that legislative change. It was suggested, I think in a letter from the Sheriffs Association, that Scottish ministers could be given the power to bring forward subordinate legislation under the bill to promote compliance. Others have said that perhaps the Lord Advocate would be the best person to collate the responses. Do you have a preference?

The Solicitor General for Scotland: I have no particular preference beyond reiterating that, having worked in this area for many years, I think that it is extremely important for the families who want lessons to be learned from an FAI that those lessons be learned and any recommendations taken forward.

When it is not necessary to have an FAI but there are lessons that have been learned, the Crown takes seriously its duty to make sure that those who need to know, do know. If that includes the Government, the Crown will make sure that the Government knows. Beyond that, the Crown would assist with whatever method was thought to be most appropriate.

Elaine Murray: What can families do if they are not happy with the result of an inquiry? What is the recourse for families who are not content after an FAI?

The Solicitor General for Scotland: After an FAI? There is none.

Stephen McGowan: Their only recourse would be to seek judicial review of the sheriff's decision, which would have to relate to matters of law, rather than specific facts. There has never been a challenge to the facts as determined by the sheriff that I can think of.

The Solicitor General for Scotland: It has never happened.

The Convener: Might they bring civil proceedings?

Stephen McGowan: There are often civil proceedings in these cases in any event.

The Convener: Okay. I will come back to Gil Paterson, but Christian Allard and Alison McInnes have been waiting a long time.

Gil Paterson: I just have a wee point on sheriff's recommendations.

The Convener: I will come back to you.

Christian Allard: My question relates to section 6(1)(c), on inquiries into deaths occurring abroad where the person's body has not been brought back to Scotland. There have been some calls for that provision to be amended, for exceptional circumstances. Would there be any difficulties if the bill was to be amended?

The Solicitor General for Scotland: I am sorry, but my hearing is—

Christian Allard: Sorry. My question relates to a death occurring abroad and the requirement to have the body recovered and sent back to Scotland. There have been some calls in evidence to the committee for that requirement to be removed in exceptional circumstances—for example, if for some reason the body cannot be recovered. If an amendment is put forward to change the bill on that point, do you see any difficulties?

The Solicitor General for Scotland: I will say a couple of things about the new power to hold inquiries in relation to deaths abroad. There are no powers for the Crown to investigate those deaths without co-operation. The reason why I mention that first is that the repatriation of the body is very important to the Crown, because it is evidence; in many cases, it may be evidence of the cause of death. There has been at least one occasion on which the information that the Crown got about the cause of death came from a post mortem, but it could be seen from the body that no invasive post mortem had been carried out.

That partly explains our thinking on the matter, but it is also entirely in line, as I understand it, with what the coroner does. Nobody likes to have rules to which there is one exception that makes them all look silly, so I would have no difficulty with there being exceptional circumstances when a body has not been repatriated, although such circumstances would require to be justified to allow the Lord Advocate to go down that route.

11:15

Christian Allard: In light of what you told us about co-operation with other countries, jurisdictions and police forces, could the bill specify more clearly that money should not be spent to double up an investigation—for example, by sending police officers abroad to do a job that is being done already? Is there a need to limit the bill's remit on that point? The financial memorandum suggests only £157,350 as the likely cost associated with revisiting deaths abroad, but if we duplicate what another jurisdiction has done, the sums could increase a lot. People work and live abroad a lot more than they used to.

The Solicitor General for Scotland: Such limitations do not require to be in the bill. The Crown has good relationships with a number of other countries and is well placed to decide whether we would be duplicating efforts in an investigation. That does not require to be in the bill.

Christian Allard: I am quite interested in that. Just now, we do not send investigators abroad and spend a vast amount of money to see or check what happened. What is the situation just now?

The Solicitor General for Scotland: We do not have power to send investigators abroad in relation to such matters, and the bill does not give us that power. We would do that as a result of co-operation with other countries through the Foreign and Commonwealth Office. We have powers in relation to criminal investigations to ingather evidence under mutual legal assistance, and we have a certain amount of knowledge of which countries will co-operate quickly and which might take longer, and of the unusual situations in which there is no method of co-operation. We have that experience.

Christian Allard: So you are happy with the financial memorandum.

The Solicitor General for Scotland: Yes.

Alison McInnes: Mr Finnie asked you earlier about the role of families and the importance of

their feelings and views about these situations. You responded fairly positively. Am I right that, at the moment, there is no formal mechanism for a family to challenge your conclusion as to whether a death is self-inflicted or accidental, for instance?

The Solicitor General for Scotland: There is none apart from judicial review.

Stephen McGowan: We come to certain conclusions but we do not make any determination as to whether a death is self-inflicted. An investigation might reach that point, we might have a discussion with the families about it and a certain statistical return might be put in, but we do not make a formal finding.

The Public Petitions Committee received a petition on the matter, on which I gave evidence.

Alison McInnes: I suppose that there would come a point at which the Crown would say that it did not think that there was any criminal activity and, therefore, the assumption would be that the death was accidental or self-inflicted.

Stephen McGowan: It would depend on the circumstances of the case. If there was any suspicion that it might have been homicidal, it would be likely to be an unresolved homicide. We treat some cases in which there is no clarity about the cause of death as unresolved homicides. It depends on the individual death.

In some cases, we might for statistical purposes send a return to the General Register Office, saying that, given the circumstances, we suspect that the death is a suicide. There might be other cases that are accidental and which might not be part of that return, while in other cases there might be a suspicion that the death is a homicide but that is not supported by the evidence at that point in time. There are various categories of death.

Alison McInnes: Is there also a category of unascertained deaths?

Stephen McGowan: Yes.

Alison McInnes: But if the family feels that there should be a further criminal investigation, there is no independent assessment of that in the system and no way for a challenge to be made at the moment.

Stephen McGowan: The independent assessment comes through the Lord Advocate and the procurator fiscal reviewing and directing the police investigation.

Alison McInnes: So you see no merit in having a sheriff's inquiry to deal with such disputes. Is there any parallel with, say, the coroner's inquest, which is used much more frequently down in England?

Stephen McGowan: I see no merit in that proposal, because there might well be a fatal accident inquiry to deal with that type of death.

The Solicitor General for Scotland: If there has been a request to review circumstances, we will carry out an in-house review, involving different people. We have held such reviews on a number of occasions. The same organisation looks the issue, but with a fresh pair of eyes, which is akin to the victim's right to review under the new legislation.

Alison McInnes: Can you explain to me the role and operation of coroner's inquests in England? Why have we not followed that system? Do you have any views on the merits of that approach?

The Solicitor General for Scotland: All I would say is that, constitutionally, we have a completely different system. The procurator fiscal was here first—so to speak—while, down south, they had the coroner and then the Crown Prosecution Service.

The Convener: Good for you for sticking up for Scots law.

The Solicitor General for Scotland: I am sorry—I could not help it.

Alison McInnes: We can sometimes learn from other places.

John Finnie: Can I come in here, convener?

The Convener: I was going to take Gil Paterson first, because I had parked him.

John Finnie: But it is on this particular point.

The Convener: Yes, but Gil Paterson has a question about a previous point. I will come back to you, John.

Gil Paterson: Would it be possible for sheriff's recommendations on a specific point to be made binding without the need for legislation, or in making such recommendations do sheriffs look at the law as it is and base their recommendations on the fact that the law was not carried out properly?

The Solicitor General for Scotland: Sheriffs usually make recommendations about practices that can be changed rather than about changes to the law itself. Under section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, they look at the system and any defects at work, and they make recommendations on what could have caused the death to be avoided, had it been in place.

Gil Paterson: Could a sheriff recommend a change in the law itself? If so, would that be only a recommendation and not something that a second

or indeed third party would be forced to act on without legislation?

The Solicitor General for Scotland: It would be just a recommendation.

John Finnie: Mr McGowan, I wonder whether you will clarify something that I perhaps misunderstood in one of your responses to Ms McInnes. I believe that you said that, if there were any dubiety, the independent assessment of whether an FAI should proceed would be made by the Lord Advocate.

Stephen McGowan: I was referring to the criminal investigation that I believe was mentioned in the question, which I think related to whether there was any means of independent assessment in cases where there is a criminal investigation if the family in question is not happy about that investigation.

In relation to decisions about a discretionary FAI, the Lord Advocate makes that decision independently, and there is the remedy of judicial review if the Lord Advocate decides not to exercise his discretion in favour of having that FAI.

John Finnie: Crime in Scotland is investigated at the behest of the Lord Advocate.

Stephen McGowan: Yes.

John Finnie: Is there not a conflict between the two?

Stephen McGowan: Between having an FAI and—

John Finnie: I am suggesting that someone who is saying, "I'm not going to have an FAI," could also be the person who has directed any criminal inquiry that may have taken place.

Stephen McGowan: I do not think that there is any conflict of interests in relation to that. It comes down to the points that the Solicitor General made.

John Finnie: Is "independence" the appropriate term?

Stephen McGowan: Yes, I think that it is. The Lord Advocate independently investigates crime, prosecutes that crime, and investigates deaths, so "independence" is the appropriate term in that regard.

It comes back to the Solicitor General's point about all the factors that make up the public interest, and I do not think that we can disaggregate those factors and say that there is a different public interest, or family interest, in a particular aspect of an FAI or a criminal prosecution. All those factors, when taken together, make up the public interest.

The Solicitor General for Scotland: It is how that is done in-house that is important. It is done by separate teams of specialists. As I indicated earlier, different aspects of public interest are considered at different stages. For example, if there is the potential for proceedings in the High Court, the circumstances will be considered by the prosecutors at that stage, sometimes within the health and safety division, and then the matter will go to Crown counsel for a decision on criminal proceedings.

It is not the same group of people who will then consider whether or not a fatal accident inquiry is appropriate, or what further investigations there should be in relation to a fatal accident inquiry. Although those groups work together, there is a separate process and a separate report, and there are two specialist Crown counsel now within the team who deal with deaths-type matters. I think that "independence" is the right word to use, but I have to satisfy you that within the one organisation that independence exists.

John Finnie: Ultimately, it is still the same person who makes the decision and who has oversight of both those functions.

The Solicitor General for Scotland: No, the duty to investigate in those two areas is invested in the Lord Advocate constitutionally. What I am indicating is—

John Finnie: There is no personal criticism.

The Solicitor General for Scotland: I understand that.

John Finnie: I want to understand the process, and ultimately it is the same person who is in overall charge of both of those decisions.

The Solicitor General for Scotland: It is the same person who is in overall charge, but the individual decision making on those two aspects will be done by different people. They are two different sets of considerations.

John Finnie: But someone has to have overall responsibility.

The Solicitor General for Scotland: Yes.

John Finnie: Thank you very much.

The Convener: We have got there.

I want to ask about section 7, as nobody has asked about it. It concerns inquiries into deaths occurring abroad, but it is about service personnel. We have received Stephen McGowan's letter, which is an excellent legal treatise on why the current state of affairs means, somewhat to our surprise, that people serving in the armed forces are not considered to be employees and therefore cannot go to employment tribunals or anything like that.

Let us look at section 7, which concerns the current status. The provision refers not to a mandatory inquiry but to a discretionary one, and it can apply only if the death of the serviceperson occurs abroad. Section 7(2) refers to being in custody, but section 7(3), which is an alternative, states that a death is within that subsection if it

"was sudden, suspicious or unexplained, or ... occurred in circumstances giving rise to serious public concern."

Why cannot we extend the provision, without bothering about whether or not someone has employee status, to service personnel per se? If it applies to somebody abroad, I do not know why we cannot do it for somebody in Scotland if the same kind of circumstances arises, without even going down the road of considering whether somebody is an employee and an inquiry is therefore mandatory.

Stephen McGowan: The genesis of section 7 is section 1A of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, which was added in the past few years to deal with matters abroad. I do not have the answer to your question, and it is a matter for Parliament itself. There may be legislative competence issues around such deaths in relation to the military.

Section 7 of the bill simply deals with the military. The issue that the committee discussed at the previous meeting relates simply to whether or not it is mandatory in the United Kingdom to have a fatal accident inquiry into the death of service personnel. It is not; it is discretionary, as it is abroad.

The Convener: So it is discretionary in the UK. I do not understand: notwithstanding an internal inquiry, could you hold an FAI if something happened to service personnel in Scotland that gave rise to a suspicion that there was something not quite right?

Stephen McGowan: Yes, we could hold one.

The Convener: You could still hold one.

Stephen McGowan: Yes, but the point is that it would be discretionary rather than mandatory.

The Convener: I understand that.

Stephen McGowan: Nothing disbars us in any way from holding a fatal accident inquiry.

The Convener: So I am really bothering about nothing.

Stephen McGowan: Yes. It would be a discretionary inquiry.

The Convener: Have you held any of those?

Stephen McGowan: I cannot think of one off the top of my head, but I have not checked—we can check that.

The Solicitor General for Scotland: We will check that out.

11:30

The Convener: I have a wee feeling that there is not the protection for service personnel that there is for other people. I appreciate from your explanation what their status is, but I still have that feeling. Perhaps this is not the place to deal with it—we can ask the minister. In any event, you are telling me that, if something happened here with Army recruits who were out training, an FAI could be held even if there was an internal Army inquiry.

Stephen McGowan: Absolutely.

The Convener: Would you get all the material from the Army?

Stephen McGowan: Yes.

The Convener: You would get absolutely everything.

Stephen McGowan: Yes, we would get that material. We have done so in the past with the incidents that I am thinking of in which we have not had an inquiry, so we would get all that information from the military for an FAI.

The Convener: Okay. I just thought that I would ask about that—and I will find out more about it, because it is still bothering me a wee bit.

Stephen McGowan: Nothing bars us from holding such an FAI, and we have no particular view one way or the other on the provisions. That is simply the law as it stands.

The Convener: It is just the word "mandatory" that is in our way.

Stephen McGowan: I was trying to clarify whether there must be an inquiry or whether the Lord Advocate has discretion to order one.

The Convener: But one could make inquiries mandatory. There could be mandatory inquiries into the deaths of service personnel that occurred in Scotland, and there would just be a separate section in the bill. That would be nothing to do with being an employee.

Stephen McGowan: In principle, we have no difficulty with that. There are legislative competence issues to explore around the matter that I do not pretend to have the answers to today—

The Convener: No—neither do I.

Stephen McGowan: But in principle there is no difficulty with that.

Christian Allard: If you come back to us to let us know whether you have held discretionary

inquiries, can you say whether you have been asked to hold one?

Stephen McGowan: Yes.

The Convener: Is John Finnie waving at me to come in?

John Finnie: It was a fond wave.

The Convener: It is about time.

John Finnie: I know that you will be uncomfortable discussing cases, but there was the tragic loss of life of a young Army cadet in the Western Isles. Would that fall into that category?

Stephen McGowan: There was an FAI in relation to that case, but the person in question was not employed by the military. That was a discretionary inquiry that came out of different circumstances.

The Convener: So we do not necessarily need to bother with the employment status. I do not know whether we want to pursue that.

We will move to questions from Elaine Murray.

Elaine Murray: You are probably aware that Patricia Ferguson's proposed member's bill would introduce time limits, which could be flexible, for the holding of FAIs. Will you comment on that and, in doing so, give us an indication of the average timescales for holding FAIs—families have raised concern about timescales—and whether there are particular reasons why delays occur?

The Solicitor General for Scotland: I share concerns about the length of time that it takes to conclude such investigations and inquiries. A lot of work has been done to try to shorten those periods without compromising other things.

I will take some time to deal with the question, as a number of issues impose on the timescale.

First, the date that the death came to the attention of the Crown can occasionally impact on the timescale if that was not immediate. Secondly, on many occasions criminal proceedings may have to be considered. As I indicated, criminal proceedings will, in the public interest, take precedence over a fatal accident inquiry. That adds to the length of time.

The third aspect is the involvement of other regulatory authorities that have duties to carry out their own investigation and inquiry. Such bodies are not necessarily subject to timescales; more importantly, though, they are not subject to the control of the Crown in relation to the ingathering of that information, in the way that the police are when the Crown instructs the police to carry out inquiries. You will be aware that I wrote last year in order to ensure that sort of co-operation from the air accidents investigation branch on the Clutha incident. The First Minister also had to write.

The fourth aspect is that most fatal accident inquiries will require expert evidence of some sort, frequently from medical experts. It is not for the Crown to set priorities within its own organisation, so in many respects we are subject to how long the experts take to produce those reports. I am not saying that we do not have a good relationship with experts, but that all adds to the length of time that an inquiry takes.

As I indicated, it is important that, if the bill controls the timescale from the point at which it is decided to have an inquiry, the Crown has information out there—in the form of the charter that I mentioned—to indicate timescales from the point at which the internal timescale of 12 weeks to make a decision on a straightforward matter stops until the final decision is made.

Over the past three years, the specialists in the SFIU have been working on an approach that involves dealing with the older cases and trying to ensure that they do not compromise more recent cases—it involves working on cases in tandem. It is one of the reasons why there were so many FAIs last year—there were 68 FAIs last year, which is probably double the number in the previous year.

I share Elaine Murray's concern, and that of families. We are continually actively working on timescales.

The Convener: If the Crown is under pressure with the number of FAIs, it is a horrible word but do you rank them in order of priority? I wonder whether FAIs that are not as complex are pushed further down the timescale by bigger FAIs.

The Solicitor General for Scotland: If you are thinking about examples in the past when things were not dealt with as effectively and quickly as they should have been, it was either before the SFIU was set up or before two years into the SFIU, when all the cases began to be project managed. The new approach means that we can work on the older ones and the newer ones to compress the timescales and eventually have an acceptable timescale going forward without ever compromising the effectiveness of the investigation—which, ultimately, is what leads to the appropriate recommendations.

The Convener: I was asking about prioritising FAIs. I can appreciate that there would be circumstances where you must stop certain things happening PDQ by making a statement about what has happened. I think that you illustrated that earlier, when you talked about changes that are made during an FAI. How do you prioritise? It may be that some FAIs slip further down or take longer, not because they are complex but because more

complex and urgent inquiries go further up the pecking order.

The Solicitor General for Scotland: That has not been the experience in relation to project managing the FAIs.

The Convener: My last question—because nobody has asked it—is this: in what circumstances should trade unions be included in the list of those automatically allowed to participate in an FAI? Is that what you do? The trade unions put that question to us.

The Solicitor General for Scotland: The bill says that it is at the sheriff's discretion whether a person has an interest in the inquiry. I think that that covers those areas where the trade unions would have a specific interest.

The Convener: So there is no role for the Crown in recommending which witnesses you want to come forward to elicit evidence in the inquiry. There is not a circumstance in which you would say, "We have to have someone from the trade unions." That would be a matter for the sheriff.

The Solicitor General for Scotland: That is correct. If there was a particular set of circumstances in which it was important, as part of the investigation, for information to be sought from the trade unions, I would expect that to be done. To be frank, I cannot think of one off the top of my head. Usually, the experience is that trade union involvement is to ensure representation for certain people involved in the inquiry.

The Convener: I will leave it at that. Thank you for your evidence.

11:40

Meeting suspended.

11:47

On resuming—

The Convener: We now have our second panel on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill. With us are Paul Wheelhouse, the Minister for Community Safety and Legal Affairs, and his Scottish Government officials. Hamish Goodall and Marisa Strutt are policy officers in the civil law and legal system division and Greig Walker is a solicitor in the directorate for legal services.

Good morning. I understand that you wish to make an opening statement, minister—unlike the cabinet secretary. I do not want to put pressure on you.

The Minister for Community Safety and Legal Affairs (Paul Wheelhouse): If you are pressed for time, convener, I do not need to—

The Convener: No, no. I would not want to curtail you. Just go ahead.

Paul Wheelhouse: Thank you for the opportunity to address the committee. We believe that it is right that the system of fatal accident inquiries was reviewed by Lord Cullen to ensure that it provides in the public interest an effective and practical system of judicial inquiry into deaths, and that the legislation should now be updated to make it fit for the 21st century. The dean of the Faculty of Advocates told the committee in evidence that he believes that the bill will modernise the system of FAIs.

Lord Cullen made 36 recommendations for reform of the FAI system. Some of those recommendations were addressed to the Crown Office and Procurator Fiscal Service and have already been implemented through the establishment of the Scottish fatalities investigation unit. The Government carried out a consultation on the legislative proposals to build on the changes that the Crown Office has already made and to further consider some of the main areas that were identified as requiring attention.

For example, 74 per cent of consultees agreed that the aim of independent investigation into the death of a person who was subject to compulsory detention by a public authority should be met by independent investigation by the procurator fiscal and exercise of the Lord Advocate's discretion on completion of that investigation. Some 80 per cent of those who responded agreed with Lord Cullen that mandatory timescales for the opening of an FAI are not practical or realistic due to the diversity and complexity of FAIs.

The bill takes forward the principle of Lord Cullen's recommendation on requiring responses to sheriffs' recommendations. The chief executive of the Scottish Courts and Tribunals Service has acknowledged to the committee that it is logical and transparent that responses to recommendations should be posted on the SCTS website as sheriffs' recommendations are already available there. The Scottish Government considers that proposal to be a proportionate and transparent way of ensuring that recommendations are taken seriously, and that was echoed by the dean of the Faculty of Advocates when he said that the policy strikes "the right balance".

Section 26 ensures that a sheriff's determination will be disseminated to not only any person to whom the sheriff is addressing a recommendation but any person who has an interest in the

recommendation, which will include regulatory, professional and trade bodies.

The bill will build on Lord Cullen's recommendations, implemented by the Crown Office, to make the system more efficient, for example through greater use of preliminary hearings and other procedural measures. The Lord President suggested that as much evidence as possible should be in writing and the bill provides for the agreement in writing of non-controversial evidence by the participants.

The bill will permit more flexible location and accommodation arrangements for FAIs, which may permit FAIs to take place more quickly than they do if people have to wait for court capacity to become available. It will permit discretionary FAIs into deaths of Scots abroad; ensure that FAIs remain inquisitorial fact-finding hearings as set out in sections 1(3) and 1(4), to which the Lord President drew attention; and permit FAIs to be reopened if new evidence arises or, if the evidence is substantial, permit a completely new inquiry to be held.

I would like to reflect on some aspects of the evidence that the committee has received and I look forward to seeing the committee's stage 1 report. I am happy to answer any questions that the committee may have.

The Convener: Let us hope that your happiness continues.

Roderick Campbell: Good morning, minister. I will kick off with a question about deaths of people who are detained compulsorily for mental health reasons. The policy memorandum, at paragraphs 116 and 117, details the graduated scale of investigations under which the Royal College of Psychiatrists operates. We have heard from a large number of witnesses concerns about the human rights aspect of that, and the Scottish Human Rights Commission and the Mental Welfare Commission for Scotland had concerns that requirements of article 2 of the ECHR are missing from the graduated scale of investigations. Can you add anything to reassure people on the human rights implications of continuing as we are?

Paul Wheelhouse: That is an important point. As Roderick Campbell said, the Mental Welfare Commission and others have a role in this. Such deaths are subject to investigation by the procurator fiscal, and the Lord Advocate has discretionary power to hold an FAI into such deaths when it is considered to be in the public interest.

As I said in my opening remarks, 74 per cent of consultation respondents favoured the retention of investigation by the procurator fiscal and exercise of discretion by the Lord Advocate on completion of that investigation to instruct an FAI, if he thinks that one is required.

We are aware that the Lord President agreed that the current discretionary power is sufficient. He said:

> "I think that we are in danger of imposing unnecessary rigidity on the system. The system by which the Crown makes investigations and forms judgments is, I think, the best model".—[*Official Report*, *Justice Committee*, 19 May 2015; c 43.]

However, I take on board people's serious concerns about human rights when someone is taken into a setting that is not a normal facility, such as the Carstairs facility. More commonly, facilities that deal with people with mental health issues who are sectioned under the Mental Health (Care and Treatment) (Scotland) Act 2003 are medical environments. We are satisfied that there are triggers to allow the Mental Welfare Commission to flag up any pattern of concern regarding the deaths of individuals in those settings and the Crown can raise criminal investigations if it believes that something of that nature has happened.

We recognise the concern that has been expressed by a number of witnesses and committee members regarding the need to ensure that inquiries are held when the circumstances are justifiable, but we do not believe that FAIs should be mandatory in every case.

Roderick Campbell: I accept that. I refer you to paragraph 117 in the policy memorandum, which says:

> "It may be that there is a case for these various inquiries and investigations to be formalised and rationalised, though not necessarily in legislation. The Scottish Government does not, however, believe that this Bill is the vehicle for this."

Do you want to add anything to that?

Paul Wheelhouse: I accept that there might be a need to improve the clarity of the procedures that are in place and the role of different agencies in flagging up concerns about a death that occurs in a mental health situation. It might be possible to make the flow diagram—as it were—of how the system works clearer to ensure that families and the individuals affected are aware of it.

However, I know that stakeholders have called for mandatory inquiries to be held in such cases, but I hope that they will accept that not every family wants an inquiry to be held in every case. It can often be quite apparent what has caused the death. It could, for example, have happened through natural causes; after all, logic suggests that people in such situations are just as vulnerable to diseases as those outside those settings. I therefore think that we need a flexible and adaptable system.

If the committee is concerned about a lack of clarity about how the system works in practice, we can certainly address that issue, but I am looking to Mr Campbell for guidance as to whether I have understood his point correctly.

Roderick Campbell: The written submission from the Equality and Human Rights Commission touches on some of the problems in the existing system, where clearer guidance would be helpful. For example, it says:

"The current system is confusing eg Crown Guidance to medical practitioners specifies that deaths in legal custody should be notified but does not specify that deaths under mental health detention should be notified. There is a separate system of notification for Health Improvement Scotland and a local case review for clinical services".

Paul Wheelhouse: The member makes a fair point. If those in the sector at the sharp end are concerned about clarity in the procedures and guidelines, we can take that away from today's session and come back to the committee on it, if that would be helpful. It is certainly our intention to avoid mandatory inquiries but I accept that people need to know whether there are sufficient triggers to call for an inquiry and how the Lord Advocate would exercise discretion if it came to that. I am happy to look at any weaknesses in the guidelines that the committee might flag up.

Roderick Campbell: I am simply looking for reassurance so that, even if we accept that there is not a case for mandatory inquiries, the discretionary system—for want of a better phrase—and the add-ons are compliant with article 2.

Paul Wheelhouse: I take Mr Campbell's point that we need to reflect on any gaps in the guidelines that might raise human rights concerns. However, I hope that we will be able to come back to the committee and address any concerns that it might raise in its stage 1 report. I will look at the detail of the evidence that you have received from witnesses and address any specific matters that there might be. Nevertheless, as I have said, I take Mr Campbell's point.

The Convener: With regard to specific issues about mandatory inquiries, I draw the minister's attention to section 2(4), which I also raised with the Solicitor General. It says:

"The death of a person is within this subsection if, at the time of death, the person was ... a child required to be kept or detained in secure accommodation."

Does that mean that the child in question is literally in the secure accommodation or does it simply refer to the child's status?

Paul Wheelhouse: I will bring in Hamish Goodall to respond to your question, convener.

Hamish Goodall (Scottish Government): Are you asking whether the child in question would be within a building?

The Convener: Section 2(4)(b) refers to

"a child required to be kept or detained in secure accommodation."

Does that mean that the child is literally in secure accommodation or does it refer to the fact that, notwithstanding where they might be, the state has said that they have to be kept for their own protection or the protection of society in secure accommodation?

Hamish Goodall: That provision would apply if the child was actually in secure accommodation.

The Convener: Is there a flaw in that respect? If a child happens to die while they are out of secure accommodation, say, for a couple of hours, should there not be a mandatory inquiry to examine why they were out when there might very well have been reasons why they should not have been out? After all, the state is in charge.

Paul Wheelhouse: It might be helpful to bring in Greig Walker at this point.

Greig Walker (Scottish Government): First, I should say that I sat in on the previous evidence session. I note that the phrase "required to be" appears a few times in section 2. The intention in drafting the bill, to take the example of prisoners, would be that if they are being taken out on a day trip, or if they are going to hospital, they require to be detained. They are not at liberty, even if they are outside the prison walls. The intention in all those cases, including for secure accommodation, is that the provision does not only apply literally within the building. However, if it is felt that there is a lack of clarity we will certainly take that away and reflect on it.

12:00

The Convener: I think that there is a lack of clarity, because I have had to ask about it. The question is whether they are within or outwith.

Section 2(5) states:

"For the purposes of subsection 4(a), a person is in legal custody if the person is—"

and there is a list. I do not know off the top of my head what

"section 56 of the Criminal Justice (Scotland) Act 2015"

says. Does that mean that someone could be in custody but not necessarily within premises? The rest of the provisions all relate to premises. Say someone has been arrested on the street and the police say that they are taking the person into custody. Is that what is meant?

Hamish Goodall: Yes. The purpose of that provision is to widen the scope of when the mandatory fatal accident inquiry would apply. We are not just talking about someone who dies in a police cell or in a police station. If they have been arrested at a football match or in the street, and they suddenly die, that would trigger a mandatory fatal accident inquiry.

The Convener: Is that what section 56 says?

Hamish Goodall: I cannot—

The Convener: I do not know whether that is what the section says, because the rest of the provision refers to places.

Hamish Goodall: That was the intent. I cannot—

The Convener: Section 2(6) says:

"For the purposes of subsections (4)(b) and (5)(a) and (d), it does not matter whether the death occurred in secure accommodation, a penal institution or, as the case may be, service custody premises."

Does that take care of my two problems with the children in secure accommodation and someone out in the street, perhaps under arrest by the police, who dies? Would an inquiry be mandatory in both cases?

Hamish Goodall: It certainly takes care of the matter regarding police custody. The amendment was made to the legislation in line with Lord Cullen's recommendation and at the request of the former Association of Chief Police Officers in Scotland. The association pointed out that there was a slight discrepancy in the law. The existing legislation applied only to police cells and police stations. The bill widens the definition to police custody outwith police stations.

The Convener: Section 2(6) says

"For the purposes of subsection (4)(b)",

which was the one that I mentioned in relation to secure accommodation. It then says that

"it does not matter whether the death occurred in secure accommodation, a penal institution or, as the case may be"—

That does not cure the first issue, which is the child who may be out and about, does it?

Hamish Goodall: I think that Greig Walker has already—

Paul Wheelhouse: Greig Walker will help the committee's understanding of that issue.

Greig Walker: I will pick up on two points from that exchange. Where section 2(5)(b) refers to the

"Criminal Justice (Scotland) Act (2015)",

that is the bill that this committee has been scrutinising. It is contingent on that—

The Convener: We have been scrutinising an awful lot, so you will have to remind me what that section actually says.

Greig Walker: To take first things first, if that bill is enacted, as Hamish Goodall described, the intention is for it to cover roadside detention and such like.

The Convener: Right. So that is that issue sorted.

Greig Walker: Section 2(6) has just been referred to. My interpretation, and that of the bill team, is that it does not literally mean within the secure accommodation wing or within the prison. It includes when the person is out on a day trip or on the way to hospital or whatever.

As I said, the bill team will consider all the points on drafting if the committee feels that—

The Convener: But it may cure the issue? You think that it does.

Greig Walker: I do personally, but we will reflect on that.

The Convener: That is fine. You have sorted that out for me.

Paul Wheelhouse: To clarify, it also covers prisoner transport, convener.

The Convener: I followed that, but the bit about secure accommodation was not clear. The provision seems also to deal with that, so that it does not matter whether the child is outwith the secure accommodation—he or she is still under the control of the state, for the protection of the public. That might cure it. I am happy now and do not want to know any more about it.

Christian Allard: Good afternoon. I would like to ask about something that was a surprise to members—the fact that the service personnel in the armed forces are not employees. We found that very difficult to accept, but we have had a letter from the Crown Office and Procurator Fiscal Service that explains the detail. Could you not draft the bill differently to try to include service personnel in a better way?

Paul Wheelhouse: I am happy to address that point. I must confess that I, too, was surprised to learn that service personnel are not considered to be employees, but I appreciate that that represents long-standing legislative practice.

The issue of FAIs into deaths of service personnel in Scotland was not raised in Lord Cullen's review or during the consultation on the legislative proposals last year, which is why it is not dealt with in the way that Mr Allard seeks in the bill. It is therefore a new issue that we have had to consider in the light of the representations that have been made to the committee and,

outwith the committee, those that have been made by Mr Angus Robertson, who is the MP for Moray.

Given the defence reservation, any change to the law would have to be achieved by means of a section 104 order, which is already being contemplated for the bill, and agreed by the UK Government. We have had some initial informal discussion with the Ministry of Defence on the matter, and we believe that there might be room for further discussion in an effort to bring deaths of service personnel in Scotland within the scope of the bill. After the meeting, to be fair to the MOD—instead of relying on the informal discussions that my officials have had—we will write to the MOD to make that point and to invite it to respond formally on the scope that exists in that regard.

I certainly recognise the point that Mr Allard makes, and I will be happy to come back to the committee as soon as we have heard formally from the MOD whether it is willing to allow deaths of service personnel in Scotland to fall within the scope of the bill under a section 104 order.

Christian Allard: Thank you very much—that would be very helpful.

The Convener: What is the timescale for that, bearing in mind that stage 2 will take place after the summer recess?

Paul Wheelhouse: We will get a letter off as soon as we can—certainly before the summer recess—and we hope that the MOD will get back to us in time for the stage 2 process in committee.

The Convener: Jayne Baxter wants to come in on the issue of military personnel.

Jayne Baxter: We discussed the topic in a previous evidence session and I am now confused. Is the wording of section 2(3) wide enough to encompass service personnel and other Crown servants, or are you saying that that is not the case?

Paul Wheelhouse: I will invite Hamish Goodall to comment on that. The issue is a new one, so we have not addressed it in the bill. We believe that, because it is a reserved issue, we will need UK Government consent for a section 104 order. We will be happy to consider amending the bill at stage 2 if the MOD is happy for us to proceed on the basis of a section 104 order in due course. That is the plan.

Hamish Goodall: I do not think that there is anything that I can add to that. The defence reservation is clear, so if the proposal were to be effected, it would have to be done by means of a section 104 order.

The Convener: What is a section 104 order?

Hamish Goodall: It is an order under the Scotland Act 1998. I ask Greig Walker to explain the detail of section 104 orders.

The Convener: The buck gets passed to Mr Walker a great deal of the time—I hope that Mr Goodall's buying the buns later.

Greig Walker: Section 104 orders are quite common for the more complicated bills. Essentially, they are for consequential things that are within a bill's policy intentions but which, for technical reasons, the Parliament does not have the competence to deal with.

I will make two related points. There has not been an intention on the part of the bill team to change the meaning of the wording that appears in the 1976 act. The bill uses a slightly different form of words, but it was not the intention to change the meaning. Of course, the issue of military employment has come up very recently. We will reflect on all that.

It is also worth mentioning that section 7 deals with service deaths abroad. Such provisions can appear in the bill, even though elements of the issue relate to a reserved matter, because they simply restate existing law. It is a slightly clunky picture, but that is why we have ended up—

The Convener: That is discretionary. We understand that bit. It is mandatory inquiries that we are asking about.

I do not particularly want to help the MOD, but would there be unintended consequences for it if service personnel were treated as employees in legislation? We would be opening up the MOD to a whole load of other legal issues, such as the status of service personnel at employment tribunals and their rights.

Paul Wheelhouse: Indeed. I guess that that is one of the issues that we need to consult the MOD on. Informally, it has been willing to discuss the issue—no doors have been closed on us so far.

The Convener: Could service personnel be treated as employees just for the purposes of a fatal accident inquiry?

Paul Wheelhouse: We will have to be careful in drafting the provisions so that we do not, as you say, undermine existing provisions elsewhere. If we can work with the MOD to find a suitable fix for the issue, we will certainly do so, and we will keep the committee informed of progress.

The Convener: We are quite interested in that status, are we not?

Roderick Campbell: We are always interested in fixes.

The Convener: That is an advocate for you.

Paul Wheelhouse: Yes, indeed.

Christian Allard: There has been a change since the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 was passed. The text has been amended, and the word "or" has not been placed in the same place.

In the bill that is before us today, section 2(3)(b) refers to

"the person's employment or occupation."

The 1976 act referred to a

"person who has died ... in the course of his employment or, being an employer or self-employed person, was engaged in his occupation as such".

That changes the sense a little bit, but I would not want us to go back to 1976. On the contrary, the change is an improvement.

Greig Walker: We will certainly reflect on all those points.

Christian Allard: My second question is about deaths abroad. Many people who have come before the committee have told us that they have no problem whatsoever with an amendment removing the requirement for the body to be brought back to Scotland in order for there to be a fatal accident inquiry. Would the Government be willing to move on that point?

Paul Wheelhouse: I certainly recognise the issue. I have had the honour of meeting some of the parents, such as Mr and Mrs Beveridge who lost their son, Blair Jordan. I am very grateful to them for explaining the process from their point of view and the weaknesses in that process.

In that particular case, Blair's body was found, although I recognise that there are circumstances in which a body may not be found. The issue is a difficult one for us to address. The requirement that the body should be repatriated has been raised as an issue with the committee, but it was not challenged during the Government's consultation, which is why we have not addressed it in the bill. Indeed, the consultees, including the group Death Abroad—You're Not Alone, which gave evidence to the committee, seem to want a system that is similar to the coroner's inquest in the south, in which an inquest is held only if the body is returned.

We can consider the matter again, but the Crown Office believes that, if there is to be no examination of the body, it may prove very difficult in practice to produce evidence in court that provides a satisfactory explanation for the cause of death. We must recognise the limitation in certain cases of not having a body, and the limit that would therefore be placed on any value that would be added by a fatal accident inquiry.

The reason why the Crown Office wishes to have a body repatriated is that there is no guarantee that there has been a proper examination of the corpse and a proper determination of the cause of a death that occurred abroad. If the body is disposed of and not repatriated—

The Convener: Can you prosecute for murder without a body?

Paul Wheelhouse: Indeed. The difficulty for authorities here is that, if a death has been reported abroad and the investigation is being conducted abroad, any physical evidence is therefore abroad and we have no body on which to conduct a post-mortem for toxicology or for some other reason to explain what may have happened. In the circumstances, that limits the ability of an FAI to add any value.

In the absence of a body and the absence of pathology and toxicology tests, there is no way of knowing whether the individual was intoxicated or affected by drugs or alcohol, which may have played a part in their death, so the cause of death may remain undetermined.

I have asked officials what would happen in circumstances in which a child had died as Blair Jordan did, but the event had been witnessed—or a child had fallen overboard and died and, although the body had not been found, the event had been witnessed.

I am happy to have a look at that issue and see whether there is anything that we can do to address it. I am simply raising the fact that there are some limitations, and asking what that might mean for the outcome of an FAI and whether there would be any value added.

The decision to hold an FAI would still be at the Lord Advocate's discretion. He may have to take the decision that an inquiry would not add value for the family or for anyone else without the presence of a body.

Perhaps Hamish Goodall can come in at this point—I know that he has looked at the area closely.

Hamish Goodall: There are additional problems. If someone simply goes missing in a foreign country, would that trigger a fatal accident inquiry? People also occasionally seek to fake their own deaths. A fatal accident inquiry would not be appropriate in those cases. There are undoubtedly circumstances in which there can be no doubt that a death has occurred and, because of the kind of accident, the body might simply not exist any more.

12:15

Christian Allard: That is exactly the point I was making. To be clear, those are exceptional circumstances, but that is what people are asking for.

The Convener: You cannot just hold an FAI if someone goes missing; the bill says that the death has to be

"sudden, suspicious or unexplained, or

to have

(ii) occurred in circumstances giving rise to serious public concern".

It would not happen for someone who has gone missing.

Paul Wheelhouse: We should remember that, in that situation, the Lord Advocate would have discretion, as he would if a body was repatriated. The Lord Advocate could say that there was a case for investigation but we would have to be realistic about what information that might yield. The absence of the body would inevitably limit the scope of an investigation back home because physical evidence is very helpful in determining cause of death.

If I may, convener, I will just bring in Greig Walker—

The Convener: We have missed you, Mr Walker. It is your turn again.

Paul Wheelhouse: He has some expertise with deaths at sea and, indeed, in the North Sea and the offshore sector where similar issues can arise. It might be helpful and instructive to have a look at that.

The Convener: I think that Christian Allard was thinking of that kind of thing: a fishing vessel, not in Scottish territorial waters, and a body that could not be retrieved.

Greig Walker: This point has not come out in evidence yet. Section 5 is on the North Sea oil and gas area and, unlike section 7, it has no requirement for repatriation, which is continuing with the provisions of the 1976 act. The committee should be aware that if, heaven forbid, there was a North Sea accident and the bodies could not be recovered, that would not preclude an FAI under current law. I imagine the factors that distinguish that situation from one that happens abroad abroad, so to speak, is that it deals with an area of Scots law, eyewitnesses who speak English and can speak to the fiscal and so on. It is quite different from an oil operation on the other side of the world.

The Convener: On the other hand, having reformed the law—if the bill is passed—you would not want to be in the position where a death abroad fulfils all the criteria for an FAI, but there wouldn't be one because there was no body. It might be possible to establish a cause of death and to have an inquiry. You would not want to be in the position of not being able to do that. Such circumstances might be very rare, but the law tends to throw up the unexpected just when you think that everything is in place.

Paul Wheelhouse: I agree. I heard so much testimony from Mr and Mrs Beveridge about Blair's case that it sprung to mind that a British-registered vessel could mean a good prospect of getting co-operation from the company involved, which we probably would have had in that situation. There was an unexplained death, but if an eyewitness had seen something or heard a splash or heard someone shouting as they fell overboard, it would have helped us to understand that it was likely that a death had occurred. It would then be worth investigating how that death had occurred and the nature of the incident that led to the individual falling overboard.

We are flexible about the bill and will look at what we can do. We want to be realistic with the committee and not raise expectations that an inquiry would automatically lead to an explanation for the death; it will be more difficult without the body, unfortunately.

Elaine Murray: In your opening statement, you gave some indications about why you think that the sheriff's recommendations should be published on the SCTS website rather than on the Scottish Government's website. Would you expect the SCTS to monitor compliance with the sheriff's recommendations?

Paul Wheelhouse: You are correct that I made that point in my opening remarks and I firmly believe that it would be advantageous for the SCTS to publish the response to the sheriff's recommendations. I do not want to overstate the point but it would probably give more credibility to the process if the sheriff gives recommendations and response is made to the sheriff about whether those recommendations will be taken forward and if not, why not. That would help the process.

On the point that you made about the monitoring of those recommendations, that would probably be a resource issue that the SCTS would face. Section 26 provides for the dissemination of the sheriff's determination to each person to whom a recommendation is addressed and any other person whom the sheriff considers has an interest in the recommendation. That could clearly include any regulatory body with power to implement change, possibly on a UK-wide basis. I would hope that if a recommendation had implications for health and safety or environmental issues, the regulatory bodies would monitor the performance of the person or persons to whom the

recommendation was addressed in respect of whether they took the steps recommended by the sheriff. So, in some way, shape or form, a relevant organisation or body would monitor progress. As a whole, on the issue that you might be getting at as to whether the SCTS should monitor overall performance and how many recommendations are followed through, I do not think it would be realistic for us to expect the SCTS to do that within its resource.

Elaine Murray: In that case do you envisage the Lord Advocate or the Scottish ministers having an oversight role?

Paul Wheelhouse: The difficulty with the Government or indeed the Lord Advocate as Scotland's senior law officer doing that is that there is no policy intention in the bill to monitor recommendations centrally. Each set of recommendations is made with respect to an individual inquiry and is particular to that situation, albeit that if recommendations are disseminated to a regulatory body they probably have wider implications that are being flagged up to that body. I would hope that they would be addressed at that point by that body, rather than through the Lord Advocate, myself or another minister pushing the case. Clearly we would have an interest in anything that had implications for Scottish Government policy. Indeed, it is possible that the sheriff would disseminate recommendations to the Scottish Government or UK Government where it is relevant to do so. We would have an interest at that point.

Roderick Campbell: I have a supplementary question, convener.

The Convener: I do not know whether Elaine Murray has finished.

Elaine Murray: Not completely, but—

The Convener: Just proceed—do not let Rod Campbell barge in.

Elaine Murray: Patricia Ferguson proposed that the sheriff's recommendations be legally binding. I understand from the explanatory note why ministers have chosen to reject that suggestion. Would you be prepared to consider legal sanctions against those who fail to respond to a sheriff's recommendations, as a sort of contempt of court-type process?

Paul Wheelhouse: I do not believe that that would be helpful. I will try to explain why, although I am happy to look at the issue. What we are trying to have is an inquisitorial inquiry and to get as much help as possible from all the parties involved who might have a role in helping us to understand how somebody has died, the circumstances and what lessons we can learn. The more potential we create for an inquiry to be seen as threatening for those bodies to be involved or to be engaged with, the more we might undermine the process of trying to get to the truth.

However, I take the point; clearly, if there was something that had the potential to save lives, I would hope that that would be flagged up to the Health and Safety Executive, the Scottish Government or UK Government as necessary and that we as legislators could take it forward. If an issue was as fundamental as that, whichever appropriate Government or agency could regulate to ensure that action happened more widely. That is one of the reasons why it would be useful to disseminate sheriffs' recommendations to the regulators to ensure that they take on board those messages and ensure that regulation is keep up to date, with evidence of potential dangers to people at work. I would hope that we could achieve the outcome that Dr Murray wants without having to threaten anyone with a legal sanction for failing to deliver on recommendations.

Elaine Murray: Is it your principal concern that a legal sanction would make the process more adversarial?

Paul Wheelhouse: We are certainly trying to avoid it becoming adversarial and getting to a situation in which everyone has to be tooled up with lawyers to take part in an inquiry. Clearly there are circumstances in which lawyers need to be present and to act on behalf of families if they need someone to advocate their concerns or raise their questions. Equally, we do not want it to become a gladiatorial or adversarial environment. We want people to be able to speak freely and get to the truth as to what happened to that individual or individuals and to answer why they died, how they died and what could be done to prevent those circumstances from happening again. The less legalistic we can keep it, the better—although we have a sheriff overseeing the process to use their legal knowledge to ensure that it is conducted fairly and with rigour. We want to avoid the inquiry being seen as a challenging setting in which people close up the doors, bring down the shutters and do not want to participate.

I do not know whether Hamish Goodall might be able to add anything about the consultation responses on that point.

Hamish Goodall: There was fairly strong support for the proposals in the Government's bill, which basically require that a party to whom a recommendation is addressed is obliged to respond.

They do not have to comply with a sheriff's recommendation, which, after all, is only a recommendation—it does not bestow rights and obligations. They have to respond to say what they have done in relation to compliance, what

they intend to do or, if they are not going to comply, why they are not going to comply. If they do not respond at all, that fact will be noted beside the sheriff's determination on the SCTS website. That is as far as we think we can go. It will become public knowledge that a body has not responded.

The Crown Office tells us, however, that in the vast majority of cases the people to whom recommendations are addressed take them very seriously. I suggest that it is unlikely that there will be many instances in which parties choose not to respond at all.

Paul Wheelhouse: The other aspect of this, which I add for Dr Murray's benefit, is that we were trying to arrive at a situation in which sheriffs did not feel reluctant to make recommendations because they might be too onerous or difficult for the organisation to respond to. If we allow the sheriffs freedom to recommend, using their best judgement, what they think would be helpful to avoid a similar situation arising in future, that would give the sheriffs maximum scope to make their points.

We hope that organisations can respond in the manner that Hamish Goodall has set out. They can either respond positively, in that they take forward the recommendation, or, if that is not practical or is economically unfeasible for some reason, they can respond as to why that is the case, and that will help to inform the process. In turn, that may inform the regulators as to what is realistic and practical for that company, or even that sector, to do across the board. We hope that it will keep the information flow going and that even a negative response may yield useful information that might be used by regulators or others to inform future policy.

Roderick Campbell: In his evidence on 19 May, Mr Tom Marshall called for responses to be made to the sheriff rather than to the SCTS, as a way of keeping the inquiry process open. I am not sure whether you have fully touched on that.

One of the other things that Mr Marshall put forward in his written submission of 22 May is that the Justice Committee itself could monitor recommendations and responses as part of Parliament's policy of assessing the effectiveness of legislation.

Do you have any comments on those points?

Paul Wheelhouse: I do not want to determine the role of the Justice Committee; it is for the Justice Committee to determine what it feels is its appropriate role in this area.

The point about reporting is an important one. Since Roderick Campbell mentions him, I make the point that even Tom Marshall has said that

"it is unrealistic to have a mandatory inquiry in every case of industrial disease". —[*Official Report*, Justice Committee, 19 May 2015, c 9.]

He has also made points that are supportive of the reporting process.

I think that it is important that we have scrutiny of the individual decisions that are made by companies or organisations in response to sheriffs' recommendations. My personal view is that it would not necessarily be appropriate for the Justice Committee to do that, but if the Justice Committee felt that it should have that role, I would not prevent it. Post-legislative scrutiny is a very important function of the Parliament and is perhaps something that we should do more of.

The sheriff's role is finished after the determination. That is because it would probably be time consuming for sheriffs to oversee the process of responses to recommendations coming back, and it would perhaps be inappropriate for them to do so when they have to take on other cases.

Clearly, as Hamish Goodall has said, if information is presented that suggests why an organisation has not been able to take forward a recommendation, it is open to regulators and others, including those concerned about the practices in that organisation, to flag the matter up. Of course, reputational issues would be raised, too. I hope that the process will be effective in driving change in the organisations to which recommendations have been made. It will not necessarily be appropriate for sheriffs to continue to play a role after that, given that they have a judicial rather than a monitoring and evaluating function.

12:30

The Convener: I understand that you might not have seen Tom Marshall's response, given that we received it only this morning. Is that correct?

Paul Wheelhouse: I have not seen it, convener.

The Convener: I am sorry—I was a bit distracted by whether responses had to be published. I see that, under section 27(5)(a), they have to be, which is important.

Jayne Baxter: I want to ask about delays, minister. Do you think that Lord Cullen's proposal of an early hearing would speed up proceedings and have a positive impact on the process?

Paul Wheelhouse: I certainly recognise Jayne Baxter's point about the need to avoid unnecessary delays. The bill is designed to make the process of delivering an FAI more efficient and effective, and anything that we can do to smooth things and ensure that the process happens as effectively as possible will be helpful.

I was not present for the Solicitor General's evidence, but I have been made aware of the point that she made about a milestone charter. I think that that is a constructive suggestion, and I understand that she is going to come back to the committee on it. In a sense, it would mean that, in the three-month interval that the Solicitor General referred to, the Crown Office would review where it was at with an inquiry and what needed to be done to ensure that it happened and that any delays were kept to a minimum. As I have said, that is a very constructive suggestion that will, I hope, largely deal with the intent behind Lord Cullen's recommendation.

It is also worth stating for the record that the Crown Office has in recent years made significant efforts to keep families themselves better informed about the progress of death investigations. We are obviously open to any points that the committee might make in its report, but we believe that, as a result of those efforts, there is no need to hold in every case the hearings that Lord Cullen suggested. Moreover, the Lord President made a valid point when he said:

"I would not like the court to be put in the position of exercising some supervisory role over the Crown's decision-making process, as that would give rise to a serious constitutional issue."—[*Official Report*, *Justice Committee*, 19 May 2015; c 37.]

The Convener: Can I just stop you there, minister? This morning, the Crown said that it would bring a charter—

Paul Wheelhouse: Yes—the milestone charter.

The Convener: —to the committee before stage 2. That should be helpful.

Paul Wheelhouse: I believe so, convener. It is a very positive move by the Solicitor General, and I think that it will help to deal with what I am sure is the intention of committee members to ensure that families are kept well informed and that everything is done to bring forward inquiries as quickly as possible. The flexibility that the bill provides with regard to accommodation should also help in that respect.

Jayne Baxter: Do you think that the COPFS is adequately resourced to take on what are not necessarily new roles but enhancements to its existing role? Will there be resource implications in that respect as time goes on?

Paul Wheelhouse: I hope that the Crown Office will raise with the justice board any problems with resourcing the provisions, that problems will be dealt with at that level and that recommendations for any changes that might be necessary are made. However, the proposal that the Solicitor General has made is an efficiency measure that will help to ensure good co-ordination with regard to the commencement of an inquiry and minimise any risks of potentially unnecessary costs arising as a result of delays or any problems in the initial process. In some ways, the costs involved can be seen as preventative spend, as they will ensure that the inquiry happens more smoothly, that it happens in the appropriate location and that it is resourced appropriately.

I hope that the approach will not be particularly onerous for the Crown Office, but we will keep things under close watch, see whether any issues arise as the legislation is applied and help the Crown Office if necessary. I should point out, though, that the Crown Office is obviously aware of the bill, has looked at the financial memorandum and is comfortable with the figures in it.

Alison McInnes: The committee currently has in front of it a couple of active petitions relating to how the COPFS carries out death investigations. Have you given any consideration to whether there is scope for introducing a review process that families can use if they are unhappy about the way in which a death investigation has been carried out?

Paul Wheelhouse: I would be happy to take on board any points or specific concerns that have been raised on that matter. We have seen the Crown Office bring in family liaison positions, although the extent to which they are deployed in local sheriffdoms may vary from one area to another. We would like to ensure that there is consistency in that process.

Judicial review is the due legal process in these situations. We can certainly address that in due course. Perhaps once we have had a chance to reflect on the evidence that the committee has received, we can come back.

Alison McInnes: As part of that reflection, will you consider whether it would be appropriate for a sheriff to be invited to adjudicate on whether it was appropriate that an investigation had been closed?

Paul Wheelhouse: If I may, convener, I will ask Greig Walker to address that point. He is earning his crust today, as you can see. [*Laughter*.]

The Convener: We are missing you already, Mr Walker.

Greig Walker: There are two points. Alison McInnes used the word "scope", but this is a bill about inquiries; it is not about the investigation stage. Perhaps the charter that will be published can address that point, but I suggest that it is not for inclusion in the bill.

The point about a sheriff having a greater role sits squarely in the territory of the Lord President's concerns about constitutionality. The Scottish tradition—which, as we heard, predates coroners—is to have discretion in investigating

deaths; a sheriff review of that is something that the judges are not comfortable with. As the minister said, although I would not encourage this to happen routinely, Crown decisions can be judicially reviewed under the ordinary grounds for judicial review.

Alison McInnes: Thank you.

The Convener: I think that this is the final question. I do not expect you to pull this rabbit out of the hat just now, minister, but can you provide the committee with information about the cost to the legal aid fund of supporting families at FAIs in the past three years? Although an FAI is in the public interest, families have a great interest themselves in what takes place, and they quite often require legally aided representation. It would be helpful to know what the costs of legal aid are and to hear any other comment that you might wish to make about legal aid for families.

Paul Wheelhouse: I agree that the issue is important. The inquiry is there to establish, in the public interest, what has happened to an individual or individuals; to find the cause of death; and to learn lessons and disseminate those lessons and recommendations.

Although this is not their statutory purpose, we recognise the very important role that inquiries play in providing a service to families that helps them to understand what happened to a loved one. In many cases, families may wish to raise questions that a procurator fiscal would not raise, because the procurator fiscal has a specific role and is acting for the public interest.

The role of the Scottish Legal Aid Board is to make legal aid available where a person entitled to be represented at an FAI can show that they have concerns that a procurator fiscal would not otherwise raise. Any application for legal aid will be subject to the usual three statutory—

The Convener: I know all that stuff; sorry, minister, but time presses on. The Government has said that it will not go ahead with Lord Cullen's recommendations on legal aid on cost grounds. We would like you to spell that out. We need to know what has been given in the last three years and why. I know about the reasonableness test, but these circumstances are very difficult from civil cases.

Paul Wheelhouse: We will certainly look at trying to provide the figures that you seek for the committee's benefit. The Scottish Human Rights Commission acknowledged in its evidence to the committee that there was no ECHR issue with the current provision of legal aid for FAIs. We have not seen any changes in circumstances that would cause the Scottish Government to revisit its attitude to the provision of legal aid for FAIs. As I think you know, we are doing work on legal aid at the moment, and I will take your point into the remit of that work and look at whether there is any scope—

The Convener: This is a sweeping-up question. The bill removes the sheriff's power to award expenses. Why does it do that when people might feel that, if someone abuses process, expenses should be awarded against them for costing the court and everybody else time and money?

Hamish Goodall: Expenses are awarded in civil litigation, and a fatal accident inquiry is not civil litigation. We believe that, if someone is behaving vexatiously at a fatal accident inquiry, the sheriff has sufficient case management powers to be able to deal with that, without any award of expenses—

The Convener: Is it not the case that sheriffs can award expenses if someone has been vexatious?

Hamish Goodall: I believe that there was one case recently, which—

The Convener: So you are changing the position. Why?

Hamish Goodall: Because we do not feel that it is appropriate. As I say, expenses are awarded in civil litigation, and a fatal accident inquiry is not civil litigation.

Greig Walker: There is a wider picture in the background, which concerns the Courts Reform (Scotland) Act 2014. The civil courts review moved all the civil courts, with all their hats on, towards much more active case management, so the power to make court rules has been expanded. The power in the bill before us for the Lord President to make FAI rules is, again, expanded, with the expectation that there will be much more in the way of active case management at all stages than has been the case to date.

We are saying that, rather than let parties get away with murder and punish them later, the sheriff will, from the outset, be able to stop people wasting time, so there should be no wasted costs or expenses for anyone.

The Convener: We will hold you to that, if it is not going to be in the bill.

Thank you very much for your evidence. I am conscious of the time, minister, so once you have had the opportunity to look at the evidence from our earlier witnesses this morning, if there is anything that you have not had the opportunity to discuss and which we have not questioned you on, please feel free to give us your comments.

Paul Wheelhouse: Thank you, convener.

Annual Report

12:41

The Convener: Item 4 is our annual report from 11 May 2014 to 10 May 2015. It is a factual account of the areas of work that we have undertaken during that period. We have the report here, in all its glory. Are members content?

Members *indicated agreement.*

John Finnie: I think that is a very good report, but I have two minor points to raise. I refer to the second line of paragraph 24. I think that we should insert "many significant", to make it read "the many significant implications".

The Convener: Yes, that is all right—if everybody is agreed. The text would be: "the significant implications the opt-out would have".

John Finnie: My other small point concerns paragraph 32. The final line says:

"provided witnesses with an opportunity to engage with each other."

I think that we should insert "the Justice Committee and", to make it read: "engage with the Justice Committee and each other."

The Convener: Yes, I see: it is rather like we were all sitting having cups of tea and buns—

John Finnie: As if we were just spectating.

The Convener: Yes—it is like we were spectating. It is a more of a grammatical suggestion.

Christian Allard: I just want to check that the report covers the period right up to 10 May 2015. I was just saying to a colleague that we—

The Convener: I beg your pardon?

Christian Allard: The report says:

"This report covers the work of the Justice Committee ... to 10 May 2015."

I told a colleague this morning that we are dealing with six bills just now. Did we not start to deal with the Apologies (Scotland) Bill before 10 May?

The Convener: Yes—we can reflect the call for evidence for the Apologies (Scotland) Bill.

Christian Allard: So, it is six bills. It would be better for the report to say that.

The Convener: You just want to get the right number in the report—yes. We will include a reference to the Apologies (Scotland) Bill at its early stages, with the call for evidence.

12:43

Meeting continued in private until 12:46.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by APS Group Scotland.

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN 978-1-78568-656-6

Revised e-format available
ISBN 978-1-78568-674-0

Printed in Scotland by APS Group Scotland