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Official Report

JUSTICE COMMITTEE

Tuesday 23 February 2016

Session 4

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JUSTICE COMMITTEE
7th Meeting 2016, Session 4

CONVENER

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

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
Margaret McDougall (West Scotland) (Lab)
Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Jane Mair (University of Glasgow)
Professor Kenneth Norrie (University of Strathclyde)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 23 February 2016

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Christine Grahame): I welcome everyone to the seventh meeting in 2016 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices as they interfere with broadcasting, even when they are switched to silent. We have received apologies from Alison McInnes and Margaret McDougall.

Before I move on to agenda item 1, I want to refer to something that I am sure the committee is not too happy about. Before Christmas, we asked Police Scotland for documentation on standard operating procedures—a Police Scotland document and documentation from the Interception of Communications Commissioner's Office. Police Scotland's lawyers previously said that the documents could be provided with redactions. Having requested an update on when the committee would finally get to see the documents, we received an email on 22 February that said:

> "This redaction work is intensive and requires to be accommodated in terms of daily business, and within the resources which are available from time to time. It is reasonably estimated to take another couple of weeks."

In other words, it looks like the documents will not be provided before the evidence session on 1 March with the chief constable and the head of the Scottish Police Authority. It may be even longer than that and, bearing in mind that we are running out of time, I am not very happy that Police Scotland is apparently deferring, to put it politely. I think that we should be pressing further on this matter. What do members feel?

John Finnie (Highlands and Islands) (Ind): I do not think that the police are deferring at all; I think that they are being consistently obstructive. This committee knows better than others that Police Scotland is very adept at redaction; we have seen it in action at first hand. I suspect that Police Scotland is hoping that this will go away and that we will not come back, but I do not think that its response is acceptable.

The Convener: I appreciate that this is not an agenda item—I am being reminded of that. However, I am in the chair, and given that we have had great difficulty in getting witnesses to come before us and in obtaining evidence on this issue, I feel that this is yet another nail in the coffin.

That is now on the record and I would like to write to Police Scotland to say that we would prefer—I will be polite—to have the redacted documents in time for our next evidence session, bearing in mind that we are running out of time. The committee does not sit during the last week of the session and we will soon be into purdah, when the Parliament will no longer be sitting. We want to deal with this before that happens. Do you agree?

Members *indicated agreement.*

The Convener: Thank you. I will suspend for a couple of minutes to allow the witnesses to come in.

10:02

Meeting suspended.

10:03

On resuming—

The Convener: I now move on to agenda item 1, which is a decision on taking items 5 and 6 in private. Item 5 is consideration of a report on the legislative consent memorandum on the Armed Forces Bill, and item 6 is consideration of our work programme. Do members agree to take those items in private?

Members *indicated agreement.*

Family Law (Scotland) Act 2006

The Convener: Agenda item 2 is on the Family Law (Scotland) Act 2006. This is our main item of business today and it is our first evidence session on post-legislative scrutiny of the Family Law (Scotland) Act 2006. During the short time that we have available for this work, we will focus our attention mainly on two matters: provisions in the act on cohabitation; and provisions in the act on parental responsibilities and rights.

I welcome to the meeting Professor Jane Mair from the University of Glasgow's school of law, and Professor Kenneth Norrie from the University of Strathclyde's law school. Professor Norrie, I note that you were the adviser to the Justice 1 Committee when it looked at the original bill 10 years ago—I was not in the chair then. It is good to welcome you back although, according to your written evidence, not everything that you had to say was listened to.

I thank you both for your written submissions. We will go straight to questions.

Margaret Mitchell (Central Scotland) (Con): Good morning, panel. I wonder if I could ask Professor Norrie about his submission, in particular the section on marriage by cohabitation with habit and repute. Maybe he could elaborate a little bit on this concept's abolition not being complete because of the provisions in sections 3(3) and 3(4), which

> "effectively retain the concept where its application would protect the validity of marriages invalidly contracted abroad".

Having been on the original committee, I confess that I did not remember that we had agreed to that, so I would be very interested in your comments in that regard.

Professor Kenneth Norrie (University of Strathclyde): The issue arose at a very late stage, because in the original bill—and certainly as the bill was going through—the concept of marriage by cohabitation with habit and repute was simply being repealed. It was deemed to be entirely unnecessary since its primary function was to give certain benefits—and obligations—of marriage to unmarried couples who had not gone through a form of marriage. So, with regard to the cohabitation provisions, the original aim was simply to abolish the concept completely.

Then, at a very late stage, a Government amendment was introduced to meet the concerns of at least one committee member who thought that it would be useful to retain the concept in a very unusual scenario: one in which you had married abroad, assumed that the marriage was valid, come back home and spent your life together as a married couple and then, at the end of the marriage—typically by death—it was suddenly discovered that the marriage was, for some reason, invalid. I think that Jerry Hall had that problem, although not in relation to Scots law. In that instance, Scots law might preserve that marriage by applying the doctrine of marriage by cohabitation with habit and repute—people were reputed to be married, so they were married.

The amendment was introduced at the very last minute—I think it was actually at stage 3—without much debate, which probably explains why you do not remember the discussion. It said that we would keep marriage by cohabitation with habit and repute if the issue was important after one of the parties died, and they had married abroad and their marriage was invalid according to the rules of the foreign jurisdiction. Fair enough.

The problem was that the provision related to marriage but did not give any protection to civil partnerships that were entered into abroad. Committee members will recall that civil partnership came in at the end of 2005, which was just about the same time as the Family Law (Scotland) Bill was being signed off in about December 2005. At that point, it seemed to me to create discrimination between married couples and civil partners—in other words, between same-sex couples and opposite-sex couples.

I raised the issue again, through the Equality Network, when the Marriage and Civil Partnership (Scotland) Bill was going through in 2013. Again, a late amendment was introduced to extend the concept of marriage by cohabitation with habit and repute to same-sex couples marrying abroad. However, again, couples who civilly empartnered abroad were forgotten. If they got the forms wrong, there was nothing that we could do about it. My personal view has always been that if you cannot even be bothered to get the process right, you should suffer the consequences, and we say that for civil partners but give extra protection to married couples. My point is: either give them the same or give them neither.

Margaret Mitchell: I think it is a point well made and certainly something to flag up in the scrutiny process, which already, even on that point alone, has proved worthwhile. I would probably tend to agree with you: if a marriage has been invalidly agreed abroad there is a question about whether we should ratify it in this country. That is perhaps something for further debate.

Could I also ask both panel members whether, under family law, we should be looking at formulating less adversarial procedures for determining orders for parental responsibilities and rights or for contact and residence?

Professor Jane Mair (University of Glasgow): The evidence is that, to a very large extent,

couples already make agreements about children. A relatively small proportion of such cases come to court or reach final adjudication in court so, although I completely agree that there should be further encouragement of non-adversarial approaches, I think that agreements already happen. In some research that I did a couple of years ago, we were looking at separation agreements, and certainly almost half of the sample that we looked at included arrangements about children—those were just part of the agreement. Now, getting that agreement might have been a very contentious process; nonetheless, the evidence shows that couples are already making such agreements to quite a large extent.

Margaret Mitchell: Maybe I have a skewed view, but for anyone who comes to me, the position seems to be less than amicable, and mediation or alternative dispute resolution, in the interests of the child, has not been entered into or even considered.

Professor Mair: There does seem to be a real split. For those for whom it becomes contentious, it becomes very contentious.

The Convener: I know, because I used to be a family lawyer. The ones who dig their heels in make it worse.

Professor Mair: I think that is right.

The Convener: I do not know if you want to comment on that, Professor Norrie.

Professor Norrie: The only thing that I was going to add was that although it is a really important question, I would slightly reformulate it, to ask whether there was anything in our current law that disabled people from coming to appropriate agreements. I think the answer to that is probably no, and that there is nothing in our current legislation that specifically sets couples up as adversaries, apart from the whole divorce process. I recall Margaret Mitchell lodging an amendment to the bill—which, unfortunately, was not agreed to—on the whole divorce issue. We have a number of processes, both before a case gets to court and during the court process, to encourage couples to come to some sort of agreement about children. The bottom line is that some separated couples will never come to an agreement.

The Convener: I accept that the question went down the road of mediation, but can I get members to focus on cohabitation and parental responsibilities and rights? The focus is very narrow, albeit important. Members should just focus on those two particular issues.

Roderick Campbell (North East Fife) (SNP): Thank you, convener. Perhaps before I start I should make reference to my registered interest as a member of the Faculty of Advocates.

First, I will turn to the definition of "cohabitant" in section 25. Since the Marriage and Civil Partnership (Scotland) Act 2014, that is now deemed, among other things, to mean that section 25(1)(a) must be read as extending to two people of the same sex who are living together or as if they were married to each other. Professor Norrie, you made the comment:

> "The substance of the law is clear but, requiring to be read in the light of the 2014 Act, is obscure."

I do not want to put words in your mouth, but do I detect that you mean not that the law cannot be interpreted but that it needs tidying up if we are looking at this whole area?

Professor Norrie: Yes, I think that is fair. It is relatively straightforward, I think, for lawyers to understand what is going on, but it is far less easy for non-lawyers to look at one piece of legislation that refers to another piece of legislation, marry them together and come out with the result. So, yes, that comment would be fair.

Roderick Campbell: Professor Mair, have you a view on the definition?

Professor Mair: First of all, I agree with that point. It would be a lot clearer if the law just said "a couple who live together as if they were husband and wife".

Roderick Campbell: I will move on from definitions to section 28 and, in particular, property rights. I do not know whether the witnesses have had the opportunity to look at the submission from Kirsty Malcolm of the Faculty of Advocates. She talks about some guidance having come from the Supreme Court in the case of Gow v Grant but says, in her second paragraph:

> "It is impossible in my view to provide any further guidance within the legislative framework that would facilitate the understanding or application of section 28 because, as was identified at the time these provisions were in contemplation, each case will turn very much on its own facts and circumstances."

Are there any comments on that?

10:15

Professor Norrie: The Government policy when the 2006 act was going through was very clearly that cohabitants must be treated differently from married couples. One of the consequences of that—although not the only one—was that courts were to be given a far greater degree of discretion in dealing with the financial implications of separation for cohabitants than they were for married couples. Sheriffs and judges were very deliberately given the widest possible discretion, and the assumption behind that was that

cohabiting couples present a huge array of different personal circumstances and that it is inappropriate to have a set of rules that applies to them all. I am not convinced by that argument; it seems to me that married couples also lead their lives in a very individual way—and they should be entirely free to do so.

We give quite detailed guidance on the division of married couples' assets, and Professor Mair's recent research shows clearly that that works very well in Scotland. However, for cohabitants, sheriffs are allowed to do what they think is appropriate in the individual case, which makes it virtually impossible for practitioners to give any advice to couples and actually creates contention. If you have a piece of legislation that deliberately allows judges to do what they think is fair in the individual case, you are inviting parties to take up cases on the off-chance that they will get a good deal. It seems to me that it would be far more sensible if we gave virtually the same guidance to the two different types of couples—if, indeed, they are so different.

Professor Mair: I would very strongly agree with that. The cohabitation provisions are very much based on an understanding that cohabitation is in some way different from marriage. There is a wide range of different research—social policy, social science and anthropology-type research—that all tends to indicate that there is a huge variety of types of relationship among all kinds of couples. For me, there is an underlying distinction between marriage and cohabitation in terms of the legal relationship that I do not think is borne out in how people live their lives.

In Kirsty Malcolm's submission, in particular, what she was saying was that, if we stick with the basic system that we have at the moment, it is perhaps difficult to see what further guidance can be given to the courts. I agree with Professor Norrie that if we go back and look at the starting point, the question is: do we think that marriage is fundamentally different from cohabitation? If we do not, very similar guidance should be given for cohabitation as is given for marriage.

The courts, family lawyers and couples themselves are now so used to financial provision on divorce, and the Family Law (Scotland) Act 1985 is so clear and so well understood, that it seems to work very easily. As Professor Norrie said, that is the finding of the research that I have been doing recently about cases from the past thirty years: everybody understands the law, it works really well and that, in turn, encourages couples to reach agreement without going to court.

The 2006 cohabitation provisions just stand out in such stark contrast to that very clear legislation and make it even more difficult for courts and sheriffs and judges to operate. I do not see any reason why the approach to cohabitation should not be similar to that for marriage. However, that will take a fundamental decision of principle: do we want to treat cohabitation and marriage in the same, or in a similar, way?

Roderick Campbell: I take that point on board as well as the point that it seems to be self-evident that where there is discretion, it is very difficult for lawyers to advise as to what the outcome will actually be. Kirsty Malcolm indicated that there is an absence of published judgments—that material is not available—so it is really difficult for lawyers, but she also says:

> "Whilst heavily criticised, it is difficult to see what might take the place of section 28, and because there is a need, in my view, for the possibility of a financial award in appropriate cases, albeit difficult to work with, the current arrangements provide a remedy that was missing before."

She then agrees that we could perhaps look at things other than the payment of capital sums. Do you agree that it would be difficult to replace section 28?

Professor Norrie: I do not agree at all. It is right that section 28 has provided a very valuable remedy where none existed before—I absolutely agree with that. However, the starting point should be section 9 of the Family Law (Scotland) Act 1985, which is the provision that deals with married couples. It would be a very useful exercise to go through the five justifications for making a financial award that apply to married couples and ask: is this appropriate for cohabitants? If the answer is yes, then that principle should apply; if the answer is no, the principle should not apply. We have a model that we could tap into; we do not need to reinvent the wheel.

Roderick Campbell: Professor Mair?

Professor Mair: I would agree. I disagree with Kirsty Malcolm's view on that; there are ways in which section 28 could be improved—it could be in a more minor way. Put simply, the provision is poorly drafted, it is complicated and it is difficult to understand how the various subsections relate to one another, so even if we just stuck to the two basic principles—that it is just about economic advantage and disadvantage, and about on-going childcare—the section could be a lot clearer. The other approach, which I would favour, would be to look at it again: to go back to section 9(1) of the 1985 act and consider all of the principles.

Roderick Campbell: Thank you.

The Convener: How far would you go? Given that we have such a varied, and quite established, set of relationships in society now, rather than doing things piecemeal, has the time come to remove all distinctions between same-sex marriage, heterosexual marriage, cohabitation and civil partnerships, in terms of financial

arrangements and contact with children, obviously subject to evidence on cohabitation and other matters?

Professor Mair: I think that the time has definitely come to consider that. Whether we decide to do it or not is for debate, but we have reformed a lot on a piecemeal basis for a very long time, and for good reasons, but have not gone back and looked at the whole picture.

For family law purposes, we need to decide what is the purpose of the regulation in the first place: what are we trying to achieve? Are we trying to protect, in which case the position of all these relationships is very similar? Or are we trying to send some sort of message and say to couples that we would rather they entered into one sort of relationship rather than another? We have to decide what family law is trying to achieve. I definitely think that it is time to look at the provision, because different relationships have been introduced into the law for different reasons and without any clear underlying principle.

The Convener: Professor Norrie?

Professor Norrie: I would agree with that. The only thing that I would add, and it actually goes back to the earlier point about the definition in section 25. One of the ways that the ad hoc approach plays out is that every time we have new legislation dealing with cohabitants, people look at the definition and add tweaks to it. The new succession bill—not the one that you have just passed but the next, more fundamental succession bill—will tackle succession rights for cohabitants and what they should be, and the current proposals have a definition based on the same factors, but with a slightly different list from the one that we currently have in section 25, which will still presumably apply to section 28.

Also, of course, this act is not the only act that gives legal consequence to cohabitants; we have the Matrimonial Homes (Family Protection) (Scotland) Act 1981, which again talks about living together as husband and wife, without any list of factors. Now, if you have got one piece of legislation with no list, another with a bit of a list, and another with a long list, you could end up with the ludicrous situation of having to tell somebody that they are a cohabitant for one purpose of the law but not for another. What we should be doing is taking an overview and saying in law what a cohabitant is for all statutory and other purposes.

The Convener: Is there not a point of view that you devalue marriage by doing that, and that if you simply want to ensure your rights, marry?

Professor Norrie: That is a political debate that is worth having. It would presumably involve examination of the situation in other countries such as Australia and New Zealand, in which most states have more or less got rid of the differences, certainly in relation to the financial situation. You might also look at the statistics to see whether the number of people who get married in those countries has gone down. At the moment, the answer is no—take from that what you will. However, that is a very important political and social question rather than a precisely legal one.

The Convener: You did not mention contact and residence with children. Does the position on proving rights vary in different relationships? Would you extend having the same tests as for marriages beyond consideration of financial arrangements to consideration of contact and residence orders?

Professor Norrie: Yes, but we more or less do that in any case.

The Convener: We do that now. Thank you.

John Finnie: I have some questions about children. Professor Sutherland and the Law Society of Scotland advised the committee that the definition of “child” in section 28 of the 2006 act is narrower than in the comparable provisions relating to divorce and the dissolution of civil partnerships. The suggestion is that that is not satisfactory.

I understand that section 28 applies if the child in question is the child of both cohabitants; it does not cover the child of one cohabitant who is cared for by the other cohabitant. Is that a gap that needs to be filled?

Professor Mair: It is another example of inconsistency. Different pieces of legislation have been reformed at different times. In family law in Scotland, the child is often taken to be the legal child of the couple or a child who is accepted into the family. There is an anomaly in the cohabitation provisions, in that section 28 applies only when both cohabitants are the parents of the child.

In other situations, such as in relation to the provision of aliment, an adult owes an obligation to a child who has been accepted as a child of the family. It would be more consistent if “child” was defined in broader terms for the cohabitation provisions.

Professor Norrie: It is a great tripwire in a family law exam to talk about the child in relation to the application of section 28, but if it is a good tripwire in an exam, that generally means that it is bad law.

A deliberate decision was made when the 2006 act was going through about what should happen with a stepchild. As far as I recall, it was felt that, if a person marries somebody who already has a child, that person undertakes obligations to that child as well as to the person he or she is marrying. If, however, the person simply moves in

with someone who already has a child, the person may be undertaking obligations to the other party, but there is no legal relationship with the child.

The basis of the distinction relates to what the obligant is undertaking by entering the relationship. Should the parties separate and the child remain with the non-parent, it leads to a really unfortunate conclusion, although admittedly it would be an unusual situation. The non-parent would have no claim under section 28 for a share of the childcare costs, although they are bringing up the child. They can cover the costs through child support and that sort of thing, but there is no additional claim under section 28. That is an unusual scenario, but it leaves the child in an unfortunate position.

10:30

In child law, the starting point ought always to be the child, not the parents and the obligations to each other that they feel that they have undertaken. The starting point should always be the child and what will give the best result for them. If the child is the starting point, it seems to me that the best result is to treat all children equally, whether the two adults they live with both happen to be their legal parents or only one is their legal parent.

John Finnie: Thank you. It was my understanding that everything was focused around the child's welfare being paramount. That seems not to be the case in that particular tripwire instance.

Professor Norrie: In child law, the welfare of the child is paramount, but that particular provision is not seen as part of child law; it is seen as to do with adult relationships, so the welfare of the child does not come in. Again, that is part of the broader issue that Professor Mair was talking about. Let us step back and look at it as a whole instead of taking it piecemeal and making an artificial distinction between the child's relationship and the adults' relationship.

John Finnie: Many people will be surprised that there has not been some consolidation. There have been a lot of initiatives—getting it right for every child, for example. Is there is a requirement for a broader consolidation of provisions affecting the child across our civil law?

Professor Norrie: In 1992, the Scottish Law Commission suggested a broad consolidation of the whole of family law, and it produced something that was almost a draft code. The Scottish Parliament and the Parliament in London have spent the time since then picking out bits and pieces and building something up. However, the times today are different from what they were in 1992, and our motivations and values have changed as time has gone on. We do not have a family law code; we have bits and pieces of legislation, each very good in itself and each reflecting the feelings of the time, but now there is very little coherence.

John Finnie: Okay. Thank you very much.

Gil Paterson (Clydebank and Milngavie) (SNP): How would it work when two people cohabit, of whom one is a parent and the other is not, and there is a third party who is the other parent? Where would the other original parent's rights fall if, as you suggest, the rights are to be given to the cohabitees rather than to them?

Professor Norrie: The original parents—the legal parents—of any child have financial obligations to that child. Whether or not the parent is living with the child, that parent will have financial obligations. The person who is living with the child has financial obligations, whether or not they are a parent, so there could be three people with financial obligations to the child.

Section 28 tries to recognise the fact that, if someone is actually bringing up a child, they will have greater costs than the alimentary cost of feeding, educating and clothing the child. They will be required to put on birthday parties and take the child to the football—they will have to spend more. Section 28 tries to share those additional costs fairly, and although it does that fine for a child in a situation where both cohabitants are the parents, it does it less well if the second parent is somewhere else.

Professor Mair: My understanding is that section 28 is primarily about the adults. The classic situation would be a cohabiting couple with a child who is the child of the man. The couple splits up and the woman continues to care for that child—the child is not her child but she continues to have the economic burden of caring for them. Section 28 would address any on-going burden on her in terms of reduced working, impact on earning and that sort of thing. However, support for that child would be separate; section 28 is more about the adults.

Gil Paterson: You have made it clear that the birth parents still have the same financial responsibility.

Professor Mair: Yes.

Gil Paterson: That does not change.

Professor Mair: No.

Gil Paterson: Thank you. That explains it well.

Elaine Murray (Dumfriesshire) (Lab): Section 24 of the 2006 act amended section 11 orders under the Children (Scotland) Act 1995. We have had a variety of evidence from witnesses on that. Scottish Women's Aid feels that the provision

could work but is not being implemented properly. Others say that there should be a more comprehensive list of factors that the court should take into account. Families Need Fathers feels that the provision is being abused by people who do not want fathers to have contact with their children. What are the witnesses' views on it? Is further amendment necessary?

Professor Norrie: That may be an issue on which Professor Mair and I take slightly different views.

The Convener: Good. We like it when witnesses fall out.

Professor Norrie: We will not fall out; we might take politely differing views.

I am not a great believer in lists of factors. Section 25 of the 2006 act contains a list of factors that we take into account in defining "cohabitant". It has often been argued that, under section 11 of the 1995 act, as in the equivalent English legislation, the welfare of the child is paramount, and here is a list of factors that the courts have to take into account.

However, I am not persuaded that such lists are valuable. There are two problems. First, they lead to a tendency for the courts simply to tick the boxes and say, "Yes, I have taken account of A, B, C or D." Secondly, they tend to emphasise the statutory, listed factors as opposed to any other factors that might arise in an individual case.

When the 1995 act was first passed, section 11 had no such list. We still do not have a list; slightly anomalously, the 2006 act added in one factor—it is broadly one factor, although it can be broken down—that the courts should take into account when determining the welfare of the child. Speaking very broadly, that factor is domestic abuse. That one factor—it is not additional; it is a factor in itself—is specified.

The question that was asked but never satisfactorily answered in 2006 was whether there was any evidence that the courts were systematically ignoring domestic abuse as a factor. I do not recall any proper evidence being advanced to say that that was the nature of the problem. Perhaps that was not the purpose of the additions to section 11. The purpose was probably a more symbolic one of giving a message that, if there is domestic abuse in the family, that is a really important matter that the court will take into account. However, its practical effect has not been particularly great. There have been very few judicial discussions of the provision and there is certainly no evidence that court practice has changed in any noticeable way. Therefore, I can understand people who argue that the provision promised more than it has delivered. My response to that is that, if we look carefully at the wording, we see that it did not actually promise much.

Professor Mair: I am sorry to disappoint you, but it turns out that we do not disagree.

Professor Norrie: I thought that you liked lists.

Professor Mair: No, I do not like lists.

The Convener: Well, that is a tiny disagreement.

Professor Mair: It was important to have further clarification of what domestic abuse might mean, the different ways in which it might operate and the different impacts that it might have within a family. Therefore, I think that the motivation behind that was really good, and it is good to have that detail.

However, I agree that having that clarification in section 11 of the 1995 act skews that section. As Professor Norrie said, we have a very clear concept of welfare, but we do not have a list of factors. Section 11 therefore looks a bit strange. We have spoken about tripping up students, and it trips them up all the time, because they pick up on it and think that it is something different from welfare. You have to tell them, "No, it is about welfare and about trying to give the courts further clarification and guidance on how to assess welfare." I do not think that the format of section 11, as amended, is particularly helpful. Nonetheless, I think that it is very important to have as much awareness as possible about the potential impact of abusive relationships within families.

There is very little evidence to show how the provision is used by the courts and what impact it is having. I am familiar with research by Kirsteen Mackay, who looked at child contact cases and how children's views have been treated in those cases, specifically in the context of alleged abuse. She found that children were not listened to as often as they might have been and that, when children specifically raised issues of abuse, the court quite often went ahead and ordered contact, although the children specifically said that they did not want to have contact.

Elaine Murray: In your view, is there a better way of drawing the court's attention to the importance of considering the potential for abuse? If you do not particularly like the way that that is done in section 24 of the 2006 act, is there a better way of achieving the aim of getting courts to take domestic abuse into consideration? The Abusive Behaviour and Sexual Harm (Scotland) Bill is under consideration in the Parliament, and there will probably be further legislation on coercive control in the new session. Is the provision just in the wrong place? Should it be in guidance? Is there a better way of doing it?

Professor Mair: I suppose that it ultimately comes down to how all those things are put into practice. It is about education and understanding. I was struck by a sentence in one of the submissions—I think that it was from Grandparents Apart UK—that stated that the law is generally fair, but that there is a problem with the way that it is put into practice. It is dangerous to always go back to the law and ask how we can make it better, because the problem is with how the law is put into practice.

The provisions in section 11 of the 1995 act do not seem to be in the right place. Perhaps they should have been in a separate section on their own. That might have made their purpose clearer. Otherwise, I imagine that it is just a question of training and education for family lawyers, courts, judges and sheriffs. I do not think that there is any magic way of changing the situation. Section 11 has become quite unwieldy. It highlights domestic abuse, but not necessarily in a good way. It perhaps makes it more contentious.

The Convener: Is there any evidence that mischievous parties might aver that in a writ? There might be issues to do with contact or residence involving children who might have said that that is what happened to them. I do not know; I am just asking. If section 11 is skewed, as you said, they might want to skew what they put down in a writ.

Professor Mair: I mentioned the research that was carried out by Kirsteen Mackay. She found that when children gave the view that they did not want contact and raised the issue of domestic abuse, a significant proportion of those children were nevertheless made subject to a contact order. When they said that they did not want contact and did not mention domestic abuse, they mostly did not have contact.

The Convener: So you are saying that the sheriff was taking a broad and proper view of all the aspects in the test that the welfare of the child is paramount.

Professor Mair: I think that Kirsteen Mackay was suggesting that perhaps, when domestic abuse was also raised, that raised a doubt in the court's mind and in the sheriff's mind that maybe the child was being unduly influenced by the other parent.

The Convener: It is a difficult and sensitive area; I accept that. However, I was thinking about neglect of a child, such as not washing or feeding them. Surely that would come out in court when parents are arguing, or when the court is concerned—even if the parents are not arguing—about the welfare of the child.

10:45

Professor Norrie: Whatever the law says, you will never completely resolve the problem that some people will lie. I do not know the percentages, but there have certainly been cases in which allegations either of domestic abuse or of neglect have been raised and, after hearing the evidence, the sheriff has held that the person who made the allegations was not truthful. That is, of course, unfortunate, but it shows that there is a possibility that people will raise such allegations unjustly. Nothing in the legislation either encourages or discourages that.

The Convener: Yes—you are saying that that will happen whether or not the issue is in the legislation.

Christian Allard (North East Scotland) (SNP): My question is a supplementary, as I would like to understand a little bit more about that. I thought that we would be talking about the 2006 act this morning, but it seems that you are talking about a lot of other acts as well, such as the 1985 act and the 1995 act.

The Convener: In fairness, that is because they all interact. We cannot just pluck out one issue and not say that it refers back to previous legislation.

Christian Allard: That is my question. The witnesses have talked about piecemeal legislation. If we work only on the 2006 act, will that be another example our dealing with legislation in a piecemeal way? Do we need to review the family courts altogether?

Professor Norrie: Most of the 2006 act amends other pieces of legislation. The only part that stands substantively on its own concerns the cohabitation provisions, but there are also various other pieces of legislation that deal with aspects of cohabitation. Our family law, which is nearly all statutory, is contained in a whole variety of different pieces of legislation, going back decades and decades, some of which interlink quite nicely and some of which clash. That takes us back to Professor Mair's original point in her written submission. The time has probably come: it would be useful if the Parliament took the decision to stand back and look at family law as a whole in the modern world and to try to work out an appropriate structure for all the various ways in which people lead their family lives today.

Christian Allard: I agree that looking at the 2006 act in isolation may not be the best thing to do.

Professor Mair: It would be much better to take time to look more broadly at how the whole system works. For a period of time, particularly in the 1980s and 1990s, Scots family law was moving

closer to becoming codified. It was becoming much easier for everyone to understand, and that was positive. We have drifted since then and there have been lots of different amendments, so it is definitely time to step back and review the area on a broader scale.

Christian Allard: Is there a way of drafting legislation to ensure that it is more easily amendable than it has been in the past, so that it can follow changes in society?

Professor Norrie: I would have thought not, actually, because different Parliaments with different political make-ups will have different views. Family law is a really political subject. You can take a very socially conservative view of family or a very libertarian view of family. Different Parliaments will want to do different things.

If we had a full structure—what lawyers tend to call a codified system—for family law, it would become more difficult to amend it. What we have at the moment is no real structure but all sorts of different pieces of legislation, and we get along with it fine whenever there is an amending statute. The 2006 act is a perfect example of that. I have not counted the pieces of legislation that it amends, but it has to do this, that and the next thing. We get by in that way. I am not sure that we can make the legislation itself easier to amend in the future.

The Convener: I have a question on something that we have not touched on yet. It is, in my view, strikingly unjust that an unmarried father is permitted to register paternity only at the discretion of the child's mother. Even if the father wants to have a DNA test, the mother can block that. There might be good reasons why the mother would not want the father to be registered, but in some circumstances that might be blocked out of—I am trying to find the right word—vindictiveness, or not for the right reasons. How would we get around that? How would any future Parliament that was looking at family law get around that issue? In my view, it needs to be dealt with.

Professor Norrie: I think that Professor Sutherland, in her written comments, makes a suggestion. Our current legislation, which is almost never used, says that, if somebody refuses to give consent to the appropriate DNA testing, the court may take that into account in determining where the truth of the matter lies. The English courts have very strongly said that, if somebody refuses, that means that they have something to hide. The Scottish courts have resisted that approach and have interpreted the legislation exactly as it is worded—the court may take the matter into account, without there being any implication as to how it is taken into account.

The Convener: However, if the court takes it into account, it cannot then make an order for a test.

Professor Norrie: Although they can in criminal matters, our courts currently cannot, in the civil law, demand or require someone to consent to the taking of a DNA sample not just from themselves but from a child. Professor Sutherland suggests that a simple amendment would be to give the courts the power to require the taking of DNA samples.

I have some hesitation about that, because civil litigation has always been based on the proposition that you have no obligation to help your opponent. On balance, however, if what is needed for a DNA test is such a minimal invasion of a child's bodily integrity as a mouth swab or a hair sample, and if that gives the truth, maybe my concerns are less important.

The Convener: With that hesitation, you would agree—

Professor Norrie: I would probably support Professor Sutherland's suggestion that courts should have the power to require the provision of DNA samples.

The Convener: However, the court could also take the view that, given the evidence or the circumstances before it, it would not take even that step. Is that correct? A test would not be done in all cases on the application of a father.

Professor Norrie: Absolutely. We occasionally get such cases. There was a case in the sheriff court two or three years ago in which paternity was in question and no DNA was available, for whatever reason. The court took evidence on the sexual relationship between the parties, on whether the dates worked out and on the physical similarities—different skin tones were involved—and other evidence of that nature.

The court always has the power to take other factors into account to build up a case. The thing with DNA is that the evidence is so certain—it leaves absolutely no room for doubt and is easy to obtain. DNA evidence is not without financial cost, of course.

Professor Mair: It is a very difficult area. There has always been an argument that the courts should not be able to require anyone to submit to testing. I agree that it is such a minimal invasion that perhaps it is not so bad. When considering the whole area of paternity and the registration of the father, it is important to bear in mind that the issue is about the welfare of the child. We must keep going back to that point.

The Convener: Dr Sutherland makes the point in her submission that the court's decision should be

"subject to the usual test that the child's welfare is the paramount consideration".

That is what I meant about the caveat for the court: even if the law in Scotland changed and the court could make an order that DNA be taken, it would be subject to the test in respect of the child's welfare. Would that satisfy you?

Professor Norrie: Can I jump in here? There is a slight risk. We should not take the welfare of the child into account in terms of avoiding the truth. The welfare of the child should be an important consideration in determining whether to take the sample, but that is all. We should not open ourselves to an argument that it would be good for the welfare of the child not to know.

The Convener: In other words, you are saying that we should not prejudge. You are saying that that is all we can do and after that, any rights that might flow would flow from the test.

Professor Norrie: They would flow.

The Convener: Professor Mair, would that satisfy you?

Professor Mair: Probably. I have hesitations about saying that the court should be able to order a test.

The Convener: What are those hesitations?

Professor Mair: We would not want the court to be able to compel any of us to submit to DNA testing. That is the principle. That is why I have slight reservations.

The Convener: But we have capacity and a child does not. Would the court not just be stepping in where the person did not have capacity?

Professor Norrie: Not necessarily. To get the full DNA analysis you need samples from both parents. For example, if the father is trying to deny paternity, rather than establish it, he might say, "You're not getting any of my DNA". Equally, there might be a situation where the court wants to order a person to undergo DNA analysis—for example, if it relates to a claim for aliment or child support. You would have to establish who the father is, and if he is denying paternity and refusing to give a DNA sample, you might well want to argue for an order. If you can argue for such an order for a child I see no reason why you would not want to argue it for a competent adult.

The Convener: Yes.

Professor Norrie: That raises even more hesitations. Do we really want our courts to require people to help their opponents in civil litigation?

The Convener: It is the proverbial legal can of worms. In solving one thing, you would create another lot of problems. However, on balance, you seem to be saying that the court should be able to order the testing of a child's DNA.

Professor Norrie: I do not really want to commit myself.

The Convener: You did earlier, so now you are backtracking.

Professor Norrie: On balance, I would probably go that way.

The Convener: What about you, Professor Mair? Can I pin you down on that?

Professor Mair: No.

The Convener: You are saying that you do not want me to pin you down.

Professor Mair: I do not want to be pinned down on that.

The Convener: You are on the fence.

Professor Mair: I am.

Gil Paterson: Before I ask my substantive question I have another question on that very point. We know that when it comes to separation and divorce, in many—not all—circumstances, there is a tendency for people to harass the other party.

If there were such a provision, would it not be used for harassment purposes? I am thinking of someone who is a third party—in other words, someone who had previously cohabited with one of the parties but who is now in another relationship, whether they are cohabiting or have got married. Would that not happen? Would the child not be used as a tool to harass one of the parties? It is normally the woman who is harassed in that way.

11:00

Professor Norrie: I could not say that that would never happen, because people can be very vindictive, particularly after relationships have broken up, and they can use children as weapons.

Whether the use of the provision would amount to harassment is a matter of definition. Now that I have committed myself to it, I suppose that my defence would be that a DNA test is a minor invasion that will quickly give a result and resolve the matter one way or the other, so why not provide for it?

The Convener: Thank you for that.

Gil Paterson: My substantive question is about cohabiting couples and the one-year time bar. Are similar restrictions put on married couples who have separated, prior to divorce? I imagine that, if there was to be a court case on a divorce, all the issues would be raised in that action. Are any

restrictions put on folk who have separated in the lead-up to divorce?

Professor Mair: With divorce, if the parties want to apply to the court to have issues concerning financial provision dealt with, they do it at the time of divorce, but there could be a long period of separation before they get to the point of going to court for their divorce, so I think that the two situations are quite different.

With cohabitation, because of the one-year limit, there is some evidence to suggest that couples have to make a decision much more quickly. If they want to apply to the court, they have to do it quickly. They are very conscious of the time limit. A number of family law solicitors argue that it is more difficult to get cohabiting couples who have separated to reach some sort of agreement, because at the back of their mind there is always the feeling that they if they want to go to court, they have to do it before the one-year time limit is up. With people who are divorcing, it would be much more normal for them to try to reach agreement before they get to the point of applying to the court for their divorce. The two situations are not comparable. There is not the same pressure on divorcing couples.

Gil Paterson: Something else kicks in with married couples. Although it is not frequent, some married couples separate and then get together again. The one-year period for going to court means that, in effect, the court is stopping a separation failing. It seems odd that the effect of that is recognised for married couples but not for cohabitees.

Professor Mair: It might have an impact on the relationship. In some of the more recent court decisions, consideration has been given to the date on which the cohabitation comes to an end. In at least one case that I can think of, the sheriff took a very commonsense, real-life approach and said that the reality was that if a couple is moving towards separation, they probably live apart and then get back together for a while. The sheriff decided that the date of separation was much later than the date that the man was arguing for. The man argued that the date of separation was the point at which he first left the house, whereas the court decided to be a bit more generous and a bit more realistic, in recognition of the fact that that is just the way that relationships sometimes go.

The one-year limitation potentially has an impact on what decisions couples might make about the final separation, and it certainly seems to put couples under some pressure to raise an action, even if they do not pursue it.

Gil Paterson: There is a suggestion that the period should be doubled to two years. If a change is to be made, do you think that there should be no time limit at all, as is the case for people who are married and in civil partnerships? Would it be better and tidier to treat everyone in the same way?

Professor Norrie: There is an attraction to that, but one of the problems is that a married couple has to go to court in any case to get divorced, whereas a cohabiting couple does not need to go to court. Cohabitants do not need the state's permission to separate, whereas married couples do, so they will be going to court in any case. It might be two years after separation, having built up the ground for divorce after two years of non-cohabitation, or it might be decades and decades later, but if they want to divorce, they must go to court. That then becomes the natural time to raise the financial claim. That is the sense in which there is no time limit from the point of separation; it is done naturally at the time of divorce. That does not happen with cohabitants, who do not go to court unless they have a financial claim to make.

In the civil law generally, we have a three-year limitation for raising all sorts of actions. I would have thought that a three-year limitation would be appropriate, rather than a slightly anomalous two-year period—given that there is no connection with the two years of non-cohabitation as a ground for divorce.

The problem is even more difficult in relation to section 29 of the 2006 act, which is about making a claim on death, because the cohabitant has only six months in which to do so. That creates real problems in practice: people who have gone through the grieving process go to their solicitor after six months, only to realise that they have lost all possible claim. The time limit problem is even worse under section 29 than it is under section 28.

Gil Paterson: Do you want to comment, Professor Mair?

Professor Mair: I agree. The time limits are too short. However, there has to be a limit, for the reasons that have been explained.

The Convener: Yes. People have to know what their financial position is.

Thank you both for your evidence, which was intriguing. I hoped that you would disagree a little, and you fulfilled that hope. We will take more evidence on 8 March, but we have not yet decided who our witnesses will be. We will report or leave something for our successor committee in the next session of the Parliament to take further. I think that we all agree that family law really must be looked at again in the next session, given that circumstances have changed since—well, since 1985, Christian.

11:08

Meeting suspended.

11:10

On resuming—

Petitions

Self-inflicted and Accidental Deaths (Public Inquiries) (PE1501)

Fatalities (Investigations) (PE1567)

The Convener: We move on to item 3, which is consideration of five public petitions that remain open. We will go through them in turn.

PE1501 and PE1567 relate to investigations into unascertained deaths, suicides and fatal accidents. The latest response from the Minister for Community Safety and Legal Affairs is provided in annex B of paper 4. The petitioner of PE1501 has responded to the minister's letter, and that response is provided in annex C of paper 4.

I ask members for their views on what we should do with the petitions.

Roderick Campbell: Are we dealing first with PE1501 and PE1567?

The Convener: Yes—that is what I said.

Roderick Campbell: Thank you, convener. I note the minister's comments, and particularly where he states:

> "If they are not satisfied with a decision not to prosecute ... they may seek a review ... under section 4 of the Victims and Witnesses (Scotland) Act 2014."

He mentions that there is also potential to go to judicial review, and adds that

> "The Charter for Bereaved Families will also introduce a process of review in relation to decisions taken on whether to hold a FAI."

Those are reasonable safeguards. I am not sure that we can realistically take the petitions forward. I am certainly not keen on taking evidence from the petitioners at this stage in the session.

The Convener: Do you want to close both petitions?

Roderick Campbell: Yes—that is my instinct. If somebody wants to refer them to the next justice committee, I could live with that.

The Convener: Petitions will continue into the next session of Parliament. They do not fall in the way that legislation does.

Gil Paterson: I am entirely sympathetic to what Roddy Campbell suggests. The Government has said that it is not minded to change its mind on the matter. The only thing is that we are close to the election, and it might be a wee bit arrogant to assume that the present Government will be re-elected. If possible, we should hold the petitions over to the next session and put a note in our legacy report suggesting that, if the present Government is re-elected, we will have reached the end of the road. As Roddy is, I am satisfied, but I suggest that we hold over the petitions.

The Convener: That is a fair point. John Finnie looks as though he wants to say something. Do you? You are keeking over your glasses.

John Finnie: We should keep the petitions open. The minister's response, particularly on the third page, is reminiscent of all the phrases that we heard in the evidence that we took on Patricia Ferguson's bill. On an additional review process, the response questions

> "where the funds to support it would come from."

That is not a helpful comment. It also states that the time taken would be

> "likely to extend the period of distress for bereaved families".

It would be helpful to keep the petitions open, not least because of the ultimate reference to the Police Investigations and Review Commissioner. Paper 4 states:

> "The petitioner accepts that his individual case was upheld by PIRC but, as highlighted above, he argues that no lessons appear to have been learned as a result."

There are still significant public frustrations about a number of cases.

The Convener: I am getting the signal that the committee wants to keep the petitions open.

Christian Allard: I was happy to close the petitions, but I am content with what is suggested.

The Convener: I think that it is appropriate to keep them open and to refer to them in our legacy paper.

Gil Paterson: I hear what John Finnie says. Is it possible to accommodate his view and say that, if the Government is re-elected—

The Convener: We cannot put that in our legacy paper. We cannot make presumptions like that. I think that the legacy paper should simply say that the petitions have been kept open—

Gil Paterson: I am trying my best. Okay.

The Convener: I think that that is fair enough.

Justice for Megrahi (PE1370)

The Convener: We move on to PE1370, on the Megrahi conviction. As I have scolded Police Scotland, I will, in fairness, also scold the Lord Advocate and the Crown Office and Procurator Fiscal Service. We asked the Lord Advocate on 5 February to respond to Justice for Megrahi's latest submission.

This morning, at 9.45, when I was sitting here getting ready to chair the committee, a response arrived. That is not good enough. The committee is again being expected to take into consideration a response that we received only minutes before we sit. I hope that the committee members agree that that is not respectful of the committee. The letter is quite short, so it cannot have taken that long to write. Do members agree that it is not satisfactory to have to wait until 23 February for a response from 5 February?

11:15

John Finnie: I agree and I think that you are being excessively generous to the Lord Advocate. In his letter—which he has wrongly addressed to someone who is not even a member of the committee—

The Convener: I am glad that it was you and not I who pointed that out. It appears that the Deputy Presiding Officer has become deputy convener of the Justice Committee.

Elaine Murray: Not for the only time.

John Finnie: There is an important point of principle here. We are talking about a significant case and I am disappointed that such simple facts can be presented incorrectly.

The convener talked about a letter of 5 February, but the Lord Advocate says:

> "Thank you for your letter of 12 January"

although we cannot discount the possibility that he also got that wrong. We have therefore received a response 42 days later and, although you say we got it at 9.45, I thought that we got it at 9.50. Either way, the message is very clear.

Can I comment on the letter, convener?

The Convener: I want to read it out first because it is not yet public.

Elaine Murray: John Finnie is right that the letter was sent on 12 January.

The Convener: I will read out the Lord Advocate's letter.

> "The allegations made by JFM are being considered by Police Scotland in accordance with due process. An independent senior counsel at the Scottish bar, with no prior involvement in the Lockerbie investigation and associated prosecution, has been appointed to undertake prosecutorial functions in relation to the Police investigation. This role includes providing an independent legal overview of the evidence, conclusions and recommendations and directing the inquiry when required.
>
> I note that JFM suggest that because Mrs Dyer considered, and did not uphold, a complaint by Mr Ashton in her correspondence to him in February 2013 that she cannot be said to be impartial. Mrs Dyer's correspondence with Mr Ashton was stage 3 of the then COPFS complaints process and related to Mr Ashton's complaint about what he alleged was a misleading statement issued by COPFS media relations in March 2012 about the Lockerbie investigation. The media release followed the publication of Mr Ashton's book "Megrahi: You are my Jury". Mrs Dyer considered the correspondence from Mr Ashton in that context, and in particular Mr Ashton's interpretation of the COPFS media release, and did not uphold the complaint.
>
> I reject wholeheartedly the suggestion that because she failed to uphold a complaint in this context, she cannot exercise impartiality and independence regarding Operation Sandwood.
>
> I do not agree that the process in place in COPFS requires to be amended to address this sweeping and unfounded assertion that Scotland's Prosecution Service cannot act independently in the public interest in a criminal investigation."

I do not know whether Justice for Megrahi has seen that letter. [*Interruption*.]

I am informed that they have seen it very briefly. I know that some members of the campaign are present today. I have read the letter out so that it is on the record, but it was too late in the day to get it into the public arena prior to this.

Roderick Campbell: I know that there are members of Justice for Megrahi in the gallery. Is it possible to hold the petition back until a meeting next week or the week after?

John Finnie: I would be happy with that, but we need to highlight certain aspects today.

I understand why you might not have read out the first sentence of the letter, convener, but it does contain the important phrase

> "in which you seek further information to ensure impartiality when there have been complaints about COPFS handling of the case"

The Convener: Yes—sorry.

John Finnie: We would have had clarity about that if the Lord Advocate had provided Justice for Megrahi or the committee with specific responses to the eight legitimate questions that we asked. I appeal again for that clarity.

In the second paragraph of his letter, the Lord Advocate says:

> "The allegations ... are being considered by Police Scotland in accordance with due process."

Whether or not Justice for Megrahi is happy with that, there has certainly not been due process because there has been significant deviation, for the better, from the normal process. That deviation was—I quote the Lord Advocate again—

> "An independent senior counsel at the Scottish bar, with no prior involvement in the Lockerbie investigation and associated prosecution, has been appointed to undertake prosecutorial functions in relation to the Police investigation."

That is not the normal process, and we are also advised about an independent overview.

The Convener: The circumstances are also not normal, in that the Police Service and the Crown Office are being accused of alleged mischief—let us put it like that—with regard to the whole case. I am not disputing what you said; the process is very different.

John Finnie: It is not helpful to concentrate on individuals. I am concerned entirely about process. The process has been confirmed—

The Convener: I was not concentrating on individuals. I am just angry that the Crown Office has done this to the committee at the last minute, as I was with Police Scotland. Was that your reference?

John Finnie: No—my reference was to the extensive third paragraph of the letter, in which an individual is named. I am not concerned about the individual. What I am concerned about is that we have had confirmation from the Lord Advocate that the individual dealt with a complaint—a complaint that is very pertinent indeed—that the fifth line of the paragraph says was "about the Lockerbie investigation". In the normal course of things, just as we do in the committee, I would expect individuals to declare an interest of prior involvement.

The Convener: You and I have not declared interests yet, but perhaps should as members of Justice for Megrahi.

John Finnie: I am not a member of Justice for Megrahi.

The Convener: I am, and should perhaps have said that. I have done so before, Mr Allard.

John Finnie: There has already been significant deviation in the process and it has gone very well. The process is now hitting a critical point at which if we revert to the standard process, in which an individual who may be deemed to have direct involvement will remain in charge of what will be a very important decision, we will reach an impasse. It would be helpful if we could get early responses to the eight questions that have been legitimately posed, and I concur with Mr Campbell that the committee should keep the petition open.

Roderick Campbell: I did not quite say that we should keep the petition open. We should certainly keep it open for today; I am not suggesting that we close it today. I suggest that more comment needs to be out there before we can take a considered view.

I have a couple of quick points to make. It is worth stressing that Catherine Dyer is not the "independent ... counsel". Her role is simply to co-ordinate matters and is therefore not involved in providing an overview.

Secondly, on a point of smaller interest, which I need to check and would be happy to withdraw if I am proved to be wrong, I think that I saw in the press that Mrs Dyer had announced her retirement as chief executive of the COPFS.

I agree strongly that the committee should avoid concentrating on personalities. It should be about process.

The Convener: It is also about independence, real and perceived.

What does the committee want to do?

John Finnie: We should keep the petition open and ask for the eight questions to be answered.

Christian Allard: I concur with what Rod Campbell said. We should look at the issue next week and, as has been said, make sure that we talk about process and not about individuals.

The Convener: It is to do with process. I read the letter out because it is not in the public domain. It will be and the person will be named once it is on the record.

John Finnie referred to eight questions. I was absent at the time: will that be in the *Official Report*?

Elaine Murray: There was an earlier paper.

Roderick Campbell: Yes. I do not feel that there is sufficient information before us this morning for the committee to do the issue justice.

John Finnie: We know that there are issues. We have discussed on at least two occasions the legitimate request for information that would inform our future decision making. There should not be anything controversial in that.

The Convener: We can certainly repeat the questions and we will discuss in private the terms of the letter, which will also be in the public domain once it is drafted. Do members agree?

Members *indicated agreement.*

The Convener: We will keep the petition open and we can return to it next week—I am told that there is space.

Emergency and Non-emergency Services Call Centres (PE1510)

Inverness Fire Service Control Room (PE1511)

The Convener: We now move on to PE1510 and PE1511 on police and fire control rooms.

In January, we agreed to keep the petitions open to monitor progress on the police and fire control room closures. Since that meeting, Police Scotland has announced a timetable for the

transfer of the 101 calls and 999 emergency calls from Dundee, Inverness and Aberdeen.

What does the committee wish to do with the petitions?

Christian Allard: On the Ministry of Defence and the fire service, the letter from Chris McGlone, the executive committee member for Scotland of the Fire Brigades Union—

The Convener: That comes later. You are on the wrong thing.

Christian Allard: Sorry.

The Convener: Keep taking the pills.

John Finnie: It was entirely premature for Police Scotland to take the decision that it took about control rooms. Many people, including me, believed that the interim report from Her Majesty's inspectorate of constabulary for Scotland evidenced a need to retain those control rooms rather than a need to dispose of them. I would like to keep the petitions open.

Margaret Mitchell: I concur with that.

The Convener: The committee would like to keep the petitions open. Do members want to recommend that a future justice committee continue to monitor the issues?

Members *indicated agreement.*

Subordinate Legislation

Scottish Sentencing Council (Submission of Business Plan) Order 2016 (SSI 2016/55)

11:25

The Convener: The next item is consideration of two instruments that are subject to negative procedure. The first is the Scottish Sentencing Council (Submission of Business Plan) Order 2016, which specifies that the Scottish Sentencing Council must prepare and submit its initial business plan to Scottish ministers before 26 September 2016.

The Delegated Powers and Law Reform Committee agreed not to draw the order to the attention of the Parliament on any grounds within its remit. Members have no comments. Are members content to make no recommendation?

Members *indicated agreement.*

Regulation of Investigatory Powers (Prescription of Ranks and Positions) (Scotland) Order 2016 (SSI 2016/56)

The Convener: The second negative instrument is the Regulation of Investigatory Powers (Prescription of Ranks and Positions) (Scotland) Order 2016, which prescribes the rank or position of staff within Food Standards Scotland who are entitled to grant authorisations for directed surveillance and covert human intelligence sources, under the Regulation of Investigatory Powers Act 2000, to help combat food fraud and other food crime.

Again, the DPLR Committee did not draw the order to the attention of Parliament on any grounds within its remit. Members have no comments. Are members content to make no recommendation?

Members *indicated agreement.*

11:26

Meeting continued in private until 12:00.

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